

and its public statements confirm that it has no intention of being held accountable under the law.

The Russian Federation through its independent judiciary should not allow foreign interests, including U.S. financial institutions, from thinking they can act illegally without there being any consequences when they are a guest of this country. The Russian Court has been exceedingly patient, but it is time to put an end to this protracted and unnecessarily lengthy litigation. It is finally time to hold BONY – as the U.S. judicial system did several years ago – accountable for its clear and admitted role in devastating the Russian economy through the wrongful flight of capital by notorious businessmen and criminal figures who were nothing less than the Bank's partners.

Again, as is intrinsically obvious, there is no way one could reasonably conclude that BONY did not knowingly assist these criminals when they laundered \$7.5 billion dollars through its offices in New York.

Since the Bank has been given every opportunity over the past several years to defend itself, Final Judgment should now be entered in favor of the Russian FCS in the amount of \$22.5 billion consistent with U.S. and Russian law, and as is unequivocally supported by RICO's author and the world's leading authority on the subject.

INTRODUCTION

This case involves holding a United States corporation accountable for admitted illegal conduct that resulted in billions of dollars of capital flight from the Russian Federation at a time of great financial and economic crisis in Russia. United States corporations, like any other foreign businesses who conduct business in Russia are not above the law. Financial institutions that rely on the public's trust should be expected to comply with local and international laws to an even greater degree. -remove and join with next paragraph

The U.S. bank involved here – the Bank of New York – (“BONY”) – has arrogantly claimed from the start not only that the Russian government cannot hold it accountable for its actions and its admissions of wrongdoing but worse still, that this Court does not have the power to hold it accountable under U.S. laws and, even more offensively, that it will not respect a judgment issued by this Court. In fact, in an April 7, 2008 press conference held by the Bank, it's CEO very confidently claimed that “any adverse decision handed down by this court would not be enforceable given the very well established legal and financial safeguards that we have in place,”—clearly the Bank is using the press in an attempt to pressure the Court and political opinion by criticizing this Court and the Russian judicial system. *See* transcript of April 7, 2008 press conference, attached as Exhibit 1.

The Bank's position is offensive. The Russian Federation has the same rights and privileges of any sovereign. The U.S. is not superior to other foreign nations in the application of foreign law when holding foreign individuals and corporations accountable for their unlawful conduct. The U.S. government, like the Russian government in this case, holds foreign corporations and banks doing business within its borders civilly liable on a regular basis. The Russian FCS is no different and here seeks to hold a U.S. bank doing business in the Russian Federation accountable for its illegal actions and seeks to obtain through Russian courts the same

civil remedy that the U.S. government could obtain in the United States against foreign corporations doing business there.

United States courts apply Russian law and hold Russian citizens and corporations liable all the time without seeking to understand the intent of Russian laws as BONY asks of this Court. Russian courts, like U.S. courts, are similarly able to apply U.S. laws, and there is nothing special or different about the RICO statute that prevents its application abroad as the Bank maintains. In fact, the Bank cannot point to a single case or a single sentence that supports its position that the RICO statute cannot be applied abroad. Nevertheless, it absurdly takes the remarkable] position that Russian courts can apply other U.S. laws, just not *this* one.

Additionally, although this U.S. bank paid millions of dollars to the U.S. government in fines for having benefitted from Russian capital flight, it steadfastly refuses to show the Russian government the same respect by recognizing in this Court what it already acknowledged in the United States. In addition, the Bank maintains that this Court has no power to hold it civilly liable under the laws of its own country. The irony is that despite the Bank's claim that this Court has no power to hold it liable, the Bank is nevertheless aggressively defending its previously admitted wrongful conduct. To make matters worse, the Bank's disdain for the Russian system is so great that it has the arrogance to state that it will not recognize or respect any judgment of this Court and to insult this Court's proceedings.

That BONY refuses to respect this Court was evident at the very first hearing when BONY did not officially send anyone to represent it, but simply sent someone to listen in and report back. Only after the Court read the register of attendants and saw that an individual from the law firm representing BONY was present in the courtroom did the individual acknowledge representing BONY. Since this first hearing, the Bank has continued to insult this Court's proceedings and its ability to apply the law. In fact, in BONY's April 7, 2008 press conference, the Bank's counsel, Jonathan Schiller had the audacity to claim that the Bank was expecting an adverse decision "given some of the concerns that we have expressed this morning about the court's handling of the case to date." BONY went so far as to wrongfully accuse counsel, public officials, and this Court of unlawful wrongdoing and made a public mockery of these proceedings.

Despite this U.S. Bank's disrespect and insults, the Russian Federation has a legitimate court system and respects the rule of law as has been clearly demonstrated by this Court's patience and willingness to permit this U.S. Bank a great deal of latitude in presenting its defense. A financial institution, which along with many others, has acted irresponsibly in the past with respect to Russia, and continues to do so, is not above the law. This U.S. Bank should be held accountable for its illegal conduct as described below and should not be permitted to avoid accountability through threats.

FACTS AND DOCUMENTARY EVIDENCE

- A. This Court Does Not Need to Interpret or Rule Upon Public of Criminal Laws Because BONY Employee, Lucy Edwards, Was**

Criminally Convicted of Money Laundering

Before describing the money laundering scheme that forms the basis of this lawsuit, it is important to highlight up front that the BONY Vice-President, who engaged in this illegal conspiracy to launder money out of Russia as described below, has already plead guilty and been convicted of conspiracy to launder money in the United States.¹ A federal court entered a criminal judgment on July 26, 2006 against her, finding her guilty of conspiracy to launder money.

She also admitted both when pleading guilty in the criminal case and in the Affidavit she submitted to this Court, that she engaged in this illegal money laundering activity for the benefit of BONY. Specifically, on February 16, 2000, after a lengthy federal investigation, Lucy Edwards and her husband, Peter Berlin pled guilty to, among other things, conspiracy to conduct unauthorized and unregulated banking activities, to establish an unlicensed branch of a foreign bank in the United States, and to operate an illegal money transmitting business, in connection with the operation of the Benex and BECS accounts maintained at BONY. *See* Edwards Affidavit (attached as Exhibit 2), at ¶48; Non-Prosecution Agreement (attached as Exhibit 3), at ¶5; Allocution Hearing transcript (attached as Exhibit 4). At her allocution hearing, Ms. Edwards admitted that, in undertaking the above described illegal activities in connection with the Benex, BECS, and Lowland accounts, she acted, in part, with the intent to benefit BONY, in order to “develop more Russian business for the Eastern European Division fo the Bank of New York.” *See* Allocution Hearing transcript at p. 44. In her Affidavit, Mrs. Edwards also states: “I further admitted that, in undertaking these illegal activities in connection with the Benex, BECS, and Lowland accounts, I acted, in part, with the intent to benefit BONY by helping BONY to expand its business in Russia.” Affidavit at ¶48. Ultimately, it cannot be forgotten that throughout the course of the illegal money laundering scheme, Ms. Edwards was employed by BONY and, as she states in her sworn affidavit, “acted as an employee, officer, and/or, later, Vice President of BONY and had actual authority to represent BONY's interest and products.” Affidavit of Lucy Edwards at 8.

Lucy Edwards was then convicted on July 26, 2006 when the federal court in the Southern District of New York entered a **Criminal Judgment** against her. *See* Judgment in a Criminal Case, Case. No. S199 Cr. 914-2 (attached as Exhibit 5). The Judgment clearly states that she is “adjudicated guilty” of the offense of conspiracy to “Launder Money to Promote Wire Fraud.” *See* Judgment, page 1. As discussed further below, conspiracy to launder money does constitute a predicate act under the RICO statute and because a BONY employee had already been found guilty of the predicate act of money laundering, this Court need not engage in any application or interpretation of U.S. criminal laws. BONY has already publically admitted that its high-ranking executive employees laundered \$7.5 Billion dollars out of Russia. As BONY’s first Russian law expert ultimately conceded, if there was a U.S. final judgment establishing that a predicate act occurred (i.e. illegal money laundering) and that if this Court relied upon the foreign final judgment as it is permitted to do, then this case would present no public or criminal law issues, which BONY wrongfully contends exist. BONY expert, Richard Thornburgh, also stated that a “prior

conviction” would suffice to find that BONY violated the RICO statute. The criminal conviction alone is sufficient for the recovery of civil RICO damages.

B. BONY Has Also Acknowledged Its Responsibility and Admitted Its Criminal Conduct

In addition to Bank Officer, Lucy Edwards, the Bank itself has admitted and acknowledges its criminal conduct, making it even clearer that this Court need not engage in any criminal findings – the findings have already been made by the U.S. government and the U.S. courts.

More specifically, on September 22, 1999, BONY Chairman of the Board and Chief Executive Officer, Thomas A. Renyi ("Mr. Renyi"), testified under oath before the United States House of Representatives in Washington, D.C., regarding the money laundering scheme. During his testimony, Mr. Renyi openly admitted that the volume of funds moving through the accounts opened by Mr. Berlin (Ms. Edwards' husband described below) and used to facilitate the conspiracy were at a level that went "well beyond what would have been expected for businesses of [that] kind." *See Renyi Testimony at pg. 153 (attached as Exhibit 6).*

Mr. Renyi also admitted that when BONY employees not involved in the conspiracy raised questions about the suspicious activity occurring, these questions "were not pursued with sufficient vigor or follow through and the questioners relied too heavily on the fact that Mr. Berlin was married to a well regarded bank officer, Ms. Edwards, who . . . originally referred the accounts" and that "[a]llowing [the subject] accounts to remain open and active without sufficient questioning was a lapse on the part of the bank." *See Renyi Testimony at pg. 153.*

Thereafter, on November 8, 2005, the United States Department of Justice ("DOJ") issued an official statement (that until recently was never challenged by the Bank as inaccurate) wherein the Bank publicly admitted its criminal conduct and agreed to pay thirty-eight million dollars (\$38 million) in penalties and victim compensation to resolve the criminal investigations conducted by the United States Attorneys' Offices for the Eastern and Southern Districts of New York. This official DOJ announcement specifically says, as part of its introductory heading, that the "Bank Acknowledges Responsibility for its Conduct" and later states in the text of the release that "[p]ursuant to an agreement signed today, BNY has agreed to its **criminal conduct.**" *See DOJ Announcement, attached as Exhibit 7.* The release also stated on page 9 that "BNY has accepted responsibility for its criminal conduct, and its chairman of the board of directors has signed a statement **admitting the criminal conduct in detail.**" This is the first time that the Russian Federation was reasonably put on notice of its claims against BONY. In fact, until the Bank finally acknowledged its criminal conduct in the DOJ official statement of November 2005, it had consistently stated that it had no involvement and that a rogue employee had engaged in this wrongful conduct.²

The DOJ official announcement further explains that as a result of BONY's public admission of liability, the United States Attorneys' Office agreed that it would not prosecute

BONY for the unlawful practices of its officers and employees. As discussed in depth below, BONY is vicariously liable under both RICO law and Russian law for the conduct of its employees. Because a corporation can only act through its employees, the doctrine of vicarious liability applies.

Pursuant to the Non-Prosecution Agreement, BONY specifically admitted that it "failed to monitor adequately the activity in the Benex and BECS accounts, which were the highest fee-producing accounts in the One Wall Street Branch where they were located" and that "[a]s a result of the failure to monitor the activity in [those] accounts, a number of highly suspicious circumstances that should have raised flags about money laundering went undetected." *See* DOJ Announcement, Exhibit 7.

BONY further "acknowledged, among other things, that it failed to have an effective anti-money laundering program, that it intentionally failed to take steps to report known evidence of suspected criminal conduct by a bank customer and BONY employees as required under [U.S.] mandatory reporting obligations . . . even after that evidence came to the attention of senior BONY executives, and that both the bank's general counsel, managing counsel, and other senior executives repeatedly ignored the bank's legal obligations to file the required Suspicious Activity Report, doing so only after the principals of a BONY customer were arrested months later by federal authorities."³

None of the money that the Bank paid to the U.S. government under this Non-Prosecution Agreement was ever used to reimburse the Russian Federation or to resolve any of its claims or those of any of its agencies. Neither BONY nor the U.S. government made any effort to properly compensate the true victim, the Russian Federation.

In addition, despite the Bank's new convenient attempt to revise history and now claim that it did not admit any criminal conduct, BONY could only have been admitting criminal conduct in this agreement. As explained by the Russian FCS' experts, Professors Dershowitz and Blakey, the Bank's acknowledgment of responsibility in the non-prosecution agreement could only be for criminal conduct. The DOJ was investigating a criminal case and thus, the admissions and acknowledgments contained in the Non-Prosecution Agreement were criminal. This is clearly set forth in the Non-Prosecution Agreement itself, which wording has never been changed and continues to state that the United States Attorney's Office for the Eastern District and Southern District of New York have "been conducting a **criminal investigation**" into allegations of BONY conduct. *See* Non-Prosecution Agreement, at ¶¶1, 3.

More important, BONY's own expert Richard Thornburgh has explained in a publication published by his law firm and to which he "provided substantial input" that BONY admitted its criminal conduct under the 2005 Non-Prosecution Agreement. *See* K & L Gates article, "The Internal Investigation: Cooperation and the McNulty Memorandum," published with the "substantial input" of Robert Thornburgh, page 15 (attached as Exhibit 8). This article states: "On November 8, 2005, the Bank of New York (BNY) agreed to a non-prosecution agreement with the

United States. The agreement relates to BY's **responsibility for crimes involving fraud and money laundering**, as well as BY's failure to comply with mandatory reporting obligations under the Bank Secrecy Act. . . . As part of the non-prosecution agreement, BNY agreed to pay \$38 million in penalties and victim's compensation, **admit its criminal conduct** and continue to take remedial measures."

Therefore, there can be no question that BONY has admitted its involvement in the money laundering scheme and its criminal conduct through both its CEO's sworn statements to the U.S. Congress and the statements contained in the Non-Prosecution Agreement. Because the U.S. DOJ has already made the criminal finding of money laundering in the Non-Prosecution Agreement, and BONY has admitted criminal conduct and criminal responsibility both on its own in the Non-Prosecution Agreement and through its employee Lucy Edwards in the criminal case brought against her and for which she was criminally convicted of conspiracy to launder money, this Court does not need to make any criminal finding.

Even if the Court finds that the Bank did not admit criminal conduct, Lucy Edwards' conviction on its own serves to find BONY civilly liable under RICO based on the U.S. and Russian concept of vicarious liability, whereby a corporation is responsible for the acts of its employees. In fact, BONY expert Richard Thornburgh himself acknowledged as much in his testimony when he stated that the finding of whether BONY violated the RICO statutes, "can be in the form of a prior criminal conviction." *See* testimony of Richard Thornburgh, October 6, 2008, page 100.

Thus, no criminal issues remain to be determined. The predicate act of money laundering has already been found to have taken place, as will be discussed in more detail below, and this Court need only determine the civil remedies that flow from engaging in money laundering.

C. A High Ranking BONY Officer Accomplished and Participated in this Massive Illegal Money Laundering That Resulted in Billions of Dollars Being Laundered Out of the Russian Federation

The illegal money laundering scheme for which Mrs. Edwards was convicted is described in detail in her Affidavit as well as the Non-Prosecution Agreement entered into between the Bank and the U.S. Attorneys' Office. The details of the money laundering scheme are summarized here.

In the early 1990s, following the collapse of the Soviet Union, BONY actively solicited new business in the emerging Russian market and formed an Eastern European Division ("EED"), staffing it mainly with Russian émigrés, including Lucy Edwards ("Ms. Edwards") and opened a Representative Office in Moscow. As a result of BONY's concerted efforts, it quickly acquired a leading position among U.S. banks in handling correspondent accounts for Russian banks and for providing other services for Russian banks and citizens, which is precisely why it was able to facilitate one of the largest money laundering operations in history. *See* Exhibit B to the Non-Prosecution Agreement, at ¶ 7.

In her Affidavit, Mrs. Edwards states as follows: "I was very successful in obtaining

Russian business for BONY. Largely as a result of my efforts and initiative, BONY quickly acquired a leading position among United States banks in handling correspondent accounts in Russia and former Soviet Union for various Russian banks.” Affidavit, at ¶9.

After actively expanding and establishing its presence in The Russian Federation, BONY, with the knowledge and assistance of BONY agents, employees and/or representatives, including primarily Ms. Edwards, facilitated and benefitted the largest money laundering schemes, which resulted in the laundering of at least seven and a half billion dollars (\$7.5 billion) out of Russia in violation of U.S. law and caused severe devastation to the Russian economy. To this end, Ms. Edwards states that “it was only through [her] contacts and banking relationships in Russia and [her] regular visits to Russia on behalf of BONY--which BONY encouraged and paid for--that [she] was able to arrange the unlicensed and therefore illegal funds transfer operation. . . .” Affidavit, at ¶10.

The illegal money laundering scheme facilitated by BONY began in late 1995, when Ms. Edwards, a then high-ranking employee of BONY's EED,⁴ entered into an agreement with certain well known Russian crime figures and notorious businessmen to illegally launder money out of The Russian Federation to benefit BONY as well as for career advancement with BONY and for personal gain. *See* Exhibit B to Non-Prosecution Agreement, at ¶ 5; Edwards Affidavit, at ¶11, 21. As evident from the extent of the money laundering that they accomplished, these hundreds of thousands of fraudulent wires transacted via the Bank of New York played a major role in devastating the Russian economy. These corrupt Russian individuals and entities were only able to do so with the help of U.S. financial institutions willing to break the law in order to obtain significant profits while also establishing an early dominant foothold in the Russian financial marketplace.

In December 1995, Ms. Edwards was approached in New York by one of these individuals who represented a Russian bank, Depozitarno Kliringovy Bank (“DKB”), which was in the process of obtaining a banking license in Russia. After the banking license was obtained, BONY developed a direct correspondent relationship with DKB. *See* Edwards Affidavit at ¶11. Together with this bank representative, Ms. Edwards and her husband, Peter Berlin established and carried out a scheme that allowed Russian bank customers to process money transfers from Russia through BONY accounts in such a way as to violate Russian laws as well as the laws of the United States. The scheme was made possible only because Ms. Edwards and Mr. Berlin established certain accounts at BONY through which the Russian customers transferred the funds out of Russia. *See* Edwards Affidavit at ¶12.

After hammering out the details of the scheme and agreeing to be critical members of this money laundering operation, in early 1996, Mr. Berlin began using his Benex account at the One Wall Street, New York, New York BONY office in furtherance of the money laundering. Mr. Berlin was the President of Benex and the account “had previously been used for legitimate purposes” and all previous financial transactions involved minor amounts and infrequent activity. *See* Edwards Affidavit at ¶13; Ech. B to Non-Prosecution Agreement, at ¶17; Allocution Hearing

at pp. 35-36, 42-43. Practically overnight, however, the Benex account became one of the Banks' highest fee generating accounts and involved hundreds of thousands of transactions, yet the Bank failed to notice such a change in an account held by the husband of one of its Vice-Presidents.

Shortly after deciding to use the Benex account for illegal activity, Mr. Berlin "applied to BONY to receive a certain software . . . which would allow us or our Russian partner in New York working for DKB to effect wire transfers on his own without the assistance, supervision or oversight of BONY employees" who were responsible for monitoring such financial transactions and reporting suspicious activity. Affidavit, at ¶14. Ms. Edwards and Mr. Berlin received the software from BONY with BONY's knowledge and cooperation, which was in violation of BONY procedures. See Edwards Affidavit at ¶¶14-15; Ech. B To Non-Prosecution Agreement, at ¶17; Allocution Hearing at pp. 36, 42. Ms. Edwards even admitted that she "knew that while certain qualified companies were allowed to receive and use the MCR software, Benex was not so qualified and should not have received the software." Affidavit at ¶16. Ms. Edwards and Mr. Berlin later received the software once again when they opened different accounts at BONY, the BECS International LLC account and the Lowland account, again in violation of BONY's mandatory procedures. Edwards Affidavit, at ¶22; Ech. B to Non-Prosecution Agreement, at ¶18.

After the installation of this software, the Russian bank began transferring funds into the Benex account (and later other accounts opened by Mr. Berlin) in bulk amounts on a daily basis, and then would issue daily instructions from its offices in Moscow directing employees in the Benex office in New York to transfer funds out of the Benex account at BONY, utilizing the BONY software, to various third-party transferees located around the world.⁵ See Edwards Affidavit at ¶¶24-26; Ech. B to Non-Prosecution Agreement, at ¶¶ 4, 19.

Incredibly and especially relevant here, while Ms. Edwards and Mr. Berlin "were actively involved in the illegal transfer of many millions of dollars on a daily basis, BONY conducted an internal audit of [Ms. Edwards] and her expenses at the London BONY office" where she worked. Affidavit, at ¶20. That audit revealed a number of Ms. Edwards' "violations of bank policy." Ech. B to Non-Prosecution Agreement, at ¶8. As a result of the investigation, the head of BONY's audit department recommended that Ms. Edwards be **fired** because of her violations. Yet, instead of terminating her or, at the very least, inquiring further into her past and present conduct and actions on behalf of the bank, BONY promoted her to Vice President of the EED. Edwards Affidavit at ¶21; Non-Prosecution Agreement, Exhibit B at ¶8. Clearly, and as Ms. Edwards herself admitted, "BONY was willing to overlook my questionable conduct given the amount of money I was generated for the Bank." Affidavit, at ¶21.

In addition, BONY turned a willful blind eye to the amount of money flowing through the Benex account on a daily basis. Senior management at BONY must have been aware that the Benex account, which had previously had almost no activity and involved minor transactions and only a few thousand dollars, now had billions of dollars involving hundreds of thousands of transactions and now was on of the Bank's highest fee generating accounts.

Eventually, however, the Bank had to admit to money laundering. In fact, the Bank through its President and CEO admitted under oath that “\$7.5 billion” was laundered during these “three years.” Renyi Testimony before Committee on Banking and Financial Services, One Hundred Sixth Congress (“Renyi Testimony”), at p.156 (attached as Exhibit 6). In addition, as admitted in the Non-Prosecution Agreement dated May 27, 2003 between BONY and the U.S. Attorney's Offices for the Eastern and Southern Districts of New York, during this “three and one-half years, billions of dollars in funds originating in Russia flowed through the Benex and BECS accounts at BNY.” *See* Ech. B to Non-Prosecution Agreement, at ¶3. With respect to only the Benex and BECS accounts, this included “\$7 billion in deposits” from February 1996 through July 1999.” *See* Ech. B to Non-Prosecution Agreement, at ¶3. Even though BONY admitted to money laundering in this Non-Prosecution Agreement such that the issue is no longer part of the case,⁶ BONY cleverly attempts to call this civil RICO case a criminal case in order to avoid liability. It cannot succeed with such misdirection. Because of the Bank’s admissions, and even more clearly, Edwards’ criminal judgment, the only issue for the Court to determine is the civil remedy that flows from these actions.

BONY facilitated the illegal money laundering business for over three years and failed to make any inquiries whatsoever during those three years precisely because it received substantial income for the money that was laundered into and out of the various BONY accounts described above. Specifically, BONY collected a fee on each wire transfer, plus other miscellaneous charges such as research fees, balance reporting fees and other service charges, which accrued daily. On average, there were approximately anywhere from thirty (30) to over one-hundred-twenty (120) wire transfers per day through the Benex, BECS, and Lowland accounts in varying amounts. *See* Edwards Affidavit at ¶46; Ech. B to Non-Prosecution Agreement, at ¶19. This activity generated a significant amount of income for BONY to the severe detriment of the Russian economy and created the incentive that resulted in BONY not inquiring into or report this obviously illegal conduct that was accomplished through the use of BONY accounts and BONY software.

D. BONY's Illegal Misconduct: BONY Acted With the Willful Blindness Found to be Actionable Under RICO

In violation of U.S. law and despite the extraordinary size of the activity in the accounts, BONY completely failed to conduct adequate due diligence into the Benex, BECS and Lowland accounts. *See* Non-Prosecution Agreement at ¶4, 36.

For starters, despite the fact that the accounts were opened by the husband of a Bank Vice-President and that the Bank Vice-President obtained important BONY software for use on the account, the Bank conveniently made absolutely no inquiries.

The Bank never asked Ms. Edwards or Mr. Berlin for reference letters or sought any information whatsoever concerning Benex, BECS or Lowland from any source outside of BONY. *See* Edwards Affidavit at ¶39; Ech. B to Non-Prosecution Agreement, at ¶23.

The Bank never audited Benex, BECS, or Lowland or requested any additional information whatsoever which would have put them on notice of the illegal money transfer operation or disclosed the true purpose of Benex, BECS and Lowland despite a clear obligation under its policies, application banking practices and U.S. laws. *See* Edwards Affidavit at ¶41; Ech. B to Non-Prosecution Agreement, at ¶23.

No Bank employee ever visited the office addresses provided for the companies from which they were conducting millions of dollars in wire transfers on a daily basis, despite the fact that it is customary for an officer of the bank or a product manager to visit a client's office when an account is opened or when MCR software is installed. *See* Edwards Affidavit at ¶41; Ech. B to Non-Prosecution Agreement, at ¶23.

No Bank employee ever spoke to Ms. Edwards about her role in the companies or ever attempted to verify whether she had complied with BONY's policies and procedures regarding conflicts of interest despite the fact that some BONY employees were aware that Ms. Edwards was the wife of Mr. Berlin and a BONY officer and even though Ms. Edwards was a signatory on the BECS account, which is itself a violation of BONY's internal policies. *See* Edwards Affidavit at ¶41; Ech. B to Non-Prosecution Agreement, at ¶24, 25.

The Bank never once inquired into the accountant letters submitted by Edwards and Berlin once a year that included a balance sheet listing the assets and liabilities of Benex, BECS, and Lowland as well as these companies' alleged sales, costs of sales, and expenses. Had BONY bothered to investigate it would have discovered that these figures were completely false. *See* Edwards Affidavit at ¶40.

As acknowledged by the Bank itself in the Non-Prosecution Agreement, “[a]s a result of BY's failure to conduct adequate due diligence, the BNY branch manager and other personnel . . . incorrectly believed . . . that Berlin was in the ‘import/export’ business and that the transactions through the Benex and BECS accounts represented payment for goods sold.” *See* Non-Prosecution Agreement, at ¶26. If the Bank had bothered to make even a cursory investigation into the businesses of Benex, BECS, and Lowland, it would have learned that these businesses “consisted exclusively in receiving transfers. . .and then, with the use if BNY software, wire-transferring those funds to other parties around the world.” *Id.* at ¶26. Conveniently for the Bank, its failure to monitor the activity in these accounts meant that it did not discover the highly suspicious activity and could continue to reap the financial benefits of the illegal money laundering taking place with the help of BONY software. *See* Ech. B to Non-Prosecution Agreement, at ¶¶ 6, 26. The Department of Justice announcement issued in November 2005 at the time the Non-Prosecution agreement was signed, and which is discussed below, confirms BONY's misconduct and admissions.

Worse still than failing to conduct required due diligence is the fact that the Bank chose to turn a blind eye even when BONY employees independently raised questions as to the suspicious activity that was taking place in connection with the Benex, BECS, and Lowland accounts. Specifically, “in 1998, a new BONY sales representative . . . was assigned to the Benex and BECS accounts. The sales representative, noting the huge volume of wire transfer activity, decided that an analysis of the accounts should be conducted to determine whether there was a reason to suspect money laundering or other illegal activity in the accounts.” Independently, “at around the same time, a [BONY] manager . . . decided to obtain a money laundering review of the Benex and BECS accounts.” However, when the sales representative and the manager informed BONY’s Funds Transfer Division of their desire to conduct the investigations, the Funds Transfer manager’s official response to both employees was that “the bank did not have an automated system for reviewing account activity and that it would be impractical to conduct a manual review of the Benex and BECS account, given the tremendous volume of activity.” *See* Non-Prosecution Agreement, at ¶ 35.

In addition, as already discussed, the Bank promoted Ms. Edwards rather than firing her when an internal audit of the London office where she worked revealed that she had violated certain Bank policies. *See* Affidavit at ¶¶20-21. The head of BONY’s Audit Department specifically recommended that she be fired, but the Bank chose instead to promote her. Clearly, this was a result of the Bank’s financial benefits at Russia’s expense from the continued laundering of billions of dollars.

The Bank also engaged in highly inappropriate and suspicious behavior with respect to the Bank software that allowed bank customers to effect wire transfers without the assistance, supervision or oversight of BONY employees.

Despite the fact that the “software created obvious risks for money laundering, BONY “failed to appreciate or to analyze the increased money laundering risks associated with the micro/CASH product” or worse yet, provided it with the knowledge that it would be used for criminal conduct.

BONY “had no anti-money laundering policies, procedures, or standards restricting who could get access to and use BY’s . . . software”

BONY “failed to establish any system or procedure to monitor activity in accounts with [this] software.”

In fact, wire transfers effected using the software received less scrutiny than wire transfers conducted by BONY employees because BONY’s audit procedures at the time instructed auditors to review only wire transfers that were initiated manually at BONY branches, thus exempting software transfers.

See Ech. B to Non-Prosecution Agreement, at ¶¶11-14.

In the Non-Prosecution Agreement, BONY itself admitted that the “software created obvious enhanced risks for money laundering . . . [y]et BY personnel involved in the development of the micro/CASH product failed to appreciate or to analyze the increased money laundering risks associated with the micro/CASH product.” Non-Prosecution Agreement, at ¶12.

The Bank’s Chairman and CEO, Thomas Renyi, also admitted that the Bank failed to conduct the appropriate due diligence. He specifically admitted under oath that “[a]llowing these accounts to remain open and active without sufficient questioning was a lapse on the part of the bank.” He even went so far as to admit the following: “There certainly were flags that were raised, not necessarily, unfortunately, to my level personally or to the regulators, but that there were individuals who supervised the accounts on a day to day basis who did see a marked increase in volume over what was originally reported to be or represented to be expected to go through those accounts.” Renyi Testimony at pgs 153, 160. In the Non-Prosecution Agreement, the Bank also agreed and admitted that it “**willfully failed** to take the actions required to file a Suspicious Activity Report (“SAR”),” which is a violation of U.S. federal banking laws. *See* Non-Prosecution Agreement at ¶1.

Ultimately, as evidenced by the fact that Ms. Edwards and Mr. Berlin were able to illegally launder at least seven and a half billion dollars (\$7.5 billion) over the course of approximately three (3) years, and for which they plead guilty and were convicted, it is clear that BONY wrongfully permitted this illegal conduct (a clear RICO violation), giving the Bank significant financial benefits at the expense of the Russian economy.

THIS COURT NEED NOT MAKE ANY CRIMINAL FINDINGS: A U.S. COURT HAS ALREADY DETERMINED THAT LUCY EDWARDS ENGAGED IN MONEY LAUNDERING AND BONY HAS ALREADY ADMITTED CRIMINAL CONDUCT

This Court need not make any criminal determinations under U.S. criminal statutes as the Bank incorrectly alleges. The predicate acts of money laundering that give rise to civil RICO damages have already been found to have taken place by the U.S. government and a U.S. Federal Court. Furthermore, a civil RICO claim does not require a finding of criminal wrongdoing. *Sedima v. Imrex Co.*, 473 U.S. 479, 485 (1985).

The civil RICO provision titled “civil remedies,” §1964(c), provides that “[a]ny person injured in his business or property by reason of a violation of section 1962 “may bring suit and “shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney’s fee.” Section 1962 lists the activities that are prohibited when engaging in a pattern of racketeering activity. Racketeering activity includes money laundering as clearly set forth under the definitions section of the statute – §1961.

In this case, this Court need not determine whether the U.S. money laundering statute, §1956, was violated in order to conclude that a pattern of racketeering activity, or pattern of money

laundering took place. This decisions has already been made for the Court on two, separate occasions:

1. On July 26, 2006, a U.S. federal court entered “Judgment in a Criminal Case” against BONY employee, Lucy Edwards and “adjudicated [her] guilty” of the offense of conspiracy to “launder money to promote wire fraud.” Before this Judgment was entered, Lucy Edward plead guilty to this offense and described in great detail under oath the money laundering operation and how it was accomplished. *See generally* Allocution Hearing Transcript.
2. BONY entered into a Non-Prosecution Agreement as a result of a “criminal investigation” by the U.S. government that confirmed that the money laundering scheme succeeded because of the actions of BONY’s employees. As part of this agreement, “BONY accept[ed] and acknowledge[d] responsibility for the conduct of its employees that is the subject of the [U.S. government’s] investigation.” One of the subject of the government’s “criminal investigation” into BONY, for which the Bank accepted and acknowledged responsibility was its “engage[ment] in **money laundering**, in violation of 18 U.S.C. §1956.” *See* ¶3. The U.S. government itself affirmed that BONY admitted criminal conduct in its official November 8, 2005 statement where it clearly stated that this “agreement relates to BY’s **responsibility for crimes involving fraud and money laundering.**”

Thus, the U.S. court and the U.S. government have already determined that BONY, through its employees, is responsible for the crime of money laundering.

In an effort to contradict this evidence, the Bank argues that Lucy Edwards criminal conviction cannot serve as the basis for RICO damages because she only plead guilty to conspiracy to money launder. This position is absurd as confirmed by Professors Blakey and Dershowitz. The offense of conspiracy to commit money laundering meant that Lucy Edwards was convicted of a much bigger and more egregious crime than simply engaging in money laundering herself. In order to be found guilty of this offense, Lucy Edwards had to actively conspire with BONY employees and offenders in Russia as well as directly involve many other individuals and develop and orchestrate a massive scheme of money laundering. More importantly, conspiracy to commit money laundering does constitute a predicate act for a finding of RICO liability under the statute.

It is well-established under RICO law, and as discussed by Professors Blakey and Dershowitz in their affidavits, that conspiracies can serve as the underlying racketeering activities because section 1961(b) defines racketeering activity as including those offenses indictable pursuant to the underlying statute – in this case the money laundering statute. *See Northeast Women’s Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989) *United States v.*

Licavoli, 725 F.2d 1040, 1045 n.6 (6th Cir. 1983). *See also* Affidavits of Robert Blakey and Alan Dershowitz, January 2009, attached as Exhibits 9 and 10 respectively. The money laundering statute that serves as the predicate offense in this case, 18 U.S.C. §1956, includes conspiracy to money launder as an offense under the statute. As a result, conspiracy to money launder, for which Lucy Edwards was convicted, constitutes a predicate act under RICO. *See United States v. Battle*, 473 F.Supp.2d 1185, 1196 (S.D. Fla. 2006) (“§1956 includes . . . conspiracy as an indictable offense”). Lucy Edwards’ conviction alone is sufficient for a finding of civil liability, as acknowledged by BONY expert Richard Thornburgh in his testimony when he stated that the finding of whether BONY violated the relevant statutes, “can be in the form of a prior criminal conviction.” *See* testimony of Richard Thornburgh, October 6, 2008, page 100.

In addition to this conviction, BONY itself has admitted criminal conduct. With respect to the Non-Prosecution Agreement and the DOJ’s official statement, the Bank could do nothing but use its political influence to request that the U.S. government change its position three years later and after this case was filed. Because the U.S. government clearly stated in its November 2005 official statement that the Bank “admitted its criminal conduct” as part of the investigation and “responsibility for the crimes involving fraud and money laundering,” this U.S. Bank could do nothing but request that the DOJ change its position. Given the Bank’s political power in the U.S., it was able to get the DOJ’s assistance to change the wording of a prior press release but not the wording of the agreement itself, which really changes nothing.⁷

Nevertheless, if in fact the U.S. bank’s position is correct – that it never acknowledged “criminal” responsibility – then it must have acknowledged and accepted civil responsibility for its conduct, which is the very nature of this claim. No matter how many experts it hires or how many legal briefs it files and how much political influence it exerts, the simple fact is that BONY admitted responsibility for its employees’ conduct and for its involvement in the money laundering scheme. The Court need only determine the civil remedy that flow from this U.S. Bank’s conduct.

BONY IS VICARIOUSLY LIABLE FOR THE ACTIONS OF ITS EMPLOYEES

Under U.S. law, and as explained by Professor Dershowitz, BONY – independent from and in addition to its own misconduct – is responsible and liable for the admitted criminal conduct of its employee, Lucy Edwards, as well as the negligence of other bank employees in failing to properly supervise and prevent the laundering of billions of dollars out of the Russian Federation. *See* Witness Statement of Professor Dershowitz, January 2009, attached as Exhibit 10. Obviously, a corporation can only act through its employees and officers since under U.S. law, corporations are legal fictions.

Under United States law, it is without dispute that employers are liable, based on the doctrine of respondeat superior, for the damages and injuries caused by their employee’s intentional torts or negligent acts that are committed within the scope and course of the employee’s employment. *See Flohr v. Mackovjak*, 84 F.3d 386 (11th Cir. 1996); *American Bankers Life*

Assurance Co. of Florida v. Tri City Bank & Trust Co., 677 F.2d 28 (6th Cir. 1982). Under the doctrine of respondeat superior, an employer is answerable for the torts of an employee who acts within the scope of his or her employment. The theory of respondeat superior is based on the fact that an employer has authority to supervise and, thereby, control his employees and that the employer has the ultimate right to discharge those who disobey instructions or are simply inept and replace those employees with more suitable ones. The purpose of the rule is to render the employer responsible, in proper cases, for the employee's tortious acts that were done in furtherance of the employer's business. See *New York Islanders Hockey Club, LLP*, 71 F. Supp. 2d 108, 119. This doctrine applies in the civil RICO context. See *Brady v. Dairy Fresh Products*, 974 F.2d 1149 (9th Cir. 1992).⁸

In the case of *Brady v. Dairy Fresh Products*, the Ninth Circuit stated as follows with respect to respondeat superior liability for violations of §1962(c):

"We hold that an employer that is benefitted by its employee or agent's violations of section 1962(c) may be held liable under the doctrines of respondeat superior and agency when the employer is distinct from the enterprise [again, our case]. **Corporations and other employers that have benefitted from their employees or agents' RICO violations will be forced to compensate the victims of racketeering activity. Respondeat superior and agency liability will encourage employers to monitor more closely the activities of their employees and agents to ensure that these agents are not involved in racketeering activities.** Thus, respondeat superior liability furthers both the compensatory and deterrent goals of the RICO statute."

974 F.2d at 1154-55 (emphasis added). Similarly, the court in *Davis v. Mutual Life Ins. Co. of New York* reasoned that finding the doctrine of respondeat superior inapplicable to RICO violations would "prevent corporate persons from ever being found liable under RICO, since corporate principals may act only through their agents. Such a rule would be manifestly contrary to the intent of Congress, and we decline to adopt it." 6 F.3d at 379. Again, *Davis* involved a civil RICO claim.

There is no question based on the evidence submitted that BONY is liable for the acts of its employees in this case. BONY does not dispute that it has already publicly accepted and acknowledged responsibility for the conduct of its employees in the Non-Prosecution Agreement, which specifically states that BONY accepted and acknowledged "responsibility for the conduct of its employees." See Non-Prosecution Agreement at ¶¶ 3-4. In addition, prior to the Bank's entry into the agreement, at her allocution hearing held on February 16, 2000, Ms. Edwards admitted that, in undertaking the illegal money laundering activities in connection with the Benex, BECS, and Lowland accounts, she acted, in part, with the intent to benefit BONY. Allocution Hearing transcript at p. 44. On July 26, 2006, Lucy Edwards was criminally convicted by the federal court in the Southern District of New York when it entered a Criminal Judgment against her. See

Judgment in a Criminal Case, Case. No. S199 Cr. 914-2. The Judgment clearly states that Ms. Edwards is “adjudicated guilty” of the offense of conspiracy to “Launder Money to Promote Wire Fraud.” See Judgment, page 1. Under clear U.S. precedent, BONY is liable under RICO for Ms. Edward’s conduct for which she has already been criminally convicted.

There is similarly no question based on the evidence submitted and discussed above that BONY benefitted from the RICO violations of its employees. BONY turned a blind eye to the activity in its Benex and BECS accounts and utterly failed to make any inquiries of its accounts or Ms. Edwards, even going so far as to promote Ms. Edwards, in direct violation of its policies, and thus reaped enormous financial benefits as a result of the money laundering that took place through its accounts and with the help of its software. Under the doctrine of vicarious liability and well-established RICO law, BONY must “be forced to compensate the victims of the racketeering activity” for the benefits that it received as a result of its employees’ RICO violations.

THE PAVLOV CASE:

BONY’S ALREADY SUCCEEDED IN HAVING A U.S. JUDGE SEND A U.S. RICO CASE AGAINST IT TO BE HEARD BY THE RUSSIAN ARBITRAZH COURTS

BONY’s hypocrisy in this case is further reinforced by its actions in a similar U.S. RICO case brought in New York by Russian citizens. The issue of whether this RICO claim belongs in this Court has already been decided in a prior case brought against the Bank in a U.S. federal court.

In the case of *Pavlov v. The Bank of New York Co., Inc.*, BONY convinced a U.S. federal judge that RICO claims brought by Russian citizens should be decided by the Russian Arbitrazh courts. BONY was also successful in getting a U.S. federal court to apply Russian law so as to deny Russian claimants a U.S. forum for damages they sustained in connection with BONY’s illegal conduct.

Arising out of the same misconduct at issue here, the *Pavlov* case was a class action brought against BONY by all Russian individuals and entities that lost their deposits when a Russian bank collapsed. Like this case brought by the Russian FCS, the *Pavlov* complaint brought by Russian citizens included a RICO count and alleged that BONY, through senior officers including Lucy Edwards, created an enterprise to unlawfully exploit the emerging private banking sector in Russia and systemically looted and converted the bank’s assets. The Russian citizens similarly alleged that BONY played a critical role in the scheme, because it was able to move U.S. dollars between and among Russian entities and into off-shore accounts, profiting immensely from the activity, including in the form of wire transfer fees.

After extensive briefing and argument on the issue, BONY succeeded in getting the U.S. federal court to dismiss the RICO case to be heard by the Russian courts. BONY maintained that Russia would be a more convenient forum for the litigation of the RICO claims and that the case should be tried in Russia because “Russian courts do offer an adequate alternative forum for

litigation of the subject matter of this dispute.” In its memorandum in support of dismissal, BONY also stated that “[t]he Russian courts are clearly an adequate, available and much more convenient forum for the resolution of this dispute.” See BONY brief, Exhibit 11. The district court ruled in BONY’s favor and found that Russia, and more specifically the Russian Arbitrazh Court, provided a better forum to resolve the RICO claims brought by Russian citizens. See *Pavlov v. The Bank of New York Co., Inc.*, 135 F.Supp.2d 426, 438 (S.D.N.Y. 2001), *rev’d on other grounds*, *Pavlov v. Bank of New York Co., Inc.*, 25 Fed. Appx. 70 (2d Cir. 2002), Exhibit 12.

By filing this action in Moscow, the Russian FCS did precisely what BONY requested of a US federal court and what the U.S. court required, which was to litigate a case arising out of exactly the same money laundering allegations in the Russia Arbitrazh Court. The case is ready to finally be brought to an end with the application of civil RICO by this Court.

The application of civil RICO law in this instance is not only supported by *Pavlov*, but by other U.S. cases acknowledging that dismissal of a RICO case for adjudication by a foreign court is not affected by the potential application of U.S. law in the foreign court. See *Contact Lumber Co. v. P.T. Moges Shipping Co., Ltd.*, 918 F.2d 1446 (9th Cir. 1990); *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944 (1st Cir. 1991); *Zen-Noh Grain Corp. v. M/V Theogennitor*, 2002 WL 31886745, *6 n. 4 (E.D.La. 2002) (“Dismissal on the grounds of *forum non conveniens* is appropriate even though it may result in a foreign jurisdiction applying American law.”). In *Contact Lumber*, for instance, the Ninth Circuit held that the “even assuming the applicability of U.S. law, appellants have no entitlement to have their case heard in a U.S. court,” because Philippine courts could apply a U.S. federal statute with civil remedies. 918 F.2d at 1451. Similarly, in *Howe*, the First Circuit held that the prospect of Canadian courts applying American securities law (which cannot credibly be argued to be substantively different from foreign application of the RICO laws), did not preclude dismissal for litigation in the Canadian courts. 946 F.2d at 952.

Moreover, in the context of RICO, U.S. courts have found that the RICO statute does not contain a mandatory provision requiring litigation in U.S. courts. See *Transunion Corp. v. PepsiCo., Inc.*, 811 F.2d 127, 130 (2nd Cir. 1987) (“A review of the legislative history of RICO, however, discloses no mandate that the doctrine of *forum non conveniens* should not apply”); see also, *Gemini Capital Group, Inc. v. YAP Fishing Corp.*, 150 F.3d 1088, 1092 (9th Cir. 1998) (holding that a RICO action “does not implicate any United States law which mandates venue in the United States district courts”). In *Transunion*, the court affirmed dismissal of a civil RICO claim even though the Philippine court might apply civil RICO law. 811 F.2d at 130. Clearly, these U.S. decisions support a foreign court’s application of U.S. RICO civil law. In fact, BONY has failed to provide a single case or a single statement in the legislative history leading to RICO’s enactment which supports the Bank’s position that this Court is powerless to apply RICO law.

NOT A SINGLE CASE SUPPORTS BONY’S POSITION.

Ultimately, there is no difference and absolutely no legal support for the Bank’s contention

that foreign courts can apply certain U.S. laws (i.e., certain U.S. securities laws) but cannot apply civil RICO laws. What is so special about this particular U.S. law? Nothing, and the Bank cannot point to a single case or a single sentence that supports its position that the RICO statute cannot be applied abroad. Instead, this U.S. bank contends that a U.S. court can apply Russian law, send a similar RICO case to a Russian court, and now contend that this Russian court lacks the authority or power to hold them accountable.⁹

What is more, this U.S. Bank is asking a Russian court to examine the purpose and legislative history of a law that it has clearly violated. United States courts, however, do not inquire into the intent of Russian laws when applying them; they do not care about intent since they consider it their exclusive right to apply **any** foreign laws they see fit. This Court possess the same power and need not delve into legislative intent when deciding to apply the RICO statute, especially when the Bank previously asked a U.S. court to send the *Pavlov* RICO claims to be tried in Russia.

THE RUSSIAN FEDERATION’S EVIDENCE
CONSISTED OF TESTIMONY BY THE AUTHOR OF THE RICO STATUTE, BY THE
MOST DISTINGUISHED LEGAL SCHOLAR IN THIS AREA OF THE LAW, AND BY
A RENOWNED U.S. FEDERAL DISTRICT AND APPELLATE JUDGE

A. Testimony by Robert Blakey, the Author of RICO

The Court will no doubt recall that Robert Blakey is the principal drafter of the Racketeer and Corrupt Organizations Act (“RICO”). Robert Blakey submitted a statement and testified extensively on the RICO statute. *See* Witness Statement of Robert Blakey, June 19, 2008, attached as Exhibit 13.

As the principal drafter of RICO, Professor Blakey, despite BONY’s unsubstantiated questioning of his role, is recognized as the leading authority on RICO. Given his position as Chief Counsel on the Senate Judiciary Committee, Subcommittee on Criminal Law and Procedure, Professor Blakey was the principal drafter of RICO. As the Court will recall, he wrote the law on a legal pad on an airplane.

In addition to being the drafter of RICO, Professor Blakey was personally involved in drafting and implementing RICO-type legislation in 22 of more than 30 states that have enacted similar laws and has published not only several books on RICO, but countless articles on the subject. It is not surprising then that he is unquestionably considered as the most knowledgeable and distinguished authority on RICO.¹⁰ In fact, the United States Supreme Court has itself cited Professor Blakey as an authority on the subject and acknowledged that he is its “principal draftsman.” *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 466 (1990) (referring to Blakey “as the principal draftsman of RICO”) (quoting *Brandenburg v. Seidel*, 559 F.2d at 1179, 1193 (4th Cir. 1988) which quotes Blakey in an article); *NOW v. Scheidler*, 510 U.S. 249, 259 n.5 (1994) (which quotes G. Robert Blakey); *Reves v. Rrnst & Young*, 507 U.S. 170, 80 (1993); *Russello v. United States*, 464 U.S. 16, 28 (1983); *Roma Construction Co. v. Russo*, 96 F.3d 566, 577 n. 6 (1st Cir. 1966) (citing to a book “describing Blakey as ‘the acknowledged author’ of the federal RICO statute and of ‘excellent’ commentaries on RICO application). As the leading authority on the

subject and the principal drafter, he is in the best position to explain the statute and testify as to legislative intent in contrast to BONY's expert, Yesakov Gennady Alexandrovich, who simply attempted to research the meaning of RICO on the internet.

During his testimony, Professor Blakey explained the legislative history with respect to the interpretation of a statute, which includes the statements of findings and purposes made by Congress in preface to the legislation, reports of committees of the Senate and the House of Representatives on the legislation. Having lived through the drafting and passage of the Act and having his original notes, he was able to testify about and quote the committee reports extensively in his written Statement to support his conclusions on legislative history. In contrast, the Bank's RICO expert could cite to nothing in support of his conclusions.

Blakey, however, given his knowledge and experience testified that it would be completely consistent with statutory and Congressional intent as well as judicial precedent to allow foreign court's to apply RICO. He testified that RICO's text and legislative history do not reflect a legislative intent on the part of Congress to preclude RICO's application in foreign courts. To the contrary, RICO's application by foreign courts would well-serve the statute's remedial purpose for victim's of prohibited conduct. In addition, Congress did not confine civil RICO solely to federal courts in the U.S., which would have been the case if it was public or criminal law. A legislative intent is implicit in the character of the legislation as a whole that foreign courts should apply RICO. Not only has the U.S. Supreme Court interpreted RICO, which is a federal statute, to apply in state courts, but has also upheld its application in private arbitration hearings. *Tafflin v. Levitt*, 493 U.S. 455, 458-67 (1990) (finding that state courts possess concurrent jurisdiction to hear civil RICO); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (finding that arbitration panels have jurisdiction to hear RICO claims). The fact that state courts just like foreign tribunals cannot entertain criminal actions, further evidences that there are two independent legal claims under RICO (criminal, which can only be brought in a U.S. federal court and civil, which can be brought anywhere).

In *Tafflin v. Levitt*, 493 U.S. 455, 458-67 (1990), the U.S. Supreme Court found that state courts possess concurrent jurisdiction to hear civil RICO litigation. Much of the court's analysis is equally applicable to the issue of the jurisdiction of foreign courts.

The court in *Tafflin* stated as follows:

Our review of the legislative history . . . reveals no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts. As the Courts of Appeals that have considered the question have concluded, the legislative history contains no indication that Congress ever expressly considered the question of concurrent jurisdiction; indeed, as the principal draftsman [G. Robert Blakey] of RICO has remarked, "no one even thought of the issue." . . . [T]he fact that Congress did not even consider the issue readily disposes of any argument that Congress unmistakably intended to divest state courts of concurrent jurisdiction.

In addition, the court stated:

[C]oncurrent jurisdiction over § 1964(c) suits is clearly not incompatible with [federal law that vests exclusive jurisdiction over federal crimes in federal courts] for civil RICO claims are not “offenses against the laws of the United States,” and do not result in the imposition of criminal sanctions-uniform or otherwise.

. . . Indeed, it would seem anomalous to rule that state courts are incompetent to adjudicate civil RICO suits when we have recently found no inconsistency in subjecting civil RICO claims to adjudication by arbitration.

. . . Thus, to the extent that Congress intended RICO to serve broad remedial purposes . . . concurrent state court jurisdiction over civil RICO claims will advance rather than jeopardize federal policies underlying the statute.

For all of the above reasons, we hold that state courts have concurrent jurisdiction to consider civil claims arising under RICO. Nothing in the language, structure, legislative history, or underlying policies of RICO suggests that Congress intended otherwise.

493 U.S. at 460-66 (citations omitted).

Thus, according to Professor Blakey, the U.S. and policy concerns used by the U.S. Supreme Court to hold that state courts and arbitration hearings had jurisdiction over RICO apply similarly to the use of civil RICO in a Russian court. Nothing in the language, structure, legislative history, or underlying policies of RICO preclude its application in a Russian court, and the Bank has not pointed to anything to the contrary.

It is absurd and arrogant for the Bank to argue in this Court that U.S. law cannot be applied abroad, especially when it previously argued for and obtained a contrary ruling in its favor. Based on principles of international law, Congress would not pass legislation such as RICO with a legislative intent that foreign courts would not apply it, which was even acknowledged by the Bank’s experts. BONY’s very own expert, Gregory Joseph, stated in his book, **Civil RICO: A Definitive Guide**, that “[a]t least in theory, **some foreign courts’ choice of law rules may permit or require application of RICO.**” See page 24 n. 30 (attached as Exhibit 14). Additionally, Professor Blakey testified that to his knowledge RICO has been applied by courts in Canada and France. There is no doubt that this is not the first time that RICO has been applied by foreign courts and there may exist many more countries where it has been applied, but because countless opinions never get published and cases settle, it is impossible to know how many times it has been applied by foreign courts.

It is, therefore, ludicrous for the Bank and this very same expert to now claim that U.S. laws may not be utilized by a foreign court when the United States regularly applies foreign law, including Russian law. In now taking this position, the Bank is attempting to argue contradictory positions – maintaining in a U.S. court that a U.S. court can dismiss a civil RICO suit to be litigated in Russia and arguing in this Court that a Russian court cannot apply civil RICO. It does not want to be held accountable anywhere in the world for its illegal conduct.

In addition to challenging this Court’s jurisdiction and whether it is liable for compensatory

damages under RICO's civil remedies provision, the Bank has also challenged the Court's standing. With respect to this issue, Professor Blakey testified that the Russian Federation, in the person of the Federal Customs Service ("FCS") can act as a Plaintiff in a case tried under U.S. law. Section 1964(c) of the RICO statute authorizes **civil** RICO suits on behalf of "any person" including foreign state and local government entities. For example, the case of *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1358 (9th Cir. 1988) held that a foreign government is a "person" that can bring suit under RICO. Accordingly, any "person," including the Russian Federation represented by any one of its instruments (FCS) can sue any person that violates the provisions of RICO. If the U.S. courts have recognized that the Republic of the Philippines can utilize the civil RICO law, why would the R.F. not be entitled to do the same thing! Is BONY contending that the Philippines can use the civil RICO law but the Russian Federation cannot? Why would Russia be denied rights or remedies afforded to other countries? According to the Bank, the Russian Federation can bring a civil RICO suit in a U.S. state court, but it cannot do it in its own country even though the Bank previously argued that related RICO claims arising out of the *Pavlov* action should be litigated in Russia.

Professor Blakey also explained that the RICO statute allows **civil** claims to be brought against a person who has violated provisions of the statute. The text and legislative history of RICO amply demonstrate that Congress intended that RICO provide for civil suits by "any person," including private parties and foreign governments, against any person that violates RICO's standards of prohibited conduct. Similar to private suits under the antitrust statutes, on which Congress modeled RICO and which indisputably have civil remedy provisions, Congress designed the RICO statute's provision so as to authorize private civil suits to "provide a significant supplement to the limited resources available to the Department of Justice" to enforce the law. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 334 (1979). In fact, Congress specifically included the treble damages provision in RICO to encourage suit by **private parties**. See *Sedima, S.P.R.L. v. Imrex, Inc.*, 473 U.S. 479, 497-98 (1985). Blakey testified that this treble damages provision was compensatory and mandatory. In his affidavit when explaining the civil and criminal dimensions of RICO, Professor Blakey concluded, as he did in his testimony, that RICO is "criminal" and "public" when it is enforced by the public prosecutor and "**civil**" and "private" when it is **civily** enforced by governmental bodies (domestic and foreign) and private persons. See Legal Expert Witness Statement of Professor G. Robert Blakey, at p. 30-31.

Apart from his personal involvement in the drafting of the statute, Professor Blakey quoted extensively from the legislative record, and the various committee reports discussing the fashioning of both criminal and **civil** remedies in support of his conclusions regarding the civil aspects of RICO.

B. Testimony by Alan Dershowitz, a Leading Authority on RICO Law and Its Civil Dimensions

Professor Alan Dershowitz of Harvard Law School has extensive experience with and knowledge of RICO law. He has been teaching RICO law since its enactment, has been teaching at Harvard for over 44 years, has litigated numerous cases involving RICO law, has testified before congressional committees and has advised government officials regarding U.S. RICO law. He has argued countless cases before the U.S. Supreme Court and has litigated civil RICO actions. His extensive resume is included in his June 25, 2008 Legal Expert Witness Statement, which is

attached as Exhibit 15.

In his testimony before the Court, Professor Dershowitz emphasized three points. First, BONY has no legitimate claim of being prejudiced by being held accountable under RICO civil provisions. It is a U.S. corporation that must operate under the law of the U.S., which includes RICO law. It must conform its conduct to RICO law. As a result, BONY cannot claim that it was denied fair warning since it was aware that the civil RICO law would be applicable to it and cannot, therefore, have a substantive objection for applying the RICO law to its conduct.

Second, BONY can have no reasonable claim to objecting to the Russian Courts deciding this case. In the *Pavlov* case, it argued that the Russian Courts were an appropriate fora in which to litigate that case – a case that grew out of the same prohibited and wrongful conduct that is involved in this case. Because BONY sought to have a Russian Arbitrazh court litigate the *Pavlov* case, it is estopped or prevented under U.S. law from taking a contrary position and now arguing that the judgment of the Russian Court is unenforceable. BONY previously stated that the Russian courts act fairly, provide due process, and are entirely legitimate courts that operate within the rule of law. Thus, based upon international legal norms, the Bank is also estopped from changing its position in this case in the event a judgment is rendered against it and the Russian FCS seeks to enforce its judgment in the United States or elsewhere.

Third, Professor Dershowitz addressed and concluded that it is proper for the Russian courts to apply the civil RICO law in a case of this kind, and more particularly that it is proper for the Russian Arbitrazh court to apply the RICO civil law.

As to this final point on the civil RICO, Professor Dershowitz explained that there is absolutely no reason why Russian courts cannot apply civil RICO law. There is nothing different about civil RICO and other U.S. civil law. RICO is a remedial law, which the Supreme Court has said should be applied liberally to achieve its remedial purposes. Moreover, in the words of the U.S. Supreme Court, Congress “set out a far-reaching *civil* enforcement scheme.” *Sedima v. Imrex Co.*, 473 U.S. 479, 485 (1985). The rule of construction applied by the U.S. courts in civil RICO cases is to determine whether there is anything in the text of the statute or in the legislative history that would preclude it from being applied to the situation at hand. That is the way U.S. courts have decided such issues as whether civil RICO can be litigated in state courts and whether States are parties under the RICO law. See *Tafflin v. Levitt*, 493 U.S. 455, 458-67 (1990). There is absolutely nothing in the RICO statute or in the legislative history that supports the Bank’s position that a Russian court cannot apply civil RICO. The text of the statute does not forbid its application abroad and judicial practice has not precluded foreign courts from applying RICO. In this respect, a Russian Court is similar to an American state court.

Additionally, Professor Dershowitz, as well as Professor Blakey, testified that a Russian Arbitrazh court, which may lack jurisdiction over criminal cases, can however appropriately consider a civil RICO claim. This view is also supported by the Russian FCS experts, George Pratt and Alexandrovich Vassiliev. Both of these experts explained that even though the Russian Arbitrazh court, like a state court in the United States, has no jurisdiction over criminal RICO cases or over any criminal cases, it can properly exercise jurisdiction over a civil RICO claim. Civil RICO is just that – a civil cause of action based on prohibited conduct specified in the RICO law. Section 1962 specifies the prohibited conduct that gives rise to a RICO claim. A separate section then describes how the prohibited conduct could become criminal conduct if prosecuted under the

criminal section. And yet a third section, 18 U.S.C. §1964, specifies how a **civil** RICO action can be based on the prohibited conduct set out in Section 1962. It is quite common under American law for the same words to be used to describe a civil cause of action and a criminal cause of action. However, the definition of a crime requires that it be subject to prosecution by the state and be proved “beyond a reasonable doubt,” whereas a private party who is seeking to enforce civil RICO need only prove his case by “a preponderance of the evidence.”

Professor Dershowitz also explained in his testimony that there are many situations under which a civil RICO case can be brought against somebody who is not subject to criminal prosecution for the same conduct. For example, a person may have immunity; the statute of limitations for a crime may have expired that has not expired for a civil RICO claim; the evidence against the person may have been obtained in violation of the exclusionary law; the person may have been pardoned for criminal conduct. He also provided the following common sense example of why RICO does not require that a person be convictable of a criminal offense or convicted of a criminal offense is the following: If a person is found liable for a civil RICO violation and is then asked if he has ever been convicted of a crime or whether he was a criminal, he could answer no, without committing perjury. That is why, as Professor Blakey explained, the Supreme Court in the *Sedima* case clearly held that a criminal conviction is not required in order to bring a civil RICO action. A civil RICO action is civil in every respect and courts that only have jurisdiction over civil cases and no jurisdiction over criminal cases, such as the Russian Arbitrazh courts here, may hear a civil RICO case

C. Testimony of George C. Pratt, a Distinguished U.S. Federal District and Appellate Judge

Not to be outdone by the other Russian Federation experts, the Honorable Judge George Pratt served as a United States District Judge for the United States District Court from 1976-1982. This is the same court that was involved in the series of allegations which led to BONY’s avoidance of criminal prosecution through the Non-Prosecution Agreement. He also served a judge for the United States Court of Appeals for the Second Circuit until 1995. The Second Circuit’s jurisdiction includes New York, where BONY was incorporated. As a district Judge, Judge Pratt presided over numerous RICO trials, both civil RICO and criminal RICO, and on the appellate court, he sat on panels which heard appeals from judgments of the district court, including both criminal and civil cases brought under the RICO statute. As a result, he too is uniquely positioned to provide an opinion on the difference between civil and criminal RICO and of the evidence submitted in this case to prove a RICO civil violation.

This very prominent U.S. Federal and Appellate judge stated unequivocally that the criminal and civil provisions of RICO are very different. *See* Legal Expert Witness Statement of George Pratt, June 19, 2008, attached as Exhibit 16. First of all, the RICO statute sets forth the criminal and civil remedies in different sections. More importantly, civil RICO need only meet the civil law standard of “preponderance of the evidence,” whereas a criminal violation must meet the much stricter standard of “beyond a reasonable doubt.” In addition, Judge Pratt explained that under civil RICO, a plaintiff does not need to prove that the defendant acted with criminal intent. The predicate acts of racketeering activity listed in §1961(1) need only be proved by establishing that the defendant acted knowingly. For the predicate act of money laundering that is at issue here, the “knowingly” requirement can be proven by showing either actual knowledge or “**willful**

blindness,” which in this case clearly existed as set forth above *United States v. Lalle*, 257 F.3d 751, 755 (6th Cir. 2001); *United States v. Antzoulatos*, 962 F.2d 720, 725 (7th Cir); *Williams v. Obstfeld*, 314 F.3d 1270, 1278 (11th Cir. 2002) (In a civil RICO action “under the doctrine of willful blindness or deliberate ignorance . . . knowledge can be imputed to a party who knows of a high probability of illegal conduct and purposely contrives to avoid learning of it”).

In his written statement, Judge Pratt also explained in detail the various sections of the RICO statute and the evidence presented to demonstrate a RICO violation in this case. In summary, the RICO statute, (1) sets forth the definitions in the first section, 1961, which includes in the definition of racketeering activity, any act that comes under the money laundering statute (§1956) (2) then lists the prohibited activities under section 1962; and finally provides for (3) criminal penalties under section 1963, (4) and civil remedies under section 1964. The diagram below illustrates this organization.

§1961 - Definitions

§1962 - Prohibited Activities

§1963 - Criminal Penalties

§1964 - Civil Remedies

To recover civil damages under §1964, Judge Pratt explained that the Russian FCS need only prove a violation of one of the four sections of 1962. It need not prove all of them. There is no doubt, as Judge Pratt found when reviewing the evidence, that BONY acted with willfully blindness when it allowed and failed to inquire in the laundering of billions of dollars from the Russian Federation as discussed above. Given his experience as a trial and appellate judge whose responsibility included the adjudication of civil RICO cases, Judge Pratt even when so far as to state without reservation that based on the admitted and clear facts of this case, he would enter final judgment under U.S. civil RICO laws against BONY. Summary Judgment is a procedure in the U.S. when the facts are so clear and compelling that Final judgment may be entered without the need for an evidentiary hearing or trial. Having reviewed the materials submitted by the R.F. to this Court, including the Statement of Lucy Edwards and the Non-Prosecution agreement, Judge Pratt concluded in his written opinion that the statements in the Non-Prosecution Agreement would be considered admissions of BONY and the allegations of Edwards would be considered admitted.

Judge Pratt, a U.S. Federal trial and appellate judge for twenty years, specifically concluded that if he “were sitting as a judge in this matter in the U.S., [he] would conclude that judgment on the liability issue of violation of RICO should be granted in favor of the R.F.” See Written Statement, Exhibit 16, at p. 21. In his written statement, he explained the various sections of the RICO statute and that a violation of any one of the four paragraphs of §1962 leads to civil RICO damages under §1964. As set forth in extensive detail on pages 22-26 of Judge Pratt’s written Statement, Judge Pratt concluded that the Russian FCS had proven all of the elements necessary for civil recovery, including that (1) an enterprise exists in violation of §1962(c); (2) two predicate acts of racketeering activity have occurred within ten years of each other under §1961(5); (3) a pattern of racketeering activity took place; (4) knowing or willful blindness to the prohibited activity; and (5) proximate harm under §1964(c) in the form of monetary damages.

D. The Testimony of the Distinguished Alexandrovich Vassiliev¹¹

Finally, the Russian FCS provided the testimony of Professor Evgeniy Alexandrovich

Vassiliev who is a professor in the Department of International Private and Commercial Law of the Moscow State Institute for International Relations and a leading researcher in issues of international civil and commercial law. For over 30 years, he has been a professor of a course on comparative civil and commercial law and he is the author of over 70 research publications on issues of civil commercial law and international trade arbitration. Professor Vassiliev was not argumentative and candidly answered questions rather than engage in personal attacks on counsel and pretend he had greater knowledge than he possessed.

In the Legal Report submitted to the Court in answer to its questions and in his live testimony, Professor Vassiliev also provided his opinions on the civil and criminal distinctions discussed by Blakey and Dershowitz. *See* Legal Report of Professor Vassiliev, attached as Exhibit 17. He too explained and concluded that U.S. legal theory does not recognize the division into public and private law and recognized in Russia. Nevertheless, he explained that the RICO statute provides for and specifically creates the basis for bringing civil claims by parties whose rights have been affected as a result of prohibited conduct. As a distinguished Russian law professor for over 30 years, Professor Vassiliev concluded that in this case, the Russian FCS “brings civil (private) claims based on civil (private) law provisions.” *See* Legal Report, Exhibit 17. Therefore, the Arbitrazh Court will not be applying foreign public (criminal) law provisions and has jurisdiction over this civil action.

With respect to the issue of application of RICO by foreign courts, Professor Vassiliev also concluded that neither the text nor RICO case law accounts for any prohibitions against application of RICO in foreign courts. As he explained, the U.S. Supreme Court has held that U.S. state (or regional) courts, such as Arbitrazh courts in Russia, can review RICO claims. He too affirmed that the U.S. Congress in enacting the statute did not include any restrictions on the judicial application of the RICO statute abroad.

Most importantly, Professor Vassiliev explained that Russian law (substantive or procedural) would not restrict RICO’s application by the Russian Arbitrazh courts.

BONY’S RICO TESTIMONY

TESTIMONY BY A U.S. POLITICIAN, AN AUTHOR WHOSE PUBLICATION RECOGNIZED THAT A FOREIGN COURT CAN APPLY RICO, A RUSSIAN PATENT ATTORNEY, A 30 YEAR-OLD PROFESSOR, AND A RUSSIAN SCHOLAR WHO ATTEMPTED TO SUPPLANT THE COURT AND LECTURE IT ON RUSSIAN LAW

A. Richard Thornburgh, a Career Politician

BONY also relied extensively on the testimony of Richard Thornburgh, a career politician. Mr. Thornburgh is now employed by K & L Gates law firm, a firm which has and continues to represent BONY. Therefore, he hardly qualifies as an independent expert.

In contrast to his former position as stated in a paper he participated in drafting, Mr. Thornburgh now states that BONY was never found to have committed any violation of U.S. criminal law by any U.S. court in connection with the events referenced in this action as required by RICO. As discussed above, Thornburgh is entirely wrong on this issue as has been

determined by a U.S. Supreme Court. In *Sedima*, the Supreme Court found that a criminal conviction is not required in order to bring a civil RICO action. *See Sedima, S.P.R.L. v. Imrex, Inc.*, 473 U.S. 479, 494 (1985) (“In sum, we can find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble-damages action under § 1964©) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists.”).

More important to Thornburgh’s credibility as an expert in this case is a prior statement made in a K & L Gates publication prepared with his “substantial input” and assistance: “The Internal Investigation: Cooperation and the McNulty Memorandum,” Fourteenth Annual Advanced ALI-ABA Course of Study for the Defense and Government Board, October 4-5, 2007 (attached as Exhibit 8). The article explains that as part of a non-prosecution agreement entered into with the federal prosecutors, BONY was required to admit to its conduct, giving the U.S. Department of Justice substantial leverage in prosecuting if the company violated the agreement. *See id.* at page 8. The article even discusses as an example the BONY Non-Prosecution Agreement entered into with the U.S. Attorneys’ Offices in New York and directly contradicts Thornburgh’s testimony that BONY did not admit its criminal conduct in this agreement. Specifically, the article states the following: “As part of the non-prosecution agreement, BNY agreed to pay \$38 million in penalties and victim’s compensation, **admit to its criminal conduct** and continue to take remedial measures,” which the Bank never did with respect to the Russian Federation. The article also explains that the “agreement relates to BNY’s **responsibility** for **crimes** involving fraud and money laundering, as well as BNY’s failure to comply with mandatory reporting obligations under the Bank Secrecy Act.” *See id.*, page 15.

Remarkably, BONY and even its expert, who is from a firm that represents the Bank, now contend that it never accepted responsibility for money laundering.¹²

B. Gregory Joseph, a Self-Proclaimed RICO Expert Who Had No Role in RICO’s Drafting or Enactment, But Wrote a Handbook on Civil RICO

Just as remarkable is the fact that the Bank’s expert who testified that RICO is solely a criminal statute, wrote a book dedicated exclusively to the civil aspects of RICO. In his written statement, Gregory Joseph stated to this Court that the “RICO statute is a criminal statute.” Yet, years before he was hired by this Bank to say just that, Mr. Joseph published a book specifically about civil RICO law and titled “**Civil RICO: A Definitive Guide.**”

In direct contrast to what he now tells this Court in stating that Congress did not “intend that RICO would be applied by foreign courts,” he previously stated in his book that RICO can be applied by foreign courts. In his handbook, he specifically stated as follows:

“[a]t least in theory, some foreign courts’ choice of law rules may permit or require application of RICO.”

Civil RICO: A Definitive Guide, page 24 n. 30 (attached as Exhibit 14). His current position in this Court clearly lacks credibility and demonstrates that he is not an independent expert.

Moreover, his previous position that RICO can be applied by foreign courts necessarily means that RICO is a civil or public law for if it were exclusively criminal it could not be applied

anywhere but in U.S. federal courts. And the United States Supreme Court has already determined that this is not the case and that civil RICO can be applied in state courts.

C. Professor Sergeyev, a Patent and Copyright Attorney that had Never Heard of RICO Before This Case

Even though he is a patent and copyright attorney and has had no previous experience with RICO in contrast to the vast knowledge and experience of the Russian FCS' experts, BONY's first Russian expert on RICO was Professor Sergeyev. Prior to being hired three months earlier, he had never heard of the RICO statute and in fact, even the Court questioned his credentials as to U.S. civil RICO law.¹³ In contrast to the unsubstantiated swipes at professor Blakey, Professor Sergeyev admitted during his testimony that Professor Blakey wrote the RICO statute. *See* transcript of Professor Sergeyev's testimony, November 27, 2008.

With respect to the issue of RICO's civil provisions, Mr. Sergeyev continued to claim that RICO was a criminal statute even after he was asked to read portions of the book written by BONY's own expert, Gregory Joseph. In fact, he was shown the very footnote discussed above in which Mr. Joseph states that RICO can be applied by other countries. If as Professor Sergeyev acknowledged, the criminal or public laws of one country cannot be applied in another country, which is a fundamental principle of international law and is equally true in the United States, then Mr. Joseph position supports a finding that RICO contains civil or private provisions. If it were not a private law, it could not be applied abroad as BONY's own expert maintains.

Professor Sergeyev also admitted that the law in Russia is "exactly the same" to that of the United States on the issue of vicarious liability. He very clearly agreed in his testimony that Russian law similarly holds that a company can only act through people and that a company is "responsible for its employees." In addition, this Bank expert admitted that the Russian court could accept the prior admission by the BONY in the Non-Prosecution Agreement and Ms. Edwards' criminal final judgment and, thus, to the extent that the Bank is correct that RICO involves the interpretation of criminal law, the issue would be moot as already having been decided and the Court would only need to determine the appropriate remedy.

Here, in addition to the Bank's own admission of criminal conduct in signing the Non-Prosecution Agreement, the Russian FCS presented the criminal conviction of BONY officer Lucy Edwards where she was found guilty of conspiracy to money laundering, which as already explained constitutes a predicate act under the RICO statute. She even admitted to the details of the money laundering scheme and how it was accomplished by means of BONY software and BONY accounts when she plead guilty to the criminal charges. There is no question given the overwhelming evidence presented by the Russian FCS and the admissions of BONY's own expert that the Bank must be held responsible for its own unlawful conduct and that of its employees. This case is in a position to make a final determination of liability and damages.

D. Yesakov Gennady Alexandrovich, a Thirty Year-Old Lawyer Who Has Never Given an Expert Opinion or Qualified as an Expert on RICO

In contrast to Robert Blakey's unparalleled knowledge of RICO law, given that he is its

principal drafter and the leading authority on RICO law, and Alan Dershowitz, a renowned professor and authority on RICO that even BONY's experts recognized, BONY presented the testimony of Yesakov Gennady Alexandrovich. Mr. Yesakov is a 30 years old lawyer who admitted that he has never taught or practiced in the United States, has never been to the United States, and has never "given an expert opinion, testimony or been qualified as an expert by any court in the world on U.S. criminal RICO or civil RICO" law. See transcript of examination of Professor Yesakov on December 12, 2008.

Despite his lack of experience with RICO, Mr. Yesakov felt comfortable testifying as to Congressional intent and to conclude that RICO belongs purely to the sphere of criminal law, and that even the civil provisions of RICO should be considered criminal. Amazingly, he also felt that he was just as capable to discuss RICO and stood on an equal footing with Professor Blakey, RICO's author, questioning whether RICO law would die when Blakey dies and claiming that because "[t]hank God, there were documents of the Congress . . . [and] the network of internet available," he as well as others could "make certain conclusions and share his knowledge." Blakey who is still alive, in contrast to the internet, is in the best position to testify about the statute's meaning and legislative intent.

Even though Mr. Yesakov claimed to be just as qualified to discuss RICO, when questioned whether he could point to "one piece of paper" from all the documents submitted to the Court, or to a "one court decision," or to "one word in the Congressional record which supported [his] position that civil RICO does not mean what it says" as stated in section 1964, but is instead criminal, Mr. Yesakov could not. He could provide no credible and authoritative support for his conclusions that RICO is purely a criminal statute that only imposes criminal penalties.

E. V.V. Yarkov, a Scholar Who Lectured the Court on Its Own Jurisdiction

Finally, the last expert that BONY presented, Mr. Yarkov, was the most argumentative. Despite his claim that in Russia experts are independent and do not support any particular side, Mr. Yarkov served as an expert for the Bank on four occasions. He provided sworn statements in the United States in favor of the Bank four different times, demonstrating that he works for the Bank and is not independent.

When it came to his testimony, Mr. Yarkov attempted to usurp this Court's function by lecturing the Court as to its own jurisdiction. The Court does not need a Russian legal expert to advise it of Russian jurisdiction, especially in such a clear case of jurisdiction. Common sense, which is clearly consistent with the law, mandates that civil RICO is just that, i.e., a civil and not a criminal claim, thus falling within this Court's jurisdiction as BONY previously argued successfully in *Pavlov*.

In addition to lecturing the Court, he could provide no testimony on the relevant issue of RICO's civil provisions. In fact, when asked a direct question of whether civil RICO exists in the United States, he could not answer, admitting that he is "not an expert in this sphere." See transcript of testimony, December 12, 2008.

Mr. Yarkov's entire testimony was nothing less than an effort to usurp the Court's role in determining its own jurisdiction, to use his words, by arrogantly lecturing the Court.

OTHER LEGAL ISSUES

A. The Russian Federation Has Standing to Bring Suit Under RICO

The Russian Federation, in the person of The Federal Customs Service, which is as a branch, department, or agency of The Federation, has standing to bring a civil RICO action because it considered a “person” under RICO. RICO provides that “any person injured in his business or property” by reason of a violation of §1962 may bring a civil action to be compensated for the harm sustained. *See* 18 U.S.C. §1964©). In other words, any person injured in his business or property due to a violation of the RICO statute may file a RICO action. As defined in RICO, a person “includes any individual or entity capable of holding a legal or beneficial interest in property.” 18 U.S.C. §1961(3).

There is no question that in this case the FCS is considered a “person” under the act and, as such, the FCS has standing to bring a RICO claim. That a governmental entity is considered a “person” is supported by several U.S. cases, including the Republic of Philippines case already discussed. *See Republic of The Philippines v. Marcos*, 862 F.2d 1355 (9th Cir 1988); *Illinois Department of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985) (finding that State Department of Revenue was a proper party under RICO statute to bring suit in federal court).

B. RICO can be Applied by a Foreign Court and Applies to Conduct that Occurs Outside of the United States

As already addressed with respect to the testimony of the Federation’s experts, the RICO statutes do not bar its extraterritorial application and RICO’s legislative history does not reflect a legislative intent on the part of Congress to preclude RICO’s application in foreign courts. In other words, nowhere in the Act does it state that the RICO statutes can only be applied in the United States and can never be applied abroad by foreign court.

United States law also provides that the RICO statute applies even when part of the conduct occurred outside of the United States. Various U.S. courts have found that when a RICO claim involves foreign events or conduct in a foreign country, subject matter jurisdiction to hear a RICO action still exists as long as one of two, alternative tests are satisfied: the conduct test or the effects test. *See Madanes v. Madanes*, 981 F.Supp. 241, 250 (S.D.N.Y. 1997); *see also North South Finance Corp. v. Al-Turki*, 100 F.3d 1046 (2d Cir. 1996). The fact that RICO creates a cause of action with extraterritorial reach, meaning for conduct that took place outside of the United States, further reinforces the conclusion that RICO can be applied abroad by a foreign court. If Congress had wished to limit RICO’s application within the United States it would have so provided and would have further restricted its application only for conduct that occurred within the United States. But it did not so restrict it.

Moreover, foreign courts are not barred from applying a U.S. statute simply because it was enacted by the United States Congress. Russian law expressly so provides under Article 1186 of the Russian Federation Civil Code. In fact, United States courts apply foreign laws routinely and are not barred from doing so simply because the laws were passed abroad. For example, in the case of *Films by Jove, Inc. v. Berov*, a United States court applied Russian copyright laws. 154 F.Supp.2d 432 (E.D.N.Y.2001). Thus, in this case, if a Russian court finds that U.S. law applies and that a cause of action exists in Russia under the RICO statutes, it is not barred from applying the RICO statutes simply because they were enacted in the United States. As stated above, nowhere does the statute prohibit its application abroad and United States courts have even found RICO applicable to conduct that took place outside of the United States.

In this case, BONY's position that a Russian court is not competent to apply foreign law is absurd given that U.S. courts apply foreign law every day and are not barred from applying foreign law simply because the laws were passed abroad. If U.S. courts can apply Russian law, why is this Court less of an authority on U.S. law. In this case especially, it is appropriate and fair to hold a New York bank chartered under U.S. law accountable to U.S. civil remedies, especially where the bank successfully argued that the *Pavlov* RICO action arising out of the same illegal conduct should be tried in Russian courts. A finding that this Court cannot apply U.S. law would signify that the Russian Federation would not be able to use its own courts in a commercial dispute seeking to address the admitted wrongs of a company doing business in its country and which exacerbated the worst financial crisis that the country has seen in modern times.

C. The Statute of Limitations Has Not Run on this Action

Despite BONY's arguments to the contrary, the statute of limitations of four years did not run by the time of filing suit because the Russian FCS did not discover BONY's involvement in this massive money laundering scheme until the U.S. government published an official announcement in November 2005 stating that BONY had admitted criminal conduct. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 142, 156 (1987) (holding that the statute of limitations for RICO claims is four years).

As explained by Professor Dershowitz, in the context of RICO claims, courts have repeatedly applied the discovery rule to determine when the limitations period begins to run. *See Rotella v. Wood*, 528 U.S. 549 (1999); *Fujisawa Pharmaceutical Co., Ltd. v. Kapoor*, 115 F.3d 1332, 1338 (7th Cir. 1997). Under the discovery rule, the limitations period does not begin to run until the plaintiff discovers or should have discovered that the defendant caused the injury – in this case, that BONY specifically caused the Russian FCS' injuries and that BONY had been instrumental in the laundering of billions of dollars from The Federation.

Although it was first discovered that Lucy Edward was involved in the money laundering scheme, because until the time of the DOJ announcement, the Bank continued to take the position that the money laundering occurred because of a rogue employee and that it had no involvement, this discovery does not fix the date upon which the limitations period begins to run.¹⁴ Because of the Bank's position at the time, it was not yet known to the Russian FCS that the crimes were committed through BONY and because of BONY's actions. In addition, that newspaper articles appeared about Lucy Edwards does not affect the analysis.¹⁵

In a case analogous to the instant action, the court in *In re Copper Antitrust Litigation*, determined that the plaintiff could not have discovered that the defendant in particular caused its injuries from certain newspaper articles. 436 F.3d 782 (7th Cir. 2004). The court ruled that the accrual date was not the date when the media began reporting that the defendant financed the illegal activities and was under investigation because none of these articles indicated that defendant's actions were unlawful or that it knew of the illegal transactions. 436 F.3d at 789 ("Even the articles published in the spring of 1997 reporting the federal investigation of Morgan did not state that Morgan had been charged with violating the law."). Instead, the Court ruled that the accrual date was the date when the plaintiff was put on notice of the defendant's involvement in the prohibited

activity.

Just like the plaintiff in *In re Copper*, the Russian FCS did not learn that BONY had admitted violating the law until the DOJ published an announcement discussing the Non-Prosecution Agreement and the U.S. Government's criminal investigation of BONY. Because of BONY's prior denials regarding its involvement and responsibility for this massive money laundering scheme, it only became clear that BONY had engaged in "unlawful" activity when the announcement was issued on November 8, 2005.

D. The Revenue Rule Does Not Apply In this Case

Finally, in taking its arrogant position that a Judgment from this Court will not be enforceable, it has claimed that the U.S. legal concept of the revenue rule will prevent its enforcement. The revenue rule, which has itself been criticized and is not uniformly applied, prevents the courts of one sovereign from enforcing or adjudicating tax claims from another sovereign. The revenue rule does not apply in this case, however, given that the Russian FCS is not seeking the recovery of lost taxes, but rather the equitable remedy of disgorgement as discussed below.

DAMAGES

Having proven that the Court in this instance will not need to apply any criminal laws or determine any criminal issues, the only issue to be decided by the Court is the civil remedies to be recovered by the Russian FCS for the severe damages caused by the Bank's prohibited conduct. It is the Russian FCS's position that the only proper remedy in this case given the extent of damages that it suffered at the hands of this U.S. Bank is disgorgement of BONY's illicit profits.

Under the civil provision of the RICO statute, §1964, a federal court has the power to "prevent and restrain" violations of RICO. Specifically, §1964(a) provides:

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Both RICO's principal draftsman Robert Blakey and federal U.S. Judge George Pratt have made clear in their written statements and testimony that "the list in this section is not exhaustive" given that federal courts have broad equitable powers and the legislative history of the RICO statute evidences that Congress did not intend to limit the remedies available. Specifically, in the Senate Committee Report on RICO, Congress stated that "[s]ubsection 1964(a) contains broad remedial provisions for reform of corrupted organizations. Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupted influence and make due provision for the rights of innocent persons." S.Rep. No. 91-617, at 160 (1969); accord. H.Rep. No. 91-1549, at 57 (1970).

In his written statement, Robert Blakey emphasized that under section 1964(a)

disgorgement of illicit profits is a well-established remedy. *See, e.g. United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk*, 44 F.3d 1082, 1084 (2d Cir. 1995). In addition, the civil remedy of disgorgement is not limited to government suits; it is a well-established private civil remedy. *See, e.g. Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965) (“[I]t is simple equity that a wrongdoer should disgorge his fraudulent enrichment.”); *Richard v. Hoechst Celanese Chemical Corp.*, 355 F.3d 345 (5th Cir. 2003); *United States v. Sasso*, 215 F.3d 282, 290-91 (2nd Cir. 2000); *United States v. Carson*, 52 F.3d 1173, 1181 (2d Cir. 1995). Courts have found that the application of equitable relief under §1964(a), such as in the form of injunctions or disgorgement, is available to private parties in part due to Congress’ intent that the RICO statute be liberally construed to effectuate its remedial purposes. *See National Organization of Women v. Scheidler*, 267 F.3d 687, 696 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003). In fact, even the U.S. Supreme Court squarely confirmed in *California v. Am. Stores Co.*, 495 U.S. 271 (1990) that these far-reaching remedies are available to private parties under the parallel antitrust statutes, an analysis that applies to RICO.

What is more, the United States Department of Justice, including during the tenure of BONY expert Richard Thornburg as Attorney General, frequently sought disgorgement in **civil** RICO case under §1964(a). The following cases reflect this practice during Thornburgh’s time in office from 1988-1991. *United States v. Int’l Bhd. Of Teamsters*, 708 F. Supp. 1388, 1408 (S.D.N.Y. 1989) (civil disgorgement from alleged RICO violations); *United States v. Local 1804-1, International Longshoremen’s Ass’n*, 732 F. Supp. 434, 438 (S.D.N.Y. 1990) (same); *United States v. Private Sanitation Indus. Ass’n*, 811 F. Supp. 808, 812 (E.D.N.Y. 1992) (seeking civil disgorgement from alleged RICO violations).

According to the principal author of RICO, pursuant to Section 1964(a), this Court should under these circumstances and under the authority of U.S. RICO law order equitable disgorgement. Equitable factors which support disgorgement in this case under §1964(a) in order to “prevent and restrain” future violations include (a) the nature of the wrongdoing; (b) the severe harm caused by the wrongdoing to the Russian FCS; (c) the likelihood that disgorgement will deter future conduct by the BONY and other corporations; (d) the difficulty of victims proving damages because of concealment by BONY; (e) the possibility that other victims will not bring claims and thus BONY will benefit by its wrongdoing if disgorgement is not ordered; and (f) the public good. The Russian FCS, through its experts, requests that this Court order disgorgement.

The facts support this remedy given the massive nature of the alleged scheme and the importance of deterring future money laundering. In this case, the nature of the wrongdoing was extremely serious, involving violations of the money laundering statute, §1956, and the unlicensed money transferring statute, §1960 over a lengthy time period. The Russian FCS suffered billions of dollars in damages, and the actions of this U.S. Bank resulted in billions of dollars of capital flight from the Russian Federation at a time of great financial and economic crisis. Disgorgement of all laundered money will provide a substantial deterrent to this U.S. Bank and others foreign corporations not to launder monies and conduct illegal money transferring operations. It will also show that the Russian Government and its judiciary will not allow lawlessness by foreign corporations who have the privilege of doing business within its borders. The Court may conclude that limiting disgorgement, for example, to the profits which the Bank received may not be a

sufficient deterrent to future misconduct because this would be disproportionately small compared to the totality of the tainted funds the Bank allegedly laundered, particularly in light of the money laundering statute (§1956(b)), which sets forth as a penalty the “value of the property, funds, or monetary instruments involved” in the money laundering. Finally, given that the Russian Federation is the plaintiff, there could be no allegation of a windfall benefitting a private party, but instead, disgorgement would support the public good.

Pursuant to the RICO statute and RICO law, the Russian FCS requests disgorgement of the illicit profits, which are \$7.5 billion dollars as admitted by BONY CEO Thomas Renyi in his testimony, set forth in the Non-Prosecution Agreement, and confirmed by Lucy Edwards in her affidavit. This amount should then be trebled for a total of \$22.5 billion as clearly set forth under the civil remedies provision, §1964(c), which calls for trebling.

The Russian FCS believes, consistent with RICO’s intent, that it is important to make it clear that it will not allow foreign corporations to act illegally and wrongfully when they are granted the privilege of doing business in Russia. This U.S. Bank is not above the law and will be held accountable despite having stated publically that it will attempt to use its power and influence to obtain a political solution so as to prevent this Court from remedying a serious wrong.

CONCLUSION

Many years after causing devastating harm to Russia, the claims underlying this RICO action were thoroughly investigated by the United States government, resulting in the entry of a Non-Prosecution Agreement and an official DOJ statement affirming that BONY admitted criminal conduct as part of the U.S. government’s criminal investigation. Yet, after misleading the Russian public of its role and clear responsibility, this U.S. Bank not only continues to refuse any acknowledgment of responsibility, but also snubs this country where it has the privilege of doing business, insults the legal system and this Court, makes outrageous accusations against the Russian Federation’s counsel and public officials, delays the prosecution of this action, and refuses to recognize the legitimacy of this Court.

Instead of recognizing its responsibilities, this U.S. Bank has engaged in a campaign of threats and outrageous and reckless accusations. BONY has a tremendous amount of resources at its disposal, not to mention a legion of attorneys, but rather than use them to attempt to support its position legally and legitimately, it has instead arrogantly used its resources to attack the Russian FCS and its attorneys and even this Court.

The time has finally come for BONY to be held accountable for its wrongful conduct in a court of law and put an end to the bullying and delay tactics directed to the Russian government and this Court. This Court has demonstrated incredible patience over the past several years while typically cases are resolved in a few months, by accommodating the Bank’s witnesses and relentless efforts to complicate what is a simple case of very clear, admitted RICO violations. As clearly set forth in this brief, the Bank has violated civil RICO law and the Russian FCS should be compensated for the damages it sustained at the hands of a U.S. Bank that laundered billions of dollars out of Russia.