

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :  
 :  
 Plaintiff, :

**GOVERNMENT'S NOTICE OF  
FINAL RELEASE OF  
SETTLEMENT FUNDS AND  
MOTION TO DISMISS**

- v - :

07 Civ. 3559 (LAP)

APPROXIMATELY \$84 MILLION ON :  
DEPOSIT IN ACCOUNT NO. T-94025 :  
IN THE NAME OF THE TREASURY OF :  
THE MINISTRY OF FINANCE OF THE :  
REPUBLIC OF KAZAKHSTAN AT PICTET :  
& CIE, GENEVA, SWITZERLAND, :  
FORMERLY ON DEPOSIT IN ACCOUNT :  
NO. 1017789E AT CAI INDOSUEZ, :  
GENEVA, SWITZERLAND, AND ALL :  
INTEREST, INCOME, BENEFITS, AND :  
OTHER PROCEEDS TRACEABLE THERETO, :

Defendant in rem. :

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The United States of America respectfully files this Notice of Final Release of Settlement Funds and Motion to Dismiss in order to inform the Court of the release of the last installment of the defendant funds to the BOTA Foundation on October 2, 2014, and the subsequent liquidation of the Foundation in 2015, thereby making dismissal of the above-named action appropriate. As set forth in the 2009 Final Order, the dismissal of this action shall occur following the release of the final installment of the funds. See Final Order, ECF No. 9, at ¶ 6

("The Clerk of the Court shall place this action on its suspense docket pending release of the last installment of the Funds, upon which the court shall dismiss the above captioned action..."). The BOTA Program ended on December 31, 2014, and beginning in January 2015 and ending in August 2015, the Foundation was liquidated in accordance with Kazakhstani laws. The final liquidation balance was approved by the governments of the United States, Kazakhstan, and Switzerland in November and December 2015.

#### **BACKGROUND**

On May 3, 2007, the United States filed this action seeking forfeiture of approximately \$84 million held in an account in Switzerland in the name of the Treasury of the Ministry of Finance of the Republic of Kazakhstan, plus all interest, income, benefits, and other proceeds traceable thereto. See Complaint, May 3, 2007, ECF No. 1. The Complaint alleged, *inter alia*, that James H. Giffen and others conspired to make unlawful payments to senior Kazakh officials in connection with or through his company, Mercator Corporation, and further made transfers and attempted transfers with the proceeds of such unlawful payments, in violation of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2; the wire fraud statute, 18 U.S.C. § 1343; and U.S. money laundering laws, 18 U.S.C. §§ 1956, 1957. The Complaint further alleged that the defendant funds were

subject to forfeiture pursuant to 18 U.S.C. §§ 981(a)(1)(A) and 981(a)(1)(C) on the grounds that they constituted the proceeds of, property traceable to such proceeds, and/or property involved in such violations. *Id.*

Contemporaneous with the filing of the Complaint, the Governments of the United States and the Republic of Kazakhstan (together "the Parties") submitted a proposed Stipulation and Order in settlement of this action, in which the United States reaffirmed its allegations and the Republic of Kazakhstan asserted its claims that it was the sole beneficiary of the funds and that the funds were its property. See Notice of Filing of Original Proposed Stipulation and Order, December 9, 2015, ECF No. 17.

On May 7, 2007, at the request of the Parties, the Court entered the Stipulation and Order, which set forth a procedure for the release of the defendant funds by agreement for the benefit of poor children and youth in Kazakhstan, contingent upon establishment and implementation of three programs: (a) a BOTA Program to expend the funds through a new BOTA Foundation, that was required to be independent from the Government of the Republic of Kazakhstan, under the supervision and guidance of the International Bank for Reconstruction and Development (the World Bank), and administered by an experienced international non-governmental organization acting as Program Manager; (b) a

Public Finance Management Review Program, through which the Government of the Republic of Kazakhstan, with the support of the World Bank, agreed to undertake a five-year program for improving public financial management in Kazakhstan; and (c) an Extractive Industries Transparency Initiative Program, through which the Government of the Republic of Kazakhstan, with the support of the World Bank, agreed to prepare and implement a comprehensive strategy and action plan for transparency in the extractive industries. See Stipulation and Order, May 7, 2007 (entered May 8, 2007), ECF No. 2. Additional terms were incorporated into the Stipulation and Order by a Memorandum of Understanding between the Governments of the United States of America, the Republic of Kazakhstan, and the Swiss Confederation (the "Three-Government MOU"). See Notice of Filing of Original Proposed Stipulation and Order, ECF No. 17. The Stipulation and Order also incorporated a "Service Agreement" between the three governments and the World Bank, in accordance with which the World Bank was to provide assistance in the establishment and oversight of the BOTA Foundation. *Id.* Both the Three-Government MOU and the Service Agreement were attached to the Stipulation and Order submitted in this action, and their terms were expressly incorporated therein. See Stipulation and Order, ECF No. 2. In addition, the Stipulation and Order attached agreements between the Republic of Kazakhstan and the World Bank

for technical assistance and advice regarding the Public Finance Management Review Program and the Extractive Industries Transparency International Initiative Program. *Id.*

The Three-Government MOU was subsequently amended by a 2008 Amended Memorandum of Understanding between the Governments of the United States of America, the Republic of Kazakhstan, and the Swiss Confederation. The terms of the Stipulation and Order, including each of its attachments, as amended, were expressly incorporated into the Final Order confirming the agreement of the Parties and the procedures for disposition of the assets. See Final Order, May 31, 2009, ECF. 9 (filed June 1, 2009).

In 2014, in order to ensure the responsible expenditure of the remaining settlement funds (estimated at approximately \$22 million at the beginning of 2014) and the orderly winding-down of BOTA Program operations, the three governments unanimously agreed to extend the BOTA Program past its then-anticipated end date of May 31, 2014, to December 31, 2014. In June 2014, the three governments executed a formal Extension Agreement to extend the terms of the 2008 Amended Memorandum of Understanding between the Governments of the United States of America, the Republic of Kazakhstan, and the Swiss Confederation. See Joint Status Report, September 11, 2015, Attachment A (Extension Agreement), ECF No. 14-1. The three governments also approved,

through an exchange of letters, an extension of the Service Agreement for the BOTA Foundation among the three governments and the World Bank to align with the December 31, 2014, end date for the BOTA Program. See Joint Status Report, September 11, 2015, Attachment A (Extension Agreement), ECF No. 14-2.

#### DISCUSSION

From 2009 to October 2014, the three governments approved the release of twelve tranches of funds totaling \$115,228,671, with the final installment released on October 2, 2014. A chart listing all tranche approvals is set forth below:

Tranche Request	Month Disbursed	Amount (in U.S. Dollars)
1	June 2009	\$3,987,288.
2	December 2009	\$3,639,021.
3	March 2010	\$8,506,273.
4	January 2011	\$4,952,989.
5	September 2011	\$7,756,390.
6	February 2012	\$12,706,829.
7	August 2012	\$15,074,122.
8	February 2013	\$22,117,175.
9	September 2013	\$15,894,780.
10	February 2014	\$15,551,043.
11	September 2014	\$5,039,960.
12	October 2014	\$2,800.
	<b>TOTAL:</b>	<b>\$115,228,671.</b>

As a result of these transfers, between 2009 and 2014, the BOTA Foundation operated as the largest child and youth welfare foundation in Kazakhstan and used the defendant funds to reach a total of 208,000 beneficiaries -- more than double its original target figure. See "The BOTA Foundation: Final Summative Report," IREX, February 12, 2015, attached hereto as Attachment

A<sup>1</sup>; "Final Supervision Report of the BOTA Foundation," World Bank, March 2015, attached hereto as Attachment B.

With the guidance and oversight of the World Bank, the BOTA Foundation and its Program Manager IREX developed three programs designed to reduce child poverty in Kazakhstan using the settlement funds. These three programs included: (1) a Social Services Program (SSP) that made grants to local non-governmental organizations working to improve the lives of children and youth from impoverished families; (2) a Conditional Cash Transfer (CCT) program that provided monetary incentives for low-income families to, for example, combat anemia in pregnant women, improve the health of newborn children, and support home-based care for disabled children; and (3) a Tuition Assistance Program (TAP) designed to increase access for students lacking financial means to undertake higher and vocational education within Kazakhstan. See Attachment A (IREX Summative Report) at p. 4-5.

Through the CCT program, the BOTA Program enrolled 154,241 beneficiaries from 95,000 poor households, delivering regular cash payments in six regions to families with preschool aged children, women with infants, households with children with disabilities, and unemployed teenage youth. See Attachment A

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<sup>1</sup> The IREX report also can be found at <https://www.irex.org/resources/bota-foundation-final-report>, and other related documents can be found at: <https://www.irex.org/projects/bota-foundation>.

(IREX Summative Report) at p.4. The SSP program provided grants in amounts of \$2,000 to \$50,000 to community organizations and non-governmental organizations, funding 632 projects to meet health, education and social welfare needs of poor children, youth and families in Kazakhstan. *Id.* Providing means-based scholarships, the TAP program awarded educational grants to 841 students to enable them to attend higher education. *Id.* at 5. As described in more detail in the IREX Final Summative Report, the BOTA Foundation engaged Oxford Policy Management (OPM) to provide an independent assessment of the effectiveness and efficiency of BOTA operations, which OPM found to have high levels of effectiveness for beneficiaries and a positive impact for recipients.<sup>2</sup> *Id.* at p.11.

In addition to the particular programmatic results, IREX expects that the BOTA Foundation will have a further enduring and positive impact as a result of the foundation's efforts to design and implement new mechanisms for identifying and reaching individuals in communities affected by poverty, to provide support to community organizations and non-governmental organizations, and to expand the number of persons with specialized experience in the development and implementation of social welfare programs in Kazakhstan. *Id.* at 49-50.

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<sup>2</sup> The OPM report can be found at: [http://www.opml.co.uk/sites/default/files/OPM%20BOTA%20summary%20note%203\\_Quantitative%20findings\\_0.pdf](http://www.opml.co.uk/sites/default/files/OPM%20BOTA%20summary%20note%203_Quantitative%20findings_0.pdf)



Similarly, the World Bank noted that elements of the BOTA Foundation's design of its CCT program had been adopted into a new conditional cash transfer program of the Government of the Republic of Kazakhstan, while several SSP grantees had joined with other organizations to establish a National Coalition of Organizations focused on Children and Youth in Kazakhstan. Attachment B (World Bank Final Supervision Report) at p. 5.

An independent auditor, BDO KazakhstanAudit LLP, conducted five annual audits between 2009 and 2014 of the BOTA Foundation, noting no material financial misstatements. See Attachment A (IREX Summative Report) at p. 10-11. In advance of these audits, the Program Manager, IREX, sent accounting staff to conduct an annual review of the financial operations of the BOTA Foundation, which resulted in recommendations on management policies and practices but did not identify serious issues. *Id.* In addition, local World Bank staff conducted office visits semi-annually to review accounting records, again, making recommendations but not identifying material issues. *Id.* Significantly, in the course of this \$115 million program, the BOTA Foundation also successfully took action to recover funds from an SSP grantee who had defaulted on a project for which it had been awarded an advance payment of approximately \$10,000, and to recover other monies from two incidents of fraud in its CCT program involving \$18,000 and \$176,314. Most of these

monies, including all of the funds involved in the larger fraud scheme, were recovered. Attachment A (IREX Summative Report) at p. 54; Attachment B (World Bank Final Supervision Report) at p. 5.

The BOTA Foundation ceased operations on December 31, 2014, and underwent liquidation procedures in 2015.<sup>3</sup> Attachment B (World Bank Final Supervision Report) at p. 2. On August 7, 2015, the BOTA Foundation was liquidated by the Ministry of Justice of the Government of the Republic of Kazakhstan. In October 2015, IREX, on behalf of the BOTA Foundation submitted to the three governments a final Financial Report for the Year Ended 31 July 2015, which showed that, as of December 31, 2014, the account at Pictet & Cie that had held the defendant funds had a zero balance and that, as of July 31, 2015, BOTA's accounts had zero balances. In November and December 2015, the three governments formally approved the final liquidation balances.

Because the defendant funds have been completely expended, the BOTA Program has concluded, and the BOTA Foundation has been liquidated, the United States of America hereby respectfully

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<sup>3</sup>After receiving approval from all three governments, BOTA made a transfer of a remainder of approximately \$375,000 to UNICEF on December 23, 2014, per an agreement between BOTA and UNICEF to utilize the remaining funds to strengthen civil society implementation of child welfare programs. Attachment A (IREX Summative Report) at p. 48.

requests that the Court dismiss this action in accordance with the 2009 Final Order.

Counsel for the United States has conferred with counsel for the Republic of Kazakhstan, who has indicated that the Republic does not oppose this motion.

Dated: December 9, 2015

Respectfully submitted,

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