

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA *ex rel.*
JANE DOE,

Plaintiffs,

v.

HSBC BANK USA, N.A.,

Defendant.
-----X

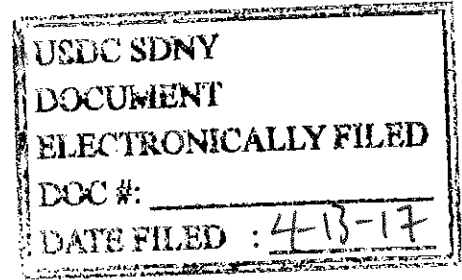
UNITED STATES OF AMERICA ,

Plaintiff-Intervenor,

v.

HSBC BANK USA, N.A.,

Defendant.
-----X



Case No. 11 Civ. 2968 (LGS)

SO ORDERED:


HON. LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

4/13/17

STIPULATION AND ORDER OF SETTLEMENT

This Stipulation and Order of Settlement (the “Stipulation” or “Agreement”) is entered into among the United States of America, by its attorney Joon H. Kim, Acting United States Attorney for the Southern District of New York (the “United States”), defendant HSBC Bank USA, N.A. (“HSBC”), and relator Jan Orlando (referred to in the *qui tam* complaint as “Jane Doe”) (“Relator”) (collectively, the “Parties”), through their authorized representatives.

WHEREAS, HSBC is a banking and financial services organization that, from time to time, extends to borrowers business loans guaranteed, in part, by the Small Business Administration (“SBA”);

WHEREAS, on or about May 2, 2011, Relator Jan Orlando filed a *qui tam* action in the United States District Court for the Southern District of New York captioned *United States ex rel. Jane Doe v. HSBC Bank USA, N.A.*, 11 Civ. 2968 (LGS), pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the “Relator’s Action”). The Relator’s Action alleges, among other things, that from 2005 until May 2011, HSBC engaged in a scheme to defraud the United States by: (i) making loans guaranteed by SBA that HSBC knew or should have known were not eligible for such guaranteed loan programs; (ii) seeking reimbursements from the Government after these loans defaulted; and (iii) retaining SBA loan guarantee payments after HSBC knew or should have known that HSBC was not entitled to these payments;

WHEREAS, contemporaneous with the filing of this Stipulation, the United States, through the Office of the United States Attorney for the Southern District of New York, is filing a Notice of Partial Intervention and Complaint-In-Intervention in the above-referenced *qui tam* action (“Government’s Complaint”), alleging under the False Claims Act and certain common law claims that HSBC failed to alert SBA in all instances to borrower fraud that occurred in 42 loans included in Exhibit A that were guaranteed by SBA before SBA paid guaranteed claims on those loans to HSBC, and submitted false claims to SBA in connection with these loans. The United States alleges that HSBC identified these 42 loans through an internal effort in 2006 to gain an understanding of fraud within HSBC’s Small Business portfolio. The specific loans are

listed in Exhibit A attached hereto. The conduct in this paragraph and described in the Government's Complaint is referred to below as the "Covered Conduct;"

WHEREAS, the total amount to be paid in settlement of the claims of the United States related to the Covered Conduct is \$2,118,861.36;

WHEREAS, the Relator's share of the settlement will be subject to a separate agreement between Relator and the United States;

NOW, THEREFORE, in consideration of the mutual promises and obligations of this Stipulation, the Parties agree and covenant as follows:

1. The Parties consent to this Court's exercise of subject matter jurisdiction over this action and personal jurisdiction over each of them with respect to this action.
2. HSBC admits, acknowledges, and accepts responsibility for the following conduct:
 - a. Certain lenders, including HSBC, are authorized to approve loans guaranteed by the SBA, including but not limited to loans issued pursuant to the *SBAExpress* program.
 - b. SBA provides a guaranty of up to fifty percent on loans issued pursuant to the *SBAExpress* program.
 - c. In requesting that SBA pay the guaranty on a loan issued pursuant to the *SBAExpress* program, a lender completes a required Purchase Demand Kit. Lenders, including HSBC, sign a certification in the Purchase Demand Kit stating, among other things, that: "The lender used appropriate diligence to ensure that disbursements were used exclusively for business related purposes" (the "Certification").
 - d. In requesting that SBA pay the guaranty on loans issued pursuant to the *SBAExpress* program, a lender, including HSBC, also completes a Wrap Up Report as part of the Purchase Demand Kit that provides factual information relating to the history of the loan.
 - e. In or around 2006, HSBC voluntarily commenced an internal effort to gain an understanding of the reasons for the default rates on loans it had made to small and medium enterprises, including but not limited to loans issued

pursuant to the SBA *Express* program. HSBC's efforts included an attempt to identify whether any of the loans involved fraud or potential fraud by borrowers.

- f. As part of this effort, HSBC identified a number of loans as fraudulent or potentially fraudulent in which borrowers may have submitted false information to HSBC in obtaining their loans, including the 42 loans identified on Exhibit A hereto (the "Loans").
- g. HSBC subsequently sought from SBA the guaranteed amount on each of these Loans (i.e., up to fifty percent of the principal of the Loans), by submitting to SBA a Purchase Demand Kit (including the Certification) and a Wrap Up Report.
- h. In submitting the Purchase Demand Kit and the Wrap Up Report for certain of the Loans, HSBC did not inform SBA of all of the facts indicating that borrowers may have submitted false information to HSBC in connection with the origination of these loans, or that as a result HSBC had identified these loans as fraudulent or potentially fraudulent.
- i. On receipt of HSBC's Purchase Demand Kit, Wrap Up Report, and signed Certification, SBA paid the guaranteed amounts on the Loans.

3. HSBC shall pay the United States \$2,118,861.36 (the "Settlement Amount") within ten (10) calendar days of the Effective Date (defined below in Paragraph 29).

4. The payment required by Paragraph 3 above shall be made by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney's Office for the Southern District of New York.

5. Subject to the exceptions in Paragraph 7, and in consideration of the obligations of HSBC in this Stipulation, and conditioned upon HSBC's full compliance with the terms of this Stipulation, including but not limited to timely full payment of the Settlement Amount, the United States releases HSBC, together with its predecessors and successors, from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Financial

Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1833a; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law theories of payment by mistake, unjust enrichment, and fraud; provided, however, that nothing in this Stipulation shall be construed as a release of any claims that the Government has, or may have, against any current or former employees, officers, directors or agents of HSBC. This Stipulation is not intended to cover, and does not cover, any allegations or conduct other than the Covered Conduct.

6. Conditioned upon HSBC's full payment of the Settlement Amount, Relator, for herself and for her heirs, successors, attorneys, agents, and assigns, hereby fully, finally and irrevocably releases HSBC and all of its predecessors and successors, together with its respective current and former officers, directors, trustees, servants, employees, agents, affiliates, and assigns, from any claims Relator has asserted, could have asserted, or may assert in the future on behalf of the United States arising out of (i) the Covered Conduct, including, without limitation, claims under 31 U.S.C. §§ 3729-3733, and (ii) the conduct alleged in the Relator's *qui tam* complaint. However, nothing in this Stipulation shall preclude Relator from seeking to recover her expenses or attorney's fees and costs from HSBC, pursuant to 31 U.S.C. § 3730(d).

7. Notwithstanding the releases given in Paragraph 5 or any other Paragraph of this Stipulation, the following claims of the United States are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);

- b. Any criminal liability;
- c. Except as explicitly stated in this Stipulation, any administrative liability, including the suspension and debarment rights of any federal agency;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Stipulation;
and
- f. Any liability of individuals.

8. HSBC shall be in default of this Stipulation if HSBC fails to pay the Settlement Amount as set forth in Paragraph 3 above or to comply materially with any other obligations under this Stipulation (“Default”). The Government shall provide written notice to HSBC of any Default, to be sent in the manner set forth in Paragraph 26 below. HSBC shall then have an opportunity to cure the Default within seven business days from the date of receipt of the notice of Default. In the event that a Default involving failure to pay the Settlement Amount is not fully cured within seven business days of the receipt of the notice of Default (“Uncured Default”), the full Settlement Amount shall be immediately due and payable, and interest shall accrue at the rate of nine percent per annum compounded annually on the remaining unpaid principal balance, beginning seven business days after mailing of the notice of Default. In the event of HSBC’s failure to pay the Settlement Amount as set forth in Paragraph 3 above, HSBC agrees to the entry of a consent judgment for the Settlement Amount. In the event of an Uncured Default, HSBC further agrees that the United States, at its option, may (a)

rescind this Stipulation and reinstate the Government's Complaint; (b) seek specific performance of this Stipulation; (c) offset the remaining unpaid balance of the Settlement Amount from any amounts due and owing HSBC by any department, agency, or agent of the United States; or (d) exercise any other rights granted by law, or under the terms of this Stipulation, or recognizable at common law or in equity. HSBC shall not contest any offset imposed or any collection undertaken by the Government pursuant to this Paragraph, either administratively or in any court. In addition, HSBC shall pay the Government all reasonable costs of collection and enforcement under this Paragraph, including attorneys' fees and expenses. In the event that this Stipulation is rescinded pursuant to this Paragraph or Paragraph 19, HSBC shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any civil or administrative claims that relate to the Covered Conduct, except to the extent such defenses were available at the time of the filing of the initial complaint in this case.

9. Relator and her heirs, successors, attorneys, agents, and assigns shall not object to this Stipulation but agree and confirm that this Stipulation is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B).

10. HSBC waives and shall not assert any defenses HSBC may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Stipulation bars a remedy sought in such criminal prosecution or administrative action. Nothing in this Paragraph or any other provision of

this Stipulation constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

11. HSBC, together with its predecessors and successors, fully and finally release the United States, and its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that HSBC has asserted, could have asserted, or may assert in the future against the United States, and its agencies, officers, agents, employees, and servants, related to the Covered Conduct and the United States' investigation and prosecution thereof.

12. In consideration of the obligations of Relator set forth in this Stipulation, HSBC, together with its predecessors and successors, fully, finally, and irrevocably releases Relator and her heirs, successors, attorneys, agents and assigns, from all claims, causes or rights of action, demands, liabilities, or penalties of any kind or nature whatsoever, in law or in equity, that they had, have, or may have against Relator arising out of the Covered Conduct, and Relator's investigation and prosecution thereof.

13. HSBC agrees to the following:

a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of HSBC or its present or former officers, directors, trustees, employees, shareholders, and agents in connection with:

(1) the matters covered by this Stipulation;

- (2) the United States' investigation(s) of the matters covered by this Stipulation;
- (3) HSBC's investigation, defense, and corrective actions undertaken in response to the United States' investigation(s) in connection with the matters covered by this Stipulation (including attorney's fees);
- (4) the negotiation and performance of this Stipulation;
- (5) the payment HSBC makes to the United States pursuant to this Stipulation and any payments that HSBC may make to Relator, including for her costs and attorneys' fees, are unallowable costs for government contracting purposes (hereinafter referred to as "Unallowable Costs").

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by HSBC, and HSBC shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Stipulation, HSBC shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by HSBC or any of its subsidiaries or affiliates from the United States. HSBC agrees that the United States, at a minimum, shall be entitled to recoup from HSBC any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. Any payments due after the adjustments have been made shall be

paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The United States reserves its right to disagree with any calculations submitted by HSBC or any of its member corporations, subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by HSBC, or the effect of such Unallowable Costs on the amount of such payments.

d. Nothing in this Stipulation shall constitute a waiver of the rights of the United States to audit, examine, or re-examine HSBC's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

14. HSBC agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Stipulation. Upon reasonable notice, HSBC shall encourage, and agrees not to impair, the cooperation of its directors, officers, and employees, and shall use its best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. HSBC further agrees to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by another on its behalf.

15. This Stipulation is intended to be for the benefit of the Parties only.

16. This Stipulation is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Stipulation is the United States District Court for the Southern District of New York. For purposes of construing

this Stipulation, this Stipulation shall be deemed to have been drafted by all Parties to this Stipulation and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

17. Except as provided in Paragraph 6 (regarding Relator attorney fees and costs), each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Stipulation.

18. HSBC expressly warrants that it has reviewed its financial situation and that it is not currently insolvent within the meaning of 11 U.S.C. § 101(32), and will not become insolvent following its payment of the Settlement Amount. Further, the Parties expressly warrant that, in evaluating whether to execute this Stipulation, such Parties (i) have intended the mutual promises, covenants and obligations set forth herein to constitute a contemporaneous exchange for new value given to HSBC, within the meaning of 11 U.S.C. § 547(c)(1); and (ii) have concluded that these mutual promises, covenants and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended and do, in fact, represent a reasonable equivalent exchange of value which is not intended to hinder, delay or defraud any entity to which HSBC was or became indebted on or after the Effective Date of this Stipulation, all within the meaning of 11 U.S.C. § 548(a)(1).

19. If, within 91 days of the Effective Date of this Stipulation or within 91 days of any payment under this Stipulation, HSBC commences, or a third party commences, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization or relief of debtor: (i) seeking to have any order for relief of

any of HSBC's debts; (ii) seeking to adjudicate HSBC as bankrupt or insolvent; or (iii) seeking appointment of a receiver, trustee, custodian or other similar official for HSBC or for all or any substantial part of HSBC's assets, then:

a. HSBC's obligations under this Stipulation shall not be avoided pursuant to 11 U.S.C. § 547, and HSBC shall not argue or otherwise take the position in any such case, proceeding or other action that: (i) HSBC's obligations under this Stipulation may be avoided under 11 U.S.C. § 547; (ii) HSBC was insolvent at the time this Stipulation was entered into, or became insolvent as a result of the payments made to the United States hereunder; or (iii) the mutual promises, covenants and obligations set forth in this Stipulation do not constitute a contemporaneous exchange for new value given to HSBC.

b. In the event that HSBC's obligations hereunder are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the United States, at its sole option, may rescind its agreement to this Agreement, and bring any civil and/or administrative claim, action or proceeding against HSBC for the claims that would otherwise be covered by the release provided in paragraph 5, above. HSBC: (i) shall not contend that any such claims, actions or proceedings brought by the United States are subject to an automatic stay pursuant to 11 U.S.C. § 362(a) as a result of the action, case or proceeding described in the first clause of this paragraph; (ii) shall not plead, argue or otherwise raise any defenses under the theories of

statute of limitations, laches, estoppel or similar theories, to any such civil or administrative claims, actions or proceedings which are brought by the United States within thirty (30) calendar days of written notification to HSBC that the releases herein have been rescinded pursuant to this paragraph, except to the extent such defenses were available on the date the initial complaint was filed in this action; and (iii) shall not contest the validity of a claim filed by the United States against HSBC in the amount of \$2,118,861.36; and the United States may pursue its claims in the case, action or proceeding referenced in the first clause of this paragraph, as well as any other case, action, or proceeding.

c. HSBC's agreements in this paragraph are provided in exchange for valuable consideration provided in this Stipulation.

20. This Stipulation constitutes the complete agreement between the Parties with respect to the subject matter hereof. This Stipulation may not be amended except by written consent of the Parties.

21. The undersigned counsel and other signatories represent and warrant that they are fully authorized to execute this Stipulation on behalf of the persons and entities indicated below.

22. This Stipulation may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Stipulation. Signatures delivered by facsimile transmission or as .pdf attachments to emails shall constitute acceptable, binding signatures for purposes of this Stipulation.

23. This Stipulation is binding on HSBC's successors, transferees, heirs, executors, administrators, estates, and assigns.

24. This Stipulation is binding on Relator's successors, transferees, heirs, executors, administrators, estates, and assigns.

25. Any failure by the United States to insist upon the strict performance of any of the provisions of this Stipulation shall not be deemed a waiver of any of the provisions hereof, and the United States, notwithstanding that failure, shall have the right thereafter to insist upon strict performance of any and all of the provisions of this Stipulation.

26. Any notices or requests pursuant to this Stipulation shall be in writing and shall be delivered by hand, express courier, or email transmission followed by postage-prepaid mail, and shall be addressed as follows:

TO THE UNITED STATES:

Lawrence H. Fogelman
Assistant United States Attorney
United States Attorney's Office
Southern District of New York
86 Chambers Street, Third Floor
New York, New York 10007
Email: Lawrence.Fogelman@usdoj.gov

TO HSBC:

Ross E. Morrison
BuckleySandler LLP
1133 Avenue of the Americas, Suite 3100
New York, New York 10036
Email: rmorrison@buckleysandler.com

TO RELATOR:

Timothy J. McInnis, Esq.
McInnis Law

521 Fifth Avenue, 17th Floor
New York, New York 10175-0038
Email: tmcinnis@McInnis-Law.com

27. Subject to the exceptions in paragraph 7, and in consideration of the obligations of HSBC in this Stipulation, and conditioned upon HSBC's full compliance with the terms of this Stipulation, including but not limited to timely full payment of the Settlement Amount, the Government's Complaint is hereby dismissed with prejudice; provided, however, that the Court shall retain jurisdiction over this Stipulation and each Party to the extent the obligations herein remain unsatisfied by that Party.

28. Subject to the exceptions set forth in this Stipulation, and in consideration of the obligations of HSBC set forth in the Stipulation, and conditioned upon HSBC's full compliance with the terms of this Stipulation, and Relator's right to seek attorneys' fees, costs, and expense from HSBC pursuant to 31 U.S.C. § 3730(d) and a share of the Settlement Amount from the Government pursuant to 31 U.S.C. § 3730(d), the Relator's *qui tam* complaint is dismissed with prejudice as to the Relator and without prejudice to the Government except with respect to the Covered Conduct; provided, however, that the Court shall retain jurisdiction over this Stipulation, as well as to resolve any dispute concerning any claim Relator may assert for attorneys' fees, costs and expenses pursuant to 31 U.S.C. § 3730(d), or a share of the Settlement Amount pursuant to 31 U.S.C. § 3730(d).

29. The effective date of this Stipulation is the date upon which this Stipulation is entered by the Court (the "Effective Date").

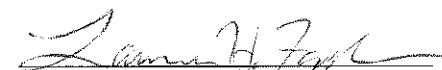
THE UNITED STATES OF AMERICA

Dated: New York, N.Y.

April 10, 2017

JOON H. KIM
Acting United States Attorney for the
Southern District of New York

By:



LAWRENCE H. FOGELMAN
Assistant United States Attorney
Attorney for the United States
of America

United States Attorney's Office
86 Chambers Street, 3rd Floor
New York, N.Y. 10007

Tel: 212-637-2719

Fax: 212-637-2686

HSBC

Dated: New York, N.Y.

_____, 2017

BUCKLEYSANDLER LLP

By:

ROSS E. MORRISON
1133 Avenue of the Americas, Suite 3100
New York, New York 10036
Attorney for HSBC

THE UNITED STATES OF AMERICA

Dated: New York, N.Y.
_____, 2017

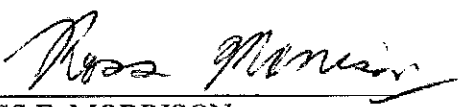
JOON H. KIM
Acting United States Attorney for the
Southern District of New York

By: _____
LAWRENCE H. FOGELMAN
Assistant United States Attorney
Attorney for the United States
of America
United States Attorney's Office
86 Chambers Street, 3rd Floor
New York, N.Y. 10007
Tel: 212-637-2719
Fax: 212-637-2686

HSBC

Dated: New York, N.Y.
April 7, 2017

BUCKLEYSANDLER LLP

By: 

ROSS E. MORRISON
1133 Avenue of the Americas, Suite 3100
New York, New York 10036
Attorney for HSBC

RECEIVED

NEW YORK, NY
APR 13 2017

[Handwritten signature]

NEW YORK, NY
APR 13 2017

Handwritten text, possibly a name and address, including "New York, NY 10017".

RECEIVED

NEW YORK, NY
APR 13 2017


NEW YORK, NY
APR 13 2017

RELATOR

Dated: New York, N.Y.
_____, 2017

By: _____
Jan Orlando

Dated: New York, N.Y.
4/6/_____, 2017

By:  _____
Timothy J. McInnis, Esq.
McInnis Law
521 Fifth Avenue, 17th Floor
New York, NY 10175-0038
Attorney for Jan Orlando

SO ORDERED:

HON. LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

Dated: _____, 2017

Exhibit A

LOAN NUMBER

1	[REDACTED]-4002
2	[REDACTED]-4003
3	[REDACTED]-4005
4	[REDACTED]-5004
5	[REDACTED]-4006
6	[REDACTED]-4006
7	[REDACTED]-4009
8	[REDACTED]-5003
9	[REDACTED]-5002
10	[REDACTED]-4003
11	[REDACTED]-4006
12	[REDACTED]-4009
13	[REDACTED]-4010
14	[REDACTED]-4001
15	[REDACTED]-4009
16	[REDACTED]-5003
17	[REDACTED]-4010
18	[REDACTED]-4004
19	[REDACTED]-02
20	[REDACTED]-4002
21	[REDACTED]-4009

LOAN NUMBER

22	[REDACTED]-5009
23	[REDACTED]-5006
24	[REDACTED]-00
25	[REDACTED]-4002
26	[REDACTED]-4000
27	[REDACTED]-4007
28	[REDACTED]-04
29	[REDACTED]-4009
30	[REDACTED]-4006
31	[REDACTED]-4004
32	[REDACTED]-02
33	[REDACTED]-4006
34	[REDACTED]-06
35	[REDACTED]-4005
36	[REDACTED]-5007
37	[REDACTED]-4007
38	[REDACTED]-5005
39	[REDACTED]-4009
40	[REDACTED]-04
41	[REDACTED]-4003
42	[REDACTED]-4002

REDACTED