

## Southern District Civil Practice Roundup

## Expert Analysis

# Enforcement of Settlement Agreements—A Case in Point

Entering into a settlement agreement does not always mark the end of a litigation. A host of issues may arise in enforcing settlement

agreements, as the recent decision in *United States v. Prevezon Holdings*, 2018 WL 679888 (S.D.N.Y. Feb. 2, 2018) makes clear. *Prevezon* involved a sensational set of facts, including allegations of alleged elaborate Russian tax fraud and complex money-laundering schemes, and the death in prison of a Russian lawyer investigating the alleged tax fraud. Shortly before a civil trial for asset forfeiture was set to begin against Prevezon, which allegedly received and laundered a portion of the fraud proceeds, the United States and Prevezon agreed to settle the case. Ruling on the government's subsequent motion to enforce the settlement agreement, Southern District Judge William H. Pauley III addressed issues ranging from New



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York contract law to international comity. Judge Pauley's detailed and thorough analysis provides valuable insights for counsel negotiating and seeking to enforce settlement agreements.

### 'United States v. Prevezon'

The government claimed that Prevezon had received and laundered through real estate investments in Manhattan approximately \$1.96 million as part of a complex scheme to defraud the Russian treasury of millions of dollars in tax refunds. Shortly after the case was initiated, in September 2013, the court entered a protective order restraining a number of Prevezon's U.S.-based assets. The government later sought to freeze a debt of approximately 300 million euros owed to Prevezon by a European company, AFI Europe N.V. (the AFI Europe

Debt). The government sought the assistance of the Dutch authorities, who restrained the AFI Europe Debt at the government's request (the US Restraint). The AFI Europe Debt was then added to an amended protective order in the *Prevezon* action. *Id.* at \*1.

Just days before the case was scheduled to go to trial, the parties entered into a settlement agreement to resolve all claims in the action. Under the terms of the settlement agreement, the United States

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agreed to inform the Netherlands that the matter had been resolved and request that the Netherlands lift the restraint of the AFI Europe Debt that had been implemented at the request of the United States. The settlement agreement further provided that the "Amended Protective Order shall be deemed modified to

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allow the release of the AFI Europe Debt.”

For its part, Prevezon agreed to pay the United States approximately \$5.9 million “within 15 business days of the release by the Government of the AFI Europe Debt.” After the government received the payment, the settlement agreement specified that the amended protective order would be vacated, the Restrained Properties returned to the Claimants, and the action dismissed with prejudice. *Id.* at \*2 (citations omitted).

On May 16, 2017, one day after Judge Pauley so-ordered the Settlement Agreement, William Browder, a non-party to the U.S. forfeiture proceeding but who was intimately involved in the underlying facts, filed a complaint with the Dutch authorities making allegations similar to those in *Prevezon*. Thereafter, on May 24, 2017, Dutch officials informed the government that the Netherlands was contemplating a seizure in connection with its investigation. On June 1, 2017, the government informed the Netherlands that the action had been settled and asked that the Netherlands withdraw the US Restraint. Shortly thereafter, representatives of the United States met with Dutch officials at their request. At that meeting, the United States representatives again asked the Netherlands to withdraw its restraint on the AFI Europe debt, and provided the Dutch officials with non-confidential information relating to the facts underlying the *Prevezon* case. In October 2017, the Netherlands informed the United States that it intended to release the US Restraint on the AFI Europe Debt and simultaneously seize

the AFI Europe Debt in furtherance of its own investigation—actions the Dutch then took. *Id.*

Prevezon declined to pay the \$5.9 million settlement amount on the grounds that the AFI Europe Debt was not “released” as required by the settlement agreement.

### Post-Settlement Motions

Contending that it had complied with its obligations under the settlement agreement and that Prevezon’s failure to pay the \$5.9 million constituted a breach of the agreement, the United States brought a motion before Judge Pauley to enforce the settlement agreement. Prevezon not only opposed the government’s motion but sought discovery as to whether the government had interfered with the release of the AFI Europe Debt, in order to support a potential counterclaim against the government for breach of the covenant of good faith and fair dealing.

### Interpreting the Settlement Agreement

In opposing the government’s motion, Prevezon did not dispute that the government had met its obligations under the settlement agreement to inform the Netherlands that the matter was resolved, withdraw its request for continued restraint on the AFI Europe Debt, and ask the Netherlands to release the funds from the US Restraint. Nonetheless, Prevezon claimed that it was not obligated to make the \$5.9 million payment because, while the AFI Europe debt had been released from the US Restraint, the funds were not

available to Prevezon as a result of the Netherlands’ restraint. Prevezon argued that the funds had thus not been “released” under the terms of the settlement agreement, and that accordingly, its payment obligation had not been triggered. *Id.* at \*4.

Judge Pauley began his analysis with the proposition that “[a] district court has the power to enforce, summarily, on a motion, a settlement agreement reached in a case that was pending before it.”<sup>1</sup> He went on to observe that settlement agreements must be construed according to general principles of contract law, and that a motion to enforce a settlement agreement is therefore “fundamentally a claim for breach of a contract.” *Id.* at \*3 (citations omitted).

Judge Pauley’s decision largely turned on how the term “release” was used throughout the settlement agreement. He noted that the term “release” was used a number of times, including in one other place in connection with the AFI Europe Debt. In that instance, the Agreement provided that once the government asked the Netherlands to lift the US Restraint, the protective order would be modified “to allow release of the AFI Europe Debt.” Judge Pauley reasoned that “[i]t would make little sense for the parties to have ascribed a broader meaning to the ‘release’ that triggers Prevezon’s duty to pay when the preceding paragraph specifically focuses on the release of the US Restraint.” *Id.* at \*5.

Judge Pauley also observed that the government’s obligation with regard to the AFI Europe Debt was different than with respect to the other restrained assets: For the AFI Europe

Debt, the government need only request that the US Restraint be lifted, whereas for the other restrained assets, the government was obliged to return them to the claimants. This was a sensible distinction to Judge Pauley, inasmuch as it limited the government's obligation "to what it can control." Construing the term "release" consistently throughout the Settlement Agreement, Judge Pauley held that Prevezon's payment obligation was triggered by the release of the US Restraint. *Id.* at \*5-6.

Notably, Judge Pauley considered the "bizarre consequences" that would result under Prevezon's reading of the term "release." First, if Prevezon did not have to pay until the AFI Europe Debt was wholly accessible, the payment could be delayed "in perpetuity," and the civil action linger, unless the parties decided to "rip up the Settlement Agreement and go to trial." Second, under Prevezon's interpretation, the government would be obligated not only to request that the US Restraint be lifted, but to persuade the Netherlands to release *its* restraint on the AFI Europe Debt. Judge Pauley observed that the United States has no authority to question another nation's law enforcement decisions or to dictate what another country may do with assets within its borders. Additionally, Prevezon's proposed interpretation would require the United States to "guard" the AFI Europe Debt against other encumbrances, including a potential lien by a third-party creditor. In Judge Pauley's view, the parties could not have contemplated that such restraints would delay or excuse Prevezon's

performance under the settlement agreement. *Id.* at \*6.

Judge Pauley rejected Prevezon's attempt to bolster its argument through consideration of the "business purposes" of the settlement agreement. Specifically, Prevezon argued that the parties were aware that the Netherlands might impose a restraint on the AFI Europe Debt, causing Prevezon to lose the value of the AFI Europe Debt in addition to the \$5.9 million settlement amount. According to Prevezon, the settlement agreement sought to mitigate this risk by requiring that the AFI Europe Debt be released to Prevezon before its payment obligation was triggered. Judge Pauley deemed this argument "curious," finding instead that the clear purpose of the settlement agreement was to avoid trial, where Prevezon would have faced much greater risk. *Id.* at \*7.

### Prevezon's Request For Discovery

In support of its motion for discovery in order to assert a claim for breach of the covenant of good faith and fair dealing, Prevezon claimed that the government had "actively worked" with Dutch officials to bring about the Netherlands' restraint on the AFI Europe Debt. The allegations were based largely on the government's meeting with Dutch officials to discuss the Netherlands investigation, without informing Prevezon of the meetings or of the Netherlands's intention to impose its own restraint.

Judge Pauley held that Prevezon's allegations fell far short of the proof needed to assert a claim for breach

of the covenant of good faith and fair dealing, let alone to obtain discovery on such a claim. He found that Prevezon knew—or should have known—that other law enforcement agencies were potentially conducting their own investigations and that its assets "could be confiscated by other parties under any number of scenarios." He found it "unsurprising" that the government would voluntarily assist the Dutch officials, and observed that the government was not required to inform Prevezon of their meetings. *Id.* at \*8.

Given that government officials are "presumed to act in good faith," and that Prevezon had failed to allege any "unusual conduct or animus" on the part of the government, Judge Pauley denied Prevezon's request for discovery. *Id.* at \*7-8.



1. A district court does not automatically retain jurisdiction to enforce a settlement agreement simply because it disposed of the original case. Such a motion "requires its own basis for jurisdiction," which can be based on the court expressly retaining jurisdiction in its order of dismissal or through incorporating the terms of the settlement agreement in the order of dismissal. *Wilson v. Dynatone Publ'g Co.*, 2018 WL 485970, at \*3 (S.D.N.Y. Jan. 18, 2018); see *Grubbs v. Safir*, 2018 WL 1225262, at \*4 (S.D.N.Y. Feb. 26, 2018).