

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Criminal Case No. 21-cr-00006-RM

UNITED STATES OF AMERICA,

Plaintiff,

v.

**1. EPSILON DATA MANAGEMENT, LLC,**

Defendant.

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**JOINT MOTION FOR DEFERRAL OF PROSECUTION**

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The United States of America, through undersigned counsel, and defendant Epsilon Data Management, LLC (“Epsilon”), through its undersigned counsel, jointly move the Court for entry of an order deferring for six additional months all proceedings in this case, including arraignment, and excluding the time within which any trial must be commenced during the six-month term upon the charge contained in the Information filed against the defendant. The parties make this request consistent with their negotiated Deferred Prosecution Agreement, Dkt. No. 2-1, and the government’s decision, made in its sole discretion, to extend the Agreement for six months, and pursuant to Title 18, United States Code, Section 3161(h)(2) of the Speedy Trial Act.

Factual Background

On January 19, 2021, the government filed an Information against Epsilon and a Joint Notice of Agreement and Motion for Deferral of Prosecution as to Epsilon (“Deferral Motion”), which attached the Agreement. Dkt. Nos. 1, 2. The Agreement was

effective for a term of thirty months (the “Term”), during which the government agreed to defer prosecution of Epsilon. Dkt. No. 2-1 ¶¶ 1, 3. In the Deferral Motion, the parties requested that the Court defer for thirty months all proceedings in the case and exclude thirty months from the time within which any trial must be commenced upon the charge contained in the Information. Dkt. No. 2 at 1. On January 27, 2021, the Court granted the Deferral Motion and ordered that: (i) all proceedings and deadlines in the matter were stayed for thirty months from the date of the Order; (ii) pursuant to 18 U.S.C. § 3161(h)(2), thirty months were excluded in computing the time within which the trial of offenses relating to this matter must commence; and (iii) the parties were to file a joint status report not later than 30 days prior to the conclusion of the term of the Deferred Prosecution Agreement. Dkt. No. 11. The thirty months are set to expire on July 27, 2023.

The Agreement provided that, under certain circumstances, “an extension or extensions of the Term may be imposed by the Government, in its sole discretion, for up to a total additional time period of six months.” *Id.* ¶ 3. On May 17, 2023, the government notified Epsilon that, pursuant to the Agreement, it intended, in its sole discretion, to extend the Agreement by six months. Pursuant to the Agreement, Epsilon was permitted to provide a written response, which the government would consider in determining whether to extend the Term. *Id.*

On June 12, 2023, the parties filed a joint status report in which they informed the Court that the Government had notified Epsilon of its intent to extend the Term of the Agreement and Epsilon planned to submit a response by June 16, 2023. Dkt. No. 19. Epsilon provided a response on June 16, 2023. On July 7, 2023, the Government

notified Epsilon that it had considered its response and decided to extend the Term of the Agreement by six months. Accordingly, the parties now jointly seek an Order deferring for an additional six months all proceedings in the case and excluding an additional six months from the time within which any trial must be commenced upon the charge contained in the Information filed against Epsilon.

### Legal Background

A deferred prosecution agreement (DPA) is an agreement between the government and a defendant, in which the defendant is criminally charged, accepts and acknowledges responsibility for its actions, and agrees to undertake and complete certain obligations imposed by the government, such as payment of monetary penalties, remediation, compliance, and cooperation with the government's ongoing investigation. *See, e.g., United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 129 (2d Cir. 2017). In turn, the government agrees to recommend to the court that any prosecution of the defendant on the filed criminal charge be deferred and eventually dismissed if the defendant fully complies with its obligations. *Id.* If the government later determines that the defendant has breached the DPA, the government may pursue the prosecution. *Id.*

Typically, the filing of an information that will be deferred by a DPA is accompanied by a motion to defer the prosecution for the duration of the agreement. The Deferral Motion cited a number of recent examples of such motions. Dkt. No. 2 at 2. This procedure is logical where the defendant admits to facts sufficient to convict on the criminal charges but does not face conviction unless the DPA is terminated by the government and the criminal charge alleged in the information is pursued.

Appellate precedents agree that the court's role is to consider whether the request for a Speedy Trial Act extension is for the purpose of allowing the defendant to exhibit good conduct. *HSBC Bank USA*, 863 F.3d at 129; *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 740-747 (D.C. Cir. 2016) (noting the district court's decision, which was reversed, was the "first time any federal court ha[d] denied a joint request by the parties to exclude time pursuant to a DPA"). *But cf. United States v. Clem*, 422 F. Supp. 3d 1105, 1116 (N.D.W.V. 2019) (rejecting DPA "without any proposed compliance monitoring or oversight of Defendants by an agency or administrative body capable of enforcing meaningful sanctions").

The Speedy Trial Act excludes any time where "prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. § 3161(h)(2). The statutory language ties the "approval of the court" to the purpose of demonstrating good conduct. *Fokker Servs. B.V.*, 818 F.3d at 741. The court's limited role in this context is consistent with the broad discretion prosecutors have to determine whether and when to pursue criminal proceedings.<sup>1</sup> *See, e.g., United States v. Batchelder*, 442 U.S. 114, 124 (1979).

A DPA requiring the defendant to cooperate, remediate, and implement compliance measures meets the standard for a Speedy Trial Act continuance. *See HSBC Bank*, 863 F.3d at 129; *accord Clem*, 422 F. Supp. 3d at 1113. Courts may have inherent authority to reject a DPA if it contains illegal or unethical provisions. *See*

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<sup>1</sup> As the Supreme Court has stated, "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 608 (1985).

*Fokker Servs. B.V.*, 818 F.3d at 747 (citing *United States v. Saena Tech Corp.*, 140 F. Supp. 3d (D.D.C. Oct. 21, 2015)); *HSBC Bank*, No. 12–CR–763, 2013 WL 3306161, at \*7 (E.D.N.Y. July 1, 2013), *rev'd by HSBC Bank*, 863 F.3d at 129. However, “[t]he presumption of regularity supports’ . . . prosecutorial decisions and, ‘in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.’” *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

### Argument

The Agreement, which was entered into between the United States and Epsilon on January 15, 2021, set forth robust terms intended to allow Epsilon to demonstrate its good conduct over the 30-month term of the Agreement. The Agreement was reached following a years-long investigation in which Epsilon offered cooperation, and contains both a meaningful admission of facts and requirements that Epsilon continue to cooperate, remediate, and implement appropriate compliance measures. The Court previously determined that the Agreement satisfied the requirements sufficient to support the parties’ joint request to defer proceedings and exclude time under the Speedy Trial Act for the duration of the Agreement’s term. See Dkt. No. 11.

As noted above, the Agreement provided that, under certain circumstances, the Government may, in its sole discretion, extend the Term of the Agreement for up to six additional months. Dkt. No. 2-1 ¶ 3. The Government has exercised that discretion, and the Agreement has therefore been extended. The same factors that supported granting the Deferral Motion support granting the further extension sought here. In

particular, staying proceedings and excluding time for an additional six months will allow Epsilon an opportunity to demonstrate its good conduct.

Wherefore, for the reasons stated herein, the parties jointly request that the Court:

- (1) Order that 6 months from July 27, 2023, be excluded from the Speedy Trial Act;
- (2) Stay all proceedings and deadlines for 6 months from July 27, 2023; and
- (3) Order that the parties file a status report no later than 30 days prior to the expiration of the 6-month period, along with any additional reports requested by the Court.

The parties note they are not seeking a hearing on this matter but are available at the Court's convenience should the Court determine that a hearing is necessary.

Respectfully submitted this 24th day of July, 2023.

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## CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2023, I submitted the **JOINT MOTION FOR DEFERRAL OF PROSECUTION** to the Court for docketing, and have also electronically mailed the Joint Motion for Deferral of Prosecution to the following counsel of record:

Shawn Cleveland; scleveland@bakerlaw.com.

/s/ Alistair Reader  
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