IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO. 1:09-CV-20423-GOLD/MCALILEY

UNITED STATES OF AMERICA,

Petitioner,

v.

UBS AG,

Respondent.

BRIEF OF UBS AG IN OPPOSITION TO THE PETITION TO ENFORCE THE JOHN DOE SUMMONS

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Table of Abbreviations

CHF	Swiss Francs
DPA	Deferred Prosecution Agreement of February 18, 2009 Between UBS and the United States Department of Justice
DTT or 1996 Treaty	Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Switz., Oct. 2, 1996
FINMA	Swiss Financial Markets Supervisory Authority
OECD	Organization for Economic Cooperation and Development
QIA	Qualified Intermediary Withholding Agreement Between UBS AG and the United States Internal Revenue Service, effective January 1, 2001
QI	Qualified Intermediary
SFTA	Swiss Federal Tax Authority
UBS Decl.	Declaration of Oliver Bartholet
1951 Treaty	Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Switz., Sept. 27, 1951
2003 Mutual Agreement	Mutual Agreement Regarding the Administration of Article 26 (Exchange of Information) of the Swiss-U.S. Income Tax Convention of October 2, 1996

UBS AG ("UBS") submits this brief in opposition to the Petition of the Internal Revenue Service ("IRS") to enforce its July 21, 2008 Summons (the "Summons"). For the reasons that follow, the Petition should be denied.

Preliminary Statement

The Supreme Court has cautioned that "[w]e cannot have trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). Despite that warning, the IRS asks this Court to enforce against UBS a broad civil summons seeking information on many thousands of client accounts located exclusively in Switzerland, even though compliance would compel UBS employees to commit crimes in Switzerland. To the best of our knowledge, no IRS "John Doe" summons — *i.e.*, a summons naming no specific taxpayer — has ever been enforced where compliance would, in derogation of the principle of international comity, require the violation of foreign criminal law. In the only other litigated instance in which the IRS has tried to use a John Doe summons as a means by which to force a bank to break a foreign country's laws, the court rejected the effort. *See In re the Matter of Tax Liabilities: John Doe*, No. C-88-0137, 92 TNI 26-24 (N.D. Cal. Mar. 11, 1992) (Tax Analysts) (Appendix of Cited Public Materials submitted herewith (hereinafter, "A") 0304). And in many other cases not involving the IRS, in which public and private parties have sought to obtain information whose production is barred by foreign laws, U.S. courts have declined to enforce the request lest they thereby induce the commission of crimes in the countries governed by those laws.

But what makes this case particularly unusual is the extent to which the IRS's proposed action rejects a long history of careful diplomatic negotiation between the United States and Switzerland, as a result of which the United States has entered into agreements

that expressly acknowledge and accommodate the Swiss laws that protect the financial privacy of those who choose to maintain accounts with Swiss financial institutions. Those agreements are the Double Taxation Treaty between the United States and Switzerland ("DTT") (executed first in 1951, and then, in substantially revised form, in 1996), and the 2001 Qualified Intermediary Agreement between the IRS and UBS ("QIA"). The negotiation history and text of these agreements reflect the careful balance between the U.S. interest in receiving tax-related information from Switzerland and the Swiss interest in preserving its long tradition of financial privacy. The DTT and virtually all of the 57 other U.S. double taxation treaties also reflect the rejection of mass, non-targeted requests, of which the Summons offers an acute example. All countries — not just Switzerland, and including the United States — have a keen interest in protecting themselves and their respective nationals from such blanket requests. For this reason, the Summons here is as disruptive to the general framework for tax cooperation established by the U.S. double taxation treaties, as it is to the framework established by the U.S.-Swiss DTT specifically.

Despite the clear historical record, the IRS now asks this Court to force a Swiss financial institution and its employees, over the express objection of the Swiss Government, to violate Swiss law by producing a massive quantity of confidential account information located exclusively in Switzerland. And not just any account information, but information that the United States clearly recognized would remain confidential unless obtained through a proper treaty request under the DTT setting forth the basis for the United States' "reasonable suspicion" that the account holder was engaged in "tax fraud or the like." Targeted at thousands of unidentified, "John Doe" taxpayers — defined so broadly as to include Swiss or foreign expatriates who live or work in the United States — the Summons is the antithesis of such a request.

UBS does not dispute the legitimacy of the IRS's interest in tax enforcement. Indeed, as described in detail below, UBS has sought to comply with the Summons, without violating Swiss law, by searching for and producing information located here in the United States regarding hundreds of responsive client accounts. Through a Deferred Prosecution Agreement with the Department of Justice ("DOJ") dated February 18, 2009 ("DPA"), UBS acknowledged serious misconduct by its employees that aided certain U.S. taxpayers' evasion of U.S. tax laws, and paid a substantial amount to the U.S. Government. But in that very DPA, the DOJ itself acknowledged that "UBS is subject to certain Swiss laws, which may impact its ability to provide documents and information" and that "UBS undertook substantial efforts to provide information to assist United States investigators while complying with established Swiss legal restrictions governing information exchange." DPA ¶ 10 (A 0267). The DOJ also acknowledged that UBS "facilitated cooperative efforts between the United States and Swiss Governments regarding the Government's investigation," *id.*, a process that resulted in the DOJ's obtaining significant amounts of U.S. client account information consistent with the information exchange standards set forth in the U.S.-Swiss DTT and pursuant to an order issued by the Swiss Financial Market Supervisory Authority ("FINMA"). The DOJ has publicly acknowledged that this information enabled the Government recently to commence criminal prosecutions against U.S. taxpayers in the Southern District of Florida. *See United States v. Rubinstein*, No. 09-6116 (S.D. Fla. Apr. 1, 2009); *United States v. Moran*, No. 09-60089 (S.D. Fla. Apr. 14, 2009).

But having received $780 million from UBS for UBS's violations of the laws of one country, the U.S. Government would now force UBS and its employees to break the criminal laws of another. Nor are these Swiss laws dead letters; they are regularly, currently enforced through sentences of imprisonment. (*See below* Section F.) The United States and

other nations clearly have an interest in strengthening the existing framework of international tax information exchange. But because of the great potential for subjecting foreign subjects to conflicting legal obligations that these efforts may present, the proper locus of government efforts to expand tax information-exchange mechanisms should be diplomatic negotiations, not a U.S. legal proceeding in which the affected government may participate only indirectly as a non-party *amicus*. Underscoring that this is fundamentally an issue for diplomats, not litigators, the Swiss Government has publicly committed to changes in the DTT, and is engaged in a new round of diplomatic negotiations with the United States, now taking place in Berne. This Court should exercise restraint and not deploy its judicial power to reset a careful balance of interests that has developed over decades of diplomatic negotiations, and that is still developing.

Background

A. The Double Taxation Treaty

The United States is a party to 57 double taxation treaties or "DTTs," under which foreign states agree on mechanisms and standards by which to harmonize tax systems and to exchange evidence relevant to tax law enforcement. IRS, Publ'n No. 515, Withholding of Tax on Nonresident Aliens and Foreign Entities 54-55 (Apr. 2009), *available at* http://www.irs.gov/pub/irs-pdf/p515.pdf (listing DTTs to which the United States is a party as of December 31, 2008). An essential feature of DTTs generally is the inclusion of terms reflecting the reciprocal agreement of the treaty parties to exchange evidence relating

to tax law enforcement in specific situations. Virtually all U.S. DTTs limit information sharing to instances in which the requesting state makes a specific, targeted request.[1]

Switzerland is one of the many nations with which the United States has executed a DTT. The United States first executed a DTT with Switzerland in 1951. Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Switz., May 24, 1951, 2 U.S.T. 1751 (hereinafter, the "1951 Treaty") (A 0001). Like DTTs generally, which, as noted, eschew blanket, untargeted requests, the 1951 Treaty rejected "automatic information exchange," or exchange of information without any particularized showing of relevance. Rather, the 1951 Treaty allowed for the exchange of information "as is necessary . . . for the prevention of fraud or the like in relation to . . . taxes," a very restrictive standard characteristic of the U.S. DTT with Switzerland. *Id.* art. 16 (A 0009).

In 1996, the United States and Switzerland entered into a new DTT, which was ratified in 1997. Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Switz., Oct. 2, 1996, S. Treaty Doc. No. 105-8 (hereinafter, the "1996 Treaty" or "DTT") (A 0019). Like the 1951 Treaty (and, again, like other DTTs the United States has executed), the 1996 Treaty did not authorize a regime of information exchange without any particularized showing of relevance. Under a 2003 "Mutual Agreement" concerning the 1996 Treaty, each party must demonstrate a "reasonable suspicion" of "tax

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[1] The Technical Explanation Accompanying the U.S. Model Income Tax Convention states that the Model DTT "would not support a request in which a Contracting State simply asked for information regarding all bank accounts maintained by residents of that Contracting State in the other Contracting State, or even all accounts maintained by its residents with respect to a particular bank." United States Model Technical Explanation Accompanying United States Model Income Tax Convention, art. 26(1) (Nov. 15, 2006) (A 0118). *See also, e.g.*, Richard Andersen, *Analysis of United States Income Tax Treaties* ¶ 24.01[1][a][i] (WG&L 2009) ("The U.S. income tax treaties generally do not provide explicitly for automatic or routine exchanges of information.").

fraud or the like" to secure assistance under the treaty. Mutual Agreement Regarding the Administration of Article 26 (Exchange of Information) of the Swiss-U.S. Income Tax Convention of October 2, 1996, ¶ 5 (Jan. 23, 2003) (hereinafter, the "2003 Mutual Agreement") (A 0065).

"Reasonable suspicion" can be shown through a variety of ways, including, but not limited to, documents, taxpayer testimony, informants, or circumstantial evidence. *Id.* ¶ 5(a)-(d) (A 0065). If such a showing is made "in cases of tax fraud, Swiss banking secrecy does not hinder the gathering of documentary evidence from banks. . . ." 1996 Treaty, Memorandum of Understanding ¶ 8(d) (A 0034). Underscoring the core principle that requests for information will be fulfilled only where the requesting party has a reasonable suspicion of tax fraud, the Appendix to the 2003 Mutual Agreement sets forth a series of hypothetical illustrations of situations in which a request would be honored. *See* 2003 Mutual Agreement, app. (A 0066-72). Notably, each describes a scenario in which the requesting state possessed evidence that a specific individual or entity had engaged in described conduct that, if proven, would constitute tax fraud for purposes of the treaty. *See id.*

In addition, the 1996 Treaty explicitly acknowledges the continuing force of the laws of each contracting party, including financial privacy laws. The treaty provides:

> In no case shall the provisions of this Article be construed so as to impose upon either of the Contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either contracting state or which would be contrary to its sovereignty, security or public policy or to supply particulars which are not procurable under its own legislation or that of the State making application.

1996 Treaty, art. 26, ¶ 3 (A 0057). The information exchange provisions of the 1996 Treaty are consistent with this provision, because Swiss law allows Switzerland to obtain bank

records in domestic matters upon a showing of tax fraud, notwithstanding financial privacy laws. *See* 1996 Treaty, Memorandum of Understanding ¶ 8(d) (A 0034); Declaration of Professor Isabelle Romy on Swiss Law (hereinafter, "Romy Decl.") ¶¶ 46-47.

B. The Qualified Intermediary Agreement

In addition to enforcement of existing tax obligations (a goal served in part by the information exchange provisions of DTTs), effective U.S. tax administration depends upon, among other things, a system of withholding and tax information reporting by U.S. financial institutions and employers, of wages, salaries and certain other payments. In the purely domestic setting, the IRS typically collects information regarding wages, dividends, and proceeds of securities sales through IRS Forms W2, Forms 1099 and the like. In the international context, however, the IRS has long recognized that its ability to collect information about payments credited to the accounts of U.S. persons and others that are maintained at foreign financial institutions is much more limited. In particular, under longstanding Treasury regulations, foreign financial institutions generally do not have any obligation to report to the IRS the identities of U.S. persons who maintain accounts outside the United States if those accounts are credited only with foreign bank interest, interest or dividends on foreign securities, or gross proceeds from the sale of securities effected outside the United States. Treas. Reg. §§ 1.6042-3(b)(1)(iv), 1.6049-5(b)(6), 1.6045-1(a)(1).

Over the years, the IRS has sought to develop workable mechanisms to ensure that the proper amount of U.S. withholding tax imposed on foreign persons is collected when U.S. financial institutions make payments of U.S. source interest and dividends to foreign financial intermediaries. In 2000, the IRS announced the development of a "Qualified Intermediary" ("QI") program under which, among other things, foreign financial institutions that entered into QI agreements with the IRS would assume certain

documentation and reporting obligations with respect to payments made to certain of their account holders. Rev. Proc. 2000-12, 2000-1 C.B. 387 ("Model QI Agreement") (A 0158). Specifically, QIs could achieve the appropriate U.S. withholding tax rate for account holders that are foreign persons without disclosing their identities to U.S. withholding agents or the IRS. Although non-U.S. QIs have specified information reporting/backup withholding obligations with respect to U.S. securities held by U.S. persons, no such obligation generally exists with respect to non-U.S. securities. Declaration of Philip R. West (hereinafter "West Decl.") ¶ 24; *see also* Model QI Agreement §§ 2.44(B), 3.05(B), 3.07 (A 0169, 0171, 0172).

As with the 1996 Treaty, the negotiation history of the QIA demonstrates that the U.S. Government ultimately agreed to recognize and make accommodations for foreign financial privacy laws that prohibited the disclosure of account holders' identities. The IRS's early QI proposals did not offer any accommodation to foreign financial privacy laws. Thus, in Rev. Proc. 98-27, 1998-1 C.B. 850, the IRS described the provisions it anticipated including in a model QI agreement, stating that its proposed requirement to disclose the identity of U.S. persons receiving reportable amounts "will apply despite local bank secrecy laws." *Id.* § 5(3). Similarly, as set forth in Notice 99-8, 1999-1 C.B. 383, the IRS's initial model QI agreement would have required a foreign financial institution to "disclose to the withholding agent any information QI has in its possession regarding the name, address and taxpayer identification number" of U.S. account holders from whom it had not received an IRS Form W-9. *Id.* § 6.02. These early proposals, however, prompted strong protests from various European bankers' associations who noted that the proposed QI agreement would, "if implemented as requested, forces certain European countries to violate national banking legislation, as well as civil or penal codes . . . ." Letter from Luxembourg Bankers' Association to IRS (Mar. 17, 1999) (A 0426); *see also* Susan C. Morse & Stephen E. Shay,

Qualified Intermediary Status, Act II: Notice 99-8 and the Role of a Qualified Intermediary, 28 Tax Mgm't Int'l J. 259, 268 (May 14, 1999) (citing comments by bankers' associations from Denmark, the United Kingdom, the Netherlands, Ireland and Germany). In response, the IRS retreated from its earlier proposals. As noted in the preamble to the final withholding regulations promulgated in 2000, the IRS's new Model QI Agreement "has specific provisions . . . that govern the treatment of U.S. persons whenever foreign law, whether or not a 'secrecy' provision, may preclude disclosure of a U.S. non-exempt recipient." T.D. 8881, 2000-1 C.B. 1158 (2000).

Section 6.01 of the final Model QI Agreement states that a "QI is not required . . . to disclose the identity of a U.S. non-exempt recipient [*i.e.*, a U.S. taxpayer] if QI is prohibited by law from making the disclosure and QI follows the procedures of Section 6.04 of this Agreement." Model QI Agreement § 6.01 (A 0181). In accordance with Section 6.04, a foreign financial institution acting as a QI will not be required to disclose the identity of its U.S. account holders if the QI is prohibited by law from making the disclosure and it has taken steps to ensure that such account holders do not hold U.S. securities. *Id.* § 6.04 (A 0182-83). These provisions were not arrived at haphazardly. The IRS's goal in offering these accommodations to foreign financial institutions bound by financial privacy laws clearly was to induce as many foreign financial institutions as possible to agree to become QIs, because the QI regime would not have been effective in facilitating proper withholding and information reporting if substantial numbers of foreign financial institutions had declined to participate. The effort proved successful, as over 7,000 financial institutions around the world ultimately entered into QI agreements with the IRS. Staff of J. Comm. on Taxation, 111th Cong., *Tax Compliance and Enforcement Issues with Respect to Offshore Accounts*

and Entities, JCX-23-09, at 30 (Mar. 30, 2009) *available at* http://www.jct.gov/publications.html?func=startdown&id=3520.

Thus, an important aspect of the Model QI Agreement as it finally emerged stemmed from the need to be sensitive to financial privacy laws. Switzerland is only one of several European countries that punish violations of financial privacy protections criminally, such as Austria, Denmark, Finland, France, Greece, Netherlands, Spain and Sweden. *See* Federico Ferretti, *The Law and Consumer Credit Information in the European Community: The Regulation of Credit Information Systems* 97-98 (2008). But Swiss banks faced the additional impediment to QI status that any provision of account information to a foreign government would run afoul of another criminal law, Swiss Penal Law Article 271. Romy Decl. ¶¶ 34-41. Article 271, discussed below, generally prohibits the gathering and transmission of evidence from Switzerland at the behest of a foreign government entity, such as a foreign court or executive agency, outside of official Swiss channels. *Id.* ¶¶ 34, 38. The statute reflects the Swiss view (and the view of some other civil law countries) that evidence collection, civil and criminal, is a sovereign function that may not be undertaken within its borders without official participation. *Id.* To overcome this impediment, the Swiss Federal Department of Finance, in November 2000, authorized Swiss banks to carry out the activities of a QI on Swiss territory. Declaration of Oliver Bartholet (hereinafter, "UBS Decl.") ¶ 7. As evidence of the Swiss Government's understanding that the QIA did not require QIs to violate Swiss financial privacy laws, the Department of Finance expressly stated that such authorization did not relieve the QI banks or their employees from complying with Swiss financial privacy laws. *Id.*

Effective January 1, 2001, UBS entered into a QIA with the IRS (hereinafter, the "QIA"). UBS Decl. ¶ 7. Like the Model QI Agreement, UBS's QIA required Form 1099

reporting for dividends, interest, and gross proceeds from U.S. securities held in accounts of U.S. persons. *Id.* ¶ 10. But the QIA, like the Model QI Agreement, also contemplated that UBS would have U.S. clients whose identity and account information UBS could not reveal without their consent. *See id.*; QIA §§ 6.04, 8.04(A)-(B) (A 0236-39, A 0243). Under Section 6.04, entitled "Legal Prohibition Against Disclosure of U.S. Non-Exempt Recipients,"[2] UBS was required to ask U.S. account holders with U.S. securities to execute a Form W-9 or, if they did not, to sell the U.S. securities in the account. If the account holder did not execute a Form W-9, then, once the QIA became effective, UBS was required, until those U.S. securities were sold, to withhold U.S. tax on reportable payments to the account and to report such payments on Form 1099 as having been made to an "unknown owner." QIA § 8.04(A)-(B) (A 0243). UBS could not have agreed, consistent with Swiss law, to serve as a QI if the QIA had not given it the ability to withhold disclosure of the identity of non-consenting account holders.

Prior to its execution of the QIA, UBS requested all its existing direct U.S. account holders with investments in U.S. securities to provide UBS with a Form W-9 or to sell such securities. UBS Decl. ¶ 11. In addition, UBS required all new U.S. clients wishing to invest in U.S. securities to provide a Form W-9. *Id.* With only minor, provisional exceptions, all UBS's U.S. clients either provided UBS a Form W-9 and were thereafter disclosed to the IRS, or sold their U.S. securities. Report of AlixPartners, LLP at 7-8 (hereinafter, "AlixPartners Report"); UBS Decl. ¶ 12. Further, UBS implemented automated IT protocols to block new U.S. securities investments by those who had not submitted a

[2] U.S. Non-Exempt Recipients are U.S. persons who receive income from sources that subject them to Form 1099 reporting and backup withholding. *See* QIA §§ 2.15, 2.30 (A 0204, A 0205).

Form W-9. UBS Decl. ¶ 9. As a result of these efforts, virtually none of these direct U.S. accounts contained U.S. securities, AlixPartners Report at 7-8, and, accordingly, were exempt from information reporting under applicable Treasury regulations and the QIA.[3]

C. The Deferred Prosecution Agreement

UBS undertook substantial implementation efforts designed to address its obligations under the QIA, including through a global program to communicate the new QIA requirements to all affected clients, new policies, procedures and IT systems, and training. DPA, Ex. C ¶ 10 (A 0297). As part of its QIA compliance efforts, UBS issued written guidelines advising managers of its U.S. cross-border business and private bankers not to assist U.S. taxpayers who may seek to establish offshore companies, and that any such companies should respect corporate formalities and not be operated as sham, conduit, or nominee entities. *Id.*, Ex. C ¶ 11 (A 0297-98). Notwithstanding these policies, as UBS has acknowledged in the DPA, certain managers in the U.S. cross-border business authorized UBS private bankers to refer those U.S. clients who did not wish to comply with the new requirements of the QIA to outside lawyers and consultants, and did so with the understanding that these outside advisors would help such U.S. clients form offshore companies to enable the clients to evade the U.S. securities investment restrictions in the QIA. *Id.*, Ex. C ¶¶ 4.A, 11 (A 0295, A 0297-98). In addition, as UBS also acknowledged,

[3] The IRS may suggest that, although the accounts at issue do not contain U.S. securities, they nonetheless are subject to Form 1099 information reporting under a provision loosely referred to as the "deemed sales" rule. *See* Declaration of Barry B. Shott ("Shott Decl.") ¶ 12. It is clear, however, from the regulation itself that this provision does not apply when a foreign intermediary, acting as QI, receives payments in respect of foreign securities on behalf of U.S. persons. West Decl. ¶ 24. Further, it should be noted that application of this "deemed sales" regulation to QIs would completely undercut the essential premise of the Model QI Agreement that a QI can avoid disclosing the identity of a U.S. client, and thereby violating financial privacy laws, by selling the U.S. securities in the account.

some client advisors and managers in its U.S. cross-border business met and communicated with certain U.S. clients in the United States on a regular and recurring basis regarding their UBS accounts. This enabled such clients, among other things, to conceal from the IRS the active trading of securities held in such accounts. *Id.*, Ex. C ¶ 4.C (A 0295).

Because of this acknowledged wrongdoing, UBS entered into a DPA with the Department of Justice on February 18, 2009. UBS Decl. ¶ 16. Pursuant to the DPA, the DOJ agreed to defer prosecution of UBS for a period of at least 18 months. DPA ¶ 14 (A 0269-70). In exchange, (i) UBS agreed to pay $780 million in disgorgement, unpaid taxes, and penalties and interest to the U.S. Government; (ii) UBS agreed to terminate its U.S. cross-border business (including offshore trusts, foundations, and non-operating companies with one or more U.S. individuals as a beneficial owner) and service U.S. resident private clients only through subsidiaries or affiliates registered with the SEC and that require U.S. private clients to supply a Form W-9; (iii) UBS agreed to implement and maintain an effective system of QI controls; and (iv) as discussed immediately below, the DOJ was provided with account information for certain U.S. taxpayers. UBS Decl. ¶ 16.

D. The U.S. Requests for Assistance Pursuant to the Double Taxation Treaty

As part of its investigation, the DOJ and IRS made formal requests to the Swiss Federal Tax Authority ("SFTA") for UBS account information pursuant to the information exchange provisions of the DTT. *See* Bundesverwaltungsgericht [Fed. Admin. Court] Mar. 5, 2009, docket nos. A-7342/2008 & A-7426/2008 (Switz.) (hereinafter, "Swiss Tribunal Opinion") ¶ 4.2 (A 0328). The most relevant of these requests — made on July 16, 2008 — sought information on a narrowly-defined group of accounts. *Id.* A decision by the Swiss Administrative Tribunal describes this request as seeking information on accounts

containing U.S. securities held by offshore non-operating companies with U.S. beneficial owners who falsely identified the account assets as belonging to the company. *Id.*

As the DOJ recognized in the DPA, UBS worked to facilitate cooperation between the U.S. and Swiss Governments. DPA ¶ 10 (A 0267). Thereafter, pursuant to the DPA, the U.S. Government received substantial information responsive to its treaty requests. UBS Decl. ¶ 17. This information was released pursuant to an order issued by FINMA and was based on evidence supporting a "reasonable suspicion" of "tax fraud or the like." *Id.* On March 5, 2009, the Swiss Administrative Tribunal confirmed that the IRS's requests met the standard established by article 26 of the DTT. *See* Swiss Tribunal Opinion ¶ 5.5.4 (A 0373-74). According to the court, the facts concerning the accounts gave rise to a reasonable suspicion of tax fraud or the like and the IRS's requests had sufficient particularity such that they did not amount to a fishing expedition. *See id.*

The U.S. Government has thus received the account information to which it was entitled under the carefully negotiated U.S.-Swiss treaty standard. And, as further evidence of the production's value, the DOJ and IRS have already used that information to initiate prosecutions. In April, the DOJ and IRS, relying on that information, filed criminal charges in the Southern District of Florida against two UBS account holders, and one has already pleaded guilty. *United States v. Rubinstein*, No. 09-6116 (S.D. Fla. Apr. 1, 2009); *United States v. Moran*, No. 09-60089 (S.D. Fla. Apr. 14, 2009).

E. The John Doe Summons

On July 1, 2008, while UBS was seeking to cooperate with the DOJ investigation that ultimately culminated in the DPA, the IRS obtained leave to serve on UBS a summons "in the matter of Tax Liability of John Does." IRS Petition to Enforce John Doe Summons ¶ 7. Immediately thereafter, the IRS explained to UBS's counsel that it was

serving the Summons to preserve its rights and that it did not expect UBS to undertake efforts to comply with the Summons at that time, at least while the treaty requests described above were pending. Declaration of Ralph M. Levene (hereinafter, "Levene Decl.") ¶ 3.

The Summons requested that UBS produce documents, wherever located, concerning "each financial account" maintained at or managed by UBS in Switzerland that existed between 2002 and 2007, over which "any United States taxpayer had signature or other authority" if UBS did not have for that account a Form W-9 executed by the U.S. taxpayer and did not file a Form 1099 reporting taxable payments. Summons ¶ 1. Notably, and in part because UBS's general compliance with the QIA has been so extensive, the accounts targeted by the Summons consist nearly exclusively of accounts for which, because they do not hold U.S. securities, UBS has no reporting obligation under the QIA or applicable Treasury regulations. *See id.* ¶¶ 1, 5. As mentioned, with certain limited exceptions, under U.S. law and the QIA, a non-U.S. financial institution does not have an obligation to request a W-9 from U.S. persons or perform Form 1099 reporting for such persons with respect to accounts that do not hold U.S. securities. The accounts sought by the Summons are primarily either direct custody accounts not holding U.S. securities or bank accounts not holding securities of any type, *see* AlixPartners Report at 7-8, neither of which receives payments that are reportable to the IRS under the QIA or applicable Treasury regulations. UBS Decl. ¶ 13.

For each of these accounts, the Summons seeks a very broad range of documents, such as all monthly or other periodic statements and all records of wire transactions between 2002 and the present. Summons ¶ 1. And because the Summons defines "U.S. taxpayer" to mean not just U.S. citizens, but also "U.S. residents," it sweeps within its scope UBS accounts maintained by Swiss expatriates who live and work in the

U.S. and therefore pay taxes there, but still need to maintain a bank account in their native country. *Id.* ¶ 3. The Summons's definition of "U.S. taxpayer" also sweeps within it the large community of U.S. expatriates and green card holders who reside in Switzerland and who therefore maintain a UBS account out of the simple need to conduct everyday banking in their country of residence. *Id.*

F. The Conflicting Swiss Laws

But as striking as is the Summons's breadth, even more striking — and troubling — is its extraterritorial reach, which disregards UBS's obligations under Swiss law. For by producing the requested documents to the IRS, UBS employees who ordered or effected production would commit at least three crimes under Swiss law:

1. Article 47 of the Swiss Banking Law strictly prohibits the disclosure to third parties of information relating to Swiss bank accounts.[4] Romy Decl. ¶ 20. Article 47 is a criminal statute. *Id.* ¶¶ 14, 16. Compliance with the Summons would violate this penal statute because the Summons calls for the disclosure of, *inter alia*, "account records" that were "maintained at, monitored by or managed through any Switzerland Office of UBS AG or its subsidiaries or affiliates." Summons ¶ 1; Romy Decl. ¶ 28. Since 1993, 48 convictions for violations of Article 47 have been reported by the Swiss Government. Romy Decl. ¶ 25. Last Friday, April 24, a Basel Cantonal Bank executive was sentenced to three months' imprisonment under this statute for providing banking information to German tax inspectors. *Urteil Wegen Verletzung des Bankgeheimnisses* [*Judgment for Violation of Bank*

[4] Loi fédérale du 8 novembre 1934 sur les Banques et les Caisses d'Épargne, RS 952.0, FF 1934 III 633 (Switz.) ("Article 47").

Secrecy], Neue Zürcher Zeitung (Apr. 25/26, 2009), 21 (A 0440). The executive was also convicted of violating Article 273 (discussed below). *Id.*

2. Article 271 of the Swiss Penal Code prohibits, except with the assistance of Swiss authorities, the collection of evidence on Swiss territory pursuant to the orders of a foreign court or performed by a party for the purpose of production in a foreign proceeding.[5] Romy Decl. ¶¶ 34, 38. Compliance with the Summons would violate this penal statute because UBS and its employees would be "tak[ing] actions, which are reserved to the public authorities, on Swiss territory without authorization for a foreign state" *i.e.*, compelled evidence collection. *Id.* ¶¶ 35, 41. Notably, this law has nothing to do with discrimination against other countries. *Id.* ¶¶ 18-19, 39. Unlike anti-disclosure or blocking statutes that are designed solely to protect domestic businesses from U.S. or other foreign civil discovery, Article 271 allows for discovery in aid of non-Swiss proceedings, so long as it is conducted through official Swiss channels, as would occur in Swiss domestic proceedings. *Id.* ¶ 39. Between 1984 and 2007, there have been at least 29 convictions for violations of Article 271 that resulted in imprisonment. *Id.* ¶ 40.

3. Article 273 of the Swiss Penal Code prohibits, among other things, the disclosure of "trade or business secrets."[6] Romy Decl. ¶ 29. Compliance with the Summons would violate this criminal statute because it would involve the disclosure of personal financial information, which has been held to constitute "business secrets" under this

[5] Schweizerisches Strafgesetzbuch [StGB], Code pénal suisse [Cp], Codice pénal svizzero [Cp] [Penal Code] Decl. 21, 1937, SR 311.0, art. 271 (Switz.) ("Article 271").

[6] Schweizerisches Strafgesetzbuch [StGB], Code pénal suisse [Cp], Codice pénal svizzero [Cp][Penal Code] Decl. 21, 1937, SR 311.0, art. 273 (Switz.) ("Article 273").

provision.[7] *Id.* ¶¶ 30, 33. Between 1984 and 2007, there have been at least 26 convictions for violations of Article 273. *Id.* ¶ 32. Included among those convictions have been those of UBS bank employees, who were sentenced to a total of six years imprisonment. *Id.*

G. UBS's Good Faith Effort to Comply with the Summons

In late July 2008, the IRS requested a meeting with UBS to discuss possible approaches to summons compliance. At that meeting, on August 19, 2008, UBS underscored its continuing concerns about its ability to comply with both the Summons and Swiss law. Levene Decl. ¶ 5. In response, the IRS agreed that, at least initially, UBS would be expected to comply with the Summons only with respect to documents that could be found in the United States and that UBS would not be expected to produce responsive information located in Switzerland. *Id.* ¶ 6. Since then, UBS has worked extensively to provide the IRS with responsive documents and information that can be produced in compliance with Swiss law. *Id.* ¶¶ 7, 9-17.

For example, UBS reviewed and analyzed the U.S. based records relating to over 6,000 wire transfers between U.S. and Swiss UBS accounts. Levene Decl. ¶ 9. On the theory that transfers between U.S. and Swiss accounts held by the same person might evidence Swiss accounts potentially responsive to the Summons, UBS singled out for review instances in which there was a wire transfer between U.S. and Swiss UBS accounts apparently held by the same U.S. person. *Id.* UBS reviewed that data to identify those transfers relating to accounts in Switzerland for which UBS in Switzerland did not have in

[7] *See* Letter from Swiss Institute of Certified Accountants and Tax Consultants to SEC, at 13 (July 2, 2003) (A 0412) (explaining that Article 273 "would apply to and penalize . . . any person facilitating access to" any "elements of Swiss economic life for which there is an interest of non-disclosure to foreign public officials or private organizations").

its possession a Form W-9. *Id*. As a result of this extensive review, UBS produced to the IRS on November 5, 2008, January 29, 2009, and April 7, 2009, information relating to 1,351 wire transfers to or from 463 unique U.S.-based accounts, to which Swiss financial privacy laws did not apply because the wire transfer records were maintained in the United States. *Id*. ¶¶ 6, 10, 12. UBS also conducted searches for, and produced to the IRS, U.S.-based annual account statements pertaining to the UBS clients associated with these wire transfers. *Id*. ¶ 11.

In connection with its exit from the US cross-border business, UBS has recently asked its clients for consent to provide their account information to the IRS pursuant to the Summons, and has already received more than 75 executed consents. UBS Decl. ¶ 18. UBS will thus be able to provide additional account information, consistent with Swiss law, to the IRS. *Id.* UBS has also explicitly encouraged clients who are not in compliance with U.S. tax law to self-report to the IRS, which will result in the IRS receiving much of the information that it is seeking through the Summons. (*See below* Section VI.) The IRS itself reported two days ago that during 2009, voluntary disclosures by taxpayers have "skyrocket[ed]" 250 percent over those made during the entirety of 2008. *See* Alison Bennett, *Government to Seek Summonses Against Additional Foreign Banks*, Daily Tax Rep. (BNA) No. 79 DTR G-1 (Apr. 28, 2009).

H. The Response to the Summons in Switzerland

As evidence of the force of the Swiss national interest in this proceeding, the IRS's recent actions have generated significant controversy in Switzerland.[8] But despite the

[8] *See, e.g.*, Simon Spengler, Editorial, "*Yes we can" – euch fertigmachen!* ["*Yes we can" – wear you down*], Blick (Zurich), Feb. 20, 2009 (A 0432) (quoting a member of the Swiss Congress: "I am in a rage. The conduct of the USA is more than questionable for a state of

depth of popular Swiss sentiment surrounding these issues, the Swiss Government has been clear that, consistent with its practice for over fifty years, Switzerland remains open to cooperative resolution of U.S. concerns through bilateral negotiation. On March 6, 2009, the Swiss Federal Council, Switzerland's seven-person executive, announced that Switzerland is prepared to enter into a dialogue with other nations on information exchange in tax matters, and set up a group of experts chaired by Ambassador Manuel Sager to advise the Swiss Government on enhancing bilateral cooperation in cases involving tax offenses. Press Release, Switz. Fed. Dep't of Fin., Banking Secrecy Remains Intact - Improved International Cooperation in the Case of Tax Offences (Mar. 6, 2009) (A 0394). On March 13, 2009, Switzerland announced that it would adopt the OECD standard on administrative assistance in tax matters (that, among other things, would eliminate the distinction in the DTT and other Swiss double taxation treaties between tax fraud, for which information sharing currently is allowed, and tax evasion, for which it is not) and would enter into negotiations on revising double taxation treaties accordingly. Press Release, Switz. Fed. Dep't of Fin., Switzerland to Adopt OECD Standard on Administrative Assistance in Fiscal Matters (Mar. 13, 2009) (A 0396). Swiss President and Finance Minister Hans-Rudolf Merz indicated that renegotiating the DTT with the United States would be Switzerland's priority. Press Release, Switz. Fed. Dep't of Fin., President Hans-Rudolf Merz Meets with Prime Minister Gordon Brown (Mar. 14, 2009) (A 0399). That process of renegotiation began in Berne two days ago and, as of the date of this filing, is continuing. UBS fully supports these

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laws; [it is] pure power politics."); Marcel Odermatt & Roman Seiler, Interview with Pierre Mirabaud, Chairman, Swiss Bankers Association, *Die UBS hat ihre Ehre verloren* [*UBS has lost its honor*], Sonntagsblick ("Zurich"), Feb. 22, 2009 (A 0436) ("I am outraged that an allied nation, the USA, does not respect the legal procedures that are part of the dual taxation agreement with Switzerland.").

efforts, which are in keeping with the spirit of mutual respect and cooperation that has generally characterized U.S.-Swiss relations.

Argument

I. This Case Engages the Principle of International Comity, Which Should Restrain the Court's Exercise of Its Power to Enforce the Summons.

By proceeding in a manner heedless of the major interests of a foreign state and the obligations of that state's citizens under its criminal laws, the IRS has brought before this Court a matter that engages the principle of international comity to an unmatched degree. As the Supreme Court stated in *Hilton v. Guyot*, comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." 159 U.S. 113, 163-64 (1895). More concretely, comity is the principle that domestic courts should not act in ways that demean the sovereignty of another nation state by, for example, requiring its subjects to flout their home country's duly enacted laws.[9]

In that specific situation, in which the offense to comity stems from a clash between the conflicting demands of this nation's laws and those of a foreign state, courts have often looked to the factors set forth in two related, "substantially similar" provisions of the *Restatement of the Foreign Relations Law of the United States*: Section 40 of the Second

[9] *E.g.*, *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1230 (Fed. Cir. 1996) (declining enforcement of civil subpoena that would have required violation of Swiss Penal Code Art. 273; "[I]t is inappropriate for the United States, a nation founded on the rule of law, to require that a person violate the criminal laws of a sovereign nation."); *Ings v. Ferguson*, 282 F.2d 149, 152 (2d Cir. 1960) ("Upon fundamental principles of international comity, our courts . . . should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures.").

Restatement (Limitations on Exercise of Enforcement Jurisdiction),[10] and Section 442(1)(c) of the Third ("Requests for Disclosure").[11] *Reinsurance Co. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1282 (7th Cir. 1990). These provisions together identify seven "largely synonymous" factors, *id.*, paraphrased and enumerated below, as bearing on the analysis of comity in a case such as this:

1. the interests of the two states (hereinafter, "Factor 1");

2. the extent and nature of the hardship that inconsistent application of the two states' laws would place upon the relevant individual or entity (hereinafter, "Factor 2");

3. the extent to which the relevant conduct would take place in the other state (hereinafter, "Factor 3");

4. the nationality of the individual or entity (hereinafter, "Factor 4");

5. whether the information originated in the United States (hereinafter, "Factor 5");

6. the degree of specificity of the request (hereinafter, "Factor 6"); and

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[10] *Restatement (Second) of Foreign Relations Law* ("*Second Restatement*") § 40 (1965): "Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state."

[11] *Restatement (Third) of Foreign Relations Law* ("*Third Restatement*") § 442(1)(c) (1987): "In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located."

7. the availability of alternative means of securing the information (hereinafter, "Factor 7").

In addition, courts have considered the good faith of the party subject to conflicting sovereign obligations when assessing the degree to which enforcement of the U.S. obligation would offend international comity. *E.g.*, *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987) ("The district court specifically found that the bank had acted in good faith throughout these proceedings. The executive branch may be able to devise alternative means of addressing this problem, but the bank cannot."). (*See below* Section V.)

As shown below, each of these factors weighs strongly in favor of declining to enforce the Summons here. This is not a case where the several factors need to be weighed against each other;[12] each factor, fairly evaluated, militates against enforcement. More fundamentally, the case for affording comity to a foreign state's laws is at its zenith when failure to do so would subject a foreign subject to a "true conflict" between the commands of two sovereigns; *i.e.*, when compliance with U.S. law would be impossible in light of the legal obligations that the foreign citizen owes to his home country. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993). If ever there was a case that presented such a "true conflict," it is this.

No fewer than three true conflicts would be triggered by enforcement of the Summons. If they comply with the Summons, UBS employees will violate the three criminal statutes of the Swiss Confederation discussed above (Section F): Article 47 of the

[12] *Compare United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 342 (7th Cir. 1983) (concluding that "a balancing of relevant competing interests weighs against compelling disclosure at this time"), *with In re Two Grand Jury Subpoenas Duces Tecum (Union Bank of Switz.)*, 158 Misc. 2d 222, 225 (N.Y. Sup. Ct. 1993) (finding the facts presented "very different" from a case requiring "a careful balancing of interests before issuing an order that encroaches upon the sovereignty of another nation").

Banking Law, and Articles 271 and 273 of the Penal Law. But although these conflicts are unusually serious here — and have presented the most acute foreign relations issues — this is not the first time they have arisen. Over more than half a century, similar conflicts have presented themselves as U.S. courts have considered whether to enforce U.S. discovery instruments in the teeth of financial privacy statutes. In numerous cases, at every level of the judiciary including the Supreme Court, comity has been afforded to the foreign state's laws, and the U.S. discovery obligation abated.[13]

For example, in the following cases — three involving UBS or its predecessors, two involving IRS summonses, and most involving conflicts with the very Swiss statutes under which UBS's employees face prosecution here — courts have declined to enforce U.S. discovery instruments in the face of conflicting financial privacy laws, employing language and reasoning with equal force and relevance here:

1. In *Société Internationale v. Rogers*, 357 U.S. 197 (1958), a Swiss company owned by a UBS predecessor sued to recover assets seized by the United States, and the district court dismissed its claims as a sanction for the company's refusal to produce Swiss bank records. Noting the threat of criminal prosecution in Switzerland if the production were made, the Supreme Court reversed and held that the sanction of dismissal is not available where noncompliance with a production order "has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Id.* at 212. The Court stated:

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[13] *United States v. Powell* makes clear that a court may consider "any appropriate ground" why an IRS summons should not be enforced, and that a summons should not be enforced if doing so would constitute an "abuse of the court's process." 379 U.S. 48, 58 (1964). An enforcement order that ignored principles of international comity, was contrary to the terms of U.S. treaties and IRS agreements, and required a respondent's employees to violate the criminal laws of its home country, would constitute an abuse of the court's process.

> It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.

Id. at 211.

2. In *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987), the D.C. Circuit reversed an order holding in civil contempt a bank that had refused to produce documents in response to a grand jury subpoena, citing the risk of criminal sanctions for violating banking secrecy laws of an unidentified country:

> [I]t causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question. . . . We have little doubt . . . that our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders. The legal expression of this widespread sentiment is found in basic principles of international comity.

Id. at 498-99.

3. In *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983), the court vacated an order enforcing a narrowly targeted, IRS (non-"John Doe") summons requiring the production of Greek bank statements of identified parties, explaining that disclosure of bank records would expose bank employees to sanctions, including imprisonment, under Greek law:

> Although the interest of the United States in collecting taxes is of importance to the financial integrity of the nation, the interest of Greece, served by its bank secrecy law is also important, and so conceded by Government counsel.

Id. at 346.

4. In *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962), the court declined to enforce a grand jury subpoena to a bank to produce records held in Panama, where compliance would subject the bank to penalties under Panamanian law:

> Just as we would expect and require branches of foreign banks to abide by our laws . . . so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries.

Id. at 613.

5. In *In re the Matter of Tax Liabilities: John Does*, No. C-88-0137, 92 TNI 26-24 (N.D. Cal. Mar. 11, 1992) (Tax Analysts) (A 0304), the court, after receiving amicus briefs from the governments of Hong Kong and the United Kingdom, declined to enforce an IRS "John Doe" Summons seeking information from a Hong Kong branch of Bank of America (a U.S. bank) concerning hundreds of wire transfers, because of conflicting Hong Kong bank secrecy laws:

> [T]he Court is satisfied that the demonstrated interest of Hong Kong outweighs the interest of the IRS. As explained above, the John Doe summons which the IRS seeks to enforce here is generic both in its terms and its purposes. It does not arise from the investigation of any particular alleged misconduct, nor does it seek evidence of particular identified transactions.

Id. (A 0309).

6. In *Motorola Credit Corp. v. Uzan*, No. 02 Civ. 666, 2003 WL 203011 (S.D.N.Y. Jan. 29, 2003), the court denied a Rule 37 motion to compel UBS to produce bank records located in Switzerland:

> [A]s the Swiss Ambassador to the United States has stated in a recent letter to the Court, an order compelling UBS to produce documents from Switzerland would raise serious questions of international comity. Among other concerns, UBS and its employees might face criminal sanctions if they were to respond to plaintiffs' subpoena without the authorization of the Swiss court.

Id. at *7.

7. In *Minpeco v. Conticommodity Services, Inc.*, 116 F.R.D. 517 (S.D.N.Y. 1987), the court declined to enforce a subpoena on the ground that it would violate Swiss financial privacy laws and subject the defendant to criminal penalty:

> There are several indications that the Swiss interest in bank secrecy is substantial. . . . [C]ompliance . . . with a compulsion order will require the disclosure of confidential information about all its brokerage customers even though plaintiffs do not contend that they expect information about more than a small number to be helpful to their case, with the result that the cost in international comity will be likely to exceed the benefit to the conduct of these American litigations.

Id. at 524, 530.

8. And in *In re Two Grand Jury Subpoenas Duces Tecum (Union Bank of Switzerland)*, 158 Misc. 2d 222 (N.Y. Sup. Ct. 1993), the court quashed the government's subpoena requiring UBS to produce Swiss bank records relating to one specific account, and denied the government's motion to hold UBS in contempt:

> The District Attorney argues that because UBS regularly does business in and derives profit from the State of New York, it is subject to New York legal process, regardless of any conflict that might arise with Swiss law. . . . Before requiring UBS to engage in conduct which violates Swiss bank secrecy laws, this court, considering the comity interests involved, would have to be persuaded: (1) that the subpoenaed information is crucial to the Grand Jury investigation; (2) it cannot otherwise be obtained in a timely fashion; and (3) that respondent failed to attempt to comply with the subpoena in complete good faith.

Id. at 224-26.

As closely analogous as those cases are, the case here for declining to enforce the Summons is even stronger. At least five considerations — all of which are relevant to one or more of the Restatement Factors — make this the paradigmatic case for non-enforcement: (i) the balance of interests that has already been struck through negotiation of the DTT and QIA; (ii) the strong, articulated interest of the Swiss Government in enforcing its financial privacy laws; (iii) the breadth and lack of specificity of the Summons; (iv) UBS's good faith; and (v) the availability of alternative means by which to receive information relevant to the IRS's enforcement efforts. Those same considerations also underscore the many differences that distinguish this extreme case from the several far closer ones,

discussed throughout below, in which U.S. courts have enforced U.S. discovery obligations despite conflicting Swiss or other foreign laws.

II. The Correct Balance of U.S. and Swiss Interests Has Already Been Struck Through the Double Taxation Treaty and the Qualified Intermediary Agreement (Restatement Factor 1).

The fundamental inquiry in any case involving conflicting state obligations is a comparison of the strength of the conflicting state interests. This case is unusual — indeed, unique — in that the conflicting state interests to be balanced, the U.S. interest in obtaining Swiss bank information and the Swiss interest in financial privacy, have already been balanced through the processes of negotiation that culminated in the United States' ratification of the DTT and execution of the QIA. Both instruments reflect the United States' understanding that its interests in obtaining information would yield to Swiss interests in financial privacy, in exchange for which the United States would realize hitherto unrealized cooperation in its tax collection efforts. Both instruments attest to the prior understanding of the U.S. Government that summonses, like the one at issue, would not be served on Swiss financial institutions, because they are inconsistent with the agreed-upon framework for information exchange these instruments establish.

A. In Negotiating the Double Taxation Treaty, the U.S. Government Acknowledged the Force of Swiss Financial Privacy Laws and the Impropriety of Blanket, Untargeted Requests.

As discussed above, the DTT affords a mechanism by which the United States and Switzerland may obtain evidence from each other, including bank account information, when either state has reasonable suspicion of the commission of "tax fraud or the like." The mechanism embodied in the DTT represents the culmination of years of negotiation by the U.S. and Swiss Governments. The history and text of that treaty leave little doubt that the United States understood that the rights it would enjoy under that

treaty, to obtain information otherwise subject to Switzerland's financial privacy laws, could not be supplemented through broader and unilateral domestic discovery mechanisms. They also leave little doubt that overbroad, blanket requests like the Summons are antithetical to the negotiated framework of information exchange under that and all other U.S. double taxation treaties, and the U.S. Model Income Tax Convention.

1. **In Negotiating the Double Taxation Treaty, the U.S. Government Acknowledged the Force of Swiss Financial Privacy Laws That Would Be Violated by Compliance with the Summons.**

Review of the ratification history of the 1996 Treaty clearly demonstrates that the United States appreciated the force and legitimacy of the constraint on tax enforcement efforts that Swiss financial privacy laws presented. The October 30, 1997 Senate Foreign Relations Committee Report on the ratification of the 1996 Treaty acknowledged that "[a]lthough broader exchange of information provisions are desirable, the Committee understands the difficulty in achieving broader provisions *given the constraints of Swiss law*." S. Comm. on Foreign Relations, *Tax Convention with Switzerland*, S. Exec. Rep. No. 105-10, at 10 (1997) (emphasis added) (A 0116). The same report observed that, whereas the treaty permitted information exchange in cases of tax fraud,

> [t]he proposed treaty does not permit the exchange of information to carry out the provisions of domestic law. . . . The omission of this provision means that under the proposed treaty, exchange of information *will not be possible for the purpose of routine enforcement of the tax laws* (except as is necessary to carry out the purposes of the proposed treaty or for the prevention of tax fraud).

Id. at 9 (emphasis supplied) (A 0115). To the same effect was the official "Explanation" of the 1996 Treaty by the Joint Committee on Taxation:

> Under the proposed treaty, information may be exchanged in connection with the enforcement of either country's domestic law only in the case of tax fraud. This means that, except for exchanges of information to carry out the

> provisions of the proposed treaty, *information will only be exchanged in the case of tax fraud.*

Staff of J. Comm. on Taxation, 105th Cong., *Explanation of Proposed Income Tax Treaty and Proposed Protocol Between the United States and the Swiss Confederation*, JCS-16-97, at 50-51 (J. Comm. Print 1997) (emphasis supplied) (A 0088-89). None of these remarks would have made sense if the IRS had retained in its back pocket the unilateral right to serve a summons on a Swiss bank every time it wanted information it could not get readily through the treaty mechanism. West Decl. ¶ 23.[14]

The United States' understanding that service of IRS summonses on a Swiss bank is incompatible with the DTT is also evident from comparison of the DTT with "Tax Implementation Agreements" ("TIAs") the United States has reached with its territorial possessions, each of which is an independent taxing jurisdiction. Like the DTT, TIAs provide for delivery of specified information on request. But unlike the DTT, the TIAs also routinely include a provision that "[n]otwithstanding the foregoing, the United States may

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[14] Although *United States v. Vetco Inc.*, 691 F.2d 1281 (9th Cir. 1981), held that the 1951 Treaty did not preclude the use of summonses by the IRS to gather information in Switzerland, that case considered the effect of this earlier double taxation treaty, with its significantly inferior information exchange provisions. *Vetco*'s holding rested primarily on the lack of any indication in the 1951 Treaty's legislative history that the treaty was intended to be the exclusive means by which tax information was exchanged. *Id*. at 1286. Even assuming *arguendo* that *Vetco*'s reading of the legislative history to the 1951 treaty is correct, the legislative history for the 1996 Treaty, by contrast, clearly demonstrates that this newer treaty serves as the only means for tax-related information exchanges between Switzerland and the U.S.

In addition, as discussed throughout below, factors tipping the balance in favor of enforcement of the narrowly targeted, non-"John Doe" summons in *Vetco*, where there were strong indications of tax fraud, included the respondent's lack of good faith efforts to comply, the lack of any objection by the Swiss government, and, most fundamentally, the absence of clear record evidence that Penal Code Articles 271 and 273 would be violated by compliance. (Article 47 of the Banking Law was not even implicated because Vetco was not a bank.) 691 F.2d at 1287. None of these factors is present here. (*See below* Sections III-V.)

exercise its rights under section 7602 *et seq.* of the Code to obtain information in [the territorial possession] without resorting to the procedures set forth in this Agreement."[15] Neither the U.S.-Swiss nor any other DTT to which the United States is a party includes such a clause. In the absence of any reservation of summons power, a U.S. attempt to enforce a production order requiring criminal acts within foreign territory would be profoundly inconsistent with the structure of these treaties, let alone the reasonable expectations of U.S. treaty partners. *See* West Decl. ¶ 23 n.21.

Despite the text of the DTT and the unmistakable historical record, the IRS argues that the DTT does not afford the exclusive means by which it may seek information from Swiss entities. *See* Gov't Response to Background Filing by Respondent at 3. But not only is it difficult to square that position with the understandings reflected in the materials cited above; it is also difficult to square with fundamental fairness. It is inherent in tax treaty negotiation, as in treaty negotiation generally, that sovereigns engage in "give and take."[16] In hearings before the Senate Foreign Relations Committee concerning ratification of the 1996 Treaty with Switzerland and DTTs with several other nations, the Treasury's International Tax Counsel made precisely this point:

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[15] Tax Implementation Agreement, U.S.-Am. Sam., art. 4, ¶ 5, Jan. 7, 1988, 1988-1 C.B. 408; *accord* Tax Implementation Agreement, U.S.-Guam, art. 4, ¶ 4, Apr. 5, 1989, 1989-1 C.B. 342; Tax Implementation Agreement, U.S.-V.I., art. 4, ¶ 4, Feb. 24, 1987, 1989-1 C.B. 347; Tax Coordination Agreement, U.S.-P.R., art. 4, ¶ 4, May 26, 1989, 1990-1 C.B. 199.

[16] *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 122 n.22 (2d Cir. 2001) (recognizing "the give-and-take of policy priorities involved in the negotiating of tax treaties and are therefore reluctant to upset the balance negotiated between [the] two governments"); *Hearing on Tax Treaties Before the S. Comm. on Foreign Relations*, 104th Cong. 21 (1995) (statement of Leslie B. Samuels, Assistant Sec'y for Tax Policy, Treas. Dep't) ("Obtaining the agreement of our [tax] treaty partners . . . sometimes requires concessions on our part. Similarly, other countries sometimes must make concessions to obtain our agreement on issues that are critical to them.") (A 0079).

> [I]t is also important to remember that each treaty is the result of a negotiated bargain between two countries that often have conflicting objectives. Each country has certain issues that it considers nonnegotiable. The United States, which insists on effective anti-abuse and exchange-of-information provisions, probably has more nonnegotiable issues than most countries. . . . The give and take that is inherent in the negotiating process leading to a treaty is not unlike the process that results in legislation in this body.

Bilateral Tax Treaties and Protocol: Hearing Before the S. Comm. on Foreign Relations, 105th Cong. 14 (1997) (A 0103). Yet the petition to enforce the Summons seeks to "take" back precisely what was "given" in exchange for Switzerland's agreement to permit the U.S. Government to obtain evidence of "tax fraud or the like" only upon a specific showing of a reasonable suspicion of such. It is difficult to understand why Switzerland would have dedicated years of diplomatic effort to the treaty's negotiation, unless it was with the understanding that the inroads on Swiss sovereignty and financial privacy the treaty authorized at the U.S. Government's instance would be the only ones Switzerland would be expected to permit. While John Doe summons enforcement might, in the short term, facilitate U.S. tax enforcement efforts, the long-term impairment to the credibility of the United States as a treaty negotiator can hardly inure to this nation's ultimate credit.[17] *In re Grand Jury Proceedings (United States v. Bank of Nova Scotia)* ("*Nova Scotia I*"), 691 F.2d 1384, 1391 (11th Cir. 1982), which enforced a grand jury subpoena seeking Bahamian bank account information, did not have to grapple with this issue, because the United States did not execute a mutual legal assistance treaty ("MLAT") with the Bahamas until 1990, years after

[17] *Cf. Third Restatement* § 442 cmt. c ("In making the necessary determination of the interests of the United States . . . , the court or agency should take into account not merely the interest of the prosecuting or investigating agency in the particular case, but the long-term interests of the United States generally in international cooperation in law enforcement and judicial assistance, in joint approach to problems of common concern, in giving effect to formal or informal international agreements, and in orderly international relations.").

the subpoena issued. Treaty on Mutual Assistance in Criminal Matters, U.S.-Bah., Jun. 12-Aug. 18, 1987, S. Treaty Doc. No. 100-17 (1990). In *Nova Scotia I*, there was no conflict between enforcement of the grand jury subpoena, on the one hand, and respect for a binding treaty, on the other.

When the tables are turned, and *foreign* nations seek to use U.S. courts to enforce their *own* tax interests, U.S. courts not only refuse, but instruct those foreign nations that the correct way to pursue their interests is through the mechanisms set forth in the applicable tax treaties. In deference to such international tax treaties, U.S. courts long have applied the common law "revenue rule" under which "United States courts generally may not interpret and enforce foreign revenue laws." *European Cmty. v. RJR Nabisco, Inc.*, 424 F.3d 175, 177 (2d Cir. 2005). As the Second Circuit has explained, "with regard to the domestic collection of foreign taxes . . . the political branches of our government have consistently acted on behalf of the United States in establishing and managing the nation's relationships with other countries" through bilateral tax treaties. *R.J. Reynolds*, 268 F.3d at 115. This is because courts "recognize the give-and-take of policy priorities involved in the negotiating of tax treaties and are therefore reluctant to upset the balance negotiated between [the] two governments." *Id*. at 122 n.22. The force of this logic is equally compelling when the United States seeks information from abroad by utilizing the judiciary rather than proceeding through applicable tax treaties. During a published "exit interview" in 1997, for example, the Treasury Department's Deputy International Tax Counsel stressed that "the IRS is not allowed to send tax information to Japan just because the Japanese want it. . . . [Y]ou need to have the [tax treaty] agreement with the other country in order to have authority to actually exchange the information." Lee Sheppard & Juliann Martin, *Berman, Part II: Departing U.S. Treasury Staffer Discusses Treaties*, 15 Tax Notes Int'l 949, 951 (1997).

That comment would not have made sense if the United States had an open file policy for access to the records of financial institutions located in the United States.

Underscoring the principle that revision of treaty obligations not only should — but does — take place through mutual diplomatic efforts, Switzerland is currently engaged in negotiations that would adopt, under its own double taxation treaties, the OECD Model Tax Convention standard endorsed and advocated by the United States. Press Release, Switz. Fed. Dep't of Fin., Switzerland to Adopt OECD Standard on Administrative Assistance in Fiscal Matters (Mar. 13, 2009) (A 0396). Under the OECD Model Tax Convention, the limitation to "tax fraud or the like" in the current U.S.-Switzerland treaty would be broadened, so as to permit requests for information "*as is foreseeably relevant* for carrying out . . . the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States." OECD, Model Tax Convention on Income and Capital, art. 26 (July 17, 2008) (emphasis added) (A 0139). To the extent that the balance of information exchange between Switzerland and the United States that has been struck through decades of treaty negotiation needs to be recalibrated to match the OECD's standard, that process is underway through negotiations taking place in Berne.

The text and history of the 1996 Treaty distinguish this case from *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987). There, the Supreme Court held that the Hague Convention on the Taking of Evidence supplemented, but did not supplant, domestic methods for obtaining evidence from a French corporation. The Court based its conclusion on "the language and negotiating history of the Hague Convention." *Id.* at 534. The former (like the TIAs discussed above) included provisions that clearly contemplated the continuing operation of domestic discovery mechanisms. For example, Article 27 of the Hague Convention

expressly permitted "methods of taking evidence other than those provided for in this Convention." *Id.* at 537 & n.24 (quoting the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 2569). And the history of the Convention reflected that its purpose was merely to standardize various international methods of evidence gathering, not to displace domestic methods. *See id*. at 532 (quoting Secretary of State's submittal letter to the President (Convention designed to "preserve all more favorable and less restrictive practices arising from internal law, internal rules of procedure")). That is quite different from the DTT, the text and ratification history of which, as discussed, reveal the clear recognition that the United States could not reach information subject to financial privacy except via the DTT's provisions.[18]

2. **The Double Taxation Treaty Rejects Blanket, Untargeted Requests, of Which the Summons Is an Egregious Example.**

The Summons is also incompatible with the 1996 Treaty because it is an overbroad, insufficiently specific, blanket request, one not tethered to any showing of a "reasonable suspicion" of wrongdoing by any identified taxpayer. Even by the boil-the-ocean standards of U.S. civil discovery, the breadth of the Summons is breathtaking. The Summons seeks the account records of *every* U.S. taxpayer with signature authority over a UBS account (including foreign expatriates residing in the U.S.) for whom UBS did not have

[18] *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), is distinguishable for the same reason. There, the Supreme Court held that the U.S. extradition treaty with Mexico did not preclude resort to forcible abduction as a means of apprehending criminal defendants. As in *Aérospatiale*, the Court based its holding on review of "the history of negotiation and practice under the Treaty," *id.* at 665, a review that, here, compels the conclusion that the DTT was intended to afford the exclusive means by which the IRS would obtain tax information located in Switzerland.

a Form W-9 in its possession, and requests *all* "account records" for those accounts from the beginning of 2002 to the present. Summons ¶ 1. Indeed, the Summons appears to be one of the broadest, if not the broadest, ever served by the IRS on any institution, domestic or foreign. In the only other located case in which the IRS has sought to enforce a John Doe summons in defiance of foreign bank secrecy laws, *In re the Matter of Tax Liabilities: John Does*, No. C-88-0137 (A 0304), the court declined to enforce the summons in part because the request for information on only 682 foreign wire transfers was considered unduly "generic." *Id.* (A 0309). Here, by comparison, the IRS seeks a vastly broader set of records pertaining to tens of thousands of accounts over a seven-year period. And as indicated by its "John Doe" moniker, the Summons, like the investigation it supports, is "focused on learning the identities of US taxpayers not known to the IRS," Shott Decl. ¶ 16, and as to whom, for that reason and others, the IRS presently lacks a "reasonable suspicion" of "tax fraud or the like" within the meaning of the DTT.

This is plainly antithetical to the standard of international information exchange to which the United States agreed in the 1996 Treaty, as Deputy Commissioner Shott acknowledges in his declaration. Shott Decl. ¶¶ 15-16. Nor does it meet the standards of non-Swiss, "model" treaties of the United States and the OECD. As the Technical Explanation Accompanying the U.S. Model Income Tax Convention states, any treaty consistent with the Model DTT "would *not* support a request in which a Contracting State simply asked for information regarding . . . *all accounts maintained by its residents with respect to a particular bank*." *Id.* art. 26(1) (emphasis supplied) (A 0118). Yet that is precisely what the Summons asks for. To the same effect is the commentary to the OECD's Model Tax Convention on Income and Capital: "The standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible extent and, at the

same time, to clarify that Contracting States are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer." OECD, *Model Tax Convention on Income and Capital: Condensed Version*, 349 (July 17, 2008) (A 0145). If the Summons is not a "fishing expedition" request, as that term is used in the quoted commentary, it is not clear what type of request would meet that description.

Were the Summons to be enforced despite its profound overbreadth, that would set a precedent unfavorable to the United States, as well as its many other double taxation treaty partners. The United States too has a strong interest in avoiding overbroad requests from its treaty partners seeking to troll through vast swaths of information on accounts of foreign nationals in U.S. banks located in U.S. financial centers like New York and Miami. The strength of that U.S. interest underscores the point that even if in certain limited cases, a summons outside a double taxation treaty might be appropriate, the Summons here, which undermines one of the DTT's core mutual objectives — the avoidance of requests untethered to specific, targeted, reasonable suspicions of wrongdoing — is not.

B. In Developing the Qualified Intermediary Agreement, the U.S. Government Acknowledged the Force of the Swiss Financial Privacy Laws That Would Be Violated by Compliance with the Summons.

The QIA also evinces the U.S. Government's recognition that its tax law enforcement efforts, to the extent they require the retrieval of evidence from Switzerland or other countries with financial privacy laws, are subject to those foreign laws. In particular, one of the QIA's core provisions, Section 6.01, clearly states that a "QI is not required, however, to disclose the identity of a U.S. non-exempt recipient if QI is prohibited by law from making the disclosure and QI follows the procedures of Section 6.04." QIA § 6.01 (A 0234). In turn, Section 6.04 describes what occurs "*[i]f QI is prohibited by law, . . . from*

disclosing to . . . the IRS on Form 1099 the account holder's name, address, and TIN . . . ," *id.* § 6.04 (emphasis added) (A 0236), and sets forth that the QI is obliged to request authority from the U.S. non-exempt account holders to either submit a Form W-9 or sell U.S. securities, *id*. (A 0236-39). Similarly, Section 8.04(A) and (B) confirm that where a QI makes reportable payments to a U.S. non-exempt recipient whose identity and account information are prohibited by law from being disclosed, a QI's information reporting obligations are limited to filing a Form 1099 made out to an "unknown owner." *Id.* § 8.04(A)-(B) (A 0243).

Equally clear acknowledgments of the continuing force of financial privacy constraints appear in the provisions relating to external audits to which QIs must regularly submit. QIA § 10 (A 0247-54). Although the "work papers and reports" of the external auditor are subject to examination by the IRS, "the external auditor is not required to divulge the identity of QI's account holders to the IRS," *id.* § 10.01 (A 0248), an assurance that would be empty if the IRS could simply serve a John Doe Summons on UBS's external auditor to obtain the same information. And whereas the QIA defines an "event of default" under the agreement to include if "QI fails to disclose to . . . the IRS, U.S. nonexempt recipient account holders," the default is triggered only "to the extent the disclosure is *not prohibited by foreign law*," *id.* § 11.04(I) (emphasis added) (A 0256) — another clear concession to the force of foreign privacy laws. The presence and wording of all these provisions attest to the IRS's appreciation that, under the bargain it was striking with UBS and other non-U.S. institutions, the IRS would respect foreign privacy laws in several key respects, in exchange for increased information and tax revenue flow in several others. Although the difficulty UBS would face in complying with the Summons would be the same even if it had never executed the QIA — for Swiss financial privacy laws bind QIs and non-QIs alike — the IRS's execution of the QIA with UBS renders this case one in which the IRS's acknowledgment of

the force of Swiss law is particularly clear. Having brought foreign financial institutions into the QI regime with the promise that the financial privacy laws to which they are subject will be respected, the IRS should not be permitted to exercise its summons authority in a manner that would inevitably result in the violation of those laws by the QI.

C. The Misconduct Covered by the Deferred Prosecution Agreement Does Not Alter the Existing Balance of Interests.

The Government's February 20, 2009 Response to Background Filing by Respondent, at 5, suggests that the IRS may argue that the misconduct of UBS personnel that is the subject of the DPA bars UBS from relying on the QIA to avoid enforcement of the Summons. This is, at base, a strawman argument. UBS is not contending that the QIA represents a contractual bar to enforcement of the Summons. Rather, the point is simply that the QIA reflects the United States' own acknowledgement of the force and legitimacy of Swiss law. UBS's defense to this proceeding would be no less strong if it had never signed the QIA, for the severity of the Swiss law violations that compliance with the Summons would cause does not depend on whether UBS is a QI.

And although the DPA reflects UBS's candid acknowledgment of past misconduct, that misconduct does not affect the analysis whether the Summons may be enforced and thereby cause the commission of additional wrongdoing in Switzerland. If anything, the DPA is still another acknowledgement by the U.S. Government that Swiss law is entitled to deference. In the DPA, the DOJ explicitly acknowledged that UBS "undertook substantial efforts to provide information to assist United States investigators while complying with established Swiss legal restrictions governing information exchange;" and that UBS "also facilitated cooperative efforts between the United States and Swiss governments regarding the Government's investigation." DPA ¶ 10 (A 0267). The DOJ also

acknowledged that "UBS is subject to certain Swiss laws, which may impact its ability to provide documents and information." *Id.* That UBS client advisors, in violation of U.S. securities laws, traveled to the United States and discussed securities matters with certain clients — conduct that UBS has acknowledged and taken remedial steps to prevent in the future — does nothing to alter the balance of U.S. and Swiss national interests struck in the DTT and QIA. Whether client account information may be exchanged under the DTT does not turn on whether the account holder was visited by financial advisors in the course of his or her banking relationship. Nor do the applicability and force of the provisions of the QIA that respect financial privacy depend upon whether a QI's employees have met with account holders in the United States.

III. This Court Should Respect the Swiss Interest in Enforcing Its Financial Privacy Laws and UBS's Interest in Avoiding Prosecution Under Those Laws (Restatement Factors 1-5).

There can be no question that the Swiss interest in enforcement of its financial privacy laws is strong and legitimate. In contrast to some other countries' financial privacy laws, the laws of Switzerland impose criminal, as opposed to merely civil, liability on those responsible for violations. *See Minpeco*, 116 F.R.D. at 524. Unlike other jurisdictions that extend financial privacy to outsiders only as a way to attract funds, the financial privacy laws of Switzerland apply to all information located within Switzerland, without regard to whether the financial institution, the account holder, or the requesting entity, is Swiss. *Cf. id.* at 524 ("[T]he bank secrecy laws . . . have the legitimate purpose of protecting commercial privacy inside and outside Switzerland."). Unlike *Nova Scotia I*, where the court rested its decision discounting the force of the Bahamian interest in financial privacy in part upon the consideration that Bahamian courts could order production of the very documents whose compelled production to a U.S. grand jury the bank was resisting, 691 F.2d at 1391, the Swiss

Government itself could not obtain from UBS the information the IRS seeks through enforcement of the Summons. Romy Decl. ¶¶ 49-51.

The executive branch of the U.S. Government clearly recognized the legitimacy of Switzerland's financial privacy laws when it negotiated the DTT and the QIA. This Court should not now show less deference to the very Swiss laws the executive branch acknowledged through these instruments, even at the behest of that same executive branch, particularly in light of the very limited role courts should play in the conduct of foreign relations.[19] To do so would go against the grain of decades of judicial decisions in this area. The legitimacy of Switzerland's interest in enforcing its financial privacy laws has been recognized by many U.S. courts including, most notably, the Supreme Court in *Société Internationale*, where the Court struck down a dismissal sanction for a plaintiff's failure to produce Swiss bank records where production had been prevented by Swiss bank secrecy laws. 357 U.S. at 211-12; *see also Minpeco*, 116 F.R.D. at 524 ("Swiss interest in bank secrecy is substantial."). Even cases that have enforced U.S. discovery demands have acknowledged that the Swiss interest in financial privacy is strong, and have enforced the demands only because other factors (not present here) have tipped the balance in favor of U.S. law.[20]

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[19] *See, e.g., In re Austrian and German Holocaust Litig.*, 250 F.3d 156, 163-64 (2d Cir. 2001) ("The conduct of foreign relations is committed largely to the Executive Branch, with power in the Legislative Branch to, *inter alia*, ratify treaties with foreign sovereigns. The doctrine of separation of powers prohibits the federal courts from excursions into areas committed to the Executive Branch or the Legislative Branch."); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 340 (1st Cir. 2000) ("Care should be taken not to impinge on the Executive's treaty-making prerogatives or to assume that courts have the institutional competence to perform functions assigned elsewhere by the Constitution.").

[20] *Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.N.Y. 1993) ("[A]s a general matter, Switzerland has a strong interest in enforcement of its secrecy laws."); *Fundacion Museo de Arte Contemporaneo de Caracas v. CBI-TDB Union Bancaire Privee*, No. 93 Civ. 6870 (PKL), 1996 WL 243431, at *2 (S.D.N.Y. Feb. 9, 1996) (ordering disclosure of documents in possession of

It should not be surprising that U.S. courts have been respectful of the Swiss interest in financial privacy and have required competing interests in U.S. law enforcement to yield to it when they conflict. The United States itself has financial privacy laws, including laws protecting the privacy of bank account information.[21] Indeed, numerous non-U.S. residents maintain accounts worth many billions of dollars with financial institutions in U.S. financial centers, including Miami, and there is no U.S. legal requirement that the U.S. financial institutions determine their non-U.S. client's home country tax compliance.[22] More generally, U.S. courts have long required the U.S. law enforcement interest in investigating crimes to yield to personal privacy interests protected by U.S. law, most notably by the Fourth Amendment's prohibition against unreasonable searches and seizures. In that context, U.S. courts regularly accept arguments that the government's interest in collecting or using evidence must bend before the individual's right to have his

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Swiss bank, but acknowledging that secrecy rules "embody an important interest of Switzerland" and that disclosure "presents the possibility [of] hardships to [defendant] or its employees, including criminal sanctions").

[21] The Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq*., provides that the government may not obtain financial records of a customer of a financial institution under certain circumstances. The act also imposes the requirement in certain circumstances that the records be "relevant to a legitimate law enforcement inquiry." *Id.* § 3407. The Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, requires financial institutions to develop procedures to protect customer information from being accessed by third parties and allows customers to opt-out of the sharing of their account information with third parties.

[22] *Cf.* 31 C.F.R. § 103.121 (2008) (Customer Identification Program rules applicable to U.S. banks impose no such requirement); 31 C.F.R. § 103.178 (2008) (due diligence requirements for U.S. banks with respect to private banking accounts of non-U.S. persons impose no such requirement); OECD, *Improving Access to Bank Information for Tax Purposes* 59-60 (2000) (A 0443-44) (summarizing information and documentation requirements associated with opening U.S. bank accounts, imposing no such requirement).

private home, vehicle, or bank safe deposit box[23] immune from invasion without "probable cause" to suspect the commission of crimes. And they do so at an acknowledged high cost to the nation's law enforcement efforts, *e.g.*, *United States v. Janis*, 428 U.S. 433, 448-49 (1976) ("[T]he exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence."). Deferring to this constitutionally protected interest in privacy has been an everyday occurrence in federal and state courts across the country since the recognition of the exclusionary rule. *A fortiori*, the interest of a separate sovereign in protecting those who deposit funds in accounts of banks organized under its laws from analogous intrusions on personal privacy, should be entitled to respect. Except for the circumstance that one expectation of privacy is created by U.S. law and the other by Swiss, there is no reason why the legal system should afford greater status to a legal expectation of privacy in a car, coat pocket, or "curtilage," than to an expectation of privacy in a bank account. If anything, because the latter interest is a feature of foreign, not domestic, law, the doctrine of comity would suggest that it should receive *more* deference, not less.

Any doubt whether the Swiss Government's interest in enforcement of its financial privacy laws is strong is dispelled by the Swiss Government's (granted) request to file an amicus brief in this matter, Press Release, Switz. Fed. Dep't of Fin., Swiss Confederation to Set Out Its Position in the Court Action Against UBS in the USA (Mar. 13, 2009) (A 0398), a circumstance that distinguishes this case from the several in which the

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[23] *See* IRS, Internal Revenue Manual § 9.4.9.3.2.2 (2005), *available at* http://www.irs.gov/irm/part9/ch04s12.html (recognizing that search warrants must be executed to search a safe deposit box). Probable cause is a far more demanding standard than the "reasonable suspicion" standard applicable to requests for administrative assistance under the DTT.

interest of a foreign government has been held not so strong. For example, in *Nova Scotia I*, the Bahamian Government did not participate in the proceedings, and its interest in the outcome was not clear. 691 F.2d at 1389. In the related decision, *In re Grand Jury Proceedings (United States v. Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir. 1984) ("*Nova Scotia II*"), the Government of the Caymans did not object to providing the information sought (and in fact ultimately authorized the release of information). The non-objection — indeed, "affirmative cooperation" — of the Cayman Attorney General was also a "significant" factor in *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985). And in *Vetco*, the Swiss Government did not oppose the summons. 691 F.2d at 1289. *See also SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 117-18 (S.D.N.Y. 1981) ("The Swiss government, . . . though made expressly aware of the litigation, has expressed no opposition.").

And in contrast with the several cases in which enforcement was ordered because it was not clear to the U.S. court whether foreign law would in fact be violated,[24] or whether foreign citizens were actually subject to penalty,[25] the Summons here, if complied with by UBS, would result in criminal violations that the Swiss Government has regularly prosecuted in the past (*see* Section F), with respect to information that originated and resides

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[24] *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983 (Marc Rich & Co. A.G. v. United States)*, 731 F.2d 1032 (2d Cir. 1984) (rejecting contention that Swiss law prevented compliance with subpoena where party asserted attorney-client privilege, not bank secrecy); *Vetco*, 691 F.2d at 1287 (stating, in case not involving bank secrecy, that there had been no finding that production would violate Swiss law); *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544 (S.D.N.Y. 2002) (requiring production where, *inter alia*, defendant argued unsuccessfully that executive privilege applied to requested documents).

[25] *E.g.*, *First Nat'l Bank of Cicero v. Reinhart Vertrieb's AG*, 116 F.R.D. 8, 9 (N.D. Ill. 1986) (noting that "defendant has not presented any evidence the Swiss code will be enforced in this case"); *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d at 563 (not clear that foreign subject would become subject to prosecution).

solely in Switzerland, outside the United States. Thus, Restatement Factors 2 through 5 also weigh strongly against enforcement of the Summons. Unlike *Nova Scotia I & II*, where a Canadian bank faced the prospect of prosecution only in Caribbean countries where it conducted a minority of its operations, here a Swiss bank's employees would face a keen risk of prosecution in their home country and the bank's base of operations.

IV. The Summons Is Far Too Broad to Be Enforced (Restatement Factor 6).

Another way in which this case presents a stronger case for nonenforcement than others is the striking lack of specificity in the Summons's requests, a consideration relevant to the sixth Restatement factor.

As discussed above (Section II.A.2), the Summons is among the broadest and least specific ever served by the IRS. In cases where courts have enforced U.S. discovery demands that conflict with foreign financial privacy laws, those requests were substantially narrower than the requests here. In *Nova Scotia II*, for example, the grand jury subpoena sought documents relating to only two identified individuals and three identified companies, *see* 740 F.2d at 820, and in *Nova Scotia I*, the subpoena sought records relating to the accounts of a single customer, 691 F.2d at 1386. *See also Davis*, 767 F.2d at 1026 (four identified individuals); *Vetco*, 691 F.2d at 1284 (one U.S. company, its Swiss subsidiary and its tax accounting firm); *Fundacion Museo*, 1996 WL 243431, at *1 (one identified individual); *Banca Della Svizzera*, 92 F.R.D. at 113 (requests were "refined at the Court's suggestion to target the demanded disclosure in simplest terms"). That is a far cry from this case, where, in place of a grand jury subpoena seeking specific information from a handful of foreign accounts, the Summons, an instrument of civil discovery, seeks all records, spanning more than half a decade, from tens of thousands of accounts. Even if considerations of financial

privacy and comity did not operate as a bar to compliance, considerations of practicality and burden would counsel strongly against enforcement.

Nor can the breadth of the Summons be excused on the ground that it was issued by the IRS, as opposed to a private party. Even when compliance has not been complicated by foreign legal considerations, courts have declined to enforce IRS summons that are not tailored to specific suspicions of wrongdoing.[26] If the overbreadth of a summons is a bar to enforcement when the records sought are located solely within the United States, then it militates, *a fortiori*, against enforcement when the summons seeks records located in a foreign country whose privacy laws bar their production altogether. *See In re the Matter of Tax Liabilities: John Does*, No. C-88-0137 (A 0304).

V. UBS Has Taken Extraordinary Steps to Comply in Good Faith with Its Conflicting Obligations Under U.S. and Swiss Law.

In nearly every case where a court has enforced a subpoena despite a conflict with the laws of a foreign state, the target of the subpoena had demonstrated a clear lack of good faith.[27] For example, in *Nova Scotia II,* the bank ignored rulings of the district court,

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[26] *See, e.g.*, *United States v. Theodore*, 479 F.2d 749, 754 (4th Cir. 1973) ("The Government cannot go on a 'fishing expedition' through appellants' records, and where it appears that the purpose of the summons is 'a rambling exploration' of a third party's files, it will not be enforced."); *United States v. Monumental Life Ins. Co.*, 440 F.3d 729, 737 (6th Cir. 2006) (denying enforcement of a summons because "some of the documents requested by the IRS appear to be far removed from the investigation of [a particular individual's] tax liability").

[27] *Nova Scotia I*, 691 F.2d at 1387, 1389 (upholding district court finding that bank "had not made a good faith effort to comply with the subpoena" where Bahamian government "ha[d] not acted to prevent the Bank from complying with the subpoena" and bank "declined to produce the documents"); *Nova Scotia II*, 740 F.2d at 826 (noting that, after issuance of grand jury subpoena, "nothing was substantially done by the bank" to comply with its production obligations; that Bank's belated production of only a few documents seven months later remained "obviously" deficient); *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. at 563-64 (finding that defendant "d[id] not appear to have genuinely attempted to comply" with subpoena); *First Nat'l Bank of Cicero*, 116 F.R.D. at 9 (noting that

was cited for contempt, and falsely represented on more than one occasion that it had produced all relevant documents. 740 F.2d at 820-26. Such uncooperative behavior is in sharp contrast with the extraordinary good faith efforts of UBS. UBS received the Summons in July 2008, and since then, although bound by Swiss law, has made substantial efforts in the United States and Switzerland to comply with the Summons. Levene Decl. ¶ 2. As described in Section G, above, UBS has, in consultation with the IRS, conducted a wide-ranging search for information located exclusively within this country. *Id.* ¶ 9. Responsive information emerged from that search, including records of wire transfers reflecting transfers of funds between 463 U.S.-based and Swiss-based accounts held by U.S. persons for which there is no Form W-9 on file in Switzerland. *Id.* ¶ 12. UBS has also recently asked its clients for consent to provide their account information to the IRS pursuant to the Summons, and in excess of 75 accountholders have already consented. *Id.* ¶¶ 19-20; UBS Decl. ¶ 18.

UBS's exit from the U.S. cross-border business and its other actions relating to the DPA also demonstrate good faith. UBS cooperated with the DOJ and SEC investigations and in executing the DPA took responsibility for wrongdoing. Going forward, all U.S. resident private accounts will be terminated unless the account holders choose to be served exclusively by UBS's SEC-regulated affiliates. DPA ¶ 5 (A 0264). As part of this exit, UBS has also encouraged account holders, if not in compliance with U.S. tax laws, to consider voluntary disclosure to the IRS, and has offered to help them accomplish that goal. Levene Decl. ¶ 22. In light of the clear dictates of Swiss law, there is nothing

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"defendant apparently has made no effort to secure permission to make the information available"); *Banca Della Svizzera Italiana*, 92 F.R.D. at 117.

more UBS could do to demonstrate its willingness to comply in good faith with the Summons. In similar cases where a subpoena seeks information protected by financial privacy laws, the good faith efforts of a target — efforts not as extensive as those made by UBS — have been deemed highly relevant and courts have declined to enforce the subpoena.[28]

VI. The IRS Has Received or Will Receive Much of the Information It Seeks Through Means Other Than Summons Enforcement (Restatement Factor 7).

A final factor bearing upon whether to enforce a U.S. discovery obligation in the face of conflicting foreign law is whether the information sought is available through other means. *Third Restatement* § 442(1)(c). This factor weighs against enforcement here because the IRS has already received, or will receive, much of the information it seeks even without the Summons. In connection with disclosures made pursuant to the DPA, the IRS received information on Swiss UBS accounts involving offshore entities for which there was a reasonable suspicion of "tax fraud or the like." Swiss Tribunal Opinion ¶ 5.5.4 (A 0373-74). UBS has also responded to the Summons by producing volumes of responsive, U.S.-based information to the IRS. The publicity surrounding this matter induced many taxpayers into "self-disclosing," *see, e.g.*, Carrick Mollenkamp & Evan Perez, *UBS Clients Seek Amnesty on U.S. Taxes*, Wall St. J., Nov. 24, 2008, at C1, and this type of voluntary disclosure accelerated with the announcement of the DPA in February and the associated

[28] *E.g.*, *In re Sealed Case*, 825 F.2d at 498 ("[T]he bank had acted in good faith throughout these proceedings."); *Minpeco*, 116 F.R.D. at 528 ("The last factor to be taken into account is the good faith shown by the party resisting discovery."); *In re Two Grand Jury Subpoenas Duces Tecum*, 158 Misc. 2d at 225-26 ("UBS has made strenuous good-faith efforts to comply with the subpoena and has exhausted all options available that might allow compliance with the subpoena without violating Swiss bank secrecy laws.").

turnover of account information by the Swiss Government to the IRS. William Barret & Janet Novack, *UBS Agrees to Pay $780 Million*, Forbes.com, Feb. 18, 2009. UBS has offered to provide the documentation necessary for clients to pursue voluntary disclosure with the IRS, and many thousands of UBS clients have requested the necessary documentation or transferred their assets to the United States. UBS Decl. ¶ 18.

Finally, as UBS urged, Levene Decl. ¶¶ 21-22, the IRS announced in March a penalty reduction program to encourage self-reporting by taxpayers with offshore accounts. *See* Memo. from IRS Deputy Comm'r for Servs. and Enforcement on Authorization to Apply Penalty Framework to Voluntary Disclosure Requests Regarding Unreported Offshore Accounts and Entities (Mar. 23, 2009) (A 0445-46). This program substantially reduces the penalties for failure to report offshore income. *Id.* In return for this reduced penalty, participants must file amended tax returns and pay all taxes and interest owed over the last six years. *Id.* The IRS's use of similar programs in the past resulted in significant disclosures. *See* Press Release, IRS, Early Data Show Strong Response to Offshore Initiative, Applicants Owe Millions, Reveal Scores of Promoters (May 1, 2003) (A 0392-93). Early responses suggest that the current penalty reduction program may achieve even greater success. *See* Alison Bennett, *Government to Seek Summonses Against Additional Foreign Banks*, Daily Tax Rep. (BNA) No. 79 DTR G-1 (Apr. 28, 2009).

Conclusion

For the foregoing reasons, the Court should deny the Petition to enforce the Summons.

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Miami, Florida

Respectfully submitted,

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