

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

Case No. 09-20423-CIV-GOLD/MCALILEY

UNITED STATES OF AMERICA,)
)
Petitioner,)
)
v.)
)
UBS AG,)
)
Respondent.)

**MEMORANDUM OF LAW IN SUPPORT OF
PETITION TO ENFORCE "JOHN DOE" SUMMONS**

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**MEMORANDUM OF LAW IN SUPPORT OF
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ISSUES FOR DECISION

1. Congress gave the IRS broad power to summons information to administer the tax laws. To enforce a summons, the IRS bears a slight burden. The uncontested declarations filed with the petition in this case satisfy that minimal burden. Those declarations – together with UBS’s own documents and admission of guilt in the related criminal case – prove that for years UBS regularly sent private bankers into the United States, and used phone, fax and e-mails from Switzerland to communicate with American clients in the United States, to help American taxpayers evade their obligations to report and pay taxes on all income, and to declare all offshore bank accounts. Has the United States proven a *prima facie* case to enforce the John Doe summons issued to UBS?

2. A person seeking to block enforcement of a summons bears a high burden to show that enforcement would constitute an abuse of the court’s process. In considering that defense in

this context, the Court should weigh the relative interests of the United States and Switzerland in enforcing their respective laws as against U.S. taxpayers, the extent to which UBS's conduct occurred within the United States, and other factors. Where UBS systematically and regularly contacted customers in the United States in violation of U.S. law, and helped untold thousands of Americans violate U.S. law, should the Court strike that balance in favor of protecting the sovereignty of the United States and the integrity of its laws, by ordering UBS to comply with the summons?

INTRODUCTION – SUMMARY OF ARGUMENT

The facts that bring the parties into court are not disputed:

1. The Internal Revenue Service is investigating as many as 52,000 unknown U.S. taxpayers who flouted their obligations to their government, by refusing to disclose their secret accounts at UBS AG, one of the largest banks in Switzerland. The IRS seeks the identities of those account holders (and other account information) from a Swiss bank that regularly conducted business in secret within the United States, and systematically violated U.S. law.
2. UBS regularly sent its private bankers into the United States to solicit business from and maintain business with U.S. citizens and residents. Those UBS private bankers made thousands of client solicitations and contacts within the United States. Those contacts earned UBS AG more than \$100 million in fees. At the same time, that business cost the U.S. Treasury hundreds of millions of dollars in unpaid taxes. UBS AG ended this practice only after the Tax Division of the Department of Justice learned of its conduct, and contacted UBS. Until its activities were discovered, UBS – on U.S. soil – regularly violated U.S. law, and actively helped its U.S. customers violate U.S. law.

3. UBS private bankers conducted their business in the United States in ways designed to prevent the United States government – including the IRS, the SEC, Customs, and Immigration – from learning what they were doing. They lied on Customs forms – claiming to be in the United States for pleasure, when in fact they had come to the United States to conduct UBS business with U.S. customers – and conducted their business under the radar.

4. Officials at UBS knew that if the activities of their private bankers within the United States were discovered by U.S. law enforcement agencies:

- a. UBS could be held criminally liable for its illegal conduct; and
- b. UBS could be called to account under the civil laws of the United States, in which it chose to conduct its illegal cross-border business. This included being required to disclose the identities of its U.S. customers whom UBS actively helped evade their obligations under U.S. tax laws.

5. One of the principal benefits that UBS promoted to its U.S. customers was that the customers could avoid their obligations to the United States, and rely on Swiss bank secrecy laws to avoid detection by the IRS.

The legal issues presented here are not unusual, when viewed in context:

1. The United States seeks information from a Swiss bank that knowingly conducted business within the United States, in violation of U.S. law.
2. The Swiss bank knew it was helping its U.S. customers violate U.S. law.
3. The Swiss bank knew it was violating U.S. laws and knew that if its conduct were discovered, it could be held criminally and civilly liable.

What **is** unusual – and demonstrably wrong – is the position that the bank has taken in response.¹ It claims:

1. The bank secrecy laws of Switzerland should shield from investigation U.S. taxpayers, many of whom UBS solicited within the United States to establish secret offshore accounts.
2. The United States entered into a treaty with the bank's home country (Switzerland) in which the United States is said to have agreed that it could not use a law-enforcement tool expressly designed to seek information directly from businesses and individuals found within the United States.
3. The United States entered into a treaty with the bank's home country (Switzerland) in which the United States is said to have agreed to be bound by Swiss bank secrecy law, in investigating thousands of U.S. citizens and residents whose violations of U.S. law were aided by a Swiss bank doing business openly and notoriously **within the United States**.
4. The United States should be bound by the terms of an agreement it entered into in good faith with UBS (the Qualified Intermediary, or QI, Agreement), which UBS secretly and consistently violated with impunity.

For reasons that are discussed in detail below, the Court should reach the following conclusions:

1. The United States has made a *prima facie* case to enforce this summons, which UBS has not even attempted to rebut;

¹The *amici* have raised similar arguments.

2. Swiss law, principles of international comity, and the QI Agreement do not shield U.S. taxpayers from liability, where UBS has systematically and deliberately violated the laws of the United States on U.S. soil.

All the rest is diversion.

FACTS²

A. The IRS is Investigating Non-Complying United States Taxpayers

The IRS is conducting an investigation to determine the identities of U.S. taxpayers who have violated the Internal Revenue Code by failing to report the existence of, and income earned in, undeclared Swiss accounts with UBS. Internal Revenue Agent Daniel Reeves is leading that investigation. In connection with that investigation, on July 21, 2008 the IRS issued a “John Doe” summons under the authority of 26 U.S.C. §7602(a), seeking information about an identifiable class of unknown U.S. taxpayers as described in the summons. On July 1, 2008, this Court entered an order under 26 U.S.C. §7609(f), authorizing the IRS to serve the John Doe summons on UBS. The IRS did so on July 21, 2008, making the summons returnable on August 8, 2008. UBS failed to comply with the summons, in that it has not produced all the documents demanded in the summons.³

²The facts recited in this section are taken from the Declaration of Barry B. Shott and the Amended Declaration of Daniel Reeves (both of which are uncontroverted in UBS’s papers); the Deferred Prosecution Agreement approved by the court in United States v. UBS AG, Case No. 09-60033-CR-COHN (S.D. Fl. 2/18/09) (UBS Appendix A, pp. 261-303); and the Deposition of Isabelle Romy, taken June 2, 2009 (portions of which are filed with this Memorandum).

³Amended Reeves Decl., ¶¶ 1-10. UBS says the IRS agreed that UBS did not have to produce documents on August 8, 2008, the date for appearance in the summons. (Levene Decl., ¶ 4) It also argues that it has produced substantial information in response to the summons. Both are true. But neither argument obviates enforcing this summons. The United States filed this action more than 6 months after the date for compliance had passed, after UBS had made it

The John Doe class includes all U.S. taxpayers who maintained an “undeclared” account at UBS in Switzerland at any time between 2002 and 2007.⁴ The summons demands documents identifying each U.S. taxpayer in the John Doe class, and reflecting the establishment of and activity within the account. This information relates directly to the investigation into undeclared UBS accounts held or controlled by U.S. taxpayers. Except for the information that UBS produced under the terms of the Deferred Prosecution Agreement (DPA) discussed below, the information located in Switzerland is not in the IRS’s possession. And the IRS has taken all administrative steps required by the Internal Revenue Code for issuance of the summons.⁵

All United States taxpayers – wherever they live – must file annual income tax returns with the IRS, disclosing the existence of, and reporting all income earned from, foreign financial accounts. Taxpayers who fail to do so are violating U.S. law. Many U.S. taxpayers have long employed offshore accounts in countries with strict banking secrecy laws – like Switzerland – as a means to conceal assets and income from the U.S. Government.⁶ This conduct has deprived the

patently clear that it would not produce all the documents demanded in the summons. And although UBS has produced some documents, it has refused to produce the vast majority of the documents. This is undisputed.

⁴The summons defines the “John Doe” class in more technical terms to include United States taxpayers who at any time during the years 2002-2007 had authority with respect to any financial accounts maintained at, monitored by, or managed through any office of UBS AG (or affiliate) in Switzerland, for whom UBS AG (1) did not have in its possession Forms W-9 executed by the U.S. taxpayer, and (2) had not filed timely and accurate Forms 1099 naming such U.S. taxpayers and reporting to United States taxing authorities all payments made to such U.S. taxpayers. (Amended Reeves Decl., ¶ 7)

⁵Amended Reeves Decl. ¶¶ 10, 11, 13, 17-19, 21.

⁶*See, e.g.*, H.R. Rep. No. 975, 91st Cong. 2^d Sess. 12, reprinted in (1970) U.S. Code Cong. & Admin. News 4394, 4397.

United States Treasury of untold millions of dollars in unpaid taxes. To date, the IRS's investigation has revealed that many U.S. taxpayers concealed their overseas assets from the IRS by using secret UBS Swiss bank accounts. UBS describes those accounts – accounts where it does not have an IRS Form W-9 from the account holder – as “undeclared accounts.” The IRS has also learned that UBS, one of the largest banks in Switzerland, collaborated with many U.S. taxpayers to establish overseas accounts and actively conceal those accounts from the IRS.⁷

B. UBS Broke the Law, and Helped U.S. Taxpayers Evade Their Taxes.

On February 18, 2009, Judge Cohn of this Court approved a Deferred Prosecution Agreement (DPA) between the United States and UBS.⁸ In the DPA, UBS admitted that beginning in 2000 and continuing until 2007 it had, “participated in a scheme to defraud the United States and its agency, the IRS, by actively assisting or otherwise facilitating a number of United States individual taxpayers in establishing accounts at UBS in a manner designed to conceal the United States taxpayers’ ownership or beneficial interest in these accounts.” The details of that scheme are described in Exhibit C to the DPA, the Statement of Facts. Among other things, in the DPA UBS agreed to pay \$780 million to the United States.

UBS’s criminal conduct spanned a wide variety of activities. UBS agrees that much of its criminal conduct occurred on U.S. soil, in ways that subject UBS to the jurisdiction of the Internal Revenue Service and the courts of the United States:

⁷Amended Reeves Decl., ¶¶ 14-16.

⁸Because UBS has agreed to the matters recited in the Statement of Facts, we cite facts from that agreement where appropriate, instead of from the Amended Declaration of Daniel Reeves.

1. UBS Committed and Facilitated Tax Evasion in the United States. In

¶4.A. of the Statement of Facts, UBS agreed,

Beginning in 2000 and continuing until 2007, UBS, through certain private bankers and managers in the U.S. cross-border business, participated in a scheme to defraud the United States and its agency, the IRS, by actively assisting or otherwise facilitating a number of U.S. individual taxpayers in establishing accounts at UBS in a manner designed to conceal the U.S. taxpayer's ownership or beneficial interest in said accounts. In this regard, said private bankers and managers facilitated the creation of such accounts in the names of offshore companies, allowing such U.S. taxpayers to evade reporting requirements and to trade in securities as well as other financial transactions (including making loans for the benefit of, or other asset transfers directed by, the U.S. taxpayers, and using credit or debit cards linked to the offshore company accounts).

2. UBS Knowingly Helped its U.S. Customers Commit Tax Evasion. In

¶4.B. of the Statement of Facts, UBS agreed:

In connection with the establishment of such offshore company accounts, UBS private bankers and managers accepted and included in UBS's account records IRS Forms W-8BEN (or UBS's substitute forms) provided by the directors of the offshore companies which represented under penalty of perjury that such companies were the beneficial owners, for U.S. federal income tax purposes, of assets in the UBS accounts. In certain cases, the IRS Forms W-8BEN (or UBS's substitute forms) were false or misleading in that the U.S. taxpayer who owned the offshore company actually directed and controlled the management and disposition of the assets in the company accounts and/or otherwise functioned as the beneficial owner of such assets in disregard of the formalities of the purported corporate ownership.

In ¶38 of his Amended Declaration, Daniel Reeves uses UBS documents to describe in detail one way that UBS helped its U.S. customers evade their U.S. taxes, by setting up sham offshore entities, and filing false W-8BENs, to mislead the IRS about the true owner of the account.

3. UBS's Private Bankers Conducted Their Illegal Activities Within the United States, and Knowingly Exposed UBS to the Jurisdiction of the IRS and United States

Courts. In ¶ 4.C. of the Statement of Facts, UBS agreed,

Additionally, said private bankers and managers would actively assist or otherwise facilitate certain undeclared U.S. taxpayers, who such private bankers and managers knew or should have known were evading United States taxes, by meeting with such clients in the United States and communicating with them via U.S. jurisdictional means on a regular and recurring basis with respect to their UBS undeclared accounts. This enabled the U.S. clients to conceal from the IRS the active trading of securities held in such accounts and/or the making of payments and/or asset transfers to or from such accounts.

In a 2004 training session, UBS acknowledged that its cross-border brokerage services could trigger the United States' "broad subpoena power [or] long-arm jurisdiction rules."

Amended Reeves Decl., ¶ 48, Ex. 20. In a 1999 memorandum, Markus Affholter of the New York office of UBS's Private Banking Legal Department acknowledged the risk that UBS was taking by providing brokerage services to U.S. customers without the requisite license, noting that the registration requirements come into play, "because such activity of the Bank has its effect on U.S. territory and is therefore subject to U.S. jurisdiction." Amended Reeves Decl., ¶ 49.

4. UBS Found the Illegal U.S. Business Profitable And Knew its Reputation Would be Harmed if its U.S. Activities Were Discovered. In ¶ 4.C of the Statement of Facts,

UBS agreed:

Certain UBS executives and managers who knew of [this conduct] continued to operate and expand the U.S. cross-border business because of its profitability. It was not until August 2007 that executives and managers made a decision to wind down the U.S. cross-border business. Executives and managers delayed this decision due to concerns that it would be costly, that it was not

likely a third party buyer of the business could be found, and it could damage UBS's business reputation.

UBS knew that if it stopped using telephone and e-mails, and stopped traveling to the United States, to provide investment advice to its U.S. customers within the United States, it would be tantamount to UBS's "virtual/real exit" from the U.S. market. Amended Reeves Decl., ¶ 46, Ex. 19.

5. UBS Adopted Compensation Practices That Encouraged its Bankers to Engage in Illegal Conduct in the United States. In ¶ 5 of the Statement of Facts, UBS agreed,

In or about 2004, the UBS Wealth Management International business changed its compensation approach . . . Thereafter, the managers of the U.S. cross-border business implemented this new compensation structure in a way that provided incentives for U.S. cross-border private bankers to expand the size of the U.S. cross-border business. This encouraged those private bankers to have increased contacts with U.S.-resident private clients via travel to the United States and contact with U.S. clients via telephone, fax, mail and/or e-mail.

6. UBS Private Bankers Based in Switzerland Regularly Traveled to the United States, and Regularly Conducted Business With UBS Customers Located Within the United States. In ¶ 6 of the Statement of Facts, UBS agreed,

[D]uring the relevant period, Swiss-based UBS private bankers also traveled to the United States to meet with certain of their U.S. private clients, including U.S. persons who were beneficial owners of offshore companies that maintained accounts at UBS. This U.S. cross-border business was serviced primarily from service desks located in Zurich, Geneva, and Lugano, which employed about 45 to 60 Swiss-based private bankers or client advisors who specialized in servicing U.S. clients. These private bankers traveled to the United States an average of two to three times per year, in trips that generally varied in duration from one to three weeks, and generally tried to meet with about three to five clients per day. An internal UBS document estimated that U.S. cross-

border business private bankers had made approximately 3,800 visits with clients in the United States in 2004. In addition, while in Switzerland, these private bankers would communicate via telephone, fax, mail, and/or e-mail with certain of their private clients in the United States about their account relationships, including on occasion to take securities transaction orders in respect of offshore company accounts.

7. UBS Private Bankers Used Stealth to Avoid Detection. In ¶ 6 of the Statement of Facts, UBS also agreed, “Private bankers in the U.S. cross-border business typically traveled to the United States with encrypted laptop computers to maintain client confidentiality and received training on how to avoid detection by US. authorities while traveling to the United States.”

Examples of the steps UBS took to help its private bankers avoid detection while in the United States are found in Amended Reeves Decl., ¶¶ 55-56. Amended Reeves Decl., ¶ 45, describes the elaborate coding system that one UBS private banker used to conceal his illegal activities within the United States, on behalf of U.S. customers who controlled undeclared Swiss accounts at UBS.

8. UBS Knew it Was Helping its U.S. Clients Evade Their Obligations to the IRS. In ¶ 9 of the Statement of Facts, UBS agreed,

On July 14, 2000, managers in the U.S. cross-border business, . . . changed the wording on a UBS form letter that was sent to U.S. clients entitled “Declaration for US Taxable Persons” from “I would like to avoid disclosure of my identity to the US Internal Revenue Service under the new tax regulations” to “I am aware of the new tax regulations” after U.S. clients expressed concern that the form as originally drafted could be considered an admission of tax evasion by U.S. clients.

According to an internal UBS e-mail, many U.S. taxpayers refused to sign the document as initially presented, since it, “fully incriminates a US person of criminal wrongdoing should this document fall into the wrong hands.” Amended Reeves Decl., ¶ 27, Ex. 6.

9. UBS Helped its U.S. Clients Illegally Structure their Accounts to Avoid

Disclosure to the IRS. In ¶ 12 of the Statement of Facts, UBS agreed,

Some U.S. clients . . . indicated that they wanted to continue to maintain their U.S. securities holdings and not provide UBS with a form W-9 (or UBS’s substitute form), thereby concealing their U.S. securities holdings from the IRS. . . . [C]ertain managers in the U.S. cross-border business thereafter authorized UBS private bankers to refer those U.S. clients who did not wish to comply with the new requirements of the QI Agreement to certain outside lawyers and consultants, and did so with the understanding that these outside advisors would help such U.S. clients form offshore companies in order to enable such clients to evade the U.S. securities investment restrictions in the QI Agreement. . . . UBS, through such referrals . . . assisted such U.S. clients in creating and maintaining sham, nominee or conduit offshore companies in jurisdictions like Panama, Hong Kong, and the British Virgin Islands, that enabled such clients to conceal their investments in U.S. securities, and thereby evade UBS’s obligation to provide tax information reporting on an anonymous basis and to backup withhold with respect to certain payments made to such accounts.

To determine which service providers to recommend to its U.S. customers, on August 17, 2004, UBS officials met to review presentations from competing service providers who were invited, “to make a short presentation on the structures/vehicles that you recommend to U.S. and Canadian clients who do not appear to declare income/capital gains to their respective tax authorities.” Amended Reeves Decl., ¶ 34, Ex. 9.

C. The U.S.-Swiss Tax Treaty Does Not Provide an Avenue for the IRS to Obtain the Documents Sought in This Summons.

At the same time the IRS sought to obtain UBS documents directly from UBS through the John Doe summons, the IRS also sought information about U.S. lawbreakers through the tax treaty with Switzerland (the “DTT”). The Declaration of Barry B. Shott describes the efforts that the IRS made to obtain information about the approximately 52,000 holders of UBS undisclosed accounts. The Shott Declaration also describes the results of those efforts, under which the IRS obtained just a minuscule portion of the information sought in the summons issued to UBS.

Moreover, the scope of information that the IRS may obtain under its treaty request is no longer at issue in this dispute, because of the agreement reached as part of the Deferred Prosecution Agreement. Under the Deferred Prosecution Agreement, the United States has withdrawn its treaty request to Switzerland, and has agreed to refrain from making any other treaty requests to Switzerland concerning customers of UBS, that do not identify the specific taxpayers about whom the United States seeks information.⁹ In short, there is no pending treaty request, and the parties have agreed that no more “John Doe” treaty requests will be made for information about UBS customers.

In sum, UBS has admitted that its bankers committed very serious crimes on U.S. soil, in ways that subjected UBS to the full jurisdiction of the IRS and the courts of the United States. The information sought in this summons is in the possession and control of UBS, and not in the possession of the IRS. In the following sections of this memorandum, we describe precisely the consequences that UBS has brought upon itself as a result of its conduct.

⁹See, e.g., Amicus Brief of Government of Switzerland, p. 10.

ARGUMENT

I.

CONGRESS HAS GIVEN THE IRS BROAD SUMMONS AUTHORITY

In 26 U.S.C. §7602(a), Congress authorized the Internal Revenue Service to issue a summons “[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . , or collecting any such liability.” The court of appeals has described the summons power as “broad and expansive,” analogizing an IRS summons to a grand jury subpoena.¹⁰

While that power is not limitless, the Supreme Court has held that a court should decline to impose restrictions on the IRS’s summons power under §7602(a), “absent unambiguous directions from Congress,” or “substantial countervailing policies.”¹¹ Following the Supreme Court’s approval of John Doe summonses under §7602(a),¹² Congress enacted legislation that expressly authorized the IRS to issue a summons which does not identify the person with respect to whose liability the summons is issued. The only restriction Congress placed on the IRS’s use of a John Doe summons is that before it can serve a John Doe summons, the IRS must first

¹⁰La Mura v. United States, 765 F.2d 974, 979 (11th Cir. 1985), quoted in, Nero Trading LLC v. United States, ___ F.3d ___, 2009 WL 1606956 (11th Cir., June 10, 2009); United States v. Davis, 636 F.2d 1028, 1038 (5th Cir. 1981).

¹¹United States v. Arthur Young & Co., 465 U.S. 805, 816 (1984); United States v. Euge, 444 U.S. 707, 711 (1980).

¹²United States v. Bisceglia, 420 U.S. 141 (1975).

obtain a court order, which issues after the IRS has established the elements in §7609(f).¹³ Last year, the court entered an order authorizing the IRS to serve this John Doe summons on UBS.

Despite clearly-established law affirming the IRS's "broad and expansive" summons power, both UBS and the Government of Switzerland object to the alleged breadth of this John Doe summons, arguing that the IRS is conducting a "fishing expedition." On the facts, nothing could be farther from the truth. After all, the summons defines the John Doe class to include only those Americans who held UBS accounts during the relevant period, who did not complete a Form W-9, and to whom UBS did not issue an accurate Form 1099. These forms, had they been completed and issued, would have resulted in UBS disclosing to the IRS the existence of the U.S. taxpayers' UBS accounts, and income earned in those accounts (as required by U.S. law). In other words, the summons seeks information about U.S. taxpayers who broke the law.

The "fishing expedition" argument is even more tenuous as a matter of law. While the Commissioner's summons authority has been described as a license to fish,¹⁴ this license is not without limit. In testing for overbreadth, the courts do not ask whether the summons calls for the production of a large volume of records. Instead, courts ask two questions: (1) did the summons describe the requested documents in enough detail to inform the summoned party of exactly what

¹³Those elements are: The summons relates to the investigation of a particular person, or ascertainable group or class of persons; there is a reasonable basis to believe that such person or group may fail or may have failed to comply any provision of the internal revenue laws; and the information to be obtained, including the identities of the persons with respect to whose liabilities the summons is issued, "is not readily obtainable from other sources."

¹⁴United States v. Luther, 481 F.2d 429, 432-33 (9th Cir. 1973); United States v. Giordano, 419 F.2d 564, 568 (8th Cir. 1969).

is to be produced,¹⁵ and (2) may the summoned records be relevant to the inquiry?¹⁶ The courts have consistently rejected challenges for overbreadth to summonses that are definite in nature and finite in scope.¹⁷ This summons is definite in nature and finite in scope. Therefore, the Court should enforce it.

The “fishing expedition” argument makes even less sense in the context of a John Doe summons. As noted above, before it can serve a John Doe summons, the government must first obtain a court order under §7609(f). In order to secure the court order, the IRS must establish certain elements. As a result, the courts have held that once the IRS has obtained an order authorizing it to serve a John Doe summons, the summons is not subject to collateral attack for overbreadth.¹⁸ In short, the objections about overbreadth lack merit both on the facts and on the law.

¹⁵United States v. Abrahams, 905 F.2d 1282, 1285 (9th Cir. 1990).

¹⁶In re Tax Liabs. of John Does v. United States, 866 F.2d 1015, 1021 (8th Cir. 1989).

¹⁷United States v. Reis, 765 F.2d 1094, 1096 n. 2 (11th Cir. 1985); United States v. Linsteadt, 724 F.2d 480, 483 n.1 (5th Cir. 1984); United States v. Cmty. Fed. Sav. & Loan Ass’n, 661 F.2d 694 (8th Cir. 1981); United States v. Nat’l Bank of South Dakota, 622 F.2d 365 (8th Cir. 1980).

¹⁸United States v. Hamilton, 1992 WL 135579 (N.D. Ga.), *motion for stay pending appeal denied*, 963 F.2d 322 (11th Cir. 1992); United States v. John G. Mutschler & Assoc., Inc., 734 F.2d 363, 366 (8th Cir. 1984); In re Does, 688 F.2d 144, 146, 148-149 (2^d Cir. 1982); United States v. Samuels, Kremer & Co., 712 F.2d 1342, 1346 (9th Cir. 1983).

II.

THE UNITED STATES HAS PROVEN A *PRIMA FACIE* CASE TO ENFORCE THE “JOHN DOE” SUMMONS ISSUED TO UBS AG

If a party fails or refuses to comply with a summons, the United States may file an action to compel compliance. 26 U.S.C. §7604(b) In such an action, the United States must prove a *prima facie* case for enforcement by establishing four elements:

1. The summons was issued for a legitimate purpose.
2. The summoned information may be relevant to that purpose.
3. The summoned information is not already in the possession of the Internal Revenue Service.
4. The IRS has complied with all the administrative requirements of the Internal Revenue Code.¹⁹

The Eleventh Circuit Court of Appeals has held that the IRS, “may satisfy its minimal burden by presenting the sworn affidavit of the agent who issued the summons attesting to these facts.” Once the government makes this showing, “the burden shifts to the party contesting the summons to disprove one of the four elements of the government’s *prima facie* showing or convince the court that enforcement of the summons would constitute an abuse of the court’s process.”²⁰

Here the United States has proven the four Powell elements through the uncontested declaration of Internal Revenue Agent Daniel Reeves:²¹

¹⁹United States v. Powell, 379 U.S. 48, 57-58 (1964).

²⁰United States v. Morse, 532 F.3d 1130, 1132 (11th Cir. 2008); Powell, 379 U.S. at 58. See also, United States v. Davis, supra at 1038; United States v. Balanced Fin. Mgt., Inc., 769 F.2d 1440, 1444 (10th Cir. 1985).

²¹After the United States filed this action, attorneys for UBS advised the petitioner’s counsel that, in their view, some aspects of Revenue Agent Reeves’ declaration may be inadvertently inaccurate or incomplete. As a result of that discussion, the United States filed an Amended Reeves Declaration, addressing some of the matters that opposing counsel had raised. In any event, the respondent has not offered any evidence that would disprove any element of the

1. The IRS Has a Legitimate Purpose. The Internal Revenue Service is investigating whether approximately 52,000 U.S. taxpayers whom UBS has identified as having maintained “undeclared” financial accounts at UBS AG, have properly reported those accounts, and paid the taxes on income earned in those accounts – as required by U.S. law. Making sure that 52,000 U.S. taxpayers obey the tax laws is clearly a legitimate purpose.

2. The Information is Relevant to that Purpose. The IRS seeks the identities of the U.S. holders of undeclared accounts at UBS, and information about those undeclared accounts. While the United States need only establish that the information sought in the summons “may be relevant” to the investigation, the information sought here clearly is relevant.

3. The Information Sought is Not Already in the IRS’s Possession. There is no dispute that the information controlled by UBS in Switzerland, and not already produced, is not in the possession of the IRS.

4. All Administrative Steps Have Been Followed. Agent Reeves established this element in ¶ 21 of his Amended Declaration. UBS has not suggested otherwise.

Because the United States has established a *prima facie* case to enforce the summons, and UBS has not contested that case, the burden now shifts to UBS to prove why enforcement would constitute an abuse of the court’s process. UBS has made three principal arguments: (1) Enforcement would allegedly compel UBS to violate the laws of its home country, Switzerland, in violation of principles of international comity; (2) the United States has allegedly agreed that it can only obtain information located in Switzerland through the U.S.-Swiss Tax Treaty; and (3)

United States’ *prima facie* showing.

The IRS allegedly agreed in the QI Agreement that UBS would not have to identify its U.S. customers.²² As demonstrated below, each of these arguments lacks merit.

III.

INTERNATIONAL COMITY FAVORS ENFORCEMENT

This is not a case of first impression. “Comity is ‘a nation’s expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.’”²³ In the Eleventh Circuit the law of comity, as applied in circumstances like this one, is well settled. The comity analysis is also consistent with the *Restatement (Third) of Foreign Relations*, which UBS failed to apply. As discussed below, the Court should enforce the summons.

A. The Controlling Case Law Supports Enforcement.

In 1981 the Eleventh Circuit Court of Appeals considered the objection of a Canadian chartered bank with branches in the United States to a grand jury subpoena, *duces tecum*, requiring the production of bank records located in the Bahamas.²⁴ There, the Bank of Nova Scotia argued that the court should not order it to produce bank records located in a foreign country, when producing those records in the United States would cause the bank to violate the laws of that foreign country. At the hearing on the government’s motion to compel the bank to

²²Although UBS, the Swiss Government, and the other *amici* have raised additional arguments they are all variants of these three. We will address those arguments in the course of responding to UBS’s arguments below.

²³In re Bank of Nova Scotia, 691 F.2d 1384, 1390 (11th Cir. 1981) (Bank of Nova Scotia I), *quoting*, Somportex Limited v. Phila. Chewing Gum Corp., 453 F.2d 435 (3rd Cir. 1971), cert. denied, 405 U.S. 1017 (1972).

²⁴Id. *See also*, cases cited in fn 8, *supra*, analogizing IRS summonses to grand jury subpoenas.

comply with the subpoena, the bank offered evidence that the records could not be accessed from the United States, and that to produce the records in the United States could expose the bank to prosecution under the Bahamian bank privacy law. The U.S. District Court for the Southern District of Florida ordered the bank to comply, the bank refused, and the district court held the bank in contempt.

On appeal, the bank argued that it was a “mere stakeholder” and did not have any purposeful involvement or responsibility in the matter before the court. The bank also argued that enforcing the subpoena would require the bank to violate the Bahamian bank privacy law. In this context, the bank claimed, imposing contempt sanctions for non-compliance would violate due process, citing the Supreme Court’s decision in Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers.²⁵

The Eleventh Circuit rejected the bank’s claims and affirmed the contempt finding. First, the court rejected the notion that Société Internationale supported the bank’s due process claims: “*Société Internationale* does not stand for the proposition that a lawfully issued grand jury subpoena may be resisted on constitutional grounds where compliance would violate foreign criminal law.”²⁶ The Eleventh Circuit then found that the bank had not brought itself within the

²⁵357 U.S. 197 (1958). In that case, the plaintiff, a Swiss holding company, brought an action to recover assets seized under the Trading with the Enemy Act. When the plaintiff failed to produce Swiss-based records relating to its claim – arguing that production would violate Swiss law – the district court dismissed the case for failing to comply with the discovery order. In reversing, the Supreme Court, “held that the sanction of outright dismissal could not be imposed where that plaintiff had acted in good faith, was unable to comply because of foreign law, and was entitled to a hearing on the merits in order for the Trading with the Enemy Act to withstand constitutional challenge.”

²⁶Id., citing United States v. Vetco, Inc., [691 F.2d 1281 at 1290 (9th Cir. 1981)]; Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir. 1978), cert. denied, 439 U.S. 833 (1979); and SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981).

holding of Société Internationale, because it had not made a good faith effort to comply with the subpoena, the Bahamian government had not acted to prevent the bank from complying, and the bank had not been denied a constitutionally required forum to recover confiscated assets (as had the plaintiff in Société Internationale).

Finally, the bank argued that comity between nations precludes enforcement of the subpoena. In particular, the bank argued that the district court improperly analyzed the case under the 5-part balancing test of the *Restatement (Second) of Foreign Relations* §40 (1965), adopted in the controlling case, In re Grand Jury Proceedings. United States v. Field.²⁷

In Bank of Nova Scotia I, the Eleventh Circuit rejected the bank's efforts to distinguish Field, and affirmed the contempt holding against the Bank of Nova Scotia. First, the Eleventh Circuit rejected the bank's attempt to distinguish Field on the ground that, unlike the Cayman Islands bank where Mr. Field was employed, the Bank of Nova Scotia was not the subject of the grand jury investigation. Second, the court rejected the bank's claim that the subpoena for documents located in the Bahamas differed from the subpoena for testimony at issue in Field.

Third – especially pertinent here – the Eleventh Circuit rejected the bank's attempt to distinguish Field on the ground that the subpoena called for the production of documents located in the Bahamas, instead of in the United States:

This argument is without merit for two reasons. First, the disclosure to the grand jury will occur in this country. See *United States v. Vetco, Inc.*, Second, the affront to the Bahamas occurs no matter where the information is originally located; the

²⁷532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976). In Field, an officer of a bank in the Cayman Islands was held in contempt for refusing to testify under a subpoena issued by a grand jury investigating the use of foreign banks to thwart U.S. tax enforcement. He claimed that the very act of testifying about his bank and its customers – even in the United States – would subject him to criminal prosecution in his home country. Nonetheless, the Fifth Circuit upheld contempt sanctions against the witness.

interest of the Bahamas in preserving the secrecy of these records is impinged by the fact of disclosure itself.²⁸

Finally – also significant here – the bank argued that instead of issuing a subpoena, the United States should attempt to obtain the bank records by seeking a judicial assistance order from the Supreme Court of the Bahamas. The Eleventh Circuit rejected that argument in no uncertain terms:

Applying for judicial assistance . . . is not a substantially equivalent means for obtaining production because of the cost in time and money, **and the uncertain likelihood of success in obtaining the order.** . . . The judicial assistance procedure does not afford due deference to the United States' interests. **In essence, the Bank asks the court to require our government to ask the courts of the Bahamas to be allowed to do something lawful under United States law.** We conclude such a procedure to be contrary to the interests of our nation and outweigh the interests of the Bahamas.²⁹

The Eleventh Circuit has applied Field and Bank of Nova Scotia I consistently in the interim. In 1991, the Eleventh Circuit applied the same analysis – and reached the same result – involving a subpoena issued by the United States Attorney in Miami to this respondent, UBS, for records located in Panama and Switzerland.³⁰ There, the U.S. District Court for the Southern District of Florida denied UBS's motion to quash the subpoena, relying on the controlling Eleventh Circuit authority.³¹ When UBS refused to comply, the district court held UBS in

²⁸691 F.2d at 1390.

²⁹Id. at 1391 (emphasis added).

³⁰In re Grand Jury Proceedings: Union Bank of Switzerland v. United States, 946 F.2d 904 (Table) (11th Cir. 1991), cert. denied, 112 S.Ct. 1163 (1992). UBS's petition for writ of certiorari, copy attached, is found at 1991 WL 11179001 (11/21/91).

³¹United States v. Bank of Nova Scotia, 740 F.2d 817 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985) (Bank of Nova Scotia II). In that case, the U.S. District Court for the Southern District of Florida entered an order directing the Bank of Nova Scotia to comply with a grand

contempt of court, and imposed a contempt sanction of \$10,000 for each day that the bank records of UBS (Panama) were not produced. The Eleventh Circuit affirmed *per curiam*, and the Supreme Court denied certiorari.

In support of its motion to quash the subpoena for records of its wholly-owned subsidiary in Panama (UBS Panama), UBS argued that UBS Panama was not subject to the *in personam* jurisdiction of the U.S. courts. UBS also argued that a factor weighing against enforcement was that neither UBS nor UBS (Panama) was a target of the grand jury investigation, nor was either bank alleged to have committed any crimes or engaged in any wrongdoing. UBS insisted that to comply with the subpoena would subject UBS and UBS (Panama) to criminal prosecution in Switzerland and Panama, respectively, for violating the bank secrecy laws of those two nations. Of course here, UBS's participation in illegal activities stands in sharp contrast to the situation in 1991, when it argued unsuccessfully that it should not have to comply with a subpoena as a mere stakeholder, and should not be held in contempt where it had not committed any wrongdoing.³²

The controlling Fifth Circuit decision in Field, the two controlling Eleventh Circuit decisions in Bank of Nova Scotia, and the unreported case involving UBS, make clear that the

jury subpoena to produce records located in the Bahamas, the Cayman Islands, and Antigua. The Eleventh Circuit upheld a contempt finding, when the bank refused to produce records located in the Cayman Islands that the bank claimed were protected by bank secrecy laws.

³²In its petition for certiorari in, In re Grand Jury Proceedings (Union Bank of Switzerland v. United States), 1991 WL 11179001, UBS aptly set out the law in the Eleventh Circuit: "In the Eleventh Circuit, as confirmed in this case, proof that a grand jury subpoena cannot lawfully be complied with is never a basis for quashing the subpoena or excusing compliance therewith. The Eleventh Circuit will not recognize any foreign law that poses an obstacle to compliance with a U.S. grand jury subpoena. The U.S. interest in enforcing the subpoena is deemed paramount *as a matter of law* – without regard to the facts of any particular case, such as the legitimate interests of the foreign state, the plight of the uninvolved holder of information, the extent to which the grand jury truly *needs* the subpoenaed information, or the availability of alternative, non-confrontational means by which the information might be collected without requiring a violation of foreign law." p. 3 (emphasis in original).

law in the Eleventh Circuit strikes the balance in the comity analysis strongly in favor of the laws of the United States. This is the case despite claims by witnesses under subpoena that to comply with demands for information here might subject them to prosecution in another country.³³

Accordingly, the case law strongly supports enforcing this summons.

B. The Comity Analysis is also Consistent with §442 of the *Restatement (Third) of Foreign Relations*.

As discussed above, well established case law favors enforcing this summons. This line of analysis is also consistent with the *Restatement (Third) of Foreign Relations* § 442(1)(c) (1987), which advises that courts “should take account” of the following factors:³⁴

- 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.

³³Moreover, as discussed below in Part III.C.3, courts have enforced summonses in civil cases, despite the threat of criminal prosecution in the foreign jurisdiction.

³⁴The Court should look to §442(1)(c) of the *Restatement (Third) of Foreign Relations Law of the United States*, which is the current version, as a guide for its analysis of international comity. In 1984, the Eleventh Circuit applied the then-current *Second Restatement*, because the *Third Restatement* would not be published until 1987. Bank of Nova Scotia II, 740 F.2d at 827. Not even the Seventh Circuit case cited at p. 22 of its brief applied UBS’s ersatz “7-part” test. The Court should reject UBS’s attempt to devise a “7-part” test by selecting its own elements from the *Second* and *Third Restatements*.

These factors, analyzed below, are drawn from many of the same controlling cases discussed above.³⁵ Upon analysis, the balance weighs heavily in favor of the United States and, hence, compelling UBS to obey the summons.

1. The Importance to the Investigation or the Litigation of the Documents or Other Information Requested. This factor weighs heavily in favor of enforcement. The Internal Revenue Service is investigating some 52,000 U.S. taxpayers who violated the laws of this country, and used the secrecy that UBS promised them – explicitly and implicitly – to hide their accounts and, undoubtedly, their income from the IRS. Our system of taxation, built and sustained on voluntary compliance, cannot long withstand a double standard of disclosure: one for the average wage-earner, whose income is reported to the IRS by his employer, and another for the wealthy investor who can place his assets in a bank secrecy jurisdiction like Switzerland, and rely on Swiss banking secrecy to avoid disclosing his offshore accounts, and paying the taxes he rightfully owes.

It is telling, indeed, that except for a passing reference in a footnote at p. 22, UBS does not even mention this factor. One might suppose that even UBS concedes how important it is to U.S. tax enforcement and compliance that the IRS have access to information about untold thousands of U.S. taxpayers who – with UBS’s active assistance – have broken the law.

2. The Degree of Specificity of the Request. Here the request is quite specific. The IRS seeks account information for all U.S. taxpayers who controlled UBS accounts during the relevant time period, and who affirmatively chose not to have their accounts disclosed to the IRS. As discussed above, this is not a “fishing expedition.” Nor can UBS collaterally attack the issuance of the John Doe summons. In fact, this request is at least as specific as the

³⁵See, *Restatement (Third) of Foreign Relations*, § 442, Reporter’s Note 7.

John Doe summons that the district court enforced – and the Eleventh Circuit affirmed – in United States v. Hayes.³⁶

UBS and the *amici* confuse the specificity of the request with the amount of information sought in the request. True, the request seeks a lot of information. But the request is also drawn specifically to seek information only about U.S. taxpayer-lawbreakers. That so many accounts fall into this category is more a testament to the breadth and depth of the UBS-aided evasion than it is to any alleged lack of specificity. This factor weighs in favor of enforcement.

3. Whether the Information Originated in the United States. Some of the information – coming from U.S. taxpayers – clearly originated in the United States. Some is information that resulted from a request from or a solicitation to a taxpayer in the United States. After all, UBS sent its bankers into the United States to solicit and maintain U.S. business, and collaborated with U.S. taxpayers in other ways to keep their UBS accounts hidden from the IRS. Although UBS did not discuss this in its brief, this factor favors enforcement.

4. The Availability of Alternative Means of Securing the Information. Here, the United States cannot obtain the information from non-compliant U.S. taxpayers, because it does not know their identities. It sought the information from the Government of Switzerland, and was unsuccessful. And now all parties involved – the United States, UBS, and the Government of Switzerland – agree that no more information will be provided under the treaty, unless the United States can provide the identity of the account holder. The only way to obtain

³⁶722 F.2d 723 (11th Cir. 1984). There the district court ordered Mr. Hayes, a tax shelter promoter, to comply with two John Doe summonses for documents located in Switzerland. The summonses sought the “partnership records” of Panamanian partnerships, which Hayes had established as part of the tax shelter scheme. Id. at 724.

information about these undeclared accounts is directly from UBS, which generated and maintains it.³⁷

5. 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. The United States has a vital national interest in maintaining the integrity of its system of taxation. When UBS routinely sent its private bankers into the United States, in secret, to make thousands of client contacts, UBS's conduct threatened this vital American interest.

Switzerland's interest in maintaining privacy, of which its banking secrecy laws are a part, is a long-standing one.³⁸ Nonetheless, the Swiss have rightly acknowledged that these laws should not shield U.S. taxpayers from who are attempting to avoid their tax obligations.

In fact, notwithstanding the claim that Swiss banking secrecy is absolute, the record here shows that it is anything but.³⁹ While it is true that Swiss laws generally protect the privacy of bank information, those laws apply differently in different parts of Switzerland, and do not act mechanically as an absolute bar to disclosure.⁴⁰ Those laws also contain exceptions. One is the

³⁷See also, Vetco, 691 F.2d at 1290-1291.

³⁸The Swiss have often justified their banking secrecy laws as protection for their citizens' privacy, and protection against religious or political persecution. The records sought in this case do not implicate any of those consideration. In this case, however, the IRS simply seeks records that reflect illegal conduct by U.S. citizens and residents.

³⁹The court in Vetco reached the same conclusion. 691 F.2d at 1288, n. 7.

⁴⁰In the Geneva Canton, for example, the prosecutor has discretion whether to bring a charge at all for violating Art. 47. Romy Dep., p. 88, line 20 - p. 89, line 2. In the Canton of Zurich, judges can order release of information under Art. 47, by balancing the various interests involved, while judges in the Canton of Geneva cannot. Reply Declaration of Isabelle Romy, dated August 24, 2006, in Lasala v. UBS AG, Case No. 06 Civ. 1736 (LTS) (RLE) (S.D.N.Y.), ¶7 (copy attached). During her deposition in this case, Prof. Romy testified that she had provided

exception in § 5 of Article 47 of the Banking Act for information provided to an “authority.”⁴¹

Another is the power that FINMA, the Swiss banking authority, has to approve release under Articles 25 and 26 of the Banking Act.⁴²

An important defense for a person charged with violating banking secrecy is the “necessity defense” codified in Article 17 of the Swiss Penal Code. In fact, during her deposition Professor Romy testified that if prosecutors were to bring charges against the head of FINMA for violating Article 47 in releasing information to the United States under the Deferred Prosecution Agreement, that person could present a defense under Article 17 of the Swiss Penal Code.⁴³

In Vetco, the Ninth Circuit relied upon an affidavit from the Swiss Federal Attorney to conclude that the “necessity” defense could permit the release of Swiss-based business records in response to a court order enforcing an IRS summons:

An affidavit from a representative of the Swiss Federal Attorney, states that where production is pursuant to an order of a United States Court enforcing an IRS summons there may be a defense to a charge of violating Article 273. Article 34 [now Article 17] of the Swiss Penal Code provides a defense to criminal charges based upon duress. No case has been cited in which a person has been prosecuted for complying with a court order enforcing an IRS summons.⁴⁴

expert testimony on behalf of UBS in the Lasala case in the Southern District of New York. Romy Dep., pp. 29- 31. In all cases, if the prosecutor does not believe he has enough evidence to prove the charge, he has the discretion not to bring the charge. Romy Dep., p. 93, lines 7 - 22.

⁴¹Art. 47, §5. Romy Deposition, p. 60, lines 12 - 25; p. 61, lines 4 - 20.

⁴²Romy Deposition, p. 22, lines 9 - 22.

⁴³Romy Deposition, p. 89, line 23 - p. 90, line 8.

⁴⁴United States v. Vetco, Inc., 691 F.2d 1281, 1289 (9th Cir. 1981). Professor Romy has never read the decision in Vetco. Romy Dep., p. 8, line 21 - p. 9, line 1.

In sum, Swiss banking secrecy is not an impenetrable wall. It may authorize the release of bank records under the circumstances discussed above. UBS's production of records both in response to this summons, and under the DPA further illustrate exceptions to the Swiss laws on bank secrecy. Accordingly, notwithstanding the general Swiss interest in banking secrecy, UBS has provided information to the IRS about U.S. holders of secret Swiss accounts.⁴⁵ Moreover in February 2009 FINMA, the Swiss banking authority, agreed that UBS should release to the United States additional, otherwise protected, account records located in Switzerland. Thus, circumstances exist under which Swiss banking secrecy gives way to competing foreign interests, even under Swiss law.

For these reasons, it is uncertain that complying with an order enforcing this summons – under the circumstances present here – will subject UBS to the hardship of inconsistent enforcement of U.S. and Swiss laws.⁴⁶ Here, the consequences of not enforcing the John Doe summons, which will advance the strong U.S. interest in enforcing its tax laws against U.S. taxpayers, outweighs the broader general interest embodied in the Swiss bank secrecy laws.

⁴⁵In ¶ 9 of his declaration, Ralph M. Levene described the information that UBS provided in response to the summons. In particular, UBS provided the IRS with client-specific account information involving wire transfers to and from UBS accounts in the United States, where the bank was able to determine that the transfers were made from or to a UBS account in Switzerland controlled by the same person that controlled the U.S.-based account. According to UBS's expert in Swiss privacy law, Isabelle Romy, the use of Swiss-based records to verify the identity of the account holder would violate Article 47 of the Swiss Banking Act. (Romy Dep. p. 46, line 5 - p. 47, line 8). Nonetheless, UBS provided this information. From this, it is reasonable to conclude that UBS provided the information because the summons required it, and because it did not face a significant threat of prosecution in Switzerland. This further demonstrates the primacy of the U.S. interest in enforcing its tax laws against its own citizens and residents, over the Swiss interest in maintaining the privacy of account records for U.S. lawbreakers.

⁴⁶Like the Ninth Circuit in 1981, Professor Romy in 2009 is not aware of any case in which charges were filed under Art. 47 of the Swiss Banking Act or Articles 271 or 273 of the Swiss Penal Code, against someone who had disclosed information pursuant to the order of a foreign court. Romy Dep., p. 6, line 19 - p. 7, line 19; p. 25, lines 10 - 18.

UBS and other banks doing business in the United States clearly face the broad range of contempt and other enforcement tools, when they refuse to comply with legitimate agency demands and court orders to provide information. It can be argued that that hardship is greater when the foreign entity is not found within the United States, or has not had “minimum contacts” with the United States sufficient to provide a U.S. court with subject matter jurisdiction over the foreign entity. Still a stronger case might be made when the foreign entity is not suspected of wrongdoing.

But that is not the case here. Here, UBS knowingly broke U.S. law when it sent its private bankers into this country to recruit and service U.S. customers. It knowingly and intentionally helped U.S. taxpayers evade their reporting obligations when it sent them to advisors whom UBS knew would (and intended them to) help its U.S. customers structure their accounts in a way to evade UBS’s obligations under the QI Agreement. Any hardship that UBS might face from refusing to comply with a court order here is a hardship that it brought upon itself – and a hardship the imposition of which would be justified under its own analysis in the petition for certiorari that UBS filed in 1991.⁴⁷

On balance, therefore, the vital national interest of the United States in fighting attempts by U.S. taxpayers to avoid and evade their tax obligations outweighs the general Swiss interest in

⁴⁷In a very important sense, UBS’s argument about “comity” fails to give due respect to the sovereignty of the United States. The concept of “comity” embodies a mutual respect for competing interests of two sovereign nations. UBS, however, has demonstrated an utter lack of respect for the laws of the very nation that provided it with thousands of customers, and millions of dollars in profits. What UBS refuses to acknowledge is that the “dilemma” it presents in its opposition papers – either obey U.S. law or obey Swiss law – is not one in which it suddenly “found” itself. UBS now faces a dilemma entirely of its own making. On this point it is instructive to compare UBS’s criminal conduct here with the position that UBS advocated before the Supreme Court in its Petition for Writ of Certiorari in, In re Grand Jury Proceedings (Union Bank of Switzerland v. United States), Case No. 91-836, 1991 WL 11179001, cert. denied, 112 S.Ct. 1163 (1991).

maintaining the secrecy of its banking relationships – especially for those foreign lawbreakers.

The analysis under the *Third Restatement* favors enforcement.

C. The Arguments on Comity Raised by UBS and the *Amici* Lack Merit.

UBS and the *amici* have raised three additional arguments against enforcing this summons, framed as elements of a comity analysis. All three arguments lack merit.

1. Enforcing this Summons Does Not Implicate Foreign Policy Decisions Reflected in the U.S.-Swiss Tax Treaty.⁴⁸ UBS (at p. 41) and the *amici* bankers argue that U.S. national interests would be best served by denying enforcement, because the tax treaty itself embodies how the executive branch decided it was appropriate to conduct foreign relations in this field.⁴⁹ This argument is a red herring because, as discussed below in Part IV, the tax treaty is not the exclusive mechanism for the IRS to obtain information from a U.S.-located business, in order to enforce the tax laws of the United States.

2. U.S. Banking Privacy Interests Do Not Weigh Against Enforcement. UBS argues (at pp. 42-43) that both the Right to Financial Privacy Act (RFPA), and the Fourth Amendment to the Constitution embody a strong U.S. interest in protecting financial privacy. What UBS neglects to mention, however, is that the Supreme Court has long held that someone who controls a bank account has no reasonable expectation of privacy in their financial records held by a bank or other financial institution, or in transactions (such as holding signature authority

⁴⁸As an aside, the United States and Switzerland have recently successfully completed negotiations for a new tax treaty, notwithstanding the pendency of this case. See, June 19, 2009 Press Release issued by Swiss Federal Department of Finance (copy attached).

⁴⁹It is, to put it mildly, presumptuous for a foreign bank that has engaged in serious criminal conduct in the United States to suggest what is in the best interests of the United States, when it comes to enforcing the very same tax laws that UBS helped U.S. taxpayers violate.

over a foreign financial account) that are required to be reported to the government.⁵⁰ As for the other argument, UBS fails to mention that RFPA contains an express exemption for procedures under the Internal Revenue Code, like this one.⁵¹

3. The “Revenue Rule” Does Not Apply Here. Finally, UBS argues (at p. 33) that U.S. recognition of the “revenue rule” shows that the United States would not use its executive and judicial resources reciprocally for another country if the tables were turned. The Supreme Court has described the rule in this way: “[A]t its core, [the revenue rule] prohibited the collection of tax obligations of foreign nations. . . [and] is often stated as prohibiting the collection of foreign tax claims.”⁵² In other words, the United States will not use its resources to collect taxes owed to another country. Here, the United States merely seeks to use its summons power to obtain the identities of U.S. taxpayers who have broken the law. We do not seek to use UBS or the Government of Switzerland to collect taxes that may be due from those unknown U.S. taxpayers. Accordingly, the common law “revenue rule” has nothing to do with this case.

Applying the comity factors – and controlling law – to the facts in this case leads to the inescapable conclusion that the Court should enforce this summons. Not only does the law support enforcement, so does the conduct of UBS. Indeed, the Eleventh Circuit affirmed UBS’s obligation to produce foreign-based records in 1991 – when UBS was not suspected of wrongdoing, UBS acted as a mere stakeholder, and UBS’s Panamanian subsidiary was not even found in this country. *A fortiori* this Court should compel UBS to produce the documents here,

⁵⁰United States v. Miller, 425 U.S. 435 (1976); California Bankers Assn. v. Schultz, 416 U.S. 21 (1974); United States v. Payner, 447 U.S. 727 (1980).

⁵¹12 U.S.C. §3413(c). “Nothing in this chapter [RFPA] prohibits the disclosure of financial records in accordance with procedures authorized by Title 26.”

⁵²Pasquantino v. United States, 544 U.S. 349, 361 (2005).

where UBS has admitted that it committed serious crimes in this country, and sent its employees into the United States, in secret and under false pretenses, to help tens of thousands of American taxpayers evade hundreds of millions of dollars in U.S. income taxes.⁵³ Accordingly, the Court should order UBS AG to provide the IRS with the information about the untold number of Americans who broke the law – often with UBS’s help – by failing to disclose their UBS accounts, and failed to pay the income taxes due on earnings in those secret UBS accounts.

In fact, the law in this circuit – and around the country – so strongly favors enforcement that UBS has resorted to a clever rhetorical trick to advance its position. On the first page of its brief, UBS suggests that the relief sought here is unprecedented, and contrary to authority. To support that dubious argument, it claims that in the only other similar case, the court “rejected the effort” by the IRS to obtain “bank records” located in a foreign country through use of a John Doe summons.⁵⁴ The argument is too clever by half.

In the case UBS cites, an unreported district court case from California, the court refused to enforce in its entirety a John Doe summons seeking foreign-based bank records.⁵⁵ That case not only lacks precedential value in any court, it also does not stand for the proposition asserted: *i.e.*, that the court “rejected” the summons. In fact, the court in Bank of America directed the summoned party to continue to apply all good faith efforts to pursue the summoned documents,

⁵³“It would be a travesty of justice to permit a foreign company to invade American markets, violate American laws . . . , withdraw profits and resist accountability for itself and its principals for the illegality by claiming their anonymity under foreign law.” SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 119 (S.D.N.Y. 1981) (Pollack, J.)

⁵⁴UBS Brief, p. 1.

⁵⁵In re the Matter of Tax Liabilities; John Does (Bank of America), 1991 U.S. Dist. Lexis 9704 (N.D. Cal. 1991), vacated by, 92 TNI 26-24 (N.D. Cal. 1992).

and to make regular progress reports to the court. This hardly constitutes “rejection” of the summons.

Perhaps more importantly, however, the record in that case makes clear that Bank of America did comply in substantial part with the summons – this can be gleaned by comparing the scope of the foreign-based records that the court initially ordered produced in 1991 with the limited universe of 682 wire transfers that were still at issue in 1992. In short, nothing in the unreported Bank of America decision suggests that the court ruled in any way, shape or form that the IRS could not use its John Doe summons power to obtain bank records located in a foreign country.

More significantly, however, is the rhetorical twist in which UBS limited its remark to include the use of a John Doe summons to obtain “bank records” located in a foreign country. This is telling. Because had UBS not limited its comment to “bank records,” it would have had to discuss an Eleventh Circuit case that affirmed the right of the IRS to use its John Doe summons power to obtain records located in Switzerland, and to impose contempt sanctions on a U.S.-located party who did not take sufficient steps to obtain the records that the court ordered him to produce.⁵⁶

There, the IRS issued a John Doe summons to John E. Hayes, a tax shelter promoter. Among other things, the summons demanded that he produce copies of partnership agreements with his tax shelter clients. The documents were located in Switzerland. Hayes made only

⁵⁶United States v. Hayes, 722 F.2d 723 (11th Cir. 1984). Indeed, this controlling case belies UBS’s claim on p. 1 of its brief that, “no IRS ‘John Doe’ summons . . . has ever been enforced where compliance would . . . require the violation of foreign criminal law.” If the testimony that UBS has offered from Isabelle Romy is accurate, compliance with the John Doe summons in Hayes, would have violated Articles 271 and 273 of the Swiss Penal Code. And yet the summons was enforced.

minimal efforts to obtain the records from the managing partner in Switzerland, even though Hayes had considerable power over the managing partner (including the power to replace him).

The district court declined to hold Hayes in contempt for failing to produce the Swiss-based documents. But the court of appeals reversed, holding that in order to avoid contempt, a party ordered to produce foreign-based records must do more than just “make some effort” to obtain them. Of particular significance here is the Eleventh Circuit’s reliance on an apt section of its opinion in Bank of Nova Scotia I noting that, “This court upheld the district court’s contempt order, concluding that **the inevitability of conflict between laws of different countries did not excuse one who chooses transnational commercial operation from compliance with United States law.**”⁵⁷

At the beginning of this section, we noted that this is not a case of first impression, either in the context of IRS summons enforcement, or in this circuit. The discussion above establishes how the courts in the Eleventh Circuit and elsewhere have applied well-established principles of domestic law and international comity to situations similar, if not nearly identical, to this one. As discussed above, the law favors enforcement even when the summoned party has done nothing wrong, or has had only minimal contact with the United States. Here, where UBS has committed serious crimes on U.S. soil, and actively helped tens of thousands of Americans evade their obligations under U.S. tax laws, the case for enforcement is even more compelling. Accordingly, the Court should enforce the summons.

⁵⁷Id., at 726. (emphasis added)

IV.

THE TREATY DOES NOT PREEMPT THE TOOLS THAT CONGRESS GAVE THE IRS TO OBTAIN INFORMATION FROM BUSINESSES IN THE UNITED STATES

For its principal legal objection to the summons, UBS – joined by the *amici* – argues that the IRS may not use its summons power to obtain UBS information located in Switzerland – even if UBS is found in the United States and is properly before the Court – if the information may be requested under the U.S.-Swiss tax treaty (the DTT). From this argument follows the corollary that, if the IRS cannot obtain the information under the treaty, it cannot obtain the information at all. UBS argues that the United States and Switzerland would have had no conceivable reason to negotiate ways to exchange information located in the other country, “if the IRS had retained in its back pocket the unilateral right to serve a summons on a Swiss bank,” or if Switzerland did not believe “that the inroads on Swiss sovereignty would be the only ones Switzerland would be expected to permit.” (pp. 29-32) This argument lacks merit on the facts and the law.

In light of its admitted illegal conduct within the United States, UBS’s argument defies all notions of common sense and fair play. In essence, UBS argues that it may come into the United States, violate the laws of the United States with impunity for seven years,⁵⁸ and help thousands of its U.S. customers violate the laws of the United States – evading hundreds of millions of dollars in U.S. income taxes in the process. And as long as it maintains the records of its wrongdoing – and the identities of its lawbreaking U.S. customers – in Switzerland, UBS argues that the IRS is powerless to obtain those records. This proposition not only defies the law, it defies logic and common sense as well.

⁵⁸And even longer, if the Department of Justice had not discovered it.

As noted above, Congress gave the IRS very broad authority to obtain information through its summons power. The treaty at issue here does not abrogate that power, either explicitly or implicitly. Accordingly, no court has ever ruled that the IRS may not use its summons power to obtain information that it might be able to request under this treaty, or any other similar tax treaty. Nor should this Court.

It is well settled that a treaty can only preempt inconsistent U.S. legislation if the treaty is clearly inconsistent with that legislation and, in entering the treaty, the United States clearly intended the treaty to preempt the legislation. The Supreme Court articulated this principle in 1987. There the Supreme Court ruled that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the “Hague Evidence Convention”), does not preempt a U.S. litigant’s right to use all the discovery tools in the Federal Rules of Civil Procedure, to obtain evidence from a foreign party in litigation that is properly before the U.S. courts.⁵⁹ This includes using requests for production of documents located in France, documents that might also be obtained under the Hague Evidence Convention.

In that case, the defendants (two French companies) and the Government of France urged the Supreme Court to adopt a rule requiring the plaintiff to use the Hague Evidence Convention to obtain documents from the defendants that were located in France (even though both defendants were properly before the court in Iowa). In the alternative, they argued, the plaintiff should be required to use the Hague Evidence Convention as a “first resort,” before seeking documents under the Federal Rules of Civil Procedure.

The Supreme Court rejected both arguments. Quoting a Fifth Circuit case, the Court first observed, “While it is conceivable that the United States could enter into a treaty giving other

⁵⁹Société Nationale Industrielle Aérospatiale v. U.S. District Court, 482 U.S. 522 (1987).

signatories control over litigation instituted and pursued in American courts, a treaty intended to bring about such a curtailment of the rights given to all litigants by the federal rules would surely state its intention clearly and precisely identify crucial terms.” Then the Court examined the language of the Hague Evidence Convention. It concluded that “[t]he Hague Convention . . . contains no such plain statement of a pre-emptive intent.” Accordingly, the Court ruled that the plaintiff could use the Federal Rules of Civil Procedure to obtain information from the defendants in France.⁶⁰ The Court also rejected the second argument – one that would require a litigant to make “first use” of the Hague Evidence Convention – holding that such a blanket rule would be “unwise” and inconsistent with the “overriding interest” of our courts in Fed.R.Civ.P. 1, “to secure the just, speedy, and inexpensive determination of every action and proceeding.”

Here UBS, the Government of Switzerland, and the *amici* bankers argue that the DTT preempts the IRS’s summons power. But they point to no language in the treaty that does so, either expressly or by implication. In fact, their argument on preemption is supported solely by the Declaration of Philip R. West, who simply provides his “expert” opinion about the reasons one might conclude that the IRS agreed to forgo its summons power as part of the treaty negotiations.⁶¹ He points to no language in the Treaty itself that supports the notion that the IRS agreed in the Treaty to give up the power that Congress provided it in § 7602 to obtain information through a summons. Mr. West’s opinion cannot substitute for the language of the

⁶⁰Id. at 539-540, quoting, In re Anschuetz & Co., GmbH, 754 F.2d 602, 612 (5th Cir. 1985).

⁶¹Mr. West’s opinion comes at a high price. According to UBS’s Rule 26 disclosures, Mr. West’s retention agreement provides for his firm Steptoe & Johnson LLP to be compensated for his time at a rate of \$1,050/hour. Others in the firm assisting him will receive their usual rates of compensation. Moreover, UBS has guaranteed Mr. West’s firm a minimum fee of \$375,000, through July 2009, whether or not his testimony is actually used in this case.

treaty itself. And his recitation of the treaty negotiation process is simply one man's view, an irrelevant view at that.

In fact, it is noteworthy that the only part of the Treaty that UBS cites in its brief (p. 6) is Article 26.3, which provides:

In no case shall the provisions of this Article be construed so as to impose upon either of the Contracting States any 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 particular which are not procurable under its own legislation or that of the state making application.

Oddly, however, this language does not support a claim of preemption at all. It merely says that one party to the treaty will not ask the other party to the treaty to do anything that would violate the other party's sovereignty, security, public policy, or laws. This case, of course, does not involve a treaty request to the government of Switzerland. Instead, it involves an attempt to compel a bank with offices and employees in the United States to comply with a summons seeking documents about U.S. taxpayers. Accordingly, Article 26.3 of the DTT does not apply here, nor is it an avenue for the IRS to obtain the information it seeks from UBS, a Swiss corporation doing business in the United States.

This is not the first case in which a summoned party has sought to limit the IRS's authority to obtain foreign-based records to those documents obtainable under a tax treaty – or even the first case in which the summoned party has sought to invoke the U.S. -Swiss tax treaty. In the other reported cases, the courts ruled that the tax treaty did not limit the IRS's summons power. In Vetco, the Ninth Circuit rejected the argument that the U.S.-Swiss tax treaty preempted the IRS's power to summons documents from a party located in the United States: “There is nothing in the treaty barring the use of summonses by the IRS to gather information.

The treaty does not state that its procedures for the exchange of information are intended to be exclusive.”⁶² In Bank of Nova Scotia I, the Eleventh Circuit cited Vetco with approval 5 times,⁶³ and cited with approval a New York district court decision in which the court ordered a Swiss bank to comply with a discovery order for information located in Switzerland, notwithstanding the existence of a mutual exchange agreement between Switzerland and the United States.⁶⁴

On these facts, and on the well-established law, the Court should reject the argument that the U.S.-Swiss tax treaty preempts the right that Congress gave the IRS to use a summons to obtain information from a party found within the United States.

V.

THE QI AGREEMENT DOES NOT TRUMP THE IRS’S SUMMONS POWER

It is difficult to understand what argument UBS is making about the QI Agreement. On the one hand, at p. 37 UBS argues that the QI Agreement with the Service, “would be violated by compliance with the summons.” And yet two pages later it says, “UBS is not contending that the QIA represents a contractual bar to enforcement of the Summons.” In either event, given its willful and systematic violations of the QI Agreement, UBS is really not in a position to argue that the QI Agreement should bar – or even limit – enforcement of this summons.⁶⁵

In its brief, UBS cites a number of provisions of the QI Agreement. But UBS fails to explain how any of those provisions can be read to preclude the IRS from learning the identities

⁶²691 F.2d at 1286.

⁶³691 F.2d at 1388-1390.

⁶⁴SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981). See also, United States v. Toyota Motor Corp., 569 F.Supp. 1158 (C.D. Cal. 1983), also ordering the production of Japanese-based records, notwithstanding the existence of a mutual exchange agreement.

⁶⁵In ¶ 3 of the DPA, UBS agreed to pay the United States \$400 million for failing to make backup withholding required by the QI Agreement, and other violations of the QI Agreement.

of U.S. taxpayer/customers of UBS who chose to conceal their ownership of UBS Swiss accounts from the IRS. From the Laurence Declaration/Report of AlixPartners, one might conclude that UBS is arguing that the IRS is only entitled to summons information about the allegedly small percentage of its U.S. customers who employed offshore sham entities to circumvent the QI Agreement. But this would ignore UBS's regular and active servicing of other U.S. customers who maintained undisclosed UBS accounts in Switzerland during the period covered by the summons. In light of its long history of willfully violating U.S. laws, any attempt by UBS to limit the IRS's access to only those customers for which UBS has acknowledged criminal conduct would be tantamount to the convicted bank robber arguing that he should be given credit for all the times he walked into a bank and didn't rob it. The argument just makes no sense.

In short, UBS's systematic and willful violations of the QI Agreement provide it with no basis to argue against enforcing the summons in its entirety.

VI.

THE REMAINING ARGUMENTS LACK MERIT

A. The Controlling Case Law Supporting Enforcement Is Not Distinguishable.

UBS has used some verbal gymnastics to make it appear that the law is not really the law. It attempts to distinguish persuasive authority and controlling Eleventh Circuit precedent, and other cases that support the petition, on dubious grounds. We address the most convoluted arguments in this section.

First, UBS attempts to distinguish Vetco (p. 30, n. 14) – cited frequently with approval by the Eleventh Circuit in Bank of Nova Scotia – on the ground that it was decided under the 1951 U.S.-Swiss DTT (while this case involves the 1996 Treaty). The difficulty with that argument is

that the tax information exchange provisions in Article 26.1 and 26.3 quoted in Vetco (at 1285-1286), do not differ materially from the tax information exchange provisions in Article 26 of the 1996 Treaty. Moreover, the part of the 1996 Treaty that UBS claims represented a “substantial increase in the type of information available under the DTT,” **did not expand the universe of information** coming from Switzerland to the United States. Instead, the “substantial increase in information” to be exchanged under the 1996 Treaty was in the **form** of the information coming from Switzerland to the United States:

The provision of authenticated copies of unedited original records or documents in admissible form **represents a substantial increase in the type of information available under the Convention**. Because paragraph 1 of Article XVI of the prior Convention did not specifically refer to the form in which information could be exchanged, a Swiss Supreme Court decision limited the form of the information that the Swiss competent authorities could supply to the United States to reports and summaries of information.⁶⁶

In other words, the information exchange provisions that the Ninth Circuit said did not preempt the IRS in Vetco, are virtually identical to the provisions that UBS now argues should preempt the IRS here. The Court should reject this transparent attempt to circumvent Vetco and Bank of Nova Scotia.

Next, UBS argues that the Court should distinguish Vetco because that case involved “strong indications of tax and securities fraud.” Here, there are not only “strong indications of fraud,” UBS has already admitted participating in a massive scheme to defraud the United states,

⁶⁶Treasury Department Technical Explanation (Oct. 7, 1997), p. 88 (copy attached). Nothing in that language suggests that this increased information caused the United States to give up its otherwise broad power under § 7602 to obtain information by summons from businesses and individuals found within the United States.

and to help its U.S. customers do the same. As the fraud here is not just “indicated,” it is admitted, the ruling in Vetco supports enforcing this summons.

Next, UBS notes that the Swiss government did not object to enforcing the summons in Vetco, while the Swiss government has objected to enforcing this summons. In at least one other case, the Swiss government attempted unsuccessfully to block a U.S. court from ordering the production of records located in Switzerland. In that case the Swiss government raised objections as an *amicus* to enforcement of a grand jury subpoena.⁶⁷ That the Swiss government objects to UBS producing documents evidencing evasion of U.S. reporting requirements and tax evasion does not weigh against enforcing the summons.⁶⁸

Finally, UBS claims that in Vetco, there was “an absence of clear record evidence that [Swiss] Penal Code Articles 271 and 273 would be violated by . . . compliance with the summons.” What UBS neglects to mention, however, is that the district court in Vetco, spent “many months . . . going into this question of Swiss law, and this threat of penal sanctions. . . . [only to conclude] that the threat of criminal sanctions by Switzerland is not as real as it was

⁶⁷In re Marc Rich & Co., A.G., 736 F.2d 864 (2d Cir. 1984) (describing involvement of Swiss government). A detailed discussion of the facts and law in that case is found In the Matter of a Grand Jury Subpoena Directed to Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir. 1983). Of note is UBS’s misleading reference to another case involving a different grand jury subpoena issued to Marc Rich. In its brief (p. 44, n. 24), UBS suggests that the Marc Rich cases involved only assertions of the attorney-client privilege, and not Swiss banking secrecy. The case cited in that footnote, Marc Rich II, 731 F.2d 1032 (2d Cir. 1984) **did** involve the attorney-client privilege, in response to a subpoena issued to Mr. Rich’s U.S. attorneys. But UBS neglected to mention that the other two Marc Rich cases cited in this footnote involved disputes over production of documents located in Switzerland, which both the taxpayer and the Swiss government sought to block in reliance on Swiss banking secrecy. The Second Circuit ordered production notwithstanding those objections, and an order entered by a Swiss court.

⁶⁸The Eleventh Circuit Court of Appeals has also enforced a grand jury subpoena for foreign-based records over the objections of foreign governments. Bank of Nova Scotia II, *supra*. (subpoenas enforced over objections of *amici* United Kingdom and Cayman Islands).

initially suggested to me to be.”⁶⁹ As noted above, the Swiss Banking regulator FINMA released records in reliance on exceptions to the secrecy laws. Professor Romy has offered other possible exceptions. And neither UBS nor the *amici* have cited even one instance where someone has been prosecuted or convicted for violating Swiss law by producing information as required by the order of a foreign court. This threat does not override the strong interest that the United States has in making sure that foreign banks do not come into this country illegally and help its citizens and residents violate the tax laws.

B. “Good Faith”

UBS takes great pains – in both its brief and its affidavits – to show the lengths to which it supposedly has gone to comply with this summons. It then argues that the Court should take note of its “good faith” and relieve it from having to comply in full with the summons. This claimed “good faith” permeates its arguments about the DTT, the QI Agreement, and international comity. But the notion that UBS has always acted in “good faith” to comply with U.S. law – and to help its customers comply with their obligations under U.S. law – bears all the hallmarks of an eleventh-hour confession, made in the hopes the sinner will be absolved from the full consequences of his wrongdoing. After all:

1. UBS did not act in good faith when it trained its private bankers in the elements of spycraft, and illegally sent them into the United States for seven years to troll for (and service) thousands of U.S. customers.

2. UBS did not act in good faith when it told its private bankers to promise confidentiality and, in a unique moment of candor, drafted account agreements that actually

⁶⁹691 F.2d 1288, n. 7.

articulated what its bankers had promised: that its U.S. customers wished to avoid complying with U.S. law, and to avoid detection by the IRS.

3. UBS did not act in good faith when it implemented the QI Agreement. It could have required **all** its U.S. customers to divest their accounts of U.S. securities, or report their accounts and earnings to the IRS. But the lure of the dollar was too strong. Instead of acting in good faith, UBS steered its wealthiest U.S. customers to hand-picked private law firms, which UBS knew had devised ways to allow the U.S. customers to keep trading U.S. securities in their secret UBS accounts, and hide their identities from the IRS. This calculated, systematic violation of the QI Agreement demonstrated the opposite of good faith.

Long before the Tax Division of the Department of Justice learned of UBS's illegal conduct and contacted UBS, UBS could have demonstrated good faith by shutting down its illegal cross-border business. But the business was too profitable, the likelihood of discovery was too remote, and the consequences of disclosure were too dire for UBS to do the right thing and exit its illegal U.S. business. So UBS passed up a chance to show good faith, and kept breaking the law instead.

It took contact from the Department of Justice before UBS would admit its crimes, and pay a hefty penalty. It took contact from the Department of Justice before UBS would shut down its illegal cross-border business, and inform its clients that they must obey the laws of the country whose protections they claim as a matter of right, but whose obligations they refuse to accept. And so when UBS talks about its "good faith," it is referring **not** to the good faith of the person who has come forward to do the right thing, because it is the right thing. This is the "good faith" of a giant multi-national bank that helped thousands of its U.S. customers break the law, and then got caught. It is time for UBS to face the rest of the consequences that it has brought upon itself.

This means that UBS must disclose the identity of every U.S. taxpayer with an undisclosed UBS account, so that every U.S. customer with an undisclosed account will get right with their government.

In the real world, good faith demands full, not partial, compliance with our obligations. In the real world, compliance comes before one is caught. If UBS will not fully comply, then the Court should order it to do so.

CONCLUSION

Contrary to UBS's claims, enforcing this summons would not constitute an abuse of the Court's process. This case falls squarely within settled U.S. law on obtaining information located abroad and – contrary to UBS's assertions – does not present a matter of first impression or a novel concept of law. The United States has a strong national interest in making sure that all U.S. taxpayers comply with the tax laws, including disclosing their offshore accounts, and paying all the taxes they owe. Although Swiss interests in bank secrecy may also be important, the Court must consider those interests in the context of UBS's conduct, where for at least 7 years the bank actively helped tens of thousands of Americans break U.S. laws, and evade hundreds of millions of dollars in U.S. taxes.

Tens of millions of Americans report their income, obey the law, and pay their taxes, because it is the law and following the law is the obligation we take on as citizens and residents. The summons in this case will help the IRS ensure that those U.S. taxpayers whom UBS assisted to avoid their U.S. tax obligations will also obey the law. The United States has proven its case for enforcement. The Court should order UBS to comply in full.

Dated: June 30, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 30, 2009, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified below, via transmission of Notices of Electronic Filing generated by CM/ECF or other approved means.

/s/ Stuart D. Gibson

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