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

Case No. 09-20423-mc-GOLD

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

RESPONSE TO BACKGROUND FILING BY RESPONDENT

Petitioner the United States files this short response to the "Background Information" document filed by respondent UBS on February 20, 2009. It plans to fully brief in due course any issues raised by any response to an Order to Show Cause.

1. Summons Enforcement Proceedings are Summary in Nature.

The respondent complains about the brief time limits in the Order to Show Cause tendered in support of the petition to enforce. This is consistent with well-established law governing summons enforcement cases, discussed briefly below.

The United States may seek to compel compliance with a summons "[w]henever any person summoned under section . . . 7602 neglects or refuses to obey such summons . . ." 26 U.S.C. § 7604(b). In such a case, the United States has the initial burden of making a prima facie showing that the following requirements have been met:

(1) the investigation has a legitimate purpose;

(2) the summoned materials may be relevant to that investigation;
(3) the information sought is not already within the IRS' possession; and,
(4) the IRS has followed the administrative steps required by the Internal Revenue Code.

United States v. Powell, 379 U.S. 48, 57-58 (1964). The United States typically makes this showing through the affidavit or sworn declaration of the IRS officer who issued the summons. Once the United States makes this showing, the burden shifts to the respondent to prove that enforcement of the summons would be an abuse of the court's process. Powell, 379 U.S. at 58; United States v. Medlin, 986 F.2d 463, 466 (11th Cir. 1993).

Because summons enforcement actions are intended to be summary proceedings, the burden on the United States to make out its prima facie case is light, but the burden on the respondent to demonstrate abuse of process is a heavy one. United States v. Davis, 636 F.2d 1028, 1034 (5th Cir.), cert. denied, 454 U.S. 862 (1981) (describing the Government's showing under Powell as "minimal"). The respondent must do more than just produce evidence that would call into question the United States' prima facie case. To meet this burden, the respondent "must allege specific facts and evidence to support his allegations." Liberty Financial Services v. United States, 778 F.2d 1390, 1392 (9th Cir. 1985). If the respondent cannot refute the United States' prima facie showing, or cannot provide factual support for an affirmative defense, the district court should properly dispose of the proceedings on the papers before it and without an evidentiary hearing. United States v. Balanced Financial Management, Inc., 769 F.2d 1440, 1444 (10th Cir. 1985).

Here the United States has established its prima facie case through the sworn Declarations of Daniel Reeves and Barry B. Shott. While the United States is amenable to altering the briefing schedule proposed in its Order to Show Cause, there is no reason to delay what should be a "summary proceeding" simply because the respondent wishes to raise a number of defenses to enforcement.

2. Nothing in the Tax Treaty Limits the IRS's Authority to Enforce a Duly Authorized Summons Issued to a Third-Party Witness Within the United States, or Requires the IRS to Exhaust its Treaty Rights With a Foreign Government Before Seeking to Enforce that Summons.

The respondent argues that the United States has a remedy under the tax treaty with Switzerland, and accuses it of using the summons to "rewrite the treaty." There is no authority for the notion that the United States must first seek information from a foreign government under a treaty, before it can enforce a summons that was duly authorized, issued and served on a witness located here in the United States. Certainly, the IRS should not have to sit idly by while tens of thousands of its citizens violate U.S. law with impunity. The existence of a treaty cannot obscure this indisputable fact, nor does it limit the rights granted to the United States under the laws of **this** country.

3. UBS Was Not Surprised by this Filing.

The respondent suggests it was surprised by the filing of this case, and claims that, in the pleadings filed in this case, it has "been given little or no credit" for its productions and commitment under the Deferred Prosecution Agreement (DPA). This claim is irrelevant. The DPA stated that the United States would file a petition to enforce the John Doe summons, and UBS expressly reserved the right to raise all

defenses to the enforcement of the summons, and to litigate those defenses through all appeals. It knew this day was coming, and it knew this day would come sooner, rather than later. UBS also knew that only a fraction of the accounts would be identified to the IRS, out of a universe of 52,000. It is, therefore, irrelevant whether UBS produced whatever accounts the DPA required it to produce. Certainly, that compliance should have no bearing on whether it should comply with the summons.

Moreover, it is odd for UBS to suggest that it should receive any credit at all in this case for complying with the DPA. UBS has already received credit by not facing immediate criminal prosecution for having committed very serious crimes on U.S. soil. Certainly agreeing to cease helping U.S. taxpayers break the law should count for nothing in a case that involves its failure to comply with a legitimate summons that this Court expressly authorized the IRS to serve.

4. The Comity Issue Raised Here is **Not** New.

The respondent suggests that the Court should treat this case differently from other IRS summons enforcement cases because it involves a question of international comity. But the respondent fails to acknowledge that the international comity analysis, in the context of an attempt by the United States to compel the U.S. office of a foreign bank to produce records, was decided long ago in this jurisdiction. In United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), the Eleventh Circuit Court of Appeals described the scope of the analysis and the considerations that should be taken into account, in deciding whether to enforce a grand jury subpoena against a U.S.-

located bank, for records that it claimed would violate the bank secrecy laws of another country (The Bahamas in that case).

5. The QI Agreement Does Not Bar this Action, Especially in Light of UBS's Conduct.

The respondent argues that, because it entered into an agreement to help its U.S. clients meet their reporting obligations under U.S. law (the QI agreement), that agreement bars the IRS from enforcing this summons. While the United States will await the formal briefing process to show why this argument should not prevail, the Court should note that **only two days ago** UBS admitted to conspiring with its U.S. clients to violate that agreement, and thereby assist U.S. taxpayers to evade their U.S. tax obligations. That UBS and IRS entered into an agreement that UBS systematically violated over the past 7 years should not bar this action.

In conclusion, we welcome the opportunity to discuss how this case should proceed, including adopting a less hectic briefing schedule. It is important to understand, however, that the United States does not believe justice is served by delay. In fact, delay serves the cause of those U.S. taxpayers who continue to hide behind the actions of the respondent – and its spurious claims that it can do business within the United States with impunity, and still rely on Swiss bank secrecy law – to avoid their obligations to comply with the laws of **this** country.

Dated: February 20, 2009

Respectfully submitted,

/s/ Stuart D. Gibson

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 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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