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,

vs.

UBS AG,

Respondent.

_____/

RESPONSE OF AMICUS CURIAE GOVERNMENT OF SWITZERLAND TO PETITIONER'S JUNE 30 SUBMISSION

John C. Dotterrer
Florida Bar No. 267260
Jenny Torres
Florida Bar No. 785881
JOHN C. DOTTERRER
COUNSELLORS AT LAW, P.A.
125 Worth Avenue, Suite 310
Palm Beach, FL 33480
Telephone: (561) 802-3808
Facsimile: (561) 802-3318

Stephan E. Becker*
PILLSBURY WINTHROP SHAW
PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
Telephone: (202) 663-8277
Facsimile: (202) 663-8007

**Admitted pro hac vice*

TABLE OF CONTENTS

I. SWISS LAW PROHIBITS COMPLIANCE WITH THE SUMMONS.....1

II. COMITY ENTAILS RESPECT AMONG NATIONS, NOT BETWEEN THE IRS AND A FOREIGN COMPANY.....5

CONCLUSION.....7

TABLE OF AUTHORITIES

U.S. CASES

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 4

Credit Suisse v. U.S. Dist. Court For The Cent. Dist. Of Cal., 130 F.3d 1342 (9th Cir. 1997) 4-5

Glen v. Club Mediterranee, S.A., 450 F.3d 1251 (11th Cir. 2006).....4

Marc Rich & Co, A.G.. v. United States, 736 F.2d 864 (2d Cir. 1984) 3

Oetjen v. Cent.l Leather Co., 246 U.S. 297, 304 (1918).....4

Société Nationale Industrielle Aérospatiale v. U.S. District Court For The S. Dist. of Iowa, 482 U.S. 522 (1987).....6

Underhill v. Hernandez, 168 U.S. 250 (1897).....4

United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982) 5

United States v. Vetco, Inc., 691 F.2d 1281 (9th Cir. 1981).....2

SWISS CASES

Urteil des Strafgerichtspräsidenten Basel-Stadt (Nov. 15, 2007) 2

Urteil des Appellationsgerichts des Kantons Basel-Stadt (April 24, 2009) 2

MISCELLANEOUS

Restatement (Third) of Foreign Relations § 442(1)(c) …….....5

Amicus curiae the Government of Switzerland respectfully files this response to arguments presented in the Memorandum of Law in Support of Petition to Enforce "John Doe" Summons ("IRS Br.") filed by the Petitioner Internal Revenue Service on June 30, 2009. [DE 83].

I. SWISS LAW PROHIBITS COMPLIANCE WITH THE SUMMONS

The Internal Revenue Service ("IRS") argues that "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."[1] This assertion is incorrect.

As explained in the Brief of Amicus Curiae Government of Switzerland [DE 48], Switzerland prohibits foreign interests from collecting evidence that is within Switzerland without proceeding within the established channels of intergovernmental assistance, which include bilateral mutual legal assistance treaties, the Swiss Federal Act on International Mutual Assistance in Criminal Matters, and tax treaties. Those prohibitions are enforced with criminal statutes such as Article 271.

The IRS, without performing any of its own research or retaining its own expert on Swiss law, asserts that Swiss courts will excuse any violation of Swiss law if UBS acts under compulsion from a U.S. court. However, a recent decision of the Canton of Basel Criminal Court dated November 15, 2007 conflicts with that assertion. In that case, the court confirmed a criminal sentence for violations by an individual of violations of Articles 47 and 273, where the defendant had cooperated with German authorities in disclosing or confirming protected information to avoid prolongation of his prison sentence in Germany. The court stated:

> Yet we should not forget that the German authorities must have exerted considerable pressure to disclose information about German investors in Switzerland and he did not offer this information on his own initiative; in addition, the detention lasting several months was also undoubtedly nerve-racking. As with

[1] IRS Br. at 29.

> the other crimes he committed for which he has already been sentenced, here, too, however, he put his own interests above all else without there having been an actual necessity. [2]

This decision, which was affirmed by the Canton of Basel Court of Appeals on April 24, 2009,[3] contradicts the legal theory proposed by the IRS.[4]

The IRS also suggests that, because it is possible for the Swiss courts and Swiss governmental authorities to order confidential information to be released under certain circumstances, privacy protections are not "absolute," and by implication not important.[5] The logic of the IRS argument, applied in the U.S. context, would suggest that because U.S. courts frequently approve warrants allowing police authorities to engage in searches and seizures, the Fourth Amendment to the U.S. Constitution should not be viewed as protecting important interests and therefore can be disregarded when enforcement authorities consider it convenient. The IRS argument is wrong in both Switzerland and the United States. That Swiss law allows the release of some qualified information under government supervision with protection for due process rights does not undermine the existence or legitimacy of privacy rights as a whole, as the IRS argues.

---

[2] *Urteil des Strafgerichtspräsidenten Basel-Stadt* (Nov. 15, 2007). A copy of the original German language decision of the Canton of Basel Criminal Court is attached as Appendix, Tab 1. The name of the defendant is redacted in accordance with Swiss rules on the confidentiality of court decisions.

[3] *Urteil des Appellationsgerichts des Kantons Basel-Stadt* (April 24, 2009). The original German language ruling of the Canton of Basel Court of Appeals is attached at Appendix,Tab 2. The name of the defendant is redacted.

[4] The purported interpretation by a U.S. court of Swiss law that the IRS quotes from *United States v. Vetco, Inc.*, 691 F.2d 1281, 1289 (9th Cir. 1981) (IRS Br. at 28) has no legal effect in Switzerland. The action of the Government of Switzerland several years later in reaction to the court proceedings in the *Marc Rich & Co.* case, discussed below, reflects the official position of Switzerland on attempts by foreign courts to compel violations of Swiss law.

[5] *See, e.g.*, IRS Br. at 27-28 ("Those laws also contain exceptions.").

The IRS mischaracterizes the ruling of the Second Circuit in *Marc Rich & Co., A.G. v. United States*, 736 F.2d 864 (2d Cir. 1984). It inaccurately implies that the Second Circuit held that U.S. interests in enforcing a subpoena outweighed the Swiss interest in enforcing Swiss law.[6] In that case the district court had already ordered enforcement of the subpoena and imposed contempt sanctions for non-compliance before the Government of Switzerland acted. Significantly, the defendant had previously withdrawn its first appeal of the contempt order with prejudice and agreed that it would not at any time raise Swiss law as a defense. *Id.* at 866-67. Subsequently, Switzerland issued a blocking order and confiscated the documents at issue. The defendant then sought to have the contempt sanctions vacated in appellate proceedings, and Switzerland filed an *amicus* brief in that appeal. The Second Circuit decided that the defendant had previously by its agreement waived its right to raise Swiss law as a defense for noncompliance and that the issue was *res judicata* because of the defendant's withdrawal of its first appeal. *Id.* at 867. Accordingly, it did not address the conflict between Swiss and U.S. law. Nevertheless, the Second Circuit remanded the case for an evidentiary hearing on the question whether the documents the defendant had not produced had been seized and were then in the possession of Switzerland, holding that "[c]ivil contempt is a coercive sanction, and thus a person held in civil contempt must be able to comply with the court order at issue." *Id.* at 866.

UBS is unable to comply with the summons without violating Swiss law. The Government of Switzerland will use its legal authority to ensure that the bank cannot be pressured to transmit the information illegally, including if necessary by issuing an order taking effective control of the data at UBS that is the subject of the summons and expressly prohibiting UBS from attempting to

[6] IRS Br. at 43 ("the Swiss government attempted unsuccessfully to block a U.S. court from ordering the production of records located in Switzerland"); *id*. at 43, n. 47 ("The Second Circuit ordered production notwithstanding those objections, and an order entered by a Swiss court.").

comply – similar to what the Government of Switzerland did in reaction to the *Marc Rich & Co.* case. When the Government of Switzerland issues such an order, it will be an "Act of State."

The Act of State Doctrine precludes U.S. courts from inquiring into the validity of the public acts of a sovereign nation that are taken within that nation's own territory. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The Supreme Court has explained that "[t]o permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations."' *Oetjen v. Cen.l Leather Co.*, 246 U.S. 297, 304 (1918) (no citation for internal quotation). Indeed, the Act of State Doctrine "requires that 'the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid." *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1253 (11th Cir. 2006) (dismissing claims for trespass and unjust enrichment against resort operator because case would require determination of propriety of Cuban government's expropriation of property) (internal citations omitted).

In *Credit Suisse v. United States District Court For The Central District Of California*, 130 F.3d 1342 (9th Cir. 1997), a district court had ordered two Swiss banks to transfer assets from Switzerland to its control to satisfy a U.S. civil judgment, even though the assets were subject to a Swiss Government freeze order.[7] The Ninth Circuit held as follows:

> The injunction sought by the plaintiffs would compel the Banks to hold any assets of the Marcos Estate subject to the district court's further orders. It is clear that the district court plans on taking control of any Estate assets held by the Banks, even though those assets are currently frozen pursuant to official orders of Swiss authorities. Any order from the district court compelling the Banks to transfer or otherwise convey Estate assets would be in direct contravention of the Swiss freeze orders. Subjecting Estate assets held by the Banks to the district court's further orders would thus allow a United States court to question and, in fact, "declare

[7] The court asserted personal jurisdiction based on the fact that the banks had U.S. branches.

> invalid the official act of a foreign sovereign." Issuance of the injunctive relief sought would therefore violate the act of state doctrine.

Credit Suisse, 130 F.3d at 1347 (internal citation omitted). The same principles will apply here if the Government of Switzerland issues an order prohibiting compliance with the summons.[8]

It is hoped that it will be unnecessary for the Government of Switzerland to take the extraordinary action of issuing an order to seize the information at issue, but such an action should be expected if the IRS continues to pressure UBS to violate Swiss law. This is a highly relevant factor for the Court to consider.

II. COMITY ENTAILS RESPECT AMONG NATIONS, NOT BETWEEN THE IRS AND A FOREIGN COMPANY

The IRS itself states that "[t]he concept of 'comity' embodies a mutual respect for competing interests of two sovereign nations." IRS Br. at 30, n. 47. Much of its discussion of comity, however, is devoted to arguing that U.S. interests outweigh Swiss interests because UBS engaged in bad conduct for which it was sanctioned under the Deferred Prosecution Agreement.[9] That argument misconstrues the nature of international comity and disregards the principles the IRS cites in the *Restatement (Third) of Foreign Relations* § 442(1)(c). The issue at hand is the attempt by the IRS to compel violations of Swiss law by persons and entities within Switzerland. The Government of Switzerland did not condone the actions for which UBS has been punished under the Deferred Prosecution Agreement, but that does not create a basis for cancelling Swiss privacy protections for account holders for which there are no specific allegations of wrongdoing,

---

[8] As noted by the IRS, in *United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1389 (11th Cir. 1982), the Eleventh Circuit found it relevant that the Bahamian government had not acted to prevent the bank from complying. In contrast, the Government of Switzerland will so act in this case if necessary.

[9] *See, e.g.*, IRS Br. at 46 ("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.").

or to abandon the respect that should be accorded between nations to avoid conflicts of sovereignty.[10] The Government of Switzerland proactively assisted the U.S. Department of Justice in achieving its goals in the criminal prosecution of UBS, in a manner consistent with Swiss law and which avoided a conflict of sovereignty. The IRS now inappropriately seeks to provoke international conflict through this civil proceeding.[11]

More broadly, the IRS argues that "comity" means that the U.S. interest is always preeminent.[12] The Court should not support the IRS's view of comity, which would eliminate any consideration of foreign nations' interests entirely.[13]

---

[10] The decision in *Société Nationale Industrielle Aérospatiale v. U.S. District Court For The Southern District of Iowa*, 482 U.S. 522, 546 (1987) cited by the IRS includes the following direction: "American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state."

[11] The IRS comments that "the United States and Switzerland have recently successfully completed negotiations for a new tax treaty, notwithstanding the pendency of this case." IRS Br. at 31, n. 8. If that comment was intended to suggest that the pendency of this case will have no effect on the treaty, it must be noted that the draft treaty has been neither signed nor ratified.

[12] *See, e.g.*, IRS Br. at 23, n. 32.

[13] The Government of Switzerland also observes that the IRS's argument that the tax treaty was not intended to be the exclusive means of requesting information ignored entirely the views of the other party to the treaty – Switzerland – and the well established principles of international law that support the Swiss interpretation. *See* Brief of Amicus Curiae Government of Switzerland [DE 48] at 11-13.

CONCLUSION

For the foregoing reasons, the Government of Switzerland respectfully urges the Court to deny the petition to enforce the summons.

Respectfully submitted,

By: **/s/** John C. Dotterrer

John C. Dotterrer
Florida Bar No. 267260
Jenny Torres
Florida Bar No. 785881
JOHN C. DOTTERRER
COUNSELLORS AT LAW, P.A.
125 Worth Avenue, Suite 310
Palm Beach, FL 33480
Telephone: (561) 802-3808
Facsimile: (561) 802-3318

Stephan E. Becker*
PILLSBURY WINTHROP SHAW
PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
Telephone: (202) 663-8277
Facsimile: (202) 663-8007

**Admitted pro hac vice*

Dated: July 7, 2009

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 7, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

JOHN C. DOTTERRER
COUNSELLORS AT LAW, P.A.

By: /s/ John C. Dotterrer
John C. Dotterrer

SERVICE LIST
United States of America v. UBS AG
Case No. 09-20423-GOLD/MCALILEY
United States District Court, Southern District of Florida

Attorneys for Petitioner, United States of America

Stuart D. Gibson
Department of Justice
Tax Division
P.O. Box 403
Ben Franklin Station
Washington, D.C. 20044
Stuart.D.Gibson@usdoj.gov

Richard D. Euliss
United States Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044
Richard.D.Euliss@usdoj.gov

Attorneys for Respondent, UBS AG

Eugene E. Stearns
estearns@swmwas.com
Ana Hirfield Barnett
abarnett@swmwas.com
Gordon McRae Mead Jr.
gmead@swmwas.com
Geri Fischman
gfischman@swmwas.com
Stearns Weaver Miller Weissler Alhadeff & Sitterson
150 W Flagler Street
Suite 2200
Miami, FL 33130

John F. Savarese
jfsavarese@wlrk.com
Martin J.E. Arms
mjearms@wlrk.com
Ralph M. Levene
rmlevene@wlrk.com
Wachtell Lipton Rosen & Katz
51 W 52nd Street
New York, NY 10019

Francis P. Barron
fbarron@cravath.com
David N. Greenwald
dgreenwald@cravath.com
Cravath Swaine & Moore LLP
825 8th Avenue
New York, NY 10019-7475
212-474-1000
212-474-3700 (fax)

Attorneys for Amicus, International Bankers

Joel Stephen Perwin
Suite 1422
169 East Flagler Street
Miami , FL 33131
305-779-6090
Fax: 779-6095
Email: jperwin@perwinlaw.com

Kathleen M. Pakenham
Email: kpakenham@whitecase.com
Owen C. Pell
Email: opell@whitecase.com
White & Case
1155 Avenue of the Americas
New York , NY 10036-2787
212-819-8200
Fax: 212-354-8113

Attorney for Amicus, European Banking Federation
Joel Stephen Perwin
Suite 1422
169 East Flagler Street
Miami , FL 33131
305-779-6090
Fax: 779-6095
Email: jperwin@perwinlaw.com