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

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

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

SUPPLEMENTAL DECLARATION OF PROFESSOR ISABELLE ROMY ON SWISS LAW

Professor Dr. Isabelle Romy, pursuant to 28 U.S.C. § 1746, declares the following:

I. INTRODUCTION

1. I have reviewed the U.S. Government's Memorandum of Law in Support of Petition to Enforce "John Doe" Summons ("IRS Br."). I submit this declaration to respond to certain points in that brief. The defined terms that I used in my Declaration dated April 28, 2009 ("Romy Decl.") are used here also.

2. Having reviewed the IRS Brief, the transcript of my deposition dated June 2, 2009 ("Romy Tr."),[1] and the Amicus Curiae Brief filed by the Swiss Government, I remain of the opinion expressed in my Declaration that UBS, its employees and representatives could not comply with the John Doe Summons without violating Swiss law and exposing themselves to Swiss prosecution, incarceration, and regulatory action. Nothing in the IRS Brief causes me to

[1] On June 17, 2009, I executed a Certificate of Deponent that included an Errata table (a copy of which is appended hereto). Quotations from my deposition reflect the Errata table.

reconsider this opinion or the contents of my Declaration. I note that the position expressed by the Swiss Government in its Amicus Brief and supporting affidavits is fully consistent with my opinion.

II. DISCUSSION

A. Overview: Relevant Swiss Law, Although Not Absolute, Is Strictly Enforced Within Its Scope

3. The IRS Brief asserts that Swiss law lacks strength and clarity because: (a) it is not absolute and is subject to certain exceptions, defenses and prosecutorial discretion; (b) it has been compromised in this case; and (c) there are no examples in which it has been applied that are identical to this case. But in fact:

(a) Although Swiss financial privacy is not absolute – and I have not suggested otherwise (*e.g.*, Romy Decl. ¶¶ 42, 44) – the Swiss authorities vigorously enforce the Swiss financial privacy law, and violations of that law are zealously prosecuted and carry serious penalties. Indeed, as the IRS correctly recognizes, Switzerland has "strict" financial privacy laws. (IRS Br. 6). None of the exceptions or defenses to Swiss financial privacy is applicable here.

(b) Swiss law has not been breached so far in this case.

(c) There has been a recent, successful prosecution for violation of financial privacy in circumstances similar to those presented by this case, and I am aware of no case where otherwise criminal conduct was excused or ignored in circumstances like those present here.

B. The Statutory Limitation on Financial Privacy - Article 47, Section 5 BA – Is Irrelevant

4. The IRS's statement that Swiss law includes an "exception in § 5 of Article 47 of

the Banking Act for information provided to an 'authority'" (IRS Br. 27-28) is both irrelevant and misleading.

5. Section 5 of Article 47 BA provides that "Federal and Cantonal provisions concerning obligations to testify and furnish information to a public authority shall remain applicable." Thus, Section 5 reserves to the Swiss Federal and Cantonal legislatures the authority to define, on a formal legal basis, the conditions under which information otherwise protected by Article 47 BA must be disclosed. Consequently, Federal or Cantonal statutes provide for a duty to disclose such information in disputes based on private law, and in criminal and administrative matters, and the statutes describe the conditions under which disclosure in such matters must be made. In the case at hand, disclosure of protected information can occur only if the requirements of the DTT are met, which is one of the (Federal) provisions reserved by Section 5. However, as the conditions for disclosure of information under the DTT are not fulfilled in the present case, Section 5 is inapplicable to the instant dispute because no "Federal and Cantonal provisions" permit disclosure of materials covered by Article 47 BA under the circumstances presented here.

6. As I stated in my Declaration, "a bank may make disclosure of confidential customer information only pursuant to a lawful order by a competent Swiss authority" (Romy Decl. ¶ 44), and as I restated at my deposition, "you can have access to information that falls within the scope of Article 47 provided a court or competent authority orders it" (Romy Tr. 61:11-13). (Copies of the relevant pages of the transcript of my deposition are appended hereto.) Here, the IRS has not sought such an order, and the conditions under which such a request could be approved under the provisions of the DTT are not fulfilled.

7. Moreover, even if a request for documents similar to the John Doe Summons were served in Switzerland by Swiss prosecutors, it would not be enforceable with respect to a

Swiss bank. (Romy Decl. ¶ 49). As I explained in my Declaration, to be enforceable under Swiss law, the summons would have to (a) "arise from proceedings charging tax fraud" and (b) "provide an explanation of acts by the individual defendant(s) that support a charge of tax fraud sufficient to justify setting aside financial privacy." (Romy Decl. ¶ 50). The John Doe Summons satisfies neither of these requirements. (*Id.*).

8. The foregoing requirements are consistent across all jurisdictions within Switzerland. Accordingly, the IRS's statement that "[i]n the Canton of Zurich, judges can order release of information under Article 47, by balancing the various interests involved" (IRS Br. 27 n.40) is beside the point, because (a) such statement refers to procedural rules of the Canton of Zurich applicable to disputes based on private law, and not to tax matters, and (b) the John Doe Summons would not meet the threshold requirements necessary to set aside financial privacy in support of a tax investigation under any Cantonal law, including that of Zurich, or Federal law.

9. Finally, the IRS's suggestion that, because Switzerland has reserved Federal and Cantonal authority to provide for a proper legal basis under which the rights of financial privacy can be limited, Switzerland lacks an "important interest" (IRS Br. 27) in invoking Article 47 in cases to which it applies, is incorrect. For example, a citizen's interest in privacy, although considered an important fundamental right, may yield when the authorities follow the necessary procedural steps, and meet the applicable substantive standard, to obtain a wire tap; that does not mean that the right under Swiss law (similar to a U.S. constitutional right) to privacy is not to be taken seriously. The fact that there can be limitations does not diminish the important interests of the Swiss authorities in enforcing Swiss law in circumstances where the conditions for such limitations are not fulfilled.

C. **The "Necessity" Defense Is Inapplicable**

10. The IRS's assertion that "the 'necessity defense' codified at Article 17 of the Swiss

Penal Code" is "[a]n important defense for a person charged with violating bank secrecy" is incorrect. (IRS Br. 28). As I stated during my deposition, "I don't think that this defense would be accepted by the Swiss court" (Romy Tr. 10:14-15) and "it is my opinion that in the present case that we are discussing today, this defense would not be admitted." (*Id.* at 11:11-13).

11. Under Article 17, necessity is a generally applicable criminal defense under which an accused who has committed all the elements of a crime with the requisite mental state nonetheless may seek to excuse his wrongdoing based on the argument that the criminal actions were justified in order to avoid a greater harm to the accused or others.

12. Under Swiss law it is extremely difficult to prevail on the necessity defense; it is typically limited to cases when an accused violates the law because he was *in extremis* (*e.g.*, as a result of imminent starvation or being held at gun point).

13. At my deposition, the IRS's lawyer asked me about — but did not supply me with a copy of — a document that he described as an "affidavit from a representative of the Swiss federal attorney" (Romy Tr. 10:4-5), filed in a 1978 federal case in California, *U.S. v. Vetco, Inc.*, No. CV-78-1177-LEW (SX) (C.D. Cal.), that addressed the necessity defense. I have since had an opportunity to review the document to which the IRS's lawyer was referring. I note that the document is a letter from the Swiss Federal Attorney to the U.S. Attorney, Tax Division, dated May 7, 1979, that addresses the necessity defense in the context of a potential violation of Article 273 SPC (economic espionage; violation of business and trade secrets) and not Article 47 BA (financial privacy). And, consistent with my opinion, the Swiss Federal Attorney concludes (based on my translation of the German original): "From experience, the requirements of article 34 [codifying the necessity defense, now found at Article 17 SPC] are only rarely fulfilled, so that the offense only very infrequently goes unpunished based on this necessity provision."

14. As I explained in my deposition, there is a sound reason why Swiss courts would

not accept the necessity defense in circumstances such as those that might be presented here. If the Swiss courts were to do so, it

> "would encourage foreign states to increase pressure on [an] entity located in Switzerland, [or on] individuals subject to the Swiss jurisdiction, and they would artificially create a state of necessity to force this person and entities to violate Swiss law and commit criminal offenses on Swiss soil, and this is a violation of Swiss sovereignty. And then the Swiss judge would be prevented from effectively enforcing this statute based on this defense, and that would be a second violation of the Swiss sovereignty, so I really – I do not think that this was the intent of the legislat[ure] when [it] enacted Article 17 of the Penal Code."

(Romy Tr. 118:12-23). In short, the necessity defense should not be subject to manipulation by the person who would benefit from the necessitated act.

D. <u>There Will Be No Prosecutorial Discretion Applicable Here</u>

15. The IRS's statement that "[i]n the Canton of Geneva . . . the prosecutor has discretion whether to bring a charge at all for violating Art. 47" (IRS Br. 27 n. 40) is of no relevance to this case.

16. As a threshold matter, it is not clear to me why the practice of prosecutorial discretion, which is available under the legal systems of many other countries, should be indicative of the seriousness or clarity of such countries' criminal laws. In any event, in Switzerland, to the extent prosecutorial discretion exists, it is extremely limited and restricted to matters where there is no public interest.

17. First, because the Swiss Federal Council (the executive of the Swiss government) is already on record opposing the release of the information sought through the John Doe Summons, if bank employees nevertheless released customer information, a federal prosecutor, as a practical matter, would prosecute the Bank's employees or representatives for violation of Article 47 BA (together with violations of 271 SPC and 273 SPC). Thus, whether UBS employees or representatives also would be prosecuted in Geneva is moot, although, as discussed below,

the reduced standard for mandatory prosecution in Geneva also would be met here.

18. Second, as I stated during my deposition, in Zurich, one of the two Cantons where UBS is headquartered and where the release of the requested information actually would - at least in part - take place, "if there is an indication that a criminal offense has been committed, the prosecutor will have the duty to initiate the prosecution. . . ." (Romy Tr. 88:12-14). In other words, so long as a Zurich prosecutor has reasonable indications that a crime has occurred, the prosecutor must prosecute the case. It is incumbent on the courts, not the prosecutor, to decide whether the crime indeed has been committed. The same standard is applicable to federal prosecutors.

19. Third, even if there were any basis for a prosecution in Geneva in the case discussed here, in Geneva, discretion not to prosecute charges is not unfettered. Rather, it is guided by the so-called "principle of opportunity," under which discretion not to prosecute is limited to cases where there is no public interest at all in such prosecution. In this case, the principle of opportunity would not permit the Cantonal prosecuting authorities to decline to prosecute. The Swiss government has demonstrated, in no uncertain terms, that this case is of great importance.

E. **Previous Production of Documents Did Not Violate Swiss Law**

20. The IRS's assertion that UBS violated Swiss law by "provid[ing] the IRS with client-specific information involving wire transfers to and from UBS accounts *in the United States*" is incorrect. (IRS Br. 29 n.45 (emphasis added)). Swiss financial privacy does not extend to information and records that originate and are maintained in the United States. As I explained in my deposition:

> "Q. So if the information is located in the United States, Article 47 doesn't apply?"

> "A. If it's located and it's not transferred to the United States for the purpose of disclosure within [a] pending procedure, then Article 47 would not apply."

(Romy Tr. 47:10-14). Accordingly, assuming that the wire transfer records produced were maintained and located in the United States, their production would not be prohibited by Swiss law.

21. Likewise, disclosure of certain account information by UBS to FINMA in February 2009 for onward transmission to U.S. authorities under circumstances where, *prima facie*, the conditions for administrative assistance were fulfilled, was made pursuant to an order of UBS's supervisory authority, FINMA, under the provisions of Swiss banking law (which order is, as I have discussed during my deposition, currently under review by the Swiss courts as to its legal basis (Romy Tr. 23:10-18)).

F. <u>There Is Precedent for Successful Prosecution</u>

22. The IRS's assertion that it is "uncertain" whether UBS will face hardship in Switzerland (IRS Br. 29) because of the lack of on-point authority is incorrect. Contrary to the IRS's argument, the Appeal Court of the Canton of Basel-City (on appeal filed against a decision of the Basel-City Criminal Court dated 15 November 2007) recently convicted and sentenced an accused to prison for violating Article 47 BA (decision dated 24 April 2009). In that case, the accused, a Swiss banker, had been arrested in Germany for participating in a fraud scheme. On the day of his arrest, the German authorities confiscated, at the residence of the banker's business partner, documents containing the identities and account details of 85 bank customers of a Swiss bank for whom the Swiss banker had been responsible while he was employed by that Swiss bank. While the Swiss banker was kept incarcerated in Germany (from January until December 2003), and likely in order to secure more favorable treatment by the German prosecutors, the Swiss banker confirmed the accuracy of the information contained in that list to

the German authorities, permitting them to identify and prosecute a number of German customers on the list. Upon his return to Switzerland, he was convicted for violations of Article 47 BA and Article 273 SPC (among other offenses), notwithstanding that the pressure on him personally to disclose customer information was much more coercive and compelling than what a UBS employee would be exposed to here. The Basel-City Criminal Court, in sentencing him, explained that "German authorities must have exerted considerable pressure on him to disclose information . . . ; in that regard, the prison term of many months must have been grueling. [But] [a]s with all the other criminal acts he committed that have already been prosecuted, in this matter as well he put his own interests above all else when there was no actual necessity." (The decision of the Basel-City Criminal Court, dated Nov. 15, 2007, is attached hereto.) This case illustrates clearly that, even when a person is recognized to have been under direct pressure, no necessity defense is available.

23. On page 29 the IRS Brief states the following: "it is uncertain that complying with an order enforcing the summons – under the circumstances present here – will subject UBS to the hardship of inconsistent enforcement of U.S. and Swiss laws. " (IRS Br. 29). Apparently, this is a conclusion drawn from my statement quoted on the same page of the IRS Brief that I am not aware of any case in which charges were filed under Article 47 BA or Articles 271 or 273 SPC against someone who had disclosed information pursuant to the order of a foreign court. The IRS's conclusion is incorrect. Irrespective of whether it is a foreign court or foreign authority that orders the production of documents located in Switzerland, such production, under Swiss law, is lawful only if it is made pursuant to a request authorized under the provisions of the available legal and/or administrative assistance proceedings. There are convictions in Switzerland of persons who have violated articles 47 BA and articles 271 and 273 SPC in response to disclosure requests by a foreign authority. The fact that I am not aware of any case

in which charges were brought against someone who complied with a foreign court order in violation of Swiss law does not mean that such cases occurred but remained unpunished. Indeed, there is a very general, broad awareness in Switzerland that compliance with such foreign orders, outside of the appropriate proceedings, would violate Swiss law. On those infrequent occasions when non-Swiss authorities have not relied upon proper legal assistance channels, the Swiss government has taken strong and decisive action to protect its sovereignty and ensure compliance with its laws.

G. **The IRS Brief's Application of My Testimony to *U.S. v. Hayes* Is Incorrect**

24. In discussing *United States v. Hayes* (IRS Br. 34 n.56), the IRS states that "[i]f 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." I see no reference to any Swiss legal provision or issue in the *Hayes* decision. Instead, the Court of Appeals based its decision in relevant part on the conclusion that the U.S.-resident summoned party appeared entitled as a matter of contract law to obtain in the United States documents held by an individual in Switzerland. If the issue had come up, assuming the Court of Appeals was correct that the U.S. individual had a legal right to obtain the information from his Swiss partner, Articles 271 and 273 would not be implicated. Article 273 (economic espionage) is not applicable where a non-Swiss party has a contractual right to the documents, in which case the exercise of that right is the antithesis of espionage. Art. 271, which, *inter alia*, prohibits gathering evidence on Swiss soil outside of proper legal channels, is not applicable to a party who is gathering and producing its own documents (which includes documents that it is contractually entitled to have or receive), provided that such documents do not contain information that is protected by third parties' privacy rights. In contrast, in this case, my understanding is that UBS's U.S. offices have neither the right nor the

ability to obtain information from UBS Switzerland concerning the account holders of the latter. Indeed, if such information were supplied by UBS Switzerland to UBS's U.S. offices, it would violate Swiss law.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on the 7th day of July, 2009.

ISABELLE ROMY

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

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

UNITED STATES OF AMERICA,
Petitioner,

v.

UBS AG,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 8, 2009, I electronically filed copies of 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 on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF or other approved means.

s/ Gordon M. Mead, Jr.
Gordon M. Mead, Jr.

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