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.

DECLARATION OF PROFESSOR ISABELLE ROMY ON SWISS LAW

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

INTRODUCTION

1. I am a member of the bar of the Canton of Zurich, a partner at the Zurich law firm Niederer Kraft & Frey AG, and I was, until the end of 2008, a Deputy Judge at the Swiss Federal Supreme Court. I have attached my resume and CV as Exhibit A.

2. I am submitting this declaration in support of UBS AG's ("UBS") Opposition to the Petition to Enforce the John Doe Summons (the "Summons"). UBS has asked that I set forth my views as an expert on whether Swiss law would permit UBS and its Swiss-based employees and representatives to comply with the Summons.

3. I have made this declaration based on my own personal knowledge and a review of the statutes, treaties and other authorities cited herein. I have also reviewed the Summons, the IRS's Petition to Enforce John Doe Summons, the Declaration of Daniel Reeves and Exhibits

thereto, and the Declaration of Barry B. Shott and exhibits thereto. The Summons seeks production of documents from the period 2002 through 2007 relating to UBS accounts of U.S. taxpayers who have not provided UBS with an IRS Form W-9, including, *inter alia*, "account records" that were "maintained at, monitored by or managed through any Switzerland Office of UBS AG or its subsidiaries or affiliates." I am further aware that UBS is a banking corporation organized under the laws of Switzerland with its headquarters in Basel and Zurich, and is also licensed as a securities dealer in Switzerland.

4. It is my understanding that the documents sought by the John Doe Summons are located in Switzerland and that, in order to produce them to the IRS, they would need to be gathered, processed and produced by UBS employees or UBS representatives in Switzerland.

II. SUMMARY OF CONCLUSIONS

5. In summary, it is my opinion that:

a. Swiss law prohibits Swiss banks from revealing any information about the bank's customers, or customers' accounts, or transactions related thereto. The information sought by the Summons is of the type protected by Swiss financial privacy and business and trade secrets laws. If any Swiss bank were to reveal in any way, other than in conformity with Swiss law (*see* Section VII below), any confidential information about its customers or accounts or transactions on their behalf, even if pursuant to an order of a foreign court:

i. Bank officers and employees would be subject to criminal prosecution under Article 47 of the Swiss Banking Act ("BA") that

provides for imprisonment of up to three years and/or for a monetary fine;

ii. Bank officers and employees would also be subject to criminal prosecution under Article 273 of the Swiss Penal Code ("SPC") (economic espionage; violation of business and trade secrets) that provides for imprisonment of up to three years and/or for a monetary fine;

iii. The Bank would be exposed to administrative sanctions by the Swiss Financial Market Supervisory Authority ("FINMA"), the Swiss bank supervisor; and

iv. The Bank's officers and employees who provided such confidential information would be subject to administrative sanctions including an order from FINMA disqualifying them as employees of a licensed financial institution (which would make it practically impossible for such employees to find new jobs in the Swiss financial sector).

b. The Bank cannot lift financial privacy unless it is ordered to do so by Swiss authorities pursuant to the applicable Federal and/or Cantonal procedural laws (which can occur only when certain specific requirements are met) or if the Bank receives a waiver by which the customer consents to the lifting of privacy. It is my understanding that UBS has requested such waivers and has asked the customers for instructions to provide information to the IRS.

c. For a foreign court or authority to compel production of documents located in Switzerland in the possession of a Swiss bank as third party records custodian without seeking and obtaining the assistance of the proper Swiss authority would be viewed in Switzerland as a violation of Swiss sovereignty. Thus, if bank officers or employees assist in the production of documents in furtherance of a foreign summons, they risk prosecution under Article 271 SPC which provides for imprisonment of up to three years, and/or for a monetary fine;

d. There are recognized procedures by which the U.S. government may obtain information in Switzerland without violating Swiss sovereignty or requiring the Bank to violate Swiss financial privacy and business and trade secrecy laws. In tax matters, for example, the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income Between the United States and the Swiss Confederation (the "DTT") provides a procedure by which the IRS may, provided that the conditions set out in the DTT are met, seek and obtain information from Switzerland that otherwise would be protected by Swiss financial privacy laws.

e. If a request comparable to the Summons were served on a Swiss bank by Swiss authorities, it would not comport with Swiss law and would not be enforceable by a Swiss domestic court.

f. Each of these conclusions is discussed in more detail below.

III. BACKGROUND AND QUALIFICATIONS

6. I am a partner at the Zurich law firm Niederer Kraft & Frey AG, one of the larger business law firms in Switzerland.

7. I was admitted to the bar of the Canton of Vaud, Switzerland in 1991. I am registered with the Attorneys' Register of the Canton of Zurich. My practice centers in the areas of international litigation, arbitration and international private law.

8. I studied law at the University of Lausanne (graduating in 1986). I then completed my doctorate degree at the University of Lausanne in 1990 (PhD equivalent). Later, in connection with my Professorial degree, I was a visiting scholar at Boalt Hall School of Law, University of California at Berkeley from 1992 to 1994 and I completed my Professorial thesis ("Habilitation")[1] at the University of Fribourg (Switzerland) graduating in 1996, on enforcement actions in environmental law and on mass tort litigation and class action under U.S. and Swiss law.

9. I was a Deputy Judge at the Swiss Federal Supreme Court from 2003 until 2008. From 2003 until 2005, I served as a Deputy Judge assigned to the Criminal Chamber (Cour de Cassation pénale). From 2005 until 2008, I was assigned to the 1st Civil Chamber (Première Cour Civile) adjudicating, among other things, cases involving contract, tort and commercial law.

10. In addition, I am an Associate Professor of Law at the University of Fribourg (Switzerland) and at the Federal Institute of Technology in Lausanne, Switzerland. I have held these positions since 1996. Prior to that, from 1994 until 1996, I held the position of teaching assistant for criminal law at the University of Lausanne (Switzerland). Currently, I teach a series

[1] Which is a condition to be admitted to teach as a professor of law.

of classes, including among other things, transnational litigation. I have supervised several master and doctoral candidates in various areas, including transnational litigation.

11. I am a member of the Swiss Arbitration Association ASA, the Zurich Bar Association, the Vaud Bar Association and the Swiss Bar Association. I also am the vice president of the Sanction Commission of the SIX Swiss Exchange.

12. Based on the foregoing experience, I believe that I am fully competent to opine authoritatively on the matters discussed herein.

IV. SWISS FINANCIAL PRIVACY LAW

A. Financial Privacy Has a Long and Valued History in Switzerland

13. In Switzerland, the Swiss Federal Supreme Court recognized the existence of financial privacy even before an express statutory provision to that effect was enacted. In an unpublished decision from 1930, the Court held that the bankers' obligation to keep customer information confidential was an inherent element of the banker-customer contract even if no reference to that obligation was set out in the contract.[2] In a later judgment the Swiss Federal Supreme Court held that financial privacy was part of the fundamental rights of personality of an individual.[3]

14. The adoption in 1934 of the Swiss Banking Act, including Article 47, underscores the importance of rights of privacy by imposing a criminal penalty for their violation. In fact,

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[2] Unpublished judgment of December 16, 1930, *R. Steffen gegen Wolfensberger & Widmer A.G.*, Zurich, quoted in O. Huber, *Berücksichtigung des Bankgeheimnisses*, at 27 n.1 (Bern 1936); *see also* G. Capitaine, *La question du secret des banques en droit suisse*, at 177-79 (Geneva 1933).

[3] Unpublished judgment of February 2, 1932, *Chapiot v. Caisse d'Eparge de Bassccourt S.A.*, quoted in Markus Lusser, *Das schweizerische Bankgeheimnis-Ideologisches Scheinproblem oder systembedingte Institution?*, 30 Wirtschaft und Recht 182, 186; *see also* Capitaine, *supra*, at 179-82.

Article 47 BA provides for the punishment of a banking official who even negligently discloses a customer's confidential information.

15. The legislative roots of Article 47 BA as well as those of Articles 271 through 273 of the Swiss Penal Code lie in the events that occurred in the aftermath of the world economic crisis in the late 1920's, when measures were taken by the Swiss government to protect both Swiss sovereignty (politically, commercially and economically) and the individual's privacy rights (irrespective of nationality) against infringements on Swiss soil by or on behalf of foreign states (such as activities in support of intrusive investigations by foreign authorities, *e.g.*, French and German) that became increasingly frequent in the 1930's.

16. The 1999 Swiss Constitution, which replaced the prior Swiss Constitution of 1874, recognizes an explicit "Right to Privacy" that provides that "Everyone has the right to privacy in their private and family life and in their home, and in relation to their mail and telecommunications" and that "Everyone has the right to be protected against the misuse of their personal data."[4] This Right to Privacy provides a modern constitutional underpinning for earlier enacted statutes protecting the right to privacy (*see* Article 28 of the Swiss Civil Code) and earlier recognized contractual privacy protections (*see* ¶ 13, *supra*); Article 47 BA criminalizes violations of the foregoing privacy rights, insofar as they relate to the bank-customer relationship.

17. The Swiss people have always expressed their view that Swiss sovereignty must be defended against foreign intrusion. This includes intrusion into financial privacy rights from abroad without an order of the appropriate Swiss authority. Thus, the Swiss are protective of

[4] Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution Fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101, art. 13 (Switz.), Official English translation *available at* http://www.admin.ch/ch/e/rs/101/a13.

privacy rights. The Swiss government has reiterated that sentiment in the context of recent statements that it will renegotiate its existing double taxation treaties and agree to expand the situations in which Switzerland will share information in support of tax investigations, while otherwise preserving financial privacy protections.

B. Swiss Financial Privacy Laws are Not Blocking Statutes

18. Swiss financial privacy laws are not "blocking statutes." I understand that blocking statutes are procedural laws that have been enacted by some countries to shield their nationals from foreign discovery. In contrast, Swiss financial privacy laws are substantive laws designed to protect the right of privacy and apply equally to these rights no matter whether the information sought is through legal processes from within or outside of Switzerland.

19. Swiss financial privacy laws apply to all persons irrespective of their nationality and /or residence, and not only – and selectively – to foreign persons who hold accounts with a bank in Switzerland. They protect a right the Federal Supreme Court has deemed fundamental to all persons.

C. Article 47 BA

20. Article 47 BA provides penalties for bank employees or their agents who violate the duty of confidentiality by disclosing protected customer information either without the customer's consent or the express direction from a competent Swiss cantonal or federal authority. Article 47 BA provides:

> 1. Whoever intentionally:
>
> > a. discloses secret information confided to him in his capacity as officer, employee, agent, or liquidator of a bank, as officer or employee of an auditing firm, or if he has acquired knowledge in such a capacity,

> b. attempts to induce another person to violate the professional secrecy
>
> shall be punished with imprisonment of up to three years or monetary penalty.
>
> 2. If the act has been committed by negligence, then the penalty shall be a fine of up to 250,000 Swiss Francs.
>
> 3. In case of a repetition of such act within five years following the final sentence, the fine shall be a minimum of 45 daily income units.
>
> 4. The breach of professional secrecy remains punishable after termination of the public or private employment relationship or practice of the profession.
>
> 5. Federal and Cantonal provisions concerning the obligations to testify and to furnish information to a public authority shall remain applicable.
>
> 6. The prosecution and adjudication of the acts under this article are left to the Cantons. The general provisions of the Penal Code are applicable.

21. Under Article 47 BA, a banker's duty of confidentiality prohibits, *inter alia*, the disclosure of: the existence of a relationship between the bank and its customer; the type of accounts held and any transactions involving the bank; any information provided by the customer to the bank on personal or financial matters; and any further disclosures that could facilitate the determination of the customer's identity or other confidential information about the customer.

22. Article 47 BA is an *ex officio* offense, which means that the state will prosecute any violation even if the injured party has not filed a complaint. The *ex officio* nature of the offense indicates the strong interest under Swiss law in protecting financial privacy against all kinds of intrusion.

23. In addition, under the laws of criminal procedure of the vast majority of Swiss Cantons, the decision to prosecute is not within the discretion of the prosecuting authority. If there are sufficient indications to support a serious suspicion that someone has committed an offense, then the prosecuting authority is required by law to prosecute the case. Any decision not to prosecute a case must specify the defects in evidence or law.

D. Criminal and Administrative Liability for Violation of Article 47 BA

24. Any bank employee and/or representative who intentionally breaches the duty of confidentiality under Article 47 BA faces criminal punishment of up to three years imprisonment or a monetary fine.

25. The Swiss Federal Office for Statistics has reported 28 cases between 1987 and 1996 in which the defendant was convicted for having violated Article 47 BA. The Swiss Federal Office for Statistics has not updated this statistic for post-1996 cases, but I understand that the Swiss government has stated that, since 1993, there have been 48 convictions for violations of Article 47 BA. Very recently, on 25 April 2009, the press reported about a decision of the Court of Appeal of Basel that was rendered on 24 April 2009, and by which a former bank employee of the Cantonal Bank of Basel was sentenced to three months imprisonment for, among other things, several violations of the banking secrecy (Article 47 BA) and several counts of economic espionage (Article 273 SPC). In that case, the bank employee had made bank data relating to 45 German private clients of the bank available to the German tax inspectors.[5]

26. In addition to the criminal sanctions provided for in Article 47 BA, any violation of bank secrecy would expose the bank and its employees to administrative sanctions by the Swiss Financial Market Supervisory Authority ("FINMA"). In cases of severe violations of

[5] *See* Neue Zürcher Zeitung Nr. 95, 25/26 April 2009, at page 21.

Article 47 BA, FINMA could even reconsider whether the bank is fulfilling the "fit and proper to do business" requirement.

27. FINMA may also strip any bank manager responsible for a violation of secrecy of his "fit and proper" status, which is a requisite for FINMA approval to serve as a senior bank manager or board member. FINMA also may enter an order requiring the termination of a bank employee who has violated financial privacy laws, making it practically impossible for employees so terminated to find new employment in the financial sector in Switzerland.[6]

28. For the reasons set forth above, it is my opinion that compliance with the Summons would constitute a violation of Article 47 BA, and expose all officers and employees of the Bank involved in the disclosure to criminal prosecution and punishment, including imprisonment, and to administrative consequences that may lead to termination. As well, UBS would be exposed to administrative sanctions by its bank supervisor, FINMA.

V. SWISS TRADE / BUSINESS SECRECY LAW

29. Divulging information protected by Swiss financial privacy laws may also constitute an offense under Article 273 SPC. Article 273 SPC protects Swiss sovereignty and the Swiss economy by prohibiting the disclosure of trade or business secrets to foreign authorities and/or private persons. Article 273 SPC provides:

> Economic Intelligence.
>
> Any person who has sought to discover a trade or business secret in order to make it accessible to an official or private foreign body or a private foreign company or to their agents,
>
> any person who has made a trade or business secret accessible to an official or private foreign body, or to a private foreign company, or to their agents,

[6] *See* Article 33 FINMASA.

> will be punished by imprisonment up to three years or by a monetary sentence, and in serious cases by a prison sentence not below one year. The deprivation of liberty can be combined with a fine.

30. Information that a company receives from its customers, including information that a bank receives from its customers, falls within the scope of this prohibition. In particular, it is well-established that the identities, and account and transaction related information of bank customers are protected by Article 273 SPC. In the case here, the Summons goes far beyond individual account holders rights and interests, but in addition also affects UBS's (and indeed the Swiss financial market's) interests that their customer relationships and the financial privacy obligations ensuing therefrom are respected. In BGE 111 IV 74, the Swiss Federal Supreme Court dealt with a case where two bank employees stole a UBS computer program that would have enabled the French authorities to access the accounts held by French account holders. The Swiss Federal Supreme Court held that such behavior amounted to a severe violation of Article 273 SPC, because the disclosure of this program endangered business interests of the bank, and that not only was the private interest of the bank affected, but in addition, and even more substantially, the economic interests of Switzerland were threatened (decision dated 6 February 1985, page 80).

31. Violations of Article 273 SPC are punishable by up to 3 years in prison and/or a monetary fine.

32. The Swiss Federal Office for Statistics reports 26 cases from 1984 through 2007 in which the defendant was convicted for violating Article 273 PC. In the most prominent of these cases, to which I have referred in the previous section (BGE 111 IV 74), a UBS employee and a former UBS employee were sentenced to 48 and 27 months of imprisonment, respectively, for violation of Article 273 SPC and Article 47 BA.

33. I conclude that compliance with the Summons would constitute a violation of Article 273 SPC, exposing all officers and employees of the Bank involved in the disclosure to a risk of criminal prosecution and punishment.

VI. SWISS SOVEREIGNTY AND ARTICLE 271 OF THE SWISS PENAL CODE

34. Switzerland subscribes to the typical civil law view that the taking of evidence is essentially a judicial function to be carried out by domestic courts or authorities (*see* BGE 114 IV 130 E 2c.), and it is the sovereign and exclusive right of the Swiss authorities to take compulsory measures against persons, including corporations, that are located in Switzerland. A unilateral attempt by a foreign court to compel the release of documents from Switzerland or the taking of depositions from persons resident in Switzerland without the participation or consent of the Swiss authorities would be an infringement of Swiss sovereignty. To compel a person in Switzerland to produce documents, a foreign court must use the available proceedings for legal and/or administrative assistance, thereby requesting the competent Swiss authorities to exercise their judicial power. Outside of legal and/or administrative proceedings, such a unilateral order by a foreign court affecting a person in Switzerland is considered a violation of international law, and falls within the scope of Article 271 SPC.

35. Article 271(1) SPC provides:

> Whoever takes actions, which are reserved to the public authorities, on Swiss territory without authorization for a foreign state, whoever takes such actions for a foreign party or for any foreign organization, whoever facilitates such actions, shall be punished by a prison sentence of up to three years or by a monetary sentence, and in serious cases by a prison sentence not below one year.

36. For purposes of Article 271 SPC, there is a distinction between whether a person disclosing information to a foreign authority does so voluntarily and as a party to the proceedings, or involuntarily (under the threat of sanctions) as a third party custodian of records.

37. Under Swiss law and practice, a party to the proceedings may voluntarily submit evidence to the court that is already in its possession in order to support its pleadings, provided that the disclosure is not inconsistent with third party secrecy rights and/or in violation of data protection laws.[7]

38. In contrast, a request addressed to a third party records custodian in Switzerland must be made, under Swiss law, by a Swiss authority and is therefore an official act. In the present case, the Summons is addressed to UBS, a corporation resident in Switzerland with respect to documents located in Switzerland, in UBS's capacity as third party custodian of records. Its enforcement must therefore take place through judicial assistance processes. Under such circumstances, complying with the Summons outside of legal assistance proceedings would expose those acting in Switzerland to prosecution under Article 271 SPC. In the course of a legal assistance proceeding, the Swiss authority, amongst other things, has the duty to verify that all requirements for granting legal assistance are met, and that the rights of affected persons (holders of trade or any other financial secrets) are safeguarded as the procedural laws require. By complying with a unilateral Summons outside of proper legal and/or administrative proceedings, UBS employees would in effect perform an activity that is, under Swiss law and as I have just described, an official act reserved to the competent Swiss authorities, thereby violating Article 271 SPC.

[7] BGE 114 IV 131. HOPF, N 15 ad Article 271 SPC.

39. Article 271 SPC is not a "blocking statute." It is not intended to thwart foreign discovery; it merely ensures that discovery in aid of foreign proceedings is conducted through official Swiss channels. Indeed, parties to domestic Swiss proceedings are subject to similar restraints, in that domestic Swiss discovery also must proceed only through judicial auspices (*e.g.*, parties to domestic litigation must apply to the court for any order seeking the production of documents by third parties; the Swiss court itself must conduct any questioning of witnesses).

40. The Swiss Federal Office for Statistics reports 29 cases for the period from 1984 through 2007 in which the defendant was convicted for violating Article 271 SPC.[8] In one of the most prominent of the published cases, decided by the Swiss Federal Supreme Court on September 30, 1988 (BGE 114 IV 128 seq.), a Swiss lawyer who had interviewed employees of a Swiss bank and used his interview notes (prepared in accordance with Australian rules of evidence) before an Australian court was convicted for having violated Article 271 SPC.

41. I conclude that officers and employees of UBS, if they were to comply with the Summons and turn over customer related bank documents located in Switzerland pursuant to the Summons, would violate Article 271 SPC.

VII. CIRCUMSTANCES UNDER WHICH DISCLOSURE TO U.S. AUTHORITIES IS PERMITTED

42. Under Swiss law, two circumstances may relieve a bank of its obligations to preserve the confidentiality of customer information protected under the foregoing laws: (1) the

[8] Article 271 SPC provides that a party may request authorization from the Swiss authorities to perform acts that otherwise would fall under Article 271 SPC. Such authorization must be obtained from the Federal authorities and is granted only in exceptional circumstances. An authorization would in any event only be granted if the conditions for granting legal and/or administrative assistance are fulfilled, but in the specific case would be impracticable or useless (Decision of the Federal Council, in VPB 46/IV [1982] no. 68 p. 382). In the case at hand, it is my understanding that the Swiss authorities would not grant such authorization.

customer's consent to disclosure (waiver); and (2) a direction to disclose by a competent Swiss authority.

A. Customer Consent

43. A customer may consent to waiver of his private financial secrecy rights under Article 47 BA. Such consent should normally be given in writing. For the waiver to be valid, it must be an expression of the free will of the customer. A waiver that is forced by coercion, *e.g.*, an order to waive Swiss privacy rights or suffer contempt sanctions, is not valid under Swiss law.

B. Orders by Swiss Authorities

44. In the absence of the customer's consent, a bank may make disclosure of confidential customer information only pursuant to a lawful order by a competent Swiss authority. The Swiss authorities may issue such an order pursuant to a legal and/or administrative assistance request from a foreign authority in civil, criminal and/or administrative matters, or the competent Swiss Federal or Cantonal authorities may issue such an order in the course of Swiss domestic civil, criminal and/or administrative proceedings. In matters of tax assessment, under domestic Swiss law, information generally may not be disclosed to a tax official; it typically may be disclosed only in the context of a criminal investigation or a prosecution for tax fraud.

C. The U.S.-Swiss Double Taxation Treaty

45. Swiss authorities may order the production of materials protected by financial privacy pursuant to certain treaties that Switzerland has entered into with other nations. Fully consistent with the Swiss domestic laws described in the preceding section, the U.S.-Swiss Double Taxation Treaty of 1996, Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Switz., Oct. 2, 1996, S. Treaty Doc. No. 105-8 ("DTT"),

provides that Switzerland will afford the United States administrative assistance – that may include disclosure of materials otherwise covered by financial privacy – in cases in which the United States is, among other conditions, able to demonstrate a reasonable suspicion of "tax fraud or the like." *See also* Memorandum of Understanding ¶ 8(d) (setting forth the shared understanding of the United States and Switzerland that Swiss financial privacy will not bar the exchange of information in cases of tax fraud or the like).

46. The DTT expressly provides that it will not be interpreted to "impose upon either of the Contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either contracting state . . . ." DTT Art. 26 ¶ 3. The DTT's information exchange provisions (affording the United States access to, *inter alia*, materials otherwise protected by financial privacy in cases of tax fraud or the like) are consistent with the foregoing provision because, as explained above, Swiss domestic law similarly affords Swiss prosecutors access to materials otherwise protected by financial privacy in cases of tax fraud.

47. Although the U.S.-Swiss DTT currently allows for information exchange (including materials protected by Swiss financial privacy) only in cases of "tax fraud or the like," Switzerland has announced that it will renegotiate its double taxation treaties with its leading treaty partners, including the United States, to allow for broader information exchange. Switzerland has stated publicly that in the new DTTs, it will adopt the standard in Article 26 of the OECD model treaty. The OECD standard allows for information exchange in cases of both tax fraud and tax evasion. I understand that the United States and Switzerland began renegotiating the U.S.-Swiss DTT in late April 2009.

VIII. THE SUMMONS WOULD NOT BE PERMISSIBLE UNDER SWISS DOMESTIC LAW

48. I was given a copy of the John Doe Summons issued by the IRS against UBS, and served upon UBS on 21 July 2008, and I have been asked to express my views whether, under Swiss law, a bank would have to produce the requested information to the Swiss authorities if an identical disclosure request was issued against such bank by the Swiss authorities.

49. If a request for documents comparable to the Summons (including the Declarations of Daniel Reeves and Barry B. Shott in support thereof) were served on a Swiss bank by the Swiss authorities, such a request would not comport with Swiss law and would not be entertained by a Swiss domestic court, as the request fails to contain the necessary requirements under Swiss law in order to be enforceable against a bank (lack of specificity as to the relevant alleged criminal acts and of the identity of the persons against whom the investigations are directed). Under Swiss law and practice that also applies to legal and administrative assistance proceedings, such request would be an improper so-called "fishing expedition".

50. If Swiss prosecutors were to serve such a request, they would be required to do so pursuant to proceedings charging the defendant or defendants with tax fraud, and to specify in the request the acts by the defendant(s) that support a charge of tax fraud sufficient to justify setting aside financial privacy. Here, the Summons does not meet these requirements. The Summons does not arise from proceedings charging tax fraud, and the Summons does not provide any explanation of acts by the individual defendant(s) that support a charge of tax fraud sufficient to justify setting aside financial privacy. For example:

a. The Summons seeks certain information for "*each* financial account maintained at . . . any Switzerland Office of UBS AG or its subsidiaries,"

if at any time from 2002 through 2007: (1) a "United States taxpayer had signature or other authority over [the] account," (2) UBS did not have an IRS Form W-9, and (3) UBS did not file a Form 1099 with the IRS. Summons ¶ 1 (emphasis added). This request does not meet the Swiss standard for making a showing of tax fraud necessary to set aside financial privacy. The Summons and supporting materials do not explain the taxing authority's basis to conclude that "each" account for which the Summons seeks information was used for the commission of tax fraud.

b. The Summons seeks, *inter alia*, in connection with the foregoing accounts, "documents pertaining to any foreign entities established or operated on behalf of each United States taxpayer." *Id.* The Summons does not explain the taxing authority's basis to conclude that each of the "foreign entities" for which the Summons seeks information was used for the commission of tax fraud.

c. The Summons seeks, *inter alia*, in connection with the foregoing accounts, "records of wire transactions, reflecting the activities of such financial accounts." *Id.* The Summons does not explain the taxing authority's basis to conclude that each of the "wire transactions" for which the Summons seeks information was used for the commission of tax fraud.

51. Requests by Swiss prosecutors for information protected by financial privacy based upon a showing of tax fraud must be particularized, *e.g.*, naming customers or identifying particular transactions about which the prosecutors are seeking additional information. Here, the summons does not meet this requirement. The Summons is directed against a broad group of

persons, and does not identify any of them with the requisite specificity. It makes blanket or indiscriminate requests, which are impermissible. For example:

a. The Summons seeks certain information for "*each* financial account maintained at . . . any Switzerland Office of UBS AG or its subsidiaries," if at any time from 2002 through 2007: (1) a "United States taxpayer had signature or other authority over [the] account," (2) UBS did not have an IRS Form W-9, and (3) UBS did not file a Form 1099 with the IRS. Summons ¶ 1 (emphasis added). This request is not sufficiently particularized to be cognizable under Swiss standards. The Summons does not differentiate amongst the UBS accounts for which it seeks information. It does not explain why the taxing authority is interested in any particular account and why that account, in particular, is suspected of being used to commit tax fraud.

b. The Summons seeks, *inter alia*, in connection with the foregoing accounts, "documents pertaining to any foreign entities established or operated on behalf of each United States taxpayer." *Id.* Again, this request is not sufficiently particularized to be cognizable under Swiss standards. The Summons does not differentiate amongst the "foreign entities" for which it seeks information. It does not explain why the taxing authority is interested in any particular foreign entity and why that entity, in particular, is suspected of tax fraud.

c. The Summons seeks, *inter alia*, in connection with the foregoing accounts, "records of wire transactions, reflecting the activities of such financial

accounts." *Id.* This request is not sufficiently particularized to be cognizable under Swiss standards. The Summons does not differentiate amongst the wire transactions (which I understand may number in the hundreds of thousands) for which it seeks information. It does not explain why the taxing authority is interested in any particular wire transfer and why that transfer, in particular, is suspected of furthering tax fraud.

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 28th day of April, 2009.

ISABELLE ROMY

Exhibit A

SUMMARY
CURRICULUM VITAE

PROF. DR. ISABELLE ROMY
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Isabelle.romy@nkf.ch

Current positions

Partner with the law firm Niederer Kraft and Frey AG in Zurich (since 2003; previously associate since 1995); practice centers in the areas of international litigation and international private law, in particular in US procedures involving a Swiss party.

Associate Professor at the University of Fribourg (Switzerland) and at the Federal Institute for Technology in Lausanne (EPFL) (since 1996) (course on transnational litigation, among other classes)

Vice-Chairman of the Sanction Commission of the SIX Swiss Exchange (member since 2002)

Education/prior activities

2003-2008	Deputy Judge at the Swiss Federal Supreme Court (Juge suppléante au Tribunal fédéral) assigned to the 1st Civil Court (contract, tort, commercial law) from 2005 to 2008 and assigned to the Criminal Court from 2003 to 2005
1994-1996	Teaching Assistant at the Law School of the University of Lausanne (criminal law)
1993 - 1996	Professoral thesis (thèse d'habilitation) at the University of Fribourg on enforcement actions in environmental law and on mass tort litigation and class action under US law and Swiss law
1992 - 1994	Visiting scholar at Boalt Hall, School of Law, University of California at Berkeley
1986 - 1989	Doctoral thesis (these de doctorat) on comparative (Swiss, French, German and Dutch) liability for transboundary water pollutions
1983 - 1986	University of Lausanne, Licence en droit (equivalent to J.D.)

Languages

French, English, German

Publications

Numerous publications on civil procedure, environmental law, law of obligations.

Zurich, March 2009