IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

In re Grand Jury Investigation of Possible Violations of 18 U.S.C. § 1956 and 50 U.S.C. § 1705	:	**Case Nos.**	**18-mc-00175** **18-mc-00176** **18-mc-00177**
	:		**UNDER SEAL**

OMNIBUS REPLY IN SUPPORT OF MOTIONS TO COMPEL PRODUCTION OF DOCUMENTS REQUESTED VIA SUBPOENAS

The United States of America, by and through its attorney, the U.S. Attorney for the District of Columbia, responds to the oppositions of the three banks—[redacted]—to the government's request for orders compelling the production of documents.

INTRODUCTION

Because North Korea's state-controlled banks—including the Foreign Trade Bank (FTB)—"conduct international financial transactions that support the proliferation of weapons of mass destruction (WMD) and the development of ballistic missiles in violation of international and U.S. sanctions," *see* 81 Fed. Reg. 78,715, Nov. 9, 2016, the Treasury Department prohibits U.S. financial institutions from processing U.S.-dollar transactions for those banks without a license from the D.C.-based Office of Foreign Assets Control (OFAC). To evade this prohibition and related money-laundering bans, 18 U.S.C. §§ 1956(a)(2)(A), (h), FTB uses front companies such as Mingzheng International Trading Limited (Mingzheng)—a Hong Kong company without any apparent business purpose operated by Sun Wei (a Chinese national) and Kim Tong Chol (a North Korean national)—to illegally transact in U.S. dollars. Whitley Dec. ¶¶ 9-11.[1] Such front

[1] We have attached three sworn declarations: FBI Special Agent Benjamin Whitley's, the case agent; Professor Donald Clarke's, an expert in Chinese law, and Jeffrey Olson's, Associate Director at the Office of International Affairs ("OIA"), Department of Justice. Also attached for

companies hide the affiliation of the sanctioned entity, which permits FTB to conduct U.S.-dollar transactions without the required OFAC license. *Id.* Between October 2012 and November 2015 alone, Mingzheng made over $100 million U.S.-dollar payments for the North Korean government's benefit. *Id.* ¶ 13. Of particular relevance, Mingzheng was a counterparty to over 680 U.S.-dollar transfers involving three Chinese banks: [redacted] (collectively, "the Banks"). *Id.* These transfers moved through the United States financial system by correspondent U.S. banks. *Id.*

As part of the United States' investigation into these crimes, in late-December 2017 the U.S. Attorney's Office issued grand jury subpoenas to [redacted] and a subpoena to [redacted], *see* 31 U.S.C. § 5318(k)(3).[2] These subpoenas seek only those records documenting the Banks' U.S.-dollar transactions with Mingzheng. During roughly three months of subpoena-return extensions, the Banks tried to convince the government to forego the subpoenas in favor of the Mutual Legal Assistance Agreement (MLAA) between China and the United States, culminating in a March 22, 2018, letter from the Chinese Department of Ministry of Justice directing [redacted] to not reply to the subpoena. Clarke Dec. ¶ 8h. In April and August of 2018, senior Department of Justice officials met with their Chinese counterparts and explained that the subpoenas were authorized by U.S. law and that the United States would enforce the subpoenas; Chinese

---

this Court's convenience is a summary exhibit prepared by the U.S. Attorney's Office detailing the alleged sanctions raised by the Banks' experts and the corresponding citation to the government's response.

[2] [redacted] appropriately concedes (at 1 n.1) that this administrative subpoena is analogous to a grand jury subpoena. *See United States v. Powell*, 379 U.S. 48, 57 (1964) ("investigative function" of Labor Administrator's "subpoena power" is "'essentially the same as the grand jury's'") (quoting *Okla. Press Co. v. Walling*, 327 U.S. 186, 216 (1946)); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950) (FTC Commissioner's "power of inquisition . . . analogous to the Grand Jury").

authorities responded by objecting to the production of these records via subpoena. Olson Dec. ¶ 17. When these Executive Branch efforts failed, the United States drafted the pending motions to compel in September and October 2018, which were reviewed by numerous government components—including the Department of Justice's Office of International Affairs and National Security Division, and the Treasury Department's Office of Terrorism and Financial Intelligence. Finally, at the end of this process, in late-November 2018 the government filed the present motions.

ARGUMENT

The Banks maintain (*e.g.*, [redacted] that it would be "fundamentally unfair" for this Court to order production of Mingzheng's bank records because the Banks are not "accused of any wrongdoing"; production would violate Chinese law; and the government "can obtain the very same documents through the MLAA process." But there is nothing "unfair" about ordering compliance with these subpoenas. The Banks have "elected to do business in numerous foreign host countries and ha[ve] accepted the incidental risk of occasional inconsistent governmental actions. [They] cannot expect to avail [themselves] of the benefits of doing business here without accepting the concomitant obligations." *United States v. Bank of Nova Scotia*, 740 F.2d 817, 828 (11th Cir. 1984). Indeed, given the "wide discretion" afforded grand juries, *id.* at 825, and the government's weighty interest in choking off any indirect U.S.-dollar financing of North Korea's ballistic and nuclear weapons programs, the true inequity would be to withhold the Banks' records from the grand jury, whose mandate is "not fully carried out until every available clue has been run down," *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) (internal quotation marks and citation omitted). Moreover, the MLAA is not an adequate alternative because it is "likely to result in significant delay and an insufficient response," Olson Dec. ¶ 4, and, unlike a subpoena, it has no enforcement mechanism for incomplete productions, Whitley Dec. ¶¶ 77-84. Accordingly,

because this Court has personal jurisdiction over the Banks, and Mingzheng's banking records are important pieces of the government's money-laundering and sanctions investigation, *id.* ¶¶ 33-69, this Court should grant the motions to compel.

I. THIS COURT HAS PERSONAL JURISDICTION OVER EACH BANK

As previously explained, this Court has specific personal jurisdiction over the Banks due to their minimum contacts with the United States. The Banks contend otherwise, asserting [redacted] that this Court can consider only their D.C. contacts and that those contacts are not related to "the underlying controversy," *viz.* the money-laundering and sanctions investigation. They are wrong on both counts. This Court should consider the Banks' contacts with the United States (not just D.C.) and *all* of those contacts—both with New York and D.C.—are related to the criminal investigation.[3]

A. The Banks' Contacts Subject them to Specific Personal Jurisdiction

Federal courts typically exercise personal jurisdiction only to the extent that their exercise of authority is consistent with a "state's long-arm statute and the Fourteenth Amendment, which requires certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Bricklayers & Trowel Trades Int'l Pension Fund v. Kel-Tech Constr., Inc.*, 319 F. Supp. 3d 330, 339 (D.D.C. 2018) (internal quotation marks and citation omitted). "But where Congress has provided for nationwide service of process, it is the federal government, not the state, that is the touchpoint for the jurisdictional

[3] For its part, [redacted] concedes (at 6) that it "has availed itself of the U.S. banking system to process certain transactions [redacted]," but asserts only that the subpoena "is not limited to those transactions." [redacted], however, ignores the (at least) 323 Mingzheng transactions totaling $45,779,669.50 processed via [redacted], which are the genesis of the [redacted] subpoena.

analysis. In those cases, jurisdiction requires compliance with a federal service-of-process statute and, under the Fifth Amendment, sufficient 'national contacts' with the United States." *Id.* The rationale underlying this "national contacts" approach is that "[w]hen the national sovereign is applying national law, the relevant contacts are the contacts between the defendant and the sovereign's nation." *Chew v. Dietrich,* 143 F.3d 24, 28 n.4 (2d Cir. 1998) (internal quotation marks and citation omitted); *see also J. McIntyre Mach., Ltd. v. Nicastro,* 564 U.S. 873, 884 (2011) (plurality opinion) ("The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."); *Marc Rich & Co. v. United States*, 707 F.2d 663, 667 (2d Cir. 1983) (because investigation related to the "possible violation of federal revenue statutes," the right to inquire of a witness depended upon "contacts with the entire United States, not simply state of New York") (citation omitted).

None of the Banks contest that the federal statutes at issue allow for nationwide service of process. Accordingly, the "requirement of 'minimum contacts' with a forum state is inapplicable." *SEC v. Bilzerian*, 378 F.3d 1100, 1106 n.8 (D.C. Cir. 2004). This Court thus may look beyond the Banks' contacts with just the District of Columbia, to the Banks' contacts with the United States as a whole. *Id.*; *see also Bally Gaming, Inc. v. Kappos*, 789 F. Supp. 2d 41, 45-48 (D.D.C. 2011) ("Prior opinions of the D.C. Circuit make clear that, when this Court derives its personal jurisdiction over a defendant from a federal statute's nationwide-service-of-process provision, the Due Process Clause of the Fifth Amendment does not require that the defendant also have minimum contacts with this district.") (citing *Bilzerian*, 378 F.3d at 1106 n.8; *Briggs v. Goodwin*, 569 F.2d 1 (D.C. Cir. 1977)); *Boland v. Fortis Const. Co., LLC*, 796 F. Supp. 2d 80, 89 (D.D.C. 2011) (where there is nationwide service, "the relevant inquiry is whether the defendant has had

minimum contacts *with the United States*") (internal quotation marks and citation omitted); *SEC v. Lines Overseas Mgmt, Ltd.*, 2007 WL 581909, at *3 (D.D.C. Feb. 21, 2007) ("This circuit has held that the requirement of 'minimum contacts' with a forum state is inapplicable where the court exercises personal jurisdiction by virtue of a federal statute authorizing nationwide service of process . . . . In such circumstances, minimum contacts with the United States suffice.") (quoting *Bilzerian*, 378 F.3d at 1106 n.8).[4]

Of the three Banks, only [redacted] addresses this nationwide-service point, contending in a footnote (at 15 n.4) that the government has not "identif[ied] any D.C. Circuit decision" adopting the standard. As detailed above, however, both *Briggs* and *Bilzerian* have applied the standard,[5]

---

[4] This nationwide-service standard has been "endorsed" by numerous Circuits. *Gucci Am. v. Weixing Li*, 768 F.3d 122, 142 & n.21 (2d Cir. 2014); *see also Chew,* 143 F.3d at 28 n.4 (court can consider contacts throughout the United States under the Fifth Amendment); *SEC v. Carrillo*, 115 F.3d 1540, 1544 (11th Cir. 1997) ("We agree with the rule applied by the other circuits and hereby hold that the applicable forum for minimum contacts purposes is the United States in cases where, as here, the court's personal jurisdiction is invoked based on a federal statute authorizing nationwide or worldwide service of process."); *SEC v. Knowles*, 87 F.3d 413, 417 (10th Cir. 1996) (citing decisions from First, Fifth, Sixth, and Ninth Circuits). Though some out-of-Circuit decisions have recognized, "notwithstanding the 'national contacts' test, there may be rare circumstances in which exercising jurisdiction over a remote defendant might be so extremely unfair as to violate due process," *Bricklayers*, 319 F. Supp. 3d at 340 n.5, this Circuit has not "weighed in on this issue," *id.* (citing *Livnat v. Palestinian Auth.*, 851 F.3d 45, 55 n.6 (D.C. Cir. 2017)). Nonetheless, even assuming an extreme-unfairness safety valve, exercising jurisdiction over the Banks does not rise to such a level – they are large international banks ably represented by counsel. *See Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 947-48 (11th Cir. 1997) (inconvenience not constitutionally significant because defendants were large corporations providing banking services); *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1213 (10th Cir. 2000) (access to counsel and convenience of modern methods of communication and transportation greatly reduce significance of burden). Moreover, the importance of the current investigation, *see* Part II.A.1 *infra*, outweighs any inconvenience to the Banks. *See BCCI Holdings*, 119 F.3d at 948.

[5] In addition, *In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987), noted in dicta that a foreign bank that does "considerable business in the United States" "plainly" has the "'minimum contacts' with this country to establish jurisdiction under *International Shoe*," *id.* at 1273 n.3. The *In re Sealed Case* panel, however, ultimately found no personal jurisdiction because the government never

and "[s]everal cases decided by other courts in this district . . . have found that jurisdiction over a defendant served pursuant to a federal statute with a nationwide-service-of-process provision is proper as long as the defendant has minimum contacts with the United States as a whole." *Bally Gaming*, 789 F. Supp. 2d at 46 (listing four district court decisions).

It is understandable why the Banks essentially ignore the nationwide-service jurisdictional standard. Once it is understood that this Court can consider, for example, the Banks' New York correspondent-account activity, it is plainly evident that there is specific personal jurisdiction here, which "exists where a claim arises out of the nonresident [party's] contacts with the forum." *Pension Benefit Guar. Corp. v. Asahi Tec Corp.*, 979 F. Supp. 2d 46, 57 (D.D.C. 2013) (citation omitted). Treasury Department sanctions prevented FTB from making direct use of the Banks' correspondent accounts. Accordingly, FTB utilized Mingzheng as a front company to do that which FTB could not: Mingzheng funneled over-$100 million through the U.S. financial system via the Banks' New York correspondent accounts. The extant subpoenas will thus help reveal how Mingzheng used the Banks to execute FTB's money-laundering scheme, which, in turn, will help reveal how North Korea circumvents counterproliferation sanctions. *See Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 36 (D.D.C. 2010) (because Chinese bank allegedly performed a transfer of money through a branch in the United States as part of the provision of financial services to a terrorist organization, the bank was subject to specific personal jurisdiction); *see also Nike, Inc. v. Wu*, 2018 WL 6056259, at *10 (S.D.N.Y. Nov. 19, 2018) (citing *Nike, Inc. v. Wu*, 2018 WL 4907596, at *6 (S.D.N.Y. Sept. 25, 2018)); *Bricklayers*, 319 F. Supp. 3d at 340 (where subpoena

---

specified the "actions by the companies that occurred within the United States or whose effects were felt here that it believes sufficient to establish jurisdiction." *Id.* at 1273–74.

had nationwide service, company's contacts with New York created sufficient contacts with the entire United States to satisfy the Fifth Amendment).[6]

In addition to demonstrating that the Banks did "considerable business in the United States," *In re Sealed Case*, 832 F.2d at 1273 n.3, the over-$100 million processed through the Banks' New York correspondent accounts caused injury within the United States. Specifically, those transactions interfered with the lawful implementation of OFAC's regulations. *See United States v. Tajideen*, 319 F. Supp. 3d 445, 461 (D.D.C. 2018) (indictment properly alleged that defendant, who hid involvement of sanctioned entity, injured the government by interfering with and obstructing OFAC's lawful governmental functions); *United States v. Zarrab*, 2016 WL 6820737, at *4 (S.D.N.Y. Oct. 17, 2016) (same). Such injury creates the requisite minimum contacts. *See Laker Airways v. Sabena,* 731 F.2d 909, 922 (D.C. Cir. 1984) ("It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory.").[7]

The federal authorities relied upon by the Banks [redacted] are inapt because those decisions hold only that general correspondent-banking activities do not create specific jurisdiction where there is no relation between the harm alleged and the U.S.-dollar

---

[6] [redacted] claims (at 37) that its U.S. "operations" [redacted] had no connection to the underlying transactions giving rise to the subpoena. But [redacted] U.S.-correspondent accounts (which are not exclusively held at [redacted]) processed at least 14 Mingzheng transactions totaling $1,627,909.34. It is irrelevant what role, if any, [redacted] specifically played in these transactions. The extant subpoena is directed at [redacted] for records in China, not New York.

[7] [redacted] claims (at 13) to have not "purposefully availed itself" of anything within the District of Columbia because it never filed an application itself for an OFAC license. But the mere existence of OFAC is not the basis for specific personal jurisdiction here – for example, this is not an attempt to collect records for a [redacted] customer who engaged in identity theft where jurisdiction relies on [redacted] unrelated contacts with OFAC; rather it is an investigation into the failure of an [redacted] customer to comply with [redacted] obligations to OFAC.

transactions that the foreign bank processed. *See Day v. Cornèr Bank (Overseas) Ltd.*, 789 F. Supp. 2d 150 (D.D.C. 2011); *Leibovitch v. Islamic Republic of Iran*, 188 F. Supp. 3d 734 (N.D. Ill. 2016). The cited portion of *Cornèr Bank* [redacted], for example, only addressed the court's lack of *general* personal jurisdiction over the Bahamian entities. 789 F. Supp. 2d. at 156-57 (mere presence of correspondent "accounts—without more—is an insufficient basis for the assertion of general jurisdiction").[8] Here, the government is not relying on a theory of general jurisdiction. Similarly, the *Leibovitch* court found that there was "virtually no link between the in-state banking activities of the[] French and Japanese banks and Plaintiffs' claims arising from a terrorist attack that occurred in Israel with the support of the Iranian government," and thus it could not "be said that Plaintiffs' claims 'directly arise' out of the banking activities of these local branches." 188 F. Supp. 2d at 751. Critically, because *Leibovitch*'s subpoena request occurred in a post-judgment proceeding rather than as a substantive Anti-Terrorism Act claim, the court noted that nationwide service of process—which would have allowed for consideration of the bank's contacts to the United States as a whole—was not available. *Id.* at 751-54. Thus, the Banks' cases show only that courts favor requests for overseas account records tethered to the U.S. correspondent

[8] Although *Cornèr Bank* also held that it lacked specific personal jurisdiction over the Bahamian law firm and bank, that holding was premised on the plaintiff's inability to allege facts to satisfy the District of Columbia's long-arm statute. 789 F. Supp. 2d at 157-58. The instant subpoenas need not satisfy the long-arm statute because they involve federal-question jurisdiction and thus implicate the nationwide-contacts test. *See Marc Rich*, 707 F.2d at 667. Even assuming *arguendo* that D.C.'s local long-arm statute applied, the Banks' contacts would satisfy the statute, because: the Banks transact business in the forum (which is the entire United States) and there has been a tortious injury in the forum caused by an act or omission in the forum (*i.e.*, the failure to obtain a license). *See* D.C. Code § 13–423(a)(1), (3). Moreover, unlike the plaintiff in *Cornèr Bank*, who provided "no reasoning as to how these acts constitute conduct *purposefully* directed at the District," 789 F. Supp. 2d at 159, the government has made specific allegations about how Mingzheng's conduct involves the forum.

transactions that serve as the basis for litigation (as in this case),[9] but disfavor requests for records unrelated to a U.S. bank's correspondent transactions (as in *Leibovitch* and *Cornèr Bank*).[10]

Moreover, even putting aside the Banks' New York correspondent-account activity, specific personal jurisdiction emanates from OFAC's blocking of 20 of the Banks' illegal Mingzheng transactions, which also are related to this criminal investigation. In these 20 instances, OFAC concluded that Mingzheng should have—but did not—get a license because Mingzheng was acting on behalf of a sanctioned entity (*e.g.*, FTB). Receiving a blocking order from OFAC creates specific personal jurisdiction because that is a finding by the regulators that the bank processed an illegal transaction by failing to get an OFAC license. The Banks' documented activity of interacting with OFAC—filtering U.S.-dollar correspondent transactions for compliance with the OFAC sanctioned-entity list and processing these 20 transactions which OFAC blocked—are "act[s] by which the [Banks] purposefully avail[ed] [themselves] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,"[11] *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 109 (1987) (internal

---

[9] In fact, Mingzheng used its [redacted] accounts to make payments for the North Korean regime to a company with administrative headquarters in D.C. Whitley Dec. ¶ 13.

[10] Moreover, "less substantial contacts are sufficient to establish jurisdiction over a witness" than over a party, because appearing to testify or produce documents "is far less burdensome than appearing to defend oneself in litigation." Sarah Sun Beale *et al.*, *Grand Jury Law & Practice* § 6:7 (2d ed. 1997). Citing *Leibovitch*, however, [redacted] maintains (at 36-37) that "a more restrictive approach to the minimum contacts" applies to nonparties. But in *Leibovitch*, the plaintiffs were "not just seeking discovery from the banks" but also "pursuing citation proceedings, which, given their unique structure, are quite similar to a lawsuit." *Id.* at 748. The subpoenas here seek only records, which trigger no travel burdens and merely involve the production of records previously created in the normal course of business.

[11] Of course, if the Banks knew or should have known of Mingzheng's illegal conduct, that knowledge would independently justify personal jurisdiction over the Banks. Foreign banks that fail to comply with OFAC's regulations can lose access to the U.S.-dollar system. Whitley Dec. ¶ 7f (Treasury Department barred Chinese bank from all U.S. correspondent-banking activities due, in part, to banks repeated business with North Korean sanctioned entities). Indeed, but for

quotations marks and citation omitted); *cf. United States v. $1,071,251.44 of Funds Associated with Mingzheng*, 2018 WL 3949962, at *4 (D.D.C. June 29, 2018) (Minghzeng's failure to obtain OFAC license created venue in D.C. to forfeit the 20 blocked transactions), *report and recommendation adopted*, 324 F. Supp. 3d 38 (D.D.C. 2018); *United States v. Hassanshahi*, 185 F. Supp. 3d 55, 57 (D.D.C. 2016) (venue in D.C. because failure to secure an OFAC license is a "critical" element of a sanctions offense).[12]

As we have established, pursuant to the nationwide-service rule, the Banks' contacts establish specific personal jurisdiction. Those contacts include the $100 million in illicit transactions they processed through their correspondent accounts in New York, which is the gravamen of this case. Declining to exercise specific personal jurisdiction over the Banks in these circumstances would be akin "to eliminat[ing] the necessary regulatory oversight into foreign entities that operate within the boundaries of the United States . . . . When corporations receive the benefits of operating in this forum, it is critical that regulators and courts continue to have the power to compel information concerning their activities." *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561, 570–71 (S.D.N.Y. 2015), *rev'd and remanded on other grounds,* 867 F.3d 310 (2d Cir. 2017); *see also Bricklayers*, 319 F. Supp. 3d at 340 (where subpoena had nationwide service,

---

the existence of OFAC and its regulations, the present case would not exist, as the Banks were only able to conduct the transactions in question, because OFAC has a framework for U.S.-dollar clearing of non-sanctioned entities. *See Walden v. Fiore*, 571 U.S. 277, 287–88 (2014) (injury "would not have occurred but for" defendants' out-of-state activity, which had an impact in the forum). Obtaining the requested records will clarify what knowledge, if any, the Banks or any of its representatives had of the illicit transactions, which impact how effective their overall OFAC compliance program was. Whitley Dec. ¶ 69.

[12] [redacted] argues (at 14) that personal jurisdiction cannot attach merely because a bank has been notified of, or a party to, unrelated OFAC blocking actions. This ignores that the Banks processed 20 transactions that OFAC blocked, each of which qualifies as "a single purposeful contact" sufficient to meet the minimum-contacts standard and subject the Banks to personal jurisdiction for requests related to Mingzheng's records. *See Knowles*, 87 F.3d at 419.

company's contacts with New York created sufficient contacts with the entire United States); *Wultz*, 755 F. Supp. 2d at 33 (Chinese bank's focus on a lack of contacts with D.C., versus its contacts with New York and California, was "misplaced," because the proper inquiry was whether the bank had minimum contacts with the United States).[13]

B. Exercising Jurisdiction Comports with Notions of Fair Play Because the Banks Purposefully Directed their Activities into the United States

As shown, the Banks have sufficient minimum contacts with the domestic forum. Accordingly, this Court's exercise of personal jurisdiction is "presumptively constitutional," and the Banks can only avoid this Court's exercise of jurisdiction by presenting a "compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985); *see also Sher v. Johnson*, 911 F.2d 1357, 1364 (9th Cir. 1990).

The Banks, however, have failed to demonstrate that any "inconvenience . . . [would] be so great as to constitute a deprivation of due process," *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 27 F. Supp. 3d 1002, 1013 (N.D. Cal. 2014). Most importantly, the Banks should have "reasonably anticipate[d] being haled into court in this country." *United States v. Ali*, 718 F.3d 929, 944 (D.C. Cir. 2013). "It should hardly be unforeseeable to a bank that selects and makes use of a particular forum's banking system that it might be subject to the burden of a lawsuit in that

[13] Although we suspect that the Banks may direct this Court to Judge Williams' recent concurrence in *In re Grand Jury Subpoena*, 912 F.3d 623, 626 (D.C. Cir. 2019), that opinion does not further the Banks' personal-jurisdiction argument. In that case, the government relied on the Corporation's "general U.S. commercial activity" to form the "'minimum contacts' necessary" to bring the Corporation's documents within the jurisdiction of the district court. *Id.* at 635 (citation omitted). Thus, the government did not "rely on any asserted 'connection' between the Corporation's contacts with the United States and the subpoena 'at issue.'" *Id.* (citation omitted). Here, however, the Banks' contacts—including the use of their New York correspondent accounts to process Mingzheng's $100 million in illicit transactions—are directly related to the subject of the subpoenas.

forum for wrongs related to, and arising from, that use." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 171-72 (2d Cir. 2013); *see also Wultz*, 755 F. Supp. 2d at 34 (Chinese bank was a sophisticated international financial institution and thus it was reasonable to presume that bank was aware of U.S. laws and related risk of being "hauled into *any* U.S. District Court"). Because the Banks have conducted hundreds of millions of dollars' worth of U.S.-dollar transactions, they were necessarily aware that they could be brought to court in D.C. to be questioned about, for example, their compliance with OFAC's licensing requirements.

Courts assessing due process claims also "tend to focus their inquiry on the logistical difficulties facing a foreign entity forced to litigate in a given forum, such as the distance the entity would have to travel and the entity's unfamiliarity with the forum." *Gucci Am., Inc. v. Weixing Li*, 135 F. Supp. 3d 87, 100 (S.D.N.Y. 2015) (citing *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99 (2d Cir. 2000)). No such inconvenience exists here. The Banks need not travel to D.C. and the Banks are large corporations providing banking services, *BCCI Holdings*, 119 F.3d at 947-48, who have access to counsel and the convenience of modern methods of communication, *Peay,* 205 F.3d at 1213.

Though the Banks claim [redacted] that they will be subjected to a "severe and significant" burden because complying with the subpoenas will cause them to "violate foreign law," the due-process analysis relates solely to the burden of submitting to jurisdiction in the United States. *See Nike*, 2018 WL 6056259, at *11. "Bank secrecy laws have nothing to do with this factor, which requires the court to consider, among other things, whether the party is familiar with the forum or would need to travel a long distance in order to participate in the litigation," *id.*, factors which, as shown, do not undermine this Court's jurisdiction over the Banks.

II. THE RELEVANT RESTATEMENT FACTORS WEIGH IN FAVOR OF ENFORCING THE SUBPOENAS

As the parties who rely on foreign law, the Banks "assume the burden" of showing that that law prohibits compliance with the subpoenas, *In re Grand Jury*, 912 F.3d 623, 633 (D.C. Cir. 2019), a burden that the government agrees the Banks have met at least to some degree, *see* Clarke Dec. ¶ 10a. But "[n]o nation is under an obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum." *Laker Airways*, 731 F.2d at 927. The operation of foreign law thus "do[es] not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that law." *Societe Nationelle Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 n.29 (1987).

To assess when comity obligations expire because "strong public policies" of the United States would be vitiated by foreign law, *Laker Airways*, 731 F.2d at 937, the courts consider five "relevant" factors: (1) "'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'"; (2) the availability of alternative means of securing the information; (3) the importance of the documents sought to the investigation; (4) the specificity of the request; and (5) whether the information originated in the United States, *Aerospatiale*, 482 U.S. at 544 & n.28 (quoting Restatement of Foreign Relations Law of the United States (Revised) § 437((1)(c) (Tent. Draft No. 7, 1986)).[14] "In general, careful

[14] This draft of the Restatement was subsequently adopted as Restatement (Third) § 442(1)(c), which is now § 306 of the Restatement (Fourth). Unless otherwise noted, all citations will be to Restatement (Third).

application" of the Restatement "will faithfully adhere to the principles of international comity." *Linde v. Arab Bank PLC*, 706 F.3d 92, 111 (2d Cir. 2013).

When conducting this comity analysis, if "[a]ttorneys representing the United States government" provide "the court with a reasoned justification for a discovery request," including proof that it has been "subject to interagency review" and, perhaps, "international consultation," Restatement § 442, Reporters' Note 9, the court should "accord some deference" to the Executive Branch's determination that "the adverse diplomatic consequences of the discovery request would be outweighed by the benefits of disclosure," *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985); *see also* A. Colangelo, *Absolute Conflicts of Laws*, 91 Ind. L.J. 719, 751-52 (2016) ("For its part, the Restatement acknowledges with a kind of ambivalent approval the argument that 'when the United States government convokes a grand jury, issues a civil investigative demand, or brings a law suit, a decision has already been made that the matter is important to the national interest, whether it concerns an antitrust violation, securities fraud or tax evasion.'") (quoting Restatement § 442, Reporters' Note 9).

In apparent recognition of this deference, the federal courts have "consistently" held that "the United States interest in law enforcement outweighs the interests of foreign states in bank secrecy and the hardships imposed on the entity subject to compliance." *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 554 (S.D.NY. 2002), *aff'd*, 318 F.3d 379 (2d Cir. 2003); *see, e.g.*, *United States v. Bank of Nova Scotia*, 740 F.2d 817, 827 (11th Cir. 1984) ("*Bank of Nova Scotia I*") (Cayman Islands); *United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1389-91 (11th Cir. 1982) ("*Bank of Nova Scotia II*") (Bahamas); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1288 (9th Cir. 1981) (Switzerland); *United States v. Field*, 532 F.2d 404, 407-09 (5th Cir. 1976) (Cayman Islands); *United States v. First Nat'l City Bank*, 396 F.2d 897, 901-05 (2d Cir.

1968) (Germany); *United States v. Sedaghaty*, 2010 WL 11643384, **6-8 (D. Ore. 2010) (Saudi Arabia); *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d at 562-64 (unidentified "Republic"); *United States v. Noriega*, 1990 WL 142524, **3-11 (S.D. Fla. 1990) (Germany); *United States v. Chase Manhattan Bank, N.A.*, 584 F. Supp. 1080, 1083-87 (S.D.N.Y. 1984) (Hong Kong); *In re Grand Jury 81-2*, 550 F. Supp. 2d 24, 27-30 (N.D. Mich. 1982) (Germany); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 114-19 (S.D.N.Y. 1981) (Switzerland).[15]

The balancing of the relevant Restatement factors in this case similarly counsels in favor of granting the United States' motions to compel, particularly because the government's subpoena decision making was subject to interagency review and, indeed, Chinese consultation. *See* Olson Dec. ¶¶ 16-18; *see also First City Nat'l Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (Executive Branch has "primacy" in "conduct of foreign relations"); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1351 (D.C. Cir. 2004) ("[w]hile we lack foreign policy expertise, the executive branch, the branch of government primarily concerned with foreign affairs and the branch charged with administering § 1324(a), has it in spades").

[15] As far as we can tell, only a single federal court applying the Restatement's comity test has ever declined to enforce an administrative or grand jury subpoena because production would contravene the laws of a foreign country, which is the sole claim the Banks raise here. *See United States v. First Nat'l City Bank of Chicago*, 699 F.2d 341, 343-47 (7th Cir. 1983) (declining to enforce IRS summons where bank employees "acting in Greece would be exposed to criminal liability, not merely a fine, but imprisonment" and countervailing United States interest was simply "collecting taxes"). As explained *infra*, *see* Pt. II.F, *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987) ("*Sealed Case I*"), did not apply the Restatement's comity analysis and, in any event, the court's holding hinged on the per curiam panel's understandable reticence to order a bank owned by one country to violate a second country's laws, a situation not presented here.

A. Noncompliance will undermine several important United States interests while not impinging on any vital Chinese interests

The Banks concede (*e.g.*, [redacted]) that the United States has a "strong interest in combatting money laundering and enforcing international sanctions," but suggest [redacted] that China has a "vital interest in upholding its bank secrecy laws" and that "the balance of interests favors denying" the motions to compel. The Banks are mistaken, however, because they undervalue the United States' interest in this investigation into the financing of North Korea's WMD program, and simultaneously overstate China's interests as reflected in its laws and regulations. When the nations' interests are properly measured, it is plain that the "first and most important factor" of the Restatement test, *Field*, 532 F.2d at 407, weighs in favor of production.

1. The United States has a significant interest in proving that North Korea is using front companies—such as Mingzheng—to circumvent international WMD sanctions

"The United States has a strong national interest in the effective enforcement of its criminal laws." *Davis*, 767 F.2d at 1035. That already-strong interest is magnified exponentially here because Mingzheng's alleged criminal-law violations relate to the illicit financing of North Korea's WMD program, which the President and the Secretaries of State and Defense have recognized constitutes a "grave threat to the United States' national security." Whitley Dec. ¶¶ 6a-6f. In March 2013, the Treasury Department—acting pursuant to Executive Order 13,382—sanctioned FTB, "North Korea's primary foreign exchange bank," because it engages in WMD proliferation activities. Whitley Dec. ¶¶ 11. OFAC's action barred FTB from accessing the U.S. financial and commercial systems without first obtaining a license from OFAC. *See* https://www.treasury.gov/press-center/press-releases/Pages/jl1876.aspx; *see also* Whitley Dec. ¶¶ 11-12. To circumvent this prohibition, FTB illegally processes U.S.-dollar transactions by employing front companies bearing no paper trail that leads to North Korea. *See* 2017 U.N. Panel

of Experts Report, 80; *see also* Whitley Dec. ¶¶ 8-28. The Banks' records documenting Mingzheng's foreign and U.S.-dollar wire and cash transactions (along with supporting due-diligence documentation), are thus crucial to the government's money laundering-investigation because they may: identify new individuals and corporate co-conspirators; provide evidence for indictments of related North Korean subjects; and reveal whether the Banks and their employees should have detected the scheme. Whitley Dec. ¶¶ 7a, 29-70.[16] The United States' interests are thus at their zenith in this criminal case. *See generally Bank of Nova Scotia II*, 740 F.2d at 827 ("Congress, as well as the Executive Branch, has long been 'concerned about [the] serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax and regulatory enactments.'" quoting *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 1494, 1501 (1974)).

2. China's regulations do not denote a strong countervailing interest

In contrast to the United States' weighty interest in securing the Mingzheng records, Professor Donald Clarke—whose academic specialization is the law of the People's Republic of China, *see, e.g.*, *Nike, Inc.*, 2018 WL 4907596, at *18—opines that "China does not have a strong state policy in favor of protecting the secrecy of bank account information." Clarke Dec. ¶¶ 1, 93. Professor Clarke's opinion is appropriately premised on his review of "the significance of disclosure in the regulation by the foreign state of the activity in question." Restatement § 442, comment c; *see* Clarke Dec. ¶¶ 22-92.

[16] As with any large-scale money laundering-investigation, the government will always review bank records to see what precautions, if any, a bank took to fulfill their sanctions-compliance and money-laundering reporting obligations. *See* Whitley Dec. ¶¶ 77-77, 57-70. Though the government is not alleging specific wrongdoing by the Banks, the volume of illicit transactions warrants issuance of the subpoenas to facilitate an understanding of how such activity has gone unnoticed.

Importantly, Professor Clarke concludes, the Banks have not demonstrated that "compliance with the Subpoenas would violate China's Criminal Law at all." Clarke Dec. ¶ 10c. The Banks' arguments about potential criminal liability are, Professor Clarke explains, "exaggerated," "highly implausible," and "extremely weak." *Id.* ¶¶ 65, 67, 71.[17] The fact that disclosure of the Minzheng records would not implicate Chinese "penal protection[s]," *First Nat'l City*, 396 F.2d at 903, undermines the Banks' claim that a "vital" national interest is at stake [redacted]. There is "less reason for a court in one state to refrain from exercising its jurisdiction when the consequence of obedience to its order is merely civil, as opposed to criminal, liability in the other state." *Chase Manhattan Bank*, 584 F. Supp. at 1086 (citing Restatement). Indeed, if the shoe were on the other foot and a Chinese prosecutor sought Mingzheng records, they would be discoverable. Clarke Dec. ¶¶ 93-97. In such circumstances, where "the general rule appears to be that for domestic investigations such information would be obtainable," it is "difficult to understand how the bank's customers' rights of privacy would be significantly infringed simply because the investigating body is a foreign tribunal." *Field*, 532 F.2d at 408; *see also Bank of Nova Scotia I*, 691 F.2d at 1391 ("It is incongruous to suggest that a United States court afford greater protection to the customer's right of privacy than would a Bahamian court simply because this is a foreign tribunal.").[18]

---

[17] Specifically, Dr. Clarke concludes, the Banks' claim that the information related to Mingzheng is a state secret "is highly implausible." Clarke Dec. ¶¶ 67-70. Further, the Banks' assertion that compliance with the subpoenas would cause them to violate Article 219 of the Criminal Law, which protects "business secrets," is "extremely weak." *Id.* ¶¶ 71-75. Similarly, the Banks' contentions that document production would result in a violation of Criminal Law Article 253A—regarding citizens' personal information—"are exaggerated." *Id.* ¶¶ 76-90. And, finally, "nothing substantiates" the Banks' suggestion of potential "criminal liability under Art. 286(I) of the Criminal Law regarding network security." *Id.* ¶¶ 91-92.

[18] Even assuming disclosure pursuant to a subpoena might constitute a crime, the absence of any such prosecutions, *see* Clarke Dec. ¶¶ 10c, 76-90, further demonstrates that the Chinese laws

Professor Clarke further opines that the Banks have not shown that compliance with the subpoenas carries even "a serious risk of civil liability for them or their responsible personnel." Clarke Dec. ¶ 10b; *see also id.* ¶¶ 53-64. The Banks' customer, Mingzheng, is defunct and thus unable to bring suit. *Id.* ¶ 13. In any event, the two Chinese judicial decisions that [redacted] claims (at 15, 27) raise the specter of "civil liability" are inapt because they are "not about information disclosure" but "account freezes." *Id.* ¶¶ 54-57. Similarly, though [redacted] cites (at 15) two Chinese tort cases, the first reflects liability for damages suffered by a depositor when "criminals hacked into his bank account," which is plainly not analogous to a subpoena-based production. *Id.* ¶ 59. As for the second, that tort case actually shows that Chinese courts do not "take breaches of information confidentiality seriously" because, even though the defendant (the China Insurance Regulatory Commission) tortiously disclosed the plaintiff's personal information, the plaintiff "got no relief—not even a court-ordered apology." *Id.* ¶¶ 60-64.

At worst, Professor Clarke concludes, the Banks' compliance with the extant subpoenas "might violate certain Chinese regulations and lead to administrative sanctions." Clarke Dec. ¶ 10a. But even those administrative sanctions would be "minor" because the hypothetical fines are "trivial," *id.* ¶¶ 25, 27-30, 42, 44-47, 52, and the non-monetary sanctions include such things as circulation of a "notice of criticism," *id.* ¶ 40.

In addition to telling courts to assess the "significance of disclosure" in the foreign-state's regulations, the Restatement instructs courts to review "expressions of interest by the foreign state, as contrasted with expressions by private parties." Restatement § 442, comment c. Such a review

---

"cannot be construed" as laws "intended to universally govern the conduct of litigation in a foreign court." *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d at 563 (internal quotation and citation omitted); *see also Aerospatiale*, 482 U.S. at 544 n.29 (relevant measure of foreign nation's "interest[] in nondisclosure" is "enforcement" history of country's laws).

shows that China's expression of interest here deserves little weight. While Professor Clarke has exhaustively reviewed the myriad of potentially applicable Chinese prohibitions identified by the Banks, China's Ministry of Justice (the lone Chinese government authority represented in the Banks' submissions) identifies only three provisions in support of its claim that subpoena compliance "will subject" the Banks to "administrative penalties . . . civil suits from the account holders . . . and even criminal liabilities according to different circumstances." MOJ Letter, 2-3. The first provision, the 2018 Judicial Assistance Law, however, is only a "procedural law setting forth the rules for governmental operations" and "does not itself provide for any sanctions for violations." Clarke Dec. ¶ 68. And beyond simply citing Articles 6 and 30 of the Commercial Bank Law, the MOJ does not provide a "detailed analysis of the specific sanctions that might or might not follow" from those provisions. *Id.* ¶ 20; *cf. id.* ¶¶ 25-28 (reviewing Commercial Bank Law decisions and concluding that "they do not appear to involve disclosure of client account information"). Indeed, the MOJ "does not even appear to understand that in this case there can be no 'civil suits from the account holders' . . . because the account holder in question, Mingzheng, is defunct." *Id.* ¶ 20. The lack of "clarity, thoroughness, and support" reflected in the MOJ's expression of interest coupled with its offer in the "context of litigation" counsels "cause for caution." *Animal Science Prods., Inc. v. Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865, 1873 (2018); *see also In re Grand Jury Subpoena,* 912 F.3d at 634.

The MOJ's expression of China's interests is further undermined by the Letter's failure to identify a substantive policy that would be contravened by a compliance order. The MOJ claims only that it is "highly concerned" because, if this Court orders production, "China's judicial sovereignty will be seriously undermined, and the mutual legal assistance in criminal matters between China and the United States will be substantially impaired." MOJ Letter, 2. But these

are precisely the types of "general" policies that the Restatement warns should not control the comity analysis. "In making the necessary determination of foreign interests under Subsection (1)(c), a court or agency in the United States should take into account not merely a general policy of the foreign state to resist intrusion upon its sovereign interests,' or to prefer its own system of litigation, but whether producing the requested information would affect important substantive policies or interests of the foreign state." Restatement § 442, comment c.

Even *had* the MOJ identified a substantive Chinese "interest in protecting the privacy of bank customers,"[19] that interest would not be significantly diminished because this case "involve[s] investigative grand juries which are required by law to maintain the secrecy of their proceedings." *United States v. Rubin*, 836 F.2d 1096, 1102 (8th Cir. 1988); *see also Bank of Nova Scotia II*, 740 F.2d at 828 n.16. Thus, assuming that China's "statutes and regulations" show that the "Chinese government . . . ha[s] a clear interest in ensuring that its laws and procedures are in place to protect customer information," as [redacted]—but not the Chinese government—maintains (at 11), the Banks' records will at least be partially protected by Rule 6(e)'s non-disclosure requirement.

* * * * *

In sum, analysis of the two nations' interests demonstrates that the United States' interest in depriving North Korea of "funding that could be used to kill American citizens strongly outweighs" China's interest "in bank secrecy laws and [its] abstract or general assertion of sovereignty," *Wultz v. Bank of China, Ltd.*, 910 F. Supp. 2d 548, 559 (S.D.N.Y. 2012).

[19] In fact, Professor Clarke notes, Chinese citizens have "barely any expectations of privacy." Clarke Dec. ¶ 95 n.89.

B. The MLAA is not a substantially equivalent alternative

In addition to claiming that a production order would undermine China's bank-secrecy interests, the Banks assert [redacted] that "the MLAA is a readily available alternative means of securing the information which can be used without forcing [redacted] to violate the law in China." Again, they are mistaken.

"[E]specially in recent years, the MLAA has not been an effective channel for the United States to receive timely, adequate responses from China to requests for bank records." Olson Dec. ¶ 8. In 2017 and 2018, for example, the United States sent ten MLAA requests to China for bank records; at least five of those requests sought records from the Banks at issue here. *Id.* ¶ 10. "To date, China has not executed a single one of these requests." *Id.* Indeed, there are roughly 22 bank-record requests currently pending with China, 12 of which have been pending for over two years. *Id.* ¶¶ 13, 10. Moreover, even when, over the past decade, China has provided U.S. law-enforcement authorities with bank records, "most" of the responses in those approximately 15 of 50 instances have been "incomplete or untimely," or have failed to include the necessary business-records certificate. *Id.* ¶ 9. "In the vast majority of cases, China has been unresponsive, and the matter has been closed due to the age of the case – that is, the statute of limitations expired or the U.S. agents and prosecutors decided to close the investigation due to the lack of records from China." *Id.* ¶ 12. "[G]iven the general inaction by China" on the United States' MLAA requests, starting in 2017, Department of Justice officials—including OIA's Associate Director, Mr. Olson—warned the Chinese government that, among other things, the United States would begin issuing subpoenas to advance its investigations and pursue justice. *Id.* ¶ 16. Despite these warnings and other "high-level" U.S.-China discussions, China has not improved its responsiveness to U.S. MLAA requests. *Id.* ¶ 17. Accordingly, in this case, after receiving the

appropriate approvals from senior Department of Justice officials, the United States concluded that subpoenas were "the appropriate path for obtaining" the Banks' Mingzheng records. *Id.* ¶ 18; *see also* Whitley Dec. ¶¶ 32, 81-85.

Though the Banks claim [redacted] that the Chinese Ministry of Justice "has produced financial records pursuant to MLAA requests on at least eight prior occasions" between 2015 and 2017, the history of those requests precisely reveals why the United States chose subpoenas in *this* case. *See* Olson Dec. ¶ 14. First, four of the eight productions were in response to MLAA requests that had been made in 2012 or 2013, thus demonstrating that China regularly sits on requests for years. *Id.* ¶ 14a. Second, in others of these eight cases, China either made an "incomplete" response, failed to provide the requisite business-record certification, or only made the response after the government issued a subpoena. *Id.* ¶¶ 14b, 14c, 14d. This record amply demonstrates why, at least in the bank-records context, the China-United States MLAA procedures do not constitute a substantially equivalent means of securing evidence. *See Aerospatiale*, 482 U.S. at 542 ("In many situations, the Letter of Request procedure authorized by the [Hague] Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules."); *see also Vetco*, 691 F.2d at 1290; *Nova Scotia I*, 691 F.2d at 1390; *cf. Nike, Inc. v. Wu*, 2018 WL 6056259, *13 (S.D.N.Y. Nov. 19, 2018) (proposed Hague Convention request to China inadequate civil-subpoena substitute because, "in similar cases," banks "that were the subject of these requests produced only partial discovery").[20]

[20] [redacted] maintains (at 6-7) that "in at least one other matter where documents at [redacted] in China were initially requested by grand jury subpoena," the "documents were procured by the U.S. government through a government-to-government exchange (presumably under the MLAA)." [redacted] has the facts inverted – after Chinese authorities failed to timely reply to a MLAA request, the government sent a subpoena to [redacted]. Olson Dec. ¶ 14(b). Chinese authorities only then complied with the MLAA request in lieu of the subpoena. *Id.* This case highlights the broken nature of MLAA requests for Chinese bank records. Whitley Dec. ¶¶ 77-84. [redacted] also claims

In sum, despite the Banks' claim [redacted] that "there is no reason to assume" that the Chinese government "would not" comply with an MLAA request in this case, there are several such reasons. First, there is the historical record, which shows that, if China responds at all, that response often takes years and, in many instances, is incomplete. *See* Olson Dec. ¶¶ 8-15. Further, notably absent from the MOJ's discussion of *this* case is a representation that it would have provided the Mingzheng records if the United States had sought them pursuant to the MLAA. Instead, the MOJ declares only that it "would timely review and handle" any such request. MOJ Letter, 4. Yet in an analogous case, involving the same banks, China has made no MLAA production, even after two trips to China by U.S. officials seeking their cooperation. *See* Olson Dec. ¶ 13c; Whitley Dec. ¶¶ 71-75. Finally, all three Banks "are closely tied to the Chinese state," Clarke Dec. ¶ 98, and China has different goals than the United States in regard to North Korea, *see* Whitley Dec. ¶ 80. For example, Chinese authorities have repeatedly failed to support either

---

(at 24 n.17) that "past precedent indicates the Chinese government will provide the necessary cooperation with the United States." As Professor Clarke scrupulously documents, however, all but one of these past "precedent[s]" are "not examples of China doing a favor to the United States," but "examples of the Chinese government advancing its own agenda." Clarke Dec. ¶¶ 106-14. Those self-benefitting examples stand in stark contrast to China's interest vis-à-vis North Korea, wherein China has divergent interests than the United States. *Id.* ¶ 106. Professor Clarke noted the one instance of non-self-serving interest cooperation, was a non-MLAA extradition of a U.S. child-predator and served "very limited value in assessing the likelihood of Chinese government cooperation in the current case." *Id.* ¶ 114. [redacted] similarly claims (at 29-30) that, in a civil case, *Nike, Inc. v. Wu*, the MOJ "recently agreed to coordinate with DOJ to facilitate production of discovery disclosures." But, again, there is more to this story. Specifically, in an attempt to save face after the court compelled the production of records, the Chinese banks offered to mail the records to DOJ. The plaintiff filed a recent notice stating, "[t]he Court expressly held that the Banks could deliver the subpoenaed documents by 'any reasonable means' [i.e., including to DOJ] but that the documents had to be delivered to [plaintiff] by the deadline set by Judge McMahon. []. They have not done so. . . . This Court made it plain that the 'Rube Goldberg' delivery method announced by the Banks was not an excuse to ignore the plain language of Judge McMahon's order." D.E. 187, *Nike, Inc. v. Wu*, Civ. A. No. 13-08012 (citation omitted). Subsequent to missing this deadline, the banks have slowly begun to comply with the court order to produce bank records.

international sanctions of, or U.S. law-enforcement actions against, North Korea. *Id.* at ¶¶ 7a-7l, 80. Indeed, the Chinese government has publicly objected to the Treasury sanctions and Department of Justice forfeiture action already taken against Mingzheng. *Id.* ¶ 80. Pursuing an MLAA request through the Ministry of Justice in such circumstances would be tantamount to asking a defendant to execute a warrant for his own computer. *See* Whitley Dec. ¶ 84; Olson Dec. ¶ 7 (MLAA "provides no enforcement mechanism"); *see also In re Grand Jury Subpoena*, 646 F.3d 159, 165 (4th Cir. 2011) ("Because the power of letters rogatory may be limited by foreign countries . . . this mechanism does not allow for the same breadth and ease of discovery as do the Federal Rules of Criminal Procedure.")

Even if there were not a conflict of interest or a ten-year history of MLAA deficiency by Chinese authorities, it would be "unwise" for this Court to "unduly restrict the broad investigatory powers of the grand jury," *Nova Scotia I*, 740 F.2d at 825, and require proof of the complete futility of an MLAA request. There is no first-resort rule, *Aerospatiale*, 482 U.S. at 542, and it is the United States' prerogative to seek an "appropriate formal order directing the demanded disclosure," which will "serve as the requisite foundation for any further actions that may be needed in the form of sanctions" and simultaneously "bring home the obligations a [Chinese bank] undertakes when it conducts business" via correspondent U.S. bank accounts, *Banca Della Svizzera*, 92 F.R.D. at 119. For a variety of reasons, the United States has chosen subpoenas as the preferred method for obtaining the Mingzheng records, *see* Olson Dec. ¶ 18; Whitley Dec. ¶¶ 79-85, and the "possibilities offered by [MLAA requests] do not render the subpoena alternative invalid or otherwise improper," *In re Grand Jury 81-2*, 550 F. Supp. at 29; *see also Sedaghaty*, 2010 WL 11643383, at **3-4 (OIA has the "complete discretion" to decline to make an MLAA request where, for example, it has the "potential to negatively impact other cases or other foreign

policy considerations"; OIA shares this responsibility with "neither the judiciary nor the legislature").

C. The Mingzheng bank records are critical to the criminal investigation

While the United States understands that courts "have refused to require production where the documents sought are largely cumulative of records already produced," *Vetco, Inc.*, 691 F.2d at 1290, the Mingzheng bank records are critical features of the government's investigation and not cumulative of other evidence, such as the records already produced in response to the government's U.S.-correspondent bank subpoenas. Whitley Dec. ¶¶ 29-32.

Mingzheng played an important role in North Korea's efforts to evade prohibitions on that country's participation in the United States financial system, laundering over $100 million for North Korea. Whitley Dec. ¶ 34. The Banks' records will constitute the best evidence of FTB's money-laundering and sanctions-related crimes. The Banks' records should also illuminate the FTB network, as agents will be able to: (i) trace foreign and U.S. currency cash transactions, which are the lifeblood of North Korea's WMD program; (ii) follow wire transfers to unknown co-conspirator front companies; and (iii) otherwise pierce the "informational black-hole" posed by Chinese banks. *Id.* ¶ 81. The Banks' records are thus critical links in the chain of proof showing how North Korea is actively flouting numerous sanctions to facilitate its WMD programs. *See id.* ¶¶ 33-70.

In contrast, subpoena returns from correspondent banks provide only "basic" and "limited" transactional information. Whitley Dec. ¶¶ 29-32. And, it is "difficult, if not impossible, to obtain 100% of the transactions that flowed through even the U.S. financial system from such subpoenas" because there is "no central repository for correspondent banking records" and a large number of banks process correspondent wire transfers. *Id.* ¶ 32. The "only way" to collect all transaction

data is thus to obtain the complete foreign bank statements, *id.*, which is the purpose of the present subpoenas. *See, e.g., In re Grand Jury Subpoena*, 218 F. Supp. 2d at 563 (government's court submission showed "documents appear to be highly relevant to the specific transactions under investigation by the grand jury" and that there was "no alternative source of the documents").

Contrary to the Banks' claims [redacted], the time that has elapsed between the initial subpoena-return dates and the present motions does not suggest that the Mingzheng records are inconsequential to the criminal investigation. That eleven-month gap is attributable to several things, including the extension of the subpoena return dates at the request of the Banks, two trips to China by senior Department of Justice officials, and the collection of data from partner agencies. Moreover, this is a complex and multi-faceted investigation. *See, e.g.*, Whitley Dec. ¶¶ 8-10, 13. In 2018, law-enforcement agents executed search and seizure warrants related to new FTB front companies, interviewed overseas witnesses, adduced grand jury testimony, and filed a forfeiture complaint, which alleged the continued laundering of funds via FTB front companies through Chinese banks including [redacted]. *See United States v. $599,930.00 of Funds Associated with Cooperating Co. 1*, Civ. A. No. 18-2746 (RC) (D.D.C. Nov. 26, 2018). Simply because the United States has been, *inter alia*, pursuing parallel investigative steps in the intervening months does not mean that the Banks' records are unimportant. As the Banks admit, they agreed to preserve the records in question, so the delay in time posed no threat of spoliation of evidence.

D. <u>The subpoenas are specific and narrow</u>

As [redacted] correctly concedes (at 18), the subpoena "request is reasonably specific" because it seeks documents relating to a single entity (Mingzheng) over a defined period of time. [redacted] similarly acknowledges (at 22) that the subpoena seeks "records related only to one entity and one account for a specific time period," but claims that it is "not sufficiently tailored" because it

"requests production of *all* records related to that entity and account," including "documents unrelated to the alleged illicit U.S. dollar payments made by Mingzheng for the benefit of the North Korean government." This argument, however, ignores a key feature of the investigation—Mingzheng solely existed as a front company for FTB. Whitley Dec. ¶¶ 8-10. Given that Mingzheng had no legitimate business, all records relating to its activities fall squarely within the ambit of the grand jury's investigation. *Cf. Nike Inc.*, 2018 WL 6056259, at *12 (civil subpoena "sufficiently specific" where "plaintiffs had connected the counterfeiting activities with certain accounts located at the subpoenaed banks").

At any rate, the present subpoenas are "narrower than what a normal request would entail" because they are confined to just three Chinese banks that processed transactions for Mingzheng. Whitley Dec. ¶ 75. "In a typical money laundering and sanctions investigation, agents would send subpoenas to numerous banks, not limiting such requests to banks with known bank accounts, as correspondent records do not always show every bank that a subject has used." *Id.* Further, the government could have—but did not—seek bank records for individual accounts belonging to Mingzheng's operators: Kim Tong Chol and Sun Wei. *Id.*

E. The documents did not originate in the United States

As the government previously conceded, the Restatement's document-origination factor weighs in the Banks' favor because the bulk of the material sought may have originated in, and is likely maintained in, China.

F. The Banks have not shown that they will suffer significant hardships

The Banks devote many pages [redacted] to the purported hardships they will suffer, asserting that they "risk[] potentially serious

penalties by providing information in response to the subpoena[s] outside of the MLAA process."[21] But, Professor Clarke explains, that risk is exaggerated because the banks face, at most, the possibility of "minor" administrative sanctions. Clarke Dec. ¶ 10a. There is no "serious risk of civil liability" because, among other things, Mingzheng is now defunct. *Id.* ¶¶ 10b, 13. And, the Chinese government has apparently never prosecuted a bank or bank employee for revealing account information to another government. The only criminal matters cited by the Banks concerned "enforcement actions" reflecting "massive disclosures" of individual citizens' personal information "for profit." Clarke Dec. ¶¶ 76-90; *cf. Societe Internationale, S.A. v. Rogers*, 357 U.S. 197, 211 (1958) ("[i]t is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction").

In addition, the risk that *these* Banks will be subject to significant sanctions is particularly low. Clarke Dec. ¶ 105. Although the Banks engage in commercial activities, for several reasons—including indirect stock ownership and the Communist Party's control of "senior management appointments," *id.* ¶¶ 99-105—the Banks are "closely tied to the Chinese state," *id.* ¶ 98. These government ties mean that the Banks are unlikely to face "severe government sanctions." *Id.* ¶ 105; *see also Nike, Inc.*, 2018 WL 4907596, at *18 (citing Professor Clarke for same finding). "Moreover, the Chinese government itself would seem to have an interest in Chinese banks maintaining access to the U.S. financial system," which the Banks might forfeit if they do not comply with the subpoenas. Clarke Dec. ¶ 105. Because the Banks and the Chinese regulators are affiliated with the Chinese government and the Bank records would be disclosed to

[21] Although *Aerospatiale* deemed only Restatement § 442's *five* factors "relevant" to the "comity analysis," 482 U.S. at 544 n.28, the Banks [redacted] identify "two additional" factors—hardship and good faith—that the Banks acknowledge have been "adopted by the Second Circuit" but not this Circuit. Assuming those factors apply here, as we demonstrate in the text, only the latter weighs in the Banks' favor.

the U.S. government, not a "private civil litigant[]," *Linde*, 706 F.3d at 114, the Banks have failed to demonstrate a risk of significant sanctions.

The United States, however, will face significant hardship without the records. Those records are an important feature of the United States' criminal investigation, which is focused on ascertaining whether North Korea's state-run bank used Mingzheng to circumvent nuclear-weapons sanctions. Whitley Dec. ¶¶ 48-69. Accordingly, this hardship factor weighs in the government's favor. *See, e.g., Vetco Inc.*, 691 F.2d at 1289; *In re Grand Jury Subpoena*, 218 F. Supp. at 563; *Noriega*, 1990 WL 142524, at *8.

G. The United States agrees that the Banks have demonstrated good faith

The United States does not contest that the Banks have acted in good faith, as they claim [redacted]. *See, e.g., Nike, Inc.*, 2018 WL 4907596, at *18 (declining to find nonparty Chinese banks acted in bad faith where, faced with civil subpoenas, banks conducted "voluntary search of records in their New York branches for responsive information," "active[ly] participat[ed]" in the case, and asked for narrow relief in the form of a requirement that assignee "proceed by way of the Hague Convention"); *cf. In re Grand Jury 81-2*, 550 F. Supp. at 28 (bank acted in bad faith where it "appears to have actually courted the [German] injunction against itself to protect its customer").

* * * * *

"Under our system of jurisprudence the grand jury's function in investigating possible criminal violations is vital." *Field*, 532 F.2d at 407. There is no need to restrict that vital function here because China's bank-secrecy interest pales in comparison to the United States' interest in ensuring that its dollars are not illegally deployed to prop up North Korea's weapons' programs.

This Court should thus direct the Banks to comply with the subpoenas, "which might possibly uncover criminal activities of the most serious nature," *id.* at 409.[22]

H. *Sealed Case II* controls this case, not *Sealed Case I*

As we demonstrated in our initial motions, *Sealed Case I*, 825 F.2d 494 (D.C. Cir. 1987), does not support the foreign-sovereign preference that the Banks seek because the result there turned on, and was expressly limited to, the "peculiar facts of th[at] case." *Id.* at 498; *see id.* at 499 ("emphasiz[ing] again the limited nature of [its] holding"). The Banks disagree [redacted], but none addresses what the *Sealed Case I* panel declared was the "[m]ost important" fact weighing against sanctions in that case, namely the sanctions "represent[ed] an attempt by an American court to compel a foreign person to violate the laws of

[22] Even in the civil-discovery context—where private litigants cannot be presumed to have "concern for national interests or for abiding by international undertakings," Restatement § 442, Reporter's Note 9—the courts applying the Restatement's comity analysis overwhelmingly order discovery. *See* Note, *The Aerospatiale Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It*, 106 Cal. L. Rev. 231, 245 (2018) (surveying post-*Aerospatiale* federal authorities and finding that "[c]ourts compelled foreign parties to produce discovery in violation of foreign law in thirty-seven of . . . forty-two contemplated orders, and refused to order violations of foreign law in only five"). Indeed, several courts faced with arguments that production would contravene Chinese law have nonetheless ordered a panoply of Chinese banks—including [redacted]—to comply with civil subpoenas seeking customer information. *See Nike, Inc. v. Wu*, 2018 WL 6056259, **11-15 (S.D.N.Y. Nov. 19, 2018); *Gucci America, Inc v. Weixing Li*, 135 F. Supp. 2d 87, 101-04 (S.D.N.Y. 2015); *Wultz v. Bank of China Ltd.*, 910 F. Supp. 2d 548, 552-61 (S.D.N.Y. 2012). [redacted] cites only a single "contrary" authority (at 32-33), and that decision predates *Nike, Gucci*, and *Wultz*. *See Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143 (S.D.N.Y. 2011). This chronology is relevant because, after the *Tiffany* court declined to enforce a civil subpoena and instead ordered the litigant to pursue bank documents via the Hague Convention, the Chinese government only made a "partial production," which subsequently caused the *Wultz* and *Nike* courts to conclude that the Hague Convention was an inadequate subpoena substitute. *Nike, Inc. v. Wu*, 2018 WL 4907596, *16 (S.D.N.Y. Sept. 25, 2018) (Mag. Op.), *aff'd*, 2018 WL 6056259, **11-15 (S.D.N.Y. Nov. 19, 2018) (Dist. Op.); *see also Wultz*, 910 F. Supp. at 558-59 (partial production provided *Tiffany* litigant by Chinese Ministry of Justice suggests "Hague Convention would definitely not represent a reasonable alternative means for plaintiffs to obtain discovery"). Contrary to [redacted] claim (at 32), then, even the civil-discovery case law is not truly "mixed."

a *different* foreign sovereign on that foreign sovereign's territory," 825 F.2d at 498 (emphasis added). That is, the district court's order compelled a bank owned by one country (Country X) to violate a second country's (Country Y's) laws. It is easy to understand why the *Sealed Case I* panel blanched at the idea of a U.S. court ordering a foreign entity to break yet another foreign country's law. In contrast, any production orders here would not have that feature; rather, the bank-secrecy laws at issue in this case involving Chinese banks are China's own.

Much more pertinent to the present analysis is *Sealed Case II*, which rejected Switzerland's claim (as *amicus curiae*) that "any attempt to secure documents located in *Switzerland* and protected by *Swiss* secrecy laws would trammel *Swiss* sovereignty and offend common notions of international comity." 832 F.2d 1268, 1283 (D.C. Cir. 1987) (emphasis added). Relying on the Fifth Circuit's *Field* decision and the Supreme Court's *Aerospatiale* decision,[23] *Sealed Case II* concluded that "considerations of comity" could not "possibly block enforcement" of the grand jury subpoena with respect to those documents "whose only copies are protected by Swiss law." *Id.* at 1283-84. Specifically, *Sealed Case II* reasoned, the Swiss-American Treaty on Mutual Assistance was not an adequate subpoena substitute because it "might not permit the [government] to obtain all the documents it seeks that are located in Switzerland," and the United States' interest in prosecuting those "who are believed to have flouted its laws" outweighed Switzerland's interest

[23] As noted in our initial motions, the *Sealed Case I* panel did not even mention *Aerospatiale* though it had been decided before *Sealed Case I*. [redacted] contends (at 24) that it is "absurd" to suggest that the *Sealed Case I* panel may not have been aware of *Aerospatiale*, but the inexplicable thing about *Sealed Case I* is not simply that it failed to mention *Aerospatiale* or, even, the Restatement's comity analysis, but that it questioned a principle of law that *Aerospatiale* deemed "settled." Thus, whereas *Aerospatiale* announced that it is "well settled" that the operation of foreign law may "not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute," 482 U.S. at 544 n.29, *Sealed Case I* questioned "whether a [U.S.] court may ever order action in violation of foreign laws," 825 F.2d at 498.

in its "secrecy laws." *Id.* at 1284; *see also Field*, 532 F.2d at 407-09 ("To defer to the law of the Cayman Islands and refuse to require Mr. Field to testify would significantly restrict the essential means that the grand jury has of evaluating whether to bring an indictment."). In like fashion here, China's bank-secrecy interest does not trump the United States' important prosecutorial interests and an MLAA request is not substantially equivalent to the extant subpoenas.

III. THE ADMINISTRATIVE SUBPOENA DOES NOT EXCEED STATUTORY AUTHORIZATION

A. Pursuant to the Patriot Act, the Department of Justice has broad authority to issue extraterritorial administrative subpoenas

Citing *FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1323 (D.C. Cir. 1980), [redacted] first argues (at 34) that deference to an agency is not justified when its action threatens to have extraterritorial impact, and that courts are bound wherever possible to construe strictly federal statutes conferring subject-matter jurisdiction on domestic agencies to avoid possible conflicts with contrary principles of international law. However, *Saint-Gobain* also instructs that "courts of the United States are nevertheless *obligated* to give effect to an unambiguous exercise by Congress of its jurisdiction to prescribe even if such an exercise would exceed the limitations imposed by international law." *Id.* (emphasis added); *see also Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 495 (D.C. Cir. 1984) (courts must adhere to "[a] clear congressional mandate authorizing [an agency] to serve investigative subpoenas on foreign citizens in foreign nations"); *Environmental Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531–32 (D.C. Cir. 1993) ("the presumption [against extraterritorial application] will not apply where there is an 'affirmative intention of the Congress clearly expressed' to extend the scope of the statute to conduct occurring within other sovereign nations") (citation omitted).

The unambiguous congressional mandate is self-evident here – Patriot Act subpoenas exclusively target extraterritorial conduct by foreign banks with no physical presence in the United States. *See United States v. Sedaghaty,* 2010 WL 11643384, at *5 (D. Or. Feb. 26, 2010) (Congress expanded the authority to collect overseas bank records in the Patriot Act, because "preexisting authorities . . . had proven outmoded and inadequate in cases in which money laundering involved foreign entities") (internal citation omitted); *see also* Pub. L. No. 107–56, 115 Stat. 272, § 302(a)(8). Because Congress has spoken clearly, the Department of Justice is due deference in its decision to issue "service of an investigative subpoena on a foreign national in a foreign country," *Saint-Gobain,* 636 F.2d at 1327 (McGowan, J., concurring).

B. This Court must enforce the administrative subpoena here because it falls well within the ambit of the statute

"Agencies are accorded 'extreme breadth in conducting [their] investigations,' because 'a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance.'" *United States v. Capitol Supply, Inc.*, 27 F. Supp. 3d 91, 99 (D.D.C. 2014) (citations omitted). "[The Court's] role in a subpoena enforcement proceeding is limited to determining whether 'the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.'" *In re Sealed Case (Admin. Subpoena)*, 42 F.3d 1412, 1415 (D.C. Cir. 1994) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)). "While the Court's inquiry involves neither minor nor ministerial matters, [i]f an agency's subpoena satisfies these requirements, [a court] must enforce it." *United States v. Apodaca*, 251 F. Supp. 3d 1, 8 (D.D.C. 2017) (internal quotation marks and citations omitted). "Thus, agencies are given broad deference both in their interpretation of the scope of their authority to issue a subpoena for targeted records

and their estimation of the relevance of such records." *Capitol Supply*, 27 F. Supp. 3d at 99 (internal quotation marks and citation omitted).

The Patriot Act subpoena issued to [redacted] is within the Department of Justice's authority because the statute empowers the Attorney General to subpoena a foreign bank for "records *related to* such correspondent account, including records maintained outside of the United States *relating to* the deposit of funds into the foreign bank." 31 U.S.C. § 5318(k)(3)(A)(i) (emphasis added). This language creates a wide scope of foreign records subject to subpoena. *Cf. Tomassi v. MDS, Inc.*, 2013 WL 1636435, at *2 (W.D. Ky. Apr. 16, 2013) (Sixth Circuit adopted an "expansive definition of a 'related to' proceeding," in which proceedings are related if the outcome of one "could conceivably have any effect" on the other) (internal quotation marks and citation omitted); *United States v. Weinberger*, 1992 WL 294877, at *3 (D.D.C. Sept. 29, 1992) (court read "related to" phrase as allowing for broad authority for Independent Counsel).

Here, the Department of Justice has requested records related to Mingzheng's activities via [redacted] correspondent account. The Department of Justice has determined that bank statements, supporting documentation of transactions, and account-identification documents fall within the statutory ambit, particularly where Mingzheng existed for no other purpose but to illicitly access the U.S. financial system. Whitley Dec. ¶ 10. Such records are important to the investigation into the laundering of funds via the correspondent account. *Id.* The Department of Justice's "interpretation of the scope" of the Patriot Act should be "given broad deference," *Capitol Supply, Inc.*, 27 F. Supp. 3d at 99.[24]

[24] [redacted] reliance (at 33) on *Resolution Tr. Corp. v. Thornton*, 41 F.3d 1539 (D.C. Cir 1994), is misplaced. The court quashed the administrative subpoena because the statute barred it from being issued once a suit was filed. *Id.* at 1547. This was an objective temporal constraint, not a dispute about the scope of the enabling statute. *Id.*

Sedaghaty does not limit the scope of the statute. There, defendant Sedaghaty cashed approximately $151,000 in cashier's check at a Saudi bank using Al-Buthe's personal account. *Sedaghaty*, 2010 WL 11643384, at *1-2. Among other things, the court compelled production of: bank statements, ledger cards, or records reflecting dates and amounts of deposits and withdrawals; debit and credit memos; deposit slips and checks deposited; withdrawal slips and teller records showing the withdrawal of currency, including records reflecting the type of currency received (U.S. dollars or Saudi Riyals); and checks issued for withdrawals, "to the extent any [such] documents relate to the cashier's check and traveler's checks or otherwise to correspondent accounts with United States Banks." *Id.* at **5-6. The government requests similar categories of records here; however, because Mingzheng's volume of transactions is much larger, and its illegal conduct is far broader than the mere cashing of checks, the government seeks a larger band of records. Without comment, the *Sedaghaty* court refused to compel the production of "signature cards and customer applications." *Id.* While the identity of Sedaghaty and Al-Buthe were irrelevant to their crime, the identity documents an individual used to open the Mingzheng accounts are important to identifying criminal liability as well as potential co-conspirators. Moreover, Al-Buthe's personal account presumably had some legitimate purposes, which is why the court focused on records related to the checks, whereas Mingzheng solely existed to launder funds, including through [redacted] correspondent account.[25]

[25] [redacted] attempts again (at 32) to manufacture a requirement to make a government-to-government request prior to issuing a Patriot Act subpoena. As explained *supra* in the comity analysis, no such requirement exists. Moreover, there is no indication the Saudi authorities in *Sedaghaty* had a demonstrated interest inimical to the United States or a history of non-compliance with international requests, as China does here.

C. The administrative subpoena is reasonable

"[A] district court must enforce a federal agency's investigative subpoena if the information sought is 'reasonably relevant,' or, put differently, not 'plainly incompetent or irrelevant to any lawful purpose of the agency,' and not 'unduly burdensome' to produce." *Apodaca*, 251 F. Supp. 3d at 12 (citations omitted). "In a proceeding to enforce an administrative subpoena, the agency's own appraisal of relevancy must be accepted so long as it is not obviously wrong." *Id.* (internal citation omitted). The Department of Justice has concluded that the request is limited, Whitley Dec. ¶ 76, and not only relevant, but vitally important, *id.* ¶¶ 33-70. The Department of Justice is uniquely positioned to know what documents are "necessary to the case" [redacted] whereas [redacted], which has processed hundreds of millions of dollars of sanction-violative transactions, lacks the perspective to draw such conclusion.

Though [redacted] argues (at 34) that it faces an undue burden because of the purported sanctions it will face in China, its own authority—*Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992)—defeats this claim. *Richmark* compelled the production of financial records in China because China's interest in state secrecy laws was inferior to a private party's interests in collecting on a default judgment. *See id.* at 1476–77.

[redacted] fails to carry its "burden" in showing the information sought is "irrelevant," *Apodaca*, 251 F. Supp. 3d at 12. Contrary to [redacted] assertion (at 35-36), there is no alternative for obtaining the information in China, as such requests are a "fool's errand." Whitley Dec. ¶¶ 81-82. Moreover, the records presently in the government's possession are inadequate for numerous reasons, including that not all transactions have been captured and there is minimal information in the U.S. subpoena returns. *Id.* ¶¶ 29-33. The Department of Justice's determination of relevance

and need for the information sought "should not be disturbed or 'rejected' [because] it is [not] 'obviously wrong,'" *Capitol Supply*, 27 F. Supp. 3d at 99 (citation omitted).

Finally, the requested timeframe of January 1, 2012, to the present date is not overbroad. Subpoena returns alone show over $50,000,000.00 in illicit Mingzheng transactions occurring via [redacted] correspondent account between October 2012 through November 2015. Law enforcement needs to review records prior to the initial and final months of known U.S.-dollar transfers to learn where and how Mingzheng initially drew in and then ultimately sent out illicit proceeds from its [redacted] account. Whitley Dec. ¶¶ 76-77. [redacted] proposed limits on the scope of the subpoena are due no deference and artificially limit the agency's duly authorized investigation.

IV. CONCLUSION

For the foregoing reasons, the government requests that this Court enter the proposed orders compelling production in seven days (as the Banks claim to have the records prepared for production). If the Banks fail to comply with such orders, the government will seek imposition of a daily $50,000 fine on each bank.

Respectfully submitted,

JESSIE K. LIU
United States Attorney

/s/

Zia M. Faruqui, D.C. Bar 494990
Arvind K. Lal, D.C. Bar 389496
Assistant United States Attorneys
Rebecca A. Caruso, V.A. Bar 90613
Special Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-7117 (Faruqui)
zia.faruqui@usdoj.gov

Certificate of Service

I certify that on the 4th day of February, 2019, service was made of a copy of the foregoing Omnibus Reply in Support of Motions To Compel Production of Documents Requested via Subpoenas via electronic mail:

- Counsel for [redacted] (18-mc-175): Brian Stolarz, c/o LeClairRyan, 2318 Mill Road, Ste. 1100, Alexandria, VA 22314, Brian.Stolarz@leclairryan.com;
- Counsel for [redacted] (18-mc-176): Daniel Levin, c/o White & Case LLP, 701 Thirteenth Street, N.W., Washington, D.C. 20005-3807, daniel.levin@whitecase.com; and
- Counsel for [redacted] (18-mc-177): Hank Bond Walther, 51 Louisiana Ave., N.W., Washington, D.C. 20001, hwalther@jonesday.com; and Samidh Guha, 250 Vesey Street, New York, NY 10281, sguha@jonesday.com.

/s/
Zia M. Faruqui
Assistant United States Attorney