

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

In re Grand Jury Investigation of Possible : Case No. 18-mc-00175
Violations of 18 U.S.C. § 1956 and :
50 U.S.C. § 1705 :
: :
: :
: UNDER SEAL

SUPPLEMENTAL BRIEFING REGARDING PERSONAL JURISDICTION WAIVER

The United States of America, by and through its attorney, the U.S. Attorney for the District of Columbia, responds to this Court’s March 5, 2019 Minute Order as follows:

Personal Jurisdiction Is Waivable

“[B]ecause the personal jurisdiction requirement is a waivable right, there are a ‘variety of legal arrangements’ by which a litigant may give ‘express or implied consent to the personal jurisdiction of the court.’” *Burger King, Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (quoting *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)). For example, “parties to a contract may agree in advance to submit to the jurisdiction of a given court.” *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (citations omitted). Forum-selection provisions are “presumptively enforceable,” *Marra v. Papandreou*, 216 F.3d 1119, 1124 (D.C. Cir. 2000) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)).

“[T]he usual due process analysis need not be done when a nonresident defendant contractually agrees to personal jurisdiction in a given state.” *Water & Sand Int’l Capital, Ltd. v. Capacitive Deionization Tech. Sys., Inc.*, 563 F. Supp. 2d 278, 282–83 (D.D.C. 2008) (citing *Alexander Proudfoot Co. World Headquarters v. Thayer*, 877 F.2d 912, 921 (11th Cir.1989)). That

is, courts need not consider “minimum contacts with the [jurisdiction],” *TruServ Corp. v. Flegles, Inc.*, 419 F.3d 584, 589 (7th Cir. 2005).

**The Bank Has Waived Personal Jurisdiction for
Matters Arising Under the Bank Secrecy Act**

Prior to establishing a U.S. branch, all foreign banks must first submit an application to the Board of Governors of the Federal Reserve System. *See* INTERNATIONAL APPLICATIONS AND PRIOR NOTIFICATIONS UNDER SUBPART B OF REGULATION K—FR K-2, https://www.federalreserve.gov/reportforms/forms/FR_K-220180731_f.pdf. This application necessarily requires foreign banks to make standard commitments. The foreign bank must consent to, *inter alia*, the jurisdiction of the federal courts of the United States and of all governmental agencies for purposes of any and all claims made by the United States in any matter arising under “U.S. Banking law.” *Id.* at 18. [REDACTED] (the “Bank”) agreed to such waiver of jurisdiction prior to opening a branch in the United States. *See* Exhibit A.¹ (“[T]he Bank consents to the jurisdiction of the federal courts of the United States and of all United States governmental agencies, departments and divisions for purposes of any and all claims made by, proceedings initiated by, or obligations to, the United States, the Board, and any other United States governmental agency, department or division, in any matter arising under U.S. Banking Law.”)

The Bank’s waiver defines “U.S. Banking Law” to include matters relating to federal criminal laws of which violations arise from “the Bank Secrecy Act,” Exhibit A at 7 n.2. The Bank Secrecy Act is “codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, 18 U.S.C. 1956, 1957, and 1960 and 31 U.S.C. 5311-5314 and 5316-5332 and notes thereto.” COMMODITY FUTURES

¹ The Federal Reserve produced the attached application, which the Bank filed when it opened a branch office in California in 2009. The Federal Reserve has not located the Bank’s application to open its [REDACTED]. The government has only analyzed the attached waiver in the extant motion.

TRADING COMMISSION, *Compliance With Suspicious Activity Reporting Requirements And Office Of Foreign Assets Control Economic Sanctions Programs*, available at 2016 WL 3655433, at *2 n.2; see also *In The Matter Of Department Of Enforcement v. Paolo Franca Iida Sao Palo, Brazil*, available at 2016 WL 4036081, at *7 n.1; <https://www.fincen.gov/resources/statutes-regulations>.²

This Matter Concerns Alleged Bank Secrecy Act Violations

The Bank has waived all claims of personal jurisdiction because the present matter is an investigation into Bank Secrecy Act violations. “FTB, Mingzheng, Wei, and Chol, are the subjects of a grand jury investigation into violations of: the federal money laundering statute, 18 U.S.C. § 1956; the International Economic Emergency Powers Act (IEEPA), 50 U.S.C. § 1705; and the Bank Secrecy Act, 31 U.S.C. § 5318.” Govt. Mtn. to Compel at 4-5; see also *United States v. \$1,071,251.44 of Funds Associated with Mingzheng Int’l Trading Ltd.*, 324 F. Supp. 3d 38, 43 (D.D.C. 2018) (noting that the government is investigating FTB for violations of the Bank Secrecy Act codified at 31 U.S.C. § 5322). The allegation of an investigation into the Bank Secrecy Act by the government is sufficient to trigger the waiver language. *Cf. In re Various Grand Jury Subpoenas*, 924 F. Supp. 2d 549, 555 (S.D.N.Y. 2013) (subjects who refused to comply with subpoenas because they claimed they were not covered by the Bank Secrecy Act inverted the investigatory function of the grand jury which need “not prove that the regulation or the Bank Secrecy Act apply” before issuing subpoenas) (citing *In re M.H.*, 648 F.3d 1067, 1071 (9th Cir. 2011)). This investigation reaches beyond North Korea to financial institutions here and abroad that processed FTB’s and Mingzheng’s laundered transactions. The Bank Secrecy Act requires financial institutions to have anti-money laundering programs and conduct enhanced due

² The Financial Crimes Enforcement Network (FinCEN) lists on its website the above statutes as comprising the Bank Secrecy Act. FinCEN administers the Bank Secrecy Act. See generally, *FinCEN Proposes Streamlined Bank Secrecy Act Regulations*, available at 2009 WL 416660.

diligence of such correspondent banking transactions. *See e.g., Sharkey v. J.P. Morgan Chase & Co.*, 2018 WL 1229831, at *8–9 (S.D.N.Y. Mar. 5, 2018); *Dusek v. JPMorgan Chase & Co.*, 132 F. Supp. 3d 1330, 1335–36 (M.D. Fla. 2015). The banking law investigation into FTB and its co-conspirators involves examining their use of “layered transactions using intermediary shell companies [i.e., Mingzheng] in third countries and stripping [North-Korea]-revealing information from payment instructions that would be provided to U.S. banks . . . which deceived the U.S. banks into processing transfers on behalf of sanctioned entities.” *United States v. Zarrab*, 2016 WL 6820737, at *12 (S.D.N.Y. Oct. 17, 2016) (internal quotation marks omitted).

The Banks Has Thus Waived Personal Jurisdiction for This Matter

The Bank’s waiver language serves as “a forum selection clause that operates as a consent to jurisdiction in all federal courts and that waives any challenge to venue in any suit brought therein,” *Nymbus, Inc. v. Sharp*, 2018 WL 705003, at *3 (D. Conn. Feb. 5, 2018). Waiver language that references the entire United States acts as a nationwide service of process provision in bringing jurisdiction to all federal courts. *See SLSJ, LLC v. Kleban*, 2015 WL 1973307, at *13 (D. Conn. Apr. 30, 2015) (even if no statutory nationwide service, court still possessed personal jurisdiction over defendants pursuant to the forum selection clause in agreement); *Turner v. Sedgwick Claims Mgmt. Servs., Inc.*, 2015 WL 225495, at *17 (N.D. Ala. Jan. 16, 2015) (forum-selection clause in retirement plan documents works like a nationwide service of process provision, in that “forum-selection clauses routinely preclude objections to personal jurisdiction”).

A personal jurisdiction waiver is treated “like any other contractual provision,” and is deemed valid “unless it is subject to any of the sorts of infirmity, such as fraud and mistake, that justify a court’s refusing to enforce a contract.” *Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 375 (7th Cir.1990) (citing *M/S Bremen*, 407 U.S. at 12–13). There was “no burial in fine print here,”

Donovan, 916 F.2d at 377. See also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590–95 (1991) (forum-selection clause on the back of cruise ticket was valid). The Bank is a “wealthy” financial institution which “knew that by signing the [] agreement they were incurring a potential liability [],” *Id.* at 378. The Bank cannot “point to factors typically relied on by litigants seeking to avoid enforcement of forum-selection clauses—for instance, that the clause is the product of fraud or that its enforcement would contravene a strong public policy of the forum in which suit is brought to overcome the presumption of validity,” *Papandreou*, 216 F.3d at 1124.

In fact, public policy of the forum (i.e., the United States) supports a broad reading of the Bank’s consent to jurisdiction. “[T]he privileges and benefits associated with a foreign bank operating a branch in New York give rise to commensurate, reciprocal obligations. Foreign corporations which do business in New York are bound by the laws of both the state of New York and the United States, and are bound by the same judicial constraints as domestic corporations.” *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561, 570 (S.D.N.Y. 2015), *rev’d on other grounds*, 867 F.3d 310 (2d Cir. 2017). “This legal status also confers obligations to participate as third-parties in lawsuits which involve assets under their management.” *Id.*³

³ Most courts equate compliance with corporate registrant statutes with also consenting to personal jurisdiction. See *Am. Dairy Queen Corp. v. W.B. Mason Co.*, 2019 WL 135699, at *4 (D. Minn. Jan. 8, 2019) (collecting cases). However, in *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016), the court held that New York’s registration provision did not implicitly create a waiver of personal jurisdiction post-*Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). The waiver there was “based only on a slender inference of consent pulled from routine bureaucratic measures that were largely designed for another purpose entirely.” *Brown*, 814 F.3d at 639. As such, “*Brown* does not upset the well-recognized principle that parties to a transaction may contractually consent to jurisdiction in New York courts, provisions that will unquestionably be enforced where there is a statutory basis for jurisdiction within the federal courts.” *In re Motors Liquidation Co.*, 565 B.R. 275, 289 (Bankr. S.D.N.Y. 2017); see also *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755, 765–69 (Fed. Cir. 2016) (holding that *Daimler* did not alter analysis that parties may enter into a forum-selection agreement, which creates general jurisdiction).

Conclusion

For the foregoing reasons, the government requests that this Court find that it has personal jurisdiction over the Bank.

Respectfully submitted,

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Certificate of Service

I certify that on the 8th day of March, 2019, service was made of a copy of the foregoing motion via electronic mail to Brian Stolarz, c/o LeClairRyan, 2318 Mill Road, Ste. 1100, Alexandria, VA 22314, Brian.Stolarz@leclairryan.com.

/s/
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