IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury	)	**Case No. 18-mc-00175-BAH**
Investigation of Possible	)	**GJ No. 18-2**
Violations of 18 U.S.C. § 1956	)	
and 50 U.S.C. § 1705	)	**UNDER SEAL**

[redacted]
Surreply Opposing Motion to Compel

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INTRODUCTION

The Government's Omnibus Reply is, at first blush, an imposing document. Together with its attached declarations, it is nearly 150 pages long, citing scores of cases and statutes—both American and Chinese. It is seemingly a lot to respond to. For all its girth, however, the Omnibus Reply is most notable for what it does *not* contain. Conspicuous omissions include the following:

- The Government fails to identify any relevant conduct that [redacted] directed at the District of Columbia;
- The Government fails to identify any statute authorizing nationwide service of process in the present case even though the Government predicates its "national contacts" theory on the existence of such a statute;
- The Government fails to identify any meaningful difference between the present case and *Sealed Case I*;
- The Government overlooks obvious material differences between the present case and *Sealed Case II*;
- The Government fails to explain why, in the 14 months since issuing the December 27, 2017 subpoena ("Subpoena"), it made zero efforts to obtain these records through the MLAA process;
- The Government fails to show the MLAA process is an ineffective tool for obtaining evidence;
- The Government fails to show that [redacted] could produce the documents without violating Chinese law; and
- The Government ignores the harm that circumventing the MLAA will cause to cooperation between the United States and China in the future.

These omissions are fatal to the Government's Motion. As elaborated below, this Court should deny the Government's motion to compel.

ARGUMENT

I. This Court lacks personal jurisdiction over [redacted]

A. The Government has not established any contacts between [redacted] and the District of Columbia related to this case.

As [redacted] noted in its earlier brief, the Government lacks sufficient contacts with this forum to ground personal jurisdiction. ([redacted] Opp. Br. at 4-6.) The Government bases its assertion of personal jurisdiction on [redacted] interactions with federal regulators in the District of Columbia. (Omnibus Reply at 8.) Of these purported contacts, the only ones related to this case concern [redacted] use of the OFAC's SDN List to filter U.S. dollar transactions. Basically, the Government argues that—by filtering transactions to ensure that [redacted] complies with OFAC regulations—[redacted] has availed itself of the benefits and burdens of operating in the District of Columbia. This is a non-sequitur. By this reasoning, anyone who consults federal regulations before performing an action has exposed itself to being hauled into court in the District of Columbia. The Government cites no authority to support this proposition.

The Government also claims that personal jurisdiction "emanates" from several blocked or rejected transactions, some of which may have been on behalf of Mingzheng. Again, this does not establish the requisite contacts with the District of Columbia. There are no allegations that these transactions were aimed at or transited through the District of Columbia. That a governmental agency in the District of Columbia took steps to halt these transactions and/or seize the funds does not mean that [redacted] purposefully availed itself of the benefits and burdens of the District of Columbia.

The Government attempts to bootstrap personal jurisdiction by suggesting that, if allowed to obtain bank records from [redacted] the records may reveal that [redacted] knowingly violated OFAC's licensing regulations. (Omnibus Reply at 10, n.11.) The Government then claims that

such a hypothetical violation could support personal jurisdiction in the District of Columbia. (*Id.*) But the Government has not alleged that [redacted] has engaged in any wrongdoing. (Omnibus Reply at 18, n.16.) ("[T]he government is not alleging specific wrongdoing by the Banks."). Unsupported speculations about what the subpoenaed documents might contain do not supply the requisite contacts with the District of Columbia.

B. [redacted] contacts with New York do not support the Government's claim of personal jurisdiction.

In its Omnibus Reply, the Government also relies on banking transactions that occurred in New York, contending that [redacted] has sufficient *national* contacts to warrant personal jurisdiction. (Omnibus Reply at 4-8.) It maintains that a national-contacts analysis is appropriate because: (1) the federal statutes at issue provide for nationwide service of process, (2) in cases involving federal statutes with nationwide service of process, the "minimum contacts" inquiry looks at national contacts, and (3) the correspondent-account activities of [redacted] in New York are sufficient national contacts to ground personal jurisdiction. (*Id.*)

The first and third of these premises are false. To begin with, the statutes in this case do not provide for nationwide service of process.[1] The Government identifies three statutory provisions implicated by the Subpoena: the federal money-laundering statute, 18 U.S.C. § 1956; the International Economic Powers Act, 50 U.S.C. § 1705; and the Bank Secrecy Act, 31 U.S.C. § 5318A. But none of these statutes authorizes nationwide service of process. Of the three, only the money-laundering statute, 18 U.S.C. § 1956, even *mentions* service of process. But this is in the statute's civil-penalty provision and applies only to persons "against whom the action is

[1] The Government claims that "none of the Banks contest that the federal statutes at issue allow for nationwide service of process." (Omnibus Reply at 5.) Although implicit in the jurisdiction analysis in [redacted] earlier brief, [redacted] hereby expressly "contests" that these federal statutes allow for nationwide service of process.

brought." 18 U.S.C. § 1956(b)(2).[2] This jurisdictional provision does not apply to the present case because: (1) this is a criminal investigation, not an action seeking to impose civil penalties, and (2) [redacted] is not a financial institution alleged to have committed an offense under the statute. Because the Government's national-contacts jurisdiction theory is based on the false premise that the statutes in this case allow for nationwide service of process, this Court should not consider out-of-state contacts when evaluating personal jurisdiction over [redacted]

The Government cites *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011), to support its national-contacts theory. (Omnibus Reply at 5.) But that was a case governed by state law, arising in a New Jersey state court, and the issue was whether the defendant had the requisite minimum contacts with the state of New Jersey. *Id.* at 886 ("Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant"). *J. McIntyre* did *not* create a rule that district courts could rely on national contacts to determine jurisdiction in every case arising under federal law. Although the Court acknowledged, in dicta, that Congress has the *power* to base personal jurisdiction in federal courts on nationwide contacts, *Id.* at 886, Congress has not exercised that power here.

The Government also relies on *Marc Rich & Co. v. United States*, 707 F.2d 663, 667 (2d Cir. 1983), in which the Second Circuit—without explanation, and relying on a district-court opinion with an equally obscure analysis—held that a national-contacts analysis applies to all

[2] The Federal Rules of Civil Procedure allow nationwide service of process over a foreign party *only* where there is no state with sufficient minimum contacts by itself to ground personal jurisdiction, but "exercising jurisdiction is consistent with the United States Constitution and laws." Fed. R. Civ. P. 4(k)(2). The Federal Rules of Criminal Procedure allow nationwide service only for subpoenas to compel attendance at a hearing or trial, Rule 17(e)(1), not subpoenas for documents and objects, Rule 17(c).

claims arising under federal statutes. (Omnibus Reply at 5.) That is not the law of this Court, which limits national-contacts analyses to cases involving federal statutes with express provisions allowing for nationwide service. *See Serv. Employees Int'l Union Health & Welfare Fund v. N. Am. Cleaning Services Co. Inc.*, 264 F. Supp. 3d 1, 4 (D.D.C. 2017) (stating, in ERISA case, 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.'") (emphasis added) (quoting *Bally Gaming, Inc. v. Kappos*, 789 F.Supp.2d 41, 46 (D.D.C. 2011)); *Bricklayers & Trowel Trades Int'l Pension Fund v. Kel-Tech Constr., Inc.*, 319 F. Supp. 3d 330, 340 (D.D.C. 2018) (using national contacts analysis in ERISA case because ERISA has an express nationwide-service provision). More recent Second Circuit law is in line with this Court's view. *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 328 (2d Cir. 2016) (using national-contacts analysis in Antiterrorism Act case because that statute has an express nationwide-service provision).[3]

Yet even if a national-contacts analysis were appropriate—and it is not—[redacted] banking activities in New York still would not support the Government's claim of personal jurisdiction. Absent allegations that a bank knew that the transactions in question were related to entities seeking to harm the United States, a bank's provision of routine banking services to those entities does not support a finding of personal jurisdiction. *See Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 34 (D.D.C. 2010) ("'In the absence of any allegations that a bank has ties to a

[3] In footnote 5 of its Omnibus Reply, the Government cites dicta from a footnote in *In re Sealed Case*, 832 F.2d 1268, 1273 n.3 (D.C. Cir. 1987) ("Sealed Case II"). This footnote castigates the Independent Counsel for citing cases to support propositions that the cases do not support. Thus, for instance, it chides the Independent Counsel for misstating the nature of personal jurisdiction in *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir. 1984), a case that did not involve a minimum-contacts analysis. Dicta in a footnote that references an irrelevant case is a slender reed on which to build a national-contacts argument.

terrorist organization, or that it knew or had reason to believe that the monies it was processing through the bank would be used to carry out terrorist attacks on civilian targets,' the mere provision of routine banking services that benefitted a terrorist organization . . . will not support a finding of specific personal jurisdiction based on the contacts created by such provision.") (quoting *In re Terrorist Attacks on Sept. 11, 2001*, 718 F. Supp. 2d 456, 488-90 (S.D.N.Y. 2010)).

In the present case, the Government bases its national-contacts argument on wire transfers for Mingzheng that transited through [redacted] New York correspondent accounts. Yet it does not allege that, at the time of those transactions, [redacted] knew or should have known that Mingzheng was a front company for FTB. (Omnibus Reply at 18 n.16) ("[T]he Government is not alleging specific wrongdoing by the Banks"). Because the processing of routine banking transactions does not, without more, support personal jurisdiction, the Court should not consider [redacted] New York contacts.[4] Thus, even if out-of-state activities were relevant to this Court's minimum-contacts analysis—and they are *not*—there is still no jurisdictional basis for the present subpoena-enforcement proceeding.

II. This Court should not compel [redacted] to violate Chinese law.

Even it this Court had personal jurisdiction over [redacted]—and it does not—it still should decline to compel compliance with the Subpoena because doing so would violate core principles of comity that govern international relations.

[4] The Government argues that harmful "effects" from foreign actions can support personal jurisdiction. (Omnibus Reply at 8.) But as the Supreme Court's recent *J. McIntyre* decision makes clear, the touchstone for personal jurisdiction is "purposeful availment." 564 U.S. at 880. So unless the Government alleges *purposeful wrongdoing* by [redacted] its routine banking transactions do not support personal jurisdiction.

A. The Government concedes that the subpoena exposes [redacted] to potential liability under Chinese law.

In its previous brief, [redacted] noted that complying with the Subpoena would require [redacted] to violate several Chinese laws, thereby exposing it to administrative, civil, and criminal liability. [redacted] Opp. Br. at 12-16.) The Government and its expert, Professor Donald Clarke, spend scores of pages trying to downplay the gravity of the offenses and to sow doubt about whether [redacted] would ever be prosecuted. (Omnibus Reply at 18-20; Clarke Decl., *passim*.) Obscured by this analysis is the key fact that *the Government and its expert concede that, by complying with the Subpoena,* [redacted] *has real exposure under Chinese law.* (Omnibus Reply at 20) (noting that Professor Clarke concluded that compliance may violate Chinese regulations and expose the banks to administrative sanctions).

Importantly, nearly all of the provisions in question are substantive laws, not mere "blocking statutes."[5] Furthermore, the entity that the Government asks to violate Chinese law,

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[5] A "blocking statute" is one that is enacted with the express purpose of frustrating efforts of foreign authorities to obtain discovery. *See* Restatement (Third) of Foreign Relations Law § 442, Reporter's Note 4. In the comity analysis, blocking statutes are not afforded the same deference as substantive laws. *Id.; Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987) ("Blocking statutes that frustrate this goal [of obtaining information for a judicial proceeding] need not be given the same deference by courts of the United States as substantive rules of law at variance with the law of the United States") (quoting Restatement (Rev'd) of Foreign Relations Law § 437, Reporter's Note 5, at 41-42).

Although the distinction between a substantive statute and a blocking statute is critical to any comity analysis, the Government's discussion of case law often is unclear about which kind of statute the case involves.

The substantive violations in the present case concern data-privacy and bank-secrecy laws, which apply generally within China. Because complying with the December 27, 2017 subpoena would force [redacted] to violate substantive Chinese law, on Chinese soil, a greater degree of deference is warranted here than in cases, like *Societe Nationale*, involving only blocking statutes.

[redacted] It is an affront to Chinese sovereignty to compel [redacted] to violate China's laws in China.

B. The D.C. Circuit's decision in *Sealed Case I* controls.

The Government's concession—i.e., that honoring the subpoenas would potentially cause [redacted] to violate Chinese law—is fatal to its argument. The Government's tacit position is that this Court may pick and choose which foreign laws it will force a party to violate, depending on the severity of the penalties and the likelihood of enforcement. But the D.C. Circuit has cautioned against engaging in this sort of "unseemly" analysis: "[U]nless we are willing simply to enter contempt orders in all such cases, no matter how extreme, in utter disregard of comity principles, we are obliged to undertake the unseemly task of picking and choosing when to order parties to violate foreign laws." *In re Sealed Case*, 825 F.2d 494, 499 (D.C. Cir. 1987) ("*Sealed Case I*"). Such an undertaking, it observed, would force a court to make a "subjective evaluation of the content of those laws," something that would bring the court "close to the act of state doctrine," the doctrine that cautions courts not to "'sit in judgment on the acts of the government of another done within its own territory.'" *Id.* (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)). Avoiding these types of international affronts is "good reason for courts not to act on their own, even at the urging of the executive branch." *Id.*

In its brief, however, the Government argues that this Court need not follow *Sealed Case I* because the D.C. Circuit's holding was limited to the "peculiar facts of th[at] case." (Omnibus Reply at 32) (quoting 825 F.2d at 498). The problem with that argument is that the "peculiar facts" of *Sealed Case I* exactly mirror the "peculiar facts" presented here:

- In *Sealed Case I*, as here, the issue concerned international enforcement of a criminal subpoena;
- In *Sealed Case I*, as here, the recipient of the subpoena was a bank owned by a foreign sovereign;

- In *Sealed Case I*, as here, the bank had branches in the United States;
- In *Sealed Case I*, as here, the Government alleged that third parties had laundered money through those United States branches;
- In *Sealed Case I*, as here, the bank itself was not alleged to have engaged in any wrongdoing;
- In *Sealed Case I*, as here, compliance with the subpoena would violate the laws of the country where the records were kept;
- In *Sealed Case I*, as here, an agency of the foreign sovereign requested that the court not order compliance with the subpoena; and
- In *Sealed Case I*, as here, the bank had acted in good faith in working with the Government to provide the requested records.

Seldom in legal research does one find authority so congruent with the facts of one's own case. Unless *stare decisis* is a dead letter in this Circuit, *Sealed Case I* controls.[6]

The Government, however, attempts to distinguish *Sealed Case I* by noting that the bank in that case was owned by country *X*, but the country whose laws would be violated by the bank's disclosures was country *Y*. (Omnibus Reply at 32-33.) Here, by contrast, the sovereign [redacted] is the same sovereign whose laws would be violated by [redacted] compliance with the subpoena: China.

This attempt to distinguish *Sealed Case I* fails. That the subpoenaed bank was owned by a different country from the country whose laws would be violated played no role in the D.C. Circuit's comity analysis. The key fact was, instead, that enforcement of the subpoena would

[6] The Government attempts to diminish this published opinion of the D.C. Circuit by stressing that it was a per curiam decision. (Omnibus Reply at 16, n.15.) But there is no "per curiam" exception to the *stare decisis* doctrine. As a published case, *Sealed I* is binding precedent.

entail an American court ordering someone to violate the laws of a foreign country *in that country*. Thus, when the court presented the reciprocal scenario of another country doing the same thing to the United States, it omitted any detail about the nationality of the "someone" ordered by the foreign court to break the law: "We have little doubt, for example, that our government and our people would be affronted if a foreign court tried to compel *someone* to violate our laws within our borders." *Id.* at 498-99 (emphasis added). And when discussing the "unseemly task of picking and choosing when to order parties to violate foreign laws," it said nothing about the nationality of the violating party. *Id.* at 499. That the bank in *Sealed Case I* was owned by a different country from the one whose law the subpoena would have forced it to violate is a distinction without a difference.

Moreover, to the extent that the distinction has any significance it cuts *against*, rather than for, the Government. The fundamental point of *Sealed Case I* is that it is an affront to a country's sovereignty to have a foreign court order someone to violate that country's laws. It is a greater, not lesser, affront where the "someone" compelled to break the law is an entity owned by the sovereign whose laws are broken. Such an order basically directs the foreign country to break its own laws.

One more aspect of the present case makes it even stronger than *Sealed Case I*: the existence of the Mutual Legal Assistance Agreement ("MLAA")[7], which the United States and China signed on June 19, 2000. In *Sealed Case I*, there was no indication that there were any established procedures—other than the cumbersome use of diplomatic letters rogatory—to help get the bank records held in the foreign country. Here, by contrast, the United States and China

[7] A copy of the MLAA was previously filed as Exhibit B-25 of the January 6, 2019 Declaration of Guan Feng ("Feng Declaration").

have entered into a bilateral agreement to provide mutual assistance in criminal matters.[8] The availability of an alternate procedure to obtain the requested documents counsels strongly against ordering [redacted] to violate Chinese law by responding to the Subpoena.

C. *Sealed Case II* differs in several material respects.

In its Omnibus Reply, the Government argues that the present case is controlled by a different D.C. Circuit case: *In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987) ("*Sealed Case II*").[9] In that case—arising out of the Iran-Contra scandal—the Government served a subpoena on the document custodian for eight Swiss companies. The Government alleged that the companies had records relevant to the scheme of using arms sales to Iran to fund the Nicaraguan Contras. The documents requested by the subpoenas included documents in Switzerland. The document custodian opposed the subpoena, arguing that compliance would force the companies to violate Swiss law. The district court disagreed, and held the document custodian in contempt. On appeal, the D.C. Circuit reversed, finding that the district court's jurisdiction over the document *custodian* did not confer jurisdiction over the *companies* themselves. *Id.* at 1272-73 ("The mere fact that the court has jurisdiction over an alleged representative of the companies is patently insufficient to establish jurisdiction over the companies."). Although the court addressed the document custodian's comity arguments, *Id.* at 1283-84, this was not essential to the case's disposition.

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[8] The efficacy of the MLAA is discussed *infra*, Sections III.A and III.B.

[9] To the extent the holdings in *Sealed Case I* and *Sealed Case II* conflict with each other, *Sealed Case I*—which was the first to be decided—controls. *FedEx Home Delivery, an operating division of FedEx Ground Package Sys., Inc. v. Nat'l Labor Relations Bd.*, 849 F.3d 1123, 1127 n.3 (D.C. Cir. 2017) ("An exception to the law-of-the-circuit doctrine applies 'when a conflict exists within our own precedent,' in which case a subsequent panel is 'bound by the earlier' of the two conflicting decisions.") (quoting *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1045 (D.C. Cir. 2011)).

Furthermore, the facts underlying the D.C. Circuit's comity analysis in *Sealed Case IIError! Bookmark not defined.* were materially different from the facts presented here and in *Sealed Case I.* Most importantly, in *Sealed Case II*, unlike *Sealed Case I* and the present case, *complying with the subpoena would not have violated Swiss law. Id.* at 1283 ("[I]t is not clear from the Witness' brief that Swiss law forbids the companies or their custodians from complying with the subpoena even in regard to documents located in Switzerland"). The statutory provisions on which the document custodian relied did not apply. *Id.* And the case did not involve questions regarding banking secrecy—the subpoenaed companies were not banks and the subpoena did not involve the records of accounts held by third parties. *Id.* Finally, in *Sealed Case II*, unlike *Sealed Case I* and the present case, the companies were privately owned. Thus, the *dicta* on the comity issue is of limited relevance here.

D. Federal courts do *not* "consistently" order third-party banks to violate foreign bank-secrecy laws.

On pages 15-16 of its Omnibus Reply, the Government argues that federal courts "consistently" find that domestic law-enforcement interests prevail over foreign bank-secrecy laws, appending a long string cite. The cited cases do not, however, support the Government's sweeping assertion. In four of these cases the court found that disclosure would *not* violate foreign bank-secrecy laws. *See United States v. Chase Manhattan Bank*, N.A., 584 F. Supp. 1080, 1086 (S.D.N.Y. 1984) (noting that Hong Kong had "no bank secrecy statute" and that "the holder of the records runs no risk of incurring criminal penalties"); *In re Grand Jury 81-2*, 550 F. Supp. 24, 28 (N.D. Mich. 1982) ("Deutsche Bank will violate neither German law nor public policy by cooperating with the American grand jury."); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1287 (9th Cir. 1981) (noting that there was no finding that production would violate Swiss law); *United States v. First Nat'l City Bank*, 396 F.2d 897, 905 (2d Cir. 1968) ("[E]xpert

testimony indicated that disclosure of such material would not violate any policy of bank secrecy").

Of the remaining cases, one did not involve bank-secrecy laws at all. *See In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 554 (S.D.NY. 2002) (party resisting subpoena claimed "executive privilege"). Two involved prior failed efforts to go through diplomatic channels. *See United States v. Sedaghaty*, 2010 WL 11643384, at *7 (D. Ore. Feb. 26, 2010); *United States v. Noriega*, 1990 WL 142524, at *4 (S.D. Fla. Sept. 24, 1990). One involved a witness who was compelled to testify while he was present in the US, and so the case raised no comity issues. *United States v. Field*, 532 F.2d 404, 407-09 (5th Cir. 1976). And the remaining three were cases in which the court held that the party opposing disclosure had acted in bad faith. *United States v. Bank of Nova Scotia*, 740 F.2d 817, 826 (11th Cir. 1984); *United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1389 (11th Cir. 1982); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 118-19 (S.D.N.Y. 1981).

In short, the cited cases do not show that law-enforcement imperatives invariably prevail over banking-secrecy concerns.[10] To the contrary, under the peculiar constellation of facts presented *here*—which are identical to those in *Sealed Case I*—the D.C. Circuit refused to enforce a grand jury subpoena that would have required a third-party bank to violate banking-secrecy laws of the foreign country where the records were held. *Sealed Case I*, 825 F.2d at 499.

[10] The Government also cites *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). That was not a subpoena case and it has marginal relevance here. It involved two sets of legal proceedings—an antitrust suit in the United States and various injunction actions in England—that involved the same parties. The plaintiffs in the English actions sued to block the plaintiffs in the American action from prosecuting the American antitrust suit against them. One party obtained an anti-suit injunction from an English court. The antitrust plaintiff countered by seeking, in the American action, an injunction preventing the remaining antitrust defendants from seeking similar anti-suit injunctions in England. The D.C. Circuit held that this injunction to prevent a foreign anti-suit injunction was proper.

E. The Government's Restatement analysis is flawed.

In its Omnibus Reply, the Government bases its comity analysis on Restatement (Third) of Foreign Relations Law § 442. To a certain extent, this is beside the point. The Restatement, while instructive, is not the governing law of this Circuit.[11] *Sealed Case I* is. Notably, *Sealed Case I* did not engage in the multi-pronged balancing analysis advocated in § 442 of the Restatement. Yet even under § 442, the Government's arguments miss the mark.

1. Enforcing the Subpoena would offend Chinese sovereign interests and violate its substantive policies.

To begin with, the Government contends that the only policy of China implicated by the Subpoena is the country's inherent interest in its sovereign status. Quoting the Declaration of Professor Donald Clarke, it contends that "China does not have a strong state policy in favor of protecting the secrecy of bank account information." (Omnibus Reply at 18.) Clarke, however, bases his conclusion on the fact that several organs of the Chinese government can obtain access to bank records. This is a strange argument. The ability of government agencies to oversee banking operations and investigate potential financial crimes does not entail any lack of interest in the privacy of bank records. In the United States, too, several organs of the government can—in appropriate circumstances—access bank records. But this does not evidence a lack of concern over the privacy of those records.

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[11] The Government cites *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522, 544 & n.28 (1987), which references an earlier iteration of § 442(1). (Omnibus Reply at 14.). But, crucially, the party opposing the subpoena in *Societe Nationale* did not claim that complying with it would cause that party to violate the substantive laws of the country where the documents were located. Compliance would violate only that country's "blocking statute." For reasons stated *supra*, note 5—and referenced in note 29 of *Societe Nationale*—comity analysis affords less deference to blocking statutes than to substantive statutes.

As the Chinese Banking Association ("CBA")—an industry group to which all three of the subject Banks belong—explains, "bank secrecy and data privacy laws . . . serve the important interest of supporting stable growth of the banking and financial systems." (*See* Letter from China Banking Association, previously submitted in [redacted] January 28, 2019 Notice of Submission of Additional Document in Support of Its Opposition Brief, at Exhibit 1-B.) That growth, in turn, depends on customer confidence in the confidentiality and security of their banking records. (*Id.*) If any foreign government could—by threatening punitive fines abroad and circumventing Chinese law—coerce a Chinese bank to disgorge customer information, this would undermine customer confidence in China's banking system. A stable banking and financial system is the bedrock of a modern economy. Thus, China has a strong interest in ensuring that any disclosure of confidential bank information be made in accordance with Chinese law

2. Respecting comity principles helps to ensure that Americans are treated fairly abroad.

The Government also ignores the important American interest of ensuring that its own citizens are treated fairly in their overseas dealings. "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States." Restatement (Third) of Foreign Relations § 442, Reporter's Note 1. Thus, comment *c* of Restatement § 442 specifically urges that, when weighing "the interests of the United States under Subsection (1)(c)," a court should not be short sighted. *Id.*, comment *c*. It should also consider "the long-term interests of the United States generally in international cooperation in law enforcement and judicial assistance, in joint approach to problems of common concern, in giving effect to formal or informal international agreements, and in orderly international relations."

In the present case, whatever short-term benefit might accrue to the United States from obtaining the desired information could, over the long term, be far outweighed by harm caused by damage to the relationship between the United States and China. At present, the Chinese government does not—and would not—compel production of American documents by threatening to fine American companies with branches or affiliates in China. (See MOJ letter, previously submitted as Exhibit 3 to [redacted] Opp. Br., at 4) ("Chinese authority has never asked American financial institutions or enterprises located in the territory of China to submit information stored in the United States directly to China"). But ignoring the MLAA creates the risk that the Chinese Government will reciprocate. Thus, in a mirroring situation, it may seek to obtain documents and records directly by threatening to impose punitive fines on American companies that happen to have branches or subsidiaries in China.

Furthermore, China shares the United States' interest in the denuclearization of the Korean peninsula, and has honored its obligations under the United Nations sanctions against North Korea. (*See* article from *China News*, dated Sept. 18, 2018, and attached hereto as **Exhibit 2**.) But the best way to accomplish shared Chinese-American goals is cooperation, not confrontation. China, for its part, has expressed its desire "to work with relevant parties in the international community to continue to play a positive and constructive role in achieving the denuclearization of the peninsula." *Id.* The MLAA process is the appropriate forum for the United States and China to cooperate vis-à-vis the information sought in the Subpoena.

3. Under Restatement § 442, special rules apply where complying with the information request would violate the laws of the country where the information is located.

Finally, the Government's Restatement analysis omits any reference to § 442(2), which deals specifically with instances, like the present case, where complying with a subpoena would

force the disclosing party to violate the substantive law of the country where the evidence is located. This subsection counsels *against* imposing sanctions in such an instance: "If disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the information or prospective witness is located, or of the state of which a prospective witness is a national . . . a court or agency should not ordinarily impose sanctions of contempt, dismissal, or default on a party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort." Restatement (Third) of Foreign Relations Law § 442(2)(b). Because the Government concedes that [redacted] has acted in good faith, sanctions would not be appropriate here. Accordingly, the Court should deny the Government's motion to compel.

III. This Court can avoid the fraught comity issues by requiring the Government to avail itself of the MLAA process.

A. Contrary to the Government's suggestion, this Court *can*, and should, direct that the Government use to the MLAA process in the first instance.

As noted above, compelling [redacted] to comply with the Subpoena raises serious comity issues. It is tantamount to an order for [redacted] to perform acts in China that violate Chinese law. To the extent that the Court examines the nature of the laws in question in choosing whether to compel compliance with the Subpoena, it must make judgments about which Chinese policies should or should not be promoted within Chinese borders—a potential violation of the "act of state" doctrine. All of these comity issues are exacerbated by the fact that [redacted][12]

[12] The Government's requested remedy (an order compelling production in only seven days) seems calculated to inflame tensions. Carrying out the search, compiling the requested

(note continued on following page . . .)

The Court can, and should, avoid these issues by requiring that the Government first seek the requested records through the MLAA. Article 14 of the MLAA states that the requested party (here, China) must search for and to provide the requested evidential materials. And Article 1, § 2(g) requires that the requested party execute requests for information.

B. Whether the Government should first attempt to obtain the records through the MLAA process is the Court's decision, not the Government's "prerogative."

In its Omnibus Reply, the Government claims that "[t]here is no first resort rule." (Omibus Reply at 26) (citing *Societe Nationale*, 482 U.S. at 542). But *Societe Nationale* does not sweep as broadly as the Government suggests. It stands for the modest proposition that there is no *blanket* rule that requires—in *every* case, no matter the circumstances—that a party go through established international channels, such as the Hague Convention, to obtain evidence. 482 U.S. at 544 ("We . . . decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.").

Instead, in deciding whether to impose a first-resort requirement, courts must undertake a "particularized analysis of the respective interests of the foreign nation and the requesting nation." *Id.* at 543-44. And when weighing sovereign interests, it is courts—not the parties—who must analyze whether using bilateral procedures would be effective. *Id.* at 544. Thus, it is not the Government's "prerogative" to seek an order compelling production before even

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(. . . note continued from previous page)
documents, and shipping them halfway around the world will take time. [redacted] strongly urges the Court to deny the Government's motion. But if it grants it, it should afford [redacted] a reasonable time for responding. A reasonable period for responding to an international document request such as this is, at a minimum, 30 days.

attempting to use the MLAA process. (Omnibus Reply at 26.) The Court must decide whether the Government should first attempt to obtain the documents through the MLAA process.

As noted above, the respective sovereign interests of the United States and China strongly counsel requiring the Government to first try to obtain the documents through the MLAA process. Compelling compliance without first exhausting the MLAA process defeats the purpose of the bilateral agreement and flouts China's sovereign right to regulate conduct within its own territorial boundaries.

The Government, however, argues that the MLAA is not an effective tool for obtaining the desired evidence. And it states that going through this process will cause inordinate delay, claiming that "China regularly sits on requests for years." (Omnibus Reply at 24.)

[redacted] has four responses. First, if—as the Government suggests—the MLAA mechanism truly were broken, then one would have expected the United States long ago to have terminated the agreement. Under Article 23, either nation is free to terminate the agreement by giving six months written notice. Yet the United States has not done so. It continues to be bound by the MLAA. This belies the Government's current claim that the MLAA is not an effective procedure for obtaining foreign evidence in criminal cases.

Second, contrary to the Government's argument, the MLAA *has* been an effective tool for the United States and China to assist each other in criminal matters. The United States has received valuable assistance. Even Jeffrey Olson—on behalf of the Government—concedes that the MLAA "has been helpful" in certain cases. (Olson Declaration, ¶ 8.) The United States incorrectly asserts that China has not responded to any MLAA request that the United States has made in the past two years (i.e., 2017 and 2018). (*See* supplemental letter of the Ministry of Justice ("MOJ"), attached hereto as **Exhibit 3**.) To the contrary, MOJ records show a request for

bank records made in November 2017 and responded to in September 2018. (*Id.*) With respect to three other requests for bank records made in this period, China has requested additional information from the United States to help investigators in China. (*Id.*) The Government also complains that China has been dilatory in responding to MLAA requests. (*Id.*) But the examples it cites were instances in which there was extensive back-and-forth between China and the United States, which explains the delay. (*Id.*) And the Government ignores the MOJ's commitment to promptly handle the Government's request in this case—a commitment it makes in both of the MOJ's letters to this Court.

Third, the United States itself has not shown alacrity in responding to China's requests under the MLAA. The MOJ reports that "China has made more than twenty judicial assistance requests to the U.S. and at least 10 of those requests have not been executed." (*Id.*) For those requests that the United States *has* answered, the response has been slow. For example, China made seven requests to the United States in 2014. (*Id.*) Of those seven, only four have been answered to date. (*Id.*) And of those four, two were not answered until January 2018. (*Id.*) Thus, China's response rate and efficiency under the MLAA is comparable to the United States' own response rate and efficiency.

Finally, the Government's argument that the MLAA process would cause "inordinate delay" should be viewed in light of the fact that the Government itself waited several months before moving to compel compliance with the Subpoena. Courts look askance at demands for prompt action where those demands are not themselves asserted promptly. *Cayuga Nation v. Zinke*, 302 F. Supp. 3d 362, 373 (D.D.C. 2018) ("Plaintiffs have been slow to seek a preliminary injunction, which belies their current claim to need emergency relief."); *eAcceleration Corp. v. Trend Micro, Inc*, 408 F. Supp. 2d 1110, 1122 (W.D. Wash. 2006) ("eAcceleration's decision to

delay approximately one year before bringing this motion contradicts its suggestion that it is suffering urgent, continuing, and irreparable harm.").

The Government also suggests that the MLAA is toothless, stating that it "provides no enforcement mechanism." (Br. at 26.) But it is a binding international agreement. And under the MLAA, the Chinese Government has agreed to use the legal tools available to it to help the United States obtain evidence in criminal cases. The Chinese government indisputably has the power, in China, to compel [redacted] to produce the requested materials.

To the extent the Government is complaining that the Chinese Government itself cannot be punished for foot-dragging, this misconceives the workings of bilateral agreements between nations. Under the bedrock principle of *pacta sunt servanda* ("agreements must be kept"), nations must honor their obligations under international agreements and treaties. This principle is embodied in Article 26 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations ("Vienna Convention"), which states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Both China and the United States are signatories.

The penalty for violating international agreements is the erosion of relations between the sovereigns. Although this penalty is less tangible than a sheriff levying on property or a judge jailing a witness, it does have real-world consequences. China's violation of one agreement with the United States may impede other negotiations where China needs something from the United States. So there would be a real cost for China's not complying with the MLAA, albeit not the sort of cost that lawyers regularly encounter. As the Vienna Convention reflects, international agreements are not empty promises.

IV. Professor Clarke's sanguine views about the likelihood of significant punishments are irrelevant and inaccurate.

A. The D.C. Circuit's comity analysis in *Sealed Case I* did not hinge on the bank's likelihood of serious punishment if it complied with the Subpoena.

In the present case, the Government has all but conceded that complying with the Subpoena would force [redacted] to violate, in China, substantive provisions of Chinese law. (*See* Clarke Decl. ¶ 10(a)) (noting that [redacted] "compliance with the Subpoenas might violate Chinese Regulations and might lead to administrative sanctions against the Banks and possibly their responsible personnel"). Rather than argue that compliance is clearly legal—which it is *not*—Professor Clarke uses most of his 31-page single-spaced Declaration to cast doubt on whether [redacted] has a "serious risk" of suffering severe civil or criminal liability for disclosing the records requested in the Subpoena.

Professor Clarke answers the wrong question.[13] The comity inquiry in *Sealed Case I* did not hinge on whether there was a risk that the complying bank would suffer severe civil or criminal sanctions. What caused the court "considerable discomfort" was the very thought of "*a court of law . . . order[ing] a violation of law*, particularly on the territory of the sovereign whose law is in question." *Sealed Case I*, 825 F.2d at 498 (emphasis added). The court also was concerned that—by violating the territorial principle and offending another sovereign—a contempt order could hinder the United States' "pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Id.* at 499 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). Put succinctly, the *Sealed Case I* court did not want to be used as tool to break another country's laws and upset international

[13] And answers it incorrectly. As explained *infra*, the violations expose [redacted] to serious liability.

harmony. Details about the likelihood and degree of the complying party's punishment were—in its comity analysis—largely irrelevant.

B. There are flaws in both Professor Clarke's general approach toward and particular analysis of the Chinese laws in question.

Those ancillary questions are, however, the ones that Professor Clarke focuses on. Yet even considered on those terms, there is much in the Clarke Declaration that is either incorrect or misleading. As [redacted] expert in Chinese law, Guan Feng, explains in his Rebuttal Declaration ("Feng Rebuttal"), attached hereto as **Exhibit 1**, Clarke's analysis errs in both its overall approach and in its application to particular laws and cases.

1. Problems with Clarke's general approach.

To begin with, Clarke's analysis makes certain general assumptions about Chinese law that are inaccurate. First, Clarke assumes that if a provision of Chinese law lacks a corresponding penalty provision—or prior precedent of legal enforcement—then violations of that law will go unpunished. Thus, Clarke brushes off legal provisions cited by the Banks that lack clear penalty provisions. (Clarke Decl. at ¶¶ 14-20.) But as the Feng Rebuttal explains, Chinese law operates under a legal system that differs from Anglo-American law. Under its civil-law system, the absence an explicit penalty provision—or prior enforcement precedent—does not foreclose imposing a judicial sanction. (Feng Rebuttal at ¶ 11.) Where Chinese law has been violated, Chinese enforcing authorities have both the power and the obligation to punish violators. (*Id.*)

Second, Clarke largely ignores the fact that the Chinese Government has, in recent years, become increasingly active in protecting the privacy of banking transactions. (*See supra* Section II.E.1.) Although Clarke notes that there are several organs of the Chinese government that can legally obtain banking records (Clarke Decl. at ¶ 95), this does not evidence a lack of concern

over the privacy of banking information. The reality is that in China, like the United States, banking operations touch on many areas of the law. But that does not mean that China routinely allows *extra*legal disclosure of banking information. Clarke's argument is akin to arguing that, because various state and federal entities can, in appropriate circumstances, examine bank records in the United States, the United States government does not care about the privacy of banking records. In China, as in the United States, customers have a reasonable expectation that their banking records will not be divulged to third parties—including foreign governments—except with their consent or in accordance with due process.

Third, Clarke assumes that the Chinese government's partial ownership interest in [redacted] and the other Banks means that punishment for illegal conduct is unlikely. (Clarke Decl. at ¶ 105) ("[T]he Banks do not have sufficient distance from the government for them to be a credible object of severe government sanctions"). As the Feng Rebuttal explains, however, being partially owned by a government-owned enterprise does not entitle [redacted] to any special treatment under Chinese laws. (Feng Rebuttal ¶ 13.) In particular, [redacted] is not immune from administrative penalties, civil liabilities, or criminal prosecution. (*Id.*) Both the Feng Declaration and the Feng Rebuttal illustrate this point with numerous specific examples of similarly situated entities being subjected to penalties under Chinese law.

Fourth, Clarke is surprisingly nonchalant about the consequences of breaking Chinese law, opining that even if [redacted] were forced to break the law, the penalties probably would be minor and individual liability probably would be reimbursed. (Clarke Decl. at page 8 n.24.) [redacted] has a different view about breaking Chinese law. Although Clarke, sitting in his office, can afford to be cavalier when evaluating the consequences of breaking the law, [redacted] cannot. If the shoe were on the other foot, and Clarke was advising a Chinese banking client

about whether it should make an extrajudicial disclosure of confidential customer account information, one expects—and hopes—he would be more circumspect.

Finally, Clarke claims that the Court should give little credence to the January 6, 2019 letter from the Chinese Ministry of Justice ("MOJ") to this Court. [14] He notes that the MOJ is not the body charged with administering the various laws recited in the Feng Declaration. (Clarke Decl. ¶ 19.) But the fact that the MOJ does not directly administer the laws it describes in its letter is irrelevant. Under Article 2 of the MLAA, the United States and China agreed that the MOJ would serve as China's "Central Authority" for dealing with American requests for evidence in criminal matters. Thus, the MOJ is *exactly* the right body to explain to this Court why compliance with the MLAA process is the proper way to obtain this evidence and, conversely, how—if the MLAA process is short circuited—[redacted] and the other banks would violate Chinese law.

2. Problems with some of Clarke's specific arguments.

In addition to these global problems, a detailed analysis of Clarke's arguments reveals that many of Professor Clarke's assertions and inferences about Chinese law are unwarranted. For reasons stated above, much of Clarke's analysis is irrelevant to the comity analysis. So [redacted] will not attempt to rebut each of Clarke's conclusions in the body of this brief.[15]

That said, a few responses are in order. First, Clarke claims that the Banks would not violate the Credit Measures Act because the Act regulates *inquiries*, whereas the subpoena

[14] Although this Court need not defer unthinkingly to the MOJ's official interpretation of Chinese law, it must give it "careful consideration." *See Animal Sci. Products, Inc. v. Hebei Welcome Pharm. Co. Ltd.*, — U.S. —, 138 S. Ct. 1865, 1873 (2018) ("In the spirit of 'international comity' … a federal court should carefully consider a foreign state's views about the meaning of its own laws.").

[15] If the Court wishes to see a detailed point-by-point response to Clarke's arguments, it can consult the Feng Rebuttal.

commands *disclosures*. (Clarke Decl. ¶ 45.) But as the Feng Rebuttal points out, any disclosure of account information would of necessity begin with an illegal extrajudicial inquiry into that account. (Feng Rebuttal at ¶¶ 34-38.) Clarke also claims that the very existence of penalties for disclosing confidential account information implies that extrajudicial inquiries are commonplace and therefore customers have no reasonable expectation that their account information will be kept confidential. (Clarke Decl. ¶ 45) ("The very need to punish the unauthorized inquiry into information suggests that such inquiries are often successful, underscoring the general lack of expectations of confidentiality on the part of bank customers."). This does not follow. It is akin to saying that, because HIPAA[16] imposes penalties for disclosing protected health information about patients, patients have no reasonable expectation that their medical records will be kept confidential. The proper inference to draw from the existence of privacy regulations is that the governing body recognizes the importance of privacy and protects it by imposing sanctions for improper disclosure.

Second, Clarke errs in his analysis of the Banks' potential exposure under the Cybersecurity Law. Clarke's analysis assumes that the law applies only to information transmitted over the Internet. (Clarke Decl. ¶ 48.) He ignores the law's application to "network data," which would encompass the electronic records sought by the Government in the present case. As for his analysis of the Banks' exposure to serious non-monetary sanctions, he acknowledges that these may "include[e] that of effectively being forced to cease operations," and that this would be a severe sanction. But he claims that "it is impossible to imagine" this sanction "being applied to a major bank." (*Id.* at 52.) He thereby insinuates that, by disclosing

[16] The Health Insurance Portability and Accountability Act of 1996, codified at 42 U.S.C. § 1320d-6 and elsewhere.

the requested records, the Banks would not be subject to serious non-monetary sanctions. Again, this does not follow. Even if one shares Clarke's inability to imagine that the Chinese government would shutter a major bank for violating the Cybersecurity Law, this does not foreclose other serious non-monetary sanctions. That the maximum penalty allowed by law is unlikely to be imposed does not mean that the likely penalty is minimal.

Third, Clarke erroneously assumes that, because the Mingzheng account is in the name of a now-defunct corporation, Article 253A—a Criminal Law provision—would not apply.[17] (Clarke Decl. ¶¶ 77-78.) Clarke notes that the law applies only to information about natural persons, not corporations. (*Id.*) But disclosing the account information requested by the subpoenas in the present case likely *will* reveal information about natural persons, including the account authorizer and payees. (Feng Rebuttal at ¶¶ 62-63.) That the *account* is held by a corporation does not entail that the *account information* does not concern natural persons. Accordingly, [redacted] has real exposure under Article 253A. (*Id.*)

3. Under Restatement (Third) of Foreign Relations Law § 442(2), the Court should *not* order [redacted] to comply with the subpoena.

[redacted] could cite additional examples where Clarke either misapplies Chinese law or employs questionable reasoning about it. But the above examples should suffice to show that the legal issues are not as clear-cut as Clarke suggests. [redacted] complies with the subpoena, it will violate Chinese law.

As noted above, Restatement (Third) of Foreign Relations Law § 442(2) addresses the circumstance where, as here, "disclosure of information located outside the United States is prohibited by a law, regulation, or order of a court or other authority of the state in which the

[17] The Feng Declaration referred to this provision as Article 253(I).

information . . . is located." It counsels that, in such circumstances, a court should—at most—order the party "to make a *good faith effort to secure permission* from the foreign authorities to make the information available." *Id.* at § 442(2)(a). And it states that absent "deliberate concealment or removal of information or of failure to make a good faith effort [to secure permission]," a court should not find a party in contempt for failing to produce this information. *Id.* at § 442(2)(b).

In the present case, the Clarke and Feng declarations show that disclosure is "prohibited by a law, regulation, or order of a court or other authority." The Government concedes that [redacted] has acted in good faith. There is no allegation that [redacted] has deliberately concealed or moved information to protect it from disclosure. Accordingly, this is exactly the kind of case where a court should not compel production or sanction a party for not complying with a subpoena.

CONCLUSION

For all the foregoing reasons, [redacted] respectfully requests that this Court deny the Government's Motion to Compel.

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2019, copies of the foregoing were served via electronic mail and via first class mail to Zia M. Faruqui, Assistant United States Attorney, c/o United States Attorney's Office, 555 4th Street NW, Room #4806, Washington, DC 20530, Zia.Faruqui@usdoj.gov.

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