UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury Subpoena	Case No. GJ No. 18-2 **ORAL ARGUMENT REQUESTED** **UNDER SEAL**

18-mc-00176-BAH

NONPARTY [redacted] MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO COMPEL PRODUCTION OF DOCUMENTS REQUESTED VIA *BANK OF NOVA SCOTIA* SUBPOENA

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Nonparty [redacted] Branch [redacted] respectfully submits this memorandum of law in opposition to the United States' Motion to Compel Production of Documents Requested via *Bank of Nova Scotia* Subpoenas.

INTRODUCTION

This is a fundamentally unfair motion. [redacted] is not accused of any wrongdoing in this matter.[1] But the U.S. Department of Justice (the "Government"), the lead law enforcement agency of the United States government, is asking this Court to compel [redacted], a Chinese bank, to violate Chinese law by producing documents held in China in response to a grand jury subpoena served in the United States, rather than using the Mutual Legal Assistance Agreement ("MLAA") negotiated between the U.S. government and the People's Republic of China ("PRC") to handle precisely such requests for documents.

This apparently unprecedented action[2] undertaken by the Government rests on a number of critical errors:

First, the Government assumes, and asks this Court to assume, that the PRC government would not comply with a request under the MLAA. But as the Government itself concedes, the PRC government has complied with MLAA requests in criminal cases before and there is no reason to assume it would not here. Indeed, in a letter to this Court, the International Cooperation Department of the Ministry of Justice of the PRC has advised that on eight occasions between 2015 and 2017, it has provided evidence on Chinese domestic financial accounts to U.S. authorities pursuant to MLAA requests and that it "would timely review and handle [a request] for assistance

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[1] *See* Government's Memorandum ("GovMem") at 1, 4 (describing the grand jury investigation and listing the "subjects" of it, which do not include [redacted]).

[2] The Government, which presumably should know, cites no case, and [redacted] is aware of no case, where a U.S. court has enforced a *Bank of Nova Scotia* subpoena against the American branch of a Chinese bank for documents located in China.

sought by the [U.S. Department of Justice] in accordance with the [MLAA] and applicable domestic laws. For . . . request[s] in line with the [MLAA], China will provide the assistance to the United States accordingly." Declaration of D. Levin ("Levin Decl.") Exhibit A (Letter from the Ministry of Justice of the PRC to the Hon. Beryl A. Howell (January 6, 2019)) at 3-4 (English translation).[3]

Second, for reasons known only to it, the U.S. government waited nearly a year after serving the subpoena in December 2017 to make this motion. If it had acted under the MLAA in a timely manner, as [redacted] repeatedly urged it to do, it would either long since have obtained the documents (as [redacted] believes) or it would be clear that an MLAA request was futile, rather than this Court being asked to assume such futility. The prosecutors' choice to ignore the MLAA is particularly surprising given the former U.S. Attorney General's statement that it was a goal of the recently announced China Initiative to "[i]ncrease efforts to improve Chinese responses to requests under the [MLAA]."[4] This would seem to have been an ideal opportunity to pursue that goal rather than asking this Court to force [redacted] to violate Chinese law, especially in light of the letter from the PRC Ministry of Justice. *See* Levin Decl. Ex. A.

Third, notwithstanding its own delays in this process, the Government claims that making an MLAA request would result in "substantial delay." GovMem at 25; *id.* at 16, 22-23. But having waited nearly a year to proceed, the U.S. government should not be able to plead the fear of delay to avoid using the MLAA that it negotiated with the PRC to handle just such requests. [redacted] long

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[3] Additionally, the PRC Ministry of Justice states that "the MOJ and the DOJ have already provided legal assistance to each other on 16 cases submitted during the period between 2015 and 2017." Levin Decl. Exhibit A at 3. This provides further support for the fact that the MLAA operates as an effective channel for procuring documents in connection with pending criminal investigations, notwithstanding any assertions by the Government to the contrary.

[4] *Attorney General Jeff Session's China Initiative Fact Sheet*, U.S. DEP'T OF JUSTICE, at 3 (Nov. 1, 2018), available at https://www.justice.gov/opa/speech/file/1107256/download.

ago advised the U.S. government that it has the documents assembled in China and ready to produce to the PRC government for transmission to the U.S. government as soon as an MLAA request is received. Indeed, [redacted] has, on at least one prior occasion, produced documents in a U.S. criminal investigation pursuant to a U.S. governmental request to Chinese authorities. Only the U.S. government can start the MLAA process, not [redacted], and [redacted] should not be penalized because the U.S. government has chosen not to do so.

Finally, the Government downplays the significance of requiring a Chinese financial institution to violate PRC law by disclosing banking information in connection with a foreign criminal proceeding without obtaining PRC government approval. Enforcement of the grand jury subpoena would require [redacted] to violate Chinese banking laws and creates the risk that it will be subject to civil liabilities and sanctions. It would also require [redacted] to violate China's newly-enacted International Criminal Judicial Assistance Law, which expressly provides that Chinese entities may not provide documents and evidence in connection with a foreign criminal investigation without PRC government approval. The letter from the PRC Ministry of Justice confirms this. *See* Levin Decl. Ex. A. There is no need to put [redacted] in this impossible position—requiring it to violate the laws of its home country or face contempt sanctions in the U.S.—when the Government can obtain the very same documents it seeks through the MLAA process.

Principles of international comity dictate that the grand jury subpoena should not be enforced here. [redacted] respectfully submits that the D.C. Circuit's decision in *In re Sealed Case*, 825 F.2d 494, 499 (D.C. Cir. 1987), in which the D.C. Circuit refused to enforce a grand jury subpoena for bank records under analogous circumstances, should be dispositive on the comity analysis here. In that case, the D.C. Circuit refused to enforce the subpoena even where it was not apparent that an alternative avenue for discovery through a mutual legal assistance treaty was

available. In contrast, that alternative is readily available here through the MLAA. It would be fundamentally unfair to subject [redacted] to civil liabilities and sanctions in China when the Government could long since have obtained (and can still readily obtain) the documents it seeks simply by utilizing the MLAA.

Moreover, service on [redacted] is not sufficient to establish general jurisdiction over [redacted] so as to require production of documents held in China under the principles of *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014). (The Government does not even argue that general jurisdiction exists here.) Nor can the Government establish specific jurisdiction as to the documents sought from China as they do not appear to be related to any conduct by [redacted] (or [redacted] more generally) in the United States. Nor is there any jurisdiction in Washington D.C. over [redacted] for these purposes, as the contacts here are merely the presence of various regulatory bodies that [redacted] interacts with, and not contacts that [redacted] have itself established with the forum. While ordinarily this jurisdictional argument would take precedence, [redacted] respectfully submits that under the comity analysis the Court should decline to enforce the subpoena at this time and need not now address—and likely will never need to address—these jurisdictional issues.

STATEMENT OF FACTS

A. [redacted]

[redacted] branch in the United States. [redacted] GovMem at 6.

1. [redacted] Does Not Have Access to [redacted] Bank Records Located Outside of New York

[redacted]

[redacted] only maintains records of bank accounts maintained at [redacted]. Its computer systems are not linked with or connected to the computer systems located at the head office or other branches of [redacted]. Accordingly, bank personnel at [redacted] only have the ability to search records relating to accounts maintained at [redacted]. [redacted] personnel are not able to search the branch's computer system to determine whether a particular account is maintained at any branches outside of New York, including at the head office in China.

[redacted] personnel also do not have the ability to direct bank personnel at the head office in China—or any other branch of [redacted] for that matter—to provide information about accounts maintained at the head office or any other branches.

B. [redacted] Has Committed to Produce the Documents Quickly if an MLAA Request is Made by the U.S. Government and the PRC Ministry of Justice Has Informed this Court that it Will Provide Assistance to the United States for Requests in Line with the MLAA

The subpoena was served on [redacted] on December 28, 2017. Counsel for [redacted] promptly contacted the Government and the parties engaged in good faith negotiations in an

attempt to resolve the matter. [redacted] also produced to the Government the single responsive document in its possession, custody and control.

[redacted] counsel explained that producing the documents from China in response to the subpoena would violate Chinese law and requested that the documents be sought through the MLAA. In connection with that request, [redacted] informed the Government that responsive documents had been assembled in China and committed that they would be produced quickly following receipt of an MLAA request. Counsel also advised the Government that the accounts at issue in China had long since been closed and that all documents in China were being preserved so that there was no issue of dissipation of assets or loss of documents.

After agreeing to consider the MLAA approach, the Government indicated that it would nevertheless insist upon compliance with the subpoena. The Government agreed to provide some time for [redacted] to attempt to arrange government-to-government contacts to try to persuade the U.S. government to utilize the MLAA. There was no further contact for over eight months until this motion was filed on November 29, 2018.

The Government has presented no explanation for its lengthy delay between the service of the subpoena and the filing of this motion (over 11 months). While asserting that it has been taking other investigative steps, GovMem at 5 n.3, it does not explain why it did not make this motion many months ago. Nor does it explain why it was unwilling to utilize the MLAA (which would likely have already resulted in the production of documents) other than to assert, without any basis, that it would not be a "viable" alternative. GovMem at 21.

However, in at least one other matter where documents at [redacted] in China were initially requested by grand jury subpoena being served on [redacted], counsel for [redacted] requested the prosecutors to utilize the MLAA procedure. In this prior instance, it appears the documents were

procured by the U.S. government through a government-to-government exchange (presumably under the MLAA).

The International Cooperation Department of the PRC Ministry of Justice has written a letter to this Court advising:

> The channel of the [MLAA] has been working effectively for years and China has provided proactive and effective [assistance] in numbers of cases to the United States. According to [PRC] figure[s], the MOJ and DOJ have already provided legal assistance to each other on 16 cases submitted during the period between 2015 and 2017. Among them, in eight cases, evidential material on Chinese domestic financial accounts has been provided to the U.S. authority.
>
> Both China and the United States are legally bound by the MLAA according to the international law. China has always strictly abided by the MLAA....Chinese authorities have never asked American financial institutions or enterprises located in the territory of China to submit information stored in the United States directly to China.
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> In this case, in order to obtain evidential, material located in China for investigation and prosecution, the DOJ should submit relevant requests for mutual legal assistance to the Chinese authority through the [MLAA] in accordance with the MLAA. This conforms to the agreement and avoids unnecessary legal conflicts between China and the United States. The MOJ would timely review and handle the requests for assistance sought by the DOJ in accordance with the [MLAA] and applicable domestic laws. For the request in line with the [MLAA], China will provide the assistance to the United States accordingly. But unfortunately...despite repeated defense ... suggestions...to go through the MLAA process, the DOJ has never submitted a request for assistance to the Chinese authorities in accordance with the MLAA....
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> Levin Decl. Exhibit A at 3-4 (footnote omitted).

ARGUMENT

I. ASSUMING *ARGUENDO* THAT THE SUBPOENA DID REACH DOCUMENTS IN CHINA, AS A MATTER OF COMITY THE COURT SHOULD NOT ENFORCE THE SUBPOENA. RATHER, AS THE D.C. CIRCUIT MADE CLEAR IN *IN RE SEALED CASE,* THE MLAA SHOULD BE USED TO OBTAIN THE DOCUMENTS.

Where compliance with a subpoena in the United States would put the recipient of the subpoena in violation of the law in another country, the court should consider principles of international comity before enforcing the subpoena. Assuming *arguendo* that personal jurisdiction

over [redacted] existed, the Court should decline to enforce the subpoena—at least at this stage[5]—as it would be inconsistent with well-established principles of international comity to do so here. Enforcement of the subpoena would create a conflict between U.S. requirements and Chinese law. This conflict could be avoided if the Government seeks to obtain the documents through the MLAA. Accordingly, in light of this factor and other significant comity considerations, the balancing test in Restatement (Third) of Foreign Relations Law § 442 as applied by the courts in this context weighs against compelling compliance with the subpoena.

A. Producing Documents from China in Response to the Subpoena Would Put [redacted] in Violation of Chinese law

Enforcement of the grand jury subpoena will put [redacted] in an impossible position because in complying with the subpoena—by producing documents located in China—[redacted] will violate Chinese banking laws that prohibit the disclosure of account information without authorization from the appropriate Chinese authorities. [redacted] faces the prospect of civil liability to its former customers and sanctions from Chinese authorities if it violates Chinese banking laws.

1. Chinese Banking Law Prohibits a Chinese Commercial Bank from Producing in the United States in Response to a U.S. Subpoena Documents from China About Customer Accounts in China

Over the last 20 years, China has adopted a comprehensive set of laws and regulations that are designed to govern banks and banking in China. All commercial banks in China are required to carry out their business in accordance with the Law of the People's Republic of China on Commercial Banks (the "Commercial Bank Law"), which was enacted in July 1995 and amended in December 2003 and August 2015, and subsequent provisions that have been enacted to enforce

[5] As noted, if the U.S. government makes an MLAA request, [redacted] has already committed that it would promptly produce the documents in China. If for any reason that did not occur, and [redacted] fully expects that it would occur, the Government could of course quickly return to this Court. *See infra* at n. 12.

the provisions in the Commercial Bank Law. Guo Decl. at ¶ 13. The People's Bank of China ("PBOC") and the China Banking Insurance Regulatory Commission ("CBIRC") are responsible for regulating commercial banks, including [redacted], and ensuring their compliance with Chinese banking laws and regulations. *Id.* at ¶ 11 n.1.

The Commercial Bank Law and related regulations set forth the fundamental principle that banks must safeguard the rights of customers from interference or incursion from any party unless authorized by Chinese law. *Id.* at ¶ 12. To this end, the law provides that information related to customer accounts may not be disclosed unless called for by a Chinese court or designated agency of the Chinese government. *Id.* at ¶ 27. These legal provisions reflect the Chinese government's understanding that "the assurance of confidentiality regarding customer information is essential to fostering a modern banking system in China that is in line with the banking systems in other nations." *Id.* at ¶ 13. It also reflects sensitivity to history, given the traditional reluctance by many Chinese consumers to make use of banks. *Id.* Chinese consumers "would be hesitant to maintain bank accounts if information could be disclosed in response to directives from foreign courts or government agencies" without prior resort to "any Chinese court or government agency." *Id.*

The Commercial Bank Law contains several provisions that provide for the protection and confidentiality of customer bank accounts. Article 6 provides that "[c]ommercial banks shall safeguard the legal rights and interests of depositors against the encroachment of any entity or individual." *Id.* at ¶ 14(b). Article 29 provides that "[c]ommercial banks shall follow the principles of . . . keeping secrecy for depositors in handling personal savings deposits. Commercial banks have the right to refuse any unit or individual to inquire about, freeze or deduct individual savings accounts, unless it is otherwise prescribed by laws." *Id.* at ¶ 14(c). Article 30 provides that "[c]ommercial banks have the right to refuse any unit or individual's inquiry about the account of

an entity, unless it is otherwise prescribed by laws and administrative regulations; it also has the right to refuse any entity or individual's request for freezing or deducting the account, unless otherwise as prescribed by laws." *Id.* at ¶ 14(d).

The Provisions on the Administration of Financial Institutions' Assistance in the Inquiry into, Freeze or Deduction of Deposits ("Financial Institution Assistance Regulations"), codified in 2002, set forth the procedures for the disclosure, restraint, and deduction of bank account deposits. *Id.* at ¶ 19. Under the Financial Institution Assistance Regulations, Chinese commercial banks must ensure that at least two conditions are met before they can disclose account information or restrain accounts: "first, the request for the disclosure must be from a 'competent organ' as defined in the regulation; second, the 'competent organ' must have presented to the bank a 'notice on the assistance with the inquiry into, or freeze or deduction of deposits issued by the competent organs at or above the level of county or regiment' (the "Assistance Notice")." *Id.* at ¶ 19 (citing Exhibit B-4).

The "competent organs" who may provide the Assistance Notice are defined in Article 4 of the Financial Institution Assistance Regulations as "the judicial organs, administrative organs, military organs and public institutions exercising administrative functions . . . that have the right to inquire about . . . the deposits of entities or individuals in financial institutions according to the clear prescriptions in the laws and administrative regulations." *Id.* at ¶ 20 (citing Exhibit B-4). These "competent organs" are more specifically defined in the regulations as the People's Court, taxation authority, customs house, people's procuratorate, public security organ, state security organ, security department of the armed forces, prison, smuggling investigation organ, supervisory organ (including the supervisory organ of the armed forces), audit organ, industrial and commercial administrative organ, and securities regulatory organ. *Id.* An entity not provided for

under the regulations, such as a foreign court, is not a "competent organ" under Chinese law. *Id.* Under these regulations, a Chinese commercial bank would not be permitted to disclose customer information in response to a request from a U.S. court or a subpoena from a U.S. grand jury.

As demonstrated by the statutes and regulations discussed above, and as discussed in further detail in the accompanying expert declaration of Professor Guo Li, the Chinese government and the relevant regulatory authorities overseeing the banking industry have a clear interest in ensuring that laws and procedures are in place to protect customer information. Although there are circumstances where banks may disclose customer account information without customer authorization, they may only do so where specific procedures, as established by the Financial Institution Assistance Regulations, are followed. These procedures do not permit Chinese banks to disclose customer account information pursuant to a foreign subpoena or court order. Rather, the banks must receive a request through Chinese judicial authorities or another government department that is expressly authorized to order the disclosure of customer accounts.

2. The Bank Would Face Serious Penalties if it Produced Documents in the PRC in Response to the Subpoena

The Commercial Bank Law states that commercial banks may be subject to civil liabilities and fines if they violate any of the provisions of the law. Article 73 of the Commercial Bank Law provides that if a commercial bank "illegally discloses information," "the banking regulatory organ of the State Council shall order the commercial bank to correct itself" and impose on it "a fine of not less than RMB 50,000 Yuan and not more than RMB 500,000 Yuan." Guo Decl. at ¶ 27.

Article 73 of the Commercial Bank Law further provides that a commercial bank that discloses information from a customer account in China illegally must be responsible for "civil liabilities to depositors." *Id.* at ¶ 28 (citing Exhibit B-1). Because, as discussed above, it is against Chinese law for a commercial bank to take such actions in response to an order from a foreign

court, [redacted] would be exposed to lawsuits in Chinese courts by account holders if it were to comply in China with the subpoena, unless customer consent has been granted for the provision of such information. *Id.* In such actions, a Chinese court would require the bank to pay the amount of any losses suffered by the former account holders. *Id.*

Article 78 of the Commercial Bank Law further provides that "[i]n case a commercial bank has the circumstances as described in Article 73 [of the Commercial Bank Law], its directors and senior management personnel directly responsible therefore and other persons directly responsible shall be given disciplinary punishment . . . ." Guo Decl. at ¶ 30 (citing Exhibit B-1).

Chinese courts have enforced these provisions. For example, in *Gucci Am., Inc. v. Weixing Li*, No. 10 Civ. 4974 (RJS), 2011 U.S. Dist. LEXIS 97814, at *38 (S.D.N.Y. Aug. 23, 2011) ("*Gucci v. Li*"), the Bank of China was ordered to produce documents concerning customer accounts located in China and also to restrain these accounts. After Bank of China produced documents and restrained the customers' assets pursuant to the U.S. court's order in *Gucci v. Li*, the customers whose accounts were subject to the restraint filed suit against Bank of China in the Second Intermediate People's Court of Beijing Municipality ("Beijing People's Court"), arguing that it was not proper for Bank of China to freeze customer assets in response to a U.S. court order. The Beijing People's Court found in favor of the customers and held that there was no basis in law or contract for Bank of China to freeze assets pursuant to a U.S. court order. *Gucci Am., Inc. v. Weixing Li*, 135 F. Supp. 3d 87, 101-2 (S.D.N.Y. 2015). The Beijing People's Court ordered that Bank of China lift the asset freeze and required it to bear "all litigation costs associated with the case." *Id.* at 102. This judgment was affirmed on appeal.

Additionally, the PBOC and CBIRC have levied administrative fines against banks in the PRC that disclosed information about customer accounts or restrained or deducted funds from

these accounts without customer authorization, citing violations of the Commercial Bank Law. Guo Decl. ¶ 31.

3. The Recently Enacted International Criminal Judicial Assistance Law in China Emphasizes the PRC's Strong Interest in Documents Being Produced Only Pursuant to the MLAA

The Government asserts that the PRC government will not enforce Chinese law if [redacted] produces these documents in response to a grand jury subpoena. To [redacted] knowledge, however, there has never been a *Bank of Nova Scotia* subpoena enforced as to documents in China (and the Government has not cited any such case), and accordingly, the Government has no basis to know how the Chinese government would have reacted in the past and how it may act in the future (and the U.S. courts have been split on the issue in the civil context regarding arguments related to the Hague Convention).[6]

But even if the Government was correct about the past, it ignores the PRC's International Criminal Judicial Assistance Law (Guo Decl. Exhibit B-18), recently enacted in October 2018, and the PRC's stated intention to "formalize procedures for international criminal judicial assistance" through this law. *See* Guo Decl. at ¶ 36. This law expressly provides that requests for judicial assistance in China should be issued pursuant to a mutual legal assistance treaty, where one applies. *See* Guo Decl. Exhibit B-18 at Article 13 ("[w]hen a foreign country requests the People's Republic of China to provide criminal judicial assistance, it shall file a written request in accordance with the requirements of the provisions of the criminal judicial assistance treaty."). Although noting that it has been enacted, GovMem at 17 n.10, the Government does not discuss

[6] *Compare Gucci Am., Inc. v. Weixing Li*, 135 F. Supp. 3d 87, 101-03 (S.D.N.Y. 2015) (Chinese banks did not demonstrate likelihood that compliance with subpoena would result in civil or criminal liability under Chinese law) *with Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 157 (S.D.N.Y. 2011) ("China's multitude of criminal and civil regulations . . . evidence its strong interest in bank confidentiality.").

its terms or the implications of the law on Chinese companies producing documents in connection with a foreign criminal investigation or proceeding.[7]

As explained by Professor Guo:

> The International Criminal Judicial Assistance Law makes it clear that approval from competent Chinese government authorities is a condition precedent to any activity carried out in China to assist in foreign criminal investigations or prosecutions. The law specifically provides that "no institution, organization or individual within the territory of the People's Republic of China may provide evidentiary materials and assistance prescribed by this Law to foreign countries" unless the "approval of the competent authority of the People's Republic of China" has first been obtained. (Exhibit B-18) at Article 4.
>
> According to the Report on Deliberation Results of the Constitution and Law Committee of the National People's Congress on a draft of the International Criminal Judicial Assistance Law, *the legislative purpose behind the law is to put an end to situations in which foreign law enforcement officials make direct requests to private individuals or entities in China to assist in criminal proceedings without first seeking the approval of the Chinese government.* (Exhibit B-19) (emphasis added).
>
> Both the MLAA between the United States and China and the recently enacted Law of the People's Republic of China on International Judicial Assistance evidence China's commitment to providing assistance to other countries in criminal affairs while still respecting the sovereignty of China and its laws.

Guo. Decl. at ¶¶ 37-39.[8] The Government's attempt to enforce the grand jury subpoena—even where the very same documents it seeks would be available through the MLAA—therefore forces Chinese entities to flout the international criminal judicial assistance laws that have been enacted

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[7] Moreover, the Government's cryptic reference to the law in a single footnote misstates its intended purpose. The law is not designed to "direct[] private parties not to share information with foreign parties related to MLA requests in criminal cases." Gov.Mem. at 17 n.10. Rather, the purpose of the law, as discussed herein and in the declaration of Professor Guo, is to ensure that the disclosure of documents and information to foreign parties in connection with a criminal investigation is done in accordance with Chinese law and in with the approval of the Chinese government.

[8] *See also* Guo Decl. Exhibit B-18 at Art 1. ("The law was "developed for purposes of guaranteeing the normal proceeding of international criminal judicial assistance, strengthening international cooperation in the field of criminal judicial justice. . .").

by the PRC to ensure that assistance with foreign criminal proceedings is handled in a consistent and standardized manner.

The PRC Ministry of Justice letter confirms that it would violate Chinese law for [redacted] to produce the documents from China in response to the subpoena without going through the MLAA process. Levin Decl. Exhibit A at 2-3.

4. The MLAA is a Readily Available Means for Obtaining the Documents in China and [redacted] has Committed to Producing Them Within Days of a Request.

The United States and the PRC have entered into a Mutual Legal Assistance Agreement, whereby both countries have agreed to provide "mutual assistance in investigations, in prosecutions, and in proceedings related to criminal matters." *See* Article 1 at ¶ 1, Agreement Between the Government of the People's Republic of China and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (Jun. 19, 2000) (Guo Decl. Exhibit B-17). Pursuant to the MLAA, both countries are empowered to obtain documents, testimony, expert evaluations, as well as execute "requests for inquiry, searches, freezing and seizures of evidence," among other forms of evidence and relief. Article 1 at ¶ 2(b)-(d), (g). The MLAA provides multiple provisions enshrining flexibility and cooperation between the United States and the PRC concerning discovery requests, and the procedure for obtaining documents is clear and straightforward. *See, e.g.*, Article 3 at ¶ 2 ("Before denying assistance pursuant to this Article, the Central Authority of the Requested Party shall consult with the Central Authority of the Requesting Party to consider whether assistance may be granted subject to such conditions as it deems necessary."); Article 22 at ¶ 1 ("The Central Authorities of the Parties shall consult . . . to promote the most effective use of this Agreement. The Central Authorities may also agree on such practical measures as may be necessary to facilitate the implementation of this Agreement."); Article 4 (specifying form and content requirements for requests under the MLAA).

The same procedure has been successfully used by U.S. prosecutors in other cases involving Chinese parties. *See, e.g.*, Anna MacCormack, *Note: The United States, China, and Extradition: Ready for the Next Step?*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 445, 467-70 (Fall 2009) (discussing US-Chinese cooperation in *USA v. Xu*, No. 2:02-cr-00674-JCM-NJK (D. Nev. 2002)).[9] Furthermore, [redacted] has given its assurances that it will produce the requested documents within days of a request through the MLAA. And as noted above, the PRC Ministry of Justice has confirmed that it has produced financial records pursuant to MLAA requests on at least eight prior occasions. Levin Decl. Exhibit A at 3-4.

B. The Balancing Test Applied in this Context Does Not Support the Enforcement of the Subpoena as to Documents in China

To determine whether to enforce a subpoena, courts have articulated seven factors to be

[9] *See also infra* n.16 (discussing *Xu* case). Additionally, the U.S. government routinely employs similar procedures to obtain documents from other countries. The United States has Mutual Legal Assistance Treaties or Mutual Legal Assistance Agreements with well over 50 countries and utilizes them regularly to obtain documents from overseas. Indeed, the practice is so common that there is a provision for extending the statute of limitations where such requests have been made. 18 U.S.C. § 3292 (a)(1) (Suspension of limitations to permit United States to obtain foreign evidence). *See e.g., United States v. Under Seal (In re Grand Jury Subpoena)*, 646 F.3d 159, 165 (4th Cir. 2011) ("The United States has negotiated MLATs with various countries to facilitate legal proceedings involving foreign parties . . . 'As their names suggest, these treaties provide for bilateral, mutual assistance in the gathering of legal evidence for use by the requesting state in criminal investigations and proceedings.'") (citing *In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 564 (9th Cir. 2011)); *Microsoft Corp. v. United States (In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.)*, 829 F.3d 197, 221 (2d Cir. 2016), *vacated as moot due to the enactment of The CLOUD ACT*, 138 S. Ct. 1186, 1187-88 (2018) ("Our conclusion today also serves the interests of comity that, as the MLAT process reflects, *ordinarily govern* the conduct of cross-boundary criminal investigations.") (emphasis added). However, [redacted] cannot unilaterally invoke the treaty to lawfully produce the documents consistent with Chinese law as only the respective governments are authorized to do so. *See United States v. Chitron Elecs. Co.*, 668 F. Supp. 2d 298, 306-07 (D.C. Mass. 2009) ("[T]he Government correctly states that the [Agreement on Mutual Legal Assistance in Criminal Matters between the United States and China] only becomes operative if a request is made by the United States to China for assistance . . . [and] the MLAT does not create a private right of enforcement of the treaty.") (citing MLAT Article 1, ¶ 3).

considered in conducting the relevant comity analysis:[10]

(1) the importance of the information to the litigation;

(2) the specificity of the request;

(3) whether the information originated in the United States;

(4) whether the information can be secured by other means;

(5) the interests of each of the sovereign states—i.e., the extent to which noncompliance would undermine important interests of the United States and compliance would undermine important interests of the foreign country;

(6) the hardship of compliance on the person from whom the subpoena seeks information; and

(7) the good faith of the person opposing the subpoena.

See, e.g., *Gucci*, 135 F. Supp. 3d at 101; *Wultz* v. *Bank of China Ltd.*, 942 F. Supp. 2d 452, 460 (S.D.N.Y. 2013); *Minpeco, S.A.* v. *Conticommodity Servs., Inc.*, 116 F.R.D. 517, 522 (S.D.N.Y. 1987).[11]

Analyzing the seven factors makes clear that the subpoena should not be enforced, at least at this time.[12]

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[10] It is unclear what the Government means in suggesting that this Court must defer to the Government's determination that pursuing the subpoena outweighs any relevant diplomatic consequences, GovMem at 19-20, but to the extent the Government is suggesting that the Court should defer to the Government in conducting the comity analysis, any such suggestion is contrary to the D.C. Circuit's decision in *In re Sealed Case*, discussed below. The Government's citation to *United States v. Sum of $70,990,605*, 991 F. Supp. 2d 154 (D.D.C. 2013) in this regard (GovMem at 20), is especially puzzling as that *in rem* forfeiture action has nothing to do with the matters at issue here.

[11] Of these factors, the first five are drawn from what is now § 442 of the Restatement (Third) of Foreign Relations Law of the United States, while the final two originate in the case law. *See Linde v. Arab Bank, PLC,* 706 F.3d 92, 109-10 (2d Cir. 2013).

[12] This Court may deny the Government's motion to compel compliance with the grand jury subpoena pursuant to § 442, but permit such a motion to be "renewed" at a later date if the bilateral

1. The Importance to the Litigation of the Documents or Other Information Requested

[redacted] assumes that the documents sought by the U.S. are important to the grand jury, though the Government's statements that they are the "foundation" of the grand jury's investigation (GovMem at 21) is belied by the fact that the Government waited a year to seek to obtain them and declined to pursue an MLAA request which could have obtained them long ago. In any event, the U.S. can obtain these same documents via the MLAA. Because [redacted] has preserved any documents in China relevant to the subpoena in anticipation of an MLAA request, there should be no concerns about document spoliation.

2. The Specificity of the Request

The request is reasonably specific, but this factor does not appear to support either approach as it would equally facilitate compliance with the MLAA or the subpoena.

3. Whether the Information Originated in the United States

The information did not originate—and never has been—in the United States. [redacted] has confirmed that it does not possess any of the documents subject to the subpoena (with the exception of one document it has already produced). Moreover, [redacted] does not have access to account information located at other branches of [redacted]. Accordingly, this factor strongly supports use of the MLAA rather than enforcing the subpoena.[13]

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mechanism proves "ineffective," "futile," or "unfruitful." *See e.g.*, *Qi Andrew*, 276 F.R.D. at 160-1 ("[P]laintiffs are directed to request the information they seek in China through the Hague Convention at this time. Should this process prove futile, plaintiffs may renew their application to enforce their subpoenas."); *Forbse*, 2012 U.S. Dist. LEXIS 72148, at *30; *SEC v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 326 (N.D. Tex. 2011).

[13] The Government argues that failing to enforce the subpoena here could create "perverse incentives to banks to station their records overseas". GovMem at 27. That argument may conceivably apply in some other case, but should be given no weight here as there is no question the documents at issue, relating to events in China, have never been in the United States.

4. The Availability of Alternative Means of Securing the Information

Perhaps most critically, 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. This factor points strongly towards use of the MLAA rather than enforcing the subpoena. As noted above, the Government would already have these documents had it simply invoked the MLAA (or it, and this Court, would know by now that such a request was futile).

The Government does not dispute that the MLAA is available and has been used successfully in at least some cases (*see* GovMem at 21-22, conceding that "the MLAA with China remains an effective law-enforcement tool in some investigations"). Rather, it asserts that it has not been successful in the last decade for "records similar to those subpoenaed by the grand jury in this investigation . . . [and] in the past 10 years, previous MLAA requests for production of similar records in China remain unanswered." GovMem at 22. The Government does not explain how many such requests have been made, when, or even what they mean by "similar" records. *Id.*

5. The Interests of Each Country

Compliance with the subpoena would undermine important interests of China. Guo Decl. at ¶ 13. China has a vital interest in upholding its bank secrecy laws, which are designed to protect customer privacy, maintain customer confidence in commercial banks, and ensure the stability of the country's financial system. *Id.* Deference to the Chinese government's views on the significance of its own laws is appropriate. *See, e.g., Tiffany (NJ) LLC v. Forbse,* 2012 U.S. Dist. LEXIS 72148, at *23 (S.D.N.Y. May 23, 2012), *vacated on other grounds*, *Tiffany (NJ) LLC v. China Merchs. Bank*, 589 Fed. Appx 550 (2d Cir. 2014) (acknowledging the interests asserted by the Chinese government in the letter submitted by the PBOC and CBRC including "material interests" in strictly enforcing bank-secrecy laws); *Minpeco,* 116 F.R.D. at 525 (denying motion to compel where the Swiss government submitted official statements to the court showing "strong

Swiss interest in bank secrecy and a familiarity with [the] litigation."). The PRC Ministry of Justice letter to this Court confirms the importance of Chinese laws at issue to the PRC government. Levin Decl. Exhibit A at 2-3.

By contrast, use of the MLAA rather than enforcement of the subpoena would not undermine important interests of the United States. The U.S. government entered into the MLAA to cover situations just like this and as such cannot complain about being expected to use it. Indeed, the United States frequently resorts to Mutual Legal Assistance Treaties and MLAAs in situations like this and the U.S. Attorney General has expressed a desire to increase the effectiveness of the MLAA. The Court need not say categorically that such grand jury subpoenas cannot be enforced—just that as a matter of comity, such a subpoena will not be enforced under these facts where the foreign country and subpoenaed entity remain ready, willing, and able to promptly provide the requested information under an international agreement the U.S. government has signed with the country involved. Of course if the request is made and not complied with, the Government can readily return to the Court. While this may entail some delay, any such delay will pale by comparison to the lengthy delay the Government has voluntarily chosen to incur. The Government should not ask this Court to punish [redacted] for the Government's own choices.

6. The Hardship of Compliance on the Person from Whom the Subpoena Seeks Information

As detailed above, [redacted] would face sanctions in China if it were to comply with the subpoena. *See* Guo Decl. ¶¶ 27-31.[14]

[14] Thus, the Chinese banking law provisions prohibiting the disclosure of customer account information are not similar to French blocking statutes, which courts have generally not granted deference to on the grounds that these blocking statutes are not regularly enforced. *See In re Vivendi Universal S.A. Sec. Litig.*, 2006 U.S. Dist. LEXIS 85211 at *14-15 (S.D.N.Y. Nov. 13, 2006) (ordering discovery of documents located in France notwithstanding French blocking

The Government does not dispute that Chinese law prohibits production of the documents or provides sanctions for violations, and the PRC Ministry of Justice letter confirms that it does. *See* Levin Decl. Ex. A. at 2-3. Rather, the Government asserts that the law "likely" will not be enforced (GovMem at 16), a troubling assumption for a law enforcement agency. And, of course, [redacted], not the Government, will suffer the consequences if the Government's assertion is wrong.

In contrast, there will be no hardship to the Government if it is directed to use the MLAA. It is a treaty the United States entered into for just this purpose and one that has been successfully used before. Indeed, [redacted] believes the Government would long since have had the documents if they had utilized the MLAA here. Moreover, enforcing the Subpoena actually may harm the US Government's enforcement interests. As the Ministry of Justice letter notes, "[i]f the Court . . . requires . . . [redacted] to provide the documents stored in the territory of China directly, rather than via the MLAA process, China's judicial sovereignty would be seriously undermined, and the mutual legal assistance in criminal matters between China and the United States will be also substantially impaired." Levin Decl. Exhibit A at 2. This would be directly contrary to the U.S. Attorney General's desire to increase the effectiveness of the MLAA.

7. The Good Faith of the Person Opposing the Subpoena

[redacted] has operated in good faith in responding to the subpoena. It has promptly contacted the Government to try to resolve this issue, steadfastly stated its intent to produce the documents quickly in China in response to an MLAA request, collected the documents and made them ready for production, and has communicated with the Chinese authorities to facilitate the response to

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statutes because "[t]he majority of courts that have examined the issue have held that France has little interest in the enforcement of its Blocking statute.") (collecting cases).

an MLAA request if and when it is made. It has also secured all responsive materials in China and has long since closed the accounts in question.

C. The D.C. Circuit's Decision in *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987) is Controlling and the Government's cases Are Not to the Contrary

1. Controlling Authority Within This Circuit Dictates That The Subpoena Should Not Be Enforced

The principal case in this jurisdiction, *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987), counsels strongly against granting the motion to compel. That case, like this one, involved a grand jury subpoena for bank records held in another country (the opinion does not specify which), the production of which would violate the law of that other country. Even though it was not apparent that there was an alternative means of obtaining the records in that case (unlike the present case), the D.C. Circuit nevertheless reversed the district court's order enforcing the subpoena and imposing contempt sanctions against a third party for non-compliance with the subpoena. In so ruling, the Court made it clear that a primary concern was that compliance with the subpoena—and the issuing of sanctions for noncompliance with it—would require the third party to violate the laws of a foreign jurisdiction. As the D.C. Circuit stated:

> We do not here decide the general issue of whether a court may ever order action in violation of foreign laws, although we should say that it causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question. Be that as it may, here we simply conclude that even if a court has the power to issue such contempt orders under certain circumstances, on the peculiar facts of this case the order should not have issued. Most important to our decision is the fact that these sanctions represent an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory. In addition, the bank, against whom the order is directed, is not itself the focus of the criminal investigation in this case but is a third party that has not been accused of any wrongdoing. Moreover, the bank is not merely a private foreign entity, but is an entity owned by the government of Country X. We recognize that one who relies on foreign law assumes the burden of showing that such law prevents compliance with the court's order, but here the government concedes that it would be impossible for the bank to comply with the contempt order without violating the laws of Country Y on Country Y's soil. The district court specifically found that the bank had acted in good faith throughout

> these proceedings. The executive branch may be able to devise alternative means of addressing this problem, but the bank cannot.

Id. at 498 (citations omitted).[15]

As in *In re Sealed Case*, the order sought here would require [redacted], a foreign entity, to violate the law in China where the documents are located. Moreover, as the D.C. Circuit noted in *In re Sealed Case* with respect to the subpoenaed entity, [redacted] is a mere third party not accused of any wrongdoing here.[16] Further, [redacted] has acted in good faith by immediately producing

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[15] The D.C. Circuit further explained why two cases from the Eleventh Circuit upholding the enforcement of grand jury subpoenas notwithstanding potential violations of foreign law, *In re Grand Jury Proceedings (the Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir. 1984) and *In re Grand Jury Proceedings*, 691 F.2d 1384 (11th Cir. 1982) were distinguishable from the case at issue:

> In the first case, the contempt order was directed against an American entity, and there was a substantial dispute over whether that entity in fact exercised complete control over the documents that were being sought. Thus, there was considerable room for doubt whether enforcement of the order would require violation of foreign laws on foreign soil. *See In re Grand Jury Proceedings*, 691 F.2d at 1386-87. In addition, the trial court specifically found that the contemner had not made a good faith effort to comply with the subpoena. *Id.* at 1389. In the second case, the trial court also found that the contemner had not acted in good faith, but had undertaken an "extensive pattern of delay" in the erroneous belief that foreign law barred production of the documents in question. *See In re Grand Jury Proceedings*, 740 F.2d at 826. Even if the power to enter a contempt order like the one in this case is theoretically within a court's province, we think that the facts of this case do not warrant the exercise of such a troublesome authority.

In re Sealed Case, 825 F.2d at 498. These factors apply equally here. The only U.S. based entity here, [redacted], has no control over the documents, their production would clearly violate Chinese law, and [redacted] has acted in good faith and not sought to delay proceedings (the only delay has been that resulting from the prosecutors' decision to undertake no action for nearly a year).

[16] *See id.* at 498 ("[T]he bank, against whom the order is directed, is not itself the focus of the criminal investigation in this case but is a third party that has not been accused of any wrongdoing."). This factor was also of particular importance to the court in the *Tiffany v. Qi Andrew* case discussed further below:

> The Banks' status as non-parties weighs against compelling production of documents in violation of Chinese law because such an order "'should be imposed on a nonparty . . . only in extreme Circumstances.'" The Banks need not prove that they will certainly be punished if forced to comply with plaintiffs' subpoenas, but they must show that the possibility of civil and/or criminal punishment for disclosure is more than speculative.

Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 158 (S.D.N.Y. 2011) (citations omitted).

responsive materials located in the bank's New York branch to the Government and negotiating with the Government about the production of materials located in China through alternative means. Finally, and most importantly, the executive has already devised an alternative means of addressing this problem through the MLAA, which is expressly designed to handle the discovery request at issue here.[17] In *In re Sealed Case*, the court declined to enforce the subpoena even though no such mechanism apparently was yet in place.

The Government's attempts to distinguish *In re Sealed Case* are unavailing. "Most critically," according to the Government, GovMem at 27, *In re Sealed Case* "neither applied the factors from, nor cited *Societe Nationale*,[18] which was decided only seven weeks prior to [the decision]." But the suggestion that somehow a panel of the D.C. Circuit Court was unaware of a decision by the U.S. Supreme Court almost two months before its decision is absurd. The D.C. Circuit simply reached a different conclusion from the one the Government seeks here. *See In re*

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[17] The Chinese government has made clear it cannot transmit the documents to the U.S. Government without a request from the U.S. Government. Once such a request is made, however, past precedent indicates that the Chinese government will provide the necessary cooperation with the United States. *See e.g.*, *Wang v. Reno*, 81 F.3d 808, 811-812 (9th Cir. 1996) (noting that the "*PRC honored the American request*" to cooperate with U.S. prosecutors to provide a witness to furnish information in an international criminal trial.); *United States v. Chaofan Xu*, No. 2:02-cr-00674, 2015 U.S. Dist. LEXIS 5618, at *1 (D. Nev. Jan. 15, 2015) (noting that the Ninth Circuit affirmed "the convictions of Defendants Chaofan Xu, Guojun Xu, Wan Fang Kuang, and Ying Yi Yu, for their participation in a scheme to steal $482 million from the Bank of China, and to escape prosecution and retain the stolen money by illegal transfers of the funds," which was only made possible, as noted below, after receiving "substantial assistance in producing evidence" from Chinese authorities); *Former Bank of China Managers and Their Wives Sentenced for Stealing More Than $485 Million, Laundering Money Through Las Vegas Casinos*, U.S. DEP'T. OF JUSTICE (May 6, 2009), https://www.justice.gov/opa/pr/former-bank-china-managers-and-their-wives-sentenced-stealing-more-485-million-laundering ("The government of the People's Republic of China, in particular the Ministries of Justice and Public Security . . . *provided substantial assistance in producing evidence* and making witnesses available, both for testimony at trial and videotaped depositions.") (emphasis added).

[18] *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987).

Sealed Case, 825 F.2d at 498-99 (recognizing, *inter alia*, that the case implicated "the legal expression of . . . *basic principles of international comity*" and declining to "utter[ly] disregard [these] comity principles . . . when [ ] order[ing] parties to violate foreign laws.") (emphasis added).

The Government's other attempts to distinguish *In re Sealed Case* are equally weak. First, the Government argues that Chinese bank secrecy laws "are not so robust as to preclude disclosure." GovMem at 26. But the Government cannot refute the fact that Chinese banking law plainly precludes production of the documents requested. *See* Guo Decl. ¶¶ 10-26. Furthermore, the Government simply ignores the impact of the new International Criminal Judicial Assistance Law, which was specifically intended to put an end to situations in which foreign law enforcement officials make direct requests to private individuals or entities in China to assist in criminal proceedings without first seeking the approval of the Chinese government. *See supra* § I(A)(3).

Second, the Government argues that "the grand jury does not have access to the testimony of a bank employee about his or her knowledge of the targets of this investigation and its activities." GovMem at 26. But the grand jury should have access to the very documents sought in the subpoena through the MLAA.

Third, the Government argues that [redacted] is not a mere custodian of records but has additional due diligence records. But the Government's sole basis for asserting this is a "reliable confidential source" that allegedly claims that "Chinese banks" (no specification of whether this includes [redacted]) "collect due diligence records when conducting transactions for North Korean customers" (with no indication of what those might be). GovMem at 26. [redacted] has advised it does not have due diligence records related to the transactions subject to the subpoena.[19] In any event,

[19] To the extent the Government may be suggesting that [redacted] may have engaged in wrongdoing ("the requested records are critical in determining what, if any, knowledge the bank had of the

the U.S. government can obtain all the requested records under the MLAA.

Indeed, the D.C. Circuit in *In re Sealed Case* anticipated almost all of the Government's arguments here. The Court there noted that "[i]t is therefore also relevant to our conclusion that the grand jury is not left empty-handed by today's decision." *Id.* at 499. So too, here, the grand jury will not be left empty-handed. There is no reason to assume the grand jury will not get the requested documents if the Government makes an MLAA request. If a request is made and not complied with, the Government can certainly come back to court. And the Government should not be heard to complain about the delay that may entail having sat on its hands with respect to this subpoena for almost a year.

The Government cites two other cases from within this Circuit or District: *In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987) (hereinafter "*Walsh*" to avoid confusion with the other *In re Sealed Case*) and *In re Info. Associated with @gmail.com*, No. 16-mj-00757, 2017 U.S. Dist. LEXIS 130153 (D.D.C. July 31, 2017). Neither case in any way undercuts or limits the analysis in *In re Sealed Case*.

- *Walsh*, decided three months after *In re Sealed Case*, cites it favorably and does not in any way suggest it is limiting, let alone overruling, the decision there. Rather, in *Walsh,* the court noted that enforcement of the grand jury subpoena seeking Swiss corporate documents was proper because (1) "some of the documents at issue might not be in Switzerland", (2) it was unclear that Swiss law even forbade production of them, given that at least one of the cited laws pertained to the disclosure of *bank* records and the subpoenaed documents were not bank records, (3) even if it did, the witness, who lived in the United

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illicit activity being investigated"), such suggestion is unfair. GovMem at 26. The Government has apparently been investigating this matter for well over a year. If it has evidence of wrongdoing by [redacted], it should present it to the Court. If not, the vague suggestions are highly inappropriate.

States, would be at no risk unless he voluntarily returned to Switzerland, and (4) "no evidence" was presented that the Swiss MLAT was "the exclusive vehicle for obtaining documents in Switzerland . . . ." *Walsh*, 832 F.2d at 1283. Here, there is no question that Chinese law forbids production of these bank records and that under the International Criminal Judicial Assistance Law, such documents may only be produced in connection with a foreign criminal investigation with approval from competent Chinese authorities. *See supra* § I(A). And there is no question that [redacted] is in China and thus subject to sanctions from the Chinese authorities.[20]

- *In re Info. Associated with @gmail.com*, 2017 U.S. Dist. LEXIS 130153 (D.D.C. July 31, 2017), a case with which this Court is obviously completely familiar, does not appear to

[20] Nor is the D.C. Circuit's recent decision in *In re Grand Jury Subpoena*, No. 18-3071, 2018 U.S. App. LEXIS 35441 (D.C. Cir. Dec. 18, 2018), to the contrary. While the decision (which as of this date has been stayed by the Supreme Court (*See* Supreme Court Case No. 18A669, Order dated Dec. 23, 2018)) provides few details on the nature of the case, for purposes relevant here, the argument that compliance with the subpoena would require the recipient of the subpoena to violate foreign law was rejected solely because the court concluded that the recipient had not shown that foreign law would in fact prohibit compliance:

> Finally, we consider the Corporation's alternative argument that the subpoena is unreasonable and oppressive because it would require the Corporation to violate Country A's law. As the party invoking foreign law, the Corporation "assumes the burden of showing that such law prevents compliance with the court's order." *In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987) (per curiam). The Corporation has fallen well short of carrying that burden. The text of the foreign law provision the Corporation relies on does not support its position. Moreover, the submissions from the Corporation's own counsel and—later—a regulator from Country A seeking to explain the Corporation's atextual interpretation lack critical indicia of reliability....Consequently, we are unconvinced that Country A's law truly prohibits the Corporation from complying with the subpoena.

Id. at *6-7 (citation omitted). Here, the Government does not appear to dispute that Chinese law would be violated if [redacted] complies with the subpoena; rather, it expresses doubt that the Chinese law would be enforced.

have involved a comity analysis at all and does not suggest that the subpoena should be enforced.

Thus, the case law in this Circuit strongly supports [redacted] and opposes enforcing the subpoena.

1. Non-binding Authority From Other Jurisdictions Does Not Support Enforcement of the Subpoena

Although the Government primarily relies on case law from other circuits, these non-controlling, non-D.C Circuit cases do not compel a result different from in *In re Sealed Case:*

- *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397, 404-05 (S.D.N.Y. 2014) (GovMem at 18) enforced the subpoena as to documents in France (involving the French blocking statute, which is generally viewed not to be enforced) and the United Arab Emirates (also because there was no evidence the blocking laws were enforced), but, in contrast, quashed the subpoena as to documents in Switzerland because of the strong Swiss interest in bank secrecy. China, like Switzerland, has made clear its national interest in protecting the confidentiality of banking records. *See supra* § I(A)(3).
- *Nike, Inc. v. Wu*, No. 13-cv-08012, 2018 U.S. Dist. LEXIS 170303 (S.D.N.Y. Sept. 25, 2018), *aff'd* 2018 U.S. Dist. LEXIS 198872 (S.D.N.Y. Nov. 19, 2018) and *Gucci America Inc. v. Weixing Li*, 135 F. Supp 3d 87 (S.D.N.Y. 2015) (GovMem at 12, 22, 24) involved civil cases and analyses under the Hague Convention rather than the MLAA.[21] *Nike* of course followed Second Circuit rather than D.C. Circuit law and was decided before the recent Chinese law re-emphasizing the need for companies in China to produce

[21] In *Nike*, after the court ordered production of the documents in China, the Chinese government and the U.S. Department of Justice arranged for the delivery of the documents government-to-government. *See Nike, Inc. v. Wu*, Case No. 13-Civ. 8012 (CM) (DF) (S.D.N.Y.) (ECF No. 181).

documents in connection with a foreign criminal investigation only pursuant to official government-to-government requests. *See supra* § I(A)(3). Moreover, in *Nike* the court considered substantial evidence that Hague Convention requests had not resulted in full or prompt disclosure of the requested information and so found that it was not a viable alternative. *Nike*, 2018 U.S. Dist. LEXIS 170303 at *52-54. *Gucci* is to similar effect. *Gucci America*, 135 F. Supp 3d at 102. Assuming arguendo that they are correct in their analysis of the Hague Convention, there is no similar record before this Court as to the MLAA (other than the Government's mere assertion that although MLAA requests have been successful, they have not been for "similar" records, with no discussion of the number of such allegedly unsuccessful requests, the circumstances, or what they even mean by "similar." GovMem at 22). As noted, [redacted] believes that government-to-government requests have been successful in obtaining documents from it in the past.

- *United States v. Sedaghaty*, No. 6:05-cr-60008, ECF No. 277 (E.D. Or. Feb 26. 2010) (GovMem at 14, 23) involved a PATRIOT Act subpoena and there, the U.S. government had already tried to obtain the documents through a government-to-government request which was unsuccessful, *id.* at n.1, and thus the court found "there is *no other means* of securing the information." *Id.* at 18 (emphasis added).
- *Linde v. Arab Bank, PLC*, 706 F.3d 92 (2d Cir. 2013) (GovMem at 23) involved review under the very deferential "clearly erroneous" standard in the context of a mandamus action. *Id.* at 107. The Second Circuit concluded the district court had not clearly abused its discretion in weighing the factors under Restatement § 442, especially given evidence that the banks had previously voluntarily produced documents without any enforcement actions being taken against them in the countries involved (not China). *Id.* at 110, 114.

- *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429 (E.D.N.Y. 2008) (GovMem at 24) again involved the French blocking statute and the Hague Convention. Credit Lyonnais was a defendant in the action, not a mere nonparty witness as is [redacted], and the court found that the requested records were "vital" to the plaintiffs' claims against Credit Lyonnais for assisting terrorist organizations and significantly, Credit Lyonnais conceded that not all of the requested discovery could be obtained under the Hague Convention even if a request were made. *Id.* at 440, 442.
- *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985) (GovMem at 23), although a criminal case, did not involve enforcement of a grand jury subpoena. In that case, bank records were obtained from Switzerland under the MLAT with Switzerland and also from the Cayman Islands. *Id.* at 1027, 1032. The case involved challenges to documents produced pursuant to an MLAT and an order requiring the defendant—a bank customer—to assist in allowing the Cayman Island bank records to be produced. Although the defendant challenged the order requiring him to assist in the production of his Cayman Island bank records, in part because their disclosure "would subject the bank or its employees to criminal liability in [Cayman]," the court held that this was ultimately an issue for the banks, and not the customer, to raise. *Id.* at 1033 ("While [defendant's] solicitude for the plight of a bank confronted with potential conflicting legal commands may be commendable, that issue is more properly raised by the bank."). The decision is not relevant here as no MLAT request has been made and, unlike *Davis*, it is the bank itself—and not the customer—that is raising the legal challenges to disclosure.

Only three of the non-D.C. Circuit cases cited by the Government involve grand jury subpoenas: *In re Grand Jury Proceedings (the Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir.

1982) (GovMem at 23-25); *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968) (GovMem at 24), and *In re Grand Jury Subpoena dated August 9, 2000*, 218 F. Supp. 2d 544 (S.D.N.Y. 2002) (GovMem at 24).

- *Bank of Nova Scotia* was expressly distinguished by the D.C. Circuit in *In re Sealed Case*, 825 F.2d at 498. *See supra* n.15.
- In *First National City Bank*, the court relied on the fact that the bank would not face criminal or civil penalties in Germany but only potential civil liability to its customer, which the court also seemed to think was not very likely. *First Nat'l City Bank*, 396 F.2d at 901. Here, by contrast, [redacted] faces civil liability to its customers and civil sanctions from the PRC government. Guo Decl. at ¶¶ 27-31. Moreover, in that case the court assumed if Germany had a "vital national interest[] threatened, they [would] have not hesitated to make known their objections . . . [but] the German government[]. . . voiced *no opposition* to Citibank's production of the subpoenaed records.") (emphasis added). By contrast, China has repeatedly and consistently addressed U.S. courts to voice their opposition to unilaterally compelled bank account disclosure by U.S. court orders in violation of Chinese bank secrecy laws.[22]

[22] *See* Guo Decl. ¶ 32 (discussing letters submitted by the Chinese government in other civil subpoena actions seeking discovery from Chinese banks); *Forbse*, 2012 U.S. Dist. LEXIS 72148, at *18-19 ("[A] letter recently submitted by [the] PBOC and [the] CBRC . . . assert[s] that Chinese law *prohibits* the Banks from disclosing customer account information pursuant to a U.S. court order . . . [and] [they] are committed to actively coordinating with the PRC Ministry of Justice and judicial organs in the PRC to ensure that they satisfy that requests for seeking evidence . . . within a reasonable time period"); *Wultz v. Bank of China*, 910 F. Supp. 2d 548, 557 (S.D.N.Y. 2012) ("recogniz[ing] and respect[ing] the sovereign interest expressed by the PBOC-CRBC letter . . . and strongly agree[ing] that bilateral mechanisms are preferable to unilateral actions in cross-border legal enforcement").

- Finally, in *In re Grand Jury Subpoena*, the court expressly found that there was no alternative method for obtaining the information. *In re Grand Jury Subpoena dated August 9, 2000*, 218 F. Supp. 2d at 563. To the contrary, the foreign government involved had apparently already categorically refused to allow their production. *See id.* at 549, 563 (noting that the Minister of Justice responded to Doe's inquiry that "any information Doe possessed was considered 'strictly confidential,' 'protected by the sovereign rights of the Republic,' and 'not subject to transfer to any third parties'" thus compelling the court's conclusion that "[t]here is no alternative source [for obtaining] the documents."). As such, the case does not suggest that an MLAT or MLAA should not be used first, if available.

In any event, outside the D.C. Circuit, the case law is mixed, with case law favorable to [redacted] position and contrary to the Government's. For example, in *Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143 (S.D.N.Y. 2011), again in the context of a civil case and the Hague Convention rather than a grand jury investigation and the MLAA, a federal district court conducted an extensive comity analysis, taking into account the potential violations of the same Chinese banking laws at issue here, and found that principles of comity weighed in favor of requiring plaintiff to seek discovery through the Hague Convention:

> While the first two prongs of the comity analysis, namely the importance of the information and the specificity of the request, weigh in favor of plaintiffs, every other factor weighs in favor of the Banks.
>
> Specifically, the fact that the information requested is located in China puts the third factor in favor of the Banks. The fourth factor, analyzing whether there is an alternative means for securing the information, similarly favors the Banks . . . .
>
> The fifth factor, the respective interests of the states, also resolves in favor of the Banks, albeit more narrowly. While the United States certainly has a general interest in enforcing its laws and protecting trademark rights, the Banks' non-party status mitigates against these interests in this case. China's interest in protecting bank customers' privacy and encouraging use of, and confidence in, its relatively new banking system is evidenced by the multitude of civil and criminal regulations it has enacted to protect these interests. The

> potentially harsh sanctions and narrow exceptions to these regulations indicate that China's interests in cases such as this one are more significant than those at issue for the United States.
>
> The sixth factor, examining the nature of the hardship imposed upon the foreign party, also weighs in favor of the Banks. Were the Banks to disclose the requested information in contravention of Chinese law, they could be subject to civil and criminal sanctions. Plaintiffs are correct that the examples in the record in which the Banks have been held liable for violations of these regulations are not analogous to the case at hand. However, there is no indication that the Banks will not be prosecuted for violating these same regulations pursuant to a Court Order from the United States. The lack of records of Chinese judicial decisions on this issue prevents a comprehensive review of the application of these regulations. Because the Banks and their personnel could potentially be severely sanctioned for such disclosure, this factor also weighs in favor of the Banks.
>
> Finally, there is no indication that the Banks have acted with bad faith in this matter. Accordingly, this prong also weighs in their favor . . . .
>
> For all the foregoing reasons, plaintiffs are directed to request the information they seek in China through the Hague Convention at this time. Should this process prove futile, plaintiffs may renew their application to enforce their subpoenas.

276 F.R.D. at 160-61.

None of these out-of-circuit cases, however, is remotely as significant as *In re Sealed Case*, where the D.C. Circuit rejected arguments similar to those raised by the Government here, even in the apparent absence of an existing procedure like the MLAA.

D. The Fact That This Is a Grand Jury Investigation Involving National Security Matters Does Not Compel a Different Result

The Government at many points stresses the grand jury nature of this investigation and the fact that it involves national security and North Korea, suggesting that that requires greater deference to the Government's judgments and lesser or even no comity analysis (GovMem at 18-19, 23-25). Without in any way minimizing the importance of national security or grand jury investigations, it is worth noting:

- The fact that the Government has waited nearly a year between serving the subpoenas and seeking to enforce them, and has not even tried to obtain the

documents through the MLAA, makes quite clear that these bank records are not critical to the national security of the United States.

- A number of the cases discussed above, including most critically *In re Sealed Case,* involved grand jury investigations and nevertheless the courts applied the comity analysis. *In re Sealed Case* appears to have involved money laundering allegations similar to those apparently involved here, although the decision does not provide details on the nature of the investigation sufficient to determine its national security implications.
- Regardless, as the Supreme Court has made clear many times, national security arguments (even ones substantially more compelling than appear to be present here) do not give the Government a "blank check" and the courts will remain scrupulous in ensuring a fair application of the law even (perhaps especially) in such settings. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

II. THE SUBPOENA DOES NOT REACH DOCUMENTS HELD AT [redacted] IN CHINA

The subpoena is not enforceable against [redacted] because this Court lacks sufficient jurisdiction over [redacted] to enforce the subpoena as to documents in China. The Court must have personal jurisdiction over [redacted] in order to require it to comply with a grand jury subpoena. *See In re Info. Associated with @gmail.com*, 2017 U.S. Dist. LEXIS 130153, at *37 ("A well-established principle is that courts have the power to exercise authority on people and entities over whom they have personal jurisdiction, including compelling those individuals or entities to retrieve documents from abroad."); *Gucci Am. v. Bank of China*, 768 F.3d 122, 141 (2d. Cir. 2014) (stating that a court must have personal jurisdiction over a nonparty before it can require that nonparty to comply with a civil subpoena issued under Fed. R. Civ. P. 45).

A. There is No General Jurisdiction Over [redacted]

The Government cannot establish general personal jurisdiction over [redacted] in the United States simply on the basis that [redacted] maintains one branch in New York. Indeed, the Government has not even asserted that such general jurisdiction exists. GovMem at 9-10 n.7. In *Daimler v. Bauman*, the Supreme Court held that general all-purpose jurisdiction over a foreign corporation is appropriate only where the corporation's in-forum contacts are "so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Daimler*, 134 S. Ct. at 761. Barring an "exceptional case," a foreign corporation is "at home" and subject to general jurisdiction only if it is (1) incorporated in that jurisdiction or (2) has established a principal place of business therein. *Id.* at 760-61 n.19. On this basis, the Court held that there were no grounds to exercise general personal jurisdiction over a German corporation on the basis that one of its subsidiaries was located in California. In *Daimler*, the Supreme Court advocated a more restrained approach to U.S. jurisdiction in the transnational context, in light of the "risks to international comity" posed by expansive notions of personal jurisdiction. *Daimler*, 134 S. Ct. at 763.

The holding in *Daimler* has specifically been applied to the issue of personal jurisdiction over nonparty banks. In *Gucci America v. Bank of China*, the Second Circuit Court of Appeals held that in light of *Daimler*, there were no grounds to exercise general jurisdiction over a nonparty Chinese bank, Bank of China, simply on the basis that the bank maintained two branches in New York. *Gucci America*, 768 F.3d at 135.

Daimler requires the same conclusion here. There is no basis to exercise general jurisdiction over [redacted] because it is not incorporated and does not maintain its principal place of business in New York or anywhere in the United States.