IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Possible Violations of 18 U.S.C. § 1956 and 50 U.S.C. § 1705	:	**Case No. 18-mc-00177-BAH**
	:	**UNDER SEAL**

[redacted] **SURREPLY IN OPPOSITION TO THE UNITED STATES' MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

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INTRODUCTION

The government's decision to file a single omnibus reply to three different banks' oppositions underscores the fundamental error that permeates its arguments. The government attempts to treat "the Banks" as an undifferentiated group, when, in reality, the status of [redacted] ("[redacted] or "the Bank") is fundamentally different than that of [redacted] ("[redacted] and the [redacted] ("[redacted] received an administrative subpoena issued pursuant to the Patriot Act, 31 U.S.C. § 5318(k)(3); [redacted] and [redacted] were served with grand jury subpoenas. While [redacted] and [redacted] have physical branches in the United States, [redacted] has no physical presence or employees in the country. [redacted] Decl. ¶ 7. Indeed, [redacted] was subpoenaed in this case solely because it maintains a handful of correspondent accounts at U.S. banks. *See id.* ¶ 10. These undisputed facts have dispositive legal consequences that the government cannot—and, in many cases, does not even attempt to—account for.

First, unlike [redacted] and other banks with branches in the United States, [redacted] is not subject to a *Bank of Nova Scotia* subpoena issued by a grand jury. The government has acknowledged as much by not attempting to serve [redacted] with a grand jury subpoena. Instead, the government has served [redacted] with an administrative subpoena pursuant to the Patriot Act, 31 U.S.C. § 5318(k)(3), which imposes unique statutory limitations without an analog in the grand jury context. While it has been said that a grand jury "must have available to it every man's relevant evidence," *Branzburg v. Hayes*, 408 U.S. 665, 737 (1972), a Patriot Act subpoena, by contrast, must be limited to documents "related to" "a correspondent account in the United States." § 5318(k)(3)(A)(i). It is not sufficient (or even relevant) that the subject matter of the subpoena might be pertinent to a grand jury investigation. Instead, to compel production of documents pursuant to a Patriot Act subpoena, the government must demonstrate that each

category of documents it seeks falls within the specific authorization Congress laid out in the Patriot Act. And as [redacted] has explained—and the government does not meaningfully dispute—the subpoena served on [redacted] facially violates the statutory terms. The government's own submissions demonstrate that it seeks some categories of documents from [redacted] precisely because they are *not* related to [redacted] U.S. correspondent accounts. For example, the government seeks records from [redacted] regarding intrabank transfers, and asserts that "such transfers of U.S. dollars would not normally appear in correspondent banking records, because a correspondent bank *is not needed to make such records*." Whitley Decl. ¶ 50 (emphasis added). In addition, the fact that [redacted] was served with a Patriot Act administrative subpoena and not a grand jury subpoena means that the government's pervasive reliance on authorities pertaining to grand jury subpoenas—arguably relevant with respect to the other two banks—is misplaced as to [redacted]

Second, [redacted] far more attenuated relationship with the United States also shifts the comity analysis in favor of allowing [redacted] to refrain from violating Chinese law. The comity analysis involves weighing the relative interests of China and the United States. Where a Chinese bank has no physical presence or employees in the United States, China's interests in enforcing its laws are heightened and the United States' interests in requiring the bank to violate Chinese law are diminished.

Third, the fact that the Bank has no physical presence or employees in the United States—and very limited contacts with the United States, much less the District of Columbia—creates a profound problem of personal jurisdiction. Only a few threads connect the Bank to the United States, and yet the government seeks to leverage that tenuous connection to subject the Bank to a broad and burdensome extraterritorial discovery request. To exercise personal

jurisdiction under such circumstances would be inconsistent with due process. The government's conflation of [redacted] with the other banks glosses over this issue.

In short, when accounting for the particular circumstances of a bank like [redacted] with no physical presence or employees in the United States, it becomes apparent that the motion to compel [redacted] to produce documents under the Patriot Act should be denied *even if* the Court enforces the grand jury subpoenas. And, in any event, the Court should address the unique Patriot Act issues separately and issue a discrete order with respect to the Bank. Separating [redacted] from the other two banks will provide clarity on these distinct legal issues and actions.

ARGUMENT

I. The Motion to Compel Should Be Denied Because the Subpoena Exceeds Statutory Authorization

A. The Subpoena Is Not Limited to "Records Related To" A "Correspondent Account In the United States"

1. As the Bank's Opposition noted (at 33), and the government does not dispute, the plain text of the Patriot Act limits Section 5318(k) subpoenas to a discrete category of records: namely, "records related to" "a correspondent account in the United States." The statute provides:

> The Secretary of the Treasury or the Attorney General may issue a summons or subpoena to any foreign bank that maintains a correspondent account in the United States and request records *related to such correspondent account* including records maintained outside of the Unites States relating to the deposit of funds into the foreign bank.

31 U.S.C. § 5318(k)(3)(A)(i) (emphasis added). Accordingly, the only records which may be subpoenaed under Section 5318(k) are "records related to" "a correspondent account in the United States," which may "includ[e] records maintained outside of the United States relating to the

deposit of funds into the foreign bank." *Id.*[1] On its face, the subpoena at issue exceeds this statutory authorization in three ways.

First, Item 1 of the subpoena seeks "[a]ll documents *related to correspondent banking transactions* for Mingzheng International Trading Limited." (emphasis added). That demand plainly extends to *all* Mingzheng correspondent banking transactions—that is, transactions involving *any* correspondent account, rather than solely *United States* correspondent accounts. As a large bank with numerous branches in China and branches in [redacted], [redacted] has multiple correspondent accounts which are not in the U.S. and do not transact U.S. dollars. [redacted] Decl. ¶ 5-6; Memorandum of Wenhao Shen (Feb. 25, 2019) ("2d PRC Counsel Letter") at 23, Second Decl. of Lillian He ("2d He Decl.") Ex. A. In conflict with the statute, the subpoena would capture responsive records related to *any* of the Bank's correspondent accounts, in any country.

Second, Item 2 of the subpoena seeks "[a]ll documents *related to correspondent banking transactions* for Account Number [redacted]." (emphasis added). Once again, the language is not limited to *United States* correspondent banking transactions, and would apply to responsive records related to *any* correspondent account anywhere in the world.

Third, the subpoena clarifies that it is meant to capture a variety of records including signature cards, account ledger cards, customer account statements, and due diligence and bank records. But there is no reason to believe that *any* of these records, let alone all of them, are related to the Bank's U.S. correspondent account. Indeed, in *United States v. Sedaghaty*, the court concluded that a very similar request exceeded the authority granted by the Patriot Act.

[1] The legislative history is consistent with the text. *See* 147 Cong. Rec. at S11008 (Oct. 25, 2001) (section-by-section analysis of Patriot Act noting that "[t]he new 31 U.S.C. 5318(k) authorizes the Attorney General and the Secretary of the Treasury to issue a summons or subpoena to any such foreign bank seeking records, wherever located, *relating to such a correspondent account* … ." (emphasis added)).

Specifically, the court barred the government from seeking any "signature cards" or "customer applications," and it restricted all of the government's other requests to records which were "directly related" to checks issued by U.S. banks. No. 6:05-cr-60008, 2010 WL 11643384, at *5-6 (E.D. Or. Feb. 26, 2010).[2]

2. The government's own description of the documents it hopes to obtain further illustrates the subpoena's impermissible scope. First, the government repeatedly acknowledges that the subpoena will capture a broad range of documents pertaining to foreign transactions. *See* Reply 18 (explaining that the subpoena encompasses "[t]he Banks' records documenting Mingzheng's *foreign and U.S.-dollar* wire and cash transactions (along with supporting due-diligence documentation)" (emphasis added)); Reply 27 (suggesting that the records would allow agents to "trace foreign and U.S. currency cash transactions"). The government makes no effort to explain how these *foreign* transactions are related to the Bank's *United States* correspondent account.

More broadly, the government acknowledges that the subpoena seeks "all records relating to [Mingzheng's] activities." Reply 29; *see* Reply 28 (explaining that the subpoena encompasses "the complete foreign bank statements"). But once again, the government does not and cannot explain why *all* records relating to Mingzheng can be characterized as "records related to" the Bank's United States correspondent account.

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[2] The government's attempts to cabin *Sedaghaty* are misguided. The government notes, first, that the *Sedaghaty* court did order the production of a range of documents, such as bank statements. Reply 37. But the government overlooks the fact that the court expressly limited its order to documents that were "directly related" to U.S. transactions. *Sedaghaty*, 2010 WL 11643384, at *6. In other words, the court imposed precisely the kind of restriction that the government resists in this case. The government also attempts to draw irrelevant factual distinctions, including whether the identities of the individuals were important to the investigation, and whether the bank account at issue had any legitimate purposes. Reply 37. But the court's analysis appropriately did not turn on (or even mention) these factual details. After all, the court was analyzing the statutory scope of the Patriot Act, not the fact pattern or equities limited to a particular case.

Indeed, the Whitley declaration indicates that the government is seeking certain records precisely *because* they are not related to a correspondent account. For example, Agent Whitley explains that it is important to obtain records regarding intrabank transfers because "such transfers of U.S. dollars would not normally appear in correspondent banking records, because a correspondent bank *is not needed to make such records*." Whitley Dec. ¶ 50 (emphasis added); *see also* Whitley Dec. ¶ 55 (explaining that records of foreign currency deposits "would not be available from U.S. correspondent banks, because such banks only process international U.S. dollar transactions"). In other words, Agent Whitley makes clear that the subpoena will capture a wide range of records which, *by their nature*, do not pertain to a U.S. correspondent account.

The government's fundamental error, once again, is confusing Patriot Act subpoenas with grand jury subpoenas. It asserts that all records relating to Mingzheng "fall squarely within the ambit of the grand jury's investigation." Reply 29; *see also* Reply 36 (insisting that the subpoena is permissible because the records at issue are "important to the investigation"). But even if true, that assertion in no way indicates that the subpoena that the government served on [redacted] is permissible under the Patriot Act. In adopting Section 5318(k), Congress took the bold step of allowing the government to subpoena records from foreign banks that have no presence in the United States. But it took that step carefully, restricting the scope of such subpoenas to documents that are related to U.S. correspondent accounts. The government must be required to abide by the decision Congress made.

3. In addition, binding precedent requires courts to narrowly construe a statute's extraterritorial reach. In light of the subpoena's self-evident extraterritorial impact, Section 5318(k) must be read *narrowly*. Opp. 34; *see FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1322 (D.C. Cir. 1980) ("Liberal judicial interpretations of agency power are not

justified when agency action threatens to have extraterritorial … impact."); *CFTC v. Nahas*, 738 F.2d 487, 495 (D.C. Cir. 1984) ("A clear congressional mandate authorizing the Commission to serve investigative subpoenas on foreign citizens in foreign nations is lacking in [the relevant statute], and inferring such a mandate would run contrary to established canons of statutory construction.").

The government appears to suggest that the presumption against extraterritoriality has no work to do where Congress has clearly indicated that the statute would have at least *some* extraterritorial application. Reply 34-35. This notion is directly repudiated by voluminous and controlling Supreme Court precedent. As the Court has recently reiterated, "'when a statute provides for some extraterritorial application, the presumption against extraterritoriality *operates to limit that provision to its terms*.'" *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2080, 2102 (2016) (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 265 (2010)) (emphasis added); *see also Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 456 (2007) (explaining that, even where a statute expressly addresses extraterritorial applications, the presumption against extraterritoriality "remains instructive in determining the extent of the statutory exception").

The presumption against extraterritoriality requires that Section 5318(k) be limited to its terms. And as demonstrated above, the subpoena at issue blatantly and repeatedly exceeds those terms. As such, it is invalid.

B. The Government's Counterarguments Are Unavailing

The government's response boils down to a plea for extreme and virtually unbounded deference. Reply 35-36. The government asserts that the subpoena should be enforced because the "Department of Justice has determined that [the records at issue] fall within the statutory ambit." *Id.* In other words, the government's position is correct because the government says so. This position should be rejected, for three reasons.

First, the question in dispute is a pure question of law: whether the subpoena is authorized by the statute. The government does not identify a *single administrative subpoena decision* in which a court has deferred to an agency on a question of this sort.[3] To the contrary, courts consistently emphasize the importance of making an independent assessment of whether the agency had transgressed its statutory authority. *See e.g., FTC v. Ken Roberts Co.*, 276 F.3d 583, 586-87 (D.C. Cir. 2001) (explaining that "there is no doubt that a court asked to enforce a subpoena will refuse to do so if the subpoena exceeds an express statutory limitation on the agency's investigative powers" and that therefore "a court *must assure itself* that the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency" (internal quotation marks omitted and emphasis added)); *In re Sealed Case*, 42 F.3d 1412, 1415 (D.C. Cir. 1994) (explaining that a court's "role in a subpoena enforcement proceeding" includes "determining whether the inquiry is within the authority of the agency" (internal quotation marks omitted)); *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683, 688 (D.C. Cir. 201) (similar); *Resolution Tr. Corp. v. Thornton*, 41 F.3d 1539, 1549 (D.C. Cir. 1994) (similar); Opp. 33-34 (collecting cases).

And this is no surprise. Indeed, the government's position—which suggests that agencies should be left to police the limits of their own subpoena authority— amounts to a brazen usurpation of the courts' authority to interpret the law. *Cf. bin Ali Jaber v. United States*, 861 F.3d 241, 249 (D.C. Cir. 2017) (noting that "it is the courts, and not executive branch attorneys, that possess the power to say what the law is" (internal quotation marks omitted)); *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 29 (D.C. Cir. 2016) ("Let the word go forth: for however much the

[3] In the primary case the government relies on, the recipient of the subpoenas "[did] not contest the authority of the [agency] to issue [those] subpoenas." *United States v. Capitol Supply, Inc.*, 27 F. Supp. 3d 91, 100 (D.D.C. 2014).

judiciary has emboldened the administrative state, we say what the law is." (internal quotation marks omitted)).

Second, even if as a general matter agencies were entitled to deference on purely legal questions concerning the scope of their subpoena authority, no deference would be due here in light of the presumption against extraterritoriality. *See Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 182 (2d Cir. 2014) ("Given the strong presumption that statutes are limited to domestic application in the absence of clear expression of congressional intent to the contrary, it is far from clear that an agency's assertion that a statute has extraterritorial effect, unmoored from any plausible statutory basis for rebutting the presumption against extraterritoriality, should be given deference."); *Validus Reinsurance, Ltd. v. United States*, 786 F.3d 1039, 1049 (D.C. Cir. 2015) (citing *Liu Meng-Lin*). And even assuming that the presumption against extraterritoriality does not vitiate deference entirely, deference could only be extended where there is reason to believe that "the agency has considered the effect of the presumption." *Id.* There is no such indication in this case (indeed, the government continues to insist even now that the presumption is simply inapplicable, Reply 34).[4]

Finally, even if the government were entitled to some level of deference, it would still have to offer a plausible statutory construction that this court could defer to. Remarkably, the government makes *no* effort to square the terms of the subpoena with the language of the statute.

[4] Elsewhere, however, the government appears to acknowledge that it must overcome the presumption against territoriality to be entitled to deference. Specifically, the government contends that deference is warranted only "[b]ecause Congress has spoken clearly." Reply 35 (citing *Saint-Gobain*, 636 F.2d at 1327 (McGowan, J., concurring) ("The service of an investigative subpoena on a foreign national in a foreign country seems to me to be a sufficiently significant act as to require that Congress to speak to it clearly.") Under this test, the subpoena is plainly unlawful. As shown above, Section 5318(k) does not authorize such a broad subpoena at all, let alone "clearly."

The closest it comes to a textual argument is its assertion—based on two unpublished district court decisions which arose in different contexts—that the term "related to" should be given an extraordinarily broad meaning. Reply 36. In reality, the term should be given a *narrow* meaning, due to the presumption against extraterritoriality. At worst, it should be given its ordinary meaning. *See, e.g.*, *Sedaghaty*, 2010 WL 11643384, at *6 (cabining the subpoena to documents which were "directly related" to U.S. transactions).

But in any event, the subpoena would be impermissible even if "related to" is read very broadly. Regardless of how the term is interpreted, the set of responsive documents relating to *any* correspondent account (which is what both Items 1 and 2 of the subpoena explicitly call for) is broader than the set of documents relating to a *United States* correspondent account (which is what the statute contemplates). The government does not even attempt to address this basic textual point.

The subpoena plainly exceeds the parameters set out in the statute. As the Bank's earlier brief explained (at 33-34), and the government does not dispute, when a subpoena facially exceeds its statutory authority, the motion to compel should be denied. *See also, e.g., Ken Roberts Co.*, 276 F.3d at 586-87 (noting that courts "will refuse to [enforce a subpoena] if the subpoena exceeds an express statutory limitation").[5]

II. This Court Should Not Force The Bank To Violate Chinese Law When The Chinese Government Has Committed In Writing In This Specific Matter To Timely Address An MLAA Request If DOJ Makes One

The government makes a host of factual assertions bearing on international comity. What is striking, however, is that the government agrees with the Bank on a number of crucial points:

[5] The Bank's earlier brief further explained (at 34-37) that the motion should also be denied for the independent reason that the subpoena is overbroad and unduly burdensome. In the interest of brevity, the Bank will rest on its earlier briefing with respect to that issue.

- Complying with the subpoena would violate Chinese law. *See* Clarke Decl. ¶ 10(a) ("The Banks have adequately shown that compliance with the Subpoenas might violate certain Chinese regulations and might lead to administrative sanctions against the Banks and possibly their responsible personnel . . . ."); *id.* ¶ 36; Reply 20.

- China has repeatedly penalized banks for violations of banking and privacy laws, including, in at least one case, for the improper disclosure of client information. *See* Clarke Decl. ¶ 36; *see also id.* ¶ 26-28, 31, 44-47.

- Even state-owned banks have been fined by Chinese regulatory agencies and courts for violating privacy and other banking laws. *See id.* ¶ 44-46, 57.

- In addition to fines, banks and responsible employees may be subject to a variety of non-monetary sanctions. *See id.* ¶ 52.

- Bank employees have been convicted of crimes and received prison sentences for illegally disclosing client information. *See id.* ¶ 81-90.

- In this case, the Chinese government has stated that it will impose administrative penalties and fines on the Bank and warned that the Bank may be subject to criminal and civil liability if it produces documents outside the MLAA process. *See id.* ¶ 18.

- The Chinese Government has also stated in this case that it will timely respond to an MLAA request for documents if DOJ makes one. *See* Reply 25.

- DOJ has never made an MLAA request for the documents it seeks in this matter despite having issued the subpoena more than a year ago. *See* Reply 23-24.

These agreed-upon facts dictate the application of the international comity doctrine in this case, and demonstrate why the motion to compel should be denied.

A. The Government Concedes That Complying With The Subpoena Would Force The Bank To Violate Chinese Law.

As shown above, the government *concedes* that the Bank would be required to violate Chinese law.[6] This is a key fact in the international comity analysis. *See In re Sealed Case*, 825 F.2d 494, 498 (D.C. Cir. 1987) ("*Sealed Case I*") ("Most important to our decision is the fact

[6] This marks an about-face from the government's position in its original motion. There, the government questioned the Bank's ability to demonstrate *any* conflict with Chinese law, stating that "[redacted] cannot simply allege a theoretical violation of unenforced Chinese laws." Mot. 18.

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.").

The remaining questions are largely matters of degree: How *many* Chinese laws will the Bank have to violate? And how *severe* will the penalties be if the Bank complies with the subpoena, despite express instructions from the Chinese Ministry of Justice ("MOJ") not to produce the documents outside the MLAA process? These points are of secondary importance, given the fundamental fact that the subpoena *would require the Bank to violate Chinese law*. *See id*; *infra* 17-20. However, even on these secondary points, the government is mistaken.

First, the government argues that the Bank would face only administrative or civil, not criminal, penalties for producing documents. Reply 29-30. The government's academic declarant, Donald Clarke, concedes that complying with the subpoena would violate China's Judicial Assistance Law, but he asserts that there are no penalties for such a violation. Clarke Decl. ¶ 15 & n.7. This is incorrect.

Article 253A of the PRC Criminal Law prohibits "provid[ing] personal information on citizens in violation of the relevant provisions of the state." 2d PRC Counsel Letter 10, 12. "The Judicial Assistance Law is such a 'provision of the state,' which [redacted] non-MLAA compliance with the subpoena would violate." *Id.* at 12. Because MOJ has instructed the Bank pursuant to the Judicial Assistance Law not to produce the documents, doing so would be "in violation of the relevant provisions of the state," and thus a crime. *Id.* 1-2, 12-13. Furthermore, the subpoenaed bank records almost certainly include "personal information" of a natural person and PRC citizen—the Mingzheng account signatory. *Id.* at 12. The Bank could be subject to criminal fines for violating Article 253A, and responsible employees could face up to three years in prison for a "serious" case, or up to seven years for an "[e]specially serious" case. *Id.* at 10.

Professor Clarke then speculates that, even if the Bank could theoretically face criminal penalties, the violation would go unprosecuted because it would not be a "massive disclosure[] for profit." Clark Decl. ¶ 88. But, as the Bank's experienced PRC Counsel points out, this speculation ignores two critical facts. The official interpretation of this statute from authoritative Chinese government agencies shows that a bank employee's disclosure of just "25 pieces of highly sensitive information" can constitute a crime under Article 253A. 2d PRC Counsel Letter 13. And the risk is even greater here because of the "extraordinary circumstance" that [redacted] has received direct instructions from the Chinese government not to disclose the information. *Id.* The Bank and its employees would face a serious risk of criminal sanctions for ignoring those instructions. *Id.*

The Bank likewise risks criminal sanctions under Article 111, which prohibits "[unlawfully] suppl[ying] state secrets or intelligence" to an entity outside of China. *Id.* at 10. As the Bank's PRC Counsel has explained, the definitions of "state secrets" and "intelligence" are broad, and Chinese courts typically defer to the decision of "state secrecy authorities" that particular information is covered under Article 111. *Id.* at 10-12. The disclosure would be "unlawful" because MOJ has forbidden it. *Id.* at 10. And even for "minor" violations of Article 111, Bank employees could face up to five years in prison, "public surveillance," or "deprivation of political rights." *Id.*[7]

Second, the government understates the sanctions that the Bank and its employees face from the laws that the government concedes [redacted] would violate. *See* Reply 19-22, 30-31. The Bank faces serious penalties under the PRC Commercial Banking Law whether or not the

[7] As the Bank's PRC Counsel further explains, the Bank also risks criminal liability under Article 219 of the PRC Criminal Law. *See* 2d PRC Counsel Letter 14-15.

particular provision the Bank violates articulates specific penalties. *Id.* at 6-7. The Commercial Banking Law places the general obligation on the Bank to "carry out business in accordance with the relevant provisions of laws" and to "not do harm to the interests of the state and the public interests of society." *Id.* at 7. Article 89 of that law provides for serious administrative penalties that can apply to *any* of the other regulations the Bank has cited. *Id.* at 6-7. Banking regulators can impose fines of up to RMB 500,000, and bar the Bank's directors or senior directors from working in the banking industry "for a certain period of time or even for the rest of their lives." *Id.* at 7. These nonmonetary sanctions would have a severe—if not fatal—impact on an employee's professional reputation and future employment prospects.[8]

Third, the government ignores evidence that China does not hesitate to sanction state-owned enterprises and their employees for violating Chinese law. *Id.* at 21-22. The government contends without meaningful support that China is simply bluffing. Reply 29-30. But as Professor Clarke is forced to concede, the Chinese government has sanctioned state-owned entities for violating Chinese law. Clarke Decl. ¶ 44-46, 57. Indeed, the risks to a state-owned entity "are aggravated, not mitigated," because it is "expected to be even more compliant with Chinese law." 2d PRC Counsel Letter 4. And the threat is even more serious here than in previous cases because the Chinese government has told the Bank that it *will* impose penalties if the Bank ignores its instructions and produces the documents outside the MLAA process.

[8] The government also tries to trivialize the impact of a 50,000 yuan ($7,400) fine on a Bank employee. *See* Reply 30; Clarke Decl. ¶ 30 & n.24. But this represents a significant amount of money in China, where the average income is dramatically lower than in the United States. *Id.* at 15. And Professor Clarke is wrong to speculate that the Bank would simply indemnify its employees. In 18 years of practicing law in China, the Bank's PRC Counsel has never seen a company indemnify an employee for violating the law in the course of performing his or her duties. *Id.* at 1, 16. Quite the opposite: The Chinese government may view this as endorsing the employee's conduct and impose additional penalties on the Bank itself. *Id.* at 16.

B. The Government Has Refused To Make An MLAA Request In This Matter Despite China's Willingness To Respond.

The government cannot point to a single instance where a court has ordered a foreign bank to violate its country's laws when the foreign government has specifically ordered the foreign bank not to do so, and has committed in writing *in that very case* to provide responsive documents in a timely manner if the United States requests them through diplomatic channels. Where a foreign government has gone to such lengths to stress its national interests and to show why the United States' interests are not threatened, considerations of international comity are at their zenith. *Cf. F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (comity concerns prevail when "the justification for [U.S.] interference" with foreign law "seems insubstantial"). If international comity is to mean anything, China must be given an opportunity to honor its express commitment in this particular case to respond through the MLAA process.

Notably, this problem is entirely of the government's own making. Nothing precluded the government from submitting an MLAA request over a year ago, at the same time it issued this subpoena. Had the government done so, the Court would have before it today a record with evidence of the Chinese government's actual response, rather than DOJ's speculation about what China might do. And given the government's failure to pursue diplomatic channels, the burden of any lingering uncertainty about the precise functioning of Chinese law and the exact contours of the two nations' interests should be borne by the government. Against this backdrop, the government's most recent excuse for bypassing the MLAA process—namely, that pursuing the process would have been futile (Reply 25-26)—should be given little weight.

First, the government's position has evolved dramatically even over the course of the past month's briefing. In its Motion, the government represented to the Court that "China has not provided—via the MLAA channel—records similar to those subpoenaed in this investigation in

at least 10 years." Mot. 22. This statement was flatly incorrect, and the government was forced to qualify it in its Reply. Through its declarant Jeffrey M. Olson, the government now concedes that, over the past ten years, the Chinese government has provided U.S. law enforcement authorities with bank records in response to properly submitted MLAA requests on some fifteen occasions. Olson Decl. ¶ 9. The government also concedes that it was satisfied with China's document production in some of those cases. *Id.* ¶ 14(e). And MOJ has explained why the need for additional information impacted its response time in other cases. Letter from MOJ to Hon. Beryl A. Howell (Feb. 26, 2019) ("2d MOJ Letter") at 6-7, 2d He Decl. Ex. 2. (Indeed, DOJ itself does not promptly grant all of China's MLAA requests. *Id.* at 7.) If anything, then, the government's experience with the MLAA process and MOJ's written commitment should have convinced the government that there *was* a reasonable prospect of obtaining the documents it sought.

The government's failure to make an MLAA request to the Chinese government is all the more puzzling given that DOJ officials recently had a convenient opportunity to do so. Specifically, *after* the subpoena was issued, DOJ officials met with Chinese officials concerning this dispute. In its Reply, the government refers to this meeting but offers no explanation of why it passed up yet another chance to acquire the documents by a diplomatic route—*after* China had indicated its willingness to cooperate with an MLAA request. *See* Reply 2 (citing Olson Decl. ¶ 17). In light of this, the government cannot show overriding national interests that would justify forcing the Bank to violate Chinese law and subject itself to significant sanctions.

C. Binding Caselaw In This Circuit Reinforces The Conclusion That The Court Should Not Force The Bank To Violate Chinese Law.

Sealed Case I, 825 F.2d 494 (D.C. Cir. 1987), remains the most relevant precedential decision for the comity analysis. There, several critical facts led the D.C. Circuit to conclude

that the district court could not compel the foreign bank to comply with the subpoena at issue. Each point (*id.* at 498) counsels against enforcing the subpoena here:

- The government has "alternative means" of securing the documents it seeks—the MLAA process. *See supra* part II.B.
- The Bank "is not itself the focus of the criminal investigation." *See* Opp. 26.
- The Bank "is not merely a private foreign entity, but is an entity [partly] owned by the government of" a foreign nation. *See* [redacted] Decl. ¶ 9.
- The Bank "acted in good faith throughout these proceedings," as the government concedes. *See* Reply 31.

Moreover, "[m]ost important" to the court was "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." *Sealed Case I*, 825 F.2d at 498. For, as the court recognized, "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. But the government misconstrues this "most important" factor. By adding italics to "*different* foreign sovereign" the government erroneously asserts that the D.C. Circuit was most concerned with "compel[ling] a bank owned by one country (Country X) to violate a second country's (Country Y's) laws." Reply 32-33. In other words, the government argues, it is not problematic to compel a Chinese bank to violate Chinese law on Chinese soil; the real concern would be to compel, say, a French bank to violate Chinese law on Chinese soil.

This is illogical. The D.C. Circuit's concern was always with the foreign sovereign's ability to enforce its own laws within its own territory—one of the "basic principles of international comity." *See Sealed Case I*, 825 F.2d at 499. Nothing in the court's analysis turned on the fact that the bank was from yet a third country. To the contrary, the court's references to "order[ing] a person to take specific actions on the soil of a foreign sovereign in violation of its laws," "violating the laws of Country Y on Country Y's soil," and "violation of

foreign laws on foreign soil" indicate that the court was *not* concerned with which foreign nation the foreign entity was from. *Id.* at 497-98.[9] If anything, compelling a nation's citizens to violate their own nation's law is *more* prejudicial to international comity, not less.

Furthermore, the fact that the Bank has no physical presence or employees in the United States indicates that the government's interest in forcing it to violate Chinese law is even *weaker* than the government's interest in *Sealed Case I*. There, the foreign bank "d[id] business in many countries around the world, including the United States," and had at least one branch in the United States. *Id.* at 495. The bank received a grand jury subpoena and did not dispute the court's personal jurisdiction over it. *Id.* Here, by contrast, the Bank's much more tenuous connection to the United States heightens each of the comity concerns from *Sealed Case I*. What's more, unlike in *Sealed Case I*, the foreign government here has committed in writing to promptly address a request for documents through diplomatic channels.

The government insists that *In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987) ("*Sealed Case II*") controls this case and resolves the comity analysis in its favor. Reply 33-34; *see also id.* at 26-27. But *Sealed Case II* must be read together with *Sealed Case I*—the two decisions were issued just months apart, and the second even cited the first. *See Sealed Case II*, 832 F.2d at 1283. And it is *Sealed Case I* that governs here; the key factors that drove the outcome in *Sealed Case II* do not apply to this case.

First, in *Sealed Case II*, some of the documents may have been located in the United States. *Id.* The bank claimed that complying would violate Swiss privacy laws, but those laws

[9] DOJ's own "Justice Manual" accords with the Bank's reading of *Sealed Case I*. *See* U.S. Dep't of Justice, Criminal Resource Manual § 279 (listing the dispositive facts in *Sealed Case I* as "status of the bank as a third party accused of no wrongdoing, ownership of the bank by a foreign government, and the district court's finding that the bank acted in good faith").

were irrelevant to documents located outside of Switzerland. *Id.* Here, the government concedes that "the bulk of the material sought may have originated in, and is likely maintained in, China." Reply 29.

Second, it was "not clear … that Swiss law forb[ade] the [witness] from complying with the subpoena even in regard to documents located in Switzerland." *Sealed Case II*, 832 F.2d at 1283. Here, the government concedes that the Bank's compliance with the subpoena is illegal under certain Chinese laws, and the Bank has demonstrated that it would also violate several others. *See supra* 11-15.

Third, the witness was a U.S. citizen, did not live in Switzerland, and only "face[d] possible prosecution … if he traveled to Switzerland voluntarily." *Sealed Case II*, 832 F.2d at 1283. Here, the Bank is Chinese, [redacted], and most of the employees who could be held personally responsible live in China. [redacted] Decl. ¶¶ 5-7.

Ultimately, the court concluded that the United States did not intend the mutual legal assistance treaty it signed "to supply the exclusive vehicle for obtaining documents in Switzerland." *Sealed Case II*, 832 F.2d at 1283. True enough—and the Bank does not suggest otherwise here. There may be situations that justify enforcing a subpoena that requires the recipient to violate foreign law. But that is not the case here given that none of the documents are located in the United States ([redacted] Decl. ¶ 14), it is uncontested that complying with the subpoena would violate Chinese law, and the Bank is a Chinese bank [redacted] located in China. Particularly when coupled with China's written commitment to cooperate in producing responsive documents through the MLAA process, the law of this circuit indicates that forcing the Bank to produce documents in violation of Chinese law would be inconsistent with international comity.

III. This Court Lacks Personal Jurisdiction Over the Bank

As discussed above, Section 5318(k) is unusual in that it allows the government to seek documents from entities, such as the Bank, which have no physical presence in—and virtually no contacts with—the United States. As such, the statute presents difficult and novel questions of personal jurisdiction. The government suggests that all of these questions can be answered by the decisions holding that, in cases involving federal statutes which provide for nationwide service, the proper minimum contacts analysis focuses on contacts with the United States, rather than with the forum state. Reply 4-12. The government is mistaken, for several reasons.

A. To begin, Section 5318(k) is distinguishable from the nationwide service provisions analyzed in the cases the government relies on. In particular, unlike those statutes, Section 5318(k) does *not* expressly authorize nationwide service. *See, e.g., Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 142 n.21 (2d Cir. 2014) (addressing Federal Rule of Civil Procedure 45(b)(2), which allows a subpoena to be served "any place within the United States"); *Application to Enforce Admin. Subpoenas Duces Tecum v. Knowles*, 87 F.3d 417, 417 (10th Cir. 1996) (addressing 15 U.S.C. § 77v(a), which authorizes service of process in any district "of which the defendant is an inhabitant or wherever the defendant may be found"). Section 5318(k) does not contain any similar language. Instead, it provides that a summons or a subpoena can be served "in the United States if the foreign bank has a representative in the United States, or in a foreign country pursuant to any mutual legal assistance treaty, multilateral agreement, or other request for international law enforcement assistance." 31 U.S.C. § 5318(k)(3)(A)(ii). Thus, service within the United States is permissible only if a foreign bank has a representative in the United States—and only in the location where that representative is located. This suggests a greater focus on the particular forum where the service would take place.

Moreover, the service provision in Section 5318(k) sharply contrasts with another service provision in Section 5318. Specifically, Section 5318(e)(5) provides that process under subsection (e) "may be served in any judicial district in which [the] person may be found." And subsection (e), unlike subsection (k), also expressly includes a broad personal jurisdiction provision. 31 U.S.C. § 5318(e)(2) (providing that jurisdiction is appropriate in any federal court within whose jurisdiction "the investigation which gave rise to the summons is being or has been carried on," "the person summoned is an inhabitant," or "the person summoned carries on business or may be found"). No such broad language—indeed, no language specifically addressing personal jurisdiction—exists in Section 5318(k).

To sum up, Section 5318(k) does not expressly provide for nationwide service, and makes no specific provision for personal jurisdiction. And elsewhere in Section 5318, Congress did both. This strongly indicates that Section 5318(k) does *not* disturb the traditional minimum contacts analysis, which focuses on contacts with the forum state. *See Johns v. Taramita*, 132 F. Supp. 2d 1021, 1026-27 (S.D. Fla. 2001) (noting that "the statutory provision at issue in this case is unlike other statutes that authorize nationwide service of process and personal jurisdiction" in that it did not "explicitly authorize nationwide service of process or personal jurisdiction by [its] terms"); *Willingway Hosp. Inc. v. Blue Cross & Blue Shield*, 870 F. Supp. 1102, 1104, 1109 (S.D. Ga 1994) (noting that "federal statutes that provide nationwide service of process do not necessarily provide nationwide personal jurisdiction" and holding that personal jurisdiction was not warranted because defendant "has not made sufficient contacts with the State of Georgia").

Accordingly, the appropriate question remains whether the Bank had the requisite minimum contacts *with the District of Columbia.* And the government makes no significant effort to demonstrate that this test is met. *See* Opp. 11-17 (explaining the lack of contacts between the

Bank and the District of Columbia); Reply 11 (asserting that "the Banks' contacts establish specific personal jurisdiction" "*pursuant to the nationwide-service rule*" (emphasis added)).

Furthermore, as the D.C. Circuit has noted, "[s]ome courts have … suggested that … even if the defendant has sufficient nationwide contacts, a plaintiff must additionally justify jurisdiction in the particular state." *Livnat v. Palestinian Auth.*, 851 F.3d 45, 55 n.6 (D.C. Cir. 2017); *see id.* ("[W]e express no view on that issue."). Thus, even if the government is correct that the nationwide contacts analysis is appropriate, it may still be necessary to justify jurisdiction specifically in the District of Columbia. The government has not done so.

2. Even assuming the relevant forum for the minimum contacts analysis is the United States, the government still has not made the necessary showing. In the Reply, the government once again disclaims any *general* jurisdiction theory, and emphasizes that it is asserting only *specific* personal jurisdiction. Reply 9. Thus, the government must demonstrate that the contacts between the Bank and the forum are related to the underlying controversy. *E.g.*, *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017). The government has not met this test, because it has not shown that the Bank's maintenance of the U.S. correspondent account is connected to the dispute at issue in this litigation—whether the Bank should be compelled to produce a broad range of records which are located in China. *See* Mot. 29 (explaining that the government's requested relief is "an order compelling production" of the records).

Moreover, the government's fundamental argument is that the Bank is subject to personal jurisdiction in the United States because it maintains a correspondent account in the United States. But "[t]he mere maintenance of a correspondent account in New York" does not "establish[] minimum contacts with the United States." *Tamam v. Fransabank Sal*, 677 F. Supp. 2d 720, 731-32 (S.D.N.Y. 2010); *see also In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 680 (2d Cir.

2013) (holding "that the alleged use of correspondent bank accounts" was "insufficient to support the exercise of general personal jurisdiction"); *Abelesz v. OTP Bank*, 692 F.3d 638, 658 (7th Cir. 2012) ("Accordingly, many courts have soundly rejected the suggestion that a correspondent banking relationship with a bank in the forum is sufficient to support general jurisdiction over a foreign defendant.").

Indeed, a decision cited by the government emphasizes that "the mere provision of routine banking services that benefitted a terrorist organization in some general nondescript manner will not support a finding of specific personal jurisdiction based on the contacts created by such provision." *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 34 (D.D.C. 2010) (internal quotation marks omitted). At a minimum, it is necessary to allege "that a bank has ties to a 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." *Id.* (internal quotation marks omitted). There are no corresponding allegations here.

Nor is it sufficient to assert that the Bank "interact[ed] with OFAC" by "filtering U.S.-dollar correspondent transactions for compliance with the OFAC sanctioned-entity list." Reply 10. As the government itself acknowledges (at 11 n.11), every foreign bank with a U.S. correspondent account must abide by OFAC's regulations. So if the government's argument were correct, "every foreign bank that opens a correspondent account in the United States would be subject to jurisdiction"—and that is "[c]learly" "not the case." *Tamam*, 677 F. Supp. 2d at 732.

3. Finally, as the government acknowledges, even where the minimum contacts test is satisfied, a court must still consider a variety of factors to determine whether the exercise of personal jurisdiction would be unreasonable. Reply 12. And as the Bank has previously explained, all of these factors counsel against personal jurisdiction in this case. Opp. 16-17. Most

fundamentally, this case involves an unusual combination of the government's highly aggressive overreach of its statutory authority and the Bank's virtually nonexistent contacts with the United States and the District of Columbia. The government's bottom-line position is that, simply by maintaining a correspondent account in the United States, the Bank was properly put on notice that the United States government would be able to access any document the Bank maintains anywhere in the world, even if that document has no meaningful connection to the U.S. correspondent account. This is not a reasonable or constitutionally permissible outcome. *Cf. Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 425-28 (D.C. Cir. 2014), *aff'd in part, rev'd in part*, 812 F.3d 127 (D.C. Cir. 2016) (explaining that "great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field" (internal quotation marks omitted)).[10]

CONCLUSION

For the foregoing reasons, the Bank respectfully requests that the Court deny the government's motion to compel and enjoin the government from taking any action under 31 U.S.C. § 5318(k)(3) to terminate the Bank's correspondent accounts with financial institutions in the United States or to cause those financial institutions to terminate the Bank's correspondent relationships. If the Court is inclined to grant the government's motion, it should address [redacted] in a separate order from the other banks.

[10] *Leibovitch v. Islamic Republic of Iran* is especially instructive. There, the court observed that "[i]t seems unlikely that these foreign banks would have envisioned that operating a handful of branches in the United States—out of hundreds or thousands worldwide—would subject them to vast discovery in an Illinois lawsuit to which they are not a party." 188 F. Supp. 3d 734, 755 (N.D. Ill. 2016), *aff'd*, 852 F.3d 687 (7th Cir. 2017). Here, of course, the Bank operated *no* branches in the United States, so the reasoning of *Leibovitch* applies *a fortiori*. *Cf. Republic of Panama v. BCCI holdings (Luxembourg) S.A.*, 119 F.3d 935, 948 (11th Cir. 1997) (concluding that Florida was a constitutionally acceptable forum to sue "large corporations providing banking services to customers in major metropolitan areas along the eastern seaboard.").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 26, 2019, I caused to be served a copy of the foregoing document via electronic mail and via first class mail to Zia M. Faruqui, Assistant United States Attorney, 555 4th Street, N.W., Washington, D.C. 20530, zia.faruqui@usdoj.gov.

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