IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury Investigation of Possible Violations of 18 U.S.C. § 1956 and 50 U.S.C. § 1705	:	**Case No.** 18-mc-00177-BAH
	:	**GJ No. 18-2**
	:	**UNDER SEAL**
	:	**ORAL ARGUMENT REQUESTED**

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

Hank B. Walther (DC Bar # 477218)
Mark C. Savignac (DC Bar # 995367)
Daniel D. Benson (DC Bar # 242253)
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
Ph: 202.879.3939
Fx: 202.626.1700
hwalther@jonesday.com

Christopher K. Pelham
Lillian He
Qiang Xue
JONES DAY
4th Floor
27 Zhongshan Dong Yi Road
Shanghai 200002, China
Ph: +86.21.2201.8000
Fx: +86.21.5298.6569
cpelham@jonesday.com

Henry Klehm III
Samidh Guha
JONES DAY
250 Vesey Street
New York, NY 10281-1047
Ph: 212.326.3939
Fx: 212.755.7306
hklehm@jonesday.com

Counsel for [redacted]

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INTRODUCTION

[redacted] ("[redacted]" or "the Bank") respectfully asks that the Court deny the government's motion to compel production of bank records located in the People's Republic of China ("PRC" or "China") pursuant to an administrative subpoena, 31 U.S.C. § 5318(k)(3).[1] This Court lacks personal jurisdiction over the Bank, a foreign entity that has no physical presence and no employees in the United States. The Bank has correspondent accounts in the United States, but none in the District of Columbia. Nor has the government identified any instance when the Bank has engaged in business in the District of Columbia or met the standards for minimum contacts with this forum. The mere presence of the Office of Foreign Assets Control ("OFAC") in this District does not create personal jurisdiction for this subpoena enforcement action.

If the Court reaches the merits, then it should deny the motion to compel under the doctrine of comity. Complying with the subpoena would force the Bank, a Chinese entity, to violate Chinese law on Chinese soil, even though the United States has alternative avenues to obtain the very documents at issue. China's Ministry of Justice ("MOJ") has informed the Bank that it will be punished if it violates Chinese law by complying with the subpoena absent approval from Chinese regulators. The Bank has made significant efforts to obtain authorization to comply from Chinese authorities, and Chinese authorities have responded by asking that the Department of Justice ("DOJ") submit its request pursuant to the Mutual Legal Assistance Agreement ("MLAA")

[1] DOJ discusses at length the scope of the grand jury's investigative power, the level of deference that courts give to the grand jury's decisions, and the sanctions that courts impose for failure to comply with a grand jury subpoena. But the subpoena in this matter came not from a grand jury but from an administrative agency. While they may be "analogous" in some ways, U.S. Br. 8, DOJ has not shown that the standards are identical in all respects.

between China and the United States. Chinese authorities have informed the Bank in writing that they will handle such a request in a timely manner.

Although the subpoena has been pending since December 2017, it appears that DOJ has made no effort to obtain the records it seeks through the MLAA process. In these circumstances, enforcing the subpoena would violate "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 544 n.27 (1987). Unilaterally dictating which law applies on foreign soil is likely to encourage other countries to respond in kind. Notably, many U.S. banks maintain correspondent accounts in China. "[O]ur government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders." *In re Sealed Case*, 825 F.2d 494, 498-99 (D.C. Cir. 1987) (per curiam). In contrast, requiring DOJ to obtain the documents it seeks through the MLAA process could resolve this dispute in a manner satisfactory to DOJ, the Bank, and both sovereigns. The motion to compel should be denied.

LEGAL BACKGROUND

A. The Patriot Act

The administrative subpoena was issued under the Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. As relevant here, the Patriot Act authorizes the Attorney General or Secretary of the Treasury to subpoena from "any foreign bank that maintains a correspondent account in the United States … records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank." 31 U.S.C. § 5318(k)(3)(A)(i). A "correspondent account" is "an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle

other financial transactions related to such institution." *Id.* § 5318A(e)(1)(B); *see id.* § 5318(k)(1)(B) (incorporating that definition). A foreign bank with a correspondent account must designate a U.S. resident "to accept service of legal process for records regarding the correspondent account." *Id.* § 5318(k)(3)(B)(i).

In order to enforce a subpoena, the Patriot Act empowers the government to order the financial institution at which the foreign bank has its correspondent account to terminate the correspondent account "not later than 10 business days after receipt of written notice … that the foreign bank has failed" either "to comply with [a] subpoena" or "to initiate proceedings in a United States court contesting [the] subpoena." *Id.* § 5318(k)(3)(C)(i)(I), (II). "[T]he United States … has never taken steps to enforce a subpoena under § 5318(k) without first seeking a court order." U.S. Br., *United States v. Sedaghaty*, No. 10-30061, 2010 WL 3950036, at *19 (9th Cir. Apr. 21, 2010). If the financial institution then fails to terminate the correspondent relationship with the foreign bank, it is "liable for a civil penalty of up to $10,000 per day until the correspondent relationship is so terminated." 31 U.S.C. § 5318(k)(3)(C)(iii).

B. Mutual Legal Assistance Agreement Between The United States And China

As the government recognizes, "[t]he United States and China have an agreement to cooperate in the prosecution of criminal matters." U.S. Br. 6 n.5; *see* Agreement Between the Government of the United States of America and the Government of the People's Republic of China on Mutual Legal Assistance in Criminal Matters, March 8, 2001, T.I.A.S. No. 13102, 2001 WL 36952300. The MLAA provides official channels for the sharing of records with the goal of "improv[ing] the effectiveness of cooperation between the two countries in respect of mutual legal assistance in criminal matters on the basis of mutual respect for sovereignty, equality and mutual benefit." *Id.* at *1. In the MLAA, the United States and China mutually committed to "provide mutual assistance in investigations, in prosecutions, and in proceedings related to criminal

matters," including "(a) serving documents; (b) taking the testimony or statements of persons; (c) providing originals, certified copies or photocopies of documents, records or articles of evidence; ... (e) making persons available to give evidence or assist in investigations; (f) locating or identifying persons; (g) executing requests for inquiry, searches, freezing and seizures of evidence;" and "(h) assisting in forfeiture proceedings." *Id.* at *2.

FACTUAL BACKGROUND

A. The Bank Has No Physical Presence In The United States

[redacted]

The Bank has no branches, physical presence, or employees in the United States. *Id.* ¶ 7 [redacted] *Id.* ¶ 6. The Bank maintains correspondent accounts with banks in the United States, including the account identified in the subpoena, to process U.S. dollar transactions. *Id.* ¶ 10. The Bank does not maintain correspondent accounts or conduct business in Washington, D.C. *Id.* It has designated CT Corporation in New York City as its agent for service of process under § 5318(k)(3). *Id.* ¶ 11.

B. DOJ Subpoenas "All Documents Relating To Correspondent Banking Transactions For Mingzheng"

On or about December 28, 2017, DOJ served the Bank's agent, CT Corporation, with an administrative subpoena pursuant to § 5318(k)(3)(A), dated December 24, 2017. [redacted] Decl. ¶ 12; *see id.* Ex. 1 (copy of subpoena). The subpoena demands production of "[a]ll documents relating to correspondent banking transactions for Mingzheng International Trading Limited" and "[a]ll

documents relating to correspondent banking transactions for Account Number [redacted] Subpoena Attachment 1. The subpoena explains that "[t]he records should cover the period from January 1, 2012, through the present," and states that the records "should include, but not be limited to: (a) signature cards; (b) documentation of account opening; (c) account ledger cards; (d) periodic account statements; (e) due diligence (including invoices); and (f) records (copied front and back) of all items deposited, withdrawn, or transferred." *Id.* The subpoena required production to the U.S. Attorney's Office for the District of Columbia by January 15, 2018.[2]

C. The Bank Makes Good-Faith Efforts To Comply With The Subpoena Without Violating Chinese Law

On or about January 8, 2018, the Bank received the subpoena in China. [redacted] Decl. ¶ 13; Letter from Hank B. Walther & Samidh Guha, Jones Day, to Assistant U.S. Att'ys Zia Faruqui & Ari Redboard 1 (Mar. 23, 2018) ("March 23 Letter to DOJ"), Decl. of Lillian He ("He Decl.") Ex. 3. On January 9—the next day—the Bank began reaching out to Chinese regulatory agencies in an effort to obtain approval to comply with the subpoena. [redacted] Decl. ¶ 18. Also in January 2018, DOJ agreed to extend the return date of the subpoena beyond January 15, 2018. *See* March 23 Letter to DOJ 1. The Bank took steps to cooperate with DOJ and to provide DOJ with regular updates about its efforts to respond to the subpoena. *See* March 23 Letter to DOJ 2.

As the Bank informed DOJ, the Mingzheng account identified in the subpoena had been closed on December 29, 2015. [redacted] Decl. ¶ 16. In other words, [redacted] had terminated its relationship with the entity targeted by the subpoena well before the subpoena issued and nearly two years *before* OFAC designated Mingzheng in August 2017, U.S. Br. 1.

[2] The subpoena erroneously gives the date as "January 15, 2017."

1. PRC Counsel Informs The Bank That Complying With The Subpoena In The Absence Of Specific Authorization From The Chinese Government Would Violate Chinese Law

After receiving the subpoena, the Bank retained PRC counsel to determine whether Chinese law permitted it to comply with the subpoena. PRC counsel concluded that Chinese law prohibits the Bank from producing the records sought by the subpoena, and that complying would expose the Bank to significant criminal, civil, and administrative penalties. *See* PRC Legal Op. on Illegality of Complying with DOJ Subpoena ("PRC Counsel Letter"), He Decl. Ex. 1. PRC counsel set out in detail the Chinese laws that prohibit compliance with the subpoena as well as the liability and penalties that the Bank would be subject to if it violated those laws. *See id.* at 2-15. PRC counsel also provided examples of penalties—including heavy fines from Chinese regulators—that state-owned banks and their officers have incurred for violating those laws. *See id.* at 7-8, 10, 15. Based on that comprehensive review, PRC counsel concluded that "[Chinese] Law prohibits [the Bank] from complying with the DOJ Subpoena unless [the Bank] receives permission to do so from relevant Chinese regulators." *Id.* at 1.

2. The Bank Seeks Authorization From The Chinese Government, Which Informs The Bank That It Will Be Subject To Penalties If It Complies With The Subpoena

On January 9, 2018, the day after it received the subpoena in China, the Bank reported the matter to the China Banking Regulatory Commission ("CBRC"), which is the main governmental regulatory body for the Chinese banking system. [redacted] Decl. ¶ 18. On January 18, 2018, Bank representatives met in person with CBRC officials to seek approval to comply with the subpoena. *Id.* ¶ 19.

At that meeting and thereafter, the Chinese officials stated that the MLAA between China and the United States provides the appropriate process for producing such documents. *Id.* ¶ 19(b). CBRC thus instructed the Bank to ask DOJ to follow the MLAA process, and explained that CBRC

would coordinate with MOJ in facilitating the expeditious production of responsive documents. *Id.* ¶ 19(b), (c).

On March 15 and 16, the Bank met with officials from China's Ministry of Justice ("MOJ"), the People's Bank of China ("PBOC"), and the CBRC. *Id.* ¶ 20. Under the *Notice Issued by the PRC General Office of the State Council regarding MOJ's Responsibilities, Structure and Staffing*, MOJ is responsible for legal affairs, including participating in national and international treaties and handling judicial assistance requests. Under the *PRC Law on the People's Bank of China*, PBOC is China's central bank and is charged with formulating and implementing monetary policy, preventing and mitigating financial risks, and maintaining financial stability. At the meeting, the three regulatory agencies again told the Bank to ask DOJ to request the subpoenaed records through the MLAA process, and represented that they were willing to respond in a timely manner to such a request. [redacted] Decl. ¶ 20(a), (b). The agencies asked the Bank to deliver these messages to DOJ. *Id.* ¶ 20(c).

On or about March 23, counsel for [redacted] sent DOJ a letter to "summarize … the significant efforts that [redacted] has made to comply with the … subpoena." March 23 Letter to DOJ 1. The letter laid out [redacted] "proposal for delivering to DOJ the document it seeks through the subpoena in a manner that complies with the laws of the People's Republic of China." *Id.* [redacted] explained to DOJ that it had expeditiously met with Chinese regulators seeking "approval" to "produce documents to DOJ," and that the Chinese regulators had refused to approve [redacted] request and had instead instructed it to ask DOJ to proceed via the MLAA process. *Id.* [redacted] expressed its "hope [that DOJ] w[ould] agree to pursue this alternative way of obtaining the records …, which [redacted] is ready and willing to provide to MOJ." *Id.*

Further demonstrating [redacted] "good faith efforts to cooperate with the DOJ investigation, notwithstanding the minimal contacts [redacted] has with the United States and the open question of whether DOJ's Patriot Act subpoena would be enforceable in a U.S. Court," [redacted] listed the efforts it had made to comply the subpoena in the preceding months. *Id.* at 2. These efforts included "sen[ding] a document hold to custodians that may have documents responsive to the subpoena," ensuring that '[redacted] employees who we ha[ve] reason to believe interacted with the account holder … maintained all potentially responsive documents," and "identif[ying] and collect[ing] documents responsive to the DOJ subpoena." *Id.*

In short, as [redacted] explained to DOJ, '[redacted] has done everything in its power to cooperate with the DOJ investigation in a manner that will not violate PRC laws and will continue to do so. [redacted] is not looking to withhold the documents DOJ seeks, it is looking for a way to deliver those documents to DOJ." *Id.* at 3. [redacted] closed by reiterating its "request that DOJ consider the proposal made by the PRC authorities to obtain the documents through an MLAA request" and by "commit[ting] that it will do whatever it can to help facilitate and expedite the MLAA request." *Id*

On or about March 25, the Bank received from MOJ a letter dated March 22, 2018. [redacted] Decl. ¶ 21; *see* Letter from China's Ministry of Justice to the Bank (Mar. 22, 2018) ("MOJ Letter"), [redacted] Decl. Ex. 2. The letter stated that if the Bank "provide[s] relevant client information to the U.S. DOJ directly, the banking regulatory authorities will impose administrative penalties and fines on [the Bank], and [the Bank] may bear civil or criminal liabilities depending on [its] situation." MOJ Letter. At the same time, the letter stated that "[t]here is a smooth channel for legal assistance in criminal matters between China and the U.S.," and that if MOJ "receive[s] a request from the U.S., [it] will review and handle such request timely in accordance with the [MLAA] and relevant PRC laws." *Id.*

After receiving the MOJ Letter, the Bank sent a copy of the letter to DOJ and again asked DOJ to request the documents through the MLAA process. [redacted] Decl. ¶ 23; *see also* March 23 Letter to DOJ 1-3.[3]

[redacted] stressed in its March 23 letter that it "look[ed] forward to talking with [DOJ] both about the path forward and how [redacted] can work within the bounds of Chinese law to get DOJ the documents it seeks." *Id.* at 3. Nonetheless, [redacted] received no meet-and-confer or any other communications from DOJ until on or about November 29, 2018, when it was served with a copy of DOJ's motion to compel. As far as the Bank is aware, DOJ has made no effort to comply with the MLAA's process for requesting the records.

D. Enforcement Of The Subpoena Will Inflict Serious Harm On The Bank

If this Court were to compel the Bank to produce the subpoenaed records, the Bank would be forced to either produce the records and violate several Chinese laws or else refuse to comply and face serious harm that could threaten the Bank's very existence. The Patriot Act authorizes DOJ to terminate a correspondent banking relationship for failure to comply with a subpoena. 31 U.S.C. § 5318(k)(3)(C)(i)(I), (II); *see supra* pp. 2-3. Termination of the Bank's U.S. correspondent bank accounts would inflict severe damage on the Bank's business. [redacted] Decl. ¶ 26. The Bank offers U.S. dollar transaction capability to [redacted] *Id.* ¶ 26(b). Those services would be unavailable if the Bank had no correspondent relationship. As a result, the value of the Bank's shares on the Shanghai Stock Exchange would likely fall, harming domestic and international investors. *Id.* ¶ 26(e). The

[3] On Sunday, January 6, 2019, MOJ reiterated its position in a letter that states it was sent directly to the Court. *See* He Decl. Ex. 4.

government has also requested a fine of $50,000 per day, which would further harm the Bank. *See* U.S. Br. 29.

ARGUMENT

First, this Court should deny the motion to compel because it lacks personal jurisdiction over the Bank. [redacted] which has no physical presence or employees in the United States, has no nexus to the District of Columbia. [redacted] maintains correspondent banking accounts in the United States, but none of them is in the District of Columbia. Nor has the government identified any instance when [redacted] has conducted business in the District. Thus, the government—which concedes that it bears the burden—cannot establish either general or specific jurisdiction over the Bank in the District of Columbia.

Second, if the Court concludes that it does have jurisdiction, then it should deny the motion to compel because enforcing it would violate the longstanding principles of comity that courts apply when compliance with a subpoena would force a foreign entity to violate the laws of its home country. Here, compelling the Bank to comply with the subpoena would mean forcing a Chinese entity to violate Chinese bank-confidentiality, anti-money-laundering, foreign-legal-assistance, and anti-terrorism laws on Chinese soil. Such an action would both disrespect China's rule of law and subject the Bank to severe hardship, despite the ready availability of alternative avenues for DOJ to obtain the information it seeks. Although DOJ issued the subpoena nearly a year before filing this motion, it has made no effort to obtain the records it desires through the appropriate diplomatic channels. Enforcing the subpoena under these circumstances would merely invite other nations to interfere with America's own rule of law and with its interests abroad. "Comity is essentially a version of the golden rule: a concept of doing to others as you would have them do to you." *Republic of Philippines v. Westinghouse Elec. Corp.* (*Westinghouse*), 43 F.3d 65,

75 (3d Cir. 1994) (citation and internal quotation marks omitted). Were the tables turned, the United States would undoubtedly want China to proceed through the appropriate diplomatic channels.

Finally, this Court should deny the motion to compel—or, at the least, limit the records that the Bank must produce—because the subpoena exceeds DOJ's statutory authority under the Patriot Act. The text of the Patriot Act expressly restricts any subpoena to "records related to" "a correspondent account in the United States." On its face, the terms of the subpoena issued by DOJ are overbroad as they purport to reach documents and information with no nexus to the United States or to a U.S.-based correspondent account. To the extent the terms of the subpoena are not limited to "records related to" "a correspondent account in the United States," DOJ has exceeded its statutory authority. This in itself is a sufficient basis to deny the motion to compel.

A. This Court Lacks Personal Jurisdiction Over The Bank, Which Has No Presence In Or Contact With The District Of Columbia

Courts have recognized two categories of personal jurisdiction: general jurisdiction and specific jurisdiction. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1779-80 (2017). As DOJ concedes, "[t]he government bears the burden of showing that the Court has personal jurisdiction." U.S. Br. 9; *see also, e.g.*, *FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1091 (D.C. Cir. 2008). Neither type of personal jurisdiction is present here.

The Supreme Court has explained that "a court may assert [general] jurisdiction over a foreign corporation … only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). Far from having "constant and pervasive" "affiliations" with the District of Columbia, [redacted] has *no* physical presence in the District of Columbia, *no*

employees in the District, and does *no* business in the District. The government is therefore right to waive any argument that this Court has general jurisdiction over [redacted] *See* U.S. Br. 10 n.9.

This Court also lacks specific jurisdiction over the Bank. For specific jurisdiction to exist, "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'" *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (quoting *Goodyear*, 564 U.S. at 919); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers Squibb*, 137 S. Ct. at 1781; *see also Goodyear*, 564 U.S. at 931 n.6 ("even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales"). Here, the underlying controversy concerns the government's attempt to subpoena records from [redacted] that are located in China and allegedly related to a U.S. correspondent account outside the District of Columbia. *See* U.S. Br. 6, 14. There is no "affiliation between [the District of Columbia] and th[at] underlying controversy," and so this Court lacks specific jurisdiction over [redacted] *See also Bristol-Myers Squibb*, 137 S. Ct. at 1780 ("'specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" (quoting *Goodyear*, 564 U.S. at 919)).

The government attempts to establish specific jurisdiction in the District of Columbia by pointing out that OFAC is located in the District, at the Department of the Treasury. U.S. Br. 7-8, 13-14. But OFAC filings in themselves are insufficient to establish minimum contacts with the district that would give rise to general jurisdiction, which, as DOJ concedes, generally applies only to a corporation's "'place of incorporation' or its 'principal place of business.'" U.S. Br. 10 n.9 (quoting *Goodyear*, 564 U.S. at 924); *see also Daimler*, 571 U.S. at 122 ("a court may assert

[general] jurisdiction over a foreign corporation … only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" (quoting *Goodyear*, 564 U.S. at 919)). And DOJ has not identified any communication from [redacted] to OFAC that is relevant to the present dispute, as necessary for specific jurisdiction. *Bristol-Myers Squibb*, 137 S. Ct. at 1780. The government implicitly acknowledges the tenuousness of the connection between [redacted] and OFAC when it informs that Court that [redacted] has been "involved in" a number of blocked transactions and that licenses were requested for some of them, but then concedes that '[redacted] itself did not submit any of these license requests." U.S. Br. 7-8. And that is precisely how the OFAC regulations are designed to work: The blocking and reporting requirements apply only to "U.S. persons," 31 C.F.R. § 501.603(a)(1), which does not include a foreign bank like [redacted] that has no branches or employees in the United States, 31 C.F.R. § 510.326 (defining "U.S. person" as "any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States"). OFAC has explicitly said that "[o]nly the financial institution that blocks or rejects a transaction pursuant to OFAC sanctions should report to OFAC." U.S. Dep't of the Treasury, *OFAC Regulations for the Financial Community*, at 31 (Jan. 24, 2012), available at https://www.treasury.gov/resource-center/sanctions/Documents/facbk.pdf. If a transaction in which [redacted] "ha[s] an interest" is blocked, [redacted] *may* choose to apply for a license to authorize the transaction. 31 C.F.R. § 501.801(b)(2). But the fact that [redacted] chose not to file a single application for the transactions at issue shows that it certainly has not "purposefully availed itself" of anything within the District of Columbia.

Nor does the government suggest that any of the transactions were made through the District of Columbia. The transactions that are relevant to the present controversy allegedly went through [redacted] account in New York, not through the District of Columbia, where [redacted] has no account or other presence of any kind.

Even if the Bank had interactions with OFAC, that cannot serve as a basis for specific jurisdiction in this case. The "underlying controversy" in this subpoena enforcement action turns on the Bank's production of "records related to" its "correspondent account[s] in the United States." *See* 31 U.S.C. § 5318(k)(3)(A)(i); *see also* U.S. Br. 6. OFAC's presence in the District of Columbia is simply irrelevant to this controversy.

DOJ appears to argue that receiving an alert from a U.S. correspondent bank that a transaction has been blocked by OFAC creates specific jurisdiction. But the government provides no citation in support of that exceptionally broad proposition, and it is inconsistent with the Supreme Court case law discussed above, under which "the *suit* must arise out of or relate to *the defendant's contacts* with the *forum*," *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (second emphasis added; brackets and internal quotation marks omitted), and "the *defendant* must have *purposefully* availed itself of the privilege of conducting activities within the forum State," *id.* at 1785 (emphases added; brackets and internal quotation marks omitted). Because the present controversy does not concern [redacted] contacts with OFAC, and because the government has failed to point to any such relevant contacts in any event, OFAC's presence here cannot create specific jurisdiction over the Bank in the District of Columbia.

The government also suggests that this Court has personal jurisdiction because [redacted] has engaged in transactions through its correspondent account in New York. U.S. Br. 12-13. But those

transactions have no nexus to the District of Columbia and thus cannot give rise to personal jurisdiction there. Judge Lamberth recently addressed this very point:

> [P]laintiff argues that the existence of U.S.-based correspondent accounts in the banks' names subjects them to jurisdiction in this forum. . . . The Court, however, is at a loss as to how the existence of bank accounts in *New York* can possibly establish the banks' presence in *the District of Columbia.*

Day v. Corn%22er Bank (Overseas) Ltd., 789 F. Supp. 2d 150, 156 (D.D.C. 2011) (citing *Licci v. Am. Express Bank Ltd.*, 704 F. Supp. 2d 403, 407 (S.D.N.Y. 2010)).

Finally, the government asserts that this Court has specific jurisdiction over [redacted] "because the conduct in question caused injury within the United States—to wit, criminal violations of U.S. money laundering and sanctions laws." U.S. Br. 14. Even assuming the government's premise that [redacted] has somehow caused injury, this argument fails: any "injury" caused by [redacted] transactions using its correspondent account in New York necessarily occurred where the "violation[]" occurred—in New York. The government says that "[t]he United States has a strong interest in combating money laundering, particularly when the U.S. financial system is used by foreign actors to promote criminal activity," *id.*, but it never explains why alleged money laundering *outside the District of Columbia* confers specific jurisdiction in a subpoena enforcement action on a court located *in the District.*[4]

[4] DOJ points to a Second Circuit case for the proposition that "under a federal statute that allows for nationwide service, … the forum for which a court examines the party's contacts is the entire United States, rather than a specific district." US Br. 10 (citing *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122, 142 & n.21 (2d Cir. 2014)). But DOJ neglects to mention that the Second Circuit itself has not adopted that standard. *See Gucci*, 768 F.3d at 142 n.21 ("This Court has not yet decided that issue."). Nor does the government identify any D.C. Circuit decision doing so. The government also contends that, in a case under federal law, the right to inquire of a witness depends upon contacts with the entire United States. U.S. Br. 10. But the only case law it cites for this proposition is a 35-year-old Second Circuit decision that provides no analysis. Finally, the government asserts that "[i]n deciding whether the exercise of personal jurisdiction over a foreign corporation comports with due process, courts consider whether: (1) the foreign corporation has the requisite minimum contacts with the United States." U.S. Br. 11 (internal quotation marks

The Supreme Court has further explained that "[i]n determining whether personal jurisdiction is present, a court must consider a variety of interests." *Bristol-Myers Squibb*, 137 S. Ct. at 1780. While "[t]hese include the interests of the forum state and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice, … the primary concern is the burden on the defendant." *Id.* (internal quotation marks omitted). The Court has also instructed courts to consider the interest in efficient resolution of the controversy and the substantive social policies at issue. *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102, 113-114 (1987). These factors weigh heavily against the exercise of personal jurisdiction here.

First, mandating that [redacted] a foreign entity, violate foreign law in its home country imposes a severe burden on [redacted] Here the foreign authority, China's Ministry of Justice, has specifically prohibited [redacted] from complying with the subpoena, and has threatened severe punishment should [redacted] violate its directive.

Second, the District of Columbia's interest in adjudicating this matter is minimal, because there is an alternative process for DOJ to obtain the relevant information: the MLAA process. The District's interest is also limited because, as discussed above, there is no connection between the District of Columbia and this controversy.

Third, the government's interest in this information is also limited because there are alternative sources for comparable information, including the U.S. bank(s) hosting the

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omitted). But the decision that the government cites held that the government had "not carried its burden of proving the effects necessary to establish … jurisdiction," making its statement of the standard dicta. *In re Sealed Case*, 832 F.2d 1268, 1274 (D.C. Cir. 1987), abrogated on other grounds by *Braswell v. United States*, 487 U.S. 99, 116 (1988). And the one decision that *In re Sealed Case* relied on, *see* 832 F.2d at 1273-74, held only that a court may exercise personal jurisdiction over a defendant who has sufficient contacts with the *state* in which the court sits. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). As discussed above, [redacted] contacts with the District of Columbia are manifestly insufficient to confer personal jurisdiction here.

correspondent accounts. There is an alternative process for obtaining the information, the MLAA process. DOJ has demonstrated that its interest in the material is limited: it waited nearly a year before seeking to enforce the subpoena, and it has not even attempted to initiate the MLAA process in the meantime, despite the Bank's requests that it do so. DOJ's failure to attempt to obtain the information it seeks through the MLAA process severely undercuts its assertion that it has a meaningful interest in obtaining the information from [redacted]

Fourth, asserting personal jurisdiction will not lead to an efficient resolution of the controversy, because [redacted] has been instructed by its home-country authorities not to comply if the government refuses to proceed via the MLAA process.

Finally, balancing substantive social policies also counsels against asserting personal jurisdiction here. If U.S. courts force foreign entities to violate the laws of their home countries, U.S. entities operating abroad will likely suffer reciprocal consequences. Furthermore, disregarding and dismissing international agreements and processes for obtaining the relevant information may also undermine U.S. interests. *See, e.g.*, *Westinghouse*, 43 F.3d at 75 (describing comity as "essentially a version of the golden rule: a concept of doing to others as you would have them do to you" (citation and internal quotation marks omitted)); *In re Sealed Case*, 825 F.2d at 498 ("our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders").

For the foregoing reasons, the government has failed to meet its burden of establishing personal jurisdiction. *See FC Inv. Group*, 529 F.3d at 1091.

B. DOJ Has Not Demonstrated That Its Interests In Forcing The Bank To Comply With Its Administrative Subpoena Outweigh The Bank's Interests In Complying With Chinese Law

This case "implicate[s] concerns about international comity that rarely appear in the ordinary lawsuit." *Sheikh v. Republic of Sudan*, 308 F. Supp. 3d 46, 52 (D.D.C. 2018). "Principles

of international comity require that domestic courts not take action that may cause the violation of another nation's laws." *FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1327 n.150 (D.C. Cir. 1980). When U.S. law conflicts with foreign law, the federal courts proceed with caution to "respect 'the independence, the equality, and dignity" of the [foreign] sovereign. *Sheikh*, 308 F. Supp. 3d at 52 (quoting *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 123 (1812)); *see also In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1049 (2d Cir. 1996). A court determining whether to compel discovery when U.S. and foreign law impose incompatible demands must "scrutin[ize] the particular facts, sovereign interests, and likelihood that resort to [treaty-based] procedures will prove effective." *Aérospatiale*, 482 U.S. at 543-44; *see Linde v. Arab Bank, PLC*, 706 F.3d 92, 108 (2d Cir. 2013). U.S. courts must "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Aérospatiale*, 482 U.S. at 546. A comity approach "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164–65 (2004).

Courts have articulated seven factors to guide this comity inquiry: (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 Am., Inc. v. Weixing Li*, 135 F. Supp. 3d 87, 101 (S.D.N.Y. 2015); *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); *Saint-Gobain*, 636 F.2d at 1327 n.148; *see also Linde*, 706 F.3d at 109-10. The most important factors are "the competing interests of the countries involved and the hardship imposed by compliance." *Minpeco*, 116 F.R.D. at 522; *see, e.g., United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968).

Enforcement of a subpoena is disfavored if it would "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," especially where that foreign person "is not itself the focus of the criminal investigation … but [rather] a third party that has not been accused of any wrongdoing." *In re Sealed Case*, 825 F.2d at 498. In such circumstances, enforcement could "'hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere,'" because "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 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)); *cf. In re Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962) ("Just as we would expect and require branches of foreign banks to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries.").

Analysis of the key comity factors supports denying the motion to compel.

1. Chinese Law Prohibits The Disclosure Of Bank Records

A court should pause before "order[ing] a violation of law, particularly on the territory of the sovereign whose law is in question." *In re Sealed Case*, 825 F.2d at 498. The subpoena seeks information created and maintained in China, whose laws prohibit its disclosure, from a Chinese bank with no U.S. presence. Indeed, China's MOJ has informed the Bank that if it "provide[s]

relevant client information to the U.S. DOJ directly, the banking regulatory authorities will impose administrative penalties and fines ..., and [the Bank] may bear civil or criminal liabilities depending on [the Bank's] situation." MOJ Letter. As set out in the PRC Counsel Letter, complying with the subpoena would require the Bank to violate China's judicial assistance law and multiple Chinese bank-confidentiality laws. *See* PRC Counsel Letter 2-15.

First, the recently enacted "Law of the People's Republic of China on International Criminal Judicial Assistance" prohibits "criminal judicial assistance" "[u]nless approved by the competent authority of the [PRC]." *Id.* at 2. The PRC Counsel Letter explains that the production of the documents mandated by the subpoena would constitute "criminal judicial assistance" within the meaning of the law. *Id.* Violation of this law could result in *criminal* liability in China. *Id.* at 3.

Second, China's Anti-Terrorism Administrative Measures require banks to refer foreign authorities' requests for "client identity information or transactional information" connected to terrorism to the appropriate diplomatic channels. *Id.* at 5. As the PRC Counsel Letter explains, the Patriot Act is an anti-terrorism law for purposes of the Anti-Terrorism Administrative Measures. *Id.* at 5-6. Article 15 provides that a bank "shall inform such foreign authority to make requests through diplomatic channels or juridical assistance channels; and shall not ... provide client identity information, and transactional information at their own discretion." *Id.* at 5 (emphasis omitted).

Third, China's Anti-Money Laundering Law prohibits Chinese banks from sharing information gathered pursuant to their anti-money-laundering obligations. Those obligations require banks to "adopt preventive and monitoring measures, establish sound systems for distinguishing clients' identities, preserving the data for clients' identities and records of

transactions, and a report system for transactions involving large sums of money and for dubious transactions." *Id.* at 8-9 (discussing Article 3). Article 5 of the Anti-Money Laundering Law provides that "[t]he data for clients' identities and information about transactions obtained through performing, in accordance with law, the duty or obligation of anti-money laundering shall be kept confidential." *Id.* at 9 (emphasis omitted). On January 1, 2019, PBOC's Money-Laundering and Terror-Funding Risk Management Guidelines for Legal Person Financial Institutions (Trial) went into effect. *Id.* at 10. The Guidelines provide that financial institutions should not "provide[] … foreign parties" with "[i]nformation concerning domestic judicial freezing, judicial inquiry, suspected transaction report or anti-money investigation of administrative agencies." *Id.* at 10.

Fourth, China's Client Deposit Information Rule similarly prohibits a bank from "answer[ing] inquiries from any entity or individual about … deposits," except as "laws or administrative regulations stipulate otherwise." *Id.* at 11 (emphasis omitted). Foreign law cannot create exceptions. *Id.*.

Finally, China's Personal Financial Information Rule states that a Chinese bank "shall not provide domestic personal financial information outside of China." *Id.* at 12 (emphasis omitted).

The records sought by the subpoena—"[a]ll documents relating to correspondent banking transactions for [redacted] International Trading Limited" and "[a]ll documents relating to correspondent banking transactions for" a particular account number—fall squarely within the bounds of the foreign-judicial-assistance, bank-confidentiality, anti-money-laundering, and anti-terrorism laws discussed above. *See* PRC Counsel Letter 2-15. For example, the subpoena clearly constitutes an "inquir[y] … about … deposits" under the PRC Client Deposit Information Rule. *See id.* at 11. And "(a) signature cards," "(b) documentation of account opening," "(c) account ledger cards," "(d) periodic account statements," and "(f) records (copied front and back) of all

items deposited, withdrawn, or transferred," Subpoena Attachment 1, are clearly "domestic personal financial information" under the PRC Personal Information Financial Rule. *See* PRC Counsel Letter 12-13. Similarly, "(e) due diligence (including invoices)," Subpoena Attachment 1, describes information protected by the PRC Anti-Money Laundering Law and Anti-Terrorism Administrative Measures. *See id.* at 5-11.

The government's argument that enforcement of the subpoena would not truly conflict with Chinese law has no merit. *First*, the government contends that the Bank "cannot simply allege a theoretical violation of unenforced Chinese laws." U.S. Br. 18. Here, however, MOJ has provided a clear statement to the Bank that compliance with the subpoena will have consequences: "[I]f you provide relevant client information to the U.S. DOJ directly, the banking regulatory authorities *will impose* administrative penalties and fines on you." MOJ Letter (emphasis added); *see also Saint-Goubain*, 636 F.2d at 1327 n.148 (explaining that courts often defer to a foreign sovereign's interpretation of its own laws). The Bank, has also produced several examples of Chinese banks' or their officers' being penalized for violating the laws at issue here. *See* PRC Counsel Letter 8, 10, 15.

Second, the government argues that China's bank-secrecy laws amount to merely "an individual privilege on customers" rather than "a national policy entitled to substantial deference." U.S. Br. 19 (citation omitted). That is incorrect. As discussed further below, the "broad confidentiality obligations [that China imposes] on Chinese banks," *Wultz*, 942 F. Supp. 2d at 464, codify and advance China's vital policy interest in promoting confidence in the nation's developing banking system. *See infra* Part C. As such, China's bank-confidentiality laws "have few exceptions and appear to provide harsh consequences for violations." *Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 158 (S.D.N.Y. 2011), *aff'd*, 2011 WL 11562419 (S.D.N.Y. Nov. 14,

2011); *see also, e.g.*, *id.* at 150, 156-58; *Wultz*, 942 F. Supp. 2d at 465 ("Plaintiffs' argument that article 15(2) implicitly permits [the Bank of China] to disclose confidential information in a legal proceeding in a foreign court is unpersuasive."). An enforcement order here would require the Bank to violate the laws of its own sovereign on its sovereign's territory, with scant regard for the rule of law under a "legal system [that] has been developing rapidly over the last several years." *Tiffany*, 276 F.R.D. at 156; *see also In re Sealed Case*, 825 F.2d at 498.

2. China Has Significant National Policy Interests In Enforcing Its Anti-Money Laundering, Anti-Terrorism, And Bank-Confidentiality Laws On Its Own Soil

The Chinese government has a significant interest in enforcing its anti-money laundering, anti-terrorism, and bank-confidentiality laws on Chinese soil. China's bank-confidentiality laws are *not* designed to prevent discovery—an attribute that entitles so-called foreign "blocking statutes" to little weight in the comity analysis. *See Minpeco*, 116 F.R.D. at 524, 528. Instead, the Chinese laws here at issue balance fighting crime with promoting confidence in a developing banking system. The laws "have the legitimate purpose of protecting commercial privacy inside and outside [the country]," *id.* at 524, in order to "foster a greater trust" in the "relatively new" "Chinese banking system," *Tiffany*, 276 F.R.D. at 156-57. At the same time, the laws do not ignore the problems of money laundering or terrorism. To the contrary, the Anti-Money Laundering Law and Anti-Terrorism Measures mandate confidentiality with respect to the efforts banks are obligated to undertake to monitor for suspicious activity.

The Bank does not dispute that the United States has a strong interest in combating money laundering and enforcing international sanctions, and that the U.S. government's judgment about the balance of comparative sovereign interests may be entitled to "some deference." *United States v. Davis*, 767 F.2d 1025, 1035 (2d Cir. 1985). But that does not mean the Court should simply defer to the Justice Department's judgment of when a foreign party can be forced to violate its

home country laws to comply with an administrative subpoena. Congress is presumed to "take account of the legitimate sovereign interests of other nations when [it] write[s] American laws." *F. Hoffman-La Roche*, 542 U.S. at 164. Thus, absent express language to the contrary, courts construe statutes "to avoid unreasonable interference with the sovereign authority of other nations." *Id.* And compelled production in violation of foreign law on foreign soil, "even at the urging of the executive branch, … may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole." *In re Sealed Case*, 825 F.2d at 499 (citation and internal quotation marks omitted). Thus, the Supreme Court has "long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation." *Aérospatiale*, 482 U.S. at 546. And the government recently confirmed that "a court … should conduct a comity analysis" when compliance with a disclosure order sought by the U.S. government would violate foreign law. Tr. of Oral Argument at 28-29, *United States v. Microsoft Corp.*, No. 17-2 (U.S. Feb. 27, 2018) (government attorney "agreeing" with Justice Kagan in context of 18 U.S.C. § 2703).

Here, an order compelling production in violation of Chinese law may also frustrate *both* countries' efforts to combat crime. As one court has observed, "[t]here is a risk that ordering [a Chinese bank] to produce internal communications or communications with the Chinese government concerning [anti-money laundering and counterterrorism financing] matters could have a chilling effect on future communications by Chinese banks, leading suspicious transactions to go unreported" and thereby "undermin[ing] the interests of both China and the United States." *Wultz*, 942 F. Supp. 2d at 467.[5]

[5] DOJ cites (U.S. Br. 24) *United States v. Sedaghaty*, No. 6:05-cr-60008, ECF No. 277, at 16 (E.D. Or. Feb. 26, 2010), in support of its position that courts consistently conclude that U.S. law enforcement interests outweigh foreign states' bank-secrecy laws and the hardship imposed

It is one thing for the Department of Justice to weigh policy choices on U.S. soil, but it is another matter altogether for it to dictate that balance in China. *See Chase Manhattan Bank*, 297 F.2d at 613 ("[W]e also have an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own."); *F-Hoffman-La Roche*, 542 U.S. at 165 ("Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese [citizens] . . . ?"). "If this Court expects courts in foreign jurisdictions to honor its orders and laws, this Court must pay due deference and respect to the laws and traditions of our [foreign] colleagues." *White v. Kenneth Warren & Son, Ltd.*, 203 F.R.D. 369, 376 (N.D. Ill. 2001).

3. Enforcing The Subpoena Would Impose Substantial Hardship On The Bank By Subjecting It To Significant Criminal, Civil, And Administrative Penalties Under Chinese Law On Chinese Soil

(a) The responsive documents were created in and are currently located in China

The responsive documents in the Bank's possession, custody, or control are located in the PRC. [redacted] Decl. ¶ 14. The overseas location of the records weighs in favor of denying the motion to compel. *See, e.g.*, *Wultz*, 942 F. Supp. 2d at 466 n.67; *Tiffany*, 276 F.R.D. at 152. In fact, the

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on the subpoena's target. But the government omits two crucial components of *Sedaghaty*'s reasoning. First, the court noted that "the government's previous request of the Saudi government appears to have been met with no viable response." *Id.* at 18. Here, by contrast, DOJ has never made any effort to obtain the cooperation of the Chinese government—despite Chinese regulators' entreaties (communicated through [redacted] that it do so. Second, the *Sedaghaty* court limited production to documents "directly relate[d] to" the correspondent accounts at issue. *Id.* at 15; *see id.* at 14-15, 19. As discussed further below, in this case DOJ's subpoena attempts—in violation of the Patriot Act—to reach far beyond records directly related to [redacted] U.S. correspondent account. *See infra* pp. 33-37. In short, because in *Sedaghaty* the government tried to obtain the documents via diplomatic channels and failed—and because the court limited disclosure even then—*Sedaghaty* is of little help to the government here.

government here concedes that "[t]he bank records originat[ion] in China … weighs in favor of [the Bank]." U.S. Br. 22.

(b) Violating Chinese law would subject the Bank to substantial hardship

Courts assessing hardship consider whether production could subject the person opposing production to civil and criminal sanctions. *See, e.g.*, *Minpeco*, 116 F.R.D. at 524 (disclosure would subject bank to civil and criminal sanctions, as well as civil lawsuits, under Swiss bank secrecy statutes). In addition, the balance weighs against ordering production where, as here, the subpoenaed party "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." *In re Sealed Case*, 825 F.2d at 498. In that circumstance, hardship "weigh[s] more heavily in the balance," for "[i]t is less supportable … to order [a third party] to violate [foreign] law when it stands … in the position of a witness, a mere source of information." *Minpeco*, 116 F.R.D. at 526, 530; *accord, e.g.*, *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 346 (7th Cir. 1983) ("We think it significant in weighing the hardship factor that the Bank employees who would be exposed to penalty and First Chicago, which would be ordering its Greek employees to act unlawfully, are involved only as neutral sources of information and not as taxpayers or adverse parties in litigation."); *Tiffany*, 276 F.R.D. at 158 ("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." (citation, alteration, and internal quotation marks omitted)).

China's foreign-judicial-assistance, bank-confidentiality, anti-money-laundering, and anti-terrorism laws impose substantial administrative, criminal, and civil penalties, and the Bank has every reason to believe its compliance with the subpoena would expose it to those penalties. The Anti-Terrorism Administrative Measures allow "judicial authorities to pursue criminal

liabilities in case of criminal offenses." PRC Counsel Letter 6. The Anti-Money Laundering Law provides for "a fine of not less than RMB 200,000 yuan but not more than 500,000 yuan" to "be imposed on the financial institution, and a fine of not less than 10,000 yuan but not more than 50,000 yuan" to "be imposed on the director, [or] senior manager who is directly in charge or any other person who is directly responsible." *Id.* at 9-10 (emphasis omitted). Finally, under the Personal Financial Information Rule, authorities may not only "[c]irculat[e] a notice of criticism within the financial system" and "[r]ecommend[] the bank to give punishment to directly in-charge senior management and other directly responsible personnel," but they may also "transfer[] to judicial authorities" for any criminal offenses. *Id.* at 14.

According to PRC counsel, "[t]here have been many cases where PRC state-owned enterprises (like [redacted] have been penalized for failure to comply with written instructions issued by government agencies." *Id.* at 19. PRC counsel gives the example of a $4.75 million fine imposed by CBRC on Nanjing Bank Zhenjiang Branch "for unlawful billing service and violation of prudent business rules." *Id.* CBRC imposed a $12.6 million fine on Postal Bank Wuwei Branch, also for "unlawful billing service and violation of prudent business rules," and it disqualified four of that bank's executives for two to five years. *Id.* In a third case, CBRC imposed a $1.5 million fine on the Industrial and Commercial Bank Qiqi Haer Branch for "privately selling financial products for public institutions in violation of Chinese regulations." *Id.* According to PRC counsel, all of these penalties were imposed recently, during 2018. *Id.* These recent events confirm PRC counsel's opinion that "[redacted] risks potentially serious penalties by providing information in response to the subpoena outside of the MLAA process." *Id.*

4. [redacted] Has Acted In Good Faith By Seeking Approval From Chinese Authorities To Comply With The Subpoena

The target of a discovery request acts in good faith where it "recognizes that it is subject to procedural rules of United States courts … and has made full efforts to follow these rules" even in the face of conflicting foreign law. *Internationale pour Participations Industrielles et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 212 (1958). Evidence of good faith includes asking authorities "to be exempt from the regulation[s] in question" or otherwise seeking permission to produce the requested documents. *E.g.*, *In re Westinghouse Elec. Corp. Uranium Contracts Litig.* (*Uranium Litig.*), 563 F.2d 992, 998 (10th Cir. 1977). A party fails to act in good faith, in contrast, where it "deliberately court[s] legal impediments to production." *Rogers*, 357 U.S. at 208-09; *see Minpeco*, 116 F.R.D. at 522-23.

On January 18, 2018, the Bank's representatives met with CBRC officials to seek approval to comply with the subpoena, and CBRC officials stated during and subsequent to the meeting that they would discuss feasible solutions as soon as possible and that, if the United States was willing to follow the process set forth in the MLAA, CBRC would coordinate with MOJ in facilitating the expeditious production of responsive documents. *See* [redacted] Decl. ¶ 19. On March 15 and 16, 2018, the Bank's representatives met with MOJ officials to seek further guidance. *Id.* ¶ 20; *see* MOJ Letter (noting MOJ's "Response" to the Bank's "Request for Instruction on Production of Client Information Required by Department of Justice of the United States"); *see also* March 23 Letter to DOJ 2. The Bank has also collected relevant documents and facts relevant to the subpoena so that it would be ready to produce in short order once DOJ and MOJ reach a solution. March 23 Letter to DOJ 2. Finally, the Bank continued to provide DOJ with updates on the status of its efforts to secure permission to comply. *Id.* at 1-3.

5. DOJ Can Seek To Obtain The Information Through Other Channels That Do Not Infringe Chinese Sovereignty Or Require A Chinese Entity To Violate Chinese Law On Chinese Soil

There is little reason to upset a sovereign nation's expectations of compliance with its laws on its own soil when the information can be obtained by other means. Where possible, "our courts dedicated to the enforcement of our laws should not take such action as may cause ... an unnecessary circumvention of [another sovereign's] procedures." *Chase Manhattan Bank*, 297 F.2d at 613 (citation omitted); *cf. Westinghouse*, 43 F.3d at 80 ("[A] court should be loath[] to interfere with a foreign sovereign's exercise of [its law enforcement] power if alternatives are available that may achieve the same result with less derogation of sovereignty."). Here, the government has at least two alternative avenues to obtain the information it seeks: through the MLAA procedure and from the Bank's U.S. correspondent bank.

First, DOJ could submit a request to Chinese authorities under the procedure contemplated by the MLAA and adopted by the U.S. and Chinese governments. Indeed, Chinese law expresses a clear preference for such international cooperation. As noted, the Chinese Anti-Terrorism Administrative Measures require banks from whom foreign authorities request information relating to terrorist activities to refer those authorities to diplomatic channels. PRC Counsel Letter 5. Similarly, the Judicial Assistance Law sets out China's basic position, that foreign countries seeking assistance in connection with criminal cases should pursue diplomatic channels. *Id.* at 2-4. And China takes international obligations to share investigative information seriously and has a history of responding positively to U.S. law enforcement requests. *Id.* at 16-18; MOJ Letter; *see also, e.g.*, *Tiffany*, 276 F.R.D. at 156.

Confirming the Chinese government's willingness to participate in production of documents in U.S. proceedings, the MOJ recently agreed to coordinate with DOJ to facilitate the production of discovery disclosures another proceeding. *See* ECF No. 181 at 1, *Nike v. Wu*, No.

13-cv-8012 (S.D.N.Y. Dec. 12, 2018) ("*Nike* Letter") ("The Ministry of Justice has contacted the U.S. Department of Justice to coordinate the delivery of documents to [the plaintiff]."). According to the *Nike* Letter, production in the *Nike* case appears to be underway. *Id.* at 2. The *Nike* Letter makes clear that Chinese law is *not* intended to prevent all disclosures responsive to U.S. subpoenas and discovery orders, and that the MOJ's opposition to compliance in this case stems instead from DOJ's refusal to follow the MLAA process or to involve the MOJ and other Chinese regulators in any way. Indeed, the *Nike* Letter demonstrates that there is a line of communication open between MOJ and DOJ, and it indicates that "[c]ooperation between the Ministry of Justice and the Department of Justice has been instrumental in making this proposed solution [to the discovery impasse in that case] possible." *Id.* This makes the absence of any effort by DOJ to communicate with MOJ in this matter all the more egregious.

Against this legal backdrop, it is all the more significant that both CBRC and MOJ *in this very case* have stated that DOJ should seek the documents through the official, agreed-upon channel—an MLAA request—rather than via a coercive mechanism. *See* [redacted] Decl. ¶¶ 18-20; MOJ Letter. As MOJ's letter explains, "[t]he Chinese government has always been strongly against unilateral enforcement actions," and the MLAA provides "a smooth channel for legal assistance in criminal matters between China and the U.S." MOJ Letter. In addition, the MOJ's letter states: "The Ministry of Justice, acting as the central authority for legal assistance in China, has provided legal assistance in criminal matters to the U.S. for multiple criminal matters." *Id.* At the Bank's meetings on March 15 and 16, 2018, with MOJ and other agencies, Chinese officials stated that the agency would respond positively and quickly. [redacted] Decl. ¶ 20(b). And MOJ subsequently confirmed in writing that it would act on any request in a "timely" manner. MOJ Letter. CBRC

officials likewise stated that they would cooperate to expeditiously process responsive documents. *Id.* ¶ 19(c).

The PRC Counsel Letter recounts numerous instances in which Chinese government agencies have provided successful criminal judicial assistance to the U.S. government. *See* PRC Counsel Letter 16-17. For example, the Chinese government facilitated the extradition of criminal suspects to the United States in 2007 and 2017, and in 2015 the two governments cooperated on a money-laundering case against an ex-Chinese official. *Id.* at 17. More broadly, China has a substantial history of responding positively to U.S. law enforcement MLAA requests. *Id.* at 16-17. In 2016, a Chinese government report stated that the Ministry of Foreign Affairs has processed 112 criminal judicial assistance requests through diplomatic channels. *Id.* at 16. Also in 2016, Chinese police assisted foreign police in the investigation of over 300 economic crime cases. *Id.*

Particularly in light of this record of cooperation between the two governments, DOJ provides no adequate explanation for its failure to pursue the available MLAA procedures. DOJ cites no case compelling production where the foreign state responded in such a manner. Moreover, with no citation to evidence or figures of any kind, the government asserts that "China has not provided—via the MLAA channel—records similar to those subpoenaed in this investigation in at least 10 years." U.S.Br. 22. DOJ provides no metric for the Court or the Bank to assess that claim. It is entirely unclear what "records similar to those subpoenaed in this investigation" means. Of particular relevance, the government provides no information about whether it has sought production pursuant to the MLAA in cases involving alleged sanctions violations by foreign states. And the government does not indicate whether, as here, Chinese authorities have ever directed it to follow the MLAA procedures and communicated that if it did,

they would respond promptly. For these reasons, the government's conclusory assertion is unconvincing.

The government issued the subpoena on or about December 26, 2017, eleven months before filing this motion. The government cannot now be heard to complain that the MLAA process would be too slow. If the United States can force a foreign bank to comply with a subpoena under these circumstances—with no apparent effort whatsoever to obtain the documents through diplomatic channels—there could be significant unintended consequences for U.S. companies and individuals abroad. As the D.C. Circuit has stated, "our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders." *In re Sealed Case*, 825 F.2d at 498-99.

The government's failure to follow the MLAA process—and its failure to satisfactorily explain why it has made no attempt to do so—is particularly glaring in light of its very different behavior in *United States v. Sedaghaty*, No. 6:05-cr-60008, ECF No. 277, at 16 (E.D. Or. Feb. 26, 2010). There, DOJ *did* "attempt to obtain the documents through a request to the government of Saudi Arabia" pursuant to an international agreement, and sought to compel the foreign bank to comply with its subpoena only when that attempt failed to "yield[] any results." *Id.* at 6 n.1. While DOJ purports to rely on *Sedaghaty* here, it cannot justify its failure to make even the attempt to obtain the desired records through diplomatic channels that led the *Sedaghaty* court to grant (albeit in limited form) its motion to compel. *See id.* at 15.

In sum, recourse to the MLAA—a *mutual* cooperation pact—protects U.S. interests just as much as Chinese interests. Here, given the gravity and sensitivity of the situation, cooperation is especially critical. *See also* MOJ Letter ("We are willing to increase exchanges and cooperation in legal enforcement provided that there is a full understanding and communication between relevant

countries and China."). The United States should undertake efforts at international cooperation where those energies could avoid unnecessarily violating foreign law on foreign soil.

C. The Subpoena Exceeds Statutory Authorization

1. On Its Face, The Subpoena Is Not Limited To "Records Related To" A "Correspondent Account In The United States"

"[T]here are real limits on any agency's subpoena power." *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Sch.*, 854 F.3d 683, 689 (D.C. Cir. 2017). The text of the Patriot Act limits the records that can be subpoenaed under § 5318(k) to "records related to" "a correspondent account in the United States." 31 U.S.C. § 5318(k)(3)(A)(i). The subpoena in this matter goes beyond this statutory limit. Item 1 of the subpoena seeks "All documents related to correspondent banking transactions for Mingzheng International Trading Limited." On its face, this demand is not restricted to "records related" to a correspondent account "in the United States," but rather appears to address *any* correspondent account, including accounts located abroad that have no relation to the United States. The same is true of Item 2 of the subpoena, which seeks "All documents relating to correspondent banking transactions for Account Number [redacted] The express scope of the subpoena exceeds DOJ's statutory authority and as a result the motion to compel should be denied. *See, e.g.*, *Resolution Tr. Corp. v. Thornton*, 41 F.3d 1539, 1544, 1549 (D.C. Cir 1994) (explaining that judicial review of administrative subpoenas is "'neither minor nor ministerial'" and refusing to enforce subpoena when agency exceeded its "statutory authority" (quoting *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 217 n.57 (1946)); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 837 F.2d 162, 165-66 (4th Cir. 1988) (refusing to enforce subpoena "because it exceeds the proper scope of [the agency's] statutory authority"); *Takazato v. Fed. Maritime Comm'n*, 633 F.2d 1276, 1278 (9th Cir. 1980) ("if there are compelling indications that the Commission exceeded its statutory authority

in issuing the subpoenas, we must … vacate the district court's order of enforcement"); *De Masters v. Arend*, 313 F.2d 79, 89-90 (9th Cir. 1963) (explaining that the "limitations … which may preclude judicial enforcement of administrative subpoenas" include the requirement that the government "not act … in excess of … statutory authority" (internal quotation marks omitted)).

Even if the text of § 5318(k) were ambiguous, the result would be the same. "Liberal judicial interpretations of agency power are not justified when agency action threatens to have extraterritorial, rather than merely national, impact." *Saint-Gobain*, 636 F.2d at 1322. Thus, "where two constructions of a statute are possible, the one less likely to conflict directly with regulations of other nations should be chosen." *Id.* at 1327.

2. The Subpoena Is Overly Broad And Unreasonably Burdensome

In weighing the importance of the information sought by a subpoena and whether to compel disclosure, courts must "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Aérospatiale*, 482 U.S. at 546. "Generalized searches for information, the disclosure of which is prohibited under foreign law, are discouraged" as "burdensome." *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992); *see Aérospatiale*, 482 U.S. at 546. "It is incorrect, and thus an abuse of discretion, to impose a serious sanction upon a [foreign] company for being unable to provide, on pain of violation of its sovereign law, a document that is not necessary to the case." *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1231 (Fed. Cir. 1996); *see also Millennium TGA, Inc. v. Comcast Cable Commc'ns LLC*, 286 F.R.D. 8, 13–14 (D.D.C. 2012) ("Based on this record, this Court would be justified in denying the Motion to Compel in its entirety based on the undue burden and territorial inconvenience to the Comcast subscribers . . . ."). And even where information is necessary, its importance does not necessarily

weigh in favor of compelling production where much of the same information has already been obtained from other sources. *See, e.g.*, *Minpeco*, 116 F.R.D. at 527-28 (considering requested discovery in light of what information plaintiffs had already received); *cf. Cochran*, 102 F.3d at 1231 (court should consider "whether there are alternative sources of the necessary information"); *Uranium Litig.*, 563 F.2d at 999 ("[T]he present discovery, though admittedly of potential significance, is still in a sense cumulative.").

Even aside from failing to limit production to "records related to" "a correspondent account in the United States," the plain terms of the subpoena seek Chinese banking records that are not "records related to" the Bank's U.S. correspondent account. For example, an individual customer's signature card, created when the customer opened an account at an [redacted] branch in China, is not "a record related to" [redacted] correspondent account in the United States. Even so, the subpoena purports to define "correspondent banking" documents to include those and other types of documents that are unrelated to [redacted] U.S. correspondent account or to correspondent banking transactions—including signature cards, account ledger cards, customer account statements, and due diligence and bank records. Indeed, the court in *Sedaghaty* addressed a similar administrative subpoena and ordered production of only those records that "*directly* related to the cashier's check and 130 travelers checks issued by U.S. banks." No. 6:05-cr-60008, ECF No. 277, at 15 (E.D. Or. Feb. 26, 2010) (emphasis added). The court did *not* compel production of any "[c]opies of signature cards and customer applications," and it compelled copies of general bank records only to the extent that they were "directly related" to the checks issued by U.S. banks. *Id.* at 14.

Moreover, it is unnecessary for the government to obtain *from the Bank* "documents relating to correspondent banking transactions" that have already been produced to DOJ by the U.S. correspondent banks themselves. Indeed, the United States' complaint in the Mingzheng civil

forfeiture action, indicates that DOJ has been able to obtain the key information it needs from U.S. correspondent banks. *See* ECF No. 1, *United States v. $1,071,251.44 of funds associated with Mingzheng Int'l Trading Ltd.*, No. 1:17-cv-1166 (D.D.C. June 14, 2017) ("Mingzheng Compl."). For instance, the complaint recites that such records "revealed that Mingzheng paid Chinese Company 1 approximately $1.8 million by between March 2013 and September 2014." *Id.* ¶ 44. Similarly, DOJ's briefing in this very case reflects that it already has obtained a great deal of information about Sun Wei, Mingzheng, and Kim Tong Chol. *See, e.g.*, U.S. Br. 1-4, 6 n.3. DOJ does not need that same information from the Bank itself, which would suffer significant hardship if it were to produce it. *See supra* pp. 26-28.[6]

Finally, the subpoena is overly broad because the documents it requests are not tailored to any reasonable timeframe. Instead, the subpoena appears to be an open-ended fishing expedition into Mingzheng's banking activities in China. For example, the subpoena seeks "[a]ll documents relating to correspondent banking transactions for Mingzheng" "from January 1, 2012, through the present." Subpoena Attachment 1. There is no effort to narrow the request, whether to the time

[6] DOJ argues its ability to obtain the same documents through other routes is irrelevant because "the government has the discretion to choose between available discovery methods." U.S. Br. 22. The cases DOJ cites for that proposition are inapposite—among other things, none involved, as here, a clear conflict with foreign law, a substantial burden on the party, and a specific suggestion from the foreign government that DOJ make a request through diplomatic channels. *See In re Sealed Case*, 832 F.2d at 1283-84 (reasoning that Swiss-American treaty was insufficient because (1) "some of the documents sought may not be located in Switzerland"; (2) "it is not clear … that Swiss law forbids … compl[iance] with the subpoena even in regard to documents located in Switzerland"; (3) the witness would "run the risk" of "possible prosecution in Switzerland" only "if he traveled to Switzerland voluntarily"; and (4) the witness had "offered no evidence that the United States Government, in signing the Treaty, understood it to supply the exclusive vehicle for obtaining documents in Switzerland"), abrogated on other grounds by *Braswell*, 487 U.S. 99; *Nike, Inc. v. Wu*, No. 13-cv-08012 (CM) (DF), 2018 WL 4907596, at *16 (S.D.N.Y. Sept. 25, 2018) (rejecting bare argument that plaintiff should have followed Hague Convention process because requests in other cases had been only "partly executed"), aff'd, 2018 WL 6056259 (S.D.N.Y. Nov. 19, 2018).

period of the Mingzheng transactions identified in the Motion or even to transactions that occurred after FTB was listed as a Specially Designated National, *see* Mingzheng Compl. ¶¶ 10, 32. Such limitless trawling is not authorized by statute and is itself grounds to deny the motion to compel.

Were the Court to enforce the subpoena, despite the compelling legal arguments to the contrary, it should limit production to documents: (1) relating to U.S. correspondent banking transactions between October and November 2015 (the timeframe of the wire transfers identified in the Motion, U.S. Br. 3-4), or, barring that, between March 2013 (when FTB was designated for sanctions) and December 29, 2015 (when the account was closed); (2) that the government is unable to obtain from the Bank's correspondent banks in the United States; and (3) that are directly related to the Bank's U.S. correspondent account (as opposed to unrelated customer banking records).

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.

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Respectfully submitted,

/s/ Hank B. Walther

Hank B. Walther (DC Bar # 477218)
Mark C. Savignac (DC Bar # 995367)
Daniel D. Benson (DC Bar # 242253)
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
Ph: 202.879.3939
Fx: 202.626.1700
hwalther@jonesday.com

Christopher K. Pelham
Lillian He
Qiang Xue
JONES DAY
4th Floor
27 Zhongshan Dong Yi Road
Shanghai 200002, China
Ph: +86.21.2201.8000
Fx: +86.21.5298.6569
cpelham@jonesday.com

Henry Klehm III
Samidh Guha
JONES DAY
250 Vesey Street
New York, NY 10281-1047
Ph: 212.326.3939
Fx: 212.755.7306
hklehm@jonesday.com

Counsel for [redacted]

CERTIFICATE OF SERVICE

I certify that on January 7, 2019, I caused to be served a copy of the foregoing brief 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.

/s/ Hank B. Walther

Hank B. Walther (DC Bar # 477218)
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
Ph: 202.879.3939
Fx: 202.626.1700
hwalther@jonesday.com