UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D'ARCY QUINN, Plaintiff, v. ALTRIA GROUP, INC. and PHILIP MORRIS INTERNATIONAL INC., Defendants.	Case No. 07 CV 8783 (LTS) (RLE) ECF CASE

MEMORANDUM OF LAW BY CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents more than 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

As the representative of businesses across the United States, including those engaged in international commerce and cross-border investment, the Chamber is uniquely well-suited to address the questions of international comity presented here. Many of the Chamber's members also operate in foreign states that have enacted or considered laws that are inconsistent with some of the substantive laws or procedures of the United States. Such conflicts of laws inherently create an unpredictable legal environment and can even present individual businesses with inconsistent legal obligations. This, in turn, makes it more difficult and expensive for companies to engage in international commerce or pursue cross-border investment opportunities, and discourages investment in the United States. Recognizing that conflicts of law impede commerce, undermine economic growth, and restrict international trade and investment, the governments of the United States and of many other nations have entered into multilateral agreements to reduce legal conflicts by establishing more predictable and uniform cross-border legal processes.

For the same reasons, the Chamber advocates for the development and implementation of uniform and predictable legal rules to reduce the unnecessary transactional costs that are

frequently associated with cross-border legal disputes. In 2007, the Chamber launched the Global Regulatory Cooperation (GRC) Project to reform regulatory activity that distorts markets and impacts trade. The GRC Project aims to promote transparent, predictable and consistent regulations across jurisdictions.

This matter presents an opportunity for this Court to address an issue that is critical to the thousands of U.S. businesses that maintain foreign operations. The extraterritorial application of U.S. discovery requirements can create an unfair dilemma for businesses by requiring them to violate the law of a foreign state. To avoid this dilemma and to advance the sovereign interests of the United States and foreign states, U.S. courts rely upon comity principles and the multilateral Hague Convention to provide litigants with a robust, alternative approach to extraterritorial discovery that is acceptable to a significant number of jurisdictions.

That is the case here: plaintiff seeks U.S. discovery of material in Switzerland despite the criminal sanctions (including imprisonment) that producing such documents without fulfilling the requirements of the Swiss legal processes would impose on the employees of a Swiss affiliate of defendant Philip Morris International, Inc. ("PMI Inc."). At the same time, plaintiff would suffer no material harm if the discovery available under the Hague Convention (which Switzerland has joined) was used instead. The well-established principles of international comity, in tandem with the strong U.S. interest in promoting international cooperation and Switzerland's legitimate sovereign interest in governing private actions undertaken within its own territory, strongly favor applying Hague Convention procedures here.

ARGUMENT

Well-Established Principles Of International Comity Require Use of Hague Convention Procedures For The Documents in Switzerland Sought By Plaintiff.

This case presents the paradigm of when the potential conflict of international judicial processes requires U.S. courts to employ internationally agreed discovery mechanisms to foster the sovereign interests of both the United States and a foreign state. These mechanisms ensure the efficient vindication of rights in U.S. courts, avoid the unfairness of forcing a private litigant with multi-national operations to violate the laws of one or another nation, and appropriately place the onus of resolving conflicting laws on sovereigns (through diplomacy and legislation).

The United States and foreign states share important interests in limiting international conflicts of laws and enhancing international cooperation. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Oct. 7, 1972, 23 U.S.T. 2555, 847 U.N.T.S. 231, *reproduced at* 28 U.S.C. § 1781 note ("Hague Convention"), was entered by the United States and other nations, including Switzerland, to avoid international conflicts of law in discovery matters while satisfying legitimate national interests. International comity and related concepts apply here and require use of the Hague Convention processes because the United States has a strong interest in harmonizing its judicial processes with those abroad; Switzerland has an important sovereign interest in enforcing its system of laws (which permit and facilitate discovery through the Hague Convention processes); PMI Inc. participates in commerce in both the United States and Switzerland, and its ability (and the ability of other companies) to operate across borders could be impeded if employees at its affiliates are required by a U.S. court to violate Swiss law; and the plaintiff will suffer no material harm if the Court authorizes the parties to proceed under the Hague Convention.

International comity is designed to prevent precisely the potential conflict of international judicial processes that granting plaintiff's motion would produce. In assessing whether to apply the Hague Convention's discovery procedures, the Supreme Court in *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987) ("*Aérospatiale*"), required "prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective." *Id.* at 544. Courts in the Second Circuit apply four principal factors derived from the Restatement (Second) of Foreign Relations Law[1] and three additional factors noted in *Aérospatiale*:

- The vital national interests of each of the states;
- The extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person from whom discovery is sought;
- The importance to the litigation of the information and documents requested;
- The good faith of the party resisting discovery;
- The availability of alternative means of securing the requested information;
- The origin of the requested information; and
- The degree of specificity of the discovery request.

Aerospatiale, 482 U.S. at 544 n.28; *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987): *see First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d

[1] The Restatement (Second) provides in full:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction in the light of such factors as (a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Restatement (Second) of Foreign Relations Law § 40 (1965).

Cir. 1998); Restatement (Third) of Foreign Relations Law § 442(1)(c) (1987). The first two factors are considered to be the most important. *Minpeco,* 116 F.R.D. at 522. Applying that analysis, *Aérospatiale* held that Hague Convention procedures are not mandatory in certain instances, such as where the foreign statute did not treat domestic and foreign litigation equally. 482 U.S. at 544-47.

As described in the discussion that follows, the first two factors – the vital national interests at stake and potential hardship facing the parties – are important to businesses with foreign operations because they represent broad and recurring comity considerations. These factors strongly support the use of Hague Convention procedures in cases such as this to avoid harming important national interests and the litigants themselves, and to avoid the unfairness inherent in requiring private parties to shoulder the burden of conflicting legal obligations when they have little capacity to harmonize them. Such conflicts of laws inherently create an unpredictable legal environment and can even present individual businesses with inconsistent legal obligations. This, in turn, makes it more difficult and expensive for companies to engage in international commerce or pursue cross-border investment opportunities, and discourages investment in the United States.

1. The Sovereign Interests Of The United States and Switzerland Support Application Of Hague Convention Procedures.

The first principal comity factor assesses the "vital" or "sovereign" interests of the two states involved. *Minpeco*, 116 F.R.D. at 523; *First Am.*, 154 F.3d at 22; *Aerospatiale* 482 U.S. at 543-44. For both the United States and Switzerland, those interests overwhelmingly support applying Hague Convention procedures here.

a. *The United States Has A Strong Sovereign Interest In Promoting International Cooperation, Including Judicial Coordination, and In Avoiding Conflicts of Law That Impede Commerce.*

The U.S. sovereign interests in this case extend far beyond the interest in the enforcement of the particular laws that plaintiff seeks to enforce, and lie principally in the national interest in promoting international legal cooperation, which includes the production of information in support of judicial processes. The Hague Convention and the doctrine of international comity are elements of a complex system of multilateral legal cooperation that the United States has promoted to advance its own sovereign interests in facilitating cross-border trade, travel, and cooperation. Other examples include U.S. measures to enhance trade and reduce transaction costs by reducing tariffs and other explicit trade barriers (*e.g.*, the General Agreement on Trade and Tariffs and the General Agreement on Trade in Services), harmonizing financial regulations (*e.g.*, the Basel Committee on Banking Supervision) and intellectual property regulations (*e.g.*, the Madrid system for trademarks), and applying well-established principles of customary international law to avoid creating conflicting legal obligations.

As globalization advances, the potential for conflicting judicial processes to harm U.S. commercial and other interests increases, and in reaction the United States has consistently promoted international comity as a means to harmonize international legal systems. As the International Chamber of Commerce has explained:

> This potential for adverse consequences is exacerbated by the fact that markets . . . increasingly are global. Thus, even when an investigation or enforcement action is undertaken by only one jurisdiction, that jurisdiction's actions may generate effects around the world when undertaken within the context of a global market. When multiple jurisdictions become involved, the potential for adverse consequences increases concomitantly.

M. Blechman, *International Comity Considerations on Behalf of the International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD Before The Antitrust Modernization Commission*, 2 (Feb. 15, 2006).[2] The United States has sought to reduce this potential harm by increasing multilateral cooperation in the implementation of U.S. laws.

Antitrust law illustrates the role of international comity and the U.S. commitment to harmonizing international legal processes. The Department of Justice has long recognized that "[s]ubstantive and procedural differences between the U.S. and non-U.S. legal systems can . . . generate frictions between nations," leading the United States "to build formal mechanisms for international cooperation." U.S. Dep't of Justice, *Final Report of the International Competition Policy Advisory Committee to the Attorney General and the Assistant Attorney General for Antitrust*, Annex I-C, at i, iii (Feb. 2000), *available at* http://www.usdoj.gov/atr/icpac/1c.pdf. One prominent example is the Justice Department's anti-cartel amnesty program. The Justice Department has also strongly opposed the efforts of plaintiffs to apply the Sherman Act in a baldly extraterritorial manner, in order to avoid harming the government's global antitrust enforcement efforts or damaging the nation's foreign relations with other countries. *See* Br. of United States at *8, *Empagran, S.A. v. F. Hoffman-Laroche, Ltd.*, No. 01-7115, 2005 WL 388672 (D.C. Cir. Feb. 16, 2005) (extending prescriptive jurisdiction of antitrust laws to foreign states where only foreign harm is alleged would amount to "'legal imperialism'" that would undermine efforts at international cooperation). For the United States, this harmonization of legal processes is an important aspect of international comity. *See, e.g.,* R. Hewitt Pate, Assistant Attorney General, Remarks before the American Bar Association Section of Antitrust Law Spring Meeting, Washington, D.C. 7 (Apr. 2, 2004), *available at* http://www.usdoj.gov/atr/

[2] *Available at* http://www.iccwbo.org/uploadedFiles/ICC/policy/competition/Statements/ICC_BIAC_Comments_Intl%20ComityAMC.pdf.

public/speeches/203088.pdf ("it is unfortunate that considerations of international comity and deference did not, in the [European] Commission's judgment, carry sufficient weight to avoid the significant divergence [in antitrust law] that has now occurred").

The United States' entry into the Hague Convention Treaty was one of the critical steps the U.S. has taken to reduce international conflicts of law. U.S. discovery differs considerably from the procedures that most, if not all, foreign states employ and indeed conflicts with the prevailing norms in civil law countries, where discovery is more commonly directed by the state. The prospect of U.S. discovery is a harrowing one for most foreigners and provides a significant disincentive to doing business in this country, and that disincentive increases to the extent compliance with U.S. procedures would incur liability under foreign law. By joining the Hague Convention, the United States recognized that foreign sovereigns have a strong and legitimate interest in enforcing their system of laws and that the United States has a strong interest in reconciling and accommodating those differences. *See F. Hoffman La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004) ("[A]ccount[ing for] the legitimate sovereign interests of other nations . . . . helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.").

The Convention provides a mechanism for resolving conflicts by providing an internationally agreed, alternative procedure for conducting discovery and satisfying the legitimate interest of litigants in U.S. courts. Use of the Hague Convention by U.S. courts thus implements and extends U.S. interests, including U.S. judicial interests and powers, rather than sacrifices or abdicates them. Contrary to the implications of plaintiff's claims in this case, Pl. Br. at 14-16, the Hague Convention does not displace the Court's authority to supervise discovery. Nor does it frustrate the litigants' right to obtain discovery. Far from it: the Hague Convention

explicitly recognizes the importance of civil discovery and "prescribes certain procedures by which a judicial authority in one contracting state may request evidence located in another contracting state." *Aérospatiale*, 482 U.S. at 524 (citation omitted). "[T]he exercise of comity is not the abdication of jurisdiction; rather, it is the exercise of jurisdiction with an accompanying understanding of the impact that the exercise of jurisdiction may have on the law enforcement activities of other countries." Blechman, *supra*, at 2. In short, the United States has embraced the Hague Convention as a means of addressing cross-border discovery issues while giving due respect to the sovereign interests of foreign states, including the U.S. interests in facilitating its own judicial processes. *See Aérospatiale*, 482 U.S. at 544-45.

b. *The Government Of Switzerland Also Has An Important Sovereign Interest In Having Hague Convention Procedures Applied To Facilitate Discovery In A Manner Consistent With Its Judicial Processes.*

Foreign sovereigns have a legitimate and powerful interest in enforcing their own laws within their territories, and the United States has a related interest in facilitating cooperation when parties seek to apply U.S. law extraterritorially. Consistent with Switzerland's history of independence and neutrality, Switzerland's laws protect its tradition of judicial sovereignty against extraterritorial exercises of jurisdiction by foreign courts. In addition, as in many civil law countries, Switzerland ensures that government authorities "have the sovereign and exclusive right to take compulsory measures against persons." Br. of Switzerland as *Amicus Curiae*, at 1-2, 13-15, *United States v. UBS AG*, No. 09-20423 (S.D. Fla. Apr. 30, 2009) ("Switzerland Brief"). This central Swiss interest in protecting its territorial and judicial sovereignty through measures such as Penal Article 271, at issue in this case, weighs heavily in favor of applying Hague Convention procedures here.

Article 271 is a substantive law of great importance to Switzerland and relates to the government's role in overseeing, rather than impeding, the provision of information. That law "ma[kes] it a crime for any person to take evidence on Swiss territory for use by foreign governments without prior authorization of the appropriate authorities." *Switzerland Brief* at 2. It "reflect[s] a national political tradition that places great value on the sovereign independence of the nation and the individual autonomy of its citizens." *Id.* at 4. Contrary to plaintiff's assertion, Pl. Br. at 16, Article 271 is not a blocking or secrecy statute, and it certainly is not designed to impede foreign proceedings. As the Swiss government recently explained to a U.S. federal court, "Swiss judicial sovereignty and the laws that protect it are not designed to frustrate legitimate foreign government investigations [and] Switzerland has been innovative and proactive in adopting laws and policies to facilitate cooperation with foreign investigations." *Switzerland Brief* at 4 (footnote omitted). The Swiss law merely serves to place foreign litigants (and their discovery demands) on the same footing as Switzerland's own citizens. *Cf. Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1282-83 (7th Cir. 1990) (Romanian law respected where it applied same standards to domestic and foreign litigants). The Government of Switzerland's intervention in a U.S. District Court proceeding to defend its discovery laws underscores the importance of this issue to Switzerland.

This law's reflection of Switzerland's sovereignty and the legitimacy of Swiss efforts to enforce it have been affirmed by numerous U.S. courts, including the Supreme Court and at least two courts in this district. *See Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 205-12 (1958) (Article 271 governed a party's ability to satisfy U.S. discovery); *Motorola Credit Corp. v. Uzan*, No. 02-666, 2003 WL 203011 (S.D.N.Y. Jan. 29, 2003) (applying Hague Convention to request for Swiss documents based on

Article 271); *Minpeco*, 116 F.R.D. at 529-30 (denying motion to compel discovery of Swiss documents, and authorizing use of Hague Convention); *In re Union Bank of Switzerland*, 158 Misc. 2d 222 (N.Y. Sup. Ct. 1993) (denying discovery of Swiss documents on comity principles); *see also*, *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1226-31 (Fed. Cir. 1996) (Article 273 – a related law – legitimately constrained discovery, citing *Rogers* for the proposition that "'[f]ear of criminal prosecution constitutes a weighty excuse for nonproduction.'"); *but see* Pl. Br. at 16 (citing *Calixto v. Watson Bowman Acme Corp.*, No. 07-6077, 2008 WL 4487679 (S.D. Fla. Sept. 29, 2008) and *In re Aspartame Antitrust Litig.*, No. 06-1732, 2008 WL 2275531 (E.D. Pa. May 13, 2008)). As confirmed by Switzerland's interest reflected in court filings, Switzerland's "sovereign interest expressed by a foreign state," *Aerospatiale*, 482 U.S. at 546, strongly favors respecting the law's prohibition on unregulated foreign judicial acts on Swiss soil and instead applying the Hague Convention's well-established discovery mechanism that accords with Swiss processes.

c. *U.S. Courts Recognize The Need To Advance The Sovereign Interests and Avoid The Conflict of Law Implicated By Plaintiff's Motion.*

Courts of the United States have long recognized the legitimate authority of foreign sovereigns to act within their respective territories and to enforce their own system of laws. International comity is one of the principal doctrines calling for courts to accord due respect to the legitimate acts of sovereigns in their own territory. *See also infra* pp. 14-16. "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Aérospatiale*, 482 U.S. at 543 n.27. International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the

protection of its laws." *Hilton v. Guyot,* 159 U.S. 113, 164 (1895). The "principles upon which international comity is based [include] the proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency." *Royal & Sun Alliance Ins. Co. of Can. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006). "Whatever its precise contours, international comity is clearly concerned with maintaining amicable working relationships between nations, a 'shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.'" *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005); *see also Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971) (comity is "more than mere courtesy and accommodation," and represents "a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws").

The extraterritorial application of American discovery requirements presents one of the core conflicts of law that comity addresses. Party-directed discovery procedures that are well established at common law contrast with the state-directed process familiar in civil law countries. This fundamental conflict between the two systems requires courts to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position," because "[j]udicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests." *Aerospatiale*, 482 U.S. at 546. Thus, "[w]hen it is necessary to seek evidence abroad, . . . the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses." *Id.*; *cf. Rogers*, 357 U.S. at 211 ("It is hardly debatable that fear of

criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.").

In *Aerospatiale*, the Supreme Court held that the principles of international comity may, in particular instances, weigh against employing the Hague Convention, but those considerations do not apply here. In that case, the Court addressed a French law that, in sharp contrast to the Swiss law at issue here which facilitates discovery and extends domestic protections to foreign litigants, purported to prohibit all discovery by foreign parties. *Aerospatiale*, 486 U.S. at 526 n.6. Laws such as the French measure – enacted specifically to target or disfavor *foreign* discovery or otherwise impede foreign litigation – are an affront to principles of international comity and cannot be given effect to "deprive an American court of the power to order a party subject to its jurisdiction to produce evidence." *Id.* at 544 n.29. *Aerospatiale* held that courts must apply the particularized analysis of international comity to determine whether a particular foreign law accorded with the Hague Convention's design, requiring "prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective." *Id.* at 544. "American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." *Id.* at 546. As shown above, pp. 9-11, the operation and intended effect of the Swiss law at issue clearly accords with and advances the Hague Convention's purposes and the interests that led the U.S. to adopt it.

Judicial respect for considerations of comity have, if anything, only increased in the past several decades. For instance, the Supreme Court has employed comity considerations to reject an interpretation of domestic law that would have reached certain foreign acts, "thereby help[ing]

the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffman La Roche Ltd.*, 542 U.S. at 164-65. Applying American laws to foreign states without due regard for the legitimate sovereign interests of those states would amount to an act of "legal imperialism." *Id.* at 169; *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (rule of construction derived from the principle of "prescriptive comity"). Moreover, courts are particularly expected to accord due respect to foreign laws that, unlike the blocking statutes at issue in cases like *Aerospatiale* but like the Swiss law at issue here, simply seek to treat domestic and foreign litigation equally. *See Reinsurance Co. of Am.*, 902 F.2d at 1282-83.

2. Failing To Apply Hague Convention Procedures Would Create A Substantial Hardship.

The second principal comity factor addresses the hardship that would be imposed on the party subject to discovery. *Minpeco*, 116 F.R.D. at 523; *First Am.*, 154 F.3d at 22. Here, requiring the employees of an affiliate of one of the defendants to violate Swiss criminal law would create an intolerable hardship. Conforming to U.S. discovery procedures would violate Swiss law, which in turn could subject these employees to substantial penalties – even imprisonment. As in most civil law countries, discovery in Switzerland is a state-directed process, and Article 271 makes it unlawful to engage in discovery that does not conform to local law. Article 271 is a criminal statute, and the Government of Switzerland prosecutes those who violate that law. *Switzerland Brief*, at 13-15 (Switzerland has successfully prosecuted numerous defendants for violating Article 271).

A range of U.S. legal doctrines, including international comity, demonstrate that courts should not require private entities to violate foreign law, or place them in a dilemma where they must violate either U.S. or foreign law. Such compelled jeopardy would fail elementary notions

of fairness and fail to accord due respect to the acts of foreign sovereigns. Thus, courts "recognize[] that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's." *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 551 (E.D.N.Y. 2008).

Concerns about fairness and respect for foreign sovereigns are also reflected in broader principles intertwined with comity, such as the foreign sovereign compulsion doctrine and the act of state doctrine, that counsel against the extraterritorial application of U.S. laws. For instance, the foreign state compulsion defense requires courts to afford relief to parties caught between the contradictory legal obligations of two or more states. As described by the Restatement (Third) of Foreign Relations Law, through its courts, "a state may not require a person . . . to do an act in another state that is prohibited by the law of that state." Restatement (Third) of Foreign Relations Law § 441(1). Where "the conduct of the [defendants] has been compelled by the foreign government they are entitled to assert the defense of foreign government compulsion and the act of state doctrine is applicable." *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987); *see also, Shen v. Japan Airlines*, 918 F. Supp. 686, 691 (S.D.N.Y.) ("A party may assert the act of state doctrine where its conduct has been compelled by a foreign government."), *aff'd*, 43 F.3d 1459 (2d Cir. 1994). In short, "[w]ere compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business." *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970). Indeed, the D.C. Circuit has observed that "it causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question." *In re Sealed Case*, 825

F.2d 494, 498 (D.C. Cir. 1987) (per curiam); *cf. In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544 (S.D.N.Y. 2002).

For related reasons, the act of state doctrine prohibits courts from "inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401 (1964); *see also W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l,* 493 U.S. 400, 405 (1990) ("In every case in which [the Supreme Court has] held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."); Restatement (Third) of Foreign Relations Law § 443(1) (courts should not invalidate the "acts of a governmental character done by a foreign state within its own territory and applicable there"). The interests manifested in this doctrine – respect for legitimate acts of foreign sovereigns, a broader concern with international cooperation and the appropriate role of the judiciary in foreign relations, and ensuring that litigants are not subjected to conflicting requirements – are intertwined with the doctrines of comity and foreign compulsion.

All three of these doctrines – international comity, act of state, and foreign state compulsion – require judicial deference to legitimate acts of foreign sovereigns, especially to avoid the extraterritorial application of domestic law where it would conflict with important foreign interests and potentially interfere with the coordination of U.S. and foreign policies. All three, in other words, strongly support using the Hague Convention processes here rather than subjecting Swiss-based employees of an affiliate of one of the defendants to the significant hardship resulting from the impossibility of complying with both U.S. and Swiss law.

Accordingly, the longstanding principles of international comity weigh heavily against ordering private parties to risk criminal liability in a foreign state when there is a well-established alternative mechanism that ensures discovery through fully lawful means. As a result, sovereigns appropriately shoulder the burden of resolving conflicting legal requirements, and that burden does not fall on private entities who have little capacity to harmonize them. And, this harmonization of legal procedures reduces the impediments to cross-border commercial operations and the costs and risks of investing in the United States.

CONCLUSION

For the foregoing reasons, the Court should apply the Hague Convention's discovery process to the documents sought by plaintiff.

Dated: October 16, 2009

Respectfully submitted,

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