UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE TAX LIABILITIES OF:

JOHN DOES, United States taxpayers, who at any time during the years ended December 31, 2002 through December 31, 2011, directly or indirectly had interests in or signature or other authority (including authority to withdraw funds; trade or give instructions or receive account statements, confirmations, or other information, advice or solicitations) with respect to any financial accounts maintained at, monitored by, or managed through Wegelin & Co. and financial accounts maintained at, monitored by, or managed through other Swiss financial institutions that Wegelin & Co. permitted to transact client business through its United States correspondent account at UBS AG.

Case No._____

ECF Case

MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' *EX PARTE* PETITION FOR LEAVE TO SERVE JOHN DOE SUMMONS

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The United States of America, by and through its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this memorandum in support of its *ex parte* petition for leave to serve John Doe summons (the "Petition").

PRELIMINARY STATEMENT

The United States Internal Revenue Service (the "IRS") has long been concerned with United States taxpayers who evade their United States tax obligations by concealing unreported taxable income in accounts in offshore tax havens or jurisdictions that provide for financial secrecy. One of the countries most widely known to permit such banking services is Switzerland. Wegelin & Co. ("Wegelin"), the oldest bank in Switzerland, serviced U.S. taxpayer clients through a correspondent account it held at UBS AG ("UBS") (the "UBS Correspondent Account"), that allowed it to access the U.S. banking system. In 2012, Wegelin was indicted in the Southern District of New York for hiding the accounts of U.S. taxpayer clients and managing the assets held in such accounts in a manner that allowed those clients to conceal the existence of their Wegelin accounts from the IRS. *See United States v. Wegelin & Co.*, S1 12 Cr. 02, Indictment, Docket No. 6 (S.D.N.Y. Feb. 2, 2012) (the "Indictment"), attached as Exhibit A to the Declaration of Revenue Agent Cheryl R. Kiger (the "Kiger Dec."). On January 3, 2013, Wegelin appeared before the Honorable Judge Jed S. Rakoff of the United States District Court for the Southern District of New York and plead guilty to Count 1 of the Indictment, which charged Wegelin with conspiracy to defraud the Internal Revenue Service ("IRS"), file false federal income tax returns, and evade federal income taxes. *See United States v. Wegelin & Co.*, S1 12 Cr. 02, Transcript of Guilty Plea Proceedings on January 3, 2013, (the "Transcript"), Docket No. 11, attached as Exhibit D to Kiger Dec. Wegelin also admitted that its conduct resulted in a loss to the IRS in the amount of $20,000,001, agreed to pay restitution in that amount to the IRS and not to appeal the imposition of a fine of up to $40,000,002, and consented

to the civil forfeiture of $32 million. *See* Guilty Plea Agreement Between the United States and Wegelin, dated December 3, 2012, (the "Plea Agreement"), attached as Exhibit C to the Kiger Decl.

The United States brings this *ex parte* proceeding under Sections 7609(f) and (h) of the Internal Revenue Code, 26 U.S.C. § 7609, for leave to serve an Internal Revenue Service "John Doe" summons upon UBS. The John Doe summons (the "Summons") seeks records of Wegelin's United States correspondent account at UBS. This information will allow the United States to determine the identity of the U.S. taxpayers who directly or indirectly hold or held interests in financial accounts at Wegelin and the other Swiss financial institutions that Wegelin permitted to use its UBS Correspondent Account (the "Other Swiss Banks"). The issuance of the Summons is warranted here because (i) the Summons relates to an ascertainable group or class of persons comprised of U.S taxpayer-clients of Wegelin and the Other Swiss Banks; (ii) there is a reasonable basis for believing these U.S. taxpayers failed to comply with internal revenue laws; and (iii) information sufficient to establish these U.S. taxpayers' identities is not readily available to the IRS from other sources.

BACKGROUND

I. U.S. Tax Laws Require the Disclosure of Foreign Financial Accounts and Payment of Applicable U.S. Taxes

U.S taxpayers with gross income in excess of a minimum threshold amount in any one calendar year are required to file a U.S. individual Income Tax Return, IRS Form 1040, with the IRS that reports the taxpayer's income from all sources worldwide. *See* Kiger Dec. ¶ 31. In addition, U.S. taxpayers who directly or indirectly had a financial interest in, or signature authority over, any foreign financial account, are required to disclose the existence of that

account and the country in which that account was located on their IRS Form 1040. *See id.* Moreover, U.S. taxpayers who had a financial interest in, or signature or other authority over, a foreign bank account with an aggregate value of $10,000 or more at any time during a particular calendar year are required to file a Report of Foreign Bank and Financial Accounts Form TD F 90-22.1 ("FBAR") with the Department of the Treasury. *Id.* ¶ 32. In general, the FBAR requires that the U.S. taxpayer filing the form identify the financial institution that held the foreign account, the type of the account (either bank, securities, or other), the account number, and the maximum value of the account during the calendar year at issue. Foreign bank accounts that are not reported to the IRS are known as undisclosed offshore accounts.

II. Offshore Private Banking Practices and the Use of Correspondent Accounts

Offshore private banking operations are private banking services used by U.S. taxpayers that enable those taxpayers to benefit from banking services in foreign jurisdictions. Typically, to open an account in a private bank, prospective clients must deposit as much as $1 million in the private bank. Kiger Decl. ¶ 6. In return for this deposit, the private bank assigns a "private banker" or "client advisor" to act as a liaison between the client and the bank, and to facilitate the client's use of a wide range of the bank's financial services and products, which can span the globe. *Id.* This allows the clients to benefit from banking services in carefully selected offshore jurisdictions, such as Switzerland, that are tax havens and/or have strong financial privacy laws. *Id.* Private banks routinely make use of shell corporations, often referred to as private investment corporations ("PICs") for their clients. *Id.* ¶ 7. PICs are usually incorporated in a foreign tax haven or country with strong financial privacy laws that restrict disclosure of the identity of a PIC's beneficial owner. *Id.* Private banks then open accounts in the name of the PIC, allowing the PIC's owner to avoid identification as the account holder. *Id.*

Correspondent banking, in turn, is the provision of banking services by one bank to another bank, which allows banks to conduct business and provide services for their customers in countries where the banks have no physical presence. *Id.* ¶ 8. Accordingly, banks that are licensed in a foreign country and have no office in the United States can provide services in the United States to its customers by opening a correspondent account with an existing U.S. bank. *Id.* Correspondent accounts can also serve as a means of moving funds from the United States into the foreign respondent bank. Foreign banks with existing correspondent accounts may allow other foreign banks to use those accounts, allowing multiple foreign banks to gain access to U.S. dollar accounts, U.S. wire transfer systems, and other financial services available in the United States through a single correspondent account. *Id.* ¶ 13. Correspondent accounts through which foreign banks other than the account holder gain access to the U.S. market are known as "nested" correspondent accounts. *Id.*

III. Wegelin and its Management of Undeclared Offshore Accounts for U.S. Taxpayers

A. Wegelin's UBS Correspondent Account

Wegelin is a private bank whose offices are located exclusively in Switzerland. Nevertheless, Wegelin provides private banking, asset management and other services to individuals and entities around the world, including U.S. taxpayers. From December 31, 2002, through December 31, 2011 (the "relevant time period"), Wegelin accessed the U.S. financial market through a correspondent bank account, Account No. 101-WA-358967-000, held at UBS in Stamford, Connecticut. *Id.* ¶ 20. UBS, in turn, maintains its headquarters in the Southern District of New York.[1] *Id.* Through the UBS Correspondent Account, Wegelin could wire funds

[1] Under 26 U.S.C. § 7609(h)(1), jurisdiction for an action seeking court authorization for the issuance of a "John Doe" summons lies in the district in which the person or entity to be summoned "resides or is to be found." A corporation "resides" or "is found" in any district in

from Switzerland to UBS in Stamford, Connecticut, as well as from Stamford, Connecticut, to Switzerland or other accounts overseas. *Id.* ¶ 21. Wegelin also had the ability to issue US currency checks drawn on the UBS Correspondent Account. *Id.* Wegelin used the UBS Correspondent Account to provide offshore banking services to dozens of U.S. taxpayers, who the IRS believes may have failed to report the existence of their Swiss bank accounts to the IRS and the Department of the Treasury. *Id.* ¶¶ 24-25.

In addition, Wegelin offered nested correspondent services to Other Swiss Banks that also held undeclared accounts for U.S. taxpayer-clients. *Id*. The Other Swiss Banks were able to have Wegelin issue checks drawn on the UBS Correspondent Account on their behalf. Indeed, one of the Other Swiss Banks used its nested relationship with Wegelin despite the fact that it maintained its own correspondent account with UBS in the United States, through which it could have conducted wire transactions directly. *Id*. ¶ 22.

B. Wegelin Helped U.S. Taxpayers Avoid Disclosing Their Foreign Accounts

During its guilty plea hearing, Wegelin admitted that it had conspired with U.S. taxpayers to help them avoid paying their U.S. obligations. *See* Transcript at 15:2-17:2. Specifically, Wegelin admitted that:

> [f]rom about 2002 through about 2010, Wegelin agreed with certain U.S. taxpayers to evade the U.S. tax obligations of these U.S. taxpayer clients, who filed false tax returns with the IRS. In furtherance of its agreement to assist U.S. taxpayers to commit tax evasion in the United States, Wegelin opened and maintained accounts at Wegelin in Switzerland for U.S. taxpayers who did not complete W-9 tax disclosure forms. …

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which it maintains a physical presence. *See Mensh v. United States*, 2009 WL 2242295, at *2, No. Civ. A. 08-4162 (E.D.N.Y. Jul. 27, 2009) (the jurisdictional requirements under Section 7609(h)(1) are satisfied if a corporation has "a physical presence, such as a branch office, within the district").

> At all relevant times, Wegelin knew that certain U.S. taxpayers were maintaining non-W-9 accounts at Wegelin in order to evade their U.S. tax obligations in violation of U.S. law, and Wegelin knew of the high probability that other U.S. taxpayers who held non-W-9 accounts at Wegelin also did so for the same unlawful purpose. …
>
> Wegelin admits that its agreement to assist the U.S. taxpayers in evading their U.S. tax obligations in this matter resulted in a loss to the Internal Revenue Service that was $20,000,001.

Id. at 15:15-17:2; *see also* Plea Agreement.

Wegelin's admissions are supported by IRS Agent Kiger's experience that U.S. taxpayers who hold undisclosed foreign accounts often do so in order to conceal their income from the IRS. *Id.* ¶ 33. Indeed, there is a direct correlation between unreported income and the lack of visibility of that income to the IRS. *Id.* ¶ 34. For example, when a third-party payer of income to a taxpayer does not report the taxpayer's income to the IRS, the taxpayer-recipient of that income is far less likely to report the income herself. *Id.* Accordingly, the fact that the John Doe taxpayers chose to hold undeclared accounts with Wegelin and the Other Swiss Banks provides a reasonable basis to believe that they have failed to comply with internal revenue laws. *Id.* The information obtained by the IRS in its investigation to date, moreover, suggests that the U.S. taxpayer-clients of Wegelin and the Other Swiss Banks have not disclosed the existence of their Wegelin accounts, nor reported the income earned on those accounts, to the IRS, relying instead on the lack of third party reporting of their Swiss assets to prevent the IRS from detecting those accounts. *Id.* ¶ 35.

In January 2001, Wegelin entered into a Qualified Intermediary Agreement with the IRS which required Wegelin to verify the identity and citizenship of its customers through the execution of IRS Form W-8BEN, the IRS Certificate of Foreign Status of Beneficial owner for

United States Tax Withholding, IRS Form W-9, and a Request for Taxpayer Identification Number and Certification. *Id.* ¶ 36. Wegelin was also required to withhold and transfer to the IRS taxes on certain transactions from accounts beneficially owned by U.S. taxpayers. *Id.* Of Wegelin's U.S. taxpayer clients, however, the IRS knows of only one who recalls being asked by Wegelin if he wished to fill out a Form W-9. *Id.* ¶ 37. When that taxpayer declined, Wegelin assured him that it would not disclose the taxpayer's identity or account information to the IRS. *Id.* In another instance, when a U.S. taxpayer provided Wegelin with both a W-9 declaring the account and another form that falsely stated that a sham corporation was the beneficial owner of the account, Wegelin opened an undeclared account on the basis of the false form rather than a disclosed account on the basis of the W-9. *Id.* In a third example, Wegelin permitted a U.S. taxpayer-client who held two declared Wegelin accounts to also open a third, undeclared account in the name of a sham Panamanian entity. *Id.*

On February 2, 2012, Wegelin and three of its employees were indicted by a grand jury sitting in the Southern District of New York on charges of having conspired to defraud the United States by concealing from the IRS undeclared Wegelin accounts owned by U.S. taxpayers. *See* Indictment.[2] That same day the United States filed a verified civil forfeiture complaint against the funds deposited in the UBS Correspondent Account. *See United States v. Funds on Deposit at UBS AG, Account No. 101-WA-358967-000, Held in the Name of Wegelin*

[2] A grand jury indictment contains more than mere allegations and instead "conclusively determines the existence of probable cause" that the defendants have committed the crimes of which they are accused. *See United States v. Contreras*, 776 F.2d 51, 54 (3d Cir. 1985).

& Co, No. 12-CV-0836 (LTS), Complaint (the "Verified Complaint" or "Compl."), attached as Exhibit B to the Kiger Dec.[3]

In 2008 and 2009, UBS and another large Swiss bank stopped servicing undeclared accounts for U.S. taxpayers in the wake of widespread news reports that the IRS was investigating UBS for helping U.S. taxpayers evade taxes and hide assets in Swiss bank accounts. Compl. ¶ 24; Kiger Dec. ¶ 9. Seeing an opportunity for additional revenue, Wegelin deliberately began recruiting UBS's former U.S. taxpayer clients for its own, highly-priced private offshore banking services. *Id.* Wegelin apparently operated under the belief that, given its small size as compared to UBS, the IRS would decline to investigate Wegelin's private banking practices. *Id.*; *see also* Plea Agreement Exhibit A at 2 ("Wegelin believed that, as a practical matter, it would not be prosecuted in the United States for this conduct because it had no branches or offices in the United States"); Transcript at 16:10-13 (same). As a result of Wegelin's recruitment efforts, its holdings of U.S. taxpayer assets grew exponentially in 2008 and 2009, and as of 2010 the total value of undeclared accounts held by U.S. taxpayers at Wegelin was at least $1.2 billion. Compl. ¶ 24; Kiger Dec. ¶ 16; *see also* Plea Agreement Exhibit A at 2; Transcript at 16:20-23.

As part of its efforts to recruit U.S. taxpayer-clients who were now fleeing UBS for fear of disclosure of their offshore accounts, Wegelin told potential clients that their undeclared accounts at Wegelin would not be disclosed to U.S. authorities because Wegelin had a long

[3] The Complaint was verified by IRS Special Agent Carolyn R. Working based on her "personal involvement in the investigation and conversations with and documents prepared by law enforcement officers and others." Complaint at 54. Accordingly, the Complaint "is to be treated as an affidavit." *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995); *see also Hedges v. Obama*, No. Civ. A. 12-331 (KBF), 2012 WL 1721124, at *6 (S.D.N.Y. May 16, 2012) ("procedurally the factual statements relating to a plaintiff in a 'verified' complaint may be taken as having the weight of a declaration or other statement under penalty of perjury").

tradition of bank secrecy and, unlike UBS, did not have offices outside Switzerland. Compl. ¶ 24; Kiger Dec. ¶ 15. Wegelin then helped certain U.S. taxpayer-clients and the Other Swiss Banks repatriate undeclared funds to the United States by issuing checks drawn on, and executing wire transfers through, its UBS Correspondent Account. Compl. ¶ 24; Kiger Dec. ¶ 21.

According to the Verified Complaint and Indictment, Wegelin and certain of its employees advised and assisted U.S taxpayer-clients in concealing their Swiss accounts from the IRS by:

a. Opening and servicing undeclared accounts for U.S. taxpayers – sometimes in the name of sham corporations and foundations established under foreign laws.

b. Knowingly accepting bank documents falsely declaring that these sham corporations beneficially owned accounts that were, in fact, owned by U.S. taxpayers.

c. Opening undeclared accounts for U.S. taxpayers using code names and numbers so that the U.S. taxpayers' names would appear on as few documents as possible in the event that the documents fell into the hands of third parties.

d. Ensuring that account statements and related documents were not mailed to their U.S. taxpayer-clients in the United States.

e. Communicating with U.S. taxpayer-clients using their personal, rather than Wegelin, email accounts and advising their U.S. taxpayer clients to travel to Switzerland to conduct business relating to their undeclared accounts rather than doing so over the phone or by email to reduce the risk of detection by U.S. law enforcement authorities.

f. Issuing checks drawn on, and executing wire transfers through, the UBS Correspondent Account, sometimes in batches of under $10,000 each to minimize the risk of detection by the IRS.

g. Concealing the nature of its transactions on behalf of U.S. taxpayer-clients' undeclared accounts by commingling funds transferred to or from those undeclared accounts with millions of dollars of additional funds that Wegelin moved through the UBS Correspondent Account.

Compl. ¶ 25; Indictment ¶ 142; Kiger Dec. ¶ 16.

Wegelin and other Swiss banks also solicited new business from U.S. taxpayers wishing to open undeclared accounts in Switzerland through the website "SwissPrivateBank.com," which advertised its services by stating that "Swiss banking laws are very strict and it is illegal for a banker to reveal the personal details of an account number unless ordered to do so by a judge" and noting that "Swiss banking secrecy is not lifted for tax evasion." Compl. ¶ 26; Indictment ¶ 17. According to the Indictment, Wegelin through this website obtained new undeclared accounts holding millions of dollars that were owned by U.S. taxpayers. *Id.*

C. The IRS's Investigation

The IRS has learned that U.S. taxpayers with accounts at Wegelin and the Other Swiss Banks may have failed to disclose those accounts, and report income earned on them, as required by law. Kiger Dec. ¶ 23. This is also borne out by the experience of the IRS that there is a direct correlation between unreported income and the lack of visibility of that income to the Internal Revenue Service. In other words, taxpayer-recipients of income are far less likely to report that income on their tax returns when they believe that the third-party payer of income to a taxpayer will not report that income to the IRS through such vehicles as Forms W-2 or 1099. *Id.* ¶ 34.

Indeed, based on the IRS's experience, U.S. taxpayers have made use of offshore accounts such as the accounts maintained at Wegelin and the Other Swiss Banks through the UBS Correspondent Account to evade the reporting and payment of income taxes. *See Id.* ¶¶ 3, 23, 32, 34, 41. Wegelin, moreover, has admitted that it knowingly and willfully conspired with U.S. taxpayers to assist them in evading their U.S. tax obligations by opening and maintaining accounts at Wegelin Switzerland for which the U.S. taxpayers did not complete W-9 tax

disclosure forms. Transcript at 15:15-20; 16:16-20; *see also* Plea Agreement Exhibit A. The IRS, therefore, is currently investigating U.S. taxpayers who directly or indirectly hold or held interests in, or have signature or other authority over, undeclared financial accounts at Wegelin and the Other Swiss Banks, and who are or may not be complying with U.S. internal revenue laws requiring the reporting of foreign financial accounts and income earned on those accounts. Kiger Decl. ¶ 23.

Because correspondent accounts by their nature are more susceptible to being used for money laundering, the U.S.A. Patriot Act and related regulations imposed obligations on U.S. financial institutions housing correspondent accounts for foreign banks to implement certain policies, procedures and controls, including conducting a periodic review of the correspondent account activity sufficient to determine consistency with information obtained about the type, purpose and anticipated activity in the account. *Id.* ¶ 26.

To further its pending investigation and the identification of U.S. taxpayers who failed to disclose private offshore accounts, the IRS through the Summons is seeking information that will allow it to identify U.S. taxpayer-clients of Wegelin and the Other Swiss Banks who have not disclosed the existence of their Swiss accounts, nor reported income earned on those accounts. The "John Doe" class, therefore, is described as follows:

> United States taxpayers, who at any time during the years ended December 31, 2002 through December 31, 2011, directly or indirectly had interests in or signature or other authority (including authority to withdraw funds; trade or give instructions or receive account statements, confirmations, or other information, advice or solicitations) with respect to any financial accounts maintained at, monitored by, or managed through [Wegelin] and financial accounts maintained at, monitored by, or managed through other Swiss financial institutions that [Wegelin] permitted to transact client business through its [UBS Correspondent Account].

Summons, attached as Exhibit E to the Kiger Dec., at 1. As discussed below, the Summons and its "John Doe" class are authorized and appropriate under Sections 7609(f) and (h) of the Internal Revenue Code, 26 U.S.C. § 7609.

ARGUMENT

The Summons Meets the Requirements for an IRS "John Doe" Summons

One of the primary functions of the IRS is to review and audit tax returns submitted by U.S. taxpayers to ensure that all applicable taxes have been paid. Accordingly, Section 7601 of the Internal Revenue Code requires the Secretary of the Treasury to "cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax." 26 U.S.C. § 7601. To aid the IRS in carrying out this function, Section 7602 authorizes the Secretary to summons records and testimony that may be relevant or material to an investigation. *Id.* § 7602. Specifically, Section 7602, from which the IRS derives its principal information-gathering powers, authorizes the IRS:

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, [or] determining the liability of any person for any internal revenue tax . . . [t]o summon . . . any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . ., or any other person the Secretary may deem proper, to appear . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry.

Id.

In passing Section 7602, Congress intended "to provide the Secretary with broad latitude to adopt enforcement techniques helpful in the performance of his tax collection and assessment responsibilities." *United States v. Euge*, 444 U.S. 707, 715 N.9 (1980). Indeed, the Supreme

Court has noted that section 7602 forms the "centerpiece" of the IRS's "expansive information-gathering authority." *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984). Because "the summons power of the IRS under the Code is quite broad, … courts are constrained to exercise caution before circumscribing the summons authority." *PAA Mgmt., Ltd. v. United States*, 962 F.2d 212, 216 (2d Cir. 1992); *see also Arthur Young*, 465 U.S. at 816 ("the very language of § 7602 reflects … a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry. In light of this explicit statement by the Legislative Branch, courts should be chary in recognizing exceptions to the broad summons authority of the IRS.")

The IRS's authority to issue "John Doe" summonses to banks or other depositories to discover the identy of individuals who may have failed to disclose all of their income was expressly recognized by the Supreme Court in *United States. v. Bisceglia*, 520 U.S. 141 (1975), and later codified in Section 7609(f), which provides:

> Any summons . . . which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that –
>
> > (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,
> >
> > (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and
> >
> > (3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

26 U.S.C. §7609(f). The Court's determination as to whether the IRS has met the requirements under Section 7609(f) for the issuance of a "John Doe" summons "shall be made *ex parte* and shall be made solely on the petition and supporting affidavits." 26 U.S.C. § 7609(h)(2).

Here, the Court should authorize the issuance of the Summons because all three statutory prerequisites have been met. First, the Summons relates to the investigation of an ascertainable group or class of persons, namely U.S. taxpayers who hold an ownership interest in accounts at Wegelin or the Other Swiss Banks. Second, there is a reasonable basis for believing that U.S. taxpayers who held an interest in any such account failed to declare the account and/or the income earned on it to the IRS, thereby violating one or more provisions of the internal revenue laws. Third, the information sought is not readily available to the IRS from other sources.

I. The Investigation Concerns an Ascertainable Class

The Summons here clearly relates to an investigation of an ascertainable group of people, which the Summons defines as follows:

> United States taxpayers, who at any time during the years ended December 31, 2002 through December 31, 2011, directly or indirectly had interests in or signature or other authority (including authority to withdraw funds; trade or give instructions or receive account statements, confirmations, or other information, advice or solicitations) with respect to any financial accounts maintained at, monitored by, or managed through [Wegelin] and financial accounts maintained at, monitored by, or managed through other Swiss financial institutions that [Wegelin] permitted to transact client business through its [UBS Correspondent Account].

Summons at 1. In other words, the Summons relates to the IRS's investigation of U.S. taxpayers with accounts at Wegelin and any of the Other Swiss Banks between 2002 and 2011. This is sufficient to establish that the Summons relates to an ascertainable group of persons.

In *In re Tax Liabilities of John Does Who from December 31, 2002 through December 21, 2010 had Interests in Financial Accounts Managed through HSBC India*, the Northern District of California recently held that a substantially similar group or class of individuals was "ascertainable" within the meaning of 26 U.S.C. §7609(f). *See* Order Granting *Ex Parte* Petition for Leave to Serve "John Doe" Summons, Docket No. 10, Case No. 11-CV-1686 (LB) (N.D. Ca. Apr. 7, 2011). In that case, the United States sought court authorization to issue a "John Doe" summons on HSBC Bank USA, N.A. seeking documents establishing the identity of U.S. taxpayers "who at any time during the years ended December 31, 2002 through December 31, 2010, directly or indirectly had interests in or signature or other authority … with respect to any financial accounts maintained at, monitored by, or managed through [HSBC India]." *Id.; see also In re Tax Liabilities of John Does Who from January 1, 2005 through December 31, 2010, Transferred Real Property in the State of California*, 2011 WL 6302284, at *2, Case No. 2:10-mc-00130 (E.D. Cal. Dec. 15, 2011) (holding that IRS investigation related to an ascertainable group of people where the summons "squarely particularize[d] the individuals sought from the general public" by identifying the class as California residents who between 2005 and 2010 were involved in certain real property transfers for little or no consideration); *In re Tax Liabilities of John Does*, 2003 WL 22953182, at * 1, Case No. 03-22793-CIV (S.D. Fla. Oct. 30, 2003) (holding that IRS investigation related to an ascertainable group of people where summons identified class as U.S. taxpayers who between 1997 and 2003 sold credit insurance policies where the policies were reinsured with entities in the Turks and Caicos Islands). Here, similarly, the IRS has established that the investigation underlying the Summons relates to an "ascertainable group or class of persons." 26 U.S.C. §7609(f).

II. There is a Reasonable Basis to Believe that the Unknown Persons May Fail, or May Have Failed to Comply with the Internal Revenue Laws

The IRS has a reasonable basis to believe that the unknown individuals who comprise the group of persons set forth in the Summons failed or may have failed to comply with provisions of the internal revenue laws. When enacting Section 7609(f), Congress did "not intend to impose an undue burden on the [IRS] in connection with obtaining a court authorization to serve this type of summons." H. Rep. No. 940658, 94th Cong., 1st Sess., at 311. Accordingly, to meet the "reasonable basis" prong, the IRS need only show that a transaction has occurred that is "of such a nature as to be reasonably suggestive of the possibility that the correct tax liability with respect to that transaction may not have been reported." *Id.* Courts, therefore, have interpreted this requirement narrowly as intended only "to prevent the Service from exercising its summons power in an arbitrary or quixotic manner." *In re Tax Liabilities of John Does, Members of the Columbus Trade Exchange in the Years 1977 and 1978*, 671 F.2d 977, 980 (6th Cir. 1982).

Here, the IRS has learned that U.S. taxpayers with accounts at Wegelin and the Other Swiss banks may have failed to disclose those accounts, and report income earned on them, as required by law. Kiger Dec. ¶¶ 24, 33. Indeed, Wegelin itself has pled guilty to knowingly and willfully assisting U.S. taxpayers in evading their U.S. tax obligations by opening and maintaining accounts for them. Plea Agreement Exhibit A; Transcript at 15:15-16:1; 17:16-18. The IRS's experience, moreover, demonstrates that there is a direct correlation between unreported income and income that, like funds kept in private offshore accounts such as those serviced by Wegelin and the Other Swiss Banks, lacks visibility to the IRS. Kiger Decl. ¶ 34. Based on the IRS's experience, U.S. taxpayers have made use of offshore accounts such as the

accounts maintained at Wegelin and the Other Swiss Banks through the UBS Correspondent Account specifically to evade the reporting and payment of income taxes. *Id.* ¶¶ 3, 34, 40.

This is particularly true of Wegelin's U.S. taxpayer-clients. Of the 33,000 U.S. taxpayers who revealed their previously undisclosed offshore accounts to the IRS under its 2009 and 2011 Offshore Voluntary Disclosure Programs (the "2009 and 2011 OVDPs"), approximately 246 held accounts at Wegelin. *Id.* ¶ 34; *see also* Compl. ¶ 40. Such a large level of participation by Wegelin accountholders in the 2009 and 2011 OVDPs suggests that a large percentage of U.S. taxpayers' Wegelin accounts remain undisclosed. This is further reflected in the Verified Complaint and Indictment, as well as Wegelin's guilty plea. As noted above, those documents and Wegelin's admissions establish that Wegelin knowingly accepted false documentation from U.S. taxpayer-clients, willingly opened and serviced undeclared accounts for those clients in the name of sham foreign corporations, and implemented client and account management procedures intended to obscure the clients' identities from detection by the IRS. *See* Complaint ¶ 25; Indictment ¶ 16; *see also* Kiger Dec. ¶¶ 37-39; Plea Agreement Exhibit A; Transcript at 15:11-17:2.

Wegelin also solicited business from U.S taxpayers with the express promise that it could keep their identities secret from U.S. authorities because it had no offices in the United States. *See* Compl. ¶ 24; Indictment ¶¶ 14, 17; Kiger Dec. ¶ 38. The Verified Complaint and Indictment further establish that, in 2008 and 2009, Wegelin opened new undeclared accounts for numerous U.S. taxpayers, referred to in the documents as Clients A through KK, who had previously held such accounts at UBS. Compl. ¶¶ 40-91; Indictment ¶¶ 27-137. The Verified Complaint and Kiger Declaration explain that Wegelin used the UBS Correspondent Account to facilitate the concealment of its U.S. taxpayer-clients' undeclared Swiss accounts by, among other things,

routing money to those clients through the UBS Correspondent Account to fictitious corporate entities or third parties and in installments of $8,500 to help avoid detection by the IRS. Compl. ¶¶ 25, 44; Kiger Dec. ¶ 39. Wegelin also allowed the Other Swiss Banks to access its UBS Correspondent Account for similar purposes. *Id.*

This information is sufficient to establish that the IRS has a reasonable basis for investigating the group of unknown persons included in the Summons. *See, e.g., United States v. Pittsburgh Trade Exchange, Inc.*, 644 F.2d 302, 306 (3d Cir. 1981) (IRS agent's testimony that transactions of the type the summonsed party arranged for its clients were "inherently susceptible … to tax error" sufficient to meet "reasonable basis" prong); *United States v. Ritchie*, 15 F. 3d 592, 601 (6th Cir. 1994) (clients' payment for legal services with large amounts of cash provided a reasonable basis to issue a "John Doe" summons). Here, as the Verified Complaint, Kiger Declaration and Wegelin's guilty plea admissions demonstrate, the IRS not only has a suspicion that the John Doe class includes U.S. taxpayers who are not complying with the law; it knows that the class includes such violators. *See* Compl. ¶¶ 40-91; Kiger Dec. ¶¶ 28, 30; Plea Agreement Exhibit A; Transcript at 15:11-17:2.

III. The Information Sought About the "John Doe" Class Is Not Readily Available from Other Sources

Finally, the information the IRS is seeking through the Summons is not readily available to it from any other sources. The identities of individuals is information that is not readily available to the IRS when those identities are known to third parties who "are not required to identify" them to the IRS. *United States v. Liebman*, 742 F.2d 807, 808 (3d Cir. 1984). In *Liebman*, the Third Circuit held that the IRS could not readily access the names of all clients of a law firm who deducted from their taxes legal fees paid in connection with the acquisition of

certain tax shelters from any source other than the law firm itself, including the IRS's own tax records, because "taxpayers who deduct legal fees are not required to identify the recipients." *Id.* Here, the very need for the "John Doe" summons is premised on the fact that U.S. taxpayer-clients of Wegelin and the Other Swiss Banks – although required to do so – failed to disclose the identity of their Swiss bank accounts to the IRS and, therefore, remain unknown to the IRS.

The fact that the IRS was alerted to the existence of a class of persons reasonably likely to be violating internal revenue laws from one source does not establish that the identities of the individuals in that class are readily available to the IRS from that same source, as the Court found in *In re Tax Liabilities of John Does Who Sold Credit Insurance Policies*, 2003 WL 22953182, at *1. In that case, an informant had alerted the IRS "to the existence of a class of persons engaged in transactions as subsidiaries of [American Bankers Insurance Group, Inc. ("ABIG")] that are violative of internal revenue law." *Id.* The court noted, however, that despite having been alerted to the existence of the class the identity of the members of that class was "not readily available through a means other than from [ABIG] itself". *Id.* Here, similarly, although the United States knows that a group of U.S. taxpayer-clients of Wegelin and the Other Swiss Banks who are in violation of internal revenue law exists, the IRS cannot readily establish the identity of the members of that group of individuals from any source other than UBS.

Indeed, courts have routinely recognized that the identities of United States taxpayers whom the IRS reasonably believed were using foreign financial and credit card accounts to avoid complying with the internal revenue laws are not readily available from sources other than the financial institutions involved. For example, on October 30, 2000, the Southern District of Florida in *In re Tax Liabilities of John Does Who During the Years Ended December 31, 1998 and 1999, Had Signatory Authority Over American Express or Master Card Credit, Charge or*

Debit Cards, Case No. 00-cv-3919 (S.D. Fla. Oct. 39, 2000), issued an order authorizing the service of "John Doe" summonses upon American Express and MasterCard International, Inc. In that case, the IRS sought authorization to issue "John Doe" summonses on American Express Travel Related Services Co. ("AmEx") and MasterCard International ("MasterCard") seeking account records establishing the identity of U.S. taxpayers who held an interest in AmEx or MasterCard credit, charge or debit cards issued by or through, or for which payment was received from, banks or other financial institutions in Antigua, Barbuda, the Bahamas or the Cayman Islands. *Id.* The Court held that the identities of the relevant U.S. taxpayers was not "readily available" from any sources other than AmEx and MasterCard, including the issuing offshore banks. *Id. See also In re Tax Liabilities of John Does Who During the Years Ended December 31, 1999 through December 31, 2001, Had Signature Authority Over Visa Cards*, Case No. 02-mc-00049 (N.D. Cal. Mar. 25, 2002) (authorizing service of a "John Doe" summons seeking the identity of U.S. taxpayer who held certain credit card accounts with ties to foreign banks upon Visa International); *In re Tax Liabilities of John Does Who During the Years Ended December 31, 1999 through December 31, 2001, Had Signature Authority Over MasterCard Payment Cards*, Case No. 02-22404 (S.D. Fla. Aug. 20, 2002) (authorizing service of a "John Doe" summons seeking the identity of U.S. taxpayer who held certain credit card accounts with ties to foreign banks upon MasterCard International); *see also In re HSBC India*, Case No. 11-CV-1686 (N.D. Cal. Apr. 7, 2011) (authorizing the issuance of a "John Doe" summons on HSBC India seeking financial account records establishing the identities of U.S. taxpayers with Indian bank accounts).

Moreover in a substantially similar case, the Southern District of Florida authorized the issuance of a "John Doe" summons on UBS that sought the identity of U.S. taxpayers who

maintained undeclared Swiss accounts at Swiss affiliates of UBS. *See In re John Does Who During the Years Ended December 31, 2002 through December 31, 2007, Had Signature or Other Authority With Respect to Financial Accounts Maintained at Any Office in Switzerland of UBS AG*, Case No. 08-21864, (S.D. Fla. July 1, 2008), Docket No. 5. The court in that case agreed with the United States that the relevant records could not be readily sought from the Swiss institutions because the records were not sought in connection with a criminal investigation and the IRS was unable to identify the members of the "John Doe" class. *Id.*; *see also In re UBS AG* Government's Memorandum of Law in Support of *Ex Parte* Petition for Leave to Serve "John Doe" Summons, Docket No. 2, at 13. Here, the IRS also is proceeding outside of the context of a criminal investigation and is unable to identify the members of the "John Doe" class – in fact, the IRS is seeking authorization to issue the Summons precisely to receive information that will allow it to determine the class-members' identities.

Finally, given the indictment returned against Wegelin in the Southern District of New York (to which Wegelin recently pled guilty), the civil asset forfeiture complaint against Wegelin's correspondent bank account, and the indictment of certain of Wegelin's employees with regard to undeclared offshore accounts, it appears that the Criminal Division of the United States Attorney's Office for the Southern District of New York may possess some of the information called for by the Summons, as a result of its production pursuant to a grand jury subpoena. However, by virtue of the secrecy provisions of Federal Rule of Criminal Procedure 6(e) ("Rule 6(e)"), the scope of the grand jury subpoena is secret and any such material is not "readily available" to the IRS without a court order because its production might violate Rule 6(e).. *See, e.g., In re Grand Jury Proceedings (Henry Kluger, Deceased)*, 827 F.2d 868 (2d Cir. 1987). Accordingly, rather than first proceeding in court to attempt to obtain documents

produced to the United States Attorney's Office, the IRS appropriately seeks production of all the relevant records directly from their original custodians through the IRS's own investigatory powers under 26 U.S.C. Section 7609. The information sought by the Summons is therefore not readily available to the IRS from other sources, if at all, without unreasonable burden, expense and delay. *See* 26 U.S.C. §7609(f)(3).

CONCLUSION

For the foregoing reasons, the Government's petition to issue the Summons should be granted.

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Respectfully submitted,

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