UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 09-60210-CR-HURLEY

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HANSRUEDI SCHUMACHER,

Defendant.
_______________________________________/

HANSRUEDI SCHUMACHER'S SENTENCING MEMORANDUM AND RESPONSE TO THE GOVERNMENT'S SENTENCING MEMORANDUM AND MOTION FOR DOWNWARD DEPARTURE FROM THE SENTENCING GUIDELINES UNDER U.S.S.G. § 5K1.1

I. INTRODUCTION

The Department of Justice is recommending that Hansruedi Schumacher be placed on five years of probation and pay a fine of $150,000. See, ECF No. 34. The basis for this request is (1) the extraordinary substantial assistance, including trial testimony, rendered by Mr. Schumacher, (2) the requirement that a sentence not be disparate from similar, if not identical, related cases, and (3) because of the unusual adverse collateral consequences which have been visited upon, and may continue to occur, as a result of his cooperation. The defense respectfully submits that these reasons are well-founded, and the uniqueness of this case and this man should call for the acceptance of the Government's recommendation.

II. BACKGROUND

In the mid-2000's, the United States Senate, then the Treasury Department, and eventually the Department of Justice, demanded that Swiss financial institutions end their generational practice of enabling American taxpayers avoid their tax obligations. The Swiss

government and their financial institutions did not warm to this assault on their domestic sovereignty; it was their national belief that tax compliance was a civil matter and Swiss financial institutions were only beholden to Swiss law. Swiss banks, emboldened by their government, declined to shrug off almost a century of practice and culture; in response, American prosecutors' indicted more than 50 Swiss banks, bankers, lawyers and financial consultants.

These indicted institutions and the indicted men and women, community leaders and their companies, held in the highest esteem in their own country, were now fugitives and putative felons. Most men were terminated from their banking positions, unemployable, and disgraced pariahs. They were not extraditable, as Switzerland does not extradite its citizens for acts it deems non-criminal. These men and women stood in a legal limbo; fired from their jobs and unable to leave their country without being arrested. Many turned to their government with the hope that a diplomatic solution would solve their situation. That help did not arrive.

Before long, the Swiss institutions capitulated; rather than face international financial expulsion, and to regain favor in the global market, the Union Bank of Switzerland ("UBS") paid the United States a $780 million fine, Credit Suisse paid penalties and a fine of $2.6 billion, BSI S.A. agreed to pay a $211 million fine, and Wegelin & Co. paid a $58.7 million fine. While financial institutions could pay to alleviate their burden, the remaining indictments against the individual defendants were not so easily resolved.

One by one, a few of these Swiss bankers and consultants—afraid of the consequences if they surrendered, yet morally responsible enough to resolve their cases—began to surrender, cooperate and accept their punishment. Unfortunately, unlike the corporate institutions they worked for, many were not able to enter into non-prosecution agreements and pay a fine. That

being said, the Department of Justice had the mercy and righteousness to understand that these defendant/employees were not the architects of the Swiss laws and culture which mandated, by law and ethics, that financial institutions provide privilege and confidentiality to a global constituency. The Department of Justice, on a case by case basis, began to fairly evaluate the conduct of these men who chose to surrender and cooperate, and in their cases, made sentencing recommendations which reflected that cooperation, as well as the collateral punishment of shame and disgrace these men encountered in their country for having cooperated with the United States.

So far as we are aware, Mr. Schumacher is the ninth Swiss banker to surrender and cooperate. All but one[1] received either a non-prosecution agreement or probation and a fine. Of those defendants who were charged, the Government will tell this Court that Mr. Schumacher has cooperated more so than any of the preceding Swiss who have been sentenced. Because of this factor, the history and background of this case, and the personal remorse and acceptance of responsibility demonstrated by Mr. Schumacher, the parties have respectfully submitted a joint sentencing recommendation.

III. JOINT SENTENCING RECOMMENDATION

Hansruedi Schumacher is a financial consultant and former banker. He pled guilty to a one count Superseding Information charging him with a conspiracy under 18 U.S.C. § 371, in that he assisted former clients in avoiding their United States tax obligations. See, ECF No. 24. The Pre-Sentence Investigation Report ("PSI") determined Mr. Schumacher's advisory guideline

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[1] The only defendant who received a prison sentence did so based upon the Government's contention, which was accepted by the sentencing judge, that his cooperation had not been truthful and complete. See, United States v. Birkenfeld, infra.

range to be a Criminal History Category 1 and Total Offense Level 25, and a guideline range of 57-71 months. See, PSI at ¶ 78. He has no objections to the PSI prepared by Probation.

The joint recommendation of the parties arises from the consideration of many factors which make this case unique from the mine-run of other tax evasion cases. First, the advisory guideline range includes an abnormally high loss amount which reflects the taxes evaded by American taxpayers who were clients, not by Mr. Schumacher. In other words, Mr. Schumacher did not evade taxes he owed, which is the case in most evasion cases; he is responsible for enabling the evasion by his clients. This unusual aspect of this tax case significantly raised the advisory guideline range, and is a factor the parties considered in reaching their joint recommendation.

Second, Mr. Schumacher's "acceptance of responsibility" did not begin (as is often the case in our criminal justice system) when he was handcuffed and offered a deal. He ceased managing undeclared U.S. accounts the year he was indicted, in 2009, and assisted many of his customers in making voluntary disclosures to the Internal Revenue Service. More significantly, he voluntarily surrendered to face prosecution, although he was not extraditable and could have remained at liberty in Switzerland.

Third, Mr. Schumacher's cooperation was not rendered in a closed interview room with no repercussions. He testified as a Government witness at the trial of his former boss, and in doing so, saw his name in the headlines of every major financial newspaper, and in television broadcasts, as the man who defied his country and his countrymen by renouncing Swiss law and the concept of financial privacy which enabled American tax evasion. The collateral effect of this public renunciation of the conduct and culture of his country's most esteemed institution has had a devastating personal effect on the Defendant far beyond the normal concept of punishment.

Fourth, a sentence of probation would meet the need to avoid disparity, a mandate under the statutory sentencing scheme. Every Swiss financial consultant who has been truthful and cooperated has received probation and a fine, even those who have had the same Guideline calculations as Mr. Schumacher; yet none have cooperated to the level and degree of this Defendant.

Based upon these factors, and the criteria set forth in 18 U.S.C. § 3553(a), Mr. Schumacher joins the Government's recommendation, both in the Plea Agreement, see ECF No. 27, and in its Sentencing Memorandum and Motion for a Downward Departure from the Sentencing Guidelines filed under U.S.S.G. § 5K1.1, see ECF No. 34, and asks that Mr. Schumacher be placed on five years' probation and receive a $150,000 fine.[2]

IV. A FACTUAL HISTORY OF THE CASE

Swiss banking has grown to surpass watch-making and chocolate as Switzerland's pre-eminent national industry. With the first enactment of banking secrecy laws in the 1930's, Swiss banks became a financial haven for foreign nationals. Swiss banking became an honored institution throughout the world; a "Swiss banker" became a colloquial expression and euphemism for the consummate professional, a person both respected and trusted. These men and women lived by an institutional and cultural code—it is Swiss law—that a depositor's relationship with their own government was their personal responsibility, and a banker could not —indeed, was forbidden by Swiss law— disclose private banking matters absent consent of the depositor. Swiss law mandated a relationship not unlike the privilege a lawyer and a doctor have with their client or patient.

[2] Mr. Schumacher will present at sentencing a certified check in the amount of $ 150,000.00 with the hope that this Court will accept this joint recommendation.

Cracks in that venerable foundation of privilege began in the first decade of this century when the United States began probing UBS, one of Switzerland's most respected banking institutions, regarding its complicity in tax avoidance by American account-holders. That investigation led to UBS acknowledging in 2009 that its conduct had interfered with the sovereign right of the United States to collect taxes from its citizens, and UBS agreed to pay a fine of $780 million, agreed to forward information concerning undisclosed bank accounts of thousands of potential tax scofflaws, and agreed that it would no longer maintain secret undeclared accounts. See, United States v. UBS AG, Case No. 09-60033-Cr-Cohn.

Mr. Schumacher was employed by UBS from 1995 until 2002, when he left due to a disagreement over how the bank should be handling its inventory of undeclared accounts held by U.S. citizens. Due to new financial regulations implemented by the Internal Revenue Service ("IRS") in 2002, UBS was required to withhold taxes and perhaps disclose the names and existence of these undeclared accounts. When the board of UBS equivocated over whether it should follow these new rules, Mr. Schumacher left to join a smaller, purely local Swiss bank, where he believed, based upon the legal advice prevalent during this time of flux, the new disclosure rules would not apply. By 2009, when the negotiations between the IRS, the Department of Justice and Swiss financial and governmental institutions broke down, many of the Swiss banks, financial advisors and bankers were indicted for their conduct—although both legal and mandated by Swiss law—which enabled U.S. taxpayers to evade their tax obligations.

The indictments alleged that the Swiss bankers and financial consultants enabled the holders of these undeclared accounts to violate American law. Mr. Schumacher was indicted in 2009, and hired counsel to negotiate a resolution to his case. He made entreaties of the DOJ regarding a plea and surrender, but the process was complicated by the parallel existence of

diplomatic and international conversations between the two counties on how these cases should be resolved. Eventually, with no plea agreement in hand, and acting only on faith, Mr. Schumacher voluntarily came to the United States in 2014 to cooperate with the Government.

He was arrested, released on bail, and after testifying as a Government witness in a pending matter, permitted to return home to await his court date. In April of 2015, he voluntarily returned to the United States a second time and pled guilty, see ECF No. 27, and acknowledged by his guilty plea that his conduct and advice enabled American taxpayers to avoid their tax obligations, in violation of § 371 to Title 18 of the United States Code.

V. THE PERSONAL HISTORY OF HANSRUEDI SCHUMACHER

Mr. Schumacher's education and career are not unique; he served his clients by providing privileged banking services, as thousands of his predecessors and mentors had done for decades. What is unique is that a man as credentialed and respected as Hansruedi Schumacher would end up being indicted. Hansruedi Schumacher is 57 years old, and was born in Zurich, Switzerland. He grew up in a normal middle class neighborhood, and his two parents, who are both deceased, owned and operated a restaurant during his upbringing. He has one brother, Peter, an owner/manager of a restaurant in San Francisco. Because of Mr. Schumacher's status, he has not been able to visit with his brother for over a decade.

Mr. Schumacher has had but one serious romantic relationship in his life; he met Monica Sibylie in 1981, and they were married a few years later. They have never separated in the ensuing 31 years. They have two children born of their union, Stefan, a teacher for "not easily integrated children", and Tanya, who is studying to get her master's degree in law at the University of Zurich.

Mr. Schumacher has spent his entire career in the financial services industry, first at SBC until its merger with UBS in 1998, and then, from 1998 to 2002 with UBS. When he left UBS in

2002, he was recruited to join Neue Zürcher Bank to start its asset management business. When he was indicted in 2009, he was fired from his position at NZB, and since that time, he has made a living providing investment advice on a small scale basis to a few clients at a company he began called Multivalor.

VI. THE LEGAL BASIS WHICH ALLOWS THIS COURT TO ACCEPT THE JOINT SENTENCING RECOMMENDATION

The United States Supreme Court recently reiterated the steps a district court must follow as a result of its ruling in United States v Booker, 543 U.S. 220 (2005), which held that the Sentencing Guidelines were advisory. In Peugh v. United States, ____ U.S. ____ (2013) (No. 12-62, decided on June 10, 2013), the Court wrote:

> First, 'a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.' Gall v. United States, 552 U. S. 38, 49 (2007) (citation omitted). The district court must then consider the arguments of the parties and the factors set forth in §3553(a). Id., at 49–50. The district court 'may not presume that the Guidelines range is reasonable,' id., at 50; and it 'may in appropriate cases impose a non-Guidelines sentence based on disagreement with the [Sentencing] Commission's views,' Pepper v. United States, 562 U. S. ___, (2011) (slip op., at 23) (citing Kimbrough v. United States, 552 U. S. 85, 109–110 (2007)).

Id., Slip Opinion at 5-6.

The advisory guideline range creates a heartland for ordinary cases. That range is but a starting point in the sentencing calculus. Booker also stands for the proposition that a court must exercise its discretion by tailoring a sentence in light of the statutory criteria contained in 18 U.S.C. § 3553(a). Section 3553(a) directs sentencing judges to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph two." Subsection (2) states that such "purposes" include "consideration of the nature and circumstances of the offense and the history and characteristics of the defendant" as well as the need for the sentence to:

> (a) reflect the seriousness of the offense, to promote respect for the law, and

to provide just punishment for the offense;
(b) afford adequate deterrence to criminal conduct;
(c) protect the public from further crimes of the defendant; and
(d) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

See, §3553(a)(2).

The doctrine of lenity from §3553(a)(2) is an important part of the sentencing analysis. "Federal sentencing law requires the district judge in every case to impose 'a sentence sufficient, but not greater than necessary, to comply with' the purposes of federal sentencing, in light of the Guidelines and other §3553(a) factors." Freeman v. United States, 131 S. Ct. 2685, 2692 (2011) (quoting 18 U.S.C. § 3553(a)). The consideration of a variance is a part of the sentencing equation.

The Supreme Court in Rita recognized that a sentencing court has flexibility in fashioning a sentence outside of the Guidelines range, and ultimately requires only that a district court "set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decision-making authority." Rita, supra at 356, 127 S. Ct. 2456. In other words, this Court has "substantial discretion in selecting a sentence, and a variance outside of the Guidelines will be deemed reasonable so long as it is accompanied by an adequate explanation of the § 3553(a) factors which support that result." United States v. Dendy, 438 Fed. Appx. 210; 2011 U.S. App. LEXIS 14555 (4th Cir. 2011).

VII. THE APPLICATION OF § 3553(a) AND THE ADVISORY SENTENCING GUIDELINES

This case is not an ordinary one, as it falls outside the heartland of guideline cases. First, it bears repeating that a guideline sentence is not presumptively reasonable. Nelson v. United States, 129 S.Ct. 890 (2009). "The advisory guideline range is but one of many considerations

that a court must take into account in exercising its sentencing discretion." United States v. Irey, 612 F.3d 1160, 1217 (11th Cir. 2010)(en banc). The Eleventh Circuit also wrote in United States v. Hunt, 459 F.3d 1180, 1184 (11th Cir. 2006): "[W]e have not attempted to specify any particular weight that should be given to the guidelines range," id., and that court rejected "any across-the-board-prescription regarding the appropriate deference to give the Guidelines."

A. Substantial Assistance and § 5K1.1 of the U.S.S.G.

The Government's sentencing submission has quantified the nature, extent and quality of the assistance rendered by Mr. Schumacher. That memorandum argues that that his assistance has been both substantial and exemplary. Section 5K1.1(a)(1) specifically acknowledges the unique perspective a district court should give the Government's recommendation, as it is generally the prosecution which has the best judgment of how valuable assistance has been. See, § 5K1.1(a)(1)("the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered.")

The substance of the United States' motion to depart under Section 5K1.1 was foreshadowed in the Plea Agreement, where the cooperation was briefly outlined; those reasons include:

(1) substantial assistance rendered by the defendant, which will be set forth at sentencing or in another pleading;
(2) defendant ceased managing undeclared accounts for U.S. customers; moreover, he aided and assisted some of those clients in making voluntary disclosures to the Internal Revenue Service ("IRS");
(3) the trial of this case would be both time consuming and expensive, requiring the government to produce witnesses from all over the United States and from at least one foreign country; in addition, many of the events occurred more than a decade ago, complicating the presentation of evidence;
(4) that the sentence would avoid any disparity based upon sentences imposed in similar cases within this district and in other districts, as required under 18 U.S.C. § 3553(a)(6);

(5) defendant may face a subsequent prosecution in Switzerland as a result of his cooperation with United States authorities based upon Swiss law which criminalizes the disclosure of private banking information;

(6) defendant was not extraditable, based upon Swiss law, yet the defendant voluntarily surrendered for arrest and prosecution; and

(7) the sentence recommended by the parties was reached after a consideration of all of the statutory criteria set forth in Section 3553(a).

See, ECF No. 24, Plea Agreement at paragraph 4.

The Government's departure motion has amply fleshed out the Plea Agreement's succinct recitation and demonstrates that the joint recommendation by the parties is reasonable under the parameters outlined in paragraphs (1)-(5) of § 5K1.1, and the circumstances this Court is required to consider under 18 U.S.C. § 3553(a).

A second and equally significant factor the parties took into consideration in making their joint recommendation is the application of the § 5K1 criteria concerning the effect cooperation has on the Defendant and his family. Mr. Schumacher was called as a Government witness to testify against the third-highest ranking director of Switzerland's most famous, popular and wealthiest banks, UBS. The notoriety which occasioned his testimony was global, and was front page fodder in every European newspaper, the lead story of every financial media report, and rendered him a persona non grata in Switzerland. He was featured in Bloomberg News, Reuters and the Wall Street Journal as the former UBS executive who gave the jury a primer on how UBS management encouraged and abetted U.S. taxpayers from paying taxes. See, http://www.bloomberg.com/news/articles/2014-10-15/ex-ubs-banker-gives-florida-jury-a-primer-on-bank-secrecy; http://uk.reuters.com/article/2014/10/15/ubsag-banker-weil-idUKL2N0SA1GW20141015; http://www.wsj.com/articles/former-ubs-manager-testifies-against-raoul-weil-1413401975.

Following his testimony, he returned home a financial traitor; the long-time bank for his family and business closed his accounts, he may face a Swiss prosecutorial investigation to determine whether he broke Swiss law by testifying as a witness for the U.S. government, and

the likelihood of his successfully re-entering the financial industry is nil. Section 5K1.1(4) expressly directs this Court to consider "any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance." Mr. Schumacher does not fear for his life, nor is he in danger. The injury he suffered as a result of his cooperation is to his reputation; those wounds do not easily heal.

B. The duty to avoid disparity under § 3553(a)(6)

Section 3553(a)(6) speaks to "the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct." See also, United States v. Lazenby, 439 F.3d 928, 934 (8th Cir. 2006)(recognizing that extreme disparities in the sentences imposed on co-conspirators could "fail to promote respect for the law"); and Cullen v. United States, 194 F.3d 401, 408 (2d Cir. 1999)(sentencing court could plausibly conclude that extremely divergent sentences would undermine the accepted notion that similar conduct should be punished in a somewhat similar manner). This provision comes in to play when the facts and circumstances of this case are compared with the dispositions of other cases prosecuted in this district and elsewhere which arose from similar scenarios. Five defendants received probation, three were not prosecuted, and the last one—the outlier case—resulted in a term of imprisonment because of the failure of that defendant to be truthful in his cooperation.

For simplicity, this chart demonstrates the lineage of similar prosecutions:

NAME/TITLE	CASE NO.	DISPOSITION
Bachmann, Andreas Executive Director Credit Suisse	11-CR-95 EDVA	- 5 years' unsupervised probation - $100,000 fine - Court accepted joint recommendation
Bagios, Christos Executive Director UBS	12-CR-60260 MARRA	- Credit time served (37 days awaiting removal); no supervised release - Court accepted joint recommendation
Birkenfeld, Bradley Executive Dir. UBS	08-CR-60099 ZLOCH	- 40 months BOP; failed to fully cooperate - Govt recommended 30 months BOP

Credit Suisse, AG	14-CR-188 EDVA	- Pled guilty and agreed to pay penalties and fine of $2.6 billion
Dorig, Joseph Head of Trust Unit Credit Suisse	11-CR-95 EDVA	- 5 years' unsupervised probation - $100,000 fine - Court accepted joint recommendation
Gadola, Renzo Executive Director UBS	10-CR-20878 KING	- 5 years' unsupervised probation - No fine - Court accepted joint recommendation
Guinard, Michel Managing Dir. UBS	----	Non-prosecution agreement in exchange for cooperation
Lack, Martin Executive Director UBS	11-CR-60184 DIMITRIOULEAS	- 5 years' unsupervised probation - $100,000 fine - Court accepted joint recommendation
Liechti, Martin General Manager UBS	----	Non-prosecution agreement in exchange for cooperation
Marti, Georg Executive Dir. UBS	----	Non-prosecution agreement in exchange for cooperation
UBS, AG	09-CR-60033- COHN	- Entered into deferred prosecution agreement - Settlement of $780 million.
Wegelin & Co.	12-CR-00002 SDNY	- Pled guilty - Settlement of $57.8 million, bank closed
Weil, Raoul Gen. Mgr./ CEO Wealth Mgmt. UBS	08-CR-60322- COHN	Acquitted by Jury

The only case where a financial consultant received a sentence of imprisonment is United States v. Birkenfeld, Case No. 08-60099-CR-Zloch. Mr. Birkenfeld, a U.S. citizen, was employed by UBS and began to cooperate regarding illegal acts committed by his associates at the bank. According to prosecutors, the anticipated breadth of the cooperation they expected from Mr. Birkenfeld led them to conclude that he would not be prosecuted. However, he declined to reveal his own criminal conduct, and his cooperation took a rocky path. See, ECF No. 76, United States v. Birkenfeld, Government's Motion Pursuant to § 5K1.1 and § 3553(e). He was indicted on a tax conspiracy charge and pled guilty. His advisory guidelines range was 76-87 months and the Government recommended a reduction to 30 months because of the equivocal nature of his cooperation. Mr. Birkenfeld received a 40 month sentence.

This case is more akin to the similar prosecutions referenced in the Related Cases section of the PSI at ¶¶ 11-16: United States v. Gadola, 10-20878-CR-King, United States v. Bagios, 12-60260-CR-Marra, United States v. Lack, Case No. 11-60184-CR-Dimitrouleas, and United States v. Bachmann and Dorig, Case No. 11-CR-95 (EDVA). Those cases all involved Swiss financial advisors who were prosecuted in the United States for enabling U.S. taxpayers avoid their tax obligations. All five cooperated, but none more so than Mr. Schumacher. All five received a Government recommendation of probation and a fine, and the district judge in each case accepted these recommendations.

In Gadola, the defendant was an asset manager who assisted financial consultants counseling Americans seeking to avoid taxation on foreign bank accounts. He was arrested in Miami advising one such client and immediately began cooperating. His advisory guidelines range was 10-16 months; the Government filed a motion to depart downward because of his cooperation, (see, ECF Nos. 52, 62), and did not oppose a defense request for probation. He was sentenced to 5 years' probation. See, ECF No. 64, United States v. Gadola.

In Bagios, the defendant was similarly situated to the other indicted Swiss financial advisors. He worked for UBS and became a financial consultant advising American clients who sought tax avoidance advice and assistance. Bagios was indicted in Miami, but was arrested in New York and was transported in custody to Miami under Fed. R. Crim. P. 20. His plea agreement with the Government noted the defendant's limited role in the offense and the time he spent in the United States awaiting a resolution of his case. The parties agreed to jointly recommend that Bagios be given credit for the 37 days he had served while being transported to Miami, see, ECF No. 106, and the court accepted the recommendation of the parties. See, ECF

No. 108. United States v. Bagios. He received no probationary term beyond the sentence of credit for time served.

Martin Lack was also a financial advisor for UBS and left to operate his own asset management firm. Unlike Gadola and Bagios, he voluntarily surrendered to U.S. authorities, despite knowing he could not be extradited, and commenced cooperating with the IRS and the Department of Justice. His cooperation yielded the filing of a motion under § 5K1.1; Judge Dimitrouleas accepted the joint recommendation of the parties and placed Mr. Lack on 5 years' probation and imposed a modest fine of $7,500.

Last, the cases of Andres Bachmann and Josef Dorig are relevant. These men were employed by Credit Suisse and were indicted in 2011 for their roles in advising U.S. taxpayers seeking to hide their foreign accounts from the IRS. Both men took a leap of faith and surrendered to authorities in the Eastern District of Virginia and commenced cooperating. Mr. Schumacher was instrumental in Mr. Bachmann deciding to cooperate, which later on led Credit Suisse to plead guilty and paid $2.6 billion in fines and penalties—a fact the Government considered in making its sentencing and departure recommendation here. At their sentencing on March 27, 2015, notwithstanding advisory guideline ranges of 46-57 months for Mr. Bachmann and 57-71 months for Mr. Dorig, the judge accepted the recommendations of the Government and gave both men five years of probation and imposed fines of $100,000 and $125,000.

Therefore, there is adequate precedential basis for the parties' joint recommendation here that a sentence of probation is reasonable under the unique circumstances of this case and cause exists under § 3553(a)(6) to accept the Government's recommended sentence of 5 years of probation and a fine of $150,000.

C. The unfair impact of the advisory sentencing guidelines in this case

The advisory guideline range in this case should not be given great weight based upon the unusual nature of this tax case. The guideline for a mine-run tax case, calculated under U.S.S.G. §2T1.1, arrives at an offense level by reference to the amount of loss the taxpayer failed to report, and the Table, at § 2T4.1, begins at 6 levels and increases based upon the amount of loss. The implicit meaning of this section is the greater the loss which results from the conduct of the taxpayer, the greater the penalty. But that principle is skewed in a case like this, where Mr. Schumacher's role was that of an enabling banker, not a taxpayer, who did not participate in the original idea which led to the evasion, nor did he have any control over the quantity of funds involved.

Nor did Mr. Schumacher directly profit from the size of funds deposited with the bank; he was a salaried employee, and other than a standard yearly bonus, had no direct pecuniary benefit based upon the size of the undeclared accounts. See, United States v. Stuart, 22 F.3d 76, 82, 83 (3rd Cir. 1994)(finding that a nine level loss enhancement may overstate defendant's culpability where he received by a small percentage of the loss amount); United States v. Kalili, 100 Fed. Appx. 903 (4th Cir. 2004)($ 800,000 loss overstated seriousness of defendant's role where he did not significantly profit from scheme); United States v. Corry, 206 F.3d 748, 751 (7th Cir. 2000)(loss overstating seriousness of offense is "an encouraged basis for departure.")

In United States v. Stevenson, 686 F.3d 32 (1st Cir. 2012), the court affirmed a variance from a 87-108 months guideline range to probation, community service and some home monitoring after observing that the district court properly found that the loss amount, which significantly elevated the advisory range, did not fairly reflect the defendant's true culpability. These cases provide a basis for the assertion that the advisory guideline range here is unfairly

inflated and should be but a small factor in the creation of a reasonable sentence.

D. Collateral consequences of conviction

It is difficult to adequately put in to words the adverse consequences that have come Mr. Schumacher's way as a result of his cooperation as a Government witness in United States v. Weil. The trial was the most significant financial trial in memory and occurred on the world stage. Journalists from all over Europe and the United States travelled to Ft. Lauderdale in the Fall of 2014 to watch a feared agency of the most powerful country in the world take aim at a former high-ranking executive of the conservative and professional financial institution which carried the name of the small peace-loving and neutral country of Switzerland. It was the IRS and the DOJ against Switzerland's UBS. And testifying on behalf of the Government, exposing the inner-most secrets of one of history's most private institutions—Swiss banking—was Hansruedi Schumacher. The case became United States vs. Switzerland, and partisan sides were taken; this political cartoon from a Swiss newspaper exemplifies the accusatory nature of the rift:

Bild: Reuters.

Mr. Schumacher's decision to cooperate was not compelled. He was not extradited; he voluntarily came to the United States to surrender and cooperate. He could have stayed home for the rest of his life and lived a peaceful and anonymous existence among family and friends. He chose to surrender and cooperate because he accepted responsibility for his actions, and he came to understand that Swiss enabling of tax evasion by Americans was not right, notwithstanding its legal, cultural and moral acceptance in Switzerland.

He also knew that, by cooperating, he risked the scorn of his fellow countrymen for betraying their arrogance; he risked ostracism, for himself and his family; he risked expulsion from the financial marketplace, and the loss of his career; and he risked his liberty, as it is a crime in Switzerland, known as economic espionage and a violation of bank secrecy laws, to reveal privileged banking information. Nevertheless, he surrendered, he cooperated, and he spent three days on the witness stand. For three days, the financial newspapers of Europe and the world displayed his name, his picture, and his testimony exposing Swiss banking secrets. A word search of international media reveals his name appeared 220 times in connection with the trial, and financial, social and personal repercussions were strong and immediate.

The crucible in which Mr. Schumacher was crushed can be best understood in the context of the letters this Court has received from his family and friends. See, Notice of Filing, ECF No. 32.

For example:

> After the indictment in 2009, our father was scolded publicly and a lot of acquaintances criticized him heavily for his actions during his time at the UBS bank. He lost a job, other business partnerships, many so-called friends, and also his reputation as a serious and good businessman.

See, Letter of August 4, 2015, Tanya Schuhmacher[3] and Stephan Schuhmacher-Morard;

* * * * *

> Hansruedi has had my support ever since he admitted his error and continually showed remorse for the offending…
> …I understand the distressing circumstances that Hansruedi faces. He has expressed his deepest regrets about the offending to me, particularly its grave repercussions for his family and his career (job loss, loss of reputation, and being disgraced in the community).

See, Letter of July 22, 2015 from Donat Parajola;

* * * * *

> Since the allegations were made toward Mr. Hansruedi Schumacher, his life has changed dramatically. From a professional point of view, he has not been able to pursue interesting and challenging business opportunities. This is a particularly sad situation, since the current status has not allowed him to follow a new career path.

See, Letter of Fulvio Micheletti; and

* * * * *

> Since the allegations started, Hansruedi Schumacher felt a disgrace, lost his job and the acceptance in the business community. He paid a very high price! At the same time his family went through a very difficult time too, being constantly questioned and intimidated by media, friends, and colleagues.

See, Letter of Martin Eberhard.

See, ECF No. 32.

Courts are permitted to recognize the collateral consequences of a criminal conviction in formulating a fair sentence. Judges can incorporate into the sentencing calculus the fact that a defendant has been otherwise punished for his actions, beyond the criminal justice system, and mitigate the punishment by recognizing the collateral punishment which occurs from one's professional, social and national community. See, United States v. "Scooter" Libby, 05-cr-

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[3] The Defendant's family name is correctly spelled here; the spelling of his name in the Indictment is misspelled, and the parties have used the misspelled version for purposes of conformity.

00394-RBW (30 month sentence of presidential advisor for perjury and obstruction of justice commuted where "the reputation he gained through his years of public service and professional work in the legal community is forever damaged [and where] the consequences of his felony conviction on his former life as a lawyer, public servant and private citizen will be long-lasting"); see, http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html); United States v. Adelson 441 F.Supp. 2d 506 (SDNY 2006) (in securities fraud where guidelines called for life, court imposes 42 months noting that factor of specific deterrence accounted for because "[W]ith his reputation ruined by his conviction, it was extremely unlikely that he would ever involve himself in future misconduct"); see also, Logan, Wayne A., Informal Collateral Consequences (October 20, 2013); and United States v. Prosperi 686 F.3d 32 (1st Cir. 2012)("Sometimes [courts do not] fully recognize the anguish and the penalty and the burden that persons face when called to account, as these men are, for the wrong that they committed.")

The most significant collateral consequence is Mr. Schumacher's justifiable fear that he will be prosecuted in Switzerland because of his cooperation. The United States Government demanded full and complete cooperation as the essential element to any resolution of this case. The Government expected Mr. Schumacher to provide every detail about his involvement with U.S. clients and the banks that held assets. That cooperation, and his testimony, may have violated Swiss law. His fear of prosecution once he returns to Switzerland is real; on November 2013, Reuters reported that a Zurich prosecutor placed Renzo Gadola under criminal investigation for the assistance that he provided as part of his plea agreement. See Reuters, "Swiss prosecutors probe former UBS banker turned U.S. informant", available at http://www.reuters.com/article/2013/11/12/swiss-usa-tax-idUSL5N0IX4KR20131112. Mr. Gadola was

subsequently permitted to enter a plea to a criminal offense, and placed on two years of probation. Mr. Schumacher may likely suffer the same fate.

E. The criteria to be considered under § 3553(a).

Consideration of the factors enumerated within § 3553(a) is mandatory. A review of those considerations also allows for the recommended sentence here. The simplest considerations first: incarceration is not necessary "to protect the public from further crimes of the defendant." Mr. Schumacher voluntarily ceased all business with clients who had undisclosed accounts by the close of 2009, the year he was indicted. Nor is incarceration necessary "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." His crime was non-violent, was unrelated to a substance abuse or gambling problem, and the likelihood of recidivism is nil.

The need to punish Mr. Schumacher with incarceration to deter others is also unnecessary. The Swiss banking industry was shaken by the UBS and Credit Suisse settlements and the indictments of leading bank executives. Treaty and diplomatic conversations between the United States and Switzerland ensued, and the number of voluntary disclosures by non-reporting account-holders increased significantly as a result of these banking upheavals. That, after all, was the goal of these prosecutions. It can certainly be argued that incarcerating bankers for abiding by institutional policies of non-disclosure and privilege, while permitting banks to settle their misconduct with fines, presents an inexplicable inequity.

Next, probation in this case is consistent with the need to reflect "the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." This is not a violent, recidivist offender, but a man who has led an exemplary life. Hansruedi Schumacher's cooperation has been beyond substantial, and without excusing his conduct, his

guilt lies in his enabling American tax scofflaws who sought to take advantage of Swiss laws. The irony now is that the Defendant may have violated Swiss law by assisting America prosecute the wrongs he facilitated.

Finally, the “nature and history of the offense and the history and characteristics of the defendant” also inure toward an acceptance of the joint recommendation. Concerning the “history of the offense”, it is only of recent vintage that what Swiss bankers were doing was perceived as prosecutable in the United States. The United States and the world have known for three quarters of a century that people have secreted funds in Switzerland. Mr. Schumacher engaged in the same conduct as his predecessors, legal under Swiss law and, until recently, the United States acquiesced to that conduct. The onset of globalization ended this attitude of *laissez faire*, and the failure of Mr. Schumacher and his peers to comprehend the new era modern led to the indictment of those who were caught in the cross-hairs of the American justice system. In the end, however, Mr. Schumacher acknowledges that he committed a crime, and he pled guilty because of that.

Finally, in regard to “the history and characteristics of the defendant,” the PSI has gone to admirable lengths detailing the education, family responsibility, and professional accomplishments of Mr. Schumacher. See, PSI at ¶¶ 64-68. We have also provided this Court with letters from his family and friends; these letters describe his pro bono work and complement the Personal and Family Data section of the PSI. See, ECF No. 32. Mr. Schumacher will continue cooperating with the United States Government, notwithstanding Swiss law, and surrendered for prosecution, knowing he could not be extradited; those two assertions are the best evidence of his character.

VIII. CONCLUSION AND RECOMMENDATION

Mr. Schumacher, in concert with the Government, asks this Court to impose a sentence of five years' probation with the conditions that he: (1) continue his cooperation with the United States, (2) be permitted to leave the United States while on probation, (3) be required to returned to the United States to continue his cooperation when so requested by the Government; and (4) pay a fine of $150,000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed using CM/ECF on this 28th day of September, 2015.

By: /s/ Peter Raben
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