

10 MAG. 742

Approved: DBM
DAVID B. MASSEY
Assistant United States Attorney

Before: THE HONORABLE RONALD L. ELLIS
United States Magistrate Judge
Southern District of New York

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|--------------------------|---|---------------------|
| ----- | x | |
| | : | |
| UNITED STATES OF AMERICA | : | <u>COMPLAINT</u> |
| | : | |
| - v - | : | Violations of |
| | : | 26 U.S.C. § 7201; |
| KENNETH HELLER, | : | 31 U.S.C. §§ 5314 |
| | : | and 5322; 18 U.S.C. |
| | : | 2. |
| | : | |
| Defendant. | : | COUNTY OF OFFENSE: |
| | : | NEW YORK |
| ----- | x | |

SOUTHERN DISTRICT OF NEW YORK, ss.:

ELVIS PALISKA, being duly sworn, deposes and says that he is a Special Agent of the Internal Revenue Service ("IRS") and charges as follows:

COUNT ONE

From in or about 2006, through on or about October 12, 2009, in the Southern District of New York and elsewhere, KENNETH HELLER, the defendant, unlawfully, willfully and knowingly did attempt to evade and defeat the assessment and payment of a substantial part of the income tax due and owing by HELLER to the United States of America for calendar years 2006 through 2008, by various means, including: (a) concealing from the IRS the existence of, and income earned in, Swiss-based financial accounts that HELLER owned from in or about 2006 through in or about 2008; (b) failing to file timely Individual Income Tax Returns disclosing the existence of, and the income earned in, those accounts during calendar years 2006, 2007, and 2008; and (c) failing to file timely reports with the Commissioner of the IRS Reports of Foreign Bank and Financial Accounts, Form TD F 90-22.1 ("FBAR") disclosing that he had a financial interest in, and

signature and other authority over, bank, securities, and other financial accounts in foreign countries during calendar years 2006, 2007, and 2008.

(Title 26, United States Code, Section 7201.)

COUNT TWO

From at least on or about July 1, 2007, through on or about April 14, 2010, in the Southern District of New York and elsewhere, KENNETH HELLER, the defendant, did unlawfully, willfully, and knowingly fail to file FBARS with the Commissioner of the IRS reporting that he had a financial interest in, and signature and other authority over, bank, securities, and other financial accounts in foreign countries, to wit, financial accounts in Switzerland, which had an aggregate value of more than \$10,000 during calendar years 2006, 2007, and 2008, which forms were due on or before June 30, 2007, June 30, 2008, and June 30, 2009, respectively.

(Title 31, United States Code, Sections 5314 & 5322; Title 31 Code of Federal Regulations, Sections 103.24, 103.27(c, d) & 103.59(b); and Title 18, United States Code, Section 2.)

The bases for my knowledge and for the foregoing charges are, in part, as follows:

1. I am a Special Agent of the IRS, Criminal Investigation Division, and I have held that position for approximately nine years. I am currently assigned to a group that investigates tax fraud, including, among other crimes, attempts to evade or defeat individual income taxes, in violation of Title 26, United States Code, Section 7201. I have participated in an investigation concerning the use of Swiss-based private bank accounts by U.S. taxpayers to evade or defeat individual income taxes. The information in this affidavit is based on my personal knowledge, information provided to me by others, including other law enforcement officials and civilian witnesses, as well as my review of documents associated with the investigation. Because this affidavit is being submitted for the limited purpose of establishing probable cause, it does not include all of the facts that I have learned during the course of my investigation. Where the contents of documents and the actions, statements, and unrecorded conversations of others are reported herein, they are reported in substance and in part, except where otherwise indicated.

Introduction

2. I know from my training and experience and review of the Internal Revenue Code, applicable regulations, and other sources that, at all relevant times, the IRS was an agency of the United States Department of Treasury responsible for administering and enforcing the tax laws of the United States and collecting the taxes owed to the Treasury of the United States.

3. From my conversations with other law enforcement agents, my review of public documents, and other sources, I know that Union Bank of Switzerland AG ("UBS") entered into a Deferred Prosecution Agreement with the United States Government on or about February 18, 2009 ("the Deferred Prosecution Agreement"). The Deferred Prosecution Agreement related to UBS's participation in a scheme to assist U.S. taxpayers in evading income tax by hiding Swiss-based UBS accounts, and the income earned in those accounts, from the IRS. As part of this agreement, on or about February 19, 2009, UBS provided to the Government business records relating to Swiss-based UBS accounts owned by various United States taxpayers, including a UBS account owned by KENNETH HELLER, the defendant, in the name of Warmwell Management, Inc. ("the HELLER UBS Account"). I have reviewed business records relating to the HELLER UBS Account, as well as UBS business records relating to UBS accounts owned by other U.S. taxpayers. In addition, I have spoken to other law enforcement officers concerning UBS's participation in this scheme. From these UBS documents, conversations with law enforcement agents, and other sources, I have learned the following, among other things:

a. From at least in or about 2000 through in or about 2008, UBS was one of Switzerland's largest banks. During this period, UBS, directly and through its subsidiaries, operated a global financial services business. Among other things, UBS provided banking, wealth management, and asset management services all over the world, including to United States taxpayers living in the Southern District of New York. Specifically, UBS offered Swiss-based private banking for United States taxpayers living in the United States ("UBS's U.S. cross-border banking business").

b. Beginning at least in or about 2000, UBS, through its employees, engaged in a scheme to assist United States taxpayers who had accounts at UBS in Switzerland in concealing the existence of the accounts, and the income earned in the accounts, from the IRS.

c. Among the means by which UBS assisted certain United States taxpayers who had accounts at UBS in concealing the existence of the UBS accounts, and the income earned in UBS accounts, from the IRS, were the following:

i. Using sham corporations and foundations, formed under the laws of offshore jurisdictions, to conceal from the IRS the ownership by United States taxpayers of certain UBS accounts;

ii. Accepting and including in UBS's account records IRS Forms W8-BEN (Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding) and UBS's equivalent forms that falsely stated that sham offshore corporations and foundations were the beneficial owners of certain UBS accounts when, in fact, as UBS and the United States taxpayers well knew, United States taxpayers were the beneficial owners of those UBS accounts.

The Defendant

4. I have reviewed documents concerning the professional career of KENNETH HELLER, the defendant, including documents relating to disbarment proceedings instituted against him by the Departmental Disciplinary Committee for the First Judicial Department, Appellate Division, New York State Supreme Court. Through these documents, court papers, and other documents relating to HELLER's career, and through conversations with other law enforcement agents concerning HELLER's professional background, I have learned the following:

a. HELLER was admitted to the practice of law by the Second Judicial Department, Appellate Division, New York State Supreme Court, on or about October 19, 1955. Thereafter, HELLER maintained an office for the practice of law in Manhattan. On or about June 24, 2004, HELLER was disbarred from the practice of law in the State of New York, effective July 26, 2004, for, among other things, giving false testimony at a deposition before the Departmental Disciplinary Committee for the First Judicial Department, and filing a false affidavit in New York State Supreme Court.

b. During the time that HELLER practiced law, for at least approximately 25 years HELLER employed an attorney who continued to work for HELLER, after HELLER's disbarment, in HELLER's ongoing consulting business, and who has represented HELLER in United States Bankruptcy Court for the Southern District of New York as recently as 2009 ("HELLER Attorney A").

5. I have reviewed correspondence written by KENNETH HELLER, the defendant, and other documents relating to HELLER's apartment in Manhattan, New York ("the HELLER Apartment"). From my review of these records and my conversations with another law enforcement agent concerning the HELLER Apartment, I have learned the following:

a. On or about March 10, 2008, HELLER signed a letter to the management company for his apartment building stating that he and his wife resided in the HELLER Apartment and that they have rented the apartment since in or about 1955. In this letter, HELLER requested that HELLER Attorney A be given a key to the HELLER Apartment so that HELLER Attorney A could also live in the HELLER Apartment.

Heller's UBS Accounts

6. Based on my review of business records that UBS provided to the Government pursuant to the Deferred Prosecution Agreement, and my conversations with other law enforcement agents concerning UBS's U.S. cross-border banking business, I have learned the following:

a. On or about December 27, 2005, KENNETH HELLER, the defendant, caused to be opened a UBS account - the HELLER UBS Account - in Switzerland in the name of a sham corporation called Warmwell Management, Inc., a British Virgin Islands corporation that had been formed less than four months before. At the time the HELLER UBS Account was opened, UBS was instructed to send all mail relating to the HELLER UBS Account to an international trust company based in Vaduz, Liechtenstein, rather than to HELLER in Manhattan. Also on or about December 27, 2005, two nominee directors of Warmwell Management, Inc. ("Nominee Director A and Nominee Director B") signed a UBS document certifying that the sole beneficial owner of the HELLER UBS Account was HELLER, and listing HELLER's business address in Manhattan.

b. On or about January 3, 2006, HELLER caused \$26,420,822.43 to be wired from the United States to the HELLER UBS Account at UBS in Switzerland.

c. On or about January 16, 2006, Nominee Director A and Nominee Director B signed UBS's substitute form for IRS Form W8-BEN, in which they falsely certified under penalties of perjury that Warmwell Management, Inc. was the

beneficial owner of the HELLER UBS Account "according to U.S. tax law."

d. On or about September 29, 2006, at UBS's offices in Zurich, HELLER signed a UBS document certifying that he had reviewed mail that UBS had retained for him concerning the HELLER UBS Account.

e. On various dates, HELLER instructed his UBS client advisor ("the HELLER UBS Client Advisor") by letter to transfer funds from the HELLER UBS Account to various bank accounts that HELLER controlled in the United States. For example, HELLER initiated such transfers on or about the following dates and in the following approximate amounts: January 10, 2006 (\$4,000,000); April 18, 2006 (\$4,000,000); November 10, 2006 (\$600,000 and \$300,000); November 29, 2006 (\$50,000 and \$50,000); January 10, 2007 (\$100,000 and \$50,000); and February 12, 2007 (\$200,000).

**HELLER Moved Approximately \$20 Million from UBS to
Another Swiss Bank Following Major News Reports
Concerning the Government's Criminal Investigation
Into UBS's U.S. Cross-Border Banking Business**

7. I have reviewed news articles, court papers, and other public documents relating to the Government's criminal investigation into UBS's U.S. cross-border banking business. From these records, and my conversations with other law enforcement agents concerning the Government's investigation of that business, I have learned the following:

a. On or about May 6, 2008, UBS publicly disclosed that United States and Swiss law enforcement authorities were investigating its U.S. cross-border banking business.

b. On or about May 14, 2008, a federal grand jury sitting in the Southern District of Florida returned an indictment against Bradley Birkenfeld, a United States citizen who had worked as a director of UBS's U.S. cross-border banking business, and Mario Staggl, an independent Swiss financial advisor. The indictment charged Birkenfeld and Staggl with conspiracy to defraud the United States by helping U.S. taxpayers evade taxes by using sham entities to conceal their beneficial ownership of Swiss-based UBS accounts from the IRS.

c. On or about May 15, May 23, and May 30, 2008, a major news organization based in New York, New York reported

that the United States Government was actively conducting a criminal investigation of UBS's U.S. cross-border banking business. One such article, published on or about May 30, 2008, reported that Bradley Birkenfeld was expected to enter a guilty plea and cooperate with investigators, and that UBS was also cooperating with the criminal inquiry.

d. On or about June 6, 2008, a major news organization based in New York, New York, published an article about UBS titled, "Inquiry Into a Guarded World: Wealthy Americans Under Scrutiny in UBS case." The article stated, in part, "Under pressure from the authorities, UBS is considering whether to divulge the names of up to 20,000 of its well-heeled American clients[.]" Later that very day, HELLER faxed a copy of this article from his office in Manhattan to the HELLER UBS Client Advisor at UBS's offices in Switzerland.

8. I have reviewed business records of a Swiss private bank that does not have offices in the United States ("Swiss Bank A") relating to an account owned by KENNETH HELLER, the defendant, at Swiss Bank A beginning in or about 2008. From these records, I have learned, among other things, that, in or about 2008, HELLER transferred at least approximately \$20 million from the HELLER UBS Account to an account owned and controlled by HELLER at Swiss Bank A ("the HELLER Swiss Bank A Account"), and that, on or about December 31, 2008, the account balance in HELLER's account at Swiss Bank A was approximately \$18,466,686.

9. During my investigation, I obtained records from the tax preparer for KENNETH HELLER, the defendant ("Tax Preparer A"). Among these records was a handwritten letter from HELLER Attorney A to Tax Preparer A dated on or about September 9, 2008. Through this letter, HELLER Attorney A gave Tax Preparer A the name and contact information for (i) the HELLER UBS Client Advisor; (ii) an independent Swiss financial advisor ("Swiss Financial Advisor A"); and (iii) HELLER's client advisor at Swiss Bank A. In addition, through this letter, HELLER Attorney A stated, in substance and in part:

a. "All HELLER money was transferred directly from UBS to [Swiss Bank A]. . . . The problem is the US Government interference with Swiss Banks, in US attempt to seize income tax evaders. UBS was not reporting stock trades made by US citizens through it, so that the US Government could assess income tax liability. UBS got sued in New York, Mass., and other states in connection with illiquidity of mortgage backed securities + fraud. The US Government gladly pressed its case with Swiss Govt for bank disclosure of US citizens, etc. This is

why KH [KENNETH HELLER] left UBS."

b. "[HELLER UBS Client Advisor] made an arrangement with his 20+ year friend, [Swiss Financial Advisor A], to transfer HELLER money to [Swiss Bank A], which, so far does not have reporting requirements, like UBS, but they soon will have and anticipate it." (Emphasis in original).

c. "To protect HELLER, the bank account at [Swiss Bank A] is in the name of Nathelm Corp., and [Swiss Financial Advisor A] is the only authorized agent of Nathelm able to authorize [Swiss Bank A] to make trades. HELLER[] is a third party beneficiary. But HELLER, pursuant to documents HELLER never signed, cannot directly contact [Swiss Bank A] to do trading. HELLER can only contact [Swiss Financial Advisor A] to act. [Swiss Financial Advisor A] acts only when HELLER tells him to act (trade). There are no bank ([Swiss Bank A]) reporting requirements to US Government (IRS) for US citizens (HELLER) since no US citizens are involved. Nathelm is not US and [Swiss Financial Advisor A] . . . is not US."

10. The records that I obtained from Tax Preparer A included a letter dated December 8, 2009 from Tax Preparer A to KENNETH HELLER, the defendant, at HELLER's business address in Manhattan. I also interviewed Tax Preparer A about this letter, among other things. From this letter, and from my interview of Tax Preparer A, I learned the following, among other things:

a. In or about 2008, HELLER instructed Tax Preparer A to travel to Switzerland to conduct a review and analysis of the HELLER UBS Account and the HELLER Swiss Bank A Account.

b. HELLER earned substantial income in the HELLER UBS Account and the HELLER Swiss Bank A Account in 2006, 2007, and 2008.

c. On or about December 8, 2009, Tax Preparer A advised HELLER as follows, in part: "There is also an issue regarding tax reporting. As I am sure that you are aware, the income from the activity on these accounts [referring to the HELLER UBS Account and the HELLER Swiss Bank A Account] is taxable in the USA."

11. The records that I obtained from Tax Preparer A also included handwritten notes from Tax Preparer A's work papers relating to KENNETH HELLER, the defendant.

- a. One such notes reads as follows, in substance and in part:

Fee
UBS
[Swiss Financial Advisor A]
Should I
Declare
Nervous
IRS 2006
2007
If I Declare
How much?

- b. Another such handwritten note reads as follows:

20 million
UBS gives
over to
US govt
19000
names of
clients

12. Based on my review of UBS's business records relating to the HELLER UBS Account, and business records of Swiss Bank A relating to the HELLER Swiss Bank A Account, and HELLER's Individual Income Tax Return for calendar year 2006, which he filed on or about October 13, 2009, I learned that KENNETH HELLER, the defendant, earned at least approximately \$7,156,249 in unreported income from these Swiss-based accounts in calendar years 2006, 2007, and 2008, such that he evaded at least approximately \$2,313,156 in federal taxes. In addition, I learned that the approximate year-end account balances in these accounts during these calendar years were as follows:

| Year | HELLER UBS Account Year-end Balance | HELLER Swiss Bank A Account Year-end Balance |
|------|--|---|
| 2006 | \$19,632,000 | \$0 |
| 2007 | \$19,955,200 | \$0 |
| 2008 | \$0 | \$18,466,686 |

**HELLER's Failure to File Individual Tax Returns Reporting His
Swiss Bank Accounts**

13. I know from my training and experience as a Special Agent of the IRS, Criminal Investigation Division, and my review of the Internal Revenue Code, applicable regulations, and various other sources, that United States citizens who have income in any one calendar year in excess of a threshold amount are obligated to file a U.S. Individual Income Tax Return, Form 1040 ("Form 1040"), for that calendar year with the IRS. On such a return, United States taxpayers are obligated to report their worldwide income. Individual Income Tax Returns for a given calendar year are due on or about April 15 of the following year.

14. HELLER's Form 1040 for calendar year 2006 was due on or about April 15, 2007. Beginning on or about April 16, 2007, through on or about October 12, 2009, KENNETH HELLER, the defendant, failed to file his individual income tax return for calendar year 2006.

15. From on or about April 16, 2008 to on or about April 14, 2010, KENNETH HELLER, the defendant, failed to file a Form 1040 for calendar year 2007.

16. From on or about April 16, 2009 to on or about April 14, 2010, KENNETH HELLER, the defendant, failed to file a Form 1040 for calendar year 2008.

HELLER's Failure To File FBARS

17. I know from my training and experience as a Special Agent of the IRS, Criminal Investigation Division, and my review of the Internal Revenue Code, applicable regulations, and various other sources, that, separate and apart from the obligation to file Forms 1040, United States taxpayers who have a financial interest in, or signature or other authority over, a financial account in a foreign country with an aggregate value of more than \$10,000 at any time during a particular year are required to file an FBAR with the IRS. On Schedule B of Form 1040, U.S. taxpayers who have an interest in, or signature or other authority over, financial accounts in foreign countries are specifically directed to refer to IRS instructions relating to the FBAR. The FBAR for any particular year is required to be filed on or before June 30 of the following year. The FBAR requires that the filer identify the financial institution with which the financial account is held, the type of account (either bank, securities, or other), the account number, and the maximum value of the account during the calendar year for which the FBAR

is being filed.

18. As described above, based on the business records of UBS and Swiss Bank A that I have reviewed, I have learned that, in or about 2006, 2007, and 2008, KENNETH HELLER, the defendant, had a financial interest in at least one financial account in Switzerland, namely, the HELLER UBS Account from in or about 2006 through in or about 2008, and the HELLER Swiss Bank A Account in 2008. Accordingly, HELLER was required to file FBARS for each of those years on or before June 30 of the following year.

19. I have consulted a law enforcement database containing records of FBAR filings by United States taxpayers. As a result of my review of that database, I learned the following:

a. From on or about June 30, 2007, the due date for an FBAR for calendar year 2006, to on or about April 14, 2010, KENNETH HELLER, the defendant, failed to file an FBAR disclosing his interest in his Swiss-based UBS account in calendar year 2006. Indeed, I obtained from Tax Preparer A a letter from Tax Preparer A to HELLER at HELLER's home address in Manhattan. Through that letter, Tax Preparer A advised HELLER of his obligation to file an FBAR for calendar year 2006, and provided a completed FBAR for calendar 2006 for HELLER's signature and filing. Thereafter, HELLER failed to file this FBAR, or any other FBAR.

b. From on or about June 30, 2008, the due date for an FBAR for calendar year 2007, to on or about April 14, 2010, HELLER failed to file an FBAR reporting his financial interest in the HELLER UBS Account in calendar year 2007.

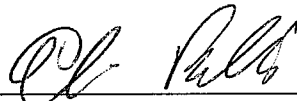
c. From on or about June 30, 2009, the due date for an FBAR for calendar year 2008, to on or about April 14, 2010, HELLER failed to file an FBAR reporting his financial interest in the HELLER UBS Account and the HELLER Swiss Bank A Account in calendar year 2008.

**HELLER's False Statements to Law Enforcement Agents
in December 2009**

20. On or about December 3, 2009, in connection with this investigation, I and other law enforcement agents traveled to an apartment in Hoboken, New Jersey that is associated with HELLER, and attempted to serve KENNETH HELLER, the defendant, with grand jury subpoenas relating to Warmwell Management, Inc.,


among other entities. When I and the other law enforcement agents arrived at this apartment, I saw HELLER leaving the apartment. I and the other agents introduced ourselves to HELLER and showed him our law enforcement credentials. In response, HELLER stated that HELLER was not home. HELLER than locked the apartment door from the outside and started to leave the area. I then informed HELLER that I recognized him to be HELLER, and served him with several subpoenas. HELLER looked at the subpoenas and stated, in substance and in part, that he could not read English well.

WHEREFORE, deponent prays that arrest warrants be issued for the above-named defendant and that he be arrested and imprisoned or bailed as the case may be.



ELVIS PALISKA
Special Agent
Internal Revenue Service

Sworn to before me this
14th day of April, 2010



UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK