

Bradley C. Birkenfeld
5875 Collins Avenue
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September 6, 2016

The Honorable Gerald Bruce Lee
Albert V. Bryan U.S. Courthouse
401 Courthouse Square
Alexandria, VA 22314

Re: *United States of America v. Michele Bergantino*, Case No. 1:11-cr-0095 GBL-3

Dear Judge Lee:

I am writing to express serious concerns about the upcoming sentencing of Michele Bergantino, a former private banker at Credit Suisse and active participant in the Swiss banking fraud scheme that has cost the United States and its taxpayers billions of dollars in unpaid taxes. As set forth below, I am deeply alarmed – and believe that the court should be alarmed as well – about the disturbingly close connection between the United States government and Mr. Bergantino’s defense team, and I am submitting this letter to make sure that the Court is fully aware of the situation, which unfortunately appears to be part of an ongoing pattern of inappropriate behavior, favoritism, and conflict of interest on the part of Justice Department officials who are supposed to be acting solely in the best interest of the citizens of the United States. At the outset, let me be clear: I have no opinion on what sentence Mr. Bergantino should receive; rather, I simply want to ensure that the sentencing process is fair and that the Court is adequately informed of the circumstances.

By way of background, I have a unique perspective on both Mr. Bergantino’s case and the conduct of the government. For approximately ten years beginning in 1996, I served as a private banker at Credit Suisse, UBS, and other banks in Geneva, Switzerland. After resigning from UBS upon learning the scope and nature of the bank’s misconduct, in 2007 I began to provide the United States government with extensive and detailed information about a tax fraud scheme perpetrated by UBS and its top executives to help clients conceal assets and avoid paying taxes to the United States. As a direct result of my whistleblowing, the government filed an action that ultimately resulted in the termination of UBS’s illicit business in the United States; UBS’s payment of a \$780 million fine; a comprehensive new tax treaty between the United States and Switzerland; the establishment of three IRS amnesty programs through which the United States has collected billions of dollars from approximately 52,000 American citizens banking offshore illegally; and a formal apology from UBS to the United States government. It also led to numerous federal criminal prosecutions of individuals involved in UBS’s offenses. My voluntary cooperation was recognized not only by the prosecutors, but by the Chairman of

the United States Senate Permanent Subcommittee on Investigations, the Director of the Division of Enforcement for the Securities and Exchange Commission, and others, and I also received the largest whistleblower award to date based on the value of my unprecedented assistance to the IRS. Even after serving more than thirty months in prison and three years of supervised release and paying a fine, I have continued to assist law enforcement agencies around the world, including but not limited to France, where my testimony has been critical in French law enforcement's pursuit of a massive tax fraud case against UBS.

The lead prosecutor in my criminal case was Kevin Downing, formerly of the Justice Department's Tax Division. Mr. Downing's name appeared on my indictment, he dictated the terms of my initial appearance, negotiated my plea, signed my motion for a sentence reduction, and sat by – despite my groundbreaking cooperation – while I was sentenced to substantial prison time. Mr. Downing also played a key leadership role in filing numerous cases against other defendants based on the cooperation that I provided, including individuals charged based on their work at Credit Suisse, such as Mr. Bergantino.

Shortly after this case was filed, however, Mr. Downing left the Department of Justice to join the tax practice at Miller & Chevalier. As your Honor knows, the Miller & Chevalier firm represents Mr. Bergantino in this case.

One need look no further than the indictment in the instant case, a copy of which is attached, to see the appearance of conflict of interest and appearance of impropriety. The indictment of Mr. Bergantino lists none other than Kevin Downing as lead prosecutor on the case. Another name that appears on that indictment as a prosecutor is Mark Daly, who is now the lead prosecutor for the government on this case. Accordingly, it cannot be disputed that Mr. Downing and Mr. Daly worked closely together to obtain this indictment of Mr. Bergantino.

Although Mr. Downing does not appear as counsel of record, it is impossible to look at this situation without wondering what role he is playing in order to provide great benefit to his firm's client, Mr. Bergantino. After all, nothing on the docket in this case reflects that Mr. Downing or his firm has informed the court of the potential conflict – or at least the stark appearance of a conflict – created by the fact that one of the government lawyers whose name appears on the very indictment at issue now works for the law firm representing one of the defendants. Moreover, there is no indication whatsoever that Mr. Downing and his firm have taken any precautions to comply with Rule 1.11 of the Virginia Rules of Professional Conduct, which would include establishing a screen and providing requisite notice to the government. The need for such safeguards is perhaps heightened considering that, while at the Justice Department, Mr. Downing was the supervisor (on my case and others) of Mark Daly, one of the prosecutors on Mr. Bergantino's case.¹

Furthermore, Mr. Downing is not just some entry level associate at Miller & Chevalier; he joined the firm in 2012, and continues to work, *as a partner*. As a partner in the firm, Mr. Downing has a vested financial interest in every case that the firm handles and every client that

¹ There were three other people indicted along with Mr. Bergantino in this indictment, one of whom was Marco Parenti Adami. I was the person who gave Mr. Adami's name directly to Mr. Downing in 2007 as a person of great interest in these criminal investigations.

the firm represents. Therefore, I am concerned that Miller & Chevalier could not build a “firewall” high enough to effectively neutralize the appearance of conflict of interest and appearance of impropriety given the unsettling particulars of this case.

My concern about Mr. Downing’s role is not merely technical. Throughout my cooperation and in my ongoing efforts to bring Swiss banking crimes to light, I have emphasized the need for transparency, not just by the banks themselves, but by the government agencies investigating them. Indeed, one of the most significant problems plaguing efforts to bring tax fraud to light has been the unduly cozy relationship between some government agencies and the perpetrators themselves. In the United States and elsewhere, this cozy relationship has yielded a number of highly suspicious deals that have allowed masterminds of the Swiss banking scheme to walk free.

Perhaps the most egregious example is that of Martin Liechti, UBS’s former head of wealth management for the United States and the entire western hemisphere, based in Zurich, Switzerland. Mr. Liechti was the chief architect and engineer of this entire UBS tax fraud that was committed against the United States – the largest and longest running tax fraud ever uncovered in the history of the country – and which was exposed by me. Mr. Liechti orchestrated, directed and encouraged this illicit activity. In 2008, more than a year after I had already blown the whistle on UBS’s conduct, Mr. Liechti received a rare, highly-coveted non-prosecution agreement from the United States, a fact which was concealed by the Department of Justice for many years. As a result, Mr. Liechti never had to serve a day of prison, probation, or supervised release. This remained true even when Mr. Liechti appeared before the United States Senate Subcommittee, just two weeks after signing the non-prosecution agreement and, with Justice Department attorneys present, asserted Fifth Amendment rights and refused to answer questions, despite explicit language in the agreement requiring him to cooperate and to answer all questions that were put to him by the government. Soon thereafter, it was revealed that Mr. Liechti had been allowed to leave the country a free man while Congress was out of session. This inexplicable free pass was granted to Mr. Liechti despite the fact that he oversaw operations involving approximately 19,000 American offshore clients worth approximately \$20 billion in assets. The non-prosecution agreement was signed by Kevin Downing in his role as Senior Trial Attorney for the Tax Division. A copy of this non-prosecution agreement is attached to this letter.

Especially in light of the history of extremely troubling sweetheart deals given out by the Department of Justice, it is hard to deny the appearance of serious conflict and impropriety surrounding Mr. Bergantino’s plea deal and sentencing. Based on my careful observation of the government’s Swiss banking prosecutions and my own experience with Mr. Downing, I find it impossible to ignore these serious concerns. The taxpayers of the United States – who are, after all, the victims – deserve to know that prosecutions like this one are completely untainted by conflict and uninfluenced by the constantly revolving door that takes lawyers directly from the prosecution to the defense of cases like this one.

While it is possible that Mr. Bergantino may have consented to this conflicted situation (and who wouldn’t, for somebody in his shoes), we cannot ignore the other clients involved in this case whose voices have not yet been heard – the American people.

The Department of Justice is supposed to represent the interests of over 300 million American citizens. However, on those occasions when the ethical compasses of prosecutors malfunction, the American people must rely on judges to correct the ethical course of the ships of justice. Only then can the interests of the American people (the other clients in this case) be safeguarded.

As stated above, I have no particular opinion on what sentence Mr. Bergantino should receive and I have the utmost confidence that Your Honor will issue a fair and appropriate judgment in this case. I do, however, want to make sure that you and all others involved in this and similar matters are aware of the serious concerns raised in this letter. If the Court so desires, I am more than willing to provide further information on these extremely important issues.

Respectfully,



Bradley C. Birkenfeld

Enclosures

cc: Thomas E. Zehnle, Esq.
Mark Daly, Esq.
The Honorable Loretta Lynch,
Attorney General of the United States
The Honorable Charles Grassley,
Chairman, United States Senate Judiciary Committee
The Honorable Patrick Leahy,
Ranking Member, United States Senate Judiciary Committee