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Courts Increasingly Demand That Businesses Break the Law

Geoffrey Sant

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COURTS INCREASINGLY DEMAND THAT BUSINESSES BREAK THE LAW

*Geoffrey Sant**

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ABSTRACT

*United States courts are demanding that businesses break foreign laws at an exponentially increasing rate. A practice that was virtually unheard of only 30 years ago is now so widespread that U.S. courts are ordering foreign lawbreaking in the most trivial discovery matters. When a court receives a discovery request that violates a foreign law, it applies the 5-part *Aérospatiale* balancing test—a test where 4 of the 5 factors are left to the subjective decisions of the judge. By ordering foreign law breaking, our courts—often biased in favor of United States discovery rules—are encouraging abusive litigation tactics, undermining the rule of law, and causing friction with foreign nations. In this article, I update my original work on court ordered law breaking by analyzing these orders over the last three years, and I conclude that the Supreme Court needs to resolve the circuit split regarding the proper way to handle requests for*

information that violate foreign laws.

The past dozen years has witnessed an extraordinary surge in United States courts ordering parties to violate foreign laws. Courts not only *encourage* businesses to violate the law—they *demand* that businesses break the law of foreign countries. The very idea of court-ordered law breaking is startling.¹ Until recently, it was virtually unheard of for courts to demand that companies break the law. As recently as 1987, the D.C. Circuit Court of Appeals, in a *per curiam* order, openly doubted “whether a court may ever order action in violation of foreign laws.”² Yet not only is it now happening, the number of cases is increasing exponentially.³ Moreover, courts order litigants to produce documents in violation of the law for seemingly trivial reasons. For example, one court ordered the unlawful production of documents in a case where the court had already expressed “skepticism that [the plaintiff] could ever make out a claim.”⁴

Court-ordered law breaking typically occurs during litigation discovery.⁵ A litigant may demand that the opposing side produce documents located overseas despite foreign laws prohibiting that production.⁶ A common scenario involves litigants seeking a bank’s overseas financial records even though these cannot be produced without violating the foreign nation’s laws regarding bank secrecy and financial privacy.⁷ When courts receive document requests that call for violating foreign laws, they usually apply the five-factor *Aérospatiale* balancing test to decide whether to order the violation of foreign law.⁸ Four of the five factors in this test require courts to make subjective judgments (*e.g.*, whether the desired information is “important”). But are United States courts able to impartially conduct such a balancing test? Or will United

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1. Geoffrey Sant, *Court-Ordered Law Breaking: U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 BROOKLYN L.R. 181, 181 (2015).

2. *In re Sealed Case*, No. 87-5208, 825 F.2d 494, 498 (D.C. Cir. 1987).

3. *See infra* notes 157-58 and accompanying text.

4. *Republic Techs. (Na), LLC v. BBK Tobacco & Foods*, No. 16-civ-3401 (SIS), 2017 U.S. Dist. LEXIS 158986, *10 (N.D. Ill. Sept. 27, 2017).

5. *See Sant, supra* note 1 at 181-82.

6. *Id.*

7. *Id.* at 215-19.

8. *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522, 544 n.28 (1987). As discussed *infra*, courts in some circuits apply different versions of the *Aérospatiale* test. *See infra* notes 36-44 and accompanying text.

States courts necessarily show bias in favor of United States discovery—and the violation of foreign laws?

In this article, I update my original article on this subject (*Court-Ordered Law Breaking*) from three years ago. Focusing in particular upon decisions from the past three years, I empirically analyze the results of every single court case to apply the five-factor *Aérospatiale* balancing test. The results are clear: United States courts are overwhelmingly predisposed to order the production of documents in violation of foreign laws. In doing so, United States courts encourage abusive litigation tactics, undermine the rule of law, demand the punishment of innocent businesses and individuals, and cause friction with international allies. As this article demonstrates, the number of these cases has increased rapidly, indicating that litigants may be strategically requesting the violation of foreign laws for litigation advantage. Moreover, a severe circuit split has developed as to which *Aérospatiale* balancing test should be applied, resulting in courts applying different sets of factors and obtaining contradictory results.⁹

The Supreme Court has expressed deep concern about the problem of court-ordered law breaking. In the 2018 case of *U.S. v. Microsoft*, at least one-third of the justices expressed concern during oral argument about the “international problems” caused by court-ordered law breaking.¹⁰ Regrettably, the controversy in *U.S. v. Microsoft* was mooted by superseding law and the Supreme Court lost the opportunity to confront the problem of courts demanding that businesses commit unlawful acts abroad. Nevertheless, as the Supreme Court itself appears to have recognized, the need is great for the Court to step in and correct the current morass of court-ordered law breaking.

I. THE *AÉROSPATIALE* BALANCING TEST

Civil litigation in the United States features broad discovery.¹¹ Litigants generally must produce any information that could lead to admissible evidence.¹² Litigants in the United States sometimes seek information held abroad that is prohibited from production by foreign law (such as financial privacy and bank secrecy laws).¹³ The conflict between

9. See *infra*, Section II.

10. Transcript of Proceedings at 12, 38, *U.S. v. Microsoft Corp.*, 138 S.Ct. 1186 (2018).

11. See, e.g., *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

12. See Fed. R. Civ. P. 26(b)(1); see also *Oppenheimer Fund, Inc.*, 437 U.S. at 351; *Hickman*, 329 U.S. at 501.

13. See Sant, *supra* note 1, *passim*.

United States discovery requests and foreign laws is both frequent and severe; many foreign nations have strict laws protecting individual privacy or financial secrecy. For example, countries as varied as Belgium, Brazil, and Japan have each enshrined the right to privacy in their national constitutions.¹⁴ Likewise, the Charter of Fundamental Rights of the European Union states that all people have “the right to the protection of personal data concerning him or her.”¹⁵ Broad demands for discovery in litigation frequently conflict with these and other foreign laws.

In 1987, the Supreme Court dealt with the problem of conflicts between United States discovery demands and the laws of foreign nations.¹⁶ In *Aérospatiale*, the Supreme Court explicitly refused to “articulate specific rules to guide this delicate task of adjudication,”¹⁷ effectively forcing lower courts to fashion their own framework for determining when to require the production of documents in violation of foreign law. Despite this lack of guidance, lower courts attempted to fashion from the Supreme Court’s decision an “*Aérospatiale* test” to apply to requests for information in violation of foreign law. Different courts have established different *Aérospatiale* tests, each of which involves the weighing of a somewhat different set of factors. The most popular of these tests is the five-factor test (discussed further below), in which United States courts weigh the interest in the discovery against the interest of the foreign nation in its laws. The five-factor test is taken from a footnote in the *Aérospatiale* decision in which the Supreme Court majority cited to the Restatement of Foreign Relations Law of the United States.¹⁸ The five factors to be weighed are: (1) the importance of the discovery; (2) the specificity of the request; (3) the origin of the information; (4) the availability of alternative means; and (5) a comparison of United States and foreign interests at stake.¹⁹ Four of these five factors require subjective judgments (such as the “importance” of the information sought).

Commentary on the *Aérospatiale* decision and the various tests has long been extremely negative, with many complaining that the factors applied are amorphous, and that the tests are unworkable and prone to

14. HOUSE OF DELEGATES, ABA, RESOLUTION 103, at 4 (Feb. 6, 2012), <http://perma.cc/UC9A-GQQ6>.

15. Charter Of Fundamental Rights Of The European Union, art. 8(1), 2012 O.J. (C 326/02).

16. Societe Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa, 482 U.S. 522, 546 (1987).

17. *Id.*

18. *Id.* at 544.

19. Sant, *supra* note 1 at 187.

bias.²⁰ After all, United States courts overwhelmingly rule in favor of ordering discovery (and thus demanding the violation of foreign law).²¹ Courts reach this result apparently due to their belief that the importance of discovery in United States litigation outweighs all other national interests. In 2015, I conducted the first-ever empirical analysis of all attempts by United States courts to apply the five-factor test in the context of requests for court orders requiring production of documents in violation of foreign law.²² As I concluded at that time:

A review of all cases applying the five-factor *Aérospatiale* test reveals evidence of pro-forum bias. U.S. courts have found that each of the four subjective factors weigh in favor of violating foreign law by lopsided ratios as high as thirteen to one. These extreme results suggest that the warnings of pro-forum bias expressed by the *Aérospatiale* dissent and by commentators have proven correct.²³

In this article, I review the past three years of cases applying the *Aérospatiale* five-factor test to determine whether the pro-forum bias identified in the previous article has continued. As I explain below, it has not only continued, it appears to have accelerated, and the harms caused by court-ordered law breaking have grown worse.

As discussed below, the need for Supreme Court guidance has become acute. First, United States courts have clearly overstepped their bounds in regularly demanding that businesses break the law in foreign countries. Second, there is a severe circuit split as to the appropriate test to apply in cases where discovery requests conflict with foreign laws. Third, there is a circuit split as to the specific issue of when and whether banks must provide financial records in violation of bank secrecy and financial privacy laws.

20. See *id.* at 187-91 (citing, *inter alia*, Abigail West, *Comment: A Meaningful Opportunity to Comply*, 63 U. KAN. L. REV. 189, 212 (2014); Patrick J. Borchers, *The Incredible Shrinking Hague Evidence Convention*, 38 TEX. INT'L L. J. 73, 81 (2003); James Chalmers, *The Hague Evidence Convention and Discovery Inter Partes: Trial Court Decisions Post-Aérospatiale*, 8 TUL. J. INT'L & COMP. L. 189, 203 (2000); Russell J. Weintraub, *The Need for Awareness of International Standards When Construing Multilateral Conventions: The Arbitration, Evidence, and Service Conventions*, 28 TEX. INT'L L.J. 441, 460-61, 470 (1993); Mark A. Cotter, *The Hague Convention: Selfish U.S. Interpretation Aggravates Foreign Signatories and Mandates Changes to Federal Discovery Rules*, 6 FLA. J. INT'L L. 233, 243 (1991); Steven R. Swanson, *Comity, International Dispute Resolution Agreements, and the Supreme Court*, 21 LAW & POL'Y INT'L BUS. 333, 333 (1990); Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-Aérospatiale Applications of the Hague Evidence Convention*, 24 INT'L LAW. 393, 404 (1990); George A. Bermann, *The Hague Evidence Convention in the Supreme Court: A Critique of the Aérospatiale Decision*, 63 TULANE L. REV. 525, 542 (1989)).

21. See *id.*

22. See Sant, *supra* note 1.

23. *Id.* at 237.

II. THE SUPREME COURT AND THE CIRCUIT SPLITS

There is a great need for Supreme Court guidance on the issue of the conflict of laws. First, as the current Supreme Court appears to have recognized, lower courts have overstepped their bounds, regularly issuing orders requiring the violation of foreign laws in a “raw exercise of their jurisdictional power.”²⁴ In fact, in a number of United States court decisions, the *courts have demanded that foreign countries punish or imprison those who obey United States court orders.*²⁵ These decisions—and other decisions requiring businesses to break the law at home or overseas—damage the rule of law and harm international relations.²⁶ Worse, these decisions encourage abusive discovery by litigants eager to use the courts as a means of trapping an opponent between the conflicting requirements of United States court orders and foreign laws.

Fortunately, the Supreme Court has expressed an interest in correcting the current problem of court-ordered law breaking. Specifically, during oral argument in *U.S. v. Microsoft*, at least one-third of the justices raised concerns about the phenomenon of court-ordered law breaking:

- Justice Sotomayor: “[T]he problem that Justice Ginsburg alludes to is the fact that, by [demanding production of overseas documents], we are trenching on the very thing that . . . our jurisprudence doesn’t want to do, which is to create international problems.”²⁷
- Justice Sotomayor: “[A]ll those amici . . . have written complaining about how this would conflict with so much foreign law. We’ve got a bunch of amici briefs telling us how much this conflicts.”²⁸
- Justice Breyer: [W]hat happens if you go to Microsoft and you ask . . . for some bank records that are in Italy, and in fact, Italy does have a law, we imagine, which says absolutely no bank

24. *Aérospatiale*, 482 U.S. at 548 (Blackmun, J., concurring in part and dissenting in part).

25. *See infra* notes 135-39 and accompanying text.

26. *See id.*

27. Transcript of Proceedings at 12, *U.S. v. Microsoft Corp.*, 138, S.Ct. 1186 (2018).

28. *Id.* at *13. The “amici briefs” referred to by Justice Sotomayor appear to be those submitted by (1) the E-Discovery Institute, Deere & Company, Freddie Mac, Bayer U.S. LLC, Gilead Sciences, Inc., GlaxoSmithKline LLC, Pfizer Inc., and individual amici; and by (2) the European Company Lawyers Association. Both of these briefs cite to my arguments in *Court-Ordered Law Breaking*. *See* Brief for E-Discovery Institute et al. as Amici Curiae Supporting Neither Party at 17-31, *U.S. v. Microsoft Corp.*, 138, S.Ct. 1186 (2018) (closely following and summarizing my arguments); Brief for European Company Lawyers Association as Amicus Curiae Supporting Respondent at 29, *U.S. v. Microsoft Corp.*, 138, S.Ct. 1186 (2018) (citing to my arguments).

record can be taken. . . ?”²⁹

- Justice Breyer: “So the answer is that, which many amici suggest to us, that what should be done in such a case is you go to the magistrate or the judge and you say, judge, I want you to look at the factors of comity. And one of them will be . . . this Italian law, . . . which says you can’t [take the documents].”³⁰
- Justice Kagan: “But you are agreeing . . . that a court in that circumstance should conduct a comity analysis?”³¹
- Justice Breyer: “Now the government suggested what’s impractical about this, in any situation where, say, Microsoft thinks that there really is a problem here because of a foreign law, which might forbid it for a variety of reasons, what you do is you—Microsoft goes to the magistrate and says, look, there’s a problem here because of the law of other countries. . . .”³²
- Justice Breyer: “You’d take foreign interests into account. Maybe you’d use *Aérospatiale* standards. One brief tells us they’re not good enough, but it didn’t say what we should use. . . .”³³

The in-depth questioning by these justices indicates that the Supreme Court already recognizes the need to correct the problems created by the *Aérospatiale* test. Unfortunately, the *Microsoft* case became moot due to superseding law and the Supreme Court therefore lost the chance to weigh in on the “international problems,” pro-forum bias by trial courts, and the ongoing circuit split.³⁴ Nevertheless, the extensive questioning indicates that the Supreme Court may be interested in correcting the problems created by the *Aérospatiale* test through a future case. This article provides further empirical evidence for the Supreme Court to consider

29. Transcript of Proceedings at 27. Justice Breyer appears to be referencing the arguments in *Court-Ordered Law Breaking*, which focused heavily on banking cases. See Sant, *supra* note 1 at 214-19. *U.S. v. Microsoft* did not involve bank records.

30. *Id.* at 27-28.

31. *Id.* at 29.

32. *Id.* at 38-39.

33. *Id.* at 39-40.

34. *U.S. v. Microsoft Corp.*, 138, S.Ct. 1186 (2018); see also, e.g., Kieren McCarthy, *Supreme Court punts on Microsoft email seizure decision after Cloud Act passes US Congress*, REGISTER (Apr. 17, 2018), <https://www.law360.com/articles/1034498/justices-drop-microsoft-warrant-row-but-fight-far-from-over> [<https://perma.cc/3D65-5N2W>] (“The United States Supreme Court has dodged a critical legal question. . . .; a situation made all the more confusing by the fact that federal appeals courts across the US have come to different conclusions about the best way of dealing with the issue.”); Allison Grande, *Justices Drop Microsoft Warrant Row, But Fight Far From Over*, LAW360 (Apr. 17, 2018), https://www.theregister.co.uk/2018/04/17/supreme_court_punts_email_seizure_decision_into_the_long_grass/ [<https://perma.cc/S52S-TB69>] (“The . . . demise of the Supreme Court dispute also leave[s] unaddressed broader overseas data transfer questions that are likely to soon re-emerge in new legal disputes. . .”).

when analyzing the effectiveness of the *Aérospatiale* test and in designing a better way for lower courts to deal with international conflicts of law.

While this article focuses primarily upon court bias and the problems created by courts ordering businesses to violate foreign laws, the Supreme Court should also review and reconsider the *Aérospatiale* test in order to resolve a pronounced circuit split. As discussed below, such a severe circuit split calls out for Supreme Court guidance and correction.

The Supreme Court's *Aérospatiale* decision specifically avoided providing guidance to lower courts when considering a request for discovery in violation of foreign law.³⁵ As a result, both circuit courts and district courts created a variety of "*Aérospatiale* tests," seizing upon various snippets of language in the *Aérospatiale* decision. These tests each contradict and conflict with each other, and they focus upon very different factors.

The Fifth Circuit (and a number of district courts) created a three-factor *Aérospatiale* test for handling instances where discovery under the Federal Rules of Civil Procedure would conflict with foreign law.³⁶ In the words of the Fifth Circuit, "[t]he district court is directed to determine whether [alternative discovery procedures] are appropriate after 'scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to these procedures would prove effective.'" ³⁷ The Fifth Circuit took this three-factor test from language within the Supreme Court's *Aérospatiale* ruling.³⁸ The Fifth Circuit's three-factor test "emphasizes the sovereignty interests of foreign states."³⁹ A number of district courts outside the Fifth Circuit have also applied this three-factor test.⁴⁰

Other courts, led by the Second Circuit, have applied a four-factor *Aérospatiale* test.⁴¹ This four-factor test examines "(1) the competing interests of the nations whose laws are in conflict, (2) the hardship that compliance would impose on the party or witness from whom discovery is sought, (3) the importance to the litigation of the information and documents requested, and (4) the good faith of the party resisting

35. *Aérospatiale*, 482 U.S. at 546 (declining to "articulate specific rules to guide this delicate task of adjudication.").

36. *In re Anschultz & Co., GmbH*, 838 F.2d 1362, 1364 (5th Cir. 1988).

37. *Id.* (quoting *Aérospatiale*, 482 U.S. at 544).

38. *Id.*

39. *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592 (EEF), 2016 U.S. Dist. LEXIS 95453, at *21-22 (E.D. La. May 16, 2016).

40. *See, e.g., Valois of Am., Inc. v. Risdon Corp.*, 183 F.R.D. 344, 346 (D. Conn. 1997); *In re Aircrash Disaster Near Roselawn, Ind.*, Oct. 31, 1994, 172 F.R.D. 295, 309 (N.D. Ill. 1997).

41. *See, e.g., First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998); *Bodner v. Paribas*, 202 F.R.D. 370, 374-75 (E.D.N.Y. 2000); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987).

discovery.”⁴² This test also focuses primarily upon the interests of the entities resisting discovery. Three of the four factors focus upon the sovereign interests of the foreign nation(s), or upon the impact upon and good faith of the party resisting discovery. Only the factor of “importance” focuses upon the impact upon the needs of the party seeking the discovery.

The Ninth Circuit has applied yet another *Aérospatiale* test, this time a seven-factor balancing test. According to the Ninth Circuit, the seven factors to consider are: (1) importance of the discovery to the litigation; (2) the specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of obtaining the information; (5) the extent to which noncompliance would undermine important United States interests or interests of the state where the information is located; (6) “the extent and the nature of the hardship that inconsistent enforcement would impose upon the person”; (7) “the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.”⁴³ These factors place much more of the focus upon the desired discovery (and less upon the impact of law breaking upon the foreign country or the business forced to produce information) than do the other *Aérospatiale* tests.

The “greater number of courts,” however, have followed a five-factor *Aérospatiale* test, consisting of (1) importance of the discovery; (2) specificity of the request; (3) origin of the information; (4) availability of alternative means; (5) comparison of United States and foreign interests at stake.⁴⁴ These factors comprise the first five factors of the Ninth Circuit’s test—but leave out the Ninth Circuit’s final two factors.

As can be seen, the circuits have split dramatically on the proper way of applying the *Aérospatiale* comity test. Moreover, these different tests focus on different concerns and lead to different results. For example, the Ninth Circuit test appears to focus on the litigant’s desire for discovery, while the Fifth Circuit test focuses on the sovereign interests of the foreign states. At this point, the only way to resolve the circuit split is for the Supreme Court to establish the correct mechanism for resolving requests for discovery in violation of foreign law.

There is yet another circuit split relating to court-ordered law breaking. In the specific case of banks, there has been a deep and enduring split as to “whether and to what extent” banks must produce financial

42. *Id.*

43. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992).

44. *Sant*, *supra* note 1 at 187.

records in violation of foreign law.⁴⁵ In 1958, the Supreme Court reversed the dismissal of a lawsuit where the plaintiff could not lawfully produce records from a foreign bank despite a discovery request for those documents.⁴⁶ As the Supreme Court stated, “It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.”⁴⁷ Likewise, the Second Circuit,⁴⁸ D.C. Circuit,⁴⁹ and Seventh Circuit⁵⁰ each rejected bald requests for the order of banking records in violation of foreign financial privacy laws. By way of contrast, the Fifth Circuit⁵¹ and the Eleventh Circuit⁵² both required the production of financial records in violation of bank secrecy laws. The Restatement of Foreign Law has noted that whether or not banks must produce financial records in violation of foreign law so as “to avoid sanction in the United States is not clear.”⁵³

The Supreme Court urgently needs to address court-ordered law breaking in order to respond to (1) the enormous surge in United States trial courts demanding that companies break the law abroad; (2) the circuit split as to how to deal with discovery requests that seek to require companies to break the law; and (3) the circuit split as to banks’ obligations to produce documents in violation of foreign financial privacy and bank secrecy laws.

III. IS THERE PRO-FORUM BIAS IN THE APPLICATION OF THE *AÉROSPATIALE* TEST?

For this article, I conducted an empirical analysis of every United States trial court decision to apply the *Aérospatiale* five-factor test. By extremely lopsided margins, United States courts have found that each of the four subjective factors (which consist of such factors as the

45. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §442(c) (1987); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §442, cmt. h (1987).

46. *Société Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

47. *Id.* at 211.

48. *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960).

49. *In re Sealed Case*, 825 F.2d 494, 498-99 (D.C. Cir. 1987).

50. *United States v. First Nat. Bank of Chicago*, 699 F.2d 341, 346-47 (7th Cir. 1983).

51. *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

52. *United States v. Bank of Nova Scotia I*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

53. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *Supra* note 45.

“importance” of the requested discovery) weigh in favor of ordering companies to break the law overseas.

Courts found each subjective factor to weigh in favor of violating foreign law by ratios of at least four to one.⁵⁴ In two cases, the ratio was at least thirteen to one in favor of ordering companies to break the law abroad.⁵⁵ Such extremely lopsided ratios strongly indicate that United States courts are unable to objectively weigh United States and foreign interests. A deeper review of specific cases shows that United States courts indeed have a pronounced pro-forum bias, and these courts regularly demand that companies break the law overseas in questionable situations.

The willingness of courts to demand that companies break the law overseas has encouraged litigants to seek this illegal discovery. Litigants abusively wield discovery requests as a means of forcing entities to choose between punishment in the United States (for failure to comply with a court order) and punishment in the foreign country (for violating the law).⁵⁶

The willingness of courts to order law breaking abroad has clearly encouraged litigants to seek these orders. The number of requests for courts to order law breaking abroad has skyrocketed over the past dozen years. Over 91% of all requests for court-ordered law breaking occurred between 2005 and the end of 2017.⁵⁷ By contrast, during the first eighteen years after the *Aérospatiale* ruling, there were only six such cases.⁵⁸ Such enormous, exponential growth strongly indicates that litigants are using discovery conflicts as a litigation strategy. Trial courts that demand that companies break the law have encouraged abusive litigation tactics.⁵⁹

Once discovery abuse and pro-forum bias become entrenched, they are extraordinarily difficult to correct due to the “the limited appellate review of interlocutory discovery decisions.”⁶⁰ Moreover, the system of precedents means that other United States trial courts repeat and cite to

54. See *infra* Sections IV(A)-(E).

55. See *infra* Sections IV(A), (B).

56. See *infra* notes 112-117 and accompanying text (bank that was nonparty to litigation sanctioned and ordered to pay daily fine; the bank later settled for \$250,000 USD.); see also, e.g., Alex Lakatos, *Bank Response to Discovery Requests for Privileged Materials*, 33 REV. BANKING & FIN. SERVS. 45, 46 (2017).

57. I base these statistics upon cases applying the *Aérospatiale* five-factor test in the context of court-ordered law breaking. As already discussed, not all courts apply the *Aérospatiale* five-factor test. See *infra* Section V.

58. *Id.*

59. *Aérospatiale*, 482 U.S. at 546.

60. *Aérospatiale*, 482 U.S. at 554 (Blackmun, J., concurring in part and dissenting in part).

decisions infected with pro-forum bias.⁶¹ This means that pro-forum bias is self-perpetuating, and the Supreme Court should correct this bias at the earliest opportunity. Worse, and as discussed further below, a number of United States courts have even demanded that foreign governments imprison those who comply with United States court orders.⁶²

IV. CASES APPLYING THE *AÉROSPATIALE* FIVE-FACTOR TEST

The *Aérospatiale* five-factor test requires United States courts to weigh the value of their own work in managing litigation discovery against the value of unfamiliar foreign laws. It is perhaps unsurprising that United States courts have a cognitive bias in favor of United States discovery.⁶³ The remainder of this article analyzes the results of the five-factor test, focusing primarily on cases from the past three years. The results show that court decisions have been infected with overwhelming pro-forum bias.

For this paper, I analyzed every United States court decision applying the *Aérospatiale* five-factor test to determine whether or not to order discovery productions in violation of foreign law. For each of these cases, I analyzed and calculated the court's conclusions as to each of the five factors.⁶⁴ (This means that I did not consider those cases applying the three-factor or four-factor *Aérospatiale* test. I only considered the first five factors for cases that applied the Ninth Circuit's seven-factor test.) When courts treated a given factor as neutral, this factor was excluded when calculating percentages; this is why the number of cases considered is different for some of the factors.⁶⁵

In the end, I found seventy cases that applied *Aérospatiale* to requests for court-ordered law breaking.⁶⁶ From these results, I conclude that (1) courts display a pro-forum bias; and (2) there has been an exponential increase in litigants seeking court-ordered violations of foreign law.⁶⁷ I

61. See, e.g., Chalmers, *supra* footnote 20 at 201.

62. See *infra* notes 135-39 and accompanying text.

63. See Sant, *supra* note 1 at 194.

64. For a more detailed discussion of the methodology, see Sant, *supra* note 1 at 194-197. The statistical results of my 2015 article were independently confirmed in M.J. Hoda, *The Aérospatiale Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It*, 106 CALIF. L. REV. 231, 241 n.80 (2018).

65. See, e.g., S.E.C. v. Stanford Intern. Bank, Ltd., 776 F. Supp 2d 323, 337 (N.D. Texas 2011) (treating the fifth factor as neutral).

66. The cases I identified as applying *Aérospatiale* to the context of weighing whether to order violations of foreign law are located in an appendix at the end of this article.

67. I previously noted that U.S. courts also appear to have an additional bias against non-Western nations. See Sant, *supra* note 1 at 230-32. I have not been able to further refine my analysis

discuss these results below.

A. *Factor One, “Importance”*

Courts applying factor one (“importance”) weigh “the importance to the . . . litigation of the documents or other information requested.”⁶⁸ By the lopsided ratio of thirteen-to-one, United States courts overwhelmingly find that this factor (“importance”) favors ordering companies to break the law in foreign countries. In particular, 93% of courts (64 out of 69) applying the *Aérospatiale* five-factor test concluded that “importance” justified violating foreign law. Such lopsided results in a purported balancing test is evidence that courts have a pro-forum bias.

Many courts unwittingly convert the first factor of the *Aérospatiale* from a test of “importance” into a test of “relevance.”⁶⁹ That is, instead of weighing whether documents are important to a litigation, courts ask only whether the documents are relevant. If they are relevant, the court claims that this is enough to weigh in favor of demanding that businesses break the law. But “relevance” is not the language used in *Aérospatiale*, and it is an extremely low standard for something as serious as ordering businesses to break the law. Yet courts frequently assert that factor one weighs in favor of court-ordered law breaking simply because “the documents are relevant to the litigation.”⁷⁰ Similarly, another recent court decision ruled that this factor weighed in favor of court-ordered law breaking because “the information sought . . . is generally relevant and otherwise discoverable under the FRCP.”⁷¹

Even when courts have not converted factor one from a test of “importance” into one of “relevance,” courts seem to find that almost

on this point because there have not been a sufficient number of cases in the past three years to modify my original conclusions. In particular, because almost every case during the past three years has ruled in favor of violating foreign law, it is not possible to identify any particular difference in how courts have treated Western and non-Western nations during this time frame.

68. *Aérospatiale*, 482 U.S. at 544 n.28.

69. Sant, *supra* note 1 at 197-99; *see also, e.g., In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2014 WL 6602711, No. 07-Civ-05944, 2014 WL 5462496, at *2 (N.D. Cal. Mar. 26, 2014) (“The Court finds the [document sought] is relevant. . . . This weighs for production.”); *Trueposition Inc. v. LM Ericsson Telephone Co.*, No. 11-Civ-4574, 2012 WL 707012, at *5 (E.D. Pa. Mar. 6, 2012) (“The documents in question deal with jurisdictional discovery . . . and are relevant discovery.”); *In re Air Cargo Shipping Services Antitrust*, 278 F.R.D. 51, 53 (E.D.N.Y. 2010); *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2010 WL 3420517, at *9 (E.D.N.Y. Aug. 27, 2010) (similar).

70. *See, e.g., Philips v. Ford Motor Co.*, No. 14-civ-0289, 2016 U.S. Dist. LEXIS 76054, at *10 (N.D. Cal. June 10, 2016).

71. *Connex R. R. LLC v. AXACorporate Solutions Assur.*, 16-civ-2368 (RAO), 2017 U.S. Dist. LEXIS 215050, *35-6 (C.D. Cal. Feb. 22, 2017).

anything qualifies as “important.” In one recent case, the court rejected the defendant’s argument that the information sought was not actually critical to “the outcome of this case,” declaring: “Plaintiffs should have access to this information in order to adequately build a case.”⁷² The court seemed unconcerned that the information was not critical or key, and instead was satisfied that the information would be helpful in organizing or planning a litigation (“to adequately build a case”). Based on this, the court declared the information was “highly relevant” and that this “relevance” (not “importance”) caused this factor to weigh in favor of violating foreign laws.⁷³ Documents peripheral to a litigation should not be deemed a sufficient reason to order businesses to break the law.

In a litigation dispute over trademarks, a court found that the importance of the documents weighed in favor of violating foreign law even though the court had already indicated it believed the plaintiff had no valid case.⁷⁴ Although “the district court judge has expressed ‘skepticism that [the plaintiff] could ever make out a claim of confusion’ as required to establish trade dress confusion,” nevertheless the documents were still declared to be important enough to require the defendant company to break the law abroad.⁷⁵ The court explained its conclusion with nothing more than a statement that “the district court has not [yet] dismissed the trade dress claim.”⁷⁶ It would seem wrong for a court to order a party to break the law and risk penalties or imprisonment in order to produce documents regarding a claim that has no basis.

In yet other cases, courts have declared it “important” for companies to produce documents in violation of foreign laws even though the documents were requested as part of a fishing expedition to identify additional potential defendants.⁷⁷ For example, banks have been ordered to produce swaths of financial records in violation of bank secrecy laws simply so that plaintiffs could identify other deep-pocketed defendants.⁷⁸

72. *Burrow v. Forjas Taurus S.A.*, 16-civ-21606 (EGT), 2017 U.S. Dist. LEXIS 9259, *14-15 (S.D. Fla. June 16, 2017); *see also, e.g., In re Cathode Ray Tube (CRT) Antitrust Litigation*, No. C-07-59944-SC, 2014 WL 6602711, No. C-07-5944-SC, 2014 WL 5462496, at *2 (N.D. Cal. Oct. 23, 2014) (finding “importance” where the documents may be of “significant value in helping Plaintiffs organize their case and may identify previously undiscovered competitor contacts”).

73. *Id.* at *15.

74. *Republic Techs. (Na), LLC v. BBK Tobacco & Foods*, No. 16-civ-3401, 2017 U.S. Dist. LEXIS 158986, at *10 (N.D. Ill. Sept. 27, 2017).

75. *Id.*

76. *Id.* at *11.

77. Sant, *supra* note 1 at 199.

78. *Id.* (citing *Tiffany LLC v. Qi Andrew*, 276 F.R.D. 143 (S.D.N.Y. 2011); *Old Ladder Litig. Co., LLC v. Investcorp Bank, B.S.C.*, No. 08-Civ-0876(RMD)(THK), 2008 WL 2224292, at *5 (S.D.N.Y. May 29, 2008); *Export-Import Bank of the US v. Asia Pulp & Paper Co., LTD.*, No. 03-

To summarize, courts have overwhelmingly found that the factor of “importance” weighs in favor of ordering the violation of foreign laws. Courts have found by a ratio of over thirteen-to-one that this factor weighs in favor of court-ordered law breaking. In some cases, courts have unwittingly replaced the standard of “importance” with a standard of mere “relevance.” In other cases, courts have found “importance” in extremely questionable circumstances, such as when the court has already indicated that the plaintiffs appear to have no case, or when the information is merely to help a party “organize” its case. In other instances, courts have found “importance” to exist even when the plaintiffs are not seeking actual evidence or proof, but are instead seeking to identify additional potential targets for suit. All of this indicates that courts have allowed pro-forum bias to undercut the *Aérospatiale* balancing test.

B. Factor Two, “Specificity”

Courts applying the second factor of the *Aérospatiale* test must weigh “the degree of specificity of the request.” Courts find this factor to favor discovery (and the violation of foreign law) in 94% of cases (65 out of 69), a ratio of more than fifteen-to-one. It seems unlikely that the Supreme Court would create a balancing test where the results are so overwhelmingly skewed in one direction.

Many courts have misinterpreted the command to weigh the “specificity” of the request. The term “specificity” is ambiguous in that it could refer to (1) the degree to which the document requests are narrowly tailored; or (2) how clearly the document requests identify the documents sought. While both interpretations are linguistically possible, the only sensible interpretation is that the Supreme Court intended the factor of “specificity” to refer to the degree to which a document request is “narrowly tailored” (that is, limited in scope).⁷⁹ After all, “[i]t would be

Civ-08554, 2009 WL 1055673, at *3 (S.D.N.Y. 2009).

79. See, e.g., *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397, 401 (S.D.N.Y. Dec. 22, 2014); *Motorola Credit Corp. v. Uzan*, 293 F.R.D. 595, 599 (S.D.N.Y. 2013); *CE Intern. Res. Holdings, LLC v. S.A. Minerals, Ltd. Partnership*, No. 12-civ-08087 (CM)(SN), 2013 WL 2661037, at *10 (S.D.N.Y. June 12, 2013); *Lantheus Medical Imaging, Inc. v. Zurich American Ins.*, 841 F. Supp. 2d 769, 793 (S.D.N.Y. 2012); *S.E.C. v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 332 (N.D. Tex. 2011); *JP Morgan Chase Bank, N.A. v. PT Indah Kiat Pulp and Paper Corp.*, Tbk, No. 02-civ-6240, 2011 WL 5588764 at *4 (N.D. Ill. Nov. 16, 2011); *AstraZeneca LP v. Breath Ltd.*, No. 08-civ-1512(RMB/AMD), 2011 WL 1421800, at *13 (D.N.J. March 31, 2011); *Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 247 (S.D.N.Y. 2010); *Gucci America Inc. v. Curveal Fashion*, 2010 WL 808639, at *3 (S.D.N.Y. March 8, 2010); *Strauss v. Credit Lyonnais*, 249 F.R.D. 429, 441 (E.D.N.Y. 2008); *Weiss v. National Westminster Bank, PLC.*, 242 F.R.D. 33, 44 (E.D.N.Y. 2007); *Adams v. Unione Mediterranea Di Sicurta*, No. 94-civ-1954, 2002 WL 472252 (E.D. La. March 28,

remarkable if the Supreme Court really intended that foreign law should be violated in part because document requests are clearly written.”⁸⁰ Many courts, however, have misinterpreted the factor of “specificity” as asking whether the desired documents are clearly identified.⁸¹

In one recent case, for example, the defendant “emphasize[d] that Plaintiffs have served over 100 RFPs [requests for production] in this action.”⁸² Nevertheless, the court asserted that this massive number of document requests, which each “may include within their scope a large number of documents,” was nonetheless specific.⁸³ According to the court, “The fact that Plaintiffs have served a large number of RFPs overall in this case does not necessarily mean that they are not entitled to this discovery.”⁸⁴ It is hard to square the court’s analysis with the *Aérospatiale* test’s requirement that the “specificity” of the requests is a factor to be weighed either in favor or against ordering discovery. A “large number” of document requests each seeking “a large number of documents” does not appear to be a narrowly tailored request. This court seems to have entirely brushed aside its obligation to weigh the narrowness of the requests.

In another case, the court concluded that the standard of “specificity” was met *because* the defendant was able to recognize that the requests would violate Quebec law.⁸⁵ Under this extraordinary reasoning, the court declared that the fact that the defendant could understand the document requests clearly enough to recognize that they sought documents that were prohibited from production by Quebec law was itself proof that the document requests were “specific.” This bizarre logic essentially holds that any party objecting to a document request as requiring the violation of foreign law has already—by making that objection—proved that the requests are sufficiently specific. Such an analysis makes a mockery of the balancing test.

Exemplifying the willingness of courts to rubber-stamp broad demands for the unlawful production of documents is a 2017 case in Florida. A plaintiff named Mrs. Burrow claimed that while removing

2002) (weighing the factor of specificity by analyzing the degree to which the document requests were “tailored” or “narrowly tailored”).

80. Sant, *supra* note 1 at 200.

81. *Id.*

82. *Id.* at 200-01 (providing examples).

83. *Connex R. R. LLC v. AXACorporate Solutions Assur.*, No. 16-civ-2368-ODW (RAOx), 2017 U.S. Dist. LEXIS 215050, at *36-37 (C.D. Cal. Feb. 22, 2017).

84. *Id.*

85. *Skky, Inc. v. Thumbplay Ringtones, LLC*, No. 13-civ-2072 (PJS/JJG), 2014 U.S. Dist. LEXIS 186391, at *17 (D. Minn. April 4, 2014).

items from her vehicle, she dropped a revolver, and that “[t]he revolver fired upon hitting the ground and a bullet struck Mrs. Burrow in the knee.”⁸⁶ Putting aside the reliability of this allegation (which may be a self-serving description as opposed to what really occurred), it certainly seems an enormous jump from this single incident to a demand for “any and all documents that refer to or relate to” a gun manufacturer’s design and manufacturing of this brand of revolver.⁸⁷ Nevertheless, the court found that the broad wording of these document requests (seeking “any and all documents that refer to or relate to” a variety of subjects) were sufficiently specific.⁸⁸ The court stated that it is “standard” in products liability cases “for requests to include the phrases ‘any and all documents relating to’ when the subject matter is on design, manufacturing, safety manuals, etc.”⁸⁹ The court here seems to have misunderstood its task. The question is not whether these document requests may be “standard” in a run-of-the-mill products liability case, but rather whether *in the context of ordering a business to break the law* such broad requests for “any and all” documents are “specific” and “narrowly tailored.” The answer should have been no.

One sign of the pro-forum bias of United States courts is that the courts will sometimes describe the same set of document requests as “specific” when analyzing factor two (“specificity”) but later state (in a different context) that the documents demanded are insufficiently specific. For example, one court found that factor two (“specificity”) “likely favors compelling the disclosure” because “the plaintiff’s requests are adequately specific.”⁹⁰ Yet this same court later declared (while discussing factor three, the “origin of the information”) that “no documents have been produced, identified, or described . . . with any specificity.”⁹¹ (Under factor three, which deals with the national origin of the information being sought, courts weigh the factor in favor of ordering discovery if the documents originated in the United States, but weigh the factor against ordering discovery if the documents originated outside the United States.) In this instance, the court ruled that “specificity” weighs in favor of violating foreign laws when it analyzed factor two, but also ruled (while considering factor three) that it was unable to state with

86. *Burrow v. Forjas Taurus S.A.*, No. 15-civ-0641-D, 2017 U.S. Dist. LEXIS 9259, at *2 (N.D. Tex. January 24, 2017) (citation omitted).

87. *Id.* at *16.

88. *Id.* at *17.

89. *Id.* at *16.

90. *Knight Capital Partners Corp. v. Heinkel AG & Co., KGAA*, 290 F. Supp. 3d 681, 690 (E.D. Mich. 2017).

91. *Id.*

certainty the national origin of the information due to the lack of “any specificity” as to the documents. Thus, the same court claimed that the same set of document requests are both specific and not specific, which is a contradiction. When considering factor two, the court stated that the document requests were specific but concluded that the third factor (“origin of information”) “is either neutral or weighs slightly in favor of compelling disclosure.” The court contradicted itself—but both times concluded that the factor weighed in favor of ordering the violation of foreign laws. This appears to show bias.

A different court contradicted itself in the same way.⁹² The court declared that factor two (“specificity”) weighed in favor of violating foreign law, but when discussing factor four (“the availability of alternative means of securing the information”), the court stated that the documents could not be obtained easily through other means because “the documents are numerous,” and “[t]his is not a case where only a few, insubstantial documents are sought.”⁹³ (Factor four, which deals with alternative means of obtaining the documents at issue, asks whether there are alternative mechanisms by which the documents at issue could be obtained without violating foreign laws, and if those mechanisms exist, then the factor weighs against violating foreign laws.) Thus, in this case, the same court determined both that the document requests were narrowly tailored when discussing factor one (“specificity”), but also found that the document requests were extremely broad when discussing factor four (“alternative means”).⁹⁴ Here, too, the court contradicted itself—but both times concluded that the factor weighed in favor of ordering the violation of foreign laws. The fact that courts declare that the very same document requests are both specific and not specific (and that in every case, they find that the specificity or non-specificity weighs in favor of violating foreign law) indicates that pro-forum bias has influenced the courts.

In many cases, courts will pare back overly broad document requests in order to make them palatable to the court. This may seem reasonable, but in fact the practice of paring back requests incentivizes litigants to make overly broad requests in the first place. This is because “litigants are incentivized to make a broad request that will either be accepted or else trimmed to whatever level the court will accept.”⁹⁵ This abusive litigation strategy of making overly broad requests for court-ordered law breaking is already occurring; in one recent case, for example, the plaintiff freely

92. *Doster v. Schenk A.G.*, 141 F.R.D. 50, 53 (M.D.N.C. 1991).

93. *Id.* at 54.

94. *Id.*

95. *Sant*, *supra* note 1 at 202.

“acknowledge[d] that these requests merely reflect an opening negotiating position.”⁹⁶ Needless to say, litigants should not seek unnecessary violations of foreign law as “an opening negotiating position.” Courts’ willingness to pare back abusive requests have had the perverse effect of encouraging more discovery abuse.

Moreover, by unilaterally paring back overly broad requests, courts tilt the results of factor two (“specificity”) so that they always weigh in favor of United States discovery (and in favor of violating foreign laws). For example, in one recent case, the plaintiffs sought forty categories of documents, “the majority of which were completely unlimited in time and scope and/or sought information irrelevant to the [litigation].”⁹⁷ The court noted that, “as the request now stands, factor two weighs in favor of non-production” and that the discovery requested was “overly broad.”⁹⁸ However, the court stated that it would unilaterally “narrow plaintiff’s document request substantially” and that “[w]ith these new limitations, factor two now weighs in favor of production.”⁹⁹ As can be seen, the court has effectively rewarded the plaintiffs for making “overly broad” requests by paring those requests back to the maximum level the court deems permissible, and then finding that those “overly broad” requests now weigh in favor of ordering the defendant to break the law.

In a dispute over the trademark used in hemp-related products, the court noted that the “request for discovery goes beyond what is relevant,” adding that the original requests sought “every email, Power Point presentation, and other shred of paper regarding the development of both the package [actually] used . . . as well as every package design that was considered but not used. . . .”¹⁰⁰ But the court simply pared back the document requests and then found that this factor weighed in favor of ordering the violation of French law.¹⁰¹ By paring back the discovery requests in these and other cases, courts have unwittingly encouraged abusive discovery requests; they have also put a thumb on the scale in favor of court-ordered law breaking.¹⁰²

96. *Catalano v. BMW of N. Am., LLC*, No. 15-cv-4889 (KBF), 2016 U.S. Dist. LEXIS 78901, at *25 (S.D.N.Y. June 16, 2016).

97. *Ney v. Owens-Illinois, Inc.*, No. 16-2408, 2016 U.S. Dist. LEXIS 169371, at *15 (E.D. Pa. Dec. 6, 2016).

98. *Id.* at *12.

99. *Id.* at *12-13.

100. *Republic Techs. (Na), LLC v. BBK Tobacco & Foods*, No. 16 C 3401, 2017 U.S. Dist. LEXIS 158986, at *14-15 (N.D. Ill. Sept. 27, 2017) (internal quotations omitted).

101. *Id.*

102. *See also Sant, supra* note 1 at 202-203 (citing as examples *Eikenberry v. Celsteel Ltd.*, No. 13 Civ. 4551(AT), 2013 WL 5308028, at *6 (S.D.N.Y. Sept. 19, 2013); *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310, 315 (E.D.N.Y. 2006); *Doster v. Schenk A.G.*, 141 F.R.D. 50, 53 (M.D.N.C.

In sum, United States courts have overwhelmingly found that factor two (“specificity”) weighs in favor of violating foreign laws. The fact that courts have ruled by a ratio of fifteen-to-one that businesses must break the law is strong evidence of pro-forum bias. Courts have frequently misinterpreted the factor of specificity as asking whether document requests are clearly written (instead of whether the requests are narrowly tailored). Courts also regularly declare that extremely broad document requests are “specific.” Most problematic of all, courts have encouraged abusive litigation by paring back overly broad requests and then finding that the requests now weigh in favor of breaking the laws of foreign countries.

C. Factor Three, “Origin of Information”

The third factor of the *Aérospatiale* test asks “whether the information originated in the United States.”¹⁰³ While courts make subjective judgments regarding each of the other four factors, this factor asks an objective question. Thus, by comparing the results of the objective factor to the four subjective factors, one can get a sense of the pervasiveness of pro-forum bias.

Courts found that the objective factor (“origin of information”) favored law breaking in only 11% of cases. By contrast, courts found each of the four subjective factors to favor violating foreign law in at least 80% of cases. Such an extreme difference in results indicates that courts may be influenced by pro-forum bias in their treatment of the subjective factors.

Moreover, courts show signs of pro-forum bias even when discussing the objective factor (“origin of information”). Courts sometimes claim that it is unclear whether the documents requested are located abroad, even though there is no reason to believe they are located in the United States. For example, one court declared that factor three (“origin of information”) “also weighs in favor of production” based on this extremely questionable logic: “To the extent [the defendant] sold its fibers to companies in the United States to be incorporated into their asbestos products, it is possible that documents regarding the sale of [the] fiber could have originated in the United States.”¹⁰⁴ The court also cited the fact that the Canadian defendant had already produced those documents that

1991).

103. *Aérospatiale*, 482 U.S. at 544 n.28.

104. *Ney v. Owens-Illinois, Inc.*, No. 16-2408, 2016 U.S. Dist. LEXIS 169371, at *13 (E.D. Pa. Dec. 6, 2016).

were actually located in the United States as a reason for claiming that the defendant's remaining documents might also be located in the United States.¹⁰⁵ None of this logic makes much sense. Selling products to companies in the United States does not make the company's internal documents magically travel to the United States; moreover, the fact that the company already produced those documents located in the United States does not mean that the remaining documents are now somehow located in the United States. Here, it seems, the court wanted to rule against the defendant and was willing to do mental contortions to reach the desired result.

Another court declared that "it is impossible to discern how much of the information requested may have originated in the United States, since no documents have been produced, identified, or described by the defendant with any specificity."¹⁰⁶ Here, the court blamed the defendant for the failure to identify or describe the documents with any "specificity", although the burden of making clear document demands would seemingly lie in the first instance with the requesting party. The court then speculated that at least some of the documents may have originated in the United States, concluding that "[t]his factor, therefore, is either neutral or weighs slightly in favor of compelling disclosure."¹⁰⁷ A number of other courts have gone beyond speculation, simply asserting that information originating outside the United States nevertheless somehow weighs in favor of violating foreign law (or else that the factor is neutral).¹⁰⁸

To summarize, the *Aérospatiale* five-factor test's sole objective factor—the "origin of the information"—overwhelmingly weighs against violating foreign law. The enormous divergence in results for the objective factor and the four subjective factors strongly implies pro-forum bias. Further evidence of pro-forum bias is the fact that courts have frequently employed mental gymnastics in order to reach a preferred result: that this factor is somehow either neutral or weighs in favor of court-ordered law breaking despite the information's origins abroad.

105. *Id.*

106. *Knights Capital Partners Corp. v. Heinkel AG & Co.*, 290 F. Supp. 3d 681, 690 (E.D. Mich. 2017).

107. *Id.*

108. *See Sant, supra* note 1 at 204-05 (discussing *Consejo de Defensa del Estado de la Republica de Chile v. Espirito Santo Bank*, 09-20613-CIV, 2010 WL 2162868, at *5 (S.D. Fla. May 26, 2010); *In re Glob. Power Equip. Grp. Inc.*, 418 B.R. 833, 848 (D. Del. 2009); *In re Air Crash at Taipei, Taiwan* on Oct. 31, 2000, 211 F.R.D. 374, 378 (C.D. Cal. June 19, 2002)).

D. *Factor Four, “Alternative Means”*

Factor four of the *Aéropatiale* test focuses upon “the availability of alternative means of securing the information.” This, too, seems to be an objective factor. Nations that are signatories to the Hague Convention or to mutual legal assistance treaties have provided an “alternative means” of obtaining the information, and therefore cases involving the laws of these nations should always weigh in favor of respecting foreign law. In reality, however, United States courts often convert factor four into a subjective test by evaluating whether or not the court feels that the “alternative means” is satisfactory to the court.¹⁰⁹ Needless to say, such an attitude places the court in the inappropriate role of evaluating and passing subjective judgment upon treaties between the United States and foreign nations. Courts generally declare that factor four (“alternative means”) favors violating foreign law despite such alternatives as the Hague Convention, third-party subpoenas, mutual legal assistance treaties, or commencing a legal action in the foreign nation. In total, 83% of cases (57 out of 69) found that factor four (“alternative means”) weighed in favor of court-ordered law breaking. As noted above, factor four should have been treated as an objective factor. Considering that the Hague Convention and other options are “alternative means” of obtaining information, the problem is not that the results are lopsided but rather that the lopsided results go in the wrong direction.

Courts regularly treat factor four (“alternative means”) as an opportunity for the trial court to evaluate whether or not the trial court itself feels that the international treaty is a sufficiently acceptable alternative to the Federal Rules of Civil Procedure. These trial courts then reject international treaties as being insufficiently “similar” to the Federal Rules in terms of speed, cost, and effectiveness.¹¹⁰ These evaluations are inappropriate as it is not the place of a trial court to measure whether a given international treaty matches its own personal preferences. Moreover, considering that a trial court can (under the Federal Rules) simply order the production of documents, it is unclear what “alternative means” would ever be deemed sufficiently similar to the Federal Rules to meet these courts’ approval. And, as discussed above, this factor of the *Aéropatiale* test only asks whether “alternative means” exist. There is no

109. See *infra* notes 106-11 and accompanying text; see also, e.g., Megan C. Chang & Terry E. Chang, *Brand Name Replicas and Bank Secrecy: Exploring Attitudes and Anxieties Towards Chinese Banks in the Tiffany and Gucci Cases*, 7 BROOK. J. CORP. FIN. & COM. L. 425, 435 (2013) (noting same problem).

110. See Sant, *supra* note 1 at 206-12.

indication that these “alternative means” were to be evaluated and dismissed if the court deems them to be, for example, overly “time-consuming.”

Courts regularly reject out-of-hand “alternative means” of obtaining information due to being insufficiently similar to the Federal Rules of Civil Procedure. One recent court declared, “Defendant does not proffer any case law deeming the issuance of letters rogatory as substantially equivalent to the Federal Rules,” adding that “case law universally describe[s] this process as inefficient. . . .”¹¹¹ Another court declared that “the Hague Convention likely is not an acceptable alternative to proceeding under the FRCP.”¹¹² Courts rejecting such “alternative means” as the Hague Convention and mutual legal assistance treaties often base these decisions upon the purportedly slow speed of obtaining documents through treaty procedures.¹¹³ Yet these treaties are not actually slower than United States litigation. By way of example, in *Aérospatiale* itself, fifteen months passed just between the Eighth Circuit’s ruling and the Supreme Court’s final decision on whether or not the plaintiffs needed to proceed through the Hague Convention.¹¹⁴ This Supreme Court decision, in turn, came a full seven years after the filing of the underlying claim.¹¹⁵ When United States courts can take seven years (in this admittedly extreme case) to resolve the *means* by which evidence is gathered, it is hard to give credence to complaints about the Hague Convention process being too slow because it may “take upwards of six weeks to begin the process.”¹¹⁶

Moreover, it must be remembered that courts are demanding parties *violate foreign law* on the justification that the Hague Convention may take too many weeks. This reasoning displays a marked disrespect for the law and for foreign sovereigns.

In one extreme example, a United States court’s rejection of the Hague Convention process (as “time-consuming”) ended up forcing a

111. *Burrow v. Forjas Taurus S.A.*, 16-21606-Civ-TORRES, 2017 U.S. Dist. LEXIS 92959, at *19 (S.D. Fla. June 16, 2017).

112. *Connex R. R. LLC v. AXACorporate Sols. Assur.*, CV 16-02368-ODW (RAOx), 2017 U.S. Dist. LEXIS 215050, at *45 (C.D. Cal. Feb. 22, 2017).

113. *See, e.g., Gucci Am. v. Curveal Fashion*, 09 Civ. 8458 (RJS)(THK), 2010 WL 808639, at *5 (S.D.N.Y. March 8, 2010) (rejecting it as “time-consuming”); *In re Glob. Power Equip. Grp. Inc.*, 418 B.R. 833, 848 (D. Del. 2009) (rejecting the Convention because it can “take upwards of six weeks to begin the process”).

114. The Eighth Circuit ruled on January 22, 1986. *See In re Société Nationale Industrielle Aérospatiale*, 782 F.2d 120 (8th Cir. 1986). The Supreme Court did not rule on this appeal until June 15, 1987, fifteen months later. *See Aérospatiale*, 482 U.S. at 522.

115. *In re Société Nationale Industrielle Aérospatiale*, 782 F.2d 120, at 122 (8th Cir. 1986).

116. *In re Glob. Power Equip. Grp. Inc.*, 418 B.R. 833, 848 (D. Del. 2009).

non-party bank to pay out a quarter of a million dollars in an unjustified settlement.¹¹⁷ The plaintiff demanded financial information from a bank in Malaysia even though Malaysian law protected those bank records from disclosure. The United States court rejected use of the Hague Convention because “the procedures [of] the Hague Evidence Convention are much more likely to be time-consuming. . .”¹¹⁸ The bank (which was a non-party to the underlying litigation) refused to violate Malaysian law, explaining that the act of releasing private financial records is punishable in Malaysia by a fine equal to about \$900,000 USD and up to three years in prison.¹¹⁹ In response, the United States court sanctioned the bank \$10,000 per day. The non-party bank eventually settled with the plaintiff for \$250,000 USD, a settlement that did not provide the plaintiff with any of the financial records at issue.¹²⁰ The plaintiff law firm later released a webcast trumpeting this “success.”¹²¹

In a particularly striking analysis, one court blasted a defendant for arguing that there was no need to violate foreign law because the desired information was already available to the plaintiff (through corporate witnesses who would testify in depositions and through documents already produced).¹²² The court declared: “The Court finds Defendant’s argument sophistic. On one hand, Defendant contends the requested information is protected by [Germany’s Federal Data Protection Act]; however, on the other hand, Defendant avers such information is available via alternative means, *i.e.*, past disclosures and their corporate witnesses.”¹²³ The court’s reasoning places the defendant in a no-win scenario: if the defendant is able to identify “alternative means” of obtaining the information, then somehow this means that the foreign law does not exist or can be ignored. But if the defendant cannot identify “alternative means” of obtaining the information, then factor four must

117. *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639, at *5 (S.D.N.Y. Mar. 8, 2010).

118. *Id.*

119. *Id.* at *4, 6; *see also* Letter to Honorable Theodore H. Katz at 1, *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010) (No. 23).

120. Stipulation and Order of Settlement at 4-7, *Gucci America, Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010) (No. 32).

121. Gibson Dunn, *Webcast: New Trends in Anti-Counterfeiting Litigation*, <http://www.gibsondunn.com/publications/pages/Webcast-NewTrendsInAnti-CounterfeitingLitigation.aspx> (last visited Mar. 10, 2015). The United Overseas Bank case is featured in one of multiple slides entitled “Failing to Comply with Court’s Orders Can Result in Serious Consequences for Third Parties. . .” (on file with author).

122. *Zoch v. Daimler*, No. 4:17-CV-578, 2017 U.S. Dist. LEXIS 185343, at *15 (E.D. Tex. Nov. 8, 2017).

123. *Id.*

weigh in favor of violating foreign law. Considering that factor four (“alternative means”) specifically demands that the resisting party identify other means of obtaining the desired information, the court should not use defendant’s efforts to comply with this factor as a justification for ordering the violation of foreign law. Nevertheless, other courts have followed similar reasoning to declare that the availability of “alternative means” of obtaining the information is itself a reason to doubt the seriousness of the foreign laws at issue.¹²⁴

Courts have converted factor four (“alternative means”) from the objective test it was intended to be into a subjective test. In particular, many courts have taken it upon themselves to evaluate whether, in the courts’ view, the international treaties are satisfactory to the court as an alternative to the Federal Rules of Civil Procedure. This is, of course, a grossly inappropriate role for United States courts, which should not be passing judgment upon the adequacy of United States treaties with foreign nations. Courts have also concluded that treaties such as the Hague Convention are unsatisfactory because they do not exactly mimic the Federal Rules. Under such a standard, no “alternative means” can ever be good enough (and if some “alternative means” perfectly duplicated the Federal Rules, it would cease to be much of an alternative!). When provided with alternative means of obtaining information, the courts sometimes take the existence of “alternative means” of obtaining information as proof that the foreign laws at issue are unworthy of respect. Under this strange logic, the United States court proclaims that the ability to obtain information without violating the law is a justification for ordering a company to break the law. This logic eviscerates the *Aérospatiale* test.

E. Factor Five, “National Interests”

The fifth factor requires courts to weigh the interests of the United States (in obtaining the information) against the foreign government’s interest in its laws. United States courts overwhelmingly declare that the United States’ interests are greater than the foreign state. Specifically, courts found the United States’ interest to prevail in 81% of cases (52 out of 64).

124. See, e.g., *Skky, Inc. v. Thumbplay Ringtones, LLC*, Nos. 13-2072 (PJS/JJG), 13-2083 (PJS/JJG), 13-2086 (PJS/JJG), 13-2087 (PJS/JJG), 13-2089 (PJS/JJG), 2014 U.S. Dist. LEXIS 186391, at *18-19 (D. Minn. Apr. 3, 2014) (“Playboy and Manwin also claim some of the subject documents are available through third parties located outside Québec, which raises questions as to how Playboy and Manwin can claim those documents are shielded by the [Quebec law].”)

United States courts have a cognitive bias when trying to weigh the interests of the United States against foreign nations. This is because, first, the courts are themselves part of the United States. Second, in most cases, courts identify the primary interest of the United States in these disputes as being the United States' "vital" interest "in vindicating the rights of American plaintiffs and in enforcing the judgments of its courts."¹²⁵ In other words, courts are weighing the value of their own work as courts. It is questionable whether any court can objectively weigh the importance or value of its own work in managing discovery against other nations' interests. Courts also appear to be biased in favor of United States parties simply due to the parties' nationality. This is evident in the Ninth Circuit's language about "vindicating the rights of *American* plaintiffs,"¹²⁶ which indicates that the nationality of the litigants may be influencing the courts' rulings in favor of court-ordered law breaking. Many court decisions have focused unseemly attention on the nationality of the parties in deciding whether to order law breaking abroad.¹²⁷

For example, in one case, despite a letter from the French Ministry of Justice urging that discovery be pursued through the Hague Convention, the court concluded that "France's interests, though strong," are outweighed by the United States "strong interest in vindicating the rights of American plaintiffs."¹²⁸ In another case, the court stated that the United States' interest in "vindicating the rights of American plaintiffs" outweighed "the concerns of the German government with protecting its citizens from unjustified compromises of their personal information."¹²⁹

125. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992). Many courts have repeated this language or reframed it as the "United States interest in fully and fairly adjudicating the matters before its courts." *See, e.g., Coloplast A/S v. Generic Med. Devices, Inc.*, No. C10-227BHS, 2011 WL 6330064, at *4 (W.D. Wash. Dec. 19, 2011) (quoting the language in *Richmark*); *In re Air Crash at Taipei, Taiwan* on Oct. 31, 2000, 211 F.R.D. 374, 379 (C.D. Cal. June 19, 2000) (partially quoting the language in *Richmark*).

126. *Id.* (emphasis added).

127. *See, e.g., Trueposition Inc. v. LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012, at *5 (E.D. Pa. Mar. 6, 2012) (claiming that the United States' interest in jurisdictional discovery "before an American court" outweighed the foreign government's interest); *Consejo de Defensa del Estado de la Republica de Chile v. Espirito Santo Bank*, No. 09-20612-CIV, 2010 WL 2162868, at *4 (S.D. Fla. May 26, 2010) ("this jurisdiction has an important interest in protecting its own nationals from unfair disadvantage when they are being sued . . ."); *Reino de Espana v. Am. Bureau of Shipping*, No. 03 Civ. 3573 LTS/RLE, 2006 WL 2239641, at *3 (S.D.N.Y. Aug. 4, 2006) (describing "America's interests in the fair adjudication of a billion dollar lawsuit brought against American defendants in an American court.>").

128. *Connex R. R. LLC v. AXACorporate Sols. Assur.*, No. CV 16-02368-ODW (RAOx), 2017 U.S. Dist. LEXIS 215050, at *47 (C.D. Cal. Feb. 22, 2017).

129. *Knight Capital Partners Corp. v. Heinkel AG & Co.*, No. 16-12022, 2017 U.S. Dist. LEXIS 196713, at *21 (E.D. Mich. Nov. 30, 2017).

In another case, the court concluded that “Germany’s expressed interest in protecting personal data through the [Federal Data Protection Act], its constitution, its filing of an amicus brief . . . , and various other expressions” was outweighed by the United States’ “substantial interest in ‘vindicating the rights of American plaintiffs’ and ‘adjudicating matters before its courts.’”¹³⁰ In each of these cases, the court focuses on the nationality of the United States litigants and the supposed importance of United States litigation, and the court concludes that these interests outweigh such things as a foreign government’s constitution or a statement of interest by its Ministry of Justice.

In one typical example, involving a trademark dispute with a company located in France, a United States court declared that “the United States also has its own sovereign interest in protecting its citizens.”¹³¹ The French defendant might well wonder based on this language whether the court is acting as a neutral arbiter of legal disputes, or is instead acting to “protect” the American litigants; the fact that this same court made this statement while ordering the French company to violate French law is certainly cause for concern.

There is another problem with courts declaring that their own work in adjudicating disputes outweighs foreign countries’ interests in their own laws. When the Supreme Court created the *Aérospatiale* balancing test, it knew that this test would be applied in the context of United States litigations. There is no other context in which the *Aérospatiale* test would be applied. It thus seems unlikely that the Supreme Court actually intended to weigh the United States’ interest in adjudication as part of the test; rather, one would assume that the United States’ interest in adjudicating disputes (to the extent this interest exists) is already baked into the test. It would be strange indeed if courts conducting a balancing test concluded that the test almost always weighed in favor of violating foreign law *because* the issue came up as part of a litigation. How else could the issue come before the court? And yet this is precisely the reasoning applied by a large number of courts that have ordered the violation of foreign laws.

In addition to overweighting the United States’ interest in adjudicating litigations, United States courts have consistently struggled to understand the foreign interests at stake. And yet, despite admittedly not understanding these national interests, United States courts

130. Zoch v. Daimler, No. 4:17-CV-578, 2017 U.S. Dist. LEXIS 185343, at *17-18 (E.D. Tex. Nov. 8, 2017).

131. Republic Techs. (Na), LLC v. BBK Tobacco & Foods, No. 16 C 3401, 2017 U.S. Dist. LEXIS 158986, at *14 (N.D. Ill. Sept. 27, 2017) (internal citation omitted).

consistently order these foreign laws to be broken. United States courts routinely acknowledge they do not understand the foreign interests at stake even as they conduct the *Aéropatiale* balancing test.¹³² Even the Supreme Court has acknowledged that it has “little competence in determining precisely when foreign nations will be offended by particular acts.”¹³³

The *Aéropatiale* test comes up most frequently in cases where litigants demand from banks documents that are protected by the bank secrecy and financial privacy laws of foreign countries. Nearly every nation—including the United States—has financial privacy and bank secrecy laws.¹³⁴ Nevertheless, United States courts routinely minimize foreign nations’ objections to the extremely intrusive act of having private financial records of individuals and companies sent abroad and reviewed by foreign nationals. The American Bar Association has warned that courts have focused too much upon “any applicable exceptions to the foreign law and any ability of a banking customer to waive secrecy.”¹³⁵

132. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992) (stating that the “strength” of China’s interest in its state secrets is “unknown” despite China’s government directly expressing concern about case); *NML Capital, Ltd. v. Republic of Argentina*, Nos. 3 Civ. 8845(TPG), 05 Civ. 2434(TPG), 06 Civ. 6466(TPG), 07 Civ.1910(TPG), 07 Civ. 2690(TPG), 07 Civ. 6563(TPG), 08 Civ.2541(TPG), 08 Civ 3302(TPG), 08 Civ. 6978(TPG), 09 Civ. 1707(TPG), 09 Civ. 1708(TPG), 2013 WL 491522, at *10 (S.D.N.Y. Feb. 8, 2013) (reasoning that the interests of foreign nations in their privacy laws is “not clear” despite violators facing potential prison sentences); *AstraZeneca LP v. Breath Ltd.*, No. 08-1512 (RMB/AMD), 2011 WL 1421800, at *15 (D.N.J. Mar. 31, 2011) (finding that Sweden’s interest is unclear); *Devon Robotics v. DeViedma*, No. 09-cv-3552, 2010 WL 3985877, at *5 (E.D. Pa. Oct. 8, 2010) (“unclear” whether Italian interests would be impacted); *British Int’l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, No. 90 Civ.2370 (JFK)(FM), 2000 WL 713057, at *10 (S.D.N.Y. June 2, 2000) (Mexico’s interest in restricting access to information about holding companies “difficult to gauge”); *Doster v. Schenk*, 141 F.R.D. 50, 54 (M.D.N.C. 1991) (stating that despite privacy rights being enshrined in Germany’s constitution, court unsure as to whether Germany’s interest in privacy is “significant”).

133. *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

134. *See, e.g.*, *NML Capital, Ltd. v. Republic of Argentina*, Nos. 3 Civ. 8845(TPG), 05 Civ. 2434(TPG), 06 Civ. 6466(TPG), 07 Civ.1910(TPG), 07 Civ. 2690(TPG), 07 Civ. 6563(TPG), 08 Civ.2541(TPG), 08 Civ. 3302(TPG), 08 Civ. 6978(TPG), 09 Civ. 1707(TPG), 09 Civ. 1708(TPG), 2013 WL 491522 (S.D.N.Y. Feb. 8, 2013) (identifying numerous nations with financial privacy laws); *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310 (E.D.N.Y. 2006) (same); *Lakatos*, *supra* note 56 at 45. Banks in the US “may have confidential supervisory information from their regulators—such as the Office of the Comptroller of the Currency (‘OCC’), the Federal Reserve Board (‘FRB’), or Federal Deposit Insurance Corporation (‘FDIC’)—that is subject to the bank examination privilege that only the regulators may waive. Similarly, banks may have suspicious activity reports (‘SARs’) and related documents that are subject to the SAR privilege that banks cannot waive, and indeed that banks are criminally prohibited from disclosing. In some instances, international banks may have customer data maintained in non-US jurisdictions, such as Switzerland or Hong Kong, that is subject to non-US bank secrecy laws that afford the banks’ customers, not the banks, ownership of the privilege.”

135. HOUSE OF DELEGATES, ABA, RESOLUTION 103, at 3 (Feb. 6, 2012), <http://perma.cc/UC9A-GQQ6>.

United States courts also often ignore the fact that banks are often nonparties to these litigations. Frequently, the bank is not a defendant or accused of wrongdoing, and yet a United States court is forcing the bank to commit crimes in its home jurisdiction through producing protected financial records.

Aérospatiale emphasized that substantive rules of law (such as bank secrecy and financial privacy laws) are to receive greater deference than generalized prohibitions against United States-style discovery¹³⁶ and that courts should view “intrusive” discovery requests with great caution.¹³⁷ Yet even the Supreme Court’s example of “intrusive” discovery (a production demand for “design specifications, line drawings, and engineering plans. . .”)¹³⁸ pales in comparison to the intrusiveness of forcing banks to hand over people’s private financial records. And yet, despite the intrusiveness of demands for financial records and the Supreme Court’s warning against intrusive discovery, courts have generally not treated demands for bank records with any greater caution when weighing court-ordered law breaking.

In an even more extreme and troubling development, some United States courts have demanded that foreign governments punish companies for obeying their orders. These United States courts demand that foreign governments prove that they are serious about enforcing their law by fining or jailing those who *obey* United States court orders demanding the production of prohibited documents. It is hard to overstate the degree to which such decisions undermine the rule of law by perversely demanding both law breaking and the punishment of innocents forced into law breaking. This goes beyond the already extreme situation discussed throughout this article, in which parties and non-parties are ordered by courts to violate foreign laws. The American Bar Association is among those who have stated that court orders demanding the violation of foreign laws “is inconsistent with promotion of rule of law, as it facilitates violation of law, either abroad or here.”¹³⁹ But when courts go a step further and demand that foreign governments punish those obeying United States court orders to produce documents in violation of foreign laws, this is troubling and outrageous. For example, in the recent case *In re Xarelto*, the court declared:

136. *Aérospatiale*, 482 U.S. at 544 n.29 (quoting Restatement § 437, Reporter’s Note 5 at 41-42).

137. *Id.* at 545.

138. *Id.*

139. HOUSE OF DELEGATES, ABA, RESOLUTION 103, at 3 (Feb. 6, 2012), <http://perma.cc/UC9A-GQQ6>.

Defendants carry the burden of providing evidence that Germany has enforced the German Data Protection Act when German personal data has been produced pursuant to a United States court order. Bayer failed to meet this burden. When questioned at oral argument, counsel for Bayer failed to cite any examples of a German entity being civilly or criminally prosecuted for the production of personal data pursuant to a United States discovery order. The Court finds this telling . . . Thus, the interests of Germany appear to be strong, but short of overwhelming.¹⁴⁰

The court is effectively demanding that, if it wants its laws be taken seriously by United States courts, Germany must imprison those who obey United States court orders demanding information. In fact, it would seem that the court expects that Germany should perhaps begin with imprisoning the defendants (right after they produce the document discovery in response to the United States court's order). Here, the United States court is truly Kafkaesque.

Nor is this the only decision to demand that foreign governments prosecute and imprison people for obeying a United States court order. In *Motorola Credit Corp. v. Uzan*, for example, the court ordered the production of documents in violation of the law in France, Jordan, and the United Arab Emirates because the court was unaware of instances where these nations had punished those obeying United States court orders.¹⁴¹ Discussing the financial privacy laws of these nations, the judge asked: "But is this [concern with financial privacy] for real? If a given country truly values its national policy of, say, criminalizing compliance with a U.S. court subpoena, it will prosecute its citizens for so complying."¹⁴² Perversely, the judge did not order violations of the law for those nations that did have a track record of punishing compliance with United States court orders. This dichotomy is problematic. First, these courts are effectively rewarding those nations that are least respectful towards United States court orders; the courts are effectively saying that the United States will respect foreign laws so long as foreign governments do *not* respect United States court orders. Second, (and the flipside of the above), United States courts are effectively punishing those nations that are most respectful towards United States court orders by declaring their laws unworthy of respect. Third, United States courts are effectively

140. *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, MDL No. 2592 SECTION L(EEF), 2016 LEXIS 95453, at *54-55 (E.D. La. July 20, 2016).

141. *Motorola Credit Corp. v. Uzan*, No. 02-cv-666 (JSR), 2014 WL 7269724, at *4-5 (S.D.N.Y. Dec. 22, 2014).

142. *Id.*

demanding (or daring) foreign governments to severely punish those who *obey* the United States court's order. Fourth, it should be enough that at least some foreign nations have prosecuted and punished those who have complied with United States court-ordered law breaking. A United States court should not demand proof from every single nation around the globe that it has punished those obeying United States court orders before recognizing that this is a real problem and that real human beings are being jailed and harmed for no good reason. Think of it this way: should foreign litigants require evidence that every single court in the United States has punished those who disobey United States court orders in order to be satisfied that United States courts take their orders seriously? What if a nation—say, Poland—demanded examples of Polish businesses punished by a United States court for failing to follow that court's orders, and concluded that if such examples could not be found, then United States courts must not take their orders seriously? Or what if an example of a Polish company punished in Texas for failing to follow a court order was deemed insufficient because the current situation involved California? The demand by United States courts that each nation provide multiple examples of punishing compliance with United States court orders is equally unreasonable.

One United States court brushed off the foreign nation's financial privacy laws, which punished violators with "one to five years imprisonment," by asserting that these laws "do not appear to be enforced."¹⁴³ Here, too, the court is effectively demanding that the foreign government put someone in prison for up to a half-decade as punishment for complying with the United States court's own order. It is important to remember that the court is demanding a half-decade in prison for real people who are trying their best to follow the laws of both the United States and their home jurisdiction. It is perverse that United States courts demand to see otherwise innocent people imprisoned simply to prove that the foreign government "cares" about its laws.

United States courts also frequently claim that the interests of the foreign nation are different from what the foreign nation itself claims are its interests. That is to say, the United States court will claim to know better than the foreign government what that nation's interests are.¹⁴⁴

143. *In re Chevron Corp.*, No. 11-24599-CV, 2012 WL 3636925, at *13 (S.D. Fla. June 12, 2012).

144. *See, e.g.*, *Linde v. Arab Bank PLC*, 706 F.3d 92, 111 (2d Cir. 2013); *Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 193 n.3 (E.D.N.Y. 2010); *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310, 315 (E.D.N.Y. 2006) (each declaring that Jordan and Lebanon had different national interests than those actually identified by Jordan and Lebanon as their national interests); *see also* Sant, *supra* note 1 at

United States trial courts have proven themselves to be ill-suited for the “delicate task”¹⁴⁵ of weighing the foreign interests of a foreign government against the interests of the United States. Courts have displayed pro-forum bias by claiming that the United States’ interest is to “vindicate[e] the rights of American plaintiffs” in litigations.¹⁴⁶ Courts are generally unable to assess the foreign nations’ interests in their own laws, and courts dramatically overvalue their own work of adjudication when it comes to weighing the interests of competing governments. It is doubtful that courts could ever objectively weigh the value of adjudication. Moreover, it seems that the United States’ interest in adjudication is already baked into the *Aérospatiale* test (because the *Aérospatiale* test can only come up in the context of a litigation).

Worse, courts have sometimes demanded that foreign governments fine and imprison those who would comply with United States court-ordered law breaking. These courts have stated that they will not take foreign laws seriously unless foreign nations punish those who obey United States court orders. Needless to say, this logic is highly destructive towards the rule of law, international comity, and foreign relations. Almost as destructive is the assertion by some courts that they know better than foreign governments the national interests of those governments.

V. NEGATIVE EFFECTS OF *AÉROSPATIALE* AND “PRO-FORUM BIAS”

Court-ordered law breaking in general, and the pro-forum bias of United States courts applying the *Aérospatiale* test in particular, have set in motion an avalanche of bad results. As discussed above, some courts have undermined the rule of law and encouraged the punishment of innocent people and businesses.¹⁴⁷

Courts have displayed a bias in favor of United States discovery and against respecting foreign law.¹⁴⁸ The bias appears to be even stronger against non-Western nations.¹⁴⁹ This disrespect for foreign nations’ laws

222-25.

145. *Aérospatiale*, 482 U.S. at 546.

146. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992); *Coloplast A/S v. Generic Med. Devices, Inc.*, No. C10-227BHS, 2011 WL 6330064, at *4 (W.D. Wash. Dec. 19, 2011); *In re Air Crash at Taipei, Taiwan* on Oct. 31, 2000, 211 F.R.D. 374, 379 (C.D. Cal. June 19, 2002).

147. See *supra* notes 135-39 and accompanying text.

148. See generally Sant, *supra* note 1.

149. *Id.* at 230-32. Although the evidence is suggestive, there are an insufficient number of cases to determine whether or not the difference in results for Western nations and non-Western nations is statistically significant. This is because “U.S. courts rarely find the *Aérospatiale* test’s subjective factors to weigh in favor of respecting *any* foreign nation’s laws. But when they do, courts were much

has apparently caused some foreign nations to issue orders demanding the production and unsealing of confidential documents from the United States.¹⁵⁰ For example, in 2015, a court in the United Kingdom ordered the production of a document filed under seal by Judge Shea in the District of Connecticut that is the “focus of an ongoing investigation” by the Department of Justice.¹⁵¹ Despite the Department of Justice’s appearance in the United Kingdom case to assert the United States government’s ongoing “interest in maintaining the confidentiality of the information,” the United Kingdom court ordered the document to be revealed to the opposing litigant.¹⁵² Moreover, the United Kingdom court asserted that, based on “the balance of factors,” it would “likely” release the sealed document to the general public.¹⁵³ This same United Kingdom court stated that its next step would be to consider possibly ordering production of certain documents in violation of United States attorney-client privilege.¹⁵⁴

Even worse, the willingness of United States courts to order law breaking abroad has itself encouraged litigants to increasingly request that courts order production of documents in violation of foreign laws. The willingness of United States courts to issue these orders has encouraged litigants to seek them as a way to pressure the foreign litigant into entering into an unjustified settlement. By way of example, one court ordered a non-party bank to produce documents in violation of the bank secrecy and financial privacy laws of its home country.¹⁵⁵ When the bank could not obtain the approval of its home regulator (and facing penalties of up to three years in prison),¹⁵⁶ the bank refused to produce the documents. The court then held the bank in contempt, imposing a \$10,000 per day coercive fine for noncompliance. One month later, the bank—a non-party not accused of wrongdoing—settled with the plaintiff, paying \$250,000

more likely to respect the laws of a Western nation than a non-Western nation.” *Id.* at 230.

150. *See id.* at 232-35.

151. *Prop. Alliance Grp. Ltd. v. Royal Bank of Scotland PLC* [2015] EWHC (Ch) 321 [11] (Eng.).

152. *Id.* at [25].

153. *Id.* at [40]. (“A year from now, when the case is approaching trial, . . . I regard it likely that the balance of factors when considering whether a document like [this] should be referred to in open court at trial is much more likely to come down in favour of publicity. . .”).

154. *Id.*

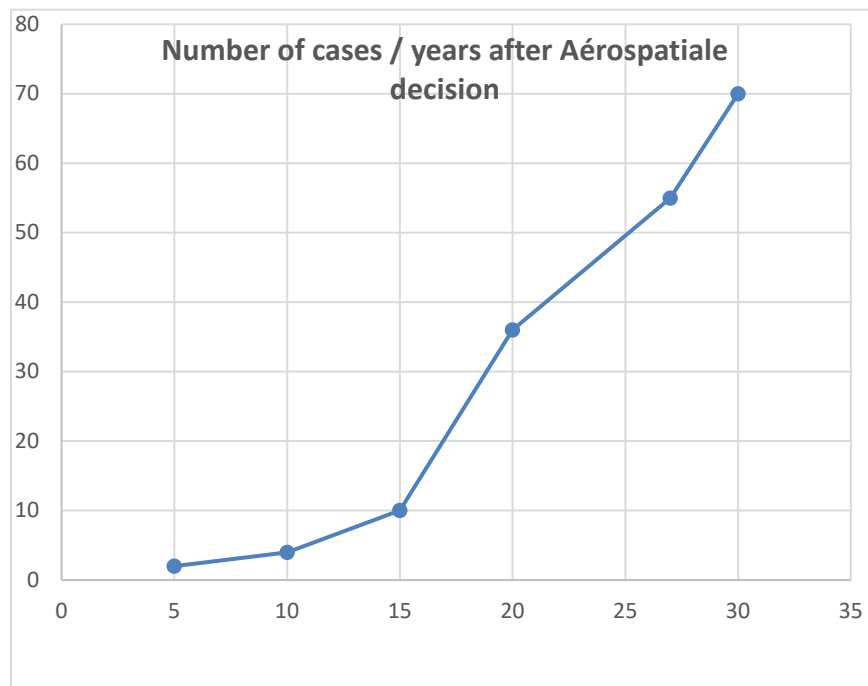
155. *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639, at *4, 6 (S.D.N.Y. Mar. 8, 2010); *see also* Letter to Honorable Theodore H. Katz at 8, *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010) (Docket No. 23).

156. *Id.* at 1.

USD.¹⁵⁷ The settlement did not provide the plaintiff with any financial records about the actual defendants.¹⁵⁸

Over the past decade, the number of requests for United States courts to order law breaking abroad has grown at an exponential rate. In the first ten years after *Aérospatiale*, only two cases applied the five-factor *Aérospatiale* test to decide whether or not to order foreign law-breaking.¹⁵⁹ By contrast, there were fourteen cases in just the last three years. The rate at which litigants are requesting courts order the violation of foreign laws has increased more than twentyfold since the first decade after *Aérospatiale*.

This rapid increase in requests for court-ordered law breaking is presented in chart form below. As can be seen, there were virtually no requests for court-ordered law breaking during the first decade after *Aérospatiale*. A few years later, however, the number of requests exploded, and there appears to be no end in sight.



157. Stipulation and Order of Settlement at 4-7, *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010) (Docket No. 32).

158. *Id.* at 4-5.

159. The numbers discussed here do not include cases that applied the three-factor or four-factor *Aérospatiale* tests. See, e.g., *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16 (2d. Cir. 1998) (applying the four-factor test). The focus here is the rapid growth of these cases in a short amount of time.

This exponential rate of growth in court-ordered law breaking is not explainable as a steady growth in international litigation over time. Rather, litigants appear to have made a calculated change in litigation strategy in response to the realization that courts overwhelmingly approve requests to order the violation of foreign laws. By seeking documents that cannot be produced, litigants force the opposing party to either break the law in its home country or violate a United States court order—or agree to an unjustified settlement.¹⁶⁰

The willingness of courts to order law breaking abroad has damaged the rule of law, harmed international relations, encouraged foreign governments to reveal documents sealed by a United States court, stimulated abusive discovery, and has encouraged unwarranted settlements. Worst of all, court-ordered law breaking has itself encouraged litigants to request that courts issue more of these orders. Courts are themselves responsible for the strange phenomenon of court-ordered law breaking.

VI. CONCLUSION

Courts applying the *Aérospatiale* test to determine whether or not to order law breaking abroad have overwhelmingly declared that each of the subjective factors weighs in favor of violating the law. The lopsided ratios by which courts have reached these results (as high as fifteen-to-one) strongly indicate that United States courts are influenced by pro-forum bias.

Courts frequently convert factor one (“importance”) into a test of mere “relevance”. Even courts that do not make this mistake frequently create a very low standard for “importance”, finding “importance” satisfied even when the underlying litigation is clearly without merit.

Likewise, courts frequently convert the second factor (“specificity”) into a test of whether the production requests are clear as opposed to whether or not the requests are narrowly tailored. Worse, instead of simply rejecting overly broad requests, many courts will pare the requests back to the broadest level the court finds acceptable. This encourages litigants to make overly broad requests, and also puts the thumb on the scale in favor of ordering law breaking abroad.

Factor three (“origin of information”) is the only objective factor.

160. Sant, *supra* note 1 at 225-27.

The extreme difference in results between this objective factor and the four subjective factors further indicates that courts may be influenced by pro-forum bias.

Factor four (“alternative means”) should be an objective factor, but has been converted by trial courts into a subjective test of whether or not the Hague Convention or other treaties (or other means of obtaining information) meet with the court’s subjective approval. This puts the court in the unseemly position of passing subjective judgment upon whether multilateral treaties entered into by the United States deserve respect.

Factor five (weighing U.S. and foreign interests) has devolved into a comparison of the respective importance of foreign laws and the United States’ interests in managing litigation. Perhaps unsurprisingly, courts—the very entity that manages United States litigations—find that the United States’ interest in litigation is of supreme importance and that it consistently outweighs all possible interests of foreign sovereigns. One indication of pro-forum bias is the unseemly focus by courts upon the nationality of the litigants and the professed desire to “vindicate[e] the rights of American plaintiffs” in litigations.¹⁶¹ Courts also prove themselves unable to effectively assess foreign nations’ interests, and in some cases, lower courts even insist that they know better than the foreign nation what its own interests are. Even more offensive is the demand by some courts that foreign governments imprison and fine those who would *obey* United States court orders.

With courts overwhelmingly biased in favor of ordering companies to break the law overseas, litigants have increasingly requested court-ordered law breaking. This abusive discovery tactic seeks to trap the opposing party between a United States court order and foreign law. Requests for court-ordered law breaking have exploded in number.

The willingness of United States courts to order foreign law breaking has damaged international comity, infuriated foreign sovereigns, and led to retaliatory actions, such as the recent order by a United Kingdom court forcing production of a document filed under seal by a United States court.

The Supreme Court should step in to resolve circuit splits regarding the proper way to handle requests for information that would violate the law. There is likewise a circuit split regarding the degree to which banks are obligated to produce documents protected by bank secrecy and financial privacy laws. The Supreme Court should declare that litigants seeking protected documents from abroad must first resort to the Hague Convention or to mutual legal assistance treaties, and only seek court-

161. Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1477 (9th Cir. 1992).

ordered law breaking if those efforts fail.

APPENDIX

This is an index of cases identified in footnote 66 as applying *Aérospatiale* to the context of weighing whether or not to order violations of foreign law:

Abiola v. Abubakar, No. 02-C-6093, 2007 WL 2875493 (N.D. Ill. Sept. 28, 2007).

Adams v. Unione Mediterranea Di Sicurta, No. Civ.A. 94-1954, 2002 WL 472252 (E.D. La. Mar. 28, 2002).

AstraZeneca LP v. Breath Ltd., No. 08-1512, 2011 WL 1421800 (D.N.J. Mar. 31, 2011).

BrightEdge Techns., Inc. v. Searchmetrics, GmbH, No. 14-Civ-01009-WHO (MEJ), 2014 WL 3965062 (N.D. Cal. Aug. 13, 2014).

British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A., No. 90Civ.2370, 2000 WL 713057 (S.D.N.Y. June 2, 2000).

Buttitta v. Asbestos Corp. Ltd., No L-9592-02, 2006 WL 2355200 (N.J. Super. Ct. App. Div. Aug. 16, 2006).

Buttitta v. Allied Signal, Inc., No. L-9592-02, 2010 WL 1427273 (N.J. Super. Ct. App. Div. Apr. 5, 2010).

Calixto v. Watson Bowman Acme Corp., No. 07-60077-CIV, 2009 WL 3823390 (S.D. Fla. Nov. 16, 2009).

Campbell v. Facebook, Inc., No. 13-civ-05996-PJH (MEJ), 2015 U.S. Dist. LEXIS 95702 (N.D. Cal. July 21, 2015).

Catalano v. BMW of N. Am., LLC, No. 15-civ-4889 (KBF), 2016 U.S. Dist. LEXIS 78901 (S.D.N.Y. June 16, 2016).

CE Intern. Res. Holdings, LLC v. S.A. Minerals Ltd. P'ship, No. 12-CV-08087, 2013 WL 2661037 (S.D.N.Y. June 12, 2013).

Chevron Corp. v. Donziger, 296 F.R.D. 168 (S.D.N.Y. 2013).

Coloplast A/S v. Generic Med. Devices, Inc., No. C10-227BHS, 2011 WL 6330064 (W.D. Wash. Dec. 19, 2011).

Consejo de Defensa del Estado de la Republica de Chile v. Espirito Santo Bank, No. 09-20612- CIV, 2010 WL 2162868 (S.D. Fla. May 26, 2010).

Devon Robotics v. DeViedma, No. 09-cv-3552, 2010 WL 3985877 (E.D. Pa. Oct. 8, 2010).

Doster v. Schenk A. G., 141 F.R.D. 50 (M.D.N.C. 1991).

Eikenberry v. Celsteel Ltd., No. 13-Civ-4661(AT), 2013 WL 5308028 (S.D.N.Y. Sept. 19, 2013).

Export-Import Bank of U.S. v. Asia Pulp & Paper Co., Ltd., No. 03-

08554, 2009 WL 1055673 (S.D.N.Y. 2009).

Fenerjian v. Nong Shim Co., Ltd., No. 13-civ-04115-WHO (DMR), 2016 U.S. Dist. LEXIS 7311 (N.D. Cal. Jan. 21, 2016).

Gucci Am. v. Curveal Fashion, No. 09-Civ-8458, 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010).

Gucci Am. v. Weixing Li, No. 10-Civ-4974, 2011 WL 6156936 (S.D.N.Y. Aug. 23, 2011).

In re Activision Blizzard, 86 A.3d 531 (Del.Ch. 2014).

In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1775, 2010 WL 2976220 (E.D.N.Y. July 23, 2010).

In re Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51 (E.D.N.Y. 2010).

In Re Air Crash at Taipei, Taiwan, 219 F. Supp. 2d 1069 (C.D. Cal. 2002).

In re Baycol Prods. Litig., No.1431, 2003 WL 22023449 (D. Minn. Mar. 21, 2003).

In re Cathode Ray Tube (CRT) Antitrust Litig., No. 07-civ-5944 SC, 2014 WL 1247770 (N.D. Cal. Mar. 26, 2014).

In re Cathode Ray Tube (CRT) Antitrust Litig., No. 3:07-Civ-05944, 2014 WL 5462496, (N.D. Cal. Oct. 23, 2014).

In re Cathode Ray Tube (CRT) Antitrust Litig., No. 07-Civ-05944, 2014 WL 6602711 (N.D. Cal. Nov. 20, 2014).

In re Chevron Corp., No. 11-24599-CV, 2012 WL 3636925 (S.D. Fla. June 12, 2012).

In re Enron Corp., 01-16034, 03-92677, 2007 WL 8317419 (Bankr. S.D.N.Y. July 18, 2007).

In re Glob. Power Equip. Grp. Inc., 418 B.R. 833 (D. Del. 2009).

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720, 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010).

In re Rubber Chems. Antitrust Litig., 486 F. Supp. 2d 1078 (N.D. Cal. 2007).

In re Xarelto (Rivaroxaban) Prods. Liab. Litig., No. MDL 2592 Section L, 2016 LEXIS 95453 (E.D. La. May 16, 2016).

JP Morgan Chase Bank, N.A. v. PT Indah Kiat Pulp & Paper Corp., No. 02-C-6240, 2011 WL 5588764 (N.D. Ill. Nov. 16, 2011).

Knight Capital Partners Corp. v. Henkel AG & Co., KGAA, 99 F. Supp. 3d 681 (E.D. Mich. Nov. 30, 2017).

Lantheus Med. Imagining, Inc. v. Zurich Am. Ins. Co., 841 F. Supp. 2d 769 (S.D.N.Y. 2012).

Laydon v. Mizuho Bank, Ltd., 183 F. Supp. 3d 409 (S.D.N.Y. 2016).

Leibovitch v. Islamic Republic of Iran, 188 F. Supp. 3d 734 (N.D. Ill.

2016).

Linde v. Arab Bank, PLC, 463 F. Supp. 2d 310 (E.D.N.Y. 2006).

Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009).

Linde v. Arab Bank, PLC, 706 F.3d 92 (2d Cir. 2013).

Milliken & Co. v. Bank of China, 758 F. Supp. 2d 238 (S.D.N.Y. 2010).

Motorola Credit Corp. v. Uzan, 293 F.R.D. 595 (S.D.N.Y. 2013).

Motorola Credit Corp. v. Uzan, No. 02-Civ-666 (JSR), 2014 WL 7269724 (S.D.N.Y. Dec. 22, 2014).

Ney v. Owens-Illinois, Inc., No. 16-civ-2408 (TJR), 2016 U.S. Dist. LEXIS 169371 (E.D. Pa. Dec. 6, 2016).

NML Capital, Ltd. v. Republic of Argentina, Nos. 03-Civ-8845, 05-Civ-2434, 06-Civ-6466, 07-Civ-1910, 07-Civ-2690, 07-Civ-6563, 08-Civ-2541, 08-Civ-3302, 08-Civ-6978, 09-Civ-1707, 09-Civ-1708, 2013 WL 491522 (S.D.N.Y. Feb. 8, 2013).

Old Ladder Litig. Co., LLC v. Investcorp Bank, B.S.C., No. 08 Civ. 0876, 2008 WL 2224292 (S.D.N.Y. May 29, 2008).

Pershing Pac. West, LLC v. Marinemax, No. 10-cv-1345, 2013 WL 941617 (S.D. Cal. Mar. 11, 2013).

Philips v. Ford Motor Co., No. 14-civ-02989 (LHK/NMC), 2016 U.S. Dist. LEXIS 76054 (N.D. Cal. June 10, 2016).

Reino de Espana v. Am. Bureau of Shipping, No. 03CIV3573, 2005 WL 1813017 (S.D.N.Y. 2005).

Republic Techs. (Na), LLC v. BBK Tobacco & Foods, No. 16-civ-3401, 2017 U.S. Dist. LEXIS 158986 (N.D. Ill. Sept. 27, 2017).

Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992).

SEC v. Gib. Glob. Sec., Inc., 13 Civ. 2575 (GBD)(JCF), 2015 U.S. Dist. LEXIS 43773 (S.D.N.Y. April 1, 2015).

SEC v. Stanford Int'l Bank, 776 F. Supp. 2d 323 (N.D. Texas 2011).

Skyy, Inc. v. Thumbplay Ringtones, LLC, No. 13-civ-2072 (PJS/JJG), 2014 U.S. Dist. LEXIS 186391 (D. Minn. April 4, 2014).

St. Jude Med. S.C., Inc. v. Janssen-Counotte, 104 F. Supp. 3d 1150 (D. Or. 2015).

Strauss v. Credit Lyonnais, 249 F.R.D. 429 (E.D.N.Y. 2008).

Stream SICAV v. RINO Int'l Corp., No. CV 10-08695, 2011 WL 4978291 (C.D. Cal. Oct. 11, 2011).

Synthes (U.S.A.) v. G.M. dos Reis Jr. Ind. Com. De Equip. Medico, No. 07-CV-309, 2008 WL 81111 (S.D. Cal. Jan. 8, 2008).

Tiffany (NJ) LLC v. Qi, 276 F.R.D. 143 (S.D.N.Y. 2011).

Tiffany (NJ) LLC v. Qi, No. 10-Civ-9471, 2011 WL 11562419

(S.D.N.Y. Nov. 14, 2011).

Tiffany (NJ) LLC v. Forbse, No. 11-Civ-4976, 2012 WL 1918866

(S.D.N.Y. May 23, 2012).

Trueposition, Inc. v. LM Ericsson Tel. Co., No. 11-4574, 2012 WL 707012 (E.D. Pa. Mar. 6, 2012).

Weiss v. Nat'l Westminster Bank, 242 F.R.D. 33 (E.D.N.Y. 2007).

Wultz v. Bank of China, 942 F. Supp. 2d 452 (S.D.N.Y. 2013).

Wultz v. Bank of China, 298 F.R.D. 91 (S.D.N.Y. 2014).

Zoch v. Daimler, 4:17-civ-578 (ALM), 2017 U.S. Dist. LEXIS 185343 (E.D. Tex. Nov. 8, 2017).