

317 F.R.D. 562
United States District Court,
D. Arizona.

IN RE: BARD IVC FILTERS
PRODUCTS LIABILITY LITIGATION.

No. MDL 15-02641-PHX DGC

|
Signed September 16, 2016

Synopsis

Background: Patients brought products liability actions against medical device manufacturer, which were consolidated by the Judicial Panel on Multidistrict Litigation. At a case management conference, patients sought discovery of electronically stored information (ESI) held by manufacturer's foreign subsidiaries or divisions regarding communications with foreign regulators.

Holdings: The District Court, [David G. Campbell, J.](#), held that:

[1] evidence is within the scope of discovery when it is relevant to any party's claim or defense, rather than when reasonably calculated to lead to admissible evidence;

[2] manufacturer's foreign subsidiaries' ESI regarding communications with foreign regulators was not so relevant as to be discoverable; and

[3] burden of discovering foreign subsidiaries' ESI regarding communications with foreign regulators outweighed benefit.

Request denied.

West Headnotes (4)

[1] Federal Civil Procedure

🔑 Scope

The test to determine whether evidence is within the scope of discovery is whether

evidence is relevant to any party's claim or defense, not whether it is reasonably calculated to lead to admissible evidence. [Fed. R. Civ. P. 26\(b\)\(1\)](#).

[27 Cases that cite this headnote](#)

[2] Federal Civil Procedure

🔑 Scope

Relevancy alone is not sufficient for permissible discovery; discovery must also be proportional to the needs of the case. [Fed. R. Civ. P. 26\(b\)\(1\)](#).

[47 Cases that cite this headnote](#)

[3] Federal Civil Procedure

🔑 Particular Subject Matters

Electronically stored information (ESI) held by medical device manufacturer's foreign subsidiaries regarding their communications with foreign regulators was not sufficiently relevant so as to be discoverable in products liability action by patients implanted with manufacturer's device; most of the communications with foreign regulators originated in the United States and thus would have been captured by the ESI searches that were otherwise underway, none of the patients in the action were from foreign countries but instead received their products and allegedly were injured in the United States, and, while patients asserted that communications between manufacturer's foreign entities and foreign regulators might have been inconsistent with manufacturer's communications with American regulators, this was merely conjecture. [Fed. R. Civ. P. 26\(b\)\(1\)](#).

[Cases that cite this headnote](#)

[4] Federal Civil Procedure

🔑 Particular Subject Matters

Burden of discovering electronically stored information (ESI) held by medical device manufacturer's foreign subsidiaries regarding their communications with foreign regulators

outweighed the benefit of such discovery in products liability action by patients against manufacturer; manufacturer had entities in 18 countries in addition to the United States, so the burden of identifying the appropriate record custodians and collecting ESI for the 13-year period sought by patients was significant, particularly given that patients were engaging in substantial discovery of ESI held by manufacturer's American operations with respect to manufacturer's communications with American regulators, and patients sought information regarding foreign regulators based on the mere possibility of finding an inconsistency between communications to foreign regulators and communications to American regulators. [Fed. R. Civ. P. 26\(b\)\(1\)](#).

[Cases that cite this headnote](#)

Opinion

*563 ORDER

[David G. Campbell](#), United States District Judge

The Court held a fifth case management conference with the parties on August 23, 2016. In preparation for the conference, the parties provided a joint status report that identified a number of issues for discussion. Doc. 3102. The report noted that the parties disagree on the discoverability of certain electronically stored information (“ESI”) generated by foreign entities (subsidiaries or divisions of Defendant C.R. Bard) that sell IVC filters abroad. Plaintiffs seek discovery of communications between the foreign entities and foreign regulatory bodies regarding the IVC filters at issue in this case. Doc. 3264 at 2. The Court discussed this topic at some length during the status conference on August 23, 2016, and directed the parties to provide focused briefing. Each side has now filed a memorandum addressing this issue. Docs. 3309, 3326. For the reasons set forth below, the Court will deny Plaintiffs' request for this discovery.

I. New Legal Standards Governing the Scope of Discovery.

[Rule 26\(b\)\(1\) of the Federal Rules of Civil Procedure](#) was amended on December 1, 2015. The new rule defines the scope of permissible discovery as follows:

Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the party's access to relevant information, the party's resources, the importance of the discovery in resolving the issues, and whether the burden and expense of the proposed discovery outweighs its likely benefit.

[Fed. R. Civ. P. 26\(b\)\(1\)](#).

A. Relevancy.

To be discoverable under the first part of this test, information must be “relevant to any party's claim or defense.” *Id.* This language has not changed from the previous version of [Rule 26\(b\)\(1\)](#).

Before the 2015 amendments, [Rule 26\(b\)\(1\)](#) also provided that inadmissible evidence was discoverable if it “appears reasonably calculated to lead to the discovery of admissible evidence.” Some courts—and many lawyers—used this language to define the scope of discovery. *See, e.g., Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir.2005) (“Relevant information for purposes of discovery is information ‘reasonably calculated to lead to the discovery of admissible evidence.’”) (quoting *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir.1992)).

This phrase was eliminated by the 2015 amendments and replaced with a more direct declaration of the phrase's original intent: “Information within this scope of discovery need not be admissible in evidence to be discoverable.” [Fed. R. Civ. P. 26\(b\)\(1\)](#). The Advisory Committee on the Federal Rules of Civil Procedure provided this explanation for the deletion:

The former provision for discovery of relevant but inadmissible information that appears “reasonably

calculated to lead to the *564 discovery of admissible evidence” is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the “reasonably calculated” phrase to define the scope of discovery “might swallow any other limitation on the scope of discovery.” The 2000 amendments sought to prevent such misuse by adding the word “relevant” at the beginning of the sentence, making clear that “relevant” means within the scope of discovery as defined in this subdivision....” The “reasonably calculated” phrase has continued to create problems, however, and is removed by these amendments.

[Rule 26](#), Advis. Comm. Notes for 2015 Amends.

The 2015 amendments thus eliminated the “reasonably calculated” phrase as a definition for the scope of permissible discovery. Despite this clear change, many courts continue to use the phrase. Old habits die hard.¹ In this circuit, courts cite two Ninth Circuit cases—*Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir.2005), and *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir.1992)—for the proposition that information is relevant for purposes of [Rule 26\(b\)\(1\)](#) if it is “reasonably calculated to lead to the discovery of admissible evidence.”² But these cases, and others like them, simply applied the earlier version of [Rule 26\(b\)\(1\)](#).

¹ Last month alone, seven cases relied on the “reasonably calculated” language to define the scope of permissible discovery. See *Fastvdo LLC v. AT&T Mobility LLC*, No. 16-CV-385-H (WVG), 2016 WL 4542747, at *2 (S.D.Cal. Aug. 31, 2016); *Sierra Club v. BNSF Ry. Co.*, No. C13-0967-JCC, 2016 WL 4528452, at *1 (W.D.Wash. Aug. 30, 2016); *Shell v. Ohio Family Rights*, No. 1:15-CV-1757, 2016 WL 4523830, at *2 (N.D. Ohio Aug. 29, 2016); *Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC*, No. 5:15-CV-00037-FL, 2016 WL 4287929, at *1 (E.D.N.C. Aug. 15, 2016); *Ecomission Sols., LLC v. CTS Holdings, Inc.*, No. MISC. 16-1793 (EGS), 2016 WL 4506974, at *1 (D.D.C. Aug. 26, 2016); *Clouser v. Golden Gate Nat'l Senior Care, LLC*, No. CV 3:15-33, 2016 WL 4223755, at *4 (W.D.Pa. Aug. 9, 2016); *Scott Hutchinson Enters., Inc. v. Cranberry Pipeline Corp.*, No. 3:15-CV-13415, 2016 WL 4203555, at *2 (S.D.W.Va. Aug. 9, 2016). Several other cases cited the language as though it were still part of [Rule 26\(b\)](#)

(1). See *Fairley v. Wal-Mart Stores, Inc.*, No. CV 15-462, 2016 WL 4418799, at *2 (E.D.La. Aug. 19, 2016); *Kuczak v. City of Trotwood, Ohio*, No. 3:13-CV-101, 2016 WL 4500715, at *1 (S.D. Ohio Aug. 26, 2016); *Kubik v. Cent. Michigan Univ. Bd. of Trustees*, No. 15-CV-12055, 2016 WL 4425174, at *2 (E.D. Mich. Aug. 22, 2016).

² See *Fastvdo*, 2016 WL 4542747, at *2 (quoting *Survivor Media*, 406 F.3d at 635); *Sierra Club*, 2016 WL 4528452, at *1 (quoting *Brown Bag*, 960 F.2d at 1470).

[1] Amended [Rule 26\(b\)\(1\)](#) was adopted pursuant to the Rules Enabling Act, 28 U.S.C. § 2072 et. seq. That statute provides that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” *Id.*, § 2072(b). Thus, just as a statute could effectively overrule cases applying a former legal standard, the 2015 amendment effectively abrogated cases applying a prior version of [Rule 26\(b\)\(1\)](#). The test going forward is whether evidence is “relevant to any party's claim or defense,” not whether it is “reasonably calculated to lead to admissible evidence.”

B. Proportionality.

[2] The 2015 amendments also added proportionality as a requirement for permissible discovery. Relevancy alone is no longer sufficient—discovery must also be proportional to the needs of the case. The Advisory Committee Note makes clear, however, that the amendment does not place the burden of proving proportionality on the party seeking discovery. The amendment “does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden addressing all proportionality considerations.” [Rule 26](#), Advis. Comm. Notes for 2015 Amends. Rather, “[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.” *Id.*

The inquiry to be conducted under the proportionality requirement, therefore, requires input from both sides. As the Advisory Committee explained:

*565 A party claiming undue burden or expense ordinarily has far better information—perhaps the only information—with respect to that part of the determination.

A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

Id. The Court therefore will look to evidence and arguments from both sides in deciding whether discovery from the Bard foreign entities is permitted under [Rule 26](#).

II. Analysis.

A. Relevancy.

[3] From the information provided by the parties, it appears that most of Defendants' regulatory communications, including communications with foreign regulators, are generated by Defendants' United States operations, which have been and continue to be subject to extensive discovery. Robert Carr, the key Bard witness on this issue, explained that the relevant Bard division within the United States "handles the regulatory burden" for a particular product. Doc. 3311-1 at 4. The division supplies "all the required documentation" to foreign Bard entities, and the foreign entities then share that information with foreign regulators. *Id.* Some foreign entities have their own regulatory staff, but Bard's United States operations "supply all the pertinent information, answer all the questions. They provide the documentation and translations back and forth." *Id.* at 11.

Carr further explained that there are regulatory persons on every Bard product development team, and that "they determine the potential regulatory pathway for a product being developed early on." *Id.* at 13. "[T]hroughout the project, they identify the required standards that need to be met in countries that we know we're going to go to, because testing requirements are different in different countries." *Id.* at 14. "And then at the end of the project they would put together the supporting documentation to allow themselves to file in America and...the other international regulatory groups to file in their particular

countries using our data. And they would liaise with them throughout that approval process globally." *Id.* at 14.

Documents submitted by the parties support Bard's assertion that regulatory communications are largely controlled from within the United States. For example, Exhibit F to Defendants' memorandum is an email chain showing Bard employees within the United States compiling information to respond to inquiries made by a regulator in Great Britain. Doc. 3313-7.

It also appears, however, that employees in foreign entities sometimes engage in their own communications with foreign regulators. Mr. Carr provided this testimony about when Bard's foreign personnel could have communications with foreign regulators that are different from the communications prepared in the United States:

Q. There's not a single place where they would be different?

A. If the indication for use, which is a regulatory term, defines how and where a product can be used, how a filter can be used, if it happens to have a different indication for use in a different country, then that's possible. And so they would be able to change that information. Japan is a common example of that.

Q. Okay.

A. They will change wording and things like that, that's based on the Japanese regulatory approval, not necessarily marketing effort.

Q. Sure. They have to get a change in an IFU approved by BPV or C.R. Bard before they can do it?

A. No, they approve it at their level.

Doc. 3266 at 10-11.

This exchange suggests that employees in foreign Bard entities at least sometimes communicate with foreign regulators on their own. This fact is confirmed by Exhibit 4 to Plaintiffs' memorandum. It is a communication from David Marshall, an employee of Bard in Great Britain, recounting communications he had with British regulators regarding Bard filters. Doc. 3266 at 13.

***566** For purposes of this discovery dispute, the Court concludes that most of the communications with foreign

regulators originate in the United States and thus will be captured by the ESI searches currently underway. There do appear, however, to be some communications that originate abroad and may not be captured in the current searches.

The Court also finds, however, that the relevancy of these communications is uncertain for at least two reasons. First, there are no Plaintiffs in this MDL from foreign countries. All plaintiffs received their Bard filters and allegedly were injured in the United States. Second, Plaintiffs seek communications with foreign regulators for a narrow purpose—to determine if any of those communications have been inconsistent with Defendants' communications with American regulators. It is inconsistency that Plaintiff's seek to discover.

Courts generally recognize that relevancy for purposes of discovery is broader than relevancy for purposes of trial. Even still, the Court concludes that the discovery sought by Plaintiffs is only marginally relevant. With no foreign-based Plaintiffs, and mere conjecture that communications between foreign entities and foreign regulators might be inconsistent with Defendants' communications with American regulators, the discovery appears to be only potentially relevant—more hope than likelihood.

B. Proportionality.

[4] [Rule 26\(b\)\(1\)](#) identifies several factors to be considered in addressing proportionality. Plaintiffs have addressed some of those factors in the evidence cited above. The “importance of the discovery in resolving the issues,” as the Court has explained, appears marginal. The parties “relative access to relevant information” favors Plaintiffs, but only in Defendants' possession of possibly relevant information.

Defendants argue that the burden or expense of the proposed discovery outweighs its likely benefit, and they provide some specifics. They note that Bard has entities in Canada, Korea, Australia, India, Singapore, Malaysia, Italy, Ireland, the United Kingdom, Denmark, the Netherlands, Sweden, Norway, Finland, Mexico, Chile, Brazil, and China. Doc. 3309 at 6 n.6. Plaintiffs seek discovery of all communications these entities have had with foreign regulatory authorities involving all Bard IVC filters since 2003. *Id.* To comply with Plaintiffs' requests, Defendants assert that they would be required to identify the applicable custodians from these foreign entities for the last 13 years, collect ESI from these custodians, and search for and identify communications with foreign regulators. The Court is persuaded by these specifics that the burden of this foreign discovery would be substantial.

Plaintiffs are engaging in substantial discovery with respect to Defendants' communications with American regulators, including extensive ESI searches and depositions of relevant witnesses. This discovery should capture communications with foreign regulators that originate in the United States, as most appear to. The Court concludes that the burden and expense of searching ESI from 18 foreign entities over a 13-year period outweighs the benefit of the proposed discovery—a mere possibility of finding a foreign communications inconsistent with United States communication.

Because the proposed discovery is not proportional to the needs of the case considering the factors set forth in [Rule 26\(b\)\(1\)](#), the Court concludes that Defendants need not search the ESI of foreign Bard entities for communications with foreign regulators.

All Citations

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United States District Court,
E.D. Louisiana.

In re: Xarelto (Rivaroxaban)
Products Liability Litigation.
This Document Relates To: All Cases.

MDL NO. 2592

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Signed 07/20/2016

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Filed 07/21/2016

Opinion

ORDER & REASONS

[Eldon E. Fallon](#), UNITED STATES DISTRICT JUDGE

*1 Before the Court is the PSC's Motion to Compel Discovery of Defendants' German Employees' Personnel Files. R. 2951. Having reviewed the parties' briefs, the applicable law, and the matters raised during oral argument the Court now issues this Order & Reasons.

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I. BACKGROUND

This matter arises from damages Plaintiffs claim to have suffered from the manufacture, sale, distribution, and/or use of the medication known as Xarelto, an anti-coagulant used for a variety of blood-thinning medical purposes. The Plaintiffs have filed suits in federal courts throughout the nation against Defendants, Bayer Corporation, Bayer HealthCare LLC, Bayer HealthCare Pharmaceuticals Inc., Bayer HealthCare AG, Bayer Pharma AG, and Bayer AG (collectively, Bayer), Janssen Pharmaceuticals, Inc., Janssen Research & Development, LLC, Janssen Ortho LLC, and Johnson & Johnson (collectively, Janssen). The Plaintiffs allege that they or their family members suffered severe bleeding and other injuries due to Xarelto's allegedly inadequate warning label, among other

things, as well as Xarelto's purported lack of reliance on regular blood monitoring.

The Judicial Panel on Multidistrict Litigation determined that the Plaintiffs' claims involved common questions of fact, and that centralization under 28 U.S.C. § 1407 would serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Therefore, on December 12, 2014, the Judicial Panel on Multidistrict Litigation consolidated the Plaintiffs' Xarelto claims into a single multidistrict proceeding ("MDL 2592"). MDL 2592 was assigned to Judge Eldon E. Fallon of the United States District Court for the Eastern District of Louisiana to coordinate discovery and other pretrial matters in the pending cases. Subsequent Xarelto cases filed in federal court have been transferred to this district court to become part of MDL 2592 as "tag along" cases. The Court has appointed committees to represent the parties, and discovery has commenced. The Court adopted a discovery plan and set bellwether trials to begin in February 2017.

*2 In anticipation of the deposition phase of discovery, the PSC requested the production of the custodial files and the personnel files of Defendants' employee-witnesses. Custodial files are maintained by the employee and include documents generated or received by the employee concerning the employee's work. R. 1922 at 2. In contrast, personnel files are maintained by the Human Resources department of an employer, and are likely to contain confidential employer evaluations which the employee may have never seen. R. 1922 at 2. The personnel file may also include sensitive information such as salary, physical or mental health data, alimony and child support garnishment, tax records, and drug test results. See *Williams v. Roy O. Martin Lumber Co. LLC*, 51 Fed.Appx. 483, at *6 (5th Cir. 2002).

On January 14, 2016, the Court ordered the parties to file briefing concerning the deposition protocol, so that a Pretrial Order could be issued for the purpose of setting guidelines in advance of the deposition phase of discovery. R. 1914. Both the PSC and Defendants timely filed memoranda in support of their positions on the protocol. R. 1920, 1922. In the briefing, the parties contested the discoverability of employee personnel files. Neither Janssen nor Bayer resisted production of custodial files. However, both Janssen and Bayer asserted that personnel files did not fall within the scope of Rule 26(b), because the

privacy interests of the deponent-employees outweighed the PSC's interest in discovery. R. 1922 at 5. Bayer also objected to the production of personnel files on the grounds that the personnel files contained "personal data," and production of such data would constitute a violation of the German Data Protection Act. R. 1922 at 10.

After hearing oral argument and reviewing the briefs, the Court issued an Order & Reasons requiring the PSC to provide an "individualized showing of relevancy, proportionality, and particularity," for each witness whose personnel files they sought. R. 1987 at 8. Following the Court's instruction, the PSC noticed depositions of the Janssen employees and made a specific, particularized request for various types of material contained in the personnel files of those witnesses. The Court subsequently required Janssen to produce the files for an *in camera* examination. The Court then appropriately tailored the scale of production by balancing the relevancy and importance of the material against employee privacy interests.

The Court delayed ruling on the German law issue raised by Bayer, finding that the parties failed to present sufficient briefing for the Court to determine whether a "blocking statute" such as the German Data Protection Act could trump the Federal Rules of Civil Procedure. R. 1987 at 8 n.1. However, at the request of the parties, the Court later provided guidance on the German law issue at a telephonic discovery conference, and the parties jointly agreed to revisit the applicability of the German Data Protection Act at a later date. R. 2048. Meanwhile, the parties began exchanging documents and taking depositions of Janssen witnesses.

II. THE PRESENT MOTION

The present motion returns to the discovery issues presented by the German Data Protection Act. On April 1, 2016, the PSC filed a Motion to Compel Discovery of Defendants' German Employees' Personnel Files, In Its Entirety. R. 2951. The motion specifically addresses the discovery of deponents Frank Misselwitz, MD, PhD, and Dagmar Kubitzka, MD. The PSC seeks to compel Xarelto-related documents associated with these witnesses' performance reviews, self-reviews, annual compensation, incentives and bonuses, or, in the alternative, to produce these documents to the Court for *in camera* inspection. R. 1951-1 at 1.

*3 The Court issued an Order & Reasons on May 16, 2016 that ordered Bayer to produce a privacy log of the employee personnel files. R. 3237. In light of the considerable comity interests at issue, the Court sought to better understand the “character, nature, and quantity of the personal data contained in the files,” R. 3237 at 10, before evaluating the legality of production under the German Data Protection Act or conducting a balancing of interests pursuant to *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 548 (1987). Bayer filed a Notice of Filing of Privacy Logs on June 6, 2016. R. 3384. The PSC filed a Reply to Bayer's privacy logs on May 16, 2016. R. 3560.

A. The PSC's Motion (R. 2951)

The PSC contends that the German Data Protection Act does not trump the Federal Rules of Civil Procedure concerning the discovery of personnel files such as the ones at issue. R. 2951. The PSC takes the position that the Court has ordered the production of numerous domestic personnel files associated with employees of Janssen, and that the “effect of the so-called German blocking statute” should not lead to a different outcome. R. 2951-1 at 2.

The PSC begins by providing a particularized discussion of Dr. Misselwitz and Dr. Kubitz's importance to the litigation. Opening with the former, the PSC notes that Dr. Misselwitz is the Vice President at Bayer AG, and leads the Cardiovascular Therapeutic Area in Wuppertal, Germany. R. 2951-1 at 4. Dr. Misselwitz directed other Xarelto development leaders, including Bayer's [Thrombosis](#) Head, Bayer's Cardiovascular Head, Bayer's Hematology Head, and Bayer's Lead for Pediatric Development. R. 2951-1 at 4. Dr. Misselwitz has a long history with Xarelto. He joined Bayer's Strategic Drug Development—Cardiovascular Team on April 1, 2002. R. 2951-1 at 5. Dr. Misselwitz worked closely with Janssen leadership in the course of the Xarelto partnership between Bayer and Janssen. R. 2951-1 at 5. Dr. Misselwitz also acted as a public voice for Xarelto during its development by meeting with investors and authoring publications. R. 2951-1 at 5. The PSC asserts that Dr. Misselwitz was one of the two primary drivers behind the selection of once-a-day dosing for Xarelto. Lastly, the PSC points out that Dr. Misselwitz supported

the use of project-specific bonuses to incentivize Bayer employees working on projects such as Xarelto. R. 2951-1 at 6–7. With the preceding in mind, the PSC takes the position that Dr. Misselwitz's personnel files will likely contain material that reveals “strategic plans for [sic] which Dr. Misselwitz and/or his superiors felt to be of critical importance to Xarelto development.” R. 2951-1 at 7–8.

The PSC next describes in particularity Dr. Kubitz's role at Bayer. Dr. Kubitz's high-level leadership role at Bayer began in 2007, when she was promoted to Group Leader Acute Care within Clinical Pharmacology. R. 2951-1 at 8. Dr. Kubitz was crucial to the assessment of the pharmacodynamics profile of Xarelto, and consulted with others at Bayer concerning inquiries involving Xarelto raised by regulatory bodies, both foreign and domestic. Dr. Kubitz participated in discussions concerning the financial consequences of potential dosing regimens in response to inquiries made by investment banking firms. R. 2951-1 at 9. The PSC also contends that Dr. Kubitz was the second primary driver of once-a-day dosing for Xarelto. Dr. Kubitz continues to be involved with Xarelto. She attends conferences and forums which discuss the ongoing debate concerning the need to measure plasma concentrations of Xarelto in an effort to appropriately dose all patients. The PSC argues that Dr. Kubitz's personnel files may provide evidence of bias, and could bring to light additional discoverable information. R. 2951-1 at 10.

*4 The PSC lastly turns to the German Data Protection Act and claims that it is inapplicable to the deposition requests at bar. The PSC concedes that the German Data Protection Act prohibits the transfer of “personal data” to any jurisdiction that does not provide the same level of privacy protections as the European Union. R. 2951-1 at 11. However, the PSC takes the position that the personnel files fall into an exception which allows the sharing of personal data where “the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise, or defense of legal claims.” R. 2951-1 at 11. Arguing in the alternative, the PSC cites the Supreme Court's opinion in *Société Nationale Industrielle Aérospatiale v. U. S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987), and argues that the *Société Nationale* factors weigh in favor of disclosure even if disclosure is prohibited by German law. R. 2951-1 at 12.

B. Bayer's Opposition (R. 3146)

Bayer contends that the Court should not require the production of the documents at issue, because production would violate the German Data Protection Act. Bayer recognizes that the illegality of production under foreign law is not dispositive, but argues that the comity interests set forth in *Société Nationale* weigh against the production of personnel files due to the employee privacy interests involved.

Bayer begins by asserting that personnel files are subject to heightened protection under the German Data Protection Act, and that no exceptions to the Act allow for production. Bayer notes that the German Constitution provides for a “right to informational self-determination,” and argues that the German Data Protection Act buttresses the values of said right. R. 3146 at 8. The Defendant leans heavily on the affidavit of its German law expert, Dr. Henning Moelle. R. 3146-1. Citing Moelle, Bayer takes the position that production of personal data could “subject [Bayer] to administrative or criminal penalties, including fines and imprisonment for up to two years, and to civil liability.” R. 3146 at 8 (citing R. 3146-1 at 9).

Before addressing the German Data Protection Act itself, Bayer attempts to distinguish the “1.1 million German-stored documents” they have already produced from the documents currently sought by the PSC. R. 3146 at 9. Bayer concedes that most, if not all, of the documents produced by Bayer contain some personal data within the scope of the German Data Protection Act. R. 3146 at 9. Bayer distinguishes the files by arguing that German law recognizes a distinction between custodial files and personnel files. According to Bayer, custodial files are employee-maintained documents that were “generated or received by the employee concerning the employee's work.” R. 3146 at 10. In contrast, Bayer characterizes personnel files as a unique “compilation of personal data” that are maintained by an employer's Human Resources department. R. 3146 at 10 (quoting R. 3146-1 at 4). In justifying this uniqueness, Moelle contends that personnel files are “massive compilation[s] of personal data of the employee,” and that they necessarily include personal and sensitive material. R. 3146-1 at 4– 5, 9.

Turning to the text of the German Data Protection Act, Bayer contends that the Act calls for a balancing of interests whenever the production of personnel files is at issue. “Under the...balancing test, the employees' interest in protecting their personnel records from what would be a massive personal-data dump is extraordinarily high, even when weighed against any litigation interest.” R. 3146 at 11. Somewhat contradicting its assertion that a balancing test applies, Bayer also asserts that the Act provides that personnel files may only be disclosed “for a legitimate purpose of the *employment relationship*.” R. 3146 at 11 (citing R. 3146-1 at 7).

*5 Moelle's affidavit clarifies this matter. According to Moelle, the German Data Protection Act's “legitimate purpose of the employment relationship” language does not alter the exceptions applicable to the transfer of personnel records for business purposes. R. 3146-1 at 7– 8. Instead, Moelle contends that this section of the Act provide contextual evidence of the “great weight that should be afforded employee privacy interests.” Moelle takes the position that the personal records at issue may be transferred without violating the Act if the employer has a legitimate interest in transfer, and “there is no reason to assume that the data subjects have an overriding interest against such processing and transfer of their data.” R. 3146-1 at 8.

Following their discussion of German law, Bayer addresses the Supreme Court's *Société Nationale* balancing test. Bayer concedes that this Court has the authority to compel the production of the German files, even if production violates the German Data Protection Act. R. 3146 at 13. However, Bayer correctly states that the Court must first conduct a *Société Nationale* comity analysis before ordering Bayer to violate a foreign blocking statute. Bayer takes the position that the balancing test weighs against production. Bayer interprets *Société Nationale* to call for the use of the five factors of the Restatement (Third) of Foreign Relations. Bayer addresses each in turn, emphasizing their position that the personnel files contain highly sensitive employee data and that the PSC may find the evidence it seeks in the 1.1 million documents already produced by Bayer or by asking the witnesses at deposition. R. 3146 at 13– 17.

Lastly, Bayer argues that the PSC's motion for Dr. Kubitz's file is untimely. Dr. Kubitz was deposed in Amsterdam on February 29 and March 1, 2016. Bayer

contends that the PSC did not raise at deposition any of the issues they now argue are crucial to their case, and are therefore barred from seeking Dr. Kubitz's personnel files.

C. The PSC's Reply (R. 3173)

The PSC timely replies. R. 3173. The PSC refines two of its arguments in response to the Defendants' Opposition and the affidavit of Bayer's German law expert.

The PSC contends that the German Data Protection Act does not prevent the disclosure of the personnel files at issue. The PSC avers that Bayer's German law expert conceded that section 4(c)(1)(3) of the Act is an exception that allows for the transfer of personal data in this case. R. 3173-1 at 3–4. The PSC further argues that Bayer wrongly distinguishes between personnel files and custodial files under German law. According to the PSC, “Personnel files are not the test; personal data is.” R. 3173-1 at 4. The PSC then cites case law where domestic courts found that personal data should be compelled despite the objections of German defendants. R. 3173-1 at 4.

The PSC also provides its *Société Nationale* comity analysis. R. 3173-1 at 4–9. Addressing the five factors of the Third [Restatement of the Law of Foreign Relations, § 442 \(Am. Law Inst. 1987\)](#), the PSC contends that all but one of the factors—whether the information originated in the United States—points towards the production of the personnel files. R. 3173-1 at 4–9. And with respect to this one adverse factor, the PSC emphasizes the fact that Bayer voluntarily chose to engage in extensive commerce with the United States, and avers that Bayer should not be able to hide behind German discovery protections when it purposefully availed itself of United States markets. R. 3173-1 at 7–9.

III. DISCUSSION

A. Applicable Law

The present matter presents a conflict between [Rule 26 of the Federal Rules of Civil Procedure](#) and a “blocking statute,” the German Data Protection Act. In seeking a resolution of this conflict that respects the discovery rights and defenses of the parties as well as the comity concerns

of the United States and Germany, a review of American and German civil procedure as well as the law concerning blocking statutes is appropriate.

*6 i. The Relationship between the Federal Rules of Civil Procedure and Foreign Blocking Statutes

The PSC seeks the production of deponent employees' personnel files. The PSC claims that these files likely contain information regarding compensation, performance bonuses, and other incentives that rewarded conduct which caused Xarelto to be prematurely rushed to the marketplace. Because this is a discovery issue, [Rule 26 of the Federal Rules of Civil Procedure](#) applies. [Rule 26\(b\)\(2\)](#) defines the scope of discovery as “any nonprivileged matter that is relevant to the party's claim or defense and proportionate to the needs of the case.... unless otherwise limited by a court order.” The rules of discovery are to be interpreted with a “liberal spirit.” [Coughlin v. Lee](#), 946 F.2d 1152, 1159 (5th Cir. 1991) (quoting [Burns v. Thiokol Chem. Corp.](#), 483 F.2d 300, 305 (5th Cir. 1973)).

At the outset, the Court notes that despite the broad scope of discovery, personnel files are generally treated with special care in the Fifth Circuit. In [Coughlin v. Lee](#), the circuit court held that a district court must consider specific factors in weighing the competing privacy and discovery interests presented by a request for the production of personnel files. *Id.* at 1155–57. The Fifth Circuit adopted ten factors outlined in [Frankenhauser v. Rizzo](#), 59 F.R.D. 339, 344 (E.D. Pa. 1973), six of which are relevant in a civil case against a private defendant such as Bayer: (1) “the impact upon persons who have given information of having their identities disclosed;” (2) “whether the information sought is factual data or evaluative summary;” (3) “whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question;” (4) “whether the plaintiff's suit is non-frivolous and brought in good faith;” (5) “whether the information sought is available through other discovery or from other sources; and” (6) “the importance of the information sought to the plaintiff's case.” *Id.* The court emphasized the importance of particularity, calling for a “case to case” balancing of the variables before the court. *Id.*

Furthermore, the production of discovery material such as personnel files sometimes carries civil or criminal consequences abroad. Through the use of so-called “blocking statutes,” foreign states may “prohibit[] the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state in compliance with the orders of foreign authorities.” *Restatement (Third) of Foreign Relations Law* § 442 (Am. Law Inst. 1987). Countries such as France, China, Malaysia, the Netherlands, Canada, and Germany have enacted blocking statutes, and thereby indirectly affect the relatively broad scope of American discovery. *See id.*; John T. Yip, *Addressing the Costs and Comity Concerns of International E-Discovery*, 87 Wash. L. Rev. 595, 615 (2012).

The Supreme Court last addressed the relationship between blocking statutes and American discovery procedures in *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 548 (1987); *see also Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204–06 (1958). In *Société Nationale*, a foreign litigant argued that American discovery procedures must yield to the discovery procedures of the Hague Convention, as required by French penal law. *See Société Nationale*, 482 U.S. at 526. The Court disagreed and adopted a balancing “comity analysis,” reasoning that “foreign tribunals will recognize that the final decision on the evidence to be used in litigation conducted in American courts must be made by those courts.” *Id.* at 542, 544 n.28. The Court declined to articulate the factors of the test. *Id.* at 546.

*7 In the wake of *Société Nationale*, courts have devised numerous mechanisms for performing the Court’s unarticulated “comity analysis.” *See* Geoffrey Sant, *Court-Ordered Law Breaking U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 Brook. L. Rev. 181, 186–87 (2015). Some courts use a three-factor test. For example, the District of Connecticut examines whether: “(1) the examination of the particular facts of the case, particularly with regard to the nature of the discovery requested; (2) the sovereign interests in issue; and (3) the likelihood that the [foreign discovery] procedures will prove effective.”¹ *Valois of America, Inc. v. Risdon Corp.*, 283 F.R.D. 344, 346 (D. Conn. 1997); *see also In re Aircrash Disaster Near Roselawn, Ind., October 31, 1994*, 172 F.R.D. 295, 309 (N.D. Ill. 1997) (employing the same factors). Others, such as the Second Circuit, have used a

four-factor test, examining “(i) the competing interests of the nations whose laws are in conflict; (ii) the hardship that compliance would impose on the party or witness from whom discovery is sought; (iii) the importance to the litigation of the information and documents requested; and (iv) the good faith of the party resisting discovery.” *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998) (citing *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523) (S.D.N.Y. 1987). *But see Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 211 (E.D.N.Y. 2007) (applying the five factors of the Restatement (Third) of the Law of Foreign Relations as well as two additional factors).

¹ This formulation of the comity analysis is drawn from language in *Société Nationale*. *See Société Nationale*, 357 U.S. at 545 (suggesting that a district court should consider “the particular facts, sovereign interests, and [the] likelihood that resort to...[foreign discovery] procedures will prove effective”).

The majority of lower courts, however, perform the five-factor test used in the *Restatement (Third) of the Law of Foreign Relations* § 442 (Am. Law Inst. 1987) (the “Third Restatement”), citing the Court’s favorable reference to the Third Restatement in a footnote in *Société Nationale*. *See, e.g., Pershing Pacific West, LLC v. Marinemax, Inc.*, Civ. No. 10-1345, 2013 WL 941617, at *6–7 (S.D. Cal. Mar. 11, 2013); *see also Sant, supra*, at 186–87 (taking the position that “a greater number” of lower courts employ this test). Under the Third Restatement, a court in deciding whether to order the production of information protected by a blocking statute should consider:

the importance to the ... litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Restatement (Third) of Foreign Relations Law § 442 (Am. Law Inst. 1987). These five factors expand to seven in

the Ninth Circuit. Relying on *Société Nationale's* holding that the Third Restatement's factors are not exhaustive, the Ninth Circuit also considers “[1] the extent and the nature of the hardship that inconsistent enforcement would impose upon the person, and [2] the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.” *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992) (citing *Société Nationale*, 357 U.S. at 543–44 n.28).

One year after the Supreme Court's holding in *Société Nationale*, the Fifth Circuit adopted a three-factor comity analysis. “The district court is only directed to determine whether [foreign 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.’ ” *In re Anshuetz & Co., GmbH*, 838 F.2d 1362, 1364 (5th Cir. 1988) (quoting *Société Nationale*, 357 U.S. at 545). The Fifth Circuit's formulation of the comity analysis emphasizes the sovereignty interests of foreign states. In particular, the circuit court found that district courts should “consider, with due caution, that many foreign countries, particularly civil law countries, do not subscribe to our open-ended views regarding pretrial discovery, and in some cases may even be offended by our pretrial procedures.” *Id.* The *Anshuetz* opinion does not cite the Third Restatement.

*8 Despite the *Anshuetz* court's adoption of a three-factor comity analysis, district courts in the Fifth Circuit routinely use the five-factor test of the Third Restatement. For example, the Northern District of Texas recently employed the five factors of the Third Restatement, adding to the comity analysis a discussion of the hardship of compliance as well as the good faith of the party resisting discovery. See *S.E.C. v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 330 (N.D. Tex. 2011). The Eastern District of Texas has also addressed the question, finding that the five factors of the Third Restatement provide the proper framework for a comity analysis. See *Seoul Semiconductor Co. v. Nichia Corp.*, 590 F. Supp. 2d 832, 834 (E.D. Tex. 2008). While there is no district court opinion from the Eastern District of Louisiana on this subject, one magistrate judge has applied the five factors of the Third Restatement. See *Adams v. Unione Mediterranea Di Sicurtà*, No. 94-1954, 2002 WL 472252, at *2–3 (E.D. La. Mar. 28, 2002). Before embarking on

any comity analysis, however, it is appropriate to consider the German Data Protection Act to determine whether the Act is applicable and if so whether there are any exceptions which may apply.

ii. The German Data Protection Act

The blocking statute at issue is the German Data Protection Act.² The roots of the Act stretch back to 1990 when the Act was first codified to protect “the individual against his right to privacy being impaired through the handling of personal data.” Bundesdatenschutzgesetz [BDSG] [Civil Code], § 1(3), *translation at* http://www.gesetze-im-internet.de/englisch_bdsge/englisch_bdsge.html#p0008 (Ger.). The Act was updated in 1995 in order to comply with the European Council and Parliament's passage of Directive 95/46/EC (“EC Directive 95”). Council Directive 95/46, 1995 O.J. (L 281). EC Directive 95 protects the privacy of personal data within the European Union. As a member of the European Union, Germany was compelled to enact privacy protection laws that enabled the EC Directive's principles. The amended Act includes civil and criminal penalties for parties who unlawfully disclose protected data. BDSG, § 44(1). Violation of the Act may result in up to two years of imprisonment. *Id.*

² The direct translation of “Bundesdatenschutzgesetz” is “Federal Data Protection Act.” For the sake of clarity, the Court refers to the German law as the “German Data Protection Act.”

As its name implies, the German Data Protection Act limits the disclosure of personal data. The Act defines “personal data” as any “information concerning the personal or material circumstances” of a natural person. *Id.* § 3(1). The Act does not specifically address personnel files, but scholars believe that the scope of the Act covers telephone numbers, addresses, jobs, familial status, credit information, and medical history (among others), and some of this information may well be contained in the personnel files. See Oliver Förster & Osama Almughrabi, *Managing the Conflict Between U.S. E-Discovery and the German Data Protection Act*, 36 *Hastings Int'l & Comp. L. Rev.* 111, 119 (2013). The Data Protection Working Party, an independent agency tasked with advisory authority concerning EC Directive 95, has signaled that personal data should be interpreted to include subjective personal

data such as “opinions or assessments.” Article 29 Data Protection Working Party, *Opinion 4/2007 on the Concept of Personal Data*, at 6, 01248/07/EN/Final WP 136 (June 20, 2007). In a 2007 advisory document, the Working Party provided several examples of subjective personal data, including “Titius is a reliable borrower,” “Titius is not expected to die soon,” and most pertinently “Titius is a good worker and merits promotion.” *Id.*; see also Article 29 Data Protection Working Party, *Opinion 8/2001 on the Processing of Personal Data in the Employment Context*, at 2 n.5, 5062/01/EN/Final WP 48 (Sept. 13, 2001) (“Examples of employment records usually involving the processing of personal data ... [include] [p]ayroll and tax information ... [a]nnual appraisal/assessment records, [and] [r]ecords relating to promoting, transfer, [t]raining, [and] disciplinary matters”). Thus the material in the personnel files would appear to be covered by the German Data Protection Act.

*9 Two obstacles impact the production of employee personal data for purposes of compliance with United States discovery procedures. EC Directive 95 places restrictions on both the transfer of personal data to countries outside the EU as well as on the purpose for which personal data may be used. See *Opinion 8/2001 on the Processing of Personal Data in the Employment Context*, *supra*, at 26. The transfer restriction appears in Article 25 of the EC Directive, and the purpose restrictions appear in Articles 6, 7, and 8. Council Directive 95/46, art. 6–8, 25, 1995 O.J. (L 281).

In harmony with EC Directive 95, the German Data Protection Act also places restrictions on both the international transfer of personal data (“the transfer restriction”) as well as the purposes for which collected personal data may be used (“the purpose restriction”). See Förster, *supra*, at 119. The transfer restriction is contained in section 4b of the Act, and provides that “Transfer shall not be effected [to foreign bodies] in so far as the data subject has a legitimate interest in excluding transfer, in particular if an adequate level of data protection is not guaranteed at the bodies stated in the first sentence of this sub-section.” BDSG § 4b(2). Enumerated exceptions to the transfer restriction are contained in section 4c of the Act. In turn, the purpose restriction is located in section 28 of the Act.

“The ... use [of personal data] as a means of fulfilling one's own business purposes shall be admissible ... in so far as this is necessary to safeguard justified interests

of the controller of the filing system and there is no reason to assume that the data subject has an overriding legitimate interest in his data being excluded from processing or use....”³

BDSG § 28(1). Exceptions to the purpose restriction are also found in section 28.

³ Section 28(1)'s reference to transfers generally is not to be confused with the distinct restrictions on international transfers found in section 4(b)(2). BDSG §§ 4(b)(2), 28(1).

Upon review of the transfer and purpose restrictions as well as their applicable exceptions, the Court identifies two possible legal mechanisms⁴ which may allow for the disclosure of the at-issue personnel files. Both data subject consent and the dual use of the “legal claims” and “justified interests of the controller” exceptions may allow for the litigation-related transfers at issue.

⁴ The Court finds that section 4(c)(2)'s “adequate level of protection” exception does not provide a viable method for avoiding conflict with the German Data Protection Act in this case. BDSG § 4(c)(2). This exception cannot be satisfied by a mere protective order—only a “competent [German] supervisory authority” may certify that this level of protection exists. BDSG § 4(c)(2); see also Förster, *supra*, at 121–22.

The first mechanism, data subject consent, is an exception found in section 4(c)(1)(1) of the German Data Protection Act. Under this provision, the written consent of the data subject is sufficient to negate both the transfer and purpose limitations of the Act. BDSG 4(c)(1)(1); see also Förster, *supra*, at 119–20. This exception is the simplest of the available options, but it also hinges on matters outside of the data holder's control.

The second mechanism uses the “legal claims” exception of section 4(c)(1)(4) to nullify the transfer restriction, and the “justified interests of the controller” exception found in section 28(1)(2) to overcome the purpose restriction. Both Bayer and its German law expert concede that the “legal claims” exception is applicable to the instant matter.⁵ See R. 3146 at 10, 3146-1 at 6–7. Thus, only the “justified interests of the controller” exception must be examined in detail. Section 28(1)(2) provides that:

*10 “The collection, storage, modification, or transfer of personal data... shall be admissible ... insofar as this is necessary to safeguard justified interests of the controller of the filing system and there is no reason to assume that the data subject has an overriding legitimate interest in his data being excluded from processing or use”⁶

BDSG 28(1)(2). Thus, under this exception, two matters are at issue: (1) the processing and transfer of the data must be necessary to safeguard a legitimate interest of the data controller; and (2) the data subject must not have an overriding legitimate interest in preventing processing or transfer. Bayer's German law expert describes this exception as a balancing test. R. 3146-1 at 7–9. The Data Protection Working Party provides support for this interpretation; the corresponding component of EC Directive 95 is also characterized as a balancing test. *See* Opinion 8/2001 on the Processing of Personal Data in the Employment Context, *supra*, at 5 (citing Council Directive 95/46, art. 7.f, 1995 O.J. (L 281)).

⁵ Despite the plain language of the legal requirement exception, some argue that an obligation to produce protected data pursuant to a United States discovery order does not qualify as “legally required.” BDSG 4(c)(1)(1). Germany may not consider compliance with an unrecognized, foreign discovery practice to be “legally required” under the terms of its own narrow discovery laws. *See* Förster, *supra*, at 120–22. The Data Protection Working Party also concludes that “legally required” transfers pursuant to EC Directive 95 are those transfers required by an EU domestic transferor state (Germany) rather than by a foreign transferee state (the United States). The Court does not find these arguments persuasive. The plain meaning of “defense of legal claims” does not exclude international claims, and the German Data Protection Act contemplates international transfers throughout its text. Further, if the exception did not apply, the burden on international discovery would be excessive. In this litigation alone, over 1.1 million discovery documents have been produced pursuant to section (4)(c)(1)(4). A *Société Nationale* comity analysis would not look favorably upon such a weighty bar to discovery.

⁶ Section 32 of the German Data Protection Act, entitled “Data Collection, Processing, and Use for Employment-related Purposes,” does not supersede the exceptions in section 28. Moelle concedes this

point in his affidavit. R. 3146-1 at 7–8. Section 32 governs the processing and use of employee personal data for employment-related purposes. Section 32 does not prevent the use of employee personal data for commercial purposes under appropriate circumstances, which is governed by section 28. “[Section 32] does not *per se* exclude the possibility that, under the circumstances of an individual case, a processing of certain personal data contained in the Personnel Records may be justified for a legitimate purpose of the employer outside the employment relationship.” R. 3146-1 at 8; *see also* *Beschlussempfehlung und Bericht des Innenausschusses, Deutscher Bundestag: Drucksache [BT] 16/13657*, <http://dip21.bundestag.de/dip21/btd/16/136/1613657.pdf> (Ger.); Franz-Josef Düwell, *Das Gesetz zur Änderung datenschutzrechtlicher Vorschriften*, Neues Aus Der Gesetzgebung, Aug. 14, 2009, http://www.hss.de/fileadmin/media/downloads/Berichte/09-9_FA_Gesetzgebung.pdf (discussing the effects of the 2009 amendments on section 28 of the BDSG).

B. Analysis of the Potential Conflict between the German Data Protection Act and the Federal Rules of Civil Procedure

*11 If Defendants may release the German personnel files without violating the German Data Protection Act, then there is no conflict with the Federal Rules of Civil Procedure. The Court therefore must first determine whether the personnel files contain “personal data,” and if any exceptions allowing for disclosure apply in the present circumstances.

i. The Presence of Personal Data

The Court has had an opportunity to review the privilege log. Despite the PSC's assertion to the contrary, at least some of the information in the sought personnel files qualifies as personal data for purposes of the German Data Protection Act. The personnel files contain objective personal data such as the deponents' salary information, job titles, and email addresses. The personnel files also contain subjective personal data such as performance reviews, evaluations for promotion, and the data subject's own self-assessments. Both objective and subjective personal data are protected under the Act. *See* Förster, *supra*, at 118–19; *Opinion 4/2007 on the Concept of*

Personal Data, *supra*, at 6. Therefore, unless an exception applies, the German Data Protection Act and the Federal Rules of Civil Procedure are in conflict.

ii. Consent of the Data Subject

The German Data Protection Act allows for the processing and transfer of information by a data holder with the consent of the data subject. BDSG, § 4(a). However, “[c]onsent shall be effective only when based on the data subject's free decision. Data subjects shall be informed of the purpose of collection, processing or use and, in so far as the circumstances of the individual case dictate or upon request, of the consequences of withholding consent.” *Id.* There is no indication in the record that any party has sought the consent of the specific Bayer employees at issue in this matter.

The Defendants' German law expert, Henning Moelle, takes the position that German employers may not ask an employee to grant their consent. The Court finds Moelle's interpretation unpersuasive. Under the BDSG, an employer may not request consent in a manner that impedes the ability of the data subject to make a “free decision.” *Id.* However, aside from Moelle's ipse dixit, no document before the Court suggests that a mere request for consent overrides the capacity of an employee to make a free decision for purposes of section 4a. On the contrary, the text of the German Data Protection Act provides safeguards and procedures for requesting consent. The data subject must be informed of the proposed use of the data and the consequences, if any, of withholding consent. *Id.* The consent must be given in writing. *Id.* And, most importantly, the data subject's choice to consent must be a “free decision,” i.e., free of undue pressure. See *Opinion 8/2001 on the Processing of Personal Data in the Employment Context*, *supra*, at 23 (“If it is not possible for the worker to refuse it is not consent.”). These safeguards are adequate to provide for meaningful consent in the context of the employer-employee relationship. The German parliament has also suggested in committee reports that employees may consent to the transfer of their personal data under the proper circumstances. See *Beschlussempfehlung und Bericht des Innenausschusses, Deutscher Bundestag: Drucksache [BT] 16/13657*, <http://dip21.bundestag.de/dip21/btd/16/136/1613657.pdf> (Ger.).

*12 Drs. Frank Misselwitz and Dagmar Kubitz are sophisticated, high-level employees of a pharmaceutical company. They are capable of meaningfully providing consent for the purposes of the German Data Protection Act in the context of this litigation. See *Pershing*, 2013 WL 941617, at *9 (“[Defendant] can, and allegedly has begun to, obtain consent of its [German] employees for disclosure of documents containing the personal information.”). Therefore, the Court finds that a good faith request for data subject consent is appropriate under Bayer's discovery obligations. If the deponents refuse to consent to such disclosures, this may raise credibility issues or at least serve as a basis for such an argument.

iii. Exceptions to the Transfer and Purpose Restrictions on Personal Data

Because the PSC seeks the international transfer of personal data, the German Data Protection Act will block unconsented production unless exceptions exist to both section 4(b)'s transfer restriction and section 28's purpose restriction. See *F_ rster*, *supra*, at 117–20. The former exception is easily met. As the Defendants concede, they may transfer data pursuant to section 4(c)(1)(4) “for the establishment, exercise or defense of legal claims.” The Court agrees with this interpretation of German law. However, the purpose restriction requires a more in-depth discussion.

The PSC seeks the production of employee personal data for commercial purposes. Section 28(1) of the German Data Protection Act provides a few exceptions to the general proposition that personal data may only be used for the purpose for which it was collected. Of the enumerated exceptions, the Court finds that section 28(1)(2) provides the only plausible candidate for the lawful unconsented transfer of personal data under the Act. Section 28(1)(2) allows for the use of employment-related personal data for commercial purposes if such use “is necessary to safeguard justified interests of the controller ... and there is no reason to assume that the data subject has an overriding legitimate interest in his data being excluded from processing or use.” BDSG, § 28(1)(2). Bayer's German law expert concedes that Bayer has a “generally legitimate interest,” R. 3146-1 at 7, so the Court must determine whether the data subject's interests in privacy override Bayer's interest in compliance with foreign discovery practices.⁷

7 Upon review of the German Data Protection Act and the relevant secondary sources, the Court finds that German law does not recognize a procedural distinction between the production of personnel files and custodial files. Contrary to the Defendants' assertion, custodial files containing personal data must meet the same exceptions under the German Data Protection Act as personnel files containing personal data. There is only one meaningful distinction between the two categories outside of section 32 of the BDSG: the nature of personnel files suggests that they will, on the whole, contain more sensitive personal data than custodial files. An employee's work-related emails will raise fewer privacy concerns than his or her health records, salary information, and performance reviews. For this reason, custodial files may be transferred en masse pursuant to sections 4(b) and 28(1)(2) of the German Data Protection Act.

German employees possess a presumptively legitimate interest in the nondisclosure of personal data to residents of countries with non-equivalent personal data protection standards. See *In re Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 1049433, at *9 (D.D.C. June 20, 2001). The Court cannot unilaterally certify that its data protection orders are sufficient to meet the standards of German law. The German governmental entity responsible for determining whether a receiving entity affords an "adequate level of protection," the Bundesbeauftragte für den Datenschutz und die Informationsfreiheit, has not given an opinion regarding this Court's Pretrial Order. BDSG, § 4(c)(2). The European Commission has certified that some non-EU countries provide adequate levels of protection under EC Directive 95, but the United States does not currently qualify. See *Foster*, *supra*, at 121–22. Therefore, the presumption in favor of the privacy interests of Drs. Misselwitz and Kubitz stands.

*13 Germany has expressed heightened concerns for the personal data interests of employees. The German Constitution contains a "right to informational self-determination." *In re: Census Act*, 30 BVerfGE 1, 42–43 (Dec. 15, 1983). But see *In re Vitamins*, 2001 WL 1049433, at *7 n.12 (finding that the right to informational self-determination embodied in the German constitution does not exceed the privacy rights codified in the BDSG). The German parliament addressed this value in the context of the employer-employee

relationship in 2009. Responding to data protection scandals involving a number of large corporations, the German parliament amended the German Data Protection Act to strengthen employee rights regarding the usage of their personal data. See Franz-Josef Düwell, *Das Gesetz zur Änderung datenschutzrechtlicher Vorschriften*, Neues Aus Der Gesetzgebung, Aug. 14, 2009, http://www.hss.de/fileadmin/media/downloads/Berichte/09-9_FA_Gesetzgebung.pdf. While this amendment does not directly change the applicability of the section 28(1)(2) exception,⁸ it further supports the notion that German law recognizes heightened privacy interests for personal data collected in the employment context. Lastly, while the German government has been silent in this litigation, the Court finds it highly significant that the Federal Republic of Germany submitted an *amicus curiae* brief urging the *Vitamins* court to defer to Germany's privacy laws and prevent the disclosure of "employee discharge, discipline, suspension, termination, and retirement records." *In re Vitamins*, 2001 WL 1049433, at *6; see also *Volkswagen, A.G. v. Valez*, 909 S.W.2d. 900, 903 (Tex. 1995) (finding it relevant that Germany filed an *amicus curiae* brief arguing that its interests would be undermined if Volkswagen were forced to produce personal data in a corporate telephone book). The German government's efforts to intercede on behalf of German employee privacy interests, as well as the text of the German Constitution and recent amendments to the German Data Protection Act, indicate that the Court should as a matter of comity vigilantly safeguard a German employee's interest in the nondisclosure of personal information.

8 To quote the PSC, "Personnel files are not the test; personal data is." R. 3173-1 at 4. Section 32 of the German Data Protection Act regulates some aspects of personal data collected in the scope of the employer-employee relationship. However, even the Defendants' German law expert concedes that "[t]his does not *per se* exclude the possibility that, under the circumstances of an individual case, a processing of certain personal data contained in the Personnel Records may be justified for a legitimate purpose of the employment relationship [as provided for by section 28(1)(2)]." R. 3146-1 at 8.

When considering the aforementioned privacy interests, as well as the German government's repeated efforts to support and strengthen protections for personal data in the employment context, the Court finds that the

wholesale production of the personnel files to the PSC would violate the German Data Protection Act. The transfer restriction of section 4(b) is satisfied by the “defence of legal claims” exception of section 4(c)(1)(4). However, there is no viable exception to the Act's purpose restriction. *See* BDSG § 28(1). Bayer has a “justified interest” in promoting its legal defense by complying with United States discovery procedures, but this interest fails to override Dr. Kubitzka and Dr. Misselwitz's weighty interests in informational self-determination. *See* BDSG § 28(1)(2). Because the purpose restriction is not satisfied, production under these circumstances would violate German law. Thus there is a clear conflict between the federal discovery rules and the German Data Protection Act.

C. Analysis of the *Société Nationale* Factors

Having found a conflict between a German “blocking statute” and the Federal Rules of Civil Procedure, the Court must now perform a *Société Nationale* comity analysis.

i. The Sought Information and the Privacy Logs

Before turning to the factors of the balancing test, the Court finds it appropriate to frame the PSC's request alongside Bayer's privacy logs of the personnel files. The PSC seeks “performance reviews and self-reviews, and compensation, incentive and bonus information for the purpose of evaluating each witness's credibility and potential bias.” R. 2951-1 at 3. The PSC also contends that the personnel files are relevant to its “rush to the market” theory of liability, and “will provide Bayer's internal assessment and valuation of these employees' contributions, as well as reflect the challenges and motivations Bayer faced in bringing Xarelto to market without a monitoring requirement and with a once-daily dosing regimen.” R. 2951-1 at 3. At times, it also appears that the PSC views the personnel files as a document review shortcut. “Stated simply, this information will point Plaintiffs to those areas of inquiry—both in document review and in preparing for and following up on the depositions of Drs. Misselwitz and Kubitzka—which are most important and likely to lead to the discovery of relevant evidence” R. 2951-1 at 4.

*14 The Court has extensively reviewed the privacy logs, the Declaration of Gudrun Lohkamp, Head of Bayer's German Human Resources Department, and the exemplar personnel files attached to Lohkamp's Declaration. R. 3384-1, 3384-2, 3384-3. However, the Court finds that its understanding of the privacy interests at stake would be greatly improved by an *in camera* review of the personnel files. The Court therefore turns to the question of whether the United States' interest in the *in camera* review of the personnel files as bounded by the PSC's asserted rationale for production outweighs Germany's interests in protecting data subjects from the privacy concerns raised by *in camera* review.

ii. Application of the Standard

At the outset, the Court finds that the five factors of the Third Restatement provide the applicable framework for the present comity analysis. The Court is cognizant of the Fifth Circuit's command that “[a] district court is only directed to determine whether [foreign 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.’” *In re Anschuetz & Co., GmbH*, 838 F.2d 1362, 1364 (5th Cir. 1988) (quoting *Société Nationale*, 357 U.S. at 545). District courts in the Fifth Circuit have consistently implemented this command by applying the five factors of the Third Restatement. *See S.E.C. v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 330 (N.D. Tex. 2011); *Seoul Semiconductor Co. v. Nichia Corp.*, 590 F. Supp. 2d 832, 834 (E.D. Tex. 2008); *Adams v. Unione Mediterranea Di Sicurta*, No. 94-1954, 2002 WL 272252, at *2–3 (E.D. La. Mar. 28, 2002). The Court joins these opinions. The five factors of the Third Restatement flesh out the Supreme Court's language in *Société Nationale*, and are applicable to the present matter.⁹

⁹ The Court does not consider the five factors of the Third Restatement to be exhaustive. The Court is mindful that the Fifth Circuit chose not to adopt the Third Restatement standard wholesale. More importantly, the *Société Nationale* Court declined to “articulate specific rules to guide this delicate task of adjudication,” in the same opinion in which it favorably cited the Third Restatement. *See Société Nationale*, 482 U.S. at 544 n. 28, 446. If the Supreme Court had intended the Third Restatement to be the

definitive mechanism for “scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to [foreign discovery procedures] would prove effective,” the Court would have adopted the Restatement rather than citing it in a footnote. Therefore, the use of additional factors may be prudent under appropriate circumstances. *See, e.g., Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992) (citing *Société Nationale*, 357 U.S. at 543–44 n.28) (applying the Third Restatement as well as two additional factors); *S.E.C. v. Stanford Int’l Bank, Ltd.*, 776 F. Supp. 2d 323, 330 (N.D. Tex. 2011).

1. The Importance of the Requested Discovery to the Litigation

Jurists evaluating the “importance” of the requested discovery to the litigation have offered different formulations of the “importance” prong. Some circuits articulate an exceedingly high bar. For instance, the Ninth Circuit hesitates to compel production unless the outcome of litigation “stand[s] or fall[s] on the present discovery order.” *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475, (9th Cir. 1992) (quoting *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 999 (10th Cir. 1977)). Courts in the District of Columbia evaluate whether the sought materials are “absolutely essential” to the case. *In re Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 1049433, at *9 (D.D.C. June 20, 2001). The Fifth Circuit has not provided guidance regarding the degree of “importance” necessary to assuage comity concerns under *Société Nationale*, but the Eastern District of Texas has used language suggesting that the sought evidence must “be critical or compelling.” *Seoul Semiconductor Co. v. Nichia Corp.*, 590 F. Supp. 2d 832, 835 (E.D. Tex. 2008). The Court finds it appropriate to rely on in-circuit persuasive authority, and accordingly shall determine whether the PSC seeks “critical or compelling” evidence in its discovery request. *Id.*

*15 The PSC essentially requests the following: evidence of employee bias due to high rates of compensation, evidence that Xarelto was rushed to the market, evidence of Bayer’s assessments of employees on the Xarelto team, and evidence that will better prepare the PSC for information which may be gleaned from document review and deposition. Turning to applicable precedent,

the PSC’s request for the production of evidence relevant to a “rush to the market” theory of liability is comparable to other cases where courts compelled the disclosure of foreign discovery materials. For example, in *In re Vitamins*, a district court was asked to produce German “employee discharge, discipline, suspension, termination, and retirement records.” *In re Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 1049433, at *9 (D.D.C. June 20, 2001). The Plaintiffs asserted that the documents were necessary “to identify and question key conspirators and...to identify and elucidate the substance of meetings with competitors and to determine how defendants dealt with conspirator-employees.” *Id.* at *8. The district court found that the files were highly relevant in this context. *Id.* The PSC’s request for personnel files is similar. Evidence of how Bayer management “dealt with” Drs. Misselwitz and Kubitza is best gleaned from the personnel files, and this information is crucial to the PSC’s theory of the case. *Id.* at *8. Guided by the holding in *In re Vitamins*, the Court finds that the first factor weighs in favor of disclosing files containing Bayer’s assessment of its employees.

Pershing, cited by the PSC, is also similar to the PSC’s request. *Pershing Pacific West, LLC v. MarineMax, Inc.*, Civ. No. 10–cv–1345–L (DHB), 2013 WL 941617 (S.D. Cal. Mar. 11, 2013). In *Pershing*, the plaintiffs sought rescission and damages stemming from the sale of a yacht that was allegedly defective at the time of sale. *Id.* at *1. The plaintiffs moved for the discovery of documents relating to vessels with similar engines and fuel delivery systems that were also sold by the defendant. *Id.* The defendant argued that a German blocking statute prevented disclosure, and that the information was not relevant. The district court resolved the dispute by applying the factors of the Third Restatement, and found that the first factor, the importance of the documents to the litigation, weighed in favor of disclosure. *Id.* at *7. The court justified its holding by noting that “courts have often permitted a showing that, under similar circumstances, similar products manufactured or sold by the defendant have had similar failures to the product at issue.” *Id.* So too here. The PSC contends that the personnel files at issue may contain highly probative evidence that Xarelto was rushed to the market. This evidence is typically admitted in products liability cases such as the one at bar, because it may be the linchpin of the case. Therefore, as in *Pershing*, this type of evidence is critical and compelling.

The Court is skeptical of the PSC's search for bias evidence in the personnel files. Even without evidence of compensation, skilled practitioners may find other mechanisms to suggest that a high-ranking employee of an international pharmaceutical company may be biased in favor of his or her employer. As for the PSC's argument that the personnel files will provide for more efficient document review and depositions, these interests fall far short of the "critical or compelling" showing required by the first prong of the comity analysis. *See Seoul*, 590 F. Supp. 2d at 835.

In sum, the Court finds that some materials in the personnel files may provide critical evidence in support of the PSC's claims that Xarelto was rushed to the market. The Court is hesitant to deny *in camera* review when the files may contain evidence of a skewed bonus compensation scheme or disciplinary files chastising guarded approaches to research and development. This type of critical information would be relevant to a finding of compelling support of the PSC's theory of the case. Therefore, the first factor of the comity analysis weighs in favor of the *in camera* production of files containing information relevant to performance evaluations, short term incentive programs, and one-time bonuses.

2. The Degree of Specificity of the Request

The PSC's requests are highly specific. The personnel files of a limited number of Bayer employees are at issue. The PSC does not seek the entirety of the personnel files—the PSC instead requests the production of easily identifiable materials from the witnesses' personnel files such as "Xarelto-related performance reviews and self-reviews, and compensation, incentive and bonus information." R. 2951-1 at 3. The Defendants respond that they fear that production of the personnel files would lead to a "massive personal-data dump." R. 3146 at 11. But this specter of invasive American discovery is unfounded. The Court has taken, and continues to take, all procedural efforts possible to individualize the production of the PSC's already-specific request. The *in camera* production of the personnel files at issue is another safeguard of specificity. *See In re Vitamins*, 2001 WL 1049433, at *9. Bayer presents no persuasive argument to the contrary, such as a claim that it would be burdensome to determine which documents in the personnel files comply with the PSC's request. *See Richmark*, 959 F.2d 1468 at 1475. For

these reasons, the Court finds that this factor also weighs in favor of production.

3. Whether the Information Originated in the United States

*16 All of the documents at issue originated outside of the United States. The documents were produced by a German entity, Bayer. The compensation information and performance evaluations of German employees are contained within the documents. And, most importantly, the documents were created in the ordinary course of business in a country that grants extensive protection to the personal data of its employees. Thus, this factor weighs against production. *See In re Baycol Prod. Litig.*, No. MDL1431, 2003 WL 22023449, at *6 (D. Minn. Mar. 21, 2003).

However, the Court concludes that this factor carries limited weight. Defendant Bayer voluntarily entered into a commercial partnership with an American corporation, Janssen. Bayer significantly benefited from availing itself of United States markets. Xarelto is sold and used extensively in the United States, so the personnel files of the German Xarelto team have developed a somewhat international flavor. Bayer should not be caught unawares on this point—Bayer first contested the production of German personnel files in the *Baycol* litigation in 2003. *See id.* In sum, while the flow of personal data to the United States is highly contested, the transfer of blockbuster profits to Germany continues unabated. The balancing of this factor deserves minimal weight.

4. The Availability of Alternative Means of Securing the Information

The PSC's request is inappropriate "if the information sought can easily be obtained elsewhere." *Pershing*, 2013 WL 941617, at *8 (quoting *Richmark*, 959 F.2d at 1475). The Court adopts the Ninth Circuit's formulation of this factor, and finds that the alternative means "must be substantially equivalent" to the requested discovery. *Id.* This articulation conforms to in-circuit precedent. *See Seoul*, 590 F. Supp. 2d at 835 (finding a viable alternative means of securing information where defendants sought one deponent, and another accessible deponent could provide the same information).

The PSC seeks evidence of employee bias as well as information suggesting that Xarelto was rushed to the market. R. 2951-1 at 3–4. The PSC also believes that the personnel files will lead to more efficient document review and depositions. R. 2951-1 at 4. Only the rush to the market evidence is cognizable under this factor. The PSC possesses no other viable method of uncovering evidence of rush to the market liability that may be contained in the personnel files. The quantity of documents already held by the PSC is irrelevant. “[T]he focus is whether the documents, if relevant, can be obtained from another source.” *Brightedge*, 2014 WL 3965062, at *5; see also *Pershing*, 2013 WL 941617, at *8. Bayer holds the personnel files at issue, and they may contain highly probative materials. Accordingly, to the extent that the PSC seeks evidence of rush to the market liability in materials such as performance evaluations and bonus compensation documents, this factor weighs in favor of an *in camera* review to better weigh the interests at issue.

In contrast, the bias and employee evaluation evidence sought by the PSC should be obtainable through depositions. See *In re Baycol Prod. Litig.*, No. MDL1431, 2003 WL 22023449, at *6 (D. Minn. Mar. 21, 2003) (“Nor can Plaintiffs show that they cannot otherwise obtain the information they need, as they may ask the Bayer A.G. employees for the information they seek in depositions.”). However, the Court notes that deponents have refused to provide salary information in at least one deposition. See R. 3146-1 at 29. The PSC has not presented sufficient information for the Court to conclude that the salary information is unobtainable by deposition, but the Court finds troubling the possibility of further evasive responses by deponents and weighs this possibility accordingly. As to the efficiency of document review and deposition preparation, the PSC fails to show that the 1.1 million documents already produced by Bayer in this litigation cannot satisfy their interest in devising efficient document review and deposition strategies.

*17 5. The Balancing of National Interests

As befits a comity analysis, the balancing of national interests carries the most weight. See *Richmark*, 959 F.2d at 1476. The interests of the foreign state may be signified by “expressions of interest by the foreign state,” “the significance of disclosure in the regulation ... of the

activity in question,” and “indications of the foreign state’s concern for confidentiality prior to the controversy.” *Richmark*, 959 F.2d at 1476 (citing *Restatement (Third) of Foreign Relations Law* § 442 cmt. c (Am. Law Inst. 1987)). American courts must also be cognizant that “many foreign countries, particularly civil law countries, do not subscribe to our open-ended views regarding pretrial discovery, and in some cases may even be offended by our pretrial procedures.” *In re Anshuetz & Co., GmbH*, 838 F.2d 1362, 1364 (5th Cir. 1988).

As discussed *supra* in the context of the applicability of the German Data Protection Act to the present discovery request, the Court finds that Germany has a weighty national interest in protecting the personal data of German citizens in their capacity as employees. The German Constitution contains a general “right to informational self-determination.” *In re: Census Act*, 30 BVerfGE 1, 42–43 (Dec. 15, 1983). Germany’s expressions of interest in employee privacy stretch back over fifteen years. In 2001, the Federal Republic of Germany addressed the matter presently before the Court by entering the *In re Vitamins* litigation. The foreign government submitted an *amicus curiae* brief urging the *Vitamins* court to defer to Germany’s privacy laws and prevent the disclosure of “employee discharge, discipline, suspension, termination, and retirement records.” See *In re Vitamins*, 2001 WL 1049433, at *6. More recently, in 2009 the German parliament amended the German Data Protection Act to provide greater protection to personal data collected for employment-related purposes. See Franz-Josef Düwell, *Das Gesetz zur Änderung datenschutzrechtlicher Vorschriften*, Neues Aus Der Gesetzgebung, Aug. 14, 2009, http://www.hss.de/fileadmin/media/downloads/Berichte/09-9_FA_Gesetzgebung.pdf.

Still, these interests are limited. The presence of a clearly compelling state interest such as national security or state secrecy weighs most heavily under this factor. See *Seoul*, 490 F. Supp. 2d at 836–37 (finding significant foreign national interests where the discovery request implicated a citizen who was employed by an agency of a foreign government); see also *Richmark*, 959 F.2d at 1477; *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat (Admin. Of State Ins.)*, 902 F.2d 1275, 1280 (7th Cir. 1990). While Germany may have an unusually strong interest in protecting the personal data of its citizens, the quantity and character of the personal data

at issue partially mitigates these concerns. The personnel files of a small number of German citizens are at issue. The Court imposed meaningful protective measures to ensure the confidential status of produced data. Many irrelevant categories of personal data such as addresses, health information, and biometric data may be redacted prior to transfer. As a matter of judicial comity, Germany may recognize the United States judiciary's interest in personally reviewing at-issue personal data before ruling whether the balance of the equities weighs for or against production. See *Société Nationale*, 482 U.S. at 544 n.28 (reasoning that “foreign tribunals will recognize that the final decision on the evidence to be used in litigation conducted in American courts must be made by those courts”). And, if eventually produced, evidentiary hurdles such as Rules 401 and 403 of the Federal Rules of Evidence will prevent the admissibility of irrelevant or unduly prejudicial information at trial. Under these circumstances, Germany's interest in nonproduction is inherently curtailed.

*18 The criminal and civil penalties contained in the German Data Protection Act are also relevant to this analysis. In order for the prospect of criminal or civil penalties to weigh in favor of non-disclosure, the possibility of enforcement by the foreign nation must be more than “slight or speculative.” *BrightEdge*, 2014 WL 3965062, at *5 (quoting *NML Capital, Ltd. v. Republic of Arg.*, No. 03 Civ. 8845 (TPG), 2013 WL 491522, at *11). 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. See *Gucci Am., Inc. v. Curveal Fashion*, 2010 WL 808639, at *7 (S.D.N.Y. Mar. 8, 2010) (citing *Minpeco S.A. v. Conticommodity Servs. Inc.*, 116 F.R.D. 517, 526–27 (S.D.N.Y. 1987)). 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, as United States courts have compelled the production of German personal data over the objection of counsel in the past. See *BrightEdge*, 2014 WL 3965062, at *5–6; *Pershing*, 2013 WL 941617, at *10; *In re Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.*, MDL No. 2385, 2014 U.S. Dist. LEXIS 10718 (S.D. Ill. Jan. 29, 2014) (ordering the production of name-redacted custodial files); cf *Sant*, *supra*, at 221 (“Foreign

governments...have usually not punished companies that obey a U.S. court order and produce documents in violation of the law”). Thus, the interests of Germany appear to be strong, but short of overwhelming.

Turning to domestic interests, the United States has a substantial interest in “vindicating the rights of American plaintiffs.” *Pershing*, 2013 WL 941617, at *8 (citing *Richmark*, 949 F.2d at 1477). As this is a nationwide MDL, the rights of thousands of American citizens hinge on the timely production of materials that fall within the scope of the Federal Rules of Civil Procedure. The rights of the states and state court Xarelto plaintiffs are implicated as well. It is no secret that federal MDL proceedings may influence the resolution of cases outside of the federal courts. Short of the United States entering this litigation or matters of national security being at issue, few changes to the facts could result in greater United States interests in document production.

Some of the PSC's asserted reasons for production raise greater United States interests than others. Materials that are “vital to the case-in-chief” produce more substantial national interests than ancillary materials. See *Reinsurance*, 902 F.2d at 1280. The PSC seeks documents such as performance evaluations and self-evaluations for the purpose of obtaining evidence that Xarelto was rushed to the market. The PSC also moves to produce the personnel files so that it may discover whether an aggressive bonus compensation scheme created incentives for Xarelto to be rushed to the market. Such evidence would certainly be relevant to the PSC's case-in-chief.

However, the PSC also seeks the personnel files for less compelling reasons such as obtaining evidence of employee bias. This rationale for production raises weaker national interests. For example, evidence that a high-level employee of an international pharmaceutical company is well-compensated supports a finding that the employee may be biased, but denying the production of such evidence would not lead to a grave domestic injustice. And to the extent that the PSC seeks the materials in order to more efficiently prepare for deposition and conduct document review, the United States' interest is at its nadir. The federal courts value the efficient and inexpensive resolution of disputes, see *Fed. R. Civ. P. 1*, but these interests pale in comparison to Germany's asserted interests in the protection of personal data.

After reviewing the interests of both Germany and the United States, the Court finds that Germany's interests outweigh the interests of the United States regarding the following categories: materials which may contain evidence of bias; (2) materials which may aid document review; and (3) materials which will better prepare the PSC for deposition. German law favors the privacy of German employees, and the German government proved its commitment to these rights by entering United States litigation numerous times. *See In re Vitamins*, 2001 WL 1049433, at *7; *Volkswagen, A.G. v. Valez*, 909 S.W.2d. 900, 903 (Tex. 1995). Pursuant to the Fifth Circuit's guidance in *Anschuetz*, 838 F.2d at 1364, the Court also considers the fact that Germany does not provide for pre-trial discovery, *see* Zivilprozeßordnung [ZPO] [German Rules of Civil Procedure], 1877, Reichsgesetzblatt [RGBl.], at 97, as amended, § 355 (Ger.), and that Germany may be offended by the breadth of the United States' asserted discovery interests.

*19 However, Germany's interests cannot override the United States' interest in obtaining the discovery of evidence relevant to the PSC's case-in-chief when the claims of thousands of United States citizens hang in the balance. Simply put, Drs. Misselwitz and Kubitz's personnel files may contain some evidence relevant to the argument that Bayer management pressured or aggressively incentivized its employees to unsafely accelerate the Xarelto research and development timeline. The production of a relative handful of sensitive documents may be critical to a just outcome in this matter.

Germany's interests are also mitigated to the extent that this Court is merely conducting an *in camera* review of the personal data, and has already issued protective orders which take into account the strong foreign interests at issue. The Court may further limit intrusions on employee privacy by ordering the redaction of irrelevant personal data prior to transfer. With these safeguards in place, the United States may vindicate its interests without unduly disturbing German rights.

iii. Weighing the Factors

For the aforementioned reasons, the balance of the factors leans towards the production of personnel file materials containing evidence relevant to the argument that Xarelto

was rushed to the market.¹⁰ Such evidence may be found in employee performance evaluations and files discussing short term incentive programs or one time bonuses. These documents may be decisive to the PSC's case, and the PSC lacks a viable alternative mechanism to uncover the records at issue. *In camera* review by the Court is proper pursuant to *Coughlin v. Lee*, 946 F.2d 1152, 1157–60 (5th Cir. 1991), and will ensure that only appropriate materials are produced.

10 The Court notes that at least one deponent has evaded answering questions regarding salary information. *See* R. 3146-1 at 29. If this behavior persists, it may indicate that, contrary to *Baycol*, there is no alternative means for the PSC to obtain this evidence of bias. *See In re Baycol Prod. Litig.*, No. MDL 1431, 2003 WL 22023449, at *6 (D. Minn. Mar. 21, 2003) (“Nor can Plaintiffs show that they cannot otherwise obtain the information they need, as they may ask the Bayer A.G. employees for the information they seek in depositions.”). Presently the Court will not require the production of salary information in the personnel files. But if deponents continue to refuse to answer these questions without explanation as to cause, the Court may entertain a request to revisit the comity analysis.

D. Timeliness of the Request

The PSC has not waived its right to request portions of Dr. Kubitz's personnel files under [Rule 26\(b\)](#). The PSC may have declined to ask questions concerning the personnel files because they have encountered non-answers or incomplete answers to these questions in other depositions. *See* R. 3146-1 at 24–29. More importantly, declining to investigate a matter at deposition is not a waiver of the right to discoverable information under the plain language of [Rule 26\(b\)](#), and the Defendants point to no positive law that suggests otherwise. The PSC's request is therefore timely.

IV. CONCLUSION

For the aforementioned reasons, **IT IS ORDERED** that the PSC's Motion to Compel is **GRANTED IN PART AND DENIED IN PART**. The motion is **GRANTED** insofar as it requests *in camera* review of the following personnel files. The Court **DEFERS JUDGMENT** on the PSC's Motion to Compel insofar as it requests delivery of the personnel files to the PSC.

IT IS FURTHER ORDERED that Bayer shall produce the following documents from Dr. Kubitza's personnel file for *in camera* review on or before Wednesday, July 27, 2016: (1) all Performance Management Process forms for calendar years 2006–2016; (2) the April 1, 2015, information letter regarding short term incentives; (3) the April 1, 2016, information letter regarding short term incentives; (4) the April 1, 2016, merit increase information letter; (5) the November 29, 2005, application for one time payment, (6); the December 9, 2005, information letter regarding one time payment; (7) the February 21, 2008, information letter regarding one time payment; and the November 27, 2014, information letter regarding one time payment.

***20 IT IS FURTHER ORDERED** that Bayer shall produce the following documents from Dr. Misselwitz's personnel file for *in camera* review on or before Wednesday, July 27, 2016: (1) all Performance Management Process forms for calendar years 2006–2016; (2) the November 10, 2005, agreement on additional incentive opportunity¹¹; (3) all letters, applications, emails and screenshots identified in the privacy log regarding one time payments to Dr. Misselwitz; (4) the June 25, 2003, agreement regarding retention program; (5) the August 12, 2005, email regarding promotion; (6) the August 17, 2005, merit increase approval; (7) the December 22, 2005, email regarding merit increase; (8) the June-September 2007 emails and supporting documentation regarding salary proposal; (9) the September 3, 2007, approval of salary proposal; (10) the September 19, 2007, merit increase information letters; (11) the May 30, 2008, agreements on salary increase and additional incentives; (12) the April 2010 information

letter regarding short term incentive (yearly bonus); (13) the May 2010 merit increase information letter; (14) the September 2011 merit increase information letter; (15) the June 2013 merit increase information letter; and (16) the July 2011, July 2012, and July 2013 notional salary increase notifications.

¹¹ The privacy log indicates that Dr. Misselwitz's employment contract was modified twice within months of this agreement. The Court may order the production of the 2005 contract and its amendments following review of the substance of the 2005 agreement on additional incentive opportunity.

IT IS FURTHER ORDERED that prior to *in camera* production that Bayer shall redact all addresses, social security numbers, health information, biometric data, monthly or annual salary calculations, and pension information from the above-referenced personnel files.

IT IS FURTHER ORDERED that Bayer shall request that Dr. Kubitza and Dr. Misselwitz consent to the transfer and production of their personnel files. The request shall not through duress or other inappropriate means interfere with Dr. Kubitza and Dr. Misselwitz's ability to make a “free decision” as to their employee privacy rights. The request shall in all respects comply with the requirements of the German Data Protection Act. *See* BDSG, § 4(a).

New Orleans, Louisiana, this 20th day of July, 2016.

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2016 WL 3406125

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United States District Court,
S.D. New York.George Catalano, on behalf of himself
and all others similarly situated, Plaintiff,

v.

BMW of North America, LLC, a New Jersey
limited liability company; and [Bayerische
Motoren Werke Aktiengesellschaft](#), a
corporation organized under the laws of the
Federal Republic of Germany, Defendants.

15-cv-4889 (KBF)

|
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Princeton, NJ, for Defendants.**Opinion**OPINION & ORDER***1** [KATHERINE B. FORREST](#), District Judge

Plaintiff George Catalano (“Catalano”) commenced this action in June 2015, on behalf of himself and all others similarly situated, alleging that defendants BMW of North America, LLC (“BMW NA”), Bayerische Motoren Werke Aktiengesellschaft (“BMW AG”), and BMW Manufacturing Company, LLC (“BMW MC”) fraudulently concealed and failed to address alleged safety defects present in certain BMW motor vehicle models. The allegedly defective vehicle models include all BMW-designed X5 series vehicles from 2000 to 2008, X3 series vehicles from 2004 to 2010, and 5 series vehicles from 2004 to 2010 (the “Class Vehicles”). Catalano alleges

that the Class Vehicles are defective because electronic components are located in trunk and cargo areas that make them prone to damage and failure due to water exposure, a problem compounded by the fact that sunroof drainage tubes are prone to clogging and rupturing, which causes leakage into trunk areas.

On March 1, 2016, the Court granted in part and denied in part defendants' motion to dismiss Catalano's First Amended Complaint (“FAC”). [Catalano v. BMW of N. Am., LLC \(“Catalano I”\)](#), No. 15-cv-4889 (KBF), 2016 WL 844832 (S.D.N.Y. Mar. 1, 2016). The Court concluded that Catalano plausibly pleaded a claim under [N.Y. GBL § 349 \(“GBL § 349”\)](#) against defendants BMW NA and BMW AG (referred to herein as “Defendants” or “BMW”), but dismissed all other claims against these defendants, and all claims against BMW MC. The Court also granted Catalano leave to replead solely his fraudulent concealment claim against BMW NA and BMW AG. Catalano re-pled this claim in a Second Amended Complaint (“SAC”), which he filed on March 31, 2016. (ECF No. 67.)

Currently pending before the Court are two motions that raise overlapping issues. The first is Catalano's motion to compel BMW AG, a foreign party, to respond to his discovery requests (ECF No. 69), and the second is Defendants' motion to dismiss the SAC (ECF No. 74). Although filed first, Catalano's motion to compel cannot be resolved until the Court first addresses Defendants' motion to dismiss, which seeks dismissal of the SAC pursuant to Rule 12(b)(6) and, at least initially, also sought dismissal of BMW AG for lack of personal jurisdiction pursuant to Rule 12(b)(2).¹

¹ Although Defendants' personal jurisdiction argument was originally a cornerstone of their opposition to the motion to compel and their affirmative motion to dismiss, BMW AG has withdrawn its personal jurisdiction argument and thus consented to the Court's jurisdiction. (Defs.' Reply Br. at 1 n.1, ECF No. 87.) Had BMW AG not conceded the point, the Court would, in any event, have concluded that BMW AG waived any attack of personal jurisdiction by failing to raise the argument in its response to the FAC. *E.g.*, [Gilmore v. Shearson/Am. Exp. Inc.](#), 811 F.2d 108, 112 (2d Cir. 1987); [Bryant Park Capital, Inc. v. Jelco Ventures](#), No. 05 Civ. 8702(GEL), 2007 WL 2119486, at *1 (S.D.N.Y. July 23, 2007).

For the reasons set forth below, Defendants' motion to dismiss the SAC is DENIED. Defendants have presented no adequate basis for the Court to reconsider its determination that Catalano's [GBL § 349](#) claim passes muster, and Catalano has added sufficient allegations to meet the particularity requirements of Rule 9(b) with respect to his fraudulent concealment claim. As to Catalano's motion to compel BMW AG to respond to discovery requests, that motion is GRANTED IN PART. The Court has the authority to impose discovery obligations under the Federal Rules on BMW AG as a party that has submitted itself to the Court's jurisdiction, and international comity considerations do not warrant mandating that Catalano proceed under the Hague Convention. That being said, the Court concludes that Catalano's operative discovery requests are far too broad in light of the Court's analysis of the relevant international comity factors. The parties shall therefore meet and confer to attempt to reach an accommodation on a narrower range of discovery as set forth below.

I. BMW'S MOTION TO DISMISS²

² In [Catalano I](#), this Court already provided a lengthy recitation of the factual allegations and procedural history in relation to Defendants' motion to dismiss the FAC. [Catalano I](#), 2016 WL 844832, at *2-5. The Court does not repeat that discussion here for the sake of judicial economy, and instead only addresses the new allegations in the SAC to the extent they bear on the adequacy of Catalano's revised fraudulent concealment claim.

A. Legal Standard on a Motion to Dismiss

*2 To survive a Rule 12(b)(6) motion to dismiss, “the plaintiff must provide the grounds upon which [its] claim rests through factual allegations sufficient ‘to raise a right to relief above the speculative level.’ ” [ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.](#), 493 F.3d 87, 98 (2d Cir. 2007) (quoting [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555 (2007)). In other words, the complaint must allege “enough facts to state a claim to relief that is plausible on its face.” [Starr v. Sony BMG Music Entm't](#), 592 F.3d 314, 321 (2d Cir. 2010) (quoting [Twombly](#), 550 U.S. at 570); see also [Asheroft v. Iqbal](#), 556 U.S. 662, 678 (2009) (same). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” [Iqbal](#), 556 U.S. at 678.

The Court does not, however, credit “mere conclusory statements” or “threadbare recitals of the elements of a cause of action.” [Id.](#) If the court can infer no more than “the mere possibility of misconduct” from the factual averments—in other words, if the well-pleaded allegations of the complaint have not “nudged claims across the line from conceivable to plausible,” dismissal is appropriate. [Twombly](#), 550 U.S. at 570; [Starr](#), 592 F.3d at 321 (quoting [Iqbal](#), 556 U.S. at 679).

On a motion to dismiss, the Court accepts as true the factual allegations in the pleadings and draws all inferences in plaintiffs' favor. See [Iqbal](#), 556 U.S. at 678 (citing [Twombly](#), 550 U.S. at 555-57). If a fact is susceptible to two or more competing inferences, in evaluating these motions, the Court must, as a matter of law, draw the inference that favors the plaintiff so long as it is reasonable. [N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC](#), 709 F.3d 109, 121 (2d Cir. 2013). “[T]he existence of other, competing inferences does not prevent the plaintiff[s] desired inference from qualifying as reasonable unless at least one of those competing inferences rises to the level of an obvious alternative explanation.” [Id.](#) (internal quotation marks omitted).

Where necessary, the Court may supplement the allegations in the Complaint with facts from documents either referenced in the Complaint or relied upon in framing the Complaint. See [DiFolco v. MSNBC Cable L.L.C.](#), 622 F.3d 104, 111 (2d Cir. 2010) (“In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.”); [Chambers v. Time Warner, Inc.](#), 282 F.3d 147, 153 (2d Cir. 2002) (“[W]here plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint[,] the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.”) (quoting [Cortec Indus., Inc. v. Sum Holding L.P.](#), 949 F.2d 42, 48 (2d Cir. 1991)).

B. Discussion

BMW's motion to dismiss seeks dismissal of each of the two claims alleged in the SAC pursuant to Rule 12(b)(6): (1) Catalano's statutory claim under [GBL § 349](#) and (2) his

common law claim for fraudulent concealment. The Court addresses each in turn.

1. [GBL § 349](#)

As stated above, in [Catalano I](#), the Court concluded that Catalano alleged a plausible claim under [GBL § 349](#), and denied Defendants Rule 12(b)(6) motion to dismiss the FAC to that extent. [Catalano I](#), 2016 WL 844832, at *15. In addition to rehashing certain of the arguments they previously advanced, Defendants now also contend that Catalano's [GBL § 349](#) claim should be dismissed against BMW AG because Catalano does not allege that he had any direct interaction with that entity. (Defs.' Opening Br. at 7-8, ECF No. 75; Defs.' Reply Br. at 3-4.) Defendants effectively ask the Court to revisit its prior ruling in the guise of a motion to dismiss, rather than through the proper channel of a motion for reconsideration under Rule 6.3 of the Local Civil Rules of the Southern District of New York. Defendants thus attempt to circumvent the appropriate "strict" standards that govern such motions. See [Shrader v. CSX Transp., Inc.](#), 70 F.3d 255, 257 (2d Cir. 1995); [In re CRM Holdings, Ltd. Sec. Litig.](#), No. 10 CIV 00975 (RPP), 2013 WL 787970, at *3 (S.D.N.Y. Mar. 4, 2013). The reconsideration standard requires Defendants to set forth concisely the matters or controlling decisions which counsel believes the Court has overlooked and point to matters that might reasonably be expected to alter the conclusion reached by the Court. [Shrader](#), 70 F.3d at 257.

*3 Even if the Court construes Defendants' arguments relating to the [GBL § 349](#) claim as a motion for reconsideration, Defendants here fail to meet the requisite standard. Instead, Defendants improperly "treat the court's initial decision as the opening of a dialogue in which [they] may then use such a motion to advance new theories or adduce new evidence in response to the court's rulings." [CRM Holdings](#), 2013 WL 787970, at *3. Although Defendants are correct that they retain the capacity to seek judgment as a matter of law with respect to Catalano's [GBL § 349](#) claim at a later stage of this case, the Court's decision in [Catalano I](#) foreclosed additional pleading stage motions with respect to this claim. Because Defendants have not presented any compelling reason why the Court should reconsider its prior ruling allowing the [GBL § 349](#) claim to proceed, Defendants' motion is denied with respect to this claim.

2. [Fraudulent Concealment](#)

"To establish a claim for fraudulent concealment under New York law, a plaintiff must allege that: '(1) the defendant made a misrepresentation or a material omission of fact which was false and which the defendant knew to be false; (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it; (3) the plaintiff justifiably relied on the misrepresentation or material omission; ... (4) injury [and (5)] the defendant had a duty to disclose the material information.'" [Catalano I](#), 2016 WL 844832, at *13 (quoting [Bannister v. Agard](#), 125 A.D.3d 797, 798 (2d Dep't 2015)). " 'In the case of fraudulent concealment or omission, where the plaintiff is unable to specify the time and place because no act occurred, the complaint must still allege: (1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff; and (4) what the defendant obtained through fraud.' " [Id.](#) (quoting [Sorooof Trading Dev. Co. v. GE Fuel Cell Sys., LLC](#), 842 F. Supp. 2d 502, 513 (S.D.N.Y. 2012)). "A plaintiff must also 'allege facts that give rise to a strong inference of fraudulent intent, which may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.' " [Id.](#) (quoting [Eternity Glob. Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.](#), 375 F.3d 168, 187 (2d Cir. 2004)).

The Court dismissed Catalano's fraudulent concealment claim in [Catalano I](#) on the ground that the FAC failed to adequately plead a strong inference of fraudulent intent as required by [Fed. R. Civ. P. 9\(b\)](#). [Id.](#) at *12-14. Specifically, the Court determined that, although the FAC adequately pleaded Defendants' knowledge of the alleged defects in the Class Vehicles, it did not adequately allege facts showing either that the Defendants had a motive and opportunity to commit fraud or facts constituting strong circumstantial evidence of conscious misbehavior or recklessness. [Id.](#) at *13-14; see [Eternity Glob. Master Fund](#), 375 F.3d at 187. The Court further explained that it would permit Catalano to re-plead this claim because the Court considered it to be a relatively close call and BMW had not squarely raised the [Rule 9\(b\)](#) argument in its motion. [Catalano I](#), 2016 WL 844832, at *14.

As revised in the SAC, Catalano's allegations supporting his fraudulent concealment claim are as follows. The SAC alleges that, as early as 2004, Defendants knew—based on the issuance of service bulletins to dealerships, customer complaints, warranty claims, and communications with BMW authorized service technicians—that the Class Vehicles that BMW AG designed and manufactured and BMW NA distributed, warranted, marketed and sold, would fail under ordinary use and conditions during their anticipated useful life. (SAC ¶ 86.) The SAC alleges that BMW had exclusive access and control over the information related to the safety implications of the material defects relating to the Class Vehicles' electronic component issues,³ but purposely concealed that information from third parties such as the National Highway Traffic Safety Administration (“NHTSA”) and did not disclose testing or its rationale behind the Service Information Bulletins (“SIBs”) developed to address the defects. (SAC ¶¶ 87-89.) The SAC alleges that, despite being aware of the alleged defects, Defendants failed to provide owners with adequate instructions to prevent water leakage and engaged in a routine practice of blaming vehicle owners and lessees for damage that Defendants knew was caused by the vehicles' design so that Defendants would not have to bear the costs of repairs. (SAC ¶¶ 90-94.) Although certain of Catalano's allegations are arguably suggestive of affirmative fraudulent misrepresentations by Defendants, Catalano's claim is for fraudulent concealment based on omissions.

³ The allegations regarding the Class Vehicles' defects and Defendants' knowledge of those defects are set forth in detail in [Catalano I](#), [Catalano I](#), 2016 WL 844832, at *2-3.

*4 The SAC further alleges that Defendants were motivated to conceal information relating to the defects from Class Vehicle owners and lessees because disclosing the potential safety risks to the vehicles would have rendered Defendants unable to sell new Class Vehicles in the primary market or as part of their “Certified Pre-Owned” program on the secondary market without having to incur costs for making the necessary repairs. (SAC ¶¶ 95-96.) The SAC alleges that Defendants acted recklessly by blaming customers for failing to address issues with their vehicles' electronic components because Defendants knew that the Class Vehicles' defects, if left unaddressed pursuant to the instructions contained

in the SIBs that Defendants sent to authorized service technicians, were material and posed potential safety risks. (SAC ¶ 97.) The SAC alleges that customers reasonably relied on Defendants' misrepresentations and omissions because they were entitled to expect that Class Vehicles would not be sold or leased with known safety defects, and that owners and lessees of Class Vehicles suffered damages by having to pay for the relocation of electronic components in their vehicles to avoid water damage. (SAC ¶¶ 102-03.)

Defendants argue that Catalano's revised allegations fail to cure the deficiencies that the Court identified in [Catalano I](#). Specifically, they contend that Catalano continues to allege only a generalized motive to increase profits and that the SAC still offers no particularized facts giving rise to an inference of conscious misbehavior or recklessness. Defendants also argue that the information purportedly withheld from plaintiffs could not have been fraudulently concealed because it was disclosed to third parties. As explained below, although perhaps still not the strongest allegations of fraudulent concealment, the Court concludes that the SAC does enough to meet the requirements of [Rule 9\(b\)](#) and plead a plausible claim.

First, as the Court previously determined in relation to the FAC in [Catalano I](#), the SAC contains sufficient allegations to plausibly plead Defendants' awareness of the alleged defects through numerous complaints made to the NHTSA and on consumer forums, and based on repair invoices, warranty claims and through SIBs that Defendants issued to dealers describing the defects to electronic components. (SAC ¶¶ 3-9, 50-51, 57, 59, 62.)

Second, the SAC adequately alleges Defendants' opportunity to commit fraud based on their exclusive possession of information relating to the electronic component defects and that Defendants were motivated to commit fraud by a desire to avoid repair costs to new and pre-owned Class Vehicles that defendants sought to sell to consumers. (SAC ¶¶ 93-96.) As revised, the SAC's allegations of motive no longer consist of a mere generalized allegation that BMW had an interest in increasing profits. The allegations are sufficiently specific to meet Catalano's burden at this stage.

Third, although still a close call, the revised allegations also do enough to plead conscious misbehavior or recklessness to the extent necessary to give rise to a strong

inference of fraudulent intent. Eternity Glob. Master Fund, 375 F.3d at 186; see also In re Carter-Wallace, Inc., Sec. Litig., 220 F.3d 36, 39 (2d Cir. 2000). Catalano no longer attempts to create such an inference solely based on Defendants' knowledge of the Class Vehicles' defects; rather, the SAC has added allegations that Defendants were in exclusive possession and control of information relating to the alleged defects—including testing, internal memoranda and the rationale and decisions relating to its development and release of the SIBs, as well as information relating to the safety implications of the alleged defects—that it purposefully withheld from all outside third parties. (SAC ¶ 87.) Where, as here, the defects are alleged to create safety issues such as the loss of power while a motor vehicle is in active operation (SAC ¶ 1), these allegations are sufficient to give rise to a duty to disclose based on Defendants' superior exclusive knowledge and the inherent unfairness of the transaction with Class Vehicle owners and lessees that would otherwise result. See Garcia v. Chrysler Grp. LLC, 127 F. Supp. 3d 212, 235 (S.D.N.Y. 2015) (citing Grand Union Supermarkets of the Virgin Islands, Inc. v. Lockhart Realty Inc., 493 Fed.Appx. 248, 252 (3d Cir. 2012)); Woods v. Maytag Co., 807 F. Supp. 2d 112, 124 (E.D.N.Y. 2011). The Court, of course, makes no determination at this stage whether Catalano will be able to muster evidence to support these allegations; for now, the Court must accept these allegations as true and draw all reasonable inferences in Catalano's favor, which leads the Court to conclude that Catalano has pled facts giving rise to a strong inference of conscious misbehavior or recklessness.

*5 Finally, Defendants also argue that the SAC fails to distinguish which defendant—either BMW AG or BMW NA—made which fraudulent misrepresentations and omission, in contravention of Rule 9(b)'s specificity requirements. Warren v. John Wiley & Sons, Inc., 952 F. Supp. 2d 610, 622 (S.D.N.Y. 2013) (stating that Rule 9(b) requires that the plaintiff specify which defendant in particular made the complained of acts or omissions). This argument is meritless because the SAC does adequately differentiate such that when the allegations are construed in the light most favorable to Catalano and all reasonable inferences are drawn in his favor, proper attribution of each category of alleged omissions becomes clear. The SAC alleges that BMW AG is the entity that designed and tested the Class Vehicles and therefore is responsible for withholding relevant information from consumers

relating to what those processes revealed with respect to the alleged defects. (SAC ¶¶ 28, 87-89.) The SAC alleges that BMW NA is the warrantor and distributor of the Class Vehicles, and thus creates a reasonable inference that BMW NA is responsible for withholding information about customer complaints and warranty claims relating to the alleged defects, and for shifting blame to Class Vehicle owners and lessees when they complained about the alleged defects. (SAC ¶¶ 28, 87, 92-94.) In short, the allegations are sufficient to “specify [Defendants'] respective roles in the manipulation,” Ritani, LLC v. Aghjayan, 970 F. Supp. 2d 232, 250 (S.D.N.Y. 2013), and make clear which alleged omissions are attributable to each defendant; that is all that Catalano need do at this stage.

Because Catalano has added sufficient allegations to state a fraudulent concealment claim that meets the heightened pleading standards of Rule 9(b), Defendants' motion to dismiss is DENIED.

II. CATALANO'S MOTION TO COMPEL

Also pending before the Court is Catalano's April 19, 2016 discovery motion seeking to compel defendant BMW AG to respond to the document requests that Catalano initially served on November 18, 2015. (ECF No. 69.)⁴ It is undisputed that BMW AG is a foreign defendant based in Munich, Germany, that designed and manufactured the Class Vehicles at issue in this case, and that the documents and information that Catalano seeks from BMW AG are located in Germany. BMW AG opposed the motion in a letter dated April 22, 2016, in which it argued that Catalano's discovery request—consisting of fifty-five document requests (plus sub-parts) and twenty-four interrogatories (see Keller Decl., Ex. C, ECF No. 70-3; Dalton Decl., Ex. D, ECF No. 82)—is unduly broad in light of the fact that it is a foreign defendant and the documents and information that Catalano seeks are located abroad. (ECF No. 71.) BMW AG further argued that Catalano should either be required to proceed by conducting discovery in accordance with the Hague Convention or that, at the very least, the scope of discovery should be narrowed based on principles of international comity.⁵ In light of BMW AG's request to allow the parties to engage in further briefing given the complex issues raised by the motion, the Court granted the parties leave to make additional submissions on the issue. (ECF No. 73.) Catalano submitted his supplemental brief

on April 29, 2016 (ECF No. 76); BMW AG submitted its supplemental response on May 9, 2016 (ECF No. 81).

4 Discovery was subsequently temporarily stayed during the pendency of Defendants' motion to dismiss the FAC. (See ECF No. 63.) Fact discovery is now set to close on February 1, 2017. (ECF No. 66.) The dispute underlying Catalano's motion to compel was previously raised to the Court at the status conference held on March 3, 2016. (See March 3, 2016 Tr. at 12:21-17:5, ECF No. 83.) At that conference, the Court suggested that the parties meet and confer to reach a narrower set of discovery requests that BMW AG would agree to produce willingly to allow Catalano to obtain some discovery without the need for the Court's intervention. Those efforts failed, resulting in the instant motion.

5 BMW AG's opposition also rested, in large part, on its assertion that the Court lacked personal jurisdiction over it. Because BMW AG withdrew that argument in its reply brief in support of its motion to dismiss the SAC, the Court deems that claim abandoned.

Having considered the parties' arguments, and in light of the Court's rulings on BMW's motion to dismiss the SAC, Catalano's motion to compel is GRANTED IN PART. The Court will allow Catalano to proceed with discovery against BMW AG under the Federal Rules, but will require the parties to meet and confer to attempt to narrow the scope of Catalano's requests to a degree amenable to both parties. That meet and confer will be informed by the Court's views regarding the relevant international comity factors set forth below.

A. Legal Standards

*6 “The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, prescribes certain procedures by which a judicial authority in one contracting state may request evidence located in another contracting state.” Milliken & Co. v. Bank of China, 758 F. Supp. 2d 238, 243 (S.D.N.Y. 2010) (quotation marks omitted). “The Hague Convention is not the exclusive means for obtaining discovery from a foreign entity[, n]or is the Convention necessarily the means of first resort.” First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 21 (2d Cir. 1998) (citing Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 539-42 (1987)); see also Milliken & Co., 758 F. Supp. 2d at 247

(“[T]he mere fact that the Hague Convention provides an alternative method for obtaining the documents is not proof that it is necessarily an effective, or efficient, method for doing so in this case.”). For instance, where, as here, the Court has personal jurisdiction over the foreign party, the Court “ ‘has the power to impose discovery under the Federal Rules of Civil Procedure.’ ” S.E.C. v. Euro Sec. Fund, No. 98 Civ. 7347 (DLC), 1999 WL 182598, at *3 (S.D.N.Y. Apr. 2, 1999) (quoting Societe Nationale, 482 U.S. at 553 n.4 (Blackmun, J., concurring)) (emphasis in original); see also Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 520 (S.D.N.Y. 1987) (stating that a court has the power under Rule 37(b)(2) to issue an order to compel discovery against a foreign party). The question thus becomes whether the Court should, as a matter of discretion, issue an order compelling discovery in light of the international comity issues raised by a request for documents or information located abroad. Minpeco, 116 F.R.D. at 520.

International comity “is neither a matter of absolute obligation nor of mere courtesy and good will, but is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.” Linde v. Arab Bank, PLC, 706 F.3d 92, 111 (2d Cir. 2013) (quotation marks omitted).⁶ “Rather than requiring application of the Hague Convention, international comity only requires that ‘American courts ... take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.’ ” Euro Sec. Fund, 1999 WL 182598 (quoting First Am. Corp., 154 F.3d at 21). The doctrine “comes into play only when there is a true conflict between American law and that of a foreign jurisdiction.” In re Maxwell Comme'n Corp. plc by Homan, 93 F.3d 1036, 1049 (2d Cir. 1996). Where relevant, international comity requires a “particularized analysis of the respective interests of the foreign nation and the requesting nation.” Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548, 552 (S.D.N.Y. 2012). “[I]n supervising pretrial proceedings, [courts] should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.” Societe Nationale, 482 U.S. at 546.

6 At least one commentator has observed that, although courts have at times only paid lip service to the implications raised by application of U.S. law to conduct occurring abroad, a number of courts have in the last couple of years demonstrated a renewed respect for the importance of international comity in a variety of contexts. See Diego Zambrano, [A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery](#), 34 *Berkeley J. Int'l L.* 157 (Spring, 2016) (identifying a new paradigm respect for international comity exhibited in recent decisions from the United States Supreme Court, the Second Circuit, and the New York Court of Appeals).

Courts in this Circuit have identified the following factors as relevant in guiding a comity analysis: (1) the importance of the documents or other information requested to the litigation, (2) the degree of specificity of the request, (3) whether the information originated in the United States, (4) the availability of alternative means of securing the information, (5) the extent to which noncompliance would undermine important interests of the United States, or compliance would undermine important interests of the foreign nation where the information is located, (6) any hardship the responding party would suffer if it complied with the requests and (7) whether the responding party has proceeded in good faith. [Wultz](#), 910 F. Supp. 2d at 552-53; accord [Milliken & Co.](#), 758 F. Supp. 2d at 246; [Minpeco](#), 116 F.R.D. at 522-23.

B. Discussion

*7 At the outset, it is clear that, as BMW AG is a defendant that has submitted itself to the Court's jurisdiction in this action, the Court has the power to order BMW AG to provide discovery to Catalano through the Federal Rules, rather than through the Hague Convention. Nonetheless, in light of BMW AG's assertion that production of material from Germany would create a conflict with German law (an argument that the Court discusses in further detail below), the Court conducts a comity analysis to determine whether it should order discovery under the Federal Rules and, if so, what the proper scope of such discovery should be. Ultimately, the Court's weighing of the relevant factors leads to the conclusion that BMW AG must produce at least some discovery pursuant to the Federal Rules, but that Catalano's current document and interrogatory requests are far too broad. Accordingly, the Court directs the parties to engage in a meet and confer—with the benefit

of the Court's views as to the relevant factors—to attempt to agree on a narrower set of requests that would be amenable to both parties.

1. Importance of the Information Requested

Within the broad range of discovery that Catalano has sought against BMW AG, his requests for documents and information relating to design and testing are highly material to this case, which primarily concerns allegations of a design defect in the Class Vehicles. At least some of the requested material is vital to allow Catalano to prove that the defects in fact existed so that he can establish that Defendants' omissions were fraudulent. See [Milliken & Co.](#), 758 F. Supp. 2d at 246-47 (stating that a court must assess where the requested information falls on the spectrum “between merely relevant at one end and crucial at the other”); [Reino De Espana v. Am. Bureau of Shipping](#), No. 03CIV3573LTSRLE, 2005 WL 1813017, at *7 (S.D.N.Y. Aug. 1, 2005) (“[P]roduction is favored when the evidence sought from the producing party is directly probative to the issues of the case.”). As the Court explains below in relation to the next factor, other requests are decidedly less material at this stage. This factor nonetheless weighs in Catalano's favor.

2. Specificity of the Requests

As discussed above, Catalano seeks to compel BMW AG to respond to fifty-five document requests and twenty-four interrogatories. (See Keller Decl., Ex. C; Dalton Decl., Ex. D.) Although certain of these requests are focused on the core issues relating to the alleged defects, others are far broader and ask for all information relating to the electronic component parts and drainage tubes that Catalano alleges are defective and all documents relating to any alleged defects in those components. Other requests appear to be more appropriately directed to BMW NA, which the parties agree is responsible for distributing and selling the Class Vehicles in the United States, or request information relating to vehicles sold throughout the United States, rather than just in New York, where the putative plaintiff class is located. (See SAC ¶ 76.) Catalano himself acknowledges that these requests merely reflect an opening negotiating position from which Catalano would seek to narrow through a meet and confer. (See Pl.'s Supp. Br. at 3, ECF No. 76.) In short, although Catalano's

requests do not necessarily constitute a fishing expedition, in total they are nonetheless substantially overbroad for Catalano's needs. This factor therefore weighs in BMW AG's favor.

3. Origin of the Information

BMW AG itself has no presence in the United States; all information, documents, and persons who would be involved in compiling responses to Catalano's requests are located in Germany. (Dalton Decl. ¶ 9, ECF No. 72.) Because all of the requested material is located outside of the United States—and compliance would impose obligations on persons outside the United States, this factor favors BMW AG. [Richmark Corp. v. Timber Falling Consultants](#), 959 F.2d 1468, 1475 (9th Cir. 1992); see also [Milliken & Co.](#), 758 F. Supp. 2d at 247 (stating that “the third factor only addresses the physical location of the documents”).

4. Alternative Means

*8 Where the information sought is easily obtainable elsewhere, there is little reason to require a party to violate foreign law; on the other hand, where the information cannot be easily obtained through alternative means, this factor weighs in favor of disclosure. [Milliken & Co.](#), 758 F. Supp. 2d at 247. Catalano's broad discovery request seeks information as to various topics that may or may not be most easily obtainable from BMW AG. As to documents and information relating to the design and testing of Class Vehicles, it appears that BMW AG is the only available source for this material. See [Sharma v. BMW of N. Am. LLC](#), No. 13-cv-02274-MMC (KAW), 2016 WL 1019668, at *4-5 (N.D. Cal. Mar. 15, 2016) (BMW NA representing that documents relating to design, manufacturing and testing are in the possession of BMW AG). Outside of the Hague Convention process, which may be time consuming and expensive, e.g., [S.E.C. v. Gibraltar Glob. Sec., Inc.](#), No. 13 Civ. 2575(GBD)(JCF), 2015 WL 1514746, at *5 (S.D.N.Y. Apr. 1, 2015); [Strauss v. Credit Lyonnais, S.A.](#), 249 F.R.D. 429, 456 (E.D.N.Y. 2008), discovery under the Federal Rules appears to be the only alternative. This factor therefore weighs in Catalano's favor to that extent. As to documents and information relating to the marketing and sale of Class Vehicles, it appears that the sought discovery is more readily obtainable from BMW

NA, which is a domestic defendant and is alleged to be responsible for those activities. Similarly, it appears that, *inter alia*, communications between BMW entities and the NHTSA can be obtained through publicly accessible means. This factor weighs in BMW AG's favor with respect to such requests.

5. Balance of National Interests

This factor requires the Court to consider the competing interests of the United States and Germany, the jurisdiction from which the documents and information would have to be produced to comply with Catalano's discovery request. Courts have found that the United States has “ ‘a substantial interest in fully and fairly adjudicating matters before its courts,’ ” [Milliken & Co.](#), 758 F. Supp. 2d at 248 (quoting [Strauss](#), 249 F.R.D. at 443), and a particularly strong interest in fully adjudicating product liability actions for injuries occurring in the United States, see, e.g., [Valois of Am., Inc. v. Risdon Corp.](#), 183 F.R.D. 344, 347 (D. Conn. 1997); [Doster v. Schenk](#), 141 F.R.D. 50, 52 (M.D.N.C. 1991). The Court therefore concludes that the United States does have a considerable interest in full adjudication of a suit that has potential safety implications for numerous vehicles owned and operated in the United States.

As a counterbalance to this interest, BMW AG contends that Germany has a competing interest in protecting citizens from expansive American discovery that conflicts with the German civil law system and also has an interest in the nondisclosure of sensitive information pursuant to the German Federal Data Protection Act (“FDPA”), which prohibits the unauthorized disclosure or transfer of personal data to countries outside of the European Union. (Defs.' Supp. Opp. Br. at 15-16, ECF No. 81.) Although the Court recognizes Germany's strong interest in enforcing the FDPA (and that this represents the source of the alleged conflict between BMW AG's discovery obligations and foreign law), it is unclear on this motion how the documents and information that Catalano seeks—or, at least, the narrower discovery that Catalano will seek after a meet and confer—could implicate personal data under that statute. Without such a showing, BMW AG has presented only a vague and hypothetical conflict between discovery under the Federal Rules and the FDPA, which is insufficient to warrant

denial of Catalano's discovery request pursuant to the Federal Rules. See [Euro Sec. Fund](#), 1999 WL 182598 at *4; [Pershing Pac. W., LLC v. MarineMax, Inc.](#), No. 10cv1345-L (DHB), 2013 WL 1628938, at *2 (S.D. Cal. Apr. 16, 2013).⁷ The Court therefore concludes that, at least on the present motion, this factor weighs in Catalano's favor.

⁷ Although the Court arguably need not even conduct a comity analysis in the first instance where the foreign defendant has failed to establish the existence of a true conflict between U.S. and foreign law, the Court has done so here because BMW AG has raised the basis for finding a true conflict in relation to at least some of Catalano's requests, and because the Court believes the analysis will help guide the parties' negotiations during their meet and confer. To the extent that no true conflict exists, BMW AG will be in a weaker position to argue that Catalano's discovery should be narrowly constrained.

6. Hardship of Compliance

*9 Besides a generalized assertion that compliance with Catalano's requests could lead it to run afoul of the FDPA and thus be subject to monetary fines, BMW AG has not detailed the likelihood of any particular penalties that it would face if it produced documents and information under the Federal Rules. Speculative assertions of hardship are insufficient to support BMW AG on this prong. See [Milliken & Co.](#), 758 F. Supp. 2d at 249-50; [In re Air Cargo Shipping Servs. Antitrust Litig.](#), No. 06-MD-1775, MDL No. 1775, 2010 WL 2976220, at *2 (E.D.N.Y. July 23, 2010). This factor therefore weighs in Catalano's favor.

7. Good Faith

“Although good faith will not insulate a party from the obligation to respond in discovery, bad faith delays and dilatory tactics will weigh against the objecting party.” [Milliken & Co.](#), 758 F. Supp. 2d at 250 (quotation marks omitted). Here, the Court cannot say that BMW AG has acted in particularly good faith in refusing to engage in a meet and confer until Catalano streamlines his discovery requests and insisting that Catalano instead proceed through the Hague Convention process, nor does the Court believe that BMW AG has exhibited particularly

bad faith given the undue breadth of Catalano's requests and his refusal thus far to trim them down. The parties are on equal footing at this prong—neither has made a genuine effort to resolve their dispute or narrow the issues without the Court's intervention. At this juncture, therefore, this factor weighs in neither party's favor.

8. Conclusion

Upon weighing the relevant factors, the Court concludes that it is appropriate to require BMW AG to provide discovery through the Federal Rules of Civil Procedure and that Catalano need not instead proceed under the Hague Convention process. However, Catalano's fifty-five document requests and twenty-four interrogatories are excessive and overbroad, especially in light of the particular concerns raised by the fact that the documents and information that Catalano seeks are located in Germany. The Court will not grant Catalano discovery as broad as if he were seeking documents and information located in the United States from a domestic party. On the other hand, BMW AG must understand that the Court will not hesitate to impose meaningful discovery obligations on it to the extent necessary and appropriate in this case, and that it will have to clearly explain how and why producing any particular material under the Federal Rules creates a true conflict with German law.

Because Catalano has not identified a narrower set of core requests that he deems particularly significant (although recognizing that some narrowing is appropriate), and the Court has no basis upon which to make that determination on the record before it, the Court hereby directs the parties to meet and confer to attempt to narrow the requests to a scope amenable to both parties and that, to the extent possible, avoids conflict with BMW AG's obligations under the FDPA. Should any outstanding issues remain after the parties meet and confer, either party may make a further letter motion to the Court to resolve them. Either party shall bring such letter motion not later than **June 30, 2016**. The Court informs the parties that, should the Court perceive either party as not bargaining in good faith to reach an equitable resolution, such conduct will be a significant factor in the Court's consideration of any further dispute on this issue.

III. CONCLUSION

***10** For the reasons set forth above, defendants' motion to dismiss the Second Amended Complaint is DENIED. Plaintiff's motion to compel BMW AG to respond to his discovery requests is GRANTED IN PART as set forth in this decision. After engaging in a meet and confer, the parties shall present any further disputes relating to Catalano's requests for discovery against BMW AG not later than **June 30, 2016**.

The Clerk of Court is directed to close the motions at ECF Nos. 69 and 74.

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2016 WL 3406125