

## **U.S. Magistrate Judge Rejects Argument that EU Privacy Law Bars Identification of Document Custodians**

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In a pending class action case, U.S. Magistrate Judge Joseph A. Dickson rejected the argument that disclosure of unredacted information regarding the “names, positions, titles or professional contact information of relevant current or former employees of [Mercedes-Benz]” violates the European Union’s (“EU”) privacy and data protection law (General Data Protection Regulation (“GDPR”)) and U.S. principles of international comity. *In re Mercedes-Benz Emissions Litig.*, Civil Action No. 16-cv-881(KM)(ESK)(Jan. 30, 2020).

Applying an abuse of discretion standard, Judge Dickson affirmed the ruling of Special Master Dennis M. Cavanaugh, U.S.D.J. (ret.), that the Discovery Confidentiality Order entered in this automobile emissions testing class action sufficiently protects the EU citizens’ private data. As Special Master Cavanaugh wrote below:

[T]he Discovery Confidentiality Order provision allowing a producing party to designate and protect as “Highly Confidential” information that the producing party claims to be Foreign Private Data[,] such as employee names, sufficiently balances the EU’s interest in protecting its citizens[’] private data and the U.S. legal system’s interest in preserving and maintaining the integrity of the broad discovery provisions set forth in the Federal Rules of Civil Procedure. [*Id.* at 6].

Therefore, Special Master Cavanaugh found “considerations of international comity do not relieve the Mercedes Defendants of its obligations under U.S. law and that the Discovery Confidentiality Order provision sufficiently protects unredacted personal data of EU citizens.” *Id.* at 9-10.

On appeal, Judge Dickson agreed, concluding that Special Master Cavanaugh properly employed and analyzed the factors set forth in the Restatement (Third) of Foreign Relations Law § 442(1) (c) and adopted by the U.S. Supreme Court in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987):

1. the importance to the litigation of the documents or other information requested;
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; and
5. 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.

The first factor “weighs in favor of disclosure where the evidence is directly relevant to the claims in the litigation” and the requested information is “by its very nature directly relevant to Plaintiffs’ claims.” *In re Mercedes-Benz Emissions Litig.*, Op. at 11. As to the second factor, Judge Dickson found that Special Master Cavanaugh’s ruling did not require production of irrelevant documents, but of business records in their ordinary form, and entails production of unredacted documents commonly produced in U.S. litigation. The third factor, however, weighed against production because the private data at issue is that of EU citizens, and the majority of documents to be produced originated in the EU and not the U.S. As to the fourth factor, Judge Dickson found the Special Master “correctly concluded that there is not an alternative means for Plaintiffs to obtain the relevant current or former employees’ names, positions, titles, or professional contact information.” *Id.* at 14. Lastly, with regard to the fifth and most important factor, Judge Dickson found this factor weighed in favor of compelling production, *i.e.*, given the nature of the claims at issue—that Defendants unlawfully mislead consumers into buying diesel cars by misrepresenting their environmental impact—“[t]he United States has a strong interest in protecting U.S. consumers and therefore allowing discovery into Defendants’ alleged acts.” *Id.* at 16. Judge Dickson further agreed with the Special Master’s conclusion that “on balance, the U.S. had a stronger interest in protecting its consumers than the EU did in protecting its citizens’ private data, particularly with a Discovery Confidentiality Order provision allowing producing parties to designate and protect foreign private data as ‘Highly Confidential’ information.” *Id.* at 17.

In light of the foregoing, parties in litigations involving foreign data should carefully consider entering into a Discovery Confidentiality Order and including provisions regarding the designation, treatment, and protection of foreign private data. The District of New Jersey has a template Discovery Confidentiality Order in Appendix S of its Local Civil Rules. However, this form does not contain specific provisions regarding foreign private data or the GDPR. Thus, parties may need to consider a Discovery Confidentiality Order specially tailored to the particular needs or circumstances of their particular case.