No. _____

IN THE

Supreme Court of the United States

VESUVIUS USA CORPORATION AND CHRISTOPHER YOUNG,
Petitioners,

v.

ROYSTON PHILLIPS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Eighth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987), this Court addressed how courts should apply comity principles to accommodate the broad discovery obligations imposed on parties in litigation in the United States with foreign laws that restrict production of information and documents located in foreign nations. When this Court decided *Aérospatiale*, the primary foreign-law obstacle to U.S. discovery was "blocking statutes," which were laws with one purpose: prohibiting compliance with American discovery obligations. More recently, foreign countries have adopted laws—like the European Union's General Data Privacy Regulation—aimed at protecting their citizens' privacy. The GDPR restricts the ability of companies with operations in the EU to comply with American discovery obligations, and can impose massive penalties for violation. However, the procedures of the Hague Convention remain available to obtain needed discovery in compliance with the GDPR. Such foreign privacy laws, motivated by substantive policy considerations, raise significantly different questions than mere blocking statutes, as this Court recognized in *Aérospatiale*.

The question presented is:

When compliance with discovery obligations in an American court is prohibited by the General Data Privacy Regulation, whether principles of comity require the American court to direct the discovering party to seek the requested information and documents through the Hague Convention, rather than through court discovery procedures.

PARTIES TO THE PROCEEDINGS

Petitioners Vesuvius USA Corporation and Christopher Young were appellants below and defendants in the trial court.

Respondent Royston Phillips was appellee below and plaintiff in the trial court

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Vesuvius USA Corporation is a wholly owned, indirect subsidiary of Vesuvius plc, which is publicly traded.

RELATED PROCEEDINGS

Court of Common Pleas, Cuyahoga County, Ohio

Royston Phillips v. Vesuvius USA Corporation, et al., No. CV-18-904574 (July 29, 2019) (journal entry granting motion to compel discovery)

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

Royston Phillips v. Vesuvius USA Corporation, et al., No. 108888 (June 11, 2020) (journal entry and opinion)

Supreme Court of Ohio

Royston Phillips v. Vesuvius USA Corporation, et al., No. 2020-0910 (Oct. 13, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the Court of Appeals of Ohio, Eighth Appellate District.

OPINIONS BELOW

The July 29, 2019, journal entry by the Court of Common Pleas of Cuyahoga County, Ohio, granting respondent's motion to compel, is unpublished and is reprinted in the Appendix to the Petition ("App.") at App. 17a. The June 11, 2020, journal entry and opinion of the Court of Appeals of Ohio, Eighth Appellate District, is published at 2020 WL 3118892, 2020-Ohio-3285 and is reprinted at App. 2a–16a. The Supreme Court of Ohio's denial of permission to appeal on, October 13, 2020 is reported at 160 Ohio St. 3d 1420, 154 N.E.3d 110 (2020), and is reprinted at App. 1a.

JURISDICTION

The judgment of the Court of Appeals of Ohio, Eighth Appellate District, affirming the order granting the motion to compel, was entered on June 11, 2020. The Supreme Court of Ohio declined to accept the case for review in an order entered on October 13, 2020. Pursuant to this Court's order of March 19, 2020, 589 U.S. 569 (2020), the deadline for this petition has been extended to 150 days after October 13, 2020, which is March 12, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Convention"),

Oct. 7, 1972, 23 U.S.T. 2555, 847 U.N.T.S. 231, provides in relevant part:

> *Article 17.* In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—
>
> a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
>
> b) he complies with the conditions which the competent authority has specified in the permission.
>
> A Contracting State may declare that evidence may be taken under this Article without its prior permission.
>
> *Article 18.* A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.
>
> If the authority grants the application it shall apply any measures of compulsion which are appropriate and

are prescribed by its law for use in internal proceedings.

STATEMENT OF THE CASE

A. The European Union's General Data Privacy Regulation.

In 2018, the European Union adopted the General Data Protection Regulation ("GDPR").[1] The GDPR "is the toughest privacy and security law in the world"[2] and "is at the heart of the EU framework guaranteeing the fundamental right to data protection."[3] This policy is implemented through sweeping safeguards for its citizens' individual

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[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679.

[2] Ben Wolford, *What Is GDPR, the EU's New Data Protection Law*, GDPR.eu, https://gdpr.eu/what-is-gdpr/ (last visited Mar. 8, 2021).

[3] Communication from the Commission to the European Parliament and the Council, Data Protection as a Pillar of Citizens' Empowerment and the EU's Approach to the Digital Transition—Two Years of Application of the General Data Protection Regulation 1, COM(2020) 264 final (June 24, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0264&from=EN; *see* Charter of Fundamental Rights of the European Union, art. 8, 2012 O.J. (C 326) 391, 397, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN.

privacy.[4] The GDPR applies to "organizations anywhere, so long as they target or collect data related to people in the EU."[5]

The GDPR applies to all "personal data," which "means any information relating to an identified or identifiable natural person." GDPR art. 4(1). Personal data includes a wide range of information, such as a name, home address, email address, driver's license or passport number, phone number, and other information specific to the "physical, physiological, genetic, mental, economic, cultural or social identity of that natural person." *Id.* Essentially everything in an employee's personnel file is personal data under the GDPR.

Unless a specific exception applies, the statute bars "processing" of personal data (*id.* art. 6), where processing includes "collection, . . . retrieval, . . . use, . . . [and] dissemination" of such data (*id.* art. 4(2)). None of the exceptions to the ban on processing permits compliance with U.S. court discovery requests or court orders related to such requests.[6] Sanctions for

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[4] For an overview of the GDPR, see W. Gregory Voss, *European Union Data Privacy Law Reform: General Data Protection Regulation, Privacy Shield, and the Right to Delisting*, 72 Bus. Law. 221, 221–30 (2016).

[5] Wolford, *supra* note 2.

[6] *See* GDPR art. 6. The GDPR authorizes processing when "necessary for compliance with a legal obligation to which the controller is subject," but this exception is limited to legal obligations "laid down by . . . [European] Union law; or . . . Member State law." *Id.* art. 6(3). U.S. discovery obligations, therefore, are excluded from the "legal obligation" exception. Article 49's exceptions permitting "a transfer . . . of personal data

violation of the GDPR include compensation to any person who has suffered damage (*id*. art. 82) and administrative fines of up to 20 million euros or four percent of global revenue, whichever is larger (*id*. art. 83).

B. Phillips' employment with Vesuvius.

Respondent Royston Phillips began his employment with the group of petitioner Vesuvius USA Corporation in 2008 when Cookson Group plc (the predecessor of Vesuvius plc) acquired his then-employer Foseco. In 2013, Phillips took a two-year position with Vesuvius in China. Due to a delay in finding his replacement, Vesuvius asked Phillips to remain in his position for another year. Phillips agreed but also requested a plan for his return to the United States, with a stated intention to retire soon thereafter. When Vesuvius discussed Phillips' next position, Phillips stated that he did not want to be placed outside of the United States, nor did he want to travel frequently. So when Vesuvius offered Phillips the position of Global Development Director, Phillips turned it down since it would be located in Europe and would require frequent travel.

Given Phillips' refusal to remain outside the United States or travel frequently, Vesuvius created a one-year position specifically for him in Cleveland in recognition of his long-tenured service with Vesuvius and stated intention to retire shortly after his return to the United States. Phillips assumed this position in March 2017. Phillips openly admitted that, during his time in the position created for him, he "lack[ed]

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to a third country" can apply only *after* such data is first lawfully processed. *Id.* art. 49.

motivation" and that he was willing to negotiate an exit package.

In May 2017, petitioner Christopher Young, a United States-based Vesuvius employee, met with Phillips to inform him that his position would not extend past 2018. Young offered Phillips a severance package consisting of 12 months' severance pay, 18 months of health insurance, and ownership of his company car. Phillips rejected Vesuvius' offer, stating that he would not accept less than three years' severance, and for the first time raised allegations of age discrimination.

In March 2018, Young again met with Phillips to discuss his interest in a severance package since his position would be concluding soon. Notwithstanding Phillips' contention that Vesuvius retaliated against him due to his age discrimination complaints, Vesuvius offered Phillips the same severance package as before he raised his unfounded allegations. Phillips again responded that anything less than three years' severance pay was unacceptable.

On May 7, 2018, Young met with Phillips to inform him that his position with Vesuvius would end on May 31, 2018. Phillips asked for an extension of his termination date to June 30, 2018, to provide him with additional time to consult a lawyer. Vesuvius agreed to this extension request. Several additional offers and counteroffers were exchanged, but Phillips ultimately did not sign a separation agreement.

C. The litigation.

Phillips filed his complaint in the Cuyahoga County Court of Common Pleas on September 28, 2018, alleging various age discrimination and

retaliation claims. On May 16, 2019, Phillips filed a motion to compel discovery seeking the production of the personnel files of six individuals. Phillips has not disputed the fact that these individuals and their personnel files are located in Europe. The individuals in question are current and former executives of Vesuvius affiliates based in the United Kingdom, Belgium, Germany, and the Netherlands. Neither the individuals nor their employers are parties to this case. Vesuvius argued in opposition to the motion that production of the personnel files would violate the GDPR, exposing Vesuvius and its affiliates to the risk of substantial fines and/or other enforcement measures and civil litigation.

Although specifically permitted by the GDPR,[7] Phillips declined to seek the information pursuant to Chapter II of the Hague Convention,[8] insisting on production of the personnel files in violation of the GDPR. On July 29, 2019, the trial court made a one-sentence journal entry granting Phillips' motion to compel without any discussion or resolution of the privacy concerns and violations of European law raised in Vesuvius' briefing. App. 17a. Placed in the untenable position of either complying with the trial court's order and exposing itself to fines and other liabilities under European law for violation of the GDPR, or complying with the GDPR and exposing itself to sanctions by Ohio courts, Vesuvius appealed

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[7] *See* GDPR arts. 6(3), 48.

[8] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Oct. 7, 1972, 23 U.S.T. 2555, 847 U.N.T.S. 231.

to the Court of Appeals for the Eighth Appellate District on August 12, 2019.

In an opinion dated June 11, 2020, the court of appeals affirmed in part the trial court's order granting Phillips' motion to compel. App. 15a. The court of appeals purported to apply the balancing test established in *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987), to weigh the competing interests and determine whether the GDPR excused non-compliance with the trial court's discovery order. App. 11a–15a. However, the court's superficial and erroneous approach misapplied the relevant factors. Contrary to *Aérospatiale*'s guidance, the court approved a broad fishing expedition into irrelevant aspects of the personnel files; ignored the undisputed fact that all requested documents are located in the EU; discarded the availability of the Hague Convention; and failed entirely to consider "the extent to which . . . compliance with the [discovery] request would undermine important interests" of the relevant European nations. *Aérospatiale*, 482 U.S. at 544 n.28. The court, however, modified the trial court's order by requiring it to conduct an in camera review of the personnel files and redact "irrelevant and confidential material that would be otherwise undiscoverable." App. 15a.

Vesuvius sought review in the Supreme Court of Ohio. But that court denied review, with one justice dissenting. App. 1a; 160 Ohio St. 3d 1420, 154 N.E.3d 110 (2020).

REASONS FOR GRANTING THE PETITION

American courts traditionally permit very broad pretrial discovery. Indeed, discovery rules are "accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials." *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *see also Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 320, 856 N.E.2d 213, 234 (2006) (explaining that Ohio's discovery rules have "been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.").[9] "Discovery is undoubtedly an intrusive process, and those subject to discovery are often forced to turn over a wide variety of information that they would prefer to keep private." *Byrd v. U.S. Xpress, Inc.*, 2014-Ohio-5733, ¶ 36, 26 N.E.3d 858, 866 (Ct. App. 2014).

Sometimes—and with increasing frequency—the documents and information demanded in discovery in American courts are located in other countries. In such circumstances, the party seeking the discovery may face not just generalized foreign hostility to broad and intrusive American discovery obligations, but also foreign laws that specifically prohibit compliance with such obligations. These foreign laws put parties receiving such discovery requests—like Vesuvius here—in a quandary: they must choose between producing the requested information in violation of

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[9] Under Ohio's civil procedure rules, "a party may obtain discovery regarding non-privileged information relevant to the claim or defense of a proceeding. This includes determining the existence of documents and the identity of persons having knowledge of any discoverable matter." *Disciplinary Counsel v. O'Neill*, 75 Ohio St. 3d 1479, 664 N.E.2d 532 (1996).

foreign law, potentially subjecting themselves to severe penalties abroad, or they must flout their American discovery obligations, potentially subjecting themselves to contempt findings and other sanctions in the American case.

As discussed below, such obstructive foreign laws are nothing new—but the GDPR (and similar national privacy laws[10]) has greatly expanded the potential for conflict between American discovery obligations and foreign legal restrictions.

Unfortunately, because they are interlocutory, cross-border discovery disputes rarely receive appellate review. *See Aérospatiale*, 482 U.S. at 554 (Blackmun, J., dissenting) (noting "the limited appellate review of interlocutory discovery decisions, which prevents any effective case-by-case correction of erroneous discovery decisions" (footnote omitted)); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (JG)(JO), 2010 WL 3420517, at *7 (E.D.N.Y. Aug. 27, 2010) (noting that the "relative dearth of appellate decisions makes it more difficult to identify a coherent body of doctrine"). The lack of appeals hampers development of a robust jurisprudence. This case presents an unusual opportunity for this Court to reassess *Aérospatiale* and provide updated guidance on how a court should

[10] After withdrawal of the United Kingdom from the European Union on January 31, 2020, the privacy law applicable to information within the U.K. is the Data Privacy Act 2018, c. 12, https://www.legislation.gov.uk/ukpga/2018/12/contents. References to the GDPR in this petition include national privacy laws such as the Data Privacy Act 2018.

weigh domestic and foreign interests in determining whether to permit cross-border discovery.

I. This Court addressed foreign laws restricting discovery in U.S. courts in *Aérospatiale*, but an update is required.

A. In the context of a French blocking statute, *Aérospatiale* adopts a comity analysis.

This Court addressed the impact of foreign laws on discovery in American courts in *Aérospatiale* in 1987. That case involved consolidated lawsuits against two companies owned by the government of France for personal injuries resulting from the crash of an airplane built and sold by those companies. During discovery, the defendants sought a protective order because the requested documents and information were located in France. 482 U.S. at 524–25. They contended that, under French penal law, they were prohibited from responding to discovery requests served in American judicial proceedings; instead, they could respond only to requests made pursuant to the Hague Convention. *Id.* at 525–26. Specifically, this French law, known as a "blocking statute," provided as follows:

> Subject to treaties or international agreements . . . it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or

> administrative proceedings or in connection therewith.

Id. at 526 n.6.

This Court first rejected the argument that, under federal law, the Hague Convention was the exclusive procedure "for obtaining documents and information located within the territory of a foreign signatory." *Id.* at 529; *see id.* at 529–41. The Hague Convention, the Court held, "did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation." *Id.* at 539–40. The Court explained that "such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." *Id.* at 544 n.29. Indeed, the Court emphasized that "American courts are not required to adhere blindly to the directives of such a statute."[11]

Next, the Court rejected the argument that a party must make "first resort to Convention procedures whenever discovery is sought from a foreign litigant." *Id.* at 542; *see id.* at 541–44. No such obligation could be "inferred from the adoption of the Convention

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[11] The Court was particularly exercised by the fact that French law appeared to prescribe a rule of decision for federal district judges: "the language of the statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge, forbidding him or her to order any discovery from a party of French nationality, even simple requests for admissions or interrogatories that the party could respond to on the basis of personal knowledge." *Aérospatiale*, 482 U.S. at 544 n.29.

itself" and it was not "described in the text of that document." *Id.* at 543.

But those holdings were not the most influential aspects of the Court's opinion. Instead, the passage that has become most important is the Court's instruction that courts should undertake a comity analysis whenever civil discovery conflicts with foreign law, in order to determine whether foreign law limits a party's U.S. discovery obligations. *Id.* at 543–44; *see also Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 146 n.6 (2014) (recognizing that a court "may appropriately consider comity interests and the burden that the discovery might cause to the foreign state"). "Comity," the Court explained, "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Aérospatiale*, 482 U.S. at 543 n.27. International comity 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." *Id.* (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)). The "principles upon which international comity is based [include] the proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency." *Royal & Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006).

Borrowing from the Restatement of Foreign Relations Law of the United States, the Court

explained that "these factors are relevant to any comity analysis":

> "(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."

482 U.S. at 544 n.28 (quoting the Restatement (Third) of Foreign Relations Law of the United States § 437(1)(c) (Tentative Draft No. 7, 1986) (approved May 14, 1986)) (omission in the original).

Finally, *Aérospatiale* instructed American courts to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Id.* at 546. "Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses." *Id.*

B. Developments since *Aérospatiale*.

In the 30 years since *Aérospatiale*, there have been two important developments. First, since 1987, the number of foreign companies doing business in the United States has increased dramatically, more than tripling since the year 2000 alone.[12] This development means that conflict between American discovery obligations and foreign laws is becoming more common.

Second, in 1987 the primary obstacle to discovery of documents located in other countries was foreign "blocking" statutes. "Many foreign countries find U.S.-style discovery to be problematic because of its breadth and scope," and some have "enact[ed] blocking statutes that restrict or prohibit the transfer of documents or information for use in foreign proceedings." Fed. Judicial Ctr., Discovery in International Civil Litigation: A Guide for Judges 26 (2015); *see also* Restatement (Third) of Foreign Relations Law of the United States § 442 reporters' note 4 (1987) (Restatement). Blocking statutes are intended "to prevent domestic individuals or corporations from having to comply with U.S. discovery production requests" and generally prohibit "the disclosure, copying, inspection, or removal of documents located in the territory of the enacting

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[12] M. Szmigiera, *Foreign Direct Investment (FDI) in the United States from 2000 to 2019*, Statista (Sept. 2, 2019), https://www.statista.com/statistics/188870/foreign-direct-investment-in-the-united-states-since-1990/.

state in compliance with orders of foreign authorities."[13]

But the GDPR is not a blocking statute. Unlike a blocking statute, the GDPR "represent[s] a 'sovereign interest[] in nondisclosure of specific kinds of material.'" *In re Activision Blizzard, Inc.*, 86 A.3d 531, 550 (Del. Ch. 2014) (quoting *Aérospatiale*, 482 U.S. at 544 n.29). And "in contrast" to a blocking statute, privacy laws such as the GDPR "exist as a result of the considered decision of [foreign governments] to enact strong . . . personal data privacy protections. They do not exist—and there is no basis to claim that they exist—for the purpose of impeding enforcement of United States laws." *In re Application Pursuant to 28 U.S.C. § 1782 of Okean B.V. & Logistic Sol. Int'l to Take Discovery of Chadbourne & Parke LLP*, No. 12 Misc. 104(PAE), 2013 WL 4744817, at *3 (S.D.N.Y. Sept. 4, 2013).

The GDPR is motivated by a strong, substantive policy—privacy. Indeed, data protection is considered a fundamental human right in the EU and is incorporated in the Charter of Fundamental Rights of the European Union. *See* GDPR recital 1; Charter of Fundamental Rights of the European Union, *supra*, art. 8. The GDPR provides substantive rights to EU citizens and residents, gives them control of their personal data, and restricts the ability of data "controllers" and "processors" (including employers) to

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[13] Kristen A. Knapp, *Enforcement of U.S. Electronic Discovery Law Against Foreign Companies: Should U.S. Courts Give Effect to the EU Data Protection Directive?*, 10 Rich. J. Glob. L. & Bus. 111, 122 (2010) (citation omitted).

use and disclose personal data—including the contents of employees' own personnel files.

Because the GDPR is not a blocking statute, courts err when they unthinkingly apply *Aérospatiale* to enforce American discovery obligations with respect to documents or information protected by the GDPR. As this Court explained in *Aérospatiale*, blocking statutes "need not be given the same deference by courts of the United States as substantive rules of law at variance with the law of the United States." 482 U.S. at 544 n.29 (quoting Restatement § 437, reporters' note 5).

Nonetheless, American courts—in addition to the courts below—have almost always ordered production of documents and information subject to the GDPR. *See*, *e.g.*, *AnywhereCommerce, Inc. v. Ingenico, Inc.*, No. 19-cv-11457-IT, 2020 WL 5947735 (D. Mass. Aug. 31, 2020); *Giorgi Glob. Holdings, Inc. v. Smulski*, No. 17-4416, 2020 WL 2571177 (E.D. Pa. May 21, 2020); *In re Mercedes-Benz Emissions Litig.*, No. 16-cv-881 (KM) (ESK), 2020 WL 487288, at *5–8 (D.N.J. Jan. 30, 2020); *Finjan, Inc. v. Zscaler, Inc.*, No. 17-cv-06946-JST (KAW), 2019 WL 618554 (N.D. Cal. Feb. 14, 2019). *But cf. Salt River Project Agric. Improvement & Power Dist. v. Trench Fr. SAS*, 303 F. Supp. 3d 1004 (D. Ariz. 2018) (requiring the use of the Hague Convention procedures in light of the French blocking statute). This case presents an ideal vehicle for the Court to provide updated guidance in light of the sea changes represented by the GDPR and the increasingly common transnational conduct of business.

II. This Court should correct the court of appeals' misapplication of *Aérospatiale*.

A. The court of appeals' superficial decision grapples with none of the important issues presented by *Aérospatiale* or the change in context represented by the GDPR.

The court of appeals "[a]ssum[ed] without deciding that the personnel files and its [*sic*] contents fall would [*sic*] under the GDPR." App. 13a. But the court held that "the [*Aérospatiale*] factors weigh in favor of disclosure." *Id.* Under the first factor, the importance of the documents to the litigation, the court stated that "[p]ersonnel records are basic discovery in employment-related cases" and are therefore "relevant." *Id.* The court also found that the request was "not overbroad," the second factor, because it sought "the personnel records of only seven individuals related to Phillips's employment and termination with Vesuvius." *Id.*

Third, the court found it "unclear from the record" whether the information requested "originated in the United States." It thus held that the third factor "does not weigh in any party's favor." *Id.* at 13a–14a. Fourth, the court found no "alternative means of securing the information," rejecting Vesuvius' argument that Phillips should be required to seek the requested documents through the Hague Convention. *Id.* at 14a. The court held that "requiring Phillips to undergo another avenue of seeking the requested documents, which have been requested for over a year, is not a viable alternative to the liberal discovery rules." *Id.* Fifth, the court described the last factor as "the extent to which noncompliance would undermine important interests of the United States." *Id.* It found

that this factor "weighs in favor of discovery" because "Ohio has a clear public policy prohibiting age discrimination and unlawful retaliation, and the information contained in the personnel files . . . is essentially a mandated disclosure." *Id.*

This analysis misstates both *Aérospatiale*'s comity factors and the record of the case.

Initially, the court of appeals focused solely on the interests of the United States in discussing the fifth factor. It completely failed to address "the extent to which . . . compliance with the [discovery] request would undermine important interests" of the *foreign* state. *Aérospatiale*, 482 U.S. at 544 n.28; *see* Restatement (Fourth) of the Foreign Relations Law of the United States § 426 reporter's note 2 (2018) ("For an order to produce information to be reasonable, it should take into account principles of international comity regarding the legitimate interests of foreign sovereigns with respect to persons and information within their jurisdiction."). Comity is by definition a two-way street. *Aérospatiale*, 482 U.S. at 544 n.29 ("The lesson of comity is that neither the discovery order nor the blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign."). Moreover, the court of appeals ignored *Aérospatiale*'s admonition that trial courts must "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Id.* at 546. These represent significant errors, because "[t]he fifth factor—the balancing of national interests—is the most important, as it directly addresses the relations between sovereign nations." *Laydon v. Mizuho Bank,*

Ltd., 183 F. Supp. 3d 409, 422 (S.D.N.Y. 2016); *see also Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1476 (9th Cir. 1992) ("the most important factor").

Indeed, the court of appeals failed even to assess adequately the full panoply of *United States* interests. The United States and Ohio have an interest in upholding the rule of law, in mitigating and eliminating international conflict, and in maintaining friendly relations with other countries. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164–65 (2004) ("[A]ccount[ing for] the legitimate sovereign interests of other nations . . . . helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world."); Restatement § 442 cmt. c ("the court or agency should take into account . . . the long-term interests of the United States generally in international cooperation in law enforcement and judicial assistance, in joint approach to problems of common concern, in giving effect to formal or informal international agreements, and in orderly international relations"). These sovereign American interests facilitate cross-border trade, travel, and cooperation—which benefit the people of Ohio and the United States. Failure of American courts to adequately respect foreign laws invites retaliation from other countries, undermining U.S. interests. *See* Kurt H. Nadelmann, *Reprisals Against American Judgments?*, 65 Harv. L. Rev. 1184 (1952). Yet the court of appeals did not factor any of these considerations into its analysis.

The court of appeals also misapplied the other *Aérospatiale* factors. While some documents in

personnel files may constitute "basic discovery" in employment cases, App. 13a, here Phillips sought, and the trial court ordered Vesuvius to produce, essentially the *entire* personnel files of senior executives—including much information (such as compensation data) completely irrelevant to the case. Such a wide-ranging fishing expedition cannot be "importan[t] to the . . . litigation" and it was certainly not "specific[]." *Aérospatiale*, 482 U.S. at 544 n.28. The first and second factors, therefore, did not support the trial court's holding. Further, the court bizarrely held, with respect to the third factor, that it was "unclear from the record" whether the personnel files were located in the United States. App. 13a. But, in fact, it is undisputed that the documents are located in the European Union and are subject to the GDPR.

And, finally, the court ignored the fact that Phillips could obtain much of the same information via the Hague Convention, which is a process the GDPR approves, *see* GDPR arts. 6(3), 48. "If the information sought can easily be obtained elsewhere, there is little or no reason to require a party to violate foreign law." *Richmark*, 959 F.2d at 1475. Indeed, if Phillips had used the Convention's process from the outset, he likely would already have the information he has sought.[14] Rather than order Vesuvius to comply with the discovery requests, therefore, the court should have required Phillips to seek the

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[14] *See* Geoffrey Sant, *Courts Increasingly Demand that Businesses Break the Law*, 52 Akron L. Rev. 121, 143 (2018) (explaining that the Hague Convention process is a faster means of obtaining documents abroad than protracted litigation over the propriety of foreign discovery in U.S. courts).

information through the established procedures in the Hague Convention.

B. Unfortunately, the court of appeals' decision is indicative of a broader trend. As anticipated by the *Aérospatiale* dissent, *see* 482 U.S. at 547–48, 553 (Blackmun, J. dissenting), the comity analysis has been overwhelmingly applied with pro-forum biases. *See* Geoffrey Sant, *Court-Ordered Law Breaking: U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 Brook. L. Rev. 181, 191–92 (2015). Because "[t]he balancing test . . . permits courts to easily prioritize U.S. interests over foreign interests, . . . [t]he legacy of *Aerospatiale* . . . was a rise in expansive U.S. discovery, with international comity falling by the wayside." Samantha Cutler, Note, *The Face-Off Between Data Privacy and Discovery: Why U.S. Courts Should Respect EU Data Privacy Law When Considering the Production of Protected Information*, 59 B.C. L. Rev. 1513, 1529 (2018).

This case presents the Court with the opportunity to update the comity framework for analyzing the competing interests in the increasingly common cross-border discovery disputes. This issue is of critical importance to the numerous international companies conducting business in both the United States and Europe, as well as their employees who are citizens of the EU, whose privacy rights could be breached in such cross-border discovery disputes. This Court should grant the petition to correct the court of appeals' improper application of the comity analysis and to provide the necessary guidance for properly weighing the interests of an American court in civil discovery and the substantive interests and rights of the EU and its citizens reflected in the GDPR.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted.

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APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF OHIO, FILED OCTOBER 13, 2020

THE SUPREME COURT OF OHIO

Case No. 2020-0910

ROYSTON PHILLIPS,

v.

VESUVIUS USA CORPORATION, *et al.*

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S. Ct. Prac. R. 7.08(B)(4).

(Cuyahoga County Court of Appeals; No. 108888)

/s/_____
Maureen O'Connor
Chief Justice

APPENDIX B — JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, COUNTY OF CUYAHOGA, DATED JUNE 11, 2020

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

No. 108888

ROYSTON PHILLIPS,

Plaintiff-Appellee,

v.

VESUVIUS USA CORPORATION, *et al.*,

Defendants-Appellants.

Civil Appeal from the Cuyahoga County
Court of Common Pleas
Case No. CV-18-904574

JUDGMENT: AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: June 11, 2020

JOURNAL ENTRY AND OPINION

KATHLEEN ANN KEOUGH, J.:

Appendix B

{¶1} Defendants-appellants, Vesuvius U.S.A. Corporation ("Vesuvius") and Christopher Young (collectively "appellants"), appeal from the trial court's decision that granted the motion to compel discovery filed by plaintiff-appellee, Royston Phillips ("Phillips"). For the reasons that follow, we affirm, but modify the trial court's decision by ordering that the trial court conduct an in camera inspection of the personnel files and redact those documents contained therein that would be deemed irrelevant or confidential under the law.

{¶2} Phillips worked for Vesuvius and its predecessor entity for nearly 40 years before he was terminated. In 2018, Phillips filed a complaint against appellants alleging various causes of action including claims of age discrimination and retaliation. In December 2018, Phillips served appellants with his first set of interrogatories, requests for production of documents, and requests for admissions. Relevant to this appeal, those requests sought the personnel records of seven individuals purportedly relevant to the Phillips's claims. *See* Request for Production of Documents No. 10.

{¶3} In May 2019, Phillips filed a motion to compel discovery after appellants objected to the requested discovery information. Specific to the issue on appeal, appellants objected because (1) the personnel files are not relevant nor likely to lead to the discovery of admissible evidence; (2) appellants do not have possession, custody, or control over the requested personnel files; and (3) the European Union's ("EU") General Data Protection Regulation ("GDPR") and other foreign laws preclude the

production of these files. *See* Phillips's Motion to Compel, filed May 16, 2019.

{¶4} In their brief in opposition, appellants contended that the production of the requested documents and information is prohibited by the GDPR and cannot be produced without the consent of the individuals whose personnel files were requested. Appellants maintained that they were willing to provide relevant information regarding the requested employees, but only if Phillips "agree[d] to a protective order regarding the use and dissemination of said information and agree[d] to indemnify [appellants] should any levies or fines be assessed against them for producing the information." *See* Appellants' Brief in Opposition to the Motion to Compel, filed May 23, 2019. Phillips agreed to a protective order, but not indemnification.

{¶5} The trial court granted Phillips's motion to compel, ordering

> Plaintiff's motion to compel discovery * * * is granted. Defendants shall provide responses to all outstanding discovery requests by 8/12/2019. Court declines to award attorneys [sic] fees at this time.

> {¶6} Appellants now appeal, raising two assignments

Appendix B

I. Final Appealable Order

{¶7} As an initial matter, Phillips contends that the order from which appellants appeal is not final or appealable and thus, this court does not have jurisdiction to consider the appeal.

{¶8}Appellate courts can only "review and affirm, modify, or reverse judgments or final orders." Ohio Constitution, Article IV, Section 3(B)(2). Before this court can exercise jurisdiction over an appeal, the order of the lower court must meet the finality requirements of R.C. 2505.02. *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 10. Appellants contend that the order in this case is final under R.C. 2505.02(B)(4).

{¶9}Pursuant to R.C. 2505.02(B)(4), an order that grants or denies a provisional remedy is a final order if (a) "[t]he order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy," and (b) "[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

{¶10}Discovery orders are generally interlocutory orders that are neither final nor appealable. *Walters v. Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 120-121, 1997-Ohio-232, 676 N.E.2d 890 (1997). But a proceeding for discovery of a privileged matter

is a "provisional remedy" within the meaning of R.C. 2505.02(A)(3). *Smith v. Chen*, 141 Ohio St.3d 1461, 2015-Ohio-370, 24 N.E.3d 1180, ¶ 5. The protection against discovery of matters identified as "privileged" in Civ.R. 26(B)(1) is limited to privileges derived from a specific constitutional or statutory provision. *State ex rel. Grandview Hosp. & Med. Ctr. v. Gorman*, 51 Ohio St.3d 94, 95, 554 N.E.2d 1297 (1990), citing *In re Story*, 159 Ohio St. 144, 147, 111 N.E.2d 385 (1953). The Ohio Supreme Court has recognized, however, that "other discovery protections that do not involve common-law, constitutional, or statutory guarantees of confidentiality * * * may require a showing under R.C. 2505.02(B)(4)(b) beyond the mere statement that the matter is privileged." *Burnham v. Cleveland Clinic*, 151 Ohio St.3d 356, 2016-Ohio-8000, 89 N.E.3d 536, ¶ 2.

{**¶11**} Phillips contends that appellants have failed to withstand their burden of demonstrating that the personnel files are privileged, thus satisfying R.C. 2505.02(B)(4)(a) that the order involves a provisional remedy. Phillips relies on appellants' praecipe, claiming that it is a "mere statement" and does not provide any information or evidence to support a finding that the requested discovery falls under the GDPR or that the production of such information violates the GDPR. Appellants' praecipe provides:

> This case falls under R.C. 2505.02(B)(4) as the trial court's granting of [Phillips's] motion to compel in effect determines the action with respect to the production of the personnel files

> at issue and prevents a judgment in Appellants' favor on this issue. Appellants would not be afforded a meaningful or effective remedy by an appeal following final judgment as Appellants' production of these files violates European law and carries high potential fines against [Appellants] for unlawful production.

{¶12}However, a party is not required to conclusively prove the existence of privileged matters as a precondition to appellate review under R.C. 2505.02(B)(4). *Byrd v. U.S. Xpress, Inc.*, 2014-Ohio-5733, 26 N.E.3d 858, ¶ 12 (1st Dist.). "To impose such a requirement would force an appellate court 'to decide the merits of an appeal in order to decide whether it has the power to hear and decide the merits of an appeal.'" *Id.*, quoting *Bennett v. Martin*, 186 Ohio App.3d 412, 2009-Ohio-6195, 928 N.E.2d 763, ¶ 35 (10th Dist.). Instead, a party need only make a "colorable claim" that materials subject to discovery are privileged in order to qualify as a provisional remedy. *Id.; see also Burnham* at ¶ 3, 29 (defendant "plausibly alleged" and made a "colorable claim" that the incident report was governed by the attorney-client privilege thus satisfying its burden that the report contains privilege information).

{¶13} In this case, we find that because appellants make a colorable claim that at least some of the information for which they seek protection is privileged or contains confidential information, the order qualifies as a provisional remedy.

{¶14} Next, we must consider whether the order determines the action with respect to the provisional remedy and prevents a judgment in favor of appellants regarding the provisional remedy. *See* R.C. 2505.02(B)(4)(a). In its response to Phillips's motion to compel, appellants claimed that they should not be ordered to produce personnel files of European citizens because the files contained confidential information whose release would violate the GDPR. Because the effect of the trial court's order is that confidential or protected information will be disclosed, the order has determined the action with respect to the provisional remedy. "Any order compelling the production of privileged or protected materials certainly satisfies R.C. 2505.02(B)(4)(a) because it would be impossible to later obtain a judgment denying the motion to compel disclosure if the party has already disclosed the materials." *Burnham*, 151 Ohio St.3d 356, 2016-Ohio-8000, 89 N.E.3d 536, at ¶ 21.

{¶15} Although we recognize that the trial court did not explain why it was granting the motion to compel or why the documents were not privileged, we can glean from the record that the asserted protections under the GDPR were rejected because this was the only discovery privilege protection appellants sought. *See Burnham* at ¶ 27 (recognizing that although the trial court's order did not specifically state why it was compelling the production of the report, the Supreme Court was able to determine from the briefing "that the attorney-client privilege had been rejected and that it was the only remaining discovery protection being sought"). Ideally, "a trial court should explain why a motion to compel production has been

granted. In that way, a reviewing court can determine the pertinent issues and whether the requirements of R.C. 2505.02(B)(4)(a) and (b) are satisfied." *Id.* at ¶ 28.

{¶16} Finally, we must consider whether appellants would be able to obtain meaningful relief by an appeal following the entry of final judgment. *See* R.C. 2505.02(B)(4)(b). Appellants seek to prevent the disclosure of alleged privileged and protected information. Because the trial court's order compels the production of material allegedly protected under a foreign law that may contain confidential and otherwise undiscoverable information, the order satisfies R.C. 2505.02(B)(4)(b) because there is no effective remedy other than an immediate appeal. *Burnham* at ¶ 25.

{¶17} Accordingly, we find the trial court's order is final and appealable but only insofar as it implicitly determined that the personnel files were not privileged or that they did not breach a protected interest in confidentiality. We decline to address appellants' argument that this court should exercise pendent jurisdiction over its additional objection that it does not have "possession, custody or control" over the requested documents. That justification would not be grounds to make an otherwise interlocutory appeal immediately appealable under R.C. 2505.02(B)(4). Accordingly, we summarily disregard appellants' first assignment of error, which contends that the trial court improperly granted Phillips's motion to compel because the information "is not within Vesuvius's custody and control." This appeal is limited to the privileged nature of those personnel files.

Appendix B

II. Motion to Compel

{¶18} In their second assignment of error, appellants contend that "the trial court's decision improperly granted Phillips's motion to compel the production of six European citizens' personnel files and residential addresses without any safeguards in place." They frame the issue as:

> The trial court granted Phillips' motion to compel the production of six European citizens' personnel files and residential addresses without any safeguards in place, despite the fact that the discovery requests are overbroad, seek largely irrelevant information, and would require [appellants] and members of its group to violate the European citizens' privacy rights, the European Union's ("EU's") General Data Protection Regulation ("GDPR"), and national legislation in the EU countries at issue, exposing them to high fines, other enforcement measures, and/or civil litigation, notwithstanding the availability of alternative methods for requesting European documents and information in discovery under Chapter II of the Hague Convention.

{¶19}Ordinarily, a discovery dispute is reviewed under an abuse-of-discretion standard. *Tracy v. Merrell Dow Pharmaceuticals, Inc.*, 58 Ohio St.3d 147, 151-152, 569 N.E.2d 875 (1991). However, whether the information sought in discovery is confidential and privileged "is a question of law that is reviewed de novo." *Burnham v.*

Cleveland Clinic, 2017-Ohio-1277, 88 N.E.3d 523, ¶ 8 (8th Dist.), citing *Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership*, 78 Ohio App.3d 340, 604 N.E.2d 808 (2d Dist.1992); *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13.

{**¶20**}The GDPR concerns the data protection and privacy of all EU citizens and regulates the transfer of EU citizens' personal data outside of EU member states, such as the transfer to the U.S. *In re Mercedes-Benz Emissions Litigation*, D.N.J. Civil Action No. 16-cv-881 (KM) (ESK), 2020 U.S. Dist. LEXIS 15967, *5 (Jan. 30, 2020). The GDPR broadly defines personal data as "any information relating to an identified or identifiable natural person." *Id.*, quoting GDPR Article 4(1). "This broad definition of personal data inherently includes information like an individual's name and job title, information that is generally considered benign in U.S. litigation and * * * produced in discovery pursuant to the [rules of civil procedure]." *Id.*

{**¶21**} In a recent decision in the Northern District of California, the court concluded that the GDRP will not act as an absolute bar to domestic discovery. *Finjan, Inc. v. Zscaler, Inc.*, N.D.Cal. No. 17-cv-06946-JST (KAW), 2019 U.S. Dist. LEXIS 24570, (Feb. 14, 2019). "In general, a foreign country's statute precluding disclosure of evidence 'do[es] not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.'" *Finjan* at *3, quoting *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist.*, 482

U.S. 522, 544, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987), fn. 29. *Aerospatiale* endorsed the balancing test contained in the Restatement of the Law 3d, Foreign Relations Law, Section 442(1)(c)(1987) in determining whether the foreign statute excuses noncompliance with the discovery order. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir.1992); *see also EnQuip Technologies Group, Inc. v. Tycon Technoglass, S.R.L.*, 2d Dist. Greene Nos. 2009 CA 42 and 2009 CA 47, 2010-Ohio-28, ¶ 88. Courts should consider:

> (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; and (5) the extent to which noncompliance would undermine important interests of the United States.

Finjan at *3, citing *Richmark Corp*, at 1475. These factors are not exclusive; courts may also consider "the extent and the nature of the hardship that inconsistent enforcement would impose upon the person," as well as "the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by the state." *Id.*

{¶22}As a threshold matter, in determining whether the compelled discovery at issue is protected from disclosure under the GDPR, the party relying on foreign law has the burden of showing such law bars production.

Appendix B

Phoenix Process Equip. Co. v. Capital Equip. & Trading Corp., W.D. Ky No. 16CV-00024, 2019 U.S. Dist. LEXIS 44390, *30 (Mar. 18, 2019).

{¶23} Assuming without deciding that the personnel files and its contents fall would under the GDPR, we find that the factors weigh in favor disclosure.[1] The first factor — the importance of the documents or other information requested to the litigation — weighs in favor of discovery. Personnel records are basic discovery in employment-related cases. Accordingly, they are relevant and pertain to Phillips's claims of age discrimination and retaliation.

{¶24} The second factor, the degree of specificity of the request, also weighs in favor of disclosure. Phillips's request seeks the personnel records of only seven individuals related to Phillips's employment and termination with Vesuvius. This request is not overbroad.

{¶25} The third factor — whether the information originated in the United States — is unclear from the record. Although Phillips contends that it is likely that some of the information contained in the personnel files originated in the United States, appellants claim that because the personnel files are those of current and former

1. We note that courts throughout the United States, including a state court in Ohio, have repeatedly balanced the *Aerospatiale* factors in favor of discovery production when deciding whether foreign laws inhibit discovery in cases originating in the United States. *See, e.g., Finjan; Phoenix Process; EnQuip Techs. Group* (discussing Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995).

executives of Vesuvius's affiliates in the United Kingdom, Belgium, and the Netherlands, the records originated and are maintained outside of the United States. This factor does not weigh in any party's favor because the record is insufficient for this court to make such determination.

{¶26} With respect to the fourth factor — the availability of alternative means of securing the information — Phillips maintains that it has no other means of obtaining this information whereas appellants claim that Phillips can seek production through the procedures set forth under Chapter II of the Hague Convention. Based on the record before this court, requiring Phillips to undergo another avenue of seeking the requested documents, which have been requested for over a year, is not a viable alternative to the liberal discovery rules of Civ.R. 26. Accordingly, this factor weighs in favor of discovery.

{¶27} Finally, the fifth factor — the extent to which noncompliance would undermine important interests of the United States — weighs in favor of discovery. Ohio has a clear public policy prohibiting age discrimination and unlawful retaliation, and the information contained in the personnel files, e.g., location information of witnesses, is essentially a mandated disclosure under Civ.R. 26.

{¶28} Moreover, and much like in *Finjan*, appellants have failed to produce evidence that the disclosure of the personnel files would lead to hardship or an enforcement action from an EU data protection supervisory authority for breach of the GDPR. *See Finjan* at *10. Accordingly,

after reviewing the factors, we find they weigh in favor of discovery production.

{¶29} Notwithstanding our conclusion, this court recognizes that documentation and information contained in the personnel files may exist that would otherwise be undiscoverable as irrelevant or confidential. *See Dubson v. Montefiore Homes*, 8th Dist. Cuyahoga No. 97104, 2012-Ohio-2384, ¶ 20-21; *Howell v. Park E. Care & Rehab.*, 8th Dist. Cuyahoga No. 106041, 2018-Ohio-2054, ¶ 34-36 (personnel files may contain confidential information; redaction is the proper remedy).

III. Conclusion

{¶30} Accordingly, we find that the trial court did not abuse its discretion in granting Phillips's motion to compel. However, we find that the trial court should have conducted an in camera inspection to review whether any of the information contained in the files is irrelevant and confidential material that would be otherwise undiscoverable. The assignment of error is therefore sustained, in part.

{¶31} Judgment affirmed in part, modified in part, and remanded. The trial court is ordered to conduct an in camera review of the personnel files and redact those documents that would be deemed confidential or otherwise undiscoverable under the law.

It is ordered that parties share equally in the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____
KATHLEEN ANN KEOUGH,
JUDGE

EILEEN T. GALLAGHER, A.J.,
and
MARY EILEEN KILBANE, J.,
CONCUR

APPENDIX C — JOURNAL ENTRY OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO, DATED JULY 29, 2019

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Case No: CV-18-904574

ROYSTON PHILLIPS,

Plaintiff,

v.

VESUVIUS U.S.A. CORPORATION, *ET AL.*,

Defendant.

Judge: Peter J Corrigan

JOURNAL ENTRY

Plaintiff's Motion for Leave to Reply in Support of his Motion to Supplement his April 9, 2019 Motion with revised Amended Complaint, filed July 5, 2019, is GRANTED.

Plaintiff's Motion to Supplement his April 9, 2019 Motion with Revised Amended Complaint, filed June 25, 2019, is GRANTED.

Plaintiff's Motion to Compel Discovery, filed May 16, 2019, is GRANTED. Defendants shall provide responses to all outstanding discovery requests by August 12, 2019. Court declines to award attorneys fees at this time.

Appendix C

Plaintiff's Motion for Leave to File Second Amended Complaint, filed April 9, 2019, is GRANTED.

/s/ Peter J. Corrigan
Judge Signature 07/29/2019