

## Out of “Control” Federal Subpoenas: When Does a Nonparty Subsidiary Have Control of Documents Possessed By a Foreign Parent?

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### INTRODUCTION

Pre-trial discovery often involves seeking documents in the possession of corporate entities located outside of the United States who are not parties to the litigation. A litigant seeking this type of discovery from a nonparty has two means of obtaining such documents: (1) through procedures provided by the Hague Evidence Convention or (2) through a nonparty subpoena issued under Rule 45 of the Federal Rules of Civil Procedure to a domestic subsidiary or affiliate of the foreign entity. The Hague Convention provides procedures for obtaining documents directly from the foreign entity, but it is a time-consuming process.<sup>1</sup> Rule 45 is more convenient for the subpoenaing party, but can raise significant legal questions regarding “possession, custody, or control” of documents located with a foreign parent or affiliate.<sup>2</sup>

Determining whether a subpoenaed party has the requisite “possession, custody, or control” of the documents sought under Rule 45 is more complicated than one might expect. The current state of the law is a mess as courts across the country apply one of two tests to determine whether a domestic entity “controls” the documents in the possession of the foreign parent or affiliate: (1) the “legal right” test or (2) the “practical ability” test. At least that is what courts say they are doing. In reality, case law is erratic and suggests courts are just reaching for an equitable solution in each individual case. The result is that other courts have little guidance on how

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<sup>1</sup> See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 524 (1987); 71 AM. JUR. *Trials* § 1 (1999).

<sup>2</sup> See generally 71 AM. JUR. *Trials* § 2 (1999); *infra* Part I.

to address the problem. The Fifth Circuit has not addressed this issue yet and has failed to provide any clear guidance as to which method should be used within its circuit.<sup>3</sup> Further, no court has really yet considered what it would do if it ordered a domestic entity to produce documents in the sole possession of a foreign affiliate and the domestic entity was unable to do so.

This Comment is based on a fairly common discovery scenario. A litigating party in federal court subpoenas a U.S. corporation (subsidiary), which is not a party to the litigation, and demands the production of documents under Rule 45 of the Federal Rules of Civil Procedure. However, the subpoenaed nonparty does not have possession of the requested documents. Instead, the documents are in the possession of the subpoenaed nonparty's parent company (parent), which is incorporated and physically located in a foreign country. The subsidiary asserts that it does not have possession of the documents sought. Under Rule 45, a party may subpoena a nonparty to produce documents within its "possession, custody, or control."<sup>4</sup> The ultimate issue is whether the subsidiary, despite not having possession of the subpoenaed documents, has "control" of them. The main question this Comment seeks to address is whether the Fifth Circuit should allow a litigating party to compel by subpoena a nonparty domestic corporation to produce documents that are in the possession of the domestic corporation's foreign parent or affiliate on the ground that the domestic entity has the "practical ability" to obtain the documents even though it has no legal right to order the foreign entity to produce the documents.

This Comment will begin by discussing both the history of and the current foreign discovery procedures permitted by the Hague Convention<sup>5</sup> and Federal Rule of Civil Procedure Rule 45.<sup>6</sup> It will then discuss the competing standards for determining whether control exists over subpoenaed documents,<sup>7</sup> and the various problems that arise because the muddled state of the law regarding the application of these tests.<sup>8</sup> It will discuss the practical issues arising from the application of the "practical

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<sup>3</sup> *Goh v. Baldor Elec. Co.*, No. 3:98-MC-064-T, 1999 WL 20943, at \*2 (N.D. Tex. Jan. 13, 1999) ("Neither the Federal Rules of Civil Procedure nor the Fifth Circuit offer clear, definitive guidance as to the appropriate definition of control.").

<sup>4</sup> See FED. R. CIV. P. 45(a)(1)(A)(iii).

<sup>5</sup> *Infra* Part I.A.

<sup>6</sup> *Infra* Part I.B.

<sup>7</sup> *Infra* Part I.B.1 and Part I.B.2.

<sup>8</sup> *Infra* Part II and Part III.

ability” test<sup>9</sup> and will conclude with a discussion of what approach the Fifth Circuit should adopt.<sup>10</sup>

## I. LEGAL BACKGROUND: THE HAGUE CONVENTION VS. FEDERAL RULES OF CIVIL PROCEDURE

Parties often choose to use the Federal Rules of Civil Procedure to attempt to obtain evidence held by foreign, non-parties to bypass the more cumbersome Hague Convention procedures.<sup>11</sup> To better understand why this is the case and the problems that arise because of it, it is imperative to have a general understanding of these two methods for obtaining evidence abroad.

### A. *The Hague Convention: The First Resort or Something to Be Avoided?*

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, also referred to as the Hague Convention, was adopted at the eleventh session of the Hague Conference on Private International Law on October 26, 1968 and was ratified by the United States in 1972.<sup>12</sup> To date, 57 countries are contracting parties to the Convention.<sup>13</sup> The Hague Conference enacted the Convention “to establish a system for obtaining evidence located abroad that would be ‘tolerable’ to the state executing the request and would produce evidence ‘utilizable’ in the requesting state.”<sup>14</sup> In other words, its purpose was to better facilitate the transmission of evidence between common law countries using litigant-

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<sup>9</sup> *Infra* Part IV.

<sup>10</sup> *Infra* Part V.

<sup>11</sup> *See* The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter The Hague Convention]; *see also* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 533–46 (1987) (holding that it is not mandatory that a party seeking foreign discovery resort to the Hague Convention first and may use the methods provided by the Federal Rules of Civil Procedure before resorting to the Hague Convention).

<sup>12</sup> *See* The Hague Convention, *supra* note 11, at 2555.

<sup>13</sup> Status Table, HCCH.NET, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=82](http://www.hcch.net/index_en.php?act=conventions.status&cid=82) (last visited Feb. 14, 2015).

<sup>14</sup> *Soci t *, 482 U.S. at 530.

directed discovery (e.g., the United States) and civil law countries using court-directed discovery (e.g., France and Germany).<sup>15</sup>

Following the United States's adoption of the Hague Convention and prior to the Supreme Court's decision in *Aérospatiale* in 1987, courts were divided on whether the Convention was to be the first resort for foreign discovery, or whether it was merely an optional set of discovery procedures.<sup>16</sup> Many courts in earlier cases held that the Convention was to be the first resort for parties seeking discovery of documents located abroad.<sup>17</sup> However, courts in later cases held that the Convention's procedures were merely an optional alternative to the applicable Federal Rules of Civil Procedure.<sup>18</sup>

In 1987, the Supreme Court attempted to resolve this inconsistency in application of the Convention in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*.<sup>19</sup> The Court held that where the district court has jurisdiction over a foreign litigant, the Hague Convention procedures for obtaining evidence are not mandatory and are merely an optional supplement to the applicable Federal Rules of Civil Procedure.<sup>20</sup> The Court also held that, in determining whether to apply the Hague Convention procedures, courts should apply some form of international comity analysis.<sup>21</sup> "Comity," as 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."<sup>22</sup> In a footnote, Justice Stevens, citing the Restatement of Foreign Relations Law of the United States, went on to provide five factors courts should consider in their

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<sup>15</sup> *In re Société Nationale Industrielle Aérospatiale*, 782 F.2d 120, 124 (8th Cir. 1986), vacated on other grounds, 482 U.S. 522 (1987).

<sup>16</sup> 482 U.S. 522.

<sup>17</sup> *E.g.*, *Phila. Gear Corp. v. Am. Pfauter Corp.*, 100 F.R.D. 58, 60–61 (E.D. Pa. 1983); *Pierburg GmbH & Co. KG v. Superior Court*, 186 Cal. Rptr. 876, 877 (Cal. Ct. App. 1982); *Volkswagenwerk AG v. Superior Court*, 109 Cal. Rptr. 219, 221 (Cal. Ct. App. 1973); *TH. Goldschmidt A.G. v. Smith*, 676 S.W.2d 443, 445 (Tex. App.—Houston [1st Dist.] 1984, no writ).

<sup>18</sup> *E.g.*, *Compagnie Francaise d'Assurance Pour le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 26–27 (S.D.N.Y. 1984); *Laker Airways Ltd. v. Pan Am. World Airways*, 103 F.R.D. 42, 51 (D.D.C. 1984); *Murphy v. Reifenhauer KG Maschinenfabrik*, 101 F.R.D. 360, 363 (D. Vt. 1984); *Lasky v. Cont'l Prods. Corp.*, 569 F. Supp. 1227, 1228 (E.D. Pa. 1983).

<sup>19</sup> *See* 482 U.S. 522.

<sup>20</sup> *Id.* at 536–38.

<sup>21</sup> *Id.* at 544–45.

<sup>22</sup> *Id.* at 543 n.27.

international comity analysis.<sup>23</sup> Justice Stevens further discussed how, in deciding whether to proceed under the Hague Convention, courts need to consider the specific type of discovery sought (documents, interrogatories, etc.) and its potential burden on the foreign parties.<sup>24</sup>

In his dissent, Justice Blackmun, though agreeing with the majority that the Convention procedures should not be mandatory in all cases, argued for “a general presumption that, in [applicable] cases, courts should first resort to the Convention procedures.”<sup>25</sup> Justice Blackmun went on to say that the “individualized analysis” which the majority laid out is appropriate only when it appears that “it would be futile to employ the Convention or when its procedures prove to be unhelpful.”<sup>26</sup> Notably, Blackmun expressed concern that the majority did not provide enough guidance to lower courts for applying the “individualized [comity] analysis” when determining whether to apply the procedures of the Hague Convention and gave them too much discretion.<sup>27</sup> This trepidation turned out to be warranted as the Supreme Court’s decision in *Aérospatiale* has been criticized for precisely this reason.<sup>28</sup> Nonetheless, *Aérospatiale* remains the seminal case on the issue of what deference should be given to the Hague Convention when seeking foreign discovery, and, as a result, courts still have significant discretion in determining whether to apply the procedures provided by the Convention.

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<sup>23</sup> *Id.* at 544 n.28 (listing five factors laid out by the Restatement: (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.).

<sup>24</sup> *Id.* at 545–46.

<sup>25</sup> *Id.* at 548–49. (Blackmun, J., concurring in part and dissenting in part).

<sup>26</sup> *Id.* at 549.

<sup>27</sup> *Id.* at 548–52.

<sup>28</sup> See Owen Peter Martikan, Note, *The Boundaries of the Hague Evidence Convention: Lower Court Interest Balancing After the Aérospatiale Decision*, 68 TEX. L. REV. 1003, 1018 (1990).

### 1. Using Letters of Request to Obtain Evidence Under the Hague Convention.

Prior to the Hague Convention, litigants in common law countries found it difficult to procure evidence located in foreign countries.<sup>29</sup> Litigants in United States courts, for example, had to, essentially, rely solely on principles of comity and international goodwill when seeking such evidence.<sup>30</sup> To help make things easier, the Hague Convention provides three agreed-upon methods for obtaining evidence located in another country: through (1) “letters of request,” (2) diplomatic officers, or (3) consular agents and commissioners.<sup>31</sup> Because letters of request are the most frequent discovery mechanism used under the Hague Convention, for this Comment’s purposes, only letters of request will be discussed.<sup>32</sup>

A litigant is most likely to use the Hague Convention after a failed attempt to procure evidence through the Federal Rules of Civil Procedure or because the court lacks personal jurisdiction.<sup>33</sup> Generally, using a letter of request to obtain evidence located in a foreign country, though a fairly straightforward and manageable process, is more time-consuming than using Federal Rules of Procedure.<sup>34</sup>

To obtain evidence pursuant to a letter of request, a party must transmit the letter through a central authority in the country where the evidence is located.<sup>35</sup> The letter must originate from either the judiciary or the party seeking the evidence.<sup>36</sup> Once the designated central authority receives the letter, it must then send the letter to the authority (generally the judiciary) chosen by the state in which the evidence is located to effectuate the

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<sup>29</sup> See Harold G. Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT’L L. 239, 244 (1986).

<sup>30</sup> *Id.*

<sup>31</sup> See The Hague Convention, *supra* note 11, at 2557–76; 28 U.S.C. § 1781 note 8 (West, Westlaw through P.L. 114-114 (excluding P.L. 114-94, 114-95 and 114-113)).

<sup>32</sup> S & S Screw Mach. Co. v. Cosa Corp., 647 F. Supp. 600, 612 n.22 (M.D. Tenn. 1986); Marguerite E. Trossevin, Comment, *Extraterritorial Discovery Under the Hague Evidence Convention*, 31 VILL. L. REV. 253, 265 (1986); 6 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 28.12[4] (3d ed. 2015).

<sup>33</sup> 71 AM. JUR. *Trials* § 1 (1999).

<sup>34</sup> *Id.*

<sup>35</sup> See The Hague Convention, *supra* note 11, art. 2, at 2558. For example, the central authority of the United States through which letters of request must be transmitted is the Department of Justice. See *id.*

<sup>36</sup> See *id.*

letter.<sup>37</sup> The Convention requires that letters of request be in the language of the country from which evidence is sought.<sup>38</sup> However, unless an objection by reservation is made, a contracting country to the Convention must accept a letter of request in French or English.<sup>39</sup> Once accepted, the executing country will apply its own laws governing the execution of letters of request.<sup>40</sup> However, if the party seeking the evidence includes with the letter a request that a special procedure be followed, and so long as such a procedure is not incompatible with the law of the executing country or is impossible of performance, then such a procedure must be followed.<sup>41</sup>

An executing country may be excused, however, from giving the evidence sought if certain privileges or duties are implicated (*e.g.*, attorney-client or doctor-patient privilege in the United States if the United States is the executing country).<sup>42</sup> Further, as Article 23 of the Convention provides, the country in which the evidence is located has the right, when first adopting the Convention, to “declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.”<sup>43</sup> Most of the Contracting States have made such a declaration.<sup>44</sup> As a result, the use of letters of request for pretrial discovery purposes has been severely limited.<sup>45</sup>

## 2. The Hague Convention: Practical Concerns

Whereas common law jurisdictions entrust evidence gathering to counsel without oppressive oversight, civil law jurisdictions entrust evidence gathering solely to the judiciary.<sup>46</sup> As mentioned earlier, the Hague Convention was enacted for the purpose of better facilitating the transmission of evidence between these types of jurisdictions who use

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<sup>37</sup> *See id.*

<sup>38</sup> *See id.* art. 4, at 2559.

<sup>39</sup> *See id.*

<sup>40</sup> *See id.* art. 9, at 2561.

<sup>41</sup> *See id.*

<sup>42</sup> *See id.* art. 11, at 2562.

<sup>43</sup> *Id.* art. 23, at 2568 (Twenty-three countries have made an Article 23 declaration, including The United Kingdom, France, Germany, China, and Mexico.).

<sup>44</sup> Teresa Snider & Mark A. Schwartz, *Non-Party Discovery Under the Hague Convention—The Fine Print*, CORP. COUNSEL (ABA Section of Litigation), Apr. 2003, at A4.

<sup>45</sup> *Id.*

<sup>46</sup> Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903, 913 (1989).

different evidence gathering procedures.<sup>47</sup> But how effective is it? Is the Convention actually more burdensome than it is facilitative?

Courts allowing parties seeking discovery within the United States to proceed under the Federal Rules of Civil Procedure instead of requiring resort to the Hague Convention have relied on several beliefs: (1) discovery under the Convention produces unduly limited amounts of material; (2) discovery under the Convention is slow [sometimes taking between six and twelve months, depending on the country]<sup>48</sup>; (3) foreign nations typically do not have significant interests in limiting U.S. discovery; and (4) U.S. interests in prompt, complete pretrial discovery are of overriding importance.<sup>49</sup> Lower courts across the United States generally require the use of the Convention when discovery is sought from foreign parties not subject to party discovery or subpoenas.<sup>50</sup> For example, one New York court, in requiring resort to the Convention when seeking documents from a foreign, nonparty witness, explained, “[w]hen discovery is sought from a non-party in a foreign jurisdiction, application of the Hague Convention . . . is virtually compulsory.”<sup>51</sup>

*B. The Federal Rules of Civil Procedure: Rule 45 Subpoena Duces Tecum and What Constitutes “Control”*

The other option U.S. litigants have to obtain evidence from foreign entities who are nonparties to the suit is the use of a subpoena *duces tecum* pursuant to Rule 45 of the Federal Rules of Civil Procedure.<sup>52</sup> A Rule 45 subpoena *duces tecum* commands a nonparty to “produce designated documents, electronically stored information, or tangible things *in that person’s possession, custody, or control*.”<sup>53</sup> In other words, if the nonparty is properly subject to a Rule 45 subpoena, the nonparty “is required to produce materials in that person’s control whether or not the materials are located within the district or within the territory within which the subpoena

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<sup>47</sup> *Id.* at 913–14.

<sup>48</sup> 6 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 28.12[1] (3d ed. 2015).

<sup>49</sup> Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on its Role in U.S. Civil Procedure*, LAW & CONTEMP. PROBS., Summer 1994, at 77, 86.

<sup>50</sup> *Id.* at 88.

<sup>51</sup> *Orlich v. Helm Bros., Inc.*, 560 N.Y.S.2d 10, 14 (N.Y. App. Div. 1990).

<sup>52</sup> See FED. R. CIV. P. 45.

<sup>53</sup> *Id.* 45(a)(1)(A)(iii) (emphasis added).



can be served.”<sup>54</sup> Rule 45 is the only method of discovery under the Federal Rules of Civil Procedure by which evidence may be directly obtained from nonparties.<sup>55</sup>

Generally, a nonparty witness under Rule 45 is subject to the same scope of discovery as a party is subject to under Rule 34.<sup>56</sup> Under Rule 34 and, thus, under Rule 45, actual possession or ownership of the documents sought is not required.<sup>57</sup> Therefore, the concept of control is critical and is a frequently litigated topic with no uniform standard applied in U.S. federal courts. When faced with the question of whether a U.S. corporation controls documents in the possession of a foreign affiliate, U.S. courts have generally at least purported to apply one of two competing tests: the “legal right” test or the “practical ability” test.<sup>58</sup>

For the purpose of this discussion, it is important to distinguish a Rule 45 subpoena to a nonparty to produce documents and a Rule 34 request to a litigation party to produce documents. Even though Rule 34 and Rule 45 use the same “possession, custody, or control” language, this does not mean that the same standards should be used in both the Rule 34 and Rule 45 contexts. Rule 34 provides that discovery may be sought of documents and things that are in the “possession, custody, or control” of a party to the litigation.<sup>59</sup> Rule 45, on the other hand, can be used to subpoena both parties and nonparties to produce documents that are in their “possession, custody, or control.”<sup>60</sup>

Why does this party/nonparty distinction matter? A non-litigant recipient of a third-party subpoena usually has no direct interest in the

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<sup>54</sup>FED. R. CIV. P. 45(a)(2) advisory committee’s note to 1991 amendment.

<sup>55</sup>JAMES M. WAGSTAFFE, RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL ¶ 11:2220 (National ed. 2015).

<sup>56</sup>See FED. R. CIV. P. 45(a)(2) advisory committee’s note to 1991 amendment (“Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person’s control whether or not the materials are located within the district or within the territory within which the subpoena can be served. *The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34.*”) (emphasis added).

<sup>57</sup>*In re Domestic Air Transp. Antitrust Litig.*, 142 F.R.D. 354, 356 (N.D. Ga. 1992) (“A party need not have actual possession of the documents to be deemed in control of them.”); *Haseotes v. Abacab Int’l Computers, Inc.*, 120 F.R.D. 12, 15 (D. Mass. 1988) (“Legal ownership is not the determining factor.”).

<sup>58</sup>See, e.g., *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999).

<sup>59</sup>FED. R. CIV. P. 34(a)(1).

<sup>60</sup>See FED. R. CIV. P. 45(a) advisory committee’s note to 1991 amendment.

underlying litigation. Consequently, the potential motive of a party litigant to withhold documents to gain an advantage in the litigation is usually absent. As will be discussed later, courts tend to disregard the distinction between Rule 34 and Rule 45 when determining whether a party has “possession, custody, or control” of documents sought for discovery and/or trial.<sup>61</sup> In fact, most courts have first adopted a standard in the Rule 34 context and then subsequently merely applied this same standard in the Rule 45 context.<sup>62</sup> Most of the confusion among federal district courts is created when the courts first apply the practical ability test in the Rule 34 context (which is generally acceptable) and then blindly apply it in the Rule 45 context when nonparties are involved. As will be explained, a stricter test (i.e., the legal right test) needs to be used in Rule 45 cases.<sup>63</sup>

### 1. The Legal Right Test

The legal right test, as used to determine whether a U.S. company “controls” documents in the possession of a foreign affiliate, is a narrower test than the competing practical ability test. The legal right test defines control as “the legal right to obtain documents requested upon demand.”<sup>64</sup> In other words, it asks whether the subpoenaed party has the right to legally compel the affiliated entity to provide it with the requested documents.<sup>65</sup> This is a highly fact-specific inquiry that often requires an alter-ego analysis of the relationship between the related business entities.<sup>66</sup>

Today, the United States Courts of Appeals in the Third,<sup>67</sup> Sixth,<sup>68</sup> Seventh,<sup>69</sup> Ninth,<sup>70</sup> Eleventh,<sup>71</sup> and Federal<sup>72</sup> Circuit have adopted the legal

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<sup>61</sup> See *infra* Part III.

<sup>62</sup> See, e.g., *In re Citric Acid*, 191 F.3d at 1107.

<sup>63</sup> See *infra* Part V.

<sup>64</sup> *United States v. Int’l Union of Petroleum & Indus. Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir. 1989); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984).

<sup>65</sup> *In re Citric Acid*, 191 F.3d at 1107.

<sup>66</sup> See *Gerling Int’l Ins. Co. v. Comm’r*, 839 F.2d 131, 140–41 (3d Cir. 1988) (Rule 34 context).

<sup>67</sup> *Id.*

<sup>68</sup> See *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995) (Rule 34 context).

<sup>69</sup> See *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426 (7th Cir. 1993) (Rule 34 context).

<sup>70</sup> See *In re Citric Acid*, 191 F.3d at 1107 (Rule 45 context).

<sup>71</sup> See *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) (Rule 34 context).

right test. The Ninth Circuit Court of Appeals provided perhaps the clearest rationale behind the legal right test when it said “[o]rdering a party to produce documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents.”<sup>73</sup> It is important to note that the Seventh, Ninth, and Federal Circuit Courts of Appeals all cited the Third Circuit’s decision in *Gerling International Insurance v. Commissioner* when they adopted the legal right test for their respective circuits.<sup>74</sup> In contrast, the practical ability test has not been adopted by any United States Circuit Court of Appeals.<sup>75</sup> Further, the cases applying the practical ability test are both geographically and philosophically scattered.<sup>76</sup>

Courts applying the strict legal right test will generally find control to exist when one of two situations exist: (1) when the party has the legal right to obtain documents requested on demand; or (2) when the two corporate entities are alter egos, thus warranting piercing the corporate veil. As will be discussed later, in *Gerling*, the Third Circuit, while purportedly adopting the legal right test, in fact expanded it dramatically by adding a third situation specifically in the *Rule 34* context where control may be found to exist: “where the subsidiary was an agent of the parent in the transaction giving rise to the suit and in litigating the suit on the parent’s behalf.”<sup>77</sup> This additional factor, however, is actually used in the practical ability test, as courts will look to “(1) the corporate structure of the party and the nonparties; (2) the nonparties’ connection to the transaction at issue in the

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<sup>72</sup> See *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1229–30 (Fed. Cir. 1996) (Rule 34 context).

<sup>73</sup> *In re Citric Acid*, 191 F.3d at 1108.

<sup>74</sup> See *Chaveriat*, 11 F.3d at 1426 (Rule 34 context); *In re Citric Acid*, 191 F.3d at 1108 (Rule 45 context); *Cochran*, 102 F.3d at 1229 (Rule 34 context).

<sup>75</sup> The practical ability test was potentially implicitly adopted—though with a caveat—by the Second Circuit. See *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007).

<sup>76</sup> See, e.g., *Shell Global Sols. (US) Inc. v. RMS Eng’g, Inc.*, No. 4:09-CV-3778, 2011 WL 3418396, at \*2 (S.D. Tex. Aug. 3, 2011) (Rule 34 context); *Halliburton Energy Servs., Inc. v. M-1, LLC*, No. 1:06MC001, 2006 WL 3085622, at \*1 (S.D. Ohio Oct. 27, 2006) (Rule 45 context); *Dietrich v. Bauer*, No. 95 Civ. 7051(RWS), 2000 WL 1171132, at \*2–3 (S.D.N.Y. Aug. 16, 2000), *on reconsideration in part*, 198 F.R.D. 397 (S.D.N.Y. 2001) (Rule 45 context); *Addamax Corp. v. Open Software Found., Inc.*, 148 F.R.D. 462, 467–68 (D. Mass. 1993) (Rule 34 context).

<sup>77</sup> *Gerling Int’l Ins. Co. v. Comm’r*, 839 F.2d 131, 140 (3d Cir. 1988).

litigation; and (3) the degree to which the nonparties benefit from the outcome of the litigation” when determining whether it applies.<sup>78</sup>

While using the phrase “legal right test” in *Gerling*, the Third Circuit actually applied more of a hybrid test,<sup>79</sup> thus spawning decades of confused rulings by federal courts around the country. This is precisely why a distinction should exist between how control is determined with respect to Rule 45 subpoenas to third-party non-litigants, and how it is determined with respect to Rule 34 production requests to party litigants. Especially when dealing with nonparty corporate entities, courts need to be more sensitive to these third parties’ legitimate concerns about corporate formalities and the burdens and intrusiveness involved in requests for sensitive documents. A stricter test for control (i.e., the legal right test) needs to be adopted.

## 2. The Practical Ability Test

The practical ability test is basically an equitable standard courts have concocted on a case-by-case basis to ease the burden on parties seeking documents in the possession of foreign corporations. As noted earlier, while no United States Circuit Court of Appeals has adopted the practical ability test for defining control, several district courts scattered across the United States have applied this broader test. Notably, several courts within the Second Circuit have applied the practical ability test.<sup>80</sup> These courts define control for Rule 45 purposes as “the legal right, authority, *or practical ability* to obtain the materials sought upon demand.”<sup>81</sup> In other words, under the practical ability test, if the nonparty has the practical ability to obtain the documents in another’s possession, regardless of its legal entitlement to the documents, it must produce the documents.<sup>82</sup> Courts applying the practical ability test will generally order document production if they find that a company’s ability to demand and have access to documents in the normal

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<sup>78</sup> *Costa v. Kerzner Int’l Resorts, Inc.*, 277 F.R.D. 468, 471 (S.D. Fla. 2011) (citing *Steele Software Sys. Corp. v. DataQuick Info. Sys., Inc.*, 237 F.R.D. 561, 564 (D. Md. 2006)).

<sup>79</sup> *Gerling*, 839 F.2d at 140.

<sup>80</sup> *Dietrich*, 2000 WL 1171132, at \*2–3; *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 471–72 (S.D.N.Y. 2000).

<sup>81</sup> *Dietrich*, 2000 WL 1171132, at \*2–3 (emphasis added); *Credit Bancorp*, 194 F.R.D. at 471–72.

<sup>82</sup> 8B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2210 n.4 (3d ed. 1998).

course of business gives rise to the presumption that such documents are in the litigating corporation's control.<sup>83</sup>

But how do courts determine whether this “ability” exists? To put it simply, there is no uniform method of applying the practical ability test. The case law is so jumbled that it provides little real guidance. Courts have considered a number of factors in applying the test, such as: (1) commonality of ownership; (2) exchange or intermingling of directors; (3) exchange of or access to documents in the ordinary course of business; (4) the nonparty's connection to the transaction at issue; (5) any benefit or involvement by the nonparty corporation in the litigation; (6) a subsidiary's marketing and/or servicing of the parent company's products; and (7) the financial relationship between the parties.<sup>84</sup> Courts are inconsistent, however, in which factors they apply. Some courts purporting to apply the practical ability test focus on the elements that are comparable to the factors in an alter ego analysis, thereby ultimately applying what is essentially the legal right test.<sup>85</sup> Other courts may not apply any alter ego-related factors but apply the factors that address the parent's and subsidiary's relationship to the litigation.<sup>86</sup> There is no universal “test” to apply when courts purportedly apply the practical ability test.<sup>87</sup>

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<sup>83</sup> See, e.g., *Cooper Indus., Inc. v. British Aerospace, Inc.* 102 F.R.D. 918, 919–20 (S.D.N.Y. 1984).

<sup>84</sup> See *Shell Global Sols. (US) Inc. v. RMS Eng'g, Inc.*, No. 4:09-CV-3778, 2011 WL 3418396, at \*2 (S.D. Tex. Aug. 3, 2011); *LG Display Co. v. Chi Mei Optoelectronics Corp.*, No. 08CV2408-L (POR), 2009 WL 223585, at \*3 (S.D. Cal. Jan. 28, 2009); *Halliburton Energy Servs., Inc. v. M-1, LLC*, No. 1:06MC001, 2006 WL 3085622, at \*1 (S.D. Ohio Oct. 27, 2006).

<sup>85</sup> *Dietrich*, 2000 WL 1171132, at \*3 (“In the context of a parent-subsidary relationship, it has been observed that the factors which the court should consider include: the degree of ownership and control exercised by the parent over its subsidiary, a showing that the two entities operated as one, demonstrated access to documents in the ordinary course of business, and an agency relationship.”).

<sup>86</sup> *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 130 (D. Del. 1986) (“Three factors are of paramount importance in ascertaining this relationship: first, the corporate structure encompassing the different parties; second, the non-party's connection to the transaction at issue; third, to what degree will the non-party receive the benefit of any award in the case.”).

<sup>87</sup> *In re Subpoena Duces Tecum to Ingeteam, Inc.*, No. 11–MISC–36, 2011 WL 3608407, at \*1 (E.D. Wis. Aug. 16, 2011) (using five factors to measure “whether a subsidiary has ‘control’ over documents held by its foreign parent corporation”); *In re Subpoena to Huawei Techs. Co.*, 720 F. Supp. 2d 969, 977 (N.D. Ill. 2010) (using seven factors to measure “the closeness of the relationship between the parties”); *Stella v. LVMH Perfumes & Cosmetics USA, Inc.*, No. 07-CV-6509, 2009 WL 780890, at \*2 (N.D. Ill. Mar. 23, 2009) (using four factors to measure “[t]he

Further, no guidance is provided as to how many factors need to be met or which factors should carry more weight when applying the practical ability test. The fundamental question, however, often boils down to whether the specific documents sought are documents the subpoenaed company requests and routinely obtains from its foreign affiliate in the ordinary course of its business.<sup>88</sup> Ironically, this core inquiry comes directly from the specific Rule 34 standard, which the Third Circuit added to its hybrid test in *Gerling*.<sup>89</sup>

It should be noted that some courts, particularly within the Tenth Circuit, have explicitly rejected this test for determining control.<sup>90</sup> For example, in a Rule 34 case, the U.S. District Court for the District of Kansas held that the approach of ordering the production of documents “that a party ‘has the practical ability to obtain from another, irrespective of legal entitlement to the documents’ . . . is not supported by law” and, in fact, conflicts with the Federal Rules of Civil Procedure.<sup>91</sup> The U.S. District Court for the District of Colorado put it another way in a Rule 45 case, saying “even under the most expansive interpretation of ‘control’ [the practical ability test], the ‘practical ability’ to demand production *must be accompanied by a similar ability to enforce compliance with that demand.*”<sup>92</sup>

## II. CASE LAW WITHIN THE FIFTH CIRCUIT

Authority within the Fifth Circuit discussing this topic is sparse.<sup>93</sup> The only time the Fifth Circuit Court of Appeals has discussed Rules 34 and 45,

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degree of control, [which] is determined by the ‘closeness of the relationship between the entities’”).

<sup>88</sup> *Linde v. Arab Bank, PLC*, 262 F.R.D. 136, 142 (E.D.N.Y. 2009) (“There is no evidence to indicate that *the documents sought* ‘flow[ed] freely’ between subsidiary and parent.”) (emphasis added); *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 443 (D.N.J. 1991) (“The proper inquiry here is whether *the documents sought* are considered records which [the subsidiary] is apt to request and obtain in its normal course of business.”) (emphasis added).

<sup>89</sup> *Gerling Int’l Ins. Co. v. Comm’r*, 839 F.2d 131, 140 (3d Cir. 1988).

<sup>90</sup> *See, e.g., Klesch & Co. v. Liberty Media Corp.*, 217 F.R.D. 517, 520 (D. Colo. 2003); *Am. Maplan Corp. v. Heilmayr*, 203 F.R.D. 499, 502 (D. Kan. 2001).

<sup>91</sup> *Am. Maplan*, 203 F.R.D. at 502.

<sup>92</sup> *Klesch*, 217 F.R.D. at 520 (emphasis added).

<sup>93</sup> *Goh v. Baldor Elec. Co.*, No. 3:98-MC-064-T, 1999 WL 20943, at \*2 (N.D. Tex. Jan. 13, 1999) (“Neither the Federal Rules of Civil Procedure nor the Fifth Circuit offer clear, definitive guidance as to the appropriate definition of control.”).

it did not discuss what constitutes control.<sup>94</sup> The court, citing the Advisory Committee notes to Rule 45, only reasoned that discovery through a subpoena *duces tecum* is intended to be co-extensive with Rule 34.<sup>95</sup> This is hardly guidance, however, as the Court of Appeals said this while discussing the 1970 amendments to Rule 45 which simply expanded the rule’s scope and the procedures for using it.<sup>96</sup> The court did not mention “control” at all.<sup>97</sup> So, while the Fifth Circuit Court of Appeals has not adopted either test and does not provide clear guidance as to the appropriate definition of control, courts within the Fifth Circuit have generally been noncommittal and have used a case-by-case analysis to determine whether control exists.

#### A. *The Northern District of Texas*

In *Goh v. Baldor Electric Co.*, the only case in which the U.S. District Court for the Northern District of Texas has addressed the issue, the court stated that it “refrains from adopting a particular definition of control . . . .”<sup>98</sup> The court instead determined that it would use a case-by-case, fact-sensitive approach, focusing on “the nature of the relationship between the party and nonparty corporation.”<sup>99</sup> In this Rule 45 case, the Dallas office of Ernst & Young received a Rule 45 subpoena *duces tecum* to produce documents in the possession of Ernst & Young Singapore and Ernst & Young Thailand.<sup>100</sup> Ernst & Young Dallas had provided a valuation opinion of the plaintiff’s interest in the defendant’s Singapore branch.<sup>101</sup> The plaintiffs subpoenaed Ernst & Young Dallas to produce documents relating to audits Ernst & Young Singapore and Ernst & Young Thailand had performed.<sup>102</sup> All three were members of Ernst and Young International, but each were completely separate legal entities.<sup>103</sup>

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<sup>94</sup> *Kendrick v. Heckler*, 778 F.2d 253, 257–58 (5th Cir. 1985).

<sup>95</sup> *Id.*; see also *Klesch*, 217 F.R.D. at 520 (discussing *Kendrick*).

<sup>96</sup> *Kendrick*, 778 F.2d at 257–58.

<sup>97</sup> *Id.*

<sup>98</sup> 1999 WL 20943, at \*2.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at \*1.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at \*3.

The court ultimately determined that Ernst & Young Dallas should not be required to produce documents in the possession of the foreign affiliates.<sup>104</sup> Notably, though engaging in a rather scattered analysis and not explicitly referencing the legal right test, the court essentially applied the legal right test. The court held that because Ernst & Young Singapore and Ernst & Young Thailand refused to provide the documents in question to Ernst & Young Dallas upon request, it necessarily followed that the Ernst & Young Dallas did not have control over the documents as it did not have the right to order the other two affiliates to produce the documents.<sup>105</sup>

### *B. The Southern District of Texas*

The Southern District has also decided the issue of what constitutes control, once in the Rule 45 context and once in the Rule 34 context. In 2010, the Southern District declined to use the practical ability test and, instead, essentially applied the legal right test.<sup>106</sup> In *WesternGeco LLC v. Ion Geophysical Co.*, a Rule 45 case, the court relied on a Fifth Circuit Court of Appeals case in which the Fifth Circuit concluded that mere access to documents in the possession of a foreign affiliate was insufficient to constitute control.<sup>107</sup> The court ultimately held that the domestic company did not control the documents in the possession of its foreign affiliate and, therefore, did not have to produce.<sup>108</sup> In *WesternGeco*, the nonparty subsidiary requested access to the documents held by its foreign parent, which the foreign parent refused.<sup>109</sup> The plaintiff seeking the documents argued that the nonparty domestic subsidiary and its foreign parent “operated as a single, world-wide integrated company.”<sup>110</sup> Despite this argument, the court held that the plaintiff did not establish that the nonparty subsidiary had control over the documents “in the sense that the Fifth Circuit appears to contemplate because . . . access to documents is not sufficient.”<sup>111</sup>

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<sup>104</sup> *Id.* at \*3–4.

<sup>105</sup> *Id.* at \*3.

<sup>106</sup> See *WesternGeco LLC v. Ion Geophysical Corp.*, No. H–09–1827, 2010 WL 2266524, at \*1–2 (S.D. Tex. June 2, 2010).

<sup>107</sup> *Id.* at \*1–2 (relying on *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 821 (5th Cir. 2004)).

<sup>108</sup> *Id.* at \*2–3.

<sup>109</sup> *Id.* at \*2.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at \*3.



In 2011, the Southern District again decided the issue of what constitutes control, this time in the Rule 34 context.<sup>112</sup> In *Shell Global Solutions (US) Inc. v. RMS Engineering, Inc.*, the defendant requested that the plaintiff, a U.S. subsidiary of Royal Dutch Shell PLC, a Dutch incorporated corporation, produce documents in the possession of its nonparty, foreign affiliate who was also a subsidiary of Royal Dutch Shell PLC.<sup>113</sup> The court applied the practical ability test to determine whether control existed, going through a factor-by-factor analysis.<sup>114</sup> The court determined that the two corporations, generally, exchanged documents and routinely communicated about certain aspects of the business.<sup>115</sup> However, the court ultimately held that because the defendant did not provide sufficient evidence that the two corporations, in the ordinary course of business, exchanged the specific types of documents requested, the plaintiff did not control the documents and would not be ordered to produce them.<sup>116</sup>

It is important to note that, in these two cases, the U.S. District Court for the Southern District of Texas essentially applied the legal right test in the Rule 45 context and the practical ability test (while citing *Gerling*) in the Rule 34 context.<sup>117</sup> If anything can be gleaned from these two cases and the case out of the Northern District of Texas, it is that district courts within the Fifth Circuit, regardless of what they say, tend to apply a stricter test for determining control in the Rule 45 context than they do in the Rule 34 context.

### *C. Louisiana District Courts*

A handful of district courts in Louisiana have addressed the issue of what constitutes control in the corporate context, all in Rule 34 cases.<sup>118</sup> In each of these cases, the district courts applied the practical ability test, but

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<sup>112</sup>*Shell Global Sols. (US) Inc. v. RMS Eng'g, Inc.*, No. 4:09-cv-3778, 2011 WL 3418396, at \*2 (S.D. Tex. Aug. 3, 2011).

<sup>113</sup>*Id.* at \*1.

<sup>114</sup>*Id.* at \*2–5.

<sup>115</sup>*Id.* at \*6.

<sup>116</sup>*Id.*

<sup>117</sup>*See* *WesternGeco LLC v. Ion Geophysical Co.*, No. H-09-1827, 2010 WL 2266524, at \*1–2 (S.D. Tex. June 2, 2010); *Shell Global Sols. (US) Inc.*, 2011 WL 3418396, at \*2.

<sup>118</sup>*S. Filter Media, LLC v. Halter*, No. 13-116-JJB-RLB, 2014 WL 4278788, at \*5 (M.D. La. Aug. 29, 2014); *Dugas v. Mercedes-Benz USA, LLC*, No. 6:12-CV-02885, 2014 WL 3848110, at \*3–4 (W.D. La. Aug. 5, 2014); *Oy v. Sikorsky Aircraft Corp.*, No. 08-3185, 2008 WL 2509821, at \*1–2 (E.D. La. June 18, 2008).

used different factors in making their determinations of whether control existed. In *S. Filter Media, LLC v. Halter* and *Dugas v. Mercedes-Benz USA*, the U.S. District Courts for the Middle District of Louisiana and the Western District of Louisiana, respectively, applied five of the seven factors listed earlier: (1) commonality of ownership; (2) exchange or intermingling of directors, officers or employees of the two corporations; (3) exchange of documents between the corporations in the ordinary course of business; (4) any benefit or involvement of the nonparty corporation in the transaction; and (5) involvement of the nonparty corporation in the litigation.<sup>119</sup> The courts ultimately reached different holdings.<sup>120</sup> In *Oy*, however, the U.S. District Court for the Eastern District of Louisiana only looked to the nonparty's relationship to the transaction, ultimately holding that the party did not have control of documents held by its nonparty affiliate.<sup>121</sup> This perfectly illustrates the inconsistent nature of the practical ability test.

### III. FEDERAL CASE LAW OUTSIDE OF THE FIFTH CIRCUIT

Because case law within the Fifth Circuit addressing what constitutes control is so sparse, it is prudent to analyze how other federal circuits have handled the issue. As mentioned earlier, the United States Courts of Appeals in the Third<sup>122</sup>, Sixth<sup>123</sup>, Seventh<sup>124</sup>, Ninth<sup>125</sup>, Eleventh<sup>126</sup>, and Federal<sup>127</sup> Circuit have adopted the legal right test. Couple this with the fact that no U.S. Court of Appeals has adopted the practical ability test, and one could assume that federal case law is fairly definitive and straight forward. This, however, could not be further from the truth.

To say that the current state of federal law defining what constitutes "control" in the Rule 45 context is a mess would be a vast understatement.

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<sup>119</sup> *S. Filter Media, LLC*, 2014 WL 4278788, at \*5; *Dugas*, 2014 WL 3848110, at \*3.

<sup>120</sup> *S. Filter Media, LLC*, 2014 WL 4278788, at \*6 (refusing to compel document production); *Dugas*, 2014 WL 3848110, at \*5 (granting motion to compel document production).

<sup>121</sup> 2008 WL 2509821, at \*2.

<sup>122</sup> See *Gerling Int'l Ins. v. Comm'r*, 839 F.2d 131, 140–41 (3d Cir. 1988) (Rule 34 context).

<sup>123</sup> See *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995) (Rule 34 context).

<sup>124</sup> See *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426 (7th Cir. 1993) (Rule 34 context).

<sup>125</sup> See *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999) (Rule 45 context).

<sup>126</sup> See *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) (Rule 34 context).

<sup>127</sup> See *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1229 (Fed. Cir. 1996) (Rule 34 context).

This is largely due to courts’ insistence on treating Rule 34 cases and Rule 45 cases identically. In fact, many courts look to cases applying the “possession, custody, or control” language in Rule 34, governing document requests between parties to the litigation.<sup>128</sup> Courts rationalize their approach by pointing out that Rule 34 and Rule 45 include the identical phrase “possession, custody, or control” and argue that the Federal Rules of Civil Procedure are read *in pari materia*, so cases implicating either rule are relevant to the courts’ disposition.<sup>129</sup> The Second Circuit Court of Appeals went so far as to say that the standard for defining control is the same, regardless of whether documents are sought from a nonparty under Rule 45 or from a party under Rule 34.<sup>130</sup> This is too broad of a generalization, however. While Rules 34 and 45 should be construed *in pari materia* in the rare instances in which a subpoena *duces tecum* is directed to a party (similar to requests for production from parties in Rule 34 cases), they should not be construed *in pari materia* when the subpoena *duces tecum*, as in the vast majority of situations, is directed to a nonparty.<sup>131</sup>

Several courts have taken the position that a distinction should exist between how control is determined in Rule 34 and Rule 45 cases. One such court is the Federal District Court in Delaware, a court that is regularly confronted with issues of corporate law.<sup>132</sup> Applying the Third Circuit Court of Appeals’s definition of control in *Gerling* in a Rule 45 nonparty subpoena case, the District of Delaware distinguished practical ability case

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<sup>128</sup> See *Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 147 n.2 (S.D.N.Y. 2011), *aff’d*, No. 10-CIV-9471-WHP, 2011 WL 11562419 (S.D.N.Y. 2011 Nov. 14, 2011) (“The scope of the two rules is coextensive . . . at least with respect to documentary discovery.”) (quoting *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 471 n.4 (S.D.N.Y. 2000)); *In re Subpoena to Huawei Techs. Co.*, 720 F. Supp. 2d 969, 976 n.10 (N.D. Ill. 2010); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 236 F.R.D. 177, 180 n.3 (S.D.N.Y. 2006); *In re Subpoena Duces Tecum Served on Duke Energy Corp.*, No. 3:05-MC-201, 2005 WL 2674938, at \*4 (W.D.N.C. Oct. 18, 2005).

<sup>129</sup> See, e.g., *Addamax Corp. v. Open Software Found., Inc.*, 148 F.R.D. 462, 468 (D. Mass. 1993).

<sup>130</sup> See *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 21 (2d Cir. 1998).

<sup>131</sup> *Dart Indus., Inc. v. Liquid Nitrogen Processing Corp. of Cal.*, 50 F.R.D. 286, 290 (D. Del. 1970).

<sup>132</sup> See *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 233 F.R.D. 143, 146 (D. Del. 2005); see also John L. Reed & Ashley R. Altschuler, *Delaware Corporate Law and Litigation: What Happened in 2014 and What it Means for You in 2015*, DLA PIPER (last visited Mar. 9, 2016), <https://www.dlapiper.com/~media/Files/Insights/Publications/2015/01/FINAL20142015AnnualDelawareCorporateLitigationReview.pdf> (discussing Delaware’s prominence in the area of corporate law).

authority, pointing out that those cases concern Rule 34 production requests, not Rule 45 third-party subpoenas.<sup>133</sup> The court discussed how courts may construe control more broadly under Rule 34 than Rule 45 because of the court's inherent power over the litigants as opposed to nonparties.<sup>134</sup>

### A. *The Confusion in the Circuits*

To help illustrate the unsettled nature of the law, it will be helpful to briefly discuss a few of the U.S. Court of Appeals cases adopting the legal right test and how these cases have affected district courts within, as well as outside, their circuits. In 1984, the Eleventh Circuit was the first U.S. Court of Appeals to address the issue, adopting the legal right test in its decision in *Searock v. Stripling*.<sup>135</sup> Next, in 1988, the Third Circuit adopted the legal right test in its decision in *Gerling*.<sup>136</sup> However, the court in *Gerling* muddied the waters when it added a third instance—in addition to the legal right to compel and status as an alter ego—when control can be found specifically in *Rule 34* cases.<sup>137</sup> Finally, in the most recent case in which a Court of Appeals has addressed the issue, the Ninth Circuit adopted the legal right test in another *Rule 34* case.<sup>138</sup> The Ninth Circuit provided perhaps the clearest rationale for adopting the test, but also cited with approval the Third Circuit's definition of control in *Gerling*.<sup>139</sup>

#### 1. Third Circuit: Muddying the Waters

When it adopted the legal right test in *Gerling*, the Third Circuit Court of Appeals listed three situations in the *Rule 34* context where control has been found where the litigating corporation is a subsidiary of a nonparty parent corporation who possesses the requested documents: (1) when the subsidiary can obtain the documents from its parent upon demand; (2) where the alter ego doctrine warrants piercing the corporate veil; and (3) “where the subsidiary was an agent of the parent in the transaction giving

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<sup>133</sup> *Power Integrations*, 233 F.R.D. at 146.

<sup>134</sup> *See id.*

<sup>135</sup> 736 F.2d 650, 653 (11th Cir. 1984).

<sup>136</sup> *Gerling Int'l Ins. v. Comm'r*, 839 F.2d 131, 140–41 (3d Cir. 1988).

<sup>137</sup> *See id.* at 140–41.

<sup>138</sup> *In re Citric Acid Litig.*, 191 F.3d 1090, 1107–08 (9th Cir. 1999).

<sup>139</sup> *See id.* at 1108.

rise to the suit and in litigating the suit on the parent’s behalf.”<sup>140</sup> The court explained this third situation saying, “[w]here the relationship is thus such that the agent-subsiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in the litigation, the courts will not permit the agent-subsiary to deny control for purposes of discovery by an opposing party.”<sup>141</sup> While purportedly adopting the legal right test, the court essentially applied more of a hybrid test.<sup>142</sup> Notably, the Third Circuit cited the U.S. District Court of Delaware’s decision in *Afros S.P.A. v. Krauss-Maffei Corp.*, a Rule 34 case in which the court did a practical ability analysis, as authority for adding this third situation to the legal right test.<sup>143</sup>

As mentioned earlier, the first two of these situations are basic aspects of the legal right test.<sup>144</sup> However, the third situation is essentially a practical ability factor. Ironically, both *Gerling* and *Afros S.P.A.*, have been cited by courts applying the practical ability test.<sup>145</sup> The Third Circuit’s reference to the third factor has caused unnecessary confusion for subsequent courts considering Rule 45 subpoenas because the third factor has unique applicability to Rule 34 cases, and little, if any, applicability to Rule 45 subpoenas. This is because, in most Rule 45 cases, a party to the litigation issues a subpoena to a nonparty to produce documents in the possession of the subpoenaed corporation’s nonparty foreign affiliate, but the nonparties do not have a direct interest in the underlying litigation. The only time the third *Gerling* situation can apply to Rule 45 subpoenas is if the subpoenas are used against parties to the litigation, an uncommon practice. Despite this, courts have still attempted to stretch the application

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<sup>140</sup> *Gerling*, 839 F.2d at 140.

<sup>141</sup> *Id.* at 141.

<sup>142</sup> *See id.* at 140–41.

<sup>143</sup> *Id.*

<sup>144</sup> *See id.* at 140.

<sup>145</sup> *See, e.g., In re Subpoena to Huawei Tech. Co.*, 720 F. Supp. 2d 969, 977 (N.D. Ill. 2010) (citing *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127 (D. Del. 1986)); *Halliburton Energy Servs., Inc. v. M-I, LLC*, No. 1:06MC001, 2006 WL 3085622, at \*1 (S.D. Ohio Oct. 27, 2006) (citing *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127 (D. Del. 1986)); *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 471–73 (S.D.N.Y. 2000) (citing both *Gerling*, 839 F.2d at 140 and *Afros S.P.A.*, 113 F.R.D. at 131 in a Rule 45 case); *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441–43 (D.N.J. 1991).

of the third Rule 34 criterion to situations in Rule 45 cases involving nonparties.<sup>146</sup>

## 2. Eleventh Circuit: Wandering Away from the Leader and Into the Muddied Water

As mentioned above, the Eleventh Circuit Court of Appeals was the first U.S. Circuit to weigh in on what constitutes control for discovery purposes.<sup>147</sup> The court provided a basic, legal-rights-based definition of control as used in *Rule 34*, defining it “not only as possession, but as the legal right to obtain the documents requested upon demand.”<sup>148</sup> While this seems like a clear and simple ruling on the issue, district courts within the Eleventh Circuit have wandered away from this precedent and have, instead, gotten caught up in the mess caused by the Third Circuit in *Gerling*.<sup>149</sup>

*Costa v. Kerzner Int’l Resorts, Inc.* is a perfect example of how the Third Circuit’s holding in *Gerling* has confused subsequent district courts.<sup>150</sup> (Notably, since its decision in *Searock*, the Eleventh Circuit has not changed its position on what constitutes control.) In *Costa*, the District Court for the Southern District of Florida ignored the *Searock* precedent and, instead, applied the practical ability test.<sup>151</sup> In fact, the court cited to *Searock* for its proposition that “[w]hether documents are in a part[y]’s control under Rule 34 is broadly construed.”<sup>152</sup> The court explained its analysis, saying:

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<sup>146</sup> See, e.g., *In re Subpoena Duces Tecum to Ingeteam, Inc.*, No. 11-MISC-36, 2011 WL 3608407, at \*1 (E.D. Wis. Aug. 16, 2011) (Rule 45 case holding “[t]hus, in the context of either Rule 34 (production of documents by party to litigation) or Rule 45 (production of documents by third-parties to litigation), relevant documents cannot be hidden by a parent corporation overseas, even though the court does not have personal jurisdiction over the foreign parent.”); *Credit Bancorp, Ltd.*, 194 F.R.D. at 471 (applying the interpretation of control under Rule 34 to a Rule 45 subpoena).

<sup>147</sup> *Searock v. Stripling*, 736 F.2d 650, 653–54 (11th Cir. 1984).

<sup>148</sup> *Id.* at 653.

<sup>149</sup> See, e.g., *Costa v. Kerzner Int’l Resorts, Inc.*, 277 F.R.D. 468, 471 (S.D. Fla. 2011); see also *Desoto Health & Rehab, L.L.C. v. Phila. Indem. Ins. Co.*, No. 2:09-cv-599-FtM-99SPC, 2010 WL 4853891, at \*3 n.3 (M.D. Fla. Nov. 22, 2010).

<sup>150</sup> 277 F.R.D. at 472.

<sup>151</sup> *Id.* at 470–73.

<sup>152</sup> *Id.* at 470–71.

[I]n determining whether a party has control over documents and information in the possession of nonparty affiliates, the Court must look to: (1) the corporate structure of the party and the nonparties; (2) the nonparties’ connection to the transaction at issue in the litigation; and (3) the degree to which the nonparties benefit from the outcome of the litigation.<sup>153</sup>

These factors come directly from the U.S. District Court for the District of Delaware in *Afros S.P.A. v. Krauss-Maffei Corp.*,<sup>154</sup> a case cited by the Third Circuit Court of Appeals in *Gerling* when discussing the specific Rule 34 situation it added to the legal right test.<sup>155</sup> This pattern repeats in several other district courts across the country, even in Rule 45 cases.<sup>156</sup>

### 3. Ninth Circuit: Getting Back to the Basics for Rule 45 Control

The Ninth Circuit, in *In re Citric Acid Litigation*, was the most recent Court of Appeals to address what constitutes control.<sup>157</sup> In this Rule 45 case, the court returned to the basic premise of the legal right test and adopted a strict rule, explaining, “[o]rdering a party to produce documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents.”<sup>158</sup> Put simply, the practical ability to obtain documents from a related organization is not enough to constitute control in the Ninth Circuit because the related organization “could legally—and without breaching any contract—refuse to turn over such documents.”<sup>159</sup> This is the essence of the reasoning behind legal right test.

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<sup>153</sup> *Id.* at 471 (citing *Steele Software Sys., Corp. v. DataQuick Info. Sys., Inc.*, 237 F.R.D. 561, 564 (D. Md. 2006)).

<sup>154</sup> 113 F.R.D. 127, 130 (D. Del. 1986).

<sup>155</sup> See *Gerling Int’l Ins. v. Comm’r*, 839 F.2d 131, 140–41 (3d Cir. 1988).

<sup>156</sup> See *In re Subpoena Duces Tecum to Ingeteam, Inc.*, No. 11-MISC-36, 2011 WL 3608407, at \*1 (E.D. Wis. Aug. 16, 2011) (Rule 45 case); see also *Stella Sys., LLC v. MedeAnalytics, Inc.*, No. 14-CV-00880-LB, 2015 WL 1870052, at \*3 (N.D. Cal. Apr. 22, 2015) (Rule 34 case); *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 269 F.R.D. 609, 618–19 (S.D. W. Va. 2010) (Rule 34 case).

<sup>157</sup> 191 F.3d 1090, 1107 (9th Cir. 1999).

<sup>158</sup> *Id.* at 1108.

<sup>159</sup> *Id.*

However, the Ninth Circuit made the mistake of citing with approval the entirety of the *Gerling* holding.<sup>160</sup> Because of this, several district courts within the Ninth Circuit, like in the Eleventh Circuit, have wandered from the Ninth Circuit Court of Appeals's adoption of the strict legal right test and have, instead, applied *Gerling*'s more expansive/hybrid test, or, in some cases, the practical ability test.<sup>161</sup> For example, in a Rule 34 case, the U.S. District Court for the District of Arizona, noted that the Ninth Circuit Court of Appeals did in fact adopt the legal right test in both the Rule 34 and Rule 45 context.<sup>162</sup> Contrary to the intent of the Ninth Circuit in *In re Citric Acid*, however, the court went on to apply a more expansive test for control, explaining:

Although it is true that *Citric Acid* adopted the legal control test, it specifically stated that its decision was consistent with decisions in other circuits, including [*Gerling*] . . . . *Gerling* adopted the legal control test, but provided a more expansive definition than AFL suggests. Specifically, *Gerling* extended the test to a situation 'where the subsidiary was an agent of the parent in the transaction giving rise to the suit and in litigating the suit on the parent's behalf.' . . . Because the Ninth Circuit cited *Gerling* favorably in its adoption of the legal control test, the Court concludes that the rationale of *Gerling* should apply in this case.<sup>163</sup>

Though saying it was applying the legal right test, the court then went on to go through a practical ability analysis.<sup>164</sup> This perfectly illustrates the confusion caused by *Gerling*, which has been made worse by sloppy language of courts and courts attempting to stretch what they say is the legal right test to reach equitable and often legally unsound results.

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<sup>160</sup> *Id.*

<sup>161</sup> *Stella Sys., LLC*, 2015 WL 1870052, at \*3 (Rule 34 case); *AFL Telecomms. LLC v. SurplusEQ.com Inc.*, No. CV11-1086 PHX DGC, 2012 WL 2590557, at \*2 (D. Ariz. July 5, 2012) (Rule 34 case); *Thales Avionics Inc. v. Matsushita Avionics Sys. Corp.*, No. SACV 04-454-JVS(MLGx), 2006 WL 6534230, at \*4 (C.D. Cal. Mar. 8, 2006) (Rule 34 case).

<sup>162</sup> *AFL*, 2012 WL 2590557, at \*2.

<sup>163</sup> *Id.* (citations omitted).

<sup>164</sup> *Id.*



#### 4. What Does All of This Mean?

The Third Circuit opened the floodgates with its decision in *Gerling*.<sup>165</sup> By applying a practical ability factor specifically in a Rule 34 case when defining control, the court, inadvertently, opened the door for courts to stretch the legal right test beyond its limits and apply a test that the Court of Appeals apparently did not intend in a Rule 45 case. The Ninth Circuit subsequently adopted a strict legal right test for control in Rule 45 cases, but made the mistake of citing with approval the entirety of the Third Circuit’s definition of control (i.e., the additional third factor used in Rule 34 cases).<sup>166</sup> Therefore, district courts within the circuits that have specifically adopted the legal right test have been able to stretch the test’s application beyond its limits, transforming it into the practical ability test. This has had catastrophic consequences. Courts are applying the tests inconsistently and are using sloppy language in explaining their decisions.

Additionally, some courts are blurring the distinction between the legal right and practical ability tests. This confusion can be illustrated by a few simple statistics. To date, *Gerling*’s Rule 34 expanded legal right test has been cited in 31 federal district court cases as authority when discussing control, regardless of which rule is being applied.<sup>167</sup> Interestingly, several of these cases came out of courts within the Second Circuit, a circuit that uniformly applies, though has not explicitly adopted, the practical ability test.<sup>168</sup> In most, if not all of these cases, the courts within the Second Circuit, cite *Gerling* (i.e., apply its third legal right test factor) while applying the practical ability test.<sup>169</sup>

Compare this with the 41 district courts that have cited *In re Citric Acid*, a case in which the Ninth Circuit explicitly adopted a strict legal right

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<sup>165</sup>*Gerling Int’l Ins. v. Comm’r*, 839 F.2d 131, 140–41 (3d Cir. 1988).

<sup>166</sup>*In re Citric Acid Litig.*, 191 F.3d 1090, 1108 (9th Cir. 1999).

<sup>167</sup>A review of KeyCite on Westlaw on February 8, 2016 revealed that 31 cases have cited and/or mentioned *Gerling* with respect to headnote 7, which addresses the expanded legal right/hybrid test.

<sup>168</sup>*See Sicav v. Wang*, No. 12 CIV. 6682 PAE, 2014 WL 2624753, at \*4 (S.D.N.Y. June 12, 2014); *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 471 (S.D.N.Y. 2000); *Glaxo Inc. v. Boehringer Ingelheim Corp.*, No. 395-CV-01342(GLG), 1996 WL 710836, at \*2 (D. Conn. Oct. 7, 1996).

<sup>169</sup>*E.g., Credit Bancorp, Ltd.*, 194 F.R.D. at 471–72; *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441–42 (D.N.J. 1991).

test.<sup>170</sup> Of these, only two were from the Second Circuit.<sup>171</sup> Ironically, while the Second Circuit courts that applied the practical ability test cited *Gerling* when defining control, the U.S. District Court for the Southern District of New York explicitly rejected the Ninth Circuit's definition of control.<sup>172</sup> This is ironic because, while adopting the legal right test, the Ninth Circuit cited *Gerling* as a case that also adopted the legal right test.<sup>173</sup> The confusion appears to be endless. *Gerling*'s purported adoption of the legal right test but application of a hybrid approach opened the door for courts to stretch *Gerling*'s Rule 34 specific approach to situations in which a stricter test needs to be used. Additionally, one district court went so far as to distinguish between the legal right test as applied by the Third Circuit in *Gerling* and as applied by the Ninth Circuit in *In re Citric Acid*.<sup>174</sup> In this Rule 34 case, the court held that, while the plaintiffs may have been able to establish the presence of control "under the more expansive *Gerling* test," they failed to establish control under *In re Citric Acid*. The court, therefore, refused to compel document production.<sup>175</sup>

A distinction must be made in how control is defined in the Rule 34 context as opposed to the Rule 45 context. The hybrid/expanded legal right test used by the Third Circuit in *Gerling*, and even the practical ability test, may work in the Rule 34 context, but cannot be used when determining nonparty control of documents. However, even in the Rule 34 context, at least when related corporate entities are involved, courts need to be cautious when applying the practical ability test.<sup>176</sup> They need to be especially wary, then, in choosing to apply the practical ability test in the Rule 45 context, which requires a stricter approach to protect the interests of nonparties. In fact, the practical ability test is quite impractical if applied in the Rule 45 context.

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<sup>170</sup> A review of KeyCite on Westlaw on February 8, 2016 revealed that 46 federal cases have cited *In re Citric Acid* with respect to headnotes 21 and 22, which address the strict legal right test.

<sup>171</sup> See *U.S. v. Stein*, 488 F. Supp. 2d 350, 361 (S.D.N.Y. 2007) (criminal context); *Dietrich v. Bauer*, 198 F.R.D. 397, 400–01 (S.D.N.Y. 2001).

<sup>172</sup> *Dietrich*, 198 F.R.D. at 400–01.

<sup>173</sup> *In re Citric Acid Litig.*, 191 F.3d 1090, 1108 (9th Cir. 1999).

<sup>174</sup> *Dugan v. Lloyds TSB Bank, PLC*, No. 12-CV-02549-WHA(NJV), 2013 WL 4758055, at \*3 (N.D. Cal. Sept. 4, 2013).

<sup>175</sup> *Id.*

<sup>176</sup> See 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2210 (3d ed. 2010).

#### IV. HOW PRACTICAL IS THE PRACTICAL ABILITY TEST?

It would be equitably impractical to enforce an order compelling a nonparty subsidiary to produce documents that it has no legal right to obtain. How can a nonparty subsidiary be held legally responsible for such an inability? It is a simple question with a simple answer: the courts should not be able to hold the nonparty subsidiary liable for such an inability. The practical ability test, however, takes this simple question and makes it unnecessarily complicated, allowing courts applying the test (at least in the Rule 45 context) to unfairly hold the nonparty subsidiary liable.<sup>177</sup>

Indeed, a nonparty typically has little or no direct, underlying interest in the litigation, and the nonparty’s foreign parent has even less of an interest. So what is a court to do when the foreign parent refuses to allow its U.S. subsidiary to access the documents sought? Rule 45 states that a court “may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.”<sup>178</sup> The only sanction available against nonparties to the litigation in a Rule 45 case is a contempt citation.<sup>179</sup> Such contempt charges may be civil or criminal, but “there is no authority for any other sanction [on a nonparty to the litigation] (except reimbursement of expenses on a motion to compel).”<sup>180</sup>

Generally, in a civil contempt context, the most appropriate sanction to be enforced on a nonparty is a fine. For example, one court imposed a \$1,000 fine per day on an individual nonparty who failed to comply with two court orders.<sup>181</sup> In *Musalli Factory for Gold & Jewelry Co. v. New York Financial LLC*, the court stated that “[t]he imposition of civil contempt sanctions, which must be ‘remedial and compensatory, not punitive,’ is designed to secure future compliance with court orders.”<sup>182</sup> It continued, “[i]f a party is adjudged to be in civil contempt, the court must determine

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<sup>177</sup> See, e.g., *In re Citric Acid*, 191 F.3d at 1108; *Halliburton Energy Servs., Inc. v. M-1, LLC*, No. 1:06MC001, 2006 WL 3085622 at \*1–2 (S.D. Ohio Oct. 27, 2006); *Dietrich*, 198 F.R.D. at 400–01.

<sup>178</sup> FED. R. CIV. P. 45(g).

<sup>179</sup> WAGSTAFFE, *supra* note 55, ¶ 11:2460; see also *Gen. Ins. Co. of Am. v. E. Consol. Utils., Inc.*, 126 F.3d 215, 220 n.3 (3d Cir. 1997) (holding that FRCP Rule 37(b)(1), which only provides for the sanction of holding the a deponent in contempt of court, provides the only means to sanction a nonparty).

<sup>180</sup> WAGSTAFFE, *supra* note 55, ¶ 11:2460.

<sup>181</sup> *Musalli Factory for Gold & Jewelry Co. v. N.Y. Fin. LLC*, No. 06 Civ. 82(AKH), 2010 WL 2382415, at \*4 (S.D.N.Y. June 14, 2010).

<sup>182</sup> *Id.* at \*3 (internal quotations omitted).

what sanctions are necessary to secure future compliance with its order and to compensate the complaining party for past noncompliance.”<sup>183</sup> Courts have great discretion in determining what an appropriate sanction would be on a case-by-case basis.<sup>184</sup> Courts are to consider several factors: “(1) the character and magnitude of the harm threatened by the continued contumacy; (2) the probable effectiveness of the sanction in bringing about compliance, and (3) the contemnor’s financial resources and the consequent seriousness of the sanction’s burden.”<sup>185</sup> On the other hand, criminal contempt is appropriate when the contemnor “willfully, contumaciously, and intentionally” violated the order.<sup>186</sup>

These enforcement measures are generally viable in Rule 34 cases because, in most cases, the nonparty foreign affiliate is obviously in some way related to a party to the litigation. (*i.e.*, the nonparty may be the subsidiary, parent, or sister corporation of the party). That is to say, a nonparty’s noncompliance with an order to produce documents could be viewed as the nonparty abetting the affiliated party to the litigation.<sup>187</sup> Further, a nonparty may be held in contempt if the nonparty is “legally accountable for the party’s actions.”<sup>188</sup> In this Comment’s Rule 45 scenario, however, the nonparty U.S. subsidiary and nonparty foreign parent have no direct interest in the outcome of the litigation, and they are not alter egos. Therefore, neither could be viewed as abetting a litigation party by refusing to disclose the information sought, and neither the U.S. subsidiary nor its foreign parent is legally accountable for the defendant’s actions. Imposing a fine on the nonparty who is refused access to documents by its foreign parent and has no legal ability to compel access to them would serve no purpose and would be unfair to the nonparty that is powerless to obtain the requested documents.

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<sup>183</sup> *Id.* (emphasis added).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* (quoting *Bank of Credit & Commerce Int’l (Overseas) Ltd. v. Tamraz*, No. 97 Civ. 4759(SHS), 2006 WL 1643202 at \*3 (S.D.N.Y. June 13, 2006)).

<sup>186</sup> *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 299 (4th Cir. 2000).

<sup>187</sup> 2 DISCOVERY PROCEEDINGS IN FEDERAL COURT § 22:27 (3d ed. 2015) (“A person who is not a party to a proceeding may be held in contempt if he or she has actual knowledge of a discovery order that was violated and either abets a party’s violation of the order or is legally accountable for the party’s actions.”).

<sup>188</sup> *Id.*

## V. WHAT APPROACH SHOULD THE FIFTH CIRCUIT ADOPT?

When determining what constitutes control of documents sought in Rule 45 cases, the Fifth Circuit should adopt a strict legal right test, as originally adopted by the Eleventh Circuit in *Searock*,<sup>189</sup> and follow the rationale of the Ninth Circuit in *In re Citric Acid*.<sup>190</sup> It needs to return to the basics of the test and find the existence of control only in two circumstances: (1) where the subpoenaed corporation has the legal right to obtain the documents upon demand; or (2) where the alter ego doctrine warrants piercing the corporate veil. Simply having the “practical ability” to demand document production is not enough. As the U.S. District Court for the District of Colorado put it, “the ‘practical ability’ to demand production *must be accompanied by a similar ability to enforce compliance with that demand.*”<sup>191</sup> This will prevent any more confusion like that suffered among the U.S. district courts across the country.

Specifically, where a domestic subsidiary does not have the legal right to obtain documents in the possession of its foreign parent, litigation parties should have to resort to the procedures provided by the Hague Convention, which is designed to facilitate precisely the type of discovery sought directly from the foreign parent corporation. In other words, this is one situation in which application of The Hague Convention is “virtually compulsory.”<sup>192</sup>

## VI. CONCLUSION

As the Supreme Court held in *Aérospatiale*, courts are not required to use the Hague Convention procedures as a first resort for obtaining evidence located in foreign countries.<sup>193</sup> However, in his dissent, Justice Blackmun stressed that courts should first resort to Convention procedures in applicable cases.<sup>194</sup> One such case is when a nonparty, domestic subsidiary is subpoenaed to produce documents located with its foreign

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<sup>189</sup> 736 F.2d 650, 653 (11th Cir. 1984).

<sup>190</sup> 191 F.3d 1090, 1107–08 (9th Cir. 1999).

<sup>191</sup> *Klesch & Co. v. Liberty Media Corp.*, 217 F.R.D. 517, 520 (D. Colo. 2003) (emphasis added).

<sup>192</sup> *Orlich v. Helm Bros.*, 560 N.Y.S.2d 10, 14 (N.Y. App. Div. 1990); *see also* *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 548–549 (1987) (Blackmun, J., concurring in part and dissenting in part).

<sup>193</sup> *Aérospatiale*, 482 U.S. at 536–538.

<sup>194</sup> *Id.* at 548–49. (Blackmun, J., concurring in part and dissenting in part).

parent who is also a nonparty, as presented by this Comment.<sup>195</sup> However, in this type of scenario, parties often try to circumvent the more burdensome Hague Convention procedures by using a Rule 45 subpoena *duces tecum*. For courts allowing this, the critical question is usually whether the subpoenaed nonparty, domestic subsidiary “controls” the documents located with its foreign parent. As discussed, the proper standard for determining this is a strict “legal right” test. The Fifth Circuit, however, has adopted neither the “legal right” test nor the “practical ability” test. For the reasons stated in this Comment, the Fifth Circuit should adopt a strict “legal right” test.

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<sup>195</sup> See *Orlich*, 560 N.Y.S.2d at 12.