

“Super Contacts”: Invoking Aiding-and-Abetting Jurisdiction to Hold Foreign Nonparties in Contempt of Court

Julia K. Schwartz[†]

INTRODUCTION

Under Federal Rule of Civil Procedure 65(d), district court injunctions are binding on nonparties who are in active concert with the enjoined parties. Many circuits have held that a district court can hold a nonparty in contempt for knowingly aiding and abetting the violation of an injunction or restraining order, even when the court could not otherwise establish personal jurisdiction over that individual. In these cases, knowingly assisting the violation of an injunction establishes sufficient minimum contacts with the forum to establish personal jurisdiction. This principle has been referred to as a “super contact.”¹ Whether this reasoning applies to nonparties residing abroad remains unresolved. The Ninth Circuit has held that an injunction does not extend across international borders to a foreign nonparty who aids and abets the violation of an injunction. Two district courts have reached the opposite conclusion.

Although courts have used traditional personal-jurisdiction analysis to determine whether courts can hold foreign nonparties in contempt, personal-jurisdiction jurisprudence does not easily apply to aiding and abetting the violation of an injunction, as the nonparty’s contact with the forum is often indirect. For instance, the nonparty might be a foreign bank that simply moves money between the defendant’s accounts in violation of a court order freezing the defendant’s assets. Nor does international law concerning the application of US judgments abroad resolve the issue. Attempts to establish international laws guiding the enforcement of judgments have been largely unsuccessful. Further, the United States is not a signatory to the one,

[†] AB 2008, Princeton University; JD Candidate 2014, The University of Chicago Law School.

¹ *Eagle Traffic Control, Inc v James Julian, Inc*, 933 F Supp 1251, 1255 (ED Pa 1996).

albeit narrow, treaty that requires the enforcement of foreign judgments.

This Comment proposes an alternative approach for determining whether a foreign nonparty who aids and abets the violation of an injunction should be subject to the court's contempt power. Under this approach, courts would apply "aiding and abetting jurisdiction": when the substantive elements of aiding-and-abetting liability under Rule 65(d) are met—that is, when the nonparty has notice of the injunction and shares with the party a purpose to violate it—a court could assert personal jurisdiction to hold the nonparty in contempt. Once personal jurisdiction is established, courts would apply a balancing test to determine whether a nonparty should be held in contempt. The test would weigh the motivations for the violation of the court's order, the burden imposed on the nonparty by the injunction, and the relevant US and foreign interests.

There are two justifications—one substantive and one procedural—for holding foreign nonparties in contempt when they knowingly assist a party in violating an injunction. Substantively, a court's assertion of aiding-and-abetting jurisdiction over a nonparty may be usefully analogized to conspiracy jurisdiction, which is invoked to hold foreign defendants liable for the in-forum actions of their coconspirators. This approach would allow courts to establish jurisdiction whenever the substantive elements of aiding-and-abetting liability—that is, active concert with the enjoined defendant and actual violation of the injunction—are met. Procedurally, there is precedent for the enforcement of court orders against foreign nonparties in the discovery context. Courts considering whether a foreign nonparty is bound by a discovery order assess the burdens that would result from compliance with the order and then determine whether the nonparty evaded the order in good faith based on a conflict between the two sovereigns' laws. These discovery cases indicate that contempt sanctions should issue when a nonparty purposefully evades a district court injunction and no compelling burden justifies the evasion.

Before turning to this conclusion, Part I provides an overview of district courts' power to hold parties and nonparties in contempt. It also explains accepted law that nonparties residing within the United States, but outside the forum, can be held in contempt for aiding and abetting the violation of an injunction. Part II explores courts' current approaches to the question of

whether a foreign nonparty who lacks any connection to the forum state may nonetheless be held in contempt for aiding and abetting the violation of an injunction. Part III explores the current international framework—or lack thereof—for enforcing US judgments abroad, ultimately concluding that international law does not resolve the issue. Part IV concludes by proposing the alternative approach discussed above.

I. THE CONTEMPT POWER AND ITS APPLICATION TO DOMESTIC NONPARTIES

This Part provides an overview of the power of district courts to hold nonparties in contempt. In cases in which a nonparty residing in another American jurisdiction assists a party in violating an injunction, circuit courts have consistently held that jurisdiction is proper based on courts' inherent power to enforce orders and on the nationwide scope of district court injunctions, when nonparties place themselves within the court's jurisdiction by knowingly violating an injunction.²

To this end, Part I.A summarizes the text and history of Rule 65(d), which makes injunctions binding on certain nonparties. Part I.B then provides an overview of courts' contempt power. Part I.C outlines the Supreme Court's specific-jurisdiction cases. Although the Court has not directly addressed the interplay between personal jurisdiction and the enforcement of injunctions, its analysis informs lower courts' jurisdictional rulings. Part I.D summarizes those lower-court cases that have directly confronted the relationship between personal jurisdiction and the enforcement of injunctions. Every appellate court to address the issue has held that a court can assert jurisdiction over an American nonparty who has no connection to the forum state when that nonparty aids and abets the violation of an injunction. This case law provides a starting point for analyzing whether injunctions can be enforced against foreign nonparties.

A. Parties Bound by Injunctions under Rule 65(d)

Courts have the power to issue injunctions³ that require an individual to do or refrain from doing certain acts. Under Rule

² See, for example, *Waffenschmidt v MacKay*, 763 F2d 711, 718 (5th Cir 1985).

³ Unless otherwise specified, this Comment uses the term "injunction" to refer to preliminary injunctions, permanent injunctions, and temporary restraining orders, all of

65(d)(2), injunctions bind not only named parties, but also a party's "officers, agents, servants, employees, and attorneys" and "other persons who are in active concert or participation" with those individuals.⁴

Rule 65(d) is a codification of the common law rule that a nonparty to a legal proceeding can be held in civil contempt for violating a court-ordered injunction.⁵ The purpose of enjoining nonparties who are not listed in a court's order is to ensure "that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding."⁶

Two elements must be established to enjoin a nonparty under Rule 65(d).⁷ First, the nonparty must have "actual notice" of the order.⁸ Service is not required to establish notice, since "knowledge, like any other fact, may be established by circumstantial evidence."⁹ Additionally, nonparties who are not "officers, agents, servants, employees [or] attorneys" of the party must have acted in concert with the enjoined party.¹⁰ This rule has also been described as a requirement that the party and nonparty act in "collusion."¹¹ In other words, the nonparty must take action that benefits or assists the party in violating the

which are covered under Rule 65(d). See FRCP 65(d) (including within the scope of the Rule "[e]very order granting an injunction and every restraining order").

⁴ FRCP 65(d)(2).

⁵ See *Regal Knitwear Co v National Labor Relations Board*, 324 US 9, 14 (1945) (noting that Rule 65(d) "is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control").

⁶ *Id.* See also Note, *Binding Nonparties to Injunction Decrees*, 49 Minn L Rev 719, 719 (1965) ("If all nonparties were allowed to violate the decree with impunity, the party-defendant could avoid the court's mandate simply by procuring others to do the forbidden act.").

⁷ See Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 11A *Federal Practice and Procedure* § 2956 at 385-87 (West 3d ed 2013) (describing persons bound by injunctions and restraining orders under Rule 65(d)).

⁸ FRCP 65(d)(2).

⁹ *Hill v United States*, 33 F2d 489, 491 (8th Cir 1929). See also *In re Lennon*, 166 US 548, 554 (1897) ("To render a person amenable to an injunction it is [not] necessary . . . to have been actually served with a copy of it, so long as he appears to have had actual notice."); FRCP 65(d)(2) (requiring notice "by personal service or otherwise").

¹⁰ FRCP 65(d)(2) (requiring "active concert or participation" to bind nonparties). See also *United Pharmacal Corp v United States*, 306 F2d 515, 517 (1st Cir 1962).

¹¹ *Ex parte Morford*, 31 P2d 406, 408 (Cal App 1934) (noting, in a case predating the enactment of Rule 65, that "a person not a party to the action may nevertheless be bound by an injunction if he had knowledge of it, provided he acted in collusion with the person directly restrained by the order").

injunction.¹² There must be some form of interdependent behavior between the enjoined party and the nonparty in order to bind the nonparty under Rule 65(d).¹³

B. The Scope of District Courts' Contempt Power

Courts compel compliance with injunctions through contempt sanctions.¹⁴ This is an inherent power of the court,¹⁵ and its scope is not limited to the parties. Nonparties bound by an injunction under Rule 65(d) can be held in civil or criminal contempt if they violate a court's order.¹⁶

Civil and criminal contempt proceedings are distinguished on the basis of the sanction's purpose, rather than on the basis of the contemnor's actions.¹⁷ Criminal contempt sanctions are imposed to punish the contemnor.¹⁸ Federal courts have the power "to punish [criminal contempt] by fine or imprisonment,

¹² See *Goya Foods, Inc v Wallack Management Co*, 290 F3d 63, 75 (1st Cir 2002). See also *United Pharmacal*, 306 F2d at 517–18 (noting that past active collaboration between parties and nonparties was insufficient to show active concert or participation in the violation of an injunction); *Alemite Mfg Corp v Staff*, 42 F2d 832, 832–33 (2d Cir 1930) (noting that the party must be involved in the contempt in order for the nonparty to violate an injunction).

¹³ See *Regal Knitwear*, 324 US at 13. For a criticism of aiding and abetting as a basis for contempt, see generally Doug Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 Tex L Rev 873 (1975).

¹⁴ See *United States v United Mine Workers of America*, 330 US 258, 304 (1947) (observing that one of the purposes of contempt sanctions is to coerce the defendant into compliance with the court's order); Joseph Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 Colum L Rev 780, 780 (1943) ("[T]he remedy, the injunction, is worth no more than its sanction, contempt.").

¹⁵ See *Young v United States*, 481 US 787, 793 (1987) ("[I]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders."). See also *Chambers v NASCO, Inc*, 501 US 32, 44 (1991) (noting that a court's power to punish for contempt is inherent in all courts and that "[t]his power reaches both conduct before the court and that beyond the court's confines"); *Michaelson v United States*, 266 US 42, 65 (1924).

¹⁶ See *Reich v United States*, 239 F2d 134, 137 (1st Cir 1956):

[O]ne who knowingly aids, abets, assists, or acts in active concert with, a person who has been enjoined in violating an injunction subjects himself to civil as well as criminal proceedings for contempt even though he was not named or served with process in the suit in which the injunction was issued or even served with a copy of the injunction.

¹⁷ See *International Union, United Mine Workers of America v Bagwell*, 512 US 821, 827–28 (1994); *Chadwick v Janecka*, 312 F3d 597, 607–08 (3d Cir 2002). See also Ronald L. Goldfarb, *The Varieties of the Contempt Power*, 13 Syracuse L Rev 44, 45 (1961) (providing examples of procedural differences between civil and criminal contempt).

¹⁸ See *International Union, United Mine Workers of America*, 512 US at 827–28.

or both, at [their] discretion.”¹⁹ A criminal contempt action involves the issuance of notice and a hearing in which criminal standards of proof are applied, followed by conviction or acquittal of the defendant.²⁰ Civil contempt sanctions are designed to compensate a party for loss or to coerce compliance with a court order.²¹ The size of civil contempt sanctions need not, however, exactly correspond to the size of the party’s loss.²² A civil contempt action involves service of a notice of contempt, a hearing to determine whether contempt has occurred, the issuance of a contempt order specifying sanctions for noncompliance, and a judgment if noncompliance continues.²³ Although there is some confusion over the contours of civil and criminal contempt, disobedience of court orders, including the violation of injunctions by nonparties, is generally considered civil contempt.²⁴ Thus, this Comment focuses on civil contempt.

The other classification applied to contempt is the distinction between direct and indirect contempt. Direct contempt takes place in the presence of a judge, and may be punished without notice. Indirect contempt takes place outside of the trial judge’s presence and may be punished only upon prior notice to the party being held in contempt.²⁵ Because aiding and abetting the violation of an injunction always takes place outside of court, it is indirect contempt. Thus, before a nonparty can be charged with the violation of an injunction, he or she must have an opportunity to challenge the allegation in a separate court proceeding.²⁶

An individual must be subject to the court’s jurisdiction in order for that court to enforce an injunction.²⁷ This requirement

¹⁹ 18 USC § 401.

²⁰ FRCP 42; Charles Alan Wright, et al, 3A *Federal Practice and Procedure* § 707 at 330 (West 4th ed 2010).

²¹ See *International Union, United Mine Workers of America*, 512 US at 829.

²² See *Goya Foods, Inc v Wallack Management Co*, 344 F3d 16, 21 (1st Cir 2003).

²³ Wright, Miller, and Kane, 11A *Federal Practice and Procedure* § 2960 at 426–35 (cited in note 7) (detailing the nature and requirements of contempt proceedings).

²⁴ See Goldfarb, 13 *Syracuse L Rev* at 58 (cited in note 17) (describing the history of contempt, which originally included only criminal contempt, and arguing that courts make ad hoc decisions as to the type of contempt and procedure to apply).

²⁵ See *id.*

²⁶ See *Zenith Radio Corp v Hazeltine Research, Inc*, 395 US 100, 112 (1969) (holding that it was error to enter an injunction against a nonparty without a court determination to show that the nonparty was in active concert or participation with the enjoined party). See also FRCP 71 (“When an order . . . may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.”).

²⁷ See *Enterprise International, Inc v Corporacion Estatal Petrolera Ecuatoriana*, 762 F2d 464, 470 (5th Cir 1985); *Lynch v Rank*, 639 F Supp 69, 76 (ND Cal 1985) (ruling

becomes an issue when the nonparties bound by an injunction under Rule 65(d) reside in another jurisdiction and have limited contacts with the forum.

C. Specific Jurisdiction and the Minimum-Contacts Requirement

A court must establish personal jurisdiction in order to hold parties or nonparties in contempt.²⁸ Courts traditionally invoke the Supreme Court's specific-jurisdiction jurisprudence in analyzing whether a court can hold nonparties who live outside of the forum in contempt.²⁹ Under *International Shoe Co v Washington*,³⁰ due process requires only that a defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."³¹ The Court has held that single or occasional acts within a state are sometimes sufficient to establish jurisdiction.³²

Since the Court's decision in *International Shoe*, there has been extensive debate over how the minimum-contacts analysis applies to individuals residing abroad. The Court has held that foreseeable injury in another forum is insufficient to establish jurisdiction³³ and has set out factors for courts to consider in assessing specific jurisdiction. These factors include "the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief . . . [;] the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social

that a court had not established personal jurisdiction over a nonparty under Rule 65, since there was no common scheme to violate the court's injunction).

²⁸ See note 27.

²⁹ See, for example, *Reebok International Ltd v McLaughlin*, 49 F3d 1387, 1391 (9th Cir 1995) (noting that the district court order properly indicated that if personal jurisdiction existed against the nonparty, it arose out of specific jurisdiction). General jurisdiction, which is not at issue in this Comment, arises when a party has sufficient contacts to allow suit to be brought in a forum, even if the claim does not arise out of the party's connection to that forum. See *Perkins v Benguet Consolidated Mining Co*, 342 US 437, 446–47 (1952) (outlining the constitutional requirements for general jurisdiction).

³⁰ 326 US 310 (1945).

³¹ Id at 316 (quotation marks and citation omitted).

³² Id at 318.

³³ *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 295–96 (1980) (finding that "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause").

policies.”³⁴ The relationship between these factors and the minimum-contacts requirement as applied to foreign individuals remains uncertain.³⁵ In *Asahi Metal Industry Co v Superior Court of California, Solano County*,³⁶ Justice Sandra Day O’Connor, writing for a plurality of the Court, set forth a restrictive reading of specific jurisdiction that would require more than the placement of a product into the stream of commerce.³⁷ Justice O’Connor emphasized the “unique burdens” borne by alien corporate defendants forced to defend suits in a foreign country.³⁸ Justice William Brennan, on the other hand, emphasized the importance of foreseeability, noting that if any product is marketed in the forum, “the possibility of a lawsuit there cannot come as a surprise.”³⁹

Most recently, in *J. McIntyre Machinery, Ltd v Nicastro*,⁴⁰ Justice Anthony Kennedy, writing for a plurality, argued that a court must determine whether the defendant purposely availed itself of the privilege of conducting activities within the forum state, and “whether the defendant’s activities manifest an intention to submit to the power of a sovereign.”⁴¹ Justice Kennedy explicitly disavowed Justice Brennan’s approach in *Asahi*, arguing that fairness and foreseeability have no place in the inquiry.⁴²

Justice Stephen Breyer concurred in holding that the court lacked jurisdiction over the defendants, because the British manufacturer whose products caused injuries in New Jersey did not market or directly sell its products in the forum. In his concurrence, Justice Breyer anticipated future challenges to the Court’s personal-jurisdiction jurisprudence based on “many recent changes in commerce and communication, many of which

³⁴ Id at 292, 295 (citations omitted).

³⁵ See Charles Alan Wright and Arthur R. Miller, 4 *Federal Practice and Procedure* § 1067.4 at 261–62 (West 2013 Supp) (“The only point of law supported by a majority of the court [is] that the personal jurisdiction requirement sounds in fairness to the defendant.”).

³⁶ 480 US 102 (1987).

³⁷ Id at 112 (plurality).

³⁸ Id at 114 (plurality).

³⁹ Id at 117 (Brennan concurring).

⁴⁰ 131 S Ct 2780 (2011).

⁴¹ Id at 2788 (Kennedy) (plurality). See also *Hanson v Denckla*, 357 US 235, 253 (1958) (noting that a defendant who does not reside within the forum must “purposefully avail[] itself of the privilege of conducting activities within the forum State” to be subject to the court’s jurisdiction).

⁴² *J. McIntyre Machinery*, 131 S Ct at 2789.

are not anticipated by our precedents.”⁴³ Although the case did not involve the issues that Justice Breyer contemplated, he nonetheless noted: “I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.”⁴⁴

The cases addressing the scope of Rule 65(d) implicate this gap in the law.⁴⁵ The Court has not addressed situations in which actions of individuals residing abroad have had significant impact within the forum state, even though no products have entered the stream of commerce, and the individual has not had sustained communication or business contact with any American jurisdiction. As international communication becomes more prevalent, activities that take place outside a forum will have an even greater potential for impact within the forum. Nonparties who evade injunctions while remaining outside of a court’s jurisdiction present only one example of the jurisdictional complexities associated with asserting jurisdiction over foreign individuals.

D. Personal Jurisdiction and the Court’s Power to Hold Domestic Nonparties in Contempt

A number of appellate courts have relied on the Supreme Court’s personal-jurisdiction analysis to hold that a court can assert jurisdiction over an American nonparty who has no connection to the forum state when that nonparty aids and abets the violation of an injunction.⁴⁶ The power to hold domestic nonparties in contempt is based on the principle that “the injunctive mandate of a federal court runs nationwide.”⁴⁷ While courts have reached no similar consensus as to sanctions against foreign nonparties who violate an injunction, the courts’ analysis in the

⁴³ *Id.* at 2791 (Breyer concurring).

⁴⁴ *Id.* (Breyer concurring).

⁴⁵ Although the Supreme Court specific-jurisdiction cases have developed due process requirements under the Fourteenth Amendment, the broader “Due Process Clause of the Fifth, rather than the Fourteenth, Amendment applies to the assertion of personal jurisdiction in the federal question context,” including the enforcement of federal injunctions. The Fourteenth Amendment jurisprudence nonetheless informs jurisdictional decisions in federal courts. Charles Alan Wright and Arthur R. Miller, 4 *Federal Practice and Procedure* § 1068.1 at 594 (West 3d ed 2002).

⁴⁶ *Waffenschmidt*, 763 F2d at 717, 722–23 (noting that *International Shoe* provides a rationale for finding jurisdiction over a nonparty that aids and abets).

⁴⁷ *Securities and Exchange Commission v Homa*, 514 F3d 661, 674 (7th Cir 2008). See also *Waffenschmidt*, 763 F2d at 716.

domestic context provides a framework through which the international application can be analyzed.

The Fifth Circuit was the first court to address “whether a court may exercise jurisdiction over a nonparty that knowingly aids and abets a violation of a court’s orders but lacks other contacts with the forum.”⁴⁸ In *Waffenschmidt v MacKay*,⁴⁹ the Fifth Circuit held: “Nonparties who reside outside the territorial jurisdiction of a district court may be subject to that court’s jurisdiction if, with actual notice of the court’s order, they actively aid and abet a party in violating that order. This is so despite the absence of other contacts with the forum.”⁵⁰

Waffenschmidt concerned a district court’s temporary restraining order that enjoined the defendant, MacKay, from transferring funds that the plaintiff had invested with him.⁵¹ Despite the court’s order, MacKay transferred money to the nonparty defendants, Currey and Johnson, neither of whom had any contacts within the forum state or lived within the territorial limits for service of process that were at that time prescribed by Federal Rule of Civil Procedure 4(f).⁵² The court held—based on the minimum-contacts analysis and the inherent powers of the court—that the initiation of contempt proceedings against a nonparty who aided in violating an injunction satisfies due process.⁵³ Although the nonparties’ only contact with the forum was their acceptance of the funds that came from Mississippi, when they “knowingly participated in [the] scheme to dissipate the funds they equally knowingly subjected themselves to the jurisdiction of that court.”⁵⁴ The court noted that such contact may “justify the assertion of jurisdiction if the conduct is sufficiently intentional.”⁵⁵ Further, the court justified its decision based on the substantial burdens of litigating the issue in another forum, given that the district court was familiar with the case and had a special interest in providing relief to its residents.⁵⁶ These considerations, which have been followed by all other circuit courts

⁴⁸ *Waffenschmidt*, 763 F2d at 717.

⁴⁹ 763 F2d 711 (5th Cir 1985).

⁵⁰ *Id.* at 714.

⁵¹ *Id.*

⁵² *Id.* at 714–15.

⁵³ *Waffenschmidt*, 763 F2d at 721.

⁵⁴ *Id.* at 717.

⁵⁵ *Id.* at 723.

⁵⁶ *Id.* at 721.

to address the issue,⁵⁷ have been described as creating a “super contact” with the forum.⁵⁸ In other words, the minimum-contacts requirement is satisfied by the contemnor’s knowing participation in violating the injunction.

In *Securities Exchange Commission v Homa*,⁵⁹ the Seventh Circuit followed *Waffenschmidt* to hold that two nonresident nonparties could be held in contempt for knowingly aiding and abetting the violation of an order to freeze the defendant’s assets.⁶⁰ The two nonparties, both American citizens living in the Caribbean, violated a district court freeze order by transferring money out of their shared accounts and by selling the enjoined party’s interest in their joint business venture.⁶¹ The Seventh Circuit affirmed the district court’s contempt findings, noting that “[i]t has been long-established that, when an individual undertakes activity designed to have a purpose and effect in the forum, the forum may exercise personal jurisdiction over that person with respect to those activities.”⁶² Despite the fact that neither of the nonparties resided in the United States or had any connection to the forum state, “as citizens of the United States, [they] were required, once they had adequate notice, to obey the order of a United States court directed at them and their activities.”⁶³ The court argued that such a policy is essential to ensure that district court orders are fully enforced.⁶⁴

All circuit courts to address the issue have followed *Waffenschmidt* and *Homa* and have permitted courts to hold an

⁵⁷ See *Homa*, 514 F3d at 674–75; *ClearOne Communications, Inc v Bowers*, 651 F3d 1200, 1214–16 (10th Cir 2011); *Eli Lilly & Co v Gottstein*, 617 F3d 186, 194–96 (2d Cir 2010).

⁵⁸ *Eagle Traffic Control, Inc v James Julian, Inc*, 933 F Supp 1251, 1255–56 (ED Pa 1996) (citing *Waffenschmidt* for the proposition that “personal jurisdiction exists over a person who knowingly and actively aids and abets a party in violating a court order on the basis of a ‘super contact’ with that forum,” but rejecting the super-contact theory as applied outside of the contempt context).

⁵⁹ 514 F3d 661 (7th Cir 2008).

⁶⁰ *Id* at 674–75.

⁶¹ *Id* at 671.

⁶² *Id* at 675.

⁶³ *Homa*, 514 F3d at 675. The citizenship of the nonparties in this case enabled the court to treat it as a domestic case. The court cited *Blackmer v United States*, 284 US 421 (1932), to argue that the nonparties were required to obey US court orders as US citizens. *Homa*, 514 F3d at 675, citing *Blackmer*, 284 US at 438 (“The jurisdiction of the United States over its absent citizen . . . is a jurisdiction *in personam*, as he is personally bound to take notice of the laws that are applicable to him and to obey them.”).

⁶⁴ *Homa*, 514 F3d at 674 (“[I]f courts did not have the power to punish those who cooperate with those named in an injunction, the named parties could easily thwart the injunction by operating through others.”).

American nonparty in contempt for the violation of a district court injunction, regardless of the nonparty's contacts with the forum.⁶⁵ Contrary to this consensus, whether the court's contempt power extends to a noncitizen nonparty residing abroad remains unresolved.⁶⁶

II. CONTEMPT POWER OVER FOREIGN NONPARTIES WITH NO FORUM CONTACTS

As discussed in Part I.D, every court to address the issue has held that nonparties residing in other US jurisdictions can be held in contempt for aiding and abetting the violation of an injunction. But whether a *foreign* nonparty can be held in contempt in those circumstances, without any contact with the forum state, remains unresolved and largely unaddressed. The court in *Waffenschmidt* was concerned that the power to enforce injunctions would be thwarted "if a court could only enforce its injunctions over nonparty aiders and abettors who resided within the court's territory for service of process."⁶⁷ This concern over "defendant[s who] enlist the aid of out-of-state individuals in an attempt to frustrate the orders of the district court"⁶⁸ is equally relevant when a foreign nonparty aids and abets the violation of an injunction. Nonetheless, courts have not reached a consensus on the issue. The Ninth Circuit is the only circuit court to directly

⁶⁵ See *ClearOne Communications*, 651 F3d at 1214–16 (following *Homa* and *Waffenschmidt* in affirming a contempt finding against a nonparty residing in another jurisdiction, because "a district court may properly exercise personal jurisdiction over a nonparty for purposes of entering contempt orders, when the nonparty, with actual notice of an injunctive order issued by the district court, and in active concert or participation with a party, violates that order"); *Eli Lilly & Co*, 617 F3d at 194–96 (applying *Waffenschmidt* to uphold the district court's exercise of jurisdiction, when the out-of-state nonparty aided and abetted the violation of a protective order because "a protective order might be thought of as a form of injunction").

⁶⁶ There is some circularity in the rule that once an American nonparty interferes with a court's injunction, the injunction can be enforced against the nonparty. Although this rule seemingly indicates that an injunction is enforceable against anyone who violates the forum's laws, even if the violator is outside the forum, the requirement that there be knowing engagement in conduct that has an effect within the forum serves as a limitation. Indeed, all courts to consider the issue have squarely upheld jurisdiction over parties who knowingly aid and abet the violation of an injunction. See notes 54–57 and accompanying text. For an example of extraforum actions that are sufficient to establish jurisdiction based on the in-forum effects of intentional torts, see *Calder v Jones*, 465 US 783, 789 (1984) (ruling that jurisdiction over defendants for libelous statements written in Florida was "proper in California based on the 'effects' of their Florida conduct in California"). See also Part IV.A.2.

⁶⁷ *Waffenschmidt*, 763 F2d at 717.

⁶⁸ *Id.*

address the question: it held that a district court injunction did not extend to a foreign nonparty lacking contacts with the forum.⁶⁹ Two district courts have reached the opposite conclusion—one allowed the enforcement of an injunction against a foreign nonparty with no contacts with the forum, and another implied that it would do so.⁷⁰ This Part will examine the reasoning of courts that have considered the issue.

A. The Ninth Circuit’s Refusal to Extend Super Contacts to a Foreign Nonparty

In *Reebok International Ltd v McLaughlin*,⁷¹ the Ninth Circuit considered evidence suggesting that Banque Internationale à Luxembourg (BIL) assisted the defendant in removing money from his accounts in violation of a district court order freezing the defendant’s assets.⁷² The Ninth Circuit reversed the district court’s contempt finding against BIL, in part because Luxembourg’s banking laws conflicted with the restraining order, and in part because it believed the analysis under *Waffenschmidt* did not apply to parties residing outside the United States.⁷³

The Ninth Circuit and the Southern District of California expressed opposing views on the jurisdictional issue. The district court established two reasons for applying *Waffenschmidt* to assert jurisdiction over the foreign bank. First, although BIL did not do business in the United States, “BIL purposefully entered into a banking agreement with [the defendant] and . . . accept[s] money from citizens of this country and of this state.”⁷⁴ Thus, the court held that the bank’s activity in Luxembourg affected the forum.⁷⁵ The court introduced the concept of super contacts, ruling that “personal jurisdiction over a non-party in a case such as this one may [be] found by construing the non-party’s act of assisting in the violation of an injunction as a ‘super-contact.’”⁷⁶ As

⁶⁹ *Reebok International Ltd v McLaughlin*, 49 F3d 1387, 1391–93 (9th Cir 1995).

⁷⁰ See *Abi Jaoudi and Azar Trading Corp v CIGNA Worldwide Insurance Co*, 2009 WL 80293, *1–2 (ED Pa), vacd and remd on different grounds 391 Fed Appx 173 (3d Cir 2010); *Select Creations, Inc v Paliapito America, Inc*, 852 F Supp 740, 778–80 (ED Wis 1994).

⁷¹ 49 F3d 1387 (9th Cir 1995).

⁷² *Id* at 1388–89.

⁷³ *Id* at 1392–93.

⁷⁴ *Reebok International Ltd v McLaughlin*, 827 F Supp 622, 624 (SD Cal 1993), revd 49 F3d 1387 (9th Cir 1995).

⁷⁵ *Reebok International*, 827 F Supp at 624.

⁷⁶ *Id*.

a second reason for establishing jurisdiction, the court invoked its “inherent authority to enforce its own orders,” arguing that litigation in the jurisdiction was foreseeable and did not offend notions of fair play and substantial justice.⁷⁷

Although the Ninth Circuit acknowledged the idea of super contacts as applied to domestic nonparties, the court reversed the district court’s finding of jurisdiction.⁷⁸ The Ninth Circuit noted that “[a]lthough *Waffenschmidt* speaks in expansive terms, it was speaking about the authority of district courts within the United States.”⁷⁹

Although it implies that injunctions do not bind nonparties outside of the United States, the Ninth Circuit’s decision was driven by the conflict between the injunction and Luxembourg law. The court held that the bank was attempting to comply with a Luxembourg court order requiring the release of funds under Luxembourg law, rather than attempting to aid and abet the violation of an injunction.⁸⁰ Accordingly, it invoked foreign policy reasons for refusing to hold the foreign nonparty in contempt: “[W]e do not agree that when a national of a foreign country follows the law of that country in that country it can be dragged halfway around the world to answer contempt charges arising out of a foreign court’s ineffective order.”⁸¹ The Ninth Circuit ultimately found that “[o]n the facts of this case, we cannot arrogate to the federal courts the power to control the banking systems of other countries within their own territory.”⁸²

After *Reebok*, whether an injunction that is registered in a foreign country and that does not conflict with that country’s laws can be enforced against a nonparty remains unresolved. As one commentator noted:

The Ninth Circuit, *Reebok* opinion [] leaves open the possibility that if an American injunction is appropriately registered in a foreign country or otherwise attains legal status in that country, violation of that injunction might create personal jurisdiction in the American court issuing the

⁷⁷ *Id.*

⁷⁸ *Reebok International*, 49 F3d at 1391.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1394–95.

⁸¹ *Id.* at 1392–93 (noting that the *Waffenschmidt* analysis “begins to crumble when a district court seeks to reach out across the Atlantic in an attempt to impose conflicting duties on another country’s nationals within its own borders”).

⁸² *Reebok International*, 49 F3d at 1395.

injunction under the theory of *Waffenschmidt*. The problem in *Reebok* was that the injunction never attained that status in the foreign country.⁸³

B. The Second Circuit's Independent-Contacts Requirement for Foreign Nonparties

The Second Circuit has implied that it would reach the same result as the Ninth Circuit by suggesting that it would not allow a court to assert jurisdiction over a nonparty residing abroad unless minimum contacts were independently established. In *Canterbury Belts Ltd v Lane Walker Rudkin, Ltd*,⁸⁴ a New Zealand corporation and its California subsidiary were held in contempt for aiding the violation of an injunction.⁸⁵ The Second Circuit reversed the lower court's denial of jurisdiction and remanded the case for the lower court to consider whether the corporate subsidiary was a "separately incorporated department or instrumentality" of the foreign corporation.⁸⁶ The court implied that if the subsidiary was *not* a separately incorporated department or instrumentality, then the court could not assert jurisdiction over the foreign parent.⁸⁷

The court indicated that jurisdiction must be established independently before a court can exercise contempt power over a nonresident nonparty: "A district court cannot exercise personal jurisdiction over a nonparty . . . on the basis that the nonparty is acting 'in active concert or participation,' within the meaning of Fed.R.Civ.P. 65(d), with a party who is subject to an injunction, unless personal jurisdiction is established over the nonparty."⁸⁸

C. A Sixth Circuit Panel's Avoidance of the Issue on Procedural Grounds

In December 2012, the Sixth Circuit had the opportunity to apply the Ninth Circuit's *Reebok* analysis. The District Court for the Eastern District of Michigan had enjoined a defendant from

⁸³ Henry H. Perritt Jr, *Jurisdiction in Cyberspace*, 41 Vill L Rev 1, 69 (1996).

⁸⁴ 869 F2d 34 (2d Cir 1989).

⁸⁵ *Id* at 35.

⁸⁶ *Id* at 40 ("Under New York law, where a corporate subsidiary is essentially a 'separately incorporated department or instrumentality' of a foreign corporation, the activities of the subsidiary will be attributed to the foreign parent for purposes of determining the parent's amenability to personal jurisdiction in New York.")

⁸⁷ *See id.*

⁸⁸ *Canterbury Belts*, 869 F2d at 40, quoting FRCP 65(d).

disposing of its assets.⁸⁹ After the defendant sold its assets to a private equity firm without providing notice, the plaintiff sought a show-cause order against two nonparties residing in Germany: Deutsche Bank and Jens Schmelt.⁹⁰ The plaintiff alleged that Deutsche Bank, the defendant's creditor, compelled the defendant to transfer assets to Schmelt, who acted as a trustee.⁹¹ Relying on *Reebok*, the district court held that there was no specific jurisdiction, based on testimony indicating that enforcement of the injunction would conflict with German law.⁹²

In their appellate briefs, the plaintiff and the nonparties debated how to apply the *Reebok* analysis. The plaintiff argued that unlike the facts in *Reebok*, the nonparty defendants were not faced with conflicting court orders and that the injunction should therefore be enforced.⁹³ Schmelt argued that *Reebok* barred enforcement of the injunction, as an expert witness had testified that “[i]n order to have a foreign judgment recognized in Germany, a party must file an action in a German court.”⁹⁴ Further, the nonparties argued that it was the plaintiff's responsibility to register the court order in Germany,⁹⁵ since *Reebok* established no obligation for a foreign nonparty to seek a judgment in his own country in order to determine whether he was bound by an American order.⁹⁶

In an unpublished opinion resting on a questionable reading of circuit precedent, a Sixth Circuit panel decided not to apply *Reebok*, noting that “[t]his briefing, while helpful in framing the issue, is ultimately superfluous in light of . . . [precedent] requiring courts in the Sixth Circuit to exercise personal jurisdiction

⁸⁹ *M&C Corp v Erwin Behr GmbH & Co, KG*, 2012 WL 6554683, *1 (6th Cir).

⁹⁰ *Id.*

⁹¹ *Id.* at *1–2.

⁹² *M&C Corp v Erwin Behr GmbH & Co, KG*, No 91-cv-74110, slip op at *8–10 (ED Mich Aug 31, 2011) (stating that the US order “did not, and could not, bind” the foreign nonparties).

⁹³ Brief of Plaintiff-Appellant, *M&C Corp v Erwin Behr GmbH & Co, KG*, No 11-2167, *44–46, 49–50 (6th Cir filed Jan 11, 2012) (available on Westlaw at 2012 WL 248073) (arguing that the district court relied on an expert who said German laws conflicted without doing independent research).

⁹⁴ Nonparty Respondent-Appellee Jens Schmelt's Brief on Appeal, *M&C Corp v Erwin Behr GmbH & Co, KG*, No 11-2167, *22 (6th Cir filed Mar 15, 2012) (available on Westlaw at 2012 WL 988886) (“Schmelt Brief”).

⁹⁵ Brief of Non-Party Respondent-Appellee Deutsche Bank AG, *M&C Corp v Erwin Behr GmbH & Co, KG*, No 11-2167, *55 (6th Cir filed Mar 15, 2012) (available on Westlaw at 2012 WL 988885) (noting that plaintiff had “a decade to register the Award in Germany and, if it saw fit, seek execution judgments for the Orders in Germany”).

⁹⁶ Schmelt Brief at *26 (cited in note 94).

whenever a defendant's attorney enters a general appearance."⁹⁷ Because the nonparties' attorneys had appeared in court in response to an order compelling them to show cause why the nonparties should not be held in contempt, the nonparties had waived personal jurisdiction.⁹⁸ Thus, the Sixth Circuit panel avoided the question of whether a district court injunction can be enforced against nonparties abroad.

D. District Courts' Enforcement of Injunctions against Foreign Nonparties

Two district courts have disagreed with the Ninth and Second Circuits. The Eastern District of Pennsylvania held that a foreign nonparty can be held in contempt, while the Eastern District of Wisconsin has strongly implied that it would enforce an injunction against a foreign nonparty.

The Eastern District of Pennsylvania addressed the issue in 2009.⁹⁹ There, the plaintiffs filed parallel actions in Liberia and in the United States against their insurer, CIGNA, for breach of insurance policies. The district court upheld CIGNA's antisuit injunction against the plaintiffs based on the duplicative nature of the two proceedings. That order enjoined the plaintiffs from "taking any action to enforce in any jurisdiction the Liberian judgment against defendant CIGNA."¹⁰⁰ CIGNA later filed a contempt motion against a Liberian nonparty, arguing that he had aided and abetted the violation of the injunction.¹⁰¹

⁹⁷ *M&C*, 2012 WL 6554683 at *2, citing *Gerber v Riordan*, 649 F3d 514, 520 (6th Cir 2011).

⁹⁸ *M&C*, 2012 WL 6554683 at *3. The court's application of *Gerber* in *M&C* is perplexing. The Sixth Circuit in *Gerber* held that defendants who submitted a motion to dismiss waived their personal jurisdiction claims when their attorneys submitted a general appearance. *Gerber*, 649 F3d at 519. In *Gerber*, the parties who waived personal jurisdiction had been participating in the litigation for over two years. *Id.* at 518–19. Although the general appearances were relevant, the court also noted that only those submissions that give a plaintiff reasonable expectation that a defendant will defend the suit constitute a waiver of personal jurisdiction. *Id.* at 519. Further, the court noted that "a personal jurisdiction defense is not waived when a party makes a special appearance solely to contest personal jurisdiction's existence." *Id.* at 520. However, the court in *M&C* relied only on the filing of identically worded general appearances to determine that the nonparties had waived personal jurisdiction, even though the attorneys' appearances were for the purpose of contesting jurisdiction. *M&C*, 2012 WL 6554683 at *3.

⁹⁹ *Abi Jaoudi and Azar Trading*, 2009 WL 80293.

¹⁰⁰ *Younis Brothers & Co v CIGNA Worldwide Ins Co*, 167 F Supp 2d 743, 747 (ED Pa 2001).

¹⁰¹ *Abi Jaoudi and Azar Trading*, 2009 WL 80293 at *1.

In considering its jurisdiction over the foreign nonparties, the court in *Abi Jaoudi and Azar Trading Corp v CIGNA Worldwide Insurance Co*¹⁰² determined that a foreign nonparty who assists the plaintiffs in violating an injunction “may be considered an aider and abettor.”¹⁰³ The court reached this conclusion despite acknowledging the *Reebok* court’s holding “that the scope of a nationwide injunction cannot be broadened to encompass a foreign national.”¹⁰⁴ Instead, the Eastern District of Pennsylvania relied on *Homa*, in which the Seventh Circuit held that American nonparties living in the Caribbean could be held in contempt for knowingly aiding and abetting the violation of an order.¹⁰⁵ The district court applied the rule that “minimum contacts exist where one has actively aided and abetted a party in violating a court order” to hold that the nonparty was subject to the court’s jurisdiction.¹⁰⁶ On interlocutory appeal of another issue in the case, the Third Circuit did not address the nonparty’s personal-jurisdiction arguments, as the jurisdictional finding was not an immediately appealable order.¹⁰⁷

In a case in the Eastern District of Wisconsin, *Select Creations, Inc v Paliafito America, Inc*,¹⁰⁸ Korean nonparty defendants were charged with aiding and abetting the violation of a writ.¹⁰⁹ The court found the evidence inconclusive as to whether the nonparties had notice of the court order and therefore did not directly address whether it had jurisdiction.¹¹⁰ Nonetheless, the court “concur[red] in the applicable standard” set forth by the district court in *Reebok*—namely, that personal jurisdiction can be upheld against foreign nonparties for aiding and abetting the violation of an injunction regardless of the nonparties’ contacts with the forum.¹¹¹ The lack of subsequent treatment of the issue in the Seventh Circuit—and the more recent decision in

¹⁰² 2009 WL 80293 (ED Pa), vacd and remd on different grounds 391 Fed Appx 173 (3d Cir 2010).

¹⁰³ *Abi Jaoudi and Azar Trading*, 2009 WL 80293 at *1.

¹⁰⁴ *Id.*

¹⁰⁵ *Homa*, 514 F3d at 674.

¹⁰⁶ See *Abi Jaoudi and Azar Trading*, 2009 WL 80293 at *1.

¹⁰⁷ See *The Abi Jaoudi and Azar Trading Corp v CIGNA Worldwide Insurance Co*, 391 Fed Appx 173, 181 (3d Cir 2010) (considering the Liberian nonparty’s sovereign immunity claims, which were immediately appealable under the collateral order doctrine, and remanding for further consideration).

¹⁰⁸ 852 F Supp 740 (ED Wis 1994).

¹⁰⁹ *Id.* at 778.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 778–79, citing *Reebok International*, 827 F Supp at 624.

Homa—support the view that the Seventh Circuit might adopt the standard set out in *Select Creations* in favor of holding foreign nonparties in contempt under Rule 65(d).

Indeed, cases like *Homa*—in which an *American* nonparty living abroad aids the violation of an injunction—should not be treated differently from *Reebok*, in which a *foreign* nonparty commits the same violation. Although the Seventh Circuit in *Homa* held that the nonparties were bound by the injunction because they were *Americans* living abroad,¹¹² there is no reason for this formalistic distinction. Both cases involved nonparties who lived abroad with no direct contact with the forum, knew of the court order, and aided and abetted the violation of that order. Indeed, lower courts have applied the reasoning of *Homa* to hold foreign nonparties in contempt.¹¹³ The key difference between the two cases is not the extraterritorial reach of the courts' contempt power, but the presence of a conflict between the laws of the nonparty's home jurisdiction and the laws of the forum that issued the injunction.

* * *

Courts have offered no clear answer to the question of whether a foreign nonparty who aids and abets the violation of an injunction can be held in contempt in the absence of any contacts with the forum state. Although most do not use the term, courts addressing the issue have focused on whether the concept of super contacts applies across international borders—that is, whether knowingly assisting the violation of an injunction, standing alone, establishes sufficient contacts to create personal jurisdiction. This Comment argues that super contacts should justify the exercise of personal jurisdiction when the substantive elements of Rule 65(d) have been met. This argument finds support in a comparison to jurisdiction over foreign conspirators with no contacts to the forum and a comparison to the discovery power that courts wield over foreign nonparties.

But before elaborating on this approach, this Comment first considers, in the next Part, whether international law offers a reasonable alternative solution to the problem of enforcing injunctions against foreign nonparties.

¹¹² *Homa*, 514 F3d at 674.

¹¹³ See, for example, *Abi Jaoudi and Azar Trading*, 2009 WL 80293 at *1.

III. THE (INCOMPLETE) INTERNATIONAL FRAMEWORK FOR ENFORCING FOREIGN JUDGMENTS

Although international law might seem to be the natural way to determine whether US injunctions can be enforced against foreign nonparties, an examination of international judgment enforcement mechanisms and related law shows that the international framework provides no meaningful guidance.

The United States employs a liberal approach to recognizing foreign judgments in American courts.¹¹⁴ Nonetheless, the enforcement of American judgments abroad remains unsettled. Part III.A describes attempts to establish uniform rules of judgment enforcement, which culminated in the Hague Convention on Choice of Court Agreements. The Hague Convention debates were largely unsuccessful, as the final treaty was limited to choice-of-court agreements.¹¹⁵ Further, the United States has not ratified the treaty and is not a signatory to any treaty requiring the enforcement of foreign judgments.¹¹⁶ There has long been speculation as to why US judgments are often not enforced abroad.¹¹⁷ One view is that the introduction of a US judgment recognition statute that requires reciprocity would lead to

¹¹⁴ See *Hilton v Guyot*, 159 US 113, 163–64, 202–03, 210 (1895) (refusing to enforce a French judgment because of lack of reciprocity, but nonetheless holding that states must enforce any foreign judgment that is not contrary to state law and does not violate a litigant’s constitutional rights). Although the principles of comity set forth in *Hilton* still apply, the enforcement of foreign judgments is now a matter of state law. See *Johnston v Compagnie Générale Transatlantique*, 152 NE 121, 123 (NY 1926) (holding that the recognition of a foreign judgment depended exclusively on New York law); The American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* 2–3 (2006) (describing how other states followed *Johnston* by applying state law to determine whether to enforce foreign judgments). The majority of states have now adopted the Uniform Foreign Money Judgments Recognition Act, which requires that states and territories give effect to judgments of other states and territories, without a reciprocity requirement. See *id.* at 4–5; Kurt H. Nadelmann, *Uniform Foreign Money-Judgments Recognition Act*, National Conference of Commissioners on Uniform State Laws 1 (1962) (“Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad.”).

¹¹⁵ Hague Conference on Private International Law, *Convention on Choice of Court Agreements* Art 1(1) (June 30, 2005), online at <http://www.hcch.net/upload/conventions/txt37en.pdf> (visited Nov 24, 2013) (“This Convention shall apply in international cases to exclusive choice-of-court agreements concluded in civil or commercial matters.”).

¹¹⁶ See Robert E. Lutz, *A Lawyer’s Handbook for Enforcing Foreign Judgments in the United States and Abroad* 567 (Cambridge 2007).

¹¹⁷ See Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 *Geo Wash Intl L Rev* 173, 173 (2008) (concluding that “on average, U.S. judgments face more obstacles in Europe than do European judgments in the United States,” and describing potential responses).

increased enforcement of US court orders abroad.¹¹⁸ Part III.B describes the American Law Institute's proposal to create such a statute in order to implement a more expansive international judgment convention. This survey shows that international law provides little clarity concerning the enforcement of injunctions abroad.¹¹⁹

A. The Hague Convention on Choice of Court Agreements

The Hague Conference on Private International Law is an association of sovereign states formed in 1893 with the goal of unifying private international law through the implementation of multilateral conventions.¹²⁰ The Hague Convention on Choice of Court Agreements governs the enforcement of judgments in signatory nations when the dispute is subject to a valid choice-of-court agreement that designates the court of one signatory as the forum. However, it is unclear whether the Convention reaches enforcement of contempt orders, which are not uniformly available in all court systems.

Negotiations for the Convention began in 1992. After extensive disagreement surrounding jurisdictional issues during the drafting, the final Convention on Choice of Court Agreements that was completed in 2005 was much narrower in scope than originally anticipated. The convention was limited to "exclusive choice-of-court agreements concluded in civil or commercial

¹¹⁸ See id at 177–78.

¹¹⁹ The enforcement of injunctions abroad is further complicated by the fact that injunctions are relatively foreign remedies in civil law countries, where judges do not wield the power to compel action through penalty of imprisonment or fine. See John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* 54–55, 123 (Stanford 3d ed 2007) (describing the absence of contempt power in civil law countries).

¹²⁰ See Hague Conference on Private International Law, *Overview* (2012), online at http://www.hcch.net/index_en.php?act=text.display&tid=26 (visited Nov 24, 2013). See also *Soci t  Nationale Industrielle A rospatiale v United States District Court for the Southern District of Iowa*, 482 US 522, 529 (1987).

matters.”¹²¹ The United States has signed, but not ratified, the treaty.¹²²

Under Article 8 of the Convention, signatories are required to recognize and enforce judgments from other states.¹²³ However, “[r]ecognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired.”¹²⁴ Thus, permanent injunctions governed by Rule 65 would be subject to Hague Convention mandates, whereas temporary injunctions and other interlocutory orders—which are by nature subject to review—would not.

The Convention on Choice of Court Agreements represents an attempt to resolve issues in the international enforcement of judgments. Nonetheless, the Convention is limited to judgments in contract disputes involving a choice-of-court agreement when the opportunity for appellate review in the state of origin has passed. Further, the United States did not ratify the Convention. Thus, the Convention does not provide meaningful guidance as to how foreign courts should treat US district court injunctions.

B. The American Law Institute’s Efforts

In 1998, the American Law Institute (ALI) began drafting a federal statute to implement the more expansive judgment treaty that was originally contemplated by the Hague Conference.¹²⁵ When the original Hague Convention on foreign judgments was scrapped in favor of the Hague Convention on Choice of Court

¹²¹ Hague Conference, *Convention on Choice of Court Agreements* Art 1(1) (cited in note 115). See also Hague Conference on Private International Law, *Preliminary Draft Convention on Exclusive Choice of Court Agreements: Explanatory Report* *4 (Dec 2004), online at http://www.hcch.net/upload/wop/jdgm_pd26e.pdf (visited Nov 24, 2013) (noting that the 1999 Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters was abandoned “when it became apparent that it would be difficult to obtain agreement at that time”).

¹²² See Gary B. Born and Peter B. Rutledge, *International Civil Litigation in United States Courts* 442 (Aspen 4th ed 2007).

¹²³ Hague Conference, *Convention on Choice of Court Agreements* Art 8 (cited in note 115).

¹²⁴ Hague Conference, *Convention on Choice of Court Agreements* Art 8(4) (cited in note 115).

¹²⁵ Lutz, *A Lawyer’s Handbook for Enforcing Foreign Judgments* at 565 (cited in note 116).

Agreements, the ALI decided to publish an alternative statute for Congress to consider.¹²⁶

The ALI's Foreign Judgments and Recognition and Enforcement Act¹²⁷ proposes adopting a uniform international standard to determine whether a foreign judgment should be enforced.¹²⁸ The ALI proposal is broader than the final Hague Convention insofar as it applies to all foreign judgments.¹²⁹ Although if enacted it would only bind the United States, the ALI's proposed statute includes a reciprocity requirement, which would permit the recognition of foreign judgments only if comparable judgments of courts in the United States would be recognized or enforced in the state of origin.¹³⁰ Thus, the ALI statute is designed to encourage the enforcement of US judgments abroad.¹³¹

The proposed statute was submitted to Congress, but Congress has taken no action.¹³² Given this standstill, the ALI proposal provides little guidance as to the scope of district court injunctions. Further, even if the ALI proposal were approved it would only bind the United States and would therefore not guarantee the enforcement of US judgments abroad.

* * *

This Comment, in the next Part, suggests an alternate approach. Instead of looking to traditional minimum-contacts and purposeful-availment standards or to international treaties, courts should apply a form of aiding-and-abetting jurisdiction to determine whether to issue contempt sanctions.

IV. APPLYING AIDING-AND-ABETTING JURISDICTION TO HOLD FOREIGN NONPARTIES IN CONTEMPT

If parties could escape sanctions for aiding and abetting injunction violations, injunctions would be relatively easy to circumvent. However, in order to enforce such sanctions, courts

¹²⁶ See Lance Liebman, *Foreword*, in American Law Institute, *Recognition and Enforcement of Foreign Judgments* xiii, xiii (cited in note 114).

¹²⁷ American Legal Institute, *Recognition and Enforcement of Foreign Judgments* at 7 (cited in note 114).

¹²⁸ *Id.* at 3–4.

¹²⁹ *Id.* at § 1(a) at 7.

¹³⁰ *Id.* at § 7 at 14.

¹³¹ See Baumgartner, 40 *Geo Wash Intl L Rev* at 177 (cited in note 117).

¹³² See John A. Spanogle, *The Enforcement of Foreign Judgments in the U.S.—A Matter of State Law in Federal Courts*, 13 *US-Mex L J* 85, 94 (2005) (observing that “Congress has not shown much interest in” the ALI's proposed statute).

must have personal jurisdiction over those who assist parties in violating injunctions. Whether courts have such jurisdiction remains unresolved. Courts unquestioningly apply US personal-jurisdiction law to assess jurisdiction over foreign individuals, perhaps because of the unsettled state of international law regarding the enforcement of judgments abroad.¹³³ However, traditional personal-jurisdiction analysis is insufficient as applied to a foreign nonparty who aids and abets the violation of an injunction. As Justice Breyer noted, the minimum-contacts analysis does not address situations in which actions taken abroad impact the forum state, but in which no products enter the stream of commerce and the individual has not communicated with any US jurisdiction.¹³⁴ Given the effect actions taken abroad can have within the United States, current personal-jurisdiction law provides, at best, an uncertain means for courts to prevent nonparties from thwarting their orders from abroad.

To fill the resulting gap, one can make comparisons to two areas of law—one substantive and one procedural—that support the assertion of personal jurisdiction over foreign nonparties who knowingly aid or abet the violation of an injunction. Substantively, courts could rely on a form of aiding-and-abetting jurisdiction, which would allow contempt sanctions upon a showing of the substantive elements of aiding-and-abetting liability. This approach borrows from civil conspiracy doctrine, under which courts assert jurisdiction over foreign parties based on the in-forum actions of a coconspirator, even if the foreign parties lack contacts with the forum. Procedurally, courts could borrow the approach of cases addressing the enforcement of discovery orders on foreign nonparty subsidiaries. These cases apply a balancing test that assesses the burdens of compliance with the order and any good-faith justifications for the nonparty's evasion of the order.

Taken together, these doctrines provide a framework that courts can use to balance their need to prevent circumvention of

¹³³ See Part III. For a criticism of courts' application of domestic jurisdiction doctrines to foreign individuals, see Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 *Harv Intl L J* 373, 389, 401 (1995) (questioning the view adopted by the Supreme Court and lower courts "that international law is not applicable in jurisdictional cases involving foreign parties," and arguing that "the international order must . . . prescribe the laws that define state jurisdiction").

¹³⁴ See *J. McIntyre Machinery*, 131 S Ct at 2792 (Breyer concurring). See also notes 42–44 and accompanying text.

their injunctions with the limits that personal-jurisdiction doctrine imposes on the scope of their power.

A. Conspiracy Jurisdiction as a Substantive Analogue

Instead of looking exclusively at a nonparty's interaction with the forum, courts should borrow the jurisdictional test from conspiracy law, in which foreign conspirators can be brought before the court *solely* based on a coconspirator's in-forum actions in furtherance of the conspiracy.¹³⁵ This Comment argues that courts should apply a similar analysis, which it refers to as "aiding and abetting jurisdiction." Rather than focusing on the nonparty's location, the aiding-and-abetting jurisdiction analysis directs courts' attention to the substantive elements of Rule 65(d): whether the nonparty had notice of the injunction, whether the nonparty defendant and the enjoined party shared a purpose to violate the injunction, and whether the injunction was actually violated.¹³⁶

1. A summary of conspiracy jurisdiction.

A majority of courts employ conspiracy jurisdiction to reach foreign defendants who lack sufficient contacts with the forum.¹³⁷ Conspiracy jurisdiction attaches whenever an in-forum coconspirator performs an act in furtherance of the conspiracy. Once an agreement is shown, courts attribute the actions of the in-forum coconspirator to all coconspirators for purposes of determining jurisdiction.¹³⁸

The constitutional basis for conspiracy jurisdiction, discussed in detail below, rests on the finding that a coconspirator's participation in the conspiracy establishes minimum contacts.¹³⁹

¹³⁵ See Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L Rev 234, 236–43 (1983) (outlining the development and history of the use of conspiracy theory to establish jurisdiction, and disagreeing with cases that allow for jurisdiction without considering the defendant's contacts with the forum).

¹³⁶ See notes 7–13 and accompanying text.

¹³⁷ See *Allstate Life Insurance Co v Linter Group Ltd*, 782 F Supp 215, 221 (SDNY 1992); *Soltex Polymer Corp v Fortex Industries, Inc.*, 590 F Supp 1453, 1456–57 (EDNY 1984); *Lolavar v De Santibañes*, 430 F3d 221, 230 (4th Cir 2005); *Posner v Essex Insurance Co*, 178 F3d 1209, 1217–18 (11th Cir 1999); *Jungquist v Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F3d 1020, 1030–31 (DC Cir 1997); *Stauffacher v Bennett*, 969 F2d 455, 459 (7th Cir 1992).

¹³⁸ *Stauffacher*, 969 F2d at 459 (“[T]he acts of one conspirator within the scope of the conspiracy are attributed to the others.”).

¹³⁹ See Part IV.A.3.

The key inquiry in determining jurisdiction over members of a conspiracy is not the traditional minimum-contacts analysis, but a substantive analysis:

[M]ost courts require a plaintiff to allege facts which, if proven, show: 1) that a conspiracy existed; 2) that the defendant over whom jurisdiction is sought became a member of the conspiracy; and 3) that a co-conspirator committed an act . . . in furtherance of the conspiracy in the forum state.¹⁴⁰

Thus, foreign defendants can be held liable for conspiracy, provided that their actions meet these substantive requirements.¹⁴¹ Although “a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough” to establish jurisdiction over a foreign defendant, most courts assert jurisdiction upon a showing of an agreement to commit an unlawful act coupled with some in-forum action in furtherance of the conspiracy.¹⁴²

For example, in a case before the Seventh Circuit, two Canadian defendants were accused of violating Wisconsin state law, RICO, and federal securities law, even though neither defendant committed any acts in Wisconsin.¹⁴³ Judge Richard Posner noted that plaintiffs might have brought their case under the Wisconsin long-arm statute by arguing that the defendants were part of a conspiracy to defraud: “If through one of its members a conspiracy inflicts an actionable wrong in one jurisdiction, the other members should not be allowed to escape being sued there by hiding in another jurisdiction.”¹⁴⁴

¹⁴⁰ Althouse, 52 Fordham L Rev at 243 (cited in note 135). See also *Allstate Life Insurance*, 782 F Supp at 221; *Posner*, 178 F3d at 1217 (laying out similar requirements to establish conspiracy jurisdiction, with an additional requirement that the defendant know that the act will have an effect in the forum); *Youming Jin v Ministry of State Secretary*, 335 F Supp 2d 72, 79 (DDC 2004) (“As one response to the problematic relationship between due process and conspiracy jurisdiction, courts often require another element for conspiracy jurisdiction: the defendant’s awareness or knowledge of the co-conspirator’s acts in the forum.”); *Hercules Inc v Leu Trust and Banking (Bahamas) Ltd*, 611 A2d 476, 483–84 (Del 1992).

¹⁴¹ See *Stauffacher*, 969 F2d at 459 (dismissing potential criticism that “merg[ing] the jurisdictional issue with the merits” was problematic by describing similar situations that arise in many legal contexts without problem, including official immunity in search and seizure cases and the status of coconspirator testimony as an exception to the hearsay rule).

¹⁴² See *id* at 460. See also Althouse, 52 Fordham L Rev at 242 (cited in note 135) (“Most courts have . . . assumed that the conspiracy theory is available in appropriate cases.”).

¹⁴³ *Stauffacher*, 969 F2d at 457.

¹⁴⁴ *Id* at 459.

2. Similarities between conspiracy jurisdiction and aiding-and-abetting jurisdiction.

Because the elements of a conspiracy are sufficient to confer jurisdiction, and because the “active concert” requirement of Rule 65 parallels the conspiracy elements, proving active concert under Rule 65 should be sufficient to establish jurisdiction. Civil conspiracy is similar to aiding and abetting the violation of an injunction in that both involve a common intent to commit an unlawful act. Conspiracy requires an agreement between two or more persons to participate in an unlawful act.¹⁴⁵ Aiding-and-abetting liability under Rule 65 is unlike other forms of aiding-and-abetting liability in that courts require active concert between the party and the nonparty, rather than merely substantial assistance in the wrongful act.¹⁴⁶ Active concert requires that the nonparty be working *with* the party to violate an injunction—they must share a common purpose. This required joint purpose has been described as “commonality of incentives and motivations” or “identity of interests” between the parties.¹⁴⁷ It is not sufficient that a nonparty violates an injunction because that nonparty has a “genuinely independent interest” in violating the order—that is, an interest unrelated to the party’s interest in violating the injunction.¹⁴⁸ For example, in *Heyman v*

¹⁴⁵ The most common elements required to establish civil conspiracy are:

- (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme.

Halberstam v Welch, 705 F2d 472, 477 (DC Cir 1983).

¹⁴⁶ See *United Pharmacal Corp v United States*, 306 F2d 515, 517 (1st Cir 1962) (holding that a nonparty must act in concert with a party in order to fall within the “active concert or participation” language of Rule 65(d)(2)); *Ex Parte Morford*, 31 P2d 406, 408 (Cal App 1934) (noting, prior to the enactment of Rule 65, that a nonparty can be bound by an injunction “provided he acted in collusion with the person directly restrained by the order”). Outside of the contempt context, aiding and abetting only requires substantial assistance to bring about the unlawful act, rather than actual agreement between the parties. See *Master-Halco, Inc v Scillia, Dowling & Natarelli, LLC*, 739 F Supp 2d 109, 121 (D Conn 2010):

The primary distinction between civil conspiracy and aiding and abetting is that in the latter, unlike the former, the aider and abettor need not actually agree to bring about the tort. Instead, what must be proven for aider-abettor liability is that the individual gave substantial assistance to the tortfeasor in carrying out the tort with the knowledge—or reckless indifference to the possibility—that the assistance would aid in carrying out that tort.

¹⁴⁷ *Lynch v Rank*, 639 F Supp 69, 72 (ND Cal 1985).

¹⁴⁸ *Heyman v Kline*, 444 F2d 65, 66–67 (2d Cir 1971).

Kline,¹⁴⁹ the Second Circuit held that the enjoined party's wife was not in concert with her husband when she refused to execute a quitclaim deed on a property for which she had been assigned a one-half interest. Because she had a "genuinely independent interest in the property," her actions were not punishable unless they were adjudged in a separate proceeding.¹⁵⁰

Rule 65(d) thus requires shared intentions between the enjoined party and the nonparty as part of the "active concert or participation" requirement.¹⁵¹ In the conspiracy context, similar shared intentions—an agreement to commit an unlawful act—is sufficient to confer jurisdiction. For this reason, a substantive assessment of the Rule 65(d) elements—whether the nonparty had notice of the injunction, whether she aided and abetted the party's violation of that injunction, and whether she was in active concert with the enjoined party¹⁵²—would screen out individuals who should not be subject to the court's jurisdiction.¹⁵³

Conspiracy and contempt also share similar jurisdictional and legal underpinnings that allow for enforcement against foreign individuals. Conspiracy jurisdiction is most frequently based on state long-arm statutes—which apply in federal court through Federal Rule of Civil Procedure 4—or on a federal statute that grants jurisdiction.¹⁵⁴ Most long-arm statutes are framed broadly and allow for jurisdiction over foreign actors

¹⁴⁹ 444 F2d 65 (2d Cir 1971).

¹⁵⁰ *Id.* at 66–67.

¹⁵¹ Compare *Waffenschmidt*, 763 F2d at 717 (holding that when nonparties "knowingly participated in [the defendant's] scheme to dissipate the funds they equally knowingly subjected themselves to the jurisdiction of that court"), with *Lynch*, 639 F Supp at 71–74 (distinguishing *Waffenschmidt* on the grounds that in this case, the nonparty lacked the "commonality of incentives" to find active concert and participation with the defendants).

¹⁵² See FRCP 65(d). See also Wright, Miller, and Kane, 11A *Federal Practice and Procedure* § 2956 at 380 (cited in note 7).

¹⁵³ One difference between aiding and abetting and conspiracy is that the two result in different kinds of liability: "Civil conspiracy imposes joint and several liability upon each conspirator for all harm committed pursuant to the conspiracy. In contrast, the aider and abettor is liable only for harm resulting from acts that she substantially assisted." David Waksman, *Causation Concerns in Civil Conspiracy to Violate Rule 10b-5*, 66 NYU L Rev 1505, 1508 (1991). See also *Halberstam*, 705 F2d at 478, 481 (noting that conspirators can be liable for all injuries caused in furtherance of the conspiracy, whereas aider-abettors are liable only for the acts that they assist or encourage).

¹⁵⁴ See S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 Wash & Lee L Rev 489, 539 n 245 (2010) (noting that RICO is one such statute that grants jurisdiction).

provided that constitutional due process is satisfied.¹⁵⁵ The constitutional basis for jurisdiction is described in the following section.¹⁵⁶

Similarly, the statutory basis for the enforcement of contempt orders is very broad. Contempt orders are authorized under 18 USC § 401.¹⁵⁷ The statutory basis for enforcing orders against nonparties stems from Federal Rule of Civil Procedure 71, which provides that the procedure for enforcing an order against a nonparty “is the same as for a party.”¹⁵⁸ Under Rule 4.1 “[s]ervice of process is not required to notify a party of a decree or injunction, or of an order that the party show cause why that party should not be held in contempt of such an order.”¹⁵⁹ Instead, contempt motions can be filed with nonparties’ attorneys.¹⁶⁰ Thus, the only real limit on the scope of the court’s power in these cases is imposed by the Fifth Amendment.¹⁶¹

3. The constitutional basis for conspiracy and aiding-and-abetting jurisdiction.

The assertion of aiding-and-abetting jurisdiction against nonparties is not barred by the due process considerations

¹⁵⁵ For an example of a broad state long-arm statute, see RI Gen Laws Ann § 9-5-33 (declaring that Rhode Island courts have jurisdiction over all foreign parties that have the necessary minimum contacts, so long as assertion of jurisdiction does not violate the Constitution). See also Wright and Miller, 4 *Federal Practice and Procedure* § 1068 at 579 (cited in note 45) (surveying state long-arm statutes, and noting the trend toward more inclusive long-arm statutes for acts that have effects in the jurisdiction).

¹⁵⁶ See Part IV.A.3.

¹⁵⁷ 18 USC § 401 (“A court of the United States shall have power to punish . . . such contempt of its authority, and none other, as . . . disobedience or resistance to its lawful writ, process, order, rule, decree, or command.”).

¹⁵⁸ FRCP 71. See *Red 1 Investments, Inc v Amphion International Ltd*, 2007 WL 3348594, *6–8 (ED Wash) (holding that enforcement of an injunction against a nonparty was governed by Rule 5, since Rule 71 makes enforcement of orders against nonparties the same as for parties).

¹⁵⁹ See FRCP 4.1, Advisory Committee Notes to the 1993 Amendments. See also *Waffenschmidt*, 763 F2d at 719–20 (finding that the territorial limits set out in Rule 4(f), now Rule 4.1(b), which establishes a 100-mile limit for service of an order committing a person for civil contempt, does not apply to an order to show cause for why a nonparty should not be held in contempt).

¹⁶⁰ See FRCP 5(b)(1). See also *City Cab Co of Orlando, Inc v All City Yellow Cab, Inc*, 581 F Supp 2d 1197, 1200 (MD Fla 2008) (noting that Rule 71 indicates that “personal jurisdiction over a nonparty contemnor is a given,” and allowing the filing of motions with counsel for the nonparty under Rule 5(b)).

¹⁶¹ Wright and Miller, 4 *Federal Practice and Procedure* § 1068.1 at 594 (cited in note 45) (noting that the broader “Due Process Clause of the Fifth, rather than the Fourteenth, Amendment applies to the assertion of personal jurisdiction in the federal question context”).

underlying personal jurisdiction. Because the conspiracy theory provides a framework for courts to analyze foreign coconspirators' contacts rather than an independent ground for jurisdiction, participation in a conspiracy can be sufficient to establish minimum contacts. This same reasoning can be applied to aiding and abetting the violation of an injunction, when a nonparty's actions in violating the injunction establish minimum contacts. Conspiracy jurisdiction is similar to the effects test for jurisdiction upheld by the Supreme Court. In *Calder v Jones*,¹⁶² the Supreme Court held that jurisdiction over defendants for libel committed in Florida was "proper in California based on the 'effects' of their Florida conduct in California."¹⁶³ Because the defendants' "intentional, and allegedly tortious, actions were expressly aimed at California," the court could establish jurisdiction.¹⁶⁴ The *Calder* effects test has been interpreted as requiring three elements: (1) intentional action, (2) expressly aimed at the forum, (3) taken with knowledge that injury would be felt in the forum.¹⁶⁵

A theory similar to the effect test supports the assertion of conspiracy jurisdiction—in which courts focus on the effects of an individual's intentional actions in the forum state¹⁶⁶ and sometimes require knowledge of the in-forum actions.¹⁶⁷ For example, the Delaware Supreme Court has focused on awareness of in-forum effects of a conspiracy to support jurisdiction over a coconspirator. The court noted that "'conspiracy theory' merely provides a framework with which to analyze a foreign defendant's contacts" rather than "an independent jurisdictional basis."¹⁶⁸ Applying this standard, the Delaware Supreme Court

¹⁶² 465 US 783 (1984).

¹⁶³ *Id.* at 789.

¹⁶⁴ *Id.*

¹⁶⁵ See *Dudnikov v Chalk & Vermilion Fine Arts, Inc.*, 514 F3d 1063, 1072 (10th Cir 2008). See also *Calder*, 465 US at 789–90 (noting that the defendants undertook "intentional, and allegedly tortious, actions," when "they knew that the brunt of that injury would be felt . . . in the [forum] State").

¹⁶⁶ See, for example, *Hanes Companies, Inc v Ronson*, 712 F Supp 1223, 1229 (MD NC 1988) (holding that plaintiff had established sufficient jurisdictional facts, as required under *Calder*, to support conspiracy jurisdiction, and noting that the standard for proving jurisdiction on a motion to dismiss is similar to the summary judgment standard, in which "the court should grant the motion . . . only if there is no dispute as to the material jurisdictional facts").

¹⁶⁷ See *Youming Jin*, 335 F Supp 2d at 79 (noting that some courts require that the foreign defendant have knowledge of the coconspirator's in-forum actions to establish conspiracy jurisdiction).

¹⁶⁸ *Hercules*, 611 A2d at 482 n 6.

found a foreign bank, whose investor traded on inside information, to be in a conspiracy to defraud with that investor.¹⁶⁹ The foreign bank was subject to its jurisdiction because the bank “knew, or had reason to know, that [] a misappropriation [of inside information] had an effect in Delaware by its impact on a Delaware company.”¹⁷⁰

A minority of courts have refused to apply the conspiracy theory of jurisdiction absent sufficient contacts to the forum.¹⁷¹ Nonetheless, even scholars and courts that have criticized conspiracy jurisdiction because it allows courts to assert personal jurisdiction when there is no independent basis for it concede that a conspiracy can sometimes be sufficient to establish minimum contacts.¹⁷² Professor Ann Althouse proposed limiting conspiracy jurisdiction to cases in which “the court [] find[s] some purposeful act on the part of each defendant that justifies the inference that he knew or should have known that that act entailed the risk of consequences in the forum state substantial enough to require him to defend a lawsuit in that state.”¹⁷³ Indeed, many courts require knowledge of the coconspirator’s in-forum actions before jurisdiction can be established.¹⁷⁴

Further, the aspect of conspiracy jurisdiction that most troubles scholars and courts—namely, that a defendant who joins a conspiracy is responsible for all acts taken in furtherance of the conspiracy, even those not foreseen by the defendant¹⁷⁵—is not present when a foreign nonparty aids and abets the violation of an injunction. Unlike civil conspiracies, mere agreement is an insufficient basis for the issuance of contempt sanctions. Whereas conspiracy jurisdiction can be established based exclusively on a

¹⁶⁹ Id at 483.

¹⁷⁰ Id at 484.

¹⁷¹ See, for example, *Massachusetts School of Law at Andover, Inc v American Bar Association*, 142 F3d 26, 37 (1st Cir 1998); *Youming Jin*, 335 F Supp 2d at 80 (“Personal jurisdiction, even if based on conspiracy, requires purposeful availment.”). See also *Chirila v Conforte*, 47 Fed Appx 838, 843 (9th Cir 2002) (noting that “[t]here is a great deal of doubt surrounding the legitimacy of this conspiracy theory of personal jurisdiction,” but ultimately declining to decide whether a conspiracy can support personal jurisdiction).

¹⁷² See Althouse, 52 Fordham L Rev at 251–54 (cited in note 135).

¹⁷³ Id at 255.

¹⁷⁴ See *Youming Jin*, 335 F Supp 2d at 79–80 & n 3.

¹⁷⁵ For a statement of this conspiracy doctrine, see *Pinkerton v United States*, 328 US 640, 646–47 (1946). For one criticism of the application of conspiracy jurisdiction to acts not foreseen by the out-of-forum coconspirator, see Lea Brilmayer and Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv L Rev 1217, 1258–59 (1992) (criticizing conspiracy theory on the grounds that it violates due process, since “it requires no showing of purposefulness or foreseeability”).

coconspirator's "involvement in planning and encouraging the co-conspirator to perform the act,"¹⁷⁶ aiding and abetting the violation of an injunction requires more than simply "planning and encouraging";¹⁷⁷ the nonparty must act in a way that affects the forum by knowingly violating an injunction while in active concert with the enjoined party.¹⁷⁸

For this reason, aiding-and-abetting jurisdiction would not—or should not—come as a surprise to foreign nonparties who act with common intent to violate an injunction. Under this framework, a court could not establish jurisdiction over nonparties in a case like *Reebok*, for instance, in which the nonparty was merely trying to comply with the law rather than purposefully violating a court's order.¹⁷⁹ In that case, although the nonparty knowingly violated an injunction, there would be no "commonality of incentives and motivations" or "identity of interests" between the nonparty and the party to establish active concert.¹⁸⁰

Because aiding and abetting the violation of an injunction requires more than awareness—it requires "active concert or participation" to undertake actions aimed at the forum¹⁸¹—due process requirements will be met when the substantive elements of Rule 65(d) exist.

4. Application of aiding-and-abetting jurisdiction.

Like conspiracy jurisdiction, aiding-and-abetting jurisdiction would provide an alternative approach for determining whether a nonparty has sufficient contacts with the forum based on a foreign nonparty's actions in violation of an injunction.

One party has successfully argued for the application of aiding-and-abetting jurisdiction in the context of Rule 65(d) sanctions. In finding a Liberian nonparty properly before the court for aiding and abetting the violation of an injunction, the Eastern District of Pennsylvania held that a foreign nonparty "may be considered an aider and abettor" despite the Ninth Circuit's holding in *Reebok* "that the scope of a nationwide injunction

¹⁷⁶ Althouse, 52 Fordham L Rev at 255 (cited in note 135).

¹⁷⁷ See Part IV.A.2.

¹⁷⁸ See *Lynch*, 639 F Supp at 74 (noting that in the context of Rule 65(d), "courts must be careful not to resort to fictional conspiracies to find personal jurisdiction").

¹⁷⁹ See *Reebok International*, 49 F3d at 1392.

¹⁸⁰ *Lynch*, 639 F Supp at 72–73.

¹⁸¹ FRCP 65(d)(2).

cannot be broadened to encompass a foreign national.”¹⁸² Significantly, the defendants, who filed a contempt motion against a nonparty for aiding the violation of an injunction enjoining the plaintiff from enforcing a previous Liberian judgment, used the term “aiding and abetting jurisdiction” in their motions. They argued that “[t]he accepted test for whether ‘aiding and abetting’ jurisdiction attaches is not whether the alleged contemnor is a foreigner, but whether his conduct has been such that he could reasonably expect to be haled into a U.S. court.”¹⁸³ The fact that the Eastern District of Pennsylvania accepted defendant’s argument by holding the foreign nonparty to be properly before the court demonstrates that courts may be willing to apply a conspiracy-jurisdiction rationale in aiding-and-abetting cases in which a foreign person acts in a way that affects the forum from abroad.

Under aiding-and-abetting jurisdiction, courts would simply determine whether the substantive elements of Rule 65(d) were met in order to assert jurisdiction over foreign nonparties charged with violating an injunction. A court’s assertion of aiding-and-abetting jurisdiction over a nonparty would not meaningfully differ from conspiracy jurisdiction and would allow courts to prevent strategic violations of injunctions by defendants.¹⁸⁴

B. Discovery Orders as a Procedural Analogue

The application of conspiracy jurisdiction to aiding and abetting the violation of an injunction finds procedural support in an analogy to courts’ treatment of discovery orders issued against foreign parties and nonparty subsidiaries. Since “[e]very discovery order is a contempt order waiting to happen,”¹⁸⁵ a

¹⁸² *Abi Jaoudi and Azar Trading*, 2009 WL 80293 at *1, citing *Reebok International*, 49 F3d at 1387.

¹⁸³ Memorandum of Law in Further Support of Motion for Finding of Contempt and in Opposition to Respondents’ Motion on Threshold Issues, *Abi Jaoudi and Azar Trading Corp v CIGNA Worldwide Insurance Co*, No 91-6785, *2, 15 (ED Pa filed Dec 17, 2008) (emphasis omitted) (available on Westlaw at 2008 WL 5669390) (relying on *Homa* as the principal aiding-and-abetting-jurisdiction case, and distinguishing *Reebok* on the grounds that the foreign party in the present case “was not an innocent third party presented with a Catch-22 choice of complying with the law of his own country or violating a federal court’s injunction”).

¹⁸⁴ Note, 49 Minn L Rev at 719 (cited in note 6) (“If all nonparties were allowed to violate the decree with impunity, the party-defendant could avoid the court’s mandate simply by procuring others to do the forbidden act.”).

¹⁸⁵ See Ryan W. Scott, Note, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 Minn L Rev 968, 997–1003 (2004) (arguing that

comparison to courts' treatment of discovery orders against foreign parties and nonparties is useful.

The Supreme Court has addressed discovery orders directed at foreign parties and indicated that courts must determine whether the party violated the order in good faith and whether international policy considerations counsel against issuing contempt sanctions for the violation.¹⁸⁶ A similar balancing test could be applied to determine whether a nonparty that has aided and abetted the violation of an injunction should be held in contempt of court. Such a test would weigh the good- or bad-faith motivations for the violation of the court's order, the magnitude of the burden imposed on the party by the initial injunction, and the US interests served by enforcing the injunction. The balancing test comports with the personal-jurisdiction analysis, which places great emphasis on the burden to foreign litigants and the interests of the home jurisdiction.¹⁸⁷

Part IV.B.1 outlines Supreme Court cases addressing the enforcement of discovery orders against foreign parties. Part IV.B.2 explores the cases that apply this balancing test to foreign nonparty subsidiaries, and argues that the concerns animating the foreign nonparty subsidiary balancing test are similar to concerns raised by courts contemplating contempt sanctions against foreign nonparties under Rule 65(d). Based on this analogy, Part IV.B.3 outlines a balancing test that can be applied when foreign nonparties violate an injunction. Under the proposed framework, courts would first determine whether the substantive elements of aiding-and-abetting liability under Rule 65(d) are met. Even when those elements are established, courts should then apply a balancing test to determine whether the party should be held in contempt for the violation of the injunction. The balancing test would weigh the nonparty's motivations for violating the court order, policy concerns, the burden that the injunction imposed on the nonparty, and the US and foreign interests served by enforcing or not enforcing the injunction.

courts should apply a modified minimum-contacts test to determine jurisdiction over nonparty witnesses, taking into consideration the burden on the witness, along with the interests of the parties, the forum, and the judicial system).

¹⁸⁶ See *Societe Internationale pour Participations Industrielles et Commerciales, SA v Rogers*, 357 US 197, 205, 208 (1958).

¹⁸⁷ See *Asahi Metal Industry*, 480 US at 114 (emphasizing the unique burdens that are placed on foreign litigants and that must be considered in the personal jurisdiction analysis).

1. The enforcement of discovery orders against foreign parties.

The Supreme Court has held that courts should determine whether they can issue discovery orders to foreign nonparties using a balancing test.¹⁸⁸ Because lower courts have applied this balancing test to nonparty subsidiaries, an analysis of these cases provides a useful starting point.

The differences between civil and common law systems do not restrain district court's power to enforce its orders. Just as the contempt power is virtually unknown in civil law systems,¹⁸⁹ discovery procedures in common law countries are also more expansive than their civil law counterparts.¹⁹⁰ Indeed, the international-law concerns regarding discovery orders and injunctions issued against foreign nonparties are similar: "Clients from civil code countries may underestimate the consequences of disregarding a court order, whether a provisional remedy, an order enforcing a discovery request, or a permanent injunction."¹⁹¹

Despite the differences between civil and common law legal systems, the Supreme Court has affirmed US courts' ability to enforce discovery orders against foreign parties.¹⁹² The Supreme Court declined to interpret the Hague Convention on the Taking of Evidence, an international treaty implemented to standardize

¹⁸⁸ See *Societe Internationale pour Participations Industrielles et Commerciales*, 357 US at 208.

¹⁸⁹ See Michael Chesterman, *Contempt: In the Common Law, but Not the Civil Law*, 46 Intl & Comp L Q 521, 521 (1997) (noting that the concept of contempt is "simply unknown" in civil law systems) (quotation marks omitted). Although many civil law countries have statutory provisions to enforce judgments, common law judges wield much greater power to determine the definition of contempt and the type of sanctions to impose to induce compliance. See *id.* at 547–48. Indeed, the concept that "inherent powers" of the court justify contempt is absent in civil law countries. *Id.* at 557. It has been noted that "[t]he very idea of giving a court the general power to compel individuals in civil actions to do or to refrain from doing certain acts under penalty of imprisonment or fine or both is repugnant to the civil law tradition." Merryman and Pérez-Perdomo, *The Civil Law Tradition* at 55 (cited in note 119).

¹⁹⁰ *Société Nationale Industrielle Aérospatiale v United States District Court for the Southern District of Iowa*, 482 US 522, 542–43 (1987). See also James H. Carter, *Existing Rules and Procedures*, 13 Intl Lawyer 5, 5 (1979) (noting that broad pretrial procedure in American courts "is so completely alien to the procedure in most other jurisdictions that an attitude of suspicion and hostility is created").

¹⁹¹ Gregory F. Hauser, *Representing Clients from Civil Law Legal Systems in U.S. Litigation: Understanding How Clients from Civil Law Nations View Civil Litigation and Helping Them Understand U.S. Lawsuits*, 17 Intl L Practicum 129, 139 (2004) (noting that clients from civil law countries often "do not anticipate that a court in a civil case can use what look like criminal sanctions to enforce its authority").

¹⁹² *Société Nationale Industrielle Aérospatiale*, 482 US at 536–37.

discovery procedures between nations, in a way that restricts courts' discovery power.¹⁹³ The Court assumed that the United States would not have signed the international discovery treaty if it restricted the reach of US courts' discovery orders:

Surely, if the Convention had been intended to replace completely the broad discovery powers that the common-law courts in the United States previously exercised over foreign litigants subject to their jurisdiction, it would have been most anomalous for the common-law contracting parties to agree to Article 23, which enables a contracting party to revoke its consent to the treaty's procedures for pretrial discovery.¹⁹⁴

Thus, courts are not required to categorically apply the Hague Convention and instead may rely exclusively on their inherent powers to determine whether discovery can be ordered against a foreign party. In *Société Nationale Industrielle Aérospatiale v United States District Court for the Southern District of Iowa*,¹⁹⁵ the Court held that US courts are not required to apply the Hague Convention in discovery proceedings involving foreign parties.¹⁹⁶ Courts must decide whether a particular case merits application of Convention guidance based on "scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to [the Hague Convention] procedures will prove effective."¹⁹⁷

Reminiscent of concerns raised in the injunction cases, the Court noted that an overly restrictive interpretation of the Convention would "rais[e] a significant possibility of very serious interference with the jurisdiction of United States courts."¹⁹⁸ Noting that "the Hague Convention 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," the Court found that the Hague

¹⁹³ The Convention on the Taking of Evidence was ratified by the US Senate in 1972. See *id.* at 530. Unlike the Convention on Choice of Court Agreements, the Convention on the Taking of Evidence is formally recognized as law in the United States. See *id.* at 533.

¹⁹⁴ *Id.* at 536–37.

¹⁹⁵ 482 US 522 (1987).

¹⁹⁶ *Id.* at 538.

¹⁹⁷ *Id.* at 544–46 (requiring courts to "demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality . . . and for any sovereign interest expressed by a foreign state").

¹⁹⁸ *Id.* at 539.

Convention did not deprive lower courts of the “well established . . . power to impose discovery.”¹⁹⁹ Thus, based on their inherent powers, courts can compel foreign parties to produce documents when refusal would interfere with US litigation. If courts’ inherent powers apply to foreign parties in the discovery context, there is little reason to think that they do not extend to foreign parties in the contempt context.

Prior to the adoption of the Convention on the Taking of Evidence, the Supreme Court developed a balancing test for courts to apply to international discovery orders. That approach has guided courts in issuing discovery orders against parties and nonparty subsidiaries.²⁰⁰ The Court distinguished between a foreign party’s purposeful evasion of a court order and principled refusal to comply with burdensome discovery inconsistent with the foreign country’s laws.²⁰¹ *Societe Internationale pour Participations Industrielles et Commerciales, SA v Rogers*,²⁰² arose after the US government seized assets during World War II pursuant to the Trading with the Enemy Act.²⁰³ After the war ended, a Swiss holding company brought suit, alleging that it was entitled to assets that had been seized during the war.²⁰⁴ In defending the suit, the US government sought discovery of the Swiss company’s banking records under Federal Rule of Civil Procedure 34.²⁰⁵ Similar to the facts in *Reebok*, the holding company refused to provide all of the records on the ground that production would have exposed the company to criminal sanctions under Swiss law.²⁰⁶ The Supreme Court upheld the district court’s discovery order and reversed the dismissal of the complaint.²⁰⁷

The Court called for a case-by-case balancing approach, and interpreted the “policies underlying the Trading with the Enemy

¹⁹⁹ *Société Nationale Industrielle Aérospatiale*, 482 US at 539–40, 553 n 4.

²⁰⁰ See notes 212–13 and accompanying text.

²⁰¹ *Societe Internationale pour Participations Industrielles et Commerciales*, 357 US at 208–13.

²⁰² 357 US 197 (1958).

²⁰³ *Id.* at 198–99. See also Act of Oct 6, 1917, ch 106, 40 Stat 411, codified at 50 App USC § 1 et seq.

²⁰⁴ *Societe Internationale pour Participations Industrielles et Commerciales*, 357 US at 199.

²⁰⁵ *Id.* at 199–200.

²⁰⁶ *Id.* at 200.

²⁰⁷ *Id.* at 206–08.

Act” to uphold the district court’s production order.²⁰⁸ Indeed, the Court’s analysis paralleled concerns raised over foreign nonparties escaping jurisdiction for injunction violations. The Court noted that allowing foreign parties to evade discovery orders “invite[s] efforts to place ownership of American assets in persons or firms whose sovereign assures the secrecy of records.”²⁰⁹ The Court nonetheless reversed the dismissal of the claims, since the holding company “had in good faith made diligent efforts to execute the production order.”²¹⁰ The Court pointed out that “Petitioner [had] sought no privileges because of its foreign citizenship It assert[ed] only its inability to comply because of foreign law.”²¹¹

The Supreme Court has thus adopted a stance that allows courts to compel foreign parties to act in instances that might threaten the courts’ ability to perform essential judicial functions, while nonetheless ensuring that such action does not conflict with foreign laws or unduly burden foreign parties.

2. The enforcement of discovery orders against foreign subsidiary nonparties.

Courts apply the balancing test articulated by the Supreme Court in *Societe Internationale* to discovery orders against foreign nonparties that are subsidiaries of a party. Thus, courts generally apply the same combination of minimum-contacts and burden analysis to determine whether nonparty subsidiaries are bound by their orders.²¹²

Courts apply the discovery-order balancing test only to foreign nonparties that are subsidiaries of parties.²¹³ Accordingly, one might wonder whether the discovery test has any application

²⁰⁸ *Societe Internationale pour Participations Industrielles et Commerciales*, 357 US at 206 (“The propriety of the use to which [Rule 34] is put depends upon the circumstances of a given case.”).

²⁰⁹ *Id.* at 205.

²¹⁰ *Id.* at 208.

²¹¹ *Id.* at 211–12 (emphasis omitted).

²¹² See Scott, Note, 88 Minn L Rev at 1012–15 (cited in note 185).

²¹³ See Restatement (Third) of Foreign Relations Laws § 442, Reporter’s Note 10 (1987). Most courts have held that discovery orders against other foreign nonparties who are not subsidiaries can nonetheless be sought through a letter of rogatory to a foreign or international tribunal, such as the Hague Convention on the Taking of Evidence Abroad. See 28 USC § 1781 (codifying this rule); *Metso Minerals Inc v Powerscreen International Distribution Ltd*, 2007 WL 1875560, *3 (EDNY) (granting Letter of Request to compel discovery from a foreign nonparty pursuant to the Hague Evidence Convention); *Laker Airways Ltd v Pan American World Airways*, 607 F Supp 324, 326–27 (SDNY 1985).

in the context of nonparties who aid and abet the violation of an injunction. However, the concerns that limit the application of the test in the discovery context are inapplicable on the injunction violation context. The reasons for not extending the discovery balancing test beyond subsidiary nonparties sound in due process.²¹⁴ Specifically, application of the discovery test to non-subsidiary nonparties might raise personal-jurisdiction concerns. But in the Rule 65(d) context, personal jurisdiction will be established before a nonparty can be held in contempt, based on the nonparty's conduct in assisting the violation of an injunction. Thus, the jurisdictional concerns that justify employing different rules for foreign-nonparty and foreign-subsidiary discovery do not apply in the context of aiding and abetting the violation of an injunction. The court will have *already* established jurisdiction over the nonparty aider and abettor by nature of his actions directed at the forum before it applies the balancing test.²¹⁵ Thus, the concern that arises in the discovery context—that enforcing orders against the nonparty will lead to overly burdensome costs and unforeseeable sanctions—does not apply. In the aiding-and-abetting context, there is a limiting principle, as Rule 65(d) imposes inherent limitations on the power to sanction nonparties.

Moreover, the logic behind the rule that discovery can be compelled against foreign subsidiaries is the same as the logic of Rule 65(d), suggesting that application of the discovery test in the injunction violation context is sensible. Courts allow discovery from nonparty subsidiaries when the parent has “control” over the subsidiary, even when there is no independent basis for jurisdiction.²¹⁶ As with Rule 65(d), the purpose of the rule is to

²¹⁴ Although there has been debate concerning the interaction between personal jurisdiction and nonparty discovery, due process probably does impose a limit on nonparty discovery. Ryan Scott analyzed the varying approaches taken by courts in trying to apply personal jurisdiction jurisprudence designed for defendants to nonparty witnesses. Scott, Note, 88 Minn L Rev at 981 (cited in note 185). Scott advocates for an approach in which courts assess personal jurisdiction over nonparty discovery orders, but with modifications in the nonparty discovery context. For instance, he argues that “fair play and substantial justice” can be analyzed based on the burden to the nonparty witness and the interests of the parties, the forum, and the interstate judicial system. *Id.* at 1012–15. This approach is compatible with the balancing test proposed in this Comment.

²¹⁵ See Born and Rutledge, *International Civil Litigation* at 934–38 (cited in note 122) (noting that personal jurisdiction is required to compel discovery from nonparty witnesses, along with service pursuant to Rule 45, which only allows courts to issue a subpoena for witnesses within 100 miles of the place of trial).

²¹⁶ See FRCP 34(a) (“A party may serve on any other party a request . . . to produce . . . items in the responding party’s possession, custody, or control.”); *In re Investigation*

prevent strategic evasion of court orders and to ensure the integrity of litigation in US courts.²¹⁷ Indeed, the requirement of good faith in the balancing test—which applies to both parties and subsidiaries—aims to order discovery in cases in which the parent company used the subsidiary to “deliberately court[] legal impediments to production.”²¹⁸

Foreign subsidiaries are similar to nonparties who violate injunctions in that jurisdictional contacts are not analyzed under the traditional minimum-contacts analysis. A fundamental principle of corporate law—that a subsidiary is not liable for the parent’s obligations or subject to personal jurisdiction based on the parent company’s actions—does not apply to document discovery orders directed at foreign subsidiaries.²¹⁹ Given that subsidiaries face contempt sanctions if they violate a discovery order, the subsidiary rule effectively allows personal jurisdiction to be exercised over subsidiaries. Under this rule, the parent’s control over subsidiary binds the subsidiary to the court’s order.²²⁰ Thus, nonparty subsidiaries can be held in contempt based not on their contacts with the jurisdiction, but based on their control over relevant documents and their subsidiary relationship.

The Court’s balancing test is applied in the same way to foreign subsidiaries as it is to foreign parties.²²¹ The Southern

of *World Arrangements*, 13 FRD 280, 285 (DDC 1952) (defining “control” as based on whether the corporation has the power “to elect a majority of the directors of another corporation”).

²¹⁷ See *First American Corp v Price Waterhouse LLP*, 988 F Supp 353, 364 (SDNY 1997) (“The United States certainly has a strong national interest in fully and fairly adjudicating matters before its courts.”); *Waffenschmidt*, 763 F2d at 717 (expressing concern over “defendant[s] who] enlist the aid of out-of-state individuals in an attempt to frustrate the orders of the district court”).

²¹⁸ See *Minpeco, SA v Conticommodity Services, Inc*, 116 FRD 517, 523 (SDNY 1987) (applying the reasoning in *Societe Internationale* to nonparty subsidiaries), citing *Societe Internationale pour Participations Industrielles et Commerciales*, 357 US at 208–09.

²¹⁹ Born and Rutledge, *International Civil Litigation* at 930 (cited in note 122) (noting that different standards apply in litigation against foreign subsidiaries and in document discovery orders directed at foreign subsidiaries).

²²⁰ See *id.* at 930–31 (noting potential tension in the differing standards for personal jurisdiction over subsidiaries generally and in the discovery context).

²²¹ Some courts have expressed reluctance to order production when the foreign subsidiary is a nonparty. See *Ings v Ferguson*, 282 F2d 149, 152–53 (2d Cir 1960) (holding that an order to produce Canadian banking documents should be modified to require only production of those documents located in the New York branches, since “[n]o claim is being made against either bank by any litigant”); *Minpeco, SA v Conticommodity Services, Inc*, 118 FRD 331, 332 (SDNY 1988) (“[A]n order compelling production should be imposed on a nonparty . . . only in extreme circumstances.”). Nonetheless, the fact that a nonparty is foreign figured as part of the burden element of the balancing test; thus, the same test is applied to parties and subsidiaries.

District of New York applied *Société Nationale* to grant a motion to compel production of documents from a French nonparty with offices in New York City.²²² The court applied a balancing test to determine that the Federal Rules of Civil Procedure rather than the Hague Convention applied.²²³ The court weighed “(1) the competing interests of the nations whose laws are in conflict; (2) the hardship of compliance on the party or witness from whom discovery is sought; (3) the importance to the litigation of the information and documents requested; and (4) the good faith of the party resisting discovery.”²²⁴ The court compelled the nonparty to produce documents despite substantial hardship from “the possibility of criminal prosecution in France pursuant to the Blocking statute,” which criminalized document requests directed at businesses from foreign individuals for purposes of litigation.²²⁵

Thus, courts are willing to impose discovery on foreign nonparty subsidiaries without regard to their involvement in the litigation.²²⁶ Although their foreign, nonparty status makes the burden of discovery much greater, courts have discretion to decide when the burden of complying with a court order outweighs the benefits.²²⁷ This practice of compelling foreign subsidiaries to produce documents provides an example of a balancing test that

²²² *In re Vivendi Universal, SA Securities Litigation*, 2006 WL 3378115, *2–3 (SDNY).

²²³ *Id.* at *4.

²²⁴ *Id.* at *2, citing *First American*, 988 F Supp at 364 (cited in note 217). See also Restatement (Third) of Foreign Relations Laws § 442(1)(c), listing factors that US courts must consider before issuing an order to compel foreign discovery, including

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

²²⁵ *Vivendi Universal*, 2006 WL 3378115 at *1 & n 1, 3. See Restatement (Third) of Foreign Relations Laws § 442, Reporter’s Note 4 (noting that a blocking statute prohibits “the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state”).

²²⁶ See *United States v Vetco Inc*, 691 F2d 1281, 1291 (9th Cir 1981) (upholding the issuance of summonses to obtain records of Swiss subsidiaries of American firms, on the grounds that the United States’ interest in prosecuting tax fraud outweighed Switzerland’s interest in preserving bank secrets).

²²⁷ See *Application to Enforce Administrative Subpoenas Duces Tecum of the Securities and Exchange Commission v Knowles*, 87 F3d 413, 414, 419 (10th Cir 1996) (holding that the district court had specific jurisdiction over a Bahamian nonparty to enforce a subpoena based on his “ongoing business relationship” related to the underlying investigation).

serves to limit the effects of US litigation on foreign individuals, while ensuring that US court orders are followed and that litigation is not hindered. As the concerns that animate foreign non-party subsidiary rules are similar to those that apply to issuing contempt sanctions against nonparties who aid and abet injunction violations, application of a similar balancing test in enforcing injunctions seems prudent.

3. A balancing approach to Rule 65(d).

The treatment of discovery orders directed at foreign parties and nonparties cuts against the application of a one-size-fits-all approach to compelling action by foreign actors. As with all categorical rules, cabining the reach of discovery orders or sanctions for the violation of injunctions to named parties invites circumvention by other entities working in concert with those parties. When deciding whether to sanction foreign nonparties for aiding the violation of an injunction, courts should first determine whether the substantive elements of aiding-and-abetting liability under Rule 65(d) are met. Even when those elements are established, courts should then apply a balancing test—like the test applied to discovery orders directed at foreign subsidiaries—to determine whether the party should be held in contempt for violation of the injunction. This two-step process is similar to the discovery context, in which a court still can refuse to compel discovery even if control over a subsidiary is established.

In the contempt context, the balancing test should weigh the following factors: (1) the good- or bad-faith motivations for the violation of a court order, (2) any policy concerns that weigh against allowing individuals or entities to evade court orders by hiding assets abroad, (3) the magnitude of the burden that the injunction imposed on the nonparty, and (4) the US and foreign interests served by enforcing or not enforcing the injunction. If the burden on nonparties is deemed to be too large, or if there is a conflict between the injunction's requirements and the laws of the foreign nonparty's home country, the court can choose not to compel compliance through contempt sanctions. If the district court's interests outweigh any potential conflict or burden, then the court should issue sanctions, even if the substantive elements of Rule 65(d) are met.

The case for applying a balancing test is even stronger in the aiding and abetting injunction violations context than it is in

the discovery context. In the discovery context, courts must grapple with the concern that they may impose unanticipated burdens on nonparties. This concern is inapplicable to injunction violations, however, as notice and active concert are required before a court can exercise its contempt powers. Thus, while the violation of injunctions resembles the violation of discovery orders in that a flexible balancing test is useful for preventing circumvention, it does not suffer from the inequities that favor limited application of the test in the discovery context.

* * *

Applied together, the aiding-and-abetting jurisdiction derived from conspiracy jurisdiction and the balancing test borrowed from the discovery context would separate cases in which policy and international comity would not support the enforcement of an injunction. These tests would allow courts to enforce injunctions as needed to avoid bad-faith evasion of court orders. At the same time, they would cabin courts' discretion in a manner that would prevent the imposition of contempt sanctions on undeserving parties.

This two-part inquiry for determining when to hold a foreign nonparty in contempt for aiding and abetting the violation of an injunction would be simple for courts to apply. First, courts would determine whether the substantive elements of aiding-and-abetting liability under Rule 65(d) are met—whether the nonparty had notice of the injunction, whether there was a shared purpose to violate the injunction, and whether the injunction was actually violated. When those elements are established, courts would then apply a balancing test to determine whether a nonparty should be held in contempt. The test would weigh the good- or bad-faith motivations for the violation of the court's order, the weight of the burden imposed on the nonparty by the initial injunction, and the US and foreign interests served by enforcing or not enforcing the injunction.

CONCLUSION

Individuals should not be able to knowingly violate a court order and evade sanctions simply because they did so from abroad. But traditional personal-jurisdiction law provides inadequate guidance for courts to determine whether they can prevent this kind of evasion while remaining within the limits of their jurisdictional authority.

This Comment proposes a new approach to enable courts—consistent with their jurisdictional bounds—to prevent foreign nonparties from flouting US injunctions. Courts should use aiding-and-abetting jurisdiction to mark the boundaries of their power to enforce injunctions against foreign nonparties. This analysis would be similar to conspiracy jurisdiction, in which courts consider actions taken by coconspirators within the forum in order to assert jurisdiction over foreign members of the conspiracy. To avoid the imposition of excessively burdensome orders on foreign nonparties, courts should complement the aiding-and-abetting-jurisdiction test with a balancing approach borrowed from the discovery-orders context. Courts' enforcement of discovery orders against foreign nonparties strongly supports the enforcement of injunctions when there is no compelling reason not to do so, but permits nonenforcement in situations in which it would be unduly burdensome on the foreign party. This approach would provide a new means of establishing jurisdiction that is different from, though consistent with, the traditional minimum-contacts analysis.