

**MICROSOFT
VS.
AÉROSPATIALE**



AN IMPENDING COLLISION IN THE CLOUD

JAMES C. FRANCIS IV

UNITED STATES MAGISTRATE JUDGE

SOUTHERN DISTRICT OF NEW YORK



IN THE MATTER OF A WARRANT TO SEARCH A CERTAIN E-MAIL ACCOUNT CONTROLLED AND MAINTAINED BY MICROSOFT CORPORATION

• **15 F. SUPP. 3D 466**
[S.D.N.Y. 2014]

• **REVERSED, 829 F.3D 197**
[2D CIR. 2016]



SOCIÉTÉ NATIONALE INDUSTRIELLE AÉROSPATIALE

V.

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA**

482 U.S. 522 (1987)

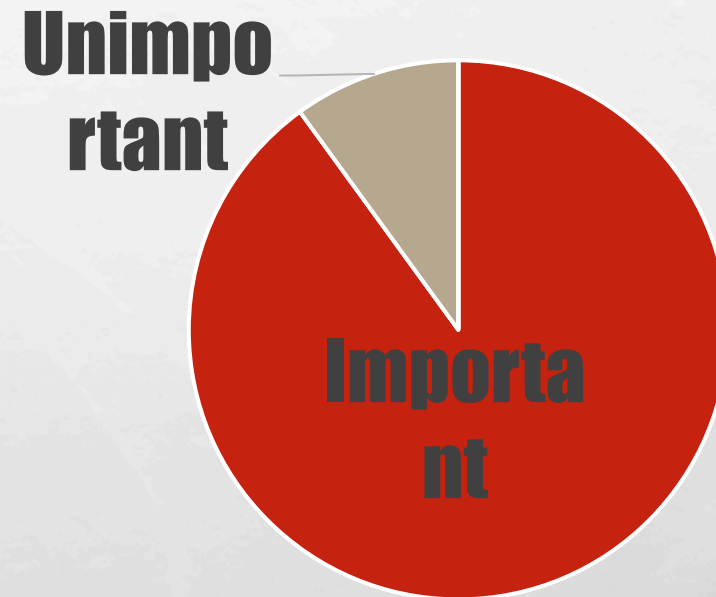
**A PARTY MAY TAKE DISCOVERY OF EVIDENCE
ABROAD PURSUANT TO THE FEDERAL RULES OF
CIVIL PROCEDURE RATHER THAN UNDER THE
HAGUE EVIDENCE CONVENTION AND NEED NOT
ATTEMPT TO UTILIZE HAGUE PROCESSES FIRST**

AÉROSPATIALE FACTORS

- 1. IMPORTANCE OF DOCUMENTS TO LITIGATION**
- 2. DEGREE OF SPECIFICITY OF DISCOVERY REQUEST**
- 3. WHETHER INFORMATION ORIGINATED IN US**
- 4. ALTERNATIVE MEANS OF OBTAINING INFO**
- 5. BALANCE OF US AND FOREIGN INTERESTS**

FACTOR 1: IMPORTANCE OF INFORMATION

**>90% FAVOR
DISCOVERY**



FACTOR 2: SPECIFICITY OF REQUEST

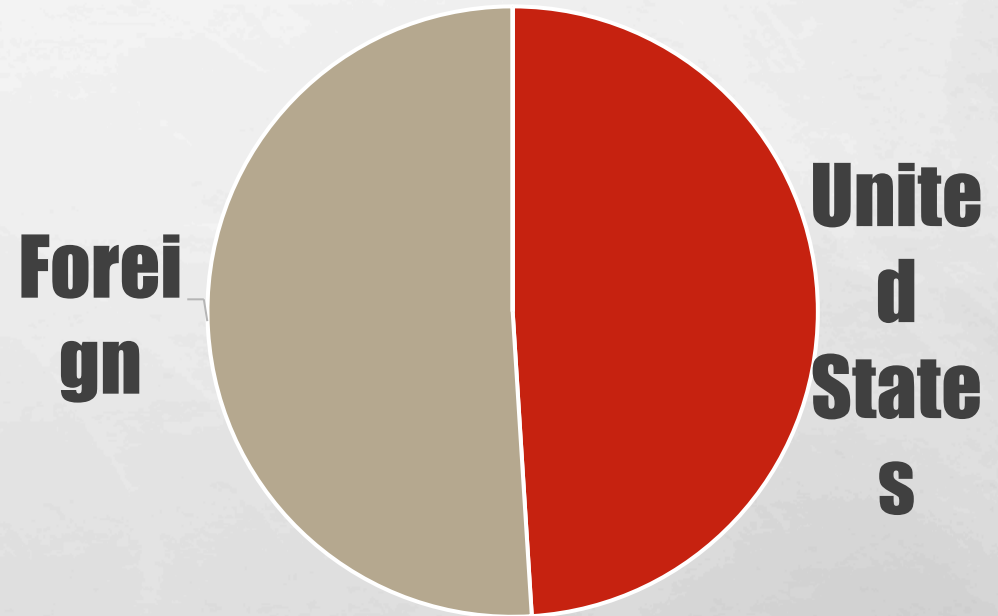
**100% FAVOR
DISCOVERY**



**Highly
Specifi
c**

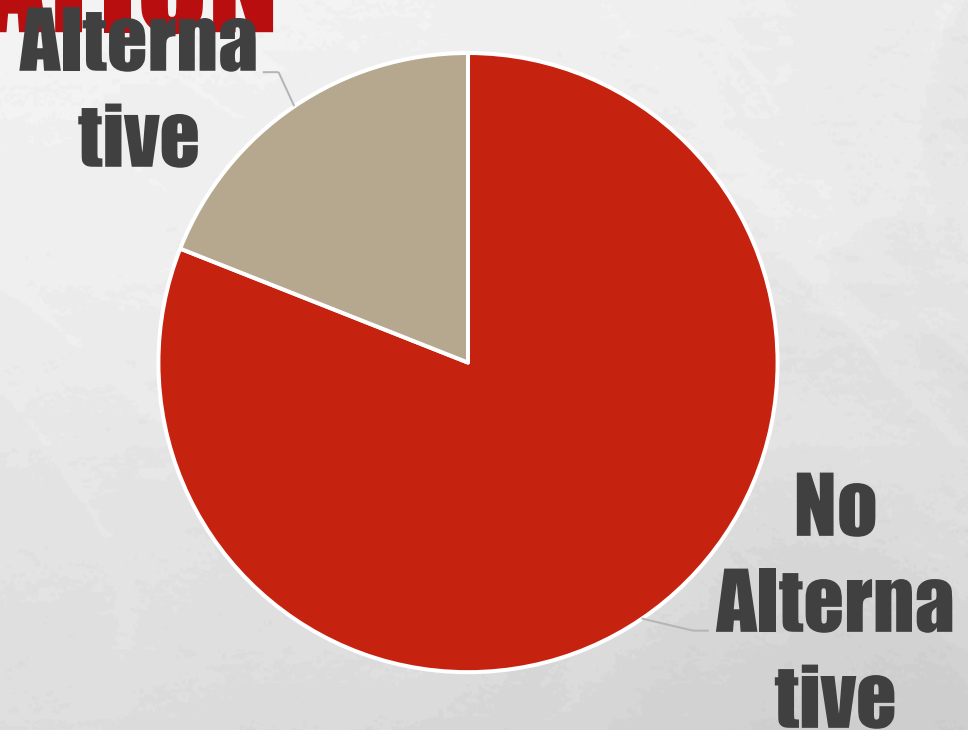
FACTOR 3: ORIGIN OF THE INFORMATION

**< 50% FAVOR
DISCOVERY**



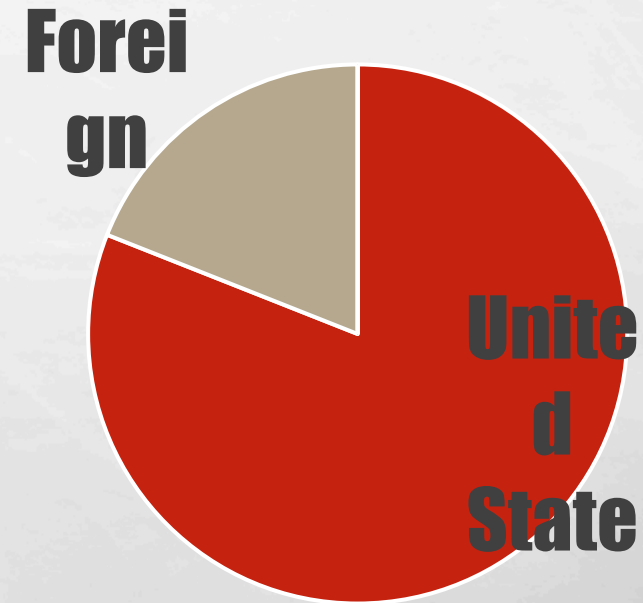
FACTOR 4: ALTERNATIVE MEANS OF OBTAINING INFORMATION

**>80% FAVOR
DISCOVERY**



FACTOR 5: US V. FOREIGN INTERESTS

**>80% FAVOR
DISCOVERY**



**MORRISON
V.
NATIONAL AUSTRALIA BANK LTD.**

561 U.S. 247 (2010)

**ABSENT A CLEAR EXPRESSION OF
CONGRESSIONAL INTENT TO THE CONTRARY, IT
IS PRESUMED THAT FEDERAL LAW HAS ONLY
DOMESTIC, AND NOT EXTRATERRITORIAL,
APPLICATION**

**RJR NABISCO, INC.
V.
EUROPEAN COMMUNITY**

136 S. CT. 2090 (2016)

**THE PRESUMPTION AGAINST
EXTRATERRITORIALITY APPLIES NOT ONLY TO
STATUTES THAT REGULATE OR CRIMINALIZE
CONDUCT, BUT ALSO TO JURISDICTIONAL,
PROCEDURAL, AND REMEDIAL STATUTES**

POSSESSION, CUSTODY, OR CONTROL



CONTROL CASES

- **MARC RICH & CO. V. UNITED STATES,
707 F.2D 663 (2D CIR. 1983)**
- **UNITED STATES V. BANK OF NOVA SCOTIA,
740 F.2D 817 (11TH CIR. 1984)**

MICROSOFT I

**BECAUSE THE INFORMATION SOUGHT BY THE
GOVERNMENT COULD BE ACCESSED BY
MICROSOFT IN THE UNITED STATES, THE
WARRANT WAS NOT BARRED BY THE
PRESUMPTION AGAINST EXTRATERRITORIALITY**

MICROSOFT II

BECAUSE THE INFORMATION SOUGHT BY THE GOVERNMENT WAS PHYSICALLY STORED IN IRELAND, THE WARRANT WAS BARRED BY THE PRESUMPTION AGAINST EXTRATERRITORIALITY

MICROSOFT II

“BECAUSE THE CONTENT SUBJECT TO THE WARRANT IS LOCATED IN, AND WOULD BE SEIZED FROM, THE DUBLIN DATACENTER, THE CONDUCT THAT FALLS WITHIN THE FOCUS OF THE [LAW] WOULD OCCUR OUTSIDE THE UNITED STATES, REGARDLESS OF THE CUSTOMER’S LOCATION AND REGARDLESS OF MICROSOFT’S HOME IN THE UNITED STATES.”

THE MICROSOFT EFFECT



MICROSOFT II

DENIAL OF REHEARING EN BANC

**___ F.3D ___, 2017 WL 362765 (2D CIR.
2017)**

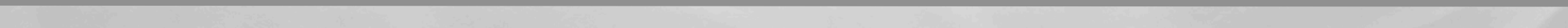
**IN RE SEARCH WARRANT NO.
16-960-M-01 TO GOOGLE**

**___ F. SUPP. 3D ___, 2017 WL 471564
(E.D. PA. 2017)**











m a c m c r a e . c o m

THE CONUNDRUM

- **AÉROSPATIALE : THE FEDERAL RULES CAN BE USED TO OBTAIN DISCOVERY ABROAD**
- **MORRISON/RJR NABISCO: ABSENT CLEAR CONGRESSIONAL INTENT, FEDERAL LAW MAY NOT HAVE EXTRATERRITORIAL EFFECT**
- **MICROSOFT II: EXTRATERRITORIAL EFFECT DEPENDS ON WHERE DATA IS PHYSICALLY LOCATED, NOT ON POSSESSION, CUSTODY, OR CONTROL**

OOPS! THE FEDERAL RULES CAN'T BE USED TO OBTAIN INFORMATION STORED ABROAD



AÉROSPATIALE?



QUESTIONS

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