

### **3. A ruling from the U.S. District Court for the Northern District of California requiring the defendant to include in its discovery responses text messages on the personal devices of its employees, because the defendant had the legal right to obtain the text messages based on its employment agreements.**

In *Westin v. Docusign, Inc.*, No. 22-cv-00824-WHO, 2024 WL 3446924 (N.D. Cal. July 15, 2024), U.S. District Judge William H. Orrick addressed the standards regarding when an employer has possession, custody, or control over information on an employee's personal mobile device.

In this securities fraud class action, Plaintiff claimed that Docusign made misrepresentations regarding its projected postpandemic performance. *Id.* at \*1.

Among other discovery disputes, Plaintiff sought production of text messages from nonparty custodians who were employees of Docusign. Judge Orrick noted that Plaintiff had shown that Docusign employees conducted some business by text, and he stated that text messages are discoverable materials. *Id.* at \*2. Docusign opposed Plaintiff's motion, arguing that it did not have "possession, custody, or control over the devices used to send the text messages" and that the discovery was disproportionate to the needs of the case.

In addressing Plaintiff's motion, Judge Orrick started with the terms of Rule 26(b)(1), pursuant to which "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit." He noted, however, that "the scope of discovery is not unlimited" and a court "must limit any discovery that it determines to be outside the scope permitted by Rule 26(b)(1)." *Id.* (quoting Rule 26(b)(2)(C)(iii)).

Turning to the merits of Plaintiff's motion, Judge Orrick stated that "[a] company has control over text messages if it has the legal right to obtain them upon demand, even if it does not currently possess them." *Id.* (internal quotations omitted). Applying that standard, he found that Docusign had that legal right and therefore had control over the text messages at issue. In particular, Judge Orrick relied on Docusign's employment agreements with the custodians, which mandated that "if [employees] used any personal [device] ... to ... transmit any Company information, [they] agree to

make a prompt and reasonable search for such information,” and Docusign “may have access to such personal [devices] ... to retrieve” it.

Judge Orrick concluded that this language in Docusign’s employment agreements gave Docusign “the legal right to obtain text messages exchanged by the custodians that concerned Docusign information” regardless of whether Docusign had control over the custodians’ personal devices.

Judge Orrick also found that Plaintiff’s request for the text messages was proportionate to the needs of the case. *Id.* at \*3. He noted that Plaintiff provided more than 20 examples of employees, including custodians, using texts for work and that Plaintiff limited his requests to texts that relate to Docusign information from 25 custodians. Accordingly, he ordered Docusign to obtain those text messages and produce them to Plaintiff.