

3. A decision from the U.S. District Court for the District of Massachusetts ordering Plaintiff to produce documents in the possession of a vendor, finding that the documents were within Plaintiff's possession, custody, or control.

In *Linhares v. Woods Hole, Martha's Vineyard, et al.*, No. 1:20-cv-12035-IT, 2022 WL 17736800 (D. Mass Dec. 16, 2022), U.S. District Judge Indira Talwani addressed Plaintiff's motion seeking to compel one of the Defendants to produce documents in the possession of a third-party vendor.

This case involved claims of personal injury against several defendants, including the Nantucket Steamship Authority, for alleged injuries Plaintiff sustained when he slipped on a stairwell while employed by the Steamship Authority as a crew member on a ship. *Id.* at *1. During discovery, Plaintiff requested records of the order, purchase, acquisition, installation, modification, replacement, and/or repairs related to the nonslip tread used on the stairwell. The Steamship Authority refused to produce these documents on the ground that they were in the possession of a third-party shipyard vendor that it used to perform periodic refurbishments of the ship. *Id.* at *4.

Plaintiff filed a motion to compel Plaintiff to produce records related to the tread, arguing that even if such records were in the possession of the shipyard, those records were in the Steamship Authority's "possession, custody, or control" under Rule 34(a). The Steamship Authority responded that while it could make a demand for the tread records from the shipyard, such a demand would not constitute control under Rule 34(a) and that Plaintiff could subpoena the documents from the shipyard directly.

Judge Talwani began her analysis of this issue by noting that for purposes of Fed. R. Civ. P. Rule 34(a)(1)(A), "the concept of 'control' has been construed broadly" and that a document is "under a party's 'control' when that party has the right, authority or ability to obtain the document upon demand." *Id.* at *5. While the Steamship Authority refuted that it had the "right" to demand the records at issue, Judge Talwani found that nothing in the record suggested that the Steamship Authority — as a customer of the third-party shipyard servicing the ship — did not have the practical ability to obtain the service-related tread records.

Judge Talwani also rejected the Steamship Authority's argument that it was under no obligation to produce the records because Plaintiff could subpoena the documents from the shipyard. She explained that the Second Circuit case relied on by the Steamship Authority for this point, *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130 (2d Cir. 2007), did not support the argument because the court in that case noted that "if a party has access and the practical ability to possess documents not available to the party seeking them, production may be required."

Judge Talwani granted Plaintiff's motion and ordered the Steamship Authority to produce the tread-related records.