

**2. An order from the U.S. District Court for the Northern District of California ordering nonparty golfers to collect and produce ESI from their sports agents, finding that the ESI was within the golfers' possession, custody, or control.**

In *Mickelson et al v. PGA Tour, Inc.*, No. 5:22-cv-04486-BLF (N.D. Cal. Nov. 17, 2022), U.S. Magistrate Judge Susan Van Keulen addressed whether ESI held by the sports agents of certain nonparty golfers was within their possession, custody, or control such that the nonparties could be required to collect and search the ESI.

This federal antitrust litigation was brought against the PGA Tour by professional golfers who claimed that the PGA Tour unlawfully suspended them after they joined the competing LIV Golf Invitational Series. Certain of the golfers, referred to as the nonparty players, later voluntarily dismissed their claims and exited the lawsuit.

In discovery, the PGA Tour served subpoenas on the nonparty players seeking the production of documents and included within the definition of the responding party the nonparty players' "attorneys, agents ..., member[s], or employee[s], or any other person acting on [their] behalf." *Id.* at 1. The nonparty players objected to this definition, arguing that they were not obligated to search for and produce relevant, nonprivileged materials in the possession or custody of their agents, managers, and others who represented them and spoke on their behalf in connection with the issues in dispute in the litigation. *See* Joint Statement Regarding Non-Party Player Objections to the Tour's Requests For the Production of Documents, Docket No. 153 (Joint Statement), at 1.

Magistrate Judge Van Keulen stated that the Federal Rules of Civil Procedure "require production of documents that are within the 'possession, custody, or control' of the responding person or entity" and that this standard applies "no matter whether the responding person is a party to the litigation or a third-party subject to Rule 45." Nov. 17, 2022 Order at 1 (quoting Fed. R. Civ. P. 34(a)(1)). She further explained that "control" is generally defined as "the legal right to obtain documents upon demand" and that "under established Ninth Circuit law, materials in the possession of an agent are within the 'control' of the responding person and must be produced." *Id.* at 2.

The nonparty players argued that they did not have the legal right to demand that their "sports agents hand over ESI stored on their phones and in their email accounts for search term review." Joint Statement at 4. The nonparty players further argued that their "agents could legally — and without breaching any contract — refuse to turn over such documents."

However, Magistrate Judge Van Keulen found that it was "not credible" that the nonparty players could not obtain responsive documents from their own agents, which with the use of limiter terms relate only to the agents' representation of the nonparty

players. Nov. 17, 2022 Order at 2. She further distinguished the caselaw cited by the nonparty players, in particular *Rojas v. Bosch Solar Energy Corp.*, 2020 WL 8617414 (N.D. Cal. Aug. 28, 2020), by noting that the analysis of “control” in the context of complex corporate structures was inapposite.

Accordingly, Magistrate Judge Van Keulen concluded that custodial ESI (email and device-level data) in the actual possession of the nonparty players’ agents was within their “control” within the meaning of Rules 34 and 45. She ordered the nonparty players to run the previously agreed-on search terms over their agents’ ESI, with the addition of added limiter terms designed to limit the scope of the results to materials related to their agents’ representation of the nonparty players and not other potential principals.