

3. A decision from the U.S. District Court for the Southern District of New York finding that a corporate Defendant did not have possession, custody, or control over the personal Google accounts of one of its employees who lived in China, where Plaintiff did not address international laws on the issue of control or otherwise demonstrate that Defendant had the “practical ability” to coerce the employee into complying with a request for the personal account.

In *Owen v. Elastos Foundation*, 19-CV-5462 (GHW) (BCM), 2023 WL 2537287 (S.D.N.Y. Mar. 16, 2023), U.S. Magistrate Judge Barbara Moses addressed whether the Defendant’s company had “control” over an employee’s personal Google account for discovery purposes, where the employee lived and worked in China.

This case involved a dispute as to whether Defendants were required to search the Google/Gmail account of its director of operations and a member of its board of directors, Ben Li, who was not himself a defendant. *Id.* at *1. Li used two different Google accounts, one account with an address associated with Defendant Elastos and one that Defendants characterized as Li’s personal Google account. The Elastos account was searched in connection with this action, but his personal account was not. Defendants produced more than 30,000 documents from Li’s files, including from his laptop, phone, and personal WeChat account, but Li refused to allow Defendants to search his personal Google account.

Discovery showed that Li received emails concerning a personal investment at his company account and forwarded them to his personal account, and on another occasion had received an email concerning Elastos business at his personal email address, which he forwarded to his company account.

When Plaintiffs requested that Defendants search Li’s personal account, Defendants maintained that the account was outside Defendants’ possession, custody, or control. Plaintiffs moved to compel Defendants to access that account, search it (using the parties’ previously agreed-on search terms), and either “produce all responsive documents or a report as to the volume and search hits of recoverable documents.”

Magistrate Judge Moses noted that the parties’ dispute presented two questions: (1) whether Li’s personal Google account was within the “control” of defendant Elastos such that Elastos could be ordered to search it and produce any relevant contents, and (2) if so, whether the discovery sought would be disproportional to the needs of the case. *Id.* at *2.

As to the question of “control,” Magistrate Judge Moses explained that documents are considered “under a party’s control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.” *Id.* (collecting cases). She noted that the criteria for determining whether a corporate party has the “practical ability” to obtain relevant documents from a nonparty officer, director, or employee include whether the corporation could discharge the individual for failure to cooperate in discovery; whether the individual has a duty, under local law, to turn over the documents on request; whether the corporate party previously secured the individual’s cooperation in discovery; and “whether the party has asked the non-party to turn over the documents at issue and, if so, whether the non-party is willing to do so.”

Magistrate Judge Moses stated that Plaintiffs had the burden of demonstrating that Defendants had the practical ability to obtain documents from Li, but found that Plaintiffs had not met that burden. She explained “[i]n most American jurisdictions, the first two factors [whether the corporation could discharge the individual for failure to cooperate in discovery; whether the individual has a duty, under local law, to turn over the documents on request] weigh heavily in favor of a finding of ‘control,’” but “the landscape is less settled abroad.” Magistrate Judge Moses noted that while Elastos is registered in Singapore, has its primary offices in Shanghai and Beijing, China, and Li works in China, Plaintiffs did not address either Singaporean or Chinese law on the question of “control.” She concluded that she was not willing to assume that Elastos had the same “practical ability” to coerce compliance from Li that a U.S. corporation would have with respect to documents in the physical or electronic possession of its officers, directors, or employees. She further noted Defendants representations that Elastos had no policies that would give it control over data on the personal devices of its employees.

Magistrate Judge Moses further relied on the fact that, although Li cooperated with discovery by, among other actions, turning over his laptop and phone to be searched and sitting for a deposition, Defendants represented that Li refused multiple requests for access to his personal accounts for collection and search. *Id.* at *3.

Finally, Magistrate Judge Moses concluded that Plaintiffs had failed to show that Li used his personal Google account to conduct Elastos business, based on one instance where Li received an Elastos business document via his personal email account — but promptly forwarded it to his Elastos Google account. She distinguished this from prior cases where directors had no company-issued email accounts and therefore used outside email accounts or cases where employees testified that they used their personal accounts for various business purposes.