

3. A ruling from the U.S. District Court for the Northern District of California declining to compel additional production of text message data for certain custodians based on “scant evidence” that the custodians used text messages to communicate about the issues in the case.

In *Boston Retirement System v. Uber Technologies, Inc.*, No. 19-cv-06361-RS (DMR), 2024 WL 555891 (N.D. Cal. Feb. 12, 2024), Chief U.S. Magistrate Judge Donna M. Ryu addressed a motion to compel additional text message productions and text source data as well as additional discovery responses regarding certain Defendants’ use of text messages.

In this action for securities fraud, Plaintiff moved to compel text messages from two Defendants, Wan Ling Martello and John Thain, as well as the entire “text message source” from another Defendant, Travis Kalanick. *Id.* at *5. Earlier in discovery, Plaintiff had moved for an order compelling Defendant Uber to produce certain text messages. *Id.* at *6. Chief Magistrate Judge Ryu had denied that motion without prejudice and granted Plaintiff leave to resubmit its motion with evidence (by declaration) that the custodians at issue texted regarding the subject matter of the lawsuit.

Chief Magistrate Judge Ryu denied Plaintiff’s motion to compel the production of text messages from Martello and Thain. She noted that despite her earlier order requiring Plaintiff to provide evidence of relevant text messages, Plaintiff still had not attached to its motion any compelling evidence of text messages from Defendants Thain and Martello. Instead, Plaintiff merely argued that Uber produced text message discovery that included “highly relevant text messages” from Kalanick to Thain and Martello. But Plaintiff provided only a single example of a text message from Kalanick to Martello while asserting that Kalanick texted a similar message to Thain. Chief Magistrate Judge Ryu noted that Plaintiff had “ample time and opportunity to build a record to support a motion to compel text messages,” but while the single text message provided discussed a “financial topic,” it was far from a “smoking gun.” Accordingly, she denied Plaintiff’s request for text messages from Thain and Martello.

Chief Magistrate Judge Ryu next addressed Plaintiff’s request for the “entire Kalanick text message source.” As she explained, Defendant produced only 28 text messages from Kalanick as a custodian, and Plaintiff sought the “text message source” to explore potential gaps in Uber’s production. Plaintiff claimed to be “skeptical” that only 28 text messages were responsive to its document requests based on “other litigations and documents leaked to the press” that suggested Kalanick “constantly texted” concerning Uber. But Chief Magistrate Judge Ryu agreed with Uber’s argument that Plaintiff failed to provide any evidence that these “leaked” documents referred to anything responsive or that Kalanick has access to them. She also referred to Uber’s argument that Kalanick had limited access to his text messages from his time as Uber’s CEO and that Uber produced all responsive text messages with other Defendants. Chief Magistrate Judge Ryu noted that Plaintiff did not respond to these arguments and therefore denied Plaintiff’s motion for the Kalanick text message source.

Finally, Chief Magistrate Judge Ryu denied Plaintiff’s motion to compel additional discovery responses from Defendants Thain and Martello regarding their use of text messages. *Id.* at *7. Thain and Martello had previously submitted interrogatory responses stating that it was not their practice to communicate about Uber business by text message, and in particular they had not

texted on the relevant devices about the subject matter of the lawsuit. Plaintiff claimed that these responses were “plainly inaccurate” in light of the Kalanick text message discussed above. But Chief Magistrate Judge Ryu held that the discovery responses were not inconsistent with the “scant evidence” referenced by Plaintiff, that is, two identical text messages from Kalanick to Martello and Thain, to which neither Martello nor Thain responded. Accordingly, she denied Plaintiff’s motion to compel.