No. 20-___

In the Supreme Court of the United States

STADTWERKE FRANKFURT AM MAIN HOLDING GMBH,
PETITIONER

v.

RWE TRADING AMERICAS INC.,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The district court quashed a subpoena after concluding that the subpoena's target conducted a reasonable search and did not have any responsive documents in its possession, custody, or control. Yet, the evidence shows that the subpoena target conducted no search at all for documents and that at least one responsive document was known by the subpoena target to exist. Did the district court apply the wrong standard in concluding that the subpoena target's search was adequate and, thus, abuse its discretion in quashing the subpoena?

2. The district court quashed a subpoena because the subpoena's target did not have any responsive documents in its possession, custody, or control. Yet, the subpoena target never established that it could not have obtained responsive documents by asking for them from a corporate affiliate that indisputably did have at least one responsive document. Did the district court apply the wrong standard for determining whether a document is in an entity's possession, custody, or control and, thus, abuse its discretion in quashing the subpoena?

PARTIES TO THE PROCEEDING

All parties named in the caption of this petition were parties to the proceeding in the court of appeals. No additional parties were present in any lower court proceeding.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner Stadtwerke Frankfurt am Main Holding GmbH states that it is a private corporation fully owned by the City of Frankfurt, which is a public corporation.

RELATED CASES

- *In re Application of Stadtwerke Frankfurt Am Main Holding GmbH for an Order Seeking Discovery Under 28 U.S.C. § 1782*, No. 19-MC-0035 (JMF), United States District Court for the Southern District of New York. Judgment entered on July 10, 2019.

- *Stadtwerke Frankfurt Am Main Holding GmbH v. RWE Trading Americas Inc.*, No. 19-2480-cv, United States Court of Appeals for the Second Circuit. Judgment entered on May 11, 2020. Panel rehearing denied on June 11, 2020.

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Stadtwerke Frankfurt am Main Holding GmbH ("SWF") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of United States Court of Appeals for the Second Circuit (App. at 1a-4a) is unreported and available at 813 F. App'x 6 (2d Cir. 2020). The Second Circuit's decision (App. at 14a-15a) denying SWF's petition for rehearing is unreported. The district court's decision (App. at 5a-10a), captioned *In re Application of Stadtwerke Frankfurt am Main Holding GmbH for an Order Seeking Discovery Under 28 U.S.C. § 1782*, is unreported. It is available on Westlaw at 2019 WL 3004150 and on Lexis at 2019 U.S. Dist. LEXIS 114435. The district court's order granting SWF's application under 28 U.S.C. § 1782 (App. at 11a-13a), is unreported.

JURISDICTION

The court of appeals entered judgment on May 11, 2020, and denied rehearing on June 11, 2020. This petition is timely because it was filed within 150 days of the court of appeals' decision denying SWF's petition for argument. *See* Order of this Court dated March 19, 2020 (providing that, in light of the ongoing public health concerns related to COVID-19, the deadline to file a petition for a writ of certiorari is extended to 150 days after, among other things, an order denying a timely petition for rehearing). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 28 U.S.C. § 1782, which is reproduced below.

28 U.S.C. § 1782

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

INTRODUCTION

Complying with a subpoena for documents is a routine part of any litigator's life. Yet precious little guidance exists from this Court on a litigant's duties under the Federal Rules of Civil Procedure when responding to such a subpoena, particularly in the context of proceedings brought under 28 U.S.C. § 1782. Questions abound regarding the subpoena target's duties to search for responsive documents, including what constitutes a reasonable search or inquiry and whether documents in the custody of an affiliated company must be produced if responsive to the subpoena. Despite the commonplace nature of these issues, courts of appeals have yet to provide clear guidance to district courts, and, in turn, district courts have been unable to provide clear guidance to litigants.

The Court should not allow this confusion to fester any longer. This Court should grant the writ and issue clear directions to lower courts and litigants on how to judge whether a search for responsive documents was reasonable and how to determine whether documents in the custody of a parent or affiliate organization are also in the control of the subpoena target.

STATEMENT OF THE CASE

I. SWF enters into agreements with RWE AG, a parent company of RWE Trading Americas Inc.

1. Petitioner SWF is a holding company owned by the City of Frankfurt, Germany. *See* Court of Appeals Appendix ("CA App'x") at A019.

2. Respondent RWE Trading Americas Inc. ("RWETA") is a New York-based company incorporated in Delaware that is a wholly-owned subsidiary of RWE Supply & Trading GmbH ("RWEST"). RWEST is a limited liability company incorporated in Germany that, in turn, is a wholly-owned subsidiary of RWE Aktiengesellschaft ("RWE AG"). *Id.* at A353. RWE AG is a German gas and electricity provider. *Id.* Thus, RWE AG is the ultimate parent company of RWETA. *See id.*

3. In 2001, SWF and several other German municipal shareholders that hold an interest in energy suppliers providing power to German customers (the "Municipalities") entered into a Consortium Agreement with what is now RWE AG. *Id.* at A019. The Consortium Agreement's purpose was to establish a new company, now known as Süwag, to become a reliable and regular supplier of economic and environmentally friendly renewable energy to the Municipalities. *Id.* Both the Municipalities and RWE AG own shares in Süwag. *Id.*

The Consortium Agreement gives the Municipalities the right to acquire RWE AG's shares in

Süwag if RWE AG decides to assign its shares to a third party not bound by the Consortium Agreement. *Id.* However, the Consortium Agreement does not give the Municipalities this right of acquisition if RWE AG sells its shares in Süwag to an affiliated company. *Id.*

Over time, RWE AG assigned its shares in Süwag to Innogy SE ("Innogy"), back then one of RWE AG's affiliated companies. *Id.* Innogy (which, at the time, was known as RWE International SE) confirmed in writing that it would honor the provisions of the Consortium Agreement. *Id.* Several months later, Innogy suggested amending the Consortium Agreement to substitute RWE AG for Innogy. *Id.* at A020. Because Innogy had previously agreed to honor the provisions of the Consortium Agreement and reaffirmed that agreement as part of the amendment negotiations, the Municipalities agreed. *Id.*

4. Less than two months later, RWE AG suddenly announced that E.ON SE ("EON"), a significant player in the German energy market, would acquire RWE AG's shares in Innogy (the "EON Transaction"). *Id.* Innogy would then divest its "green" business, which would then be integrated into RWE AG. *Id.* The EON Transaction is valued at approximately EUR 30 billion. *Id.* Given the size and importance of the entities, both EON and RWE AG recognized that the EON Transaction may have antitrust implications in the United States. *Id.* at A022.

As a result of these transactions, the Municipalities, including SWF, will lose their partnership with Innogy as a supplier of economic and environ-

mentally friendly renewable energy. *Id.* at A020-021. EON will take over their electrical grids and become Germany's largest operator of power grids. *Id.* Moreover, EON will abandon Innogy's focus on renewable energy. *Id.* Because of the EON Transaction, the Consortium Agreement's purpose—providing the Municipalities with reasonably-priced renewable energy—will become obsolete. *Id.*

Given the short time period between the finalization of the amendment to the Consortium Agreement and the public announcement of the EON Transaction, it is likely RWE AG and its top management were already considering or planning the transaction at the time RWE AG, Innogy, and the Municipalities amended the Consortium Agreement. Yet neither RWE AG nor Innogy gave any indication to SWF or the other Municipalities that Innogy soon would no longer produce renewable energy and would no longer be in a position to fulfill the Consortium Agreement. *Id.* at A021. If RWE AG or Innogy had disclosed these plans, SWF would never have accepted the change of parties in the Consortium Agreement. *Id.*

II. At the time SWF sought discovery, SWF was planning to bring or act as an interested party in multiple European proceedings relating to the EON Transaction and its impact on the Consortium Agreement.

5. Because of the significant impact the EON Transaction had on the Consortium Agreement, SWF sought discovery to support anticipated or existing

proceedings relating to the EON Transaction. *Id.* at A021-022. For example, SWF was admitted as an interested party in antitrust proceedings before the European Commission concerning the EON Transaction.

SWF also contemplated and partially initiated additional proceedings, including:

(i) an arbitration in Germany against RWE AG seeking damages relating to certain post-contractual obligations and conduct damaging to public policy, as well as a cease and desist order preventing RWE AG from assigning its shares in Innogy as part of the EON Transaction without excluding the shares Innogy owns in Süwag as part of the transaction;

(ii) an arbitration in Germany against Innogy seeking adaptation (a remedy similar to contractual reformation) of the amendment to the Consortium Agreement so that SWF and/or other Municipalities have a right to acquire Innogy's shares in Süwag if Innogy's major shareholder, RWE AG, sells its Innogy stake to a third party which is not bound by the Consortium Agreement; and

(iii) state court proceedings in Germany seeking damages against the CEOs of RWE AG and Innogy, as well as a cease and desist order against Innogy's CEO preventing him from supporting the assignment of shares in Innogy as part of the EON Transaction.

Id.

III. History of this litigation.

A. The subpoena and RWETA's response.

6. In preparation for the European proceedings, SWF sought documents from RWETA, a New York-based corporation affiliated with RWE AG. Specifically, SWF sought an order under 28 U.S.C. § 1782, which allows a district court to order discovery to assist in foreign proceedings. Through this request, SWF sought the following categories of documents from RWETA:

1. All documents, from January 1, 2017 to the present, referring, reflecting, or relating to the EON Transaction.
2. All documents from January 1, 2017 to the present, referring, reflecting, or relating to any consideration by RWE AG or its management of dissolving, selling, or transferring its interest in Innogy SE.
3. All documents from January 1, 2017 to the present, referring, reflecting, or relating to any discussions between RWE AG and E.ON SE.
4. All documents from January 1, 2017 to the present, referring, reflecting, or relating to Innogy SE's renewable energy business.
5. All documents from January 1, 2017 to the present referring, reflecting, or relating to the use of data generated by E.ON SE's smart meters, smart grids, and end cus-

tomers.

6. All documents from January 1, 2017 to the present referring, reflecting, or relating to the use of data generated by Innogy SE's smart meters, smart grids, and end customers.

Id. at A030. The district court granted the request. App. at 11a-13a.

7. RWETA then moved to quash the subpoena, arguing, *inter alia*, that it did not have any responsive material in its possession, custody, or control. CA App'x at A347-348. To support this argument, RWETA's general counsel provided a declaration stating that RWETA had no involvement with the EON Transaction and had engaged in no other transactions regarding Innogy's renewable energy business or E.ON's or Innogy's smart meters, smart grids, or end customers. *Id.* at A353-354. RWETA's general counsel also stated that she had interviewed all six of RWETA's current employees to ascertain whether they had any responsive documents. *Id.* at A354-355. The declaration stated that none of the employees reported having any involvement with or did any work on the EON Transaction or other areas within the subpoena's inquiry. *Id.* Yet, the declaration did not specifically state whether the employees reported having any responsive documents. *Id.*

RWETA's general counsel further stated that RWETA did not maintain or have access to any centrally located files related to the EON Transaction, Innogy's renewable energy business, or EON's or Innogy's smart meters, smart grids, or end customers.

Id. at A355-356. She also maintained that RWETA did not have access to "the hard copy files, archives, shared drives, or other central files on which RWE AG might maintain documents related to the Transaction, Innogy's renewable energy business, E.ON's smart meters, smart grids, and end customers, or Innogy's smart meters, smart grids, and end customers." *Id.* at A355.

RWETA's general counsel did not state that she had conducted an actual search of RWETA's files for documents. Instead, she concluded, based on her assertions about RWETA's access to RWE AG files, that she did "not believe it has possession, custody, or control of any documents which would be responsive to SWF's subpoena." *Id.*

Nevertheless, RWETA's general counsel did acknowledge having identified at least one piece of responsive correspondence in RWETA's possession, stating that:

> In early 2017, RWETA provided information about an entity in which it invests to a number of other energy companies, including Innogy. To the best of my knowledge, based on discussions with RWETA personnel, Innogy never did business with this entity, and RWETA personnel have had no other discussions with Innogy's renewable energy business on this or any other topic.

Id. at A355 n.1. On reply, RWETA's general counsel further stated that the information RWETA distrib-

uted to Innogy "related to a potential investment in a U.S. windfarm project." *Id.* at A382. RWETA's general counsel never stated that the document was unresponsive to any of the subpoena's requests. *See id.*

RWETA's general counsel also acknowledged that RWETA's employees learned of the EON Transaction when it was publicly announced, which would have been on or about March 12, 2018. *Id.* at A354. RWETA's general counsel further admitted that RWETA focuses, among other things, on "management of investments within the Americas," and that it received some documents—namely, "policies, newsletters, and other announcements sent to all employees of RWE AG and its subsidiaries"—in the ordinary course. *Id.* at A353, A355-356. RWETA's general counsel never stated that these "policies, newsletters, and other announcements" were reviewed for relevance and determined to be unresponsive to SWF's subpoena. *See id.* at A355-356.

Regarding RWETA's access to documents held by RWE AG, RWETA's general counsel appeared to acknowledge that RWE AG has documents responsive to SWF's subpoena. However, RWETA's general counsel maintained that she did not believe RWETA had a legal right to obtain documents from RWE AG, and that, "[i]n the ordinary course of business, RWETA does not obtain documents from RWE AG regarding the Transaction, Innogy's renewable energy business, E.ON's smart meters, smart grids, and end customers, or Innogy's smart meters, smart grids, and end customers." *Id.* Notably, the original declaration that RWETA's general counsel provided in support of the motion to quash said nothing about RWETA's

ability to obtain documents from RWE AG by asking for them.

Only in a reply declaration did RWETA's general counsel first state that "RWETA does not have the practical ability to obtain from RWE AG the documents requested in [SWF's] subpoena." *Id.* at A381. Yet RWETA's general counsel refused to say what that assertion actually meant, instead claiming that "[i]n this declaration, I use the term 'practical ability' to carry the ordinary, English-language definition associated with those words." *Id.* at A381 n.1. RWETA's general counsel did not elaborate further on that definition.

Here again, what the reply declaration did not say is notable. Although RWETA's general counsel did state, in the reply declaration, that she "understand[s]" based on her discussions with RWE AG about the subpoena, that if RWETA were to request documents from RWE AG, RWE AG would refuse to provide them, *id.* at A381, she did not assert that RWE AG would have refused to provide documents if RWETA had requested them before the dispute arose between RWETA and SWF concerning the subpoena.

B. The district court's decision.

8. In its July 10, 2019 decision granting RWETA's motion to quash, the district court stated that "RWETA does not have possession, custody, or control over any of the requested materials." App. at 6a. In so deciding, the district court found that the declarations by RWETA's general counsel:

> establish two dispositive facts. First, they establish that RWETA conducted a reasonable search for responsive documents—including for example, by interviewing all current employees and confirming with the General Counsel of RWE AG that no current or former RWETA employees were involved in the E.ON Transaction—and that the search came up empty. See Gooren Decl. ¶¶ 6-8, 10-12; Gooren Supplemental Decl. ¶ 3. Second, the declarations establish that RWETA has neither the legal right nor the practical ability to obtain documents that may be in the possession or control of RWE AG. See Gooren Decl. ¶¶ 11-14; Gooren Supplemental Decl. ¶ 2 & n.1.

App. at 8a.

C. The Second Circuit's decision.

9. SWF timely appealed to the Second Circuit on August 8, 2019 under 28 U.S.C. § 1291. The Second Circuit affirmed the district court's ruling, holding that the district court, in quashing the subpoena, did not "abuse its wide discretion." App. at 1a-5a.

SWF timely filed a Petition for Panel Rehearing, which the Second Circuit denied on June 11, 2020. App. at 14a-15a.

ARGUMENT

This Court should grant certiorari to address the proper standards for whether a subpoena target under 28 U.S.C. § 1782 has conducted a reasonable search for responsive documents and whether a subpoena target has documents in its possession, custody, or control when responsive documents are indisputably in the possession of a corporation affiliated with the subpoena target. District courts are often inundated with disputes such as this one, but this Court has yet to provide workable standards for determining the adequacy of a search and the duties of affiliated corporate entities with respect to discovery, either in the context specific to 28 U.S.C. § 1782 or under the Federal Rules of Civil Procedure more generally. The lack of meaningful standards is particularly troubling when district courts attempt to apply 28 U.S.C. § 1782—a statute that is meant to have "increasingly broad applicability." *Lancaster Factoring Co. Ltd. v. Mangone*, 90 F.3d 38, 41 (2d Cir. 1996) (quotation omitted). Given Congress's "twin aims of the statute: 'providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts,'" *In re Application for an Order Permitting Metallgesellschaft AG to take Discovery*, 121 F.3d 77, 79 (2d Cir. 1997) (quoting *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992)), direction is especially needed. This Court should clear the morass of conflicting standards and provide express guidance to the lower courts.

I. Lower courts are split on the standards to apply to determine whether a subpoena target has undertaken an adequate inquiry and is in possession, custody, or control of documents.

1. The Federal Rules of Civil Procedure require a person responding to discovery requests to certify that the responses are correct "to the best of the person's knowledge, information, and belief formed after a *reasonable inquiry*." Fed. R. Civ. P. 26(g) (emphasis added). The advisory committee's notes further instruct:

> The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. . . . Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

Fed. R. Civ. P. 26, advisory committee's notes to 1983 amendments.

While numerous courts have repeated this language, federal precedent is devoid of any uniform test or standard to determine whether a search for responsive documents was actually reasonable. Indeed, some courts import standards from legal ethics to determine whether a search for documents was "reasonable," others require affidavits or declarations,

still others undertake a searching inquiry into the content of those affidavits and declarations, and even more fail to articulate a standard at all. The lack of clarity is detrimental to courts and litigants alike. One court has even expressly noted "the need for clearer guidance [on] how to comply with the requirements of Rules 26(b)(2)(C) and 26(g)." *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 363 (D. Md. 2008). This Court should intercede to provide such guidance.

The potential avenues for determining if an inquiry was reasonable are multifaceted. One way to define a reasonable inquiry is to look to the Rules of Professional Conduct. *See* Debra Lyn Bassett, *E-Pitfalls: Ethics and E-Discovery*, 36 N. Ky. L. Rev. 449, 470 (2009) (explaining that the Federal Rules of Civil Procedure may provide guidance on issues such as the scope of discovery, but "an ethical component often plays a role in evaluating the reasonableness of the action and whether sanctions are warranted"). This was the approach taken by the court in *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), *vacated in part* 2008 WL 638108 (S.D. Cal. Mar. 5, 2008). In that case, the court imposed sanctions after the defendant belatedly discovered 46,000 emails that had been requested by the plaintiff during discovery but never produced. *Id.* at *6. Rather than imposing sanctions under Rule 26(g), the court found violations of the lawyers' duties of candor, fairness, and good faith and imposed sanctions on that basis. *Id.* at *4-6.

The court in *St. Paul Reinsurance Co. v. Commercial Financial Corp.*, 198 F.R.D. 508 (N.D. Iowa

2000), took a different approach, outlining four different factors to determine whether a search for responsive documents was reasonable. *Id.* at 517. These factors were "(1) the number and complexity of the issues; (2) the location, nature, number and availability of potentially relevant witnesses or documents; (3) the extent of past working relationships between the attorney and the client, particularly in related or similar litigation; and (4) the time available to conduct an investigation." *Id.* A court is supposed to evaluate the search holistically based on these four factors. *Id.* Notably, the factors used by the court in *St. Paul Reinsurance Co.* bear little resemblance to the ethical considerations used by the court in *Qualcomm*.

Rather than balancing factors or looking to ethics rules, some courts use a third approach: expressly requiring documentation regarding the method of a search for responsive documents and an affidavit or declaration saying no responsive documents were found. In these courts, a reasonable search requires, "at a minimum, a reasonable procedure to distribute discovery requests to all employees and agents of the defendant potentially possessing responsive information, and to account for the collection and subsequent production of the information to plaintiffs." *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556 (N.D. Cal. 1987).

In courts using this third approach, when a party claims it does not have responsive documents, it must come forward with an explanation of the search conducted "with sufficient specificity to allow the court to determine whether the party made a reasonable inquiry and exercised due diligence." *Rogers*

v. Giurbino, 288 F.R.D. 469, 485 (S.D. Cal. 2012); *see also V5 Techs. v. Switch, Ltd.*, 332 F.R.D. 356, 366-67 (D. Nev. 2019) (finding that a non-party's "conclusory assertions of a good faith search . . . fall woefully short of her obligations in responding to a subpoena for documents"); *Gray v. Faulkner*, 148 F.R.D. 220, 224 (N.D. Ind. 1992) (noting that a court may require a certification that the respondent "ha[s] conducted a search for the information reasonably available to them through their agents, attorneys, or others subject to their control and ha[s] determined that the information requested either does not exist or that it has been produced"). A "sworn statement that a party has no more documents in its possession, custody or control" generally suffices "to satisfy the party's obligation to respond to a request for production of documents." *Gray*, 148 F.R.D. at 224. But if sought documents "are known to have been in the party's possession, custody, or control, it would not suffice for that party to simply disavow their existence without adequately explaining the disposition of the documents." *Super Film of Am., Inc. v. UCB Films, Inc.*, 219 F.R.D. 649, 651 (D. Kan. 2004).

These courts are also hesitant to credence vague or evasive declarations that purport to say no documents were found. Indeed, "[w]hen the response is minimal and clearly omits materials from readily identifiable repositories likely to include some or all of the requested materials or information, the obvious conclusion is that the responding party has neither conducted a reasonable inquiry nor produced all documents within its possession, custody or control." *Meeks v. Parsons*, No. 03-cv-6700, 2009 WL 3003718, at *4 (E.D. Cal. Sept. 18, 2009) (citing *A. Farber &*

Partners, Inc. v. Garber, 234 F.R.D. 186, 189 (C.D. Cal. 2006)); *see also V5 Techs.*, 332 F.R.D. at 366-67.

Before the district court's decision in this case, federal courts in New York considered disputes regarding the reasonableness of a subpoena target's search for documents in line with this third approach. It was generally recognized that a party responding to a document request must actually conduct a search for such documents. *See Republic of Turkey v. Christie's, Inc.*, 326 F.R.D. 394, 401 (S.D.N.Y. 2018). Where responsive documents likely exist, New York district courts recognized that is "patently unreasonable" for the responding party to refuse to consider a protocol to search for them. *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414-15 (S.D.N.Y. 2009) (finding SEC's unilateral decision to limit a search to specific centralized compilations that turned up nothing was insufficient and directing counsel to meet and confer to "develop a workable search protocol that would reveal *at least some* of the information [the requesting party] seeks"); *see also Mason Tenders Dist. Council of Greater N.Y. v. Phase Constr. Servs., Inc.*, 318 F.R.D. 28, 42-43 (S.D.N.Y. 2016) (ordering defendants "to show *specifically* where they have searched and why [requested] documents are not, in fact, within their custody, possession, or control" where plaintiffs had reason to believe additional responsive documents existed).

Yet, in quashing the subpoena in this case, the district court here did not follow the traditional third approach. Instead, it created a new, extremely lenient standard where a subpoena target does not *actually have to search for documents*. App. 8a. Indeed, the

record contains no representation that RWETA ever did even a cursory search for electronic documents or emails, using agreed-upon search terms or otherwise. Nor does the record actually contain a statement that RWETA has no responsive documents. CA App'x A192-207, A353-356, A381-382. At most, RWETA's general counsel submitted a declaration stating that, based on her conversations with employees, "RWETA does not *believe* it has possession, custody, or control of any documents which would be responsive to SWF's subpoena." *Id.* at A355 (emphasis added).

Rather than searching for documents, a litigant can avoid responding to discovery simply by asking its employees whether they *worked on* topics related to the document requests. If they answer in the negative, the company can satisfy its obligations by stating that it "believes" it does not have any responsive documents. Yet, not working on an issue or transaction is not the same thing as having no responsive documents relating to that issue or transaction. Until the district court's opinion in this case and the Second Circuit's affirmance, no court had approved of such a lackadaisical and bare-bones approach to responding to a properly-issued subpoena.

The standard set by the district court in this case is even more concerning because the statements made by RWETA's general counsel *undermined* her very conclusion that "RWETA does not believe it has possession, custody, or control of any documents which would be responsive to SWF's subpoena." *Id.* RWETA admitted that it identified at least one exchange in RWETA's possession concerning Innogy's renewable energy business and a potential invest-

ment in a U.S. windfarm project—a document responsive to SWF's subpoena that RWETA discussed in its filings but nevertheless has refused to produce. *Id.* at A355 n.1. The district court erroneously refused to require RWETA to produce this document, despite its obvious relevance and responsiveness. Similarly, RWETA admitted that it receives "policies, newsletters, and other announcements sent to all employees of RWE AG and its subsidiaries" from RWE AG "[i]n the ordinary course." *Id.* at A355-356. RWETA did not run a cursory search on, let alone examine, these documents to see if they discuss any topics listed in SWF's subpoena. Nevertheless, the district court and the Second Circuit took the unprecedented step of deeming RWETA's search sufficient under the Federal Rules of Civil Procedure and quashing the subpoena in its entirety.

This Court should grant certiorari to address the varying standards for determining if a search for documents is adequate and to bring much needed guidance and uniformity to this important area. At a minimum, this Court should make clear that an actual search for documents using agreed-upon search terms is necessary for a subpoena response to be reasonable and that it is insufficient for a company only to state that it "believes" it does not have responsive documents rather than providing an affirmative declaration that it does not have responsive documents.

2. Lower courts similarly lack uniform standards to determine whether a document is in the possession, custody, or control of a party or a subpoena target. *See* Fed. R. Civ. P. 45(a)(1) (allowing subpoenas for "documents, electronically stored information,

or tangible things in that person's possession, custody, or control"). This is particularly true in the context of documents sought from a domestic subsidiary or affiliate of a foreign entity. Indeed, one commentator characterized the state of the law about whether a document held by a foreign entity is in the possession, custody, or control of a domestic subsidiary as a "mess." Johnathan D. Jordan, *Out of "Control" Federal Supoenas: When Does a Nonparty Subsidiary Have Control of Documents Possessed by a Foreign Parent*?, 68 Baylor L. Rev. 189, 189 (2016).

Circuit courts are split on how to determine whether a document is in the possession, custody, or control of an affiliate entity. Some courts—notably, the Third, Sixth, Seventh, Ninth, Eleventh, and Federal Circuits—have adopted a "legal right" test to determine whether a domestic company "controls" documents held by a foreign affiliate. *See Gerling Int'l Ins. Co. v. Comm'r*, 839 F.2d 131, 140-41 (3d Cir. 1988); *In re Bankers Tr. Co.*, 61 F.3d 465, 469 (6th Cir. 1995); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1426 (7th Cir. 1993); *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984); *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1229-30 (Fed. Cir. 1996). The legal right test generally finds that a company has control of a document in possession of another where the company has "the legal right to obtain documents upon demand," *United States v. Int'l Union of Petroleum & Indus. Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir. 1989), or because the subsidiary is the alter ego of a parent company.

Courts in the Second Circuit, by contrast, apply a "practical ability" test, where a document is in the control of a subpoena target if the target has "the legal right, authority, *or practical ability* to obtain the materials sought upon demand." *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 471-72 (S.D.N.Y. 2000) (emphasis added); *see also Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007). District courts in other jurisdictions have similarly adopted the practical ability test. *See, e.g.*, *Flame S.A. v. Indus. Carriers, Inc.*, 39 F. Supp. 3d 752, 759 (E.D. Va. 2014); *Bush v. Ruth's Chris Steak House, Inc.*, 286 F.R.D. 1, 5 (D.D.C. 2012).

Yet, even among these district courts, there is no uniformity regarding what factors should be analyzed to determine the practical ability of one entity to ask for documents of another. The district court in *Pitney Bowes, Inc. v. Kern International, Inc.*, 239 F.R.D. 62 (D. Conn. 2006), for example, outlined five circumstances where previous courts determined a finding of control was warranted: (1) where one entity is the alter ego of another, warranting corporate veil piercing; (2) where "the subsidiary was an agent of the parent in the transaction giving rise to the lawsuit"; (3) where the relationship between the parent and the subsidiary is such that the subsidiary can "secure documents of the principal-parent to meet its own business needs and documents helpful for use in litigation"; (4) where one entity can access the documents of another "when the need arises in the ordinary course of business"; and (5) where the "subsidiary was [a] marketer and servicer of [the] parent's product" in the United States. *Id.* at 66-67 (quotation omitted).

Rather than relying purely on case law, the district court in *Flame S.A.* compiled a list of factors or circumstances that could justify a finding that one entity has control over documents in possession of another, instructing courts to examine:

> (1) the corporate structure of the party/non-party, (2) the non-party's connection to the transaction at issue in the litigation, (3) the degree that the non-party will benefit from the outcome of the case; (4) whether the related entities exchange documents in the ordinary course of business; (5) whether the non-party has participated in the litigation; (6) common relationships between a party and its related nonparty entity; (7) the ownership of the non-party; (8) the overlap of directors, officers, and employees; (9) the financial relationship between the entities; (10) the relationship of the parent corporation to the underlying litigation; and (11) agreements among the entities that may reflect the parties' legal rights or authority to obtain certain documents.

Flame S.A., 39 F. Supp. 3d at 759 (citations omitted). Some courts added the entities' "history of cooperating with document requests" as an additional factor to consider when determining the practical ability to control documents in the possession of another. *See, e.g.*, *Gross v. Lunduski*, 304 F.R.D. 136, 142 (W.D.N.Y. 2014); *Benisek v. Lamone*, 320 F.R.D. 32, 35 (D. Md. 2017).

In this case, the district court ostensibly followed the practical ability test, but based its decision on RWETA's general counsel's carefully tailored, conclusory declaration in which she stated that she "understand[s]" that RWE AG would not provide documents to RWETA if RWETA asked for them. CA App'x at A381. The district court did not require a concrete representation about RWETA's attempts to obtain such documents or probe the basis for RWETA's "understanding." For example, the district court did not require RWETA to explain whether RWE AG has previously given RWETA access to electronically-stored information. Thus, the district court—and by extension, the Second Circuit—opened the door for a new standard of control based on subjective beliefs rather than relationships between entities. If adopted by more courts, the district court's rationale here may encourage parties to take an "ostrich" approach, relying on their convenient (and conveniently untested) impressions rather than confirming reality. The result would remove any obligation on litigants to determine whether they actually have the practical ability to obtain documents held by others.

The district court's and Second Circuit's reasoning is all the more problematic because it arises in the context of 28 U.S.C. § 1782. Congress enacted this statute over a century ago with the dual goals of providing "'equitable and efficacious' discovery procedures in United States courts 'for the benefit of tribunals and litigants involved in litigation with international aspects,' and [encouraging] 'foreign countries by example to provide similar means of assistance to our courts.'" *Lancaster Factoring Co. Ltd.*, 90 F.3d at 41 (first quoting S. Rep. No. 1580, 88th

Cong., 2d Sess. 2 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3873; and then quoting *In re Malev Hungarian Airlines*, 964 F.2d at 100). Allowing subpoena targets to avoid responding to properly-issued subpoenas by providing vague declarations does nothing to advance these goals and, in fact, undermines them. A subpoena target who can easily escape discovery does not benefit litigants in foreign proceedings. A court permitting for such an escape does not act equitably. And a foreign country observing such proceedings in the United States is unlikely to force any of its citizens to comply with discovery requests that would aid in litigation here. The district court's and Second Circuit's rationale renders 28 U.S.C. § 1782 both toothless and meaningless.

This Court should grant certiorari in order to address, first, whether the legal right test or practical ability test is the correct standard to determine whether one entity has control over documents in another entity's possession, and second, if the practical ability test applies, what factors should be considered when deciding the practical ability of one entity to obtain documents from another. This Court should consider, *inter alia*, the type of showing that must be made by the party resisting production, the maximum level of control a parent can have over a subsidiary in order for the records of the parent not to be within the control of the subsidiary, and the extent to which a subpoena target is obligated to ask for responsive documents before asserting that it does not have any documents in its control. Without this Court's intervention, case law on this topic will remain "erratic," leaving the impression that

"courts are just reaching for an equitable solution in each individual case." Jordan, *supra*, at 189.

II. This case presents an appropriate vehicle to create discovery standards.

3. The proper standards for addressing the adequacy of a search for documents and whether documents are in the control of an entity are undoubtedly important issues that likely affect every litigant in every case that proceeds to discovery. Yet this Court has rarely offered guidance on how to resolve everyday discovery disputes regarding document productions, and the courts of appeals have not created any uniform standards in this Court's stead. The result is a complicated morass of varying standards and factors that no court applies in the same way. Given both the importance of discovery to the litigation process and the potential for litigants to be sanctioned for subverting the discovery process, this Court should infuse this area of the law with much needed clarity.

Moreover, this case presents an ideal instrument for this Court's intervention. Unlike more complicated civil litigation, this dispute arises solely in the context of a subpoena requesting documents. The merits of the underlying claims—all being conducted in foreign proceedings—do not impact the pure discovery issues presented in this petition. Similarly, the factual record is limited to the subpoena issued at SWF's request and the steps RWETA did or did not take to attempt to comply with that subpoena.

By taking this case, the Court can decide pure legal issues about the standards a district court should use in deciding discovery disputes. The Court can thus channel the district court's discretion in an appropriate direction within an area where uniform guidance has been severely lacking. It should do so.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MAY 11, 2020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 19-2480-cv

STADTWERKE FRANKFURT
AM MAIN HOLDING GMBH,

Applicant-Appellant,

v.

RWE TRADING AMERICAS INC.,

Respondent-Appellee.[*]

May 11, 2020, Decided

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of May, two thousand twenty.

PRESENT: RAYMOND J. LOHIER, JR.,
JOSEPH F. BIANCO,
MICHAEL H. PARK,
Circuit Judges.

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* The Clerk of Court is directed to amend the caption as set forth above.

Appendix A

SUMMARY ORDER

Appeal from an order of the United States District Court for the Southern District of New York (Jesse M. Furman, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court is AFFIRMED.

Applicant-Appellant Stadtwerke Frankfurt am Main Holding GmbH (SWF) appeals from an order entered July 10, 2019 by the United States District Court for the Southern District of New York (Furman, J.) quashing its subpoena directed at Respondent-Appellee RWE Trading Americas Inc. (RWETA). We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

In January 2019 SWF filed an *ex parte* application under 28 U.S.C. § 1782 for a subpoena ordering RWETA to produce documents related to a transaction between RWETA's parent company, RWE Aktiengesellschaft (RWE AG), and a German energy company. The District Court granted the application, and RWETA filed a motion to quash the subpoena in response. The District Court then granted RWETA's motion to quash, concluding, as relevant here, that RWETA: (1) "conducted a reasonable search for responsive documents . . . [that] came up empty"; and (2) "has neither the legal right nor the practical ability to obtain documents that may be in the possession or control of RWE AG." Special App'x 3-4. SWF disputes both conclusions on appeal and asks us to reverse the District Court's order quashing its subpoena.

Appendix A

We review "[a] district court's ruling on a motion to quash a subpoena . . . for abuse of discretion," *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 79 (2d Cir. 2012), mindful that "Congress planned for district courts to exercise broad discretion over the issuance of discovery orders pursuant to § 1782(a)," *In re Edelman*, 295 F.3d 171, 181 (2d Cir. 2002). For the reasons set forth below, we conclude that the District Court did not abuse its wide discretion in quashing SWF's subpoena.

First, it was not impermissible for the District Court to conclude that RWETA conducted a reasonable search in response to SWF's subpoena. Among other things, RWETA's General Counsel personally interviewed all RWETA employees to determine whether they possessed any responsive material and, after learning that they did not, further confirmed those employees' responses with the company's information-technology staff. RWETA's General Counsel also confirmed that RWETA's employees "performed no work with respect to" the transaction between RWE AG and the Germany energy company. App'x 355. While SWF argues that RWETA could have done more to respond to SWF's subpoena, both parties agree that only a "reasonable search" was necessary. Applicant's Br. 18. We see no reason to conclude that the District Court abused its "broad discretion to manage the manner in which discovery proceeds" when it determined that RWETA conducted a reasonable search here. *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 69 (2d Cir. 2003).

Second, the District Court also did not abuse its discretion when it concluded that RWETA could not obtain responsive documents from RWE AG. "[A] party

is not obliged to produce . . . documents that it does not possess or cannot obtain." *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007). Here, RWETA's General Counsel affirmed that: (1) "RWETA does not have access to the hard copy files, archives, shared drives, or other central files on which RWE AG might maintain documents related to the" subpoena topics, App'x 355, and (2) it was her understanding, "[b]ased on . . . discussions with RWE AG[,] . . . that if RWETA were to request documents from RWE AG, RWE AG would refuse to provide said documents," *id.* at 381. We agree with the District Court that SWF's speculative assertion that RWETA could nonetheless obtain documents from RWE AG "offers no basis to question" RWETA's General Counsel's sworn declaration to the contrary. Special App'x 4.

We have considered SWF's remaining arguments and conclude that they are without merit. For the foregoing reasons, the order of the District Court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court
/s/_____

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JULY 10, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19-MC-0035 (JMF)

IN RE APPLICATION OF STADTWERKE FRANKFURT AM MAIN HOLDING GMBH FOR AN ORDER SEEKING DISCOVERY UNDER 28 U.S.C. § 1782

July 10, 2019, Decided
July 10, 2019, Filed

MEMORANDUM OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

On January 31, 2019, this Court granted the *ex parte* application of Stadtwerke Frankfurt am Main Holding GmbH ("SWF") for an order authorizing discovery from RWE Trading Americas Inc. ("RWETA") pursuant to Title 28, United States Code, Section 1782. *See* Docket No. 8. SWF seeks discovery for use in connection with various proceedings in Europe relating to a contract it had with the predecessor to RWETA's ultimate parent company, RWE Aktiengesellschaft ("RWE AG"), establishing a renewable energy supplier, Süwag Vertrieb AG & Co. KG ("Süwag"). *See* Docket No. 3, ¶¶ 1, 3-5; Docket No. 24 ("Gooren Decl."), ¶ 1. The particulars of those proceedings are largely irrelevant here. It suffices to say that SWF

alleges that RWE AG induced it into amending the parties' agreement to SWF's detriment, in part by concealing that RWE AG was selling its shares in Süwag to an affiliate, Innogy SE ("Innogy"), which would in turn be acquired by one of SWF's competitors, E.ON SE ("the E.ON Transaction"). *See id.* ¶¶ 4-15.

RWETA now moves, pursuant to Rule 45(d)(3) of the Federal Rules of Civil Procedure, to quash the subpoena that SWF served in accordance with the Court's January 31, 2019 Order. *See* Docket No. 21. The subpoena seeks the following categories of documents, for the period from January 1, 2017, to the present: those "relating to the E[.]ON Transaction"; those "relating to any consideration by RWE AG or its management of dissolving, selling, or transferring its interest in Innogy SE"; those "relating to any discussions between RWE AG and E.ON SE"; those "relating to Innogy SE's renewable energy business"; those "relating to the use of data generated by E.ON SE's smart meters, smart grids, and end customers"; and those "relating to the use of data generated by Innogy SE's smart meters, smart grids, and end customers." Docket No. 23-1 ("Subpoena"). RWETA argues that the subpoena should be quashed for two reasons: first, because RWETA does not have possession, custody, or control over any of the requested materials; and second, because the requested discovery is improper under Section 1782. *See* Docket No. 22.

The Court agrees with RWETA's first argument and, thus, does not reach its second. It is well established that a subpoenaed party is required to produce only those responsive documents that are in its possession, custody, or control. *See* Fed. R. Civ. P. 34(a)(1); Fed. R. Civ. P.

45; *see also Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007). Admittedly, "control" in this context can extend to documents that are in the possession or custody of a third party. In particular, a subpoenaed party is required to produce responsive documents held by a third party if the subpoenaed party has "access and the practical ability" to obtain them. *Shcherbakovskiy*, 490 F.3d at 138; *see Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146 (S.D.N.Y. 1997) (stating that "documents are considered to be 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"); *see also, e.g., Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 147-48 (S.D.N.Y. 2011) ("If the party subpoenaed has the practical ability to obtain the documents, the actual physical location of the documents — even if overseas — is immaterial."), *aff'd*, No. 10-CV-9471 (WHP), 2011 U.S. Dist. LEXIS 158033, 2011 WL 11562419 (S.D.N.Y. Nov. 14, 2011). But if the subpoenaed party does not have the practical ability to obtain documents held by a third party, it need not produce them. *See, e.g., Shcherbakovskiy*, 490 F.3d at 138 ("[A] party is not obliged to produce . . . documents that it does not possess or cannot obtain."); *see also* 7 James Wm. Moore et al., Moore's Federal Practice § 34.14[2][a] (A subpoenaed party "may not be compelled to produce items that are not within either its possession, its custody, or its control."). Although the ultimate "burden of persuasion in a motion to quash a subpoena . . . is borne by the movant," *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 48-49 (S.D.N.Y. 1996) (internal quotation marks omitted) (citing cases), "[w]here control is contested, the party seeking production of documents bears the burden of establishing the opposing party's control over those

documents," *Alexander Interactive, Inc. v. Adorama, Inc.*, No. 12-CV-6608 (PKC) (JCF), 2014 U.S. Dist. LEXIS 2113, 2014 WL 61472, at *3 (S.D.N.Y. Jan. 6, 2014) (citing cases).

Applying those standards here, the Court, in its discretion, concludes that the subpoena should be quashed. *See In re Fitch, Inc.*, 330 F.3d 104, 108 (2d Cir. 2003) (noting that a motion to quash is "entrusted to the sound discretion of the district court" (internal quotation marks omitted)). In support of its motion, RWETA submits two declarations from its General Counsel, Alberdina Gerardina Maria Gooren. *See* Gooren Decl.; Docket No. 31 ("Gooren Supplemental Decl."). These declarations establish two dispositive facts. First, they establish that RWETA conducted a reasonable search for responsive documents — including, for example, by interviewing all current employees and confirming with the General Counsel of RWE AG that no current or former RWETA employees were involved in the E.ON Transaction — and that the search came up empty. *See* Gooren Decl. ¶¶ 6-8, 10-12; Gooren Supplemental Decl. ¶ 3. Second, the declarations establish that RWETA has neither the legal right nor the practical ability to obtain documents that may be in the possession or control of RWE AG. *See* Gooren Decl. ¶¶ 11-14; Gooren Supplemental Decl. ¶ 2 & n.1. SWF offers no basis to question those representations or, for that matter, to conclude that the requested materials would not be more properly sought from RWE AG, which was party to the E.ON Transaction.[1]

1. In light of Gooren's declarations, the cases upon which SWF relies are easily distinguished. *See* Docket No. 28 ("SWF Opp'n"), 11-14. In each of those cases, there was evidence that the subpoenaed party either had the legal right or the practical ability to obtain responsive documents from a third party. *See, e.g., Mazzei v.*

Accordingly, the subpoena is quashed. *See, e.g., Mason Tenders Dist. Council of Greater N.Y. v. Phase Constr. Servs., Inc.*, 318 F.R.D. 28, 42 (S.D.N.Y. 2016) ("Generally, a party's good faith averment that the items sought simply do not exist, or are not in his possession, custody, or control, should resolve the issue of failure of production since one cannot be required to produce the impossible." (internal quotation marks omitted)); *cf. Republic of Turkey v. Christie's, Inc.*, 326 F.R.D. 394, 401 (S.D.N.Y. 2018) (directing a subpoenaed entity to "conduct a reasonable search for responsive . . . documents in locations where those documents are likely to be found"); *Pitney Bowes, Inc. v. Kern Int'l, Inc.*, 239 F.R.D. 62, 69 (D. Conn. 2006) (denying, in part, a motion to compel where the movant failed to demonstrate that the subpoenaed subsidiary had

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Money Store, No. 01-CV-5694 (JGK) (RLE), 2014 U.S. Dist. LEXIS 99850, 2014 WL 3610894, at *4 (S.D.N.Y. July 21, 2014) (finding that the subpoenaed defendants "were in control of" the relevant information, even though a third party collected it, because a contract gave the defendants "the right to request" the information); *SEC v. Strauss*, No. 09-CV-4150 (RMB) (HBP), 2009 U.S. Dist. LEXIS 101227, 2009 WL 3459204, at *8 (S.D.N.Y. Oct. 28, 2009) (finding that the subpoenaed party had "control" based on "an agreement with a third-party possessor granting [the] party access to [the requested] documents, along with an actual mechanism for getting the documents"); *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195-96 (S.D.N.Y. 2007) (concluding that the subpoenaed entity had the "practical ability to obtain the relevant documents" from its sister company based on its CEO's representation that "whenever there was a document that we needed from [the sister company] . . . we would call [the company] and ask if they had it, and if they had it, they'd send it" (internal quotation marks and alterations omitted)), *aff'd sub nom. Gordon Partners v. Blumenthal*, No. 02-CV-7377 (LAK), 2007 U.S. Dist. LEXIS 35895, 2007 WL 1518632 (S.D.N.Y. May 17, 2007). Gooren's declarations establish the opposite here.

"control" over or the "ability to easily obtain" the relevant documents (internal quotation marks omitted)); *United States v. Int'l Bus. Machines Corp.*, 477 F. Supp. 698, 699 (S.D.N.Y. 1979) (denying a motion to quash a subpoena against an entity that "submitted no affidavit setting forth facts and circumstances which establish that the documents requested are not in [its] control").

Accordingly, RWETA's motion to quash is GRANTED. SWF's letter motion for an expedited ruling on the motion to quash is thus DENIED as moot. *See* Docket No. 32. The Clerk of Court is directed to terminate Docket Nos. 21 and 32 and to close the case.

SO ORDERED.

Dated: July 10, 2019
New York, New York

/s/ Jesse M. Furman
JESSE M. FURMAN
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JANUARY 31, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19-MC-35 (JMF)

IN RE APPLICATION OF STADTWERKE FRANKFURT AM MAIN HOLDING GMBH FOR AN ORDER SEEKING DISCOVERY UNDER 28 U.S.C. § 1782

ORDER

JESSE M. FURMAN, United States District Judge:

Stadtwerke Frankfurt am Main Holding GmbH ("Applicant") brings this application pursuant to 28 U.S.C. § 1782 for an order authorizing discovery from RWE Trading Americas Inc. ("RTAI") by means of a subpoena served pursuant to Rule 45 of the Federal Rules of Civil Procedure. Having considered Applicant's submissions, the Court concludes — without prejudice to the timely filing of a motion to quash the subpoena and, in the event such a motion is filed, subject to reconsideration — that Section 1782's statutory requirements are met and that the so-called *Intel* factors favor granting the application. *See, e.g., Mees v. Buiter*, 793 F.3d 291, 298 (2d Cir. 2015) (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004)).

Accordingly, the application is GRANTED. Applicant's U.S. counsel, Duane Morris LLP, is authorized to serve the subpoena attached as Exhibit A to the Declaration of Thomas Raacsch, Docket No. 3-1, on RTAI, together with a copy of this Order, no later than **thirty days** from the date of this Order. No later than **the same date**, Applicant shall serve those same papers on the party or parties against whom the requested discovery is likely to be used. *See In re Application of Sarrio, S.A.*, 119 F.3d 143, 148 (2d Cir. 1997) ("[T]he ultimate targets of a § 1782 discovery order issued to third parties have standing to challenge the district court's power to issue a subpoena under the terms of an authorizing statute." (internal quotation marks omitted)). Applicant shall promptly file proof of such service on ECF.

In the event of any dispute concerning the subpoena, the parties shall meet and confer before raising the dispute with the Court. Any further proceedings shall be governed by the Federal Rules of Civil Procedure, the Court's Local Rules (http://nysd.uscourts.gov/courtrules.php), and the Court's Individual Rules and Practices in Civil Cases, (http://nysd.uscourts.gov/judge/Furman). Additionally, if the parties believe that a protective order is appropriate or necessary, they shall file a joint proposed protective order on ECF, mindful that the Court will strike or modify any provision that purports to authorize the parties to file documents under seal without Court approval. *See generally Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-20 (2d Cir. 2006).

Appendix C

The Clerk of Court is directed to terminate Docket No. 1 and to close the case.

SO ORDERED.

Dated: January 31, 2019
New York, New York

/s/
JESSE M. FURMAN
United States District Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JUNE 11, 2020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 19-2480

STADTWERKE FRANKFURT
AM MAIN HOLDING GMBH,

Applicant-Appellant,

v.

RWE TRADING AMERICAS INC.,

Respondent-Appellee.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of June, two thousand twenty,

Before: RAYMOND J. LOHIER, JR.,
JOSEPH F. BIANCO,
MICHAEL H. PARK,

Circuit Judges.

Appendix D

ORDER

Appellant Stadtwerke Frankfurt am Main Holding GmbH having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court
/s/_____