In In re Mercedes-Benz Emissions Litigation, 2020 WL 103975 (D.N.J. Jan. 9, 2020), Special Master Dennis M. Cavanaugh, acknowledging that technology-assisted review (TAR) offered cost and efficiency advantages in discovery, ruled that (1) a responding party was best situated to determine how to carry out its discovery obligations and would not be compelled to use TAR and (2) plaintiffs would have to undergo transparent validation of their document production set.

In this environmental litigation, plaintiffs argued that defendants should be compelled to use TAR to complete its document review. Id. at *1. Plaintiffs contended that TAR "yields significantly better results than either traditional human 'eyes on' review of the full data set or the use of search terms." Defendants countered, arguing that there was no "authority for imposing TAR on an objecting party" and that particular issues within the data set would make the use of TAR particularly challenging.

While expressing reservations, Special Master Cavanaugh permitted the defendants to "evaluate and decide for themselves the appropriate technology for producing their ESI" (electronically stored information). Id. at *2. Special Master Cavanaugh noted that TAR is widely recognized as "cheaper, more efficient and superior to keyword searching." Id. at *1 (quoting Hyles v. New York City, 2016 WL 4077114, at *2 (S.D.N.Y. Aug. 1, 2016)). But he noted that "courts also recognize that responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for producing their own electronically stored information." In permitting defendants to use custodian-and-search term review, Special Master Cavanaugh admonished that he would "not look favorably on any future arguments related to burden of discovery requests, specifically cost and proportionality, when Defendants have chosen to utilize the custodian-and-search term approach despite wide acceptance that TAR is cheaper, more efficient and superior to keyword searching." Id.at *2.

Special Master Cavanaugh also addressed defendants' proposed adjustments to plaintiff's proposed protocol to validate its production. Specifically, defendants took "issue with the fact that Plaintiffs' proposal states that 'Plaintiffs will not be obligated to collect or sample ESI that does not contain a search term.' " Id. at *3. Plaintiffs argued that they could not feasibly apply the same validation protocol as defendants because of the "highly personal nature of Plaintiffs' email collections and the relatively small size of those collections." Special Master Cavanaugh recognized that using identical validation protocols might not be practicable but that the plaintiff's proposal did not "articulate how it will perform appropriate sampling and quality control measures to achieve the appropriate level of validation." Therefore, Special Master Cavanaugh adopted defendants' protocol to the extent that it required the parties to meet and confer concerning the application of validation procedures.

Special Master Cavanaugh also addressed the parties' disagreement about how to handle known or presumptively responsive material. The protocol required production of "all documents and ESI 'known' to be responsive, regardless of how or by whom the materials are 'known' to be responsive." Defendants argued that as phrased, the protocol "provides no clear standard for the court to administer or the parties to apply." Special Master Cavanaugh agreed and modified the protocol to require only "production of materials that are 'reasonably known' to be responsive."

Finally, Special Master Cavanaugh addressed plaintiff's request that defendants produce in their entirety "folders or collections of information that are known to contain documents likely to be responsive to a discovery request." Id. at *4. Defendants argued that the request was overbroad and not proportional. Special Master Cavanaugh required the parties to collect folders or collections of documents and noted that "to the extent the folder or collections contain an extensive volume of material, ... [he would] require the parties to meet and confer if a party believes a discrete document folder or collection of information that is relevant to a claim or defense is too voluminous to make review of each document proportional to the needs of the case."