1. In In re Valsartan, Losartan, & Irbesartan Prod. Liab. Litig., No. CV 19-2875 (RBK/JS), 2020 WL 7054284 (D.N.J. Dec. 2, 2020), U.S. Magistrate Judge Joel Schneider of the District of New Jersey found that defendants violated the court-entered ESI protocol requiring the parties to meet and confer and cooperate in good faith regarding the use of TAR. But rather than require defendants to manually review 200,000 likely not-responsive documents, Magistrate Judge Schneider ordered that defendants abide by the terms of a previously negotiated but unexecuted TAR protocol and required defendants to accept two provisions in the protocol that they had rejected during the negotiations.

In this products liability multidistrict litigation, plaintiffs alleged that a drug manufactured by defendants was contaminated with cancer-causing chemicals. *Id.* *1. Despite lengthy negotiations regarding the discovery process, defendants decided to unilaterally implement TAR to guide its review of documents and initially did not disclose the use to plaintiffs. *Id.* at *2–*3. The defendants' TAR model indicated that over 200,000 documents "hitting" on the negotiated search terms were nonresponsive. *Id.* at *4. Defendants ultimately told plaintiffs that they would not review those documents. In the face of plaintiffs' objections, defendants filed the instant motion requesting that the court foreclose additional review of those documents or, in the alternative, shift the costs of review to plaintiffs. *Id.* at *1.

At the beginning of the discovery process, the parties entered into an ESI protocol that required them to "cooperate in good faith regarding the disclosure and formulation of appropriate search methodology, search terms and protocols, and any TAR/predictive coding prior to using any such technology." *Id.* at *2. After months of negotiations, the parties agreed on a set of search terms and custodians. Two weeks prior to defendants' first production, defendants informed plaintiffs that they intended to use "a continuous multi-modal learning ('CMML') platform to assist" with ESI review. *Id* at *3. Defendants also indicated that they might use the CMML system to identify documents unlikely to be responsive and not review those documents. After this disclosure, the parties engaged in negotiations to establish a CMML protocol but did not reach agreement because defendants refused to agree to the entry of a court order memorializing the CMML protocol and defendants would not permit plaintiffs to review 5,000 documents identified by the CMML platform as not responsive. *Id.* at *4.

Following the failed CMML negotiations, defendants undertook an effort to self-validate its electronic review but again did not tell plaintiffs this was done until shortly before the defendants' motion was filed. Defendants claimed that from a sample of 15,000 documents identified as not responsive by the CMML model, only 109 were deemed responsive after a quality control review. Defendants argued that they should not be required to review documents identified as likely not responsive by their CMML.

Magistrate Judge Schneider began his analysis by identifying a number of issues that he did *not* have to decide. He did not have to decide "if TAR is an appropriate discovery tool" or "if there are instances when a party may layer a document production with search terms and TAR." He noted that "[a]mple case law exists to support [defendants'] position that in appropriate instances layering may be done." Finally, he noted that he did not have to decide if plaintiffs could dictate to defendants the manner in which defendants must review and produce their ESI. He agreed "with the line of cases that holds that a producing party has the right in the first instance to decide how it will produce its documents." *Id.* at *5–*6. On the last point, however, Magistrate

Judge Schneider noted that the general principle that a producing party has the right to decide how it will produce its documents "is trumped by the requirements in an agreed upon ESI Protocol memorialized in a Court Order." *Id*. at *6. He noted that if the ESI protocol was violated, "the Court's task is to decide the relief to be granted, not to do a proportionality analysis under Fed. R. Civ. P. 26(b)(1)." He explained that "if the Court addressed [defendants'] proportionality argument and ignored the Protocol, it may incentivize parties to skirt the requirements in a Court Order."

Magistrate Judge Schneider held that defendants violated the requirement in the ESI protocol by failing to timely notify plaintiffs of their use or possible use of TAR. He noted that the protocol required "the parties to 'meet and confer as early as possible' regarding TAR/predictive coding." This meant that defendants were required to "timely disclose its use or possible use of TAR when [defendants] objectively knew or reasonably should have known that [they] might use TAR to reduce the universe of documents to review." Magistrate Judge Schneider noted that use of TAR was foreseeable well before the defendants' disclosure given "the stakes in the case, the volume of ESI likely to be requested, and the fact [defendants were] consulting with TAR specialists" during the search term negotiations. *Id*. at *7.

Magistrate Judge Schneider also held that defendants failed to comply with their "meet and confer obligation" because they did not cooperate regarding the disclosure and formulation of their CMML platform, which was adopted without any input or knowledge of plaintiffs. Nor did defendants meet and confer "as early as possible with Plaintiffs since Defendants proposed to use a TAR that they did not notify Plaintiffs about until their mind was already made up." *Id*. (cleaned up).

Magistrate Judge Schneider was unimpressed with defendants' argument that they employed a similar TAR protocol to one used in a different multidistrict litigation. He explained that the effectiveness of the TAR protocol was not at issue. Rather, the issue was what the ESI protocol required and what defendants' failed to do. Further, Magistrate Judge Schneider noted that the parties in the other multidistrict litigation did not "undertake months of negotiations and argument over search terms with no inkling that TAR would be proposed for use."

Nor did Magistrate Judge Schneider credit defendants' argument that they cooperated in good faith with plaintiffs regarding TAR usage. *Id*. at *10. Defendants argued that by stating during the ESI protocol negotiations that they were still evaluating the use of TAR, defendants had reserved the right to implement TAR. Magistrate Judge Schneider did not find such a "reservation" sufficient to demonstrate good faith. Additionally, defendants argued that they had proceeded in good faith since, at the time of the negotiations of search terms, they had not decided to use TAR. Magistrate Judge Schneider also found this unpersuasive, explaining that even if defendants had not decided to use TAR during the ESI negotiations, they "should have foreseen [during negotiations] that this would or was objectively reasonably likely to occur." Because TAR usage was likely, "[i]t was inappropriate for [defendants] to involve plaintiffs and the Court in intensive search term negotiations and disputes without also disclosing there was a reasonable prospect TAR would be used to winnow its documents to be reviewed."

Having denied defendants' motion, Magistrate Judge Schneider turned to the issue of how to proceed given the over 200,000 likely not responsive documents at issue. He noted that "contrary to [defendants'] argument ... a court may order alleged non-responsive documents to be produced

without a manual review first being done by the producing party." Magistrate Judge Schneider held that because he found that defendants violated the ESI protocol, he had "wide discretion to fashion an equitable remedy." *Id*. at *13. He expressed that having one of the parties "spend millions of dollars to manually review irrelevant or marginally relevant documents is more than mildly disturbing." The equitable solution, Magistrate Judge Schneider held, was to permit defendants to conduct a TAR review of the likely nonresponsive documents but to require defendants to do so using the protocol previously negotiated by the parties. He also ordered that the protocol include the two provisions defendants had objected to — court entry of the protocol and validation of the not-responsive set by plaintiffs. In so holding, Magistrate Judge Schneider noted that defendants' "insistence that it is unheard of for alleged non-responsive or irrelevant documents to be produced either by court order or by agreement is not correct."