1.   In Nichols v. Noom Inc., No. 20-CV-3677 (LGS) (KHP), 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021), Magistrate Judge Katherine H. Parker denied Plaintiffs' motion to clarify or reconsider a prior discovery order regarding Defendant's collection of Google Drive documents and Gmail communications via hyperlink because Plaintiffs failed to demonstrate that their competing proposal for collection of the hyperlinked documents was proportional to the needs of the case. Id. at *5.

During discovery in this class action consumer protection case, the parties negotiated and disagreed on various aspects of an electronically stored information (ESI) protocol that would govern document collection and production. Id. at *2. Among other issues, the parties disagreed on the use of Google Vault to collect one of the defendant's Gmail communications. From Defendant's early productions of documents, Plaintiffs had learned that Defendant's employees tended to hyperlink to internal Google Drive documents in lieu of attaching them. Plaintiffs argued that hyperlinks are akin to attachments and should be produced as part of the document family. Plaintiffs asked Defendant to use MetaSpike's Forensic Evidence Collector (FEC) to collect the Gmail communications, rather than Google Vault, because Plaintiffs were concerned that Google Vault would not pull Google Drive documents that were hyperlinked in the Gmail communications. As an alternative to FEC, Plaintiffs suggested Defendant "create a program using Google's application programming interface to extract links from responsive Google Drive documents, retrieve those linked documents, and produce them as attachments." Id. at 1. Plaintiffs estimated that it would take one or two weeks to write the suggested program to extract the links.

Defendant, by contrast, argued that hyperlinks are not attachments and that it was separately collecting and producing relevant internal documents on Google Drive. Further, Defendant argued that so long as its preferred method of collection was reasonable, Defendant should be able to decide which method to employ. Id. at *2. Defendant's discovery expert also submitted a declaration stating that the FEC tool is "unworkable" insofar as it "continues to stall, leading to significantly longer processing times," and that Defendant "would incur roughly $180,000 in costs to collect the hyperlinked documents and produce them, resulting in further delays."

Additionally, the ESI protocol negotiated by the parties and later entered by the court did not state that hyperlinked documents are part of "family groups." Id. at *3. At the same time, the protocol did not define "attachments." In Magistrate Judge Parker's view, "[i]t [was] clear ... there was no meeting of the minds on whether hyperlinks were attachments," and when she entered the order cementing the ESI protocol, Magistrate Judge Parker "did not view hyperlinks to be attachments."

After considering the parties' arguments, Magistrate Judge Parker held in her original order that Defendant could use Google Vault to collect Gmail communications and Google Drive documents because, in her view, that method of collection was reasonable, and Defendant was best situated to determine its own search and collection methods. Id. at *2. However, with respect to Plaintiffs' concern about not being able to identify which Google Drive documents in the production corresponded to a particular hyperlink, Magistrate Judge Parker directed that if there were particular key documents containing hyperlinks where Plaintiffs could not locate the hyperlinked documents in the production, Plaintiffs could raise that issue with her. Magistrate Judge Parker later amended that order and held that Plaintiffs could raise the issue with Defendant, and Defendant would be required to provide the document or Bates number. Plaintiffs then filed a letter

seeking to "clarify" the court's previous orders or, in the alternative, seeking reconsideration of those orders. Id. at *1.

As an initial matter, Magistrate Judge Parker disagreed with Plaintiffs' contention that a hyperlinked document is an attachment. Id. at *4. As she put it, "[w]hen a person creates a document or email with attachments, the person is providing the attachment as a necessary part of the communication. When a person creates a document or email with a hyperlink, the hyperlinked document/information may or may not be necessary to the communication." "For example, a legal memorandum might have hyperlinks to cases cited therein," but Magistrate Judge Parker did "not consider the hyperlinked cases to be attachments." Similarly, a "document might have a hyperlink shortcut to a SharePoint folder. The whole folder would not be an attachment." Further, Plaintiffs made no showing that they "need to link to or even care about all of the hyperlinked documents." To the contrary, at this stage of the case, the number of relevant and material hyperlinked documents was "entirely speculative."

Magistrate Judge Parker also expressed concerns regarding costs and delay. One argument she found compelling was Defendant's contention that "one email thread may contain multiple hyperlinks to the same document that already was flagged for production." As Defendant explained, "[t]he same underlying hyperlinked document may be pulled tens if not hundreds of times in some cases," and "[t]his additional collection would certainly increase the review population and ... complicate de-duplication, delay production, and impose additional costs." In Magistrate Judge Parker's view, given the inherent challenges with Plaintiffs' proposed collection methods and Plaintiffs' lack of explanation for why they needed to link or care about all of the hyperlinked documents, Plaintiffs did not demonstrate that the value of obtaining the metadata establishing the linkages for all hyperlinked documents was proportional to the needs of the case. Id. at *5.

Magistrate Judge Parker rejected Plaintiffs' contention that Defendant could write a program to use Google's Application Programming Interface (API) to extract links to Google Drive documents from other Google Drive documents, emails, and Slack communications. Id. at 4. Although Plaintiffs' expert suggested that Defendant's "ediscovery programmers could create such a program within two weeks," Magistrate Judge Parker stated that Plaintiffs' expert did not address the time it would take to apply the program, load, and review the documents.

Accordingly, Magistrate Judge Parker concluded that "[t]he process ... [she] already ordered [was] appropriate" because "[i]t [would] allow Plaintiffs to evaluate [Defendant's] production and, if Plaintiffs determine there is a need for an additional targeted pull or production or clarifying information about a hyperlinked document's identity or Bates number, Plaintiffs can request it." And, as the parties reported during a conference, they had already successfully used Magistrate Judge Parker's procedure.