4. An opinion from the Northern District of Illinois addressing various disputes regarding the parties' negotiation of their ESI protocol, including the selection of custodians and data sources, the applicable timeframe for searching, and the allocation of discovery costs.

In *Cary v. Northeastern Illinois Regional Commuter Railroad Corp.*, 2021 WL 678872 (N.D. Ill. Feb. 22, 2021), U.S. Magistrate Judge Jeffrey T. Gilbert resolved a number of early discovery disputes, including addressing the number of custodians, denying Plaintiff's request that her email inbox be produced without any search limitations, and requiring Defendant to identify sources of ESI in addition to email.

This discovery dispute came relatively early in the discovery process and largely concerned the contours of how discovery between the parties would proceed — which custodians' data sets would be searched, what data sources would be used, and over what timeframes searches would be run. Magistrate Judge Gilbert stressed the need for "cooperation" between the parties, citing to the cooperation principles embodied the Northern District of Illinois' Standing Order Relating to the Discovery of Electronically Stored Information. *Id*. at *1.

Magistrate Judge Gilbert first addressed the parties' dispute regarding the number of custodians Defendant would use to collect and run searches for ESI. *Id*. at *1. Defendant proposed an "arbitrary limit of five or seven custodians," asserting that it would be too burdensome to search more. In support of its burden argument, Defendant ran test searches on two potential custodians that returned approximately 18,000 hits. But Magistrate Judge Gilbert was skeptical of this burden argument because the parties had not agreed on complete ESI protocols or search terms, and Defendant's numbers therefore told him "very little about the ultimate burden on Defendant from executing whatever ESI protocol the parties eventually agree upon for all custodians." As such, he said that the parties could lessen the burden of each search by further discussing and fine tuning them. Magistrate Judge Gilbert rejected Defendant's line-in-the-sand approach and ordered the parties to continue discussing the issue of custodians. He also set a backstop to their discussions: In the event that they could not negotiate and agree on custodians, he would order 27 custodians, based on a list Plaintiff submitted that he deemed "logical and reasonable." *Id*. at *2.

Magistrate Judge Gilbert also rejected Plaintiff's request to treat the Plaintiff's documents differently than those of other custodians. Plaintiff requested that her entire email inbox be produced, rather than searched as would be done for other custodians. Magistrate Judge Gilbert described this "blanket request" as "on its face overbroad" as it would "very likely" include emails and documents not relevant to either the claims or defenses in the case.

Magistrate Judge Gilbert next rejected Defendant's attempt to artificially limit the timeframe applied to searches. *Id*. at *3. Defendant argued that the relevant timeframe should be limited by (i) the statute of limitations; and (ii) the dates of Plaintiff's employment, leading to a four-year period for the searches. On the other hand, Plaintiff wanted to run searches back to 2010 and through to the present day. Because "the parties present the Court with only a binary choice," Magistrate Judge Gilbert did not side with either proposal. Rather, he encouraged the parties to continue to meet and confer to come up with an ESI protocol that was "proportional to the needs of the case." He rejected Defendant's assertion that no searches could be run for the time prior to the statute of limitations. He also was "not convinced" that Plaintiff's attempt to go all the way back to 2010, or through to the present day, was "relevant." He also was convinced that the search

terms to be run were a key component of this discussion," and so prior to the parties agreeing on terms, he did not believe the parties could make definite decisions on the time frame.

Magistrate Judge Gilbert also rejected Defendant's assertion that only emails were relevant and that it should not have to disclose other possible data sources. *Id*. at *4. While Defendant contended that the company's emails were the only relevant data source, Magistrate Judge Gilbert rejected this hardline stance as inconsistent with the cooperative approach to discovery his order required. He required Defendant to "provide Plaintiff with information necessary for her to calibrate her discovery requests so she can seek relevant information that is proportional to the needs of the case," and this includes possible data sources other than email. Magistrate Judge Gilbert acknowledged the possibility that, at the end of the meet-and-confer process, email would be the only relevant data source, but he noted that Defendant's refusal to identify any other source had halted the parties' ability to have those discussions.

Defendant made numerous attempts to use productions from another litigation to supplement its discovery or support its defenses, all of which were rejected. Defendant asserted that this prior litigation was similar to Plaintiff's case, so Defendant offered to reproduce all of its discovery from that case to reduce Plaintiff's discovery demands. *Id*. at *2. Magistrate Judge Gilbert said that because "this is a different case, Plaintiff is entitled to discovery relevant to the claims and defenses in her case rather than those in another case" and rejected Defendant's request. *Id*. (internal quotations omitted). Defendant had tendered the invoices it paid to produce that prior discovery as proof of burden, but Magistrate Judge Gilbert rejected this proof because he knew nothing about the efficiency and manner of the production in the prior litigation.

Magistrate Judge Gilbert also rejected Defendant's proposal for the parties to split discovery costs. He first outlined the general rule that "in federal litigation, each party bears its own costs of [production]." He then highlighted some of the exceptions to that rule, "such as when a party requests information that is inaccessible or the discovery being sought is not proportional to the needs of the case." Because the parties had not agreed on the ESI protocol, all of Defendant's proof and estimates of its cost were not credited, and Magistrate Judge Gilbert did not see any basis to go against the traditional rule. However, he left open the possibility that costs could be split differently between the parties if Defendant submitted a credible reason for doing so in the future.