

1. A ruling from the U.S. District Court for the Western District of Pennsylvania denying competing motions regarding the defendants' use of search terms and TAR, finding that the plaintiffs could not impose on defendants her own TAR methodology or search terms.

In *In re Diisocyanates Antitrust Litigation*, 2022 WL 173678 (W.D. Pa. Jan. 7, 2022), E-Discovery Special Master James C. Francis IV recommended denying competing motions from the parties regarding the defendants' use of TAR and search terms and finding that plaintiffs could not impose on defendants their own TAR methodology or search terms and that defendants could implement their own proposed search terms and TAR methodology consistent with prior orders of the court.

In prior motion practice, the parties had litigated defendants' use of TAR and search terms in this antitrust case. Special Master Francis explained that plaintiffs had earlier moved to compel defendants to use plaintiffs' proposed search terms in order to identify the universe of electronically stored information (ESI) to which defendants should apply TAR and to use plaintiffs' proposed methodologies to determine when to conclude the TAR process and to validate the search. *Id.* at \*1. Defendants had earlier cross-moved for a protective order that would allow them to rely on their own list of search terms and their own TAR methodologies.

In a previous order, Special Master Francis had recommended that the parties' prior competing motions should be denied. He had found that defendants' proposed TAR methodology was unreasonable "because the validation procedure tested recall only for the search conducted by TAR, ignoring the documents eliminated by search terms" and "failed to take advantage of the capability of the defendants' continuous active learning tools to analyze the marginal value of conducting additional search iterations beyond a chosen stopping point." He had also declined to endorse defendants' search terms, concluding that "their exclusive focus on hit rates was inappropriate and that they had failed to conduct systematic testing of their proposed terms" and that they had not sufficiently documented their assertion that plaintiffs' proposed search terms would impose a disproportionate burden.

As for plaintiffs' prior motion, Special Master Francis had found that plaintiffs' proposed validation criteria for defendants' TAR methodology exceeded the law's requirements, such as by incorporating an analysis of human review error. *Id.* at \*2. He declined to recommend plaintiffs' protocol and determined that defendants should be permitted to identify reasonable search terms.

After Special Master Francis' prior report and recommendation, defendants had indicated they would modify their TAR protocols to address flaws he had raised. Defendants had represented that if the parties did not agree on search terms, defendants would apply their own "but would perform a validation analysis that incorporated the search term phase as well as the TAR phase of the process." Defendants had also committed to share the number and content of responsive documents identified in the documents processed by TAR so that plaintiffs could seek court review if they disagreed that the search was complete.

In response to the prior report and recommendation, and defendants' proposal, plaintiffs had argued that the court should implement one of their three alternative solutions: 1) grant plaintiffs' motion requiring defendants to implement plaintiffs' proposed TAR procedures and run their proposed search terms, or forgo search terms and use only TAR; 2) adjudicate the search terms in dispute and ask Special Master Francis to fashion a TAR methodology; or 3) order defendants to

produce all nonprivileged documents in their possession responsive to plaintiffs' search terms. Plaintiffs had argued that the court should reject Special Master Francis' deference to defendants' choice of search methodologies and instead enter an order endorsing plaintiffs' search terms and TAR protocols.

In response to the prior report and recommendation and the parties' arguments, the court agreed that defendants were not compelled to adopt plaintiffs' search terms or TAR methodologies and could proceed with their proposal. The court ordered defendants to provide plaintiffs the Bates numbers of all relevant documents obtained from the last two batches they searched, identify the batch the documents were found in, and identify the number of relevant but privileged documents withheld as well as provide the recall rate and calculations used to derive that rate. If plaintiffs did not agree with defendants, the parties were to meet and confer and present the dispute to the court for Special Master Francis to resolve.

After further discovery, the parties filed their present motions. *Id.* at \*3. Plaintiffs sought an order requiring defendants to use their proposed search terms or, alternatively, establishing a process by which disputed search terms would be adjudicated. However, Special Master Francis stated that the "ship has sailed" with respect to any order requiring defendants to use plaintiffs' proposed search terms or establishing a process to adjudicate disputed search terms. Special Master Francis stated that while he had previously left open the prospect of further litigation of search terms in a report and recommendation, any window of opportunity for further adjudication prior to the application of TAR closed when the court directed defendants to proceed with their proposed TAR methodology. Special Master Francis stated that this procedure specifically allowed defendants to rely on their chosen search terms subject to end-to-end validation that assessed the quality of review over both the search terms and TAR review stages.

Plaintiffs argued that revisiting the search term dispute was justified because when defendants adopted their protocol, the protocol incorporated the caveat that it was "necessarily general" because it was designed to "leave the parties flexibility to negotiate the details," thereby anticipating further litigation concerning search terms. Special Master Francis disagreed, as defendants had emphasized when presenting their amended methodology to the court that their proposal "contemplated no further adjudication until the defendants deemed their search complete." Defendants had argued that under Special Master Francis's protocol, the producing party selected its own search terms and assumed the risk of assuring they were not unduly narrow.

Special Master Francis rejected plaintiffs' argument that, by referring the motion to him, the court expected him to adjudicate the merits of any search term dispute. Special Master Francis reasoned that it was equally plausible that the motion was subject only to determination on procedural grounds. *Id.* at \*4. While the court had rejected plaintiffs' motion, plaintiffs were still entitled to challenge defendants' production. Special Master Francis noted that defendants acknowledged that they have a "powerful incentive . . . not to use unduly narrow search terms," and plaintiffs had remedies available to address inadequacies. Special Master Francis stated that the court stressed the need for the production to proceed immediately based on defendants' protocol. Based on these factors, he recommended denying plaintiffs' motion to compel.

Special Master Francis next addressed defendants' motion for a protective order to permit them to use the search terms they disclosed to plaintiffs. He noted plaintiffs' argument that defendants

failed to demonstrate with specificity a clearly defined and serious injury if plaintiffs' order was not granted, but he found that plaintiffs' requested relief was precluded by the court's prior order. He added that defendants had an interest in the order's enforcement and did not need to show harm beyond the inherent prejudice when "the finality of a court order is undermined."

Despite that, Special Master Francis described defendants' motion for a protective order as "functionally the mirror image of the plaintiffs' motion to compel" and therefore "should be denied as moot insofar as it seeks the same relief that necessarily flows from denial of the plaintiffs' motion."