1. A ruling from the U.S. District Court for the District of New Jersey denying the Defendants' application to use TAR to produce documents because the parties had not agreed to use TAR and because the Defendants did not substantiate the need for their request to use TAR.

In *In re Allergan Biocell Textured Breast Implant Products Liability Litigation*, 2022 WL 16630821 (D.N.J. Oct. 25, 2022), Special Masters Judge Joseph A. Dickson (Ret.) and Brittany Manna evaluated Defendants' proposed protocol for the use of TAR to produce documents, as well as Plaintiff's opposition to the use of TAR.

Defendants applied to the Special Masters to use TAR (or predictive coding) for the remainder of its document production. Plaintiffs opposed Defendants' use of TAR and instead requested that Defendants be ordered to proceed with its search term and linear review or be ordered to implement the TAR protocol to Defendants' full custodial set of documents. *Id*. at *1.

In support of their application, Defendants argued that "applying TAR after the application of search terms is standard practice and commonly used to promote efficiency and reduce costs." Defendants also argued that they were in the best position to determine the proper review methodology, and, based on the large number of documents, the best method was to apply TAR protocols to the remaining 560,000 documents (comprising 3.5 million pages) after the application of search terms. Defendants' e-discovery vendor estimated that manual review of the remaining documents would take approximately 20 weeks, and Defendants argued that using TAR would thus be more efficient.

Defendants rejected Plaintiffs' suggestion to apply TAR protocols *before* applying search terms, arguing it would impose a burden and be inefficient, as they had collected and indexed over nine terabytes of data prior to the application of the parties' search terms. Defendants also cited to case law to argue that their proposal was "consistent with the majority of courts that have addressed whether a producing party may utilize TAR after search term culling."

Plaintiffs argued that using TAR prior to the application of search terms "creates no additional burden on the Defendants and will increase the accuracy of the review." *Id*. at *2. Plaintiffs further argued that applying TAR to unreviewed documents after search terms had been applied would be "prejudicial and unreasonable because it will exclude documents from review and reduce the 'efficiency and accuracy' of the review process." Plaintiffs raised Defendants' lack of supporting data and argued that any alleged burden must be weighed against the needs of the case, importance of the issues, and amounts in controversy, and presented alternative case law to support their arguments.

The Special Masters began their analysis with the determination that contrary to Defendants' argument, there was no accepted "general principle" that parties can apply TAR after applying search terms. Rather, the Special Masters stated that courts "find solutions to the problems confronting them" but do not "settle the question of which method is better." The Special Masters distinguished a case cited by Defendants by noting that in that case, the requesting party had undergone an analysis of the burden and cost of the discovery, which had not been done here. *Id*. at *3. Further, that court explicitly stated that it was not judging which method was superior to the other. The other case cited by Defendants also noted that the use of predictive coding is a judgment call. The Special Masters commented that both cases were decided eight to nine years ago, "which is a lifetime in the world of technological development and advancement of TAR."

The Special Masters criticized the declaration from Defendants' e-discovery vendor, which presented the costs Defendants had incurred to date for their review, explaining that it did "not detail how those costs will be increased or decreased based upon the implementation of TAR either before search terms are applied or after search terms are applied." The Special Masters added that Defendants had had numerous opportunities to provide a cost-benefit analysis or statistical sampling but had not done so, and they had not explained why their method would be more efficient.

The Special Masters were also not persuaded by Defendants' burden argument and noted that the nine terabytes of data should still be maintained on a database. They stated that after reviewing Defendants' submissions and the declaration from Defendants' e-discovery vendor, "the question of the benefit of using both search terms and TAR remains unanswered."

The Special Masters commented that TAR requires transparency and cooperation among counsel in the review and production of ESI, calling this "an overriding principle to be taken from all of the cases cited by the parties." The Special Masters continued that an important factor was the fact that the parties had not agreed to the application of TAR. *Id*. at *4. The Special Masters also noted that the case management order and ESI protocol required cooperation and collaboration amongst the parties on search terms, TAR, and other things. Specifically, the ESI protocol required agreement of the parties for any revisions to the protocol. The Special Masters found that "the Defendants have not set forth an adequate basis for ordering the application of TAR *after* the application of search terms, over the objection of the Plaintiffs."

The Special Masters concluded by stating that ESI discovery costs would inevitably be high but that it was impossible to predict which method was the most economical, and implementing TAR at this stage "open[ed] the door for potential disputes that may arise related to the accuracy of the review process and will further delay the completion of

discovery and drive costs upward." Finally, the Special Masters stated that application of TAR at this point would not reveal documents that search terms had precluded. Therefore, "[b]ecause Plaintiffs did not bargain for this at the outset, over a year ago, it is inappropriate to force them to accept it now."

The Special Masters thus denied Defendants' application to apply TAR after the application of search terms and ordered Defendants to continue with the originally chosen review method of linear search term review.