2. A decision from a discovery special master in the U.S. District Court for the Northern District of Illinois ordering the Plaintiff to produce documents found during "elusion" testing on documents that did not hit on the parties' search terms, where the Plaintiffs' initial elusion testing was clearly inadequate.

In *Deal Genius, LLC v. O2COOL, LLC*, No. 21 C 2046, 2023 WL 4556759 (N.D. Ill. July 14, 2023), Special Master Philip J. Favro addressed the use of elusion testing in e-discovery disputes.

This was a patent infringement case for a neck-worn portable cooling fan device. The parties were "bitterly divided ... over issues relating to the production of relevant emails," including whether Plaintiff "made fulsome email productions." *Id.* at *1. Because the parties were unable to resolve this issue before the close of fact discovery, Special Master Favro was appointed to oversee the e-discovery disputes. Upon his appointment, Special Master Favro worked with the parties to execute a stipulated order, which required that Plaintiff redo some of its production and conduct elusion testing.

Elusion testing "involves having the producing party review a random sample from the 'null set,' which comprises the documents that did not hit on any of the search terms, together with the documents the producing party deemed not responsive after reviewing the search term hits." *Id.* at *6. This sample will typically be "calculated using a statistical confidence level of 95% with a margin of error of 2%" and will typically "contain between 1,000 and 2,400 documents." *Id.* at *6 n.34. The producing party then reviews the documents in the sample and produces any additional relevant documents. Special Master Favro described elusion testing as "a standard quality assurance practice" designed to combat the inherent underinclusivity of search terms and that "can ultimately validate, or confirm the reasonableness and proportionality, of the producing party's production and thus help satisfy the Rule 26(g) reasonable inquiry standard." *Id.* at *5-6.

The parties' dispute centered around the adequacy of the elusion testing Plaintiff conducted pursuant to Special Master Favro's order. Plaintiff's first round of elusion testing contained a sample of 2,397 documents, out of which Plaintiff identified two responsive documents. *Id.* at *2. After some time, Defendant requested Plaintiff run an additional search query on the null set of documents. *Id.* at *3. Plaintiff did so and found that the search yielded 28 documents, "all of which [Plaintiff] deemed relevant upon review." Finally, Defendant requested a second additional search. Special Master Favro ordered Plaintiff to run this second search and report the number of hits before producing the documents. *Id.* at *4. The second search yielded 18 additional, unique documents, which Plaintiff argued it should not have to produce. Special Master Favro overruled Plaintiff's objections to producing these 18 documents and found that the results of the first search raised "questions regarding the reliability of [Plaintiff]'s elusion testing results." *Id.* at *9-10.

Special Master Favro noted that whether the documents from the second additional search should be produced was a question of relevance and proportionality under Rule 26(b)(1). *Id.* at *4. He found that both cut in favor of production: Plaintiff did not contest that the documents at issue were relevant and did not argue that producing 18 documents was unduly burdensome. *Id.* at *6-7. Plaintiff raised three other objections to production, each of which Special Master Favro

overruled. First, Plaintiff argued that the 18 documents had no "causal connection" to the initial elusion testing inquiry (which yielded two documents). Special Master Favro found that his order did not require such a causal connection. *Id.* at *7. Second, Plaintiff argued that the stipulated order provided a seven-day window in which to raise any issues with elusion testing and that Defendant objected after the close of that window. Special Master Favro found that responding to the first modified search query "operate[d] as a waiver" of any right under the order and also noted a "general judicial preference to resolve disputes on the merits rather than on procedural issues" that cut against strict enforcement of the seven-day deadline. *Id.* at *8. Third, Plaintiff argued that the new search should have been run before the close of fact discovery. While Special Master Favro was sympathetic to this argument, he ultimately rejected it because Defendant had "long disputed the adequacy of the email searches that [Plaintiff] ran during fact discovery" and remaining concerns were "outweighed by the need to ensure that potentially key documents are produced" given "the well-chronicled problems Deal Genius has experienced conducting ESI searches." *Id.* at *8-9.

Special Master Favro further explained that problems with Plaintiff's elusion testing warranted the production of the documents at issue, holding that the results of the first additional search "demonstrably establish[ed] the need ... for the Parties to consider running additional search terms to identify relevant information." *Id.* at *10. He noted that Plaintiff's first production — two documents from a sample of almost 2,400 — had a purported statistical "elusion rate" of .08% and that if that rate were applied to the total "null set" of about 660,000, about 530 remaining relevant documents would exist. *Id.* at *9. Special Master Favro indicated, however, that Plaintiff's null set "include[d] an excessive number of documents" and that "the presence of so many irrelevant documents ... skew[ed] the ability of the ... sample to capture relevant documents." This was demonstrated, he noted, by the fact that the initial sample yielding two relevant documents did not contain any of the 28 documents that the first additional search would later reveal. This, Special Master Favro stated, "raise[d] questions regarding the reliability of [Plaintiff]'s elusion testing results" because it meant "[t]he .08% elusion rate may ... be 'misleading.' " Thus he found that the production of the 18 documents from the second additional search, the documents at issue, was "warranted under the circumstances of this dispute" and subsequently ordered Plaintiff to produce those documents. *Id.* at *10.