3. A decision from the U.S. District Court for the Southern District of New York awarding sanctions against Plaintiffs for using unreasonably narrow search terms, despite the fact that Defendant had refused to negotiate specific search terms with Plaintiffs during discovery, because Plaintiffs had an independent obligation to craft appropriate search terms.

In Gardner-Alfred v. Federal Reserve Bank of New York, No. 22-CV-01585 (LJL), 2023 WL 3495091 (S.D.N.Y. May 17, 2023), U.S. District Judge Lewis J. Liman addressed a motion for sanctions against Plaintiffs for failing to run "reasonable" search terms on its documents during discovery.

This litigation was brought by employees of the Federal Reserve Bank of New York who claimed they were denied religious accommodations in connection with the COVID-19 vaccines. Id. at *1. After the case entered discovery, "[a]lmost from the start, Plaintiffs delayed producing documents and information in response to Defendant's discovery requests." Id. at *3. After a contentious history involving multiple orders from Judge Liman for Plaintiffs to complete productions on time, Plaintiffs repeatedly failed to meet discovery deadlines. Despite repeated representations that Plaintiffs' discovery was substantially complete, they "produced a staggering 1,082 additional pages of documents" a month after the close of the fact discovery deadline, more than twice what they had produced during the discovery period. Id. at *3-6. After the close of fact discovery, Defendant moved for sanctions.

Judge Liman granted the motion for sanctions, finding that Plaintiffs' counsel abused the discovery process. He noted that Plaintiffs "blame[d] their plainly inadequate" production on the lack of guidance from Defendant on which search terms to use. Id. at *15. Plaintiffs represented that they had reached out to Defendant about which search terms to use, and Defendant repeatedly told Plaintiffs to "run search terms on its own determination." Rebuffed in this way, Plaintiffs ran extremely narrow search terms, which resulted in the small production to which Defendant objected.

Judge Liman made clear that "even absent agreement or discussion about the appropriate terms, [a producing party] still has an independent obligation to craft search terms to fulfill the requirements of Rules 26 and 34." Parties have an "affirmative obligation to search for documents" and must "conduct a reasonable search." Although Judge Liman noted that "courts are generally loath to second guess search terms," he found that there was "little question that Plaintiffs' search terms were not reasonably calculated to lead to production of documents relevant to their claims or Defendant's defenses." Defendant's document requests, which had been the subject of a motion to compel, called for broad categories of documents, but Plaintiffs only searched their own emails among themselves and a total of five other custodians. Judge Liman noted that the search terms applied to this narrow set of documents were also quite narrow. For instance, in response to a document request for documents concerning COVID-19, Plaintiffs produced only "documents with the terms 'covid' or 'covid-19' or 'coronavirus' ... if one of those words was within ten words of either 'immune!' or 'natural' or 'CDC.'"

Thus, Judge Liman granted Defendant's motion and awarded it reasonable expenses and attorneys' fees for much of Defendant's dealings with Plaintiffs in discovery as well as adverse inference instructions that Plaintiffs withheld relevant documents and what those documents would have shown. However, he declined to instruct the jury that it should draw any particular inference based on the lack of production, explaining that "courts in this circuit have not gone so far as to direct that a jury should draw a certain inference from a party's spoliation or withholding of evidence, instead opting to allow the jury to draw such inferences as it sees fit, from the facts presented."