

2. A ruling from the U.S. District Court for the Western District of Pennsylvania denying a motion to compel the Defendants to produce all calendar entries and text messages for certain custodians without application of search terms, finding that the use of search terms was routine and acceptable and that Defendants' search terms and search methodologies were not shown to be unreasonable or inadequate.

In *In re Diisocyanates Antitrust Litigation*, MDL No. 2862, 2023 WL 427082 (W.D. Pa. Jan. 26, 2023), U.S. District Judge W. Scott Hardy addressed a motion to compel Defendants to produce hundreds of thousands of calendar entries and text messages that did not hit on search terms after Defendants had already applied search terms to the documents.

Plaintiffs in this antitrust litigation alleged that Defendants conspired to reduce the supply and increase prices for precursor ingredients used in the manufacturing of polyurethane foam and thermoplastic polyurethanes. After extensive discovery, Plaintiffs moved to compel the production of text messages and full sets of calendar entries from 45 custodians of three Defendants over a five-year period. *Id.* at *1. Defendants had already produced more than 50,000 calendar entries and 5,000 text messages after applying search terms, but Plaintiffs moved to compel the production of the remaining more than 350,000 calendar entries and 750,000 text messages that Defendants reported returned no hits under the relevant search criteria.

Judge Hardy noted that Plaintiffs' motion was governed by Federal Rule of Civil Procedure 26(b) and, therefore, that discovery requests must be proportional to the needs of the case. He rejected Plaintiffs' argument that "courts routinely order the full production of calendars without first applying search terms and because the search term review improperly risks excluding relevant evidence," finding that the cases Plaintiffs cited did not support wholesale production of calendar entries without application of search terms. *Id.* at *3.

Judge Hardy emphasized that the use of search terms to cull large document productions is routine and acceptable, particularly in complex cases. The parties had agreed to a stipulated ESI protocol setting out search terms for the parties' initial disclosures and providing for a process for limiting future production requests, and this protocol did not exclude calendar entries or text messages. *Id.* at *2, 3. Judge Hardy noted that the motion to compel at issue concerned a dispute about the scope of the search Defendants ultimately conducted, stating that "the record ... reflects disagreements between Plaintiffs and Defendants as to the adequacy of the search terms that were applied." *Id.* at *2–3. He found, however, that "Plaintiffs have presented no basis to persuade this Court to disrupt those agreements and thus expand Defendants' review and production obligations (and the commensurate costs and burdens created thereby) by obviating the use of search terms at this far-along juncture." And he concluded that Plaintiffs had failed to demonstrate that Defendants' search terms or search methodologies for calendar entries or text messages were unreasonable or inadequate. *Id.* at *4.

Judge Hardy then held that the requested production of the calendar entries was disproportionate to the needs of the case. *Id.* at *4. He noted that the parties "expressly contemplated that Plaintiffs would likely propound follow-up discovery requests," so there was no need for Defendants to produce the whole set of calendar entries and text messages that had already been searched and appropriately reviewed, "[g]iven the substantial time and effort undertaken ... thus far." As such, Judge Hardy stated that "targeted follow-up discovery requests for discernably relevant information, rather than the wholesale production of documents

that will certainly yield significant amounts of irrelevant material, is more aptly proportional to the needs of this case.” Judge Hardy noted that “the burden or expense of re-reviewing the entire universe of calendar entries and text messages sans search terms” did not outweigh its likely benefit. In denying the motion to compel, Judge Hardy stated that Plaintiffs could issue discovery requests that are “non-cumulative, specifically targeted and not generalized, and be informed by the documents and other information produced to Plaintiffs thus far.” *Id.* at *4.