

4. An opinion from the U.S. District Court for the District of Maryland affirming a special master's order requiring the Plaintiff to manually review the documents responsive to agreed-on search terms based on the parties' protocol governing the review and production of ESI.

In *McCormick & Co., Inc. v. Ryder Integrated Logistics, Inc.*, --- F.Supp.3d ----, 2023 WL 2433902 (D. Md. March 9, 2023), Chief Judge James K. Bredar addressed a special master's order requiring Plaintiff to manually review the documents responsive to agreed-on search terms based on the parties' protocol governing the review and production of ESI.

In this litigation involving competing claims for breach of contract, the parties agreed on lists of search terms to run across their ESI and negotiated an ESI protocol. *Id.* at *1. The ESI protocol provided that the parties' obligation to conduct a reasonable search for documents in response to discovery requests would be deemed satisfied by reviewing documents captured by utilizing the methodology provided for in the protocol, and that "[t]he fact that a document is captured by a search pursuant to this protocol does not mean that such document is responsive to a discovery request or otherwise relevant to this litigation and Parties may exclude such nonresponsive documents from production."

During discovery, a dispute arose as to whether the parties were required to manually review the documents captured by the agreed search terms for relevance prior to production or whether they could produce those documents without a document-by-document review. *Id.* at *2. Plaintiff contended that the ESI protocol did not require the parties to conduct a manual review of documents identified through the use of search terms, but Defendant took the opposite view. A special master assigned to resolve this dispute sided with Defendant, reasoning that the ESI protocol expressly contemplated a manual review of the documents and that such reading was consistent with Federal Rule of Civil Procedure 26(b)(1)'s provision that only relevant evidence is discoverable. The special master also rejected Plaintiff's argument that the costs associated with the manual review (estimated at \$240,000 on a claim for \$4 million) was not proportional to the case.

Chief Judge Bredar began his analysis with the language of the ESI protocol, which provided that "a party's obligation to conduct a reasonable search for documents in response to discovery requests shall be deemed to be satisfied by reviewing documents that are captured by utilizing the methodology provided for in this Protocol," and that "[t]he fact that a document is captured by a search pursuant to this protocol does not mean that such document is responsive to a discovery request or otherwise relevant to this litigation and Parties may exclude such nonresponsive documents from production." Chief Judge Bredar viewed the relevant question as whether the parties "agreed to conduct a page-by-page responsiveness review prior to production."

Chief Judge Bredar concluded that the ESI protocol required a page-by-page responsiveness review. *Id.* At *3. He found such review "plainly require[d]" by the language in the ESI protocol providing that "a party's obligation to conduct a reasonable search for documents in response to discovery requests shall be deemed to be satisfied by reviewing documents that are captured by utilizing the methodology provided for in this Protocol." In making this finding, Chief Judge

Bredar rejected Plaintiff's arguments that the ESI protocol merely permitted a producing party to review documents that were captured by using the methodology provided for in the ESI protocol, and that the party's obligation was satisfied by applying search terms alone. Chief Judge Bredar again relied on the language in the ESI protocol that deemed a party's obligation satisfied "by reviewing documents."

Chief Judge Bredar also rejected Plaintiff's argument that the special master's order requiring a page-by-page review contravened the proportionality standard set forth in Federal Rule of Civil Procedure 26(b)(2)(B), which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Id.* at *4. Chief Judge Bredar found that although the special master's order had not expressly addressed each of these factors, the order had concluded that the costs of the review were proportional to the needs of the case.