

3. A ruling from the U.S. District Court for the Southern District of New York denying a motion to compel Defendants to produce all documents that hit on the parties' agreed search terms, finding that this obligation would be inconsistent with a parties' obligations under Rules 26 and 34 of the Federal Rules of Civil Procedure to produce information that is relevant and responsive.

In *United States, for the Use and benefit of M. Frank Higgins & Co., Inc. v. Dobco Inc. et al.*, No. 22-cv-9599 (CS) (VR), 2023 WL 5302371 (S.D.N.Y. Aug. 17, 2023), U.S. Magistrate Judge Victoria Reznik addressed whether parties could be required to produce all documents that included agreed-on search terms without regard to whether the documents were responsive to the parties' requests for production.

During discovery, the parties disagreed on how searches for ESI should be conducted. *Id.* at *4. Plaintiffs argued that the parties should be required to produce all nonprivileged documents that hit on one or more of the search terms agreed between the parties. Defendant argued that Plaintiffs' proposed approach was beyond the scope of permissible discovery because it would require Defendant to produce every single document that included at least one of the agreed search words, without considering relevance or proportionality to the needs of the case.

Magistrate Judge Reznik first noted that "there is nothing improper about parties agreeing to produce all documents generated from an ESI search protocol," but she declined to impose this obligation on Defendant involuntarily. *Id.* at *4. She explained that ESI is not exempt from Rules 26 and 34 of the Federal Rules of Civil Procedure, which only obligate a party to produce information that is relevant and responsive. *Id.* (citing Rule 26(b)(1) and Rule 34(a)). Because search terms may produce some amount of nonresponsive documents, she concluded that Defendant was entitled to review its documents to ensure that they are responsive to the discovery demands even if they hit on one or more of the parties' agreed-on search terms. However, she noted that Defendant must "promptly produce all non-privileged documents responsive to the parties' document demands, except for those that it properly withholds based on an objection."

Magistrate Judge Reznik next noted that the parties had not yet "engaged in any meaningful dialogue about proposed search terms, custodians, and date ranges to be applied to any searches for ESI." She explained that without such discussions, arguments about relevance and burden were "speculative at best." Rather, "[i]t is standard practice for the negotiation of search protocols to be an iterative process that allows parties to narrowly tailor search terms, custodians, and date ranges to locate responsive and non-privileged documents for production." She further noted that parties can minimize concerns about producing large quantities of nonresponsive documents by narrowly tailoring and testing their search protocol.

Ultimately, Magistrate Judge Reznik ordered the parties to meet and confer to negotiate search terms, custodians, and date ranges that are (1) narrowly tailored to achieve responsive search results, (2) proportional to the needs of the case, and (3) not unduly burdensome, costly, or voluminous.