1. A decision from the U.S. District Court for the Northern District of California admonishing the parties' counsel for failing to engage in appropriate negotiations regarding the search terms to be applied to the defendants' electronically stored information (ESI) and imposing specific meet and confer obligations on counsel.

In Humanmade v. SFMade, No. 23-cv-02349-HSG (PHK), 2024 WL 3378326 (N.D. Cal. July 10, 2024), U.S. Magistrate Judge Peter H. Kang addressed the obligations on parties in discovery to negotiate appropriate search terms for ESI.

In this action alleging claims for false advertising, unfair business practices, and related torts, Plaintiff claimed that Defendants misused a proprietary training program developed by Plaintiff and cut Plaintiff out of partnerships with cities and aid organizations.

During discovery, the parties agreed on five custodians for Defendants to use and "several" search terms to apply to the ESI of those custodians. Id. at *2. But the parties could not agree on seven additional proposed search terms because Defendants claimed that they yielded too high a hit count, thus making review of documents based on those seven search terms overly burdensome. Plaintiff complained that Defendants refused to disclose hit counts resulting from the seven disputed search terms and refused to negotiate revisions to those terms. There was apparently no dispute as to the relevance of Plaintiffs' document requests or the seven additional proposed search terms.

Magistrate Judge Kang began his analysis with a lengthy discussion of proportionality under the Federal Rules. In particular, he noted that Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case," and relevancy "is broadly defined to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."

But Magistrate Judge Kang explained that even if relevant, information must be "proportional to the needs of the case" to fall within the scope of permissible discovery. Id. (quoting Rule 26(b)(1)). Quoting from the 2015 amendments to Rule 26(b)(1), he explained that the proportionality standard "impose[s] reasonable limits on discovery" and "guard[s] against redundant or disproportionate discovery by giving the Court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry."

Magistrate Judge Kang further explained that evaluating the proportionality of a discovery request requires consideration of "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to the 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. (quoting Rule 26(b)(1)).

Finally, Magistrate Judge Kang noted that while the party seeking discovery bears the burden of establishing relevancy, once it does so the resisting party has the burden to show that the discovery should not be allowed, including to "specifically explain the reasons why the request at issue is objectionable and may not rely on boilerplate, conclusory, or speculative arguments." In this regard, Magistrate Judge Kang stated that Courts have "broad discretion and authority to

manage discovery," including to determine relevancy for discovery purposes and to craft "discovery orders that may expand, limit, or differ from the relief requested."

Turning to the application of these standards, Magistrate Judge Kang first concluded that it would be proportional to require Defendants to "run additional search terms, if appropriately drafted, and produce responsive ESI documents and materials" because there was no dispute over the relevance of Plaintiffs' document requests. Id. at *3.

But Magistrate Judge Kang ultimately concluded that he could not rule on Plaintiffs' motion to compel. He noted that neither party had submitted all seven of the disputed search terms in connection with the motion. He also expressed disappointment that the parties failed to engage in "the kind of communication during meet and confers which is expected and necessary for effective resolution of discovery issues." He noted that "[e]xperienced counsel should be capable of and, indeed, are expected to resolve ESI and search term disputes typically without the need for Court intervention, because eDiscovery issues are common in the modern era and members of the bar are expected to be familiar with and capable of competently working through these kinds of issues."

Magistrate Judge Kang also took Defendants to task for failing to share "statistics on hit counts for the seven disputed search terms transparently with Plaintiff." He explained that "[p]arties are both encouraged and expected to timely share eDiscovery statistics such as hit number results when they have a dispute over eDiscovery issues such as search terms." He similarly chided Plaintiff for failing to "propose any alterations to, limitations on, or modifications to any of the seven disputed search terms when informed that they yield an excessive and unreasonably high number of hits (regardless of the details of the statistics)."

Based on these failures by counsel, Magistrate Judge Kang ordered the parties "to undertake the normal type of search term negotiation and resulting ESI production that they should have done without the need for Court intervention." As part of this negotiation, he ordered (1) Defendants to provide Plaintiff with the hit count statistics resulting from running each of the seven disputed search terms against Defendants' database of collected ESI; (2) Plaintiff to provide Defendants with a set of up to seven modified search terms to replace the original seven search terms, "where the modifications shall be made for the purpose of reducing the hit count to address overbreadth and undue burden"; and (3) Defendants to run the proposed modified search terms and report the document hit count statistics to Plaintiff. In this regard, Magistrate Judge Kang noted that the party in possession of the documents and ESI database from which discovery is sought is generally expected to "run test searches using the opposing party's proposed search terms to see if they return a reasonable and mutually agreeable hit count (whether too high or too low)."

Magistrate Judge Kang imposed additional obligations on the parties, including ordering lead trial counsel for the parties to meet and confer and negotiate "reasonably and in good faith regarding whether any further modifications to the search terms are reasonably warranted in light of the document hit count statistics." Id. at *4. He also ordered the parties "to timely share eDiscovery statistics such as hit number results when they have a dispute over eDiscovery issues such as search terms (i.e., like the current dispute), and to timely and promptly propose and counterpropose modifications to search terms." Magistrate Judge Kang also imposed on the

parties specific procedures for production of the resulting ESI, including "privilege/clawback procedures for eDiscovery" and procedures for designating ESI as confidential. Id. at *4-5.

Finally, Magistrate Judge Kang again admonished the parties' counsel for failing to "effectively engage in the meet and confer process for resolving discovery disputes." He noted that "[a]ble and experienced counsel, particularly lead trial counsel for the Parties here, are expected to and should know better how to resolve disputes of the kind raised herein and how to resolve them efficiently and without undue delay." Id. at *6. He ordered the parties' counsel to review and comply with the Court's Guidelines for Professional Conduct, the Court's Discovery Standing Order, and the Federal Rules of Civil Procedure, "particularly Rules 1 and 26." He warned the parties that a future failure to "resolve discovery disputes in a reasonable manner consistent with Rules 1 and 26, as well as this Court's directives and Orders," could result in additional meet and confer procedures, including ordering lead counsel for the parties to meet and confer in person "at the San Francisco courthouse or other location."