

2. A decision from the U.S. District Court for the Northern District of Illinois granting a motion to compel one Defendant to use additional specific search terms based on the Plaintiffs' discovery of relevant documents that the Defendant had not produced.

In *In Re Outpatient Medical Center Employee Antitrust Litigation*, No. 21-cv-305, 2024 WL 4188728 (N.D. Ill. Sept. 13, 2024), U.S. Magistrate Judge Young B. Kim addressed the proportionality standard of Rule 26 as applied to a request to compel the use of additional search terms.

Plaintiffs in this antitrust litigation brought claims under Section 1 of the Sherman Act, alleging that Defendants, ambulatory surgery centers and outpatient medical centers, conspired to reduce and limit compensation and mobility of their employees. *Id.* at *1.

Earlier in discovery, Plaintiffs had filed a motion to compel Defendants Surgical Care Affiliates, LLC, and SCAI Holdings, LLC (SCA), to produce documents related to wage-fixing and the exchange of employment-related business information with other Defendants. The court had granted that motion and compelled SCA to produce the requested documents because Plaintiffs' complaint included allegations that Defendants conspired to fix wages. Based on this order, SCA performed a series of searches relating to wage-information-sharing practices, including using the search term "Wage w/5 (increase* OR budget)" which SCA represented generated 2,706 hits.

But Plaintiffs claimed that SCA failed to produce responsive documents that should have been captured in that search, including two email threads that another Defendant, United Surgical Partners International (USPI), had produced discussing the sharing of wage increase information with SCA. Magistrate Judge Kim surveyed these email threads, in which an SCA employee discussed the exchange of wage increase budgets with an employee of USPI. *Id.* at *2. Magistrate Judge Kim found these email exchanges to be "significant and incriminating, at least on the surface."

Based on those emails, Plaintiffs moved to compel SCA to perform supplemental searches for ESI to search for documents relating to exchanges of wage information using three new search terms across two new and three previously designated custodians. In particular, Plaintiffs proposed broadening the terms SCA had used to include (1) "Wage* /20 (increas* OR budget*)"; (2) "(Wage* or info* or data) /20 (shar* OR swap* OR exchang*)"; and (3) "Wage* AND (USPI OR 'United Surgical Partners International')."

In response to the motion, SCA argued that it produced 890,233 documents and conducted reasonable search for documents concerning wage-fixing. SCA suggested that its failure to produce the USPI email threads raised by Plaintiffs may have been because they predated SCA's preservation obligations. SCA also argued that Plaintiffs' supplemental requests were "unreasonably cumulative, duplicative, and burdensome." SCA pointed out that the USPI email threads identified by Plaintiffs did not contain any of the three new proposed terms.

SCA further argued that the proposed search terms were not proportional to the needs of the case. *Id.* at *4. In particular, SCA noted that the three new search terms returned 648 hits, 22,458 hits, and zero hits respectively across the three previously designated custodians and estimated it "would take 462 hours of attorney time to review those documents, at a significant cost to SCA."

Based on these figures, SCA argued that Plaintiffs' request failed the proportionality requirement in Rule 26(b)(1) because "[a]ny potential benefit of running these new search terms is minimal and far outweighed by the expense and burden of performing these reviews."

Magistrate Judge Kim began his analysis by explaining that Rule 26(b) governs the scope of discovery and provides that the "[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," with relevance "to be construed broadly." *Id.* at *3. He further explained that an assessment of proportionality required 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.* (quoting Fed. R. Civ. P. 26(b)(1)).

Magistrate Judge Kim noted that SCA did not dispute the relevance of the USPI email threads, so "[t]he key inquiry thus turns on whether SCA, as the opposing party, has satisfied its burden of showing that the supplemental searches Plaintiffs seek are improper."

Magistrate Judge Kim agreed with Plaintiffs that the three new proposed search terms were "narrowly tailored" to discover "exchanges of wage information between SCA and USPI" and related documents. Magistrate Judge Kim found that Plaintiffs' newly proposed search terms sought relevant information and satisfied the proportionality requirement because the documents Plaintiffs sought related to evidence of wage-fixing, which he found to be relevant and important to the resolution of Plaintiffs' claims. Magistrate Judge Kim also found that "the importance of the issues at stake in the action, the amount in controversy, [and] the importance of the discovery in resolving the issues" all weighed in favor of compelling the supplemental searches.

While Magistrate Judge Kim credited SCA's concerns that the new proposed search terms placed an undue burden on SCA, he found that SCA has not satisfied its burden of showing that Plaintiffs' requested searches are improper. He noted that the parties had proceeded with discovery under an existing ESI protocol and that "tweaking search terms now will increase SCA's discovery expenses." But Magistrate Judge Kim held that the supplemental discovery was appropriate given the significance of the USPI email threads to the claims in this case. He stated that SCA could "minimize its burden of reviewing newly identified documents by relying on [TAR] and Federal Rule of Evidence 502(d)."