

2. A recommendation from a special discovery master for the U.S. District Court for the Eastern District of Pennsylvania, adopted by the District Court, declining to order a party to completely redo its collection and production of electronically stored information (ESI) despite numerous errors in the party's ESI productions, but requiring the party to outline in detail the process used to collect, search, review, and produce its ESI.

In *United States ex rel. Ellsworth Associates, LLP v. CVS Health Corp.*, No. 2:19-cv-02553, 2024 WL 2972767 (E.D. Pa. May 23, 2024), Special Discovery Master Bruce P. Merenstein addressed whether numerous deficiencies in a party's production of ESI required a complete redo of the party's discovery process.

In this *qui tam* action, Relator claimed that Defendants' document production efforts had been "woefully deficient" for a number of reasons, including because Defendants had failed to search a shared drive used by an actuarial team; belatedly produced documents from a former employee shortly before his deposition; redacted certain information from spreadsheets; failed to produce certain audit reports; and failed to produce certain work instructions and related documents referenced in other documents produced by Defendants. *Id.* at *1. Based on these alleged deficiencies, Relator requested that Defendants be ordered to provide a detailed accounting of all of their non-email data sources, including shared drive files, identifying which ones had been searched and which had not, and that Defendants be required to produce additional documents.

After an initial dispute regarding these deficiencies, Defendants were ordered to provide greater detail on their process for locating and producing ESI from shared drive locations and to produce any additional relevant documents that Relator had identified. In response, Defendants explained that to determine which sources of ESI to review for relevant, responsive documents, they had consulted with relevant employees, in-house counsel, IT personnel, and others, focusing on Relator's specific requests for production of documents and the allegations in Relator's complaint. Defendants also stated that they had found certain documents identified by Relator that had been inadvertently omitted from their prior review and production.

Unsatisfied with Defendants' explanations, Relator renewed its argument that Defendants' productions were flawed and requested that Defendants be required to rerun their entire document collection and review process at their own expense, using a neutral third-party vendor, and/or that the court impose a sanction. *Id.* at *2. In support of this request, Relator argued that Defendants' oversights and belated productions "substantially impair[ed] its ability to prosecute its case."

In response, Defendants admitted to certain errors in their productions but argued that these errors were "modest," did not involve large numbers of documents, and resulted in little or no prejudice to Relator. However, Defendants later informed the Special Master that in the process of assessing the document collection, review, and production efforts of Defendants' ESI vendor, Defendants learned that approximately 47,000 documents that should have been reviewed had not been, in part because of typographical errors in the search terms applied.

Special Master Merenstein began his recommendation with an overview of the relevant rules, starting with Rule 26 of the Federal Rules of Civil Procedure. *Id.* at *3. He noted that Rule 26

defines the scope of discovery as “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case” and “provides for liberal and broad discovery.” He further explained that “a party responding to discovery requests is not required to achieve perfection in its efforts to locate and produce every relevant document in its possession.” Rather, its obligation is to “conduct a diligent search, which involves developing a reasonably comprehensive search strategy.”

Special Master Merenstein stated that “the right and responsibility to determine the parameters for searching ESI and other document sources lie initially with the responding party.” Only if the requesting party shows “that the party from whom documents were requested either withheld relevant documents or failed to conduct a reasonable search” may a court require the responding party to take additional steps such as searching new data sources. He further explained that the burden to justify such additional steps “is not trivial” but can be met by “evidence that affirmatively indicates that responsive documents exist,” that is, “some concrete evidence pointing to the existence of missing documents.”

In this context, Special Master Merenstein noted that discovery is imperfect and that “[t]he collection, review, and production of documents in complex litigation such as this seldom is carried out without a hitch.” He explained that when mistakes are made, the “the primary means of addressing such errors is the meet-and-confer process, i.e., a good-faith attempt by the requesting party to obtain the missing discovery” and that “[c]orrection of such errors during the discovery process mitigates (though does not necessarily eliminate) the potentially prejudicial effect.”

Applying these standards, Special Master Merenstein found that despite “multiple errors and gaps in defendants’ document production efforts,” the mistakes did not demonstrate that Defendants’ entire document production process was flawed and must be redone from scratch, as requested by Relator. *Id.* at *4. He explained that not all of the errors were of the same magnitude or equally worrisome, but “as a whole, they paint[ed] a picture of problems that must be addressed and that have caused some prejudice to Relator; they do not demonstrate a large-scale failure severely prejudicing Relator and warranting the drastic relief Relator seeks.”

However, Special Master Merenstein found that Relator had identified “sufficient specific deficiencies to warrant Defendants’ disclosure of additional information regarding the specifics of their process to ensure that they ha[d] conducted a reasonably comprehensive collection, review, and production process and to fill any gaps in their production.” He further found that Defendants “should take all necessary steps to investigate and remedy the specific document production issues that the parties have identified, which they already are doing” and “provide greater transparency regarding their document collection, review, and production process and how it led to the errors that have been identified.”

Accordingly, Special Master Merenstein recommended that Defendants be ordered to provide Relator with “a declaration (or declarations) of a representative (or representatives) of the defendants, outlining in detail the process defendants used to collect, search, review, and produce documents from non-email data sources, providing as much information as possible regarding the process Defendants used.” He further recommended that the declarations provide additional

details regarding the audit of Defendants' vendor's work as well as descriptions of "any errors, omissions, or other problems identified by the audit."

Upon review, U.S. District Court Judge John Milton Younge adopted Special Master Merenstein's recommendation and ordered Defendants to provide "a declaration (or declarations) of a representative (or representatives) of the Defendants, outlining in detail the process Defendants used to collect, search, review, and produce documents from non-email data sources, providing as much information as possible regarding the process Defendants used (without disclosing counsel's mental impressions, conclusions, opinions, or legal theories concerning this case), including a listing of the share drives or folders, by name or description, from which documents were collected, as well as an indication for each drive or folder (or groups of drives and folders) of the manner in which the files were reviewed." Judge Younge further ordered that Defendants' declarations should provide details regarding the audit of Defendants' vendor's work as well as descriptions of "any errors, omissions, or other problems identified by the audit."

See In United States ex rel. Ellsworth Associates, LLP v. CVS Health Corp., No. 2:19-cv-02553, 2024 WL 2959295 (E.D. Pa. June 12, 2024).