1. In *In re Exactech Polyethylene Orthopedic Products Liability Litigation,* No. 22-md-3044 (NGG)(MMH), 2024 WL 4381076 (E.D.N.Y. Oct. 3, 2024), U.S. Magistrate Judge Marcia M. Henry addressed competing provisions for the use of TAR 2.0 in the parties' discovery protocol.

This multidistrict litigation involved claims that Plaintiffs were injured by certain products manufactured by Defendant Exactech.

At the outset of discovery, the parties submitted to the court several disputes including whether the applicable TAR 2.0 protocol in the parties' ESI protocol should permit Plaintiffs to review nonprivileged documents coded as "non-responsive" during Exactech's document review to ensure the responsiveness of those documents. Id. at *12. Magistrate Judge Henry noted that the parties' competing TAR protocols were otherwise "nearly identical."

But Plaintiffs proposed a provision in the ESI protocol providing that Exactech would "make available to Plaintiffs the nonprivileged documents coded as nonresponsive" in Exactech's estimation sample (and provide a privilege log for any such documents Exactech claimed were privileged). Plaintiffs further proposed that the ESI protocol require the parties to meet and confer "[s]hould a disagreement arise regarding the responsiveness of certain documents within the sample."

Plaintiffs argued that their proposal "efficiently explores the issue of Exactech's responsiveness at the beginning of the production process instead of at the end." Id. at *13. But Exactech disputed that Plaintiffs had a right to be involved in a producing party's responsiveness.

At the outset of her analysis, Magistrate Judge Henry noted that Plaintiffs sought "discovery on discovery" and therefore "must provide an adequate factual basis to justify the discovery." Relying on prior decisions in *Kaye v. New York City Health & Hosps. Corp.,* No. 18-CV-12137 (JPO)(JLC), 2020 WL 283702 (S.D.N.Y. Jan. 21, 2020), and *Hyles v. New York City,* No. 10- CIV-3119 (AT)(AJP), 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016), she explained that courts "must closely scrutinize the request in light of the danger of extending the already costly and time-consuming discovery process." She concluded that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."

With respect to TAR, Magistrate Judge Henry explained that courts generally decline to intervene in a responding party's decisions about how to use TAR unless the requesting party shows a specific deficiency in production or unreasonableness in the process. *Id.* (citing The Sedona Conference, TAR Case Law Primer, Second Edition, 24 Sedona Conf. J.1, 27–30).

Magistrate Judge Henry found that the parties had "largely agreed to a TAR protocol including detailed information regarding the collection criteria used and the culling and review process" and that "[t]his is sufficient information to make the production transparent." She also noted that Plaintiffs' position regarding review of nonresponsive documents was "wholly unsupported by the law."

Finally, Magistrate Judge Henry rejected an argument that Exactech's TAR implementation required oversight because Exactech was ordered to produce documents that were miscoded as privileged in another litigation. Id. at *14. She noted that Plaintiffs had not demonstrated any deficiencies in Exactech's TAR protocol as applied in the current litigation but could raise any issues with the court if Plaintiffs later found deficiencies in Exactech's production as a result of its improper application of the TAR protocol.

Accordingly, Magistrate Judge Henry adopted Exactech's proposed TAR 2.0 protocol.