IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILMER GARCIA RAMIREZ, *et al.*,	
Plaintiffs,	Case No. 1:18-cv-00508-RC
v.	Class Action
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,	MEMORANDUM REGARDING PLAINTIFFS' PROPOSED PLAN FOR PRODUCTION OF ELECTRONICALLY STORED INFORMATION
Defendants.	

MEMORANDUM REGARDING PLAINTIFFS' PROPOSED PLAN
FOR PRODUCTION OF ELECTRONICALLY STORED INFORMATION

Discovery in this case has already been unnecessarily delayed and protracted. Yet, Defendants now propose an ESI discovery protocol that, at best, ensures a slow trickle of ESI productions over the next year and creates an opaque process that will likely be the subject of future discovery disputes. Although the parties have reached agreement on search terms, they have not agreed on document review protocols or a timeline for production. Because of this impasse, Plaintiffs submit this Proposed Plan for Production of Electronically Stored Information ("Proposed ESI Plan"), which addresses the unreasonably slow schedule and other deficiencies in "Defendants' Protocol for Use of Active Learning to Assist With Responsiveness Review" ("Defendants' Protocol") (Ex. A) and "Draft Plan for Review of Electronically Stored Information" ("Defendants' ESI Review Plan") (Ex. B).

I. Defendants' Proposal Is Unnecessarily Slow and Inappropriately Opaque.

Under Defendants' ESI Review Plan, ICE will "make good faith efforts to produce 5,000 documents" on December 21, 2018, 5,000 more documents on a month later, and 5,000 additional

documents every week thereafter "until all relevant documents are produced." (Ex. B at 1.) At that rate, it could take as long as 51 weeks—over a year—for Defendants to complete the production of ESI for the initial set of 18 custodians, not to mention the other custodians for whom Defendants are required to search and process emails per the Court's October 12, 2018 minute order. Part of the delay comes from Defendants' proposed review protocol, which does not account for any type of staging—something that is common and accepted practice in discovery review. And, Defendants have stated that they are not willing to be transparent about their proposed Continuous Active Learning ("CAL") process.

Plaintiffs have three principal concerns with Defendants' ESI Review Plan. ***First,*** it is unreasonably and unnecessarily slow.

Second, Defendants refuse to conduct an appropriately-staged review—where non-privileged, responsive documents are quickly produced and potentially privileged documents are reviewed later.

Third, Defendants refuse to disclose key information essential to assure the Court and Plaintiffs that its proposed CAL review technology operates effectively.

II. Plaintiffs' Proposals

Plaintiffs present two, alternative approaches that would ensure that the ESI review and production are completed in a reasonable amount of time. Under Plaintiffs' preferred approach, the Court would order Defendants to immediately produce all 256,000 documents that hit on the agreed search terms, holding back only those documents that hit on privilege search terms, and thereafter produce any additional documents that are deemed to be responsive and non-privileged after subsequent review ("Option One"). In the alternative, Plaintiffs request that the Court order that Defendants review at least 50,000 documents per week, and produce at the end of each week those documents that are responsive and not privileged ("Option Two").

A. Option One

Plaintiffs' preferred approach finds support in the case law, including *Progressive Casualty Insurance Co. v. Delaney*, No. 2:11-cv-00678, 2014 WL 3563467 (D. Nev. July 18, 2014) and *Stambler v. Amazon.com, Inc.*, No. 2:09-CV-310, 2011 WL 10538668 (E.D. Tex. May 23, 2011).[1]

In *Progressive*, it was the government (FDIC) that was trying to pry documents out of a recalcitrant private plaintiff. A significant period passed without any agreement on protocols and or without any production of responsive ESI documents from the 1.8 million documents in question. The parties agreed to search terms that reduced the number of potentially-responsive documents to 565,000. Plaintiff then began a manual review, but determined it was "too time intensive and expensive" and that an early form of technology-assisted review, predictive coding (the precursor to CAL), would be more effective and efficient. *Id.* at *2. Use of predictive coding reduced the number of potentially responsive documents to 90,575. In addition, Plaintiff applied a privilege filter to identify 27,000 of those 90,575 documents as "more likely privileged" and proposed that it produce the 63,000 documents that did not hit on privilege terms "without conducting any further manual review," subject to potential claw back of documents subsequently determined to be privileged. As to the 27,000 documents identified as potentially privileged, plaintiff proposed that counsel would manually review those documents and produce any that were not privileged. *Id.* at *2-3.

The FDIC objected to the plaintiff's proposed approach because there, as here, plaintiffs had refused to provide critical information concerning its technology-assisted review, and

[1] *See also, e.g., Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of New Mexico*, No. 09-0885, 2010 WL 4928866, at *2, *9 (D.N.M. Oct. 22, 2010) (ordering defendant to produce backup tapes subject to a rule 502(d) order preserving the defendants' claims of privilege); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, No. 99-3564, 2002 WL 246439, at *8-9 (E.D. La. Feb. 19, 2002) (offering defendants the choice of either reviewing e-mails contained on a backup tape at its own expense, or turn over the tapes to plaintiff to conduct its own review for relevance, while preserving an option to challenge plaintiff's relevance determinations).

"unilaterally employed predictive coding" "without court approval or the [FDIC's] concurrence." *Id.* at *4. The FDIC proposed that the plaintiff immediately produce all of the 565,000 documents that had been identified by the agreed search terms, subject to a claw back of documents subsequently determined to be privileged. *Id.*

The *Progressive* court made a number of holdings that are instructive here. It stated that it would have approved the use of predictive coding had the parties agreed to "a transparent, mutually agreed upon ESI protocol," but they did not. *Id.* at *9. This failure to agree, combined with the already considerable delays, caused the court to reject the plaintiff's proposed approach. Instead, the court ordered plaintiff to produce within fourteen days all 565,000 documents identified by the agreed search terms, "without further review" for responsiveness, but subject to a claw back of documents subsequently determined to be privileged. *Id.* at *11. While the court noted that the plaintiff had originally agreed to this approach as one of two alternatives for producing ESI (*id.*), that was *not* the case at the time of the court's order. The approach was ordered over plaintiff's objection, based on the court's determination that it would "allow discovery, which has been stalled for many months while this dispute is pending, to move forward, and reduce future disputes about Progressive's ESI production." *Id.* The court did, however, allow the plaintiff to first apply a privilege filter to the 565,000 documents to identify documents that were "more likely privileged," manually review them, and produce any documents that were not privileged. *Id.*

Similarly, in *Stambler v. Amazon.com, Inc.*, the court ordered two of the defendants to produce e-mails and documents collected using search terms agreed upon by the parties. 2011 WL 10538668, at *10-11. Defendants had opposed any production of the documents in question on grounds that review would be too expensive and the documents were "irrelevant, cumulative, or of exceedingly low relevance." *Id.* at *10. The court's order noted that defendants could pass on

some of the costs of review to plaintiff by producing the emails without reviewing them in advance for responsiveness, and could protect against producing privileged materials because defendants could "conduct reasonable keyword-based searches for privileged material without needing to review every single e-mail." *Id.* at *11.

Plaintiffs propose here exactly what the *Progressive* court ordered and the *Stambler* court suggested: immediate production of documents identified as responsive through agreed-upon search terms and screened through privilege filters. More specifically, Plaintiffs propose the following:

1. The parties will enter into a claw-back and non-waiver agreement under Federal Rule of Evidence 502(d);

2. ICE shall promptly develop a list of search terms to identify potentially-privileged documents and apply the privilege search terms against the 256,000 documents that hit on the search terms previously agreed upon by the parties, and

    a. All documents that did not hit on privilege terms shall be produced by Thursday, December 20, 2018, subject to claw back of any documents ICE later claims are privileged; and

    b. All such documents shall be deemed Confidential under the Protective Order, and ICE shall also have the option of subsequently designating documents Attorneys' Eyes Only where appropriate under the Protective Order.

3. ICE will immediately begin review of the potentially privileged documents, reviewing no fewer than 25,000 documents per week, producing any documents that are not privileged, and providing a privilege log for documents withheld in whole or in part.

B. Option Two

Plaintiffs' alternative proposal is that the Court order defendants to review at least 50,000 documents each week, and produce all non-privileged, responsive documents identified during the weekly review, subject to an added week for the initial production and an added week for the holidays. Under this proposal, Defendants' first production deadline is December 20, 2018 and Defendants' second production deadline is January 4, 2019. Thereafter, Plaintiffs request that

Defendants review 50,000 documents per week, and produce any responsive, non-privileged documents at the end of each week.

Using this review rate of 50,000 documents per week, Defendants will complete their production of documents for the first 18 custodians in no more than seven weeks (late January 2019 at the latest). The production likely will be completed earlier, as the use of CAL should reduce the number of documents that need to be reviewed.

To expedite this review and the production of responsive ESI, Plaintiffs propose that Defendants conduct a staged production. As in Option One, Defendants would develop a set of privilege terms to identify potentially-privileged documents. Such documents would be moved to the end of the review process, and Defendants would prioritize their review of documents that do not hit on the privilege terms.

This approach is similar to the one ordered in *Progressive*. *See* 2014 WL 3563467, at *11. It is also consistent with the Sedona Principles:

> [A]ppropriately crafted and tested search terms can be used to improve the thoroughness of privilege detection and to create workflow efficiencies. … Records that do not contain privileged terms might be prioritized for review as they are more likely to yield non-privileged documents that can be expedited for production. And records that do not contain privilege terms may be directed to less experienced reviewers, while documents containing privilege terms and data for custodians who are attorneys can be assigned to a more experienced review team.

The Sedona Conference, "The Sedona Conference Commentary on Protection of Privileged ESI," 17 Sedona Conf. J. 95, 168-70 (2016); *see also* The Sedona Principles, Third Edition, "Best Practices, Recommendations & Principles for Addressing Electronic Document Production," 19 Sedona Conf. J. 1, 158 (2018).

This type of staged privilege review is a best practice that is commonly used.[2] It prioritizes and expedites the review and production of documents that are likely not to be privileged, so that such documents can be produced more quickly and without unnecessary delay. Defendants can thereafter review the documents that do hit on the privilege search terms, producing any that are not privileged or that may be produced in redacted form. Based on extensive experience with this approach, Plaintiffs' counsel believe it will expedite the production significantly.

C. Disclosure of Details Concerning CAL Protocols

Defendants propose using CAL to assist them in their review and production in this matter. While Plaintiffs welcome the use of CAL and believe that CAL—when properly used—may save time and create efficiencies, they oppose any use of CAL unless Defendants first disclose key metrics they are using, and meet and confer with Plaintiffs to reach consensus on appropriate parameters. In short, if ICE intends to use CAL, it should be ordered to immediately disclose information necessary to understand and reveal the protocol it is using.

Numerous courts have found that cooperation and transparency are essential—and required—if a party seeks to use CAL.[3] As the court held in *Bridgestone Americas, Inc. v.*

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[2] *See, e.g., Adair v. EQT Production Co.*, 2012 WL 2526982, at *4-5 (W.D. Va. June 29, 2012) (discussing the use of search terms to "ferret out potentially privileged documents" and collecting cases rejecting defendants' position "that the only reasonable search for privileged and responsive documents is done by human beings on an individual document basis").

[3] *See Da Silva Moore v. Publicis Grp.*, 287 F.R.D. 182, 192 (S.D.N.Y. 2012) ("[I]t is unlikely that courts will be able to determine or approve a party's proposal as to when review and production can stop until the computer-assisted review software has been trained and the results are quality control verified."); *Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enf't*, 877 F. Supp. 2d 87, 111-12 (S.D.N.Y. 2012) (ordering parties in Freedom of Information Act action to "agree on search terms and protocols," defendant agencies to "cooperate fully with plaintiffs," and parties to raise with the court disagreements over search term methodologies and potential predictive coding techniques "before they lead to inadequate (or wasteful) searches"); *Indep. Living Ctr. Of So. Cal. v. City of Los Angeles*, No. 2:12-cv-00551, Slip Op. at 1 (C.D. Cal. June 24, 2014) (ordering that the plaintiffs would "be involved and play an active role during both the Assessment Phase and the Iterative Training Phase" of the defendant's predictive coding training process); The Sedona Conference, *The Sedona Conference Cooperation Proclamation* (July 2008) (identifying the joint development of "automated search and retrieval methodologies to cull relevant information" among the methods for counsel to act cooperatively in the discovery of electronically stored information).

International Business Machines Corp., No. 3:13-1196, Slip Op. at 4 (M.D. Tenn. Feb. 5, 2015), technology-assisted review is permissible only with full transparency into "how the predictive coding is established and used."

There are four metrics in particular that Defendants should be required to disclose and about which they should meet and confer with Plaintiffs to reach consensus. Two relate to the front-end set up of the CAL process, and two relate to verification of the CAL system's effectiveness.

On the front end, the metrics are (1) Elusion Rate, and (2) Cutoff Rank. The "Elusion Rate" refers to the percentage of documents coded as responsive after initial training of the computer. (Ex. A at 2.) The "Cutoff Rank" refers to the threshold at which Defendants propose to stop reviewing documents that are retrieved by a search term. *Id*. Both speak to how the technology-assisted review system is set up in the first instance. The authorities above not only require Defendants to disclose these metrics, but also that the parties meet and confer and attempt to reach agreement on these critical inputs.

On the back end, Plaintiffs seek a determination and disclosure with respect to two standard quality-control metrics used to evaluate whether a technology-assisted review process actually worked: (1) "Recall," which is the percentage of the total universe of responsive documents actually retrieved by the CAL system; and (2) "Precision," which refers to the percentage of non-responsive chaff that is also retrieved. As the Sedona Conference recognizes, these quality-control metrics are critical to determining whether the computer did a good job. *See* The Sedona Conference, "The Sedona Conference Commentary on the Use of Search & Information Retrieval Methods in E-Discovery," 15 Sedona Conf. J. 217, 224 (2014) ("Parties and their counsel should cooperate and seek ways to agree on measurements to evaluate the effectiveness of the search and

retrieval process. The metrics currently used in information retrieval science, most notably 'precision' and 'recall' may serve as key points of reference."). Depending on the technology Defendants propose to use (which should be disclosed to Plaintiffs), estimated Recall and Precision metrics are automatically available through the course of the review, and final Recall and Precision metrics are determined by sampling at the end of the process.

Plaintiffs seek an order requiring that Defendants disclose each of these four items and meet and confer with Plaintiffs in an attempt to reach agreement as to acceptable values/numbers for each. Notably, this information is readily available, and there is no privilege that could be associated with these metrics: the metrics do not disclose mental impressions, nor do they communicate legal advice or analysis. They are simply statistical numbers that are the byproduct of a mechanical process. Indeed, Plaintiffs' counsel routinely share these metrics with opposing parties in litigation.[4]

During the telephonic conference with the Court on December 12, 2018, Defendants asserted that Plaintiffs' ESI Plan violates Sedona Principle 6 and Comment 6.b. But those provisions only provide that "a responding party is best situated to preserve, search, and produce its own ESI." Sedona Principles, "Best Practices, Recommendations & Principles for Addressing Electronic Document Production," 19 Sedona Conf. J. at 118, 123. None of Plaintiffs' requests violate these principles, constitute "discovery on discovery," or attempt to dictate what technology or software Defendants should use. Rather, as to Plaintiffs' request for disclosure of CAL metrics, Defendants made the decision to use CAL, and Plaintiffs simply seek metrics to ensure that the

[4] It is unreasonable for Defendants to assert that Plaintiffs can raise claims of deficient document productions in a motion to compel if they believe that Defendants' production is insufficient or incomplete. Without the quality-control metrics, Plaintiffs would have no way of knowing whether, and the extent to which, the production excluded responsive documents.

process is operating as it should. Similarly, Plaintiffs' proposed production deadlines do not dictate how Defendants should run their review, but rather propose reasonable and necessary deadlines for ESI production. Finally, as to the staged privilege review, Plaintiffs propose a common practice that will expedite the review process. None of these requests qualify as "preemptive restraint" discussed in Sedona Comment 6.b. *Id.* at 123.

D. Periodic Status Reports

Finally, Plaintiffs propose that Defendants provide periodic status reports that summarize their progress. The reports should contain information sufficient to let the Court and Plaintiffs know how much work has been done and how much is left to do.

Status reports are easy to generate when using CAL, as CAL programs typically have a dashboard with information and estimates that are constantly being updated, and reports can be generated with a keystroke. Defendants' reports should include the total number of documents being reviewed, the estimated number of responsive documents after application of CAL, and the interim Recall and Precision metrics provided by the CAL system (which are not as accurate as final metrics, but provide good guiderails for the progress of the review). In this way, both parties will be able to easily see how many documents remain and estimate the time required to review and produce them.

While Defendants are setting up the CAL system, and as they run it until it is stabilized, Defendants should be ordered to provide such status reports every two days. Thereafter, Defendants should be ordered to provide weekly status reports that include: (1) the number of documents reviewed for that week, (2) the total number of documents reviewed to date, (3) the number of documents waiting to be reviewed, (4) the number of documents determined to be responsive but not yet produced, and (5) the number of documents determined to be not responsive.

Finally, Defendants should provide a screen shot of the dashboard at the end of each one-week period, showing all available estimated quality-control metrics.

Dated: December 12, 2018

/s/ Tia T. Trout Perez

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 12th day of December 2018, a true and correct copy of the foregoing was served via ECF upon counsel of record.

/s/ Tia T. Trout Perez