The Buckley Sandler *eDiscovery Update* is a quarterly publication that highlights key cases and other developments bearing on electronic discovery issues. Buckley Sandler's eDiscovery group has extensive knowledge and experience in electronic discovery in compliance, enforcement, and complex litigation matters. If you would like to discuss any electronic discovery matters with our team, do not hesitate to contact us.

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Requesting Party Cannot Force Responding Party to Use TAR

On August 1, 2016, Magistrate Judge Peck of the Southern District of New York denied a plaintiff's motion to compel a Technology Assisted Review (TAR) production in an employment discrimination case against the City of New York.

Plaintiff Pauline Hyles, the former employee, argued that the City should use TAR as a "more cost-effective and efficient method of obtaining ESI." The City declined, voicing concern that based on their prior negotiation attempts, the parties would not be able to cooperate on building a seed set.

Judge Peck wrote that even though TAR is generally "superior" to keyword searching in terms of cost and efficiency, the answer to whether Hyles was permitted to force the City to use TAR was a "decisive 'NO.'" Judge Peck has long been recognized as a judicial advocate for the use of TAR, and in this order he revisited some of his past decisions that legitimized the use of TAR and predictive coding. Nonetheless, Judge Peck found that Principle 6 of the Sedona Conference Cooperation Proclamation controlled here. That principle provides that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."

Even though Judge Peck "would have liked the City to use TAR in this case," he ruled that it was not forced to do so as keyword searching was still a reasonable process. In closing, he wrote "[t]here may come a time when TAR is so widely used that it might be unreasonable for a party to decline to use TAR. We are not there yet."

The case is *Hyles v. New York City*, No. 10-CIV-3119 (S.D.N.Y. Aug. 1, 2016). A copy of the opinion is available [here](#).

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Responding Party Does Not Have to Supplement Document Production Generated by Collaborative Predictive Coding Process

On July 13, 2016, Judge Ronald L. Buch of the United States Tax Court denied the IRS's motion to compel production of certain documents that had been excluded from the parties' collaborative predictive coding process.

Dynamo Holdings had used predictive coding for its production, and during that process had used certain search terms in a Boolean search to identify how many documents had each term. The IRS deemed the production incomplete, and served Dynamo Holdings with a new discovery request asking for all documents containing any of the search terms. (The number of documents at issue for each term ranged from 765 to 1353.)

Judge Buch noted that he had earlier authorized Dynamo Holdings to use predictive coding, and praised both parties for working together to fashion a predictive coding workflow process, with the IRS choosing the required recall rate. Judge Buch stated that Dynamo Holdings was not required to respond perfectly, and discussed the "myth of human review" that supposes people can manually review documents more accurately and completely than other means.

In denying the motion to compel, Judge Buch found that Dynamo Holdings had made a "reasonable inquiry" in responding to the document requests using the collaborative predictive coding process, and that their response was complete when they produced those documents.

The case is *Dynamo Holdings Ltd. P'ship v. Comm'r of Internal Revenue*, No. 2685-11 (T.C. July 13, 2016). A copy of the order is available here.

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"Ignorance" Regarding Which of Your Own Documents Might Be Responsive is Not a Legitimate Proportionality Argument

On June 24, 2016, Judge Patricia Gaughan of the Northern District of Ohio granted in part and denied in part a defendant's motion to compel in a breach of contract case.

After twice notifying the plaintiff of deficiencies in its responses to the defendant's discovery requests, the defendant filed the motion to compel. The plaintiff, *inter alia*, argued that the production of the documents sought by the defendant would be disproportionate to the needs of the case, under Federal Rule of Civil Procedure 26(b)(1).

First, the plaintiff argued disproportionality because the case "involves only six loans;" however, the court noted that the plaintiff was seeking over $1.5 million and damages. The plaintiff also argued that it "simply cannot know" which documents reflect policies and procedures applicable to the disputed loans, or which documents concern any due diligence, audit, or quality control review the plaintiff performed on those loans, as requested by the defendants. The court rejected this argument, citing the plaintiff's access to its own documents, and observing that the plaintiff had not offered any "alternatives that would enable even some degree of production." Judge Gaughan stated that a party "cannot simply claim ignorance" in order to avoid producing relevant documents.

Judge Gaughan ordered the plaintiff to produce the majority of the documents in question, noting that the plaintiff had not made any meaningful attempt in good faith to run searches to cull the universe of available documents, so that it could more efficiently evaluate its own documents. The judge also awarded attorney fees to the defendant for filing this motion, finding that the plaintiff's reasons for nondisclosure were "not substantially justified."

The case is *Fed. Deposit Ins. Corp. v. Ark-La-Tex Fin. Servs., LLC*, No. 1:15–CV-2470 (N.D. Ohio June 24, 2016). A copy of the opinion is available here.

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Court Denies Motion to Redo Document Production in Native Format

On June 14, 2016, Magistrate Judge Sullivan of the District of Rhode Island denied (with one minor exception) Quick Fitting's motion to compel production of native electronic files from a recent document production of PDF documents.

Although discovery had generally been contentious, Quick Fitting had not required any specific format for production under Federal Rule of Civil Procedure Rule 34(b). Wai Feng Trading had supplied ESI in a searchable PDF format for all of its productions. At the end of discovery, which included six deadline extensions, Quick Fitting demanded that some documents be produced again in native format, stating that it needed more information, *inter alia*, about the "server path the email took." Judge Sullivan observed that Quick Fitting had previously raised no issues regarding a searchable PDF production for the three and a half years that discovery had already commenced. The court also noted that Quick Fitting had not discussed production at the meet-and-confer, nor had it sought to seek a Rule 16 order that would control the format of production. Judge Sullivan did, however, rule that two pages of the production would be produced in native format to determine whether the document had actually been prepared by Wai Feng, but otherwise denied Quick Fitting's motion to compel.

The case is *Wai Feng Trading Co. Ltd v. Quick Fitting, Inc.*, No. CV 13-33S (D.R.I. June 14, 2016). A copy of the opinion is available here.

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Scope of Discovery Does Not Extend to Unpled Claims or Defenses

On May 23, 2016, Magistrate Judge James C. Francis IV of the Southern District of New York granted in part and denied in part defendant's motion to compel various discovery in a trademark dispute over the designation LIFEGUARD on various types of apparel.

Before filing the motion to compel, defendants had moved to dismiss the case. The defendants justified their motion to compel because they were entitled to discovery that would go to "possible" defenses of the intellectual property infringement. Judge Francis observed that while the amended Federal Rule of Civil Procedure 26(b)(1) allows parties to obtain discovery "relevant to any claim or defense," it was "well-established" that the scope of discovery did not extend to unpled claims or defenses. Judge Francis denied the motion to the extent it sought to compel discovery responses related to the unpled defenses of genericness, naked licensing, descriptive use, or functional use.

The defendants also moved to compel the plaintiffs to engage third-party vendors to search the plaintiff's ESI and hard copy document repositories, arguing that the plaintiffs' search has been "deficient, and, in some cases, non-existent." Judge Francis agreed that the plaintiffs had not demonstrated a sufficient search for the completeness of their production, for even though the plaintiffs had emailed each other, no search was conducted of any of their computers. Judge Francis did not find a basis for requiring the services of a third-party vendor, but did order that 1) the parties must meet and confer to determine the scope of the defendant's document requests, and 2) that the plaintiffs must then conduct a further search for responsive documents.

The case is *Lifeguard Licensing Corp. v. Kozak*, No. 15-CIV-8459 (S.D.N.Y. May 23, 2016). A copy of the opinion is available here.