SHIPMAN & GOODWIN® LLP
COUNSELORS AT LAW

E-DISCOVERY
A SHIPMAN & GOODWIN® ALERT

May 5, 2015

Court Seeks Clarity and Cooperation in Technology-Assisted Review

Authors

Vaughan Finn
(860) 251-5505
vfinn@goodwin.com

Alison P. Baker
(202) 741-4887
abaker@goodwin.com

Diane C. Polletta
(203) 324-8179
dpolletta@goodwin.com

www.shipmangoodwin.com

Three years ago, Judge Andrew J. Peck became the first judge to officially condone the use of computer-assisted review in electronic discovery in his seminal case Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 193 (S.D.N.Y. 2012), adopted sub nom. Da Silva Moore v. Publicis Groupe SA, No. 11 CIV. 1279 ALC AJP, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012). Since then, computer-assisted review (also known as technology-assisted review, or "TAR") has continued to gain widespread acceptance, and has become an increasingly important tool in document-intensive lawsuits.

TAR involves the use of computer programs that employ sophisticated algorithms, which enable a computer to electronically review vast numbers of documents and determine whether each document is relevant to the subject litigation. TAR typically requires parties to use "seed sets," or samples of documents, that the parties use to "teach" the computer which documents are relevant. Proponents praise TAR for its ability to process documents more quickly than traditional human review, while others express concern about its accuracy.

Three years after officially sanctioning the use of TAR, Judge Peck stepped into the limelight again. In his recent opinion in Rio Tino PLC v. Save S.A., No. 14-Civ-3042, 2015 WL 872294 (S.D.N.Y. Mar. 2, 2015), Judge Peck noted the growing acceptance of TAR in the courts, but also recognized that there are still unsettled issues about its application. Specifically, the court observed that the level of transparency and cooperation with respect to development and review of seed sets had not been consistently decided by other courts. Judge Peck ultimately did not provide an answer to this question in the opinion, but generally encouraged cooperation between the parties. Courts consistently call for cooperation in electronic discovery [http://www.shipmangoodwin.com/courts-call-for-cooperation-in-e-discovery], so Judge Peck's opinion serves as another reminder to parties that transparency and cooperation will serve the interests of all litigants.

In addition to transparency, Judge Peck's Order suggests the need for greater specificity in discovery protocols. After the Court previously chastised the parties for submitting a "somewhat vague and generic" electronic discovery plan, the parties submitted a detailed TAR protocol, explaining each step in their intended review process, including which tools the

parties intended to apply, the process for reviewing seed sets, and quality control checks in place. Judge Peck found the more detailed plan acceptable, and approved it. In doing so, the Court cautioned the parties that no single protocol or tool is appropriate for every case.

The Rio Tino opinion serves as a reminder that discovery, particularly electronic discovery, has become one of the most rapidly changing, intricate components of litigation. When crafting a discovery plan, parties are wise to consider the specific needs of their case, including the quantity and complexity of the electronic documents involved, and to explore available technology. Technology-assisted review is not appropriate in every case, but when judiciously employed, it has the potential to reduce the labor, cost and time incurred in litigation.

Questions or Assistance?

If you have questions about this alert, please contact Vaughan Finn at 860-251-5505, Alison Baker at 202-741-4887 or Diane Polletta at 203-324-8179.

This communication is being circulated to Shipman & Goodwin LLP clients and friends and does not constitute an attorney client relationship. The contents are intended for informational purposes only and are not intended and should not be construed as legal advice. This may be deemed advertising under certain state laws. © 2015 Shipman & Goodwin LLP.

One Constitution Plaza
Hartford, CT 06103-1919
860-251-5000

300 Atlantic Street
Stamford, CT 06901-3522
203-324-8100

1875 K St., NW - Suite 600
Washington, DC 20006-1251
202-469-7750

289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

12 Porter Street
Lakeville, CT 06039-1809
860-435-2539

www.shipmangoodwin.com

SHIPMAN & GOODWIN LLP®
COUNSELORS AT LAW