UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

MARILYN MOORE, RYAN and LAURA SPADO, CYNTHIA LOVELESS, ELLEN and LARRY GILLILAND, GEROLD GALLEGOS and DEBORAH CAMPBELL, and BRIAN and DANYELLE MILLER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WESTGATE RESORTS, LTD., L.P. a/k/a WESTGATE RESORTS, LTD., CENTRAL FLORIDA INVESTMENTS, INC., WESTGATE RESORTS, INC., WESTGATE MARKETING, LLC, WESTGATE VACATION VILLAS, LLC, and CFI RESORTS MANAGEMENT, INC.,

Defendants.

CASE NO.: 3:18-cv-00410

NOTICE OF FILING THE DECLARATION OF PHILIP J. FAVRO IN SUPPORT OF PLAINTIFFS' MOTION TO ENTER AN ORDER GOVERNING ELECTRONIC DISCOVERY

PLEASE TAKE NOTICE of the filing of the accompanying declaration of Philip J. Favro in support of Plaintiffs' Motion to Enter an Order Governing Electronic Discovery. (Dkt. No. 63.)

Dated: November 1, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2019, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

By: s/Christopher E. Coleman
Christopher E. Coleman

UNITED STATES DISTRICT COURT
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MARILYN MOORE, RYAN and LAURA SPADO, CYNTHIA LOVELESS, ELLEN and LARRY GILLILAND, GEROLD GALLEGOS and DEBORAH CAMPBELL, and BRIAN and DANYELLE MILLER, individually and on behalf of all others similarly situated, Plaintiffs, v. WESTGATE RESORTS, LTD., L.P. a/k/a WESTGATE RESORTS, LTD., CENTRAL FLORIDA INVESTMENTS, INC., WESTGATE RESORTS, INC., WESTGATE MARKETING, LLC, WESTGATE VACATION VILLAS, LLC, and CFI RESORTS MANAGEMENT, INC., Defendants.	**DECLARATION OF PHILIP J. FAVRO IN SUPPORT OF PLAINTIFFS' MOTION TO ENTER AN ORDER GOVERNING ELECTRONIC DISCOVERY** CASE NO.: 3:18-cv-00410 U.S. District Judge Clifton L. Corker

I, Philip Favro, declare as follows:

1. I am a Consultant for Driven, Inc., an international electronic discovery ("eDiscovery") consulting firm. I am also an attorney licensed to practice law in the State of Utah (active) and in the State of California (inactive). If called to do so, I could and would competently testify to the statements and opinions in this declaration.

2. I am a nationally recognized expert in the field of electronic discovery and regularly offer consulting services in the areas of data preservation practices, litigation holds, data collection strategies, search methodologies for electronically stored information ("ESI"), and protocols regarding the preservation, identification, and production of relevant ESI. I also serve as a court-appointed special master on issues related to electronic discovery.

3. I am one of the field's leading scholars on issues relating to the discovery process and the confluence of litigation and technology. Academic journals have cited the articles I have authored including the Boston College Law Review, the Cornell Law Review, and the Notre Dame Law Review. Federal and state courts have also cited my articles in their opinions including *Winfield v. City of New York*, 15-CV-05236 (LTS) (KHP), 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017), *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 128 (S.D.N.Y. 2015), and *United States ex rel. Carter v. Bridgepoint Education, Inc.*, 305 F.R.D. 225, 237, n.23 (S.D. Cal. 2015).

4. I am a member of the Steering Committee for Working Group One (Electronic Document Retention and Production) of The Sedona Conference. The Sedona Conference is the preeminent legal institution dedicated to advancing thoughtful reforms on important legal issues. The organization is best known for its work on electronic discovery. The authoritative resources it prepares are regularly cited by courts as instructive on issues relating to electronic discovery. *See, e.g., NuVasive, Inc. v. Alphatec Holdings, Inc.*, No.: 18-cv-0347-CAB-MDD, 2019 WL 4934477 (S.D. Cal. Oct. 7, 2019) (spotlighting the importance of *The Sedona Principles* and directing the parties to follow "the learned views expressed in the Sedona Principles").

5. I have been engaged by Lieff Cabraser Heimann & Bernstein, LLP, who I understand is counsel of record for plaintiffs Marilyn Moore, Ryan Spado, Laura Spado, Cynthia Loveless, Ellen Gilliland, Larry Gilliland, Gerold Gallegos, Deborah Campbell, Brian Miller, and Danyelle Miller, and the proposed Class, to offer the instant declaration in support of plaintiffs' motion to enter an order governing electronic discovery. I have reviewed plaintiffs' proposed ESI order under consideration by this Court.

6. While this Court is well aware of the complexities with ESI from its extensive history with complex litigation, in this declaration I provide a brief background on electronic discovery and why electronic discovery service providers play such a critical role in facilitating efficient document productions. I also discuss why stipulations and orders governing electronic discovery—also known as "ESI protocols"— are frequently a best practice and often reduce the expense and burden of discovery, particularly in proposed class action matters. I conclude by reviewing certain statements from the Affidavit of John Willman ("Willman Affidavit") regarding defendant Westgate Resorts, Ltd.'s ("Westgate") anticipated approach to electronic discovery and anticipated electronic discovery costs.

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I. EVOLUTION OF ELECTRONIC DISCOVERY AND THE ROLE OF SERVICE PROVIDERS

7. The digital age has transformed the civil discovery process. Before the proliferation of electronic information, a lawyer in a typical commercial contract lawsuit would generally request and produce paper copies of contracts, correspondence, and related materials during discovery. It was only an exceptional suit that would involve electronic evidence and voluminous document productions numbering in the hundreds of

thousands or millions of documents. With the universe of paper documents often numbering in the hundreds or thousands, lawyers could easily thumb through these records to identify pertinent information for the client's claims or defenses, often placing yellow "Post-It" notes to mark relevant and "hot" documents. In such cases, lawyers had no need for a discovery service provider, an ESI protocol, or generally any other protocol governing the production of paper documents.

8. Contrast the scenario described in Paragraph seven with litigation counsel representing the same client in 2019. Among other things, counsel must sort through various electronic drafts and versions of the contract and related electronic records. Even in small commercial cases involving only a handful of custodians, counsel must also cull through tens of thousands of communications memorialized in emails and text messages. Counsel must determine the storage locations—whether in corporate SharePoints, on employee hard drives, or both—of relevant unstructured data such Microsoft Word and PowerPoint documents. Counsel also needs to analyze whether corporate electronic databases holding structured data reflect relevant information and ascertain whether relevant data can be found in other systems such as enterprise grade and personal cloud applications. Last but not least, counsel should advise and work with client representatives to preserve relevant information and ensure it is not altered, modified, or destroyed.

A. The Importance of Searching through ESI

9. The hypothetical case described in Paragraph eight has the potential to involve hundreds of thousands of potentially relevant documents. While the subset of relevant documents would likely be substantially less than the overall universe of

potentially relevant information, lawyers cannot—and should not—print off and then manually review paper copies of hundreds of thousands of electronic documents for relevance and privilege. Such an approach would be a logistical impossibility; indeed, it would approach absurdity given the time and expense such a task would take to accomplish. *See In re Instinet Group, Inc.,* 2005 WL 3501708 at *3 (Del. Ch. Dec. 14, 2005) (reducing plaintiffs' request for attorney fees by $1 million for "obvious" wastefulness in reviewing paper printouts from electronic data, which "added unnecessary expense and greatly increased the number of hours required to search and review the document production."). Worse, however, is that reviewing paper versions of ESI would deprive lawyers of the ability to quickly search through, identify, and isolate material documents from those records that are merely marginal.

10. ESI has many unique qualities that make it searchable and distinguish it from paper records. Unlike paper materials, ESI has metadata, which is electronically stored detail about the nature, background, usage, and other key features relating to an electronic document. *See generally* Philip J. Favro, *A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata*, 13 B. U. J. SCI. & TECH. L. 1 (2007). For example, a native, electronic version of an email reflects email addresses for the sender and addressees. It also includes the date and time the email was sent, along with time stamp information for replies and forwards. Printed versions of emails often deprive lawyers of such information. *See Armstrong v. Executive Office of the President*, 1 F.3d 1270 (D.C. Cir. 1993) (rejecting defendants' argument that email print-outs were the logical equivalent of electronic material and finding instead that printed computer records often failed to display information "such as who sent a document, who received it, and

when that person received it"). In like manner, printouts of Microsoft Excel spreadsheets fail to display key electronic information like formulas and hidden text necessary to understand the quality and nature of data memorialized within the document. *See Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 647 (D. Kan. 2005) (ordering the production of Excel spreadsheets in native format to ensure the requesting party had access to critical information including formulas and related data).

11. The metadata associated with ESI allows a lawyer using a computer device to search through a particular document or application. For example, the instant Declaration was created using Microsoft Word. When opened in Word, a lawyer can use the "CTRL F" feature in the application to locate and identify information within the document by search term. When this Declaration was converted to portal document format ("PDF") for purposes of filing, it could have retained much of its original metadata and therefore the ability for users to quickly search through and analyze my statements.

12. Nevertheless, this Declaration, when converted to PDF, could also have easily had its metadata removed, either inadvertently or intentionally. Unless a document's metadata is retained during the conversion process to a PDF (or tagged image file format ("TIFF"), a commonly used static production format), the document cannot be searched, thus depriving counsel of an effective tool for analyzing data.

B. 2006 Rule Amendments Provide Lawyers with Ability to Search ESI

13. The unique and distinct properties of ESI led the Civil Rules Advisory Committee ("Committee") to enact amendments to the Federal Rules of Civil Procedure ("FRCP") on December 1, 2006 that would forever distinguish electronic information

from paper documents. Under the 2006 amendments, ESI is separately characterized from paper documents and equally subject to discovery. *See* FED. R. CIV. P. 34(a)(1)(A). Examples of ESI include Microsoft applications like Word documents, Excel spreadsheets, PowerPoint presentations, and similar unstructured documents created using the Google suite of applications.

14. They also include, among other things, emails, voicemails, text messages, and information found on mobile devices like smartphones and tablet computers. Just as significantly, the Committee empowered requesting parties with the right to demand the desired form of production for the sought after information from the responding party. *See* FED. R. CIV. P. 34(B)(1)(C). Such a right enables a requesting party to obtain relevant information with metadata, either by requesting that productions be made in native format or in PDF or TIFF with corresponding databases containing extracted metadata. All of which should enable the requesting party to search through the requested information.

15. While the responding party retains the right to object to the form of production, the responding party may not produce ESI in a form that makes the documents more difficult to review. As the Committee observed, "[p]roducing electronically stored information with the ability to search by electronic means removed or degraded is the electronic discovery version of the "document dump," the production of large amounts of paper with no organization or order . . . [i]f the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature." JUDICIAL CONFERENCE OF THE UNITED STATES,

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, at app. C-67 (Sept. 2005). *See also* FED. R. CIV. P. 34, 2006 committee note.

16. The production of electronic data in searchable format is now generally considered a mandatory practice and is a settled issue of case law in federal discovery practice. *See, e.g.*, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 176 (2018) (observing that "courts have ruled that production of static electronic images without text and load files is not reasonably usable and is therefore impermissible").

17. These same principles also apply to the production of paper documents. Because paper documents do not have searchable data, when responding parties produce them in electronic format for cost and convenience purposes, they typically scan those documents using optical character recognition ("OCR") software. By using OCR technology, the produced paper documents (depending on the quality of the OCR process and the print quality of the paper documents). Producing paper documents in this manner has been an acknowledged best practice in electronic discovery for many years. *See The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 15 Sedona Conf. 265, 287-88 (2014) (discussing the practice of producing paper documents that have been electronically scanned and processed with OCR technology). Moreover, the overall cost of the OCR process is generally nominal, particularly when compared with the cost of attorney time required to manually review scanned versions of paper documents which lack electronic search capability.

C. Service Providers Facilitate Lawyers' Searches through ESI

18. With ESI in searchable format, lawyers may cull through enormous sums of electronic data for purposes of preparing a matter for summary judgment, settlement negotiations, and trial. However, lawyers generally lack the technology to conduct searches through massive or even minor troves of ESI. While easy to use an application to search through one document, advanced computer technology is required to search through tens or hundreds of thousands of documents.

19. Such technology exists in the form eDiscovery platforms, which enable ESI to be hosted, processed, and searched on a macro level. Some law firms and companies have acquired eDiscovery platforms and invested the substantial time and resources necessary to handle the technical and logistical issues associated with the electronic discovery process. However, many firms and companies have not taken this step. Instead, they have turned to service providers to handle their electronic discovery needs.

20. Electronic discovery service providers—often referred to as vendors—provide lawyers and their clients with the ability to search through vast amounts of ESI. Services providers can do this by offering an eDiscovery platform that provides advanced search functionality to process through electronic data—either for production purposes or for identifying information to help prepare a client's claims or defenses. The eDiscovery provider handles the storage, hosting, and processing of that data necessary to make it visible and searchable on the eDiscovery platform. The provider carries out search queries under the direction and at the request of counsel. The provider then prepares productions, drafts privilege logs, troubleshoots technical challenges, and otherwise

services the electronic discovery needs of the client—all under the guidance and supervision of counsel.

21. Without the help of service providers, law firms would have to invest large sums of capital in the acquisition of technology and resources to ultimately search through client ESI and relevant electronic data produced by their litigation adversaries. For many firms, such a scenario does not scale financially and is impractical since they do not serially litigate cases with millions of electronic documents. Nor would it be realistic for firms to pass through the fixed costs of electronic discovery to clients whose legal budgets are already too narrow to support anything more than the fees and costs typically associated with litigation. Service providers have accordingly become a fact of life in electronic discovery.

22. Given that the discovery landscape includes ESI and service providers, organizations such as The Sedona Conference have developed guidance to assist lawyers and clients in the selection of providers. As early as 2005, The Sedona Conference published *Navigating the Vendor Proposal Process: Best Practices for the Selection of Electronic Discovery Vendors* in order to provide counsel with informed understanding on the selection of a service provider. The Sedona Conference published an updated version of that same paper in 2007. A decade later in 2017, The Sedona Conference further revised and modernized its guidance on selection of service providers with the publication of *The Sedona Conference Guidance for the Selection of Electronic Discovery Providers*, 18 Sedona Conf. J. 55 (2017). The 2017 *Guidance* discusses generally the process for engaging a provider, along with best practices and other considerations surrounding the use of such providers.

23. The use of service providers is generally considered a best practice for handling electronic discovery across the spectrum of litigation in the United States. Case law is replete with examples spotlighting the importance of using providers to handle the rigors of electronic discovery. *See Sands Harbor Marina v. Wells Fargo*, 2018 WL 1701944 (E.D.N.Y. Mar. 31, 2018) (discussing generally how conducting discovery without using an eDiscovery provider is "a more time-consuming approach" than the "efficient and economical approach for the production" that using an eDiscovery vendor offers); *Perfect 10, Inc. v. Giganews, Inc.*, 2015 WL 12699460 (C.D. Cal. Feb. 4, 2015) (criticizing plaintiff for failing to timely engage an eDiscovery vendor to assist with collection and review of ESI); *Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012) (spotlighting the benefits generally of using eDiscovery providers and having them present at court proceedings to address technical questions relating to ESI review and production). Authoritative secondary sources have also adopted this view. *See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 130 (2018) (explaining the importance of using service providers to facilitate the complexities of electronic discovery).

II. THE USE OF ESI PROTOCOLS AS A BEST PRACTICE IN ELECTRONIC DISCOVERY

24. Beyond the use of service providers, another best practice in electronic discovery is stipulating to an ESI protocol for handling preservation and production of relevant information. Cooperatively negotiated (where possible) and then entered as a court order, an ESI protocol can standardize the parties' collective process for handling a range of aspects regarding written discovery and document productions.

25. A well prepared ESI protocol can also help decrease the costs associated with pursuing discovery. Costs can be reduced since discovery should proceed in a more orderly fashion with the court and all parties cooperatively involved in the process. A cooperative and transparent approach should likewise reduce satellite litigation over the process the responding party used to search for, review, and produce responsive information. All of which can make discovery less costly, more efficient, and ultimately focused on disclosing information to enable the parties to resolve matters on the merits. *See* Philip J. Favro, *Navigating The Discovery Chess Match Through Effective Case Management*, 53 AKR. L. REV. ---, *31 (Publication forthcoming—Fall 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3381899.

26. This is particularly the case in matters such as class action litigation. Class actions place a significant burden on defendants as the responding party to produce massive troves of relevant and discoverable ESI, often from dozens of custodians throughout the enterprise. Without an ESI protocol, which can help logically structure the nature and timing of document productions, class action defendants can be crushed by the burdens of discovery.

27. Properly negotiated, an ESI protocol in a class action like the above-captioned litigation should include various provisions that will enable discovery to proceed swiftly yet orderly to ensure the plaintiffs timely receive relevant information without overwhelming the defendants. An effective ESI protocol may include a phasing provision to stage discovery from priority custodians and data resources. By cooperatively determining the sequence of discovery to emphasize primary resources, the

parties can better focus their efforts on the merits rather than getting bogged down in satellite disputes over alleged non-disclosures of information.

28. An ESI protocol may also include sampling provisions that allow the defendants to produce samples of requested information to the plaintiffs. Such a step could enable the parties to triage information held by representative custodians and data sources. This, in turn, can help the plaintiffs prepare subsequent discovery requests that are more targeted in their nature and scope.

29. ESI protocols often have comprehensive approaches for addressing the use of search methodologies and analytics tools. Specifying the use of these methodologies and tools—including search terms, technology-assisted review ("TAR"), email threading, deduplication, etc.—frequently provides predictability for the parties on how search results and productions will be accomplished. This has the potential of reducing satellite discovery and allowing the discovery process to proceed more efficiently.

30. ESI protocols memorialized as a court order should also include a non-waiver provision under Federal Rule of Evidence ("FRE") 502(d). An FRE 502(d) non-waiver provision enables parties to "claw back" any mistakenly produced document that is attorney-client privileged or attorney work product without having to demonstrate that the responding party's mistaken disclosure was legally inadvertent. *See Winfield v. City of New York*, 15-CV-05236 (LTS) (KHP), 2018 WL 2148435 (S.D.N.Y. May 10, 2018) (discussing the nature and scope of FRE 502(d) and explaining that Congress implemented this provision in 2008 to reduce concerns over waiver through mistaken productions of privileged information due to increasing volumes of ESI). An FRE 502(d) non-waiver provision can thereby safeguard responding parties from waiver and ensuing

satellite litigation resulting from mistaken productions of attorney-client privileged information or attorney work product.

31. The draft order governing electronic discovery that plaintiffs have presented for approval to the Court includes some useful provisions that will undoubtedly assist the parties in their efforts to jointly conduct electronic discovery. Such provisions include requirements to unitize documents, scan and OCR paper records, and produce Excel spreadsheets (among other applications) in native format.

III. DEFENDANTS' APPROACH TO ELECTRONIC DISCOVERY AND ANTICIPATED ELECTRONIC DISCOVERY COSTS

32. My opinion that a properly negotiated ESI protocol can assist all parties to class action litigation, but particularly responding parties like defendant Westgate, is confirmed by the Willman Affidavit. The Willman Affidavit generally delineates Westgate's anticipated approach to electronic discovery and complains of anticipated exorbitant electronic discovery costs. To be sure, discovery, particularly in class action matters, can be costly and burdensome. Nevertheless, a properly negotiated and developed ESI protocol can decrease allegedly unreasonable and unduly burdensome costs that Westgate would incur if it indeed proceeds with the approach to electronic discovery contemplated in the Willman Affidavit.

33. For example, regarding the anticipated discovery discussed in paragraphs five through 12 of the Willman Affidavit, if the burden became so extreme (and it may not), Westgate could work with plaintiffs to develop a sampling methodology that would allow the parties to gauge the quality and nature of the requested information. Sampling is a particularly effective method for addressing discovery in putative class actions since it provides a snapshot of the requested data without imposing all of the demands and

burdens associated with making a comprehensive production of all relevant information at the outset of litigation. *See Quintana v. Claire's Boutiques, Inc.*, 13-cv-00368, 2014 WL 234219, *2, n.13 (N.D. Cal. Jan. 21, 2014) (ordering statistical sampling and observing that "sampling advances the goal of proportionality" in the "specific context of class action discovery"). Phasing discovery to focus on priority discovery issues and custodians would also obviate some of the burdens anticipated by the Willman Affidavit. As discussed in Paragraphs 27 and 28, both of these approaches—sampling and phasing—are key components of ESI protocols.

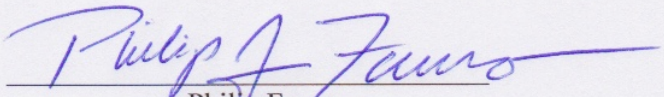
34. The Willman Affidavit also posits in paragraph 13 that Westgate would "need to review all communications" that "1,845 employees, and each of their supervisors" sent or received regarding "how promotion, retaining or termination decisions were made." Such a statement demonstrates a fundamentally flawed understanding of how electronic discovery is conducted in 2019 or has been conducted over the past 10 to 15 years. A responding party will not manually review *all* emails from thousands of employees to make determinations of relevance and privilege. *See Dynamo Holdings Ltd. P'Ship v. Comm'r of Internal Revenue*, No. 2685-11, 2016 WL 4204067 (T. C. July 13, 2016) (describing the "myth" that manual review is the most effective method for handling document review and citing extensive authorities to demonstrate the sophistry of such a myth). Such a process would be cost prohibitive and unduly delay the proceedings. Instead, a responding party should work with the requesting party to design search terms and also consider developing a TAR process to rapidly and efficiently identify a subset of relevant emails. Moreover, Westgate should (once again) engage with

Plaintiffs on a mutually agreeable sampling methodology and phasing strategy for a more orderly process of email discovery.

35. I understand that an additional electronic discovery process and cost issue that Westgate has raised relates to conducting privilege reviews. Privilege reviews can be a significant concern for responding parties, particularly given the sheer volume of ESI in which privileged information may be hidden. To better ensure that privileged information is identified and not mistakenly produced in discovery, Westgate should engage a service provider and direct the provider to use a combination of search methodologies and analytics tools. For example, Westgate can supply search terms—including the names of its in-house and outside legal counsel—to help isolate potentially privileged communicates. It can also use data clustering to identify email domains for law firms whose communications are generally privileged. Concept searching could be used to more readily recognize the content of certain privileged discussions. The provider could also employ near duplicate identification and email threading to reduce the risk that certain privileged emails could escape notice during a review. A combination of these and other methodologies and tools would greatly enhance the ability of Westgate to isolate privileged information over a strictly manual privilege review of its production. *See Dynamo Holdings Ltd. P'Ship v. Comm'r of Internal Revenue*, No. 2685-11, 2016 WL 4204067 (T. C. July 13, 2016) (citing an authoritative study that demonstrates the deficiencies of exclusively relying on manual review of documents). Doing so would also significantly reduce the prohibitively expensive process of manually reviewing an entire production for privileged information.

36. In summary, it is my opinion that an ESI protocol can generally reduce the expense and burden of discovery and that such a protocol should be entered to more effectively manage the process, costs, and other burdens of electronic discovery in this case.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Alpine, Utah on November 1, 2019.



Philip Favro