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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JAVO BEVERAGE CO., INC.,  
Plaintiff,  
v.  
CALIFORNIA EXTRACTION  
VENTURES, INC.; STEPHEN COREY,  
Defendants.

Case No.: 19-CV-1859-CAB-WVG

**ORDER ON DISCOVERY DISPUTES  
REGARDING DRAFT STIPULATED  
PROTECTIVE ORDER AND DRAFT  
PROTOCOL ON  
ELECTRONICALLY STORED  
INFORMATION**

**I. INTRODUCTION**

Since January 2020, Plaintiff and Counter-Defendant Javo Beverage Co., Inc. (“Javo”) and Defendants and Counter-Claimants California Extraction Ventures, Inc. and Stephen Corey (“CEV and Corey”) (collectively, “Parties”) have been negotiating the terms of two orders for this Court’s adjudication, namely a Protective Order and a protocol on electronically stored information (“ESI Protocol”). Despite extensive meet and confer efforts, the Parties remain unable to resolve four disputes arising from the Protective Order and the ESI Protocol as drafted. Consequently, on April 1, 2020 the Parties jointly informed this Court’s Chambers of the disputes, consistent with Chambers Civil Rule IV(A). On that same day, the Court ordered the Parties to submit supplemental briefing on each issue no

1 later than April 8, 2020. (Doc. No. 70.) The Parties timely filed their submissions. In short,  
2 the matters before the Court are as follows:

- 3 (1) Whether Javo’s outside counsel may access highly confidential Outside Attorneys’  
4 Eyes Only (“OAE0”) designated information upon executing the Protective Order;
- 5 (2) Whether and to what extent CEV and Corey’s counsel of record, who obtains Javo’s  
6 OAE0 information, as designated under the Protective Order, may be barred from  
7 future patent acquisitions or applications related to the technology at issue here;
- 8 (3) Under the ESI Protocol, whether Javo’s filepath information is discoverable to any  
9 extent; and
- 10 (4) Under the ESI Protocol, whether the Parties are obligated to preserve their deleted  
11 and ephemeral data and, if so, to what extent.  
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13 The Court answers each of these issues, as framed above, in the affirmative and resolves  
14 the Parties’ discovery disputes as follows.

15 **II. DISCUSSION**

16 **a. Javo’s Outside Counsel’s Access to OAE0 Information**

17 Under the Protective Order, the Parties dispute whether Javo’s affiliates, William  
18 Marshall and Drew Konig, should gain access to CEV and Corey’s OAE0 information  
19 upon Marshall and Konig executing the Protective Order. For purposes of this action,  
20 Marshall and Konig serve in an advisory capacity as Javo’s outside counsel and not as  
21 counsel of record. Marshall previously worked as Javo’s general counsel and senior  
22 executive vice president of operations before entering private practice in or around 2011.  
23 In contrast, Konig has no employment history with Javo. Under these facts, Javo argues  
24 Marshall and Konig are entitled to access CEV and Corey’s OAE0 information to ensure  
25 Javo receives Marshall and Konig’s fully informed advice and counsel throughout this  
26 litigation. CEV and Corey oppose Marshall and Konig’s access to OAE0 information  
27 chiefly because it risks Marshall and Konig’s misusing, inadvertently or otherwise, CEV  
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1 and Corey's information for Javo's commercial advantage. Javo rejects this position and  
2 responds that Marshall and Konig hold no commercial interest in the coffee or extraction  
3 industries and there is no basis to suspect Marshall or Konig will abandon their ethical  
4 obligations in breach of the Protective Order.

5 As a foundational matter, Rule 26(b) of the Federal Rules of Civil Procedure favors  
6 disclosure of all information "reasonably calculated to lead to the discovery of admissible  
7 evidence." Fed. R. Civ. P. 26(b)(1). At the same time, the Rule is not limitless. For good  
8 cause, the court may issue a protective order to protect a producing party from undue  
9 burden or expense, including "requiring that a trade secret or other confidential research,  
10 development, or commercial information not be revealed or be revealed only in a specified  
11 way." Fed. R. Civ. P. 26(c). To resolve protective order disputes implicating trade secrets,  
12 courts apply the Ninth Circuit's *Brown Bag* balancing test, which considers parties' rival  
13 interests. *GXP Capital, LLC v. Argonaut EMS*, 2018 U.S. Dist. LEXIS 102581, at \*7 (S.D.  
14 Cal. June 19, 2018) (citing *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th  
15 Cir. 1992)). On one end of the balancing scale is the risk of inadvertent disclosure of the  
16 producing party's confidential information; on the other end of the scale is the risk that  
17 protection of confidential information might impair the requesting party's ability to  
18 prosecute its claims. *Kaseberg v. Conaco*, 2016 U.S. Dist. LEXIS 97581, at \*40 (S.D. Cal.  
19 July 26, 2016); *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2012 U.S. Dist. LEXIS  
20 168351, at \*2-3 (N.D. Cal. Nov. 26, 2012). At all times, "Rule 26(c) confers broad  
21 discretion on the trial court to decide when a protective order is appropriate and what  
22 degree of protection is required." *GXP Capital, LLC, supra*, 2018 U.S. Dist. LEXIS  
23 102581, at \*7 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, (1984)); *Karl Storz*  
24 *Endoscopy-America, Inc. v. Stryker Corp.*, 2014 U.S. Dist. LEXIS 163473, at \*3 (N.D.  
25 Cal. Nov. 21, 2014).

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1 **i. Risk of Inadvertent Disclosure of CEV and Corey’s OAEO**  
2 **Information**

3 The Court’s assessment of the risk of Marshall or Konig’s inadvertent disclosure of  
4 CEV and Corey’s OAEO information considers the factual circumstances of Marshall and  
5 Konig’s relationship to Javo. *Frank Brunckhorst Co., LLC v. Ihm*, 2012 U.S. Dist. LEXIS  
6 28152, at \*3-4 (S.D. Cal. Mar. 2, 2012) (citing *Brown Bag Software, supra*, 960 F.2d at  
7 1470 and *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984)). The  
8 inquiry largely turns on whether Marshall or Konig constitute competitive decision-  
9 makers, such that “the risk of disclosure may outweigh [Javo’s] need for confidential  
10 information.” *Intel Corp. v. Via Technologies, Inc.*, 198 F.R.D. 525, 529 (N.D. Cal. Oct.  
11 11 2000) (*U.S. Steel, supra*, 730 F.2d at 1468) (defining a competitive decision-maker as  
12 counsel who advises on and participates in client decisions regarding pricing, product  
13 design, and other commercial matters made in light of similar or corresponding information  
14 about a competitor); see also *Matsushita Elec. Indus. Co. v. United States*, 929 F.2d 1577,  
15 1579 (Fed. Cir. 1991) (same). Notably, “unrebutted statements made by counsel asserting  
16 that he does not participate in competitive decision-making, which the court has no reason  
17 to doubt, form a reasonable basis to conclude that counsel is isolated from competitive  
18 decision-making.” *Id.* (citing *Matsushita, supra*, 929 F.2d at 1580).

19 The Court strains to find any meaningful risk that CEV and Corey’s OAEO  
20 information is subject to inadvertent disclosure if Marshall and Konig were to access such  
21 information upon executing the Protective Order. Both Marshall and Konig operate as  
22 outside legal counsel, rather than in-house counsel. This framework inherently limits, if  
23 not altogether severs, Javo’s access to Marshall and Konig’s working files, which would  
24 presumably contain copies of CEV and Corey’s OAEO information for not longer than 45  
25 days from the date this litigation concludes<sup>1</sup>. Moreover, Marshall and Konig’s substantive  
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28 <sup>1</sup> Javo indicates Marshall and Konig both agree to “return and/or destroy all of Defendants’ Confidential Information, purge the same from their systems, and certify that they have done so and “have not

1 work for Javo is limited to “providing legal counsel to Javo in connection with this  
2 dispute.” (Doc. No. 72, 7:6-7.) Providing “standard legal services to Javo,” without more,  
3 should not be conflated with competitive decision-making, as neither Marshall nor Konig  
4 participate in business decisions akin to those made by internal executives or officers of  
5 Javo. (*Id.*, 8:9-10.) Absent CEV and Corey’s substantiated rebuttal, Javo’s counsel’s  
6 representation that neither Marshall nor Konig participate in competitive decision-making  
7 “form a reasonable basis to conclude that counsel is isolated from competitive decision-  
8 making.” *Intel Corp.*, *supra*, 198 F.R.D. at 529 (citing *Matsushita*, *supra*, 929 F.2d at  
9 1580). To that end, the Court places little weight on Marshall’s former life as a Javo  
10 executive and general counsel. Nearly ten years have passed, and Marshall’s present role  
11 as outside counsel to Javo is divorced from competitive decisionmaking, as just explained.  
12 Further, neither Marshall nor Konig competes in the coffee or extraction industries, such  
13 that either would be incentivized to tip competitive scales in Javo’s favor.

14 To oppose Javo’s request for disclosure, CEV and Corey mainly indulge in the  
15 speculation that Marshall would be tempted to misuse, inadvertently or otherwise, OAEO  
16 information to spur Javo’s competitive advantage over CEV and Corey. In doing so, CEV  
17 and Corey offer no fact-specific basis for their suspicions, other than pointing to Marshall’s  
18 prior employment with Javo, which the Court finds unpersuasive for the reasons recited  
19 above. CEV and Corey seemingly undermine their position by agreeing that Marshall and  
20 Konig may be trusted with confidential information while, in the same breath, failing to  
21 explain why that trust dissipates when it comes to OAEO information. (Doc. No. 71, 11:20-  
22 23.) The sensitivity gap between confidential and OAEO information that CEV and Corey  
23 point to does not elucidate why Marshall and Konig are unfit to handle one type of  
24 information with care but not the other. Ultimately, CEV and Corey fall short in  
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27 retained any copies, excerpts, or summaries of that information” within 45 days of this litigation’s final  
28 disposition. (Doc. No. 72, 9:2-6.)

1 demonstrating that Marshall and Konig are unable or unwilling to abide by the terms of the  
2 Protective Order. The Court finds that there is no appreciable risk of inadvertent disclosure  
3 of CEV and Corey's OAE0 information on account of either Marshall or Konig. This  
4 finding weighs in favor Marshall and Konig's access to the OAE0 information at issue. At  
5 the same time, it does not end the Court's inquiry.

6 **ii. Potential Harm of Inadvertent Disclosure to CEV and Corey**

7 The Court next evaluates the potential harm any inadvertent disclosure of the OAE0  
8 information may cause CEV and Corey. As a foundational matter, the party resisting  
9 discovery must substantiate why discovery should not be permitted and must clarify,  
10 explain, and support its objections. Fed. R. Civ. P. 26; *Duran v. Cisco Sys., Inc.*, 258 F.R.D.  
11 375, 378 (C.D. Cal. July 1, 2009) (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429  
12 (9th Cir. 1975)). CEV and Corey bear that burden here and do not convince the Court they  
13 have met it. The most insight CEV and Corey provide as to any potential harm they may  
14 suffer is that the OAE0 information constitutes "CEV and Corey's most sensitive  
15 information, including trade secrets, [that] could be used by Javo to unfairly compete with  
16 CEV." (Doc. No. 71, 17:1-3.) However, the fact that the Parties are direct competitors  
17 operating in the same market does not explain what potential harm may befall CEV and  
18 Corey in the event of an inadvertent disclosure. While it may appear self-evident that the  
19 disclosure of sensitive information to a competitor could inflict harm upon the disclosing  
20 party, more is required to demonstrate the potential prejudice. The conclusory statement  
21 that the two competitors generally occupy the same space in the marketplace certainly does  
22 not meet the mark. In itself, this statement does not articulate *how* inadvertent disclosure  
23 of the particular categories of OAE0 information may likely harm CEV and Corey.

24 Instead, CEV and Corey seemingly invite the Court to presume the OAE0  
25 information is so vital to CEV and Corey, and so distinguishable and novel from existing  
26 competitors' product lines, processes, services, and/or any other information, that any  
27 disclosure of that information would undercut CEV and Corey's business. But without  
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1 articulating this representation and providing factual basis to believe Marshall and/or  
2 Konig presently constitute competitive decision-makers, CEV and Corey leave the Court  
3 with no basis to find they have met their burden under *Brown Bag*'s specific harm factor.  
4 *Mad Catz Interactive, Inc. v. Razor USA, Ltd.*, 2014 U.S. Dist. LEXIS 115896, at \*15 (S.D.  
5 Cal. Aug. 19, 2014) (producing party failed to meet its burden to prove *Brown Bag*'s  
6 "specific harm" element because producing party abandoned the product line under the  
7 disputed patent and requesting party's general counsel "was not engaged in any  
8 competitive decision-making as it concern[ed] competition with the producing party's  
9 business"); but see *Life Techs. Corp. v. Ebioscience Inc.*, 2011 U.S. Dist. LEXIS 44926, at  
10 \*10 (S.D. Cal. Apr. 26, 2011) ("Ebioscience asserts that the trade secrets... directly relate  
11 to the success of the product. Accordingly, the potential injury from disclosure is great").

12 Further, CEV and Corey's publication of patents on their extraction process call into  
13 question the sensitivity of the OAEO information at least as far as the CEV and Corey's  
14 process is concerned. (Doc. No. 72, 9:27-28.) To that end, the Court notes CEV and Corey  
15 "admit they are still in the development stage and currently have no competing products or  
16 services" in its analysis here. (Doc. No. 72 (citing Doc. No. 45-2).) Having not yet emerged  
17 onto the competitors' stage alongside Javo, CEV and Corey appear to have less at stake if  
18 its OAEO information were inadvertently disclosed. To the extent this impression is false,  
19 CEV and Corey should have, but did not, explain why not so. Ultimately, CEV and Corey  
20 fail to make the requisite fact-intensive showing of specific harm that may result from any  
21 inadvertent disclosure of their OAEO information. Accordingly, this circumstance weighs  
22 against CEV and Corey's interest in withholding their OAEO information from Marshall  
23 and Konig upon their execution of the Protective Order.

24 **iii. Prejudice to Javo in Denying Marshall and Konig Access to**  
25 **CEV and Corey's OAEO Information**

26 Lastly, the Court examines whether Javo is likely to suffer actual prejudice if  
27 Marshall and Konig were excluded from accessing the OAEO information. In doing so,  
28 the Court emphasizes a blanket assertion that counsel requires access to OAEO information



1 to “manage” this litigation fails to meet the prejudice factor under *Brown Bag. Ubiquiti*  
2 *Networks, Inc. v. Kozumi USA Corp.*, 2012 U.S. Dist. LEXIS 168351, at \*5 (N.D. Cal.  
3 Nov. 26, 2012). Javo must show more to meet its burden here, and the Court finds that it  
4 has. As a general matter, this is a complex and fact intensive patent case. Between Javo’s  
5 claims and CEV’s counterclaims, the Parties are embattled in a heated litigation where  
6 critical documents and data are not publicly available. Heightening this complexity is the  
7 Parties’ stipulation that, to some extent, ephemeral and deleted data may be potentially  
8 relevant to the claims and defenses at issue. Consequently, liability and damages are  
9 entangled in the most nuanced details and, potentially, in the recesses of decades-old hard  
10 drives and computer memory.

11 Taken together, the above circumstances appear to reasonably inform Javo’s need  
12 for the advice and counsel of its longtime outside counsel, Marshall and Konig. As set forth  
13 in its briefing, Javo seeks to “leverage[e] Marshall’s institutional knowledge and  
14 specialized technical and legal expertise” to effectively litigate Javo’s claims and defenses  
15 to CEV and Corey’s counterclaims. (Doc. No. 72, 10:18-21.) This Court joins other courts  
16 within the Ninth Circuit in finding that institutional and other specialized knowledge is  
17 sufficient to show a compelling need for access to confidential information that outweighs  
18 the risk of inadvertent disclosure. *Intel Corp. v. VIA Techs., Inc.*, 198 F.R.D. 525, 528 (N.D.  
19 Cal. June 26, 2000) (“Where, because of the technical nature of a case, the specialized  
20 knowledge of in-house counsel was necessary to supervise the litigation, good cause was  
21 found to outweigh the risk of inadvertent disclosure and permit access of in-house counsel  
22 to confidential information”); *Persian Gulf Inc. v. BP W. Coast Prods. LLC*, 2019 U.S.  
23 Dist. LEXIS 167361, at \*10-11 (S.D. Cal. Sep. 27, 2019) (finding in favor of disclosure  
24 given an expert’s “extensive research since the inception of [the] case” and that “finding  
25 [a replacement] with detailed knowledge [of] the focus of Plaintiff’s claims would be a  
26 much harder task”); see also *Kaseberg, supra*, 2016 U.S. Dist. LEXIS 97581, at \*40 (citing  
27 *Life Techs. Corp., supra*, 2011 U.S. Dist. LEXIS 44926, at \*10 (contrasting denial of a  
28 party’s counsel of choice with expertise lacking in a party’s outside counsel for purposes



1 of analyzing the prejudice factor under *Brown Bag*). Consequently, the Court concludes  
2 Javo will suffer appreciable prejudice if Marshall and Konig are denied access to CEV and  
3 Corey's OAE0 information because such information may well bear upon Marshall and  
4 Konig's advice and counsel to Javo throughout this litigation. Javo has a legitimate interest  
5 in receiving the full benefit of its outside counsel's strategic thinking and guidance in  
6 furtherance of its claims and defenses against CEV's counterclaims, particularly because  
7 Marshall and Konig possess longstanding institutional knowledge of Javo's business model  
8 and legal needs that are likely to inform Javo's posture in this case.

9 **iv. The *Brown Bag* Factors Here Weigh in Favor of Disclosure of**  
10 **CEV and Corey's OAE0 Information to Marshall and Konig**  
11 **upon Marshall and Konig's Execution of the Protective Order**

12 In light of the above, the Court hereby DENIES CEV and Corey's request to modify  
13 the stipulated Protective Order to exclude Marshall and Konig from accessing OAE0  
14 information upon Marshall and Konig's execution of the Protective Order. In other words,  
15 Marshall and Konig shall enjoy the same access as Javo's counsel of record with regards  
16 to CEV and Corey's OAE0 information, as designated under the Protective Order, upon  
17 agreeing to be bound by the terms of the Protective Order. In this vein, the Court also  
18 DENIES CEV and Corey's request for an evidentiary hearing on Marshall and Konig's  
19 work for Javo to probe into the competitive decision-maker issue. As stated, "unrebutted  
20 statements made by counsel asserting that he does not participate in competitive decision-  
21 making, which the court has no reason to doubt, form a reasonable basis to conclude that  
22 counsel is isolated from competitive decision-making." *Id.* (citing *Matsushita, supra*, 929  
23 F.2d at 1580). As discussed, CEV and Corey have not set forth any factual grounds to  
24 challenge Javo's representation of Marshall and Konig's non-competitive decision-maker  
25 status. In cases that similarly lack substantive rebuttal, courts have decided protective order  
26 issues like the instant one on the papers and without holding evidentiary hearings on the  
27 requesting party's alleged competitive decision-making activities. *R.R. Donnelley & Sons*  
28 *Co. v. Quark, Inc.*, 2007 U.S. Dist. LEXIS 424, at \*4 (D. Del. Jan. 4, 2007) (deciding

1 confidential and OAEO disclosure issue on the papers absent substantiation of any acts of  
2 competitive decision-making); *Sprint Communs. Co. L.P. v. Big River Tel. Co., LLC*, 2008  
3 U.S. Dist. LEXIS 70669, at \*11 (D. Kan. Sep. 16, 2008) (same); see also *Alza Corp. v.*  
4 *Impax Labs., Inc.*, 2004 U.S. Dist. LEXIS 33076, at \*10-11 (N.D. Cal. June 21, 2004)  
5 (concluding plaintiff’s in-house litigation team did not consist of competitive decision-  
6 makers because its statements representing so remained unrebutted and noting that “should  
7 [defendant] become aware of information that points to a different conclusion, [defendant]  
8 could certainly bring a motion to modify the protective order”). The Court finds no reason  
9 to depart from such precedent on account of the Parties’ supplemental briefing. Should  
10 some factual basis materialize through the discovery process that suggests Marshall and/or  
11 Konig in fact act as competitive decision-makers for Javo, CEV and Corey may revive  
12 their request to modify the Protective Order and bring forth such evidence at that time. For  
13 now, the Court’s decision here endures unless and until such evidence emerges.

14 **b. Javo’s Proposed Patent Acquisition Bar as to CEV and Corey’s**  
15 **Litigation Counsel of Record**

16 The Parties are at an additional standstill with respect to their draft Protective Order.  
17 Javo seeks enforcement of its proposed patent acquisition bar as to CEV and Corey’s  
18 litigation counsel of record for a period of two years once this litigation concludes. Javo  
19 proposes the bar apply to any patent acquisition activity that may be considered  
20 “substantially related” to the coffee extraction technology at issue here. (Doc. No. 72,  
21 12:13-15.) Javo argues, absent such restrictions, CEV and Corey are likely to inadvertently  
22 or otherwise misuse the confidential information learned from this action to engage in  
23 future patent acquisition to Javo’s detriment. CEV and Corey dismiss Javo’s concerns and  
24 consider Javo’s proposed bar equal parts overbroad and unnecessary. To that end, CEV  
25 and Corey pose that their agreement to a broad patent prosecution bar prohibiting CEV and  
26 Corey’s counsel from using Javo’s confidential or OAEO information in future patent  
27 prosecutions sufficiently protects Javo and should not be extended any further.

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1 **i. Substantive and Temporal Scope of Javo’s Proposed Patent**  
2 **Acquisition Bar**

3 The threshold inquiry into the propriety of a patent acquisition bar considers whether  
4 "the information designed to trigger the bar, the scope of activities prohibited by the bar,  
5 the duration of the bar and the subject matter covered by the bar reasonably reflect the risk  
6 presented by the disclosure of proprietary competitive information." *Applied Signal Tech.,*  
7 *Inc. v. Emerging Markets Communications, Inc.*, 2011 U.S. Dist. LEXIS 97403, at \*2 (N.D.  
8 Cal. Jan. 20, 2011) (internal citations and quotations omitted); *Ubiquiti Networks, Inc.*,  
9 *supra*, 2012 U.S. Dist. LEXIS 168351, at \*6-7 (same). The party seeking to impose the bar  
10 bears the burden of establishing these matters. *EPL Holdings, LLC v. Apple Inc.*, 2013 WL  
11 2181584, at \*2 (N.D. Cal. May 20, 2013) (citing *In re Deutsche Bank Trust Co. Americas*,  
12 605 F.3d 1373, 1381 (Fed.Cir.2010)). The burden shifts once the moving party makes this  
13 showing. The party seeking an exemption from the bar must then demonstrate on a counsel-  
14 by-counsel basis: (1) counsel's representation of the client does not and is not likely to  
15 implicate competitive decision-making related to the subject matter of the litigation so as  
16 to give rise to a risk of inadvertent use of confidential information learned in litigation; and  
17 (2) the potential injury to the party from restrictions imposed on its choice of litigation and  
18 acquisition counsel outweighs the potential injury to the opposing party caused by such  
19 inadvertent use. *Id.*; *Am. GNC Corp. v. LG Elecs., Inc.*, 2017 U.S. Dist. LEXIS 176306, at  
20 \*11 (S.D. Cal. Oct. 23, 2017); see also *Uniloc USA, Inc. v. Apple Inc.*, 2018 U.S. Dist.  
21 LEXIS 110427, at \*6 (N.D. Cal. July 2, 2018) (approving one-year patent acquisition bar  
22 upon finding existing bar on using confidential information in future acquisitions did not  
23 account for preventing the "inadvertent" use of confidential information).

24 The Court finds Javo’s proposed patent acquisition bar is appropriately tailored to  
25 meet Javo’s need for confidentiality while allowing CEV and Corey reasonable opportunity  
26 to retain some, albeit not all, of its counsel of choice for future patent acquisitions for a  
27 two-year term following this action’s disposition. As a principal matter, the proposed bar  
28 seeks to safeguard Javo’s confidential and OAEO information as it may be used to acquire

1 patents that are “substantially related” to the technology in dispute here. The bar also  
2 extends to “the particular technology disclosed in the patents and patent applications filed  
3 by Corey/ CEV.” (Doc. No. 72, 12:13-15.) CEV and Corey emphatically object to the latter  
4 language in particular because it would prevent them from engaging in patent acquisition  
5 that does not necessarily implicate Javo’s confidential or OAEO information. (Doc. No.  
6 71, 16:10-14.) The objection is unavailing. Javo makes clear throughout its briefing that  
7 the proposed bar implicates only the technology that the Parties both dispute, in Javo’s  
8 claims and CEV’s counterclaims: “Javo does not seek to bar Defendants’ litigation counsel  
9 from advising in the acquisition of all future patents by Defendants – only patents  
10 “substantially related to the particular technology” at issue here.” (Doc. No. 72, 13:22-24.)  
11 To the extent CEV and Corey insist that Javo’s proposed language is inconsistent with  
12 Javo’s representation as excerpted in this Order, the Court ORDERS the Parties to meet  
13 and confer on the acceptable language that is consistent with Javo’s representation. The  
14 Court finds satisfactory Javo’s proposal bar as to the subject matter implicated because the  
15 bar permits CEV and Corey to engage in patent acquisitions of any products and processes  
16 that are *not* substantially related to the subject matter at issue in this action for a period of  
17 two years once this lawsuit ends.

18         Additionally, Javo has taken steps to fittingly narrow the bar’s reach by agreeing to  
19 allow CEV and Corey’s current patent prosecution counsel to engage in *every* aspect of  
20 future patent acquisitions and related activity without limitation. Javo seeks to preclude  
21 only litigation counsel of record from being involved in patent acquisition activity as it  
22 relates to the technology at issue here. Inherently, the provision allows litigation counsel  
23 at any time to still play a robust role in patent acquisition activity insofar as it does not  
24 substantially implicate the subject matter of this lawsuit and, if it is substantially related,  
25 then litigation counsel is barred for a period of only two years following the lawsuit’s  
26 resolution. *Catch A Wave Technologies, Inc. v. Sirius XM Radio, Inc.*, 2013 WL 9868422,  
27 at \*1 (N.D. Cal., Aug. 6, 2013) (approving two-year patent acquisition bar preventing  
28 counsel from advising clients in patent acquisition implicating the subject matter in dispute

1 because “such a quid pro quo is reasonable”); *Am. GNC Corp. v. LG Elecs., Inc.*, 2017 U.S.  
2 Dist. LEXIS 176306, at \*11 (S.D. Cal. Oct. 23, 2017) (rejecting proposed patent  
3 acquisition bar when bar encompassed information not relevant to the subject of the dispute  
4 and extended beyond counsel to include “any person associated with a party and permitted  
5 to receive” the confidential information). To that end, the Court finds the two-year term  
6 reasonably measured. *Catch A Wave Technologies, Inc.*, *supra*, 2013 WL 9868422, at \*1  
7 (granting proposed patent acquisition bar and noting “the two-year patent acquisition bar  
8 allows time for the limitations of human memory to run their course or for the information  
9 to become largely stale”). Javo’s self-imposed limitations on its proposed patent  
10 acquisition bar are proper.

11 **ii. Potential Harm to the Parties if Javo’s Proposed Patent**  
12 **Acquisition Bar Is Approved or, in the Alternative, Rejected**

13 As explained above, the Court finds Javo has met its burden. In turn, the Court looks  
14 to CEV and Corey to demonstrate their litigation counsel of record is unlikely to become  
15 involved in “competitive decision-making related to the subject matter of the litigation so  
16 as to give rise to a risk of inadvertent use of confidential information learned in litigation.”  
17 *EPL Holdings, LLC*, *supra*, 2013 WL 2181584, at \*2 ((citing *In re Deutsche Bank Trust*  
18 *Co. Americas*, *supra*, 605 F.3d at 1381); *Uniloc USA, Inc.*, *supra*, 2018 U.S. Dist. LEXIS  
19 110427, at \*6. CEV and Corey underscore their agreement to a broad prosecution bar  
20 prohibiting their counsel of record from engaging in patent prosecutions, “competitive  
21 decision-making... concerning extraction process or extract products,” and using Javo’s  
22 confidential or OAEO information beyond this litigation constitutes a generous safeguard  
23 against Javo’s concerns of unfair competition. (Doc. No. 71, 15:21-27 (citing Housh Decl.,  
24 Ex. 3 at § 17).) The Court underscores it has no reason to doubt CEV and Corey’s litigation  
25 counsel’s attestation to uphold the terms of the Parties’ proposed patent prosecution bar,  
26 and Javo offers none as well. Concurrently, however, the Court is mindful of the  
27 distinctions between “administrative and oversight duties from activities in which counsel  
28 play a ‘significant role in crafting the content of patent applications or advising clients on

1 the direction to take their portfolios,' with the latter activities posing a more significant risk  
2 of inadvertent disclosure than the former." *In re Deutsche Bank Trust Co. Americas, supra*,  
3 605 F.3d at 1378; see also *Xerox Corp. v. Google, Inc.*, 270 F.R.D. 182, 183 (D. Del. 2010).  
4 This consideration is imperative to the Court's analysis given the difficulty "for the human  
5 mind to compartmentalize and selectively suppress information once learned, no matter  
6 how well-intentioned the effort may be to do so." *Barnes & Noble, Inc. v. LSI Corp.*, 2012  
7 U.S. Dist. LEXIS 23103, at \*9 (N.D. Cal. Feb. 23, 2012); *Catch a Wave, supra*, 2013 U.S.  
8 Dist. LEXIS 189086 at \*1. The contentious nature of this litigation and the voluminous  
9 sensitive information to be exchanged amongst the Parties convinces the Court that CEV  
10 and Corey's litigation counsel of record are more apt to assume a hands-on role in future  
11 patent acquisition activity rather than mere "administrative and oversight duties." Absent  
12 a patent acquisition bar, the fallout from such an active role is a heightened risk of  
13 inadvertent disclosure of Javo's confidential or OAEO information.

14 Assuming *arguendo* the risk of inadvertent disclosure could be entirely eliminated,  
15 the Court finds Javo would suffer greater prejudice if it were denied enforcement of the  
16 proposed patent acquisition bar than if CEV and Corey were to endure the two-year bar on  
17 patent acquisition activity implicating the technology in dispute by its litigation counsel of  
18 record. While accepting CEV and Corey may be inconvenienced by litigation's counsel's  
19 two-year absence from patent acquisitions limited to the subject matter here, the proposed  
20 bar would not trample CEV and Corey's retention of their patent prosecution counsel to  
21 for such endeavors. The work could still be performed by CEV and Corey's patent  
22 prosecution counsel without incurring the risk of Javo's confidential and OAEO  
23 information being inadvertently weaponized to Javo's detriment. Javo's fear on this point  
24 is well founded, given that CEV has filed counterclaims for patent infringement based on  
25 "the very same patents Javo has alleged contain its trade secrets." (Doc. No. 72, 13:10-12.)  
26 12.) Further, CEV and Corey would remain free to retain its litigation counsel of record for  
27 patent acquisition activity that is not substantially related to the technology in dispute here.  
28 Each of these circumstances inform the Court's decision to GRANT Javo's proposed



1 modification to the Protective Order. The Court ORDERS the Parties to meet and confer  
2 on language that imposes the two-year patent acquisition bar against CEV and Corey’s  
3 litigation counsel of record as it relates to the technology the Parties dispute, to the extent  
4 CEV and Corey maintain that Javo’s provision as memorialized in Doc. No. 72, page 12,  
5 lines 13-15, is inconsistent with the Court’s finding.

6 **c. Discoverability of Javo’s Filepath Information**

7 The Parties have reached an impasse on two matters arising under the ESI Protocol,  
8 namely whether Javo’s “ORGFOLDER” data is discoverable and whether the Parties bear  
9 any obligation to preserve deleted and ephemeral data. The Court resolves each matter in  
10 turn. In doing so, the Court prefaces its analysis of the “ORGFOLDER” data issue with a  
11 more simplistic definition of the technical term, “ORGFOLDER data,” namely information  
12 indicating the original file path of an electronically stored record as it was maintained  
13 throughout the routine course of business. For the remainder of this Order, the Court will  
14 refer to “ORGFOLDER data” as “filepath information.” CEV and Corey’s position on  
15 filepath information is that it is discoverable and should be produced in conjunction with  
16 Javo’s ESI productions made pursuant to the Parties’ ESI Protocol. CEV and Corey  
17 articulate a number of reasons why the filepath information is discoverable, including that  
18 the data is highly relevant to assessing the claims at issue, and Parties have already agreed  
19 to produce metadata<sup>2</sup> alongside its relevant ESI, where filepath information is  
20 encompassed within that metadata. Javo objects to producing the filepath information to  
21 any extent. In particular, Javo argues threefold that (1) the filepath information is  
22 misleading and thus irrelevant; (2) extracting the original filepath information would be  
23 unduly burdensome and costly; and (3) producing the filepath information would leave  
24

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25  
26 <sup>2</sup> “Metadata is information about the ESI, as opposed to its contents.” *Resnick v. Netflix, Inc. (In re*  
27 *Online DVD-Rental Antitrust Litig.)*, 779 F.3d 914, 925 (9th Cir. 2015) (“Metadata is simply data that  
28 provides information about other data. It is ‘[s]econdary data that organize, manage, and facilitate the  
use of primary data.’”) (quoting Black’s Law Dictionary 1141 (10th ed. 2014)) (citations and some  
internal quotation marks omitted).

1 Javo vulnerable to breaches of attorney-client privilege and, consequently, irreparable  
2 harm to Javo would flow from such breaches.

3 The Parties' dispute is governed by the discovery rules. Under Rule 26(b), the scope  
4 of discovery is broad and entitles the parties to obtain discovery as to "any non-privileged  
5 matter that is relevant to any party's claim or defense and proportional to the needs of the  
6 case..." Fed. R. Civ. P. ("Rule") 26(b)(1). "Information within this scope of discovery need  
7 not be admissible in evidence to be discoverable." *Id.*; *Morgan Hill Concerned Parents*  
8 *Association v. California Department of Education*, 2017 WL 445722, at \*3 (E.D. Cal.  
9 Feb. 2, 2017) (citing same). When the discoverability of information becomes the subject  
10 of dispute, the party seeking to compel discovery has the burden of establishing that its  
11 request satisfies the relevancy requirements of Rule 26(b)(1). See *Bryant v. Ochoa*, 2009  
12 U.S. Dist. LEXIS 42339 at \*3 (S.D. Cal. 2009).

13 Further, "with its *potential* relevance under Rule 26(b)(2) unquestioned, the  
14 metadata of both archival and active ESI has been found to be discoverable." *U.S. ex rel.*  
15 *Carter, supra*, 305 F.R.D. at 237 (citing *Aguilar v. Immigration & Customs Enforcement*  
16 *Div., U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 355–56 (S.D.N.Y.2008)). However, as  
17 with other types of ESI, the extent to which the producing party must turn over the metadata  
18 depends on the form in which the ESI whose metadata is sought is kept in the ordinary  
19 course of business. *Id.* at 355. Assuming the requesting party articulates a "precise and  
20 detailed" discovery request, the ESI and its accompanying metadata is discoverable and  
21 producible. *Id.* at 238-239. Rule 34 makes this clear and provides that metadata must be  
22 produced "as [it] is kept in the usual course of business or must organize and label [the  
23 data] to correspond with the categories in [a discovery] request." Fed. R. Civ. P.  
24 34(b)(2)(E)(i)-(ii). *City of Colton v. American Promotional Events, Inc.*, 277 F.R.D. 578,  
25 583 (C.D. Cal. 2011). To that end, as a matter of custom, "the [rebuttable] presumption is  
26 that the responding party must bear the expense of complying with discovery requests."  
27 *U.S. ex rel. Carter, supra*, 305 F.R.D. at 236–237 (citing *Country Vintner of N.C., LLC v.*  
28

1 *E. & J. Gallo Wintery, Inc.*, 718 F.3d 249, 261 (4th Cir.2013)); *LightGuard v. Spot Devices,*  
2 *Inc.*, 281 F.R.D. 593, 598 (D.Nev.2012)).

3       Once relevance is established, the opposing party must demonstrate the discovery  
4 should be prohibited by substantiating its objections. *Morgan Hill Concerned Parents*  
5 *Association, supra*, 2017 WL 445722, at \*4 (citing *Lofton v. Verizon Wireless (VAW) LLC,*  
6 308 F.R.D. 276, 281 (N.D. Cal. 2015)). Most significantly, consistent with Rule 26, a court  
7 may limit discovery for any one of three reasons: (1) “the discovery sought is unreasonably  
8 cumulative or duplicative;” (2) it is “obtainable from some other source that is more  
9 convenient, less burdensome, or less expensive;” or (3) “the burden or expense of the  
10 proposed discovery outweighs the likely benefit.” Fed. R. Civ. P. 26(b)(2)(C)(i)—(iii);  
11 *U.S. ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 237 (S.D. Cal. Feb. 20,  
12 2015) (citing *Nicholas v. Wyndham Int'l, Inc.*, 373 F.3d 537, 543 (4th Cir.2004 and *S. Ute*  
13 *Indian Tribe v. Amoco Prod. Co.*, 2 F.3d 1023, 1029–30 (10th Cir.1993) (discussing the  
14 courts' powers to grant protection against “undue burden and expense” by shifting costs of  
15 discovery to the requesting party as a condition of discovery)).

16       With the relevance of the filepath information in dispute, the Court turns to CEV and  
17 Corey’s briefing and finds they have met their burden. CEV and Corey properly place  
18 emphasis on Rule 34’s stance that production of ESI is relevant. The Rule necessarily  
19 encompasses the metadata that inherently exists within the ESI in requiring the Parties to  
20 produce ESI as maintained in the usual course of business. To that end, the Parties’ own  
21 agreement to produce ESI with accompanying metadata (Doc. No. 71, 6:27-28) plainly  
22 evidences that Javo, too, is of the position that the metadata underlying the ESI is as  
23 relevant as the ESI itself. Equally convincing, the location and manner in which Javo stored  
24 its ESI in the normal course of its business is directly relevant because, as part of its claims,  
25 Javo “must prove that it took reasonable measures to maintain the secrecy of its alleged  
26 trade secrets.” (Doc. No. 71, 3:21-22.) For these reasons, the Court finds CEV and Corey  
27 have met their burden as to establishing the relevance of the filepath information.  
28

1 In turn, Javo fails to adequately rebut the presumption of relevance and, moreover,  
2 its additional objections are unconvincing. Javo’s weightiest objection appears to be that  
3 the effort to discover and produce the filepath information CEV and Corey seek will be  
4 unduly burdensome and costly. However, “it cannot be argued that a party should ever be  
5 relieved of its obligation to produce accessible data merely because it may take time and  
6 effort to find what is necessary.” *Peskoff v. Faber*, 244 F.R.D. 54, 62 (D.D.C.2007); *Juster*  
7 *Acquisition Co., LLC v. N. Hudson Sewerage Auth.*, 2013 U.S. Dist. LEXIS 18372, at \*10,  
8 2013 WL 541972, at \*3 (D.N.J. Feb. 11, 2013) (“[A]ctive, online data, near-line data, and  
9 offline storage/archives are typically identified as accessible electronic data.”); *Zubulake*  
10 *v. UBS Warburg LLC*, 216 F.R.D. 280, 284 (S.D.N.Y.2003) (“When a discovery request  
11 seeks accessible data—for example, active on-line or near-line data—it is typically  
12 inappropriate to consider cost-shifting”). Javo insists that the filepath information “does  
13 not exist as metadata and cannot be automatically generated during the collection process.”  
14 (Doc. No. 72, 15: 12-13.) Consequently, Javo contends that “it will require a manual,  
15 document-by-document determination regarding the ‘original’ filepath where a document  
16 was stored ‘in the normal course of business.’” (*Id.*, 15:10-12.)

17 But in so representing, Javo offers no explanation for why this is the case. Javo  
18 exclusively relies upon the declaration of its counsel, Alexander Miller, (“Miller  
19 Declaration”) to verify these statements. But the Miller Declaration explains neither why  
20 the filepath information, unlike the other metadata underlying Javo’s ESI, would not be  
21 automatically populated and readily producible nor why a document-by-document analysis  
22 is required in contrast to the productions Javo intends to make. The Court finds far more  
23 convincing CEV and Corey’s briefing and the supporting declaration of ESI expert Lauren  
24 Doucette (“Doucette Declaration”) because that declaration sets forth sufficient factual  
25 context as to how metadata, including filepath information, is created and stored and how  
26 it may be potentially altered. *U.S. ex rel. Carter, supra*, 305 F.R.D. at 243 (“While  
27 defendants did provide a declaration from an actual expert detailing these possible financial  
28 burdens [involved in the production of certain ESI and metadata], plaintiffs afforded only

1 their lawyers' words and emails. This very dearth of an actual expert declaration... is a  
2 telling sign of the plaintiffs' inadequate argumentation on this precise issue) (citing to  
3 *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 557 (W.D.Tenn.2003);  
4 *Wiginton*, 229 F.R.D. at 570, 577 (“\$249,000”); *Zubulake, supra*, 216 F.R.D. at 283 to  
5 illustrate necessity of setting forth factual specificity to support any objections to producing  
6 ESI or related metadata on undue burden grounds)). Further, even if the Court accepts  
7 Javo's representations that the filepath information does not presently exist in *any* of Javo's  
8 ESI, Javo provides not even an iota of insight into the approximate monetary cost, man  
9 hours, and length of time recovering and producing the filepath information would entail.  
10 In turn, this leaves the Court with no grounds to sustain Javo's objection on the basis of  
11 undue burden or cost, at least not in the immediate instance.

12 As to Javo's objections on privilege grounds, the Court is not persuaded that such  
13 objections should stand in the way of Javo producing any relevant and non-privileged  
14 filepath information to accompany Javo's relevant ESI productions. As with all routine  
15 discovery, Javo may address any privilege concerns by withholding, in good faith, certain  
16 filepath information on privilege grounds, timely raising its privilege objections to CEV  
17 and Corey, and producing a privilege log that identifies the withheld information at the  
18 same time Javo's ESI productions are due to be served. To the extent Javo's concern  
19 remains that there is “no mechanism in the PO for the basis for withholding to be  
20 communicated in a privilege log or by some similar method,” the Parties are ORDERED  
21 to amend the ESI Protocol to reflect the mechanism the Court has described here. Further,  
22 as to Javo's objection that certain filepath information would be misleading because it  
23 would reflect the ESI's current location rather than where the ESI existed during the  
24 relevant time for purposes of either Javo's claims or CEV's counterclaims and the relevant  
25 time therein, Javo may again assert standard discovery objections reflecting not relevant  
26 information as to time. There is simply no reason to obstruct the free flow of relevant, non-  
27 privileged discovery on the basis of this particular objection or on privilege grounds. Javo's  
28 suggestion that this discovery should be halted altogether because, if not, it “will only lead

1 to further discovery disputes” subverts the spirit of the discovery rules that require  
2 production of relevant information, even if it not admissible for evidentiary purposes.

3 Given the above, the Court GRANTS CEV and Corey’s request to compel Javo’s  
4 production of its filepath information to the extent it presently exists and accompanies  
5 Javo’s any ESI productions pursuant to the Parties’ ESI Protocol. Javo may properly object  
6 to producing discrete filepath information if Javo can articulate a good faith basis for such  
7 objection, including, but not limited to irrelevance as to time or scope if Javo determines  
8 the filepath as presently displayed is misleading. In the event Javo determines any filepath  
9 information is privileged, Javo shall produce a privilege log indicating so along with its  
10 ESI and accompanying metadata and filepath information productions. To the extent that  
11 Javo maintains that any filepath information is not readily accessible, the Court hereby  
12 ORDERS the Parties to meet and confer over the matter and regarding whether a cost-  
13 effective resolution may be reached. Should the Parties remain at an impasse, the Court  
14 ORDERS them jointly contact this Court’s Chambers regarding the dispute. At such time,  
15 the Court will (1) order Javo to file supplemental briefing, inclusive of a supporting  
16 declaration from at least one ESI expert, who can provide a reasonable estimate of the  
17 expense, man hours, and time involved in retrieving and producing the filepath  
18 information; and (2) provide CEV and Corey the opportunity to similarly respond with its  
19 own approximation of the cost and work entailed based on Javo’s reporting. Only then may  
20 the Court properly determine which party may appropriately bear the cost of searching for,  
21 recovering, and producing the filepath information.

22 **d. Preservation of the Parties’ Deleted and Ephemeral Data**

23 Finally, under the ESI Protocol, the Parties disagree as to whether they are under any  
24 obligation to preserve deleted or ephemeral data; or, at least, they appear to be under such  
25 impression. While the Parties’ briefing suggests the Parties’ impasse on whether a  
26 preservation duty exists, their substantive analysis arrives at the same conclusion: to the  
27 extent ephemeral or deleted data is relevant to the claims and defenses at issue here, such  
28 data *should* be preserved. Throughout its briefing, Javo states the equivalent while opting



1 to frame the statement in negative terms: “The following categories of ESI need not be  
2 preserved, searched, or produced, unless the parties have reason to suspect it contains  
3 information that is relevant to any party’s claims or defenses and is proportional to the  
4 needs of the case: (i) “deleted,” ... (ii) random access memory (RAM) or other ephemeral  
5 data...” (Doc. No. 72, 19:6-17.) The provision appears to be mutually enforceable as it  
6 obligates both Javo and CEV and Corey to preserve, search, and/or produce the listed data  
7 types if counsel finds grounds to believe such data is relevant to the claims or defenses at  
8 issue in this case. CEV and Corey’s briefing appears to reference a prior version of Javo’s  
9 proposed provision, which excludes the qualifier that the preservation duty attaches to data  
10 counsel suspects may be relevant. (Doc. No. 71, 9:1-14.) From there, CEV and Corey state  
11 they “agree these data sources need not be searched or produced in the first instance, but  
12 reserve their right to request that Javo produce information from these sources if it later  
13 becomes relevant and necessary.” (*Id.*, 9:17-19.) Thus, this so-called dispute in fact appears  
14 to be a non-issue as the Parties are in agreement in principle, albeit not in exact language.

15 Based on the Parties’ briefings and the excerpted representations above, there  
16 appears to be no genuine dispute on whether the Parties are obligated to, at least, preserve  
17 deleted and ephemeral and other similar kinds of data if relevant. In any event, the Court  
18 emphasizes that litigants bear a duty to preserve “what [they know], or should know, is  
19 relevant in the action, is reasonably calculated to lead to the discovery of admissible  
20 evidence, is reasonably likely to be requested during discovery and/or is the subject of a  
21 pending discovery request.” *Toppan Photomasks, Inc. v. Park*, 2014 WL 2567914, at \*5  
22 (N.D. Cal., May 29, 2014); see also *Io Grp.*, 2011 WL 4974337, at \*5 (quoting *Zubulake*,  
23 *supra*, 220 F.R.D. at 217). Further, the duty “arises not only during litigation but also  
24 extends to that period before the litigation when a party reasonably should know that the  
25 evidence may be relevant to anticipated litigation.” *World Courier v. Barone*, 2007 WL  
26 1119196, at \*1 (N.D. Cal. Apr. 16, 2007) (quoting *Kronisch v. United States*, 150 F.3d 112,  
27 126 (2d Cir.1998)). As to the scope of such duty, no party is ever obligated to preserve  
28 “every shred of paper, every e-mail or electronic document, and every backup tape;”

1 however, a litigant bears the duty to preserve what it “knows, or reasonably should know,  
2 is relevant in the action, is reasonably calculated to lead to the discovery of admissible  
3 evidence, is reasonably likely to be requested during discovery and/or is the subject of a  
4 pending discovery request.” *Zubulake, supra*, 220 F.R.D. at 217.

5 Courts generally agree that deleted, ephemeral, and other similar kinds of data are  
6 discoverable, and, necessarily then, subject to the parties’ preservation duty. *U.S. ex rel.*  
7 *Carter, supra*, 305 F.R.D. at 236; see also *John B. v. Goetz*, 879 F.Supp.2d 787, 877–78  
8 (M.D. Tenn. 2010) (noting that “[d]eleted information in a party’s computer’s backup tapes  
9 is as discoverable as electronic documents in current use,” though simultaneously  
10 observing that these emails may in fact be presently maintained “as replicant data, archival  
11 data or residual data”); *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652  
12 (D.Minn.2002) (“it is a well-accepted proposition that deleted computer files, whether they  
13 be e-mails or otherwise, are discoverable”). As both Javo and CEV and Corey articulate in  
14 their briefings, there is no question regarding whether a duty of preservation attaches to the  
15 file types at issue – ephemeral, deleted, and other similar data – when counsel has reason  
16 to believe such data may be relevant to the claims, counterclaims, and defenses in this  
17 litigation.

18 The Parties’ position readily aligns with the authority that informs this matter, and  
19 this Court’s determination that Javo, CEV, and Corey bear the ongoing duty to preserve  
20 such data that may be relevant to any extent. Accordingly, the Court GRANTS CEV and  
21 Corey’s proposed request that the ESI Protocol reflect the Parties’ mutual understanding  
22 that they are obligated to, at minimum, preserve ephemeral, deleted, and other related kinds  
23 of data where counsel reasonably suspects such data is relevant to the claims,  
24 counterclaims, and defenses at stake. To the extent that CEV and Corey disagree with  
25 Javo’s proposed wording as reflected on page 19, lines 6 through 17 of Javo’s briefing  
26 (Doc. No. 72), the Court hereby ORDERS the Parties to meet and confer to forge language  
27 that reflects their agreement and this Court’s decision on the matter, prior to submitting the  
28 ESI Protocol for the Court’s adjudication.

1           **III. CONCLUSION**

2           Having reviewed and considered the Parties’ respective briefing, the Court hereby  
3 ORDERS as follows:

4           (1) CEV and Corey’s request to modify the Protective Order to exclude Marshall and  
5           Konig from accessing OAE0 information upon Marshall and Konig’s execution  
6           of the Protective Order is DENIED; CEV and Corey’s related request that the  
7           Court hold an evidentiary hearing on the scope of Marshall and Konig’s work for  
8           Javo for purposes of the competitive decision-making issue is DENIED without  
9           prejudice;

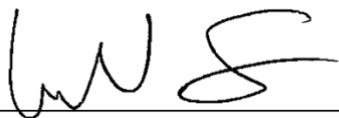
10          (2) Javo’s proposed modification to the Protective Order to include a patent  
11          acquisition bar as detailed in Javo’s briefing, specifically inclusive of a two-year  
12          acquisition bar against CEV and Corey’s litigation counsel of record as it relates  
13          to the technology at issue here, is GRANTED; the Parties shall meet and confer  
14          on the wording of the provision to ensure it reflects the Court’s decision as  
15          discussed above to the extent that CEV and Corey believe Javo’s language as  
16          proposed in its briefing does not square with the Court’s Order;

17          (3) CEV and Corey’s request to compel Javo to produce its filepath information is  
18          GRANTED, to the extent that such information readily exists in Javo’s ESI as  
19          produced pursuant to the ESI Protocol; to the extent Javo has particular objections  
20          to producing specific filepath information on privilege grounds or otherwise,  
21          Javo shall timely assert such objections, produce a privilege log, and meet and  
22          confer with CEV and Corey on the matter; and finally, to the extent Javo asserts  
23          it would be too costly or otherwise burdensome to recover any filepath  
24          information Javo discovers does not already exist within the ESI, the Parties are  
25          ORDERED to first meet and confer on the matter and then if necessary jointly  
26          contact this Court’s Chambers and be prepared to submit to supplemental briefing  
27          fully setting forth the cost, labor, and time such a recovery process will take; and  
28

1 (4)CEV and Corey’s request to modify the ESI Protocol to contain language  
2 reflecting the Parties’ mutual obligation to preserve deleted, ephemeral, and  
3 similar kinds of data, to the extent counsel suspects such data may be relevant to  
4 the litigation, is GRANTED.

5 **IT IS SO ORDERED.**

6 Dated: April 29, 2020

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9 Hon. William V. Gallo  
10 United States Magistrate Judge  
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