

# No. 08-0836

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IN THE SUPREME COURT OF TEXAS

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*IN RE WEEKLEY HOMES, L.P.*

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Original Proceeding from the 134<sup>th</sup> Judicial District Court, Dallas County, Texas  
Trial Court Cause No. 06-07736  
Honorable Anne Ashby, Presiding

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**REAL PARTY IN INTEREST'S  
RESPONSE BRIEF ON THE MERITS**

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## STATEMENT OF THE CASE

**Nature of the Case**

This case involves the trial court's proper exercise of discretion in following existing Texas precedent, precedents from other jurisdictions, and the Texas Rules of Civil Procedure in granting Plaintiff's Motion for Limited Access to Weekley Homes, L.P.'s Computers. Given existing law and the protections provided to Weekley, the trial court's entry of the Order Establishing Procedure for Examination of Computer Hard Drive and Protective Order did not constitute an abuse of discretion.

**Respondent**

The Honorable Anne Ashby, Judge of the 134<sup>th</sup> District Court located in Dallas County, Texas, in Cause No. 06-07736.

**Respondent's Action**

Weekley seeks relief from the Order Establishing Procedure for Examination of Computer Hard Drive and Protective Order.

**Court of Appeals**

Weekley filed a petition requesting the same relief with the Texas Court of Appeals for the Fifth District on September 22, 2008. Justices Morris, Richter, and Mazzant participated in the decision. Justice Morris authored the opinion in Cause No. 05-08-01249-CV.

**Court of Appeals Disposition**

The Court of Appeals denied Weekley's Petition for Writ of Mandamus on September 24, 2008.

## **ISSUES PRESENTED**

**ISSUE NO. 1:** The trial court's entry of the Order was consistent with the Texas Rules of Civil Procedure and precedent from Texas and other jurisdictions. The process set forth in the Order has been implemented in several cases, and the limitations it provides have been found to provide adequate protections to the producing party. Furthermore, courts have rejected the same arguments that Weekley is making. After extensive hearings on the Motion, including the presentation and admission of evidence, the trial court entered the Order, and this was not an abuse of discretion.

**ISSUE NO. 2:** The Order does not require Weekley to produce irrelevant, privileged, confidential, or personal documents to HFG. The exact opposite is true as Weekley, alone, makes the decision of which documents to produce. To the extent that Weekley withholds any documents on the grounds of privilege, then it must provide a privilege log of the withheld privileged documents in accordance with the Texas Rules of Civil Procedure. This procedure as set forth in the Order was not an abuse of the trial court's discretion.

**ISSUE NO. 3:** Weekley has failed to meet its burden of proving that it has no adequate remedy at law. The Order does not require Weekley to produce irrelevant, confidential, personal, or privileged documents; the Order only requires Weekley to comply with its discovery obligations by reviewing documents and producing those that Weekley determines are relevant, non-privileged, and responsive to HFG's discovery requests.

## INTRODUCTION

In Texas, the discovery system's ultimate purpose is to ensure that disputes are decided by the facts that are revealed and not by those that are concealed. The rules of discovery, therefore, must be construed liberally. In this regard, after noticing significant and troubling holes in Weekley's document production (which now have been shown to have been well-founded), HFG filed its Motion for Limited Access to Weekley Homes, L.P.'s Computers (the "Motion"), which was a form of a motion to compel. The Motion sought an order implementing a process that is hardly unique, and it was aimed at obtaining the documents that HFG had been requesting for almost two years.

More particularly, in a non-party subpoena and in two sets of requests for production, HFG had tried to obtain emails of certain Weekley employees, as well as documents relating to, among other things, engineering studies and reports. In response, Weekley produced almost nothing from its Dallas employees who were responsible for the project in question, including absolutely no documents from two key employees who were in charge of the subdivision at issue. The evidence before the trial court established that there are documents that have not been produced, and that the requested emails, which had been "deleted," are still on the hard drives. These documents are retrievable and discoverable.

As a result of the gaps in Weekley's production, HFG proposed in the Motion using the same process that has been approved by the only Texas court to address this issue, as well as by several courts from other jurisdictions. That is, HFG sought limited access by a forensic expert to the computers of four current or former Weekley

employees. The trial court's Order Establishing Procedure for Examination of Computer Hard Drive and Protective Order (the "Order") specified the protocol to be employed, provided substantial protections to Weekley that consistently have been approved by courts across the country, required the use of an independent, neutral expert (which HFG is to compensate), and provided a procedure in which relevant, responsive, non-privileged documents are to be reviewed and produced by Weekley's counsel (as is standard during discovery). The Motion and the Order specifically focused on the issues presented in this case and the discovery dispute between HFG and Weekley. The Order was based on the general protocol that has been employed by courts in Texas and other jurisdictions, and it was further tailored to address the specific factual issues present in this dispute. As such, the issues in this case have applications to the litigants.

In its Brief on the Merits (the "Brief"), Weekley raised the very same arguments that have been consistently rejected by courts in multiple jurisdictions when facing similar issues to those present here. The record establishes that the Order does not require the production of privileged or irrelevant documents (as Weekley alone decides which documents to produce to HFG), is not a fishing expedition, and complies with the Texas Rules of Civil Procedure (the "TRCP"). Despite Weekley's rhetoric to the contrary, the Motion is not a new form of discovery; rather, it is, for all intents and purposes, a motion to compel that was properly before the trial court. The trial court's entry of the Order allows HFG to obtain the documents it has requested and to which it is entitled, and its entry was not an abuse of the trial court's discretion.

## STATEMENT OF FACTS

As set forth in its Sixth Amended Original Petition, Enclave at Forney Branch, Ltd. ("Enclave"), a residential real estate developer that planned and constructed a subdivision in Dallas known as the Enclave at Wooded Creek (the "Subdivision"), entered into an Agreement for the Purchase and Sale of Lots (the "Builder Contract") with Weekley under which Weekley, a homebuilding company, agreed to buy all the lots in the Subdivision pursuant to a takedown schedule. (C.R. 59) Later (on November 30, 2004), HFG, a lot warehouser, entered into a financing arrangement with Enclave whereby HFG agreed to acquire the remaining lots in the Subdivision; as a part of that transaction, HFG received an assignment of Enclave's rights under the Builder Contract. (C.R. 54) HFG's only obligation under this arrangement was to sell the lots to Weekley, with Enclave, as the developer, retaining responsibility for all other obligations under the Builder Contract, including the maintenance of the lots, landscaping, and the paying of property taxes. (C.R. 54, 60)

In an effort to reach the level of comfort needed to enter into this lot warehousing transaction, HFG required Weekley to provide it with a Consent to Assignment and Estoppel Certificate (the "Estoppel Certificate") containing Weekley's representations, warranties, and covenants regarding (i) the Subdivision, (ii) Enclave's performance of its obligations under the Builder Contract, and (iii) the condition of the lots in the Subdivision. (C.R. 61) In particular, Weekley represented to HFG that Enclave had achieved "Substantial Completion," that Enclave had fulfilled all of its contractual duties under the Builder Contract, and that Weekley had no knowledge of any defective lots in

the Subdivision. (*Id.*) HFG contends that Weekley's statements were false when made, as several significant problems existed in the Subdivision at the time of Weekley's execution of the Estoppel Certificate. (2 R.R. 6-7, C.R. 65-67))

After the closing of the lot warehouse transaction (which provided an immediate financial benefit to Weekley in the form of a huge reduction in its earnest money), HFG learned that Enclave had not been performing all its obligations; rather, Weekley had been performing those obligations (such as maintaining the Subdivision and constructing the perimeter fence for it). (C.R. 61-63) In addition and soon following the closing, Weekley informed HFG that there were lots in the Subdivision that were not buildable. (C.R. 64-65) Thus, HFG has alleged that the representations in the Estoppel Certificate were false when they were made.

Unbeknownst to HFG at the time it entered into this transaction, Weekley, in March of 2004, had requested the preparation of a geotechnical engineering study known as a slope stability analysis (the "Slope Stability Analysis"), and, in May 2004, Weekley learned from such report that there were 21 lots in the Subdivision that had unsafe slopes and that required remedial measures. (2 R.R. 7, C.R. 65-67) Following its receipt of the Slope Stability Analysis, Weekley spent \$92,000 to construct retaining walls in the Subdivision. (*Id.*) However, neither this engineering study nor the remedial measures were disclosed to HFG. (C.R. 65-67) Weekley's remedial measures were not effective, were not done in accordance with applicable laws, and were done "on the cheap." (2 R.R. 7) Weekley's knowledge of the Slope Stability Analysis and its efforts to implement remedial measures are directly relevant to HFG's fraud-based claims against Weekley.

Following Enclave's failure to perform various obligations owed to HFG, suit was filed by HFG against Enclave in August 2006. HFG subpoenaed documents from Weekley long prior to naming it as a party, and Weekley produced documents in October 2006. (2 R.R. Exh. 1) HFG immediately noticed gaps in Weekley's production and promptly addressed these issues with Weekley's counsel. Weekley then produced additional documents. After reviewing Weekley's supplemental production, HFG added Weekley as a party to the litigation in June 2007. (C.R. 52) HFG later propounded two sets of requests for production to Weekley. (2 R.R. Exh. 3, 4) These requests specifically asked for emails, geotechnical reports, engineering analyses, documents relating to the construction of the perimeter fence, documents relating to the maintenance of the Subdivision (including mowing and landscaping), and other documents concerning HFG's claims against Weekley. (2 R.R. Exh. 3, 4) For example, in Requests 13 through 78 of its Second Request for Production to Weekley Homes, HFG specifically requested emails sent or received by specific Weekley employees. (2 R.R. Exh. 4) In an effort to collect documents, Weekley's General Counsel, John Burchfield ("Burchfield"), sent email communications to certain Weekley personnel asking that they collect the documents responsive to HFG's document requests. (2 R.R. 34) At Weekley, each employee has an inbox for emails. (2 R.R. 39)

Weekley has not produced documents critical to HFG's claims, including emails between key executives and documents relating to the Slope Stability Analysis and the subsequent remedial measures Weekley performed. (2 R.R. 56-57) Of the four individuals identified in the Motion – Russell Rice ("Rice"), Weekley's Division

President; Joe Vastano ("Vastano"), Weekley's Area President; Scott Thomson ("Thomson"), Weekley's Project Manager for the Subdivision; and Biff Bailey ("Bailey"), Weekley's Land Acquisitions Manager – Weekley produced a total of 31 emails in response to HFG's many requests. *Id.* More particularly, Weekley produced only 30 emails from Rice's email account and a total of one email from the email accounts of Bailey, Thomson, and Vastano.<sup>1</sup> (2 R.R. 8-9, 2 R.R. 56-57).

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<sup>1</sup> HFG's counsel offered testimony during the hearing as follows:

Your honor, if the Court wants me to, I will take the stand. I will put Mr. Castle on the stand. Nobody knows the documents that were produced better than we do. We know exactly what was produced by whom.

Now, I'm an officer of the Court, and I've already represented to the Court today how many documents were produced by these parties that we're talking about. I'll do it again. Russell Rice produced 30 emails to or from him. And then we have one email in the aggregate from Mr. Vastano, Mr. Bailey, and Mr. Thomson.

(2 R.R. 56-57) HFG's counsel clearly was offering evidence regarding the paucity of Weekley's production. While the general rule is that an attorney's statements must be sworn in order to constitute evidence, such requirement is waived by a failure to object when the opponent knows or should have known an objection was required. *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997). The evidentiary nature of the above statements regarding the incompleteness of Weekley's production was obvious, as HFG's counsel offered to take the witness stand (but did not), and then made representations in his capacity as an officer of the court. *Id.*, see also *Knie v. Piskun*, 23 S.W.3d 455, 463 (Tex. App. – Amarillo 2000, pet. denied) (explaining that an opponent of attorney testimony can waive the oath requirement by failing to object when the opponent knows or should know that an objection was necessary, and finding that evidentiary nature of attorney's statements was apparent); (*Russ v. Titus Hospital Dist.*, 128 S.W.3d 332, 338 (Tex. App.–Texarkana 2004, pet. denied). It was proper for the trial court to consider these statements as evidence, and notably Weekley never refuted the fact that it had failed to produce a single email from Vastano or Thomson.

Furthermore, Weekley had only produced one email relating to the crucial Slope Stability Analysis. (2 R.R. 7) Indeed, HFG first learned of the existence of the Slope Stability Analysis in February 2008 when Weekley belatedly produced this lone email. (C.R. 65-57) Importantly, the safety issues highlighted by the Slope Stability Analysis were brought to Weekley's attention at the very time Weekley was trying to determine whether Substantial Completion in the Subdivision had been achieved by Enclave (as later represented to HFG in the Estoppel Certificate). (2 R.R. 57) An email communication from a Weekley employee in Houston to Thomson inquiring whether Substantial Completion had occurred at the Subdivision was sent to him at the same time the results of the Slope Stability Analysis results were being presented to Weekley; nevertheless, no written communications from Thomson (Weekley's project manager in Dallas in charge of the Subdivision) have been produced regarding these issues. (2 R.R. 57)

After reviewing Weekley's production and identifying its shortcomings, HFG filed a Motion to Compel Production and for the Imposition of Sanctions (the "First Motion to Compel"). In May 2008, the trial court conducted a hearing (which extended over the course of three days) on the First Motion to Compel, and addressed issues relating to the lack of emails produced and the lack of documentation surrounding the Slope Stability Analysis and the subsequent remedial measures. (2 R.R. 7-8) During that hearing, Burchfield testified that each Weekley employee's email inbox was limited in size, and once the size limitation was reached, the employee had to delete items in order to be able to receive any more emails. (2 R.R. 39) At the close of the May 2008 hearing, counsel for

Weekley acknowledged the common use of forensic experts and stated, "I have no earthly idea, Your Honor, whether there's something a forensic specialist could go in and retrieve. We always hear about that. That hasn't been raised as an issue before the Court. We haven't heard that request."<sup>2</sup> (2 R.R. 9) The evidence and arguments presented during the First Motion to Compel hearings (including testimony that the emails HFG was seeking had been "deleted") led to HFG's filing the Motion so as to allow a neutral, independent computer forensic expert to retrieve the emails (and any attachments) that had been deleted. *Id.*

On July 2, 2008, and following the extensive hearings on the First Motion to Compel, HFG filed the Motion, which laid out a process that painstakingly followed existing precedent from Texas and several other jurisdictions and which provided a way for HFG to obtain the documents it had been seeking for more than a year and a half.<sup>3</sup> The trial court held two separate hearing sessions on the Motion on August 8, 2008 and yet a third on August 25, 2008 during which HFG introduced evidence of the gaps and inconsistencies in Weekley's production. HFG further introduced evidence in the form of testimony from Burchfield, Weekley's General Counsel, establishing that the emails that it was seeking had either been deleted (which, as discussed in detail below, does not

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<sup>2</sup> That "request" was soon made by HFG in the form of the Motion.

<sup>3</sup> (2 R.R. 12, 22) In the Motion, HFG limited the scope of the forensic expert's examination to five hard drives, including the hard drives of Kaye Logan, a Weekley employee in Houston, and of Rice, Vastano, Thomson, and Bailey. At the hearing on the Motion, HFG orally amended the Motion to confine the examination only to the hard drives of Rice, Vastano, Thomson, and Bailey. (2 R.R. 9-10).

mean that they have been permanently destroyed) or were otherwise stored on Weekley's computer hard drives. (2 R.R. 32-40)

During the hearings on the Motion, HFG explained the relevance of these emails and related documents to its claims against Weekley, including its claims of fraud, fraudulent inducement, fraud by non-disclosure, and statutory fraud. (2 R.R. 42-46) HFG further showed that there were critical emails that had not been produced, including emails directly relating to the representations made in the Estoppel Certificate and to the Slope Stability Analysis. (2 R.R. 57) HFG proposed limiting the forensic examination of the hard drives by having the contents of the hard drives indexed for the purpose of searching (utilizing 21 keyword terms directly tied to HFG's claims) and document retrieval. *Id.* Finally, HFG made clear that it was limiting the search to calendar year 2004. *Id. See also* 2 R.R. 59. After considering the briefing, the extensive oral arguments, and the evidence, the Court entered the Order. (2 R.R. 61, C.R. 47)

### **ARGUMENT AND AUTHORITIES**

**I. ISSUE NO. 1: The trial court's entry of the Order was consistent with the Texas Rules of Civil Procedure and precedent from Texas and other jurisdictions. The process set forth in the Order has been implemented in several cases, and the limitations it provides have been found to provide adequate protections to the producing party. Furthermore, courts have rejected the same arguments that Weekley is making. After extensive hearings on the Motion, including the presentation and admission of evidence, the trial court entered the Order, and this was not an abuse of discretion.**

**A. The Order Comports with Texas Case Law and Other Precedent**

In the recent *Honza* case, the Waco Court of Appeals upheld a trial court's order that permitted the imaging and searching of the opposing party's computer hard drive. *In*

*re Honza*, 242 S.W.3d 578 (Tex. App.–Waco 2008, original proceeding). When preparing the Motion and seeking the relief set out in the Order, HFG went to great lengths to ensure that it used the exact same language and process that the *Honza* court and several other courts had approved. (2 R.R. 12, 22) In this regard, the Order required the following:

- The forensic expert named by the trial court in the Order will travel to Weekley's offices to make forensic images of the hard drives of Rice, Vastano, Bailey, and Thomson (C.R. 43);
- The forensic images will be indexed and used for the limited purpose of searching for documents (from 2004) containing one or more of the 21 keyword terms as identified in Exhibit "A" to the Order (C.R. 44, 2 R.R. Exh. 5);<sup>4</sup>
- Any documents containing one or more of the keyword terms will be extracted and supplied directly to Weekley's counsel for review (*Id.*);
- Weekley then has the right to review the extracted documents for privilege and responsiveness to HFG's discovery requests (*Id.*);
- If Weekley determines that any of the extracted documents are subject to any claim of privilege or immunity from discovery, it would provide a privilege log in accordance with Rule 193.3 of the TRCP (*Id.*);
- The forensic expert is expressly prohibited from disclosing the nature or content of any documents or information observed during the process of examining the four hard drives (C.R. 45);
- The forensic expert is required to agree in writing to be bound by the terms and conditions of the Order (*Id.*); and

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<sup>4</sup> As noted above, the 21 search terms directly relate to HFG's claims against Weekley. 19 of the 21 terms are discrete terms, and the two remaining terms are Boolean search terms designed to identify derivations of such terms ("landscap!" would, for example, include landscape, landscaping, landscaper, and landscaped).

- HFG must pay the costs for the retrieval of data from the hard drives, and Weekley is only responsible for paying its own counsel (*Id.*).

A comparison of the contents of the Order to the procedure and protections adopted by the *Honza* court and by courts of other jurisdictions reveals that they are virtually identical. Compare C.R. 42-45 with *Honza*, 242 S.W.3d at 582; *The Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 653-54 (D. Minn. 2002). Weekley nevertheless attempts to distinguish *Honza* by claiming that the defendant in that case was not burdened with the requirement of searching through every document that mentions generic words. (Brief at 15-16) Admittedly, the scope of the retrieval here is slightly different than that of *Honza* – the use of 21 search terms to locate responsive emails versus a search process in *Honza* designed to locate two documents and their various iterations and accompanying metadata – but the underlying methodology is exactly the same; the forensic expert first indexes and searches the hard drives and then provides the responsive documents to the opposing party's counsel for review and subsequent production.<sup>5</sup>

While *Honza* was a case of first impression in Texas, this issue has arisen in several other state and federal courts, and they ruled in the same fashion as the *Honza* court and the trial court. For example, in *Rowe Entm't, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), the plaintiffs sought access to certain

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<sup>5</sup> Weekley argues that in *Honza*, the requesting party first sent a request for electronic and magnetic data before filing its motion. This contention is purely speculative as the *Honza* opinion is silent as to the wording and specifics of the underlying discovery request.

emails, and the defendants (as Weekley did here) objected on multiple grounds, including privilege and the privacy of their employees. The *Rowe* court concluded that any concerns about the defendants' privacy were adequately addressed by the confidentiality order covering the case. *Id.* at 428.

The court further affirmed that "an employee who uses his or her employer's computer for personal communications assumes some risk that they will be accessed by the employer or others." *Id.* The court also rejected the contention that any privilege would be waived by engaging in this procedure. *Id.* at 432.<sup>6</sup> As a consequence, the *Rowe* court ordered the implementation of a protocol similar to that set forth in the Order and in *Honza*. See also *The Antioch Co.*, 210 F.R.D. at 653-54 (describing protocol virtually identical to that in the Order); *Ameriwood Industries, Inc. v. Liberman*, No. 4:06CV524, 2006 U.S. Dist. LEXIS 93380 \*16-21 (E.D. Mo. Dec. 27, 1006) (entering a search, retrieval, and production procedure similar to that in the Order); *Cenveo Corp. v. Slater*, No. 06-CV-2632, 2007 U.S. Dist. LEXIS 8281 at \*5-8 (E.D. Pa. Feb. 1, 2007) (ordering a search protocol similar to that in the Order); *Easton Sports, Inc. v. Warren Lacrosse, Inc.*, 05-72031, 2005 U.S. Dist. LEXIS at \*3-4 (E.D. Mich. Sept. 14, 2005) (ordering search, retrieval, and production procedures almost identical to that in the Order); *Simon Property Group, L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 641-42 (S.D. Ind.

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<sup>6</sup> The *Rowe* court recognized that it should not and could not compel the production of privileged documents; however, the court determined that the sanctity of any privilege would be preserved by enforcing the confidentiality order already in place, by allowing the producing party to review the documents prior to production, and by ordering that any review of privileged documents would not effect a waiver of the privilege. *Id.* at 432.

2000) (entering an order setting forth a process far broader than that contained in the Order). Thus, the protocol sought in the Motion and granted by the Order is not only commonly accepted, it has been found to be a necessary tool in discovery.

Various state courts have reached similar conclusions.<sup>7</sup> For instance, in *In the Matter of the Estate of John B. Maura*, 842 N.Y.S.2d 851, 17 Misc. 3d 237 (N.Y. Surr. Ct. 2007), a party demanded access to the computers of a law firm. The court, in allowing such access, explained that raw computer data and electronic documents are discoverable and that electronic discovery raises issues not presented in traditional paper discovery given that "[r]etrieving computer based records or data is not the equivalent of getting the file from a file cabinet or archives." *Id.* at 246 (citations omitted). The *Maura* court explained the difference: "[o]nce a paper document has been destroyed, it cannot be produced. 'Deleted' material is not expunged from a computer's hard drive. 'Deleted' material can be retrieved by a person with sufficient computer savvy...." *Id.* (citing *LIPCO Electrical Corp. v. Action Electrical Cont. Co.*, 798 N.Y.S.2d 345 (N.Y. Sup. Ct. 2004)). The New York court entered a protocol whereby an expert was retained to make a mirror image of the hard drive. Once the responsive documents were identified, the opposing party's counsel could review the documents for privilege and confidentiality.

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<sup>7</sup> See, e.g., *LIPCO Electrical Corp.*, 798 N.Y.S.2d 345 (noting that computer discovery presents issues that are not faced in traditional paper discovery, especially in terms of deleted documents); *Byrne v. Byrne*, 650 N.Y.S.2d 499 (Sup. Ct. Kings County 1996).

**B. The Use of Forensic Specialists is Common, Well-Known, and Widely Accepted in Modern Litigation**

The use of forensic computer experts is common in litigation today,<sup>8</sup> and HFG was not required to provide evidence of this accepted and proven technology. HFG did, however, present the trial court with Burchfield's earlier testimony to the effect that the documents HFG was seeking had been "deleted." (2 R.R. 40) Significantly, courts and commentators have consistently recognized that merely "deleting" a record or hitting the "delete" key on a computer does not erase or permanently remove a document from a computer hard drive. As famously explained by the *Zubulake* court:

The term "deleted" is sticky in the context of electronic data. "Deleting" a file does not actually erase that data from the computer's storage devices. Rather, it simply finds the data's entry in the disk directory and changes it to a "not used" status – thus permitting the computer to write over the "deleted data." Until the computer writes over the "deleted" data, however, it may be recovered by searching the disk itself rather than the disk's directory. Accordingly, many files are recoverable long after they have been deleted – even if neither the computer user nor the computer itself is aware of their existence. Such data is referred to as "residual data."

*Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 313 n.19 (S.D.N.Y. 2003). Decisions from other courts agree with the rationale in *Zubulake* and underscore the fact that deleted data is not really "deleted;" instead, it resides on a computer's hard drive as so-called "residual data." Numerous courts also have held that this deleted, residual data is discoverable, and have recognized that computer experts can retrieve this data through

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<sup>8</sup> This point was, as noted above, volunteered by Weekley's counsel during the First Motion to Compel hearing. (2 R.R.9)

the use of forensic imaging. *See, e.g., Rowe Entm't, Inc.* 205 F.R.D. at 427, 431 (stating that "electronic documents are no less subject to disclosure than paper records" and only questioning who should bear the cost of such discovery..."); *Simon Property Group*, 194 F.R.D. 639 at 640 ("First, computer records, including records that have been 'deleted,' are documents discoverable...."). These courts have granted a party access to the opponent's computers through procedures either identical or similar to that employed in the Order, and the use of a forensic computer specialist is widely accepted and typically required in order to retrieve such documents. *Id.*; *see also Ameriwood Industries, Inc.*, 2006 U.S. Dist. LEXIS 93380 at \*13; *LIPCO Electrical Corp.*, 798 N.Y.S.2d 345.

Likewise, the leading treatises have explained that so-called "deleted" documents are not permanently removed from a computer hard drive. For example, Moore's Federal Practice explains:

Electronically stored information is constantly revised, edited, and ostensibly discarded by clicking on the computer's delete button. However, the deletion process does not permanently or completely destroy a document. The name of the file is removed from the computer's directory, or index. The file remains within the computer as a magnetic image, until it is overwritten by a new file. Deleted data is also referred to as "residual data."

7 JAMES WM. MOORE ET AL, MOORE'S FEDERAL PRACTICE, §37A.03 (3d ed. 2008).<sup>9</sup>

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<sup>9</sup> *See also* ANDREW E. WESTLEY 2-24 FEDERAL LITIGATION GUIDE § 24.02 (2008) ("Computerized data and documents are constantly received, edited, and ostensibly discarded by deletion. However, the deletion process does not permanently or completely destroy a computer file. Rather, the file remains within the computer as residual data on existing 'free space...." "[E]xpert technicians are generally required to recover deleted computer files without compromising any information on the computer.").

It is with this backdrop and common understanding that HFG filed the Motion. While Weekley has contended that HFG failed to produce evidence that the use of a forensic expert would actually succeed in retrieving the missing documents, the same process set out in the Order has been accepted by and used in several courts throughout the country. *See* section I.A, *supra*. Courts consistently acknowledge the modern reality that forensic computer specialists and software make possible the recovery of previously-deleted information. Indeed, the use of these resources is common in litigation today, and HFG was not required to introduce independent evidence that this proven and accepted technology is effective. *See, e.g., Cenveo Corp.*, 2007 U.S. Dist. LEXIS 8281 (noting that "[s]everal prior cases have allowed the digital imaging of a hard drive in the presence of an opponent's digital forensics expert.").

**C. HFG's Motion was Filed as a Result of the Discrepancies and Inconsistencies in Weekley's Production as Established by the Evidence**

Numerous courts have ruled that inconsistencies and discrepancies in a party's production warrant the granting of access to that party's computers so as to allow discovery to proceed. *See Simon Property Group, L.P.*, 194 F.R.D. at 641 (allowing requesting party to mirror image opponent's computers where there were "troubling discrepancies with respect to defendant's document production"); *Ameriwood Industries, Inc.*, 2006 U.S. Dist. LEXIS 93380 at \*13 ("discrepancies or inconsistencies in the responding party's discovery responses may justify a party's request to allow an expert to create and examine a mirror image of a hard drive").

The Motion was not based on mere skepticism or frustration as alleged in Weekley's Brief; rather, the troubling gaps, discrepancies, and inconsistencies in Weekley's production led to HFG's seeking limited access to the four Weekley employees' computers. As explained above, Weekley produced a mere 30 emails from the email account of Rice (who was in charge of Weekley's Dallas operations), and one email in the aggregate from the email accounts of Vastano, Thomson, and Bailey, all key members of Weekley's Dallas team. These former employees were responsible for the day-to-day management of Weekley's operations in the Subdivision. Despite these levels of heavy involvement and participation, only a small handful of documents from those four employees (and absolutely no emails from two of the former employees) were produced. Weekley unquestionably learned from its engineering consultants in 2004 that the Subdivision contained 21 unsafe lots, which required Weekley to spend \$92,000 on remedial measures; nevertheless, it produced only a single email mentioning the Slope Stability Analysis and no documents discussing the remedial measures that were implemented in an effort to correct these hazards.

The evidence presented to the trial court was clear – the four Weekley employees identified in the Motion had and used email accounts in the performance of their jobs. Furthermore, the existence of 21 unsafe lots required expensive remedial measures to be put in place. Notwithstanding these facts, Weekley produced virtually no documents in response to the document requests seeking this information. Instead, Weekley representatives testified that the emails that HFG is seeking were deleted, thus no longer available. (2 R.R. 39-40) As explained above, deleted emails are not destroyed. *See*

section I.B, *supra*. The deleted documents should still be on the hard drives, and, as the overwhelming majority of courts have held, such deleted documents are discoverable. *See id.*<sup>10</sup>

**D. The Motion is Nothing New; it Simply was a Motion to Compel**

Weekley attempts to focus the Court's attention on the nomenclature of the Motion. Specifically, Weekley contends that HFG has crafted a "new" form of discovery that is not expressly permitted by the Texas Rules of Civil Procedure. However, the name of a motion is not controlling, as courts look to the substance of a motion rather than to its title in determining the nature of relief or action sought by a party. *See* TEX. R. CIV. P. 71; *State Bar v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980) ("We look to the substance of a plea for relief to determine the nature of the pleading, not merely at the form of title given to it."); *Gallien v. Washington Mutual Home Loans, Inc.*, 209 S.W.3d 856, 861 n.6 (Tex. App.–Texarkana 2006, no pet.). Regardless of its title, the Motion was, for all intents and purposes, a motion to compel and was treated as such during the hearing.

In filing the Motion, HFG simply followed the procedures and protocols that had been employed by other courts facing discrepancies and inconsistencies in a party's production, and moved the trial court to implement those processes in this case. As did

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<sup>10</sup> Generally, the contested issues in cases involving requested access to an opposing party's computer medium do not question whether it is permissible to do so or whether the deleted documents are discoverable; rather, the focus in those cases is usually on who should pay for the procedure. *See, e.g., Rowe Entm't, Inc.*, 205 F.R.D. at 428-432. That issue is not present here as HFG has agreed to (and, in fact, has been ordered to) pay for the costs of the forensic expert and the forensic imaging.

parties facing identical issues in other courts (in which the parties generally filed a motion to compel seeking this very relief), HFG filed its Motion in an effort to obtain an order compelling Weekley to produce documents by providing access to four hard drives. *See Simon Property Group, L.P.*, 194 F.R.D. at 139 (filing motion to compel after noting troubling discrepancies in production); *Ameriwood*, 2006 U.S. Dist. LEXIS 93380 at \*2 (filing motion to compel to gain access to opposing party's computers after noting discrepancies and inconsistencies in production); *Cenveo Corp.*, 2007 U.S. Dist. LEXIS 8281 at \*1 (filing motion to compel to gain access to opposing party's computers); *Easton Sports, Inc.*, 2005 U.S. Dist. LEXIS 37051 at \*1 (filing motion to compel and motion for inspection of computers); *LIPCO Electrical Corp.*, 798 N.Y.S.2d 345 (filing motion to compel to gain access to computer of opponent). The relief HFG sought in the Motion was consistent with that obtained by movants in these other cases – namely the right to image the computers of the responding party so as to retrieve documents that otherwise would be unavailable by utilizing a detailed protocol that provides ample protection to the producing party. As such, there was nothing new, novel, or unique about the Motion – HFG simply followed the same process and sought the same relief that multiple courts across the country have granted in similar situations. *See, e.g., Cenveo Corp.*, 2007 U.S. Dist. LEXIS 8281 at \*5.

Although Weekley erroneously contends that HFG did not provide evidence to support the Motion, there is no requirement for the introduction of evidence at a hearing

or a motion to compel.<sup>11</sup> It is well recognized that in motion to compel hearings, a court may base its decision solely on lawyer arguments. *El Centro Del Barrio, Inc. v. Barlow*, 894 S.W.2d 775 (Tex. App.–San Antonio 1994, no writ) (noting that no evidence was presented by either side at the motion to compel hearing where the motion to compel had been granted and denying petition for mandamus); *Van Ens v. Frazier*, 230 S.W.3d 770, 777-78 (Tex. App. Waco 2007, pet. denied) (noting that trial court had granted motion to compel and imposition of sanctions based on argument of counsel).

Although the Motion was nothing more than a motion to compel that did not require a showing of good cause or the admission of evidence, HFG did, in fact, present significant evidence and established good cause sufficient to justify the granting of the Order. After all, HFG had been seeking the requested discovery for more than 21 months at the time of the August 8 hearing. Prior to the filing of the Motion, HFG had filed the First Motion to Compel which identified serious shortcomings in Weekley's production, including missing emails from key employees and virtually no documents relating to the

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<sup>11</sup> At the hearings on the Motion, HFG introduced five exhibits (2 R.R. Exhs. 1-5) read the testimony from Burchfield into the record (2 R.R. 32-40), and offered evidence of the lack of production of emails from two key employees, and the production of one email from another employee, (2 R.R. 56-57).

Slope Stability Analysis.<sup>12</sup> (C.R. 304) During the First Motion to Compel hearings, Burchfield testified that the emails that HFG was seeking had been deleted and that there were no back up tapes containing this information. (2 R.R. 39-40) Weekley took the position at those hearings that it should not be compelled to produce documents that it claimed no longer existed, and after the court denied the First Motion to Compel, HFG filed the Motion.

HFG provided the trial court with good cause to enter the Order by showing that it had requested these documents which were critical to its claims against Weekley, that essential documents had not been produced, that emails had been deleted from the inboxes, that there were no back up tapes available, and that the only place where these documents could be located was on the individual hard drives. (2 R.R. 41) HFG also established that the emails and other documents that it has been seeking are critical to its claims of fraud, statutory fraud, fraud by non-disclosure, and negligent misrepresentation as they directly relate to Weekley's knowledge of events and conditions at the time it made its representations to HFG in the Estoppel Certificate. (2 R.R. 42-44) The evidence showed that the requested emails had been deleted; however, the documents HFG is seeking should, as explained above, still be on the hard drives, are discoverable, and are retrievable by forensic computing experts employing the process outlined in the Order. *Id.* To allow the outcome of a lawsuit to hinge on the deletion of emails, ostensibly making them forever unavailable, would turn litigation into a game of cat-and-

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<sup>12</sup> Weekley erroneously contends that HFG had not prosecuted any motion to compel. (Petition for Writ of Mandamus at 2).

computer-mouse in which the evidence at trial is dictated by a person's willingness to click on a delete button. That would not be consistent with the TRCP's aim of allowing a case to be decided on what is revealed rather than what is concealed. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998). There was, therefore, ample evidence to support and good cause for the trial court's entry of the Order.

Furthermore, following the entry of the Order on August 25, 2008, Weekley informed HFG that it had found several emails from Vastano's email account which had been stored on Rice's network drive. Weekley thereupon produced almost 200 pages of emails from Vastano's email account that were directly responsive to HFG's discovery requests (including emails relating to the slopes of the lots, the Slope Stability Analysis, and the construction of retaining walls). Consequently, the gaps in Weekley's production that HFG identified for the trial court were real, not imaginary, and this subsequent production establishes that there were documents in Weekley's possession, custody, and control that had not been produced at the time of the August hearings. Even today, Weekley has produced only one email from the account of Bailey, and no emails from the account of Thomson. Thus, the same problems in Weekley's production that HFG has repeatedly identified continue, and the well-accepted protocol set forth in the Order would allow these shortcomings to be addressed.

**E. HFG Complied with the TRCP and Used Permissible Discovery Forms in Attempting to Uncover the Facts of This Case**

The TRCP require a person to produce a document or tangible thing that is within a person's "possession, custody, or control." TEX. R. CIV. P. 192.3(b). HFG requested, in

accordance with Rule 196.1 of the TRCP, multiple categories of documents, including emails from Rice, Bailey, Thomson, and Vastano, yet the evidence established that HFG did not receive all of the documents requested.<sup>13</sup> Furthermore, the deleted and archived emails, attachments, and related documents are within Weekley's possession, custody, or control, and courts have found such documents to be discoverable. *Id.* During the hearings on the Motion, HFG presented the Court with abundant case law from Texas and other jurisdictions addressing the relief HFG was seeking and the process HFG had proposed. The Order provides a safeguarded mechanism that allows for the retrieval and production of such deleted emails and is based on the exact process adopted by various courts. The trial court followed the TRCP and numerous cited case authorities in entering the Order.

Weekley contends that HFG is employing a form of discovery not contemplated or allowed by the TRCP; this argument ignores the TRCP and the evidence presented to the trial court. That is, in its three sets of production requests, HFG specifically sought documents, including emails, to and from certain Weekley employees, including the four individuals identified in the Motion. (2 R.R. Exh. 1, 3-4). HFG is merely trying to obtain, once and for all, the documents it has repeatedly requested by utilizing the discovery tools in the TRCP.

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<sup>13</sup> See *Zubulake*, 217 F.R.D. 309 at 316-17 (deleted data may be recovered by searching the disk itself rather than the disk directory, and many files are recoverable long after they are deleted even if neither the user nor the computer, itself, is aware of their existence); see also *Simon Property Group*, 194 F.R.D. at 640 (computer records, including records that have been deleted are discoverable documents); *In the Matter of the Estate of John B. Maura*, 842 N.Y.S.2d 851.

HFG, in accordance with Rule 196.1, requested that Weekley produce the documents as they are maintained in the ordinary course of business.<sup>14</sup> (2 R.R. Exhs. 1, 3-4) HFG also expressly included "emails" within its definition of "Document," and specifically requested "emails" in the text of its requests for production, including expressly requesting emails sent to or received by Vastano, Thomson, Bailey, and Rice. *Id.*; see also *In re CI Host, Inc.*, 92 S.W.3d 514 (Tex. 2002) (allowing the discovery of computer back up tapes following an initial request for same). At the time it served its requests, HFG had no way of knowing how Weekley stored its emails – whether they were still in the various email inboxes, were archived, were on back up tapes, or had been printed out – and drafted its instructions and definitions accordingly. Weekley did ultimately produce a smattering of emails from a few employees, and prior testimony from Burchfield establishes that he worked with Weekley's in-house computer team to search for the requested emails. (2 R.R. 40). Still, huge gaps remained; hence the filing of the Motion. Furthermore, in its responses, Weekley never objected to the requests for the production of emails. Instead, it searched its electronic system for responsive documents, and it claims to have produced the emails that were stored electronically. (2 R.R. 37-40)

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<sup>14</sup> Weekley argues, mistakenly, that HFG failed to comply with Rule 196.4 of the TRCP. (Pet. at 5-6). The Motion was not, however, an effort by HFG to obtain, under Rule 196.4, electronic data and compilations, such as spreadsheets or statistics; instead, the Motion sought the production of documents, including emails, that had long been requested. Moreover, there is no reference to Rule 196.4 in *Honza*. See generally, *Honza*, 242 S.W.3d 578.

**F. The Proposed Forensic Expert is Not HFG's Agent; Rather it is a Neutral, Independent Expert**

PriceWaterhouseCoopers ("PWC"), the forensic specialist named in the Order, is neither HFG's expert nor its agent, as Weekley contends. Accordingly, Weekley is not being required to allow HFG's agent to rummage through its files; instead, the exact opposite is true. In seeking limited access to four of Weekley's computers, HFG followed the process employed by several courts, and, in accordance with that protocol, suggested an expert that was capable of performing the forensic computing services that would be required to retrieve the deleted emails. As HFG explained at the hearings and as established by the resumes of the proposed experts that were attached to the Motion, PWC is qualified to make forensic images of the hard drives and to perform the searches. HFG also agreed to pay, and was in turn ordered to pay, the costs associated with the creation of the forensic images, including PWC's fees.

Despite HFG's suggestion of PWC and agreement to pay for its services, PWC would be an independent, neutral expert. In the many cases addressing this issue, courts have allowed the requesting party to select the forensic expert, who then was required to work under a protective order to prevent the disclosure of any information to the requesting party (including confidential and privileged documents). *See, e.g., Rowe Entm't Inc.*, 205 F.R.D. at 433 (S.D.N.Y. 2002) (allowing requesting party to identify expert); *Ameriwood Industries, Inc.*, 2006 U.S. Dist. LEXIS 93380 at 16-17; *Experian Information Solutions, Inc. v. I-Centrix, L.L.C.*, No. 04 C 4437, 2005 U.S. Dist. LEXIS 42868 \*6 (N.D. Ill. July 21, 2005) (allowing requesting party to identify an "independent

expert" to prepare a "bitstream" of the producing party's computers); *Easton Sports, Inc.*, 2005 U.S. Dist. LEXIS 37051 at \*3 (allowing requesting party to select the expert); *Cenveo Corp.*, 2007 U.S. Dist. LEXIS 8281 at \*58 (allowing requesting party to select computer expert who had to abide by the protective order in place); *Simon Property Group, Ltd.*, 194 F.R.D. at 641 (same); *Honza*, 242 S.W.3d at 582 (allowing requesting party to select expert to image opposing party's computers subject to terms of a protective order). In each of these cases, the requesting party selected the expert; however, none of the courts found that the forensic expert was acting as the requesting party's agent or expert. Instead, the experts simply were selected and paid for by the requesting party, and the experts acted pursuant to protective orders put into place by the respective courts to prevent the disclosure of the documents. *Id.* These measures were found sufficient to protect privileged, private, irrelevant, or confidential information to the requesting party.

Consistent with these cases, the Order takes multiple steps to ensure that PWC is acting independently and not as the agent or expert of HFG, and Weekley's contentions to the contrary are lacking in merit. The Order expressly preserves any privileged or confidential information, appoints PWC as the neutral, independent forensic expert, and imposes strict limitations on PWC's handling of the imaged hard drives. Specifically, the Order provides that:

- Weekley, not HFG or the forensic expert, will review any extracted documents, determine which documents are relevant, and make any assertions of privilege; (C.R. 44)
- any observation of information that is privileged or confidential is not a waiver of an otherwise valid privilege or right of confidentiality (C.R. 45); and

- the forensic expert shall not disclose or reveal to anyone the nature or content of any documents or information observed during the process of examining the hard drives, and all persons participating in the review process must execute a copy of an acknowledgment prohibiting the unauthorized disclosure of information. (*Id.* 45-46)

These same protections have been found to be sufficient to prohibit the unauthorized disclosure of protected information. *See, e.g., Honza*, 242 S.W.3d at 583; *Rowe Entm't, Inc.*, 205 F.R.D. at 421; *The Antioch Co.*, 210 F.R.D. at 653-54 (implementing same protections when granting requesting party access to opponent's computers).

Despite the substantial protections afforded to Weekley and the magnitude of precedent allowing the requesting party to select the forensic expert, Weekley would have the Court believe that PWC (one of the world's leading consulting firms) is going to open every document contained on the four hard drives, read every word, and then provide HFG with either copies of or a detailed report on what was uncovered. This depiction mischaracterizes the Order. Instead, the Order expressly prohibits the production of documents by PWC to HFG and eliminates any concern Weekley might have. HFG will never see or have any direct access to any of the documents extracted from the hard drives, other than those Weekley decides to produce. As such, Weekley's concerns about being forced to produce personal information of its employees is also misleading, as Weekley will have the chance to review any extracted documents prior to producing a single page to HFG. As part of this process, Weekley will make the determination of relevance and produce only relevant documents. *See C.R.* 42-45. Emails that are not relevant, such as personal emails relating to a "defective heart valve",

do not have to be produced. HFG has not requested (and Weekley has not been ordered to produce) irrelevant documents.

Finally, Weekley has never objected to the use of PWC as a forensic expert and has not challenged PWC's ability to perform the forensic imaging; rather Weekley only has objected to the process itself. *See generally* R.R. If Weekley had made an objection to PWC's serving as the independent expert, then the court could have appointed a different expert. For example, the trial court initially named Peter Vogel to serve as the forensic expert in this case; however, Weekley objected to Mr. Vogel on conflict of interest grounds. However, at the hearing on August 25, 2008, Weekley's counsel offered no objection regarding the Court's naming PWC as the forensic expert. *See generally* 3 R.R.

Accordingly, PWC is not HFG's expert or agent. PWC is an independent expert named by the trial court in the Order and bound by the strict terms and conditions of the Order. This process is consistent with the decisions and processes implemented by courts in Texas and other jurisdictions, and it was not an abuse of the trial court's discretion to implement this same process here.

**G. The Order Does Not Constitute a Fishing Expedition or Cause a Waiver of Privilege**

The process set forth in the Order does not constitute a fishing expedition as contended by Weekley. HFG has limited the forensic examination to 21 search terms, has confined the searches to a single calendar year, and has limited the forensic imaging to four individuals' hard drives in an effort to minimize the documents to be reviewed.

Furthermore, during the multiple hearings on the Motion, HFG explained the relevance of the proposed search terms and then linked those terms to its claims against Weekley. (2 R.R. 42-44, Exh. 5). While Weekley argues that the search terms included in the Order are too broad and will lead to the review of irrelevant documents, the use of such search procedures is widely accepted in courts. *See, e.g., Rowe Entm't Inc.*, 205 F.R.D. at 432; *The Antioch Co.*, 210 F.R.D. at 653-54.

The process required by the Order allows a much smaller universe of documents to be reviewed by Weekley's counsel than what other courts have ordered in that there is a limit on the number of search terms, the number of computers to be searched, and the relevant time frame (as opposed to requiring the review of all documents retrieved from the four hard drives). *See, e.g., Simon Property Group, L.P.*, 194 F.R.D. at 641 (requiring forensic expert to provide "all word processing documents, electronic mail messages, PowerPoint or similar presentations, spreadsheets, and similar documents"); *Cenveo Corp.*, 2007 U.S. Dist. LEXIS 8281 at \*7 (requiring requesting party's expert to deliver "all documents, email messages, PowerPoint or similar presentations, spreadsheets and other files, including 'deleted' files"); *Easton Sports, Inc.*, 2005 U.S. Dist. LEXIS 37051 at \*3 (requiring expert to provide and opposing party to review "all available word processing documents, electronic mail messages, PowerPoint or similar presentations, spreadsheets, and other files"). Furthermore, absent the use of search terms, Weekley would have had to review all of the documents, including irrelevant documents, personal documents, and relevant documents to determine which documents were relevant and which documents to produce. That is simply the way discovery works.

Thus, HFG established that the information it is seeking is relevant (and critical) to the litigation and responsive to its document requests, and HFG took aggressive steps to limit the number of documents that would have to be reviewed by Weekley's attorneys.

**II. ISSUE NO. 2: The Order does not require Weekley to produce irrelevant, privileged, confidential, or personal documents to HFG. The exact opposite is true as Weekley, alone, makes the decision of which documents to produce. To the extent that Weekley withholds any documents on the grounds of privilege, then it must provide a privilege log of the withheld privileged documents in accordance with the Texas Rules of Civil Procedure. This procedure as set forth in the Order was not an abuse of the trial court's discretion.**

**A. No Production of Irrelevant and Privileged Material is Required**

The Order does not require the production of irrelevant or privileged material. The opposite is true as the Order only requires Weekley to produce relevant, non-privileged documents. Although not explicitly stated in its Brief, Weekley seems to be equating the copying of four hard drives by PWC to producing documents directly to HFG. *See* Brief at 18. First, PWC is a neutral, independent expert, and it is not HFG's agent or HFG's expert. *See* section I.F, *supra*. The idea that allowing a neutral expert appointed by the trial court to image four hard drives is the same as producing documents to an opposing party is without basis and stands in stark contrast to the multitude of courts that have ordered this exact process. *Id.* Second, Weekley, not PWC or HFG, will decide which documents to produce to HFG. Finally, Weekley's reliance on *Texaco, Inc. v. Dominguez*, 812 S.W.2d 451 (Tex. App. – San Antonio 1991, no writ) is misplaced. In the *Dominguez* case, the requesting party sought to personally go through the files of the

party opposing discovery. *Id.* at 455-56.<sup>15</sup> Here, HFG has not requested and, under the terms of the Order, will not have access to any of the documents retrieved from the hard drives, except for those that Weekley chooses to produce. (C.R. 42-45)

**B. The Privilege Log Procedure is Proper and Only Requires Compliance with Rule 193.3**

Weekley has mischaracterized the nature of the privilege log required under the Order. Paragraph 5 of the Order states in part:

[Weekley] shall have the right to review the Extracted Data and designate which documents or information such party claims are not relevant, not discoverable, or subject to any claim of privilege or immunity from which they are withheld under such claims, identifying such withheld documents by page identification number, directory and subdirectory identification, statement of claimed privilege or immunity from discovery, and brief description of the information in question as is required by the Tex. R. Civ. Pro. 193.3.

(C.R. at 43)<sup>16</sup> The Order calls for the production of a privilege log in accordance with Rule 193.3 of the TRCP, and, consistent with that rule, it requires Weekley to identify the privilege or immunity that is claimed. *Id.* Any determination that a document is not relevant or responsive is not an assertion of privilege or immunity, and the plain language of the Order contemplated only the listing of privileged materials on the privilege log.

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<sup>15</sup> Weekley cites to the case of *Menke v. Broward County School Board*, 2005 WL 2373923, \*4 (Fla. 4<sup>th</sup> DCA Sept. 28, 2005) for the proposition that the cases "permitting access to another party's computer, *all* have been in situations where evidence of intentional deletion of data was present." *See* Brief at 12. The Florida court, however, was incorrect in this assertion. At the time *Menke* was decided, several cases had permitted a requesting party to have access to the opposing party's computers for reasons other than the intentional deletion of data. *See, e.g., Rowe Entm't, Inc.* 205 F.R.D. at 428-29; *LIPCO Electrical Corp.*, 798 N.Y.S.2d at \*6-\*8.

<sup>16</sup> The *Honza* court's order contained the identical provision requiring the producing party to provide a privilege log covering the items it claimed to be privileged. *Honza*, 242 S.W.3d at 583.

Weekley's erroneous characterization of the Order also ignores the trial court's explanation of the Order, wherein the judge stated "[a]nd that any documents produced will be tendered to [Weekley] for [Weekley] to go through and make a privilege log and determine what documents that [Weekley] feel[s] are relevant to the case. And that you will make a log as to any privileges." (2 R.R. 60) (emphasis added). Neither HFG, nor apparently the trial court, expected Weekley to produce a log of documents based on the grounds of relevance.

Likewise, the Order's requirement that the privilege log comply with Rule 193.3 undercuts Weekley's argument regarding its having to disclose documents on a log in contravention of Rule 193.3(c). Specifically, Rule 193.3(c) states:

[A] party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative – (1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the lawyer in the prosecution or defense of a specific claim in which discovery is requested, and (2) concerning the litigation in which the discovery is requested.

*See* TEX. R. CIV. P. 193.3(c)(1), (c)(2). Under the Order, PWC will use the search terms to seek documents created during the calendar year 2004 only. HFG did not file suit until 2006 and did not add Weekley as a party until 2007. The protections of Rule 193.3(c) extend only to communications to or from a lawyer or lawyer's representative if they are created in connection with the litigation in which they were requested. *Id.* Given the limited one-year time period for the documents (2004) as compared to when HFG named Weekley as a party (2007), there should be no privileged documents that would require

the protections of Rule 193.3(c). Therefore, any concerns relating to Rule 193.3(c) are unfounded. However, on the off chance that Weekley did somehow anticipate litigation in 2004 (approximately three years prior to being named as a party), then neither the Order nor HFG would require Weekley to produce documents protected by Rule 193.3(c).<sup>17</sup>

The Order merely requires that any privilege log be created in accordance with Rule 193.3...nothing more, nothing less, and it does not represent an abuse of the trial court's discretion.

**III. ISSUE NO. 3: Weekley has failed to meet its burden of proving that it has no adequate remedy at law. The Order does not require Weekley to produce irrelevant, confidential, personal, or privileged documents; the Order only requires Weekley to comply with its discovery obligations by reviewing documents and producing those that Weekley determines are relevant, non-privileged, and responsive to HFG's discovery requests.**

To prove that its existing remedies are inadequate, a relator must establish that it is "in danger of permanently losing substantial rights." *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 306 (Tex. 1991). Weekley has offered no statement or argument explaining why there is no adequate remedy at law. Instead, Weekley attempts to meet this burden by alleging that the Order "compels the production of irrelevant, privileged, and confidential documents to HFG's experts and then, adding insult to injury requires Weekley to sort through all of the documents found ... regardless of relevance, and then

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<sup>17</sup> If Weekley anticipated litigation in 2004, a host of issues relating to Weekley's knowledge of problems in the Subdivision at that time would be presented, and it would raise concerns regarding Weekley's failure to preserve documents, including emails, once it reasonably anticipated litigation.

requires Weekley to list in detail each document it concludes is not relevant." Brief at 24. However, the Order does not require the production of privileged documents, and it does not mandate Weekley to produce irrelevant or confidential materials to HFG. *See generally* section I, *supra*; *see also* C.R. 42-45. As explained above, Weekley is only required to allow an independent, neutral expert to image four hard drives, and then the independent expert appointed by the trial court will provide Weekley with any documents that contain one or more of the 21 search terms that are relevant to HFG's claims against Weekley. As was the case with other courts facing this issue, Weekley will then have the opportunity to review the retrieved documents, and Weekley, not HFG or PWC, will decide which documents are to be produced. Despite the protests Weekley has offered, the Order does not require the production of irrelevant, privileged, or confidential information, and it does not require overbroad discovery. *See id.*

The Order contains detailed protections which have been approved by courts across the country addressing this same issue which are designed to prohibit any unauthorized disclosure of privileged or confidential information. *Id.*; *see also* C.R. 42-45. Similarly, the Order only requires Weekley to produce a privilege log in accordance with Rule 193.3 of the TRCP, and it does not require Weekley to list in detail each document it concludes is not relevant. *See* section II. B, *supra*.

Weekley's alleged fear that it will be injured because it will have to review documents that contain one or more of the 21 search terms is equally without merit. As the producing party, Weekley would invariably have the responsibility to review a given universe of documents and to make the necessary determinations of privilege,

responsiveness, and relevance. That is how discovery always unfolds, and having to engage in that process does not constitute a loss of any permanent rights. Weekley has failed to show that any substantial right will be lost if mandamus review is denied; thus, Weekley has not proved that it has no adequate remedy at law.

### **CONCLUSION AND PRAYER**

The trial court did not abuse its discretion by entering the Order. HFG followed the Texas Rules of Civil Procedure, Texas case law, and precedent from across the country in seeking the relief granted by the Order. The Motion was not a new discovery tool as alleged; rather it sought to compel, and laid out a mechanism for, the production of documents that HFG had been requesting for almost two years. The process set forth in the Order is common, widely-accepted, and well-founded, especially given that Weekley, after presenting evidence to the effect that all responsive documents had been produced, subsequently found and produced almost 200 pages of emails from a former employee's email account. The same troubling discrepancies and inconsistencies in Weekley's production still persist, and absent allowing the processes set out in the Order to move forward, the underlying litigation may well be decided on the facts that are not revealed. HFG, therefore, respectfully requests that this Court deny Relator's Petition for Writ of Mandamus, and it additionally prays for all further and other relief, in law or in equity, to which it may be justly entitled.

Respectfully submitted,

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**VERIFICATION**

STATE OF TEXAS                   §  
  §  
COUNTY OF DALLAS           §

Before me, the undersigned authority, on this day personally appeared Christopher H. Rentzel, the person whose name is subscribed below and who, upon his oath and based on personal knowledge stated (i) he is the attorney of record for the Real Party in Interest in this proceeding and in the underlying case; (ii) as a result of his position as counsel for the Real Party in Interest in the underlying case and through his participation in the proceedings leading to the signing of the order at issue in this proceeding, he is personally familiar with the facts giving rise to this proceeding; (iii) the facts stated in this Response Brief on the Merits (the "Response") are true and correct; and (iv) the documents in both the appendix and the record submitted with this Response are true and correct copies of the original documents.

s/Christopher H. Rentzel  
Christopher H. Rentzel

SUBSCRIBED AND SWORN TO BEFORE ME by Christopher H. Rentzel, on this 5<sup>th</sup> day of January, 2009, to certify which, witness my hand and seal of office.

\_\_\_\_\_  
Notary Public, State of Texas

**CERTIFICATE OF SERVICE**

Pursuant to the Texas Rules of Appellant Procedure, the undersigned hereby certifies that on the 5<sup>th</sup> day of January, 2009, a true and correct copy of the foregoing is being served via Federal Express on:

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