In related cases M.A. v. Wyndham Hotels & Resorts, Inc., and H.H. v. G6 Hospitality LLC, 2020 WL 1983069 (S.D. Ohio Apr. 27, 2020), Chief District Judge Algenon Marbley ordered the parties to use defendants' suggested confidentiality language, rejected plaintiffs' efforts to require defendants to preserve file types such as backup data and server logs, and allowed plaintiffs to pursue Fed. R. Civ. P. 30(b)(6) depositions to determine the file types that required preservation.

In March 2019, plaintiffs filed complaints against various hotel locations and their parent companies alleging civil violations of the Trafficking Victims Protection Reauthorization Act. Id. at *1. On April 18, 2019, after discovery had commenced, plaintiffs sent preservation letters to the defendants requesting that they place litigation holds on potentially discoverable ESI. On September 10, 2019, the parties moved to enter orders regarding confidentiality and discovery of ESI.

Because the parties were unable to agree on terms regarding the use of confidential and highly confidential documents during depositions and certain excluded file types from the defendants' obligations to preserve potentially discoverable information, the magistrate judge scheduled a series of telephonic conferences to promote resolution. At an October 7, 2019, conference, the magistrate judge issued an oral ruling denying a request that some of the defendants preserve certain temporary internet data. On October 21, 2019, the plaintiffs filed objections to this ruling, which the district court overruled on March 25, 2020.

On October 18, 2019, the magistrate judge held another telephonic status conference, during which she rejected the plaintiffs' proposed language regarding "the use of confidential information in depositions and other excluded ESI file types from preservation." On November 2, 2019, the plaintiffs filed objections to aspects of the magistrate judge's October 18 order, which the parties briefed.

On the issue of confidentiality, the district judge adopted the magistrate judge's ruling. Id. *3. At the status conference, the magistrate judge accepted the defendants' proposal requiring deponents to sign an acknowledgement before being shown documents designated as "confidential." She similarly accepted the defendants' proposed language for "highly confidential" information, which limited showing this information to employees, former employees, and contractors to address the defendants' concerns about disclosing trade secrets to their competitors. According to the plaintiffs, these restrictions would "hinder the Parties' collective ability to effectively and meaningfully complete depositions." Specifically, the plaintiffs argued that they wanted to depose other guests of the hotels and the trafficker regarding defendants' adherence to various hotel procedures, the known risks of sex trafficking in the hospitality industry, and prevention measures the defendants failed to disclose to staff and guests. The plaintiffs further argued that these depositions would "likely require the Plaintiff to show the respective Defendants' policies and procedures and guest safety protocols to witnesses who are not employed by an entity affiliated with the designating party."

With respect to the defendants' proposal to require deponents to sign an acknowledgement, District Judge Marbley noted that he had approved similar language in other cases and that "[o]ther than speculative assertions that such a process would hinder their ability to conduct depositions, Plaintiffs provide no support for their claim that requiring deponents to sign a confidentiality acknowledgement is contrary to law." On the limits regarding "highly confidential" information,

the district judge focused on the magistrate judge's conclusion that "we do need to protect the intellectual property of the defendants in the course of this multiple-defendant case." Indeed, Rule 26(c) specifically contemplates protective orders "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way." District Judge Marbley therefore overruled the plaintiffs' objections and adopted the magistrate judge's ruling on the confidentiality issues. Id. at *4.

On the issue of exclusion of certain file types from preservation requirements, the district judge began by explaining that courts in the Sixth Circuit have relied on the Sedona Principles to inform their analysis of ESI discovery requests. Like Rule 26 itself, the Sedona Principles emphasize that proportionality should guide the scope of ESI discovery. The plaintiffs objected to the magistrate judge's ruling accepting the defendants' proposal to exclude certain file types from the defendants' obligations to preserve ESI including (1) data maintained in electronic backup systems; (2) server, system, and backup logs; and (3) calendar entries and contacts from mobile devices. In response, the defendants contended that the magistrate judge's order accepting these excluded file types is not contrary to law and follows models from other jurisdictions. The defendants also argued that the plaintiffs waived objections at least to backup data and cell phone data because they agreed to the language during the status conference.

The district judge concluded that the plaintiffs' objections lacked merit. In particular, the status conference transcript reflected that the plaintiffs were largely in agreement with the magistrate judge's oral rulings on the ESI discovery issues. For example, the proposed language, with respect to excluded file types, was based on standard language of another court and only excluded backup data that was "substantially duplicative" of data more accessible elsewhere, and this language was approved by both parties at the conference after the word "substantially" was deleted. Id. at *5. Even if there was an issue as to the agreement, the district judge found that the ruling excluding certain file types from preservation was not clearly erroneous or contrary to law, and the approach taken by the magistrate judge was supported by the Sedona Principles.

As a final matter, the plaintiffs requested that District Judge Marbley allow Rule 30(b)(6) depositions to proceed to assist the parties to determine, through factual inquiry, what file types do and do not exist and what file types do and do not need to be preserved as potentially discoverable information. The magistrate judge had disallowed this request, stating it was too early to allow "discovery on discovery." District Judge Marbley ruled in favor of the plaintiffs' request to proceed with Rule 30(b)(6) depositions. The district judge noted that he had permitted depositions regarding the adequacy and scope of document production in other cases, that the magistrate judge gave no legal basis for rejecting the plaintiffs' proposal other than her opinion that it was "too early" to proceed with such depositions, that such depositions did not amount to "discovery on discovery," that the scope of discovery is "traditionally quite broad," and that plaintiffs' contentions regarding the purpose of the proposed Rule 30(b)(6) depositions demonstrated "a need for such discovery in order to prosecute their case." Accordingly, the district judge sustained the plaintiffs' objection and reversed the portion of the magistrate judge's order prohibiting Rule 30(b)(6) depositions to go forward. Id. at *5-*6.