Electronic Records Management and Discovery

Committee on Issues Affecting Local Government

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Table of Contents

Introduction 1

Chapter 1: Electronically-Stored Information In Litigation: Rules Of Discovery........2

1-1. FEDERAL RULES OF CIVIL PROCEDURE 2

1-1.1. Rule 16(b) Pretrial Conferences-Scheduling and Planning Rule 3

1-1.2. Rule 26(a)(1)(B) General Provisions Regarding Discovery-Initial Disclosures 4

1-1.3. Rule 26(b)(2) General Provisions Regarding Discovery Scope and Limits...4

1-1.4. Rule 26(b)(5) General Provisions Regarding Privilege Claims 5

1-1.5. Rule 26(f) General Provisions Regarding Party Conference........................6

1-1.6. Rule 33(d) Interrogatories: Option to Produce Business Records..............7

1-1.7. Rule 34(a) Production of Documents and Electronically Stored Information: Scope 7

1-1.8. Rule 34(b) Production of Documents and ESI: Procedure...........................8

1-1.9. Rule 37(f) Failure to Disclose: Sanctions Regarding Electronically Stored Information..9

1-1.10. Rule 45 Subpoenas 10

1-2. RULES OF THE SUPREME COURT OF VIRGINIA 10

1-2.1. Rule 4:1 general Provisions Governing Discovery 11

1-2.1. Rule 4:4. Stipulations Regarding Discovery..12

1-2.3. Rule 4:8(f) Interrogatories to Parties – Option to Produce Business Records...12

1-2.4. Rule 4:9. Production by Parties of Documents, Electronically Stored Information, and Things: Entry on Land for Inspection and Other Purposes; Production at Trial 12

1-2.5. Rule 4:9A. Production from Non-Parties of Documents, Electronically Stored Information, and Things and Entry on Land for Inspection and Other Purposes; Production at Trial 13

1-2.6. Rule 4:12 Failure to Make Discovery; Sanctions 14

1-2.7. Rule 4:13. Pretrial Procedure; Formulating Issues 14

Conclusion 14

Chapter 2: Metadata and Electronic Records 15

2-1. METADATA 15

2-1.1. What It is 15

2-1-.2 Its Uses and Hazards 15

2-1.3 Ethical Issues Posed 16

2-1-4. Conclusions and Recommendations 18

2-2 ELECTRONIC RECORDS

2-2.1. Types of Electronic Records 19

2-2.2. Records Retention Requirements 19

2-2.3. Issues Presented by Retention and Disposition Schedules 19

2-2.4. Virginia Legal Ethics Opinion 1818 20

Chapter 3: Litigation Practicalities in the Preservation and Discovery of Electronically Stored Data 21

3-1. PRESERVATION OF DATA OBLIGATION BASED ON KNOWLEDGE OF POTENTIAL CLAIM 21

3-1. THE PRESERVATIN DEMAND LETTER 21

3-2.1. Preservation Letter From Plaintiff 21

3-2.2. Spoliation 22

3-2.3. Your Preservation Letter 22

3-3 DISCOVERY REQUESTS 22

3-3.1. Breadth 22

3-3.2. Consultants 22

3-3.3. Electronically Layered Files 23

3-3.4. Objections to E-Discovery and Privilege Log 23

3-3.5. Rule 26 23

3-3.6. Electronic Data Article 23

APPENDICES

Appendix A: Simple Preservation Letter A-1

Appendix B: "Perfect Preservation Letter" B-1

Appendix C: Motion for Sanctions C-1

Appendix D: Rambus, Inc. v. Infineon Technologies D-1

Appendix E: Discovery Request E-1

Appendix F: Interrogatories and Production Request F-1

Appendix G: 21 Tips for Working with E-Discovery Service Providers G-1

Appendix H: Privileged Document List H-1

Appendix I: Privilege List I-1

Appendix J: Order J-1

Appendix K: Proposed ESI Discovery Plan K-1

INTRODUCTION

In 2008, the LGA standing committee on Issues Affecting Local Government Law was asked by the LGA Board to research and develop a handbook for use of the members on issues regarding electronic records management, with a focus on newly promulgated rules of discovery addressing "electronically stored information" or "ESI".

Committee members comprised:
Jeff Mincks, Chair
Steve MacIsaac, Vice Chair
Cynthia Hudson
Sally Little
Norman Sales
Curt Spears
Liz Whiting

Survey response to an inquiry by Norman Sales suggested that LGA jurisdictions largely have escaped a bruising introduction into the burdens imposed and issues posed in the keeping and production of ESI and a wide disparity in practices regarding electronic records management that may indicate that few local government lawyers have been asked to vet their jurisdiction's policies.

This handbook is divided into three chapters.

Chapter 1 summarizes the purpose and substance of revisions to the Federal Rules of Discovery and Rules of Court of the Virginia Supreme Court.

Chapter 2 explores (i) issues involved in the netherworld of "metadata" in the absence of rules governing practices by members of the Virginia State Bar; (ii) obligations imposed on local governments regarding the retention and disposition of electronic records and legal issues arising therefrom; and (iii) obligations of Virginia lawyers regarding retention of client records.

Chapter 3 focuses on issues related to marshaling, storage and production of electronic records when litigation is expected and in the cauldron of combat.

The Committee was not plowing virgin territory and we commend handouts available on the LGA website from conferences in the Spring of 2006 and Fall of 2007.

Chapter 1

ELECTRONICALLY-STORED INFORMATION IN LITIGATION: RULES OF DISCOVERY

1-1. FEDERAL RULES OF CIVIL PROCEDURE

On April 12, 2006, the United States Supreme Court approved, without comment or dissent, an entire package of proposed amendments to the Federal Rules of Civil Procedure relating to the discovery of "electronically stored information." The package which the Court adopted included revisions and additions to Rules 16, 26, 33, 34, 37, and 45 of the Federal Rules of Civil Procedure. The revised Rules took effect on December 1, 2006. While the package of amendments and explanatory notes, as approved by the Court, can be found at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf; the revisions which the Court approved are summarized below. However, as a starting point and to provide a general overview, it is useful to quote at length from Federal Judicial Center's 2007 publication for judges concerning the import of the amendments to the Rules concerning management of electronic information:

> "Exchanging information in electronic form has significant benefits – it can substantially reduce copying, transport, and storage costs; enable the requesting party to more easily review, organize, and manage information; facilitate the use of computerized litigation support systems; and set the stage for the use of digital evidence presentation systems during pretrial and trial proceedings. To ensure that these benefits are achieved and any problems associated with ESI are minimized, attorneys and parties should address ESI in the earliest stages of litigation, and judges should encourage them to do so.
>
> "All too often, attorneys view their obligation to "meet and confer" under Federal Rule of Civil Procedure 26(f) as a perfunctory exercise. When ESI is involved, judges should insist that a meaningful Rule 26(f) conference take place and that a meaningful discovery plan be submitted. Amended Rule 26(f) directs parties to discuss any issues relating to disclosure or discovery of ESI, including the form or forms in which it should be produced. More specifically, the parties should inquire into whether there will be discovery of ESI at all; what information each party has in electronic form and where that information resides; whether the information to be discovered has been deleted or is available only on backup tapes or legacy systems; the anticipated schedule for production

and the format and media of that production; the difficulty and cost of producing the information and reallocation of costs, if appropriate, and the responsibilities of each party to preserve ESI. . . .

"The Rule 16 conference and order afford the court the opportunity, early in the case, to discuss and memorialize the agreements or shared understandings that parties reach in their 'meet and confer' session, and to resolve disputes that may have arisen. Amended rule 16(b) provides that scheduling orders may include provisions for disclosure or discovery of ESI and any agreements that parties reach for asserting claims of privilege or of protections as train-preparation material after production." Managing Discovery of Electronic Information: A Pocket Guide for Judges, Federal Judicial Center, p.4-5 (2007).

1-1.1. Rule 16(b) Pretrial Conferences-Scheduling and Planning Rule

The explanatory note to this amendment states that the revision to Rule 16(b) is "designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur." In doing so the court is advised to consider the Report from the parties which is now required by the revision to Rule 26(f), as discussed below. Such involvement, it is suggested, "will help avoid difficulties that might otherwise arise." Rule 16(b)(8) requires that the district judge or magistrate judge enter a scheduling order, "as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. Rule 16(b)(8) further provides the schedule, "shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge."

Rule 16(b) has also been revised to allow parties to execute agreements which facilitate discovery by minimizing the risk of waiver of privilege or work-product protection in the scheduling order. In doing so the Court is once again advised to consider the revision to Rule 26(f) and add to the Court's discovery plan that the parties enter into a case-management or other order adopting such agreements. For example, the parties may agree to what has been termed a "quick peek" agreement in which there is an initial exchange "of requested materials without waiver of privilege or protection to enable the party seeking production to designate the materials desired or protection for actual production, with the privilege review of only those materials to follow." The comment goes on to note that, "Alternatively, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without

waiver," also known as a "clawback agreement." Other arrangements are possible. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

1-1.2. Rule 26(a)(1)(B) General Provisions Regarding Discovery-Initial Disclosures

The revision to Rule 26(a)(1)(B) requires that, "a party must, without awaiting a discovery request, provide to other parties . . . a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment." The revision deleted the term "data compilations" previously found in the Rule, as unnecessary because it was felt to be defined by the term "documents" and the term "electronically stored information".

1-1.3. Rule 26(b)(2) General Provisions Regarding Discovery Scope and Limits

The explanatory note to this revision is quite lengthy, however the commentary states, in part, that, "Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing." The comment also notes that the identification, "should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources." In effect, this encourages the parties to negotiate a two-tiered approach to discovery of ESI in which information found in easily accessed sources is first addressed and then information contained in less accessible sources is considered and addressed as necessary.

The comment provides that in the event that a source of ESI "is not reasonably accessible" the requesting party may still obtain discovery by showing good cause, "considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery." The comment indicates that the decision to require a responding party to search for and produce ESI which is not reasonably accessible, "depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case." In conducting this proportionality analysis, the court may consider the following factors, "(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed

sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources."[1]

The revision clearly notes that the good-cause inquiry and investigation of Rule 26(b)(2)(C) limitations are tied to the court's authority to set conditions in discovery, including limits on the amount, type, or sources of ESI required to be accessed and produced, as well as requiring that the requesting party pay all or part of the reasonable cost to get ESI from sources that are not reasonably accessible. It also provides that a requesting party's willingness to share such costs may be considered by the court in deciding whether there is good cause; however the producing party's burden in reviewing the information for relevance and privilege may weigh against permitting such discovery.

Finally, the limitations of Rule 26(b)(2)(C) apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

1-1.4. Rule 26(b)(5) General Provisions Regarding Privilege Claims

The revision to Rule 26(b)(5)(A) provides a procedure whereby a party which has withheld information, "on the basis of privilege or protection as trial-preparation material" can make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. The revision to Rule 26(b)(5)(B) addresses previous concerns, "that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery." The comment therefore notes that, "Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution." Because the process set forth is quite

[1] Moore's Federal Practice suggests that the following investigation and disclosures should meet the basic requirements of the Rule: "The disclosing party should identify the nature of its computer system – including back-up system, network system, and e-mail system – as well as any software applications used to operate those systems. However, the disclosing party should not be required to attempt to search back-up systems or to retrieve deleted files in an exhaustive effort to locate all potentially relevant evidence as part of this initial disclosure obligation. Further, a party should not be held liable for sanctions or other penalties for failing to disclose this evidence as part of its initial disclosure obligation, even when that evidence is subsequently used in the litigation. The difficulty in retrieving this information provides 'substantial justification' to excuse such an exhaustive search effort." J.M.Moore, Moore's Federal Practice §37A.21[1] (3d ed. 2005). Managing Discovery of Electronic Information: A Pocket Guide for Judges, Federal Judicial Center, p.6 (2007).

detailed, readers are urged to read the comment at pages 17-20 of the following link, found at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf.

1-1.5 Rule 26(f) General Provisions Regarding Party Conference to Plan Discovery

Rule 26(f) has been amended to direct the parties to discuss the discovery of ESI during a discovery-planning conference. Because the rule focuses on issues which arise from the disclosure and/or discovery of ESI, no discussion is required in cases which do not involve electronic discovery. However if the case does involve the discovery of ESI the comment provides that, "the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and on the parties' information systems." The comment stresses that it is very important that both of the parties discuss those systems, and critical that counsel become familiar with these information systems before the conference in order to allow the parties to develop a discovery plan that is compatible with the capabilities of their computer systems.[2]

The comment notes that the particular issues regarding ESI which deserve attention during the discovery planning stage are case specific and cites several examples. For example, in a case where the parties have specified the topics for discovery of ESI and the time period during which discovery will be sought, the comment suggests that the parties might, "identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient." Please note that this provision can be particularly important with regard to ESI because the volume and dynamic nature of ESI quite possibly may complicate preservation obligations and the failure to address preservation issues early in the litigation substantially increases uncertainty and raises the risk that disputes will occur. Beyond this, Rule 26(f) also expects the parties to discuss matters related to ESI that involve claims of privilege and protection of trial preparation materials.

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[2] "A failure to acquire sufficient knowledge to engage in such discussions arguably violates the ethical obligation to provide competent representation. *See* ABA Model Rules of Professional Conduct Report 1.1 (2002) ('Legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.')" Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 Rich.J.L. & Tech. 9, f.n. 59.

1-1.6. <u>Rule 33(d) Interrogatories: Option to Produce Business Records</u>

The revision to Rule 33(d) specifically addresses situations in which the answer to an interrogatory may be "derived or ascertained" from business records, including ESI, of the party who has been served with the interrogatory or "from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof,". The Rule provides that, "if the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries." The Rule does however require that such specification "shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained."

The comment explains that the revision to the Rule allows a responding party to substitute access to documents or ESI <u>only</u> if the burden of deriving the answer will be substantially the same for either party. The comment observes that, "Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33(d) by specifying ESI may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory." The comment concludes that in light of the direct access allowed by the Rule 33 a responding party's need to protect its confidentiality or privacy interests "may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d)."

1-1.7. <u>Rule 34(a) Production of Documents and Electronically Stored Information: Scope</u>

The comment observes that revised Rule 34(a) confirms that the "discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information . . . in a tangible form and to information that is stored in a medium from which it can be retrieved and examined." The revised Rule includes ESI, in any form, including email and the comment observes that the rule even encompasses, "future developments in computer technology."

The revised Rule additionally requires, if necessary, that a party producing ESI translate it into reasonably usable form and further expressly allows a party to request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. The comment cautions that "Courts should guard against undue intrusiveness resulting from inspecting or testing such systems" because such inspection or testing might raise issues of confidentiality or privacy.

1-1.8. Rule 34(b) Production of Documents and ESI: Procedure

The revision to Rule 34(b) specifically provides that, "The request may specify the form or forms in which electronically stored information is to be produced." The comment observes that, "The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information." The revised rule takes into account that different forms of production might be appropriate for different types of ESI. For example, the comment suggests that, "Using current technology . . . a party might be called upon to produce word processing documents, email messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information."

The revision to Rule 34 further provides that a responding party "shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information — or if no form was specified in the request — the responding party must state the form or forms it intends to use."

The revised Rule further provides a process if the requesting party is not satisfied with the form set forth by the responding party, or if the responding party has objected to the form specified by the requesting party; in either case, the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel. It further provides that if the parties can't reach an agreement and the court consequently resolves the dispute, the court is not limited to the forms chosen or suggested by the parties or the comment observes that, "even to the form specified in the rule for

situations in which there is no court order or party agreement." In the event that the form of production is not specified by party agreement or court order, the revised Rule requires the responding party to produce ESI either in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. However the comment indicates that the option to produce ESI in a reasonably usable form does not mean that a responding party is free to convert ESI from the form in which it is ordinarily maintained in order to make it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. The comment states, "If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature."

1-1.9. Rule 37(f) Failure to Disclose: Sanctions Regarding Electronically Stored Information

The revision to Rule 37(f) provides that, "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This is because, the comment notes, so many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation.

According to the comment, good faith, "in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case." The comment notes that the good faith requirement of Rule 37(f) does not allow a party to exploit the routine operation of an information system in order to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. Most importantly the comment concludes that, "When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information." It is also important to remember that one factor which courts will invariably consider is "whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources."

1-1.10. Rule 45 Subpoenas

Because of the revisions discussed above, Rule 45 was amended so that the provisions for subpoenas would conform to the revisions related to discovery of ESI. The revision to Rule 34 regarding the production of ESI, required that Rule 45(a)(1)(C) be revised to recognize that ESI, as defined in Rule 34(a), can also be sought by subpoena. Similarly, Rule 45(a)(1) was amended to provide that a subpoena can designate a form or forms for production of electronic data and Rule 45(d)(1)(B) was amended to provide that if the subpoena does not specify the form or forms for ESI, the person served with the subpoena must produce ESI in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 45(d)(1)(C) was also added so that a person producing ESI would not have to produce the same information in more than one form unless ordered to do so by the court for good cause.

Because the receipt of a discovery subpoena for ESI may impose burdens on nonparties, Rule 45(c) now provides such nonparties protection from undue impositions. The comment notes that Rule 45(c)(1) directs that a party serving a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "*shall* protect a person who is neither a party nor a party's officer from significant expense resulting from" compliance." (Emphasis added) In addition, Rule 45(d)(1)(D) was added to provide that the responding person need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible, unless the court orders such discovery for good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense.

1-2. RULES OF THE SUPREME COURT OF VIRGINIA

In June of 2007, the Advisory Committee on Rules of Court, acting at the direction of the Chief Justice of the Supreme Court of Virginia, prepared an initial and unapproved "discussion draft" of possible rules amendments related to the discovery of ESI. The "discussion draft" was circulated and in response to comments received from several affected legal groups, the Advisory Committee on Rules of Court published what it called "Tentative Draft Rules" on October 1, 2007. These draft rules, which can be found at http://www.courts.state.va.us/scv/reports/ediscovery.pdf, were then discussed and approved by the Advisory Committee at the Committee's meeting in April, 2008 and the proposed amendments were then recommended to the Judicial Council of Virginia and the Supreme Court. On October 31, 2008 the "Tentative Draft Rules" were approved, with mostly minor revisions, and promulgated by Order of the Court as Amended Rules of Court, effective January 1, 2009. The Amendments to Rules 4:1; 4:4, 4:8, 4:9, 4:9A and 4:13 are summarized below. (A detailed description of the rule change process can be found at

http://www.creagerlawfirm.com/wp-content/uploads/summary-by-roger-t-creager-of-status-of-proposed-rule-changes-regarding-discovery-of-electronically-stored-information.pdf.)

1-2.1. Rule 4:1 General Provisions Governing Discovery

The sole revision to Rule 4:1(a) is that the Rule now includes the term, "electronically stored information". However, Rule 4:1(b) was significantly expanded by the addition of a new subpart to former Rule 4:1(b)(6) as well as the addition of new subsections (7) and (8). It is interesting to note that the new subpart, Rule 4:1(b)(6)(ii), was significantly changed as the initial "discussion draft" became the Amended Rule. As initially drafted the discussion draft addressed situations where an arguably privileged or protected item has been inadvertently produced. The final Amendment deleted the "inadvertent production" provision and provides for, what is in essence a "clawback agreement". If a producing party believes that a document or ESI that has already been produced "is privileged or its confidentiality is otherwise protected" the receiving party may be notified of such claim and the basis for the claimed privilege or protection. Upon receipt of the notice, the receiving party "shall sequester or destroy its copies thereof, and shall not duplicate or disseminate such material pending disposition of the claim of privilege or protection by agreement, or upon motion by any party. If a receiving party has disclosed the information before being notified of the claim of privilege or other protection, that party must take reasonable steps to retrieve the designated material. The producing party must preserve the information until the claim of privilege or other protection is resolved."

New subsection Rule 4:1(b)(7) is entitled "Electronically Stored Information" Pursuant to this provision a party is not required to provide discovery of ESI from sources that the party identifies as "not reasonably accessible because of undue burden or cost." However the Rule provides that even if the party making the objection successfully meets the burden of proof and satisfies the court that the information is not reasonably accessible because of undue burden or cost; "the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 4:1(b)(1). The court may specify conditions for the discovery, including allocation of the reasonable costs thereof. "

New subsection 4:1(b)(8) was also a significantly changed during the discussion and consideration process, as it was not originally part of the October 2007 "discussion draft". As included in the final Amendment, the rule, entitled, "Pre-Motion Negotiation" is a nearly verbatim restatement of the next to last paragraph of Rule 4:12(a) and requires that any motion must be accompanied by a certification that the movant "has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."

1-2.2. Rule 4:4. Stipulations Regarding Discovery

Just as in revision to Rule 4:1(a), the sole revision to Rule 4:4 is that stipulations may now also be made with regard to “electronically stored information”.

1-2.3. Rule 4:8(f) Interrogatories to Parties - Option to Produce Business Records

Again the revision to Rule 4:8 has been mostly cosmetic. Rule 4:8(f) now specifies that if the answer to an interrogatory may be derived or ascertained from the business records, that such records now also include ESI. Additionally, the subpart has been revised by addition of this final sentence: “A specification of electronically stored information may be made under this Rule if the information will be made available in a reasonably usable form or forms.”

1-2.4. Rule 4:9. Production by Parties of Documents, Electronically Stored Information, and Things; Entry on Land for Inspection and Other Purposes; Production at Trial

The Amended Rules completely deconstructed the old Rule; indeed the introduction to the “Tentative Draft Rules” notes, “Finally, in response to suggestions by bar groups, the Advisory Committee agreed that the Rules will be less confusing if the provisions for non-party subpoenas are separated from the rule on party discovery by way of documents under Rule 4:9. As a result, the provisions currently in Rule 4:9 with respect to subpoenas duces tecum have been pulled out to form a separate proposed rule, and the same "e-discovery" edits have been made to that rule, now numbered 4:9(A).” Therefore, amended Rule 4:9 now deals only with parties and has been significantly modified. Sadly, pursuant to Rule 4:9(a), a party may no longer request that the other party permit that he or she be allowed to inspect and copy any “phono-records” as the term “phono-records” has now been deleted from the Rule and consigned to the “dustbin of history”. As amended, Rule 4:9(a) now allows a requesting party to “test or sample” ESI, “stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form), or to inspect, and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 4:1(b) and which are in the possession, custody, or control of the party upon whom the request is served”

The amendment to Rule 4:9(b) now has three subparts – 4:9(b)(i) Initiation of the Request, 4:9(b)(ii) Response, and 4:9(b)(iii) Organization, Reasonable Accessibility, and Forms of Production. Subpart (b)(i) provides that a request for production, may in addition to specifying, “a reasonable time, place, period and manner of making the inspection and performing the related acts”, also “may

specify the form or forms in which electronically stored information is to be produced."

Subpart (b)(ii) has been revised so that if the responding party objects to the requested form or forms for producing ESI, or if no form was specified in the request, the responding party "must state the form or forms it intends to use." Similar to Rule 4:1(b)(8), this subpart was also a significantly changed during the discussion and consideration process, and the Court has added a requirement that the moving party provide a good faith certification, a requirement which was not included in the October 2007 "discussion draft".

The most significant amendment, is new subpart (b)(iii) which also contains three subparts, with subparts (b)(iii)(B) and (b)(iii)(C) having been newly added. The new language in subpart 4:9 (b)(iii)(B) is identical to Rule 4:1(b)(7) and similarly allows for the discovery of ESI from sources which are not reasonably accessible due to an undue burden or cost, if the requesting party has established good cause, although of course a court may specify conditions for the discovery, including allocation of the reasonable costs thereof." Subpart 4:9 (b)(iii)(C) establishes the appropriate procedure if a request does not specify the form or forms for the production of ESI, in which case, "a responding party must produce the information as it is ordinarily maintained if it is reasonably usable in such form or forms, or must produce the information in another form or forms in which it is reasonably usable. A party need not produce the same electronically stored information in more than one form."

1-2.5. Rule 4:9A. Production from Non-Parties of Documents, Electronically Stored Information, and Things and Entry on Land for Inspection and Other Purposes; Production at Trial.

As noted above, new Rule 4:9A is old Rule 4:9 (C) (which was previously entitled, "Production by a Person"), however it has been renumbered and significantly reconstructed. The Rule has been greatly simplified as it relates to a subpoena duces tecum issued by the clerk of court. Rule 4:9A (a) (1) requires, a written request, filed with the clerk of the court in which the action or suit is pending, by counsel of record for any party (or by a party having no counsel in any pending case), and "a certificate that a copy thereof has been served pursuant to Rule 1:12 upon counsel of record and to parties having no counsel" whereupon, "the clerk shall issue to a person not a party therein a subpoena duces tecum subject to this Rule." Unfortunately, the revision with regard to a subpoena duces tecum issued by an attorney-at-law (previously found at Rule 4:9 (c)(2)) has not been simplified and there have been many significant changes. Because the changes are numerous and the process set forth is quite detailed I would urge the reader to carefully read "the mark up" of Rule 4:9A (a) (1) found at pages 6-8 of the discussion draft, which as noted above, can be found at http://www.courts.state.va.us/scv/reports/ediscovery.pdf.

1-2.6. Rule 4:12 Failure to Make Discovery; Sanctions

The amendment to Rule 4:12 was accomplished by adding Rule 4:12 (e) in order to specifically address ESI. The Amendment is clear and concise, and specific in mandating that, “Absent exceptional circumstances, a court should not impose sanctions upon a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” Please note that this is almost exactly the same language which is found in Rule 37(f) of the Federal Rules of Civil Procedure

1-2.7. Rule 4:13. Pretrial Procedure; Formulating Issues

The last of the Amended Rules, Rule 4:13, adds three additional ESI related subparts to the litany of subjects which may be considered at a pre-trial conference. Newly added Rule 4:13 (8) addresses issues relating to the preservation of potentially discoverable information, including electronically stored information and information which might be located in sources which are not believed to be reasonably accessible because of undue burden or cost; Rule 4:13 (9) provides for disclosure or discovery of electronically stored information; and Rule 4:13 (10) to discuss any agreements reached by the parties regarding claims of privilege or as to the protection of trial-preparation material after production.

CONCLUSION

Unfortunately, litigation in federal court as well as in Virginia circuit courts now requires litigators of the Luddite persuasion to cease protesting the mechanized and computerized world in which we live and emerge into the world of terabytes and metadata. As the discussion which follows makes clear, the failure to do so will exact a steep price.

Chapter 2
Metadata and Electronic Records

2-1. METADATA

2-1.1. What It Is

"Metadata" is often used to describe "data about data." For the purposes of this discussion, the term will be used to describe information that is embedded in an electronic record (such as a word processing document, spreadsheet or database) which is not viewable upon an ordinary examination of the record. This type of electronically embedded information usually describes the "who, what, when, where, why and how" a document was created. The significance of metadata has been explained as follows:

> Metadata may reveal who worked on a document, the name of the organization that created or worked on it, information about prior versions of the document, recent revisions, and comments inserted in the document during drafting or editing... . The hidden text may reflect editorial comments, strategy considerations, legal issues raised by the client or the lawyer, or legal advice provided by the lawyer.

ABA/BNA Lawyers' Manual on Professional Conduct 21 Current Rep. 39 (2004).

Some forms of metadata are easily accessible by methods as simple as clicking on a file's "Properties" within Microsoft Windows, or by "revealing codes" in Microsoft Word. Other forms of metadata may require specialized software to access, but are available to a well-equipped recipient.

2-1.2. Its Uses and Hazards

There are many constructive uses for metadata. For instance, the ability to attribute comments to the proper person during editing, or the ability to view previously deleted versions of a document can be quite valuable. But attorneys must be mindful that the existence of metadata in electronic documents can cause serious problems. If an attorney prepares an electronic document and ultimately decides to remove confidential information from a previous draft, a recipient of that electronic document may still be able to find the confidential information that was deleted. Similarly, a recipient may be able to identify the author of the record, read comments from others who have reviewed the document electronically, or even determine the server where the document is electronically stored. Obviously, transmission of any of these kinds of information can carry disastrous consequences.

2-1.3. Ethical Issues Posed

The inadvertent transmission of metadata may pose ethical concerns for the unwary practitioner as well. Different jurisdictions have come down on different sides of the issue. The New York State Bar was the first to issue an opinion on the ethics of mining metadata. In 2001, the New York State Bar adopted the position that "[a] lawyer may not make use of computer software applications to surreptitiously 'get behind' visible documents or to trace e-mail[3]." The New York State Bar revisited the issue approximately three years later, stating that a lawyer has "an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets[4]." It also placed a duty on lawyers to take reasonable steps to ensure that they do not disclose their clients' confidential information when sending documents by e-mail[5]. Interestingly, the New York State Bar seemed to consider the transmission of metadata to be "inadvertent," even when the sender clearly intended to send the document to which the metadata attached.

The American Bar Association appeared to reject the New York approach with the issuance of Formal Opinion 06-442 in August of 2006. In that opinion, the ABA stated that:

> The Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. A lawyer who is concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata, or who wishes to take some action to reduce or remove the potentially harmful consequences of its dissemination, may be able to limit the likelihood of its transmission by 'scrubbing' metadata from documents or by sending a different version of the document without the embedded information.

With this opinion, the ABA placed the duty to "scrub" metadata from documents squarely on the sender, while imposing no limit on the recipient's ability to mine the metadata for information.

Despite the ABA's formal opinion, Florida and Alabama adopted the New York position over the next several months. The Florida Bar and the Alabama Bar each required sending attorneys to take reasonable care to avoid the disclosure of their clients' confidential information in sending documents, including metadata, but clearly stated that recipients should not examine documents for information contained in metadata[6].

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[3] New York State Bar Opinion 749.
[4] New York State Bar Opinion 782.
[5] *Id.*
[6] Florida Ethics Opinion 06-2; Alabama Ethics Opinion Number: 2007-02

By contrast, the District of Columbia Bar and the Maryland Bar adopted positions similar to that articulated by the ABA, at least in part. District of Columbia Bar Opinion 341 stated that:

> A receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent. In such instances, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work product of the sending lawyer or confidences or secrets of the sending lawyer's client.

Note that the standard set by the District of Columbia Bar is "actual knowledge" that the metadata was inadvertently sent. Similarly, in Ethics Docket No. 2007-09, the Maryland Bar stated that:

> Subject to any legal standards or requirements (case law, statutes, rules of procedure, administrative rules, etc.), this Committee believes that there is no ethical violation if the recipient attorney (or those working under the attorney's direction) reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata.

Maryland attorneys, therefore, are free to examine metadata without first contacting opposing counsel to determine whether it was sent intentionally or inadvertently.

By the fall of 2007, several states had taken the position that it was not ethically permissible for the recipient of an electronic document to make use of any embedded metadata, while simultaneously opining that attorneys sending electronic documents had a duty to take reasonable steps to prevent the transmission of client confidences therein. Arizona joined those states in November of 2007, stating in Arizona Bar Opinion 07-03:

> Under Arizona's version of ER 4.4(b), a "lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." While it might be argued that ER 4.4(b) is inapplicable because the document was not inadvertently sent, only the metadata embedded therein, we think that is an insubstantial distinction. If the document as sent contains metadata that reveals confidential or privileged information, it was not sent in the form in which it was intended to be sent, and the harm intended to be remedied by ER 4.4(b) is the same.

The Colorado Bar entered the fray in May of 2008, determining that "a Sending Lawyer has an ethical duty to take steps to reduce the likelihood that metadata containing Confidential Information would be included in an electronic

document transmitted to a third party[7]." The Colorado Bar then expressly rejected the approach taken in New York, Alabama, Florida and Arizona, and stated that "a Receiving Lawyer generally may ethically search for and review metadata embedded in an electronic document that the Receiving Lawyer receives from opposing counsel or other third party[8]."

A few months later, the Maine Board of Overseers of the Bar issued Maine Ethics Opinion #196, in which the Maine Bar adopted the New York view that it is not ethically permissible for receiving attorneys to mine the metadata embedded in electronic documents.

Obviously, jurisdictions are split on the issue, with at least five states taking the position that examining electronic documents for metadata is not ethically permissible, while at least two others, along with the District of Columbia and the ABA, have taken the opposite position.

2-1.4. Conclusions and Recommendations

Virginia has not yet taken a position on whether it is permissible for an attorney receiving an electronic document to examine it for metadata. Because other jurisdictions are split fairly evenly on the issue, it is difficult to predict with certainty which stance Virginia will adopt.

Almost all jurisdictions, however, have taken a uniform position that an attorney sending an electronic document must take reasonable steps to avoid transmitting a client's confidential information in metadata that is electronically embedded in the document. At present, the best options would appear to include the following:

a) Using fax or traditional mail (i.e., "snail mail") when sending documents to third parties which may contain confidential information or information prejudicial to the client within the metadata.

b) Follow instructions provided by Microsoft for minimizing metadata from documents created in Microsoft Word or Microsoft Office. Instructions are available for documents created in Microsoft programs older than Microsoft Office 2003 at http://support.microsoft.com/default.aspx?scid=kb;en-us;223396. Instructions for documents created in Microsoft Office 2003 are available at http://support.microsoft.com/default.aspx?kbid=834427. Instructions for documents created in Microsoft Office 2007 are available at http://office.microsoft.com/en-us/help/HA100375931033.aspx.

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[7] Colorado Bar Ethics Opinion 119.
[8] *Id.*

c) Convert Microsoft Word or Corel Word Perfect documents into Adobe PDF documents before sending through e-mail. Senders should be aware, however, that certain metadata may also be transmitted in Adobe PDF files.

d) Purchase and use third-party metadata scrubbing software.

2-2. ELECTRONIC RECORDS

2-2.1. Types of Electronic Records

For the purposes of this discussion, "electronic records" will be used to refer to any collection of words, images or data recorded and stored in electronic format. Examples include word processing files, database files, spreadsheet files, digital photographs or videos, e-mails, text messages, and many other kinds of electronically stored information.

Whenever any of these types of records arise in the course of transacting public business, it is a "public record" under the Virginia Public Records Act, §§ 42.1-76, *et seq.*, VA Code Ann. Public records must be maintained throughout the lifecycle prescribed by the Records Retention and Disposition Schedule promulgated by the Library of Virginia pursuant to the Virginia Public Records Act ("the Act").

2-2.2. Records Retention Requirements

The Library of Virginia has promulgated at least two Records Retention and Disposition Schedules of which Virginia local government attorneys should be aware. General Schedule No. 19 deals with Administrative Records of County and Municipal Governments[9]. These schedules provide a list of retention schedules for various types of public records.

2-2.3. Issues Presented by Retention and Disposition Schedules

As many offices attempt to convert to an increasingly "paperless" world, a question arises: can paper public records be reformatted and maintained as electronic records? Yes, according to General Schedule No. 19, which states that "[u]nless prohibited by law, records may be reformatted at agency or locality discretion." Such records must be reformatted in accordance with The Library of Virginia Guidelines for Electronic Records and with §§ 17 VAC15-20-10, *et seq.*, of the Virginia Administrative Code.

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[9] A copy of Records Retention and Disposition Schedule, General Schedule No. 19, may be viewed at http://www.lva.virginia.gov/agencies/records/sched_local/GS-19.pdf.

As with paper records, a Certificate of Records Disposal (Form RM-3) must be approved by the designated record officer and on file with the locality before any electronic records may be destroyed[10].

E-mails, of course, constitute public records when they relate to the transaction of public business. The Library of Virginia has advised that this includes both sent and received e-mail messages, and any attachments thereto[11].

Virginia local government attorneys should also be aware that many e-mail systems are programmed to purge e-mail messages after a certain period of time. E-mails that constitute public records should not be purged from the system until after the time period stated in the applicable retention schedule. Records management and IT officers must establish sufficient backup systems to comply with the records retention schedules.

2-2.4. Virginia Legal Ethics Opinion 1818

The Virginia State Bar's Standing Committee on Legal Ethics has addressed the issue of converting paper records to electronic format in Legal Ethics Opinion 1818. In that opinion, the Committee opined that an attorney has no ethical duty to maintain a paper copy of a client's file, noting that while Rule 1.16 addresses what items in a client's file must be provided to the client, it does not dictate the format in which those items must be kept.

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[10] See Records Retention and Disposition Schedule, General Schedule No. 19, Policy No. 3.

[11] See Library of Virginia Electronic Records Guidelines, which may be viewed at http://www.lva.virginia.gov/agencies/records/electronic/electronic-records-guidelines.pdf.

Chapter 3
Litigation Practicalities in the Preservation and Discovery of Electronically Stored Data

3-1. PRESERVATION OF DATA OBLIGATION BASED ON KNOWLEDGE OF POTENTIAL CLAIM

A party must preserve relevant data when the party is fairly put on notice that a claim may be asserted against that party. You cannot destroy (spoliate) such data at will after you are on notice of a potential claim in advance of actual written claim being asserted, an actual data preservation letter being received or an actual lawsuit being filed or served. Knowledge of a potential claim is enough to make subsequent destruction of data an act of spoliation. Buckley v. Mukasey, 538 F. 3d 306, (4th Cir. 2008). Spoliation can result in sanctions (Silvestri v. General Motors Corp., 271 F. 3d 583, 590 (4th Cir. 2001)), including an "adverse inference" jury instruction (Vodusek v. Bayliner Marine Corp., 71 F. 2d 148, 156 (4th Cir. 1995) or, in the worst case, dismissal of a lawsuit (King v. American Power Conversion Corp., 181 Fed Appx 373 (4th Cir. 2006). Rule 4:12(b)(2), Rules of the Sup. Ct. of Va.; Rule 37, FRCP. See , Hodge v. Wal-Mart Stores, Inc., 360 F. 3d 446 (4th Cir. 2004) for an a comprehensive discussion of both the duty to preserve evidence and spoliation claims. See also Wolfe v. Virginia Birth – Related Neurological Injury Compensation Program, 40 Va. App. 565, 580 S.E. 2d 467 (2003).

3-2. THE PRESERVATION DEMAND LETTER

3-2.1. Preservation Letter From Plaintiff

Depending on the sophistication of your opposing counsel, you should expect to see shortly before or after the filing of a lawsuit a letter from opposing counsel notifying you (or demanding you to be aware) that your client should retain each and every shred of information relating to the claims being made or that will be made. These letters often describe in rich detail all of the electronically stored information ("ESI") which must be protected including data stored on hard drives, on discs, in flash drives, on the mainframe or in individual servers. This includes data in voice mail, webmail, text messages, phone cameras and, surveillance video. (See Appendix A for a simple but effective preservation letter; see Appendix B for the "Perfect Preservation Letter") Craig Ball, the universally recognized guru of e-discovery has written an excellent article entitled "The Perfect Preservation Letter" (from which Appendix B was taken). The article is at http://www.craigball.com.

Make sure that everyone in your locality who may have the opportunity and authority to delete a relevant email, erase a 911 voice communications tape or otherwise dispose of data is rigorously schooled on his or her preservation

obligations. Any destruction of data, however innocent, after receiving a preservation demand letter is almost conclusively presumed to be spoliation. Thus, all persons who can delete or destroy data must be told they cannot. This especially includes the IT people who love to "clean out" deleted folders to free up storage capacity. Bureaucrats rebel at having their normal (and legitimate) deletion, destruction, and shredding routines interrupted. Be clear, and firm, about the obligation to preserve.

3-2.2. Spoliation

Destruction of information due to customary, periodic purging of data pursuant to an otherwise legitimate retention/destruction policy is no defense to a spoliation claim. Spoliation is not dependent on bad motive such as an intent to willfully destroy harmful evidence. It is only dependent on an intent to destroy data at all. Legally, spoliation looks more like simple negligence: 1) a duty to preserve data, 2) a breach of that duty which 3) causes 4) destruction of data. Certainly to your opponent – and perhaps to your judge – even "negligent" spoliation may look more like a purposeful attempt to destroy presumably damaging evidence. (See Appendix C) The spoliation story in Rambus, Inc. v. Infineon Technologies, AG, 222 F.R.D. 280 (E. D. Va. 2004) and 220 F.R.D. 264 (E.D. Va. 2004) should be enough to scare all of us into using greater care to ensure that information is preserved and not inadvertently destroyed under a retention/destruction policy. Also see Appendix D, a hair-raising sanctions motion related to the Rambus spoliation saga which was filed before the Federal Trade Commission.

3-2.3. Your Preservation Letter

You should send out your own preservation demand letter. Private plaintiffs often have little worth preserving but you may find something valuable in an electronic diary or in a candid email from the plaintiff to an understanding friend. Corporate plaintiffs on the other hand customarily have mountains of ESI data and a legion of minions responsible for purging it according to elaborate data destruction schedules. Your preservation letter just might: 1) preserve a piece of evidence you can use or, alternatively 2) allow you to ask the court to brand the company a "spoliator". This is a damaging attack on the credibility of an opponent which may, consequently, benefit your case. Needless to say, you must be cleaner than Caesar's wife in data preservation and discovery disclosure to mount a meaningful spoliation offensive.

3-3. DISCOVERY REQUESTS

3-3.1. Breadth

Make sure that your discovery requests are broad enough to encompass all forms, methods and devices of electronic data storage. (See Appendices E

and F for ESI discovery requests). For emails, you may even want to mandate that computer files be searched using, at the very least, a selection of search words which you provide.

3-3.2. Consultants

Consider hiring a consultant to assist you on how to obtain, search for, convert and manage ESI. Many consultants provide computer forensic services. Your police department may do so as well. Law enforcement officers love to find hidden data. Consider using them to perform forensic tasks. Craig Ball posts "21 Tips for Working with E-Discovery Service Providers" on his website (copy attached as Appendix G) which is a good check list on how to most efficiently use an e-discovery consultant.

3-3.3. Electronically Layered Files

Electronic files may have "drill-down" capabilities. These capabilities may only exist on designated computers and may only be available to specified employees with password clearance. Always ask to have access to "buried" layers of data. This may mean an extra trip to a corporate office. In a recent Chesterfield tax case, it was only by drilling down below the surface of the revenue data we were given that allowed us to determine how much revenue was being attributed by the company to the office we were taxing and the rationale behind the attribution. This information was valuable in resisting an apportionment claim that would have reduced business license tax to less than a percent of the tax we assessed.

3-3.4. Objections to E-Discovery and Privilege Logs

Objections to ESI requests for production are generally no different from objections to producing hard records. Always object to any definitions or instructions that attempt to place greater disclosure burdens on you than the burdens already imposed by state or federal (or local) rules. Remember that Rule 26(b)(2)(B), FRCP, offers specific protection from burdensome ESI discovery requests. The attorney-client privilege and work-product doctrine applies to ESI. Be prepared to create a detailed "privilege log" listing each ESI communication by date, subject, sender, recipients and claimed protection (privilege or doctrine allowing non-disclosure). See Appendices H & I. Such logs are required under Rule 4:1(b)(6), Rules of Sup. Ct. of Va. and Rule 26 (b)(5), FRCP. Trial judges have been known to compel discovery of otherwise protected data that has not been disclosed on a privilege log or to personally (and carefully) scrutinize emails or other information that was not initially placed in a privilege log to assess the validity of the protection being claimed. (Appendix J)

3-3.5. <u>Rule 26</u>

Rule 26 of the FRCP governs both discovery and "pre-discovery" discovery. The rule aggressively mandates disclosure of (among many other things) all relevant information, including electronically stored information, in a party's possession. Rule 26(b)(2)(B) allows protection to a party for disclosure of ESI that is "not reasonably accessible because of undue burden or costs", subject always to the court ordering production "for good cause". Parties must also meet and confer about preserving discoverable information and developing a discovery plan. The plan must contain a section on disclosure or discovery of ESI "including the form or forms in which it should be produced." (See Appendix K for a proposed ESI discovery plan).

3-3.6. <u>Electronic Data Article</u>

There is an excellent short article on electronic data including ESI discovery entitled "Electronic Data: A Commentary on the Law in Virginia in2007" at 42 U. Rich. L. Rev. 355 (2007).

Appendix

Appendix A

Steven L. Micas, Esquire County Attorney
Chesterfield County
9901 Lori Road, Room 503 Chesterfield, VA 23833

The Estate of _______________, deceased
Date of Incident: _____
Our File Number: _______________

Dear Steve:

Thank you for your recent telephone call concerning the Board of Supervisors meeting scheduled for January 10, 2007. I note that this meeting is three days after the ___________________ Grand Jury hearing to determine if ______________________. will be indicted for felony murder. I presume that Chesterfield County is cooperating with _____________________ in this prosecution and is preserving/maintaining all evidence related to the _________________ crash. Are there procedures/safeguards in place to preserve the documents, recordings (audio and video), photographs and physical evidence associated with the police chase and crash? Items of specific interest include, but are not limited to:

1. All personnel files to include but not limited to those maintained pursuant to the application, qualification, background and character, training, testing, annual reviews of driver record, property damage reports, injury accident reports, reportable traffic accident reports, controlled substance/alcohol testing, disciplinary actions and periodic review of ________________________. which are routinely maintained by Chesterfield County.

2. All records pertaining to the dispatching, monitoring, dispatch progress reports, communications with __________________________. or his police vehicle for the period of six hours prior and subsequent to the __________________ collision.

3. All dispatch logs, officer call-in logs, telephone/radio or other records, electronic or otherwise, of driver/dispatch communications for _____________________ for the period of six hours prior and subsequent to the ______________ collision.

4. All driver's daily inspection reports of ___________________________ for the 2006 Crown Victoria motor vehicle operated by him in the twenty-four hour period prior to the ______________________ collision.

5. All mechanical or electronic records by any on-board or other communication device of the vehicle operated by ______________________ to include but not to be limited to tacographs, any satellite locator records, any vehicle tracking records or any similar device for the period of six hours prior and subsequent to the __________________ collision.

6. All maintenance records maintained of the 2004 Crown Victoria motor vehicle operated by ________________________________ on _________________________. These include but are not limited to any and all records of daily, periodic and annual vehicle inspections as well as inspector and brake mechanic training and certification(s). This also includes any inspections, testing, measurements, etc. of this vehicle after the ______________________ collision.

7. All records produced or received pursuant to inspections/investigations by local, State or Federal officials related to the ___________________ collision.

6. Please print and/or preserve all mechanical or electronic records, trip reports, fault codes hard brake incident(s), last stop record or similar data collected by any on-board recording Electronic Control Module (ECM) or Motor Vehicle Event Data Recorder (MVEDR) commonly known as a "black box" of the 2004 Crown Victoria operated by ___________________________________. on ___________________ or any similar device utilized on this vehicle. Please also preserve and maintain the hardware producing this data.

5. Any and all Rules, Regulations, Guidelines, Instructions, General Orders, Standard Operating Procedures, etc. addressing, related to or concerning vehicle operation by a Chesterfield County Police officer in the course of his job duties, including, but not limited to, officer responses, emergency driving and pursuits.

I am optimistic that our negotiations will be successful and that it will be unnecessary for these materials to ultimately be produced. However, out of an abundance of caution and due to the unique circumstances, I feel it appropriate to request that this relevant evidence be protected against spoiliation. If you should have any questions regarding this information, please let me know.

Sincerely,

Appendix B

> What follows *isn't* the perfect preservation letter for *your case*, so don't simply treat it as a form. Use it as a drafting aid that flags issues unique to EDD, but tailor *your* preservation demand to the unique issues, parties and systems in *your* case.

Demand for Preservation of Electronically Stored Information

I write as counsel for ____________ (hereinafter "Plaintiffs") to advise you of a claim for damages and other relief against you growing out of the following matters (hereinafter this "cause"):

[DESCRIPTION OF CLAIM, INCLUDING RELEVANT ACTORS, EVENTS, DATES, LOCATIONS, PRODUCTS, ETC.]

Plaintiffs demand that you preserve documents, tangible things and electronically stored information potentially relevant to the issues in this cause. As used in this document, "you" and "your" refers to [**NAME OF DEFENDANT**], and its predecessors, successors, parents, subsidiaries, divisions and affiliates, and their respective officers, directors, agents, attorneys, accountants, employees, partners and other persons occupying similar positions or performing similar functions.

You should anticipate that much of the information subject to disclosure or responsive to discovery in this cause is stored on your current and former computer systems and other media and devices (including personal digital assistants, voice-messaging systems, online repositories and cell phones).

Electronically stored information (hereinafter "ESI") should be afforded the broadest possible meaning and includes (*by way of example and not as an exclusive list*) potentially relevant information electronically, magnetically, optically or otherwise stored as:

- Digital communications (e.g., e-mail, voice mail, instant messaging);
- E-Mail Server Stores (e.g., Lotus Domino .NSF or Microsoft Exchange .EDB)
- Word processed documents (e.g., Word or WordPerfect files and drafts);
- Spreadsheets and tables (e.g., Excel or Lotus 123 worksheets);
- Accounting Application Data (e.g., QuickBooks, Money, Peachtree data);
- Image and Facsimile Files (e.g., .PDF, .TIFF, .JPG, .GIF images);
- Sound Recordings (e.g., .WAV and .MP3 files);
- Video and Animation (e.g., .AVI and .MOV files);
- Databases (e.g., Access, Oracle, SQL Server data, SAP);
- Contact and Relationship Management Data (e.g., Outlook, ACT!);
- Calendar and Diary Application Data (e.g., Outlook PST, blog entries);
- Online Access Data (e.g., Temporary Internet Files, History, Cookies);
- Presentations (e.g., PowerPoint, Corel Presentations)
- Network Access and Server Activity Logs;
- Project Management Application Data;
- Computer Aided Design/Drawing Files; and
- Backup and Archival Files (e.g., Veritas, Zip, .GHO)

ESI resides not only in areas of electronic, magnetic and optical storage media reasonably accessible to you, but also in areas you may deem *not* reasonably accessible. You are obliged to *preserve* potentially relevant evidence from *both* sources of ESI, even if you do not anticipate *producing* such ESI.

The demand that you preserve both accessible and inaccessible ESI is reasonable and necessary. Pursuant to the rules of civil procedure, you must identify all sources of ESI you decline to produce and demonstrate to the court why such sources are not reasonably accessible. For good cause shown, the court may order production of the ESI, even if it is not reasonably accessible. Accordingly, you must preserve ESI that you deem inaccessible so as not to preempt the court's authority.

Preservation Requires Immediate Intervention
You must act immediately to preserve potentially relevant ESI, including, without limitation, information with the *earlier* of a Created or Last Modified date on or after [**DATE**] through the date of this demand and concerning:

1. The events and causes of action described [**above**]/[**in Plaintiffs' Complaint**];
2. ESI you may use to support claims or defenses in this case;
3. ....
4. ....

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. You must intervene to prevent loss due to routine operations or malfeasance and employ proper techniques and protocols to preserve ESI. *Booting a drive, examining its contents or running any application may irretrievably alter the evidence it contains and constitute unlawful spoliation of evidence.* **Preservation requires action.**

Nothing in this demand for preservation of ESI should be understood to diminish your concurrent obligation to preserve documents, tangible things and other potentially relevant evidence.

Suspension of Routine Destruction
You are directed to immediately initiate a litigation hold for potentially relevant ESI, documents and tangible things and to act diligently and in good faith to secure and audit compliance with such litigation hold. You are further directed to immediately identify and modify or suspend features of your information systems and devices that, in routine operation, operate to cause the loss of potentially relevant ESI. Examples of such features and operations include:

- Purging the contents of e-mail repositories by age, capacity or other criteria;
- Using data or media wiping, disposal, erasure or encryption utilities or devices;
- Overwriting, erasing, destroying or discarding backup media;
- Re-assigning, re-imaging or disposing of systems, servers, devices or media;
- Running antivirus or other programs effecting wholesale metadata alteration;
- Releasing or purging online storage repositories;
- Using metadata stripper utilities;

- Disabling server, packet or local instant messaging logging; and,
- Executing drive or file defragmentation or compression programs.

Guard Against Deletion
You should anticipate that your officers, employees or others may seek to hide, destroy or alter ESI. You must act to prevent and guard against such actions. Especially where company machines were used for Internet access or personal communications, you should anticipate that users may seek to delete or destroy information they regard as personal, confidential or embarrassing, and in so doing, they may also delete or destroy potentially relevant ESI. This concern is not unique to you. It's simply conduct that occurs with such regularity that any custodian of ESI and their counsel must anticipate and guard against its occurrence.

Preservation of Backup Tapes
You are directed to preserve complete backup tape sets (including differentials and incrementals) containing e-mail and ESI of the following custodians for all dates during the below-listed intervals:

[CUSTODIAN] **[INTERVAL, e.g., 1/1/06 through 9/1/06]**

Act to Prevent Spoliation
You should take affirmative steps to prevent anyone with access to your data, systems and archives from seeking to modify, destroy or hide ESI on network or local hard drives and on other media or devices (such as by deleting or overwriting files, using data shredding and overwriting applications, defragmentation, re-imaging, damaging or replacing media, encryption, compression, steganography or the like).

System Sequestration or Forensically Sound Imaging
As an appropriate and cost-effective means of preservation, you should remove from service and securely sequester the systems, media and devices housing potentially relevant ESI of the following persons:

[NAME KEY PLAYERS MOST DIRECTLY INVOLVED IN CAUSE]

In the event you deem it impractical to sequester systems, media and devices, we believe that the breadth of preservation required, coupled with the modest number of systems implicated, dictates that forensically sound imaging of the systems, media and devices of those named above is expedient and cost effective. As we anticipate the need for forensic examination of one or more of the systems and the presence of relevant evidence in forensically accessible areas of the drives, we demand that you employ forensically sound ESI preservation methods. Failure to use such methods poses a significant threat of spoliation and data loss.

"Forensically sound ESI preservation" means duplication of all data stored on the evidence media while employing a proper chain of custody and using tools and methods that make no changes to the evidence and support authentication of the duplicate as a true and complete bit-for-bit image of the original. The products of forensically sound duplication are called, *inter alia,* "bitstream images" or "clones" of the evidence media. A forensically sound preservation method

guards against changes to metadata evidence and preserves all parts of the electronic evidence, including deleted evidence within "unallocated clusters" and "slack space."

Be advised that a conventional copy, backup or "Ghosting" of a hard drive does not produce a forensically sound image because it only captures active, unlocked data files and fails to preserve forensically significant data existing in, e.g., unallocated clusters and slack space.

Further Preservation by Imaging
With respect to the hard drives and storage devices of each of the persons named below and of each person acting in the capacity or holding the job title named below, demand is made that you immediately obtain, authenticate and preserve forensically sound images of the hard drives in any computer system (including portable and home computers) used by that person during the period from ______ to ______, as well as recording and preserving the system time and date of each such computer.

[NAMES, JOB DESCRIPTIONS OR JOB TITLES]

Once obtained, each such forensically sound image should be labeled to identify the date of acquisition, the person or entity acquiring the image and the system and medium from which it was obtained. Each such image should be preserved without alteration.

Preservation in Native Form
You should anticipate that certain ESI, including but not limited to spreadsheets and databases, will be sought in the form or forms in which it is ordinarily maintained (i.e., native form). Accordingly, you should preserve ESI in such native forms, and you should not employ methods to preserve ESI that remove or degrade the ability to search the ESI by electronic means or that make it difficult or burdensome to access or use the information.

You should additionally refrain from actions that shift ESI from reasonably accessible media and forms to less accessible media and forms if the effect of such actions is to make such ESI not reasonably accessible.

Metadata
You should further anticipate the need to disclose and produce system and application metadata and act to preserve it. System metadata is information describing the history and characteristics of other ESI. This information is typically associated with tracking or managing an electronic file and often includes data reflecting a file's name, size, custodian, location and dates of creation and last modification or access. Application metadata is information automatically included or embedded in electronic files, but which may not be apparent to a user, including deleted content, draft language, commentary, collaboration and distribution data and dates of creation and printing. For electronic mail, metadata includes all header routing data and Base 64 encoded attachment data, in addition to the To, From, Subject, Received Date, CC and BCC fields.

Metadata may be overwritten or corrupted by careless handling or improper preservation, including by moving, copying or examining the contents of files.

Servers
With respect to servers used to manage e-mail (e.g., Microsoft Exchange, Lotus Domino) and network storage (often called a "network share"), the complete contents of each user's network share and e-mail account should be preserved. There are several ways to preserve the contents of a server. If you are uncertain whether the preservation method you plan to employ is one that we will accept as sufficient, please immediately contact the undersigned.

Home Systems, Laptops, Online Accounts and Other ESI Venues
Though we expect that you will act swiftly to preserve data on office workstations and servers, you should also determine if any home or portable systems or devices may contain potentially relevant data. To the extent that you have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD-R/DVD-R disks and the user's PDA, smart phone, voice mailbox or other forms of ESI storage.). Similarly, if you used online or browser-based e-mail accounts or services (such as Gmail, AOL, Yahoo Mail or the like) to send or receive potentially relevant messages and attachments, the contents of these account mailboxes (including Sent, Deleted and Archived Message folders) should be preserved.

Ancillary Preservation
You must preserve documents and other tangible items that may be required to access, interpret or search potentially relevant ESI, including logs, control sheets, specifications, indices, naming protocols, file lists, network diagrams, flow charts, instruction sheets, data entry forms, abbreviation keys, user ID and password rosters and the like.

You must preserve passwords, keys and other authenticators required to access encrypted files or run applications, along with the installation disks, user manuals and license keys for applications required to access the ESI.

You must preserve cabling, drivers and hardware, other than a standard 3.5" floppy disk drive or standard CD or DVD optical disk drive, if needed to access or interpret media on which ESI is stored. This includes tape drives, bar code readers, Zip drives and other legacy or proprietary devices.

Paper Preservation of ESI is Inadequate
As hard copies do not preserve electronic searchability or metadata, they are not an adequate substitute for, or cumulative of, electronically stored versions. If information exists in both electronic and paper forms, you should preserve both forms.

Agents, Attorneys and Third Parties
Your preservation obligation extends beyond ESI in your care, possession or custody and includes ESI in the custody of others that is subject to your direction or control. Accordingly, you

must notify any current or former agent, attorney, employee, custodian and contractor in possession of potentially relevant ESI to preserve such ESI to the full extent of your obligation to do so, and you must take reasonable steps to secure their compliance.

Preservation Protocols
We are desirous of working with you to agree upon an acceptable protocol for forensically sound preservation and can supply a suitable protocol if you will furnish an inventory and description of the systems and media to be preserved. Alternatively, if you promptly disclose the preservation protocol you intend to employ, perhaps we can identify any points of disagreement and resolve them. A successful and compliant ESI preservation effort requires expertise. If you do not currently have such expertise at your disposal, we urge you to engage the services of an expert in electronic evidence and computer forensics. Perhaps our respective experts can work cooperatively to secure a balance between evidence preservation and burden that's fair to both sides and acceptable to the court.

Do Not Delay Preservation
I'm available to discuss reasonable preservation steps; however, *you should not defer preservation steps pending such discussions if ESI may be lost or corrupted as a consequence of delay.* Should your failure to preserve potentially relevant evidence result in the corruption, loss or delay in production of evidence to which we are entitled, such failure would constitute spoliation of evidence, and we will not hesitate to seek sanctions.

Confirmation of Compliance
Please confirm by **[DATE]**, that you have taken the steps outlined in this letter to preserve ESI and tangible documents potentially relevant to this action. If you have not undertaken the steps outlined above, or have taken other actions, please describe what you have done to preserve potentially relevant evidence.

Appendix C

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CHESTERFIELD

FORD MOTOR CREDIT COMPANY,

Plaintiff,

v. Case No.: CL05-242

COUNTY OF CHESTERFIELD,

Defendant.

MOTION FOR SANCTIONS AND MEMORANDUM IN SUPPORT

COMES NOW the defendant, County of Chesterfield ("County"), by counsel, pursuant to Rule 4:12 (b)(2) of the Rules of the Supreme Court of Virginia and moves this Court to impose sanctions against the plaintiff, Ford Motor Credit Company ("FMCC") for failing to comply with the Court's October 7, 2005 Order Compelling Discovery. In support of its motion, the County states as follows:

Statement of Facts

A. Facts Leading Up to Order Compelling Discovery

FMCC filed this lawsuit in 2004 pursuant to Va. Code §58.1-3984, seeking to have this Court declare that the County's business license taxation of FMCC's financial services business located in Chesterfield County was erroneous for the tax years of 2001, 2002, 2003 and 2004. FMCC contends that the tax violates the Commerce Clause of the United States Constitution and

various other provisions of the Virginia and United States Constitutions. The County filed a timely response challenging these contentions.

On December 30, 2004, the County served its Interrogatories and Requests for Production of Documents on FMCC. FMCC amended its lawsuit in March of 2005 and the County sent FMCC a replacement set of interrogatories and requests for production on April 1, 2005 to conform the allegations of FMCC's new lawsuit.

Despite numerous conversations, letters and e-mails to FMCC, FMCC did not respond to the County's discovery requests in compliance with Part Four of the Rules. Accordingly, the County filed a Motion to Compel Discovery in July of 2005, outlining in detail FMCC's repeated failures to provide legitimate responses to the County's discovery. After a hearing on the Motion to Compel on September 23, 2005, the Court ordered FMCC 1) to produce "all documents in its possession or control, without objection", which were responsive to Requests for Production Nos. 21, 22, 23, 24, 25, 27, 28, 29, 35, 37, 39, 40, 43, 45 and 46, and 2) to respond "in full and without objection" to the County's Interrogatories Nos. 7, 8, 9, 10, 11, 12, 13, 14, 15, 22, 23 and 24.

At the September 23 hearing, the Court asked FMCC whether it could comply in full with the Court's Order by October 14, 2005. Counsel for FMCC assured the Court that FMCC could meet this deadline. Thus, the Order Compelling Discovery expressly ordered FMCC to comply in full with the Order no later than October 14. (Order Compelling Discovery attached as Exhibit 1. Verbatim text of the interrogatories and requests for production listed in the Order Compelling Discovery, and all paragraphs in FMCC's lawsuit referenced in the interrogatories or requests for production, attached as Exhibit 2 (requests for production) and Exhibit 3 (interrogatories)).

B. Document Production on October 13, 2005.

On October 13, 2005, three weeks after the County's Motion to Compel Discovery was granted and one day before the deadline contained in the Order Compelling Discovery expired, the County reviewed documents which FMCC produced as a result of the Order Compelling Discovery. These documents were: 1) some business cards, 2) daily financial activity reports dating from 1998 to 2004 for certain defunct car dealerships (known in FMCC parlance as "status dealers")[1], 3) three-ring binders concerning an old sales promotion program, 4) a lease agreement form and an installment contract form, and 5) a dealer loan application.[2] Except for 4) (the lease and loan agreement forms) and 5) (dealer loan application), the documents which FMCC produced on October 13 (and approximately 99% of the documents by volume) were documents of which the County was already aware prior to the September 23 Motion to Compel hearing.[3]

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[1] These defunct activity report documents were for "Primus" financing only. Primus is a FMCC division that brokers financing with a variety of financial institutions including other auto financing companies such as GMAC. Both financing programs are administered by the plaintiff, FMCC. No activity report documents similar to the "Primus" reports were produced by FMCC for any "FMCC" financings.

[2] The County was told that every dealership which utilizes "FMCC" or "Primus" financing has a dealer loan application on file. There are 69 active dealers according to FMCC. It is the County's understanding that the loan application that was produced is similar to the loan applications for the other active dealerships.

[3] In fact, the "status dealer" daily activity reports and the sales promotion program binders had been present in the FMCC document storage room where the County had first discovered the existence of multiple years of "daily reports" which had been retained by FMCC's Chesapeake and Roanoke branch sales offices but had been shredded at FMCC's Chesterfield office. (See previously-filed Update to County's Motion to Compel Discovery, p. 4).

The dealer activity reports which the County reviewed on October 13 are extremely detailed compilations of every financing transaction relating to every vehicle financed by an individual automobile dealership through FMCC. The activity reports show, among other information, FMCC's gross receipts from loans between the dealership and FMCC (basically, loan interest income plus rental income plus financing fees). However, when the County asked FMCC during the October 13 document production to produce the dealer activity reports for the dealerships FMCC currently does business with (so-called "active dealers"), the County was told that FMCC had not retained any of those records on active dealers for any of the tax years at issue: 2001 - 2004. In contrast, activity reports for defunct, status dealers are retained for 20 years. Counsel for FMCC reiterated by e-mail that no such records for active dealers exist. (Exhibit 4)

Significantly, however, despite the fact that FMCC claims that it does not retain activity reports for dealers it actually does business with, the County saw during its October 13 document review activity reports for status dealers that spanned multiple years of the dealers' operations while they were still in active operation. Some of these records were dated as recently as 2004. Obviously FMCC was, at some time, retaining dealer activity reports for these now-defunct dealers and was retaining them for more than one year. For some reason, however, FMCC did not retain any of its currently active dealer activity reports for any of the years (or even portions of the years) requested by the County: 2000-2004.

Regardless of the reason, it became apparent on October 13 that FMCC would not produce any business records that would enable the County to verify FMCC's license tax returns or determine the two fundamental issues which must be litigated in this, and every other, County business license tax case in which the defense of apportionment has been raised: 1) what are the

actual gross receipts generated by the business sited in Chesterfield, and 2) to what extent are these gross receipts legitimately subject to taxation outside of Chesterfield. In fact, after nine and one-half months of attempting to obtain legitimate financial records from FMCC, FMCC had not produced any of the financial documents regularly retained by businesses, particularly financial services businesses, to verify their tax returns. (See Va Code §58.1-3109(6.) for duty of taxpayers to supply information verifying their tax returns)

As the County was leaving FMCC's office on October 13, counsel for FMCC stated that FMCC was "looking into" some financial data that existed in electronic form. This was the first time FMCC had mentioned electronic data notwithstanding the fact that the County's December 30, 2004 and April 1, 2005 requests for production had specifically requested both electronic records and computer printouts. On October 19 (five days after the deadline for production mandated by the Order Compelling Discovery), having heard nothing further on the subject of electronic data, the County contacted FMCC's counsel by e-mail reminding him about this electronic data. (Exhibit 5).

As of October 27 – almost two weeks after the deadline for production set in the Order Compelling Discovery had expired – the County had received no reply to its e-mail. Accordingly, the County sent a letter to FMCC's counsel outlining in detail FMCC's failure to comply with the Order Compelling Discovery. (Exhibit 6). The County even provided FMCC's counsel a verbatim listing of each one of the requests for production to which FMCC was required by the Order to respond, and asked that FMCC review the list again since virtually no documents responsive to most of these requests had yet been produced. (See Exhibit 2 which was attached to the letter). The letter also raised once again the "electronic data" issue. The

County told FMCC that unless it fully complied with the Order by November 4, the County would move for sanctions under Rule 4:12.[4]

C. The "Electronic Data"

On November 3 and 4, FMCC sent by e-mail what it characterized as electronic "gross receipts data". FMCC further represented that this was the data "reported on the... [business license tax] returns" for FMCC and Primus. (Exhibits 7 and 8)[5] The "data" is a listing of dealerships by name with a dollar figure shown for each dealership for calendar years 2000-2004. (Representative pages for the FMCC and Primus "data" are attached as Exhibits 9 and 10). FMCC neither provided nor offered any back-up information verifying the dollar figures shown on these lists or demonstrating why the figures should be considered in any way legitimate or accurate.

Not only are the figures submitted by FMCC unsupported and unverified, the figures are not the gross receipts which FMCC reported to the County for any of the tax years at issue for either its FMC or Primus operations. (See FMCC Gross Receipts Analysis attached as Exhibit 11 and Primus Gross Receipts Analysis attached as Exhibit 12). In fact, if the "electronic data" actually represents reportable gross receipts, then FMCC under-reported its gross receipts for its Primus financing business alone by over $42,000,000. (Exhibit 12).

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[4] The County is aware that it could have filed a motion for sanctions at any time after October 14 but it chose to give FMCC one last opportunity to comply with the Order Compelling Discovery.

[5] The "financial data" was submitted three weeks after the deadline in the Order Compelling Discovery. FMCC's excuse for the delay was that its tax expert, Christopher Mucke, was married on October 15 and stranded by Hurricane Wilma in Mexico. (Exhibit 7). This begs the question that FMCC's electronic data had first been request eleven months previously and had been among the documents FMCC was told to produce when this Court granted the Motion to Compel on September 23 and set the October 14 deadline.

Equally significant, however, is the fact that FMCC indicates in the e-mail transmitting its "data" that the data currently in FMCC's system is not the same data that was in the system when it was originally inputed and that due to constant "updat[ing]" the "data has changed from what it was when the returns were filed." (Exhibit 7). In short, the "data" is unsupported by any competent business records, is admittedly inaccurate and is conclusively at odds with the tax returns FMCC itself filed.[6] Yet, despite these facts, FMCC states in its last e-mail conveying the "electronic data" (Exhibit 8):

> "This completes the discovery responses we have on gross receipts."

D. Spoliation of Documents.

The County issued its Requests for Production to FMCC on December 30, 2004 requesting documents from "January 1, 1999 to the present" or 1999 through 2004. In its April 1, 2005 reissued Requests for Production, the County modified its discovery at FMCC's request and requested documents from 2000 through 2004. Thus, as of December 30, 2004, FMCC was on notice that the County wanted to review all of FMCC's documents responsive to the County's requests dated from 1999 through 2004. And as of April 2, 2005, FMCC was on notice that the County continued to desire to review all of FMCC's responsive documents dated from 2000 through 2004.

As explained above and explained previously in its Update to County's Motion to Compel Discovery ("Update"), the County has been allowed to review two categories of

[6] FMCC also e-mailed "gross receipts data" for other FMCC offices. (Transmitting e-mail and representative pages attached as Exhibit 13). Like the "data" sent for the Chesterfield office, this "data" has no back-up documentation that would show whether the "data" is accurate, what business activity the figures relate to or how the gross receipts listed on the spreadsheet are somehow being attributed to and taxed by Chesterfield County.

documents which contain detailed financial information concerning FMCC's Chesterfield gross receipts.[7] One category is "daily reports". As the Court will recall, FMCC only produced such reports from the Chesterfield office for September through December 2004, claiming that the previous months' daily reports had been shredded pursuant to FMCC's document retention policy.[8] The second category is the dealership activity reports. As explained above, the County reviewed such reports on October 13 but only for defunct, "status" dealers. No report for any month in 2004 or previous years relating to any active dealership was produced by FMCC.

As of December 30, 2004, FMCC was on notice from the County's Request for Production that the County wanted to see these daily reports and dealership activity reports and all other FMCC records, in whatever form, showing FMCC's gross receipts from its Chesterfield financial services business operation as well as all records showing the gross receipts generated by other FMCC offices which FMCC contends expose it to the risk of double taxation under the Commerce Clause. Yet FMCC shredded or otherwise disposed of documents responsive to the County's document requests after December 30, 2004.[9] As the Commissioner of the Revenue

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[7] Of course, there may be other financial records relevant to the County's requests which the County has not been given access to review.

[8] Under FMCC's document retention policy, a month's worth of daily reports are apparently shredded after they are a year old. For example, July 2004 records are shredded at the end of July 2005 and so on. FMCC finally produced the daily reports for September – December 2004 to the County during a September 14, 2005 document production (See Update at p. 4). All previous months' daily reports had already been shredded. Contrary to FMCC's policy, however, the County also discovered that FMCC's other two Virginia branch sales offices retained their own daily reports for multiple years including daily reports spanning the 2000 – 2004 time period covered in the County's Requests for Production.

[9] That the destruction of relevant documents may have occurred pursuant to a document retention policy is not a legally cognizable justification under the law of spoliation. The only issue is whether the documents were destroyed intentionally. Destruction under a retention policy is intentional. (See below at pp. 13-14).

will testify, had FMCC's 2004 financial records been retained in compliance with FMCC's discovery obligations under Part Four of the Rules, the Commissioner could have, in the absence of 2000 – 2003 records, conducted a legitimate audit of FMCC's 2004 gross receipts which he then could have utilized — by extrapolation — to determine the accuracy of the gross receipts FMCC reported for the 2001 through 2004 tax years. The Commissioner has previously utilized this procedure in those rare instances when a taxpayer fails to supply business records verifying the gross receipts it has reported to the Commissioner. (See Va. Code §§58.1-3109, -3110, -3111 for the obligations of taxpayers to furnish business records to Commissioner).

E. FMCC's Failure to Respond to Interrogatories.

FMCC has also failed to comply with its obligation under the Order Compelling Discovery to respond "in full" to the County's interrogatories. FMCC's failure in this regard is directly related to FMCC's failure to produce, and its destruction of, financial records related to the issue of gross receipts generated by FMCC's Chesterfield office and, more particularly, to the Commerce Clause apportionment issue of whether there were any gross receipts generated by FMCC's non-Chesterfield business offices that 1) were being attributed to the Chesterfield office and taxed by the County, and 2) were also
subject to the risk of double taxation in violation of the Commerce Clause. Virtually all
of the interrogatories which FMCC previously failed or refused to answer, and the interrogatories which were listed in the Order Compelling Discovery, related directly to the issue of apportionment. These interrogatories ask FMCC to explain the extent to which its gross receipts are being unconstitutionally subjected to the risk of double taxation. (See Interrogatories Nos. 7, 8, 9, 10, 11, 13, 14, 15 (dealing in part with apportionment), 22, 23, and 24).

FMCC's responses are inadequate. (Exhibit 14) FMCC asserts repeatedly in its answers that "FMCC's activities within the County make up a small percentage" of the activities that produce gross receipts attributable to the Chesterfield office; that "only a small percentage of FMCC's gross receipts" are attributed to Chesterfield activities; and that a "very large percentage of FMCC's activities do not occur within the County." (See, e.g., FMCC's responses to Interrogatories Nos. 7, 10, 13, 15, and 23). Far from maintaining, as it has to date in this litigation, that it is "impractical or impossible" to determine how FMCC's gross receipts should be attributed, FMCC states in its answers that it has indeed determined that a small percentage is attributable to Chesterfield and a very large percentage to other offices. What FMCC fails to do, however, is to then describe, as the interrogatories request and the Order Compelling Discovery requires, "all facts supporting the allegations" which FMCC is making concerning apportionment. However, having stated under oath that it has determined that a small percentage of gross receipts should be attributed to Chesterfield, FMCC is compelled by the Order Compelling Discovery to describe all facts supporting this allegation.

FMCC's failure to describe all facts supporting its allegations is perhaps best illustrated in its response to Interrogatory No. 23. This interrogatory asks FMCC to describe in detail all facts which support FMCC assertion that "over 90% of the activities engaged in by FMCC to provide financial services to Virginia customers occur outside the borders of Chesterfield County (and Virginia)." FMCC's somewhat circuitous response begins by stating that the "over 90%" estimate was determined by FMCC's tax expert Christopher Mucke but that, "since this litigation", FMCC has "learned" that it

cannot state the percentage "with certainty."[10] Directly on the heels of this statement, FMCC lists the activities it claims would make up the estimated 90% and then refers the County back to FMCC's response to Interrogatory No. 7, a response which contends that "a small percentage" of the activities which generate FMCC's Chesterfield gross receipts occur in the Chesterfield office. Apparently FMCC wants to take the position that it is impractical or impossible to determine how to apportion gross receipts between its offices but, at the same time take the contrary position that only a small percentage, (approximately 10% according to FMCC) can be attributed to Chesterfield.

The County continues to assert that no non-Chesterfield receipts are factually or legally attributable to the gross receipts which the County has actually taxed. FMCC has, to date, failed to provide any information that might establish that gross receipts generated by any of its non-Chesterfield offices are somehow being attributed to Chesterfield, despite the County's repeated requests for this information if it indeed exists. FMCC now takes the position that a "very small percentage" of gross receipts should be attributed to Chesterfield but does not provide the requested facts, "in detail" or otherwise, to support this contention. At the same time, FMCC is attempting to salvage its original, but apparently unwarranted, claim that there is no practical or possible way to apportion gross receipts even if such apportionment was legally required.

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[10] Interestingly, FMCC claimed in its original 2004 lawsuit (as well as in its revised lawsuit) that it is "impractical or impossible" to determine what gross receipts taxed by the County are generated by and attributable to FMCC's Chesterfield versus non-Chesterfield offices. FMCC then cites, quotes and underlines the portion of County Code §6-6(b) that states that the default method of payroll apportionment should be used because it is "impractical or impossible" to attribute its gross receipts between it's offices. However, FMCC now conveniently contends in its response to Interrogatory No. 23 that it was only "[s]ince FMCC initiated this litigation and the intensive discovery ensued" that FMCC supposedly "learned" that its percentage calculation was somehow less than certain. [Emphasis added]

FMCC cannot be permitted, however, to assert repeatedly that "only a small percentage of gross receipts" are attributable to Chesterfield without revealing the facts to support such an assertion. Nor can FMCC be permitted to destroy relevant documents by which it would be possible to determine the gross receipts legally attributable to the Chesterfield office and then declare that the attribution task is "impractical or impossible." As long as FMCC continues to rely on its "small percentage of gross receipts" allegations, it is required by the Order Compelling Discovery to respond to the County's request for "all facts in detail" supporting that allegation.

Argument

A. Sanctions Are Appropriate Under Rule 4:12

Sanctions are appropriate under Rule 4:12(b)(2) whenever a party "fails to obey an order to provide or permit discovery, including an order [compelling discovery] made under subdivision (a)" of Rule 4:12. Trial courts have broad discretion to determine the appropriate sanction for failure to comply with an order compelling discovery. Woodbury v. Courtney, 239 Va 651, 654 (1990). FMCC was ordered from the bench on September 23 to respond fully to specified interrogatories and requests for production no later than October 14, 2005. This October 14 deadline was incorporated into the Order Compelling Discovery.

As discussed above, FMCC has failed to respond in full to the County's discovery in either a timely way or an adequate way: 1) FMCC has not produced financial "daily report" documents from its Chesterfield office even though the same documents are customarily retained in identical FMCC branch offices elsewhere for over four years; 2) FMCC has not retained dealership activity reports for active dealers even though identical reports – for multiple tax years – are retained for defunct dealers; 3) FMCC has not retained any financial record customarily

kept by other financial service businesses for the purpose of responding to tax audits and the requests of tax officials; 4) FMCC's "electronic data" merely list unverifiable figures unsupported by any legitimate financial records, figures which conflict with the gross receipts returns filed by FMCC and which, according to FMCC, have been altered since the data was first compiled; in short, the figures are valueless to determine either the taxable gross receipts of FMCC's Chesterfield office, the gross receipts of other FMCC offices or the extent to which the gross receipts of one can be attributed to the other, if at all.

Finally, FMCC's financial records for the year 2004 no longer exist because they were being systematically destroyed throughout 2005. This destruction occurred despite the County's pending requests for production of those very documents.[11] FMCC's conduct constitutes spoliation, which is defined by the Virginia Supreme Court as the intentional destruction of evidence which a party had a duty to retain. Austin v. Consolidation Coal Co., 256 Va. 78 (1998). Although no Virginia court has, to the County's knowledge, addressed the precise issue of a party's destruction of documents through a document purging program as spoliation, the federal courts have held that destruction of documents relevant to pending or anticipated litigation, even if the destruction is pursuant to a routine document purging policy, is intentional destruction which constitutes spoliation of evidence. Rambus Inc. v. Infineon Technologies AG, 222 F.R.D. 280, 287-288 (E.D. Va. 2004); Rambus, Inc. v. Infineon Technologies AG, 220 F.R.D. 264, 281 (E.D. Va. 2004). (Attached as Exhibits 15 and 16).

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[11] FMCC has contended in the past that it had no obligation to produce any documents under the County's request for production until a protective order was entered. This contention is incorrect. Rules 4:1 and 4:9 require FMCC to produce requested documents unless a protective order is entered under 4:1(c) which limits or conditions that production. Furthermore, the Rules never permit a party to destroy requested documents pending the entry of a protective order.

Significantly in this case, FMCC spoliated documents which, if they had been retained by FMCC in accordance with its duty under Virginia's discovery rules, would have enabled the Commissioner to make reasonable conclusions concerning the existence of, and the appropriate apportionment (if at all) of, FMCC's Chesterfield gross receipts. The problems created by FMCC's destruction of relevant documents are only compounded by FMCC's contention in it's interrogatory responses that only a "small percentage" of FMCC's gross receipts are subject to County taxation, a contention which apparently can no longer be proven "with certainty" (assuming it ever could have been proven at all) due to the destruction of supporting evidence.

B. The Appropriate Sanctions

Rule 4:12(b)(2) sets forth a variety of sanctions which a Court may appropriately impose due to a party's failure to comply with an order compelling discovery and specifically provides that these sanctions "among others" are available. In the present case, FMCC has failed to furnish legitimate financial records in a lawsuit that has as its two fundamental issues FMCC's gross receipts and the apportionment of the County's taxation of those receipts. This failure profoundly hampers the County's ability to prepare its defense or to take depositions of FMCC officials. Neither the County's repeated letters urging FMCC to comply with its discovery obligations nor this Court's Order Compelling Discovery have yielded meaningful, relevant information or documents. When threatened with motions or sanctions, FMCC always "discovers" some new documents but these documents invariably reveal only deeper problems and more significant gaps in FMCC's recordkeeping and retention.

FMCC has been given every fair opportunity to furnish the documents which other financial service business regularly prepare, retain and produce to support the tax returns they

file. It is apparent that FMCC simply will not allow the County to look behind either FMCC's tax returns or its conclusory interrogatory answers concerning apportionment.

Under these circumstances, it is appropriate at this juncture for the Court to prohibit FMCC from offering evidence going to the issues of gross receipts or apportionment (Rule 4:12(b)(2)(B)) or to dismiss this action altogether (Rule 4:12(b)(2)(C)). If the Court chooses to allow this case to continue, the County asks, in accordance with Rule 4:12 (b)(2)(C), that the Court stay all further proceedings until FMCC has complied in full with the Order Compelling Discovery. At a minimum, FMCC should produce what every other taxpayer in the Court required under Va. Code §58.1-3109(6.) to produce to the Commissioner of the Revenue: "information relating to...income or license taxes" including access "to books of accounts or other papers and records for the purpose of verifying the tax returns of such taxpayers and procuring the information necessary to make a complete assessment of the taxpayer's license taxes..." If FMCC simply cannot or will not produce this information or these records, then the only appropriate action is dismissal with prejudice under Rule 4:12(b)(2)(C).

COUNTY OF CHESTERFIELD

By: ______________________________
Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Sanctions and Memorandum in Support was mailed first class, postage prepaid, this 21st day of November, 2005, to John L. Marshall, Jr., Esquire, McSweeney & Crump, P.C., 11 South Twelfth Street, Richmond, VA 23218 and James C. Owen, Esquire, McCarthy, Leonard, Kaemmerer, Owen, McGovern & Striler, L.C., 400 S. Woods Mill Road, Suite 250
Chesterfield, MO 63017.

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Appendix D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

In the Matter of RAMBUS INCORPORATED, a corporation.	Docket No. 9302 **PUBLIC**

COMPLAINT COUNSEL'S MOTION
FOR SANCTIONS DUE TO
RAMBUS'S SPOLIATION OF DOCUMENTS

> There is nothing legitimate about devising and implementing a plan to destroy documents as a core part of a patent licensing and litigation strategy. No decision cited by Rambus so holds. And, the Court's independent research has uncovered no authority to that effect.[1]

This quote from Judge Payne's May 2004 ruling is equally applicable in this matter. Rambus's document retention policy was "part and parcel" of its litigation efforts against the DRAM manufacturers,[2] and Rambus knew that its planned litigation against those DRAM manufacturers was imperiled by its own conduct at JEDEC. Rambus adopted the policy and encouraged its employees to destroy enormous quantities of evidence, including documents relevant to JEDEC. Following his *in camera* review that included the same documents recently admitted into the record in this matter, Judge Payne concluded that Rambus's document retention policy "was set up for what, on the record to date, clearly appears to have been an impermissible

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1 *Rambus, Inc. v. Infineon Tech. AG,* 222 F.R.D. 280, 298 (E.D.Va. 2004).

2 *Rambus, Inc. v. Infineon Tech. AG*, Memorandum Opinion (Payne, J.) at 18 (E.D.Va. May 18, 2004) (See Attachment B to Complaint Counsel's Reply Brief, filed July 2, 2004).

purpose – the destruction of relevant, discoverable documents at a time when Rambus anticipated initiation of litigation to enforce its patent rights against already identified adversaries." *Rambus Inc. v. Infineon Technologies AG,* 222 F.R.D. at 298. He continued: "The record shows that the document destruction was on an enormous scale reaching all kinds of documents with potential relevance to this case and that it was voluminous, sweeping up and purging millions of documents under the control of Rambus, both in its own facilities and in the offices of its retained outside patent counsel." *Id.* at 296. He noted, "[t]he policy underlying [the spoliation doctrine] is the need to preserve the integrity of the judicial process in order to retain [society's] confidence that the process works to uncover the truth." *Id.* at 288 (citing *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). In March 1, 2005, following a five-day evidentiary hearing, Judge Payne dismissed Rambus's patent infringement claims against Infineon on grounds of Rambus's spoliation of evidence and unclean hands.

The Commission has an identical interest in protecting the integrity of its administrative litigation process. In this case, there is more than ample evidence that escaped the Rambus's destruction efforts to justify judgement against Rambus on the merits of the case. Nonetheless, the Rambus conduct is sufficiently serious to warrant action by the Commission to enter a default judgment against Rambus, as did Judge Payne, as the appropriate sanction for its spoliation of evidence and related litigation misconduct. Such an action by the Commission would help ensure that future FTC litigants do not think that they, too, can benefit from such tactics.

I. Background

A. Equitable Estoppel and *Dell* Concerns Caused Rambus to Leave JEDEC.

Equitable estoppel was a risk for Rambus almost from the beginning of its participation in JEDEC. Shortly after Rambus joined JEDEC, Richard Crisp, who was to become Rambus's official JEDEC representative, and his boss Allen Roberts, discussed with Rambus's outside counsel Lester Vincent "[a]dvising JEDEC of patent applications." CCFF 887-888. Mr. Vincent

warned Rambus that equitable estoppel could be a problem if Rambus continued to participate in JEDEC. *Id.* In particular, he advised that Rambus should not "mislead JEDEC into thinking that Rambus will not enforce its patent." CCFF 889.[3]

Over the course of the next three-and-a-half years, Mr. Vincent continued to explain to Rambus the danger that equitable estoppel could pose for the future enforcement of Rambus's patents against JEDEC-compliant products. *See* CCFF 956-957; *see also* CX1958 ("Plaintiff could not remain silent while an entire industry implemented the proposed standard and then when the standards were adopted assert that his patents covered what manufacturers believed to be an open and available standard."). Beginning in the fall of 1995, a new in-house counsel, Anthony Diepenbrock, also voiced his misgivings about the potential for Rambus's conduct at JEDEC to create equitable estoppel problems. CCFF 1059-61.

The crucial importance of equitable estoppel was driven home in December 1995, when Mr. Vincent forwarded the Commission's proposed *Dell* consent order to Rambus. CCFF 1083.[4] Mr. Vincent and his partner Maria Sobrino explained to Rambus CEO Geoff Tate the downside risks for Rambus raised by the *Dell* decision and equitable estoppel. CCFF 1084. In January 1996, outside counsel Lester Vincent met with CEO Geoff Tate, Vice President David Mooring, Richard Crisp and in-house counsel Anthony Diepenbrock. CCFF 1085-87. Again at that meeting, the attorneys stressed to Rambus management the downside risk caused by *Dell* to Rambus's patent enforcement strategy. *Id.*

At this point, Rambus management finally accepted the seriousness of the equitable

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[3] At this point Rambus did not have any patents, but did have patent applications.

[4] Around the same time, Dave Mooring, Tony Diepenbrock and Richard Crisp apparently received a newsletter written by Wilson Sonsini lawyer James Otteson titled "Patent Rights and Industry Standards Associations." *See* CX5058. That newsletter described equitable estoppel and the *Dell* decision. *Id.* at 2 ("Although the Dell-FTC settlement is not yet final, its significance for technology companies is clear: failure to disclose proprietary intellectual property rights during standard-setting activities could lead to a loss of those rights through the FTC's enforcement of Section 5 of the Federal Trade Commission Act. But even when the FTC chooses not to enforce Section 5, technology companies should be aware they can also lose patent rights through the doctrine of equitable estoppel.").

estoppel risk they had incurred. CX0858 at 2 (email from Richard Crisp to Tate and others at Rambus: "So, in the future, the current plan is to go to no more JEDEC meetings due to fear that we have exposure in some possible future litigation."); CX0868 ("I think we should have a long hard look at our IP and if there is a problem, I believe that we should tell JEDEC there is a problem. Other opinions?"). In June 1996, Rambus withdrew from JEDEC. CCFF 1109-1114.

B. Rambus Developed its Document Retention Policy as Part of its Litigation and Licensing Strategy Regarding JEDEC.

In October 1997, Rambus hired Joel Karp as Vice President of Intellectual Property to assist Rambus in its goal of enforcing patents against manufacturers of JEDEC-compliant SDRAMs and DDR SDRAMs. CCSF 76. Prior to joining Rambus, Mr. Karp had submitted a sworn declaration in support of Samsung's equitable estoppel defense to a patent infringement suit by Texas Instruments relating to a JEDEC DRAM standard. CCSF 77 ("It is contrary to industry practice and understanding for an intellectual property owner to remain silent during the standard setting process – and after a standard has been adopted and implemented – later attempt to assert that its intellectual property covers the standard and allows it to exclude others from practicing the standard.").

In early 1998, Mr. Karp began planning and preparing for the initiation of litigation against manufacturers of JEDEC-compliant SDRAMs and DDR SDRAMs. He hired litigation counsel. CCSF 79-80. In 1998 and 1999, he and his outside litigation counsel evaluated legal theories, focusing on patent infringement and breach of contract. CX5007 ("Litigation/Licensing Strategy . . . make ourselves battle ready . . . Need to litigate against someone to establish royalty rate and have court declare patent valid. . . . Other approach is breach of contract");[5]

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[5] Rambus itself has taken the position that Rambus was anticipating litigation at the time of this meeting. Rambus's counsel instructed outside counsel Daniel Johnson not to answer questions relating to statements in this document partly on grounds of work product in anticipation of litigation. CCSF 13; *see also* CX5079 at 49 (corresponding to transcript pages 573-574) (Judge Payne: "And in every objection where [a] ... work product claim, you had to admit in making it it was in anticipation of litigation at the time it was made, and that admits that

CX5005 at 2 ("a tiered litigation strategy has been developed.... The first option is to pursue breach of contract remedies.... Rambus may [also] elect to file a patent infringement suit."); CX5006 at 3 ("Licensing and Litigation Strategy . . . – Option 1: Breach of Contract Remedy – Option 2: Patent Infringement Suit"); CX5013 at 2, 4-6 (identifying patents that cover SDRAM and DDR SDRAM; "compliants against DRAM companies"); CCSF 9-47.

Rambus and its outside litigation counsel evaluated potential litigation targets, focusing on specific DRAM manufacturers. CX5007 (Outside counsel "will review Micron, Fujitsu, and Samsung and Hyundai contracts and formulate litigation strategy driven by results of the analysis – breach-scope of license, NDA or patent infringement."); CX5013 at 5 ("Picking Litigation Targets"); CCSF 9-47. Rambus and its outside litigation counsel also evaluated possible forums, including the International Trade Commission, the Northern District of California, and the Eastern District of Virginia. CX5006 ("patent suit can be brought in venue of our choice – ITC – Northern California – Eastern District of Virginia (Rocket Docket)"); CX5013 at 6 ("Potential Litigation Forums") CCSF 9-29.

Following discussions with outside litigation counsel, and as a part of its litigation preparation, Rambus started planning for the compilation of a document database for use in litigation. CX5006 at 8 ("Licensing and Litigation Strategy Near Term Actions . . . – Need to prepare discovery database"); CX5005 at 2 ("To implement the above strategy Rambus has authorized outside counsel to begin organizing documents, and preparing a discovery data base ..."). Also following consultations with outside litigation counsel, and also as an integral part of its preparations for litigation, Mr. Karp drafted and implemented a document retention policy.[6]

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there's anticipation of litigation in the minds of those who ... of 1998 at the time he was doing this.").

[6] At some point, Mr. Karp asked outside counsel Diana Savage for information on how to develop a document retention policy. CCSF 81. Ms. Savage gave Karp a "template agreement" that he could use as a starting point. *Id.* That document made clear that it was intended for information purposes only and could not be considered a Rambus-specific comprehensive document retention policy. CCSF 82-83. Ms. Savage informed Mr. Karp that if Rambus had any litigation-oriented issues that could be affected by a new document retention

CX5006 at 8 ("Licensing and Litigation Strategy Near Term Actions – Need to create document retention policy . . . – Need to organize prosecuting attorney's files for issued patents"); CX5015 ("IP Litigation Activity . . . B. Propose policy for document retention"); CX5014 ("IP Litigation Activity A. Implement document retention action plan – Done"); CX5023 at 7-8 (IP Update 10/04/98: "All Day Shredding Party Held on Sept. 3"); CX5045 ("Licensing/Litigation Readiness . . . G. Organize 1999 shredding party at Rambus"); CCSF 75-92. Contrary to the advice of outside litigation counsel, however, Mr. Karp did not take steps to ensure that documents relevant to anticipated litigation were preserved. CCSF 90-92, 103-108.[7] Instead, Mr. Karp insisted on the wholesale destruction of any and all documents not deemed helpful to Rambus.

Rambus's document retention policy required Rambus employees to search out and maintain evidence that might be useful to Rambus in litigation, such as documents relating to patent disclosures and proof of invention dates that are of "great value to Rambus," as well as material relating to trade secrets. CCSF 100-102; RX-2503. In sharp contrast, however, Rambus's document retention policy never once mentioned any obligation to preserve any other documents relevant to litigation. CCSF 103-104. Despite the fact that the policy was created as part of a litigation and licensing plan to obtain royalties over JEDEC-compliant DRAM, and despite Rambus's awareness that its past presence at JEDEC gave rise to substantial risk pursuant to equitable estoppel and the Commission's *Dell* consent decree, Rambus included no warning whatsoever in its document retention policy to retain documents relating to JEDEC or to anticipated litigation. *Id.* Thus, Rambus's document retention policy invited, indeed required,

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policy, he should contact another attorney in her office, David Lisi. *Id.* Mr. Karp did not do so; instead, he himself generated Rambus's two-page document retention policy. CCSF 87.

[7] Although Mr. Johnson apparently evaluated some aspects of Rambus's document retention policy, he never knew when he reviewed that policy that Rambus had been at JEDEC or that its presence there might equitably estop them from enforcing their patents against the JEDEC standard. CCSF 85. ("When I read in the newspaper about the JEDEC issue, I was flabbergasted. It ... never came up when I was involved with any input from the client.... let me make sure I make it clear, I never had a conversation with anybody at Rambus about anything relating to JEDEC, ever.").

Rambus employees to carefully preserve evidence potentially helpful to Rambus in its upcoming litigation, and to engage in the wholesale destruction of everything else. And that is precisely what Rambus employees did.

C. Rambus Implemented its Campaign of Document Destruction in Preparation for Litigation.

In the summer of 1998, Vice President Karp began implementing Rambus's campaign of document destruction. Mr. Karp declined any assistance from outside counsel (CCSF 94-96) and himself presented Rambus's policy to the various divisions within Rambus, and monitored compliance with the policy. CCSF 93. As with the policy itself, Mr. Karp's presentations failed to provide any notice to Rambus employees of their responsibility to maintain documents relevant to Rambus's upcoming litigations. CCSF 104-107. Instead they encouraged wholesale destruction of physical and electronic documents, including those that were not helpful to Rambus. See, e.g., RX2505 at 1 (email is "discoverable in litigation or pursuant to a subpoena"; "Email – throw it away"); CCSF 104.

As partially documented previously, in September 1998 Rambus held "Shred Day 1998," at which 20,000 pounds of documents were shredded in a single day. CCFF 1739-40. Rambus's employees collected 185 burlap bags and 60 boxes full of documents to be destroyed. CCSF 53. It took a professional shredding company 10 hours to shred all the documents presented by Rambus's employees. *Id.* By the end of Shred Day 1998, Rambus's electronically stored documents were either destroyed or in the process of being destroyed. CCSF 51-52.

But that was not enough. Concerned that some documents might have escaped the purge, Mr. Karp ensured that part of Rambus's "Licensing/Litigation Readiness" in 1999 was to "Organize 1999 shredding party at Rambus." CX5045; CCSF 58-59. As with the 1998 "Shred Day," Rambus employees were instructed to comply strictly with the document retention policy when deciding what documents to keep and what documents to throw away. CCSF 106. Rambus collected another 150 burlap bags full of documents to be shredded, requiring the professional

shredding company over four hours to complete the job. CCSF 61. At Mr. Karp's instruction, outside counsel Lester Vincent also conducted a "clean-up" of his files that continued through 1999 and into 2000, with plans to do more in 2001. CCSF 56-57; 128-133. The only files he neglected were his "chron" files. *Id.*

In the fall of 1999, immediately after Shred Day 1999, Rambus finalized its plans for litigation and picked its targets. CCSF 37-42. Rambus sent an assertion letter to Hitachi on October 22, 1999, and filed suit against Hitachi in January 2000.[8] CCFF 1953, 1995. In the spring of 2000, Rambus notified four other DRAM manufacturers and at least one video card manufacturer of alleged infringement of its patent claims. CCFF 1954-1958. Rambus settled its lawsuit with Hitachi in June 2000, but starting in August 2000 began litigation with other DRAM manufacturers, some of which continues today. CCFF 2015-2018 (Infineon), 2019 (Hynix), 2020 (Micron).

During this period, <u>after</u> threatening to sue manufacturers of JEDEC-compliant SDRAM and DDR SDRAM for alleged infringement of specific Rambus patents claiming priority back to the time when Rambus was a JEDEC member, Rambus and its agents continued to destroy documents. Vice President Neil Steinberg instructed Rambus executives to destroy all drafts of contracts and negotiation materials on July 17, 2000. CCSF 63. Mr. Vincent, after briefly ceasing his file cleaning when the Hitachi case was filed, began destroying documents once again as soon as the case settled in June 2000. *See* CX5036 (listing patent files cleaned up and "reviewed" by Vincent on June 23, 2000); CCSF 62.

On December 28, 2000, while in active litigation with Infineon, Micron and Hynix, and the day before receiving official notice from FTC staff of the Commission's investigation, Rambus executed the biggest Shred Day of all. *See* Response of Complaint Counsel to the Commission's Order Regarding Designation of the Record Pertaining to Spoliation of Evidence

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[8] Rambus also filed a Section 337 complaint against Hitachi before the United States International Trade Commission. CCFF 1997-1998.

by Rambus (filed Dec. 22, 2004), Attachment F. As with Rambus's other document shredding events, on this day no instructions were given to employees to ensure that they did not destroy documents relevant to Rambus's patent litigation. CCSF 107. Instead they were required to conform to the same document retention policy as always. *Id.* On December 28, 2000, Rambus destroyed 460 burlap bags of documents, bringing the grand total of documents destroyed during Rambus's "shred days" and "office cleanings" to 795 burlap bags and 60 boxes of documents. CCSF 64; *see also* DX0501 at 72-75 (by Infineon's calculations, the volume of documents destroyed by Rambus since it began anticipating litigation exceeded 2.7 million pages).[9]

The impact of all of this document destruction became clear to Rambus's own litigation counsel relatively early in Rambus's litigation against Hitachi. CCSF 118-120. When Rambus's attorneys attempted to collect Rambus documents to respond to Hitachi's document requests, they found very little for the period in which Rambus was at JEDEC. *Id.* As explained by Rambus's attorney: "It would be difficult to characterize them to any specific grouping. It was more historical documents prior to a certain date, were – either didn't exist or seemed to be incomplete." CCSF 118. Among the documents that were missing were internal correspondence and emails, JEDEC-related documents, patent-related documents, and other documents directly relevant to this case – in short, precisely "the kinds of documents usually generated in the course of business that contain information that is useful in ascertaining truth and in testing the validity of positions taken in litigation." *Rambus, Inc. v. Infineon Tech. AG*, 222 F.R.D. at 297; *see also* CCFF 1736-1748; CCSF 118-144.

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[9] Complaint Counsel first discovered the 2000 document destruction event from hearings in *Infineon* in December 2004. *See* Response of Complaint Counsel to the Commission's Order Regarding Designation of the Record Pertaining to Spoliation of Evidence by Rambus (filed Dec. 22, 2004) at 4.

ARGUMENT

It is by now clear that Rambus committed spoliation of evidence before enforcing its patents against JEDEC-compliant SDRAM and DDR SDRAM, as found by Judge Payne in Virginia and Judge Timony below. *Rambus v. Infineon,* 155 F.Supp.2d 668, 680-683 (E.D.Va. 2001) (Payne, J.) (Rambus's document retention policy was "set up in part for the purpose of getting rid of documents that might be harmful in litigation."); Order on Complaint Counsel's Motions for Default Judgment (February 26, 2003) at 8-9 (Timony, J.) (Rambus intentionally destroyed documents "that it knew or should have known were relevant to reasonably foreseeable litigation."); *see Micron v. Rambus,* Transcript of Status Conference/Motion Hearing at 75-79 (Jordan, J.) (July 14, 2005) (attached hereto as Attachment A) ("There is a *prima facie* case that there was a crime").

Sanctions for spoliation of evidence are appropriate if: (1) the party having control over the evidence had an obligation to preserve the evidence when it was destroyed; (2) the evidence was destroyed with a culpable state of mind and (3) the destroyed evidence was relevant to a claim or defense in that a reasonable trier of fact could find that the evidence would support or contradict that claim or defense. *See Byrnie v. Town of Cromwell,* 243 F.3d 93, 107-112 (2d Cir 2001); *Zubalake v UBS Warburg,* 2004 WL 1620866 at *6-7 (SDNY 2004).[10] The obligation to preserve evidence can arise when the party has notice that the evidence may be relevant to future litigation. *See, e.g., Silvestri v. General Motors Corp.,* 271 F.3d 583, 591 (4th Cir. 2001). A culpable state of mind is found by a showing that the evidence was destroyed "knowingly, even if without intent to breach a duty to preserve it, or negligently." *Residential Funding Corporation v. DeGeorge Financial Corp.,* 306 F.3d 99, 108 (2d Cir. 2002). Finally, relevance in this context means that there must be sufficient evidence "from which a reasonable trier of fact could infer

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[10] *See also Stevenson v. Union Pacific Railroad,* 354 F.3d 739, 746 (8th Cir. 2004) ("there must be a finding of intentional destruction indicating a desire to suppress the truth"); *see generally,* Scheindlin and Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century,* 11 Mich. Telecomm. Tech. L. Rev. 71 (2004), *available at* http://www.mttlr.org/voleleven/scheindlin.pdf.

that the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction." *Id.* at 110.

Here, these elements and more have already been established. Judge Timony's Order on collateral estoppel, which Rambus never appealed to the Commission, establishes conclusively that Rambus intentionally destroyed relevant documents in anticipation of reasonably foreseeable litigation, and that Rambus's document retention policy was instituted in 1998 "in part for the purpose of getting rid of documents that might be harmful in that litigation." Order Granting Complaint Counsel's Motion for Collateral Estoppel (Feb. 26, 2003) at 5. Judge Timony also instituted a number of rebuttable presumptions as the result of his evaluation of the spoliation evidence. Order on Complaint Counsel's Motions for Default Judgment (February 26, 2003) at 8-9. Among these presumptions are that Rambus knew that its failure to disclose the existence of its intellectual property at JEDEC could serve to equitably estop it from enforcing its patents as to other JEDEC participants; that Rambus's corporate document retention policy failed to direct its employees to retain documents that could be relevant to foreseeable litigation; and that Rambus's document retention program failed to require employees to create and maintain a log of the documents purged pursuant to the program. *Id.* Rambus never even attempted to rebut these presumptions.

As more light has been shed on Rambus's conduct, the evidence in favor of Judge Timony's conclusions has become more concrete and more arresting. After reviewing *in camera* the same evidence that was recently submitted to the Commission, Judge Payne in Virginia found that Rambus's document retention policy was set up for the impermissible purpose of destroying relevant, discoverable documents at a time when Rambus anticipated initiating litigation to enforce its patent rights against already identified adversaries, and that the policy was an integral part of Rambus's licensing and litigation strategy. *Rambus v. Infineon,* 222 F.R.D. 280, 292-299 (E.D. Va. 2004). After an unclean hands hearing when this evidence was presented in open court and Rambus was allowed to respond, Judge Payne dismissed Rambus's patent case against

Infineon, finding that "I have concluded that [Infineon] has proved, by clear and convincing evidence, a spoliation that warrants dismissal of this action as the only appropriate sanction after having – of the patent infringement case after having considered the alternatives." DX0507 at 1139.

The circumstances surrounding Rambus's development and implementation of its document retention program, as described above, fully support this result.

- Rambus designed its program as part of its preparation for litigation against DRAM manufacturers over its patents covering JEDEC standard DRAM. CCSF 9-29.
- Rambus implemented its program of document destruction barely two years after Rambus's attorneys (Vincent and Diepenbrock) had finally convinced Rambus to leave JEDEC because of concerns that its conduct at JEDEC might lead to equitable estoppel problems and also might lead to a *Dell*-type investigation by this Commission. *See, e.g.,* CCFF 821, 849-852.
- Rambus's document retention policy was developed by Vice President Joel Karp, who had been actively involved in litigation over a patent claim on JEDEC-standard DRAM where he submitted a declaration in support of the defendant's equitable estoppel defense. CCSF 77; *see also* DX0501 at 8, 16.
- Throughout the first half of 1998, Mr. Karp had multiple meetings about the document retention policy with CEO Geoff Tate, who had been briefed extensively by Rambus's lawyers regarding equitable estoppel and *Dell. See generally* Memorandum in Support of Complaint Counsel's Motion for Default Judgment Relating to Respondent Rambus Inc.'s Willful, Bad-Faith Destruction of Material Evidence (12/20/2002) at 34-38.
- Although Mr. Karp had been warned by Rambus's outside litigation attorney, Mr. Johnson, that a document retention policy could not be imposed in bad faith – that it could not be used to destroy documents relevant to anticipated litigation – the policy Mr. Karp designed, and Mr. Tate approved, failed to ensure that evidence relevant to Rambus's potential equitable estoppel problems would be preserved. CCSF 90-92, 103-107.
- Mr. Karp ensured that relevant documents (including electronically stored documents) would be eliminated by deleting back-ups and instituting shred days and house-cleanings where Rambus employees were instructed to eliminate all documents not covered by the document retention policy. CCSF 48-64.

The evidence shows not only Rambus's bad faith, but also that in fact relevant evidence was destroyed. All that remains here is to establish the degree of prejudice to the Commission's procedures from Rambus's spoliation of evidence and the sanction the Commission should

impose.

A. Rambus Acted in Bad Faith to Deprive Opposing Litigants of Relevant Evidence.

The document destruction here occurred not despite Rambus's anticipation of litigation, but because of it. A firm that destroys evidence, with the intention of keeping that evidence away from litigation opponents, acts in bad faith. *See, e.g., Telectron, Inc. v. Overhead Door Corp.*, 116 FRD 107, 127 (S.D. Fl. 1987); *Rambus v. Infineon,* 222 F.R.D. at 298 (Destroying relevant, discoverable documents at a time when the firm anticipated initiating litigation against already identified adversaries is "wrongful and is fundamentally at odds with the administration of justice.").[11]

Courts have found bad faith document destruction when firms, in anticipation of litigation, selectively preserve documents favorable to them, but allow other relevant evidence to be destroyed pursuant to established document retention programs. *See Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004); *E*Trade Securities v. Deutsche Bank AG,* 2005 U.S. Dist Lexis 3021 at *14 (D.Minn 2005). In *Stevenson,* a railroad facing suit from an accident destroyed a tape that the railroad knew would be relevant in any litigation involving the accident. The Eighth Circuit affirmed the district court's finding of bad faith, even though the tape was destroyed as part of a routine tape retention policy, because the railroad "had general knowledge that such tapes would be important to any litigation over an accident that resulted in serious injury or death, and its knowledge that litigation is frequent when there has been an accident involving death or serious injury." 354 F.3d at 748. The railroad's failure to preserve the tape in

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[11] In *Telectron,* an in-house counsel ordered employees of the company to destroy documents after receiving a complaint and document request as a defendant in an antitrust action. 116 FRD at 109-126. The court ordered a default judgment against that firm finding that "there is ... evidence of willful document destruction by a corporate defendant, carried out in an unabashed – and successful – attempt to render irretrievable records clearly pertinent to the claims brought against it." *Id.* at 127.

that context was in bad faith in part because the railroad company made an "immediate effort to preserve other types of evidence but not the voice tape." *Id; see also E*Trade Securities,* 2005 U.S. Dist. Lexis 3021 at *18 ("Here, as in *Stevenson*, [the defendant] chose to retain certain documents prior to the destruction of the hard drives. This gives rise to an implication of bad faith on the part of the ... defendants.").

Here, the circumstances go far beyond these other cases. Unlike in *Stevenson,* where a tape was disposed of in compliance with a routine and long-established company document retention policy, the Rambus selective document policy was designed as part of the litigation strategy itself. *See, e.g.,* CCSF 10-15; RX-2503 at 1 ("The documents, notebooks, computer files, etc., relating to patent disclosures and proof of invention dates are of great value to Rambus and should be kept permanently."). Rambus's document retention policy explicitly incorporates a strategy to maintain only favorable evidence, which the court had to infer in *Stevenson. See Stevenson,* 354 F.3d at 748 ("The prelitigation destruction of the voice tape in this combination of circumstances, though done pursuant to a routine retention policy, creates a sufficiently strong inference of an intent to destroy it for the purpose of suppressing evidence of the facts surrounding the operation of the train at the time of the accident."); *see also Lewy v. Remington Arms,* 836 F.2d 1104, 1112 (8th Cir. 1988) (A document retention policy is instituted in bad faith "in cases where [it] is instituted in order to limit damaging evidence available to potential plaintiffs").

Also unlike in *Stevenson,* where only a single tape was destroyed in bad faith, here Rambus committed a massive document destruction in an attempt to eliminate evidence of its misconduct while it was a member of JEDEC. In effect, Rambus's litigation preparations consisted of a highly selective document retention program keeping intact and assembling a database of corporate records "of great value to Rambus" because they would help Rambus enforce its patents and licenses, while at the same time trying to eliminate most other documents.

The result, Rambus hoped, would be that Rambus could deny any wrongdoing in JEDEC

and even argue that it made no efforts at all to seek to patent the JEDEC standards while a JEDEC member. Indeed, this was the argument that Rambus made clearly, explicitly, and spectacularly falsely, in its whitepaper to FTC staff at the investigative stage of this case:

> Rambus ... was not seeking any patents that covered the SDRAM standard during the time that the standard was being considered by JEDEC.

CX1883 at 11; *see also id.* at 12 ("Rambus never even sought [a patent covering the SDRAM standard] while it was a member of JEDEC."); CX2054 at 165-66 (Mooring: "The pending applications related to RDRAM."); CX2053 at 404 (Crisp: "I wasn't thinking in terms of SDRAM.").[12] Rambus's scheme failed because, despite its destruction efforts, some relevant documents were discovered – on a hard drive in Richard Crisp's attic, in Lester Vincent's chron file (which he neglected to clean out) and on a forgotten file on one of Rambus's servers – that showed Rambus's assertions to be false. And more such documents have continued to surface since the close of the record below.

B. The Circumstances Demonstrate that Relevant Evidence was Destroyed.

1. Why the Relevance of the Destroyed Evidence Is Important.

To establish an appropriate sanction for spoliation, the degree of relevance of the destroyed evidence must be considered. *Kronish v. United States.,* 150 F.3d 112, 127 (2d Cir. 1998). The relevance of the destroyed evidence allows the tribunal to assess the harm to its procedures caused by the destruction of evidence. *Id.* This task "is unavoidably imperfect, inasmuch as, in the absence of the destroyed evidence, we can only venture guesses with varying

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[12] Rambus's bad faith is underscored by the deliberate misrepresentations of witnesses, and the company itself, trying to cover up the nature and effect of its campaign of document destruction. CCSF 145-148 (Rambus did not anticipate litigation when it destroyed documents); CCSF 149-151 (Vice President Karp was concerned about a third-party document request); CCSF 152-154 (Mr. Karp was not concerned with the substance of the destroyed documents); CCSF 157-159 (designated witness Mr. Steinberg was only aware of one instance when Rambus collected documents for shredding); CCSF 160-163 (Richard Crisp took affirmative steps to preserve his emails); CCSF 166-167 (Rambus produced all pertinent and relevant documents).

degrees of confidence as to what that missing evidence may have revealed." *Id.* Care should be taken not to "hold the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed or unavailable evidence because doing so would subvert the purposes of the adverse inference, and would allow the parties who have destroyed evidence to profit from that destruction." *Residential Funding Corporation,* 306 F.3d at 109.[13]

When it is difficult to identify a particular relevant document or documents because voluminous files that might contain that evidence have all been destroyed, "the prejudiced party may be permitted an inference in his favor so long as he has produced some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files." *Kronish,* 150 F.3d at 128. Moreover, the state of mind of the party that caused the destruction determines the amount of proof necessary to show the relevance of the destroyed evidence. *See e.g., Thompson v. U.S. Department of Housing and Urban Development,* 219 F.R.D. 93, 101 (D.MD 2003). The more culpable that party is, the easier it is for the other party to establish relevance. *Id.*

Where a party destroys evidence in bad faith, "that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party." *Residential Funding,* 306 F.3d at 109. Even a finding of "gross negligence" in the destruction of evidence can support a finding that the destroyed evidence was unfavorable to the negligent party. *Id.*[14] "Accordingly, where a party seeking an

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[13] That is important here because Rambus's document retention program was implemented in a way to make it hard to identify what was destroyed. ALJ Timony instituted a rebutable presumption that Rambus failed to maintain a log of the documents that it destroyed. CCSF 70. Needless to say, that presumption has not been rebutted. CCSF 109 ("[O]ther than interviewing every employee in the company and asking for each one what – what – if they remember what they destroyed, that would be the only way. I can't think of any other way.").

[14] *See also Blinzler v. Marriott Intern. Inc.,* 81 F.3d 1148, 1159 (1st Cir. 1996) ("When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a fact finder may reasonably infer that the party probably did so because the records would harm its case.").

adverse inference adduces evidence that its opponent destroyed potential evidence ... in bad faith or through gross negligence,... that same evidence of the opponent's state of mind will frequently also be sufficient to permit a jury to conclude that the missing evidence [is relevant]." *Id.*

2. The Evidence Here Shows That Relevant Documents Were Destroyed.

In this case, Rambus destroyed its documents in bad faith. Rambus committed a wholesale destruction of both its electronic and hard copy documents. CCSF 48-64. This destruction occurred as part of Rambus's litigation plan. When Rambus's lawyers came to look for relevant documents to comply with document requests from Rambus's litigation opponents, the documents were conspicuous by their absence. CCSF 118-120. The conclusion reached by Rambus's own lawyers was that the document destruction program was responsible for the lack of documents including JEDEC-related documents. CCSF 119 ("In looking for documents that would be responsive to the Hitachi document request, there were request for some historical documents that the company simply did not have because of this document retention policy that had been adopted in '98 and which resulted in the destruction of certain documents.").

There is evidence that particular crucial Rambus executives and lawyers destroyed their documents, and that few of their documents were left when Rambus's lawyers came to look for documents to respond to Hitachi's document requests in 2000. It is also clear that relevant documents were likely among the documents that were destroyed. Finally, there is concrete evidence that specific documents are missing.

a. Crucial Rambus Executives and Lawyers Destroyed Documents.

i. Richard Crisp.

Richard Crisp was Rambus's primary JEDEC representative for most of the time Rambus was at JEDEC, and also worked with outside counsel Lester Vincent to draft patent applications to cover the JEDEC standard. Prior evidence established that, in response to the 1998 Shred Day, Mr. Crisp destroyed "anything he had on paper" in his office. CCSF 114. New evidence

confirms that, prior to Shred Day 1998, he stored large numbers of documents in his office. CCSF 123. In addition, many of his most-important JEDEC-related emails were purged from Rambus's business files. CCSF 115. The JEDEC-related emails that form the core of the case against Rambus were not found in Rambus's working files, but instead were found by Mr. Crisp himself on an unused computer hard drive in his attic at home.[15] CCSF 115, 122. Mr. Crisp's awareness of the effect of the document retention program on Rambus's JEDEC-related documents can be seen by his odd joke about JEDEC-related documents "fall[ing] victim to the document retention policy." CCFF 1754.

ii. Billy Garrett.

Billy Garrett was Rambus's first JEDEC representative and attended a number of JEDEC meetings for Rambus. The new evidence confirms that, as with Richard Crisp, Mr. Garrett also stored large quantities of documents in his office. CCSF 124. In Shred Day 1998, Mr. Garrett eliminated all of the JEDEC documents in his office. *Id.* ("got rid of all the stuff – document retention policy jedec stuff all went away"). Mr. Garrett found no JEDEC-related documents when Rambus attempted to respond to Hitachi's document request. *Id.*

iii. Anthony Diepenbrock.

Anthony Diepenbrock, a lawyer and an engineer, was hired in 1995 by Rambus CEO Geoff Tate to "focus [] full time" on Rambus's IP strategies, including analyzing Rambus's IP position against JEDEC-compliant DRAMs. CCFF 1056-61. Mr. Diepenbrock destroyed documents in response to the document retention policy. CCSF 116. When they interviewed him to respond to Hitachi's document requests, Rambus's lawyers found that he had no JEDEC-related documents. CCSF 126.

iv. Lester Vincent.

Lester Vincent, Rambus's outside patent lawyer, filed patent applications for Rambus

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[15] Some of these emails were also found 2½ years later in a forgotten file in a Rambus server. CCSF 122.

relating to the JEDEC standard. Prior evidence established that, in response to a request from Rambus Vice President Joel Karp, Mr. Vincent systematically "cleaned" out his Rambus files. CCSF 56-57, 62, 117; CCFF 1744-1752. New evidence confirms that Mr. Vincent cleaned out his files relating to the '327 patent and the '651, '961,'490, '692, 'and '646 applications, all of direct relevance to this case. CCSF 127-133. He also cleaned out his email system in response to Vice President Karp's request. CCSF 128. Mr. Vincent found some handwritten notes and correspondence with Rambus that were not destroyed because the correspondence was in his chron file, which he had not searched for Rambus documents, rather than in his Rambus-specific files. CCSF 57.

b. Specific Relevant Documents Were Destroyed.

The JEDEC-related emails that Richard Crisp produced from his attic, but that were never found in Rambus's working files, demonstrate that highly relevant JEDEC related documents were swept into Rambus's 1998 document retention program. More recent evidence of some of what was destroyed comes from Rambus's recently discovered back-up tapes. *See* CCSF 134-144; *see also Wiginton v. Ellis,* 2003 WL 22439865 at *8 (N.D.Ill.2003) (pre-trial evaluation of back-up tapes useful to establish the relevancy of destroyed evidence). The back-up tapes apparently contain copies of hundreds , if not thousands, of documents that disappeared from Rambus's business files and computers. CCSF 134-144. None of the new documents from those back-up tapes are yet in evidence here, but Rambus's privilege log provides a snapshot of a small portion of the materials discovered on the back-up tapes. CCSF 137-144. That privilege log includes Rambus's representation that 58 documents that have never been produced to Complaint Counsel are covered by Judge Payne's March 7, 2001 crime fraud order. *Id.*

Rambus's descriptions of the documents in its privilege log demonstrate that these and other documents purged from Rambus's business files are likely to be directly relevant to the issues in this case. CCSF 138. Relevant categories include:

- a number of emails involving advice from Lester Vincent regarding JEDEC's

disclosure policy at around the time Mr. Vincent was discussing equitable estoppel with Rambus in the early 1990s (CCSF 139);

- contemporaneous documents relating to Rambus's attempts to expand its patent coverage while it was a member of JEDEC (CCSF 140-141);
- a number of emails that appear to relate to legal advice Rambus received regarding its exit from JEDEC (CCSF 143); and
- a number of emails describing legal advice Rambus received relating to equitable estoppel, including the information that Rambus planned to provide to JEDEC relating to its intellectual property rights in 1996 (CCSF 142, 144).

Many of the documents listed on the privilege log went to multiple recipients but apparently were never found by Rambus in any of its business files or active computer files.

In short, there can be no doubt that Rambus destroyed documents between 1998 and 2000 that were relevant to core issues in this case. The destroyed documents apparently include, but are not limited to, documents relating to Rambus's understanding of its disclosure obligation at JEDEC, the relationship between its patent applications and ongoing JEDEC work, the equitable estoppel implications of its failure to disclose at JEDEC, and the implications of the Commission's *Dell* consent for its subsequent conduct.

C. The Commission Should Impose Sanctions for the Rambus Document Destruction.

Rambus's deliberate conduct subverted the most fundamental procedures necessary for the Commission, and the federal courts, to have access to relevant evidence and render informed, accurate and fair judgments. In light of such misconduct, imposition of sanctions is supported by both evidentiary and punitive rationales. *See, e.g., Kronish,* 150 F.3d at 126. The evidentiary rationale "derives from the commonsense notion that a party's destruction of evidence which it has reason to believe may be used against it in litigation suggests that the evidence was harmful to the party responsible for its destruction." *Id.* The punitive rationale protects the integrity of the administrative and judicial process, by imposing sanctions to deter spoliation of evidence in future cases by placing the risk of an erroneous judgment on the party that created the risk. *Id.*

1. A Default Judgment Is Justified Here.

A default judgment is justified either in circumstances of bad faith or when there is extraordinary prejudice to the opposing litigant. *Silvestri,* 271 F.3d at 593. In *Silvestri*, the Fourth Circuit affirmed dismissal of a product liability suit against a car manufacturer arising out of an auto accident, based on the conduct of the plaintiff's attorney and experts, who were in a position to prevent the elimination of crucial evidence in the case but failed to do so. The court found that the level of culpability of the plaintiff for the destruction of the evidence was "at least negligent and may have been deliberate." *Id.* at 594. The court found that the missing evidence was highly prejudicial to the defendant's case, based largely on the testimony of the defendant's expert (*id.* at 594-5), even though the dissenting judge believed the defendant did not need the information it would have gotten from inspecting the car "in order to support its position," and the defendant's expert had "sufficient information in order to form the opinions that he had expressed." *Id.*

The *Silvestri* case demonstrates that a default judgment is appropriate when justified by a combination of two factors – the nature of the spoliator's conduct and the prejudicial effect of the spoliation – even if the victim of the spoliation is still able to support its case. In this case, Rambus destroyed its documents in bad faith – the destruction was undertaken solely because of anticipated litigation, it was part and parcel of Rambus's offensive litigation strategy, and it served to prevent litigation opponents from obtaining potentially unfavorable evidence. And although Complaint Counsel have ample evidence in the record to establish Rambus's liability, that destruction was prejudicial to Complaint Counsels' case.

As described above, the evidence destroyed relates to every major contested issue in this case. The absence of that evidence during discovery impeded Complaint Counsel's ability to develop further evidence and prevented Complaint Counsel from evaluating the testimony of Rambus witnesses against contemporaneous documents. Rambus's JEDEC representative Richard Crisp, outside patent counsel Lester Vincent, and founders Mark Horowitz and Mike

Farmwald testified at trial, but Complaint Counsel lacked many of their documents. Complaint Counsel's decisions regarding whether to call other Rambus executives, such as CEO Geoff Tate, Vice President Allen Roberts, Vice President Dave Mooring, or JEDEC representative Billy Garrett could have been changed by either the content of documents that were never produced or by their testimony at deposition in light of those documents.

Judge Payne saw Rambus's conduct as a threat to the integrity of the judicial process:

> Simply put, destruction of documents of evidentiary value under those circumstances is wrongful and is fundamentally at odds with the administration of justice. Such activities are not worthy of protection by privileges that are designed to advance the interests of justice because those activities run contrary to the interest of justice and, in fact, they frustrate the fair adjudication of controversies by depriving the finder of fact of evidence from which the truth may be discerned. Courts simply cannot sanction the destruction of relevant evidence when litigation reasonably is, or should be, anticipated. Nor can courts allow cherished and important privileges to be diminished by permitting their use to conceal document destruction as practiced by Rambus.[16]

The same considerations articulated by Judge Payne warrant the same conclusion by the Commission. The Commission has an identical interest in protecting the integrity of its administrative litigation process, and the Commission should enter a default judgment against Rambus, as Judge Payne did, as the appropriate sanction for its spoliation of evidence, to ensure that future FTC litigants do not think that they, too, can benefit from such tactics.

2. Alternatively, an Adverse Inference Is Justified That Rambus's Misconduct at JEDEC Led to its Market Power.

When, as here, documents are destroyed by a party with notice of the relevance of the documents to anticipated litigation, the other party is entitled to the inference that the documents were destroyed because their contents were unfavorable. *See, e.g., Blinzler v. Marriott Intl. Inc.*, 81 F.3d 1148, 1158-59 (1st Cir. 1996). This inference is made stronger when it is shown that the

[16] *Rambus, Inc. v. Infineon Tech. AG,* 222 F.R.D. at 298.

documents were destroyed in bad faith. *Id.* This inference applies even if the documents were destroyed pursuant to a regular document retention program prior to the onset of litigation. *Id.* ("When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a fact finder may reasonably infer that the party probably did so because the records would harm its case"). A party seeking an adverse inference may rely on circumstantial evidence to presumptively establish the contents of the destroyed evidence. *Byrnie,* 243 F.3d at 110.

Here Rambus destroyed documents as part and parcel of their planning for the litigation in which the documents were relevant. They did so in bad faith, denying litigation opponents the use of those documents. The Commission is entitled to infer that the destroyed documents would have shown that Rambus acted anticompetitively at JEDEC, and that Rambus's misconduct is the cause of its current market power.

CONCLUSION

Rambus's spoliation of evidence was part and parcel of its patent litigation efforts directed against firms practicing the JEDEC standards, was done in bad faith in anticipation of litigation for the purpose of destroying relevant evidence, and was carried out with the effect of destroying documents relevant not only to Rambus's patent enforcement efforts, but to the present case before the Commission. For all the reasons set forth above, Complaint Counsel request that the Commission enter such relief as it deems appropriate, including entry of default

judgment against Rambus, for the spoliation of evidence that Rambus engaged in over many years. Granting such relief will protect the integrity of the Commission's administrative process.

Respectfully submitted,

____
Geoffrey D. Oliver
Patrick J. Roach
Robert P. Davis

Bureau of Competition
FEDERAL TRADE COMMISSION
Washington, D.C. 20001
(202) 326-2275

Counsel for the Complaint

August 10, 2005

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

In the Matter of RAMBUS INCORPORATED, a corporation.	Docket No. 9302 **PUBLIC**

PROPOSED ORDER

IT IS ORDERED THAT, Complaint Counsel's Motion for Sanctions Due to Rambus's Spoliation of Documents is hereby **GRANTED**; and

IT IS FURTHER ORDERED THAT:

Because of the extensive conduct of the respondent Rambus, Inc., in engaging in spoliation of evidence over many years, which the Commission finds was done in anticipation of litigation and for purposes of destroying evidence that was relevant to litigation that Rambus itself planned to initiate, and which resulted in the destruction of evidence relevant not only to Rambus's planned litigation but also to the current matter pending before the Commission, now therefore

Judgement by default shall be entered herein against the Respondent as to each of the allegations set forth in the Complaint herein, and relief hereby is granted as set forth in the Proposed Order submitted by Complaint Counsel to the Administrative Law Judge below, dated September 5, 2003.

By the Commission.

Donald S. Clark

Secretary

ISSUED: ____________ __, 2005

CERTIFICATE OF SERVICE

I, Beverly A. Dodson, hereby certify that on August 10, 2005, I caused a copy of the attached, *Complaint Counsel's Motion For Sanctions Due to Rambus's Spoliation of Documents*, to be served upon the following persons:

by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
via Office of the Secretary, Room H-135
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

and by electronic transmission and overnight courier to:

A. Douglas Melamed, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
2445 M Street, N.W.
Washington, DC 20037-1402

Gregory P. Stone, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071

Counsel for Rambus Incorporated

____
Beverly A. Dodson

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

____., a minor, by and through
her mother and next friend, ____.;
and _______

Plaintiffs,

Civil Action No. ___________

v.

CHESTERFIELD COUNTY
SCHOOL BOARD, et al.,

Defendants.

PLAINTIFF ___________'S FIRST REQUESTS FOR PRODUCTION TO DEFENDANTS ___________ AND ___________

Plaintiff H.H., by counsel, submits the following First Requests for Production to Defendants _____________ and ______________ pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, as amended.

Definitions

1. ______________________ Elementary School.

2. __________________ means _________________ Elementary School.

3. ______________ means Defendant _______________.

4. ________________ means Defendant __________________.

5. _______ means Defendant _________________ as well as its officers, employees, agents, representatives, divisions, affiliates, subsidiaries, committees, working groups, consultants and attorneys.

6. The "affiants" means those persons who have submitted affidavits in support of the motions for summary judgment filed by the Defendants in this civil action.

7. The "assistant principals" means those persons who served in the position of assistant principal of either ____________ Elementary School or ________________School at any time during _______.'s time as a student at those schools and whose duties included the provision of services to special education students.

8. The "principals" means those persons who served in the position of principal of either __________________ Elementary School or _______________ School at any time during _________________.'s time as a student at those schools.

9. "IEP" means an individualized education plan.

10. "Document" includes electronically stored information, writings, emails, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations from which information can be obtained or translated, if necessary by you, into reasonably usable form. It includes, but is not limited to, any electronically stored data on magnetic or optical storage media as an "active" file or files (readily readable by one or more computer applications or forensics software); any "deleted" but recoverable electronic files on said media; any electronic file fragments (files that have been deleted and partially overwritten with new data); and slack (data fragments stored randomly from random access memory on a hard drive during the normal operation of a computer [RAM slack] or residual data left on the hard drive after new data has overwritten some but not all of previously stored data).

11. "Identify" or "identification" when used in reference to an individual person or entity, means to state their or its full name, present home and business address or, for a person, their present or last known place of employment or business affiliation.

12. "Identify" or "identification" when used in reference to a document or other tangible item means to state the following: the date, nature and substance of each document or

other tangible item with sufficient particularity to enable it to be described in a request for production and/or subpoena, the physical location of each such document or other tangible item and the name of its custodian or custodians, whether the document or other tangible item has been destroyed and, if so, with regard to such destruction, (i) the date thereof; (ii) the reason therefore; and (iii) the identity of the person or persons who destroyed the document or other tangible item.

13. The word "communication" shall mean any exchange of words, ideas, messages, or information, whether by speech, e-mail, signal, and/or writing, and includes both telephonic and in-person conversations.

14. To "identify" with respect to a communication means to state:

a. the name of each person who participated in or was present during such communication;

b. the nature and substance of such communication;

c. the date on which, and the place at which, such communication was made;

d. the date, nature and substance of each document, if any, recording, memorializing and/or pertaining to such communication with sufficient particularity to enable it to be described in a request for production of documents and/or subpoena, the physical location of each such document and the name of its custodian or custodians.

15. "State fully and in detail," "explain" and "describe" shall mean to identify all facts – including, but not limited to, the dates relevant to each event or occurrence – that relate directly or indirectly to the subject matter of the Interrogatory, all persons involved directly or indirectly in the subject matter of the Interrogatory and all communications that directly or indirectly affected the subject matter of the Interrogatory.

16. "Relating to" and "relates to" mean regarding, containing, recording, discussing, mentioning, noting, summarizing, referring to, commenting upon, describing, digesting, reporting, listing, analyzing, or studying the subject matter identified in an Interrogatory.

17. "You" and "yours" are defined to include the person(s) to whom these discovery requests are addressed and any of its officers, employees, agents, representatives, consultants and attorneys.

18. "Person" means all entities of any and every kind, including (without limitation) individuals, related businesses, associations, companies, partnerships, limited partnerships, limited liability companies, limited liability partnerships, joint ventures, corporations, agents, trusts, estates, public agencies, departments, bureaus and/or boards.

19. "Complaint" refers to the Complaint filed by Plaintiff initiating this litigation.

20. "Archive" means a copy of data on a computer drive, or on a portion of a drive, maintained for historical reference.

21. "Back up" means a copy of active data, intended for use in restoration of data.

22. "Computer" includes but is not limited to network servers, desktops, laptops, notebook computers, employees' home computers, mainframes, the PDAs (personal digital assistants, such as PalmPilot, Cassiopeia, HP Jornada and other such handheld computing devices), digital cell phones and pagers.

23. "Data" means any and all information stored on media that may be accessed by a computer.

24. "Hard Drive" means the primary hardware that a computer uses to store information, typically magnetized media on rotating disks.

25. "Imaged copy" means a "minor image" bit-by-bit copy of a hard drive (i.e., a complete replication of the physical drive).

26. "Magnetic or Optical Storage Media" includes but are not limited to hard drives (also known as "hard disks"), back up tapes, CD-ROMs, DVD-ROMs, JAZ and Zip drives, and floppy disks.

27. "Network" means a group of connected computers that allow people to share information and equipment (e.g., local area network [LAN], wide area network [WAN], metropolitan area network [MAN], storage area network [SAN], peer-to-peer network, client-server network).

28. "Storage devices" means any device that a computer uses to store information.

29. "Storage media" means any removable devices that store data.

Instructions

1. When asked to provide information, documents and/or your knowledge, such request includes information, documents and/or knowledge in the possession of your agents, employees, officers, directors, representatives and, unless privileged, attorneys.

2. These Requests are continuing so as to require you to file supplemental responses in accordance with Rule 26(e) of the Federal Rules of Civil Procedure.

3. Regarding the format of electronic information that you produce, Group IV Multi-Page Tiffs should be produced, accompanied by a Summation DII load file and .dat file containing the image key and extracted metadata. OCR or Extracted Text should also be provided, either in multipage text files (preferable) or contained within the .dat file. The extracted metadata should at least include the following fields: to, from, cc, bcc, subject, date sent, time sent, parent - child information (for emails and attachments), doc title, author, date

created, date modified, last modified by. Preferably, the Image key and the Bates Number of the document will be identical, however, if this is not possible, the beginning and ending bates numbers should also be provided in the .dat file. We reserve the right to request native versions of individual files. Track changes and comment metadata should be shown on any images provided and, if not provided, native files for such images will need to be provided as well.

Appendix F

Due June 1

VIRGINIA:

IN THE CIRCUIT COURT FOR CHESTERFIELD COUNTY

COMCAST OF CHESTERFIELD COUNTY, INC., Plaintiff, versus **BOARD OF SUPERVISORS FOR CHESTERFIELD COUNTY.** Defendant.	)	Case No. CL07-1003 Hon. Herbert C. Gill, Jr.

PLAINTIFF'S INTERROGATORIES 1-11 AND REQUESTS FOR PRODUCTION OF DOCUMENTS 1-4 TO DEFENDANT CHESTERFIELD COUNTY

The following interrogatories and document requests are served upon you pursuant to Rule 4:8 and 4:9 of the Rules of the Supreme Court of Virginia. Please answer each interrogatory separately and fully, in writing, under oath, and serve a copy of the answers thereto upon the undersigned attorney within twenty-one (21) days after service. Please also produce, or make available for inspection and copying, all documents responsive to the document requests. Detailed instructions and definitions follow the interrogatories and document requests.

INTERROGATORIES

1. Identify each person known by the County to have first-hand knowledge of some or all of the allegations in Comcast's Complaint, or any matter relating to this litigation, and state what knowledge or information each identified person has.

WCSR 3542095v1

10. State the factual and legal bases for the County's apparent contention in Paragraphs 4 and 5 of its Answer that "the assessments . . . are not limited to the equipment listed in paragraphs 4 and 5 of the Complaint".

Response:

11. Identify each person you intend to call as an expert witness at the trial of this matter, and with respect to each identified person, state (i) the subject matter on which each is expected to testify, (ii) the substance of the facts and opinions to which each is expected to testify, (iii) a summary of the grounds of each opinion, (iv) and a summary of the qualifications of each such expert.

Response:

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Produce the documents identified in your answers to Interrogatories 1-11.

2. Produce the documents reviewed by, or relied upon by, any person identified as an expert by the County.

3. Produce the documents related to communications between the County and any other taxing authority or jurisdiction about taxation of any cable television business.

4. Produce the documents related to any communications, including internal communications, regarding the County's supplemental business personal property tax assessments of Comcast's property for Tax Years 2003 through 2006.

INSTRUCTIONS AND DEFINITIONS

a. Please answer each interrogatory and document request separately, fully, in writing, and under oath, and serve a copy of your answers upon James S. Kurz at the offices of Womble Carlyle Sandridge & Rice, PLLC, 8065 Leesburg Pike, 4th Floor, Vienna, Virginia 22182 within twenty-one (21) days after service. The documents requested should be made available for inspection and copying at the offices of Womble Carlyle Sandridge & Rice, PLLC, 8065 Leesburg Pike, 4th Floor, Vienna, Virginia 22182 within twenty-one (21) days after service. Alternatively, copies of documents requested may be delivered to James S. Kurz at the offices of Womble Carlyle Sandridge & Rice, PLLC, 8065 Leesburg Pike, 4th Floor, Vienna, Virginia 22182.

b. Unless otherwise indicated, the time period covered by this discovery shall be from December 1, 2005 to the date of response. However, these interrogatories and document requests are continuing in character so as to require you to promptly amend or supplement your responses if you obtain further or different information.

c. If in responding to this discovery you encounter any ambiguity in construing any request, interrogatory, instruction or definition, please telephone undersigned counsel, or set forth the matter deemed ambiguous and the construction used in responding.

d. These interrogatories and document requests seek knowledge, information and documents in your possession. The terms "you" and "your" refer to the party to whom these

interrogatories and document requests are addressed, its attorneys, present and former officials, executives, officers, employees, representatives, agents, and all other persons acting or purporting to act on its behalf.

e. For each interrogatory or document request or part thereof which you refuse to answer on grounds of burdensomeness, the answer should provide a good faith estimate of: (1) the number of files and/or documents needed to be searched; (2) the number of hours required to conduct the search; and (3) the estimated cost of the search in dollars.

f. Whenever an interrogatory requests identification of a document that is no longer in your possession, custody or control, the answer should state approximately when the document was most recently in your possession, custody or control, and the identity of the person presently in possession, custody or control of such document. If the document has been destroyed, the answer should provide a brief explanation of why it was destroyed.

g. "Person" or "persons" includes, but is not limited to, natural persons, partnerships, corporations, governmental agencies, boards of directors, and other legal entities.

h. The term "document" includes, but is not limited to, any written, printed, typed, recorded (including on computer disks), filmed, transcribed, taped or other graphic matter of any kind or nature however produced or reproduced, whether sent or received or neither, including the original, drafts, copies, and nonidentical copies bearing notations or marks not found on the original, and includes, but is not limited to, all records, memoranda, reports, financial statements, hand-written and other notes, transcripts, letters, tabulations, studies, analyses, projections, work papers, summaries, opinions, journals, desk calendars, appointment books, diaries, lists, charts, graphs, books, pamphlets, articles, magazines, newspapers, notices, instructions, manuals, minutes of transcriptions or notations of meetings or telephone conversations or other

communications of any type, photographs, microfilms, sound recordings, magnetic tapes, optical disks, hard disks, floppy disks, data cells, drums, printouts, or other data compilations from which information can be obtained of any kind, which is in your custody, possession or control or to which you otherwise have access.

i. Production of electronic messages (*e.g.*, e-mail, instant messages) should, whenever reasonably practical, be in a generally recognized electronic format. Specifically, Microsoft Exchange Server files should be produced in an accessible *.pst format with attachments included, or in a documented file format negotiated with Comcast's counsel. Alternatively, e-mails may be produced as .TIFF images accompanied by metadata including at a minimum the following fields (or their equivalents): (1) time/date sent, (2) time/date received, (3) Message from, (4) Message to, (5) Message to (cc:), (6) Message to (bcc:), (7) Subject line, (8) Message body/contents, (9) Attachments, and (10) pointers to .TIFF Images . Attachments to e-mails should follow the e-mail, with available attachment metadata provided.

j. Production of electronic documents, including WORD files, spreadsheets, and Presentations (*e.g.*, PowerPoint presentations), should be in their native format. If production includes database files, identify the database and provide a copy of the database schema or a diagram of the schema; please contact Comcast's counsel to negotiate a mutually acceptable production format.

k. The term "communication" means any words heard, spoken, written or read, regardless of whether designated confidential, privileged or otherwise, and includes without limitation words spoken or heard at any meeting, discussion, interview, encounter, conference, speech, conversation or other similar occurrence; and words written on or read from any document, as defined above.

1. "Identify," "identification" or "identity" means:

(1) with respect to a natural person, his or her name and present or last known home and business address (including street name and number, city or town, state, zip code, and telephone number), present or last known job title and position, and the dates of tenure in each job title or position;

(2) with respect to a person other than a natural person, its full name and type of organization, the address of its principal place of business (including street name and number, city or town, state, zip code, and telephone number), and the jurisdiction and place of its incorporation or organization; and

(3) with respect to a document, the type of document (e.g., letter, record, list, memorandum, report), date, title, contents, identification of the person who prepared the document, identification of the person for whom the document was prepared, or to whom it was delivered, identification of the person who has possession, custody or control over the original of the document, and identification of each person who has possession, custody or control over each copy of the document.

In response to requests for identification, sufficient information should be given to support a request for production of documents that would not be objectionable by you for lack of particularity or insufficiency of identification. In lieu of identifying a document, you may attach a true and correct copy of it to your answers.

(4) with respect to a communication other than a document, who was present, the date(s), where it occurred, *e.g.*, if by telephone, the place from which each person involved actually participated, and what was said by each person involved.

m. A communication or document "regarding," "relating," "related," or which "relates" to any given subject means any communication or document that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any way pertinent to that subject, including but not limited to documents concerning the preparation of other documents.

n. If you claim privilege as to any communication as to which information is requested by these interrogatories or documents requests, specify the basis for your claim of privilege.

o. "State the bases for" means to identify (1) all facts upon which an assertion or contention is based, (2) the persons who have knowledge of those facts, (3) all communications that relate to the facts identified, and (4) all documents that relate to the facts identified.

p. "Comcast" means Comcast of Chesterfield, Inc., including its officers, employees and agents.

q. "County" means the Board of Supervisors for Chesterfield County, including the supervisors, County officials, County employees and agents.

r. "Commissioner of the Revenue" refers to Joseph A. Horbal, Commissioner of the Revenue for Chesterfield County, Virginia.

s. The "Deputy Commissioner of the Revenue" or "the Deputy" refers to Patricia Howell.

Respectfully submitted,

COMCAST OF CHESTERFIELD COUNTY, INC.

By Counsel

Appendix G

21 Tips for Working with E-Discovery Service Providers

1. Bone up on e-discovery before you wade in.
2. Find out all you can about the forms and volumes of ESI before approaching vendors.
3. Know what systems and software you already own capable of reviewing ESI.
4. Don't purchase products or services you or your staff don't know how to use unless you budget the time and money needed for training.
5. Visit the processing facility. Does it look like the photos on the website? Is it orderly and up-to-date? Is it secure?
6. Explore conflicts. You may not mind that the vendor is also working for the defendant or opposing counsel in other matters, but you need to know about it.
7. Establish the vendor's ability and willingness to deliver both the technical and testimonial support you'll need.
8. Insist on meeting the project manager or consultant who'll be assigned to your project. Is it a good fit? Can she communicate in non-technical language? Does she look shell shocked?
9. Get the cell phone numbers of your project manager and at least one other person working with your data.
10. Get customer references and talk with them. Did the vendor meet deadlines? How much work had to be reprocessed due to errors? Did actual charges significantly exceed projections?
11. It's a vendor's job to be certain you understand the scope of work, the reasons behind actions and what it will all cost. Don't be baffled by jargon or concerned about looking foolish. The only dumb questions are the one you don't ask.
12. Clearly establish the scope of work in writing, and be sure you understand all price components and how they are calculated.
13. For pricing based on data volumes, be certain you understand how volumes are calculated. Are bills based on raw volumes or determined after filtering? Beware of "page equivalency" calculations.
14. Guard against sticker shock by setting a threshold above which you must expressly authorize further work.
15. Even the sharpest attorneys can't find loopholes in the laws of physics. Large ESI volumes take time to duplicate, index, search and process, so be sure you allow sufficient time; else, be prepared to pay expedited rates and seek extensions.
16. Clearly communicate deadlines, and get written commitments to meet them.
17. Protect your ability to efficiently and economically recover your data if serious problems occur. Insure your data can't be "held hostage" in billing disputes.
18. Be sure you know what tasks the vendor handles in-house and what they outsource. Outsourcing may be smart, but you need to know why and what markups apply.
19. Arrange for your side's EDD technician to talk directly to your opponent's EDD technician. Their ability to speak the same language streamlines data transfer and establishes appropriate expectations.
20. The demand for talented e-discovery product managers far outstrips the supply, so there's a lot of turnover. Get acquainted with others working on your project before your project manager moves on. When crunch time comes, you don't want to hear, "She's gone, let me find out who's handling that now."
21. Don't wait until you need an e-discovery service provider to start lining up prospects. The need will be there. Having someone on deck helps you hit the ground running.

Appendix H

Privileged Document List

This list is filed in accordance with the pre-trial order in this case and lists privileged documents which are relevant to this litigation or which could reasonably lead to the discovery of admissible evidence. This list does not contain privileged documents which were requested but which are not subject to discovery because they are irrelevant or could not reasonably lead to the discovery of admissible evidence. There are a significant number of such documents not shown on this list since they are outside the scope of appropriate discovery; provided, however, that all such privileged documents relating to Tracy Eddy are included on this list regardless of whether they are within or outside the scope of permissible discovery.

HRM Routing slip to memo from Karla Gerner to County Attorney's Office including attorney's edits of EEOC charge position statement re: Tracy Eddy EEOC Charge # 122-2002-01418. Dated 2/3/03. Attorney-Client Privilege.

Memo from Judi Williams to Steven L. Micas, 12/31/02 concerning Notice of Charge of Discrimination filed by Tracy Eddy. Attorney-Client Privilege.

E-Mail from Steven L. Micas to Mary Martin, 4/17/03, re: resolution of Tracy Eddy personnel disputes. Attorney-Client Privilege.

Interview Questions for Tracy Eddy, Rick Edinger and Paul Mauger; dated September 18, 2002. Attorney-Client Privilege.

List of documents responsive to Hechler FOIA request. Undated. Prepared by County Attorney's Office. Attorney-Client Privilege.

Hechler v. County FOIA Oral Argument; prepared by the County Attorney's Office; undated. Attorney-Client Privilege and Work-Product.

Deposition questions for Frank Edwards. Undated. Prepared by County Attorney's Office. Attorney-Client Privilege.

Hechler v. County – Oral Argument; prepared by the County Attorney's Office for Grievance Hearing. Undated. Attorney-Client Privilege and Work-Product.

Chart undated describing Eddy's and Hechler's performance. Prepared by County Attorney's Office. Sent to file. Work-Product.

E-Mail to Susan Jones from Stylian Parthemos; dated 10/22/02 re: Approval of letter regarding administrative leave by Tracy Eddy with handwritten notes stating that Karla confirmed via telephone. Attorney-Client Privilege.

Handwritten, undated notes; author unknown, referring to receiving advice from the County Attorney's Office re: Eddy. Attorney-Client Privilege.

E-Mail to Susan Jones from Stylian Parthemos; dated 10/22/02 re: Approval of letter regarding administrative leave by Tracy Eddy with handwritten notes stating that Karla confirmed via telephone. Attorney-Client Privilege.

Handwritten notes dated October 18, 2002, unknown author, possible questions for unidentified person. Work-Product.

E-Mail dated December 2, 2002, to Paul Shorter from Steve Elswick re: Eddy FOIA Request Response and discussions with Stel Parthemos. Attorney-Client Privilege.

E-Mail dated November 12, 2002, to Stephen Elswick from Stylian Parthemos re: Request for Administrative Leave by Tracy Eddy and compliance with FOIA request. Work-Product.

E-Mail dated November 8, 2002 to Paul Mauger from Tracy Eddy re: Request for Administrative Leave for time taken to file injunction or petition for mandamus against Chief Elswick due to not receiving FOIA Request. Also contains handwritten notes regarding a conversation with Stylian Parthemos concerning the same. Attorney-Client Privilege and Work-Product.

E-Mail dated October 22, 2002 from Stylian Parthemos to Susan Jones re: Review attached file regarding Eddy, with handwritten note regarding Karla confirming letter okay.

Document entitled "Initial Interview of Tracy Eddy", dated September 18, 2002 re: Questions/statements by Tracy Eddy, and questions by Captain Edinger. Attorney-Client Privilege

Documentation of meetings and consultations between County Attorney's Office and Fire Department prior to discipline of Eddy, undated, author unknown. Attorney-Client Privilege.

Document entitled "History of County Response to Taking or Misusing County Leave" undated, re: misuse of county time in all departments for the time periods from Fiscal Year 1988 through Fiscal Year 2003. Attorney-Client Privilege and Work-Product.

Letter dated May 15, 2003 to Tracy Eddy, prepared by Sr. Captain David Bailey, regarding Eddy grievance with handwritten notes by Jeffrey Mincks, Deputy County Attorney. Attorney-Client Privilege.

Memo dated January 12, 2004 from Jeffrey L. Mincks to Karla Gerner re: Settlement of Eddy claim. Attorney-Client Privilege.

Document entitled "Initial Interview of Tracy Eddy", dated September 18, 2002 re: Questions/statements by Tracy Eddy, and questions by Captain Edinger. Attorney-Client Privilege.

1/2/03, author unknown, file opening slip, prepared by County Attorney's office. Attorney-Client Privilege.

Undated document, index to County Attorney's file, prepared by County Attorney's office. Attorney-Client Privilege.

Note to Jeff Mincks, Deputy County Attorney from David Bailey; dated January 20, 2004; regarding note to return to work from Tracy Eddy. Attorney-Client Privilege.

Undated draft of Release and Settlement Agreement re: Eddy prepared by the County Attorney's Office with handwritten notes by County Attorney. Attorney-Client Privilege.

Memo dated October 31, 2003 to files 7535, 7572, 7618, 7696 from the Michelle McKesson of the County Attorney's Office regarding change of address information received from Susan Jones of Fire Administration. Attorney-Client Privilege.

Sealed envelope, undated, in Eddy personnel file containing settlement agreement. Work-Product.

Undated, research conducted by County Attorney's Office. Sent to file. Work-Product.

Undated chart of events in Tracy Eddy, Hechler, Mathews and Rothell grievances. Created by County Attorney's Office. Work-Product.

E-Mail to Stylian Parthemos from Tracy Eddy, undated re: statute of limitations on EEOC claim. Attorney-Client Privilege.

2/3/03 – Rough draft of EEOC charge position statement for Tracy Eddy for review by County Attorney's office with HRM Routing slip. Attorney-Client Privilege.

Undated document, index to County Attorney's file. Prepared by the County Attorney's office. Attorney-Client Privilege.

Documentation of meetings and consultations prior to disciplinary action of Eddy, undated, author unknown with handwritten notes by County Attorney's Office. Attorney-Client Privilege.

Undated, draft of EEOC Charge response with handwritten notes by County Attorney's office. Attorney-Client Privilege.

Undated, handwritten notes of comparison between County and grievant's (Eddy's) position. Prepared by County Attorney's Office and sent to file. Work-Product.

4/23/03 – E-mail from Mary Martin to Steve Micas regarding meeting with Lou Lassister re: Eddy grievance. Attorney-Client Privilege.

4/10/03 – letter to Barbara Queen from Karla Gerner re: Scheduling of hearing with Chesterfield County Personnel Appeals Board. Re: Eddy grievance. Attorney-Client Privilege and Work-Product.

2/7/03 – E-Mail to Kevin Bruny of Human Resource Management from Michelle McKesson of the County Attorney's office re: review of document regarding Eddy EEOC charge response. Attorney-Client Privilege.

2/7/03 – E-Mail to Susan Jones of Fire Administration from Michelle McKesson of the County Attorney's office regarding Eddy EEOC response. Attorney-Client Privilege.

Undated – Witness List of Chesterfield County in regard to Tracy Eddy grievance. Prepared by the County Attorney's office for grievance. Attorney-Client Privilege and Work-Product.

January 13, 2003 – E-Mail from Susan Jones to Steven Elswick regarding e-mail received from Tracy Eddy and response from County Attorney's office. Attorney-Client Privilege.

January 7, 2003 – E-mail from Karla Gerner to Pam Craze of the County Attorney's office regarding letter to Barbara Queen and access to documentation for grievance hearing. Attorney-Client Privilege.

December 6, 2002, letter to Tracy Eddy from Paul W. Mauger, Deputy Chief regarding confirmation of renewal of Freedom of Information Act request dated November 1 and November 7. Work-Product.

December 6, 2002 – Fax coversheet to Paul Mauger and Paul Shorter attaching documents for attachment to letter to Tracy Eddy. Attorney-Client Privilege.

November 7, 2002 – E-mail to Stephen Elswick from Tracy Eddy regarding Freedom of Information Act request with handwritten notes from County Attorney's office. Attorney-Client privilege.

October 21, 2002 – E-mail from Joy Galusha of County Administration to Beverly Minetree of the County Attorney's office re: scheduling Eddy pre-grievance meeting on October 30th. Attorney-Client privilege.

Undated document, created by Fire Department and requested by County Attorney's Office, regarding behavior by Tracy Eddy leading up to grievance. Work-Product.

November 16, 2002 – E-mail to Pam Craze from Paul Mauger regarding FOIA request by Tracy Eddy with comments to Stel Parthemos, Senior Assistant County Attorney. Attorney-Client Privilege.

Paging records of Eddy from 5/1/02 to 7/31/02 with handwritten notes by County Attorney's office. Attorney-client privilege.

September 18, 2002 – E-mail from Tracy Eddy to Steve Micas regarding County policy as to employees taping interviews between themselves and supervisors. Attorney-Client Privilege.

Undated document, index to County Attorney's file. Prepared by the County Attorney's Office. Work-Product.

October 7, 2003 draft letters to Tracy Eddy from Steve Elswick regarding relationship with Fire Department. Work-Product.

Paging records from May 1, 2002 through July 31, 2002 for Tracy Eddy with handwritten notations. Work-Product.

April 24, 2003 – Final Order prepared by the County Attorney's office and signed by the Court regarding Tracy Eddy with notes by the County Attorney. Work-Product.

April 2, 2003 – Letter from Tracy Eddy to Chief Elswick requesting information, contains handwritten notes by Stel Parthemos, Senior Assistant County Attorney. Attorney-Client Privilege.

Undated, notes of Stylian Parthemos, Senior Assistant County Attorney – "Points for Eddy FOIA Oral Argument" with handwritten notes by County Attorney's Office. Work-Product.

July 1, 2002 – Chesterfield County Administrative Policies and Procedures policy on Sexual Harassment with portions highlighted by the County Attorney's Office. Work-product.

Undated, Post-It notes with notations about memo or e-mail regarding "Golf Cart Seat Incident". Author, Michelle McKesson and Beverly Minetree of the County Attorney's office. Work-Product.

Undated, authored by the County Attorney entitled "Documents Provided to Opposing Counsel Tracy Eddy Grievance. Work-Product.

4/21/03 – Fax coversheet to Stel Parthemos of the County Attorney's office from Dave Bailey of Fire Department requesting review of document and call with changes. Attorney-Client Privilege.

Undated document prepared by County Attorney's Office entitled "Direct Examination of Deputy Chief Paul Mauger" questions for examination. Work-Product.

Undated document prepared by County Attorney's Office entitled "Mary Martin" questions for examination. Work-Product.

Undated document prepared by County Attorney's Office entitled "Cross T.E. [Tracy Eddy]" questions for examination. Work-Product.

Undated, handwritten notes with Closing remarks, prepared by the County Attorney's office for use in Eddy hearing. Work-Product.

November 12, 2002 – E-mail from Stylian Parthemos of the County Attorney's office to Stephen Elswick, Fire Chief regarding request for administrative leave by Tracy Eddy with handwritten notes by County Attorney. Attorney-Client Privilege.

January 28, 2003 – E-mail from Susan Jones to Pam Craze note of Tracy Eddy's address change to Midlothian, Virginia. Work-Product.

January 28, 2003 – E-mail to Frank Edwards from Pam Craze regarding FOIA request of 1/24/03. Attorney-Client Privilege.

February 7, 2003 – E-mail to Michelle McKesson of the County Attorney's office from Susan Jones regarding Eddy EEOC charge response and review of response. Attorney-Client Privilege.

November 13, 2002 – E-mail to Stephen Elswick from Beverly Minetree of the County Attorney's office regarding response to Tracy Eddy's FOIA Request. Attorney-Client Privilege.

December 31, 2002 – Document e-mailed to Susan Wilson of the County Attorney's office regarding Eddy Leave Usage since 9/1/02. Attorney-Client Privilege.

Undated – document e-mailed from Fire Department to Susan Wilson of the County Attorney's office entitled "End of Year Sick Leave Summary". Work-Product.

Undated – e-mail to Susan Wilson from Rick Edinger attaching documents for review regarding Tracy Eddy grievance. Attorney-Client Privilege.

April 10, 2003 e-mail from Rick Edinger to Susan Wilson attaching more documents for review regarding Tracy Eddy grievance. Attorney-Client Privilege.

April 10, 2003 e-mail to Susan Wilson from Rick Edinger attaching documents for review regarding Tracy Eddy grievance. Attorney-Client Privilege.

September 24, 2002, e-mail to Jeff Mincks from Rick Edinger attaching transcripts of the original interview, the follow-up interview, related documents and the transcript of the grievance meeting regarding Tracy Eddy. Attorney-Client Privilege.

Undated – Direct Examination of Mary Martin prepared by the County Attorney's office for use in hearing. Work-Product.

Document dated April 19, 2004 prepared by Frank Edwards for Jeff Mincks, sent to Mincks re: Battalion Chief Promotional Process. Attorney-Client Privilege and Work-Product.

Undated document, index of pleadings in Hechler v. County Case No. CL03-106; prepared by the County Attorney's Office. Sent to file. Work-Product.

Questions, undated, prepared by County Attorney's Office for examination of Frank Edwards in Hechler v. County before Chesterfield County Circuit Court. Attorney-Client Privilege and Work-Product.

Memo 6/16/04 from Frank Edwards to Jeff Mincks and Steve Micas concerning requested info relating to promotional process in Fire Department. Attorney-Client Privilege. Work-Product.

Undated, analysis of complaint of Hechler prepared in March 2004 by County Attorney's Office. Sent to file. Work-Product.

Undated, Hechler Chronology prepared by the County Attorney's Office. Sent to file. Work-Product.

Memo, undated from Bucher to Edwards concerning advice given by County Attorney concerning recording of meeting. Attorney-Client Privilege.

Draft dated November 18, 2002 of Notification of Formal Investigation concerning Hechler with edits by County Attorney. Attorney-Client Privilege.

Letter, undated from Frank Edwards to Steve Micas concerning Battalion Chief promotional process as requested by Micas. Work-Product and Attorney-Client Privilege.

Letter, undated, from Frank Edwards to Steve Micas concerning promotional procedures in Fire Department as requested by Micas. Attorney-Client Privilege; Work-Product.

Calendars containing Scheduling Order Dates from June 1, 2004 until September 30, 2004; prepared by County Attorney's Office and sent to file. Work-Product.

Undated, index to file, prepared by County Attorney's Office and sent to the file. Work-Product.

Note concerning Barbara Hulburt and Paul Shorter, undated, to file, prepared by County Attorney's Office. Work-Product.

Research notes concerning litigation prepared by County Attorney's Office in April 2004, sent to file. Work-Product.

Index to file, prepared by the County Attorney's office and sent to file. Attorney-Client Privilege.

Potential Expert Witnesses List prepared by Steve Elswick sent to County Attorney's office in May 2004. Attorney-Client Privilege; Work-Product.

Expert Witness Brochure sent by firm in May, 2004 with notations and filing post-it created by County Attorney's office. Work-Product.

Chronology of case prepared by Jeff Mincks in April-May 2004 for litigation. Sent to file. Work-Product.

Memo dated April 28, 2004 with attachments created by Frank Edwards at request of and sent to County Attorney's office. Attorney-Client Privilege and Work Product.

Documents prepared and compiled by Fire Department at County Attorney's Office request re: TQI committee, training and discipline of Hechler and sent to County Attorney 's Office. Work-Product and Attorney-Client Privilege.

Memo from Steve Elswick to Steven Micas dated 10/10/03 re: Hechler's EEOC charges. Attorney-Client Privilege.

Drafts of letters dated January 23, 2003; September 10, 2003; September 4, 2003; October 7, 2002; February 5, 2003; October 17, 2002 relating to Hechler's complaints. Prepared by the County Attorney's Office. Work-Product.

Documents concerning TQI Committee and Fire Dept. training prepared by Fire Department and requested by County Attorney's Office in relation to litigation. Undated. Work-Product and Attorney-Client Privilege.

Memo with attachments dated 10/10/2003 concerning "Ethics Charge" made by Hechler. Attorney-Client Privilege

Memo, dated November 7, 2003 reflecting conversation between Steve Elswick and County Attorney Office concerning sexual harassment training. Sent to file. Attorney-Client Privilege.

Memo and attachment prepared by County Attorney's office, 12/18/02 re: Hechler grievance sent by County Attorney's Office to Fire Dept. Attorney-Client Privilege and Work-Product.

Memo dated December 16, 2002 to Steve Elswick from Steve Micas transmitting letter re: Hechler grievance. Attorney-Client Privilege.

Draft of letter and post-it, dated 12/18/02, requesting review by S. Elswick. Sent by County Attorney's Office. Re: Expectations of Fire Dept. for Hechler. Attorney-Client Privilege.

Index to file, prepared by County Attorney's office and sent to file.

Memo dated 1/29/04 from Lane Ramsey to Steve Micas and Karla Gerner re: Letter from Greg Hooe dated 1/28/04.

Response, undated, to Hechler's EEOC Charge #122-2003-01196. Edited by County Attorney's office. Attorney-Client Privilege.

Draft of letter to Greg Hooe dated February, 2003 sent from County Attorney's Office to Karla Gerner. Attorney-Client Privilege.

Post-it from Jeanne (HRM) to Stel Parthemos re: FOIA request from counsel for Hechler. Attorney-Client Privilege.

Draft of letter dated November 21, 2002 to Hechler sent by County Attorney's Office to Karla Gerner with County Attorney's Office; Re: Grievance. Work-Product and Attorney-Client Privilege.

Memo to Joy Galusha of County Administration office from County Attorney's Office dated 10/21/02 concerning pregrievance meeting on grievances of Hechler and Eddy. Attorney-Client Privilege.

Memo dated 10/16/23 from S. Micas to file re: Response to Hechler's EEOC Charge. Work-Product.

Draft of EEOC Charge Response in Hechler's Charge, undated, edited and reviewed by County Attorney office in conjunction with HRM. Attorney-Client Privilege and Work-Product.

Index to file, prepared by County Attorney's office and sent to file.

Index dated 3/20/03 prepared by County Attorney's office for litigation in Hechler v. County and sent to file.

Index dated 3/20/03 prepared by County Attorney's office for litigation in Hechler v. County and sent to file.

Internal memo dated October 31, 2003 from Michelle McKesson of County Attorney's office to file re: Hechler's address.

Comcast of Chesterfield County, Inc. v. Chesterfield County Privilege List

5/15/07 E-mail from Jeff Mincks to Joe Moore concerning Comcast Complaint Responses (Attorney-Client)

5/14/07 E-mail from Joe Moore to Jeff Mincks concerning Comcast Complaint Responses (Attorney-Client)

5/1/07 E-mail from Joe Moore to Jeff Mincks concerning Comcast Complaint (Attorney-Client)

5/2/03 E-mail from Mike Chernau to Lou Lassiter concerning Comcast franchise fee (Attorney-Client)

2/5/07 E-mail from Mike Chernau to Joe Horbal, Patti Howell, Joe Moore concerning e-mail from James Kurz dated 2/2/07 (Attorney-Client)

2/6/07 E-mail from Mike Chernau to Joe Horbal concerning e-mail from James Kurz dated 2/2/07. (Attorney-Client)

2/6/07 E-mail from Joe Horbal to Mike Chernau, Patti Howell, Joe Moore concerning e-mail from James Kurz dated 2/2/07. (Attorney-Client)

4/26/07 E-mail from Jeff Mincks to Joe Horbal concerning Comcast Complaint. (Attorney-Client)

5/25/07 E-mail from Jeff Mincks to Joe Horbal, Patti Howell concerning e-mail from James Kurz dated 5/25/07. (Attorney-Client)

5/2/07 E-mail from Jeff Mincks to Joe Moore concerning Comcast Complaint (Attorney-Client)

4/25/07 E-mail from Jeff Mincks to Joe Horbal concerning e-mail from James Kurz dated 4/24/07. (Attorney-Client)

Comments regarding taxing of converters by other localities undated (2007). Prepared at the request of Jeff Mincks for litigation (Work-Product Doctrine)

3/21/07 E-mail from Patti Howell to Dan Lejman concerning taxation of converters. Specifically requested by Jeff Mincks for litigation (Work-Product Doctrine)

3/22/07 E-mail from Patti Howell to Priscilla Bele concerning taxation of converters. Specifically requested by Jeff Mincks for litigation. (Work-Product Doctrine)

3/23/07 E-mail from Patti Howell to Joseph Correa concerning taxation of converters. Specifically requested by Jeff Mincks for litigation. (Work-Product Doctrine)

3/23/07 E-mail from Patti Howell to Nancy Horn concerning taxation of converters. Specifically requested by Jeff Mincks for litigation.

5/1/07 E-mail from Patti Howell to Joe Moore concerning Comcast Complaint. Specifically requested by Jeff Mincks for litigation. (Work-Product Doctrine)

5/1/07 E-mail from Patti Howell to Joe Moore concerning Comcast Complaint Responses with attached Responses. Specifically requested by Jeff Mincks for litigation (Work-Produce Doctrine)

3/22/07 E-mail from Priscilla Bele to Patti Howell concerning taxation of converters. Response to specific request by Jeff Mincks concerning litigation (Work-Product Doctrine)

3/26/07 E-mail from Patti Howell to 'rrush@loudoun.gov' concerning taxation of converters. Specifically requested by Jeff Mincks for litigation. (Work-Product Doctrine)

4/5/07 E-mail from Patti Howell to Douglas P. Brown concerning taxation of converters. Specifically requested by Jeff Mincks for litigation (Work-Product Doctrine)

4/5/07 E-mail from Douglas P. Brown to Patti Howell concerning taxation of converters. Response to specific request by Jeff Mincks concerning litigation. (Work-Product Doctrine)

4/4/07 E-mail from Patti Howell to Douglas P. Brown concerning taxation of converters. Specifically requested by Jeff Mincks for litigation. (Work-Product Doctrine)

Appendix J

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF COLONIAL HEIGHTS

CITY OF COLONIAL HEIGHTS, VIRGINIA,

Plaintiff,

v. Case No.: CL97-25

SOUTHWOOD BUILDERS, INC.,
and HYDRO-STOP, INC.,

Defendants.

ORDER

On August 26th, 1997, came Royal Insurance, Inc. ("Royal") and Crum and Forster, insurers of Southwood Builders, Inc. and Hydro-Stop, Inc., through counsel, on the Motions to Quash the Subpoenae Duces Tecum. Upon consideration of the Motions, the responsive brief and arguments of counsel, it is hereby ORDERED as follows:

1. That Royal and Crum and Forster shall create a detailed privilege log for every document identified in the subpoenae but not produced pursuant to the subpoenae. The privilege log shall include the date, author, recipient, subject matter, and doctrine/privilege asserted for each document.

2. The privilege logs prepared by Royal and Crum and Forster shall be delivered to the plaintiff, City of Colonial Heights, and filed with the Court no later than September 15, 1997.

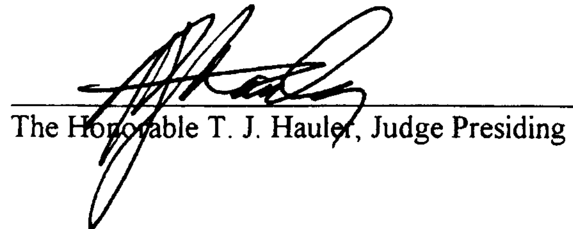
3. In the event the parties are unable to resolve whether a particular document is protected from disclosure and is not legally required to be produced pursuant to the subpoenae, the document shall be submitted to the Court for an in camera review for judicial determination of whether the attorney-client privilege or work product doctrine prevents disclosure in accordance

with the laws of Virginia.

4. The Court's decision on the Motions to Quash will be held in abeyance pending the filing of the privilege logs and the subsequent in camera review determining which documents are not subject to disclosure by law.

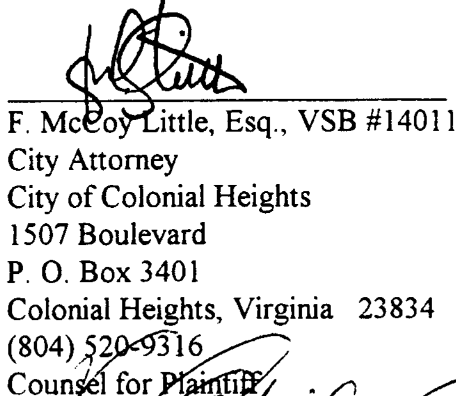
5. The Clerk is directed to send an attested copy of this Order to all counsel of record upon entry.

ENTER: 9/30/97

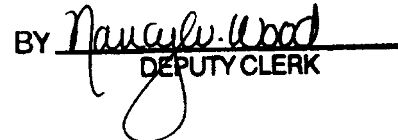


The Honorable T. J. Hauler, Judge Presiding

Seen and Agreed:



F. McCoy Little, Esq., VSB #14011
City Attorney
City of Colonial Heights
1507 Boulevard
P. O. Box 3401
Colonial Heights, Virginia 23834
(804) 520-9316
Counsel for Plaintiff



A COPY, TESTE:
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BY ____________
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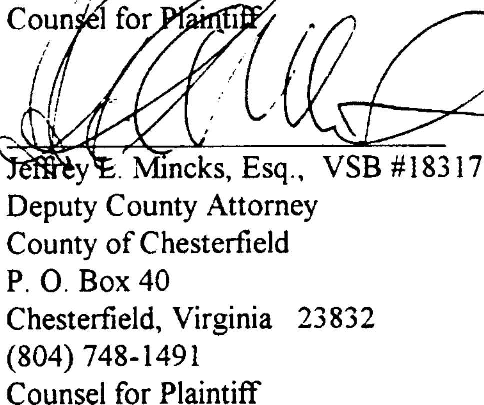
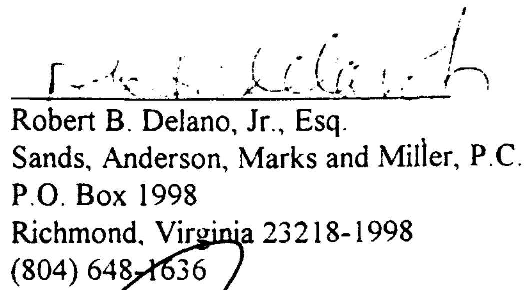


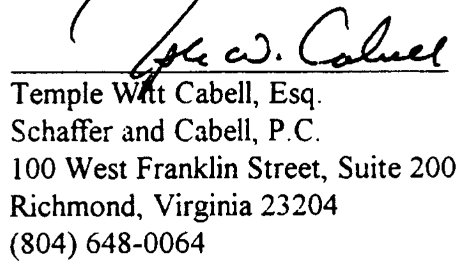
Jeffrey L. Mincks, Esq., VSB #18317
Deputy County Attorney
County of Chesterfield
P. O. Box 40
Chesterfield, Virginia 23832
(804) 748-1491
Counsel for Plaintiff

1718(14).19677.1

Seen and objected to for the reasons stated at the August 26th hearing.



Robert B. Delano, Jr., Esq.
Sands, Anderson, Marks and Miller, P.C.
P.O. Box 1998
Richmond, Virginia 23218-1998
(804) 648-1636



Temple Witt Cabell, Esq.
Schaffer and Cabell, P.C.
100 West Franklin Street, Suite 200
Richmond, Virginia 23204
(804) 648-0064

Appendix K

[Letterhead]

Dear Counsel:

As you are aware from yesterday morning's email, we would like to schedule a Rule 26(f) conference next week. As I mentioned, __________ and I are available next week with the exception of Tuesday morning and Thursday afternoon. Please advise me as to your availability.

I am writing this letter to you in an effort to make this conference more efficient and useful for the parties by outlining the areas of discovery Plaintiffs anticipate seeking from Defendants. This letter also discusses your and your clients' obligations with respect to preserving and producing information including electronic information. Finally, I set forth the format for production of electronic information as required by Rule 26(f)(3).

Anticipated Scope of Discovery

At this preliminary stage, Plaintiffs anticipate discovery to generally cover the following subject matters:

1. Plaintiffs. Plaintiffs will request all information possessed by Defendants relating to _______ or ___________ This would include, for example, __________'s cumulative education record and all of the customary contents of that record, such as her special education file, psychological evaluations, occupational therapy evaluations, current and former individualized education plans

("IEPs") and other materials. This is not limited to documents in the County's possession. It also includes any documents retained personally by __________, _________ or any other employee. Any communications with or relating to_______ or ______ must be produced as well.

2. ______________Plaintiffs will request all information relating to the employment of _________ and _________. This includes, but is not limited to, all information kept in their employment files. I would assume such files contain information relating to their separation from employment, their employment evaluations, and other instances of alleged child abuse, neglect or mistreatment, if any.

3. Potential Witnesses. Plaintiffs will request the identity of persons who may have knowledge of relevant facts. This will include the identity of other school employees who observed _________ experiences at school. It will include the school officials who supervised and/or evaluated __________ and ____________. It will include the identity of other students of __________ or ____________as well as the parents of such students.

4. Complaints. Plaintiffs will request information relating to formal and informal complaints concerning _________, __________ or the education of other disabled students at O.B. Gates including, but not limited to, information about any incident involving the use of clothing or other material to restrain or restrict any child.

5. Policies and Procedures. Plaintiffs will request any and all Chesterfield County School Board policies or procedures bearing upon any of the issues in this case.

The foregoing areas of inquiry should not, of course, be taken as the final word on this topic. It is likely that other areas of inquiry will materialize. The foregoing areas are being provided to you solely for the purpose of expediting the discovery process consistent with the spirit of Rule 26(f).

Preservation of Evidence and Electronic Discovery

By this letter, you and your clients are hereby given notice not to destroy, conceal or alter any paper or electronic files and other data generated by and/or stored on your clients' computers and storage media (e.g., hard disks, floppy disks, backup tapes), or any other electronic data, such as voice mail, relating to any of the foregoing general subject matters or to any other subject matter that may be relevant to the issues involved in this litigation, including your clients' alleged defenses. As you know, your clients' failure to comply with this notice can result in severe sanctions being imposed by the Court for spoliation of evidence or potential evidence.

Through discovery, we expect to obtain from your clients a number of documents and things including files stored on your clients' computers and your clients' computer storage media. (As part of our initial discovery efforts, you will soon receive initial interrogatories and requests for documents and things.)

Electronic documents and the storage media on which they reside contain relevant, discoverable information beyond that which may be found in printed documents. Therefore, even when a paper copy exists, we will seek all documents in their electronic form along with information about those documents contained on the media. We also will seek paper printouts of those documents that contain unique information after they were printed out (such as paper documents containing handwriting, signatures, marginalia, drawings, annotations, highlighting and redactions) along with any paper documents for which no corresponding electronic files exist.

Our discovery requests will ask for certain data on the hard disks, floppy disks and backup media used in your clients' computers, some of which are not readily available to an ordinary computer user, such as "deleted" files and "file fragments." As you may know, although a user may "erase" or "delete" a file, all that is really erased is a reference to that file in a table on the hard disk; unless overwritten with new data, a "deleted" file can be as intact on the disk as any "active" file you would see in a directory listing.

Courts have made it clear that all information available on electronic storage media is discoverable, whether readily readable ("active") or "deleted" but recoverable. *See, e.g., Easley, McCaleb & Assocs., Inc. v. Perry,* No. E-2663 (Ga. Super. Ct. July 13, 1994) ("deleted" files on a party's computer hard drive held to be discoverable, and plaintiffs expert was allowed to retrieve all recoverable files); *Santiago v. Miles,* 121 F.R.D. 636, 640 (W.D.N.Y. 1988) (a request for "raw information in computer banks" was proper and obtainable under the discovery rules); *Gates Rubber Co. v. Bando Chemical Indus., Ltd.,* 167 F.R.D. 90,112 (D. Colo. 1996) (mirror-image copy of everything on a hard drive "the method which would yield the most complete and accurate results," chastising a party's expert for failing to do so) and *Northwest Airlines, Inc. v. Teamsters Local 2000, et al.,* 163 L.R.R.M. (BNA) 2460, (USDC Minn. 1999) (court ordered image-copying by Northwest's expert of home computer hard drives of employees suspected of orchestrating an illegal "sick-out" on the Internet).

Accordingly, electronic data and storage media that may be subject to our discovery requests and that your client is obligated to maintain and not alter or destroy include, but are not limited to, the following:

All digital or analog electronic files, including "deleted" files and file fragments, stored in machine-readable format on magnetic, optical or other storage media, including the hard drives or floppy disks used by your clients' computers and their backup media (e.g., other hard drives, backup tapes, floppies, Jaz cartridges, CDROMs) or otherwise, whether such files have been reduced to paper printouts or not. More specifically, your clients are to preserve all of their e-mails, both sent and received, whether internally or externally; all word-processing files, including drafts and revisions; all spreadsheets, including drafts and revisions; all databases; all CAD (computer-aided design) files, including drafts and revisions; all presentation data or slide shows produced by presentation software (such as Microsoft PowerPoint); all graphs, charts and other data produced by project management software (such as Microsoft Project); all data generated by calendaring, task management and personal information management (PIM) software (such as Microsoft Outlook or Lotus Notes); all data created with the use of personal data assistants (PDAs), such as PalmPilot, HP Jornada, Cassiopeia or other Windows CE-based or Pocket PC devices; all data created with the use of document management software; all data created with the use of paper and electronic mail logging and routing software; all Internet and Webbrowser-generated history files, caches and "cookies" files generated at the workstation of each employee and/or agent in your client's employ and on any and all backup storage media; and any and all other files generated by users through the use of computers and/or telecommunications, including but not limited to voice mail. Further, you are to preserve any log or logs of network use by employees or otherwise, whether kept in paper or electronic form, and to preserve all copies of your backup tapes and the software necessary to reconstruct the data on those tapes, so that there can be made a complete, bit-by-bit "mirror" evidentiary image copy of the storage media of each and every personal computer (and/or workstation) and network server in your clients' control and custody, as well as image copies of all hard drives retained by your clients and no longer in service, but in use at any time from 2002 to the present.

Your clients are also not to pack, compress, purge or otherwise dispose of files and parts of files unless a true and correct copy of such files is made.

Your clients are also to preserve and not destroy all passwords, decryption procedures (including, if necessary, the software to decrypt the files); network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software, and any and all other information and things necessary to access, view and (if necessary) reconstruct the electronic data we will request through discovery.

Your clients will be expected to produce information consisting of the following:

1. Documents and information about documents containing backup and/or archive policies and/or procedures, document retention policies, names of backup and/or archive software and names and addresses of any offsite storage provider;

2. All e-mail and information about e-mail (including message contents, header information and logs of e-mail system usage) sent or received by any Chesterfield County School Board employee, ___________, or any other person relating to any of the general subject matters identified on pages 1-2 of this letter or to any other subject matter that may be relevant to the issues involved in this litigation (this certainly would include the affiants referred to in the recent Motion for Summary Judgment, but would also include others, such as Thelma Smith);

3. All databases (including all records and fields and structural information in such databases), relating to any of the general subject matters identified on pages 1-2 of this letter or to any other subject matter that may be relevant to the issues involved in this litigation;

4. All logs of activity (both in paper and electronic formats) on computer systems and networks that have or may have been used to process or store electronic data containing information relating to any of the general subject matters identified on pages 1-2 of this letter or to any other subject matter that may be relevant to the issues involved in this litigation;

5. All word processing files, including prior drafts, "deleted" files and file fragments, containing information relating to any of the general subject matters identified on pages 1-2 of this letter or to any other subject matter that may be relevant to the issues involved in this litigation; and

6. All files, including prior drafts, "deleted" files and file fragments, containing information from electronic calendars and scheduling programs containing information relating to any of the general subject matters identified on pages 1-2 of this letter or to any other subject matter that may be relevant to the issues involved in this litigation.

Online Data Storage on Mainframes and Minicomputers. With regard to online storage and/or direct access storage devices attached to your client's mainframe computers and/or minicomputers: they are not to modify or delete any electronic data files, "deleted" files and file fragments existing at the time of this letter's delivery, which meet the definitions set forth in this letter, unless a true and correct copy of each such electronic data file has been made and steps have been taken to assure that such a copy will be preserved and accessible for purposes of this litigation.

Offline Data Storage, Backups and Archives, Floppy Diskettes, Tapes and Other Removable Electronic Media. With regard to all electronic media used for offline storage, including magnetic tapes and cartridges and other media that, at the time of this letter's delivery, contained any electronic data meeting the criteria listed in paragraph 1 above: Your clients are to stop any activity that may result in the loss of such electronic data, including rotation, destruction, overwriting and/or erasure of such media in whole or in part. This request is intended to cover all removable electronic media used for data storage in connection with their computer systems, including magnetic tapes and cartridges, magneto-optical disks, floppy diskettes and all other media, whether used with personal computers, minicomputers or mainframes or other computers, and whether containing backup and/or archive data sets and other electronic data, for all of their computer systems.

Replacement of Data Storage Devices. Your clients are not to dispose of any electronic data storage devices and/or media that may be replaced due to failure and/or upgrade and/or other reasons that may contain electronic data meeting the criteria listed in paragraph 1 above.

Fixed Drives on Stand-Alone Personal Computers and Network Workstations. With regard to electronic data meeting the criteria listed in paragraph 1 above, which existed on fixed drives attached to stand-alone computers and/or network workstations at the time of this letter's delivery: Your clients are not to alter or erase such electronic data, and not to perform other procedures (such as data compression and disk de-fragmentation or optimization routines) that may impact such data, unless a true and correct copy has been made of such active files and of completely restored versions of such deleted electronic files and file fragments, copies have been made of all directory listings (including hidden files) for all directories and subdirectories containing such files, and arrangements have been made to preserve copies for the duration of this litigation.

Programs and Utilities. Your clients are to preserve copies of all application programs and utilities, which may be used to process electronic data covered by this letter.

Log of System Modifications. Your clients are to maintain an activity log to document modifications made to any electronic data processing system that may affect the system's capability to process any electronic data meeting the criteria listed in paragraph 1 above, regardless of whether such modifications were made by employees, contractors, vendors and/or any other third parties.

Personal Computers Used by Your Employees and/or Their Secretaries and Assistants. The following steps should immediately be taken in regard to all personal computers used by your clients' employees and/or their secretaries and assistants. As to fixed drives attached to such computers: (i) a true and correct copy is to be made of all electronic data on such fixed drives relating to this matter, including all active files and completely restored versions of all deleted electronic files and file fragments; (ii) full directory listings (including hidden files) for all directories and subdirectories

(including hidden directories) on such fixed drives should be written; and (iii) such copies and listings are to be preserved until this matter reaches its final resolution. All floppy diskettes, magnetic tapes and cartridges, and other media used in connection with such computers prior to the date of delivery of this letter containing any electronic data relating to this matter are to be collected and put into storage for the duration of this lawsuit.

Evidence Created Subsequent to This Letter. With regard to electronic data created subsequent to the date of delivery of this letter, relevant evidence is not be destroyed and your clients are to take whatever steps are appropriate to avoid destruction of evidence.

In order to assure that your and your clients' obligation to preserve documents and things will be met, please forward a copy of this letter to all persons and entities with custodial responsibility for the items referred to in this letter.

Format of Production

As I mentioned above, you will soon be receiving interrogatories and requests for production of documents. As for the format of the production of electronic information, Group IV Multi-Page Tiffs should be produced, accompanied by a Summation DII load file and .dat file containing the image key and extracted metadata. OCR or Extracted Text should also be provided, either in multipage text files (preferable) or contained within the .dat file. The extracted metadata should at least include the following fields: to, from, cc, bcc, subject, date sent, time sent, parent - child information (for emails and attachments), doc title, author, date created, date modified, last modified by. Preferably, the Image key and the Bates Number of the document will be identical, however, if this is not possible, the beginning and ending bates numbers should also be provided in the .dat file. We reserve the right to request native versions of individual files. Track changes and comment metadata should be shown on any images provided and, if not provided, native files for such images will need to be provided as well.

Please contact me at my direct dial number listed above or by email if you have any questions concerning the contents of this letter.

Sincerely,