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The Twenty-Seventh Annual John Marshall Law School International Moot Court Competition in Information Technology and Privacy Law: Brief for the Petitioner, 26 J. Marshall J. Computer & Info. L. 283 (2008)

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Zach Rudisill

BRIEF FOR PETITIONER

No. 08-1701

IN THE
SUPREME COURT OF THE STATE OF MARSHALL
FALL TERM 2008

ALEX ROMERO,
Petitioner,
v.
WINDBUCKET ENTERTAINMENT, LLC,
Respondent.

ON ORDER GRANTING LEAVE TO APPEAL TO THE
STATE OF MARSHALL COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

David Caras
Jennifer Robbins
Zach Rudisill

QUESTIONS PRESENTED

I. Whether current tort law should be applied to the virtual world due to society's increased usage of technological advancements.

II. Whether the district court erred in denying sanctions for appellee's bad faith destruction of crucial evidence to appellant's underlying claim when traditional spoliation analysis, strong public policy and the newly amended Marshall rules of civil procedure indicate that sanctions should apply.

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OPINIONS BELOW

The opinion of the Court of Appeals for the State of Marshall for the Fourth Circuit is not officially reported but appears in the Record. (R. at 3-7.) The opinion of the Cyrus County District Court is not officially reported but also appears in the Record. (R. at 3-6.)

STATUTORY PROVISIONS

The following statutory provisions appear in the appendices following this brief: Fed. R. Civ. P. 37; Fed. R. Evid. 401.

STANDARD OF REVIEW

Grants of summary judgment are reviewed *de novo. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A trial court's denial of sanctions is reviewed for abuse of discretion. *Brandt v. Vulcan*, 30 F.3d 752, 755 (7th Cir 1994).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Defendant-Appellee, Windbucket Entertainment, LLC ("Appellee"), is a maker and publisher of multi-player online games. (R. at 4.) "Eden" is Appellee's most successful online game, allowing players to create a virtual representative called an "avatar" to interact in the virtual world. These avatars can amass virtual property in the form of land, homes, starships, and virtual money that can be used within the game. (R. at 4, 5.) Players can also create their own communities and conduct businesses to trade their Eden property. (R. at 4.) Appellee requires that each player agree to the Eden Terms of Use Agreement before playing the game. According to the Terms of Use Agreement, players "hold expectations of privacy in their conduct and affairs conducted in the Game." (R. at 9.)

Plaintiff-Appellant, Alex Romero ("Appellant"), lives in the State of Marshall and is an Eden subscriber. (R. at 5.) Appellant "has invested a significant amount of time and money in running his online life," developing a gated community for himself and his invitees. (R. at 5.) By creating this gated community, Appellant sought to conduct his private affairs from within the seclusion of his virtual mansion. (R. at 5.)

To participate in Eden, players pay a fee of $15 per month. (R. at 4.) Due to the competitive nature of the online gaming industry, Appellee has experimented with a number of special features to promote subscriber retention and to generate profits. (R. at 4.) One of these special features was Zero Being mode, which penalized subscribers with delinquent accounts by making their avatars invisible. (R. at 4.) Rather than

pay the reinstatement fee, many subscribers intentionally withheld payment to become invisible. (R. at 4.) They created an independent website entitled "Zombies of Eden" where they would post their observations of other subscribers' actions within the game. (R. at 4.) After learning of the website and the intentional non-payment, Appellee discontinued Zero Being mode in July 2006. (R. at 4.)

Another feature was called "Voyage Enhanced Unrecognizability" mode ("Voyeur mode"). (R. at 4.) In Voyeur mode, avatars were invisible and could travel to any location within Eden, including otherwise restricted areas, instantaneously. (R. at 4.) Consequently, Voyeur mode allowed select avatars to spy on the private conduct and affairs of other Eden gamers. (R. at 4.) Appellee profited from permitting individuals to spy on other Eden gamers by charging an extra monthly fee for Voyeur mode. (R. at 4.) However, in November 2007, Appellee suspended Voyeur mode indefinitely after receiving "numerous complaints" from subscribers and citing "policy concerns." (R. at 5.)

In July 2006, an Eden subscriber known only by the avatar name "LEETDUDE" purchased Voyeur mode from Appellee (R. at 5.) On or before November 30, 2007, LEETDUDE posted numerous images consisting of screen shots captured from his game sessions in Voyeur mode to the Zombies of Eden site. (R. at 5.) Two of these screen shots were of Appellant's conduct and affairs within the game. One was a screen shot of the bedroom of Appellant's private online mansion. (R. at 5.) The other was a picture of six or seven avatars, one of which appears to be Appellant, engaged in sexual acts within Appellant's virtual curtilage. (R. at 5.) To the best of Appellant's knowledge and belief, both of these areas were restricted to himself and his invited guests. (R. at 5.)

Appellant filed a complaint against Appellee and LEETDUDE on December 27, 2007, along with a discovery request seeking the identity of LEETDUDE. (R. at 5.) When Appellee denied knowing the identity of LEETDUDE, Appellant submitted a second discovery request, asking for the server authentication logs of September, October and November 2007, in order to discover LEETDUDE's internet protocol address and identity. (R. at 6.) At this time in January 2007, when Appellant submitted the discovery request, Appellee's Data Retention Policy did not indicate that the logs were routinely deleted, stating only that "older logs may be pruned." (R. at 14.) When Appellee refused to produce the authentication logs, Appellant obtained a court order to compel production. (R. at 6.) Not once, not twice, but three times Appellee flaunted the court's authority by producing inadequate responses, if it responded at all. (R. at 13.) Only when the District Court ordered Appellee to turn over the logs or show cause for its failure to do so did Appellee produce a new, more favorable Data Retention Policy, drafted merely two days earlier, on February 2, 2008. The new Data Retention Policy provides that

"[t]he current month and previous months of logs are available as raw log files in the server data directory." (R. at 13.) Both the new and old policies expressly state that the logs in question are actively "used for diagnosing customer issues as well as tracking server utilization," as opposed to the general web site data which is "not considered a generally available archive, [used only] in the event of a catastrophic systems failure." (R. at 13.)

II. PROCEDURAL HISTORY

On December 27, 2007, Appellant filed a complaint for invasion of privacy in the Cyrus County District Court against Appellee and LEETDUDE, in case number 07 CV 5309. (R. at 3.) Appellant also filed a motion for sanctions based on Appellee's spoliation of evidence and failure to comply with court ordered discovery. (R. at 6.) The District Court entered an order granting summary judgment in favor of Appellee and denying Appellant's motion for sanctions, but ordered Appellee to pay reasonable expenses incurred as a result of its failure to obey discovery orders. (R. at 3.)

Appellant appealed to the Court of Appeals for the State of Marshall for the Fourth Circuit, under case number 4-08-0315, on two bases. (R. at 3.) First, Appellant sought reversal of the District Court's award of summary judgment in Appellee's favor. Second, Appellant contended the District Court erred in denying his motion for sanctions pursuant to Marshall Rules of Civil Procedure ("MRCP") 37.[1] (R. at 3, 6.) On June 16, 2008, the Court of Appeals affirmed the District Court on both issues. (R. at 7.) On the first issue, the court declined to hold that a fictional avatar in a virtual world could be a victim of an intrusion upon seclusion. (R. at 7.) On the second issue, the court held that because Appellant did not suffer an actionable tort, the District Court's denial of sanctions was harmless. (R. at 7.) On July 7, 2008, the Supreme Court of the State of Marshall granted Appellant's leave to appeal. (R. at 2.)

SUMMARY OF THE ARGUMENT

This Honorable Court should reverse the decision of the State of Marshall Court of Appeals for the Fourth Circuit and the Cyrus County District Court because the courts erred in their failure to recognize a cognizable claim of intrusion upon seclusion. Appellee created an expectation of privacy grounded in the Terms of Use Agreement. Appellant's affirmative steps to seclude his private affairs within Eden were consis-

1. "The Marshall Rules of Civil Procedure applicable to this matter are identical in all relevant respects to the corresponding provisions of the Federal Rules of Civil Procedure." (R. at 3.)

tent with an actual expectation of privacy. Because of these affirmative steps and the humiliation caused by the intrusion, it was highly offensive as defined in case law. Further, this Court has the opportunity to evolve the right to privacy, within the common law, to account for wrongs unique to the technology of today. Appellee is liable for the invasion of privacy under a contributing tortfeasor theory; but for the actions of Appellee, Appellant's privacy would not have been intruded upon.

Also, the District Court abused its discretion by denying Appellant's motion for sanctions when Appellee destroyed crucial electronic evidence in bad faith. Moreover, Appellee's refusal to comply with repeated requests and orders for discovery ruined Appellant's ability to seek full judicial relief against LEETDUDE. The court should have either awarded default judgment or taken Appellee's liability as established because those remedies were warranted under traditional sanctions analysis and for historically recognized reasons of specific deterrence, general deterrence and to prevent Appellee's unjust enrichment. Moreover, the newly enacted MRCP 37 provides Appellee no refuge from sanctions because Appellee's self-interested and bad faith spoliation does not reach sufficient merit to warrant protection under the rule and interpreting case law.

ARGUMENT

I. THE INTRUSION ON APPELLANT'S REASONABLE EXPECTATION OF PRIVACY WAS HIGHLY OFFENSIVE TO A REASONABLE PERSON, THEREBY IMPOSING LIABILITY ONTO APPELLEE FOR INTRUSION UPON SECLUSION

Marshall Courts have consistently recognized that a cause of action lies for an invasion of privacy under § 652B of the Restatement (Second) of Torts. (R. at 7.) In order to succeed on an intrusion upon seclusion claim, the plaintiff must establish that: (1) the plaintiff had a reasonable expectation of privacy, (2) there was an intrusion (physical or otherwise) into the personal affairs or concerns of the plaintiff, and (3) a reasonable person would find the intrusion to be highly offensive. Restatement (Second) Torts § 652B (1979).[2]

Appellee, having satisfied all the requisite elements for intrusion upon seclusion, is liable for intruding upon Appellant's seclusion. First, Appellee's Terms of Use Agreement expressly states that users of the game "may hold expectations of privacy in their conduct and affairs conducted in the Game." (R. at 9.) Second, Appellee intruded upon Appel-

2. *See* Fletcher v. Price Chopper Foods of Trumann, Inc., 220 F.3d 871, 875 (8th Cir. 2000). The Eight Circuit recognizes the exact 3 elements as necessary to sustain a successful cause of action under Restatement (Second) Torts § 876(b).

lant's private affairs when it created and surreptitiously disseminated Voyeur mode. This dissemination enabled LEETDUDE to gain unauthorized access to Appellant's virtual community and expropriate personal information. Finally, Appellee's blatant disregard for the users' rights to privacy, coupled with LEETDUDE'S subsequent violation of Appellant's expectation of privacy, is conduct that a reasonable person would find highly offensive.

As the virtual world continues to develop and integrate with numerous aspects of the real world,[3] the law must adapt to accommodate the increased litigation arising from actions commenced within the virtual world. *Id.* In declining to uphold the viability of intrusion upon seclusion claims arising out of the virtual world, the lower court's grant of summary judgment reflects an archaic perception and stagnant application of the law that is inconsistent with society's current perception of virtual worlds. Because Appellee is liable for intrusion upon seclusion, this Court must reverse the decision of the Fourth Circuit Court of Appeals.

A. Appellant Possessed a Reasonable Expectation of Privacy in His Affairs Conducted in the Virtual World Based on Contract Theory, the Exclusionary Nature of Appellant's Actions, and the Progressive Application of the Intrusion Upon Seclusion Tort

1. *Appellee's Terms of Use Agreement Contractually Provided Participants in Eden With a Reasonable Expectation of Privacy in Their Conduct and Affairs Conducted in the Virtual World.*

The right to privacy is not derived solely from the traditional statutory and common law constructs; rather, this right may also be created through contractual agreements. In support of this proposition, the First Circuit held that an employer violated an employee's right to privacy when it disclosed the employee's psychiatric evaluation in direct violation of the parties' contractual agreement that prohibited such disclosures. *Bratt v. IBM Corp.*, 785 F.2d 352, 355 (1st Cir. 1986).[4] Similarly, a California appellate court held that an employer's written policy state-

3. Avatars have been used to provide valuable real-world services such as psychotherapy, teaching, and conducting electronic commerce. Woodrom Barfield, *Intellectual Property Rights in Virtual Environments: Considering the Right of Owners, Programmers and Virtual Avatars*, 39 Akron L. Rev. 649, 656 (2006).

4. *See also In re* Eli Lily & Co., No. 012 3214 (F.T.C. January 18, 2002), *available at* http://www.ftc.gov/opa/2002/01/elililly.htm. (Pharmaceutical company liable for disclosing sensitive medical information of 669 customers when it promised the information would be kept confidential. "Companies that obtain sensitive information in exchange for a promise to keep it confidential must take appropriate steps to ensure the security of that information.") . *Id.*

ment prohibiting inquiries into employees' personal lives granted the employees a contractual right to privacy. *See Rulon-Miller v. IBM Corp.*, 162 Cal. App. 3d 241 (Cal. App. 1984), *overruled on other grounds by Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089 (Cal. App. 2000). In applying traditional contract doctrines to online contracts, the courts have enforced online terms of use agreements where the users had an opportunity to review and consent to the agreement. *Caspi v. Microsoft Network*, 732 A.2d 528 (N.J. Super Ct. App. Div. 1999); *see also Groff v. America Online, Inc.*, No. PC 97-0331, 1998 WL 307001, at *4 (R.I. Super. 1998 May 27, 1998) (holding that terms of use agreements can constitute valid contracts).

Given the courts' widespread recognition and enforcement of terms of use agreements, this Court should acknowledge Appellant's contractual right to privacy. Appellee's Terms of Use Agreement specifically states that users of the game "may hold expectations of privacy in their conduct and affairs conducted in the [g]ame." (R. at 9.) The express terms of this clause are directly analogous to the provisions in *Bratt and Rulon-Miller* that established an expectation of privacy. Furthermore, as in *Caspi*, the Appellant's assent to the Terms of Use Agreement established a valid and enforceable contract.

2. *Appellant's Conduct in the Virtual World was Consistent With an Actual Expectation of Privacy*

"The right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close." *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998). Recognizing this dichotomy, courts have held that a determining factor in intrusion upon seclusion cases is whether the plaintiff conducted himself in a manner that is consistent with an actual expectation of privacy. *Hill v. NCAA*, 869 P.2d 633, 648 (Cal. 1994). More specifically, "a person's behavior may not give rise to an inference that he no longer expects to maintain privacy in some aspects of his affairs." *Id.*

Whether a person's behavior demonstrates an expectation of privacy is determined by the presence, or lack thereof, of affirmative actions designed to restrict access to his private affairs and information. As the court noted in *Four Navy Seals v. AP*, merely intending for limited people to have access to information, without affirmative restrictive actions, does not support possessing a reasonable expectation of privacy. 413 F. Supp. 2d 1136, 1145 (S.D. Cal. 2005). In this case, the Navy Seals took photographs of themselves interacting with war prisoners and sent them to the spouse of one of the participants. Upon receipt of the photographs,

the spouse posted them on a non-restricted website that was open to the general online public. Given the absence of prerequisites to gain access (e.g. requiring a password or subscription) to the photos, the court concluded that the posting of the photos online dissolved any expectation of privacy. *Id.*; *see also Med. Lab. Mgmt. Consultants v. ABC, Inc.,* 30 F.Supp.2d 1182, 1188 (D. Ariz. 1998) (holding that laboratory owner had no expectation of privacy due to his failure to affirmatively communicate that he expected the conversation to be private and take subsequent precautions to ensure privacy).

While failure to take affirmative action can result in dissolving an expectation of privacy, this expectation may also be destroyed by affirmative acts. In *Fletcher*, a deli worker, upon learning that she had a staph infection, immediately disclosed her medical condition to two of her coworkers. 220 F.2d at 874. Although a person's medical condition generally is considered private information, the court held that the plaintiff's "revelation of private information eliminated her expectation of privacy by making what was formerly private a topic of office conversation." *Id.* at 878. As such, the court denied plaintiff's intrusion upon seclusion claim. *Id.* at 879. Similarly, in *Cheatham v. Paisano Publ'ns Inc.*, a clothing designer brought an intrusion upon seclusion claim resulting from the publication of a picture displaying her bottom through fishnet fabric patches on jeans she wore at biker events. 891 F.Supp. 381, 384 (W.D. Ky. 1995). In rejecting the plaintiff's claim, the court stated that wearing her designs in public was inconsistent with possessing an actual expectation of privacy. *Id.* at 385.

While the courts have steadfastly rejected intrusion upon seclusion claims where the plaintiff has engaged in some act inconsistent with maintaining an expectation of privacy, they have consistently found for plaintiffs who took affirmative steps towards securing their right to privacy. In *Doe v. P.P.S Guard Servs. Inc.*, security guards used a surveillance camera to watch and video tape fashion show models changing their wardrobe behind a curtained dressing area. 945 F.2d 1422, 1424 (8th Cir. 1991). Despite the general accessibility to the secluded area for many members involved in the show, the court held that creating a curtained dressing area was consistent with a reasonable expectation of privacy. *Id.* at 1427. *See also Leventhal v. Knapek*, 366 F.3d 64, 73-74 (2d Cir. 2001) (employee had a reasonable expectation of privacy in office computer because he was the only one that had access to the computer and did not allow others to use it). As the California Supreme Court noted in *Sanders v. ABC*, "privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable." 978 P.2d 67, 72 (Cal.

1999). Additionally, the court noted that "the mere fact that a person can be seen by some people does not mean that they can be legally forced to be subject to being seen by everyone." *Id.*

Applying the law to the case at hand, Appellant conducted himself in a manner consistent with an actual expectation of privacy by taking steps within the game of Eden to ensure that his private online domain would be accessible only to invitees. Like the curtained dressing room in *Doe* and the private office in *Leventhal*, Appellant's virtual gated community established a zone of privacy for conduct occurring within that barrier. Furthermore, the fact that Appellant's seclusion was not absolute, as in *Doe*, does not diminish his expectation of privacy to be free from unwanted intruders. While the plaintiffs in *Fletcher*, *Navy Seals*, and *Cheatham* destroyed their expectations of privacy by exposing private matters to the general public, Appellant shielded his affairs from the virtual public eye by secluding himself within his gated community. Appellant easily could have engaged in sexual conduct outside of his secluded community; however, he chose to hold that part of his virtual life close. Consequently, Appellant created a reasonable expectation to privacy in his online affairs.

3. *Ever-Increasing Technological Advances Warrant Progressive Development of Common Law to Recognize Torts Occurring in the Virtual World*

Civilization has progressed far beyond the days when typewriters and rotary telephones represented the height of communication technology. The "strength of our legal system lies in its elasticity, adaptability, capacity for growth and ability to meet the wants of an ever changing society and to apply immediate relief for every recognized wrong." *Lake*, 582 N.W.2d at 234. Consequently, the lower courts' failure to expand the application of intrusion upon seclusion to virtual environments contradicts the strong historical trend favoring expanding the applicable scope of this tort to account for new developments.

> As society changes over time, the common law must also evolve. . . . It must be remembered that the common law is the result of growth and that its development has been determined by the social needs of the community which governs it. . . . Manifestly, it must change as society changes and new rights are recognized; otherwise the law ceases to be effective." *Id.*

Despite the considerable advancements in communication technology, society has continued to adhere to the notion that "[i]t is the legal right of every man to enjoy social and business relations with his friends, neighbors, and acquaintances, and he is entitled to converse with them without molestation by intruders." *Rhodes v. Graham*, 37 S.W.2d 46, 47 (Ky. Ct. App. 1931).

The genesis for recognizing invasion of privacy torts has often been attributed to the seminal Harvard Law Review article, "The Right to Privacy" written by Justices Warren and Brandeis. Louis D. Brandeis & Samuel D. Warren, *The Right To Privacy*, 4 Harv. L. Rev. 193 (1890) [hereinafter Brandeis]. Because recent technological advancements[5] produced increases in privacy invasions, Warren and Brandeis stated that the law must evolve to protect individuals' "right to be let alone" and provide a remedy when this right has been violated. *Id.* Shortly thereafter, the development and use of wiretaps caused the courts to re-evaluate the scope of the right to privacy. *Rhodes*, 37 S.W. 2d at 47. Because the courts were of the impression that wiretapping did not involve property or contractual rights, there was widespread disagreement as to the applicability of invasion of privacy torts. *Id*. In expanding the scope of invasion of privacy torts, the court concluded that "[t]he evil incident to the invasion of privacy of the telephone is as great as that occasioned by unwarranted publicity in newspapers and by other means of a man's private affairs for which courts have granted the injured person redress. *Id.*

As technology continued to provide more avenues for invading the privacy of others, Congress and the courts took affirmative action to ensure the protection of individuals' right to privacy. In *United States v. Councilman*, the court addressed whether the Wiretap Act (amended and renamed the Electronic Communications Privacy Act) applied to e-mail communications that were intercepted, copied, and electronically stored. *United States v. Councilman,* 418 F.3d 67, 70-71 (1st Cir. 2005). The defendant asserted that Congress deemed computer communication less worthy of protection because users had a lower expectation of privacy. *Id.* The court rejected the defendant's arguments finding that his interpretation of the Wiretap Act was inconsistent with congressional intent. *Councilman*, 418 F.3d at 70-71. In support of its conclusion, the court noted that Congress drafted the ECPA amendments to the Wiretap Act specifically to account for the rise in computer communications and corresponding threats to privacy that extended well beyond the original scope of the Wiretap Act. *Id.* at 80.[6] Furthermore, when Congress initially passed the ECPA in 1986, the Act excluded cordless telephone conversations from being encompassed within the definition of electronic communication. *Id.* at 75. In recognition that this exclusion no longer fit with the significant advances in technology and society's privacy expectations, the legislature repealed the cordless phone exclusion eight years after its enactment. *Id.* at 72 n.11.

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5. *i.e.* instantaneous photographs and newspaper enterprises

6. *See also In Re* Pharmatrak, Inc., 329 F.3d 9, 18 (1st Cir. 2003) (stating that the "ECPA amended the Federal Wiretap Act by extending to data and electronic transmissions the same protection already afforded to oral and wire communications.").

As scholars have observed, "the boundaries between the game space and real space are permeable. Things that happen to people in the game space can have real-world effects." Jack M. Balkin, *Virtual Liberty: Freedom to Design and Design and Freedom to Play in Virtual Worlds*, 90 Va. L. Rev. 2043, 2059 (2004) [hereinafter Balkin]. [7] Recently, virtual world property has attained significant real world value.[8] Many gamers have begun to sell their virtual world property or powers for real world currency. Balkin, at 2059-60. As a byproduct of this blurred separation, portions of the regulation and protection of virtual environments are being governed by real world law. Because of the substantial growth in the interplay between the real and virtual worlds, the creators of Second Life granted intellectual property rights to players for the virtual content they created in the virtual world. *Bragg v. Linden Research Inc.,* 487 F.Supp.2d 593, 595 (E.D. Pa. 2007).[9] In a 2003 case involving a hacker's expropriation of a player's online property, a Chinese court recognized that real world tort law applied to virtual world torts. Balkin, at 2067 (citing *Lawsuit Fires Up in Case of Vanishing Virtual Weapons*, China Daily, Nov. 20, 2003, at 1, *available at* http://www.chinadaily.com.cn/en/doc/2003-11/20/content_283094.htm). Additionally, the Chinese court held the game manufacturer tortiously liable because it refused to identify the hacker who committed the theft. *Id.*

"The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world . . . [as such,] solitude and privacy have become more essential to the individual." Brandeis, at 196. In today's exposure driven society, many people find virtual worlds as a refuge for their privacy. In light of society's increased recognition of virtual worlds and the recent recognition of various online rights, the lower court erroneously denied Appellant's claim.

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7. *See also* Woodrom Barfield, *Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars*, 29 AKRON L. REV. 649 (2006) (discussing the increased use of virtual avatars for providing real world services in the virtual world).

8. An average World of Warcraft gamer will spend over 350 hours to advance his or her avatar to the highest level. This roughly equates to nine weeks of work at a full time job. *See* David Shelton, *Claiming Ownership, But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods*, 54 UCLA L. REV 751, 761 (2007).

9. Second Life is a popular online role playing game where participants are able to communicate with others and encounter many experiences that mirror those in the real world. Even Judge Posner has made an appearance in Second Life as a balding, bespectacled cartoon rendering of himself where he addressed a crowd on a range of legal issues including property rights in virtual reality. *Id.* at 595 n.4.

B. Appellee Intruded Upon Appellant's Seclusion by Covertly Creating and Distributing Voyeur Mode, Thereby Substantially Assisting Select Gamers in Invading Others' Private Virtual Worlds

1. *LEETDUDE Intruded Upon Appellant's Seclusion When He Entered and Photographed Appellant's Online Domain*

To have an action for intrusion upon seclusion, it must be shown that the intrusion was intentional. The *Restatement* defines intent to mean "that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." Restatement (Second) of Torts § 8 (1979). Thus, an intentional intrusion is committed if a person believes, or is substantially certain, that they do not have the necessary legal or personal permission to commit the intrusive act. *See, e.g.*, *Fletcher*, 220 F.3d at 876 *and O'Donnell v. United States*, 891 F.2d 1079, 1083 (3d Cir. 1989).

The intrusion in an action for intrusion upon seclusion need not be physical. Non-physical intrusions, such as taking photographs, are central in the *Restatement*'s examples of intrusion upon seclusion.[10] The overseeing or overhearing of private affairs or the investigation or examination of private concerns constitutes an intrusion upon seclusion. Restatement (Second) of Torts § 652B cmt. b (1977). The opening of personal correspondence in *Vernars v. Young*, 539 F.2d 966, 969 (3d Cir. 1976), intruding into a private relationship in *Moffett v. Glick*, 621 F. Supp. 244, 283 (N.D. Ind. 1985), and the monitoring of e-mail correspondence in *Thygeson v. U.S. Bancorp*, No. CV-03-467-ST, 2004 WL 2066746, at *1 (D. Or. Sept. 15, 2004), have all been considered or stipulated to be intrusions upon seclusion.

Within his private world, Appellant intended his communications within his private community to be personal and undiscoverable. Analogous to the sealed letters in *Vernars*, Appellant's gated community was designed to prevent unauthorized access to his private affairs and communications. Furthermore, the private nature of Appellant's relationship is directly analogous to the employee's personal relationship in *Moffett*. Absent a change to the Terms of Use Agreement, LEETDUDE lacked the legal permission to bypass the rules of conduct and intrude on Appellant's private domain. Furthermore, like the defendant in *Vernars*, LEETDUDE did not have personal authorization or legal permission to intrude into Appellant's online privacy. Finally, in order to gain access to Appellant's private online domain, LEETDUDE had to consciously en-

10. Taking pictures through a telescopic lens of another person's bedroom interior, and photographing a sick woman in the hospital over her objections are both examples of an intentional intrusion. *Id.* at illus. 1 & 2.

able Voyeur mode. Because LEETDUDE's purpose in using Voyeur mode was to secretly obtain information on other Eden gamers, his conduct satisfies the intentional requirement set forth in the Restatement.

2. *Appellee is Liable to Appellant as a Contributing Tortfeasor for Giving Substantial Assistance to LEETDUDE in Accomplishing His Invasion of Appellant's Privacy*

Contributing tortfeasors are liable for the tortious conduct of another resulting in harm to a third party if they (1) know that the other's conduct constitutes a breach of duty and (2) give substantial assistance in conducting the breach. Restatement (Second) of Torts § 876(b) (1979). Additionally, the *Restatement* comments state that "[i]f the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act." *Id*. at cmt. b.

Where a defendant's actions are the proximate cause of an invasion of privacy, case law dictates that the defendant be held liable under a contributing tortfeasor theory. In *Russell v. Marboro Books*, the defendant was held tortiously liable for a third party's libelous publication of altered photographs of the plaintiff. 18 Misc. 2d 166, 187 (N.Y. 1959). The court imposed liability on the defendant because its sale of the negatives to a third party was the proximate cause of the libelous conduct. *Id.* "The general rule is that if the probable result of an act is injury to another, the actor cannot escape liability merely because his act was not the immediate cause of the injury, if the intervening cause was foreseen or reasonably foreseeable." *Id.* at 187. In California, a publisher was held liable for publishing an advertisement that caused an invasion of privacy. *Vescovo v. New Way Enters., Ltd*., 60 Cal. App. 3d 582, 588 (Cal. App. 1976). The publisher ran an advertisement describing the mother of a household as a "sexy bored housewife." *Id*. In response to the ad, many "unsavory characters" intruded on plaintiff's seclusion by showing up at her home. *Id*. Despite not directly invading the plaintiff's right to privacy, the court held that but for the defendant's publication of the advertisement, the plaintiff's right to privacy would have remained intact. *Vescovo*, 60 Cal App. 3d, at 587.

In the case before the Court, Appellee's assistance to LEETDUDE was a substantial factor in the intrusion upon Appellant's seclusion. As in *Russell* and *Vescovo*, but for Appellee's actions, LEETDUDE would have been unable to enter the restricted areas of Appellant's private online domain. Appellee's creation of Voyeur mode allowed LEETDUDE to become invisible to other avatars and instantaneously travel to any point within Eden, including areas specifically designated as private by other subscribers. Because Appellee was the author of the Terms of Use

Agreement, it knew, or should have known, that this feature would enable other users to violate the Terms of Use Agreement, thereby breaching its duty to Appellant. Without Appellee's assistance, Appellant's privacy would not have been invaded.

C. A Reasonable Person Would Find Appellee's Conduct Highly Offensive Because Appellee Guaranteed Gamers Certain Privacy Rights and Then Intentionally Disregarded Those Rights

The *Restatement* requires that the invasion of privacy be highly offensive to a reasonable person. Restatement (Second) of Torts § 652B (1977). In applying the reasonable person standard, courts have held that an intrusion into the personal affairs of another is highly offensive. *Duff Supply Co. v. Crum & Foster Ins. Co.*, No. 96-8481 1997 LEXIS 6383 (E.D. Pa. May 6, 1997) (holding that an employer's monitoring of employee's private phone calls was highly offensive). In *Hamberger v. Eastman*, the court held that a landlord's installation of a recording device in his tenants' bedroom was a highly offensive intrusion. 106 N.H. 107, 111 (N.H. 1964). The court further stated that intrusions into the "intimate details of the life of one who has never manifested a desire to have publicity are exposed to the public," are highly offensive. *Id.* Additionally, intrusion upon seclusion has been found to be highly offensive where the information disclosed would have caused, "mental suffering, shame, or humiliation to a person or ordinary sensibilities." *McGuire v. Shubert*, 722 A.2d 1087, 1092 (Pa. Super. Ct. 1998). The *McGuire* court concluded that the defendant's intrusion into plaintiff's bank account was so humiliating that it rose to the level of being highly offensive. *Id.; see also Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973) (holding that wiretapping was highly offensive due to the humiliating nature of the act).

Conversely when information may be obtained through other non-intrusive and readily available methods, courts have held that intrusive acquisition is not highly offensive. *Werner v. Kliewer*, 710 P.2d 1250 (Kan. 1985). In *Werner*, a husband had his wife's doctor write a note to the trial court disclosing that his wife attempted suicide and demonstrated suicidal behavior while in the midst of the child custody proceedings. The court held that since there was nothing in the letter that was not already known by the husband, the information revealed did not rise to the level of being highly offensive to a reasonable person. Similarly, the U.S. District Court for the Southern District of California found that a reporter's uploading of digital photographs from a website that was available to the general public did not constitute highly offensive conduct. *Four Navy Seals*, 413 F. Supp. at 1145.

In contrast to the *Werner* and *Four Navy Seals*, the information that Appellee enabled LEETDUDE to acquire from the Eden game was not accessible to the general public. Appellant never manifested any desire to have publicity thrust upon his private online domain. In fact, he intended just the opposite, spending a "significant amount of time and money" creating an area within Eden for himself and select guests of his choosing only. (R. at 5.) Furthermore, Appellant's interaction with his fellow avatars, within his private community, paralleled the intimate nature of the communications in *Duff Supply Co*. and *Hamberger*. Thus, in accordance with *Hamberger*, LEETDUDE's unauthorized entrance into Appellant's virtual community and private affairs was highly offense.

Appellant, in spending a significant amount of time in Eden, has established a pre-eminent reputation within this virtual world. Consequently, LEETDUDE'S posting will seriously injure Appellant's online reputation and cause Appellant to suffer humiliation and mental suffering, analogous to the plaintiffs in *McGuire* and *Billings*. Because of the resulting humiliation and suffering, LEETDUDE'S intentional intrusion is highly offensive to the reasonable person. Thus, this Court should reinstate Appellant's intrusion upon seclusion claim.

II. THIS COURT SHOULD REVERSE THE LOWER COURT FOR ABUSE OF DISCRETION AND AWARD SANCTIONS UNDER RULE 37 FOR APPELLEE'S BAD FAITH SPOLIATION OF CRUCIAL ELECTRONIC EVIDENCE IN DEFIANCE OF REPEATED DISCOVERY REQUESTS AND COURT ORDERS

One "central tenet" of the adversarial process is the obligatory "self-reporting" and disclosure of information "relevant to the subject matter involved in the pending action." *Danis v. USN Commc'ns, Inc.*, No. 98-C-7482, 2000 WL 1694325, at *1 (N.D. Ill. Oct. 23, 2000). This duty to self-report all relevant non-privileged evidence frequently requires parties to disclose information that is adverse to their interest in the litigation. When a party defies this obligation, by spoliating evidence, it "strikes at the core of our civil litigation system." *Id*.

Spoliation is the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). A party who spoliates evidence and, as a result, fails to comply with an order compelling discovery of that evidence is subject to sanctions under MRCP 37(b).[11] *See* Fed. R. Civ. P. 37(b)(2)(A); s*ee also Treppel v. Biovail Corp.*, 249 F.R.D. 111, 119-

11. "The Marshall Rules of Civil Procedure applicable to this matter are identical in all relevant respects to the corresponding provisions of the Federal Rules of Civil Procedure." (R. at 3.)

20 (S.D.N.Y. 2008). Appropriate sanctions for this violation include, *inter alia*, "any order that is just," in addition to default judgment against the disobedient party and designating certain facts be taken as established, as the prevailing party claims. *Societe Internationale Pour Participations Industrielles Et Commerciales, S. v. Rogers*, 357 U.S. 197, 207 (1958); *see also* Fed. R. Civ. P. 37(b)(2)(a)(i) & (vi).

A party may be entitled to an award of sanctions regardless of whether that party wins its underlying claim. The Tenth Circuit has held that "the imposition of sanctions depends not on who wins the lawsuit, but on how the parties conduct themselves during the litigation." *Beilue v. Int'l Bhd. of Teamsters, Local No. 492*, 13 Fed. Appx. 810, 813 (10th Cir. 2001). In fashioning a remedy for such conduct, courts apply the long recognized maxim of Sir T. Willes Chitty, "*omnia presumuntur contra spoliatorem,*" or, in modern verbiage, all things are presumed against a spoliator. *West*, 167 F.3d at 778. As the Second Circuit has expressly directed, spoliation sanctions should be imposed diligently (1) to deter parties from engaging in spoliation, (2) to place the risk of erroneous judgment on the party who created the risk, and (3) to restore the prejudiced party to the place he would have been absent the spoliation of evidence. *Id*. at 779.

A lower court's refusal to impose sanctions is reviewed for abuse of discretion. *Brandt v. Vulcan*, 30 F.3d 752, 755 (7th Cir. 1994). "Generally, in the context of Rule 37 sanctions, a district court abuses its discretion when it makes a mistake of fact or law." *United States v. $49,000 Currency*, 330 F.3d 371, 376 (5th Cir. 2003). Because of the overwhelming evidence that Appellee willfully shirked its duty to preserve its authentication logs out of self-interest, the lower court clearly abused its discretion by failing to order sanctions in conformity with longstanding legal principles of punishment, general and specific deterrence, and justice to the prejudiced party. Moreover, this brief will show that sanctions were warranted under the three traditional spoliation elements, that only default judgment or taking Appellee's liability as established will suffice as a remedy, and that Appellee has no safe harbor under the newly amended electronic discovery rules. In order to hold Appellee accountable and to bring justice to Appellant, this Court should hold that the lower court abused its discretion and order a default judgment against Appellee, or in the alternative, direct that Appellee's participation in the invasion of privacy be taken as established for purposes of the underlying action.

A. Sanctions are Warranted Under Traditional Three-Pronged Spoliation Analysis Because Appellee Shirked its Duty to Preserve Crucial Evidence With a Highly Culpable State of Mind

To warrant the imposition of sanctions against a spoliator under the MRCP, the prejudiced party must show these three elements: (1) that the party accused of the spoliation had a duty to preserve evidence at the time it was destroyed; (2) that the evidence was destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant in such a way that a reasonable trier of fact could determine that it would support a party's claim or defense. *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002); *accord Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) (*"Zubulake IV") and Thompson v. United States Dep't of Hous. & Urban Dev.*, 219 F.R.D. 93, 101 (D. Md. 2003). This standard applies when a party is seeking any form of sanctions for SPOLIATION, not just an adverse inference jury instruction. *Zubulake IV*, 220 F.R.D. at 220*; accord Sampson v. City of Cambridge*, No. WDQ-06-1819, 2008 U.S. Dist. LEXIS 53003, at *16-17 (D. Md. Apr. 30, 2008).

1. *Appellee Had a Duty to Preserve the November 2007 Logs at the Time They Were Destroyed*

The duty to preserve evidence for litigation is more than "a passive obligation." *Danis*, 2000 WL 1694325, at *29-30. As a general rule, parties have an active obligation to place a litigation hold on any relevant information within their control whenever litigation becomes reasonably foreseeable, even when that evidence is only useful to an adversary. *See Zubulake IV*, 220 F.R.D. at 217 *and Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991). If a party fails to preserve such evidence while under a duty to do so and is later ordered to produce that evidence in discovery, sanctions under MRCP 37(b) are appropriate because the inability to comply "was self-inflicted." *Chan v. Triple 8 Palace, Inc.*, No. 03CIV6048, 2005 WL 1925579, at *7 (S.D.N.Y. Aug. 11, 2005); s*ee also Broccoli v. Echostar Commc'ns Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005) (stating that "a failure to preserve documents and records, once the duty to do so has been triggered, raises the issue of spoliation of evidence."). In determining whether there was a duty to preserve certain information, courts make a twofold inquiry into when the duty triggered and what information is covered within its scope. *Zubulake IV*, 220 F.R.D. at 216.

i. The Logs Were Destroyed After the Duty to Preserve Had Triggered

The duty to preserve evidence often attaches before a formal complaint is filed, triggering whenever a party "reasonably should know that the evidence may be relevant to anticipated litigation." *Silvestri v. GM Corp.*, 271 F.3d 583, 591 (4th Cir. 2001); s*ee also* Mary Kay Brown, *Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron*, 74 Pa. B.A. Q. 1, 4 (2003) (citing nine cases to illustrate the growing judicial trend of the duty triggering prior to the complaint). In *Zubulake IV*, the court found that the duty to preserve electronic evidence triggered four months before the complaint was actually filed, because "the relevant people at [the defendant company] anticipated litigation" in April before the complaint was filed in August. *Zubulake IV*, 220 F.R.D. at 217. The court was unwilling to consider a finding that the trigger date was any later than the date the complaint was filed. *Id.* The court held that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake IV*, 220 F.R.D. at 218; *accord* Fed. R. Civ. P. 37(e) advisory committee's note.

Like the defendant company in *Zubulake IV*, Appellee had a duty to enact a litigation hold when Appellee began to anticipate litigation, which was far in advance of the filing of any complaint. This Court should find that the duty to preserve triggered in November of 2007, when Appellee demonstrated that it believed that Voyeur mode could lead to future litigation. Around that same time, LEETDUDE posted the tortious screen shots on the Zombies of Eden website, which Appellee monitored. Within weeks, Appellee was flooded with complaints about Voyeur mode and proceeded to shut it down, citing "policy concerns." (R. at 5.)

Moreover, like the *Zubulake IV* court, this Court should be equally unwilling to consider a trigger date any later than the date the complaint was filed—December 27, 2007—when Appellant simultaneously filed a complaint against Appellee and LEETDUDE, and served Appellee with a discovery request seeking the identity of LEETDUDE. (R. at 5.) According to Appellee's most recent Data Retention Policy, at least the November authentication logs were in existence as of the date of the complaint and therefore should have been preserved when the duty triggered. However, case law supports a finding that the duty to preserve the logs triggered in November, which would have required Appellee to preserve at least the October and November logs as requested.

ii. The Logs Were Within the Scope of What Should Have Been Preserved

While not "every shred of paper" must be preserved, *Zubulake IV*, 220 F.R.D. at 217, the duty to preserve evidence for anticipated litigation embraces "any information relevant to the claims or defenses of any party, or which is relevant to the subject matter involved in the litigation." *Broccoli*, 229 F.R.D. at 510. Generally, a litigation hold does not apply to inaccessible data compilations that are maintained "solely for the purpose of disaster recovery." *Zubulake IV*, 220 F.R.D. at 218. But, on the other hand, accessible data compilations that are actively used for information retrieval are subject to the litigation hold and must be preserved. *Id.*

The server authentication logs for the months of September, October, and November 2007 were within the scope of the duty to preserve evidence because they were relevant to the claims of Appellant and were accessible. These logs would provide LEETDUDE's identity and enable Appellant to join LEETDUDE as co-defendant. Moreover, even according to Appellee's most recent Data Retention Policy drafted admittedly during litigation, Appellee concedes that the "internet game server traffic logs" are "used for diagnosing customer issues as wells as tracking server utilization," proving that the logs are, in fact, "accessible" and subject to preservation. Thus, the logs were within the attachment and scope of the duty to preserve evidence, which satisfies the first element of the spoliation claim.

2. *Appellee's Destruction of the Logs Was at Least Grossly Negligent, Which Meets the Culpability of Mind Prong*

Appellee had the culpable state of mind required for a spoliation of evidence claim. There are three states of mind that satisfy the culpability requirement: bad faith, gross negligence and ordinary negligence. *Sampson*, 2008 U.S. Dist. LEXIS 53003, at *18. Essentially, a showing that the spoliator was at fault for the loss of the evidence is sufficient to warrant sanctions under this inquiry. *Langley by Langley v. Union Elec. Co.*, 107 F.3d 510, 514 (7th Cir. 1997). Disobedience of court orders has been held to be enough to show fault when courts are applying sanctions for spoliation. *Virtual Vision v. Praegitzer Indus.*, 124 F.3d 1140, 1144 (9th Cir. 1997). In *Virtual Vision*, the Ninth Circuit held that sanctions could be issued against a bankrupt company because it had the ability to produce relevant documents, but failed to do so. *Id*. It was held that "disobedient conduct not shown to be outside the control of the litigant is all that is required to demonstrate willfulness, bad faith, or fault." *Id*.

However, negligence alone is enough to justify sanctions. *In re WRT Energy Secs. Litig.*, 246 F.R.D. 185, 195 (S.D.N.Y. 2007). The underlying

rationale is that the court should give remedy to a party who suffers detriment due to the opponent's loss of evidence and that each party should bear the risk of its own negligence. *Residential Funding*, 306 F.3d at 107. Thus, gross negligence also satisfies the culpability prong of the spoliation sanctions test. "The utter failure to establish any form of litigation hold at the outset of litigation is grossly negligent." *Doe v. Norwalk Cmty. College*, 248 F.R.D. 372, 379-80 (D. Conn. 2007). In *Norwalk*, the court held in 2007 that a company's failure to cease its normal electronic document destruction policy, despite the limitations of its 50 megabyte e-mail storage capacity, was grossly negligent and deserving of sanctions. *Id*.

Like the defendant company in *Norwalk*, Appellee was at least grossly negligent in failing to place a litigation hold on its electronic logs after litigation formally began. Evidencing bad faith, Appellee failed to obey multiple court orders, like in *Virtual Vision*. Further, Appellee offered merely a sham replacement Data Retention Policy, a month into litigation, after several other excuses failed. As a result, Appellee managed to avoid liability at the trial court level and to protect the identity of LEETDUDE, which has enabled Appellee to continue operating its lucrative gaming system. Thus, this Court should conclude that Appellee, out of monetary self-interest, either (1) anticipated litigation and destroyed the logs so as not to become liable for the underlying claim in this action, or else (2) continued to retain the logs pursuant to the original Data Retention Policy, subsequently destroyed the logs and proffered a sham replacement policy to cover up for its disobedience and spoliation. Either way, Appellee's actions and inactions satisfy the culpability prong, because they have proven that Appellee was at fault for the loss of the logs. Therefore, Appellee is deserving of sanctions for its bad faith disobedience of court orders and spoliation of evidence.

3. *Appellee's Unproduced Logs Were Sufficiently Relevant to the Underlying Claim, Frustrating Appellant's Ability to Add a Co-Defendant in This Litigation*

The final element in spoliation sanctions analysis is that the destroyed evidence must be relevant to the proponent's claims. *Sampson*, 2008 U.S. Dist. LEXIS 53003, at *18. This inquiry "is unavoidably imperfect, inasmuch as, in the absence of the destroyed evidence, we can only venture guesses with varying degrees of confidence as to what that missing evidence may have revealed." *Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir. 1998). To aid this imperfect inquiry, courts use a sliding scale of culpability to determine whether lost evidence would have been relevant to a spoliation claim. When documents are lost or destroyed in bad faith, the bad faith destruction by itself is enough to establish that the destroyed documents were relevant. *Thompson*, 219

F.R.D. at 101. For example, the Southern District of New York has held that "long-term and purposeful evasion of discovery requests give rise to an inference that the evidence sought would be unfavorable to [the spoliator], in satisfaction of this relevance prong." *Cordius Trust v. Kummerfeld*, No. 99 Civ. 3200, 2008 U.S. Dist. LEXIS 1824, at *11 (S.D.N.Y. Jan. 11, 2008). The reasoning behind this presumption is that a party would not have acted in bad faith or purposely evaded discovery requests unless the evidence was unfavorable to the spoliator and relevant to the case. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995).

On the other end of the sliding scale, courts have determined that when destruction of evidence is negligent or grossly negligent, the proponent of sanctions must prove that the evidence is relevant to their case. *Thompson*, 219 F.R.D. at 101. The standard for showing relevance for the purpose of this prong requires more than the "any tendency" test under the MRCP for admissible, relevant evidence generally. [12] The United States District Court for the District of Colorado held that "[t]he burden is on the aggrieved party to establish a reasonable possibility, based on concrete evidence rather than a fertile imagination, that access to the lost material would have produced evidence favorable to his cause." *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 104 (D. Colo. 1996). However, the Second Circuit has directed that "courts must take care not to hold the prejudiced party to too strict a standard of proof" because doing so would defeat the purpose of sanctions and "allow parties who have destroyed evidence to profit from that destruction." *Residential Funding*, 306 F.3d at 109 (internal quotation marks omitted).

The server authentication logs that Appellee is unable to produce would have contained evidence favorable to Appellant's case, sufficient to meet this relevance prong even under the more stringent test which assumes Appellee was merely negligent in losing the logs. LEETDUDE was intended to be a co-defendant to Appellee in the present litigation and the server authentication logs would have provided the identity of LEETDUDE. The concrete proof of this connection is twofold. First, the screen shots taken by LEETDUDE show that LEETDUDE was active on the Eden game server when the shots were taken sometime in November 2007. Second, both of Appellee's Data Retention Policies say that the logs are used for "diagnosing customer issues as well as tracking server utilization." (R. at 13.) Thus, LEETDUDE's activity would have been tracked by the logs, and his IP address and identity would be contained

12. MRCP 401 states that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. CIV. P. 401.

on the November logs that existed after the duty to preserve arose. Because the unavailability of these logs forecloses Appellant from gaining complete judicial relief against Appellee and co-defendant LEETDUDE for their contributions to the invasion of Appellant's privacy, the logs are clearly relevant in supporting Appellant's underlying claim, even under the more stringent test which assumes Appellee's loss of the logs was merely negligent.

However, this Court should find that Appellee's inability to produce the logs is because of Appellee's bad faith destruction of the logs in order to avoid liability, to protect its customer, LEETDUDE, from liability, and to escape the consequences of setting precedent against the online gaming industry. In such a case, this Court should presume that the logs were destroyed because they would have been favorable, and thus relevant, to this litigation. Under either the bad faith or negligence test, the lower court should have awarded sanctions against Appellee for its actions. By ignoring clear factual support for sanctions under both tests, the lower court abused its discretion by refusing to impose sanctions.

B. The Fundamental Concepts of Punishment, Deterrence and Justice Demand the Award of Default Judgment, or in the Alternative, Taking Appellee's Liability as Established

"The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts within the framework of the rules of evidence." *Update Art, Inc. v. Modin Publ'g, Ltd.*, 843 F.2d 67, 70 (2d Cir. 1988) (quoting *United States v. Nixon*, 418 U.S. 683, 209 (1974)). Because of the need to foster the development of relevant facts in the discovery process, severe sanctions can be appropriate when parties do not comply with discovery requests and orders. *See* Fed. R. Civ. P. 37. Although sanctions such as default judgment and adverse inference are "harsh medicine that should not be administered lightly," no lesser sanctions suffice in the case before this Court to meet the underlying policies of spoliation sanctions. *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 197 (S.C. Ct. App. 1999).

The Supreme Court has twice directed that even the most severe sanctions under MRCP 37(b) "must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.'" *Roadway Express Inc. v. Piper*, 447 U.S. 752, 763 (1980) (quoting *NHL v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976)). Moreover, the circuit courts have encouraged the application of these sanctions to restore the evidentiary balance between parties and to prevent the

innocent party from losing on the merits while the bad faith litigant is unjustly enriched. *See Residential Funding*, 306 F.3d at 108. In the instant case, no sanction less than default judgment or taking Appellee's liability as established in the underlying claim will sufficiently serve these purposes of punishment, deterrence and justice.

1. *No Sanction Less Than Taking Appellee's Liability as Established Will Sufficiently Punish and Specifically Deter Appellee From Discovery Abuse*

Default judgment or taking liability as established is necessary to serve as a specific deterrent, to punish Appellee for its conduct and thus dissuade Appellee from abusing the discovery process in the future. The courts have an obligation to prevent unjust enrichment. "[H]owever innocent a failure to provide discovery may be, it is fundamental that a party that does not provide discovery cannot profit from its own failure." *Dellums v. Powell*, 566 F.2d 231, 235 (D.C. Cir. 1977). Based on factual findings supported by the record, a court may "sanction conduct that is disrespectful to the court and deter similar misconduct in the future." *Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998).

In the instant case, the lower court permitted Appellee to profit both in the lawsuit and in its business, from the loss of the authentication logs. Appellee created an online game and contractually guaranteed subscribers a right to privacy within that game. It then reneged on the contract and enabled select subscribers to tortiously invade that privacy for the purpose of profit. Appellee, when brought before the court for these actions, rebuffed the court's request for discovery two separate times, and when the court ordered it to show cause or suffer the consequences it responded with an altered document destruction policy. If Appellee is permitted to flout discovery requests and profit monetarily, it will have no reason not to act similarly in the future. This is unacceptable according to the D.C. Circuit and must be remedied with default judgment or taking liability as established.

2. *General Deterrence Supports the Award of Nothing Less Than a Strong Sanction Against Appellee*

In order to send a message to future litigants, this Court must award a default judgment or take Appellee's liability as proven in order to establish a general deterrent from future disobedient or negligent destruction of electronically stored information. These specific sanctions would also promote respect for the judicial process, the court's time, and dignity of the adversarial process. The Supreme Court has held that leniency in such matters would cause "other parties to other lawsuits to feel freer than . . . Rule 37 contemplates they should feel to flout other

discovery orders of other District Courts." *NHL*, 427 U.S. at 643. The overall goal of sanctions is not just to punish the offending party, but to deter those who may engage in the conduct without the absence of a deterrent. *NHL*, 427 U.S. at 643. If parties are allowed to ignore their discovery obligations, the effect will be to make judges supervise every step of the discovery process, a result that is contrary to the goals of the discovery rules. *Dellums*, 566 F.2d at 235.

In this case, it is particularly important for this Court to award a strong sanction, such as default judgment, and continue to develop the growing interpretation of the new electronic discovery amendments to the MRCP. With the amount of electronically stored information increasing daily, it becomes easier and more profitable for bad faith litigants to lose information, unless there is a severe penalty which will prevent that discovery abuse and promote active preservation of relevant data. Every time relevant documents are negligently or willfully destroyed, the court is one step further from uncovering the truth and rendering justice. A strong sanction of default judgment or taking liability as established would aid judicial efficiency throughout the State of Marshall by putting potential litigants on notice that electronic discovery obligations are real and are being enforced.

3. *The Concepts of Eliminating Prejudice and Restoring Justice to the Innocent Party Necessitate an Award of Default Judgment or Taking Appellee's Liability as Established*

The Second Circuit has expressly noted that one of the main purposes of applying sanctions against a spoliator is "to restore the prejudiced party to the place he would have been absent the spoliation of evidence." *West*, 167 F.3d at 779. Courts find prejudice when "the lost evidence prevents the aggrieved party from using evidence essential to its underlying claim. *Langley*, 107 F.3d at 515. Thus, to remedy a finding of prejudice, courts have found that sanctions can be "a necessary mechanism for restoring the evidentiary balance." *Residential Funding*, 306 F.3d 99, 108 (reversing the district court's denial of sanctions for this reason). Moreover, the Sixth Circuit has recognized that "our system of discovery was designed to increase the likelihood that justice will be served in each case, not to promote principles of gamesmanship and deception in which the person who hides the ball most effectively wins." *Abrahamsen v. Trans-State Express, Inc.*, 92 F.3d 425, 428-29 (6th Cir. 1996).

Appellee's refusal to produce the server authentication logs has seriously prejudiced Appellant by foreclosing the possibility of Appellant joining LEETDUDE as a co-defendant in this litigation and thus weakening Appellant's third-party liability theory against Appellee. To re-

store the evidentiary balance and to fully compensate Appellant for the underlying tort, it is necessary to either (1) enter default judgment so that it is ensured that Appellant gains full restitution despite the loss of the discovery materials, or (2) in the alternative, enter an order directing that Appellee's participation in the invasions of privacy be taken as established so that Appellee does not benefit from its own spoliation.

C. Rule 37(e)'s Safe Harbor Provision Provides No Refuge for Appellee's Bad Faith Discovery Conduct

On December 1, 2006, the Advisory Committee on Civil Rules unveiled the amendments to the Federal Rules of Civil Procedure pertaining to electronic discovery. The Committee specifically addressed features of electronic information systems that have no counterpart in hard-copy documents and added a new rule concerning spoliation sanctions under MRCP 37(e). [13] Fed. R. Civ. P. 37(e) advisory committee's note. The new rule provides that "[a]bsent 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." Fed. R. Civ. P. 37(e).

Although early commentators dubbed this provision a "safe harbor," subsequent comment and case law interpretation have proven this title to be ill-suited. Kenneth J. Withers, *We've Moved the Two Tiers and Filled in the Safe Harbor*, 52 Fed. Law 50 (Nov./Dec. 2005). Rather than broadly protect litigants for loss of electronic evidence, the rule has been used as a firm standard of conduct, while anything less is in danger of sanctions. *Id.* (attributing the analogy to Jonathan Redgrave, chair of The Sedona Conference's Working Group on Electronic Production, saying that there is no safe harbor—but there is a lighthouse). Thus, litigants who lose electronic evidence are subject to sanctions under the rules as amended, when the proponent can show just one of the following points: 1) the loss was not in good faith, 2) the loss was not within the routine operation of the system, or 3) that exceptional circumstances warrant sanction. Fed. R. Civ. P. 37(e).

1. *Because Appellee's Actions Were Not in Good Faith, Appellee is Not Protected by Rule 37(e)*

For MRCP 37(e) to protect litigants from sanctions, the rule requires that the litigants acted in good faith. Fed. R. Civ. P. 37(e). The Advisory

13. When this rule was created in 2006 it was designated as Fed. R. Civ. P. 37(f). Four months later, in 2007, the section was changed to Fed. R. Civ. P. 37(e). Accordingly, this brief will refer to the rule under its current title, and edit references in analytical materials to reflect the structural change.

Committee notes accompanying the rule state 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." *Id.* at advisory committee's note. To take advantage of the good faith exception, a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business. *Norwalk*, 248 F.R.D. at 378 (holding that failure to prevent routine deletions precluded defendants from taking advantage of Fed. R. Civ. P. 37(e)'s good faith exception). The requirement of good faith means "that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve." Fed. R. Civ. P. 37(e) advisory committee's note; *accord Peskoff v. Faber*, 244 F.R.D. 54, 60 (D.D.C. 2007).

When Appellee was served Appellant's complaint on December 27, 2007, Appellee had an affirmative obligation under the MRCP 37(e) and interpreting federal case law to put a stop to its routine destruction of the game server logs, according to *Norwalk*. At no point in the record does Appellee indicate that it put any sort of litigation hold on any routine document destruction. To the contrary, Appellee released a statement on February 2, 2008, more than one month into the litigation, that its Data Retention Policy had been changed and only server logs from the previous two months were going to be saved. This is a clear demonstration of Appellee's lack of the good faith needed to take advantage of the safe harbor provided by MRCP 37(e).

2. *Because Appellee's Logs Were Not Lost During Routine System Operation, Appellee is Not Protected by Rule 37(e)*

Generally, courts will not punish a litigant for evidence destroyed in good faith pursuant to an organization's legitimate data retention policy. Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 Fordham J. Corp. & Fin. L. 721, 728 (2003) [hereinafter Chase]. However, such a policy must have a distinct reason and purpose, "as opposed to a sham policy created to destroy unfavorable evidence in anticipation of litigation." *Id.* For example, in a wrongful death action against an aircraft corporation, the U.S. District Court for the Southern District of Florida held that where the corporation could not prove that its document destruction policy was routine instead of a sham, a default judgment was the appropriate remedy. *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 485-86 (S.D. Fla. 1984). Another indication of a sham policy is when the policy is changed after litigation has commenced. "Such policies should be cre-

ated in advance of document destruction or during a neutral time without litigation." Chase, 8 Fordham J. Corp. & Fin. L. at 724.

Like the defendants in the *Carlucci* case, Appellee has not presented any evidence that Appellee's document destruction policy was routine, which precludes the protection of MRCP 37(e)'s safe harbor and warrants default judgment. Instead, the record proves that Appellee's Data Retention Policy was a sham, created months after litigation began only to hide behind MRCP 37(e). Appellee's Data Retention Policy that was in effect until February 2008, months into the litigation, said only that "older logs may be pruned." (R. at 14.) This general statement cannot be considered a routine. It was not until over a month into the present litigation and three motions to compel that Appellee claimed to have any sort of routine destruction policy for its server authentication logs. This Court would be setting dangerous precedent by permitting Appellee and future corporations to change their document retention policies in the middle of litigation, because it lets defendants tailor their own safe harbor to avoid liability for destroying the smoking gun. Because Appellee's destruction of the logs was not pursuant to a routine policy, as case law has contemplated, Appellee is not protected by MRCP 37(e)'s safe harbor and default judgment is warranted.

3. *Because the Circumstances in This Case are Exceptional, Appellee is Not Protected by Rule 37(e)*

Even if this Court finds that Appellee's loss of evidence was routine and in good faith, this Court should still award sanctions under MRCP 37 because of the exception to the safe harbor provision. The drafters of the new MRCP 37(e) specifically crafted an exception, beginning the safe harbor rule with the phrase "absent exceptional circumstances." Fed. R. Civ. P. 37(e). This exception left courts flexibility in determining that sanctions were necessary, even when good faith and routine system operation were found. Other courts have held that when evidence is crucial enough to a party's case, the reason for the loss of evidence does not negate the prejudicial impact. *See Residential Funding*, 306 F.3d at 108. Where spoliation is prejudicial and substantially denies the other party the ability to prosecute or defend a claim, intentional, negligent and even inadvertent spoliation of evidence may justify adverse judgment. *Silvestri*, 271 F.3d at 589.

Here, Appellant has been prejudiced by Appellee's loss of the logs, despite a duty to preserve them, because Appellee is consequently unable to join LEETDUDE as a co-defendant in order to seek full restitution on the invasion of privacy claim. Because the prejudice in this case is unique to the progressive application of traditional tort law to the virtual world, Appellant's circumstances are, indeed, exceptional. Therefore, if

this Court finds that the safe harbor provision would apply to Appellee in all other regards, then this Court should still render a finding that due to the exceptional nature of this litigation and the unique way in which Appellee has thwarted discovery and hence Appellant's full restitution, either default judgment or taking Appellee's liability as established is the only acceptable remedy.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Honorable Court REVERSE the decision of the Court of Appeals for the State of Marshall for the Fourth Circuit, and hold that Appellant is entitled to judicial relief from Appellee's invasion of privacy and spoliation of evidence.

Respectfully Submitted,

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Counsel for Petitioner
Date: September 26, 2008

APPENDIX A

Fed. R. Civ. P. 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions.*

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.*

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) *Sanctions in the District Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) *Sanctions in the District Where the Action Is Pending.*

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) *In General.*

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Provide Electronically Stored Information. 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.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

APPENDIX B

FED. R. EVID. 401. Definition of Relevant Evidence.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.