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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 Respondent, 26 J. Marshall J. Computer & Info. L. 321 (2008)

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BRIEF FOR RESPONDENT

No. 08-1701

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

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

ON APPEAL FROM THE
FOURTH CIRCUIT COURT OF APPEALS

BRIEF FOR RESPONDENT

Adam Powell
Erin Blake
Kris Kokotayo

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ISSUES PRESENTED

I. Whether the Court of Appeals correctly affirmed summary judgment in Romero's erroneous claim of intrusion upon seclusion based upon third party, LEETDUDE's observation of Romero's fictional avatar and virtual mansion.

II. Whether the district court correctly denied Romero's request for a default judgment or adverse inference as a sanction under Rule 37 of the Marshall Rules of Civil Procedure.

OPINIONS BELOW

In case number 07 CV 5309, the Cyrus County District Court granted summary judgment in favor of Appellee, Windbucket Entertainment, LLC. In case number 4-08-0315, the Fourth Circuit Court of Appeals of the State of Marshall affirmed the district court's order granting summary judgment.

STANDARD OF REVIEW

The standard of review of a lower court's grant of summary judgment is de novo. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The evidence must show no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Marshall R. Civ. P. 56(c).

The standard of review of a lower court's grant of sanctions is for abuse of discretion. *Halaco Eng'g Co. v. Costle*, 843 F.2d 376, 379 (9th Cir. 1988). A reversal is appropriate only upon a showing of clear error. *Id*. Findings of fact are reviewed under the clearly erroneous standard. *Id*.

STATEMENT OF THE CASE

I. Statement of the Facts

Appellee, Windbucket Entertainment, LLC ("Windbucket"), is in the business of developing and publishing computer games. (R. at 4.) After successfully publishing several single-player computer-based role-playing games, Windbucket entered the multi-player online gaming market in 2002. (R. at 4.) Windbucket's most successful multi-player online game is Eden, which has amassed a significant player base, numbering into the millions of players. (R. at 4.) In Eden, players create fictional characters (or "avatars"). (R. at 4.) Avatars may amass virtual property in the form of land, starships, and virtual money or credits, which can be used within the game. (R. at 4.)

Windbucket charges a monthly subscription fee and requires all players to agree to its Terms of Use Agreement ("Agreement") before engaging in the game. (R. at 4.) The Agreement establishes that "[a]ll rights and title in and to the Program and the Service . . . are owned by Windbucket or its licensors." (R. at 8.) Although the "Rules of Conduct" in the Agreement state that players "may hold expectations of privacy in their conduct and affairs conducted in the Game," it also makes it clear that "Windbucket reserves the right to modify [the] 'Rules of Conduct' at any time[.]" (R. at 9-10.) Furthermore, Windbucket "reserves the right, at its sole and absolute discretion, to change, modify, add to, supplement or delete any of the terms and conditions . . . at any time." (R. at 9-10.) The Agreement thus allows Windbucket to add features to Eden pro-

vided that material changes are disclosed to players. (R. at 10.) However, Windbucket determines what constitutes a material change at its "sole and absolute discretion." (R. at 10.)

Given the highly competitive nature of the online computer gaming market, Windbucket must constantly update Eden in order to maintain player interest. (R. at 5.) Since the release of Eden, Windbucket has used its discretion to experiment with features designed to promote subscriber retention. (R. at 4.) Such features include "Zero Being" mode and "Voyage-Enhanced Unrecognizability" ("Voyeur") mode. (R. at 5.) Under Zero Being mode, players who stopped paying monthly subscription fees experienced functionality reductions in their avatars. (R. at 4.) Zero Being mode made avatars "invisible, unable to interact with other participants, accumulate virtual property or credits[.]" (R. at 4.) Players eventually began to intentionally allow their avatars to reach Zero Being mode so that they could spy on other avatars. (R. at 4.) Some players also established a website, entitled "Zombies of Eden," to discuss what they observed while their avatars were in Zero Being mode. (R. at 4.) Because Zero Being mode failed to retain subscriber interest, Windbucket eventually discontinued the feature in July 2006. (R. at 4.)

Following its failed attempt with Zero Being mode, Windbucket created Voyeur mode to again attempt to increase subscriber retention. (R. at 4.) Like Zero Being mode, Voyeur mode permitted avatars to become invisible and included an additional feature allowing for avatars to instantaneously travel to any point in Eden. (R. at 4.) Windbucket eventually discontinued Voyeur mode in November 2007. (R. at 5.)

Appellant, Alex Romero ("Romero"), is a subscriber to Eden and has played Eden since its release in 2005. (R. at 5.) During the course of his gaming, Romero created an avatar, "PWNED," obtained a significant amount of virtual money, virtual property, created a virtual gated community and leased virtual homes to other players. Romero also built a virtual mansion for PWNED. (R. at 5.)

In July 2006, a player known only by the avatar name "LEETDUDE," activated Voyeur mode for his account. (R. at 5.) On or before November 30, 2007, unbeknownst to Windbucket, LEETDUDE posted various screen shots taken from LEETDUDE's Voyeur mode game sessions on the Zombies of Eden website. (R. at 5.) Included in the screenshots were images from Romero's virtual mansion, including a screenshot of PWNED's master bedroom and a screenshot of six or seven avatars engaging in what appear to be sexual acts in front of PWNED's virtual mansion. (R. at 5.) Romero subsequently filed a complaint against Windbucket and LEETDUDE, alleging that the two were liable for an invasion of his privacy. (R. at 5.)

II. Preliminary Statement

On December 27, 2007, Romero filed a lawsuit against Windbucket and LEETDUDE, asserting a claim for intrusion upon seclusion. (R. at 5.) At that time, Romero also served Windbucket a discovery request seeking the identity of LEETDUDE. (R. at 5.) In response, Windbucket informed Romero that it permits players to pay for Eden via credit card or prepaid cards and does not require players using prepaid cards to enter identifying information. (R. at 5-6.) Because LEETDUDE paid with a prepaid card, Windbucket could not ascertain LEETDUDE's identity. (R. at 6.)

Following Windbucket's disclosure, Romero subsequently submitted additional discovery requests, seeking Windbucket's server authentication logs for September, October and November 2007, so that it could identify LEETDUDE's internet service provider and identity. (R. at 6.) Because of a trade secret Windbucket did not produce the logs. (R. at 6.) Romero subsequently obtained a discovery order, compelling production of the logs. (R. at 6.) Windbucket's attorneys failed to respond to the discovery order. (R. at 6.) However, after Romero requested a second discovery order, Windbucket produced authentication logs for the web server. (R. at 6.) Because Romero desired the server authentication logs, he requested a third discovery order, to which Windbucket produced its game server authentication logs for December 2007 and January 2008. (R. at 6.)

Following Romero's request for discovery orders, the district court proceeded to order Windbucket to produce the server logs for September, October and November 2007 or show cause for why it was not possible. (R. at 6.) Windbucket responded that as a result of its data retention policy it no longer retained the logs. (R. at 6.) Windbucket's Data Retention Policy, dated November 2004, stated that older log files "may be are pruned." (R. at 14.) In actual practice, Windbucket only maintains logs for two months because of technology limitations associated with maintaining the logs longer. (R. at 6, 13.) Windbucket updated its Data Retention Policy in February 2008 to reflect that practice. (R. at 6.) Windbucket maintains internet game server traffic logs for a limited time for the limited purpose of diagnosing customer issues and tracking server utilization. (R. at 13.) Thus Windbucket was unable to comply with the district court's discovery order. (R. at 6.)

Based on Windbucket's failure to comply with the court's discovery orders and the fact that Windbucket no longer had the requested logs, Romero moved for sanctions under Rule 37 of the Marshall Rules of Civil Procedure. (R. at 6.) Specifically, Romero requested that the court render a default judgment against Windbucket on his invasion of privacy claim, or in the alternative, enter an order directing that Windbucket's

participation in the alleged invasion of privacy be taken as established for purposes of the action. (R. at 6.) The district court denied the motion for sanctions but ordered Windbucket to pay reasonable expenses caused by its inability to obey the discovery orders. (R. at 6.)

Windbucket subsequently moved for summary judgment on the invasion of privacy claim on the basis "that Romero did not suffer an actionable invasion of privacy and that Windbucket could not be held liable for the acts of a third party." (R. at 6.) The district court granted Windbucket's motion on that basis and dismissed. (R. at 6.)

The Fourth Circuit Court of Appeals granted Romero's petition for review of the district court opinion granting summary judgment and its denial of his motion for sanctions. (R. at 6.) The circuit court affirmed the district court's summary judgment decision on the basis that a fictional avatar cannot be a victim of invasion of privacy. (R. at 7.) The circuit court also affirmed the district court's denial of Romero's motion for sanctions on the basis that any error was harmless since Romero did not "suffer any actionable invasion of privacy." (R. at 7.)

SUMMARY OF THE ARGUMENT

Viewed in the light most favorable to Romero, the undisputed facts do not raise a genuine issue of material fact that Romero stated a claim for intrusion upon seclusion. Furthermore, there is no evidence that Windbucket's actions constituted such egregious conduct that would warrant greater sanctions than those levied by the district court. Therefore, Windbucket respectfully requests this Court affirm the lower court's decision.

I.

This Court has recognized the tort of intrusion upon seclusion as stated by the Restatement (Second.) Thus, Romero must prove the following elements: (1) Windbucket intentionally intruded into Romero's seclusion without authorization; (2) Windbucket intruded upon a private matter; (3) the intrusion was highly offensive to a reasonable person, and; (4) the intrusion caused Romero mental or physical anguish and suffering. Romero failed to prove all of the elements.

Windbucket did not commit an intentional intrusion, according to the Restatement. In order to prove an intentional intrusion, Romero must prove that Windbucket committed an affirmative act, constituting an actual intrusion. Section 652(B) of the Restatement does not recognize claims for reckless or negligent intrusions. Because Romero failed to demonstrate any affirmative act constituting an actual intrusion on the part of Windbucket, he failed to prove an intentional intrusion. Furthermore, before engaging in Eden, Romero voluntarily signed an agree-

ment, which allowed Windbucket to alter the game, including the creation of Voyeur mode. Romero's voluntary acceptance of such an agreement further negates a finding of an intentional intrusion. Even if the Court finds an intentional intrusion occurred, it was committed by third-party, LEETDUDE. Windbucket is not liable for an intrusion committed by LEETDUDE since Romero failed to prove Windbucket provided substantial or material assistance to LEETDUDE.

Romero did not prove a reasonable expectation of privacy existed in Eden or that a highly offensive intrusion occurred. First, Romero could not establish a subjective expectation of privacy in Eden because he should have known LEETDUDE's actions were possible. Even if Romero had a subjective expectation of privacy in Eden, he failed to demonstrate that society would recognize his expectation as reasonable. Because Eden is essentially a public forum in which Romero voluntarily participated and communicated with unknown parties, he could not establish a reasonable expectation of privacy. Lastly, Romero failed to show that a reasonable person would find spying on a fictional character strongly objectionable, thereby precluding a finding of "highly offensive" behavior.

Romero cannot show that the alleged intrusion proximately caused the requisite anguish and suffering. The facts indicate that any harm resulted from LEETDUDE's postings on the Zombies of Eden website and not from the intrusion itself. Thus, the alleged intrusion and any harm suffered by Romero are only remotely linked.

II.

Romero has failed to demonstrate that Windbucket's actions were so egregious that a default sanction or an adverse inference are warranted. In determining whether a default sanction is appropriate, courts should consider: (1) willful delay; (2) whether the moving party was prejudiced; (3) whether the party affected by the sanction was warned that a default sanction was possible; and (4) whether less drastic sanctions were first imposed or considered.

Windbucket did not willfully delay the proceedings. To warrant a default sanction the fault must be that of the party, not his attorney. Windbucket's initial delays were caused by its attorney's mistake, not by willful conduct. Furthermore, Romero is not prejudiced because the identity of LEETDUDE is a peripheral matter and does not affect the merits of Romero's action against Windbucket. Additionally, there is no evidence on the Record that the district court warned Windbucket of the possibility of a default sanction. Finally, the district court, in its considerable discretion, chose to issue a monetary sanction as an alternative sanction.

An adverse inference instruction is also inappropriate. An adverse inference is only warranted when the following three conditions are all met: (1) the party with control over the evidence had an obligation to preserve it; (2) the records were destroyed with a culpable state of mind; and (3) the missing evidence is relevant to the party's claim. Windbucket has a reasonable retention policy and maintained the policy without any reason to believe the evidence would be relevant. Furthermore, Windbucket acted in good-faith when it removed old internet logs. Finally, Romero did not produce sufficient evidence that a reasonable trier of fact could find the identity of LEETDUDE relevant to Romero's intrusion upon seclusion claim against Windbucket.

Even if the district court should have imposed sanctions, any error was harmless because Romero does not have a valid claim for intrusion upon seclusion. For these reasons, this Court should affirm the decision of the Fourth Circuit Court of Appeals and dismiss Romero's action.

ARGUMENT

The Fourth Circuit Court of Appeals correctly affirmed summary judgment for Windbucket. Summary judgment is appropriate when no genuine issue of material fact exists. Marshall R. Civ. P. 56(c); *Celotex*, 477 U.S. at 322-23. Romero has not shown that a genuine issue of material fact exists in his claim for intrusion upon seclusion. Summary judgment is also required when a party fails to establish a necessary element of his claim. *Celotex*, 477 U.S. at 322. The record demonstrates that Romero did not state a claim for intrusion upon seclusion. Furthermore, Romero's request for a default sanction or adverse inference is not warranted under the facts of this case. The Record does not indicate that Windbucket's actions were so egregious as to warrant a default sanction or adverse inference. Thus, Windbucket requests that this Court affirm the decision of the Fourth Circuit Court of Appeals.

I. THE APPELLATE COURT PROPERLY AFFIRMED SUMMARY JUDGMENT BECAUSE ROMERO FAILED TO STATE A CLAIM FOR INTRUSION UPON SECLUSION

Privacy, as a legal right, is part of the bundle of rights that enjoy preferred status in the legal system's hierarchy of rights. The right to privacy safeguards the most intimate aspects of an individual's life, including his "private life, habits, acts, and relations . . . ." Samuel D. Warren & Lou Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 215 (1890). Tort law's "invasion of privacy," originally coined by William Prosser, includes the four common law privacy torts intended to protect a plaintiff's right "to be left alone." William Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960). Prosser's first tort, intrusion upon seclusion, pro-

tects a plaintiff's right to solitude in his private affairs. *Id.* at 389-92. The intrusion tort is triggered when a defendant uses illegal or unreasonable means to discover private aspects of a plaintiff's life. *Id.* at 389-90. However, as with all legal rights, the right to seclusion is not absolute. *Shorter v. Retail Credit Co.*, 251 F. Supp. 329, 330 (D.S.C. 1966).

The right to seclusion is a "qualified right[,]" *Id.*, and recognizes that no one can expect to live in an "ivory tower[,]" completely free from other members of society. *Voneye v. Turner*, 240 S.W. 2d 588, 590 (Ky. 1951). To bring a successful claim for intrusion upon seclusion, a plaintiff must demonstrate an intentional intrusion, into his solitude or seclusion, for which a reasonable person would be highly offended. Restatement (Second) of Torts § 652(B) (1977). Insensitive, annoying, or insulting conduct does not impose liability. *Nagy v. Bell Tel. Co.*, 292 Pa. Super. 24 (Pa. Super. Ct. 1981).

Application of the intrusion tort on the Internet is unclear. However, plaintiffs face an uphill battle when attempting to establish claims. Online information is usually not considered "private," since it is often provided voluntarily. Christopher F. Carlton, *The Right to Privacy in Internet Commerce: A Call For New Federal Guidelines and the Creation of an Independent Privacy Commission*, 16 St. John's J.L. Comm. 393, 423 (2002). Moreover, claims for invasion of "private matters" are farfetched considering online virtual worlds are "artificial, fictitious, imaginary, intangible, and invented[.]" Jack M. Balkin & Beth Simone Noveck, The State of Play: Law, Games, and Virtual Worlds 3 (2006).

Several limiting principles define the common law intrusion tort and prevent it from becoming an all-encompassing constantly litigated assertion of an individual right. Robert C. Post, *The Social Foundations of Privacy*, 77 Cal. L. Rev. 957, 1008 (1989). Thus, to bring a proper claim for intrusion upon seclusion, Romero must have pled and proved the following elements: (1) Windbucket, without authorization, intentionally intruded or pried into Romero's seclusion; (2) that the intrusion was highly offensive or objectionable to a reasonable person; (3) that the matter intruded upon was private; and (4) that the intrusion caused anguish and suffering. *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 904 (Ill. App. Ct. 1990). Failure to prove any element of the tort necessarily destroys the claim. *Bank of Indiana v. Tremunde*, 365 N.E. 2d 295, 298 (Ill. App. Ct. 1977). Because Romero failed to establish every element of the intrusion tort, his claim was properly denied on summary judgment.

A. Romero Failed to State a Claim Because Windbucket Did Not Intentionally Intrude or Pry Into Romero's Seclusion

Claiming intrusion upon seclusion requires a plaintiff to demonstrate that the defendant intentionally intruded upon a plaintiff's pri-

vacy. *Knight v. Penobscot Bay Med. Ctr.*, 420 A.2d 915, 918 (Me. 1980). A defendant's act is "intentional" when he acted willfully, either desiring to commit the intrusion, or knowing that the intrusion would likely occur. *Snakenberg v. Hartford Casualty Ins. Co.*, 383 S.E.2d 2, 6 (S.C. Ct. App. 1989). An "intrusion" occurs when the defendant acted "without invitation, permission, or welcome[,]" in invading the plaintiff's privacy. *Mauri v. Smith*, 929 P.2d 307, 311 (Or. 1996). Therefore, to establish an "intentional intrusion," the plaintiff must demonstrate that the defendant desired to intrude or was substantially certain that his conduct would result in the unauthorized exposure of the plaintiff's private matters. *Acuff v. IBP, Inc.*, 77 F. Supp. 2d 914, 924 (C.D. Ill. 1999); *See also O'Donnell v. United States*, 891 F.2d 1079, 1083 (3d. Cir. 1989). An "intentional intrusion" does not occur when the defendant believed that he had "the necessary legal or personal permission to commit the intrusive act[.]" *O'Donnell*, 891 F.2d at 1083.

1. *Windbucket Did Not commit an Intentional Act as Required by the Restatement (Second) § 652(B)*

An intentional intrusion, occurs when the defendant commits an "affirmative act" that constitutes an actual intrusion. *Kane v. Quigley*, 203 N.E.2d 338, 340 (Ohio 1964). A defendant is not guilty of an intrusion for "unintended conduct amounting merely to a lack of due care." *Snakenberg*, 383 S.E.2d at 7. Additionally, to impose liability for a third-party's intrusion, the plaintiff must prove that the defendant provided substantial or material assistance to the third-party. *Le Crone v. Ohio Bell Tel. Co.*, 201 N.E.2d 533, 536 (Ohio Ct. App. 1963).

Simple knowledge of a third-party's intrusion does not establish the "affirmative act" required to constitute an intentional intrusion. *Nix v. Hoke*, 139 F. Supp. 2d 125, 133 (D.D.C. 2001). In *Nix*, the plaintiff argued that the defendant, a congressman, was guilty of an intrusion because he knew that his constituents installed a wiretap on the plaintiff's phone line. *Id.* at 130. Even though the plaintiff admitted that the defendant did not participate in the wiretapping, he argued that since the defendant was aware of the wiretapping, did nothing to stop it, and helped cover-up the activities after the fact, he was jointly liable for the intrusion. *Id.* at 133. The court disagreed and held that the allegations did not establish an intentional intrusion since the defendant neither "participated" in nor "conducted" the wiretapping. *Id.*

Here, Romero failed to establish an intentional intrusion by Windbucket. Even though Windbucket may have been aware of LEETDUDE's actions, it did not act intentionally since it did not commit any affirmative act contributing to the alleged intrusion by LEETDUDE. Assuming an actionable intrusion even occurred, it was committed by

third-party, LEETDUDE, and not by Windbucket. (R. at 5.) The Record establishes, and Romero does not dispute, that LEETDUDE, a third-party and subscriber to Eden, acted alone in activating Voyeur mode. (R. at 5.) The Record also demonstrates that LEETDUDE acted alone when infiltrating Romero's virtual mansion. (R. at 5.) Even if Windbucket was aware of LEETDUDE'S actions, knowledge without participation does not establish a claim for intrusion upon seclusion. *See Nix*, 139 F. Supp. 2d at 133. Without showing any affirmative action by Windbucket, Romero's claim for intrusion upon seclusion must fail.

i. Section 652(B) of the Restatement Does Not Permit Claims for Reckless or Negligent Intrusion Upon Seclusion

To suggest that the intrusion tort may be committed recklessly or negligently would enlarge the tort beyond the confines of the Restatement. *Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1381, n.4. (Md. 1997). The Restatement explicitly requires that a defendant act "intentionally" in order to be liable for an intrusion. Restatement (Second) of Torts § 652(B) (1977). Therefore, if the evidence demonstrates that the intrusion was unintentional, any claim for an intrusion must fail. *See McCormick v. Haley*, 307 N.E.2d 34, 38 (Ohio Ct. App. 1973).

Only one court has affirmatively held that a defendant may be liable for a negligent intrusion. *See Prince v. St. Francis-St. George Hosp.*, 484 N.E.2d 265, 269 (Ohio Ct. App. 1985). In *Prince*, the court interpreted an Ohio Supreme Court decision that defined "intrusion upon seclusion" as "the wrongful intrusion into one's private activities in such manner as to outrage or to cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *Id*. at 268-69, quoting *Housh v. Peth*, 133 N.E.2d 340, 343 (Ohio 1956). Based on that language alone, the *Prince* court concluded that the tort of intrusion upon seclusion did not require an intentional intrusion. *Id.*

Romero incorrectly contends that Windbucket is liable for acting negligently or recklessly in the alleged intrusion. (R. at 6.) The test used in *Prince*, permitting a claim for a negligent intrusion, is incorrect. In *Prince*, the appellate court interpreted Ohio common law decided in 1956. *Id.* Unlike the language used in Ohio common law, the Restatement explicitly requires intent, stating "[o]ne who *intentionally* intrudes . . . is subject to liability to the other for invasion of his privacy[.]" Restatement (Second) of Torts § 652(B) (1977) (*emphasis* added). Section 652(B)'s use of "intentionally" is significant since there is no mention of "intentionally" in the Restatement's other three privacy torts. *See* Restatement (Second) of Torts § 652(C)-(E) (1977). By including "intentionally" in § 652(B) and omitting it in the other three sections, the Restatement's authors acted deliberately and purposefully. *See Keene*

Corp. v. United States, 508 U.S. 200, 208 (1993). Since there is no evidence that "intentionally" acquired any special meaning in § 652(B), it must be afforded its ordinary meaning as defined by the Restatement. *See Nix v. Heddon*, 149 U.S. 304, 306 (1893). The Restatement defines "intentional" as acting with either the desire or with the knowledge that a certain result will follow. Restatement (Second) of Torts § 8(A) (1965).

Several other courts recognize negligent invasion of privacy, without regard to the specific tort, as a valid cause of action. *See Boyles v. Kerr*, 806 S.W.2d 255, 259 (Tex. Ct. App. 1991). However, this is consistent with the Restatement since, unlike the intrusion tort, the other three privacy torts do not affirmatively require that the invasion of privacy be intentional. *See* Restatement (Second) of Torts § § 652(C)-(E) (1977). Section 652(B)'s requirement of intent is appropriately followed by Marshall courts, and accordingly, Romero's arguments for a negligent or reckless intrusion must fail.

ii. Windbucket Cannot be Liable for the Actions of Third-Party, LEETDUDE, Because it Did Not Provide Substantial or Material Assistance to Him

A defendant is liable for a third-party's intrusion only when the plaintiff can prove that the defendant provided substantial or material assistance to the third-party, *Le Crone*, 201 N.E.2d at 536, or that the defendant directly participated in the intrusion. *Lucas v. Ludwig*, 313 So. 2d 12, 15 (La. Ct. App. 1975). In addition, the plaintiff must first prove an actionable invasion by the third-party. *Le Crone*, 201 N.E.2d at 537.

To find a defendant liable for a third-party's intrusion, the court must conclude that the defendant knowingly provided material assistance or abetted the third-party in the wrongful intrusion. *Id.* at 538. In *Le Crone*, the defendant telephone company complied with a request by a husband to attach an extension on his wife's private telephone line. *Id.* at 535. At the time of his request, the telephone company knew that the couple was separated and living at different addresses. *Le Crone*, 201 N.E.2d at 538. The telephone company also knew that the telephone bill was in the wife's name and was paid for by her. *Id.* Moreover, the telephone company knew that the extension's only possible use was to intercept phone calls. *Id.* at 540. Despite its knowledge of the situation between the couple, the telephone company complied with the husband's request without notifying his wife. *Id.* The court found the telephone company jointly liable for the intrusion, reasoning that it rendered material aid to the husband by knowingly providing him with a device to intercept phone calls, even though he had no control over his wife's phone. *Id*.

In the case at bar, Windbucket did not knowingly provide material assistance to LEETDUDE. Unlike the defendant telephone company in *Le Crone*, Windbucket was not aware of any relationship between Romero and LEETDUDE that would indicate that Romero would not want LEETUDE to intrude upon his virtual mansion. Furthermore, unlike the extension in *Le Crone*, Voyeur mode's sole purpose was not to intercept private communications. Players could activate Voyeur mode and travel *anywhere* in Eden, not just into "private" areas. (R. at 4.) And lastly, unlike the defendant in *Le Crone*, where the defendant knew that its assistance would result in unauthorized intrusion, by simply creating Voyeur mode, Windbucket could not predict that LEETDUDE would use it to intrude Romero's virtual mansion and take screen shots. Even if the Court determines that LEETDUDE intruded upon Romero's virtual mansion, because Windbucket did not knowingly provide material assistance to LEETDUDE, it cannot be found liable as a third party.

In addition to providing material aid, a defendant may also be jointly liable for an intrusion if the plaintiff can prove that the defendant and third party pursued a common plan to commit the intrusion or that the defendant actually participated in the intrusion. *Clayton v. Richards*, 47 S.W.3d 149, 154 (Tex. App. 2001). In *Clayton*, the court found the defendant, a private detective, jointly liable with the plaintiff's wife, after he acted as her agent in setting up a videotaping system in the couple's bedroom. *Id.* at 154-55. Similarly, in *Lucas*, the court found an attorney jointly liable for an intrusion when he acted with his client to facilitate an unjustified police visitation to plaintiff's premises. 313 So.2d at 15. Additionally, in *Tompkins v. Cyr*, the court found the defendants, who planned and orchestrated unprotected focused picketing at plaintiff's home, jointly liable for the intrusion, despite the absence of their personal involvement in the picketing. 995 F. Supp 664, 684-85 (N.D. Tex. 1998).

Unlike the defendants in *Clayton*, *Lucas*, and *Tompkins,* there is no evidence that Windbucket participated in LEETDUDE's intrusion upon Romero's virtual mansion or even pursued a common plan to do so. Unlike the defendant in *Clayton*, Windbucket did not assist LEETDUDE in his intrusion into Romero's virtual mansion, and unlike the defendant in *Lucas*, Windbucket did not facilitate LEETDUDE's actions. Windbucket simply created Voyeur mode to promote subscriber retention. (R. at 4.) Unlike the defendant in *Tompkins*, Windbucket did not command or help plan LEETDUDE's intrusion. Aside from providing a subscription, Windbucket had absolutely no contact with the party in control of LEETUDE. Based on the undisputed facts, Windbucket may not be found to have pursued a common plan or participated in a plan with LEETDUDE, and thus, may not be found jointly liable for the alleged intrusion.

2. *Windbucket Did Not Commit an Intentional Intrusion Since it Believed its Conduct was Authorized*

To find that an intrusion was "intentional," the plaintiff must establish that the defendant believed, or was substantially certain, that he lacked "the necessary legal or personal permission to commit the intrusive act." *O'Donnell*, 891 F.2d at 1083. This requirement is derived from the comments and illustrations of § 652(B) of the Restatement, which demonstrate that an intentional intrusion involves a defendant who does not believe he has the authority to commit the intrusive act. *O'Donnell*, 891 F.2d at 1083. Such illustrations include:

> [A] photographer taking a picture of a hospital patient over her objection, a detective wiretapping a person's phone or using binoculars to view inside a private residence, a litigant using forged court papers to examine bank records of the opposing party, and a person who, in an effort to gain an audience with a prominent individual, refuses to desist making harassing phone calls.

Id. at 1083, n.3, quoting Restatement (Second) of Torts § 652(B) com. b, illustrations 1-5 (1977).

Therefore, if the defendant can show that he reasonably believed he had legal or personal permission to commit the intrusion, a claim for intrusion upon seclusion must fail. *Id.* at 1083.

In *O'Donnell*, the plaintiff authorized the Veteran's Administration Agency (VA) to release information to his employer showing that he suffered from post-traumatic stress disorder (PTSD). 891 F.2d at 1081. The VA provided plaintiff's employer with proof that plaintiff suffered from PTSD and provided additional information detailing plaintiff's anger problems. *Id.* When the plaintiff alleged an intrusion, the court refused to impose liability, holding that the VA did not intend to intrude upon the plaintiff's privacy since it believed that the plaintiff had provided it with the "necessary legal or personal permission" to release his full treatment summary. *Id.* at 1080-83.

Here, the Record demonstrates that Windbucket likely believed it had the necessary legal or personal permission to enact Voyeur mode, thereby permitting players to spy on other avatars. Before users subscribe to Eden, they are required to accept the Agreement. (R. at 4.) Included in the Agreement is a statement explaining that "[a]ll rights and title in and to the Program and Service . . . are owned by Windbucket[.]" (R. at 8.) Although the Agreement provides that users "may hold expectations of privacy in their conduct and affairs conducted in the Game[,]" it also states that "Windbucket reserves the right to modify [the] Rules of Conduct at any time." (R. at 8.) Furthermore, Windbucket reserved "the right, at its sole and absolute discretion, to change, modify, add to, supplement or delete any of the terms and conditions of [the] Agreement at any time, including . . . the availability of any feature of the Program[.]"

(R. at 10.) Thus, while the Agreement suggests that users may expect some privacy in their gaming conduct, the Agreement makes it clear that Windbucket is permitted to alter the terms and conditions of the Agreement at anytime. (R. at 10.)

As the owner of Eden, and with the sole discretion to alter the game and Agreement signed by Romero, Windbucket may have reasonably believed that it had the legal and personal permission to modify the game, thereby permitting conduct like LEETDUDE's. Even though Romero invested his time in Eden, he voluntarily signed the Agreement acknowledging that Windbucket could alter the terms of the game at anytime. Thus, the court should find that Windbucket acted with the belief that Romero authorized it to enact Voyeur mode, thereby negating any possible finding of an intentional intrusion.

B. Romero Failed to State a Claim Because He Did Not Have a Reasonable Expectation of Privacy in His Virtual Mansion

Proof of an intentional intrusion alone is not enough to sustain a claim for intrusion upon seclusion. The plaintiff must also prove that the matter intruded upon is private. *Med. Lab. Mgmt. Consultants v. Am. Broad. Co.*, 306 F.3d 806, 812 (9th Cir. 2002). To establish a matter as "private," the plaintiff must prove that he had a reasonable expectation of privacy in the matter. *Id.* When the undisputed material facts demonstrate that the plaintiff lacked a reasonable expectation of privacy, any claim for intrusion upon seclusion must fail. *Deteresa v. Am. Broad. Co., Inc.*, 121 F.3d 460, 465 (9th Cir. 1997).

When assessing whether a plaintiff has a reasonable expectation of privacy, courts have borrowed the two-prong test used in Fourth Amendment jurisprudence. *See Katz v. United States*, 389 U.S., 347, 361 (1967). The first prong requires that the plaintiff prove that he had "an actual, subjective expectation of seclusion or solitude in the place, conversation, or matter." *Med. Lab. Mgmt. Consultants*, 306 F.3d at 812. The second prong requires that the plaintiff demonstrate that his subjective expectation of privacy is "one that society is prepared to recognize as reasonable." *Kemp v. Block*, 607 F. Supp. 1262, 1264 (D. Nev. 1985). Without proof of both subjective and objective expectations of privacy, a plaintiff cannot demonstrate that the matter intruded upon is private, and a claim of intrusion cannot succeed. *Med. Lab. Mgmt. Consultants*, 306 F.3d at 818-19.

1. *Romero Did Not Have a Subjective Expectation of Privacy in His Virtual Mansion*

A plaintiff may demonstrate a subjective expectation of privacy by bringing forth any outward manifestations showing that he intended to keep the matter private. *Med. Lab. Mgmt. Consultants*, 306 F.3d at 810. The plaintiff's actions must affirmatively prove that he intended to keep the subject matter private. *Hill v. Nat'l Collegiate Ath. Ass'n*, 865 P.2d 633, 655 (Cal. 1994). The court may also compare what precautions the plaintiff took to safeguard his privacy interest against what precautions he may have reasonably taken. *Dow Chem. Co. v. United States*, 749 F.2d 307, 312-13 (6th Cir. 1984). Therefore, it is essential that the court assess what actions the plaintiff took in attempting to keep a subject matter private. *Id.*

Evidence showing the plaintiff knew that his communications or other conduct could be intercepted negates any claim that the plaintiff had a subjective expectation of privacy in the matter. *Chandler v. State*, 680 So. 2d 1018, 1034-35 (Ala. Crim. App. 1996). For example, in *Kemp*, the plaintiff failed to demonstrate that he had a subjective expectation of privacy in a workplace conversation when he failed to take any action to keep the conversation private and knew that other employees could hear it. *Kemp*, 607 F. Supp. at 1264. Similarly, in *State v. Delaurier*, the court held that the plaintiff could not claim a subjective expectation of privacy in his phone calls since his phone came with a manual alerting him that conversations could be intercepted by others. 488 A.2d 688, 694 (R.I. 1985).

The Record demonstrates that Romero should have been aware that LEETDUDE's conduct was possible. Voyeur behavior was not foreign to Eden since it previously occurred during the existence of Zero Being mode. Although Windbucket eventually discontinued Zero Being mode, the fact that Windbucket reserved the right to alter the game at anytime should have put Romero on notice that such conduct could occur again. The fact that Romero should have been aware of the possibility that another player might spy on him, must destroy any claim that Romero had a subjective expectation of privacy in his avatar's virtual mansion.

A plaintiff may not claim a subjective expectation of privacy when evidence demonstrates that he consented to the intrusion. *See* Restatement (Second) of Torts § 892(A)(1) (1979) ("[o]ne who effectively consented to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for the harm resulting from it"). Moreover, plaintiffs cannot claim subjective expectations of privacy when the source they claim privacy in is outside of their control. Christopher F. Carlton, *The Right to Privacy in Internet Commerce: A Call For*

New Federal Guidelines and the Creation of an Independent Privacy Commission, 16 St. John's J.L. Comm. 393, 423 (2002).

Here, Romero's conduct demonstrates that he relinquished any expectation of privacy he may have desired in his online fantasy life, thereby negating any finding of a subjective expectation of privacy. In voluntarily signing the Agreement, Romero "agree[d] that [he had] no right or title in or to any content that appears in the program[.]" (R. at 10.) Since this clause granted all ownership to Windbucket, including his virtual mansion, Romero cannot contend that he had an expectation of privacy in a matter outside his control. *See* Carlton, *supra* at 423. Moreover, Romero's voluntary acceptance of the Agreement granted consent to Windbucket to alter the game. Such action is inconsistent with any subjective expectation of privacy in the game. *See Hill*, 865 P.2d 633, 658-59.

2. *Even if Romero Subjectively Believed He Had an Expectation of Privacy in His Virtual Mansion, That Belief was Not Objectively Reasonable*

Even if the court finds that Romero had a subjective expectation of privacy in his virtual mansion, this would not be enough to establish that he had a reasonable expectation of privacy. "No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy." *Hill*, 865 P.2d at 660. Therefore, when assessing a plaintiff's subjective expectation of privacy, the court must also determine whether that expectation was objectively reasonable. *Id.* This requires that the plaintiff demonstrate that a reasonable person would share his expectation. *Id.* To determine whether this prong has been satisfied, the court must determine whether the plaintiff's expectation of privacy is "one that society is prepared to recognize as reasonable." *Kemp*, 607 F. Supp. at 1264.

A reasonable expectation of privacy depends on "broadly based and widely accepted community norms[.]" *Hill*, 865 P.2d at 655. Therefore, what is considered reasonable necessarily depends on "the normal standard of community behavior." F. Harper & F. James, The Law Of Torts § 16.2 (1956). "[I]t is only where [an] intrusion has gone beyond the limits of decency that liability accrues." *Hamberger v. Eastman*, 206 A.2d 239, 242 (N.H. 1964).

Courts have generally been unwilling to find reasonable expectations of privacy in places that are open to the public, *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081, 1087 (E.D. Pa. 1980), or in information which the plaintiff voluntarily provided. *Dwyer v. American Express Co.*, 652 N.E.2d 1351, 1354 (Ill. App. Ct. 1995). Furthermore, courts have refused to find reasonable expectations of privacy in matters that are not inher-

ently "private." *Med. Lab. Mgmt. Consultants*, 306 F.3d at 814. Therefore, because Romero's virtual mansion was part of a game, and arguably not "private" at all, the court may determine that he lacked an objectively reasonable expectation of privacy on that basis alone.

In the context of the Internet, courts have refused to find reasonable expectations of privacy in online chat rooms and e-mail messages sent to their intended recipients. *United States v. Maxwell*, 45 M.J. 406, 419 (C.A.A.F. 1996); *United States v. Charbonneau*, 979 F. Supp. 1177, 1185 (S.D. Ohio 1997). In *Maxwell*, the court explained that although the sender of an e-mail message may enjoy a reasonable expectation of privacy in a message, that expectation is destroyed as soon as the recipient receives the message because the sender no longer controls the message's destiny. 45 M.J. at 418. Similarly, in *Charbonneau*, the court held that the plaintiff did not have a reasonable expectation of privacy in an online chat room since he could not predict what individuals who received his "chats" might do with the messages. 970 F. Supp. at 1185. By participating in Eden, a multi-player online game, Romero undoubtedly interacted with other parties. Romero could not predict what those parties might do with the information they received from him. Such interactions with unknown parties necessarily destroy any reasonable expectation of privacy that Romero may have claimed. *See Maxwell*, 45 M.J. at 419; *See also Charbonneau*, 979 F. Supp. at 1185.

A finding that the plaintiff or his "private matters" were in a public place destroys any claim of a reasonable expectation of privacy. *Fogel*, 500 F. Supp. at 1087. The comments and illustrations to the Restatement § 652(B) explicitly reject imposing liability for intrusions that occurred in public view. Restatement (Second) Torts § 652, cmt. c (stating, there is no liability "for observing [plaintiff] or even taking his photograph, while he is walking on the public highway, since he is not here in seclusion, and his appearance is public and open to the to the public eye . . .").

Here, given the public nature of Eden, Romero cannot demonstrate that he had an objectively reasonable expectation of privacy in his virtual mansion. By their very nature, virtual worlds are considered public places, "intended for [their] users to inhabit and interact via avatars." Wikipedia, *Virtual World*, http://en.wikipedia.org/wiki/Virtual_ world (last visited Sept. 12, 2008). Essentially, members interact as a "community." *Id.* In Eden players interact by fighting against one another, conducting business, and trading online property. (R. at 4.) Given the public nature of Eden, even if Romero subjectively believed his conduct was private, he cannot establish that such a belief was objectively reasonable.

Courts have also refused to find reasonable expectations where plaintiffs have voluntarily provided information. Shawn C. Helms,

Translating Privacy Values with Technology, 7 B.U.J. SCI. & TECH. L. 288, 310 (2001). In *Dwyer*, the plaintiffs alleged that the company intruded upon their privacy when it collected and rented their personal information to third-parties. 652 N.E.2d at 1353. The court found that the plaintiffs did not have a reasonable expectation of privacy in the information since they had voluntarily provided it. *Id.* at 1354.

Even when defendants have assured parties that data will not be intercepted, courts have refused to find reasonable expectations of privacy where plaintiffs voluntarily provided information. *See Smyth v. Pillsbury*, 914 F. Supp. 97, 98 (E.D. Pa. 1996). In *Smyth*, the defendant company maintained an internal electronic mail communication system to promote corporate communications between its employees. *Id.* The company repeatedly assured its employees that communications would not be intercepted. *Id.* Despite these assurances, the company subsequently intercepted employee plaintiff's private messages. *Id.* Finding that the employee plaintiff voluntarily made these communications on the company system, the court held he did not have had a reasonable expectation of privacy in those messages. *Id.* at 100-01.

Like the plaintiffs in *Dwyer* and *Smyth*, Romero cannot establish that he had a reasonable expectation of privacy in his virtual mansion since he voluntarily participated in Eden. Although the Agreement states that users "may hold expectations of privacy in their conduct and affairs[,]" (R. at 9), the court's holding in *Smyth*, demonstrates that this does not affect the voluntary nature of Romero's participation. Because Eden is essentially a public forum in which Romero voluntarily participated in and communicated with unknown parties, this Court should refuse to find that Romero had an objectively reasonable expectation of privacy in his virtual mansion.

C. Romero Failed to State a Claim Because the Alleged Intrusion was Not Highly Offensive

Even if the Court determines that Romero had a reasonable expectation of privacy in his virtual mansion, Romero would still need to prove that the alleged intrusion was highly offensive. In order to avoid excessive litigation, an actionable intrusion of privacy must be "sufficiently serious in [its] nature, scope, and actual or potential impact[,]" so as "to constitute an egregious breach of the social norms underlying the privacy right." *Hill*, 865 P.2d at 655. Such a determination is made by assessing social conventions and expectations. *PETA v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1281 (Nev. 1995). Although the offensiveness of an intrusion is a question of fact, because most cases are determined on summary judgment, the court is necessarily involved in this determination. *See Carter v. Innisfree Hotel, Inc.*, 661 So. 2d 1174, 1178 (Ala. 1995).

To determine the "offensiveness" of an intrusion, courts consider several factors, including: the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion, the intruder's motives and objectives, and the expectations of those whose privacy is invaded. *Miller v. Nat'l Broad. Co.*, 187 Cal. App. 3d 1463, 1483-84 (Cal. App. 1986).

Merely annoying, disruptive or insulting conduct does not rise to the level of "highly offensive" conduct as required by the intrusion tort. *See Christie v. Greenleaf*, 1951 Pa. Dist. & Cnty. Dec. LEXIS 119 (Pa. C.P. 1951). The illustrations and comments to the Restatement (Second) § 652(B) demonstrate that, in order to constitute a "highly offensive" intrusion, the plaintiff must prove an exceptional kind of prying, such as: (1) taking a photograph of a woman with a rare disease in a hospital over her objection, or (2) using a telescopic lens to take intimate pictures in another's bedroom. Therefore, a defendant was not found liable when he made the plaintiff "the butt of billingsgate, harsh names and insulting gestures[,]" *Id.*, or where the defendant created a spoof portraying plaintiff's sex life with her husband. *Stein v. Marriot Ownership Resorts, Inc.*, 944 P.2d 374, 379 (Utah Ct. App. 1997).

LEETDUDE's actions did not rise to the level of an exceptional kind of prying and thus may not be considered "highly offensive" conduct. In making its assessment, the Court must consider the context in which the alleged intrusion took place. *See Miller*, 187 Cal. App. 3d at 1483-84. Thus, this Court must determine what constitutes "highly offensive" conduct in the context of an online game. Eden is a fictitious world where users voluntarily enter for fun and games. *See* Wikipedia, *Virtual World*, http://en.wikipedia.org/wiki/Virtual_world (last visited Sept. 12, 2008). The fact that Romero voluntarily entered Eden to participate in a fantasy world goes against finding the alleged intrusion highly offensive, as most individuals would likely conclude that such conduct was simply part of the game. *See Aisenson* v. *Am. Broad. Co.*, 220 Cal. App. 3d. 146 (Cal. App. 1990). In the gaming world, LEETDUDE's posting of the screenshots from Romero's virtual mansion may amount to insulting conduct, but it cannot be ignored that the conduct took place in the context of a game. Moreover, given that such conduct previously occurred in Eden, it is possible that such behavior is commonplace in online fantasy worlds, thereby negating any finding that the conduct is "highly offensive."

When assessing what constitutes "highly offensive" conduct, courts must also consider the intruder's motive or reason for engaging in the intrusive action. *Med. Lab. Mgmt. Consultants*, 306 F.3d at 819. In *Medical Laboratory Management Consultants*, a group of undercover reporters posed as potential business partners and surreptitiously videotaped a private conversation with an employer's lab technician and

broadcast portions of the conversation to the general public. *Id*. at 814-815. Finding that the defendants had a "noble motive[,]" reporting on important health issues that could potentially impact millions of women, the court refused to find that the deception constituted "highly offensive" conduct. *Id.* at 819.

Here, Windbucket's motive behind enacting Voyeur mode was legitimate, as Windbucket enacted it as a means of promoting subscriber retention rather than as a means to engage in unauthorized intrusions. (R. at 4.) Such a motive must serve to negate a finding that Windbucket's conduct was highly offensive. Because Romero voluntarily entered Eden and LEETDUDE's alleged intrusion did not constitute highly offensive conduct, Romero's claim for intrusion upon seclusion was properly denied.

D. Romero Failed to Demonstrate That Any Anguish and Suffering was Sufficiently Serious or That it Was Proximately Caused by the Alleged Intrusion

Even if all three elements of the intrusion upon seclusion tort are satisfied, the plaintiff must still prove that the claimed harm was proximately caused by the defendant's conduct. *Tompkins*, 202 F.3d at 782. Moreover, the plaintiff's claimed harm must rise to a level that constitutes serious mental or physical injury. *Shorter v. Retail Credit Co.*, 251 F. Supp. 329, 332 (D.S.C. 1966). Because the intrusion tort is specifically aimed at the discomfort caused by the intrusion itself, *Thomas v. Pearl*, 998 F.2d 447, 452 (7th Cir. 1993), the plaintiff must show that the substantial harm flowed directly from the intrusion itself. *Schmidt v. Ameritech Illinois*, 768 N.E.2d 303 (Ill. App. Ct. 2002).

The intrusion tort focuses on the manner in which the defendant obtains information and is not concerned with what the defendant later does with the information. *Fernandez-Wells v. Beauvais*, 983 P.2d 1006, 1010 (N.M. Ct. App. 1999). The basis of the tort is neither publication nor publicity. *Id.* Therefore, in interpreting § 652(B) of the Restatement, the majority of courts have refused to consider the defendant's subsequent publication of information obtained during an alleged intrusion in considering whether the plaintiff plead the requisite harm. *Med. Lab. Mgmt. Consultants*, 306 F.3d at 1191. Instead, courts require that the plaintiff demonstrate that the harm flowed directly from the intrusion itself, such as when a defendant enters the plaintiff's bedroom, *Byfield v. Candler*, 125 S.E. 905 (Ga. Ct. App. 1924), opens the plaintiff's mail, *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978), or makes repeated and unwanted telephone calls to the plaintiff. *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715 (Fla. Dist. Ct. App. 1961).

Failing to establish the requisite link between the alleged harm and the intrusion destroys any claim for intrusion upon seclusion. *Lovgren v. Citizens First Nat'l Bank*, 534 N.E.2d 987 (Ill. 1989). In *Lovgren*, the plaintiff argued that he suffered mental anguish when uninvited third-parties arrived at his home after the defendant placed an unauthorized advertisement regarding plaintiff's home in a local newspaper. *Id*. The court denied the plaintiff's intrusion claim, finding that the resulting harm sprung not from any intrusion, but from the defendant's publication. *Id.* at 988. In *Schmidt*, the plaintiff argued that he suffered mental harm when his employer fired him after inspecting his private phone records. 768 N.E.2d at 306. The court denied plaintiff's intrusion claim, finding that the mental harm suffered was proximately caused by the loss of the plaintiff's job rather than from the intrusion itself. *Id.* at 316-17.

Romero does not bring forth any evidence of harm he suffered as the result of LEETDUDE's entry into Romero's virtual mansion. Here, the only harm that Romero may demonstrate is the harm he may have suffered as the result of LEETDUDE's subsequent posting of images on the Zombies of Eden website. (R. at 5.) Such harm did not flow from the intrusion itself; rather, it resulted from LEETDUDE's subsequent publication. Thus, Romero cannot demonstrate a harm flowing directly from the alleged intrusion itself.

In addition to establishing that the harm flowed directly from the intrusion itself, the plaintiff must also prove that the intrusion caused substantial mental or physical injury. *O'Shea v. Lesser*, 416 S.E.2d 629, 633 (S.C. 1992). This requires that the plaintiff prove actual injury by way of medical care, an inability to sleep or work, or a loss of reputation and integrity in the community. *Schmidt*, 329 Ill. App. 3d at 316. The court will not presume injury. *Id.* In *O'Shea*, the plaintiffs alleged that they suffered substantial harm when the defendants violated a restrictive covenant by erecting an extension, thereby permitting them to see into a portion of the plaintiffs' home. *O'Shea*, 416 S.E.2d at 630. Specifically, the plaintiffs claimed that as a result of the defendants' ability to see into their home, they were forced to change their lifestyle so as to avoid being watched by the defendants. *Id*. The court held that the fact that the plaintiffs had to change their lifestyle did not constitute serious mental harm. *Id.* at 633. In its holding, the court noted that "[p]eople who live in organized communities must of necessity suffer some inconvenience and annoyance from their neighbors . . ." *Id*.

In the case at bar, Romero has failed to demonstrate that he suffered substantial physical or mental anguish. In *O'Shea*, the court refused to find substantial mental anguish when the plaintiffs were forced to change their lifestyle due to the defendants being able to see into their actual home. *Id.* at 633. Any intrusion into Romero's virtual mansion

certainly does not rise to the level of harm suffered by the plaintiffs in *O'Shea*. Because Romero cannot demonstrate that he suffered substantial mental harm flowing directly from the intrusion itself, his claim for intrusion upon seclusion was properly denied.

The Fourth Circuit Court of Appeals properly affirmed summary judgment because Romero failed to state a claim for intrusion upon seclusion. First, Romero cannot demonstrate that Windbucket intentionally invaded his privacy since any alleged intrusion was made by a third party, LEETUDE. Because the Restatement (Second) § 652(B) does not recognize claims for reckless or negligent intrusions, Romero may not succeed on any such theory. Moreover, Windbucket cannot be shown to have committed an intentional intrusion since it may have reasonably believed it had Romero's consent to alter the contours of the game. Second, Romero cannot demonstrate that he had a reasonable expectation of privacy in his virtual mansion, given that Windbucket was the sole owner of Eden and that virtual worlds are generally considered public forums. Third, Romero could not prove that spying on a fictional avatar constituted highly offensive behavior. And finally, Romero failed to plead the requisite anguish and suffering because any possible harm resulted from LEETDUDE's posting on the Zombies of Eden website, not from the alleged intrusion. Moreover, any such harm could not rise to the necessary level of substantial mental or physical anguish. Therefore, Windbucket respectfully requests that this Court affirm summary judgment.

II. THE COURT OF APPEALS DID NOT ERR IN DENYING ROMERO'S MOTION FOR SANCTIONS.

Under Marshall R. Civ. P. 37(b)(2), courts may sanction parties who fail to comply with discovery orders. *Freeland v. Amigo*, 103 F.3d 1271, 1276-77 (6th Cir. 1997). Courts have broad discretion in fashioning appropriate sanctions for failure to produce evidence. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106 (2d Cir. 2002). Dismissal or default sanctions are the most severe sanctions and should only be ordered in extreme situations. *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980). Absent an extreme situation, a default sanction is an abuse of discretion and the court must choose a lesser sanction. *Id.*

Because of expense and technological limitations, it has become Windbucket's policy to maintain Internet game server traffic logs for only two months before deleting them. (R. at 13.) Windbucket maintains logs for a limited period of time in order to diagnose customer issues and track server utilization. (R. at 13.) Neither of those purposes would justify the massive expense of maintaining old game server traffic logs.

The original Data Retention Policy from November 2004 provided for the pruning of older logs, but failed to specify exactly how long the logs were maintained before they were pruned. (R. at 14.) Accordingly, Windbucket amended its Data Retention Policy in February 2008 solely to clarify its existing practice. (R. at 13.) Windbucket updated its Data Retention practices only to reflect current practice. (R. at 6.) Windbucket acted in good faith in maintaining its logs for a limited purpose and for as long as technologically feasible. Thus, arguably, Windbucket should not be sanctioned at all.

A. The Failure to Maintain Internet Server Traffic Logs is Not Severe Enough to Warrant a Default Sanction

Dismissal or default sanctions are "draconian" penalties which should be applied only in extreme situations. *Barnhill v. United States*, 11 F.3d 1360, 1367 (7th Cir. 1993). Courts differ slightly in the test they use to determine whether a sanction of default or dismissal is appropriate. The various factors are designed to further the "strong policy favoring a trial on the merits and against depriving a party of his day in court." *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989, 996 (8th Cir. 1975). The most commonly considered factors are: (1) willful delay; (2) whether the moving party was prejudiced; (3) whether the party affected by the sanction was warned that further failure could result in a default sanction; and (4) whether less drastic sanctions were first imposed or considered. *Freeland v. Amigo*, 103 F.3d 1271, 1277 (6th Cir. 1997); *Adriana Intl. Corp. v. Lewis & Co.*, 913 F.2d 1406, 1412 (9th Cir. 1990); *Ball v. City of Chicago*, 2 F.3d 752, 755-58 (7th Cir. 1993); *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, (3rd Cir. 1984) (considering factors 1, 2 and 4 and the meritoriousness of the claim).

Because Marshall R. Civ. P. 37 is based on Fed. R. Civ. P. 37, Marshall courts should follow the Federal Courts' interpretation of Fed. R. Civ. P. 37. Such action is consistent with the practice of other states with rules similar to the Fed. R. Civ. P. 37. *See Greathouse v. American Nat'l Bank and Trust Co.*, 796 S.W.2d 868, 870 (Kentucky 1990) (considering prejudice, warning, and less drastic sanctions).

1. *Windbucket Did Not Willfully Delay the Proceedings*

It is an abuse of discretion to issue a default sanction unless the record clearly demonstrates a history of delay or contumacious conduct. *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980). Furthermore, the delay must be the fault of the party rather than his attorney. *Id.* In *Carter*, the plaintiff's attorney failed to timely respond to discovery requests. *Id.* Finding the plaintiff blameless, the 6th Circuit reversed an order of dismissal to allow the plaintiff his day in court. *Id.*

Like the plaintiff in *Carter*, Windbucket did not willfully delay the proceedings. Windbucket was unresponsive to the first order to produce the logs based on a failure of its attorneys. (R. at 6.) On subsequent attempts to compel production, Windbucket inadvertently produced the wrong logs. (R. at 6.) Unfortunately, by the time the district court ordered Windbucket to produce the correct logs or show cause for its failure, Windbucket no longer retained copies of the logs as a result of a routine pruning of its data retention system. (R. at 6.) Thus, Windbucket should not be denied its day in court solely as a result of its attorney's failure.

2. *Romero's Claim was Not Prejudiced by Windbucket's Actions*

A party suffers prejudice only if the actions of the opposing party threaten the rightful decision of his case. *Malone v. U.S. Postal Serv.*, 833 F.2d 128 (9th Cir. 1987). Thus, even if a party acts deceitfully, "a party should not be deprived of his opportunity to defend based on factors unrelated to the merits of his case." *Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir. 1982). Some courts have proposed that failure to produce documents as ordered may be evidence of prejudice. *Adriana*, 913 F.2d at 1412, citing *SEC v. Seaboard Corp.*, 666 F.2d 414, 417 (9th Cir. 1982). However, failure to produce documents is only evidence of prejudice when the documents were essential to the "disposition of the case." *SEC*, 666 F.2d at 417, citing *Norman v. Young*, 422 F.2d 470, 473 (10th Cir. 1970).

In *Phoceene Sous-Marine*, the court entered a default judgment after it discovered that a telegram from the defendant's doctor, used to secure an extension before trial, was not actually sent by the doctor. *Phoceene Sous-Marine*, 682 F.2d at 805. In fact, the telegram was actually sent by the defendant's sister and the defendant had even attempted to convince the doctor to falsely testify that he had sent the telegram. *Id*. at 804-05. The district court found that the defendant had willfully deceived the court and entered a default judgment. *Id*. The Court of Appeals sympathized that the district court faced a "recalcitrant, deceitful party" and exercised "admirable restraint." *Id*. at 807. Ultimately, however, the court reversed, holding that a default judgment should not be entered when the reason for sanctions is a peripheral matter wholly unrelated to the matters in controversy. *Id*.

Similar to *Phoceene*, Winbucket's alleged failure to produce the internet game server traffic logs is not related to the merits of the case. The logs would not provide any insight to whether Romero has an actionable invasion of privacy claim. The logs would only help Romero secure the identity of a potential co-defendant. Thus, the only benefit to Romero would be another person to enforce a potential judgment on. Be-

cause the documents were not essential to the disposition of the case against Windbucket, there is no evidence of prejudice. Windbucket should not be denied its opportunity to defend its case because of a routine, good-faith destruction of documents which do not relate to the merits of the case.

3. *The Court Never Warned Windbucket About the Possibility of Default.*

Courts should not enter a default sanction without first demonstrating that the party was adequately warned about the possibility of such a sanction. *Vinci v. Conrail*, 927 F.2d 287, 288 (6th Cir. 1991). Moreover, a warning must be explicit and clear to be considered adequate. *Id.* at 288. In *Vinci*, the court found the following warning inadequate: "failure of counsel to appear at any scheduled pretrial or otherwise comply with any of the provisions of this Standing Order may result in dismissal, default judgment, or the imposition of sanctions, as may be appropriate." *Vinci v. Conrail*, 927 F.2d at 288. In finding the warning inadequate, the court noted that the required warning should have stated: "*further* noncompliance would result in dismissal." *Id.* Because the statement was a boilerplate warning that did not adequately warn the parties that their conduct may result in dismissal, the court reversed for abuse of discretion. *Id*.

Additionally, it may be an abuse of discretion to enter a default sanction even if the parties were explicitly warned. In *Carter*, the district court's pretrial order specifically warned the parties that failure to comply could result in dismissal. 636 F.2d at 160. However, despite its explicit warning, the court still reversed because the party's attorney was responsible for the delay. *Id*. at 161.

Here, no such warning was issued. Although Windbucket's attorneys failed to respond to the first order, the record fails to demonstrate that the lower court warned Windbucket of the possibility of sanctions. Moreover, the court failed to warn Windbucket that further non-compliance would result in default. Furthermore, the other errors committed during the course of discovery were not in response to a court order, and thus the court did not make any warnings based on those failures. Because Windbucket received absolutely no warning about the possibility of a default sanction, the court properly refused to enter such sanctions.

4. *The District Court Had Not Considered Alternative Sanctions Before Romero Moved for a Default Sanction*

Dismissal or a default judgment "must be a sanction of last, not first, resort." *Poulis*, 747 F.2d at 869. Thus, courts must consider alternative sanctions before imposing default sanctions. *Id*. As a result, appellate

review of a court's "discretionary choice of a lesser sanction than default judgment will be very deferential." *Hewlett v. Davis*, 844 F.2d 109, 113 (3d Cir. 1988). In *Hewlett*, a district court chose a monetary sanction instead of a default sanction for the defendant's failure to comply with a discovery order. *Id.* The court upheld the district court's decision, finding that that the plaintiff failed to establish "such extreme prejudice to cause us to interfere with the district court's considerable discretion in refusing to order so severe a sanction as default judgment." *Hewlett*, 844 F.2d at 113.

This Court should not interfere with the district court's considerable discretion in choosing a monetary sanction rather than a default sanction. Here, the district court did not implement or even discuss alternatives before Romero made his motion for a default sanction. (R. at 6.) Only at that time did the court consider sanctions, and chose, in its discretion, to implement the lesser sanction of ordering Windbucket to pay reasonable expenses. (R. at 6.)

Furthermore, when an attorney is at fault, courts have increasingly emphasized directly sanctioning the delinquent lawyer, rather than his client. *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1095 (6th Cir. 1994). Possible attorney sanctions include: "(1) a reprimand by the court, (2) a finding of contempt, or (3) a prohibition against practicing for a limited time before the court whose order was neglected or disregarded." *Flaksa v. Little River Marine Constr. Co.*, 389 F.2d 885, 889 (5th Cir. 1968). Furthermore "it seems fairly clear that the judicious use of such measures would tend to promote "attorney compliance in the first instance." *Id.*

Here, the failure to produce the logs was the fault of Windbucket's attorneys. As discussed, Windbucket itself did not willfully delay the proceedings and, therefore, should not be denied its day in court. However, if the court chose to increase sanctions, the attorney sanctions listed above would be sufficient to prevent future dilatory conduct.

5. *Additional Considerations – Meritoriousness of the Defense*

Some courts find the likelihood of a defense's success a compelling factor in determining whether to issue a default sanction. *Poulis*, 747 F.2d at 869. In determining whether a defense appears to be meritorious, courts do not use summary judgment standards. *Id.* A defense is meritorious when the allegations of the pleadings, if established at trial, would constitute a complete defense. *Poulis*, 747 F.2d at 870. Clearly, the required standard is less than the standard used for summary judgment, and if the facts are sufficient for summary judgment, they must be sufficient for determining the meritoriousness of the defense.

Here, the district court granted summary judgment based on Windbucket's defense that Romero failed to state a claim for intrusion upon seclusion and the court of appeals upheld that decision. (R. at 7.) Even if this Court chose to reverse the summary judgment order, it cannot be denied that Windbucket's defense that Romero failed to state a claim appears to be meritorious. Therefore, if this Court chooses to follow the Third Circuit's test and look to the meritoriousness of the defense, it should still find for Windbucket and refuse to enter a default sanction.

B. An Adverse Inference Instruction is Inappropriate

An "adverse inference" is generally defined as "[a] detrimental conclusion drawn by the fact-finder from a party's failure to produce evidence that is within the party's control." Black's Law Dictionary (8th ed. 2004). To support an adverse inference instruction, Romero must show all three of the following: "(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed 'with a culpable state of mind'; and (3) that the missing evidence is 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107-108 (2nd Cir. 2002). Because the documents were irrelevant to Romero's claim and Windbucket had no obligation to preserve them, an adverse inference is inappropriate.

1. *Windbucket Did Not Have an Obligation to Preserve the Internet Game Server Traffic Logs*

In determining whether a party should have preserved evidence which was destroyed in the course of a document retention policy, courts consider: (a) whether the record retention policy is reasonable considering the facts and circumstances surrounding those documents, (b) whether lawsuits or complaints have been filed frequently concerning the type of records at issue, and (c) whether the document retention policy was instituted in bad faith. *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988).

i. Windbucket's Record Retention Policy is Reasonable

As discussed above, Windbucket's document retention policy is based on the technological limitations and expense associated with storing massive internet game server traffic logs. (R. at 13.) Because the purpose of these logs is only to diagnose customer issues and track server utilization, they are not needed for more than two months. (R. at 13.) Windbucket does not need these logs for any other purpose and, there-

fore, requiring Windbucket to incur substantial costs to maintain old logs for an indefinite amount of time is unreasonable.

ii. There is No Evidence of Any Other Complaint Concerning the Type of Records at Issue

The Record does not contain information about whether any party other than Romero has filed a complaint and requested the internet game server traffic logs. It is possible that another party could have filed a lawsuit, but without evidence, it must be assumed that no other party has filed suit. While several customers made general complaints about Voyeur mode, no evidence suggests that a customer has complained formally or informally about Windbucket's data retention policy. (R. at 5.)

iii. Windbucket's Record Retention Policy was Not Instituted in Bad Faith

Where a routine document retention policy has been followed, an intent to destroy the evidence "for the purpose of obstructing or suppressing the truth" must be present to justify an adverse inference instruction. *Lewy*, 836 F.2d at 1112. Courts may assume bad faith when a party has been involved in many similar conflicts and knowingly destroys a particular type of evidence relevant to potential litigation. *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 747 (8th Cir. 2004). In *Stevenson*, Union Pacific was involved in several grade crossing collisions and knew that taped conversations were relevant to the litigation. *Id*. at 748. Furthermore, in other cases, Union Pacific had preserved tapes that were beneficial to it. *Id.* The court found that such conduct demonstrated an intent to destroy the tapes for the purpose of suppressing evidence. *Id*. Thus, an adverse inference instruction was proper. *Id*.

Here, Windbucket exercised its normal data retention policy with no intent to destroy evidence for the purpose of obstructing or suppressing the truth. Unlike *Stevenson*, no evidence suggests that Windbucket was involved in similar suits that would put it on notice that internet game server traffic logs would be relevant. Furthermore, Windbucket had never retained the logs past the two months for any purpose, and certainly not to aid itself in litigation. Because Windbucket's data retention policy is reasonable, and it had no reason to expect that the evidence would be relevant, Windbucket did not act in bad faith by exercising its routine document retention policy.

2. WINDBUCKET DID NOT HAVE A "CULPABLE STATE OF MIND"

A party has a "culpable state of mind" if it destroys evidence in bad faith. *Residential Funding Corp.*, 306 F.3d at 108. District courts apply

a case-by-case approach because failures occur along a continuum of fault, ranging from innocent to intentional. *Id.*

As noted above, Windbucket did not have an obligation to preserve the logs, and did not act in bad faith. Therefore, Windbucket could not have had a "culpable state of mind." Assuming, arguendo, that Windbucket should have produced the logs, they were deleted as a result of a routine, good-faith operation of an electronic information system. (R. at 6.) Windbucket did not take any affirmative action, and therefore the failure was completely innocent. Furthermore, because Windbucket's attorney failed to produce the logs, it cannot be said that Windbucket itself had a "culpable state of mind."

3. *No Reasonable Trier of Fact Could Find That the Internet Game Server Traffic Logs Were Relevant to or Supported Romero's Claim for Invasion of Privacy Against Windbucket*

The party seeking an adverse inference instruction must produce sufficient evidence that a reasonable trier of fact could find that the unavailable evidence is relevant to the parties' claim. *Residential Funding Corp.*, 306 F.3d at 109. Here, the instruction Romero seeks is not related to the unavailable evidence. Romero requested the district court take Windbucket's participation in the alleged invasions of privacy as established for the purposes of this action. (R. at 6.)

No reasonable trier of fact could find that the logs would have established Windbucket's participation in the alleged invasion of privacy. The logs would have only been used to establish LEETDUDE's internet service provider. Such information would not establish Windbucket's participation in the alleged intrusion. Thus an adverse inference instruction is inappropriate.

C. Even if the District Court Erred in Denying Romero's Motion for Sanctions, the Error was Harmless

Assuming, arguendo, that the District Court should have imposed sanctions on Romero, its failure to do so was harmless. Courts should disregard all errors unless it affects any party's substantial rights. Marshall R. Civ. P. 61. As discussed above, Romero did not suffer any actionable invasion of privacy because he failed to state a claim for intrusion upon seclusion. Without an actionable invasion of privacy claim, identifying LEETDUDE's internet service provider would not have altered Romero's substantial rights. Therefore, this Court should affirm the lower court's denial of Romero's motion for sanctions.

CONCLUSION

Windbucket did not intrude upon Romero's seclusion when it created Voyeur mode. Windbucket did not act intentionally because it did not participate in LEETDUDE's entry into PWNED's virtual mansion. Additionally, Romero failed to show that he had a reasonable expectation of privacy in Eden or that spying on a virtual character is highly objectionable to a reasonable person. Even if Romero can prove that Windbucket is responsible, there is no evidence that he endured the requisite anguish or suffering necessary for a valid claim of intrusion upon seclusion. Thus, Romero did not present a genuine issue of material fact necessary to survive summary judgment.

Romero also failed to show that a default sanction is appropriate. Romero did not provide evidence that Windbucket willfully delayed the proceedings or that his claim was prejudiced. Furthermore, the district court never warned Windbucket of the possibility of a default sanction or considered alternative sanctions. Similarly, an adverse inference instruction is inappropriate because Windbucket maintained a reasonable data retention policy, did not act with a culpable state of mind, and the internet game server logs were not relevant to Romero's claim for invasion of privacy. For the foregoing reasons, Windbucket respectfully requests this Court affirm the decision of the Fourth Circuit Court of Appeals of the State of Marshall.

Respectfully Submitted,

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Attorneys for Respondent
Dated: September 26, 2008

APPENDIX A:

Restatement (Second) of Torts, § 652(B)-(E) (1977)

§ 652(B). Intrusion Upon Seclusion

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

§ 652(C). Appropriation Of Name Or Likeness

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

§ 652(D). Publicity Given To Private Life

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

§ 652(E). Publicity Placing Person In False Light

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

APPENDIX B:

Marshall Rule of Civil Procedure Rule 37

Rule 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.