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ATTORNEYS AT LAW

Reply to Washington, D.C.

January 7, 2005

04-CV-075
Request to testify
2/11 DC

VIA FACSIMILE (202-502-1766)
Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Court
Washington, D.C. 20544

Re: Request to Testify at the February 11, 2005 Hearing on Proposed Amendments to the Federal Rules of Civil Procedure

Dear Mr. McCabe:

I request that I be permitted to testify before the Advisory Committee on Civil Rules at its February 11, 2005 public hearing in Washington, D.C., regarding the proposed rules relating to electronic discovery. I am also preparing written comments that I will submit prior to the hearing. My contact information is as follows:

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Thank you.

Very truly yours,

William P. Butterfield

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04-CV-075 Testimony 2/11 DC

Testimony of William P. Butterfield
Before the Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
February 11, 2005
Washington, D.C.

I. Introduction

My name is William P. Butterfield. I am a partner at Finkelstein Thompson & Loughran ("FTL"), a law firm with offices in Washington, D.C. and San Francisco, CA. FTL focuses its practice in complex litigation – usually on behalf of plaintiffs – involving antitrust violations, securities and commodities fraud and consumer fraud in federal and state courts throughout the country.

FTL helped pioneer the expanded use of electronic discovery in complex litigation. In the early 1990's, FTL was instrumental in the creation and implementation of a nationwide remote discovery project involving thin client server access to over a million documents and other materials necessary to prosecute *In re: Prudential Sec. Inc. Ltd. Partnerships Litig.*, MDL No. 1005 (S.D.N.Y.), a nationwide securities case. For this project, FTL used software applications and computers to manage and disseminate electronic documents and information to attorneys all over the country.

With the evolution of technology, FTL has remained in the forefront of electronic discovery methods in complex litigation. In numerous cases, FTL has managed all aspects of electronic discovery, from document preservation issues, to data mining, to designing and implementing extranets used to house documents in preparation for trial.

Our firm has hands-on experience with the issues raised by the proposed amendments to the Federal Rules of Civil Procedure as well as the effect such

amendments would have on the ability of plaintiffs, in particular, to procure and manage in a fair and logical manner the documents necessary for the prosecution of their claims.

II. Summary of Comment

While I applaud the Committee's efforts to address some thorny electronic discovery issues, I believe that the proposed amendments inadequately incorporate the current standards under the Federal Rules of Civil Procedure and result in increased ambiguity and complexity as well as decreased equity among the parties. In particular, Rule 26(b)(2) already authorizes the court to limit discovery based on an analysis of several factors. Rule 26(c) allows a party to seek protective orders to further limit discovery based on, among other considerations, the extent to which the discovery sought constitutes an undue burden or expense. Rather than authorizing the responding party to unilaterally assess the discoverability of data based on its analysis of an additional, determinative factor that is solely within its control – i.e. accessibility – the Rules simply should add this factor to the court's list of considerations in Rule 26(b)(2) and (c). Placing this determinative factor in the hands of the producing party rather than the court not only upsets decades of judicial interpretation regarding the scope of discovery, it also creates an incentive for all parties – especially corporate entities - to bury data, even before litigation becomes imminent. In addition, the increased standard of proof that must be met in order to exact punishment for dilatory conduct under the "safe harbor" provision in Rule 37(f) provides unwarranted protection to parties refusing or destroying documents even in cases where such information might otherwise be discoverable.

Ultimately, the combination of the "not reasonably accessible" language in Rule 26(b)(2) and the "safe harbor" provision in Rule 37(f) creates a dangerous interplay

whereby documents can be withheld but improperly destroyed without consequence – i.e. a "hide and destroy" mentality.

III. Not Reasonably Accessible

Proposed Rule 26(b)(2) provides that:

> *A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.*

a. Authorizing the producing party to determine accessibility issues under Rule 26 (b)(2) creates a "hide" incentive

Proposed Rule 26(b)(2) improperly places discretion in the producing party rather than the court to ultimately decide the issues of discovery scope and undue burden. In so doing, the proposed amendments fail to take advantage of decades of judicial interpretation as to the parameters of discovery and, more disturbingly, create a "hide" incentive that decreases business productivity and deprives legitimate discovery to requesting parties.

Under current Rule 26(b)(2), as well as Rule 26(c) regarding protective orders, the court is authorized to limit the scope and nature of discovery after considering certain enumerated factors. The proposed amendments create an additional factor, accessibility of electronic data, and place authority to consider that factor in the hands of the producing party – the very entity that controls the manner and protocol for storing its information electronically. This responsibility is improperly delegated.

Moreover, business needs and resources should dictate a company's electronic information storage protocols, usually in conjunction with a formal document retention

and destruction policy. The language in proposed Rule 26(b)(2) threatens to upset the ordinary development and operation of these protocols by introducing and codifying a new consideration that goes beyond business needs and resources; namely, the threat of litigation.

A simple example illustrates the corrosive effect that proposed Rule 26(b)(2) would have on the customary and expected development of electronic information storage protocol. Company X is a large corporation which, like most large corporations, uses electronically stored information on a daily basis. Having such information in an accessible format and location is an important asset to the company; improved accessibility is a goal for which Company X strives. The company's document retention and destruction policy reflects this goal, and Company X is continually working towards improved storage capacity, accessibility and readability so that it can increase the amount of information that may prove relevant to its operation.

Company X also has a responsibility to protect itself from litigation. A brief review of proposed Rule 26(b)(2) conveys one instruction to Company X: To decrease exposure in the event of litigation, make electronically stored information less accessible. As a result of this instruction, Company X curtails its efforts to expand accessibility – for example, by failing to adopt new technologies that would make it easier to retrieve inactive data.

Unfortunately, the inconvenience suffered by Company X is eclipsed by the inequity inflicted upon any party requesting relevant, electronically stored discovery from Company X during the course of litigation. Such requesting party is now confronted with the prospect of being denied otherwise discoverable information as a result of the

decision by Company X that such information – the storage, handling and destruction of which the company controls – is not reasonably accessible.

As this simple example illustrates, the incentive provided by proposed Rule 26(b)(2) is contrary to the business interests of corporate America, which will be compelled to heed the Rule's "hide" instruction even at the expense of their own daily needs. Equally if not more important, the proposed Rule deprives parties of electronic information with potentially critical discovery that might otherwise have been accessible. Placing the accessibility factor in the court's domain rather than the hands of the producing party will allow that factor to become part of the overall analysis as to discovery scope and significantly lessen the incentive to bury data.

b. Proposed Rule 26 (b)(2) creates disincentives for corporations and other responding parties to adopt new technology that would reduce costs and enhance backup document retrieval

The proposed rule provides a disincentive for corporations to readily adopt technological advances that would make it easier and cheaper to back up and retrieve inactive data. Corporations or other typical producing parties claim that it is too time-consuming and expensive to search existing backup tapes to find data relevant to document requests lodged by the requesting parties. When new technology is introduced which makes it less expensive and less burdensome to search within backup data for relevant files, proposed Rule 26(b)(2) provides little incentive for corporations to take advantage of such seemingly beneficial developments. Corporations may not advantage of these technological advances after determining that they would have deleterious effects on their discovery litigation strategy. Indeed, the message articulated by proposed Rule 26(b)(2) is that responding parties either can avoid producing backup material and

other so-called "inactive" electronic files, or make it very difficult and expensive for requesting parties to obtain such information. This message is exactly contrary to the search for truth.

c. Recent advances in data retrieval technology cast doubt on the rationale behind proposed Rule 26(b)(2)

As discussed above, proponents of proposed Rule 26(b)(2) argue that responding parties need protection from any obligation that would require time-consuming retrieval of backup data. Recent advances in backup retrieval technology cast doubt on this common accessibility excuse. For example, new versions of standard full text searching and retrieval applications now make it possible to search email stores such as Microsoft .pst files, Lotus Notes files and other standard forms of internet mail format, thereby allowing quick retrieval of relevant emails (and attachments) from restored backup tapes.[1] Another technological advance makes it possible to archive data so that it is readily retrievable on backup media.[2]

As explained above, any argument that the "not reasonably accessible" standard is designed to accommodate technological changes[3] is undermined by the disincentives in the proposed Rules for a corporation to adopt such improvements. What is reasonably accessible to one company that adopts new data retrieval technology may not be reasonably accessible to another company, which chooses to spend its money elsewhere or which deliberately chooses not to develop the means by which to make its backup records available to litigants.

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[1] For example, the ISYS Search Software application makes it possible to quickly and accurately search over 140 different file formats, including Microsoft Outlook and Lotus Notes files.

[2] EMC Corporation's Legato Product includes an e-mail archiving application known as EMAILXTENDER.

[3] *See, e.g.*, Noyes, New Rules for E-Discovery, 71 TENN. L. REV. 505, 637.

d. Litigating "not reasonably accessible"

In addition to providing an incentive to bury data, proposed Rule 26(b)(2) will result in a dramatic increase in motions practice: It is difficult to conceive of a situation where the producing party will not classify at least a portion of their materials as "not reasonably accessible" or a scenario where such designations – again, determined by the party who controls and ascertains such accessibility - would not be challenged to some degree by the requesting party.

This added layer of litigation is made inevitable and unavoidable by the structure of proposed Rule 26(b)(2). The procedure articulated in proposed Rule 26(b)(2) for challenging the "not reasonably accessible" designation imposes a requirement for formal litigation by motion rather than the traditional process of meet and confer. The responding party is compelled under the proposed amendment to support its initial designation. Ultimately, a court is called upon to analyze the relevant briefing, affidavits, exhibits and arguments in order to determine whether the requesting party has made a showing of "good cause."

Under current discovery procedures, informal negotiations are the driving force behind logical and fair compromise; meet and confer meetings often resolve, partially or completely, the need to include the court and thereby save the judiciary and the parties countless hours of haggling and motions practice. To replace such time-honored and time-saving procedures with an immediate march to formal briefing can only be described as a step backwards.

This added layer of litigation is especially unnecessary in light of the protections already afforded to responding parties. Parties seeking discovery under the current Rule

26(b)(1) must demonstrate that any requested information is "reasonably calculated to lead to the discovery of admissible evidence." As applied, this standard requires a requesting party to tailor its discovery requests to relevant electronic data, such as specific classes of emails and documents. Current Rule 26(b)(2) directs a court to further limit requests where the discovery sought is cumulative, duplicative, otherwise available from more convenient sources, or where reference to a variety of other factors indicates an undue burden when compared to the utility and importance of the information. Also, Rule 26(c) allows a responding party certain protections from discovery requests that would generate undue burden or expense. Discovery scope and burden under Rule 26(b) and (c) is assessed by reference to a variety of delineated factors that can be argued by the litigants. A court's weighing of these factors, and any purported burden, is driven by decades of precedent.

Proposed Rule 26(b)(2) adds a "good cause" requirement that unfairly expands the parameters of these limitations, especially in light of the fact that information regarding the accessibility of the requested information is solely in the possession of the responding party. This shift in focus – whereby the requesting party must further justify its discovery requests by reference to typically unavailable details regarding the storage of a respondent's electronic data – places the requesting party at an undeniable and significant disadvantage. The requesting party must demonstrate the value of the requested information without having a single opportunity to view such data and is confronted with counter-arguments involving accessibility factors beyond their control or comprehensive understanding. The search for truth is not served by this protocol.

IV. Safe Harbor

Proposed Rule 37(f) provides that:

> *Electronically Stored Information. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if: (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.*

The proposed safe harbor provision should be rejected or modified for at least two reasons: (1) It appears to abrogate well-established legal authority requiring parties to retain discoverable information before lawsuits are filed if there is reason to believe that such information will be relevant to imminent litigation, and (2) it creates a loophole for responding parties to destroy relevant information even after lawsuits are commenced. As with the proposed rule regarding document accessibility, the safe harbor provision provides far too much latitude to the responding party to decide when electronic records can be destroyed.

a. The safe harbor provision of proposed Rule 37 (f)(1) potentially abrogates well-established legal authority requiring parties to retain discoverable information prior to the filing of a complaint where there is reason to believe that such information will be relevant to imminent litigation

Consider this hypothethcal: Party A believes that it has a legal claim against Party B. To avoid litigation, Party A approaches Party B with a settlement demand prior to filing a complaint. Party B rejects the settlement demand and proceeds to immediately destroy all emails and other electronic records relevant to the claims of Party A. If Party A subsequently files its complaint, is the search for truth served if Party B enjoys the safe harbor afforded by proposed Rule 37(f)?

The duty to preserve electronic records arises prior to the filing of a lawsuit where the producing party has notice that those records are relevant to future litigation. In *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-18 (S.D.N.Y. 2003) ("*Zubulake IV*"), the court explained that, "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[4] *Zubulake IV* follows several earlier decisions supporting this conclusion. See, e.g., *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 236 (2d Cir. 2001) (providing that the obligation to preserve evidence arises when a party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation); *Rowe v. Albertsons, Inc.*, 2004 U.S. App. LEXIS 20959, at *8 (10th Cir. Oct. 7, 2004)(noting that preservation obligations arise depending on "whether it was reasonable for the investigating party to anticipate litigation and prepare accordingly"); *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988)(stating that, "if the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved" and that "a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy"); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001)(stating that "[t]he duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation").

[4] While the court in *Zubulake IV* excluded "inaccessible backup tapes" from this required litigation hold, recent technological advances have cast doubt on the rationale for that exclusion. *See Infra* at section IV(b).

By providing that the duty to preserve electronically stored information arises when the party "knew or should have known the information was discoverable *in the action,*" (emphasis added), proposed Rule 37(f)(1) creates considerable ambiguity over whether it departs from the well-established case law by implying that the duty to place a litigation hold does not arise until after a lawsuit is filed.

b. Proposed Rule 37(f)(2) improperly creates incentives for responding parties to destroy relevant electronic evidence with impunity

The "destroy" incentive is evident from a continuation of our earlier hypothetical: After Party A files its lawsuit, Party B fails to take steps to reprogram its record-keeping software to prevent automatic deletions of relevant electronic records. Does proposed Rule 37(f)(2), which forgives a party's failure to preserve electronic records that results from "the routine operation of the party's electronic information system," still provide safe harbor? In other words, even where a party has an absolute duty to preserve relevant electronic records, the proposed Rules appear to allow a loophole whereby that party can simply fail to reprogram its software to prevent automatic destruction of those records and not suffer any consequences. Computers do not have a mind of their own. To offer safe harbor because the party controlling its computer system failed to place a litigation hold on the automatic destruction of relevant electronic records is contrary to the purpose underlying the Federal Rules of Civil Procedure.

c. Recent advances in backup technology raise doubt about the rationale behind proposed Rule 37(f)

As noted above, proponents of proposed Rule 37(f) argue that responding parties need protection from any obligation that would require them to maintain backup data. Such proponents claim that it is too expensive to maintain backup tapes for long, because

of the volume and expense of backup media. While acknowledging that the common law duty to preserve evidence "clearly" extends to electronic documents, the authors of *The Sedona Principles* contend that "preserving backup tapes would require the time-consuming and costly process of reprogramming backup systems, manually exchanging backup tapes, and purchasing new tapes or hardware."[5]

It should come as no surprise that there have been significant advances in the technology for electronic data storage and retrieval since the publication of the Sedona Principles and Judge Scheindlin's series of decisions in *Zubulake*. Although some hurdles remain for legacy data, new backup media technology eliminates many of the concerns expressed by corporations regarding the volume and expense of maintaining backup tapes. These solutions make it clear that corporations now have the ability to back up data inexpensively, and the Federal Rules should not provide an excuse to destroy or make inaccessible data that would be relevant to legal proceedings.

d. Proposed Rule 37(f) will create more litigation and waste judicial resources

At present, there is no need for requesting parties to seek a document preservation order unless there is reason to believe that the responding party is not abiding by its obligations to preserve documents under well established legal principles. Proposed Rule 37(f) will change that landscape. To avoid the consequences of proposed Rule 37(f), plaintiffs' attorneys will almost certainly seek a document preservation order in any case involving electronic records. Instead of eliminating litigation over electronic document

[5] *See* The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, Comment 5.g., pg. 24-25 (Jan. 2004) (stating that "because backup tapes generally are not retained for substantial periods, but are instead periodically overwritten when new backups are made, preserving backup tapes would require the time-consuming and costly process of reprogramming backup systems, manually exchanging backup tapes, and purchasing new tapes or hardware. . . Organizations that use backup tapes for archival purposes should be aware that this practice is likely to cause substantially higher costs for evidence preservation and production in connection with litigation.")

destruction, the safe harbor will simply push these issues into the courtroom, thus further taxing limited judicial resources.

e. There is a dangerous interplay between Rule 26(b)(2) and Rule 37(f) that reinforces a "hide and destroy" incentive

The combination of the "not reasonably accessible" standard in proposed Rule 26(b)(2) and the "safe harbor" provision in proposed Rule 37(f) creates a dangerous interplay whereby documents can not only be withheld, but improperly destroyed without consequence. This "hide and destroy" incentive is directly in conflict with parties' obligations under decades of discovery precedent.

As noted above, proposed Rule 26(b)(2) empowers the responding party, not the court, to determine whether electronic information is "not reasonably accessible." Once that determination is made, the responding party might reason that such materials – by virtue of being inaccessible - are not "discoverable" and may therefore be destroyed without consequence pursuant to the safe harbor provision in Rule 37(f)(1).

Once the documents are destroyed, they are no longer producible in the litigation. Despite the best efforts of proposed Rule 26(b)(2) to provide a specific procedure by which the "not reasonably accessible" determination is tested, a producing party can skirt such a procedure using this critical loophole. Court-required proof that the electronic information is inaccessible would never be required, let alone challenged. The net result of this loophole is that a requesting party will never have the opportunity to prove that the electronic information was improperly destroyed, determine the value that such electronic information may have held for their claims, or prove a motion for sanctions against the producing party who destroyed their own data.

Comments in the Committee Note to Rule 37(f) recognize the potential for abuse by parties who designate information as not reasonably accessible but nonetheless *should* take care to preserve such information. However, without specific edits to the proposed language, such comments will not adequately shelter requesting parties from such abuse. Rather, to close this loophole, the language of the "safe harbor" provision must explicitly exclude protection for the destruction of any documents where the determination that such documents are not discoverable was based on the conclusion that such information is "not reasonably accessible." Phrased differently, where a producing party has made a determination that certain electronic information is "not reasonably accessible," and has destroyed that information based on their conclusion that information which is "not reasonably accessible" is therefore not "discoverable," the safe harbor provision should be inapplicable and sanctions made available.

V. Conclusion

As an attorney who has pursued claims on behalf of plaintiffs against large corporations for more than a decade, I understand that the search for truth must be tempered by reason and equity. The Federal Rules of Civil Procedure have achieved this balance by maintaining the flexibility to adapt to developments in quickly-changing fields such as electronic discovery. Occasionally, amendments to the Rules facilitate better adaptation, and the Committee's efforts in identifying the areas that would best be served by such amendments are admirable.

However, the proposed amendments place too much discretion in the parties, particularly the responding parties, to self-diagnose what is appropriate for discovery. This approach tips the balance of equities against parties pursuing the relevant discovery

necessary to support their claims. The Federal Rules of Civil Procedure already demand that any requested information be reasonably calculated to lead to the discovery of admissible evidence, and already provide limitations on parties' abilities to seek abusive or burdensome discovery. FED. R. CIV. P. 26(b)(1), 26(b)(2), 26(c). If accessibility to electronic data must be made an explicit consideration in assessing discoverability, it should be a consideration for the court, which is already tasked with determining appropriate limitations.

By providing a safe harbor to parties that destroy electronic data by automatic measures, or that destroy data that they deem undiscoverable according to their own accessibility protocols, the proposed amendments open an era of ambiguity and negative incentives for litigants - to bury data, to reject efficient technology and to litigate discovery disputes rather than streamline production through informal meet and confer efforts.

Thank you for the opportunity to present my views to the Committee on these important issues.