To be Submitted by:
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New York Supreme Court

Appellate Division—First Department

VOOM HD HOLDINGS L.L.C.,

Plaintiff-Appellant,

– against –

ECHOSTAR SATELLITE L.L.C.,

Defendant-Respondent.

AMICUS CURIAE BRIEF OF LAWYERS FOR CIVIL JUSTICE

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PRELIMINARY STATEMENT

Lawyers for Civil Justice (LCJ) submits this proposed *amicus curiae* brief in support of Defendant-Appellant's appeal seeking reversal of the Supreme Court's order of November 3, 2010 (the "Order").

The Order and its newly-minted and unclear standard will impose an unduly burdensome and enormously expensive obligation on all participants in large-scale civil litigation proceedings. Under the standard adopted by Supreme Court in this case, corporations throughout the United States will be required to suspend document retention policies when one of its employees "reasonably anticipates" that a routine business dispute (here a contract dispute) may result in litigation. Essentially, this new standard triggers the duty to preserve based on a mere "possibility" of litigation, which is far too broad considering the potential cost. Supreme Court's ruling must be reversed and the well settled New York standard clarified or restored. A rule requiring notice of litigation or at least a reasonable probability of litigation before the duty to preserve is triggered should be retained.

Accordingly, *Amicus* urges this Court to reverse the Order based on the following:

(1) Supreme Court applied an incorrect standard regarding when the duty to preserve documents and electronically stored evidence is triggered,

by adopting an unclear and oft-criticized standard used by a federal district court in New York;

(2) Supreme Court should have applied the existing New York rule which provides that a duty to preserve is triggered when a party is on notice of litigation or litigation is likely;

(3) this Court should enunciate a clear and easily understood standard for when the duty to preserve potentially relevant documents is triggered;

(4) the enormous cost and burden of undertaking massive preservation activities based on the mere possibility of litigation outweighs the minimal benefit offered by abandoning existing New York law;

(5) the Order creates complete uncertainty and inequity regarding how a court will determine culpable state of mind by imposing a severe sanction without compelling proof of "culpable" destruction or negligent destruction after a party has been placed on notice of potential litigation; and

(6) Supreme Court's Order provides an incentive to parties with non-meritorious causes of action or defenses to bait their adversary into a spoliation violation by planting seeds of future litigation in their ordinary business dealings – promoting a true game of "gotcha" in civil litigation.

Parties to litigation, as well as those who *might* be parties, will face a tremendous burden of having to preserve significant volumes of information at the mere possibility of litigation, even if the prospect of litigation is

relatively remote. The Order will have a profound impact on all companies that do business in New York. These companies will have to significantly increase the number of "litigation holds" related to New York litigation and expand the volume of information subject to preservation to avoid spoliation sanctions in New York.

Regrettably, Supreme Court overlooked the fact that New York has already articulated the applicable standard to determine when the duty to preserve is triggered. Under New York precedent, the duty is triggered when a party is on notice of litigation, on notice that evidence will be necessary in litigation or when litigation is "reasonably likely."

Although not the optimal standard (as discussed below), the "reasonably likely" trigger is a fairer and more concrete approach that places companies on notice of their duty to preserve when they become aware that litigation is "likely" or "probable", rather than simply possible. This distinction is significant. There are many circumstances where litigation appears possible but not likely. The number of required holds under Supreme Court's standard is infinitely larger, resulting in vast over-retention and preservation of data for which there is no legitimate business purpose or litigation need.

To adhere to Supreme Court's new rule, failure to implement a "litigation hold" at the slightest hint of litigation will result in collateral

litigation seeking sanctions as opposed to focusing efforts on the merits of the litigation. Litigation battles over discovery increasingly have become a major tactical device used by parties to gain leverage in litigation. To avoid the risk of being caught in this expensive and dilatory process, parties in future litigation will likely find it necessary to undertake significant prophylactic efforts that will increase costs inordinately, without any meaningful increase in the volume of relevant data actually produced during discovery and used in litigation.

Supreme Court's Order further encourages plaintiffs to focus on companies who have lost spoliation fights in the past to argue the "repeat offender" syndrome, even when the prior dispute bears no connection to the current claim of spoliation. Companies that have fallen victim to this issue are now doomed to wearing a scarlet "S" despite best intentions, current efforts to preserve and without any evidence of willful efforts to destroy or hide potential evidence. Supreme Court's Order will permit courts to completely ignore any effort to improve preservation practices since the prior dispute. While focusing on conduct in unrelated prior litigation may ease the burden on courts it fails fundamental notions of fairness.

Finally, this Order will open the floodgates to spoliation litigation in all complex litigation actions. Experienced and competent attorneys are provided great incentive to press spoliation claims in order to gain an unfair

advantage in litigation by merely pointing to one or two missing emails – a surprisingly easy task given the complexities of modern information systems. The reward is a potential adverse inference instruction and the inevitable credibility consequences before a jury. Parties will be hard pressed to achieve compliance sufficient to avoid sanctions pursuant to the preservation obligations required by Supreme Court.

This Court should reverse Supreme Court's Order and continue to adhere to the "reasonably likely" standard accepted in New York State Courts, with perhaps some additional guidance or factors to be considered in making that determination.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case set forth in the Brief for Defendant-Appellant.

STATEMENT OF INTEREST OF AMICUS CURIAE

Lawyers for Civil Justice is a national organization of corporations, defense bar associations and participating law firms supporting civil justice reform. The corporate and defense counsel representatives participating in LCJ draw upon their legal expertise and litigation experience to promote excellence and fairness in the U.S. legal system by providing a defense perspective on federal and state legislative enactments and recent judicial decisions.

LCJ combines the expertise of defense trial lawyers with the support of a significant segment of the business community. With members throughout the United States, LCJ is supported by three national defense trial lawyer associations and works closely with over 60 state defense trial lawyer associations. The three national associations are DRI, the Federation of Defense and Corporate Counsel, and the International Association of Defense Counsel.

Lawyers for Civil Justice is based in Washington, D.C. and operates throughout the United States.

LCJ members are frequently confronted with issues of preservation of documents and electronically stored information during litigation, including pre-litigation conduct, as analyzed by courts during litigation. As such, the analysis that courts apply to determine when the duty to preserve evidence is triggered, the existence of prejudice (if any) and the existence of sufficient culpability to warrant the most severe sanctions (such as an adverse inference jury charge) is of the utmost importance to LCJ members.

In light of the experiences of a corporate membership that spans a diverse group of companies in a wide range of businesses, LCJ explains herein the statewide and national impact Supreme Court's November 3, 2010 Decision and Order will have on any company that creates and maintains business records (whether or not the records are in paper or electronic form). LCJ also discusses the specific impact that Supreme Court's November 3, 2010 Decision and Order will have on companies conducting business in New York.

As a representative of a broad cross-section of American and international businesses, LCJ is in a unique position to discuss the public policy implications of Supreme Court's November 3, 2010 Decision and Order.

ARGUMENT

I. NEW YORK HAS ALREADY ADOPTED A CLEAR NOTICE STANDARD FOR WHEN THE DUTY TO PRESERVE IS TRIGGERED

Supreme Court adopted an entirely new standard – "reasonable anticipation of litigation" – for New York state court proceedings regarding when the duty to preserve is triggered. This standard is a departure from well settled New York law requiring notice to trigger a defendant's duty to preserve. Litigants (as well as "prospective" litigants) will have greater difficulty determining when the duty to preserve has been triggered in New York if courts abandon the clear "notice" standard used in New York for the vague and unworkable standard used by Supreme Court. Reasonable anticipation of litigation as a standard does not provide a clear and consistent test for when parties should begin to preserve information.

In the absence of "pending litigation" or "notice of a specific claim," defendants should not be sanctioned for discarding items in good faith and pursuant to normal business practices. This rule was articulated in *Conderman v. Rochester Gas & Electric*, 262 A.D.2d 1068 (4th Dep't 1999). In *Conderman* the Fourth Department specifically rejected "anticipated litigation" as a standard triggering the duty to preserve evidence.

In *Conderman*, plaintiff was driving on a public road when 14 utility poles broke during an ice storm causing injury. Defendants repaired the poles and discarded the broken poles pursuant to standard practices. Plaintiff sought spoliation sanctions. The Fourth Department held that it would be unreasonable to impose a duty to preserve evidence based on "anticipating the possibility of litigation." 262 A.D.2d 1068, 1070.

This Court has cited to *Conderman* for the rule that notice is a prerequisite to sanctions for inadvertent or negligent destruction. See *Diaz v. Rose*, 40 A.D.3d 429 (1st Dep't 2007) (routine disposal of foreign body removed during surgery is not spoliation absent "knowledge of its potential evidentiary value or plaintiff's claimed need for it."); *Longo v. Armor Elevator*, 278 A.D.2d 127 (1st Dep't 2000) (routine disposal of elevator parts after repair); *Flomenbaum v. New York University*, 71 A.D.3d 80 (1st Dep't 2009) (cited by dissenting opinion) (spoliation sanction should have been granted when destruction of documents took place *four months after* litigation commenced, because a party has a duty to preserve once a party is "on notice" that the evidence might be needed for future litigation).

In a case involving lost records, sanctions were not deemed appropriate by this Court because the loss of records took place before the custodian of records "had *notice* of an impending action by plaintiff." *Bach v. City of New York*, 33 A.D.3d 544 (1st Dep't 2006).

The Second Department has also adopted the notice rule as triggering the duty to preserve evidence prior to commencement of litigation. In *New York Cent. Mut. Fire Ins. Co. v. Turnerson's Elec.*, 280 A.D.2d 652, 653 (2d Dep't 2001) the court held that harsh sanctions may be appropriate "even if the evidence was destroyed before the spoliator became a party, provided it was *on notice* that the evidence might be needed for future litigation." *Id.* quoting *DiDomenico v. C & S Aeromatik Supplies,* 252 A.D.2d 41, 53 (2d Dep't 1998) (emphasis supplied).

In a case involving alleged destruction of documents, the Second Department reversed the harsh sanction of striking an answer because "plaintiffs failed to demonstrate that the purported loss of [a document] and a [paper] file were the result of intentional or negligent conduct on the appellant's part *after* it was placed *on notice* that this evidence might be needed for further litigation." *Huezo v. Silvercrest*, 68 A.D.3d 820, 821 (2nd Dep't 2009) (emphasis supplied). In addition, the Second Department held that plaintiffs failed to show that the missing documents were "central to their case, or that they were prejudiced by the purported loss." *Id*.

The Third Department has also adopted notice as triggering the duty to preserve evidence prior to commencement of litigation. In *Dobson v. Gioia*, the Third Department affirmed the denial of spoliation sanctions when defendant discarded parts to the product at issue pursuant to routine

business practices because plaintiff never informed defendant she was injured. The Third Department held: "courts are reluctant to impose [sanctions] when a party is not yet *on notice* of a pending claim, and the evidence was discarded in 'good faith and pursuant to its normal business practices.'" 39 A.D.3d 995, 998 (3d Dep't 2007) (quoting *Conderman*, 262 A.D.2d 1068) (emphasis supplied).

Although the Court of Appeals has not directly articulated a pre-litigation standard for when the duty to preserve is triggered, it has analyzed the duty to preserve. Its analysis was conducted in the context of cases entertaining the viability of the tort of negligent spoliation of evidence in New York. The tort has been rejected, largely because remedies exist in New York against spoliators. See *MetLife Auto & Home v. Joe Basil Chevrolet*, 1 N.Y.3d 478 (2004) and *Ortega v. City of New York*, 9 N.Y.3d 69 (2007).

In *MetLife*, the Court of Appeals held that "[t]he burden of forcing a party to preserve when it has *no notice* of an impending lawsuit" coupled with the difficulty of assessing damages militate against the tort of spoliation. 1 N.Y.2d 478, 484 (emphasis supplied). In *MetLife* the Court of Appeals cited to a laundry list of cases where a cause of action for negligent spoliation was rejected because the parties were never "put on notice" that a lawsuit was contemplated. See *Id*. citing *Monteiro v. R.D. Werner Co.*, 301

A.D.2d 636 (2d Dept 2003) (municipality was not on notice that an action was contemplated); *Ripepe v. Crown Equip. Corp*., 293 A.D.2d 462 (2d Dep't 2002) (employer had no duty to preserve a pallet jack because it was not on notice that the evidence would be needed for litigation); *Curran v. Auto Lab Serv. Ctr.*, 280 A.D.2d 636, (2d Dep't 2001) (plaintiff could not bring a third-party action against his employer for failure to preserve a truck destroyed in an accident because the employer was not on notice to preserve it).

In *Ortega v. City of New York*, the Court of Appeals revisited the duty to preserve evidence while analyzing the tort of negligent spoliation. 9 N.Y.3d 69. Citing to its prior opinion in *MetLife*, the Court held that it was unnecessary to rule whether such a tort was viable in New York [then] "because plaintiff [in *MetLife*] had failed to establish a fundamental element—that the party who destroyed the evidence owed plaintiff a duty to preserve it." 9 N.Y.3d 69, 76. In *Ortega* the court did not analyze the duty to preserve, as it did in *MetLife*, but cited to another laundry list of cases and attendant remedies available to parties to litigation. Two of the cases cited are from this Court.

In *Standard Fire Ins. Co. v. Federal Pac. Elec. Co*., 786 N.Y.S.2d 41 (1st Dep't 2004), this Court dismissed the subrogation lawsuit initiated by Standard Fire, because a key piece of evidence was missing – an electrical

panel manufactured by defendant. Addressing harsh sanctions for pre-litigation conduct this Court held: "[t]he sanction of striking a pleading has been applied even in instances where the destruction took place before litigation, provided the spoliator was *on notice* the evidence might be needed for future litigation." 786 N.Y.S.2d 41, 46 (emphasis supplied).

Another First Department case cited by the Court of Appeals in *Ortega*, was *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170 (1st Dep't 1997). *Kirkland* has been widely cited throughout New York as the standard for when spoliation sanctions are appropriate against a plaintiff that has lost a crucial item of evidence necessary to plaintiff's claim. In *Kirkland* plaintiff's pre-litigation destruction of the crucial item of evidence – the product at issue – so prejudiced defendant that dismissal was warranted. When the duty to preserve was triggered, however, was not discussed in *Kirkland*.

A. THE TRIGGER STANDARD EMPLOYED BY SUPREME COURT IS NEITHER CLEAR NOR PRACTICAL IN THE CONTEXT OF BUSINESS PRACTICES

In its Order, Supreme Court relied on the "reasonably anticipated" standard articulated in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). As discussed, this standard is not the law in the State of New York and, furthermore, has been widely criticized as failing to provide

the necessary guidance to apprise parties of when the duty to preserve relevant information for litigation arises.

The fundamental flaw with this standard is that it is so vague that it simply does not provide sufficient, practical guidance to allow parties to make reasonable, informed decisions with respect to when their duty to preserve is triggered. This uncertainty creates substantial risks: either parties will face the allegation of spoliation (with attendant costly and distracting ancillary litigation) or parties will engage in wasteful and inefficient over-preservation (to avoid the specter of spoliation). The later efforts undermine business efficiency, often lead to higher discovery costs and force compromising data storage decisions that can degrade the competitiveness of the business. As a result companies choosing to conduct business in New York face a higher cost than in other jurisdictions with a clear and appropriate trigger standard.

For example, the New York City Bar Association Report on Electronic Discovery criticizes the "reasonably anticipated" standard articulated in *Zubulake* as "vague."[1] In its report, the New York City Bar Association recommended that the appropriate standard for determining when the duty to preserve arises is at the point of "becoming aware of

[1] Association of the Bar of the City of New York, *Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR, Joint Committee on Electronic Discovery* at 11 (2009).

circumstances which would lead a reasonable person in the party's position to believe that future litigation is likely."[2] (Emphasis added).

Similarly, the Federal Courts Committee of the New York City Bar has criticized the *Zubulake* standard as one that "creates great uncertainty for litigants."[3]

Indeed, a higher "credible probability" standard has been adopted by *The Sedona Conference Commentary on Legal Holds*[4] (the "*Legal Hold Commentary*"), the public comment version of which Judge Scheindlin relied on in her decision in *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Amer. Sec., LLC*, 685 F.Supp.2d. 456 (S.D.N.Y. Jan 15, 2010, as amended May 28, 2010).[5]

Guideline 1 of *The Legal Hold* states that:

> A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating

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[2] *Id*. at 10-12.
[3] Federal Courts Committee of the Association of the Bar of the City of New York, *Proposals for the 2010 Duke Conference Regarding the Federal Rules of Civil Procedure* at 11-12 (Apr. 2010).
[4] The Sedona Conference, *Commentary on Legal Holds: The Trigger & The Process*, 11 The Sedona Conference J. 265 at 269 (Fall 2010).
[5] Courts throughout the country rely upon The Sedona Conference to provide clarification in areas of law where clear guidance is lacking, particularly in the area of electronic discovery. *See, e.g., Susquehanna Commercial Fin., Inc. v. Vascular Resources, Inc.*, No. 1:09-CV-2012, 2010 US. Dist. LEXIS 127125, at *40 (M.D. Pa. Dec. 1, 2010). ("In order to resolve disputes that arise regarding the production of metadata or ESI, courts have generally referred to the Sedona Principles and Sedona Commentaries, which are recognized as 'the leading authorities on electronic document retrieval and production.'")

> litigation, or when it takes specific actions to commence litigation.

The commentary to Guideline 1 explains that "a duty to preserve is triggered *only* when an organization concludes (or should have concluded), based on credible facts and circumstances, that litigation or a government inquiry is probable." It is important to note that the standard articulated by *The Legal Hold Commentary* was revised between the publication of the public comment version of *The Legal Hold Commentary* in August 2007 and the official version in October 2010, to account for evolving jurisprudence and to endorse a standard that provides greater certainty.[6] As explained in the revised preface to *The Legal Hold Commentary*:

> In a nutshell, the edits take into consideration the continued evolution of law and best practices in the area over the past few years. Just as the awareness and consideration of issues involved in implementing legal holds evolved significantly since the founding of the Working Group in 2002 to the initial publication of this document, so too has the legal world evolved since 2007.[7]

Thus, the "credible probability" standard reflects the considered comments received by The Sedona Conference over the course of almost

[6] Guideline 1 of the public comment version of *The Legal Hold Commentary* provided that "[r]easonable anticipation of litigation arises when an organization is on notice of a credible threat it will become involved in litigation or anticipates taking action to initiate litigation." The Sedona Conference, *Commentary on Legal Holds: The Trigger & The Process (August 2007 Public Comment Version)*, at 3.

[7] *Id.* at 266.

three years, culminating in the publication of the clear legal guidance for which The Sedona Conference is renowned.[8]

Litigation holds, by their nature, create a disruption to the normal operations of businesses. Business information systems are typically designed to streamline information management with optimal systems keeping information only as long as the information is actively used or otherwise subject to retention. Efficient management of email systems often include protocols that delete emails after a specified period to avoid accumulation of emails that can degrade the efficient operation of the email system and create a records retention nightmare. Companies can experience tens of thousands to millions of non-spam email messages each month – the inability to control and dispose of many of the emails can make the system unmanageable.

Courts also should not presumptively expect that companies can easily and quickly change their information systems to disable deletion protocols or alter their information systems to accommodate preservation. These systems are not, and should not be, designed to facilitate preservation for litigation purposes. Rather, such systems are engineered and designed to facilitate reliable and effective information exchange and management.

[8] *See, e.g., Susquehanna*, 2010 US. Dist. LEXIS 127125, at *40.

Preservation obligations require undertaking costly steps to disrupt the normal operation of these systems. Additionally, changes to the operation of the systems are often challenging and require considerable effort on the part of a company's information technology staff. Unfortunately, many companies have been forced to create systems designed solely to respond to uncertain preservation obligations. These systems impair operational efficiency and result in significant added costs.

The need for a higher threshold for triggering the preservation obligation has also been recognized by, among others, the Defense Research Institute ("DRI"), the Federation of Defense & Corporate Counsel ("FDCC"), and the International Association of Defense Counsel ("IADC"). Amicus has previously addressed this issue in the Preservation Commentary it submitted with DRI, FDCC and IADC to the Federal Civil Rules Advisory Committee following the Duke Conference on Civil Litigation. The Preservation Commentary proposed a "reasonable certainty of litigation" standard arguing that such a standard would "supply litigants, their lawyers, and judges with more practical guidance in identifying trigger events. . . ."[9] The lack of clarity and consistency in the standards applied to preservation

[9] Lawyers for Civil Justice, et al., *Preservation – Moving The Paradigm*, at 7 (Nov. 10, 2010).

undermines the court system and creates unnecessary burdens on parties and the judiciary.

The systemic problems caused by a lack of clear guidance with respect to preservation, including rampant spoliation allegations by litigants, are well recognized:

> Spoliation of evidence -- particularly of electronically stored information -- has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution. The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information.[10]

Accordingly, this Court should consider the persuasive arguments in favor of a more definite standard and take this opportunity to provide clear guidance to litigants in the form of a "reasonable certainty of litigation" standard for determining when the duty to preserve relevant information arises.

B. SUPREME COURT FAILED TO PROPERLY APPLY EXISTING NEW YORK LAW

In its Order, Supreme Court held 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

[10] *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598, 607 (S.D. Tex. Feb. 19, 2010).

preservation of relevant documents." R. 32.[11] (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)). *Zubulake* is not, and should not be, the law in the State of New York. Indeed, the adoption of this standard is contrary to settled New York law that a party has no obligation to preserve evidence unless "a party is on notice that litigation is likely to be commenced."[12]

However, even assuming *arguendo* that *Zubulake* were the appropriate standard, Supreme Court erred in its application of *Zubulake* to the case before it.

Correspondence regarding a contractual dispute, without the threat of litigation, is simply not sufficient to trigger a reasonable anticipation of litigation.

For example, in a situation strikingly similar to the one before the trial court, the court in *Claude P. Bamberger Int'l, Inc. v. Rohm & Haas Co.*, 1997 U.S. Dist. LEXIS 22770 (D.N.J. 1997) found that defendant had not anticipated litigation when plaintiff's pre-filing correspondence had not

[11] The Record on Appeal is cited as "R. __".

[12] *Fada Indus., Inc. v. Falchi Bldg. Co.*, 189 Misc. 2d. 1, 17 (Sup. Ct. Queens Cty. 2001); see also, *Monteiro v. City of New York*, 301 A.D. 2d 636, 637, 754 N.Y.S. 2d 328, 330 (2nd Dep't 2003) ("Contrary to the plaintiff's contention, neither the fact that the plaintiff was gravely injured nor that the Occupational Safety and Health Administration conducted an investigation at the work site the following day put the City on notice of future litigation or a need to preserve the scaffold [ ]") and *Conderman*, 262 A.D.2d 1068 (in the absence of "pending litigation" or "notice of a specific claim" defendants should not be sanctioned for discarding items in good faith and pursuant to normal business practices).

threatened litigation, but rather sought a business remedy for perceived business wrongdoing.[13] *See also, Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 622 (D. Colo. 2007) (no reasonable anticipation when letter to defendant did not threaten litigation but rather implied that plaintiff was willing to explore a negotiated resolution); *Ind. Mills & Mfg. v. Dorel Indus.*, 2006 U.S. Dist. LEXIS 45637, *4 (S.D. Ind. 2006) (defendant could not reasonably anticipate litigation after receiving a letter from the patent holder which referred to infringement and the possibility of a negotiated resolution but made no threat of a lawsuit).

Based on the facts set forth in the Order, Supreme Court's ruling creates an untenable standard for other corporations. To comply with the expectations in Justice Lowe's decision, corporations will be forced to issue a litigation hold at the outset of any negotiation cycle with an existing counterparty and likely in most negotiations with potential counterparties. Many companies engage in hundreds of these negotiations every month. The vast majority of negotiations never result in litigation – strong positions are taken but most of the time the parties resolve disputes or disagreements prior to litigation. Thus, although litigation is a possible outcome, it is not reasonably probable.

[13] *Bamberger Int'l* at *3.

The cost of implementing premature and unnecessary holds in such situations is significant. Each hold results in substantial costs to the business – each person on hold has to change her normal practices; the company must track and manage the hold; the IT department must change its processes to ensure compliance with the hold; the company has to build an infrastructure to support the substantial increase in data volumes; the company must also provision to manage the release of the hold (which in most cases is almost impossible to determine because the company will not know that it is no longer subject to suit until after the expiration of the longest possible statute of limitations.)

Supreme Court's reasoning could impose upon parties to a contract the obligation to begin preserving relevant information once any disagreement regarding the contract's provisions arose. Such a result would be crippling to businesses and would, perversely, reduce the incentive to reach negotiated settlements when contractual disputes arise.

C. PRESERVATION CONDUCT SHOULD BE MEASURED IN LIGHT OF THE PRACTICAL COMPLEXITIES OF MODERN INFORMATION SYSTEMS

In the digital age information is fluid – not static. In other words, the very benefits of electronically stored information ("ESI") (the speed at which it is created, shared, stored and destroyed) make it extraordinarily

difficult to identify and preserve. The volume of electronic data is increasing at an exponential rate (some estimate the total volume of all data ever created will double in the next year due to the proliferation of electronic data). Real world examples and empirical data demonstrating the magnitude of the problems faced by our members in dealing with preservation issues can be found in two comprehensive white papers submitted to the Federal Rules Advisory Committee, *Reshaping the Rules of Civil Procedure for the 21st Century*[14] and *Preservation – Moving The Paradigm.*[15]

Rather than analyzing the often herculean efforts taken to preserve data in the electronic age some leading federal cases have placed a disproportionate burden on businesses by requiring preservation of *all potentially* relevant data without considering the difficulty and costs involved. Disputes related to preservation have focused on what was lost, rather than focusing on what still exists. Much like some of the current case law in New York, some federal cases discussing deliberate efforts to destroy documents sometimes conflate the general requirements for preservation into what is clearly a case of deliberate misconduct. The focus has been on the reasonableness of a parties efforts to preserve, rather than focusing on

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[14] Lawyers for Civil Justice, et al., *Reshaping the Rules of Civil Procedure for the 21st Century – The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure* (May 2, 2010).
[15] *Preservation – Moving The Paradigm.*

the intent to destroy evidence, whether the missing evidence is crucial to the case or the opposing party is truly prejudiced by a few missing emails.

Given the complexities of modern information systems, Supreme Court's preservation obligations doom companies to failure. Most skilled lawyers can argue an opponent failed to properly preserve some undiscovered pocket of ESI for many reasons; one key custodian was missed, a network location was overlooked or a laptop of a former employee was misplaced irrespective of good faith efforts to preserve the information.

In response, well intentioned companies have fashioned detailed, time consuming and costly preservation procedures, often requiring individual employees to expend significant, resource consuming efforts to preserve data in systems that are designed to limit email mailboxes and to otherwise manage the overwhelming volume of electronic data. Instead of the law evolving with changing technology, the law is imposing costly changes on litigants. To make matters worse, when dealing with electronic data no matter what efforts are taken, some piece of electronic information is likely to be lost or inadvertently destroyed during preservation and discovery due to the complexity of information management (i.e. if a computer is lost or stolen). The fluid nature of digital information is the very antithesis of preservation.

The use by some federal courts of the "reasonable anticipation of litigation" standard has only compounded these problems and has led the federal judiciary to undertake efforts to codify a clearly defined trigger event for putting parties on notice of the need to undertake preservation efforts. As previously discussed, New York already adheres to a notice standard for triggering the duty to preserve evidence.

A number of real world examples of problems faced by companies attempting to implement litigation holds were submitted to the Federal Rules Advisory Committee along with empirical data supporting the need for reform:

(1) Patrick Oot, former Director of Electronic Discovery and Senior Counsel at Verizon, believes that there is a worrisome "creep toward over-protectiveness and unreasonableness" in the scope of litigation holds at many organizations that have attempted to put a "hold" policy in place.[16] Specifically, there is a tendency to identify too many employees as holders of relevant ESI. This leads to excessive retention of ESI that attorneys will eventually review at significant cost.[17]

(2) Jason R. Baron stated in a paper: "I believe the explosive growth of information is transforming the litigation system, and that the current paradigm is broken."[18]

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[16] Institute for the Advancement of the American Legal System, *E-Discovery: A View from the Front Lines* 9 (2008).

[17] *Id. (A*s some of our advisors note, devising an appropriate litigation hold is an art, not a science. For a variety of reasons, discovery in a case can be delayed and many parties fail to understand what exactly needs to be preserved until discovery has begun in earnest. Accordingly, lawyers tend to err on the side of over-retention.)

[18] Jason R. Baron, E-discovery and the Problem of Asymmetric Knowledge, Presentation at the Mercer Law School Symposium: Ethics and Professionalism in the Digital Age

(3) A study of Global 1000 companies was cited.

A survey of Global 1000 companies with revenue over $5 billion was conducted between October 2007 and March 2008.[19] The survey demonstrates with empirical data that the burden on American companies to implement litigation holds is very high. The survey highlights the changes in processes and technology within the surveyed companies, the impact of those changes on reducing risk and cost, and the methodologies used to issue litigation holds, manage preservation, and conduct e-discovery.[20]

The majority of companies surveyed had an average of 980 new matters initiated each year, with an average of 5,100 open matters at any given time across all industries.[21]

The survey discusses the tasks involved to implement a litigation hold pursuant to current federal case law requirements. Based on the data collected the survey includes a hypothetical look at the tasks involved to manage litigation holds across two hundred matters by one large

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(Nov. 7, 2008), *in* 60 Mercer L. Rev. 863 (2009); Am. College of Trial Lawyers & Inst. For the Advancement of the Am. Legal Syst., *Interim Report* A-2 (2008).

[19] Compliance, Governance and Oversight Council, *Benchmark Survey on Prevailing Practices for Legal Holds in Global 1000 Companies* (2008), *available at* http://www.cgoc.com/events/benchmarkwebinar.

[20] *Id.*

[21] *Id.*

organization over one year. The survey projected a staggering 60,000 tasks to simply send out a written litigation hold notice with quarterly reminders.[22]

In a follow up survey, CGOC analyzed the growing problem of IT costs associated with an exponentially expanding universe of data.[23] Although the perception may be that IT costs are marginal, in reality IT costs are rising to keep up with an ever expanding digital universe:

> [T]he widely-held perception in the CGOC legal community is that IT costs are trivial, declining naturally as a function of technology advances rather than headcount or budget reductions, and remain unaffected by blanket legal holds or "keep everything" approaches to mitigating legal risk.
>
> * * *
>
> In fact, IT spend is increasing faster than revenue, despite brute-force 2009 expense reductions of 0.9% on average in response to economic conditions.
>
> * * *
>
> As one respondent put it, "Our data volume grew by 875% in the last five years, but our budget shrank. Something has got to give." This sharp rate increase in data accumulation coincides with the *Zubulake* opinions on legal holds and the emergence of "keep everything" in lieu of more precise legal hold definition and execution — unintended consequences which most companies face as evidenced in legacy data build-up. With high average IT costs (as high as 12% in financial services), over-managing information is a gross waste of capital resources. At the same time, consumer attitudes toward actual or perceived corporate wrong doing are extremely hostile, driving the risk of improper record destruction into the "Court of Public Perception."

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[22] *Id*. p. 22.

[23] Compliance, Governance and Oversight Council, *Information Governance Benchmark Report in Global 1000 Companies* (2010).

The unintended consequence of over preservation in dollars and volume of data is in stark contrast to the perception that it is easy to preserve data. Even more shocking is how apparent the increase in the volume of data correlates to *Zubulake* and the 2006 e-discovery amendments to the Federal Rules of Civil Procedure when presented in graphic form[24]:

Thus, preservation of all data for individuals subject to holds, results in retention of massive amounts of information, the vast majority of which will never be used in litigation. Additionally, as more companies seek to develop best practices to manage the huge growth in data; these practices involve placing limits on mailbox sizes and following records retention practices to delete materials that are no longer needed.[25] Preservation requirements frustrate these efforts and result in inefficient, time consuming and costly efforts to preserve information.

Against this back drop, efforts to preserve data *after* notice of litigation is given through a specific preservation demand or the filing of a lawsuit is a clear more practical approach. The hair trigger developed by Supreme Court is simply not reasonable in the 21st Century. Given the real

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[24] *Information Governance Benchmark Report in Global 1000 Companies*, p. 17 (attached as Exhibit B to Affirmation In Support Of Motion For Leave To Appear As Amicus Curiae).

[25] *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S.Ct. 2129, 2135 (2005) document retention policies are appropriate and created "to keep certain information from getting into the hands of others, including the Government."

hurdles caused by complex information systems, New York should not abandon its current notice rule for a rule that requires preservation simply because litigation is possible or merely anticipated.

D. SUPREME COURT'S ORDER CREATES COMPLETE UNCERTAINTY AS TO HOW CULPABILITY WILL BE DETERMINED AND IS INEQUITABLE

Supreme Court relied upon the retention period employed by EchoStar as evidence of its culpable state of mind.[26] However, absent a duty to preserve relevant information for litigation, a corporation is not obliged to retain emails for which it has no business purpose.[27] Indeed, absent such a duty to preserve, the Supreme Court of the United States has recognized that corporations are entitled to employ document retention policies that mandate the destruction of information which there is no business need to retain.[28] Thus, the Supreme Court of New York is penalizing precisely the type of valid, business-driven information management decisions that the U.S. Supreme Court has ruled corporations are perfectly entitled to make.

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[26] The trial court erroneously concluded that EchoStar's email retention policy had been shortened since the *Broccoli* decision when, in fact, the same 21-day purge period remained in effect. R. 47.

[27] *See, e.g., Conderman v. Rochester Gas & Elec. Corp.*, 262 A.D.2d 1068, 1070, ("[i]n the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices."); see also, Paul W. Grimm, Michael D. Berman, Conor R. Crowley, Leslie Wharton, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. Balt. L. Rev. 381, 388 (2008) ("[a]bsent some countervailing factor, there is no general duty to preserve documents, things, or information, whether electronically stored or otherwise.")

[28] *Arthur Andersen LLP*, 125 S.Ct. 2129, 2135.

Modern corporate information systems are designed to efficiently manage information by retaining information only as long as the information is actively used by the corporation, unless it is otherwise subject to a retention or preservation obligation. The trial court's Order creates such uncertainty with respect to how courts will determine culpability that it would force corporations, even those who have no preservation obligation, to engage in inefficient, expensive information retention when there is neither a business purpose for retention nor any credible probability of litigation.

Supreme Court's finding of culpability is also inequitable because it finds that the fact that a corporation was found to have engaged in spoliation years earlier in a wholly unrelated matter is evidence of a corporation's culpability.[29] Thus, once a corporation is found to have engaged in spoliation in any matter at any time, that finding could be used in later, unrelated proceedings to support a finding of culpability. This is simply

[29] The trial court concluded, contrary to abundant evidence in the record, that:

> . . . EchoStar's failure to preserve documents was more than negligent. It was the very same "bad faith" conduct for which EchoStar had been sanctioned in *Broccoli* (229 FRD at 512), and EchoStar has been on notice of its substandard document retention practices at least since the Broccoli decision, yet continued those practices even after this litigation was commenced by VOOM HD. Therefore, EchoStar's failure to preserve documents constituted, at a minimum, gross negligence.

R. 47., citing, *Broccoli v. EchoStar Communications Corp.*, 229 F.R.D. 506 (D. Md. 2005).

inequitable and gives no weight to the significant efforts the corporation may have undertaken to improve its preservation practices.

E. SUPREME COURT'S ORDER CREATES A REGIME WHERE SPOLIATION WILL BE ARGUED IN ANY CASE WHERE A PARTY FAILS TO PRESERVE ALL INFORMATION

The Supreme Court's Order creates a situation where even a party that takes reasonable good faith steps to preserve information will be the target of spoliation sanctions where the party fails to preserve all information. This creates a requirement of perfection where none has existed before.

As Judge Scheindlin noted in *Pension Committee*, "[c]ourts cannot and do not expect that any party can meet a standard of perfection."[30] In *Victor Stanley, Inc. v. Creative Pipe, Inc*, Civ. No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644 (D. Md. 2010), the court noted the impossibility of preserving all information and advised that courts should consider the reasonableness of the measures taken to preserve relevant information:

> Moreover, concern has been expressed by some commentators that court decisions finding spoliation and imposing sanctions have in some instances, imposed standards approaching strict liability for loss of evidence, without adequately taking into account the difficulty -- if not impossibility -- of preserving all ESI that may be relevant to a lawsuit, the reasonableness of the measures that were taken to try to preserve relevant ESI, or whether the costs that would be incurred by more complete

[30] *Pension Committee* at 461.

> preservation would be disproportionately great when compared to what is at issue in the case.[31]

Thus, courts have recognized that parties are required only to take reasonable steps to preserve relevant information and should not be penalized for a failure to preserve all relevant information.

In the instant case, it is clear that EchoStar took reasonable steps to preserve relevant information. For example, within a day of issuing the legal hold notice, EchoStar preserved the emails of every EchoStar employee who had been identified as a custodian of relevant information and to whom EchoStar had sent the legal hold notice. R. 451. EchoStar took the additional step of taking subsequent preservation snapshots of the emails of key employees. *Id*. EchoStar also instructed those employees as to their obligations under the legal hold and the need to preserve, on an ongoing basis, all potentially relevant emails. *Id*.; R. 420-21. Finally, EchoStar took affirmative steps to monitor compliance with the legal hold. R. 421.

Such measures more than satisfy a company's obligation to take reasonable steps to preserve relevant information, even if in hindsight some information was lost despite these good faith efforts. No preservation system is perfect, nor can it be short of halting company operations.

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[31] *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *66.

Preservation obligations cannot be so onerous that they crush companies under their weight. A rule that penalizes parties for failing to preserve all relevant information, even where the obligation to take reasonable steps to preserve such information has been satisfied, would impose draconian requirements on companies and will serve only to encourage opposing parties to bring unjustified sanctions motions rather than litigating the merits of a case.

F. SUPREME COURT'S FINDING OF PREJUDICE SHOULD BE REVERSED AS CONTRARY TO ESTABLISHED LAW

Supreme Court's finding of prejudice relies in part on the mere possibility that relevant emails were destroyed. Such a finding is contrary to established law. As the court in *Voultepsis v. Gumley-HaftKleir Inc.*, 2008 N.Y. Misc. LEXIS 9993, **16-17 (Sup. Ct. N.Y. Cty Jul. 7, 2008), noted:

> Significantly, spoliation sanctions are not warranted unless the party seeking such sanctions meets its burden of establishing that the evidence destroyed is crucial to the moving parties' case, and that the party suffered prejudice as a result of the loss.

Citing, Balaskonis v. HRH Constr. Corp., 1 A.D.3d 120 (1st Dep't 2003); *see also, Fitzpatrick v. Toy Indus. Ass'n*, 2009 N.Y. Misc. LEXIS 4122 (Sup. Ct. N.Y. Cty Jan. 5, 2009) (noting that "the lynchpin for spoliation sanctions under New York law, is prejudice" and declining to impose spoliation sanctions where the evidence failed to demonstrate that plaintiff had been prejudice); *Gilbert v. Albany Medical Ctr.*, 13 A.D. 3d 753 (3rd

Dep't 2004) (declining to impose spoliation sanctions where plaintiffs had not demonstrated prejudice); *Lane v. Fisher Park Lane Co.*, 276 A.D.2d 136, 139 (1st Dep't 2000) (noting that the decision to impose spoliation sanctions is guided by the extent to which a party has been prejudiced and whether the sanction is necessary as a matter of elementary fairness).

Furthermore, in order to impose severe sanctions, like an adverse inference charge, other courts have required evidence of both relevancy and prejudice in the absence of willful destruction of evidence. As explained by Judge Scheindlin in *Pension Committee*,

> "[F]or more severe sanctions – such as dismissal, preclusion, or the imposition of an adverse inference – the court must consider, in addition to the conduct of the spoliating party, whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence"[32]

Here, there was no showing that the destroyed emails were relevant. However, even assuming *arguendo* that the destroyed emails were relevant, this is insufficient to support a finding of prejudice. This crucial point was clearly articulated by Judge Scheindlin in the *Pension Committee* decision:

> It is not enough for the innocent party to show that the destroyed evidence would have been responsive to a document request. The innocent party must also show that the evidence would have been helpful in proving its claims or defenses – i.e., that the innocent party is prejudiced without that evidence.

[32] *Pension Comm.*, 685 F.Supp.2d at 467.

Proof of relevance does not necessarily equal proof of prejudice.[33]

As explained by the court in *Orbit One Commc'ns., Inc. v. Numerex Corp.*, No. 08 Civ. 0905, 2010 U.S. Dist. LEXIS 123633 (S.D.N.Y. Oct. 26, 2010), "[n]o matter how inadequate a party's efforts at preservation may be, however, sanctions are not warranted unless there is proof that some information of significance has actually been lost."[34] Here, there was no showing that any information of significance was lost, or that the destruction of emails resulted in prejudice.[35]

Supreme Court made no specific finding of prejudice as required under New York law and comes close to conceding that no prejudice resulted from the loss of emails. For example, Supreme Court notes that "the evidence destroyed by EchoStar does not completely deprive [Network] of the ability to establish its case." R. 51. Supreme Court further conceded that "the court believes that [Network] still has the opportunity to make its case using other evidence...." *Id.*

Thus, there has been no showing of prejudice and Supreme Court's finding relies on mere speculation as to the possibility that relevant emails

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[33] *Id (emphasis supplied).*
[34] *Orbit One*, 2010 U.S. Dist. LEXIS 123633, at *3.
[35] Indeed, the party now claiming that it has been prejudiced, conceded the sufficiency of the evidence available to it when it filed a motion for summary judgment in April 2010, long before any charges of spoliation were raised.

were destroyed. Clearly, when the standard used is the *possibility* that relevant emails were destroyed, any failure to preserve could arguably result in a finding of prejudice. Such a rule would only serve to encourage the type of inappropriate sanctions motion filed in the instant case. As LCJ has noted:

> Although information appears to be more available in the digital age, ancillary litigation has increased over the loss of small portions of digital information with little or no connection to the controversy. Judicial examination of pre-litigation preservation conduct also has significantly increased in recent years. The result is a legal "gotcha" game focused on the steps used to preserve data, instead of the data actually available, and without regard to the significance of the data to the ultimate outcome of the case. The game is simple: Severed sanctions, such as an adverse inference jury instruction, are easier to obtain than ever, by merely poking holes in an opponent's preservation efforts. Inevitably, Monday morning quarterbacking of how preservation efforts should have been undertaken often concluded that some part of the process could have been done better.[36]

Upholding Supreme Court's finding of prejudice, based on the possibility that relevant emails were destroyed, and in the absence of a showing of prejudice, will impose the strict liability standard that was

[36] *Reshaping the Rules of Civil Procedure for the 21st Century citing, Calpine Corp. v. AP&M Field Servs., Inc.*, 2008 U.S. Dist. LEXIS 99178 (S.D.N.Y. Dec. 9, 2008) ("[t]he spoliation doctrine exists to prevent one side from denying such an opportunity to the other by destroying or altering material evidence. It does not, however, permit a party to avoid the contest by defaulting the other side through playing a game of 'gotcha' instead of seeking to develop its own case in a timely and appropriate manner.")

criticized as improper by the court in *Victor Stanley*[37] and serve only to encourage such legal "gotcha" games.[38]

CONCLUSION

For the reasons set forth above, Supreme Court's Order granting the motion for sanctions based on spoliation of evidence should be reversed. This Court should articulate a clear standard, with an appropriately high threshold, for determining when the duty of preservation arises and how culpability will be determined. Finally, this Court should emphasize the need for a showing of prejudice before sanctions can be imposed on a party that has acted in good faith.

Dated: Buffalo, New York
March 18, 2011

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[37] *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644, at *66.
[38] It is important to recognize the severity of the sanction imposed in this case. "[A]n adverse inference instruction is an extreme sanction and should not be imposed lightly." *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 121 (S.D.N.Y. 2008).

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