



**DISTRICT OF COLUMBIA COURT OF APPEALS BOARD OF
PROFESSIONAL RESPONSIBILITY**

In the Matter of
Theodore C. Marcus, Esq.
Respondent.
Member of the Bar of the District
Of Columbia Court of Appeals
Bar No. 4339950
Date of Admission: Dec. 6, 1993

Disciplinary Dkt. No. 2021 -D050

**RESPONDENT'S MOTION TO DISMISS, OR ALTERNATIVELY STAY
PROCEEDINGS, SEPARATE ANSWER TO, BAR COUNSEL'S SPECIFICATON
OF CHARGES¹**

Pursuant to Rule XI of the DC Bar Rules, Respondent, Theodore C. Marcus, *pro se*, hereby MOVES to dismiss the Specification of Charges ("Specification" or "Charges") and separately ANSWERS the Specification of Charges in this matter.²

MOTION

The deficiently constructed, improvidently pressed and inflammatory and prejudicial Charges should never have been filed. To the contrary, if Bar charges were appropriate (and, they are), a target-rich environment of miscreant counsel is available, including the hapless Company filer (a man, "Mr. Green", whom Mr. Marcus has never met or worked with, and who has no first-hand knowledge of any of the "facts" averred

¹ Nothing in this Pleading should be construed as a reflection of the views of Mr. Marcus' employer, the Federal Communications Commission, its leadership or its staff. Also, artificial intelligence (AI) was not used in any fashion in drafting this Pleading. The Pleading is entirely the work of Mr. Marcus, *pro se*, or his previous counsel, as indicated herein.

² This Motion and Answer necessarily reveal and discuss what the Company, which initiated the underlying disciplinary complaint, would view as "privileged" or "confidential", etc. Mr. Marcus, for multiple reasons stated therein, does not believe anything revealed or described in this pleading is subject to attorney-client privilege or should be considered "confidential." That said, and solely for argument's sake, Mr. Marcus references Rule 1.6 (c) to take the position that the disclosures are appropriate and necessary and there are no references that do not fit well within the rule's exceptions for disclosures made by an attorney to answer disciplinary charges brought by former counsel, and the very "specific allegations by [the Company/Bar Counsel] concerning [Mr. Marcus'] representation" DCPR 1.6(c)(3).

in the Complaint or, derivatively, the Charges) who authored the underlying Complaint filed by the Company.³ Mr. Marcus, a whistleblower whose conduct has been utterly pristine and in accord with the highest standards the Bar ought to uphold, is *not* one of those proper targets. For the following reasons, the Charges should be rejected, or at the very least, stayed pending the outcomes in two federal cases adjudicating the underlying subject matter, and at least one state (California) investigation into the same, as described more fully as follows.

1. *Undue Prejudice Caused by an Ice Age of Delay.* Viewed most charitably in Bar Counsel's (and its complainant's) favor, the factual matrix encompassing these Charges began *over 18 years ago*, in 2008, when Mr. Marcus learned of, and began internally "blowing the whistle" about the Company's serial fraud and abuse of a multi-billion dollar federal program designed to narrow the "digital divide" by providing internet, voice service and internal connections subsidies to poor and needful school children and community libraries. Regardless whether Bar Counsel has convinced itself that it can make out its case-in-chief, on clear and convincing evidence, despite an extraordinary set of factual gaps and holes, the reality is (i) Bar Counsel cannot, and (ii) the delay in the bringing of these Charges has incurably prejudiced Mr. Marcus in his ability to defend himself. This is the very essence of prejudicial delay and destruction of due process, and none of the fault lies with Mr. Marcus.

First, Mr. Marcus' memory of the critical events is virtually non-existent. The underlying, core facts are hyper-detailed, and, Mr. Marcus has no particular recall of any

³ The "Company" is the megalith, "AT&T, Inc.", which has had several corporate variations, constituents and components relevant to the sufficiency of the Charges, as a pleading, than Bar Counsel may have appreciated. The lack of understanding and proper management of these distinctions, of course, renders the Charges infirm, as later described herein.

of them. Further, there is almost no material (available to Mr. Marcus or not) that can jog his memory on critical facts and circumstances, at least not to any level that would permit credible testimony. Due to delays not caused in any way by Mr. Marcus, respondent cannot defend himself capably, even with a phalanx of lawyers, and is left to the mercy of a vindictive corporate fiction with an inexhaustible supply of [ill-gotten] resources.

Second, there are MANY critical fact witnesses (with respect to Bar Counsel's case-in-chief AND Mr. Marcus' defense), who (i) are dead (including one who reportedly committed suicide, another who reportedly died of cancer, and presumably others), (ii) "separated" from the Company (a euphemism for being pushed out for their role in the scandal), (iii) retired (e.g., Wayne Watts, former General Counsel and orchestrator of several of the bad choices made by the Company in addressing itself to the scandal), (iv) "no longer with the Company" (a euphemism for sensible career choices), or (v) still with the Company but undoubtedly suffering from loss of memory about the facts. It will be impossible for a fair proceeding for Mr. Marcus or a fair and responsible record to be made under these circumstances, circumstances owing entirely to the egregious delay of the Company and, derivatively and independently, Bar Counsel.

Further, Mr. Marcus, in truth, has no power to force any witness to appear. Perhaps Bar Counsel will assist in obtaining witnesses, but that will almost certainly do next-to-nothing to ameliorate the prejudice to Mr. Marcus due to the extraordinary lapse of time. The testimony – *especially for this proceeding* -- of dead witnesses was not procured, and thus not preserved prior to their demise. Regardless whether Bar Counsel feels secure in its view it can make out its case, that doesn't address the utter prejudice to

Mr. Marcus that results from having no access to [for example, Mr. Jack Zinman's and Mr. Ernie Bond's⁴] testimony.

The same can be said about those who were "separated" or "retired" from the Company, especially to the extent their separation owes to their role in the underlying scandal, or their retirement paperwork addresses the matter in some direct or indirect way. Many witnesses are scattered throughout the country, or perhaps the world, and Mr. Marcus has no idea where they are or how to find them. Even if they can be found, somehow compelled to appear, and have any sort of useful, testable evidence, Mr. Marcus, in order to defend himself remotely adequately, would need to obtain full, unredacted versions of their separation agreements, summaries of their statements and related evidence⁵ with respect to their roles in the underlying scandal (e.g., as prepared by the "Independent Investigatory Counsel", Gibson Dunn and perhaps other legal representatives with Mayer, Brown), and any other materials representing their factual and other positions with respect to the Company's participation in the [E-Rate] program for the years in question. Those statements and materials almost certainly have tentacles of [contractual] confidentiality all around them, including, perhaps, resolutions obtained

⁴ Mr. Zinman apparently and quite tragically died by suicide. Mr. Bond died of cancer, apparently. See <https://www.gofundme.com/f/zinman-children-educational-fund>; <https://www.northsidechapel.com/obituaries/ernest-bond/#!/TributeWall>.

⁵ Mr. Marcus' understanding is that many, if not all, of the key witnesses to the facts and circumstances directly at issue in the Charges were interviewed by "Independent Investigatory Counsel", Gibson Dunn (F. Joseph Warin and Eugene Scalia, principally), as part of its "Independent" – i.e., Board/Audit Committee-commissioned investigation of the Company's nationwide and Wisconsin-specific E-Rate program abuse and its separate but also related obstruction of justice with respect to a federal investigation in Indiana concerning the Company's E-Rate activity there. Those interviews, of course, were reduced to written summaries (unless an unimaginable level of incompetence and malpractice was involved). Those summaries, and relevant documents, in turn, were incorporated into a report to the Company's Board/Audit Committee by Gibson, Dunn. That report – which the Company refused to share with Mr. Marcus – was never given to or shown to Bar Counsel either, upon information and belief. All of those materials, of course, should have been given to Bar Counsel, in unredacted form, as part of the Company's complaint and Bar Counsel's good faith, professional review of the relevant facts.

through the witness' personal, e.g., defense, counsel. And, of course, the financial terms of those separation/retirement documents are relevant to the witnesses' economic incentives regarding this and related proceedings and those facts also need to be fully aired to aid assessment of their evidence, assuming it could even be procured (doubtful at best).⁶ These are mountains that Mr. Marcus will not be able to climb, all to the prejudice of his case, and owing solely to the delays Mr. Marcus has had no part in causing.

Who is going to pay for the record to be made vis-à-vis these witnesses? They will want to know. Mr. Marcus, *pro se*? That's impossible. Perhaps the Bar arranges to pay for transportation or some stipend to defray costs. That will not begin to cover what is likely their lawyers' fees and related expenses to make sure their testimony, should it be given, is prudently prepared and monitored by counsel. The Company will certainly assert its interests in the premises. And so on. The expense(s) will be astronomical.

All of this, and more, is just about the challenges to getting, and permitting the testing of, evidence of critical fact witnesses. It does not begin to address likely documentary deficit issues. Suffice it to say, Mr. Marcus is aware of no "litigation holds" or similar prophylaxes issued at any time by anyone associated with assuring the fairness and integrity of *these* well-overtime proceedings. Mr. Marcus is aware of no independent document retention requirement that would cover 18 years – not even the tax laws and audit requirements of the Company would seem to be sufficient. How will those

⁶ Indeed, it is likely that any separation agreements or similar documents do not even guarantee the witnesses will even make themselves available to testify in these proceedings, *i.e.*, by having clauses requiring them to do so. This isn't federal or state litigation – it's a malicious prosecution (no shade on Bar Counsel intended) occasioned by the vindictive, "cya" complaint by the Company filed after it was warned of its exposure to civil liability for attacking the ethics of a DC lawyer – Mr. Marcus – to gain litigation advantage (a motion to strike) in the underlying lawsuit over its fraud and other criminal misconduct as reported. Cooperating in this sideshow (as they would view it) is almost certainly not going to be a compulsory term in a separation agreement.

deficiencies be cured in this matter now? And how could whatever that patently unsatisfactory mitigation effort be anything but fatally prejudicial to Mr. Marcus?

And, of course, all of this must be viewed in the other key – frankly, “the” key – context of this proceeding: federal and state investigations of the Company’s fraud and criminal misconduct that, in all likelihood, is ongoing or, in any event, could spring out of these matters at any time. Any witness that Mr. Marcus might call, by definition, likely, or at least probably, has some criminal or other exposure to be concerned about in his or her testimony. For example, although the Company (and the likely wiped-out and resource-starved Relator’s counsel) reported a “\$55,000,000 settlement”⁷ of the E-rate litigation underlying this proceeding (read: “VINDICATION FOR MR. MARCUS”⁸) in March 2026, it/they has/have not been able to secure finalization by the federal government which has the power and obligation to sign off on it.⁹ The parties have appeared before the federal district court in Wisconsin overseeing the case FIVE TIMES since announcing a done deal to provide a status on finalization and have had to re-set the conference each time.

⁷ See <https://broadbandbreakfast.com/at-ts-wisconsin-bell-settles-whistleblower-case-for-55-million/>. Of this, reportedly, \$25,000,000 is for Relator’s attorneys fees, and \$30,000,000 to the Government.

⁸ Bar Counsel, presumably, did not know the complainant was cutting a deal with the relator and his counsel to resolve the matter when moving forward with the Charges. Bar Counsel also, presumably, did not know or anticipate that such a deal would entail, for example, an actual “Agreement”, a “Consent Decree”, a “Corporate Integrity Agreement”, a “Compliance Plan”, and other similar critical documents that Mr. Marcus would absolutely require as part of fundamental due process but, more importantly, Bar Counsel should have personally reviewed WAY before pressing charges. At a minimum, it should have raised, and should still raise, concern in Bar Counsel’s mind as to the bona fides of the complainant in making the complaint.

⁹ See, e.g., <https://www.pillsburylaw.com/en/news-and-insights/white-house-task-force-national-fraud-enforcement-division.html>; <https://www.whitehouse.gov/presidential-actions/2026/03/establishing-the-task-force-to-eliminate-fraud/>.

The Company and Relator's counsel represented to the District Court in Wisconsin, J. Adelman, in a Joint Status Report that, among other things, "the United States has indicated its consent to the settlement." That representation was made on May 26, 2026. Since then, the status conference has been pushed off an additional 4 times, by Mr. Marcus' count, with the latest re-set date of July 21, 2026. *Very possibly, the parties' joint statement is false as to the United States* "indicat[ing] its consent to the settlement", though whether it was intentionally false, and/or how the DOJ views it, is not known.

The probability, indeed likelihood the Department of Justice is very carefully still reviewing the proposed settlement is significantly enhanced by the Trump Administration's intense emphasis on cleaning up "waste, fraud, and abuse" in federal benefits programs. In fact, the White House, by Executive Order 14395, established a Task Force to Eliminate Fraud on March 16, 2026.¹⁰ DOJ is a Task Force Member and, as such, was required, within 90 days, to develop and provide (to the Task Force and presumably other coordinates) measurable implementation plans outlining how the adopted controls will be operationalized and enforced.

The parties' proposed settlement was submitted to Judge Adelman in the Wisconsin matter *only a few days before, on March 12, 2026*. Perhaps the Company and Relator's counsel got wind of the impending Task Force's creation (and, presumably,

¹⁰ See, generally, <https://www.sidley.com/en/insights/newsupdates/2026/04/white-house-and-doj-announce-sweeping-new-anti-fraud-initiatives> (On January 8, 2026, the White House announced the creation of a new National Fraud Enforcement Division at DOJ. At the April 7 press conference announcing the formal rollout of the new division, Acting Attorney General Blanche emphasized that the new division's mission is "'to zealously investigate and prosecute those who steal taxpayer dollars and rip off the American people.'" Blanche also stated that DOJ will "spare no resources"' to support its fraud-focused mission and announced a new National Fraud Detection Center that will be "'a permanent, prosecutor-led, multi-agency, data-analytics team working to ferret out the most harmful, actors defrauding federal government programs.'")

chose not to tell the Court). Either way, it would appear that DOJ is required to engage significant steps and protocols as part of tackling corporate fraud when federal benefits are involved (and, after the Supreme Court's recent decision overruling *Humphrey's Executor*,¹¹ these requirements almost certainly now extend to agencies, like the FCC, that were formerly treated as "independent agencies" in the federal administrative framework), and those newly minted requirements and protocols almost certainly require DOJ to impose extraordinary conditions in respect of the Settlement or, perhaps, block it altogether.¹²

Thus, several reasonable conclusions spring to mind: (i) the deal is far from done; (ii) the parties misrepresented the Government's position to Judge Adelman; (iii) the Government, in fact, hasn't signed off (regardless whether it "indicated its consent"); (iv) jeopardy for the Company's extraordinary misconduct is still extant.

Even if the deal is done – it isn't – what witness will happily come forward to be asked "what did you know and when did you know it" about the Company's obstruction of justice (in the Indiana federal investigation) and E-rate Program fraud (in Wisconsin and nationally)?¹³ It will be an orthodontic surgical experience getting their testimony, a

¹¹ See *Trump et al. v. Slaughter*, U.S. Supreme Court, No. 25-32 (decided June 29, 2026) https://www.supremecourt.gov/opinions/25pdf/25-332_qn12.pdf.

¹² The Company's contumacious, "Bataan Death March" approach, it would appear, backfired.

¹³ It should also be noted that the State of California recently challenged the parties' attempt at "settlement", claiming, among other things, that it wants its ability to conduct its own investigation of these matters preserved in whatever outcome accrues in the federal matter in U.S. District Court, D.C. – the "companion" case that the parties surreptitiously seek to wrap up with the Wisconsin Settlement. See Letter from A. Hartman, Dep. A.G., California, June 29, 2026 in *United States of America et al. ex rel. Heath v. AT&T, Inc. et al.*, Case No. 11-cv-01897 (RJL) ("As the court is aware, this case, alleging claims on behalf of the United States and *numerous states including California*, was largely stayed while the companion Wisconsin case was litigated. The parties have now agreed to settle the Wisconsin case with \$30 million payable to the United States plus \$25 million payable to Relator's counsel as attorney fees. The settlement is further conditioned on the voluntary dismissal of Relator's claims in this action, *although without any recovery to any state or municipality named in this action*. In light of Relator's recovery of

truly unfair burden placed on Mr. Marcus by the improvidently filed(and now published) Charges because Mr. Marcus will never be able to sustain the fight through this and related unfair stacking of the deck due to this extraordinary delay.

Mr. Marcus will be witness-less, largely if not entirely, and document-less; that is, unless a Trojan effort is successfully brought to bear to ensure that evidence has been preserved and will be produced. And, even if the evidence is forthcoming, it'll be riddled with memory-loss and other gaps, gaps that cannot be filled sufficiently to rescue Bar Counsel's case-in-chief, except through undue and unfair inferences to Mr. Marcus. It is pure prejudice posing as process, is extremely unfair, and utterly denies the process that is due in this proceeding. It is an invitation to a railroading of Mr. Marcus the Board/Hearing Committee should promptly decline.

The "accusatorial quality of attorney disciplinary proceedings, coupled with their grave consequences, demand the provision of due process safeguards." *In re Ruffalo*, 390 U.S. 544 (1986). Recognizing this, the D.C. Court of Appeals established the standard for the kind of highly prejudicial and extraordinary delay in the bringing of Bar charges in *In re Williams*. There, the Court specifically opined that "a delay coupled with actual prejudice could result in a due process violation, in which case we would be unable to agree with a finding that misconduct had actually been shown." *In re Williams*, 513 A. 2d 793 (D.C. 1986).¹⁴ Eighteen years ago, Mr. Marcus, then 44, would have had a

\$30 million . . . the Attorney General believes the claims of California may have merit, but will require sufficient time to investigate before making a decision about whether to pursue them through litigation. . . . [California seeks a decision to ensure tolling in order to] leave the Attorney General sufficient time to investigate and possibly pursue such a case." (emphases added).

¹⁴ Citing *In re Oxman*, 437 A.2d 1169 (Pa. 1991); *Caldwell v. State Bar*, 13 Cal. 3d 488, 496, 119 Cal. Rptr. 217, 223, 531 P.2d 785, 791 (1975).

fighting chance with his memory.¹⁵ Today, or whenever any evidentiary portion of these proceedings might begin, Mr. Marcus does not. Mr. Marcus' defense has been incurably prejudiced by the delay, through no fault of his own. Per the Court in *In re Williams* and elsewhere, these proceedings should not be permitted to proceed at this juncture.

2. *The "Law of the Case" – the Company Waived Privilege as to Mr. Marcus' Alleged Conduct.* According to Bar Counsel (Specification at para. 47), the Company learned of Mr. Marcus' contacts with opposing FCA counsel sometime in 2017.¹⁶ *Three years later*, in September 2020, the Company, *i.e.*, the Complainant, with what it felt was a full understanding of the "facts", made the decision (with a coterie of the finest lawyers ill-gotten millions could ever buy) to seek litigation advantage – that is, a 'kill shot' motion to strike key elements of the Relator's case in U.S. Dist. Court, D.C. that, if granted, would have decimated the case entirely.

Presumably, though the Charges do not endeavor to so state, the Company spent the three years between 2017 and 2020 getting its litigation advantage strategy set. Presumably, that included conversations with opposing counsel – discovery, please – and

¹⁵ This position cannot be countered by the fact that Bar Counsel got the Company's vindictive and bad faith complaint five years ago (which is still quite a long period in its own right). If that were true, a perpetual fiction could simply wait 30, even 50 years to inject its poison into former counsel's reputation and livelihood. Even if Bar Counsel filed the Complaint that very day, the prejudice of the delay, for due process purposes, must include the entirety of the period as it relates to memory, evidence, lost and unavailable witnesses, etc. And, of course, even though Mr. Marcus, as Bar Counsel noted, was deposed in 2021 about some of these matters, that is still 5 years ago and, more importantly, there was nothing in the deposition remotely bearing on Mr. Marcus's defense to the Charges at Bar. That is, Mr. Marcus – then and now – couldn't recall with any specificity dates, places, times, etc. relevant to the narrow issues being inquired about for the Motion to Strike. These Charges are much broader in scope and scale, and Mr. Marcus has never had the opportunity to prepare for them at any time where he would have had any sufficient memory to defend himself. That ability disappeared long, long ago owing to the passage of time and a great deal of real life.

¹⁶ Mr. Marcus does not concede this was the earliest date the Company knew of the alleged conduct. Mr. Marcus believes the Company, or some of its officers, knew as early as 2012. But, this is how the pleading frames the chronology of events, so Mr. Marcus is accepting that – for now -- for argument's sake.

probably Mr. Shepherd – discovery please. Those discussions, especially with Mr. Shepherd, probably contain some “here is how this is going to go” discussions, in writing, and possibly some settling of terms around Mr. Shepherd’s “cooperation.” The Charges do not make any effort to fill that gap, but simply serves up the 3 years as, presumably, “notice” to Mr. Marcus to force him to inquire upon peril of missing the opportunity.¹⁷ At minimum, Bar Counsel must produce the material, likely filed under seal in the District Court in D.C., that fills in the gap. It is relevant to a proceeding where Mr. Marcus’ livelihood, and that of his family, is being threatened.

In any event, the Company laid out every drop of the scandalous allegations before the District Court in D.C. that it would later shop over to Bar Counsel in its Complaint in spring 2021. In its pleading before the Court on the motion to strike, which was loudly aired by Law360 and others at the time, it decried “shocking misconduct” of its former counsel (Mr. Marcus) and went into every jot and tittle of its argument, evidence, etc. In reaction to the motion, Relator and counsel implored the District Court to permit discovery, *i.e.*, a deposition of Mr. Marcus, to develop a proper record for the Court to review in assessing the merits of the motion. The Court acquiesced.

Mr. Marcus – with zero resistance or objection – submitted to deposition on a subpoena duces tecum in early 2021. Mr. Marcus withheld nothing, and answered every single question, both from Relator’s counsel and from the Company’s counsel, internationally renowned attorney Rob Walters of Gibson, Dunn. Testimony took somewhere between 8-10 hours, as Mr. Marcus recalls. Mr. Marcus explained, in painful

¹⁷ Without impugning Bar Counsel’s good faith, these kinds of pleading traps are unfair. There are several in the Charges.

detail, his understanding of his ethical duties, the “why”, “what” and “how” of his conduct, and so on.

A transcript of the video-taped deposition (this was during the COVID experience), of course, was prepared and presented to the Court, and the parties presented their various arguments on the question whether Relator and/or Relator’s counsel should be sanctioned as sought due to the alleged “shocking misconduct” of Mr. Marcus.¹⁸ The Company argued the facts and law on privilege, on “attorney side-switching”, and so on; the same stuff re-capitulated in essentially whole cloth in these proceedings.¹⁹ The Court clearly was not impressed.

Although Bar Counsel tries, in its Charges, to cabin the court matter to a mere “did not grant the motion to strike because the sanction would have been too harsh on the facts” take, that diversion should be unavailing. What is more important, as Bar Counsel surely [now] knows, the Judge assessed the merits of the Company’s privilege claims – which is the ENTIRE FOUNDATION OF THE PRESENT PROCEEDINGS – thusly:

AT&T has *likely waived any privilege and confidentiality* protections for these documents by failing to immediately take steps to rectify their disclosure. *See, e.g., Fischman v. Mitsubishi Chem. Holdings Am., Inc.*, [further citation omitted] (“Defendants waived any privilege (or confidentiality protections) with respect to the contents of the Complaint by failing to take immediate steps to remedy any misuse by [the

¹⁸ To the best of Mr. Marcus’ recollection, the deposition was never presented to him *for review or correction* prior to being submitted to Court via the presentations of the parties there.

¹⁹ Before going to the heart of the merits, Mr. Marcus would note that his counsel, Kevin Byrnes, excoriated the Company for its clearly improper impugning of the ethics of its former counsel in order to gain litigation advantage. This kind of tactic is universally known to be unlawful. As the transcript reveals, Mr. Marcus’ counsel warned the Company’s counsel that it would likely need to review its malpractice policy, i.e., a threat as to potential liability. Mr. Byrnes explained, among other things, that if the Company had the notion that Mr. Marcus had trafficked in its confidential and “secret” information, whether documentary or otherwise, its obligation/duty was to refer the matter to the Bar, not look for litigation advantage, e.g., the Motion to Strike. It appears the Company, advised by its counsel, took the threat, as it perceived it, to heart, hastily filing the underlying Complaint a few weeks later: a classic “CYA” move.

plaintiff].”); *United States v. HCA Holdings Inc.* [further citation omitted] (similar). But AT&T’s ***failure to promptly invoke the proper remedy*** for the release of its documents is not a justification for imposing a drastic and more punitive sanction at this juncture.”²⁰

It is telling that the Company did not seek review of the denial of its motion or, specifically, the Court’s consideration of its privilege claims. That is, it did not move the court to reconsider, it did not move the court to certify the issue of privilege, it did not move to clarify or otherwise test the proposition expressed by the Court, and it did not seek an appeal (either as of right or through certification of the question). The reasons for that, if Occam’s razor applies, is obvious: it was a loser.²¹

The Company, as the Court could see, took NO steps to “rectify” the disclosures it claims were against applicable privileges. It did not, as GE did in the *Koeck* matter of which Bar Counsel is intimately aware, bring an action in court to cause any disclosures to cease and desist, to claw-back any documents it may have claimed had improperly been exchanged, or to otherwise remedy any alleged harm resulting from the alleged improper disclosures. One reason for that (beyond pure malpractice, and beyond its clear desire to seek litigation advantage) is simply that the Company knew the material was not subject to privilege, i.e., due to the crime-fraud exception, and it wanted to avoid having that issue litigated out in the open given its otherwise deliberate and intense public smear of Mr. Marcus in court and in court filings.

Applying the law of the case doctrine here would reflect the very sound principles that undergird it. As Judge Friendly long ago explained, “it would be absurd that a party

²⁰ *United States of America et al. ex rel. Heath v. AT&T, Inc. et al.*, Case No. 11-cv-01897 (RJL), Opinion of Leon, J., June 3, 2022 at 5, n.3.

²¹ Law of the case is applicable when a losing party does not challenge an adverse district court decision – where the opportunity certainly existed -- on appeal. In those instances, the decision of the court at issue becomes the law of the case. See *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987).

who has chosen not to argue a point [i.e., on appeal or reconsideration motion] should stand better as regards the law of the case than one who had argued and lost.” *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2nd Cir. 1981), cert. denied, 459 U.S. 828 (1982). Indeed where, as here, there are very sound reasons for the doctrine’s application, law of the case’s application would “force parties to raise issues whose resolution might spare the court and parties later rounds of . . . appeals.” *Hartman v. Duffy*, 88 F.3d 1232, 1236 (D.C. Cir. 1996), cert. denied, 520 U.S. 1240 (1997).

Infinitely rich, uber-represented complainants like AT&T know how to work the federal-state-licensing adjudicative, administrative and legislative systems throughout their considerable operational footprints to achieve their desired outcomes. The Company chose to pick up its remaining marbles after wiping out in the deposition (and, eventually, in District Court) and wait for what it considered a better opportunity to establish what it wants to establish, i.e., that Mr. Marcus is not a whistleblower protected by the crime-fraud exception and other policies, but some kind of scoundrel. If its cause was pure, it would have wrestled it out with the Court and, if need be, the D.C. Circuit. It chose this Bar for that job. Make no mistake: these proceedings are simply another venue for the same litigation, just styled a bit differently, and with different stakes. The Bar should not reward this brazen and improper tactic.

In addition, the Court’s review of the facts before it – again, the complete airing of all the relevant facts now shopped to the Bar by the Company – were conducted against the backdrop of the Judicial Canons of Ethics, including Rule 2.15, which states, in pertinent part:

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the

lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

* * *

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.²²

It is clear that Bar Counsel went forward with the Company's mislaid Complaint *well before the Court ruled on the Motion to Strike*. Perhaps it has some regrets about that decision, given the Company's subsequent failure in Court (a regret that ought also to be present now that the Company is attempting to settle the underlying case with its 18-year late *mea culpa*). In any case, what cannot be ignored is (i) a clear-eyed Court's statement that the Company "likely waived" privilege (frankly, "waived"), (ii) the Company accepted that declaration in toto by not challenging it in any way, (iii) the Court did not, as would have been its obligation, refer Mr. Marcus to this or any Bar though it had every fact (and the ability to assess Mr. Marcus' credibility up close) before it that Bar Counsel, in its judgment, finds actionable, and (iv) the Court's opinion post-dates the development of the Charges and the decision to press them.

For this proceeding to achieve what the Company, through Bar Counsel, is seeking, the authorities here would have to step on, step over and implicitly, if not explicitly, *overrule the considered judgment of the learned Judge*.²³ This proceeding is a

²² ABA Model Code of Judicial Conduct, Canon 2, Rule (and DC Court Rule) 2.15. Federal Courts are well-aware of this duty and do not hesitate to police attorneys' conduct when they see it. See, e.g., Judge Kathleen Williams multiple bar referrals in the IRS "settlement" matter . . . <https://www.usatoday.com/story/opinion/columnist/2026/03/15/polling-trump-iran-war-2026-republicans/89118484007/>.

²³ Of course, someone may argue that the Judge's decision on waiver was not "final"; of course it was and, to the extent there is any argument on the point, it should be resolved against the complaint and, derivatively, the Charges. The Company cut and run from the Court without hammering out the decision. It has appealed virtually every other aspect of this matter in two Circuits, up to the Supreme Court (2x). It's choice not to push its luck with the Judge on the motion to strike should not produce dividends here

collateral attack on the Court and its authority and power over cases and controversies before it. This isn't about an implied waiver by the Company on a side issue; this is the whole matter now before the Bar. The Court saw a waiver by the Company of the privilege it is now, *clearly to advance its own continuing litigation purposes*, trying to get the Bar to bless. And, similarly, the Court did not – using canons very similar to those bottoming the Charges – see a referable issue after the fullest record imaginable on the very issue(s) the Charges present now.

The Bar should send the Company away empty-handed by dismissing these falsely procured charges. If there is a place for claim preclusion, issue preclusion or plain old “law of the case”, it is now.²⁴ Jurisprudential equities disfavor re-litigation of litigated and decided issues, and that should apply both court-to-court *and* court-to-Bar. Mr. Marcus’ conduct has been judged. The issue of privilege has been judged. The merits of the Company’s actions in relation to its assertions of privilege and Mr. Marcus’ conduct have been judged. To the extent anything was left out of that judgment, it was the Company’s fault, not Mr. Marcus, and it should not be allowed to get the Bar to finish an errand that is, by all rights, complete. This case never should have been brought.

3. *The Charges Were Ill-considered and Have Been Improvidently Brought (i.e., an Unfortunate Abuse of Prosecutorial Discretion).*

that would certainly not have been produced had the Company forced the issue further with the disapproving Judge.

²⁴ The “law of the case” doctrine “conserves judicial time and resources by discouraging ‘multiple attempts prevail on a single question’, and is limited in application only where (1) the first ruling has little or no finality, or (2) the first ruling is clearly erroneous in light of newly presented facts or a change in substantive law.” *Minick v. United States*, 506 A. 2d 1115 (D.C. 1986) (citing *Kritsidimas v. Sheskin*, 411 A. 2d 370 (D.C. 1980), and *United States v. Davis*, 330 A. 2d 751 (DC 1975)). See also *Scales v. District of Columbia*, No. 05-CV-1446 (DC 2009) (applying law of the case doctrine to appellant’s 4th Amendment, excessive force argument).

As indicated above, and in the further material provided below, which is incorporated herein by reference, the Charges are so deficient and so ill-founded as to be considered “improvidently filed.” They should be dismissed if not withdrawn.

First, the Charges (and Bar Counsel’s discretion in bringing them) have been substantially undercut by the Company’s own moves and further key developments. The Company is looking to settle the case with a large [stated] figure -- \$55,000,000 (though there are undoubtedly other sweeteners that discovery will discover) – which it entered, reportedly, AFTER pushing Bar Counsel to push the Charges. At a minimum, Bar Counsel should have waited to examine all the core materials of the Settlement before making a determination to press Charges, especially where, as here, there are substantial indicia of criminality and fraud. If nothing else, it raises a question about the good faith of the complaining witness, and any prudent use of prosecutorial discretion would entail a measure of standing still where Bar Counsel, unfortunately, plowed ahead.

Bar Counsel should have required the Company to produce the Settlement documents, especially any stipulated facts and prospective compliance terms and conditions, to ensure that it was standing on firm terrain. And, of course, if the Company balked, Bar Counsel should have taken that as a red light in moving forward.

Similarly, Bar Counsel apparently never got scads of important material sitting in the Company’s hands at the time it filed its Complaint. For example, Bar Counsel [apparently] never got the Gibson, Dunn report or related materials associated with its “Independent Investigation” of the facts and circumstances about the Indiana fraud and obstruction or the Wisconsin or nationwide E-Rate fraud and criminality. That report and the underlying investigatory materials have existed since 2011; why weren’t they

provided to Bar Counsel? They would have allowed Bar Counsel the fullest assessment of the most obvious issue in this matter: whether the crime-fraud exception in Rule 1.6 applies or not to Mr. Marcus' efforts.

Moreover, proper review of the Gibson, Dunn material would have allowed Bar Counsel to understand another critical and dispositive issue – whether Mr. Marcus properly escalated his concerns “up, up the ladder”, i.e., internally before going ‘outside’ the Company. First and foremost, Bar Counsel would have learned that Gibson, Dunn wasn’t serving the Company’s managers or its legal department; rather, it was “Independent Investigations Counsel”, which means it was retained by the Board or its Audit Committee appointed by the Board. Properly understood, that means that when Mr. Marcus presented a 45-page or so factual chronology²⁵ to Independent Investigation Counsel, as he did in the Spring of 2011, *that presentation was to the Board/Audit Committee by way of its agent, Gibson, Dunn.*

And, the Charges are riddled with un-baked positions, opinions and ill-founded conclusions posing as “facts” and “averments” that, frankly, *are false*, and this includes extremely material ones, e.g., an averment that Mr. Marcus did not further report matters to certain named federal enforcement authorities.²⁶ There are many other factual errors

²⁵ Bar Counsel make repeated references to this Chronology in the Charges. However, Bar Counsel, as Mr. Marcus now understands it, never got a copy of the Chronology from the Company, and never reviewed it or its contents until very recently. This is extraordinary given (i) the Company had it all along and should have produced it to Bar Counsel with its Complaint – and failing to do so is clear indicia of its bad faith in a malicious prosecution; and (ii) Bar Counsel’s multiple references to it, i.e., as though it actually had it and considered it as part of moving forward, which absolutely does not appear to be the case.

²⁶ Mr. Marcus did make such additional reports, and can demonstrate that reporting uncontrovertibly. Had Bar Counsel interviewed Mr. Marcus prior to pressing charges (there is no reason to believe Mr. Marcus would have declined – he has nothing to hide; after all, he is a whistleblower), Bar Counsel would have learned of every effort Mr. Marcus made to ensure that proper authorities were apprised of the facts.

and deficiencies in the Charges, as further detailed in the Answer below (incorporated herein by reference).

And, of course, there is the fact that, after 18 years of driving its litigation get-away car, the Company is STILL in the thick of major federal and state investigative and/or litigation actions *about the very conduct at issue in this proceeding*. Material, critical events are taking place almost daily in this matter. Filings are happening in Wisconsin, D.C. and, likely, California per the State AG's office. There are 19 other states/municipalities that almost certainly are considering following California's lead in challenging the Settlement (as reported), and all of these threads of activities will involve witness review, documentary review, litigation and adjudication of issues, and so on. Why the Bar Counsel thinks the waters are remotely settled enough for it to be attempting to make a record on these matters is incomprehensible.

The Company, master as it is of contumacy and clock-killing, chose the long slog to accountability. That choice should apply here, as Bar Counsel should have observed. Mr. Marcus wasn't going anywhere. Justice wasn't being thwarted, at least not by Mr. Marcus. As awful as more time might have seemed, in a vacuum, all of that falls on the shoulders of the complainant and, because of its false choices in litigation (it has repeatedly and routinely been embarrassed with losses on the merits of its arguments in court, including the SCOTUS), it does not deserve rocket-docket treatment by the Bar. It has usurped enough resources, to be sure. It should be told to wait for the air to clear on the real matters affecting all outcomes, including this one.

4. *The Specification is Insufficient as a Matter of Pleading.*

There are multiple material holes in the Specification that render it infirm as a matter of sufficiency. For example, the Specification does not do what was done in Koeck:

A. Respondent Koeck's Employment with General Electric 3. Beginning on January 3, 2006, Koeck worked as an in-house attorney for the Consumer & Industrial Division (C&I) of General Electric (GE), located in Louisville, Kentucky. BX 1; Tr. 180. The Louisville office managed C&I's dealings in Latin America. 4. *As a condition of her employment, Koeck signed an Employee Innovation and Proprietary Information agreement. BX 1. The agreement provided that Koeck would keep the company's information strictly confidential and, upon termination of employment with GE, she would return all materials of a secret or confidential nature relating to GE's business and not use or disclose these materials.* Id. Koeck also signed an "ADR Policy Agreement," which generally required Koeck to arbitrate any claims against GE.²⁷

In the present Specification, there is no effort to establish the privilege at issue and its ownership and durability. First, there is simply no corresponding discussion of any employment contract between Mr. Marcus and [?] that establishes the grounds of the privilege claim. Passing remarks about Mr. Marcus as a lawyer or counsel or attorney are interesting, but do not establish, as a factual pleading matter, the existence of "privilege" between Mr. Marcus and the Complainant. This is a surprising omission given the Statement of Facts in Koeck.

More importantly, unlike GE, the "Company" with which Mr. Marcus's relationship began was *not* the Complainant, it was a no-longer-existent entity, "BellSouth." Although Mr. Marcus does not recall, and does not possess, any employment contract or language from his initiation of employment with BellSouth in late 1999 (not 2000, as Bar Counsel states), the issue, for pleading purposes, is to establish, on clear and convincing evidence, the existence of the privilege, the privilege

²⁷ *In re Koeck*, Board Docket No. 14-BD-061, at 9.

holder, and the attachment of that privilege as between Mr. Marcus and Complainant. Given the Company's acquisition spree during the relevant time period, which would have included hundreds if not thousands of due diligence points (including with respect to employment and, specifically, professional services employment), NO benefit of the doubt should be given on whether the Company took the steps shown in Koeck to establish the very privilege it claims, putting aside all the other downstream problems there are with that assertion here (crime-fraud, waiver, etc.). Where is the GE-like evidence of employment contract language, etc., establishing the privilege at the center of the charges?

Further, and although there may be an argument that certain issues are "affirmative defenses" with respect to which, arguably, Bar Counsel does not have the burden of proof at the outset to address, it is clearly the case that that pleadings must state valid claims as pled. Here, if Bar Counsel knew, as it did, or should have known, that (i) the Company waived any claims of privilege by its litigation gambit in September 2020, and/or (ii) that the Company appears to acknowledge that the claims of fraud and abuse of the E-Rate program "ha[ve] merit", to use the California AG's phrasing, which would negate the assertion of privilege under a crime-fraud exception, then it had an obligation to address those matters in its pleading in order to state a proper claim for disciplinary action. Here, the Specification of Charges leaves all the hard work to Mr. Marcus. Pleadings should not be abused in this fashion, but should instead be found facially deficient for failing to address the obvious, fundamental infirmities in its case-in-chief.

And, again, there are multiple factual errors – including categorical misstatements of fact and false statements of fact – in the Specification. Such averments should never

be in a prosecutorial pleading such as the Specification, seeking, as it does, to destroy the reputation of a lawyer with impeccable credentials over 35 years of uninterrupted public and private sector service. It is an outrage to be treated as Mr. Marcus has in this matter, and that should chill the bones of anyone reading this Motion and Answer. As described above, and later in the Answer, here are *a few* of the Specification's core factual untruths:

- “After Marcus was informed of AT&T’s decision, he did not refer the matter to a higher authority within AT&T, such as the board of directors or audit committee.” FALSE [see discussion supra and infra].
- “A few days after receiving the performance review, Marcus reported to his superiors concerns that he had allegedly developed during his group’s internal investigation.” FALSE. Mr. Marcus had been actively discussing and detailing and presenting the facts to his supervisors on a consistent basis before “a few days after receiving the performance review”, starting at least by 2010 and continuing, with increasing intensity, throughout the rest of Mr. Marcus’ time with the Company. These efforts were captured in pages 34-46 of the Chronology and included a multi-page memorandum October 21, 2010, to Mr. Marcus’ supervisors and/or superiors – Ed Barillari, Gary Phillips and Keith Epstein – laying out in detail what the Specification of Charges calls “concerns that he had allegedly developed during his group’s internal investigation.”²⁸ The “performance review”, far from being some sort of implied cause of Mr. Marcus stating his “concerns” was, in FACT, retaliation, and nakedly so, as the Chronology thoroughly details in granular, factual terms.

²⁸ See Chronology, Tab A at pp. 41-42.

- “According to Mr. Marcus, he made no other efforts to report AT&T’s alleged wrongdoing to the DOJ, the FCC, or any other government agency.” FALSE.

This averment misrepresents the facts both as to content and context. As to both, it is categorically false.

There are quite a few other errors of fact and misleading slanting of “facts” in the Specification. Those have been laid out in the Answer, *infra*. To say the Charges are not a model pleading is classic understatement.

For inexplicable reasons, the Specification of Charges takes what may have seemed an easy road for a straight-forward case and, thereby, destroyed Mr. Marcus’ reputation without his having any opportunity to respond, other than improvidently through the press after reading the Charges. The shortcuts in the Charges, all things considered, are breathtaking, consequential and impossible to cure. It is unclear to Mr. Marcus whether Bar Counsel ever sought *to talk to Mr. Marcus* before formulating the views reflected in the Charges, but, in any event, Mr. Marcus was never interviewed by Bar Counsel, something Mr. Marcus would likely have permitted, especially if the consequence was the filing of this derelict. We will never know now.

For the foregoing reasons, and for additional reasons gleaned from the Answer below, and in the interests of fairness and due process, and in accordance with the requirements of the Rules for Disciplinary proceedings, Mr. Marcus respectfully requests the Charges be DISMISSED.

ANSWER

Introduction

Exhibit A: “I, _____, do solemnly swear (or affirm) that as a member of the Bar of this Court, I will demean myself uprightly and according to law; and that I will support the Constitution of the United States of America.”

-- D.C. Bar Attorney’s Oath

Exhibit B: “Never rat on your friends, and always keep your mouth shut.”

-- Jimmy Conway, Goodfellas

These quotes represent the poles of the ethical continuum that frames this matter.

At the high end is “officer of the court” culture, to which Mr. Marcus humbly, unabashedly and permanently belongs, a culture that imbues counsel with an authority that clients are compelled to observe and that the community demands of, expects and needs from lawyers. At the low end is corruption, where lawyers are used by fictions to promote criminality and fraud and serve as human shields when the law knocks at the door. The former culture sustains the human experience for which the law is intended. The latter is gangsterism’s abyss.

This matter gives the authorities (the Bar and, perhaps ultimately, the DC Court of Appeals) an opportunity to define in-house counsel’s obligations in a nation tumbling into corruption,²⁹ away from the high ideals it once held, that were the envy of the

²⁹ The U.S. now occupies its lowest ranking ever – No. 29 out of 182 countries – on Transparency International’s Global Corruption Index. Its downward trend, unfortunately, appears to be entrenched and picking up pace. <https://www.forbes.com/sites/duncanmadden/2026/02/10/us-drops-to-its-lowest-ranking-in-global-corruption-perceptions-index/>. See also <https://www.cnn.com/2026/02/10/business/corruption-index-transparency-international-united-states-intl> (“We are very concerned about the situation in the United States,” Transparency International CEO Maíra Martini told CNN Tuesday. “This declining trend might continue.” In a statement, Transparency International, a not-for-profit coalition fighting corruption, raised further alarm about the United States, noting that, “[b]eyond the CPI findings, the temporary freeze

Democracy-aspiring world, and that used to be the hallmark for the practice of law. To do anything other than fully exonerate Mr. Marcus on these facts would be to establish “attorney-client privilege” as a false idol and socially worthless vanity that dooms the Bar to forfeiture of the grace given it by the communities we serve.³⁰

The Specification of Charges was improvidently constructed and, respectfully, injudiciously presented and pressed. In truth, it should be withdrawn. *First*, it is missing core facts, which causes an improper shifting of the burden of initiating/going forward to Mr. Marcus when that burden should be entirely on Bar Counsel. And, of the factual averments it does present, many are materially inaccurate or are so slanted as to be critically infirm and unable, facially, to serve as “clear and convincing evidence” of ethical misconduct.³¹

Second, the Specification of Charges was, and still is, quite premature in the overall scope of the matter to which it is inextricably linked – the Company’s management of corruption charges against it with respect to the federal E-Rate Program (and its misconduct in dealing with federal law enforcement investigating its business activities in that space). The document was crafted and advanced entirely on the bonafides of a complaining Company facing significant liability for egregious misconduct involving the nation’s most important federal program to ensure that its poor schoolchildren and community libraries have internet access for education and other

and weakening of enforcement of the Foreign Corrupt Practices Act signal tolerance for corrupt business practices, while cuts to US aid for overseas civil society have weakened global anti-corruption efforts.”)

³⁰ Jonah 2:8.

³¹ Mr. Marcus is not questioning Bar Counsel’s integrity in this or any other aspect of this Answer. Rather, Mr. Marcus would assert that Bar Counsel unduly, and improvidently, accepted the Company’s view of things when, instead, Bar Counsel should have kept its powder dry for as long as necessary to ensure it had *all* the facts. As will be shown throughout this Answer, Bar Counsel simply did not do that.

salutary purposes; a Company that, weeks *after* Bar Counsel had set itself on going full steam ahead with these proceedings and put them in motion, entered into a settlement agreement that, among many other things, clearly represents a *mea culpa* on the Charges' underlying subject matter, a *mea culpa* that thoroughly vindicates Respondent.

More specifically, on or about March 12, 2026, it was announced that the Company – after 18+ years of parkouring through the judicial system to avoid responsibility for its serial, criminal and fraudulent abuse of the nation's "E-Rate Program"³² – had settled with the False Claims Act plaintiff prosecuting that misconduct for an announced \$55,000,000 (including \$25,000,000 in attorneys' fees).³³ That announced settlement, of course, does not end the matter; to the contrary, in order for the settlement to be "finalized", the Government must approve it. That, in turn, almost certainly includes substantial taskings for the Company, regardless of whether it "admits" its liability; that is, there are likely to be prospective policing documents, e.g., a

³² The Company's abuse of judicial and legal resources has been nothing short of breathtaking in its arrogance and determination. It has, over 18 years+, advanced one patently unmeritorious, even specious argument after another. It has, for example, attacked the False Claims Act – first its scienter requirement and then its very constitutionality as a violation of the Appointments and Take Care Clauses. It has assaulted the E-Rate program – challenging it fundamentally as not being subject to False Claims Act protection at all because, gasp, the Program is funded by private company service providers, not the U.S. Treasury. It has pushed these and other ill-considered positions in federal district courts in Washington D.C. and Wisconsin, in the DC and 7th Circuits and, of course before the Supreme Court where, in one case, cert was denied and, in the other, it lost 9-0. The entire affair of this Company's abuse of Justice, encompassed into one case, would be an *in rem* proceeding styled: "*In Re Kitchen Sink*." Along the way in this shameless getaway exercise, the Company has mocked, embarrassed, shamed and humiliated the bar, all with the ill-gotten spoils of its E-Rate Program raid. It has squandered the good name of a former Supreme Court Justice, further sullied the name of a disgraced former House Speaker, among other low lights. It has even hired, through outside counsel of course, the very prosecutor supervising the criminal fraud case in Indiana (see discussion *infra*) that touched off all of the present saga (presumably, this is the kind of "side switch" the Company prefers). That counsel now loudly touts his victories in behalf of the Company on his firm's web page. The Company has fired its in-house lawyers, used them as human shields for its misconduct, marginalized them, threatened, manipulated and abused them -- even to the point of tragedy (suicide, regarding which the heartless Company refused to permit insurance proceeds to be paid to the grieving family – instead, a crowd-fund was set up by the deceased's friend to provide a few thousand dollars to support the three children left by their father, an AT&T lawyer). It now strides, "like a Colossus", into the very heart of the law – the Bar – to try, finally, to finish the job on Mr. Marcus. It is disgraceful.

³³ See <https://broadbandbreakfast.com/at-ts-wisconsin-bell-settles-whistleblower-case-for-55-million/>.

Compliance Agreement and Compliance Plan, an Integrity Monitoring Plan, Consent Decree, Corporate Integrity Agreement, an Administrative Agreement, a Deferred Prosecution Agreement, a Non-Prosecution Agreement, etc.³⁴ There is likely to be some version of stipulated facts. There will be substantive terms and conditions under which the Company, a major federal and state government contractor, will have to abide for, presumably, substantial duration, and reporting requirements for missteps and misconduct throughout the applicable term(s). And so on.

All of these things go directly to one of the core issues in this matter: whether the crime-fraud exception to attorney-client privilege requirements vitiates(d) the privilege claimed by the complaining Company. The fact of the Company's capitulation is powerful evidence in Mr. Marcus' favor, of course, but it is just the beginning of that examination, not its end. All of the substantive terms and conditions to which the Company is to be bound are relevant to Mr. Marcus' defense but they are also fundamental to the prudent consideration that should be expected of Bar Counsel before committing itself to prosecuting. Bar Counsel rushed to judgment, and sadly so.

Worse, it appears there are snags in the Company's/FCA Plaintiff's attempt to conclude the proceedings via settlement. As noted, the Government must approve the settlement and, although the Company has represented to court (the Eastern District of

³⁴ See, generally, <https://www.whitehouse.gov/presidential-actions/2026/03/establishing-the-task-force-to-eliminate-fraud/>; <https://www.pillsburylaw.com/en/news-and-insights/white-house-task-force-national-fraud-enforcement-division.html> ("**False Claims Act Implications** Section 6 of the Order is especially significant from an enforcement perspective. It directs the Attorney General to "promote the meritorious pursuit" of *qui tam* lawsuits by private individuals, known as relators, who file lawsuits against entities that have defrauded federal benefit programs under the False Claims Act (31 U.S.C. § 3730). *The order also directs the Attorney General to ensure prompt review of those matters, including within the 60-day statutory review period to the maximum extent practicable. That language suggests increased emphasis not only on criminal and administrative enforcement, but also on civil fraud investigations and whistleblower-driven False Claims Act litigation tied to federal benefit programs. The directive is also likely to increase the importance of hotline triage, privileged internal investigations, and document-preservation protocols for entities operating in or around federal benefit programs.*") (Emphasis added).

Wisconsin) that the Government is on board, the fact is the status conference set for “finalization” of the settlement and, thus, full closure of the federal court matters (there is a “nationwide” E-Rate fraud case pending in D.C. District Court) has now been set and re-set multiple times indicating, at a minimum, problems between the Government and the Company in getting to the finish line. Thus, we have a current status quo of a dangling *mea culpa* of some type divorced from an actual, finalized settlement. All of these facts are highly relevant to fundamental due process and Justice of these proceedings. The documents associated with the settlement, assuming it is ever finalized, will need to be brought forward for examination of material pertinent to the accusations of the Company (imagine, for example, stipulated facts utterly according with Mr. Marcus’ well-established claims), Bar Counsel’s misplacement of reliance upon the complainant’s initial telling of the facts, and, of course, Mr. Marcus’ ability to defend himself against the Charges. It would have been best, for all concerned, had Bar Counsel waited a while longer before pushing forward.

And third, the Specification of Charges flies in the face of a ruling by a federal district judge that, among other things, all but declares the Company long, long ago waived any claim of attorney-client privilege it might have had regarding the matter(s) at issue in this proceeding. That is, the U.S. District Court, D.C. stated, in relation to the very subject matter on which the entire Specification of Charges is founded, that “[t]he Company] *has likely waived any privilege and confidentiality protections . . .*” That pronouncement, made June 3, 2022, should have utterly chilled Bar Counsel’s ardor. Sadly, it didn’t.

Stepping back a bit for context, the Company became aware of the facts of Mr. Marcus' whistle-blowing efforts (however one wishes to characterize them) no later than 2017, indeed if not well before. The Company certainly knew, at least by its 2020-2021 appearance in Judge Leon's court seeking case-disposing sanctions against Plaintiff concerning Mr. Marcus' alleged "shocking misconduct", the provenance of the Pro Publica article by Jeff Gerth (a focus of the Charges) which came out in 2012. By 2017, at the absolute latest, the Company was fully seized of the facts it ultimately would put before Bar Counsel in its February 2021 complaint. Thus, years before it filed the complaint, the Company had a choice to make: (i) take steps to rectify the allegedly improper disclosures, whether of documents or other information it viewed as privileged, directly – e.g., through appropriate litigation steps and demands, etc. -- and thus preserve its asserted privileges over the subject matter to the extent appropriate, or (ii) do nothing, or (iii) do what it did, i.e., attempt to use the purported conduct to gain litigation advantage³⁵ in open court proceedings (and to punish Mr. Marcus through the press, which 'picked up' the Company's pleading and arguments and reported on it). The Company chose (iii).

In proceeding as it did, the Judge (who is quite familiar with the Company) expressly ruled:

[The Company] has likely waived any privilege and confidentiality protections for the documents by failing to immediately take steps to rectify their disclosure.

³⁵ See Rule 8.4(d) -- a lawyer is forbidden by the Bar rules to "seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter." See *In Re Koeck*, Opinion at 35. The Company's actions in open court, in published filings (amplified by engaging the press itself, as appears entirely likely (then and continuing)), etc., was a prima facie violation of Rule 8.4(d). Indeed, the Company's complaint, now vouched forward by Bar Counsel, is entirely a "cya" to attempt to avoid its lawyers being referred for charges themselves or being sued at common law, once advised of their misconduct by Mr. Marcus' then-counsel, Kevin Byrnes in the deposition of Mr. Marcus in aid of the Court's consideration of the Company's Motion to Strike.

See, e.g., Fischman v. Mitsubishi Chem. Holdings Am. Inc., No. 18-CV-8188 (JMF), 2019 WL 3034866, at *4 (S.D.N.Y. July 11, 2019) (“Defendants waived any privilege (or confidentiality protections) with respect to the contents of the Complaint by failing to take immediate steps to remedy any misuse by [the plaintiff]”).³⁶

In order for the Company’s position, as parroted in the Specification of Charges, to prevail, in a very real way the Bar must override or ignore Judge Leon’s statement and proto-ruling on the key issue(s).³⁷ Judge Leon’s ruling, indeed, should have been, and should be, considered “law of the case”, at least as a matter of fundamental Justice if not specific disciplinary proceedings jurisprudence. The Bar should not substitute its judgement for the federal Judge’s and should steer well clear of the kind of collateral attack the Specification of Charges represents.

And, it should be noted, Judge Leon, who had a duty as a judicial officer to report attorney misconduct,³⁸ did not do so with respect to Mr. Marcus, despite having a birds eye view of all the facts at issue in these proceedings in a matter where Mr. Marcus’ conduct – the very conduct surfaced in the Specification of Charges – was the central issue. *Judge Leon made no such referral*, i.e., because there was no factual or ethical basis for doing so. The Bar should not collaterally attack or undermine the court’s judgement especially where, as here, respectfully, doing so is fundamentally wrong merits-wise.

³⁶ *See* <https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:83f5dd6e-a277-49d4-b064-de0fc3101158> at 5, n.3 (emphasis added).

³⁷ It is telling that the Company did not seek reconsideration of Judge Leon’s denial of its Motion to Strike or otherwise seek appellate review before the DC Circuit. Presumably, the Company did not find the prospects of appealing, appealing. It now seeks its fortune, such as it is, through Bar Counsel in this sponsored collateral attack.

³⁸ *See* D.C. Code of Judicial Conduct (and ABA Model Rule) 2.15 (B) (“A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.”)

In sum, the Specification of Charges powers forward that which should not proceed at all or, at best, not proceed until ALL the facts are in. The only “clear and convincing” evidence shows (a) that the Company waived any privilege claims it could assert regarding the subject matter at issue, and (b) for any arguable claim of privilege, the Company’s criminal and fraudulent misconduct fully vitiated said privilege.

The Specification of Charges – unwittingly but powerfully – sends a message to the community we lawyers serve, and to the nation’s in-house counsel particularly, that the gangster “keep your mouth shut” ethos controls operations. This, at a time of intensifying, crippling corruption and scandals in the corporate world and the loosening of corporate standards of ethics and good citizenship, *is the wrong message to send*. And, given the complex, interlocking but often frictional duties that encumber in-house counsel particularly, the Specification of Charges is a powerful statement of abandonment. More than a ‘dog whistle’, the Specification of Charges emboldens cheaters and scoundrels and enfeebles Officers of the Court. The facts of this case do *not* warrant issuing that declaration of surrender, not by a very long shot.

Finally, at bottom, the Specification of Charges are derived from the vindictive “CYA” complaint of a Company-in-trouble – a litigant that, over 18 years of full-on evasion of Justice, took many bad gambles, all to end up where it is: caught. The Bar need give it no cover by punishing Mr. Marcus any more so than he already has been throughout this terrible saga. To be absolutely clear: this matter seeks punishment of Mr. Marcus *solely* because he blew the whistle on an entity that

- lied to multiple federal investigators on material issues in major federal investigations in Indiana and nationally with respect to its compliance with the E-

Rate Program's pricing requirements, including volunteering a deception in order to avoid criminal liability (in Indiana) and hide its culpability on the other matters;

- tried to force Mr. Marcus also to deceive said federal investigators in his own right;
- tried to force Mr. Marcus to cover up deceptions already told by the Company before Mr. Marcus was aware of the facts himself;
- tried to shut down, through intimidation, harassment and threats, Mr. Marcus in his efforts seasonably and assiduously to get the facts to protect the Company, its shareholders and the critical equities of the E-Rate Program; and
- tried to use Mr. Marcus very directly to take advantage of deceptions and lies already told to multiple federal investigators and remain silent about those facts while the entity actively and doggedly tried to evade Justice (for now 18 years and counting).

Any punishment of Mr. Marcus, on these facts, affirms that misconduct and, indeed, invites it.

Background³⁹

1. The E-Rate Program. The Universal Service Fund's "Schools and Libraries" or "E-Rate program" is a federal subsidy program established pursuant to the Communications Act, as amended by the Telecommunications Act of 1996 (together, the

³⁹ Reference is hereby made to Mr. Marcus' submissions (i) through counsel Richard Berwanger on August 19, 2022 to Bar Counsel and (ii) through counsel Evan Parke on April 12, 2021, attached at Tab E, as though fully set forth herein. This would seem preferable to restating, line by line, that material, which comprised approximately 22 total, single-spaced pages. This submission should be viewed as both supplementing, and being supplemented by, those earlier submissions to Bar Counsel.

Act).⁴⁰ The E-Rate program, whose annual, capped funding (paid by residential and business voice service and Interconnected VoIP subscriber revenues) level roughly \$2.7 billion, is overseen by the Federal Communications Commission (FCC) and operated by the Universal Service Administrative Company (“USAC”). The fund subsidizes critically needed internet access, wireless and wireline voice services, internal connections to enable those services and other telecommunications “universal services” to needy schools and libraries⁴¹ throughout the United States based on the demonstrated levels of recipients’ needs.

2. E-Rate discounts can be up to 90 percent off service providers’ billed rates and are paid by the federal government to the communications companies that are chosen to provide services to qualified recipients. The program is intended to ensure that schools and libraries, particularly in underprivileged communities, have access to affordable telecommunications and information services. The E-Rate program, at its outset in 1997, had an annual capped budget of \$2.25 billion to cover the annual internet access, telecommunications services, and internal wiring and connections needs of the entire

⁴⁰ For general discussion, see *Wisconsin Bell, Inc. v. United States ex. rel. Heath*, 604 U.S. 115 (2025), located at https://www.supremecourt.gov/opinions/24pdf/23-1127_k53l.pdf. The 1996 Act, as it is called, among other things, transitioned the nation’s universal service efforts from an implicit subsidy platform to an explicit subsidy program. Those explicit subsidies were spread across four baskets – Schools and Libraries, High Cost (funding for hard to serve areas of the nation), Low Income (known as the “Lifeline” program), and Rural Healthcare. The conversion of the subsidy system corresponded with the changing marketplace realities also established via the 1996 Act, principally the introduction of competition in local exchange markets which, to that point, had been controlled by incumbent monopolists (one way or another), and the prospect of the incumbents being able to resume long distance services of which they had been stripped, essentially, in the 1984 divestiture of AT&T. It was anticipated that competition, once stimulated, would evolve, take root, and supplant the need for pricing regulation, or at least substantially supplant it. See, generally, **The Breakup of “Ma Bell”: *United States v. AT&T***, Federal Judicial Center <https://www.fjc.gov/history/spotlight-judicial-history/breakup-ma-bell> (last visited July 10, 2026).

⁴¹ See <https://www.npr.org/2026/07/10/nx-s1-5878405/fcc-erate-schools-internet-discount> (“E-Rate has had a notable impact since its founding. It was created by Congress in 1996, when only 14% of schools and libraries could access the internet. That number is now near 100%.”)

nation's eligible schools and libraries (around 2014-15, the cap was expanded to just over \$3 billion and indexed to inflation – it is now roughly \$3.9 billion).

3. Because of the limited budget for the program and the extensive needs for digital communications services, pricing discipline for the E-Rate Program is and always has been imperative to ensure that the funding is spread as widely as possible to meet the digital services needs of the nation's underprivileged schools and libraries. The E-Rate program is critical to addressing the deficits in resources (the "digital divide") available to libraries and schools in underprivileged communities. The E-Rate program has strict competitive bidding and certification requirements to ensure maximum coverage of annual needs. Included in these requirements, among other things, is a mandate that participating service providers bid, charge, and invoice their offerings at their "lowest corresponding price."

4. "Lowest corresponding price" or "LCP" is defined as "the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services."⁴² Generally, eligible schools and libraries are required to seek competitive bids for the services sought and are required to select "the most cost-effective service offering,"⁴³ with price being the most significant factor. Participating service providers, such as the Company⁴⁴, are prohibited from submitting bids for, charging (or, later, invoicing, or being reimbursed regarding)

⁴² 47 C.F.R. § 54.500; *see also* FCC Universal Service Order, FCC-97-157, 12 FCC Rcd 8776 at ¶¶ 484-490, CC Docket No. 96-45 (rel. May 8, 1997); Fourth Order on Reconsideration et al., FCC 97-420, CC Docket No. 96-45, ¶¶ 133-143 (rel. Dec. 30, 1997).

⁴³ 47 C.F.R. §§ 54.503, 54.511(a).

⁴⁴ AT&T, Inc. (including its various iterations throughout the relevant time frame unless otherwise specified) is referred to herein as "the Company". The Company initiated this matter by the filing of a Complaint with Bar Counsel in 2022.

eligible schools or libraries at “a price above the lowest corresponding price for supported services, unless the [FCC], with respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory.”⁴⁵

5. Once a contract was negotiated and selected by the school or library and approved by USAC, USAC pays the discounted portion of the services through the end of the contract term. Notably, service providers are required to retain documents related to the delivery of supported services for at least 10 years, as well as “[a]ny other document that demonstrates compliance with the statutory or regulatory requirements for the schools and libraries mechanism.”⁴⁶

6. Service providers are further required to produce records at the request of any state education department, USAC, the FCC, or any local, state or federal agency with jurisdiction over the entity.⁴⁷ Service providers are also subject to pre-service and post-service audits and other reviews (including investigations) to ensure their compliance with the statutory and regulatory requirements of the E-Rate program, and must permit representatives of state education departments, USAC, the FCC or any local, state or federal agency with jurisdiction over the service providers “to enter their premises to conduct E-rate compliance inspections.”⁴⁸ In other words, service providers who participate in the E-Rate program are obligated to maintain and permit inspection of the

⁴⁵ 47 C.F.R. § 54.511(b).

⁴⁶ 47 C.F.R. § 54.516(a)(2).

⁴⁷ 47 C.F.R. § 54.516(b).

⁴⁸ 47 C.F.R. §§ 54.516(c)-(d).

information and documentation necessary to establish their compliance with the statutory and regulatory requirements of the E-Rate Program.

7. In addition to the record-keeping requirements outlined above, service providers who participate in the E-Rate program also must file a Service Provider Annual Certification (“SPAC”) Form (Form 473).⁴⁹ If a Service Provider chooses to conduct E-Rate business through multiple affiliates (typical of large providers, including the Company), each entity given an identification number called a “SPIN” has an independent obligation to submit such a SPAC every year in order to participate lawfully in the Program. The SPAC Form requires service providers to certify annually that they will comply with E-Rate program rules.

8. As part of the SPAC, service providers are required to certify, among other things, that the invoices they submit under the ERate program “are accurate and represent payments...for equipment and services provided pursuant to E-rate program rules.”⁵⁰ In addition, monthly invoices submitted by Service Providers to USAC for E-Rate reimbursement (monthly) also bear certifications of similar language (see FCC Form 474 – Service Provider Information Form).

9. The forms, invoices and certifications described are subject to severe federal penalties for false statements including, but not limited to, criminal and/or civil fraud, False Claims Act liability, FCC and FCC OIG enforcement (including suspension and debarment along with severe monetary penalties), and, of course, criminal false statements under 18 U.S.C. § 1001.

⁴⁹ 47 C.F.R. § 54.504(f).

⁵⁰ 47 C.F.R. § 54.504(f)(4).

10. *The LCP Non-Compliance Problems.* Especially in the years immediately following the E-Rate Program's roll-out, the main providers of these services were legacy monopolists that largely did not compete with each other within their respective footprints, and CLEC competition within those footprints was, at best, insubstantial. The Commission, harkening to Congress' concerns, was intent on making the [then] \$2.25 billion spread as far as possible to address as much need as possible. This entailed establishing LCP to achieve policy outcomes that otherwise would be produced by a future competitive landscape the Act's other provisions stimulated, but which was not at all in place at the E-Rate Program's inception. LCP, along with the competitive bidding framework overall, thus, was central to the E-Rate Program's connectivity goals.

12. On April 3, 1997, a group of telecom monopolists (SBC, Ameritech, BellSouth, among others)⁵¹ made a full-court lobbying press on the FCC regarding establishment of certain definitions and parameters for LCP. In 1997, the monopolists wanted to ensure the LCP rule's compliance requirements and the FCC's expectations of providers were flexible, and that the pricing factors to be utilized in determining LCP in a given contractual context were those "normally relied upon in determining prices" (e.g., service similarity between comparables, prices within the geography associated with a given offer/bid for similarly situated entities, volume and term arrangements that might impact value of a given deal, etc.). These notions, ultimately, were incorporated into the codified rules and, importantly, the Commission's Order promulgating the rules and

⁵¹ Today, the Company comprises the SBC, BellSouth and Ameritech entities that were otherwise independent of each other back in April 1997. Each entity, along with the other participants in the lobbying push, was a territorial incumbent local exchange communications services monopolist at the time this program was introduced via the 1996 Act and the Commission's efforts to enable it through regulation.

subsequent orders interpreting and clarifying them.⁵² LCP was of such intense significance to ensuring Program success, it should be noted, that, included among the rules, originally, were requirements that E-Rate providers "self-certify" as to their compliance with E-Rate program rules including, specifically, LCP.⁵³

13. The Company – whether in its prior iterations or, post-2008, in its present form (encompassing legacy SBC, Ameritech, BellSouth, T. Corp.⁵⁴ and other formerly independent and competing entities) -- elided LCP from its/their institutional memory(ies), across the board, and across all aspects of its/their E-Rate business(es).

That blotting out, if you will, seems to have taken place immediately upon the establishment and activation of the Program itself. This was real and actual "shocking

⁵² See Chronology of Facts in Aid of Independent Investigation, Tab A at 2. This Chronology is a carefully detailed whistleblower's diary. It was not requested by the Company and, as such, cannot be called the Company's "attorney work product" or "attorney-client" material. It establishes, without question, the facts underlying or associated with (a) the Company's criminal and fraudulent conduct regarding which, among other things, the "crime-fraud" exception to attorney-client privilege obligations must be measured, (b) the completion of due and appropriate escalatory steps by Mr. Marcus in accordance with his duties as in-house counsel to report "up the ladder", and (c) Mr. Marcus' good faith and the reasonableness of his conduct in attempting to meet his duties in this affair, both within the Company and after separation from it.

⁵³ Once the Order and rules ("Part 54" in Commission parlance) went into effect, it appears the companies, collusively it appears, began to lobby to cabin the ability to enforce LCP. One way this was done was through lobbying on the Paperwork Reduction Act process, i.e., the requirement for self-certifications entailed an "information collection" that had to have a separate notice-and-comment type procedure per the PRA. As an outgrowth of this lobbying, the original explicit LCP-based compliance certification got nixed. It appears this was not an accident but, instead, was a result of a concerted effort by the monopolists to render the requirement still-born.

⁵⁴ SBC is the legacy entity, based in Dallas, Texas, that initially had an incumbent territory of Texas, Arkansas, Missouri, Kansas and Oklahoma. Around 2005, SBC acquired T. Corp., i.e., "AT&T", which was, at the time of acquisition, a long-distance and enterprise services provider, not an incumbent local exchange carrier – i.e., it was SBC's very active competitor (referred to then as a "CLEC") when acquired. Ameritech, acquired by SBC in 1999 was, at the time of acquisition, the incumbent provider in several midwestern States, including Wisconsin, Ohio, Michigan, Illinois and Indiana. The Company's LCP issues, thus, initially arose in legacy Ameritech territory. Lastly, BellSouth, which SBC also acquired in between late 2006 and 2007, encompassed nine states in the nation's Southeast – Georgia, Louisiana, Mississippi, Kentucky, Tennessee, North Carolina, South Carolina, Alabama and Florida. This combination, along with other elements (Southern New England Tel., Alascom in Alaska, etc.) are now known as "AT&T." Mr. Marcus had been employed as BellSouth's counsel for roughly 6.5 years before SBC acquired BellSouth.

misconduct”, to borrow the Company’s parlance, and was made all the more concerning given the Company’s use of outside counsel at Mayer, Brown to provide business legal advice (to be distinguished from litigation legal advice) and training with respect to all things E-Rate, advice that utterly failed to mention LCP (for years, apparently).⁵⁵

14. Fast forwarding to 2008 . . . owing to multiple different threads (the T. Corp. Indiana matter – see discussion *infra*, the Wisconsin LCP matter⁵⁶, etc.) that came to his attention in the course of his service to the Company, Mr. Marcus (and, clearly others newly tasked, as Mr. Marcus was, with working on E-Rate), began to realize that some portion of the Company’s E-rate business, at minimum, had an exposure re: LCP compliance and certifications associated with compliance. The scale and scope of the exposure was unknown (though eminently knowable with a modicum of effort)⁵⁷, but there was sufficient clarity about it to give rise, at minimum, to a duty to investigate the facts. This duty arises from the corporate duties of care and loyalty – to shareholders – and is inviolable in law and equity.

⁵⁵ See Chronology, Tab A, at 4-6, 11-13. On December 17, 2008, the FCC’s Enforcement Bureau sent a draft compliance agreement to the Company re: the Indiana/Intelnet/IHETS investigatory matter that sought, among other things, “a section entitled ‘documentation of lowest corresponding price analyses.’” This was Mr. Marcus’ earliest awareness of the substantive rule and, apparently, the same was true about most of the persons who had been assembled to serve as a new E-Rate compliance control point or “team” for the post-integration Company (i.e., including BellSouth, Ameritech, T. Corp., Southern New England Tel., SBC, and a few other entities). Per the Company’s foremost E-Rate regulatory expert, Mary Henze at the time, “[we] lived through the debate over LCP but it seemed to disappear as an issue once e-rate was implemented. I’m a little puzzled as to why it’s cropping up everywhere now.” See *id.*

⁵⁶ The “Indiana Matter” refers to the joint DOJ/USAO/FCC OIG/FCC Enforcement Bureau investigations of fraud and related misconduct during roughly the 2002-2010 time frame. The “Wisconsin LCP Matter” refers to False Claims Act litigation and investigatory activity associated with legacy Ameritech’s and then the Company’s E-Rate activities in Wisconsin. The “Nationwide” or “National Matter” refers to the litigation and investigatory activity associated with the Company’s, both legacy parts and integrated, E-Rate activities throughout the entirety of that activity, i.e., wireline and wireless voice services and internet access and connections services across the country.

⁵⁷ There was more than enough evidence of non-compliant pricing in the Company’s E-rate business to warrant internal investigation in accordance with standard fiduciary duties and responsibilities (e.g., “notice duty”). It would not have been an esoteric exercise to say the least.

15. As an Officer of the Court (including service as a former federal prosecutor), Mr. Marcus took this duty very seriously. His peers and supervisors at the Company, as high up as the General Counsel and the Board itself (i.e., the Audit Committee), utterly disagreed and made the extraordinarily corrupt choice to prevent the Company from ever investigating the facts of its non-compliance with LCP across the full scope and scale of its E-Rate business. That state of being persists to this day, upon information and belief: to the best of Mr. Marcus' knowledge, the Company *has never authored or authorized a full inspection of its pricing behaviors for the apparent 14 years it conducted E-Rate business without acknowledging the LCP rule.*

16. That is, among other things, Mr. Marcus was part of a group assigned to conduct an initial review of AT&T's participation in the E-Rate program, primarily in the context of the allegations in the Wisconsin Case.⁵⁸ The group focused its investigation in part on the participation of AT&T's affiliated companies in the E-Rate program primarily in Wisconsin, but also elsewhere, at least at a surface/theoretical level, from approximately 1997 until 2010. Mr. Marcus recalls that the group discovered as part of its internal review that by 2009 or 2010, AT&T (i.e., the amalgam of multiple "legacy entities" formed after a breakup of the Bell communication system in the 1980s) had performed hundreds of millions, if not several billion, dollars of E-Rate business in the United States, and as part of that participation, had submitted dozens of annual certifications, and many monthly invoices' certifications, claiming – falsely – that the AT&T entities were in full compliance with the E-Rate program rules, including its LCP requirement, since as early as 1997.

⁵⁸ This is a reference to the FCA litigation, *U.S. ex rel. Heath v. Wisconsin Bell, Inc.*, E.D. Wisconsin (Adelman, J.).

17. Specifically, during the course of the in-house counsel group's review, Mr. Marcus and several others on the review team discovered that, despite repeated representations to the government that it complied with the E-Rate program rules, there was no evidence that AT&T or any of its affiliates had ever implemented any plan, policy, procedure, training, monitoring or auditing activities to ensure any awareness of, and thus compliance with, the requirement by anyone associated with E-Rate business, or to verify or ensure compliance with the LCP requirements of the E-Rate program until approximately 2009 – i.e., after the allegations made in the Wisconsin matter – when Reference to LCP wasn't in training decks or other materials, audit plans at any level, and so on. It appeared that every single iteration of the corporate entity had arrived at the same miraculous place: zero compliance recognition of LCP.

18. AT&T “modified”⁵⁹ its corporate-wide pricing behaviors to comply with LCP standards, but only in the wake of the filing of the Wisconsin Case (which was contemporaneous with the Company's affirmative and false representations of LCP compliance in the Intelnet investigation). However, given that several of the companies that were now part of AT&T had actually lobbied the FCC in approximately 1996 and 1997 concerning the granular aspects of the LCP requirement, including through personnel who were with the company when the allegations first arose in the Wisconsin Case, it appeared to Mr. Marcus that, despite those lobbying efforts which made clear

⁵⁹ Mr. Marcus makes no representations as to whether, in fact, the Company cleaned up its LCP act even after its non-compliance was clearly obvious. Only the Company, and presumably its **Independent** Investigation counsel, Gibson, Dunn (brought in to investigate the facts), would know the answer to that. If no analysis of historic pricing was ever done, of course, then the Company and its various counsel remain willfully blind.

that the companies were aware of the LCP requirement, AT&T's behavior in this regard likely took place from the very inception of the LCP requirement.

19. During the time period covered by Mr. Marcus's investigation, he was unaware of any staff or subject matter experts that the group interviewed who understood or even knew about the program's LCP requirement. Mr. Marcus recalls that AT&T's auditing, training and monitoring protocols revealed no recognition, discussion, awareness or institutional plan for LCP compliance, despite the company and its affiliates having repeatedly certified to the government that it was in full compliance with the E-Rate program rules, including the LCP requirement. Thus, Mr. Marcus determined that AT&T, potentially in all of its legacy components and lines of business, charged prices to E-Rate customers without conducting any LCP analysis, and left it to E-Rate purchasers to raise any questions they may have regarding pricing.

20. Moreover, some of the pricing behavior Mr. Marcus learned about demonstrated conduct expressly forbidden by the FCC (e.g., consideration of whether a given bid opportunity would have any "competitive offers," i.e., whether AT&T would have no one to bid against and, thus, wouldn't need to be concerned about being undercut). Mr. Marcus recalls discovering that, if an E-Rate customer did complain, the company sometimes conducted a limited, post-hoc analysis of its prices, but the company would typically either self-servingly conclude its prices were in line with LCP or provide a refund to a complaining purchaser (of course, without notifying authorities of the issues). These tactics were not, in Mr. Marcus's view, compliant with the E-Rate program's rules, interpretative orders, or the legacy companies' express, written understanding of, and commitment to, what LCP would require.

21. The Company made a careful, calculated and concrete decision that it would not – ever – (a) do the investigation necessary to determine the scope and scale of its *historical* LCP noncompliance, despite very clear corporate fiduciary duties calling for such investigation⁶⁰, or (b) correct its false and deceptive statements to federal investigators with respect to the Indiana matter. And, to be sure, these matters still are not in any way a ‘thing of the past’; to the contrary, these investigatory proceedings essentially *remain open to this very day*.⁶¹

22. When Mr. Marcus attempted to encourage, nudge, or even compel it to take those clearly necessary steps, the Company’s officers uniformly refused. Their response was seemingly hygienic. This opened extraordinary avenues of liability, not only for individuals involved, but for the Company and its shareholders in the event the government (federal or state or both) were to determine, without any cooperation from the Company, that it was materially non-compliant and, indeed, refused to “cooperate”,

⁶⁰ See <https://www.jenner.com/en/news-insights/publications/the-duty-of-directors-and-officers-to-respond-to-red-flags> (“The duty of oversight requires directors to (1) make a good faith effort to ensure that their corporations have proper reporting systems in place, and (2) take action to address red flags that indicate potential corporate wrongdoing. These oversight duties provide the basis for two corresponding forms of fiduciary duty claims, often called Caremark claims: (1) information systems claims and (2) red-flag claims. In a few recent decisions, the Delaware Court of Chancery has offered some further guidance regarding red-flag claims. Red-flag claims assert that, even if necessary, reporting systems and controls were in place, the directors (and potentially officers) of the corporation failed to utilize or monitor those systems, and thereby failed to stay informed of (and thus failed to act on) problems requiring their attention. Red-flags claims generally require that a director’s or officer’s failure to remain informed and act on such information amount to bad faith because the inaction was (1) sufficiently sustained, (2) systematic, or (3) striking.”)

⁶¹ In any such matter, there are two time-frames – the ‘prospective’ piece, i.e., establishing compliance going forward, and the ‘retrospective’ piece, i.e., examining the facts, “wherever they lead”, historically to determine the scope and scale of any non-compliance. The Company refused to do that, and has refused to do that to this day, it is believed. This means, unless the Government conducts such an investigation itself, that the Company is avoiding having to truly answer for its prior misconduct, the price differentials between what it charged and what it should have charged involving billions of dollars of business, potentially, and hundreds, likely thousands of certifications of compliance it submitted that expose it to federal false statements liability. This is over and above any claims that States would also have with regard to the subject matter (e.g., under the E-Rate Program, States typically help schools and libraries participants further defray expenses through their own connectivity funding efforts. The higher the totals needed, the more exhaustion of State resources.).

i.e., by doing the legwork to get to the bottom of its noncompliance, responsibly report findings re: same to authorities, and make the government(s) whole appropriately.

23. *The Indiana/IHETS/Intelenet Matter.* Compounding the emerging horrors of the Company's obvious serial and ubiquitous LCP non-compliance was the acute misconduct with respect to its E-Rate activities in Indiana. As Mr. Marcus learned during the internal review, the Company's T. Corp. affiliate had made statements to the United States Attorney's Office in the mid-2000s' Indiana Intelenet Investigation⁶² that its prices were "LCP compliant."

24. That is, Mr. Marcus learned that in-house and external attorneys for [then still-transitioning/integrating T. Corp.] had argued successfully to federal prosecutors that the government's prosecution theory (*i.e.*, a kickback bribe theory in which the company was alleged to have charged higher prices for services in order to furnish kickbacks) was legally infirm because the company's prices were "federally mandated" under the LCP requirements of the E-Rate program. It became clear to Mr. Marcus that these statements were made to government prosecutors despite the fact that the Company *did not have any policy or procedure in place at the time that would have enabled it to justify the assertion in the first instance or, if challenged, to verify whether the prices offered complied with the LCP requirement.* As such, the statements were materially false, whether made with intent or through negligence.

25. In fact, during his investigation, Mr. Marcus learned that no one associated with the making of those statements to the government prosecutors had any actual knowledge or understanding of the LCP requirement, but were, *at best*, only assuming the Company

⁶² See <https://www.justice.gov/archives/opa/pr/att-technical-services-corp-pay-us-more-82-million-settle-false-claims-involving-e-rate>; and https://www.justice.gov/archive/opa/pr/2006/June/06_civ_396.html.

was complying with the requirements given years of certifications to full E-Rate compliance. Thus, it was unclear to Mr. Marcus how such statements could have been made in good faith. Mr. Marcus was particularly concerned about the Company's representations regarding LCP compliance because, based on his research, the FCC's orders, rules and regulatory framework were clear that the prices charged under the E-Rate program – upon which the discounts were then to be applied – needed to be based on a good faith analysis of comparative prices and enumerated factors (i.e., those factors logically related to cost of service) offered to similarly situated customers. In other words, as it was aware *before the E-Rate program even began*, the Company was legally required to affirmatively analyze its pricing under the E-Rate program and ensure LCP compliance before it could certify to the government (whether in Grand Jury-backed investigatory proceedings in Indiana or anywhere else) that it had complied with the E-Rate program rules.

26. Given that the Company (in any iteration) had not been conducting any such analysis (or training, monitoring or auditing) to ensure compliance with the LCP requirement, Mr. Marcus did not see how the Company could justify its statements (or certifications) that it was meeting the E-Rate program rules, including the LCP requirement. In fact, Mr. Marcus believed that there were potentially thousands of price points that needed to be reviewed by the Company – and swiftly given the myriad threads emerging through investigations and law suits -- to determine whether the Company had, in fact, complied with the LCP requirement or, as was much more likely, had not and needed to find a disclosure path to mitigate the damage.

27. Given the emerging and established facts at that time, and the multiple disclosure duties also emerging, Mr. Marcus raised questions with his supervisors as to whether there was any valid basis the Company or its affiliates could represent to the government and others that it had, in fact, complied with the LCP requirements anywhere, let alone the business under investigation or review. Given the serious probability of mischarges – putting aside the false certifications of compliance, which were independent criminal and civil exposures – resulting from the Company’s apparent long-term, Company-wide LCP non-compliance (if not likelihood, as there were specific instances of suspect charges uncovered in the investigation), Mr. Marcus inquired about the Company’s duty to investigate the extent of the potentially false certifications that had been made in connection with the E-Rate program and whether the government or the Company’s E-Rate customers were entitled to recoup any excess funds received by AT&T during the years in which it or its affiliates had participated in the program.

28. Mr. Marcus advised his supervisors and further up the chain, including to the Company’s Audit Committee (or Board of Directors) per its agent, the “Independent Investigatory Counsel, Gibson, Dunn, that, *at a minimum*, he believed that the Company had a duty to retract its affirmative statements of LCP compliance to the United States Attorney’s Office in the Intelnet Investigation given the Company’s inability to verify its compliance with the LCP requirement, and emerging knowledge of apparent non-compliance with the program’s competitive bidding rules.

29. The Company, of course, refused to do that and, indeed, refused to take any of the steps necessary to identify the scope and scale of its non-compliance and related misconduct with respect to the FCC’s E-Rate pricing standards, particularly LCP, and to

take steps, as likely would have been indicated, to make the E-Rate program whole, make its customers whole, make state E-Rate stakeholders whole and, of course, protect the interests of its shareholders in the premises. The Company's sole apparent rationale for not taking these steps, it turns out, was its desire to keep the way clear for its acquisition of T-Mobile, a failed experiment in the end that cost it billions of dollars in "break-away" fees.⁶³

30. The Company's contumacious, "head-in-the-sand/let's see what they do"⁶⁴ conduct in the LCP matters and the Indiana matter was anathema to Mr. Marcus, trained as he was in sensitive internal investigatory matters and dealing with federal enforcement in those contexts, and totally against the book in meeting corporate fiduciary duties, including norms associated with achieving favorable federal treatment for "cooperating" in enforcement investigations.⁶⁵ Obviously, the Company, at its highest level, had other plans for "advancing" the interests of shareholders beyond those counseled by

⁶³ See <https://www.reuters.com/article/world/americas/attt-mobile-usa-break-up-is-6-billion-sources-idUSTRE74B5H2/>; <https://www.wsj.com/articles/BL-DLB-35948>. The Company's motives, in this regard, made sense; after all, one of the key issues to be examined by reviewers of the merger (FCC, DOJ, the courts) was the extent to which the combined company might pose harm to consumers, particularly vulnerable ones like, say, poor children in schools and community libraries.

⁶⁴ It was reported to Mr. Marcus, long ago, that the Company's General Counsel, Wayne Watts, when apparently apprised of the LCP non-compliance facts, said to those present: "well, let's see what they [the government] do". Mr. Marcus cannot recall who made this report to him.

⁶⁵ See Justice Department Manual, at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-businessorganizations> (Cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (e.g., suborning perjury or false statements, or refusing to comply with lawful discovery requests). Thus, failure to cooperate, in and of itself, does not support or require the filing of charges with respect to a corporation any more than with respect to an individual. . . . General Principle: The Department encourages and rewards cooperation. Credit for cooperation takes many forms and is calculated differently based on the degree to which a corporation cooperates with the government's investigation and the commitment that the corporation demonstrates in doing so. A corporation's cooperation may, as part of a holistic analysis, impact the appropriate form of the resolution as well as the fine range and fine amount. Companies that identify significant facts but delay their disclosure will place in jeopardy their eligibility for cooperation credit. Corporations seeking cooperation credit ultimately bear the burden of ensuring that documents and information are provided in a timely manner to prosecutors.)

fundamental justice and integrity. Although Mr. Marcus was in no position to challenge those calls, very clearly Mr. Marcus was not obligated to go along with and even promote wrongdoing as a part of executing that strategy. Indeed, Mr. Marcus' obligations were precisely the opposite.

31. And, as it turns out, the Company had no plan other than to run the board for as long as possible, profligately spending shareholder money (not to mention ill-gotten gains from the E-Rate Program) across four Presidential administrations and multiple federal court systems (including two hapless journeys to the Supreme Court of the United States) until either (a) everyone got too tired to care, (b) some soft(er), negotiated, exit ramp presented itself that's better than exposure of the true facts (i.e., through self-disclosure or through litigation), or (c) some combination of (a) and (b) occurred.

32. In any event, the Company egregiously violated the E-Rate rules' LCP requirements and outrageously lied to federal investigators about it (and, presumably, is still lying about it). This campaign of deception, lies and witness intimidation (*e.g.*, the Bar Complaint sponsored by Bar Counsel in its Specification of Charges) has been ongoing for almost 20 years. The campaign has engaged and corrupted a phalanx of "legal talent" from multiple law firms, not to mention in-house counsel and non-legal professionals. The seeds of the Company's corruption have been planted in many, many places.

33. The Company certainly has continued to dog and punish Mr. Marcus – now through the Specification of Charges' sponsorship -- for not getting with the program. This is indicative of the Company's resolve to see its powerfully vindictive will done while validating for all and sundry that corruption prospers. It is hoped that the present

authorities will take a higher and better view than the Company/Bar Counsel has presented of Mr. Marcus and, frankly, back his play.⁶⁶

34. *Mr. Marcus' Escalation within the Company and Subsequent Efforts as a Whistleblower.* The Specification of Charges embodies an institutional refusal to consider that Mr. Marcus could be, has been, and is a “whistleblower.”⁶⁷ That is, it is clear that Bar Counsel can conceive of no facts in which in-house counsel can be a relator in a False Claims Act matter, or probably in any other context (e.g., Dodd-Frank reporting, Sarbanes-Oxley reporting, etc.), that is, if it involves disclosure of what a corporate wrongdoer considers its privileged secrets, even when the crime-fraud exception to privilege is abundantly proved, and even when the Company, through its own actions upon reflection of its circumstances (including, e.g., its obvious recognition of the crime-fraud exception’s applicability), clearly and conclusively waives such claims. This elevates Bar Counsel’s view of things to the highest possible level, even higher than Congress’ which, in each of those contexts, has expressly permitted in-house

⁶⁶ There should be no mistake: Mr. Marcus’ efforts, especially the creation of a comprehensive factual Chronology (Tab A), appropriately served(s) justice by establishing a durable recitation of core facts that would or could withstand a long slog. The Chronology is a witness, if you will, that could not be outdistanced.

⁶⁷ From the beginning, Mr. Marcus has claimed, and sought protection as, an in-house corporate counsel whistleblower. *See* Affidavit of Theodore C. Marcus, April 25, 2011, Tab B. As such, the Company’s FCA Settlement and express or implied admissions of wrongdoing is vindication of Mr. Marcus and his efforts to see the right thing done. Mr. Marcus’ activities, in fact, should be protected from retaliatory, vindictive follow-on action from the Company, to wit, the present Charges. For decades, the Company, through its multiple iterations, took advantage of a federal program designed to ensure that poor schools and libraries in poor communities had access to the internet and essential connectivity for education, health care, personal business, and multiple other salutary uses. There is ample evidence the Company intentionally, knowingly and deliberately erased the LCP requirement from its institutional compliance structure altogether, never intending, from Day 1, to comply with the requirements, billing needful applicants at whim without regard to the careful pricing discipline built into the program – indeed as lobbied for by the incumbent monopolists themselves (see Chronology, Tab A, at 1, 14 n.4), and running out multiple litigation clocks using its inexhaustible resources unapologetically. Mr. Marcus asks this Committee to consider his vindication on these facts, especially when, as here, the Company and the Bar’s charges pre-date the Company’s implicit, if not explicit (we do not yet know) *mea culpa*.

counsel to serve as whistleblowers. It is hoped that view will be rejected in these proceedings.

35. Mr. Marcus was charged with assisting the Company in responding to an FCC subpoena in the Wisconsin Case. In conjunction with his duties, Mr. Marcus, consistent with his experience and training as a former Assistant United States Attorney, experience as litigation counsel in a large law firm, and other prior experience with large Company internal investigations, suggested to his supervisors that the Company work diligently to investigate the facts of its apparent long-term LCP non-compliance. Mr. Marcus believed doing so was necessary to (a) verify the extent of noncompliance, (b) enable the Company to disclose such non-compliance as would have been necessary under the circumstances, (c) enable the Company to meet its various and extensive duties of candor and good conduct as a Carrier of Last Resort and as a federal and multi-state telecommunications licensee, and (d) eventually enable the Company to be viewed and treated by investigators as “cooperating”,⁶⁸ i.e., addressing itself seriously to the facts at hand. When his immediate supervisors ignored his pleas, seemingly without legitimate bases, Mr. Marcus attempted to notify his supervisors’ superiors of his concerns, but he was unable to convince any supervisor to take any action even to superficially review the Company’s LCP compliance.

36. In the Affidavit provided to the Company and to its Independent Investigation Counsel, Gibson, Dunn, Mr. Marcus swore and affirmed the following:

The undersigned, Theodore C. Marcus, General Attorney for AT&T, hereby swears, affirms and attests to the following:

⁶⁸ See 18 U.S.C. § 3553(e) and Section 5K1.1 of the United States Sentencing Guidelines (regarding cooperation credit for corporate criminal defendants); see also DOJ’s Principles of Federal Prosecution of Business Organizations, § 9- 28.720.

1. That on Friday, April 22, 2011, I advised (and am continuing to advise) AT&T that it should disclose in its upcoming quarterly SEC filing (10-Q), and all future similar SEC reports (10-Q, 10-K, etc.), in an appropriate fashion, the existence of the pending "Independent Counsel" investigation (see, e.g., the recent report on the CompUSA whistleblower internal independent counsel investigation, in which CompUSA reported the existence of that investigation in its annual report 10-K) into allegations I have made about potential criminal and other wrongdoing by Ed Barillari and Suzanne Montgomery with respect to their roles and statements in relation to the federal government's Indiana Intelenet investigation, and Brian Moore, with respect to his role in punishing me, in Ed Barillari's and perhaps other officials' behalf, as a "whistleblower" concerning these matters;

2. That I advised "Independent Counsel", by "FYI" copy, of my effort as described above on April 22, 2011, and that I am now advising "Independent Counsel" that it has a role in ensuring that the Company makes a legally valid and appropriate determination of its obligations to report the existence of the "Independent Counsel" investigation in its 10-Q, and thus have placed "Independent Counsel" on notice of its potential duties in that regard;

3. That I have asked, and am continuing to ask, responsible officials in the AT&T Legal Department to provide me — at the Company's expense -- with competent counsel to assist me in identifying, assessing and determining all issues associated with my abilities to provide appropriate, effective legal service to the Company and its shareholders in the present environment, including, but not limited to, (1) assessing potential conflicts of interest arising out of the subject matter, (2) assessing my duties to report and/or escalate matters arising out of the subject matter (both the allegations of criminal false statements and also the underlying but separate issues relating to the Company's compliance with the FCC's E-Rate "LCP" rules over the past 14 years), and (3) establishing an appropriate set of boundaries and protocols to ensure that I can practice law in behalf of the Company without fear of further reprisal and hostile activity by way of "Performance Reviews", travel and expense reviews, or other mechanisms of abuse, and that the Company can suitably supervise me without engaging — knowingly or otherwise — in misconduct with respect to that supervision;

4. That I have orally advised the Company, repeatedly, and specifically in writing on October 21, 2010, that it should conduct an internal review of its E-Rate LCP pricing compliance throughout its history of participating in the program, across its entire GEM organization, across all pre- and post-merger entities, across all Priority 1 and Priority 2 categories, across wireline and wireless services, and across both its ILEC footprint and states outside of that footprint;

5. That I am advising the Company, and have suggested before, that a substantial number of persons in the Legal Department have "skin in the game," that is, are associated with, or have exposure associated with, the Company's problems with LCP compliance, and that it is appropriate for the Company to ensure that no

such persons, or persons they control via reporting relationships, supervise my work or provide input to others to be used for evaluation of my work and performance;

6. That I am concerned that the Company's Legal Department may be actively attempting to selectively gather and selectively frame information for the purpose of identifying so-called "deficiencies," while ignoring positive performance (e.g., the 2010 review in which the Company refused to consider any of the "significant achievements" for that year, and further refused to seek or permit any input from my prior supervisor, despite the fact that I had served in his organization for the entire first quarter of 2010), and even ignoring entire evaluations in which my overall performance was identified as "Meets Most and Exceeds Some Expectations" (2009);

7. That I am advising the Company's Legal Department that it has a duty to provide honest, prudent and ethical service to its organizational client, the GEM organization, which may include advising that organization's leadership of any long-term failure by the Legal Department's to provide advice, counsel and guidance on the Company's LCP obligations, thereby exposing members of that organization (and its various predecessor organizations' members) to exposure for multiple violations of those requirements, and to take all steps to provide counsel to affected individuals in the GEM organization so that they can have adequate representation, as needed, in addressing themselves to those exposures — which representation, in my judgment, should be paid for by the Company unless there are strong reasons for not doing so in any individual case;

8. That I have provided specific, detailed documents and information to the Company's "Independent Counsel" investigating the matters described above that definitively establish that Suzanne Montgomery (with Ed Barillari directing her) and Mary Henze were the principal authors of the Company's 2 strategy for negotiating with the FCC toward a Compliance Plan to resolve the Indiana matter in late 2008 and early 2009, that my role was quite limited in that regard and that, in fact, I was on vacation the first critical week of January in which much of the strategy for negotiations with the FCC over the Compliance Plan was formed, and initial consultation with the FCC took place and, thereafter, was in a very limited role on those matters as Montgomery (under Barillari's direction) took the full lead on all issues both within the Department and before the FCC in the Company's behalf. To the extent that there is any question as to my role before the FCC on these matters, or statements I made or that were made in my presence by others (e.g., the Henze conference call I attended in early 2009 with the FCC's EB, which I described in last week's interview with "Independent Counsel"), I am hereby requesting that the Company so advise me of such concern(s), and immediately provide a limited waiver of attorney-client and related privileges it may believe are in effect, so as to permit me to clarify such statements to the FCC's Enforcement Bureau and remove any potential taint associated with those statements — even though, as I have repeatedly stated, I am

certain that! have neither made such misstatements, or permitted them to be made in my presence. if the Company does not so advise me of its position to that effect immediately, the Company's silence constitutes total agreement with my substantive position, thus described.;

9. That I have advised the Company, through its "Independent Counsel", that if the Company chooses not to discipline Barillari, Montgomery and Moore, including but not limited to, removing them from the Company and reporting them to their respective Bars and to the federal government if that is appropriate, then I wish to have the Company waive all privileges that it may believe bar me from making such reports as described in the event that I determine it is my obligation to make such reports, and I am hereby renewing that request;

10. That at the outset of the present "Independent Counsel" investigation, I provided the Company, through its "Independent Counsel," with a 45-page chronological narrative and full set of source documents (a binder approximately 8-9 inches thick) describing the matters underlying my allegations and fully validating my "concerns" about wrongdoing by Barillari, Montgomery and Moore (and others, possibly), and have further endured sixteen (16) hours and counting of intense questioning, in person, concerning these matters (including with respect to LCP compliance). I have submitted these materials and evidence without the benefit of counsel, and without requesting or demanding counsel for these ends;

11. That I am hereby renewing my request that the Company make available to me competent legal counsel, at the Company's expense, to assist me and the Company in exploring an appropriate resolution of my current and future role in the Company for my benefit, and for the benefit of the institution to which 3 my legal obligations and duties run. It is unquestionably prudent for the Company to make such counsel available, and exceptionally ill-advised to refuse to do so, or to attempt to force me to retain such counsel at my own expense, when all of the causes for the need for counsel owe to the conduct and failings of the Company and its Legal Department, not me; and

12. That I am hereby requesting, in behalf of the Company's shareholders, that the Company not engage in any efforts to discredit and/or punish me for bringing these and related matters to light, and for acting in my best judgment and good faith in the premises. In this regard, I am appropriately concerned about potential missteps, some of which are detailed herein, that the Company is making, or may make, in handling these issues and in dealing with me.⁶⁹

37. Specifically, as the Chronology and Affidavit make clear, Mr. Marcus made an extraordinary, and likely unprecedentedly thorough internal reporting effort to deal with the

⁶⁹ Affidavit, Tab B.

crisis of wrongdoing he uncovered or otherwise became aware of. Mr. Marcus carefully and assiduously reported “up, up, up the ladder” – first to his immediate supervisors and coordinating legal department stakeholders, then to their bosses, then to the Company’s vice-General Counsel, Bill Drexel, and General Counsel, Wayne Watts. Then, after Watts advised that the Company had retained “Independent Investigatory Counsel” to take the next steps, Mr. Marcus, by providing the full Chronology to “Independent Counsel” (Gibson, Dunn) in the Spring 2011 (along with sitting for hours of interviews by Independent Counsel), Mr. Marcus *directly provided the fullest report possible to the Company’s Audit Committee, the highest rung on the reporting ladder.*⁷⁰

38. To the best of Mr. Marcus’ knowledge, both at the time and now, Gibson, Dunn was retained by, and reported to, the *Company’s Audit Committee or the Board of Directors itself*, which is certainly the norm in such matters.⁷¹ That is, as retained counsel

⁷⁰ This is a key fact that contradicts and refutes the relevant averments of the Specification of Charges (*see, e.g.*, para. 22, and further discussion, *infra*), and Bar Counsel’s essential theory of the case, i.e., that Mr. Marcus did not act reasonably in the disclosures at issue because he did not make the requisite internal “up the ladder” reporting effort. To the contrary, Mr. Marcus took all due steps to report the misconduct within the organization before going outside the organization.

⁷¹ *See, generally, Overseeing internal investigations: audit committee responsibilities: PwC, at <https://www.pwc.com/us/en/services/governance-insights-center/library/audit-committee-overseeing-internal-investigations.html>* (“Companies are getting more whistleblower tips and complaints. Shareholders, employees and regulators expect companies to follow up and resolve any issues. For many companies, it is not a matter of if a significant complaint will occur but when. And given the size of some whistleblower settlements, the incentive to speak up is growing. Complaints often involve a possible economic loss to the company and have accounting, internal control and disclosure ramifications. As a result, the audit committee is usually called upon to oversee or direct an internal investigation.”). *See also* Harvard Law School Forum on Corporate Governance: Internal Investigations Special Committees Resource, at <https://corpgov.law.harvard.edu/2017/07/06/internal-investigations-special-committees-resource/> (“In recent years, companies increasingly have been undertaking internal investigations in an effort to uncover and remediate corporate wrongdoing. Some internal investigations are handled by the company’s board of directors, if a majority of the board is comprised of independent directors, while others are carried out by the audit committee . . . or other existing board committee. In many cases, however, the board creates a special committee of independent board members specifically to conduct the investigation. Typically, a special committee is used to investigate large matters where the board of directors is concerned about the company’s ability to conduct an independent investigation (for example, because the allegations implicate the company’s senior management). Common scenarios include where . . . a government agency is investigating the company.”).

for the Audit Committee or the Board, Gibson, Dunn was *its agent* and, thus, Mr.

Marcus' provision of the full Chronology to Gibson, Dunn, as well as Mr. Marcus' multi-hour interview by Gibson, Dunn's lawyers wherein Mr. Marcus provided answers to all questions and concerns, met, without more, any requirement to report the matters to the "highest authority" of the organization. If the Company had given the Gibson, Dunn report/brief/readout/etc. to Bar Counsel, as it should have,⁷² Bar Counsel would have known Mr. Marcus met all obligations under Rules 1.13 and 1.6, and Bar Counsel presumably would not have stated in the Specification of Charges that Mr. Marcus failed to make report to the Audit Committee, i.e., the highest necessary levels within the corporate structure before going outside the structure to make report.⁷³

⁷² It is Mr. Marcus' understanding that the Company has not provided any such document to Bar Counsel either accompanying its Complaint or through Bar Counsel's investigation. That document will speak directly to what the Company knew about its criminal and civil exposures, and when it knew it. In turn, the material will illuminate the good faith behind the Charges (stemming, as they do, from the Complaint), bolster Mr. Marcus' crime-fraud and waiver claims, and otherwise serve the administration of justice in these proceedings. Mr. Marcus certainly demands the opportunity to review it as part of defending against these Charges (see catalog of documents Mr. Marcus will seek in this matter, *infra*). This is fundamental due process.

⁷³ See N. Faquih, Choosing Which Rule to Break First: An In-House Attorney Whistleblower's Choices After Discovering a Possible Federal Securities Law Violation, 82 Fordham Law Review 6, Article 23, at 3373 (2014) ("The lawyer is permitted to disclose confidential information to outside sources only if the lawyer reports the violation to the higher authority who refuses to act or delays action, and the lawyer believes that the violation is reasonably certain to result in substantial injury to the organization. Although in this situation the lawyer may disclose information regardless of whether or not Rule 1.6 permits it, disclosure is limited to situations in which 'the lawyer reasonably believes [it is] necessary to prevent substantial injury to the organization.' . . . Rule 1.13 also provides that lawyers who believe they have been discharged because of the actions described above, or who withdraw under these circumstances, should take steps as reasonably necessary to ensure that 'the organization's highest authority is informed of the [lawyer's] discharge or withdrawal.'"). Suffice it to say, and as shown in the Affidavit at page 1, para. 1, this matter certainly represented a major contingent liability for the Company at the outset. Mr. Marcus, as a General Attorney for the Company, was responsible to provide input, on a routine basis, in aid of the Company's quarterly and annual reporting. Mr. Marcus specifically advised that the Company should report, or should have reported, the fact of the Government's investigation of its E-Rate practices or, at least of the allegations I had raised with respect to the Independent Investigation it had initiated. See Affidavit, Tab B at para. 1. So, in addition to all of the pressures already on Mr. Marcus as described in the Chronology (but not in Bar Counsel's Specification of Charges), Mr. Marcus also had the responsibility of ensuring the Company's public reports to shareholders, was truthful and accurate under the Securities laws. Thus, Mr. Marcus' responsibilities were in multiple dimensions that, in all candor, Bar Counsel does not seem to appreciate or, in any event, has given very short shrift to: (i) as an Officer of the Court; (ii) as a protector of the Company and its shareholders; (iii) to meet all duties of candor under the Bar's rules and

39. Mr. Marcus was later informed that Gibson Dunn concluded the company had no “affirmative duty” to make any disclosures to the government regarding its LCP compliance issues, and was affirmatively denied access to Gibson Dunn’s report (“that would not be productive”, Mr. Marcus was told by Mr. Drexel, he recalls). Given his knowledge of the E-Rate program rules and the statements made by the Company, Mr. Marcus was not satisfied that Gibson Dunn had conducted a legitimate investigation of the issues or, at minimum, that the “no affirmative duty to disclose” conclusion reported to Mr. Marcus was legitimate.⁷⁴

40. Thus, Mr. Marcus remained concerned that the Company had repeatedly certified in SPACs and invoices (SPIFs), and had argued to the United States Attorney’s Office, a federal Grand Jury (derivatively, at least), and other federal investigators, that it was, and had been, complying with the LCP requirement when it could not in good faith verify that it had done so. Mr. Marcus was concerned that, if the government or others conducted a thorough investigation, it would be proven that those statements were false. Further, he wanted there to be clarity, and beyond argument to the contrary, that he, or his group, aided the Company in committing fraud, perjury, or obstructing a government agency given the assistance he had provided on E-Rate matters.

applicable requirements with respect to dealing with Government investigators; (iv) as a faithful steward with regard to the E-Rate program and its goals and objectives; and (v) to himself and his dependent family.

⁷⁴ As readers will recall from the infamous Valerie Plame/Lewis Libby saga, Karl Rove, President Bush’s closest advisor, ran into considerable problems for misstatements to a Grand Jury and to federal investigators, problems for which he only very narrowly escaped criminal liability by seasonably correcting the record. See <https://www.dailykos.com/stories/2005/10/9/155522/community/Rove-Withheld-Info-from-the-Grand-Jury-And-FBI/> (“A discrepancy between the grand jury testimony of Karl Rove and Time Magazine reporter Matthew Cooper is the reason Rove will testify again. Newsweek reports investigators have found an e-mail confirming a meeting between Cooper and Rove, President Bush’s top political adviser. Rove failed to disclose the meeting both during a 2003 FBI interview and during his first appearance before a federal grand jury investigating the leak to the press of the identity of CIA agent Valerie Plame...”).

41. Mr. Marcus's concerns stemmed from his ethical duties as an attorney, as a senior director of a publicly traded and heavily regulated Fortune 25 concern, and the duty of candor and truthfulness that is incumbent upon every person appearing before the FCC. Indeed, under 47 CFR § 1.17, in any FCC investigatory or adjudicatory matter, no person is permitted in any written or oral statement of fact to "intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading."⁷⁵

42. In addition, Mr. Marcus was aware that in 2002, SBC Communications, Inc., the predecessor to AT&T and the acquiring entity of BellSouth, Ameritech, etc., had entered into a Consent Decree with the Commission's Enforcement Bureau that included a multi-year Compliance Agreement in which SBC (now AT&T) had agreed to taking steps "to ensure that all of its employees who engage in contacts with the FCC are properly educated and thus made aware of their obligations to provide truthful, accurate, and complete information to the [FCC]."⁷⁶

43. Mr. Marcus was concerned as to whether his participation in the team that was in part responsible for formulating the Company's representations to the government in the Intelenet Investigation and other E-Rate matters before the FCC would violate the ethics rules or rules relating to representation before the FCC. In addition, while the Company had, or claimed to have, by 2009 made changes to its pricing policies and internal pricing model to account for LCP in new E-Rate contracts, it refused to undertake any appropriate, retroactive audit of prior E-Rate program contracts – even though many of

⁷⁵ See 47 CFR § 1.17(a)(1).

⁷⁶ See 2002 SBC Consent Decree, <https://transition.fcc.gov/eb/Orders/2002/FCC-02-153A1.html>.

those contracts were still being performed at the previously set contract rates – in connection with which it was still issuing invoices and certifying to the government compliance with the LCP requirement.

44. And, regarding Indiana specifically, but the entire set of matters by extension, the Company's refusal to correct the record with federal prosecutors, the Grand Jury, or investigators in the Indiana E-Rate matter hardened the criminality of that conduct under obstruction, false statements and willful deception and other theories designed to safeguard the integrity of federal criminal investigations, and cast an intense pallor over its conduct with respect to the rest – what it would do in the Indiana context meant it would “die with the lie”. This turned out to be rather prescient.

45. Mr. Marcus did not understand how the Company could so behave under the circumstances, especially knowing it could not verify LCP compliance when it entered into any E-Rate contracts from the Program's inception to that point, and he was concerned that the Company was making, and would keep making, *ongoing misrepresentations*, either consciously and willfully or through “willful blindness.” Mr. Marcus's concerns were heightened by the Independent Investigation law firm's “findings” of “no affirmative duty to disclose” the Company's conduct in any of the investigations at issue. Mr. Marcus, therefore, requested – in writing -- that the Company authorize him to obtain independent legal advice with respect to his duties and obligations as a senior lawyer with duties of care to shareholders, an officer of the court, a lawyer appearing before the FCC, and a member of the Bar. The Company, inexplicably and corruptly, denied those requests.

46. But this wasn't simply a philosophical difference of opinion. To the contrary, the Company immediately shifted into intimidation mode to manage Mr. Marcus whom it clearly had identified, by this time, as a gallstone. Mr. Marcus, as he became apprised of the facts utilizing all due care and diligence,⁷⁷ as described, attempted to convince the Company, through its representatives (including Mr. Marcus' superiors in the Legal Department) to reverse course, correct the record with DOJ/USAO/OIG and proceed accordingly, including through the necessary internal reviews to identify the full scope and scale of the LCP non-compliance issues uncovered in that context.⁷⁸ The Company chose to do neither and, instead, set itself to bullying, intimidating, harrassing, threatening⁷⁹ and demeaning Mr. Marcus,⁸⁰ using all of its power and considerable means

⁷⁷ See Chronology, Tab A, at pp. 15-19.

⁷⁸ See Affidavit, Tab B; *see also* Chronology, *passim*.

⁷⁹ See, e.g., Chronology, Tab A, at 36-44 ("... Moore called TCM to chastise him about the [October 2010] memo [describing LCP compliance problems, investigatory integrity issues, suggestion to conduct internal review of all LCP compliance problems company-wide, etc], and to challenge the provenance of the memo, TCM's motives in writing it (Moore attacked it as a plan for personal gain, among other things), and the efficacy of the recommendation for a [plenary pricing] review. Moore did not address any of the merits of the memo, however, preferring to stay on an ad hominem offensive, and to toss out that the internal review suggestion 'was shot down by [General Counsel Wayne] Watts when it was floated ... Of course, TCM could not challenge the truth or accuracy of the statement, nor could TCM check the context, assuming it was 'shot down'. In any event, TCM was convinced that Watts did not see the memo, and did not get a fair presentation of the overall approach, or even the 'stress test' [reviewing E-Rate pricing in a defined set of voice, internet and internal connections activities] idea. The conversation ended as follows: (1) TCM apologized to Moore for not sending the memo to Moore first; and (2) Moore [telling] TCM that **'Wayne would have shot off your nuts if you brought that idea up.'**").

⁸⁰ In the evaluation upon which Bar Counsel has relied for its belief that Mr. Marcus was considered 'substandard' or 'underperforming' as counsel – an evaluation that, in all candor, is simply a self-serving hit piece designed by its co-authors to threaten and leverage Mr. Marcus into a state of compliant service that bore no resemblance to the duties required of him as counsel – Mr. Barillari (who authored or co-authored the bad strategy with the Indiana investigation) injected his own poisonous commentary to ensure that Mr. Watts – the Company's General Counsel -- was aware of the punishment Mr. Marcus was receiving for having attempted to 'do the right thing' on the LCP and Indiana matters. *See* Chronology, Tab A, at 45-46 (describing, among other things, a performance review around March 4, 2011; in that review, Mr. Marcus recalls, Mr. Barillari – who was separated from the Company several years ago, along with Mr. Moore, it should be noted – specifically wrote that Mr. Marcus [paraphrasing] **"was told not to bring up the LCP matter but kept doing so"**). This was a clear threat to Mr. Marcus, and clear retaliation – naked and in writing – for having attempted to serve the Company and its shareholders properly in the matter of the

(including, of course, work product disparagement and naked manipulation of the performance management system).⁸¹

47. As described above, to the best of Mr. Marcus' knowledge, the Company has never had to address itself to its obstructive and related misconduct – as described – with respect to the Indiana matter. If it has, that certainly has not been made public. Mr. Marcus does not know, of course, whether the Company's deception and related obstructive misconduct in the Indiana matter was even revealed in its settlement negotiations with the FCA plaintiffs or the government and, thus, made part of, the “announced” settlement of the FCA matters.⁸² Mr. Marcus also does not know, for example, if the Company provided, or was even asked to provide, a copy of Gibson

LCP and Indiana misconduct. Mr. Marcus has advised Bar Counsel to obtain, and carefully review, that performance evaluation from the Company, and consider it in the context laid out in the Chronology.

⁸¹ See Chronology, Tab A, at 44-46 (“Further, even though TCM had provided a copy of his significant accomplishments memo to G. Phillips, in whose organization TCM was a member for the entire first quarter of 2010 [i.e., the evaluation period], Phillips did not, and apparently was not allowed to, submit any comments or thoughts into TCM's review. Phillips['] preceding evaluation [i.e., for the entire performance period prior to TCM's transitioning over to Ed Barillari's group – the group and attorney responsible for lying to the Government in the Indiana matter, among other misdeeds] had TCM rating in the '4s' [out of 5] overall, with a notation that TCM 'met most, and exceeded some expectations.'”).

⁸² Although the Company has claimed -- with apparent acquiescence by the qui tam Plaintiff, Plaintiff's counsel and perhaps the government(s), that the matter has been settled”, Wisconsin Bell to Pay \$55 Million False Claims Act Settlement, there are substantial questions about just how “settled” things actually are. Settlement was announced to the Court in Wisconsin (Judge Adelman) at some point in March 2026, after multiple rounds of discussions following 18 years of litigation. Accordingly, per the Court's docket, the matter was “administratively closed.” Since then, there have been several status conferences scheduled, ostensibly, to provide updates of finalization including, but not limited to, DOJ approval and, perhaps, suitable wrap-up of the matter in DC federal court before Judge Leon which, Mr. Marcus understands, has been ‘on hold’ pending further developments in Wisconsin. Needless to say (though Mr. Marcus has said), Mr. Marcus needs to have full access to the Settlement, including any “corporate integrity” obligation, compliance agreement or consent decree wrapping up matters before the FCC, and any statement of liability and stipulated facts. Clearly, for \$55,000,000 (and likely other un-disclosed consideration between the Company and the government), there must be something of relevance to Mr. Marcus' defense to these ethical misconduct allegations, regardless of how those allegations are framed or couched in Bar Counsel's Specification. Mr. Marcus has asked for, and renews said request here, the Company's settlement documents. Mr. Marcus is fully prepared to provide sworn, signed assurances of non-disclosure and strictly circumscribed use. Access to the Settlement materials (and the Gibson, Dunn report/readout/briefing of internal investigation), among other discovery, quite obviously, is *sine qua non* of due process here.

Dunn's 2011 internal investigation "report" or "summary" or "briefing" or "readout" to DOJ/FCC. Mr. Marcus has never seen that report and, indeed, when Mr. Marcus asked to see it, he was told by the Company's Bill Drexel, who was the client contact overseeing the investigation, that "[getting a copy] would not be productive."⁸³

48. Thereafter, Mr. Marcus remained as careful in executing his perceived duties as he had been while within the Company.

49. After exhausting efforts to attempt to rectify the conduct of the Company internally, Mr. Marcus became convinced that he had no choice under the Rules of Professional Conduct but to take action externally to prevent what he believed was fraud being committed by the Company and attempt to rectify potentially hundreds millions of dollars (or more) of harm caused by the Company's failure to ensure LCP compliance as part of its participation in the E-Rate program. Mr. Marcus reviewed the Rules of Professional Conduct, *including Rules 4.1 and 1.6*, and conducted other research, including research relating to the "crime-fraud" exception to attorney-client privilege and the protocols of disclosure under the Sarbanes-Oxley Act. Mr. Marcus concluded based on his research that his ethical obligations as an attorney, his obligations to the shareholders of the Company, his duties as a person appearing before the FCC in the matters described (or in future matters), and his Officer of the Court responsibilities not

⁸³ Clearly, the Gibson, Dunn report -- in which, apparently, the firm advised the Company that it "had no affirmative duty to disclose" (which is not the same as saying there had not been corporate misconduct) the facts of its LCP and Indiana conduct -- is critical to both Bar Counsel's case-in-chief, and also to Mr. Marcus' due process and ability to defend himself against the charges which would include, at absolute minimum, the ability to put forward a fulsome crime-fraud privilege exception defense, which goes to the merits of Mr. Marcus' conduct and also the good faith of his escalation efforts and whistleblowing efforts after involuntarily separating from the Company. The report, among other things, goes to the Company's *mens rea* with respect to the conduct that Mr. Marcus has blown the whistle on and, in any event, Mr. Marcus' ability to claim that the crime-fraud exception to the attorney-client privilege is fully applicable on the facts. Mr. Marcus has been hamstrung from the beginning by the Company's withholding of the key materials that would shed true light on Mr. Marcus' *bona fides* and, of course, the Company's bad faith. Due process for Mr. Marcus requires production of the Gibson, Dunn report or findings, such as they may be called.

to allow the E-Rate Program and its recipients be looted, required him to disclose the Company's conduct: to cure the affirmative misrepresentation(s) and misrepresentations by omission he believed had been made; rectify any financial or other harm that had been caused by those misrepresentation; and prevent future harm caused by the Company's conduct.

50. *The Outreach to DOJ.* Accordingly, Mr. Marcus contacted the Department of Justice to attempt to inform that agency of the Company's misrepresentations. The Department of Justice, however, declined to receive the information Mr. Marcus sought to offer. This was not due, as Bar Counsel insinuates, to an conclusion by DOJ as to the application of the crime-fraud exception, or waiver, or other basis for which the information could have been taken: indeed, DOJ opted not to hear Mr. Marcus' proffer to that effect that may have put them in a different posture. Instead, DOJ made clear it was following a *general Department policy* of refraining from contact with counsel/former counsel of a civil or criminal subject or target.⁸⁴

51. *The Shepherd Experience.* Mr. Marcus concluded that his next avenue for disclosure was to consider whether he should (or could) pursue qui tam claims under the False Claims Act ("FCA"), regarding which, by law, in-house counsel certainly are eligible to serve as relators. Given that Mr. Heath had already initiated the Wisconsin Case – an FCA action relating to the Company's E-Rate program participation – Mr. Marcus intuited that the FCA's "first to file" rule would likely confound an independent effort to proceed as a relator; thus, Mr. Marcus determined to contact the lead attorney handling the Wisconsin Case – Scott Shepherd, of the Shepherd Finkelman firm -- to

⁸⁴ Mr. Marcus wonders whether, in hindsight, DOJ now sees that unfortunate choice differently.

carefully and ethically seek his and his firm's legal advice and possible representation regarding his options for joining or separately serving as a potential *qui tam* relator.

52. Mr. Marcus initially used aliases, as is typical in whistleblower cases, to communicate with counsel to protect his anonymity given that he did not know whether counsel would assist him, and he believed – quite correctly -- that the Company would retaliate against him. Whatever date it was that Mr. Marcus first made contact with “Heath’s lawyers”,⁸⁵ the clear, stated and obvious goal was to get advice of counsel on the propriety, feasibility, lawfulness and legitimacy of being a *qui tam* relator (whistleblower).⁸⁶

53. Mr. Marcus did what all whistleblowers do: proceed with extreme caution. The term is “anonymously sought” or “confidentially sought” to inquire about taking legal action as a whistleblower, whether that meant “relator” (i.e., in a new case), “co-relator” (i.e., in an expanded case, especially given Mr. Heath knew nothing about most of the

⁸⁵ See Tab D -- “Acknowledgement Re: Initial Consult”.

⁸⁶ The fact that Mr. Marcus was concerned about the highly toxic circumstances to the point of wanting to preserve anonymity to take initial steps doesn't deserve being called “secret”, which is pejorative and nefarious in tone, but “prudent.” NO whistleblower puts an ad in the paper for help. This was a person in distress, looking for help, trying to manage multiple ethical, legal and moral duties as counsel, as a managerial employee and as a person, husband and father. All, or substantially all, whistleblowers fearfully and fretfully move into and through this space, especially in seeking counsel. See *Can a Whistleblower Remain Anonymous?* - LegalClarity <https://legalclarity.org/can-a-whistleblower-remain-anonymous/> (“Whistleblowing involves reporting illegal or unethical activities within an organization. Individuals considering such disclosures often face a significant concern: whether they can remain anonymous, as coming forward can carry substantial personal and professional risks.”); <https://www.whistleblowers.org/whistleblower-confidentiality/> (“Individuals who come forward with evidence of fraud or wrongdoing at a company or organization may find themselves retaliated against for their disclosures. . . . Confidentiality is a critical issue for whistleblowers. It is our experience that most employees will be afraid to blow the whistle unless they know that their identity will be protected. . . . Whistleblowers should seek and obtain confidential informant status whenever that is available, as remaining anonymous may be a whistleblower’s best tool in preventing retaliation.”); <https://www.markaustlaw.com/whistleblower-lawyer/can-a-whistleblower-remain-anonymous/> (“Whistleblowers are critical for exposing fraud and misconduct. However, potential whistleblowers are often concerned about protecting their identities. [W]e are often asked whether a whistleblower can remain anonymous. The short answer is that whistleblowers can, in many cases, protect their identities, but the degree of protection varies based on the type of whistleblower claim and the circumstances.”)

actual facts and could not have known them), or whistleblower under Sarbanes-Oxley or other related theories of whistleblowing. At this time, Mr. Marcus was being bombarded throughout by multiple parties at the Company, and by the processes of the Independent Investigation, which thoroughly looked like a whitewash, objectively, by that time.⁸⁷

54. The Charges state that Mr. Marcus “sought to become a ‘silent’ co-relator” in the outreach to Mr. Shepherd.⁸⁸ *That is not so at all.* Mr. Marcus had no idea what such an animal was or that it existed (if it does). That notion was expressly and solely proposed by Mr. Shepherd, not Mr. Marcus. To the contrary, Mr. Marcus sought counsel expressly and exclusively to determine if, as a whistleblower, Mr. Marcus could be represented by counsel in that effort. The concept of “silent co-relator”, especially as it is presented in the Charges, never was Mr. Marcus’: *it was Shepherd’s*. And, to the extent Mr. Shepherd had some notion about, or nefarious, unethical meaning behind that, it was his own and cannot be imputed to Mr. Marcus, a complete stranger to Shepherd, who sought his guidance and counsel in good faith, and exercised incredible care NOT to allow impropriety or misconduct to taint his efforts. Mr. Marcus never suspected, until too late, that Mr. Shepherd was acting, or would act, unethically and improperly.

55. As the “Confidential – Acknowledgement” (Tab C) document demonstrates, Mr. Marcus was seeking legal advice and only providing information as part of an initial consult to permit counsel to determine if proceeding, as a whistleblower, was appropriate

⁸⁷ The actual facts, including Mr. Marcus’ emails to Independent Counsel and others at this time, conclusively bear this out. Mr. Marcus believes that Bar Counsel never saw the Chronology, the Independent Investigation report or other related documents before pressing the Charges. The beginnings of that error lie with the complainant – the Company – which strategically withheld quite a bit of important information, it would appear.

⁸⁸ See, e.g., Specification of Charges at para. 28.

and lawful; the document expressly states that purpose, and expressly states all information exchanged was to be treated as confidential and privileged for that purpose:

[T]he meeting taking place today between myself and [Mr. Marcus], and any future meetings or conversations as may be necessary to supplement today's meeting, is an initial consultation between a prospective client [Mr. Marcus] and myself [Scott Shepherd];

[E]very aspect of today's and any future meetings, including the fact and date of the meeting itself, the actions taken to cause the meeting to take place, the nature of the subject matter, the substance of the meeting and communications therein, [Mr. Marcus'] name, [Mr. Marcus'] physical description, the place and time of the meeting, and anything I observe about [Mr. Marcus], are part of the scope and definition of the *initial consultation*;

[I]f, at any point, [Counsel – Scott Shepherd], believe[s] or determine[s] that [he] has any cause to question the propriety of the attorney-client privilege concerning the initial consultation, I shall so advise [Mr. Marcus] immediately and the initial consultation shall be terminated at that point. All matters, as described, up to that point *shall remain subject to attorney-client privilege. Any failure by me to assert such cause or concern shall constitute full waiver of that concern and any right I or my firm may have to assert that I or the firm should be permitted to disclose any part of the subject matter of the initial consultation to any third party.*⁸⁹

56. Obviously, Mr. Marcus was terribly betrayed by Mr. Shepherd who, to this day, has not had the decency to contact Mr. Marcus about any of this mess to which he and his law firm abandoned him in extreme breach of their duties.⁹⁰

⁸⁹ *Id.* (Some emphases added, others in original.)

⁹⁰ Suffice it to say, when Mr. Marcus made contact with Mr. Dehler and/or Mr. Heath – see, e.g., paragraphs 16-17 of the Specification of Charges – Mr. Marcus had no idea what Mr. Shepherd's status or whereabouts were. Mr. Marcus had no idea whether Mr. Shepherd had, as he should have, shared information with his co-counsel, Mr. Dehler and others about Mr. Marcus' role, and had no idea what Mr. Dehler's disposition was on Mr. Marcus' role or potential role and assuring that role was properly documented and protected appropriately. How could Mr. Marcus have known? Thus, once again, it was necessary for Mr. Marcus to proceed cautiously, which he did. When it was clear that Mr. Dehler had not been read-in at all, apparently, Mr. Marcus appropriately shut down any efforts with that avenue of whistleblowing. Indeed, *when Mr. Dehler offered to meet with Mr. Marcus, Mr. Marcus declined*, as it was clear Mr. Shepherd had acted improperly and there was no viable and appropriate path for Mr. Marcus to serve as a whistleblower as he had hoped, intended and sought advice and counsel for. Bar Counsel seems oblivious to this clear state of facts and their proof of Mr. Marcus' good faith, at minimum.

57. Mr. Marcus relied on Mr. Shepherd -- a professed expert on False Claims Act litigation and the sticky and complex anonymity, confidentiality and ethics associated with that discipline -- for expertise, advice, counsel, *etc.* Mr. Shepherd took full advantage of Mr. Marcus' prudence and good faith. Mr. Shepherd led Mr. Marcus to believe he was in a legitimate attorney-client relationship, with respect to which, by definition, Mr. Marcus was not behaving unethically or improperly. Mr. Shepherd, through that apparent ruse and artifice, used Mr. Marcus' whistleblowing evidence to establish a viable, new and comprehensive case outside of the narrow matter in Wisconsin and then, when pressured by the Company in some fashion, chose to fully betray Mr. Marcus, without so much as giving Mr. Marcus a courtesy heads-up, despite the Acknowledgement, Mr. Marcus' good faith, and Mr. Shepherd's representations to Mr. Marcus, upon which Mr. Marcus fully relied.

58. Clearly, as Mr. Marcus testified in a day-long deposition with respect to the Company's Motion to Strike in the Nationwide Case before Judge Leon, Mr. Marcus, reasonably and in good faith, thought Mr. Shepherd was serving as his counsel, and Mr. Marcus fully expected the details of the client-counsel relationship (i.e., full retainer agreement, etc.) to be drafted, provided and executed. Mr. Marcus, in seeking advice and counsel in an initial consult, anonymously (as probably all whistleblowers do), was not seeking to be some "silent co-relator", a term Mr. Marcus wouldn't have known, didn't know and didn't seek. This was Mr. Shepherd's appellation, one that Mr. Shepherd introduced as the appropriate mechanism for proceeding, and one that Mr. Marcus believed was appropriate because it was offered and suggested by Mr. Shepherd, upon whose expertise and experience Mr. Marcus relied in good faith.

59. To be sure, Mr. Marcus sought as much anonymity as an FCA (or other statutory) whistleblower might be entitled to and acted consistently with that hope. Mr. Marcus was certainly in no hurry to be outed as a whistleblowing lawyer given the incredible professional risk (not ethical, but other real world risk) that entails. But that is NOT nefarious. It is natural and permissible and ethical, and any contrary contention is simply belied by the facts including, but not limited to, the Confidential--Acknowledgement. For reasons of his own, and utterly unknown or assented to by Mr. Marcus, and in full contravention of his duties to Mr. Marcus, Mr. Shepherd took matters in a very different direction, one highly prejudicial to Mr. Marcus.⁹¹ The Bar should not validate Mr. Shepherd's horrific behavior by painting Mr. Marcus -- a 30-year member of two Bars with a spotless record, a former federal prosecutor, and an upstanding member of his community -- with any part of the same brush.

60. As part of the initial consult and, thereafter, pursuant to his belief that an attorney-client relationship was established for the purposes described, Mr. Marcus provided to the Wisconsin Case attorneys documents that he had obtained during his employment at the Company, though given the amount of time that has passed since doing so in 2011, Mr. Marcus cannot recall with specificity what documents he provided to counsel. In the Company's Complaint, Mr. Green (a stranger to Mr. Marcus) asserts that Mr. Marcus provided counsel with confidential memoranda from the Company's outside counsel, Crowell & Moring LLP and the following three documents that were attached as Exhibits.

⁹¹ Mr. Marcus assumes, as one must, that the Company and Mr. Shepherd came to some 'agreement' about Mr. Shepherd's involvement that, presumably, led to his withdrawal and, subsequently, his removal from his firm and, apparently "retirement", based on reports. If there is such an agreement between the Company and Mr. Shepherd, it would be important to these proceedings for that agreement and its terms, underlying consideration, etc. to be brought forward by Bar Counsel pursuing, as it is, the Company's charges here. Inquiry, through Bar Counsel, should be made of both Mr. Shepherd and the Company to provide that information, under oath, in this matter. It is minimally required for due process.

to the Complaint filed by relator Todd Heath in the matter styled *United States of America, et al., ex rel. Todd Heath v. AT&T, et al.*, Case No. 11-cv-01897 in the United States District Court for the District of Columbia (the “D.C. Case”): (1) E-Rate Compliance Training presentation slides dated September 2007; (2) slides from a presentation at an E-Rate Conference dated March 10 & 11, 2008; and (3) an Agenda dated August 4, 2010 created by Detroit Public Schools in connection with an audit of the Company’s services.

61. Mr. Marcus has no recollection of any documents from Crowell & Moring relating in any way to the Company’s E-Rate issues, and thus, Mr. Marcus does not believe he provided any Crowell & Moring memoranda to anyone. Mr. Marcus simply cannot recall, however, whether he did, in fact, provide the other materials identified by Mr. Green to counsel.

62. After providing documents to counsel, Mr. Marcus determined that he could not continue to represent his institutional client, the Company, without serious conflicts of interest arising from the company’s E-Rate LCP non-compliance, its refusal to make any effort to review its pricing (both within the 10-yr frame of the E-Rate audit rules, but also within the term of existing contracts, many of which had begun years prior to the LCP revelations and were still ongoing at that time), and related misconduct. He believed that, effectively, the only way to disassociate himself⁹² from the Company’s conduct and, obviously, withdraw representation of the Company was through acknowledging the

⁹² In the classic criminal conspiracy context, with respect to which Mr. Marcus was concerned at the time and throughout, for one to prove withdrawal from a conspiracy, it is necessary to take an **affirmative act**—such as fully communicating disassociation to co-conspirators or making a clean breast of it to law enforcement – to defeat the conspiracy’s purposes. Simply staying quiet or being inactive is not enough. Although Mr. Marcus certainly was not involved in any conspiracy (or some facsimile thereof depending on whatever enforcement theories might have been asserted), it was certainly Mr. Marcus’ belief that staying “mum” was utterly imprudent. There was ample indicia of criminal conspiracy (*see* Chronology, Tab A at page 1) and Mr. Marcus wanted no part in it.

termination of his employment with the Company. Accordingly, he resigned his position from the Company. While Mr. Marcus thereafter had additional discussions with counsel about becoming involved as a relator in a qui tam case against the Company, he never signed on as a relator or other party in any such lawsuit. Contrary to Mr. Green's allegations, Mr. Marcus, as Judge Leon affirmatively found in denying AT&T's sanctions motion, never reached any point in any case wherein he would have been entitled to, or had any expectancy to receive, any financial compensation as a qui tam relator or on any other basis.⁹³

63. *Mr. Marcus's Communications with the Press.* The Specification of Charges advances the Company's complaint allegations that Mr. Marcus shared "privileged matters" with ProPublica, an online news organization. The Charges (as with the underlying Complaint) do not, however, identify what privileged materials or information it is claimed Mr. Marcus shared. Mr. Marcus acknowledges that he spoke with a reporter for ProPublica in approximately 2012. However, he does not recall what information he may have shared with that reporter, but believes it was in the nature of background tutorial information about the E-Rate program and the LCP requirements. To the extent he did share information with that reporter, Mr. Marcus submits that he did not reveal anything more than he reasonably believed was necessary to serve the interests of justice, interests that, as clearly demonstrated, were and are profound.

64. In or about 2020 to 2021, Mr. Marcus communicated and shared information relating to the Company and the E-Rate program with reporters from the Washington

⁹³ Counsel in the qui tam lawsuit also never returned any of the documents he provided, and thus, Mr. Marcus does not have records of what he provided to them or that the company has averred were from Mr. Marcus. He also has no personal knowledge of whether or to what extent counsel in the qui tam cases may have used any materials or information provided by Mr. Marcus.

Post, *but only after* the Company had filed a Motion for Sanctions (i.e., requested dismissal) in the public record in the D.C. Case without any effort to confirm facts with Mr. Marcus or permit rebuttal – a motion containing incendiary allegations that were published largely verbatim by an online news outlet, Law360.com – in which the Company asserted that Mr. Marcus had violated his ethical duties. By that time, the Company had made the allegations of misconduct against Mr. Marcus, as well as many of the documents it is claiming were privileged and confidential, *public*.⁹⁴ Mr. Marcus only shared information with the Washington Post that was related to the allegations made against him in public court submissions and arguments by AT&T and passed on to Law360.com.

Specific Challenges to the Alleged Rules Violations

65. Mr. Marcus incorporates the foregoing paragraphs in this Answer as though fully set forth here.

Response to Allegation that Mr. Marcus Violated Rule of Professional Conduct 1.6

66. Bar Counsel alleges, consistent with the Company's Complaint, that Mr. Marcus violated D.C. Rule of Professional Conduct 1.6(a) by revealing to qui tam counsel and the press "confidences" and/or "secrets" he obtained during his representation of the Company as in-house counsel. For the reasons set forth below, however, Mr. Marcus submits that he did not violate Rule 1.6.

⁹⁴ It should be noted that, at no time did the Company make any effort whatsoever to "rectify the situation" of which it complained, i.e., the improper treatment of and disclosures regarding allegedly "confidential" or "privileged" information by Mr. Marcus. Judge Leon pointed out that very fact in ruling against the Company's Motion to Strike in concluding "the Company has likely waived any privilege . . .". And, of course, the Company never sought reconsideration by Judge Leon, and never appealed his decision. This is quintessential proof of the Company's bad faith in engaging the Bar in this false mission of punishment of Mr. Marcus. It knew it would lose if it had squared up the issue with Judge Leon, so it decided to collaterally attack Judge Leon's conclusion as to privilege here.

67. First, Rule 1.6(a) only requires the protection of “confidences” and “secrets” of the lawyer’s client. “‘Confidence’ refers to information protected by the attorney-client privilege under applicable law, and ‘secret’ refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.” DCRPC Rule 1.6(b).⁹⁵ It is clear from the context of the Company’s complaint that the primary thrust of its claims arise from an allegation that the Mr. Heath and his attorneys utilized confidential documents received from Mr. Marcus to advance Mr. Heath’s qui tam claims against the Company in the Wisconsin Case and the D.C. Case. However, the only documents that the Company contends were used by the plaintiff were three exhibits attached to the Complaint in the D.C. Case.⁹⁶ Those documents, however, were not “confidences” or “secrets” entitled to protection under Rule 1.6(a) in the context of the Wisconsin Case or the D.C. Case.

68. Two of the documents purport to be internal training materials (presentation slides) created by AT&T’s E-Rate Compliance Coordination Committee for in-house

⁹⁵ Interestingly, the Specification of Charges does not attempt to describe or establish any employment contract between Mr. Marcus and the Company, which, if Mr. Marcus’ memory serves, would entail a two-step effort – Mr. Marcus’ employment contract with BellSouth and some absorption of that relationship by AT&T and Mr. Marcus’ acceptance of, or ratification of that new relationship. That actually may be a bridge too far for Bar Counsel, hence the lack of those representations in the Specification of Charges. This was not the same as the evidentiary steps, for example, in *In re Koeck*, wherein it was stated: “As a condition of her employment, she signed an agreement requiring her to keep the company’s information strictly confidential and to return all secret or confidential materials to GE when her employment terminated.” *Koeck, supra*, at p. 5. If the Company, *post-acquisition of BellSouth*, failed to ensure an attorney-client relationship between Mr. Marcus and the new Company after change-in-control, regarding which Bar Counsel implicitly relies, then it cannot claim any breach of that relationship on any theory. It is important for Bar Counsel, as part of its case-in-chief, to establish that relationship *ab initio* in these proceedings. The evidence, of course, must be “clear and convincing.”

⁹⁶ See Complaint, February 6, 2021 at p. 2.

presentations in 2007 and 11 2008.⁹⁷ Mr. Green contends that these materials were “confidential” and “proprietary,” i.e. “secrets,” that were entitled to protection under Rule 1.6. Those materials, however, were not “secrets” in the context of the Wisconsin Case or the D.C. Case. In fact, according to a Declaration filed in the D.C. Case by the plaintiff’s current counsel, Matthew K. Organ, the Company produced both sets of training materials (one of which with only minor redactions) in the Wisconsin Case.⁹⁸ Such documents were clearly discoverable in the Wisconsin Case and the D.C. Case to show AT&T’s knowledge and internal training on E-Rate issues, and unsurprisingly, were therefore produced by AT&T in those cases.

69. The third document about which the Company complained is a summary created by Detroit Public Schools (“DPS”) in connection with DPS’s audit of the Company’s E-Rate billings.⁹⁹ The document was not created by nor did it belong to the Company. Thus, the Company has no right to contend that the document was confidential or “secret,” and it is not protected under Rule 1.6.

70. It must again be noted that the information about which the Company complains were used by qui tam counsel have been in the public records for years. During that time, the Company *made no effort whatsoever to seal the documents, seek their return, or otherwise contend they were confidential until its counsel filed a Motion for Sanctions almost nine years after the documents were filed with the Complaint in the D.C. Case.*

⁹⁷ See *id.*

⁹⁸ See Declaration of Matthew K. Organ at ¶¶ 6-7, described in the Berwanger Ltr., Tab E.

⁹⁹ See Complaint, *supra*, at p. 2.

This fact was noted by the Court in the D.C. Case when it denied AT&T's Motion for Sanctions. In fact, the Court ruled:

AT&T has likely waived any privilege and confidentiality protections for these documents by failing to immediately take steps to rectify their disclosure. See, e.g., *Fischman v. Mitsubishi Chem. Holdings Am., Inc.*, No. 18-CV-8188 (JMF), 2019 WL 3034866, at *4 (S.D.N.Y. July 11, 2019) ("Defendants waived any privilege (or confidentiality protections) with respect to the contents of the Complaint by failing to take immediate steps to remedy any misuse by [the plaintiff]."); *United States v. HCA Holdings Inc.*, No. 12- 20638-CIV, 2015 WL 11198933, at *5-*7 (S.D. Fla. July 21, 2015) (similar). But AT&T's failure to promptly invoke the proper remedy for the release of its documents is not a justification for imposing a drastic and more punitive sanction at this juncture.¹⁰⁰

Given that AT&T clearly waived the attorney-client privilege and confidentiality in connection with the material and information, there is no basis for concluding that Mr. Marcus violated Rule 1.6 if he provided them to qui tam counsel.

71. Even if the materials and information the Company contends Mr. Marcus shared with counsel (counsel for both the Wisconsin Case and the D.C. Case, initially, was the same firm, Shepherd Finkelman, that Mr. Marcus sought advice from and that now is removed from both cases) in the Wisconsin Case and the D.C. Case had been "confidences" or "secrets" as defined in Rule 1.6(b), Mr. Marcus's provision of those documents to counsel as an FCA whistleblower was permissible under Rule 1.6(d). D.C. Rule of Professional Conduct 1.6(d) reads:

(d) When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

(1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or

¹⁰⁰ See Tab E Memorandum Opinion in D.C. Case denying AT&T's Motion for Sanctions) at p. 5, fn. 3.).

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of the crime or fraud.

Comment 18 to Rule 1.6 states in pertinent part:

[18] Paragraph (d)(2) refers to situations in which the crime or fraud has already commenced and is on-going or completed such that complete prevention is not an option. Thus, the client no longer has the option of preventing disclosure by refraining from the wrongful conduct. ***In these circumstances, there may be situations in which the loss suffered by an affected person can be prevented, rectified, or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses.***

(emphasis added). Moreover, Comment 19 to Rule 1.6 states:

In some instances when a lawyer's services have been or are being used to further a client's crime or fraud, a lawyer may conclude that more than withdrawal and disaffirmance is required to avoid assisting in the client's crime or fraud and that disclosure of client information protected by this rule is warranted. If the lawyer has such a reasonable belief, the lawyer may make such disclosures to the extent reasonably necessary to permit corrective action, for example, prompt initiation of proceedings in order to seize or recover assets fraudulently obtained by the client.

(emphasis added). Disclosure is permissible under Rule 1.6(d) “to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified.”¹⁰¹ In other words, the critical inquiry in determining whether disclosure was permissible is whether the lawyer “reasonably believed” disclosure was necessary to accomplish the purpose of the Rule.

72. As set forth in detail above, Mr. Marcus spent years of his career at the Company investigating the company’s compliance – or lack thereof – with the rules of the E-Rate program, including the LCP requirement. During that time, it became clear to Mr. Marcus that the Company was using his services, as well as the services of other in-house and

¹⁰¹ See DCRPC 1.6, Comment 21.

external lawyers, to make representations to government investigators and others relating to the Company's E-Rate/LCP compliance *that were demonstrably false*. It appeared that the Company was doing so as part of a coordinated effort to mislead the government and avoid responsibility for the company's corruptly fraudulent E-Rate practices. It was also clear that the Company had charged prices to E-Rate program participants – schools and libraries in underprivileged areas – that the Company could not verify were compliant with the LCP requirement.¹⁰²

73. Other company lawyer and non-lawyer witnesses to these activities were aware of the developments and were actively paying attention to how they were being resolved. Indeed, Mr. Marcus first learned of the potential depth of the problems in this regard when one of his regulatory colleagues at the Company and, thus, “clients,” brought him a 1997 *ex parte* letter¹⁰³ submitted to the FCC containing advocacy by all the legacy companies as to what the LCP rule under consideration should and should not say, how the companies would apply it, and how the FCC should frame the rules accordingly. Thus, any claim by the Company that it lacked knowledge of the LCP requirement and that any overcharges were “accidental,” would not have been accurate. As in-house counsel, Mr. Marcus knew his efforts would have an impact on in-house personnel associated with representing the company to federal officials and, thus, would either empower or snuff any future efforts to ensure that the company maintained standards of good corporate citizenship.

¹⁰² Over the relevant time period, it is believed the Company, all-told, raked in E-Rate revenues in the billions of dollars.

¹⁰³ See Chronology, Tab A at p. 14.

74. Mr. Marcus reasonably believed that an audit of the Company's E-Rate pricing would reveal that the Company had caused many millions of dollars in financial harm to the government and E-Rate program participants – most of which serve the needs of children and libraries in underprivileged communities – by failing to comply with the LCP requirement for years. In addition, he was concerned that the Company continued to issue invoices and collect revenue on E-Rate contracts that were agreed to at a time when the Company had no protocol in place for ensuring LCP compliance. Thus, it was likely in Mr. Marcus's (and any reasonable person's) view that the Company's fraudulent E-Rate invoicing and false certifications that its pricing was LCP compliant was continuing. Mr. Marcus was terribly concerned that the company's apparent effort to hide the facts of its non-compliance (i.e., by not investigating them in the first place) placed it and its shareholders at great risk on multiple levels, starting with depriving it of the ability to be seen as cooperating with investigatory entities, and indefinitely putting off an unavoidable reckoning on the subject matter. Mr. Marcus was confident that the only way to rectify the past and future harm caused by the Company and the inadvisable decisions of its legal officers and managers *was to make disclosures as permitted under Rule 1.6(d)*.

75. Before doing so, Mr. Marcus made repeated oral and written efforts to alert his supervisors (and officers up to and including the Company's Board/Audit Committee) to the issue and persuade them to address the matters in a manner that would obviate the need for him to make disclosures under Rule 1.6. Those efforts, however, were continuously rejected. Once Mr. Marcus concluded that the issues would not be properly addressed internally at the Company, he was permitted to disclose confidential

information in order to rectify potentially millions of dollars in financial harm caused by Company's E-Rate practices and to mitigate Company management's corrupt decision-making with respect to same in behalf of the organization and its shareholders.

76. Mr. Marcus also concluded, however, ***that he was obligated to make disclosures under Rule 4.1(b)***. Indeed, under Rule 4.1(b), attorneys are forbidden from “[f]ail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.” Mr. Marcus firmly believed that the Company had used and was continuing to use his services to make false and fraudulent statements to the government and others regarding its E-Rate program compliance, and that disclosing the issue was the only way to avoid allegations that he had assisted the company making false statements to the government. In light of what Mr. Marcus uncovered during his time at the Company, as outlined above, Mr. Marcus's belief that disclosure was necessary under Rules 4.1 and 1.6 was reasonable and permissible. Mr. Marcus's position is further supported by the fact that the Company paid more than \$8 million to settle the Intelenet Investigation, ***and utterly bolstered by its now reported mea culpa on the entire matter, including a \$55,000,000 payment and as-yet undisclosed and likely quite onerous compliance and integrity and consent decree terms with the federal government*** (and probably state governments). It stands to reason that, if there were no basis for allegations that the Company did not comply with E-Rate program rules, it would not have paid MANY millions of dollars to settle the Intelenet Investigation and the Wisconsin and Nationwide cases.

77. Mr. Marcus also submits that he was entitled under Rule 1.6 to disclose “confidences” and “secrets” to *qui tam* counsel “to the extent reasonably necessary to

secure legal advice about the lawyer's compliance with law....”¹⁰⁴ Mr. Marcus has been clear from the outset, and the Company’s Complaint appears to acknowledge, that Mr. Marcus provided information and documents to counsel in the Wisconsin Case and the D.C. Case in an effort to seek counsel regarding his rights as a whistleblower under the FCA. The law is clear that Mr. Marcus was permitted to reveal confidential information to counsel under Rule 1.6(e)(6) because it was reasonably necessary to seek legal advice about his rights and obligations under the law, including potential claims he could make as a relator under the FCA.¹⁰⁵

78. It must also be said that the Company’s Complaint arises principally from Mr. Marcus’s alleged disclosures to counsel in the Wisconsin Case, and D.C. Case, both of which are federal qui tam actions. Under Rule of Professional Conduct 8.5(b), “[f]or conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise[.]” The FCA is a federal whistleblower law.¹⁰⁶ When the Board on Professional Responsibility considers alleged violations of Rule 1.6 in connection with a federal law proceeding, it is required to examine the matter under the ABA Model Rule rather than the D.C. Rule of Professional Conduct.¹⁰⁷ Unlike the D.C. Rule, the ABA Model Rule permits an attorney to disclose confidential information “to

¹⁰⁴ See DCRPC 1.6(e)(6).

¹⁰⁵ Thereafter, Mr. Marcus responsibly and appropriately relied upon Mr. Shepherd to conduct himself honorably, ethically and expertly in establishing the proper, ethical and legal contractual relationship with Mr. Marcus as Mr. Marcus’ lawyer. Mr. Shepherd egregiously and despicably misled Mr. Marcus and, when the situation obviously tightened, abandoned Mr. Marcus altogether with, apparently, tales of a secret conspiracy.

¹⁰⁶ See 31 U.S.C. §§ 3722-3733.

¹⁰⁷ See *In re Koeck*, Board Docket No. 14-BD-061, Board Report at 19-25 (Aug. 30, 2017).

establish a claim...on behalf of the lawyer in a controversy between the lawyer and the client.”¹⁰⁸

79. In *In re Koeck*, which involved the filing of a Sarbanes-Oxley retaliation claim by a former inhouse attorney for GE, the Respondent had allegedly revealed confidential information belonging to GE as part of her claim filed with the Department of Labor. The Board concluded that an examination of ABA Model Rule 1.6 was appropriate to determine whether the Respondent had violated her duty of confidentiality. The Board further concluded that, in revealing confidential information as part of her retaliation claims under federal law, the Respondent did not violate ABA Model Rule 1.6 because it permitted her to use the information to make an affirmative claim.¹⁰⁹

80. A similar analysis applies here. Indeed, even if one were to assume that Mr. Marcus did reveal confidential information to counsel in an effort to take part in a federal FCA *qui tam* action as is alleged by the Company, he was plainly authorized to do so under ABA Model Rule 1.6(b)(5) to explore pursuing an affirmative *qui tam* claim.

81. As for Mr. Marcus’s alleged disclosures to ProPublica, there appears to be no specific identification of what, if any, confidential or privileged information Mr. Marcus provided to ProPublica. Thus, one cannot conclude that Mr. Marcus violated Rule 1.6 in connection with any such disclosures, particularly where, as here, Mr. Marcus does not recall providing any such material to ProPublica.

82. Regarding Mr. Marcus’s disclosures to the Washington Post, the Company alleges that Mr. Marcus provided information and documents to the Washington Post but does not identify what it contends was provided that would have been entitled to protection

¹⁰⁸ See ABA Model Rule 1.6(b)(5).

¹⁰⁹ See generally *In re Koeck*, Board Docket No. 14-BD-061, Board Report at 19-25 (Aug. 30, 2017).

under Rule 1.6. Critically, however, by September 15, 2020, the Company had filed its Motion for Sanctions in the D.C. Case which outlined in detail the documents and information Mr. Green now contends was privileged and/or confidential. That information and those documents are accessible in the public record, and by raising the Company's allegations of misconduct against Mr. Marcus in the public record, the Company waived any claim of confidentiality or privilege it may have had. Accordingly, the Company cannot claim that Mr. Marcus breached Rule 1.6 by responding via the press to its allegations of misconduct that the Company caused to be put in the public record.

Response to Allegation that Mr. Marcus Violated Rule of Professional Conduct 1.9

83. The Specification of Charges posits that, by sharing information and documents with *qui tam* counsel, Mr. Marcus violated Rule 1.9. Bar Counsel support the Company's view that Mr. Marcus "changed sides," thereby creating a conflict of interest. This view, and the Charges based on it, are without merit.

84. D.C. Rule of Professional Conduct 1.9 reads:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.¹¹⁰

The language of Rule 1.9 is clear in that it bars an attorney who has represented one client in a matter from representing another client in the same or a substantially related matter unless the former client gives informed consent. In this case, there is no allegation, nor could there be, that Mr. Marcus ever represented anyone against the Company in a

¹¹⁰ DCRCP 1.9.

matter that was the same or substantially related to any matter he worked on as in-house counsel at the Company.

85. The Company (and Bar Counsel) appears to believe that, despite the clear language of the Rule barring an attorney from representing another person in the same or substantially related matter, the Rule should be construed to bar an attorney from acting *as a party in such a matter*. Specifically, the averment is that Mr. Marcus attempted to become a relator in a qui tam action against the Company. First, Mr. Marcus never became a party to any action against the Company. Nonetheless, even if he had, the plain language of 1.9 does not prevent him from doing so. Had the D.C. Bar wanted to implement such a prohibition, it could, and would, do so. Unless and until the Bar modifies the language of Rule 1.9 to apply in such circumstances, however, the plain language of the Rule applies *only in instances where an attorney is representing another person in the same or substantially related mater*. There is no dispute that Mr. Marcus did not do so in this case. Accordingly, he did not violate Rule 1.9.¹¹¹

Vindication and Self-Defense

86. Three months ago, the Company and the qui tam plaintiff reportedly agreed to a settlement of the underlying matter.¹¹² It is not clear that the Government has signed off on it, hence the multiple status conference resets in all likelihood, but that is a separate issue. The terms are not known, but reports are that the Company, in addition to making a substantial payment of \$55,000,000 (which includes \$25 million in attorneys' fees.),

¹¹¹ To the extent the foregoing denials do not cover any portion or aspect of the Charges' alleged violations, those portions or aspects are DENIED hereby, for the reasons stated *supra* and *infra*.

¹¹² See <https://news.bloomberglaw.com/federal-contracting/wisconsin-bell-to-pay-55-million-false-claims-act-settlement>.

has submitted itself to the other substantial and serious impositions addressing its conduct typically associated with settling FCA claims. None of this is reflected in the Specification of Charges, likely because the settlement (which is still undergoing some finalization, apparently) occurred after Bar Counsel moved forward in February.¹¹³ Mr. Marcus has not seen any documents associated with the reported settlement and obviously must see them as part of his ability to defend this matter before the Bar should it proceed.

87. The Company's express, or at minimum implied, admission of its wrongdoing ***vindicates Mr. Marcus and supports his defense to the charge of improper disclosures under Rule 1.6 and to the other charges.*** The Company's express and/or implied admission of wrongdoing also validates the reasonableness of Mr. Marcus' belief as to the Company's misconduct, including holding that belief even beyond the Company's paid-for "internal investigation" and report from Gibson, Dunn (which it has never disclosed to Mr. Marcus or, presumably, Bar Counsel),¹¹⁴ and Mr. Marcus' good faith in

¹¹³ Mr. Marcus, *pro se*, does not know the extent to which the Company maintains contact with Bar Counsel or whether Bar Counsel otherwise has monitored developments in these proceedings. Mr. Marcus is not attempting to suggest the Company is influencing the process or timing of this matter, or that Bar Counsel is being prodded by the Company in some way, but the proceedings should NOT be ahead of the final disposition of the Company's misconduct. This proceeding should be paused, if not closed altogether given the knee-capping of the putative merits by the Company's *mea culpa* and the need to find some way to stop bleeding scarce resources placating the Company in its evasion of Justice. Mr. Marcus hereby notes his request to Bar Counsel (and to this Committee) for a full set of those settlement materials, which should be obtained from the Company as part of the ***initial consideration*** and, thus, reconsideration of the provenance of this matter.

¹¹⁴ Though unknown to Mr. Marcus at the time he was making the effort to adjust the Company's approach to the Indiana and LCP matters, the Company was on the cusp of announcing its planned \$39-\$40 billion dollar acquisition of its wireless competitor, T-Mobile. *See* <https://archive.nytimes.com/dealbook.nytimes.com/2011/03/20/att-tobuy-t-mobile-usa-for-39-billion/>. The federal enforcement consideration of the merger, both at DOJ and the FCC, would have centered on the potential harm to consumers, particularly vulnerable ones (like the poor), that eliminating a serious wireless competitor might engender. Clearly, disclosure of the Company's misconduct with respect to E-Rate, including in its wireless verticals, would have been powerful evidence against the merger's approval. This was the obvious "business aspect" driving the internal investigation outcome(s). *See* <https://www.bgr.com/general/looking-back-at-2011-atts-bid-to-acquire-t-mobile-is-defeated/>.

his efforts to hold the Company to account for the public good as well as the Company's good.

88. And, of course, it is clear that the Company has repeatedly attempted to insinuate and even accuse Mr. Marcus of some level of complicity regarding its misconduct. Mr. Marcus has long been entitled to defend himself from the Company's efforts, which necessarily entailed vitiation of privilege under the Bar rules.¹¹⁵ Whether the Company has pursued a strategy of using Mr. Marcus as a human shield ('we acted upon the advice of counsel' or, 'it's Marcus' fault', etc.), or other scapegoat for its misconduct, Mr. Marcus is entitled – by that strategy alone – to defend himself under the rules. The Company cannot attack Mr. Marcus as having failed it as counsel but shield itself from Mr. Marcus' defense to that attack.¹¹⁶

Escalation

89. A critical aspect of Bar Counsel's Specification of Charges, and theory of the case obviously, is the view that Mr. Marcus's escalation efforts were deficient and, thus, Mr. Marcus failed to meet his ethical obligations under the Rules (e.g., Rule 1.13) in the various reporting steps taken, including, but not limited to, "going to the press." Respectfully, this position is not supported by the facts.

90. As the Chronology and Affidavit make clear, Mr. Marcus made an extraordinary internal reporting effort to deal with the crisis of wrongdoing he uncovered and that was unfolding around him. Not only did Mr. Marcus carefully and assiduously report "up, up, up the ladder", but by providing the full Chronology to "Independent Counsel" (Gibson,

¹¹⁵ See Affidavit, Tab B, 1-4.

¹¹⁶ The settlement documents (and the Gibson, Dunn report) are critical materials to elucidate the contours here.

Dunn) in the Spring 2011, Mr. Marcus directly provided the fullest report possible to the Company's Audit Committee, the highest rung on the reporting ladder. This is a key fact that contradicts the relevant sections in the Specification of Charges (*see, e.g.*, para. 22) perhaps on the most important question, or one of them: did Mr. Marcus take all due steps to report the misconduct within the organization?

91. To the best of Mr. Marcus' knowledge, both at the time and now, Gibson, Dunn (as is typically the case in high-stakes, highly sensitive internal, "independent" investigations such as the one it conducted in and around early 2011) was retained by, and reported to, the Company's Audit Committee, which is certainly the norm in such matters.¹¹⁷ That is, as retained counsel for the Audit Committee, Gibson, Dunn was its agent and, thus, Mr. Marcus' provision of the full Chronology to Gibson, Dunn, as well as Mr. Marcus' multi-hour interview by Gibson, Dunn's lawyers wherein Mr. Marcus provided answers to all questions and concerns, met, without more, any requirement to report the matters to the "highest authority" of the organization. If the Company had given the Gibson, Dunn report/brief/readout/etc. to Bar Counsel, as it should have, Bar Counsel would have known Mr. Marcus met all obligations under Rules 1.13 and 1.6, and Bar Counsel would have perceived Mr. Marcus' escalatory efforts in an entirely different and, hopefully, favorable light.¹¹⁸

¹¹⁷ *See, generally*, <https://www.pwc.com/us/en/services/governance-insights-center/library/audit-committee-overseeing-internal-investigations.html> ("Companies are getting more whistleblower tips and complaints. Shareholders, employees and regulators expect companies to follow up and resolve any issues. For many companies, it is not a matter of if a significant complaint will occur but when. And given the size of some whistleblower settlements, the incentive to speak up is growing. Complaints often involve a possible economic loss to the company and have accounting, internal control and disclosure ramifications. As a result, the audit committee is usually called upon to oversee or direct an internal investigation.").

¹¹⁸ *See* N. Faquih, Choosing Which Rule to Break First: An In-House Attorney Whistleblower's Choices After Discovering a Possible Federal Securities Law Violation, 82 Fordham Law Review 6, Article 23, at 3373 (2014) ("The lawyer is permitted to disclose confidential information to outside sources only if the

The Chronology, the Gibson, Dunn Report, Misconduct/Crime-Fraud¹¹⁹

92. Mr. Marcus prepared a “Chronological Narrative” in early 2011. That Chronology painstakingly and granularly details the core facts of Mr. Marcus’ efforts, the Company’s conduct, and the surrounding circumstances. The document is a diary or work product of a whistleblower¹²⁰ who was actively being retaliated against, harassed, threatened and

lawyer reports the violation to the higher authority who refuses to act or delays action, and the lawyer believes that the violation is reasonably certain to result in substantial injury to the organization. Although in this situation the lawyer may disclose information regardless of whether or not Rule 1.6 permits it, disclosure is limited to situations in which ‘the lawyer reasonably believes [it is] necessary to prevent substantial injury to the organization.’ . . . Rule 1.13 also provides that lawyers who believe they have been discharged because of the actions described above, or who withdraw under these circumstances, should take steps as reasonably necessary to ensure that ‘the organization’s highest authority is informed of the [lawyer’s] discharge or withdrawal.’”). Suffice it to say, and as shown in the Affidavit at page 1, para. 1, this matter certainly represented a major contingent liability for the Company at the outset. Mr. Marcus, as a General Attorney for the Company, was responsible to provide input, on a routine basis, in aid of the Company’s quarterly and annual reporting. Mr. Marcus specifically advised that the Company should report, or should have reported, the fact of the Government’s investigation of its E-Rate practices or, at least of the allegations I had raised with respect to the Independent Investigation it had initiated. See Affidavit, Tab B at para. 1. So, in addition to all of the pressures already on Mr. Marcus as described in the Chronology (but not in Bar Counsel’s Specification of Charges), Mr. Marcus also had the responsibility of ensuring the Company’s public reports to shareholders, was truthful and accurate under the Securities laws. Thus, Mr. Marcus’ responsibilities were in multiple dimensions that, in all candor, Bar Counsel does not seem to appreciate or, in any event, has given very short shrift to: (i) as an Officer of the Court; (ii) as a protector of the Company and its shareholders; (iii) to meet all duties of candor under the Bar’s rules and applicable requirements with respect to dealing with Government investigators; (iv) as a faithful steward with regard to the E-Rate program and its goals and objectives; and (v) to himself and his dependent family.

¹¹⁹ Per the Supreme Court: “[t]he attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing. It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the “seal of secrecy” between lawyer and client does not extend to communications “made for the purpose of getting advice for the commission of a fraud or crime.” *United States v. Zolin*, 491 U.S. 554, 562 (1989). See also “Privilege Pierced by Ongoing or Future Wrongful Conduct: The Crime-Fraud Privilege Exception is Broader Than You Think”, <https://www.iadclaw.org/defensecounseljournal/privilege-pierced-by-ongoing-orfuture-wrongful-conduct-the-crime-fraud-privilege-exception-is-broader-than-you-think/> (March 4, 2024) (“A reasonable basis to believe the client engaged in a crime or fraud is insufficient, as ‘[f]orfeiture of the privilege requires the client’s use or aim to use the lawyer to foster the crime or the fraud.’ ‘The client’s state of mind controls this analysis.’) (citations omitted).

¹²⁰ See C. Ajanwachuku, An In-House Counsel’s Decision to Whistleblow, 25 Geo. J. Legal Ethics, Vol. 25:379 (2012) at 379 (“The term ‘whistleblower’ originates from English Bobbies (policemen) blowing their whistles to alert the general public and other law enforcement officials that a criminal act is being committed. A whistleblower is an employee who reports employer wrongdoing or fraud to a governmental or law enforcement agency. The employer’s behavior can be unethical or illegal. To many the word whistleblower represents heroes who risk their careers for the benefit of society. Critics have perceived

bullied by the Company's representatives (detailed in the Chronology);¹²¹ that is, Mr. Marcus prepared the document in the belief that the Company's representatives intended to act improperly and even criminally and there would be a need, not only for Mr. Marcus' own personal defense in actual conflict with his client (or, as the case might be, former client) in any number of potential proceedings with respect to the subject matter. To be clear: the document was NOT sought by the Company and was NOT prepared at its behest either for the purpose of giving it advice and counsel on a question or issue presented, or in anticipation of litigation (that is, as the Company's counsel).

93. The Chronological Narrative was provided to the Company's "Independent Counsel", Gibson, Dunn in that vein.¹²² To the best of Mr. Marcus' knowledge, it was not

them to be 'tattletales', 'snitches', or 'industrial spies' who disregard employee loyalty for the furtherance of their own political, ethical, moral, or personal agendas. A whistleblower, therefore, is subject to a double-edged sword – either remain silent and suffer potential internal harm, or report a suspected violation and endure unknown risks and retaliation.”) (citations omitted). *See also* P. Banick, “Case Note: The ‘In-house’ Whistleblower: Walking the Line Between ‘Good Cop, Bad Cop’”, 37 Wm. Mitchell L. Rev. Issue 4 at 1905 (2011) (“Despite any alleged trend eroding fundamental tenets of the attorney-client relationship, there has always been, and will continue to be, a consideration of the public interest – which was the basis for professional rules in the first place. An attorney’s duty to his or her client is not unfettered by the public interest and an attorney’s duty to the public as a whole. Whistleblower statutes [e.g., the FCA, Sarbanes-Oxley, Dodd-Frank, etc.], in general, are a recognition that in certain instances the public interest must prevail over an employee’s duty of loyalty (e.g., confidentiality) to his or her employer. Similarly, there are likely to be instances in which the public interest overrides even the in-house counsel’s duty of confidentiality to his or her client and employer.”) (emphases added). It is hard to imagine a more compelling public interest than that of enabling poor school children to be educated, something that appears to be utterly ignored, to date, by Bar Counsel. *See, e.g.*, Statement of FCC Commissioner Anna Gomez, June 25, 2026 (“For nearly thirty years, the Schools and Libraries Universal Service Fund Program (E-Rate) has stood as one of our country’s most successful and impactful education and digital literacy initiatives. By connecting schools and libraries across the nation, we have narrowed the digital divide, ensured that students have access to the communications services necessary to learn essential digital skills, and prepared them to participate fully in our modern economy. As the United States competes globally to lead in artificial intelligence (AI) and advanced technologies, the importance of E-Rate has never been greater.”)

¹²¹ *See, generally,*

https://www.bing.com/search?q=whistleblowers+should+keep+a+diary+of+the+retaliation&cvid=0b7b32d1079242c5939021dffe0a09bd&gs_lcrp=EgRIZGdIKgYIABBFgDkyBggAEEUYOTIHCAEQ6wcYQNIBCTeZNTUzajBqN KgCCLACAQ&FORM=ANAB01&PC=U531.

¹²² As such, the Company's Audit Committee was fully notified of Mr. Marcus' allegations; *i.e.*, Mr. Marcus, by giving the material to Independent Counsel, met all requirements for "up and out" reporting to

given to Bar Counsel by the Company. It certainly should have been. As is abundantly clear by any view of the facts, here, the entire matter centers on the Company's intentional, knowing and active obstruction of justice and related misconduct with respect to the Indiana matter and, separately and combinedly, its intentional, knowing and active non-compliance with LCP including, but not limited to, hiding that non-compliance from investigators actively seeking to get to the bottom of its compliance history and deceiving those investigators – to this day – as to the non-compliance and, thus, managing to hold onto hundreds of millions, if not some billions, of ill-gotten E-Rate revenues. The Company, seeking full acquiescence and aid from its in-house counsel, sought to elude investigators (including, in the government's behalf, the qui tam plaintiff) and the courts with respect to its ongoing wrongdoing. Those were active misconduct scenarios with respect to which the Company – to this day -- has insisted on acquiescence and aid by in-house counsel. There is no credible argument to the contrary on the facts.

Waiver

94. In addition to what has been said thus far on the point of the Company's clear waiver of any privilege assertion it could otherwise purport to make (putting aside crime-fraud), it is clear that the Company could have "taken immediate steps to remedy" the alleged abuse(s) of privilege, whether with respect to documents, disclosures, etc. as early as perhaps 2012 or, in any event, by 2017 or, at latest 2020. The Company saw what it

the Company, to the highest level, which directly contradicts Bar Counsel's belief, stated in paragraph 22 and elsewhere in the Specification of Charges.

believed were higher and better purposes – *litigation advantage*. That choice, as Judge Leon recognized,¹²³ constituted a waiver, not preservation, of privilege.

95. The Company has had, and intentionally taken, a huge bite at the privilege/ethics apple here, starting with its ill-fated gambit before Judge Leon. It has ruined Mr. Marcus' reputation without cause, or certainly improperly (and without cause). Those choices were similar to those taken in *Wadler v. Bio-Rad*,¹²⁴ a matter before the 5th Circuit that tracks the material issues here. In *Wadler*, the court reviewed the rules regarding waiver of privilege in the litigation context. Among other things, the Court affirmed and applied the well-known common law standard, applicable presumably in all 50 states, that where a party publicly discloses privileged information, which generally includes disclosure in government proceedings, it has expressly waived that privilege. Moreover, the Court found that where a party takes the “open and aggressive” tack of putting its lawyer’s performance at issue in litigation, it has impliedly waived its attorney-client privilege

¹²³ See <https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:83f5dd6e-a277-49d4-b064-de0fc3101158> at 5, n.3. Judge Leon’s ruling, indeed, should be considered as *a sort of law of the case*. In order for the Company’s position to prevail, in a very real way, the Bar must override or ignore Judge Leon’s ruling on the key issue(s). Indeed, the Bar should not substitute its judgement for Judge Leon’s this respect and also in another: Judge Leon, who had a duty as a judicial officer to report attorney misconduct, apparently did not do so with respect to Mr. Marcus, despite being fully possessed of all the facts at issue in these proceedings. Judge Leon made no such referral, i.e., because there was no basis for doing so. The Bar should not, without considerable cause – far beyond the facts shown in this matter – to embarrass the court especially where, as here, respectfully, doing so is fundamentally in error on the merits

¹²⁴ See *Wadler v. Bio-Rad*, Case No. 15-cv-02356-JCS, (N.D. Cal. 2016) order-denying-motion-to-exclude.pdf, discussion at 28-32. The “sword and shield” dichotomy is well-known in attorney-client privilege and attorney ethics jurisprudence. The case law and precedents are ample, and Bar Counsel are certainly well-versed in the subject. See, e.g., “When a Party Wants to Have Its Cake and Eat It Too: Applying Sword-and-Shield Waiver in Federal Securities Litigation” <https://www.labaton.com/news-insights/when-a-party-wants-to-have-its-cake-and-eat-it-too-applying-sword-and-shield-waiver-in-federal-securities-litigation> (A “sword-and-shield waiver is a type of implied privilege waiver, where a court determines, as a matter of fairness, that a party waives privilege by putting potentially-designated material ‘at issue’ in a litigation.” When a party relies on third-party communications as evidence or an assertion of affirmative defense but withholds related communications as privileged, fairness requires allowing the opposing side to examine those underlying materials. In short, a litigant must choose between using evidence as a “sword” or protecting it as a “shield”—it cannot do both.”) (emphases added); “The Consequences of Waiving the Attorney-Client Privilege”, <https://www.mintz.com/insightscenter/viewpoints/2451/2015-06-consequences-waiving-attorney-client-privilege> (discussing “sword and shield” waiver dichotomy).

with respect to any otherwise privileged communications on the entire subject matter.

This should long ago have been the outcome of this matter.

96. The Company applied the sword, openly, hostilely, aggressively and intentionally, in attacking Mr. Marcus as unethical and guilty of serious misconduct in open Court. The Company did so with more than enough specificity and publicity to effectuate full waiver of privilege over the entire subject matter. It only filed the Complaint, reflexively, to blunt what it thought was potential litigation over its disparagement (as Mr. Marcus' then counsel, Kevin Byrnes, threatened at the end of Mr. Marcus' deposition on the Motion to Strike in 2022). That privilege, putting aside all other arguments against its durability (e.g., crime-fraud), was waived; its late-filed complaint and, thus, the current charges, are improper and null.

Other Over-arching Process Issues

97. In addition to the foregoing concerns, Mr. Marcus must point out that the posture of this matter is askew and unduly prejudicial to Mr. Marcus, who respectfully and urgently calls for a “pause” so that due process equities can catch up.

98. As Bar Counsel is aware, the Company filed its Complaint in 2022, and Bar Counsel produced its charging document in February 2026. In between that time, the Company steadfastly asserted its innocence, or at least that it should not be found liable for any misconduct, including intense litigation in district and appellate courts in two Circuits – the 7th and the D.C. Circuit – and two trips to the U.S. Supreme Court (one was denied cert, the other proceeded through oral argument and a 9-0 opinion against the Company). The Company did not, in any way, demonstrate the correctness of its position(s); to the contrary, the Company solely demonstrated its power to usurp enormous amounts of judicial resources on false premises. At the end of 18 years of corporate Machiavellianism, the Company, finally, landed on “Jail”, to use Monopoly parlance, by agreeing to a \$55,000,000 payout and other presumably serious, onerous conditions that would ordinarily accompany such settlements.

99. Nowhere in the Specification of Charges is there any mention of the Company’s FCA Settlement. This is logical, as the Company did not lay down its effort to evade Justice until March 2026, i.e., after Bar Counsel drafted and forwarded its charges. It does not appear that the Company notified Bar Counsel of its FCA Settlement decision, and it certainly does not appear that the Company provided, at any point, information on the FCA Settlement’s terms, either as part of substantiating or presumably correcting its initial complaint, or for any other reason to aid the administration of Justice in the matter

it initiated. The Company certainly would know of the material relevance of the FCA Settlement on these proceedings, or it should know.

100. In any event, due process demands -- and Mr. Marcus herewith specifically requests the Bar cause to be produced to Mr. Marcus -- a full, unredacted set of copies of all relevant FCA Settlement documents be provided to Mr. Marcus. It is fundamentally unfair, and the absence of due process, for Mr. Marcus not to be able to review the full record of the Company's status vis á vis its settlement. There must be some form of agreed-upon or stipulated set of facts, some compliance requirements or corporate integrity agreements (or both), perhaps a consent decree resolving the FCC aspects, etc. The Company may have offered to provide internal documents, including internal investigation documents, to support the government's due diligence in reaching settlement. There is a host of potentially critically germane documents that go to Mr. Marcus' defenses to the Company's complaint and, derivatively, the Bar's specification of charges.

101. Mr. Marcus, in accordance with basic due process, is entitled to see and utilize those materials in order to present his defense and, absolutely, the tribunal reviewing this matter (whether in a full hearing or as part of reviewing a negotiated settlement) should have access to it as part of executing its responsibilities. Mr. Marcus has a due process right to use the material to articulate, fully, his defenses, instead of having to speculate -- unhelpfully and unconvincingly -- about what the settlement record would reveal. And, this Committee clearly must see the record of settlement as part of its considerations of the entire gestalt here. Indeed, one must ask, given how long the Company has usurped

the nation's judicial and federal enforcement resources to run out the clock: what possible rush is there now?

102. Further, the FCA Settlement materials are not in some state of extreme care. This is not a national security or similar matter, at least as far as Mr. Marcus knows. This is common corporate fraud and abuse of the system designed to hold wrongdoers to account for such misconduct. It is run-of-the-mill corporate misconduct dressed up as something more because of the Company's power, pocketbook and contumacy. At bottom, what Mr. Marcus is seeking, and what he should be entitled to, are a few documents that would put not only Mr. Marcus, but all the stakeholders here -- in position to ensure that Justice is done through the adducing of clear and convincing evidence concerning the conduct in question. It's a simple matter of Bar Counsel asking the Company to produce the materials and, of course, if the Company refuses, Bar Counsel can issue a subpoena to compel production. Until production is made, respectfully, these proceedings should be frozen. And, should the Company refuse to comply, the matter should be withdrawn with prejudice.¹²⁵

¹²⁵ This is not to suggest that every form of discovery would automatically be required here. Indeed, as Mr. Marcus understands it, the process due, including discovery, should be commensurate with the stakes. It should be obvious to all that the core materials -- in the Company's hands right now -- needed for Mr. Marcus' defense should be produced. Mr. Marcus is not asserting any blunderbuss discovery rights; to the contrary, he is only requesting the settlement agreement materials described, as well as the Gibson, Dunn investigatory report, or read-out, or briefing, or download given to the Company in 2011 with respect to these matters, and underlying materials therewith and, of course, any 'agreement' between the Company and/or its lawyers and Mr. Shepherd or his representatives as described *supra*. See ABA Model Rule 18 Commentary, at

https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_f_or_lawyer_disciplinary_enforcement/rule_18/ ("The holder of a license to practice law is subject to discipline for breaches of the standards of professional conduct; the license must not be arbitrarily taken away and the holder is entitled to procedural due process in any proceeding relating to such conduct. Such due process rights include fair notice of the charges, right to counsel, right to cross-examine witnesses, right to present arguments to the adjudicators, right of appeal (Rule 11); and right to subpoena and discovery (Rules 14 and 15)").

103. For substantially the same reasons, the Company should be required to produce – and Mr. Marcus herewith specifically requests the Bar cause to be produced to Mr. Marcus -- the Gibson, Dunn findings/report/briefing/readout¹²⁶ associated with its internal investigation of the core facts – including its recommendations to the Company in addressing the issues. This is equally important, one could argue, as the FCA Settlement vindicating Mr. Marcus in this matter, because it establishes the Company's state of mind from that day forward in terms of its use of information in court on the motion to strike, its filing of the Bar complaint, its averments to the government in negotiating the FCA Settlement, and so on.

104. There would be no prejudice to anyone, no destruction of the equities, for there to be a pause at this point in order to enable full assessment of new facts or, in the case of the Chronology and the Gibson, Dunn report, established facts not made available to Bar Counsel (or Mr. Marcus) by the Company. Justice Holmes' maxim, "Justice delayed is Justice denied", was tailor-made for the circumstances authored by the Company in this matter.¹²⁷

105. Mr. Marcus has had an impeccable, 30-year legal career serving both private and public sectors. Mr. Marcus has never been subjected to discipline by any state bar or court, has never faced charges of misconduct, and has always been a member 'in good

¹²⁶ This awkward framing of the Gibson, Dunn report is designed to avoid the kind of corporate word games that, sadly, always get played in these matters. It is not designed to annoy.

¹²⁷ What's left after such abuse of process is, well, not much. Multiple crucial witnesses (e.g., Jack Zinman [to suicide]; and Ernie Bond [to cancer] are dead; many (e.g., Ed Barillari, Brian Moore, Wayne Watts, Bill Drexel) are scattered and no longer with the Company; others almost certainly have next to no command of the facts or even basic memory of the facts to be of use to Mr. Marcus in his defense, or the tribunal(s) reviewing these matters overall. The Company has thoroughly cheated Justice. It's unfair, after all the Company's posturing and parkouring, for these proceedings to go into overdrive against Mr. Marcus where, as here, the Company's wrongdoing is the only thing to see, and Mr. Marcus, at worst, only can be shown to have taken appropriate risks to expose wrongdoing in protection of Justice and protection of a program to help the poor stay connected in a rapidly evolving, online information-driven world.

standing' of the Bars under which he is licensed. Mr. Marcus is a pillar in his community as a tennis and swim coach, a tenor in his church choirs, a neighbor, friend and colleague.¹²⁸ Mr. Marcus has never gotten less than excellent and, indeed, outstanding performance reviews¹²⁹ in his various roles over 14 years of service at the FCC, and nearly two years of service as a Federal prosecutor. There must be some benefit of the doubt given to Mr. Marcus, especially on these facts, and he requests, respectfully, that he no longer be treated as a scoundrel just on the basis of the Company's sayso. Basic dignity demands it, and the community Mr. Marcus has long served as a lawyer, coach, and otherwise, deserves it.

¹²⁸ Please *see* Tab D.

¹²⁹ Mr. Marcus, in 2024, received a special "Outstanding Public Service Award" for excellence as an attorney at the FCC, and was named "Coach of the Year" by the Fredericksburg Free Lance Star in 2021. Given all of Mr. Marcus' exceptional service, good will, and selfless sacrifices to contribute to his community, *see, e.g.*, Tab D, Mr. Marcus deserves the benefit of the doubt here, including an appropriately slow process to ensure Mr. Marcus is not unduly harmed in a rush to Justice.

Responses to Specific Factual Averments in the Specification of Charges

The foregoing material is incorporated herein by reference.

106. As to Paragraph 1 of the Charges: Admitted as to the first two sentences. Denied as to the rest.

107. As to Para. 2: Admitted in part and Denied in part. The “merger” of BellSouth and AT&T was an acquisition. Further, the actual change-in-control did not take place until after 2006, and transitional, integration activity took place well through 2007 and into 2008. The Complaint attempts to suggest Mr. Marcus’ experience with the Company, after acquisition, started in 2006. It did not.

108. As to Para. 3: Denied. Mr. Marcus also objects to footnote 1 of that paragraph, which improperly elides and attempts to simplify critical corporate iterations, prior periods of integration and separateness, and related organizational facts that are critical to the understanding of this matter and, thus, to its burden to establish the violations charged by “clear and convincing evidence.” As Mr. Marcus’ Chronology shows, in multiple areas, and as the litany of misconduct by the Company in its various pre- and post-merger/acquisition iterations makes clear, this matter turns materially on conduct committed by the various “companies” at varying points in time. “AT&T”, to industry professionals, easily can mean all things to all people, but that is not a matter of insignificance here. An understanding of the Company’s structures and changes from 1997 through and including its acquisition of BellSouth is critical in order to ensure the record properly reflects who did what and for whom and what Mr. Marcus’ duties and responsibilities were in the premises. [This is almost certainly spelled out in the

settlement documents and the Gibson, Dunn documents Mr. Marcus has described and explicitly sought herein.]

109. Also, Paragraph 3, which describes the Company's "participation in the FCC's [E-Rate] program", and the LCP requirements associated with participation, gives significantly short shrift to the subject matter. cursory treatment is not appropriate, respectfully, on the core matters, because it elides what are important background facts showing the critically significant social policy context of this matter – serial fraud and obstruction of Justice in and around *a federal program to ensure educational and community library connectivity largely for the poor* -- and Mr. Marcus' conduct. Too much reliance, apparently, is placed on the "adversarial nature" of these proceedings, but that should not alleviate Bar Counsel of the burden to put forward a comprehensive set of charges, regarding which it has the burden to produce clear and convincing evidence, that goes beyond what the Company may think is sufficient, but goes all the way to establish the core facts supporting, on clear and convincing evidence, why Mr. Marcus should be sanctioned. In that regard, specifically, paragraph 3 should explain, in much more detail, what the LCP requirements are, what they were designed to accomplish, how "the companies" both knew yet still serially flaunted them from Day 1 of the rules, and just how many thousands of potential counts/charges of wrongdoing are associated with "these companies'" abuse of the program. Paragraph 3 is unduly neutral, even benign, which is not appropriate even in a charging document of this ilk.

110. As to Para. 4: Denied. Paragraph 4 is materially (though presumably unintentionally) misleading to the point of being false. Mr. Marcus, as the Chronology makes clear, was placed into the E-Rate portfolio after BellSouth was acquired and

gradually assumed his various responsibilities in the portfolio during the post-acquisition integration. Mr. Marcus, along with multiple other members of the “team” associated with aiding the Company’s E-Rate compliance after a decadelong merger/acquisition spree, was brand new to the portfolio, and very much in the process of being trained in the subject matter.¹³⁰ Mr. Marcus, like his colleagues, had to receive initial E-Rate training in Chicago – after his onboarding with this group -- from the Mayer, Brown firm, to get going. And, as noted, that training did not even contain any treatment or even mention of LCP! This malpractice (or worse) frustrated Mr. Marcus’ effort and ability to serve in any role of guidance and counsel on E-Rate, especially in relation to the core LCP matters of concern here, and gave him a tall hill to climb to get up to speed even without the initial madness of the Indiana and broader LCP matters. The Company, in its transparent pin-the-tail-on-the-donkey effort, should not be heard to complain that Mr. Marcus is at fault for having received flawed training that *omitted* any reference, presumably intentionally, to the key issue(s) of concern.

111. Further, the Company’s assertions (reflected in the Specification of Charges) are misleading in that they suggest the Company actually relied on, and theoretically followed, Mr. Marcus’ guidance and counsel on E-Rate. As the record, by now, painfully shows, the Company didn’t listen or follow or respect the very advice it claims it was

¹³⁰ In a ‘hairy’ battle scene in Oliver Stone’s *Apocalypse Now*, Captain Willard asks a soldier, “Hey soldier, do you know who’s in charge here?” to which the soldier replies, “Ain’t you?” This moment encapsulates the chaos and confusion of war, highlighting the breakdown of command and the absurdity of the situation in the movie – this was definitely true, as well, of the E-Rate environment into which Mr. Marcus and his colleagues were thrown in 2008. *See* Chronology, Tab A, pp. 1-22. The Company, especially SBC but also other non-BellSouth entities, had had several problems with E-Rate compliance and with misleading the FCC in investigatory matters. *See* https://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1999/fcc99153.html. Indeed, as Mr. Marcus learned only *after* BellSouth was acquired, SBC was operating under a consent decree with the FCC that was premised on *SBC’s lying and deceptive conduct before the FCC in a prior regulatory/investigatory matter*.

relying on from Mr. Marcus. Nowhere does the Company follow Mr. Marcus' "opinions and guidance" when it came to the critical advice on its years of non-compliance, its utter obstruction of Justice with respect to both the Indiana matter and the LCP matter(s), or other related opinions and guidance. The Company picked and chose what it wanted, disregarded the rest, bullied Mr. Marcus for trying to bring about a change in direction, and then washed him out of the private sector. It is hoped Bar Counsel will reconsider this aspect of things.

112. As to Para. 5: Because Mr. Marcus does not know the origins of the *qui tam* suit, and for other reasons, this paragraph is Denied. Further, this initial, set-up paragraph of this section is improvidently chosen. The core narrative for the Charges doesn't start in 2008, it starts with the origination of the LCP rules in 1997, the various "companies" apparently collusive lobbying for and subsequent disregard of those requirements, and the passing down of the 'hot potato' to T. Corp. through its negligent, reckless and false representations to federal authorities in the Indiana matter (that is, while DOJ's lead lawyer was still working for DOJ and not the Company).¹³¹ And, it should again be noted, the *qui tam* suit, Mr. Marcus believes, was brought against Wisconsin Bell, not "AT&T" (i.e., it was a Wisconsin-specific E-Rate-based FCA suit, NOT a nationwide suit or, in any event, a suit going beyond the narrow set of schools (and, perhaps, libraries) in Wisconsin.

113. As to Para. 6: Denied. The Heath *qui tam* filing came at a time when the T. Corp. Indiana matter and underlying investigation had been underway for over 3 years (possibly as many as 6 years or more), as was well-known to both T. Corp. and, materially, the Company in making its allegations to Bar Counsel. The sequence is important. Had the

¹³¹ See Chronology, Tab A, at 1-15

T-Corp. Indiana investigation actually been “initiated . . . [a]round the same time” as the Heath litigation in 2008 (see Para. 6), arguably, the timeline for the investigations associated with them would have been on the same timeline, and the stakes would have been different and managed differently. However, T. Corp. was far along when the Wisconsin Case [Heath] litigation landed, which raised multiple questions about what was actually happening, whether there was coordination between the Wisconsin and other matters, and whether/how the integrated Company best should move to (i) resolve Indiana, where critical representations (including misrepresentations of material fact) to the Department of Justice were already in the can, while (ii) getting its arms around Wisconsin (and, as it would turn out, everywhere else, across all of its E-Rate vertical) and the LCP allegations there. None of that context is remotely suggested in Paragraph 5.

114. Further, the last sentence of Paragraph 6, which says that the Company “agreed to document and submit data demonstrating its Lowest Corresponding Price compliance for three years” is unhelpfully ambiguous. It could be read to mean retroactive demonstration, which it was not, and prospective demonstration, which it was. As such, T. Corp. was knowingly and deceptively using its newfound colleagues, and their lack of any background on the subject matter, to dodge a bullet on the true story of its LCP compliance because it had lied to the Government about its historical compliance and refused to disabuse the Government of that lie/those lies, in order to get away with the compliance agreement (i.e., fraudulent inducement). There is no dispute T. Corp. (or the rest of the Company, eventually) got religion on LCP. But the question *is whether it had been complying for any period of time prior to entering the compliance agreement*. All evidence suggests it was not. Mr. Marcus, once he began to suspect, after appropriate

vigilance and diligence, the true facts, was absolutely alarmed and made all due efforts to get the Company to correct the record, as seasonably as possible. The Company would have none of it, preferring instead to hold Mr. Marcus and the others' feet to the fire while improperly attempting to shield itself via privilege.

115. Further as to Para. 6, all indications are that the Government began investigating T. Corp.'s Indiana misconduct well before 2008. This is a material misstatement in the Specification, and tends to nullify the fact(s) that prior T. Corp. personnel and representatives (Barillari, Montgomery, Barnes & Thornburgh,¹³² others possibly) were actively involved with the E-Rate portfolio and its various fires well before Mr. Marcus came into the group and, thus, knew without question what had happened and was happening in Indiana at a level orders of magnitude beyond what Mr. Marcus – from BellSouth – knew.

116. Also, Para. 6 materially misleads in the sense that it suggests that “the government” and “AT&T” “agreed to document and submit data demonstrating its Lowest Corresponding Price compliance for three years.” This is facile and improperly ambiguous. First, it doesn't define what “AT&T” means – the whole Company and its entire E-Rate footprint? If that were the case, we wouldn't be here. More to the point, it says “for three years”, i.e., suggesting a look-back. But, this wasn't a look-back, it was prospective as Mr. Marcus recalls; thus, there wasn't a demonstration, with data, that “AT&T” complied with LCP in the past, but had to show compliance going forward. This paragraph, thus, passes along the Company's deceptions and, indeed, blesses them before this Committee. It should not do that, but make very clear what it means by

¹³² Mr. Marcus recalls that outside counsel with Barnes & Thornburgh [though it could have been a different law firm] was involved in assisting T. Corp. with its presentations in the Intelenet matter, including a 'white paper' presentation to prosecutors. This is detailed in the Chronology, Tab A.

“AT&T” and what scope of activities it intends to describe, and whether the time frame is prospective (it was, as Mr. Marcus recalls) or retrospective (it was NOT, as Mr. Marcus recalls).

117. As to Para. 7, Denied. Bar Counsel does not know, nor can it, when “the government opened investigations into AT&T in connection with Heath’s claims”, etc. Thus, in addition to being unduly vague, it likely relies solely on “facts” proffered to it by the Company without benefit of a thorough consideration of the government’s files (DOJ, FCC, FCC OIG, etc.). Bar Counsel, it is further believed, does not know if/whether “the FCC and DOJ” actually opened their investigations “separately”, as stated, or in some form of coordination, and the timing and sequencing of that coordination. This is important as it sets the table for the different ethical challenges facing Mr. Marcus and his good faith, reasonable efforts in dealing with those challenges. Indeed, it is unlikely Bar Counsel knows and, thus, is in a position to make representations concerning, anything about how the Government coordinated or didn’t coordinate with respect to the multiple threads of investigations of multiple Company entities and affiliates over the better part of a decade between roughly 2003 and 2012 (frankly, it is likely still ongoing even now).

118. As to Para. 8, Denied. This paragraph reflects almost no useful facts. First, the Company’s “regulatory group” consists of *non-legal professionals*, in the main, who advocate regulatory policy and coordinate with legal professionals (lawyers) within the Company’s shared services organization as needed to present properly founded (in law) advocacy to the Commission (and, when needed, to State commissions). This “regulatory group” could not and, in fact, did not conduct any “internal investigation” of anything relating to the present subject matter, nor could it have. Mr. Marcus is uncertain

of when he was tasked to serve in this group or whether it was as “co-chair” or something else. Mr. Marcus is fairly certain, however, that this “appointment” was in the late 1Q of 2008 by which time, at least, Mr. Marcus had received some appropriate SME-level (subject matter expert) training on the E-Rate Program’s rules and requirements.

119. As to Para. 9: Denied. This paragraph is shockingly deficient on a key moment in the chronology. The actual facts are these:

- Very early in 2010, Barillari began to express interest in TCM coming to work in his group. TCM understood that Barillari’s interest was an outgrowth of his observation of TCM’s work in the Wisconsin matter, which was the only basis for Barillari to have taken any interest, objectively, in TCM’s joining his team.
- Montgomery began to lobby TCM directly for TCM to join Barillari’s team, and also began to indicate her desire to “move out of New Jersey.” Montgomery, who reported directly to Barillari, suggested to TCM that she wanted to “go to Dallas”, but would also generally be happy “getting out of New Jersey.”
- TCM, though not unhappy in Phillips’ organization, saw the issue as one of “highest and best use” for AT&T of his services. That is, TCM had just completed a relatively successful year in the Legal/Reg group (“Meets most, and Exceeds Some Expectations” overall in the 2009 review) and was feeling that he had traction in the group after an uphill climb coming over from BellSouth in the merger with virtually zero regulatory experience to that point in 2007. However, TCM recognized that he had substantial background in “white collar” matters, internal investigations with respect to same, and dealing with the federal government in these matters. As a former criminal Assistant U.S. Attorney who is still tied in with that community, TCM recognized that the Company needed his background, experience and skill set for matters such as Wisconsin (and, by implication, Indiana) more so than it needed TCM’s writing skills and FCC advocacy (which, TCM acknowledges, was not always a natural fit “tone”-wise).
- TCM became convinced, based on experience and his knowledge of the issues, the LCP investigation was going to be a major continuing work item, and would in all likelihood expand. TCM was also convinced that, although he did not know the organizational and operational “ins and outs” of AT&T like Montgomery (TCM did not know any of the other persons in Barillari’s group), he brought much more seasoning, judgment,

fortitude, professional assets and acumen and core skills to the table for matters like Wisconsin than anyone in the litigation group or in the Department that TCM had met to date.

- TCM asked Phillips for his advice and, essentially, his blessing with respect to the transfer. Phillips explained, as a mentor, that there was a real potential opportunity in joining Barillari's group that seemed best suited to my skill set, that it would also mean that TCM would be reporting to a "Level 6" as opposed to a "Level 5", and that, in any event, the opportunities for advancement within the Legal/Regulatory group were not likely to materialize in the foreseeable future. TCM asked Phillips whether the "situation (i.e., leaving Phillips' organization and going to Barillari's) could be trusted." Phillips expressed his view that it could be trusted, but advised TCM to ensure that it was understood that TCM would not move from D.C. Phillips also conveyed that message personally, he advised TCM.
- Without more, TCM communicated his assent to Phillips that he would transfer to Barillari's team, so long as there was "no bridge being burned" as between TCM and Phillips. Phillips assured TCM that there was no issue on that front. TCM asked Phillips whether he had any hesitation recommending TCM: Phillips replied that he would never recommend to Wayne that he transfer an attorney unless Phillips believed the attorney was a good asset. Phillips advised that he had "no problem recommending me to Wayne" in that regard.
- In March 2010, at the Legal Department Conference in Dallas, Phillips and Barillari, as part of their discussions with Department leadership (including Watts, apparently), expressed their mutual assent to the move. On the bus ride back to the airport from Dallas, Phillips confided to TCM that the discussion had taken place and Watts had approved it. TCM asked how quickly it would take place. Phillips replied that it would happen immediately, so TCM should begin transitioning work ASAP.
- Accordingly, TCM began the process of working with Barillari's team — through Montgomery almost entirely — to effectuate the transition. TCM also began discussing the transfer of his portfolio to his colleagues in the Phillips organization.
- During the entire first quarter 2010 time frame, however, TCM attended to all of his regular portfolio duties, particularly (but not exclusively) the Wisconsin investigation and the broader LCP strategic defense as well. All of these efforts, and this work product, took place while TCM was in Phillips' [legal-regulatory] organization.¹³³

¹³³ See Chronology, Tab A at 26-27.

Thus, as is clear from the foregoing, the Company did not simply “move Marcus to a litigation group”, i.e., as some innocuous movement untethered to the core narrative and, indeed, it is most deficient in that it negates Mr. Marcus’ agency in the movement as well as the influence implicated individuals (like Ms. Montgomery) had in the activity.

120. As to Paragraph 10: Admit in part, deny in part. As a lawyer for the Company, Mr. Marcus had access to information and materials in the Company’s possession. That said, the “confidential and secret information” tag in the paragraph is gratuitously vague and provides no basis for Mr. Marcus to assess as part of making an answer. For that reason, and others, this Paragraph is denied.

121. As to Paragraph 11: Denied. The paragraph, which adopts the Company line on Mr. Marcus, is extraordinarily jaundiced, erroneous and misleading. Whatever “concerns” were there “by late 2010” were those of individuals whose misconduct was being uncovered by Mr. Marcus. For example, from the Chronology:

Shortly after August 17, 2010

- TCM, in New Jersey, met with Moore in his office and presented Moore with a leave- behind copy of the “LCP Strategic Approach 2010” briefing book he had intended to walk through with [Senior AT&T Officer John] Langhauser.
- TCM walked Moore through the core details about each document so that Moore could understand the nature of TCM’s concerns and TCM’s desire to ensure that the company took advantage of the lag time to put more structure into its defense approach. Among the documents in the book was a copy of the criminal mail and wire fraud statutes, as well as the false statements statute, the false claims statute and relevant limitations research, along with the substantive LCP Petition documents and related material (e.g., the Shepherd Finkelman comments).
- Moore listened with keen interest and asked some questions, but otherwise appeared not to have been very much “in the know” on the issues.

- The focus of the criminal statute documents, in TCM's mind, was the company's E-Rate invoicing and certifications broadly, considering the known LCP compliance gaps historically inside the legacy E-Rate organizations. Given that history, TCM wanted to ensure decisionmakers were addressing the potential government liability theories, including criminal theories, that might be applied to that history, if revealed — as TCM expected it would — as soon as the first witness was interviewed by the government in the Wisconsin matter (as the government had indicated it would seek in due course, consistent with what we learned they were doing with VZ's witnesses).
- After the meeting, which took about 30-45 minutes, TCM stepped out of Moore's office either to go eat lunch in the cafeteria or to go to the men's room. TCM believes it was the latter. When TCM returned, he went back to Moore's office to touch on an additional point, only to find Moore in Barillari's office, door open, with the briefing notebook open on Barillari's desk. The body language of both men indicated stress and agitation.
- The two were discussing the book, and seeing that, TCM walked up to the door and asked whether the two needed his input, seeing that they "were discussing the notebook I prepared." Moore immediately looked up at TCM and quickly declared: "no, that's not necessary." The look on Moore's face struck TCM as being one of significant stress.
- Barillari's and Moore's reaction in these circumstances gave TCM the clear impression that there was some personal consciousness of wrongdoing, exposure, etc., that one or both persons was experiencing in relation to the notebook. However, TCM could not fix what that issue would be, other than a concern that the Indiana matter had been the genesis of the company's LCP investigatory problems, and presumably that they had never revealed that fact to Department leadership. TCM had not focused, at this point, on the statements made to the government on July 11, 2008.¹³⁴

¹³⁴ Chronology, Tab A, at 34-35. The entire context of the lie that is at the heart of Para. 11 (*and, again, Mr. Marcus is not impugning the integrity of Bar Counsel – it clearly was put to a malicious prosecution by the Company on self-servingly selected "facts") is shown in the Chronology, roughly pages 28-35, 38-46. As the Chronology points out, the "concerns" about Mr. Marcus' performance were expressed by Mr. Barillari and Mr. Moore, two persons thoroughly implicated in the facts of misconduct. They openly and nakedly used the performance review process to retaliate against Mr. Marcus, and this cannot be seriously denied. Both were separated from the Company in the aftermath, almost certainly as an outgrowth of their misconduct and exposure-generating actions and activities. This proceeding would benefit greatly from the Independent Investigation report, including witness summaries and other materials, in order to elucidate these issues even more completely. To be sure, the Company's retaliation against Mr. Marcus would be a case study in classic retaliation against a whistleblower, as Mr. Marcus pointed out to Company officials at the time.

Thus, it is clear that the Company's in-earnest retaliation campaign against Mr. Marcus was initiated by Mr. Marcus' uncovering of the facts. It was clear to the Company, by late 2010, that Mr. Marcus was 'not with the program' and was intent on finding out the facts associated with the Company's E-Rate conduct. Knowing that, the Company, through Barillari, Moore and others, executed a steadily intensifying harassment, threat, abuse and intimidation campaign designed, among other things, to spike the factual record in future proceedings, e.g., this one.

122. As to Para. 12: Denied as false, scandalous and disparaging. The "unfavorable performance review" to which it refers was simply naked, improper and illegitimate retaliation for the concerns Mr. Marcus raised, especially and directly with respect to the persons issuing the review. Indeed, in the review, one of the persons, Mr. Barillari, directly and openly revealed his retaliatory animus by declaring that Mr. Marcus "continued to raise his concerns", etc. after being told to drop it (i.e., the LCP issues). In other words, Mr. Marcus was not keeping his mouth shut and moving on from the matter, but was digging in (as appropriate). Both reviewers were implicated in the very bad facts, as the Independent Investigation report/readout/briefing/? almost certainly makes clear. It is hoped there will be a comprehensive review of those materials to ensure a proper assessment of this highly critical set of facts. And, it should be noted, a very good review would have been provided by Mr. Gary Phillips, to whom Mr. Marcus had reported for a substantial portion of the reporting period, but Mr. Phillips was not allowed to provide it – further proof of the retaliatory fixing of the record against a whistleblower. In addition to the foregoing, the actual relevant facts, as per the Chronology, are these:

- Between October 22, 2010 and March 2011

- Thoroughly demoralized, TCM moved forward to address himself to his matters. TCM now felt beaten down for having made a strong, principled effort to assist the company in the brewing LCP storm. Worse, without question at this point, TCM was convinced that his bosses were corrupt, and willing to go to great lengths in pursuit of their personal agenda.
- When the end of year review process came around in December, TCM was still smarting from the treatment leading up to October 22. Moore, by then, had had a vicious rant at TCM's expense over the Pildis matter, and was further executing even more vicious directives from Barillari to "put Theo on the bench" in the Pildis matter for alleged failings of TCM, despite TCM's efforts to rescue a lost case in only a few months' time that had been in Montgomery's care for two years and which was ruined well before TCM came on board, and with respect to which Montgomery gave instructions not to overreact to Marello's witness problems (which turned out to be deadly, as assumed). TCM accepted all these indignities, and more, with grace.
- When submitting his "significant accomplishments memo", however, TCM decided to do precisely that: list those accomplishments that were, in fact, significant; i.e., that related to the highest value representation that TCM had provided in the time frame: (1) the LCP Petition development and filing; (2) the establishment of a joint defense agreement and joint defense team including Verizon, AT&T, and now Century Link; and (3) the October 12, 2010 presentation to the government and run-up efforts to that meeting.
- On or around March 4, 2011, Moore sent TCM his performance review (which otherwise appears to have been completed in December 2010). In this flagrantly hostile, retaliatory and meritless document, Moore and Barillari viciously and abusively maligned TCM on the Pildis and Niles matters, without commenting whatsoever on the "significant accomplishments" TCM had submitted to them. Moore had already conveyed his and Barillari's desire to have TCM write up his time sheets going forward so that they "would know what TCM was working on," which was a uniquely nasty jab at a 20-year veteran attorney with TCM's accomplishments and experience.
- Further, even though TCM had provided a copy of his significant accomplishments memo to G. Phillips, in whose organization TCM was a member for the entire first quarter of 2010, Phillips did not, and apparently was not allowed to, submit any comments or thoughts into TCM's review. Phillips preceding evaluation had TCM rating in the '4s' overall, with a notation that TCM "met most, and exceeded some expectations." Barillari's and Moore's evaluation averaged around a "2" across the board, with only a '3' in diversity (presumably some comment on, or nod to — TCM is unsure -- the fact that TCM is Black).

- But, what was most interesting in the “evaluation” to TCM was not so much the declaration that despite 20 years of practicing law, TCM had no leadership potential and was not an “effective litigator,” yet despite these criticisms, but that it would nonetheless be useful and recommended for TCM to remain in the group under its supervision and guidance for “2-3 years.”
- The 2-3 years triggered TCM’s thinking, for the first time, that Barillari might have some personal concern about criminal false statements liability.
- TCM reviewed the limitations period for 18 U.S.C. § 1001 and confirmed that it was 5 years. • TCM then re-looked at the materials from the July 8, 2008 presentation to the government, as that was the target time frame (i.e., going back 5 years from roughly mid-2013, which would be the end of the prescribed TCM “supervision” period).
- At this point, around March 7, 2011, TCM observed, for the first time, that Barillari and Montgomery were named on the power point document from the July 8, 2008 meeting, and thus TCM clearly was able to frame in his mind that they were actual sponsors of the statements made in that meeting, even though TCM did not know what was actually said in the meeting. This established a predicate for personal exposure to criminal liability for those statements, which occurred to TCM for the first time.
- This realization placed Barillari’s conduct into an understandable context, and also created overwhelming concern about Barillari’s furtive behavior and transparent consciousness of wrongdoing, as described, in part, herein.
- On March 8, 2011, Moore phoned TCM and left a voice mail message regarding a recent meeting at the FCC’s Enforcement Bureau attended by T. Hoskins and M. Henze. The subject of the meeting was a concern the FCC was expressing about the Company’s compliance plan LCP submissions, and particularly the Company’s methodology for certain price analyses. Although the matter had long since left the care and portfolio of the Litigation group, Barillari (and Rodewald, apparently), through Moore, was making serious inquiry about these events, and Moore was charged to find out from TCM what happened.
 - In his voice mail, Moore stated: “Somebody apparently, I believe the situation was that somebody added a note about the meeting that Terri [Hoskins] and Christopher [Heimann] had last week with the FCC to Wayne’s Hot topics list and of course I’ve been bombarded with questions since then by Ed and April. .. They don’t seem to get that nothing’s really happened yet, but. . . hey look do me a favor, just get your thoughts in a row, get your ducks in a row — it’s entirely possible that you and I will be beset upon when we’re down there in Dallas with questions about what happened at the meeting ... and the

fact that we're keeping an eye on things and what could happen next, you don't have to do anything crazy just be prepared to discuss that if it comes up. I'll probably catch up with you at some point just to have us be on the same page in case we are approached or of course the real answer is they should talk to Heimann and Hoskins. . . but that would be too fucking easy, anyway, I did want to give you the heads up. I'll send you the email chain so that you have it, no need to respond. I just want you to be aware that this got a little attention."

- March 9-11, 2011, TCM attended the Legal Department conference, still trying to figure out what steps to take, if any, with this new realization. There, TCM confirmed when reviewing the Department face guide, that Barillari had 27 years with the company (thus, was less than 3 years from having a full 30 years; although TCM is not aware of all of the significance of that milestone, its coincidence with the 2-3 year timeline proposed by Barillari for TCM's supervision, and the remainder of the limitations period, was interesting).
- Moore met with TCM on March 10, 2011 to "go over" the written evaluation. TCM did not protest the writing at that time, other than to observe to Moore that it was "harsh."
 - Moore advised TCM that Barillari had made numerous entries in the evaluation, despite not being TCM's supervisor and despite having very little direct interactions with TCM throughout the period.
 - Moore stated that Barillari had insisted on significant negative commentary on the Pildis matter in the review, and had written several portions of the review himself.
 - Moore clearly attempted to distance himself from some of the harsher aspects of the review, and pointed out that he had argued with Ed in order to keep TCM on the Pildis case after Barillari insisted that "TCM be put on the bench."
 - Moore also observed that TCM's "performance had significantly improved in the first quarter of 2011."
 - The conference ended March 11, 2011. Moore never mentioned the Indiana developments that he had left a voice mail about on March 8th (see above).¹³⁵

123. As to Para. 13: Denied. This paragraph is risible given the actual facts. Mr.

Marcus had been actively discussing and detailing and presenting the facts to his supervisors on a consistent basis before "a few days after receiving the performance review", starting at least by 2010 and continuing, with increasing intensity, throughout

¹³⁵ Chronology, Tab A, at pp. 44-46.

the rest of Mr. Marcus' time with the Company. These efforts were captured in pages 34-46 of the Chronology and included a multi-page memorandum October 21, 2010, to Mr. Marcus' supervisors and/or superiors – Ed Barillari, Gary Phillips and Keith Epstein – laying out in detail what the Specification of Charges calls “concerns that he had allegedly developed during his group’s internal investigation.”¹³⁶ The facts show Mr. Marcus outlining, describing and raising alarms about the facts *many months before March 14, 2011*, which the Specification of Charges poses as the key date. Mr. Marcus didn’t spring his concerns on the Company in response to a patently abusive and retaliatory performance review; indeed, the review itself and all the machinations captured in it were BECAUSE of Mr. Marcus’ raising of alarms, including about his bosses. The actual truth about Para. 13, thus, and how it should read, would be: “In response to Mr. Marcus’ efforts to address the facts of the Company’s apparently significant and continuing misconduct, his superiors punished him with a false and jaundiced performance review, one that left out – deliberately – any material from others that would have softened or mitigated the review.”

124. As to Para. 14: Denied. First, Mr. Marcus cannot affirm the Company’s motivations for hiring anyone to do anything in this matter. Mr. Marcus certainly would not advise the Company be taken at its word. More to the point, this paragraph, to be complete, must carefully spell out what it means by “the Company hired an outside law firm to conduct an investigation.” What aspect of the Company “hired” the firm? What is the nature of the “investigation”? Was counsel acting as “independent” in the investigation, i.e., engaged to provide a report on the facts and circumstances (of what?) to the Board of Directors/Audit Committee, or was counsel engaged by managers, i.e.,

¹³⁶ See Chronology, Tab A at pp. 41-42.

not “independent”? As it turns out, Gibson, Dunn – likely the firm to which this paragraph refers, was hired as “independent investigatory counsel” according to the Company’s own General Counsel, Wayne Watts. This is crucial because it was conveyed to Mr. Marcus as “independent investigatory counsel” which means, and meant, its engagement was with the Board either directly or through its Audit Committee (a fact that utterly undermines the Charges’ Paragraph 22, which says that Mr. Marcus failed to take adequate steps “up the ladder” in his reporting), and Mr. Marcus appropriately understood that role. None of this careful detail – which is utterly relevant and part of Bar Counsel’s burden to establish the Charges by “clear and convincing evidence” – is present in this paragraph, rendering it fatally incomplete.

125. Further, Paragraph 14 seems to suggest that Bar Counsel was given, and thus reviewed, the “Chronological Narrative” (i.e., the Chronology attached here as Tab A), but it is Mr. Marcus’ understanding that the Company did not provide that document to Bar Counsel. That fact and, thus, the fact that Bar Counsel hadn’t read the Chronology as part of its factual investigation in preparing the Charges, should not have been omitted.

126. As to the heading for paragraphs 15 through 28, Mr. Marcus objects to it in its entirety as scandalous, defamatory and unworthy of the seriousness of the matter at Bar. Mr. Marcus respectfully asks that the heading be stricken in its entirety. And, to be absolutely clear, Mr. Marcus denies all of the material and import of Paragraphs 15-28, with specific objections as follows:

127. As to Paragraph 15: Denied, for the reasons principally stated, supra, on this topic. To be sure, Mr. Marcus sought advice and counsel, and did so prudently and anonymously. This is 100% the norm for whistleblowers. Mr. Marcus was not looking

for any sort of “‘silent’ co-relator” status; Mr. Marcus wouldn’t have known of such a thing and wouldn’t have sought it. It is a ridiculously slanted allegation and should be stricken. And, obviously, if Mr. Marcus had retained counsel, in the end, it would have been to serve as a relator which, under the FCA, involves potential compensation. This is Congress’ will – odious though it may be to some – and not to be construed as a fact against the whistleblower, who faces every manner of risk in coming forward with critical facts about wrongdoing. Mr. Marcus was seeking legal advice and only providing information – which is protected and legitimate under the law and the rules -- as part of *an initial consult to permit counsel to determine if proceeding*, as a whistleblower represented by counsel via an appropriate retainer agreement, was appropriate and lawful; the document expressly states that purpose, and expressly states all information exchanged was to be treated as confidential and privileged for that purpose:

[T]he meeting taking place today between myself and [Mr. Marcus], and any future meetings or conversations as may be necessary to supplement today’s meeting, is an initial consultation between a prospective client [Mr. Marcus] and myself [Scott Shepherd];

[E]very aspect of today’s and any future meetings, including the fact and date of the meeting itself, the actions taken to cause the meeting to take place, the nature of the subject matter, the substance of the meeting and communications therein, [Mr. Marcus’] name, [Mr. Marcus’] physical description, the place and time of the meeting, and anything I observe about [Mr. Marcus], are part of the scope and definition of the initial consultation;

[I]f, at any point, [Counsel – Scott Shepherd], believe[s] or determine[s] that [he] has any cause to question the propriety of the attorney-client privilege concerning the initial consultation, I shall so advise [Mr. Marcus] immediately and the initial consultation shall be terminated at that point. All matters, as described, up to that point shall remain subject to attorney-client privilege. Any failure by me to assert such cause or concern shall constitute full waiver of that concern and any right I or my firm may have to assert that I or the firm should be permitted to disclose any part of the subject matter of the initial consultation to any third party.¹³⁷

¹³⁷ Acknowledgement, Tab C.

128. As to Paragraph 16, this paragraph omits time, date and other core material so as to be sufficient as a matter of essential pleading. Because of its critical deficiencies, it should be stricken. As it is, it is Denied. Given the critical importance to the Charges' theory of the case, including the timing and sequencing of Mr. Marcus' whistleblowing efforts (which, it should be added, Bar Counsel seems fundamentally opposed to considering), these deficiencies render the Charges infirm as a matter of "notice" pleading.

129. Paragraph 17, following on the deficient Paragraph 16, also is deficient and, as such, is Denied. It is bereft of time, date and other core contextual material. Additionally, for the reasons put forth already, *supra*, it is Denied. No "privileged" material was sent or shared.

130. Paragraph 18, for reasons similar to Paragraphs 16 and 17, is Denied. To the best of Mr. Marcus' knowledge, Mr. Shepherd and Mr. Dehler were not, and never have been, members of the "same firm" as alleged in this paragraph. This reflects a fundamental misapprehension of the critical facts and should give pause to anyone reading the Charges as to its legitimacy. Mr. Marcus admits that he sought to be represented by Mr. Shepherd – but only so long as it was appropriate, legal and ethical, which Mr. Marcus made absolutely clear, in writing, BEFORE meeting with Mr. Shepherd. Mr. Shepherd, for his own reasons, and on his own steam, simply abused that trust and made a mess of things. That was all on Mr. Shepherd, not Mr. Marcus. Further, it appears the Charges have things substantially out of sequence. It would be better for the Charges to be withdrawn (and the matter dropped, frankly) and re-constructed on these and other key factual areas.

131. Paragraph 19 is Denied. As established herein, Mr. Marcus, at no time, trafficked in “confidential or secret” information. Mr. Marcus sought to enter a client-counsel relationship as a qui tam whistleblower/relator, either in an independent case entirely or as a co-relator in the pending case. Mr. Marcus’ research into that prospect yielded no results upon which he could ascertain if either or both of those paths existed and, thus, reached out for advice and counsel. Because of the looming “first to file” rule for FCA matters, Mr. Marcus thought, it would be necessary to take the question up first with standing counsel, Shepherd. Any information shared was part of the “initial consultation”, see Tab C and expressly provided solely for the determinations and intentions expressed, all of which was legitimate. Had Mr. Shepherd, as he was duty-bound to do, declined representation, this matter would not be here. Mr. Marcus acted in good faith, with no “effort to assist Heath’s case”, but to act appropriately as a whistleblower in his own right as to misconduct of which Heath was unaware, and with respect to which his existing lawsuit was entirely separate.

132. Paragraph 20 is Denied. Mr. Marcus, as his Affidavit demonstrates (Tab B), took all due steps to put the Company on notice that it – the Company – had a fiduciary and related set of duties to allow Mr. Marcus to proceed outside the Company to address the misconduct at issue, i.e., get advice and counsel, etc., on what was to be done. The Company illegitimately and improperly refrained from assenting to those efforts. The Company’s behavior (combined with the DOJ’s knee-jerk declination) left Mr. Marcus with no options other than to pursue external assistance from an appropriate “cop on the beat”, i.e., a qui tam suit. The Company’s managers and officers, in total breach of their fiduciary duties to the organization, its shareholders, and the stakeholders of the E-Rate

Program, unlawfully withheld whatever “informed consent” is being described in this Paragraph (without any suitable explanation or effort to disabuse Mr. Marcus of his conception of his duties) and, as such, waived any argument as to its right to withhold that consent.

133. Paragraph 21 is Denied. No such declaration by anyone in the Company ever took place. If it had, we would not be here. To the contrary, Mr. Drexel (Mr. Marcus is unsure of the date) informed Mr. Marcus – it may have actually been Mr. Watts, but Mr. Marcus believes it was Drexel – told Mr. Marcus (1) that Independent Investigatory counsel had determined the Company “had no affirmative duty to disclose” (i.e., with respect to any of its conduct anywhere), and (2) that Mr. Marcus would not be provided with a copy of any document containing that advice as Mr. Marcus requested as doing so “would not be productive.” That is a far cry from the averments in Para. 21. Mr. Marcus denies the import of the “did not waive” statement for the reasons stated herein.

Moreover, to the extent the paragraph is designed to suggest, or suggests, the durability of privilege (which Mr. Marcus does not concede, as described, *supra*), that “privilege” was certainly waived long ago by the Company’s own actions, starting with its litigation gambit in the Nationwide Case before Judge Leon in the Motion to Strike. Bar Counsel cannot resurrect any such privilege years after it was waived, putting aside the clearly applicable crime-fraud exception to any such privilege claimed. The paragraph is further Denied to the extent it suggests or states that the investigation was “completed.” It is highly doubtful the investigation ended at or around the May 30, 2011 date Bar Counsel stipulates. To the contrary, it is likely the investigation continued for some time thereafter, as would have been appropriate given the still unfolding factual matrix, a

matrix that ultimately ended in multiple personnel adjustments of key witnesses and employees. At most, that date may represent when the Company decided it would not report the facts to governmental investigators, i.e., when it locked in its commitment to obstruct Justice, company-wide.

134. As to Paragraph 22, Denied. This paragraph is a, if not the, critical aspect of Bar Counsel's Specification of Charges, and theory of the case, which is that Mr. Marcus's escalation efforts were deficient and, thus, Mr. Marcus failed to meet his ethical obligations under the Rules (e.g., Rule 1.13) in the various reporting steps taken, including, but not limited to, "going to the press." This position is contradicted entirely by the facts. As the Chronology and Affidavit make clear, Mr. Marcus made an extraordinary internal reporting effort to deal with the crisis of wrongdoing he uncovered. Not only did Mr. Marcus carefully and assiduously report "up, up, up the ladder", but by providing the full Chronology to "Independent Counsel" (Gibson, Dunn) in the Spring 2011, Mr. Marcus *directly provided the fullest report possible to the Company's Audit Committee*, the highest rung on the reporting ladder. This is a key fact that contradicts Paragraph 22 (and other insinuations of reporting failure in the Charges.

135. As to Paragraph 23, Admitted in part, Denied in Part. Mr. Marcus does not deny sending a 'goodbye' note (though Mr. Marcus does not recall doing so). That said, the insinuation about "patently absurd claims" is without any context or material to bear out what the reference is and, as such, renders Paragraph 23 materially deficient as a matter of notice pleading. It should be stricken for that reason, among others. To be clear: any "patently absurd claims" would not have been, and could not have been, about the Company's criminal misconduct and wrongdoing, if that is where Bar Counsel is going.

136. As to Paragraph 24, Mr. Marcus admits to not disclosing the specifics of his external escalatory efforts, but denies the import of the paragraph, which is that Mr. Marcus left the Company un-advised of his intentions. This is abundantly clear in the Affidavit, which lays out painfully Mr. Marcus' intent to see Justice done, i.e., through appropriate outside disclosures.

137. As to Paragraph 25, Denied. Mr. Marcus was constructively discharged by the Company, he did not "resign", at least not in the sense conveyed in this Paragraph. The rest of the Paragraph is Denied in that it seems to suggest Mr. Marcus was some kind of consultant or simply gossiping about the Company. To the contrary, Mr. Marcus believed he was being represented by Mr. Shepherd, i.e., as a relator in an FCA case to be initiated in Washington DC federal court, with the retention surely to be memorialized in immediate due course. There was no generic "offer to help" anything at any portion of this time frame.

138. As to Paragraph 26, Denied, except to the extent that Mr. Marcus, by the averments here and elsewhere, was clearly acting consistent with his belief that Mr. Shepherd, and his firm, were representing him and that, in the immediate due course, would memorialize that representation in writing. There is no universe of fact that negates that desire and intent of Mr. Marcus, and Mr. Shepherd's behavior and underlying motives, whenever and however they were formed, as stated, cannot be imputed to Mr. Marcus.

139. As to Paragraph 27, Denied. Mr. Marcus made very clear to Mr. Shepherd that Mr. Marcus was a former lawyer of the Company. The Acknowledgement alone establishes that fact. Any suggestion to the contrary is patently false. This averment is

obviously the recapitulation of the self-serving statements of others (perhaps Mr. Shepherd)¹³⁸ designed to exculpate themselves as much as possible from charges of wrongdoing. It is transparent, and unworthy of this proceeding.

140. As to Paragraph 28, it is partially admitted and partially denied. Mr. Marcus does not recall, and does not have, any such “proposed agreement” and, thus, is not in position to address it factually. That said, Mr. Marcus adamantly denies “proposing”, i.e., out of his own thinking, to be a “silent co-relator”. Again, Mr. Marcus would not have known of any such status or what it could consist of; it was wholly the advice and counsel of Mr. Shepherd who would have proposed the concept out of his own expertise and experience, not Mr. Marcus, who had never been in the FCA environment before. As for recovery, the notion of serving as a co-relator, whether anonymously (for a time at least, as is pro forma and customary in such cases) or not would have meant some agreement, to be appropriately memorialized and binding upon all parties and their counsel, that would have included equal recovery sharing terms. If Mr. Marcus presented any such memorandum of understanding, it would have been precisely that, nothing more and nothing less.

¹³⁸ Consider the following from the Acknowledgement: “. . . if, at any point, I believe or determine that I may have any cause to question the propriety of the attorney-client privilege concerning the initial consultation, I shall so advise Doe immediately and the initial consultation shall be terminated at that point. All matters, as described, up to that point shall remain subject to attorney-client privilege. Any failure by me to assert such cause or concern shall constitute full waiver of that concern and any right I or my firm may have to assert that I or the firm should be permitted to disclose any part of the subject matter of the initial consultation to any third party; and . . . That this Acknowledgment is fully binding on me and my firm, regardless of the nature and scope of any inquiry by any person or party or entity into any aspect of the initial consultation.” Assuming Mr. Shepherd is the source of the averments in the Charges, a considerable grain of salt is needed before believing them. Mr. Shepherd took advantage of an earnest effort by an earnest, prudent whistleblower. He abandoned Mr. Marcus, apparently when the Company pressured him in the litigation, and never, ever took any of the steps to which he agreed in the Acknowledgement, clearly evidencing his bad faith and determination to harm Mr. Marcus, his putative client.

141. As to Paragraph 29, neither admitted or denied (and, again, Mr. Marcus raises an objection to the scandalous framing of the Header leading this Paragraph through Paragraph 34). Mr. Marcus cannot recall, or otherwise does not know, when such lawsuit was filed.

142. As to Paragraph 30, Admitted. Mr. Marcus was not named co-relator, because he was not a co-relator and had no established role as a party despite his expectation of that role being formalized and memorialized.

143. As to Paragraph 31, neither Denied or Admitted. Mr. Marcus does not know or recall what was or may have been attached to the lawsuit's filing. Mr. Marcus does not know if materials he actually provided to "Heath's attorneys", if any, were the documents attached as exhibits, or were obtained through other mechanisms by those attorneys or Mr. Heath. Mr. Marcus otherwise refers the Committee to the material, supra, re: any confidentiality or privilege associated with any such materials.

144. As to Paragraph 32, Mr. Marcus has no idea about the filing of an amended complaint in Wisconsin, or certainly does not recall it and, as such, Denies this paragraph.

145. As to Paragraph 33, Mr. Marcus is in no position to Admit or Deny the statement and, as such, Denies it.

146. As to Paragraph 34, Denied. Mr. Shepherd did abandon and otherwise cease communicating with Mr. Marcus at some point. Mr. Marcus has no idea where he went and with whom he communicated thereafter. Mr. Marcus has no idea what Mr. Shepherd's firm, alone or in concert with Mr. Dehler's firm, did regarding the lawsuit at or after the time frame stipulated in this paragraph. Mr. Marcus does not know the

circumstances of Mr. Shepherd's departure from his firm, the firm's treatment of the subject matter, including Mr. Shepherd's egregious malpractice and handling of Mr. Marcus, or any other salient facts. Mr. Marcus assumes, but does not know, that the Company influenced these and related events, but does not have the facts.¹³⁹

147. As to Paragraph 35, Denied for all the reasons stated herein, *supra*. Mr. Marcus did not disclose "confidential and secret information" to anyone, whether in 2012 or any other time, the Company's self-serving and patently baseless assertions to the contrary notwithstanding. Mr. Marcus was not invested in "Heath's claims"; rather, Mr. Marcus was adamant about meeting his own obligations as an ethical attorney whistleblower with respect to these matters, and has, throughout, acted consistently with that intent and moral motivation. No greater proof on the subject is needed than the incontrovertible proof of Mr. Marcus' efforts well beyond any point where there arguably could have been any other motivation (e.g., "there was no agreement" between Marcus and others, as Judge Leon found).

148. As to Paragraph 36, Denied. There is no proof of any materials, as alleged, and thus this paragraph fails as a matter of pleading. And, as asserted before and throughout, Mr. Marcus did not disclose "confidential and secret information" to Mr. Gerth or anyone else, with the exception of the "initial consult" regarding which Mr. Marcus, not the Company, had the assertable privilege right(s), a fact Bar Counsel unduly and prejudicially and consistently omits.

¹³⁹ Mr. Marcus certainly expects, *and hereby requests*, that the Bar obtain a full set of records relating to Mr. Shepherd's involvement in this matter, including any agreements and side agreements between and among the Company and Shepherd, Shepherd and his firm, the firm and the Company, Shepherd and Dehler, their respective firms, and so on. All of these materials would constitute, at minimum, core parts of Bar Counsel's case-in-chief, not to mention critical aspects of due process for Mr. Marcus.

149. As to Paragraph 37, Denied. That Mr. Marcus may have shared materials or information as a whistleblower doesn't mean he "secretly" did anything. This is a prejudicially slanted averment that is beneath the dignity of these proceedings and, as such, should be stricken.

150. As to Paragraph 38, Denied. This paragraph is untethered to the Specification of Charges and, as such, should be stricken. In any event, if there were continued conversations between Mr. Marcus and Mr. Gerth, as indicated, there is no statement as to why such conversations were illicit, if at all.

151. As to Paragraphs 39-42, Mr. Marcus is no position to admit or deny the averments and, as such, Denies them. To the extent of any effort made by Mr. Marcus to "follow the cases" or to contact anyone with respect to them "in the years that followed" (inappropriately vague, of course, as an averment), Mr. Marcus would have been doing so solely as a whistleblower with continuing ethical duties with respect to the subject matter as described *supra*. And, of course, these paragraphs, though nefariously framed in tone and context, simply show Mr. Marcus' good faith effort to find out what happened to Mr. Shepherd, in whom he had placed his trust – prudently and earnestly – and from whom he had heard NOTHING. Any failure by Mr. Marcus to try to understand what happened to Mr. Shepherd and the understanding Mr. Marcus believed was in place would have suggested that Mr. Marcus never had that understanding or belief. To the contrary, Mr. Marcus had no option but to try to get the facts. Bar Counsel views that effort as maleficent. Bar Counsel is in error.

152. As to Paragraph 43, Denied. The Paragraph lacks context and time data so as to be admitted or denied. As such, it fails to put Mr. Marcus on notice of what is being stated and should be stricken.

153. As to Paragraph 44, Admitted in part, Denied in part. Mr. Marcus did contact Mr. Dehler for the purpose of learning Mr. Shepherd's status. Mr. Dehler did not satisfy Mr. Marcus as to his inquiry and actually sought to meet with Mr. Marcus to discuss matters outstanding. Mr. Marcus declined when it was clear that Mr. Shepherd, and perhaps Mr. Dehler, were not behaving consistently with, and thus properly, what Mr. Marcus thought was the legitimate status quo. As for "proposed terms", Mr. Marcus may have asked about whether provision had been made for him to be a co-relator. To that extent, the Paragraph is not in error.

154. As to Paragraph 45, Admitted in part, Denied in part. Mr. Marcus admits that he, at all times, sought to behave "appropriately", whether with respect to being a relator or co-relator, or otherwise as a whistleblower regarding the Company's serial and serious misconduct. Suffice it to say, when Mr. Marcus made contact with Mr. Dehler and/or Mr. Heath – see, also Mr. Marcus' answers to Paragraphs 16-17 – Mr. Marcus had no idea what Mr. Shepherd's status or whereabouts were. Mr. Marcus had no idea whether Mr. Shepherd had, as he should have, shared information with his co-counsel, Mr. Dehler and others about Mr. Marcus' role, and had no idea what Mr. Dehler's disposition was on Mr. Marcus' role or potential role and assuring that role was properly documented and protected appropriately. How could Mr. Marcus have known? Thus, once again, it was necessary for Mr. Marcus to proceed cautiously, which he did. When it was clear that Mr. Dehler had not been read-in at all, apparently, Mr. Marcus appropriately shut down any

efforts with that avenue of whistleblowing. Indeed, when Mr. Dehler offered to meet with Mr. Marcus, Mr. Marcus declined, as it was clear Mr. Shepherd had acted improperly and there was no viable and appropriate path for Mr. Marcus to serve as a whistleblower as he had hoped, intended and sought advice and counsel for. Bar Counsel seems oblivious to this clear state of facts and their proof of Mr. Marcus' good faith, at minimum.

155. As to Paragraph 46, neither Admitted or Denied. Mr. Marcus lacks knowledge to address this averment factually or otherwise.

156. As to Paragraph 47, neither Admitted or Denied. Mr. Marcus lacks knowledge to address this averment factually or otherwise.

157. As to Paragraph 48, Denied. Upon information and belief, the Company was intercepting e-mails between Mr. Gerth and Mr. Marcus in the 2012 time frame leading up to the ProPublica article described in the Charges. In that regard, Mr. Marcus wishes to make the Bar aware of what appeared to have been the Company's unlawful surveillance of Mr. Marcus' (and Pro Publica's Jeff Gerth's) digital communications. The Gerth Pro Publica article appeared in 2012. Prior to its appearance, a mysterious change to a subject line of Mr. Marcus' email traffic with Mr. Gerth was changed to "Ethical" by some actor other than Mr. Marcus or Mr. Gerth. This was taken as a warning by Mr. Marcus and Mr. Gerth at the time, as Mr. Marcus recalls. Mr. Gerth may have a similar recollection, if asked. Mr. Marcus does not know the origins of the discovery described in Paragraph 48 and, as such, denies it.

158. As to Paragraph 49, Denied. Mr. Marcus denies that DOJ made a principled, merits-based decision as to the applicability of the crime-fraud exception to the information Mr. Marcus sought to report. To the contrary, DOJ acted consistent with its

departmental guidelines and refused to take the information out of a litigation risk-assurance posture. Mr. Marcus denies that he did not report the Company's misconduct to other federal enforcement, a direct contradiction of the allegations in this paragraph. And, Mr. Marcus has further reported the alleged wrongdoing to DOJ when it became clear, to Mr. Marcus, that the announced settlement of the *qui tam* litigation might be burdened by the Company's manipulation of the relevant record and, indeed, possible misrepresentations about the entirety of the record in (i) obstruction of the DOJ's ability fully to review the facts as part of its determinations, and (ii) potential perpetration, thereby, of a miscarriage of justice in the federal courts. Accordingly, this Paragraph should be stricken as fundamentally false.

159. As to Paragraph 50, neither Admitted or Denied. Mr. Marcus does not know when the Company filed whatever it filed. Mr. Marcus would note, of course, that Bar Counsel did not reveal Judge Leon's statement as to privilege ("likely waived") and, thus, the Company's backtracking away from that issue either through a motion for reconsideration or appeal of the ruling in any fashion, whereupon, of course, its waiver would have been etched in stone. Nonetheless, Judge Leon's ruling should be "law of the case" as to privilege, suitable to put an end to these proceedings, full stop and, further, it should be alarming to all that Bar Counsel is proceeding here despite Judge Leon's decision NOT to refer Mr. Marcus for charges despite having a legal obligation ("shall") to do so if the learned Judge believed there was cause. Judge Leon saw all the facts that Bar Counsel saw, after all, and made the sagacious determination that the Company hadn't been wronged. The Bar should take that advice and dismiss this matter in toto.

160. As to Paragraph 51, Denied. The averment suggests emotional causality for the Washington Post article, despite scads of credible information and facts to the contrary. It's one thing not to give Mr. Marcus the benefit of any doubt (a travesty marking this Specification of Charges, it should be noted), but it's entirely another to work so assiduously to color and slant things to fit a narrative. Mr. Marcus was, has been, and still is, a whistleblower. For 18 years and counting, the Company has run the board looking to avoid Justice. The E-Rate fund has not been made whole. Corporate shareholders have not been told the truth. State educational funds have not been made whole. Bar Counsel are being lied to, the government's enforcement authorities are being lied to, the Courts are being lied to. It's not about being "upset", it's about doing what is right.

161. As to Paragraph 52, Denied as inflammatory (e.g., "stacks") and vague and, in any event, false. No such "stacks" of materials were provided. And, in any event, the information would not have been, in any way, privileged, for the reasons repeatedly stated herein.

162. As to Paragraph 53, Denied as improperly vague ("AT&T's internal workings").

163. As to Paragraph 54, Denied, particularly to the extent that it seeks to elevate hearsay to the status of fact. Mr. Marcus has noted repeatedly that DOJ reached no conclusion as to the crime-fraud or waiver potential with respect to the proffer Mr. Marcus was prepared to make. To the contrary, DOJ held to a prophylactic policy choice about the material, almost certainly knowing that the Company would have made "a federal case" out of it. The reality is that DOJ could have, and should have, taken the information and, in all likelihood, regrets now not having done so then. DOJ's failure,

reasoned as it was without any factual consideration, is not a cause for the Bar to consider the proffer illegitimate.

164. As to Paragraph 55, Denied. The Company's failure properly to permit Mr. Marcus to execute his duties as an attorney, as an Officer of the Court, and as a person the Company sought to tie to the misrepresentations (mostly of others) to federal investigators was in bad faith, illegitimate and, as such, invalid. The Company ordering, essentially, Mr. Marcus to keep his mouth shut was an even bigger red flag than what occurred up to that point, especially so because the Company offered *no justification or rationale* save for the obvious: it didn't want to be held to account for its wrongdoing and, of course, its eyes were on the prize of \$40 billion acquisition of T-Mobile that coming clean on its E-Rate misconduct would have jeopardized. This was not some litigation over an outputs contract. This was criminal wrongdoing and fraud. The Company stepped improperly, and has done so for 18+ years. This malicious prosecution effort does not change that.

165. As to Paragraph 56, Denied. Bar Counsel would appear to be in no position whatsoever to characterize what the DOJ or FCC are doing. Indeed, the DOJ is almost certainly still investigating and reviewing the facts as part of its responsibilities in the FCA litigation for "finalizing" settlement, per Judge Adelman's multiple orders since the announced Settlement in March 2026. For the Specification to be remotely accurate in this Paragraph, it should specifically cite confirmation from the DOJ (including the FCC and possibly state investigators) that, in fact, this matter and any investigatory activity has been closed. It is quite doubtful that statement can be obtained. Moreover, the infirmities in this Paragraph again point to the imprudence in lodging charges before-the-

facts. The case is still ongoing, and all that anyone does know is that the Company has agreed to pay \$55,000,000, including \$25,000,000 in attorneys' fees, to try to get out of it. This is a hanging *mea culpa* that should give everyone pause in moving forward before finding out everything about what is entailed in that *mea culpa*. At a minimum, it is powerful vindication for Mr. Marcus. It is quite likely much, much more, and the Bar must consider it as part of its administration and adjudication of this matter.

166. As to Paragraph 57, generally Admitted in part, but otherwise Denied as vague. Bar Counsel has an obligation to present a clear and convincing evidentiary case. The subject matter of the Wisconsin and DC federal cases *is* the axis upon which this entire matter turns, regardless of Bar Counsel's predisposition to assume there is no set of facts that would exonerate Mr. Marcus in respect of these scandalous charges. It is unclear what has motivated the rush to judgment, but Paragraph 57, perhaps more than any other single paragraph, shows the need for these proceedings to cease and desist. All stakeholders – Bar Counsel, the Committee, the DC Court of Appeals (if appeal is had), and Mr. Marcus – must see the foundational documents of a settlement that has not been finalized and, indeed, may not be when all is said and done.

167. As to the Charges outlined in Paragraph 58, Denied. Mr. Marcus has not violated the Rules of Professional Responsibility at any time in this horrific saga. Whether the Bar has an aversion to even the notion of in-house counsel being whistleblowers or not, Congress has clearly made room for that very thing in multiple statutes. There may be sound policy in limiting attorneys in this area of their "Officer of the Court" responsibilities, but this matter is *not* the vehicle to affirm and enforce that notion. To be sure: (i) Mr. Marcus did not violate, or attempt to violate, any Rule of Professional

conduct; (ii) Mr. Marcus did not intentionally prejudice or damage the Company at any time – to the contrary, Mr. Marcus has consistently acted to safeguard the Company and its shareholders from extraordinary corruption, and has duly served the Company and its shareholders in that regard – and Mr. Marcus has consistently acted, prudently and in good faith, to protect the property of another, i.e., the federal government and state governments’ respective purses, from the rapacity of this Company, and from this Company’s commitment to the obstruction of justice in the premises; (iii) Mr. Marcus did not reveal any privileged information or [legitimate] client confidences or secrets, as those matters have been interpreted in circumstances such as the matter at bar, to any person or entity; (iv) Mr. Marcus has engaged in no “conflict of interest” at any time upon proper application of the rules and established precedent. And, to be sure, Mr. Marcus only acted to serve the interests of Justice, not himself, and Bar Counsel’s contrary statements and insinuations reflects a profound contempt for those aspirations unsuited to the culture necessary for Officers of the Court, and for the well-being of the community that allows attorneys to self-regulate and self-license.

CONCLUSION AND PRAYER

Mr. Marcus respectfully prays and requests that the Charges be dismissed for failing to state, and failing to show, any violation of the Bar Rules, or any path to be able to establish, by “clear and convincing evidence” the violations charged. The dismissal should be “with prejudice” as to re-filing or, at minimum, should not be permitted for re-filing until after Bar Counsel has actually done a thorough, not cursory, investigation of the facts, beginning with the body of material associated with Mr. Marcus’ vindication, i.e., the \$55,000,000 Settlement”, and in any event AFTER the civil and criminal

investigatory activity concerning the Company's misconduct has concluded. This is a malicious and vindictive prosecution, nothing more, and the Bar should not put its nose in it, either ever, or certainly not before the core matters have come to ground.¹⁴⁰ Bar Counsel has been haplessly manipulated by a Company-in-trouble to punish a whistleblower for acting diligently and dutifully to hold it to account and, in the process, protect the multiple interlocking, and occasionally frictional, interests of multiple stakeholders.

Further, Mr. Marcus respectfully requests the immediate provision of multiple documents that support his defense(s) and, indeed, go to the *bona fides* of the Specification itself, outlined in the foregoing including, but not limited to:

(i) the Gibson, Dunn report and associated documents, as described herein, as well as the entire set of engagement documents through which Gibson, Dunn served as "Independent Investigation Counsel" regarding the subject matter;

(ii) all settlement documents associated with the Company's \$55,000,000 [reported] settlement of the FCA litigation;

(iii) any agreement(s) (broadly construed) between the Company and Heath's lawyers, including Mr. Shepherd, or their firms;

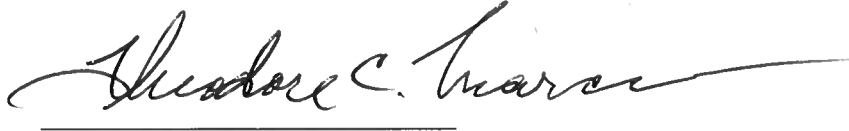
(iv) all separation and related documents and agreements associated with material and indispensable witnesses to the alleged facts in the Company's Complaint underlying Bar Counsel's Charges, including but not limited to Ed Barillari, Brian Moore, Cyndee Wales, Wayne Watts and Bill Drexel;

¹⁴⁰ Again, Mr. Marcus is not questioning Bar Counsel's motives or good faith. This malicious prosecution has been authored by the Company, at bottom, designed to aid the Company in its effort to avoid yet another terrible consequence of its strategic and tactical errors and for other litigative purposes.

(v) all witness interviews, summaries, memorandums of law and fact, and other documents of any and all persons with regard to the subject matter (LCP, Wisconsin case, Nationwide Case, Indiana matter, etc.) including, but not limited to the persons named above, Mr. Marcus, Mary Henze, Ernie Bond, David Baker, John Mason, Jack Zinman, Cathy Carpino, Cyndee Wales, Gary Phillips, Christopher Heimann, Suzanne Montgomery, and any other persons interviewed with respect to these matters, and any assessments by the interviewing attorneys associated with those interviews; and

(vi) documents associated with the tragic death of Mr. Jack Zinman, one of Mr. Marcus' coordinating supervisors in the relevant time period, including the Company's rationale for transitioning Mr. Zinman to a position in Atlanta, as opposed to Company headquarters in Dallas, Texas in the time frame relevant to this proceeding – Mr. Zinman's testimony would have been critical to Mr. Marcus' defense and his demise likely establishes the infirmity of any position regarding his performance reviews and input of Mr. Marcus in the relevant time frame.

Mr. Marcus advises that, in the interests of due process and fundamental Justice, Bar Counsel should be required to procure the appearance of multiple witnesses, including all persons named in this Answer and/or upon whom Bar Counsel has relied for the Charges specified, and procure all necessary documentary evidence as described, at Bar Counsel's sole expense and as part of ensuring due process in this proceeding.

A handwritten signature in cursive script, reading "Theodore C. Marcus", written in black ink. The signature is fluid and extends to the right with a long horizontal stroke.

Theodore C. Marcus, Esq.
Pro Se
11811 Sumner Glen Drive
Spotsylvania, VA 22551
tcmarcus@live.com
540.972.0687

CERTIFICATE OF SERVICE

The undersigned, Theodore C. Marcus, pro se, hereby affirms and certifies that this Answer to the Specification of Charges was served via electronic mail on Bar Counsel, Mr. Ebtehaj Kalantar (kalantare@dcodc.org), on July 17, 2026.

A handwritten signature in cursive script, appearing to read "Theodore C. Marcus", written in black ink.

Theodore C. Marcus, Esq.
Pro Se

7/17/2026

TAB A

(Chronology)

A 8AT

Finalized Draft – May 4, 2011

Chronological Narrative in Aid of Independent Counsel Investigation

**Prepared by Theodore C. Marcus
General Attorney
AT&T**

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Chronological Narrative in Aid of Investigation

Finalized Draft – 5/4/2011

April 3, 1997

- SBC (Steve Melnikoff), Ameritech (Marvin Bailey), BellSouth (Robert Blau), GTE (Scott Randolph), and US West (BB Nugent) sent an *ex parte* letter to the FCC's Common Carrier Bureau in further support of their comments and positions on the proposed E-Rate program then under consideration by the Commission. The letter is specifically and exclusively addressed to LCP.
- The parties argue, among other things, that "the Commission *should allow carriers to determine* the lowest corresponding price ("LCP") – the pre-discount price – *based on a consideration* of factors normally used in determining prices within a competitive market."
- They further state that "the FCC should allow carriers *flexibility in determining the LCP applicable in a particular situation.*"
- It further states that "*carriers should be allowed to consider factors* they would normally rely on in determining – and differentiating – prices within a competitive market."
- They proposed that the rule state that "*in determining LCP, carriers may consider factors normally relied upon in determining prices* within a competitive market," and further that a "*carrier shall not be required to set the LCP* based on prices it charges to other users if those prices are based on materially different factors"
- Thus, it was clear at the outset of the rules that service providers, and presumably the FCC, contemplated some pre-bid or pre-charge activity by the providers themselves to ensure LCP compliance.
 - Source: *Ex Parte* Letter from Carriers to the Common Carrier Bureau (forwarded to the FCC Secretary for filing by M. Henze), April 3, 1997 (Cover)

Sometime in 2005-2006

- The Department of Justice, the U.S. Attorney's Office in the Southern District of Indiana, and the FCC's OIG began investigating the relationship and activities of Intelenet, AT&T Corp. and its affiliate, ATTSCO concerning the provision of E-Rate-supported services to schools and libraries in Indiana.
 - A central issue in that investigation was whether Intelenet and AT&T "charged inflated prices" to E-Rate customers. It is unclear whether the government was

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pursuing conspiracy theories involving the state entities and AT&T entities, but it is likely that the government viewed them as acting in concerted fashion, i.e., reaching some mutual agreement about pricing the services to schools and libraries at unlawful levels, with a view toward recouping the excess monies from the E-Rate fund.

- It appears that Ed Barillari and Suzanne Montgomery were the lead attorneys handling the matter for T. Corp., presumably from its inception. Others involved in the reporting and decisional matrix are not known, but presumably existed (e.g., Langhauser?).
- Thus, by July 11, 2008, the apparent date of a critical meeting with federal prosecutors and investigators, this investigation was well under way, and presumably had been for several years.
- It is not clear to what extent briefings on these matters were prepared and delivered during the two changes-in-control that took place between 2005 and 2007 (i.e., SBC's acquisition of T. Corp. to form AT&T Inc., and then AT&T Inc.'s acquisition of BellSouth). It is likely that T. Corp. had formed its core arguments and defense plan well before the latter change-in-control including, but not limited to, its strategy in addressing the government's contentions about overbilling E-Rate customers. That strategy included, apparently, the LCP argument.
- It is not known whether, or to what extent, the lawyers for AT&T (internal or external) knew the organizational facts and circumstances relating to the LCP argument. However, it does not appear that T. Corp. had any particular compliance structure, awareness or consciousness of LCP at or by the time of the litigation with the government over the Intelenet deal, thus there does not appear to be any business/compliance practices evidence involving T. Corp. to support any contention that its pricing policies for E-Rate reflected LCP, or could have reflected LCP.
- It is also not known how the issue of LCP was managed in the transition in the first C-I-C, when T. Corp. was acquired.
 - Source: Indiana Law Blog, 4/12/2005; DOJ Press Release, 6/27/2006 (Tab A)

February 2007

- Post-merger, TCM beginning transition to Phillips organization. Reporting to Jack Zinman. Portfolio shifts to me as follows: (1) CALEA and E-911/public safety from

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Zinman; (2) Accounting and Affiliate Transactions from Hoskins; and (3) E-Rate from Carpino (*though Carpino stayed involved in E-Rate matters at least through April 2007).

- Source (re: E-rate): Notes, 2/1/2007, Calendar, 2/1/2007, and C. Carpino E-mail (Tab B)
- First E-Rate conference call believed to have been February 1, 2007.
 - Source (re: E-rate): Notes, 2/1/2007 and Calendar, 2/1/2007 (Tab B)
- Prior to that, TCM was not an E-Rate legal SME for BellSouth, had never received training in E-Rate issues, and had had only limited engagement with E-Rate issues for a few months leading up to the merger. The BellSouth SME was Ted Kingsley.
 - Source: *See, e.g.*, T. Kingsley's e-mail 1/9/2007 (Tab C)
- In Feb. 1, 2007 conference call (unclear who participated, but notes suggest Carpino and Heimann), there was discussion of Legacy AT&T's (SBC's?) expired consent decree that AT&T was still following as an internal compliance policy matter. It included training requirements, establishment of an E-Rate oversight committee and the appointment of regional E-Rate teams.
 - Indicates that there had been a number of government investigations into legacy T and SBC E-Rate practices, but none of companies' internal reviews had revealed "material non-compliance".
 - Mayer Brown firm was outside counsel assisting in those efforts.
 - There was a desire to train all lawyers involved in assisting E-Rate clients, and the training was to encompass all aspects of the E-Rate process so as to be able to "identify all issues that clients raise with respect to [E-Rate] business."
 - Several "red flags" were discussed: (1) bidding process and rules are a "hot item"; (2) free services rules; and (3) billing and invoicing process (including BEARs). No mention of LCP in this meeting.
 - Source: Notes, 2/1/2007 (Tab B)

April 2007

- Formal E-Rate training for post-merger E-Rate compliance structure, affected clients and shared services takes place in Chicago. TCM attends training, as well as SLD-hosted training. This represents first training or education on, or formal introduction to E-Rate received by TCM either pre- or post-merger.

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- Per recollection and materials, there is no discussion about, or presentation on, LCP in any part of the training, either at the internal training or the SLD-provided training.
 - Source: E-mail April 11, 2007, Calendar, 4/23/2007, (Tab D)

August 2007

- Final E-Rate compliance training deck created by E-Rate compliance group and distributed.
 - Deck says that service providers “must . . . comply with ALL program rules and policies . . .” (emphasis in original)
 - There is no discussion of LCP in the 61-pg training deck.
 - Page 50 of the deck references the False Claims Act, and states that “all statements made to the Government must be scrupulously accurate and truthful, including, proposal information, pricing data, and invoices.” Further notes that this “includes deliberate ignorance of truth or falsity; or reckless disregard for truth or falsity.”
 - Page 50 also references potential criminal liability under 18 U.S.C. § 1001.
 - Page 54 notes the Code of Business Conduct and its requirements, including the duty to “notify management if you learn of or suspect unethical business conduct or an illegal act.”
 - Source: E-mail and attachment, August 17, 2007 (Tab E)

March 2008

- Annual E-Rate “follow-up” meeting (after the previous year’s kick-off) in Dallas on March 10-11. TCM attended, along with GEM E-Rate SMEs, E-Rate business managers, regional attorneys, EA, compliance and other shared services SMEs.
 - Sixty-seven page agenda deck for two days of meetings and discussions. No reference to, or discussion of, LCP.
 - An update (according to the agenda deck) was provided concerning active litigation, including Kansas City, Mo., Indiana and Connecticut. The Kansas City matter was a legacy SWBT matter, Indiana was T. Corp., and Connecticut was SNET. TCM does not recall who provided those updates, though it likely would

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have been S. Montgomery (if she was at the meeting), as the KC and Indiana matters were being handled by her. It is possible that M. Gill of Mayer Brown provided the update on Connecticut, but TCM does not recall.

- It is not believed that anyone presenting the Indiana-related briefing mentioned LCP.
 - Source: E-mail, February 6, 2008, and E-mail and attachment, March 7, 2008 (Tab F)

April 2008

- E-Rate monthly communique' issues (first one since the Dallas meeting); no mention of LCP.
 - Source: April 2008 E-Rate Compliance Coordination Committee Communique' (Tab G)

July 2008

- On July 11, 2008 (apparently), Ed Barillari, Suzanne Montgomery and outside counsel had a meeting with the government's lawyers to discuss the Intelenet matter, and to advocate AT&T's defense.
- A lengthy "white paper" and lengthy presentation deck were presented and/or utilized by the AT&T team in the discussion. The white paper bears the name of outside counsel only; the deck, however, reflects Barillari's and Montgomery's names, along with those of outside counsel.
- It does not appear that the AT&T side consulted with any lawyers, SMEs or other E-Rate compliance teammembers (*e.g.*, TCM, David Baker, Mary Henze, Ernie Bond, John Mason, Cyndee Wales, Debra McNicoll – Montgomery was not a member of the E-Rate coordination committee group) in advance of their meeting with the government.
- In the white paper and power point deck, there are arguments made that AT&T's prices were not improper because they were LCP, *i.e.*, "in full compliance with the FCC's E-Rate regulations," citing the relevant E-Rate rules and orders in support of these contentions. Page 3.
 - The white paper's executive summary frames the argument as follows: rates a provider charges that result from competitive bidding are authorized under the rules unless "it was shown by a school or library that the rates exceed" LCP. Page 2. And, because AT&T "was in *full compliance with the FCC's E-Rate*

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regulations, there is no basis for the Government . . . to seek refunds . . .” Page 3 (emphasis added).

- There is further argument in the text at pages 24-25, citing 47 C.F.R. §§ 54.504 and 54.500, that AT&T's prices are LCP, that is, unless “they are shown to exceed the price charged for similar services provided to similarly situated customers . . .” Page 24. And, because “neither Intelnet nor any school or library complained to the FCC or a state utility commission that the charges for [the services] exceeded the rate charged to any similarly situated non-residential customer for these services,” the government could not “collaterally attack” the rates in its investigation. Page 25. This amounts to an argument that, under the LCP rules, a provider may charge any price it wants when competitively bidding on an opportunity, and that price is LCP – even if, in fact, it is not and even if the carrier did not make any effort to ensure that it was or even knew about the requirements when making its bid -- until it is shown to be otherwise in a proceeding. (*The government has a sharply different view of the requirements, and believes that there must be some conscious effort to comply with LCP that undergirds the bid, regardless of the state of competition for the opportunity.)
- Nowhere in any of this discussion is there any indication that AT&T, as appears to have been the case, had no institutional compliance evidentiary support for, or even any organizational knowledge of, the LCP rules. In other words, it appears that there may have been no evidence of any particular consciousness that there were such requirements at any point prior to establishing the prices at issue and, thus, that AT&T had not considered the LCP requirements in any fashion in deciding what prices to charge.
- Although Barillari and his team may, after the fact, have come to some comfort that they could argue AT&T's prices were LCP (on the theory it presented to the government), it does not appear that they disclosed to the government – as a caveat to their argument -- what appears to have been true at the time: AT&T apparently had no basis to support a belief about its prices *before* charging them, and was making a strictly “after the fact” argument.
- **Though this apparently omitted fact may not have caused AT&T to argue differently about the prices under investigation, the government and reasonable persons could decide that the effect of it – and likely the intent of it – was presumably to cause the government to assume that AT&T actually had LCP compliance awareness organizationally, and an intent to comply with LCP in its pricing activities for E-Rate business (and, thus, that it didn't “price first, and hope for the best after”), even if it might be shown the prices at issue were not LCP.**

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- **The omission would have had the further effect of inoculating AT&T from what the government's likely response to more complete disclosure would have been: broader inquiry into AT&T's LCP compliance, beyond the Intelnet pricing at issue at that point.**
- The power point deck, slide 43, summarizes the actual v. proposed charges associated with the T-1 services at issue in the discussion/investigation. The title of that slide is "Financial Analysis – 'Lowest Corresponding Price'". On Page 45, the "Conclusions" page, it is argued that the "standard" applicable to the government's overpayment theory is "actually 'Lowest Corresponding Price'". Presumably, then, Barillari's team expounded orally in the meeting with the government on these LCP points. It is not known what the attorneys actually said, or who said it. But, the government presumably has notes of the statements (as might AT&T's attorneys as well).
- As we have subsequently learned, it does not appear that AT&T (in any of its corporate iterations) *had ever made any identifiable effort to comply with the LCP rules in its pricing activities, or that it was even aware of the rules* prior to these arguments being proffered to the government in rebuttal of its allegations. Subsequent reviews have revealed not a shred of evidence anywhere that any employee in this company had ever heard of LCP or "lowest corresponding price" or "lowest corresponding rate" prior to 2009, in fact.¹
- Although the LCP arguments did not appear to have been AT&T's most important arguments, they nevertheless touched core aspects of the government's investigation, *i.e.*, the propriety of AT&T's charges for the services under review, and the concerted (?) activity between ATTSCO and the state players regarding the prices to charge for the E-Rate eligible services to schools and libraries. If there was no consciousness about LCP (and thus no intent to ensure compliance with LCP) at the time the prices were set and charged, the government would view that as a material fact, and would have a negative view of the omission of that fact by the AT&T lawyers in their affirmative statements.
- Thus, if Barillari and Montgomery knew that there was no evidence that AT&T had incorporated those requirements into its compliance framework for conducting E-Rate business generally, or specifically concerning the services

¹ If Barillari, Montgomery or the outside counsel firm have any evidence to suggest otherwise, they have never suggested that they do, or brought that evidence forward, in spite of there being a significant effort inside the company to ascertain its cross-organizational LCP awareness prior to 2009, and despite both knowing that the pre- and post-merger legacy LCP compliance awareness has been an issue of major concern within the company since the FCC first raised questions about it December 17, 2008.

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under investigation, or that there was no evidence that AT&T was even aware of the LCP requirements at all prior to charging or bidding its prices on the transaction, they have subjected themselves and the company to exposure for omitting or concealing a material fact in their negotiations with the government under 18 U.S.C. § 1001 (a).²

- If, however, they contend they did not know what AT&T's actual compliance history or evidence with respect to LCP was at the time they made their presentation to the government, that may not excuse them from failing to apprise the government of the true facts *after* they learned them (ethically and probably legally as well), as they certainly have learned in the immediately ensuing months after the July 11, 2008 meeting. In any event, the government, not Barillari and Montgomery, would likely not accept the company's role as sole arbiter of their intent under the circumstances. At the very least, the two are subject to governmental inquiry on the question of their knowledge, and in that review, the government would look at all their post-meeting conduct in considering the issue of their mental state about the omitted facts and the representations made.
- And, of course, whether they knew or didn't know the underlying facts about AT&T's actual compliance consciousness for LCP, they are, at minimum, subject to serious challenges about their professional judgment, due diligence and care in failing to run these issues to ground with the right people before making the arguments. To the best of TCM's knowledge, however, these positions were not vetted with anyone on the E-Rate team in advance and, thus, the arguments were not – it is believed – vetted throughout the broader post-merger organization, even if (which certainly does not appear to be the case) the Indiana team conducted suitable due diligence inside T. Corp.
- It is not known whether these arguments were new as of the presentation July 11, 2008, or whether AT&T had previously advanced these arguments earlier in the matter. (*Note: TCM's records on this subject begin with an email from S. Montgomery July 11, 2008; if there are any earlier transmissions with TCM regarding the subject matter, TCM's recollection will need to be refreshed, and this statement possibly revised. In any event, TCM does not believe he was aware of the meeting before hand, and does not recall providing any input, or being asked to provide any input, on the subject matter.)

² The federal felony false statements provision prohibits one from “knowingly and willfully . . . falsifying, concealing, or covering up by any trick, scheme, or device a material fact” in “any matter within the jurisdiction of the executive . . . branch of the Government of the United States,” or knowingly and willfully “making any materially false, fictitious, or fraudulent statement or representation.” 18 U.S.C. §§ 1001(a)(1) and (2). The applicable statute of limitations for false statements is 5 years. 18 U.S.C. § 3282.

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- That same day, July 11, 2008, at approximately 4:41 p.m., S. Montgomery sent an email, attaching the white paper and power point presentation, to TCM, John Mason, David Baker, Cyndee Wales and Mary Henze. The sole text of the email was as follows:
“Attached are the final versions of the white paper and presentation made to the government on the Indiana case. I'll schedule a call to update you all on what happened at the meeting.”
 - Source: E-mail from S. Montgomery, July 11, 2008, with “White Paper” and Power Point presentation attached (Tab H)

October-November 2008

- Barillari and Montgomery continue negotiations with the government (DOJ/USAO/FCC) to reach settlement with respect to the Indiana matter. Montgomery takes lead in handling the negotiations over a compliance agreement with the FCC's Enforcement Bureau, along with Mary Henze. TCM has some role in assisting/advising Henze, but it is a limited one.
 - Source: *See, e.g.*, E-mail from FCC's EB to S. Montgomery and M. Henze, 12/17/2008 (Tab J)
- On Tuesday, October 6, 2008, Montgomery sends an email to Mason, TCM, Baker, Henze and Wales providing an “FYI. Ed and I are scheduled to meet with the DOJ and AUSA in Indianapolis on Friday. I'm working on a letter responding to the letter we received from the DOJ a couple of weeks ago, and hope to have a draft to circulate later today.”
 - Source, E-mail from S. Montgomery to Mason, TCM, Baker, Henze and Wales, 10/6/2008 (Tab I)
- On October 7, 2008, at 1:32 p.m., Montgomery circulates a draft of a “proposed response to the DOJ” to Mason, TCM, Baker, Henze and Wales. She says that she would “appreciate any thoughts that anyone has. Ed is still reviewing it, but I don't anticipate that he will have any substantive changes.”
 - Source: E-mail from S. Montgomery to Mason, TCM, Baker, Henze and Wales, 10/7/2008 (Tab I)
- Later, at 4:20 p.m. on October 7, 2008, Montgomery sends a revised version, noting: “I was mistaken when I thought Ed wasn't going to make any substantive changes. If you have time, please look at this version instead. Thanks!”
 - At page 4 of the five-page draft, the letter states that “on pricing, the only relevant regulation is 47 C.F.R. § 54.504(e), the lowest corresponding price rule, which is

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discussed at length in our White Paper and which is not addressed at all in the Government's letter."

- Further: "it provides that the prices that are charged in a contract that results from competitive bidding cannot be found excessive unless the FCC or a state commission finds that there is a similarly situated customer that has received a lower price for the same service."
- Neither the email seeking input, nor the draft, makes any reference to AT&T's actual compliance awareness about LCP, nor does Montgomery seek any advice that might indicate a concern that AT&T's position might be risky given its apparent organizational non-awareness of the LCP rules in the first place. In sum, Montgomery made no effort to highlight the LCP aspects of the five-page, single-spaced document containing the paragraph on LCP at page 4.
 - Source: E-mail from S. Montgomery to Mason, TCM, Baker, Henze and Wales, 10/7/2008 (Tab I)

December 2008

December 17, 2008

- At 6:05 p.m., the FCC's EB, which was responsible for reviewing the settlement and reaching a compliance agreement with "AT&T Indiana" (not limited to ATTSCO or legacy T. Corp.), sent an email to AT&T, addressed to Suzanne Montgomery and Mary Henze. The e-mail attached a proposed draft compliance agreement. Montgomery forwarded the transmission at 6:26 p.m. to Cyndee Wales, Nena Romano, David Baker, TCM and John Mason, with a one-line note: "This just in from the FCC."
 - At page 5 of the draft proposal, there is a section entitled "documentation of lowest corresponding price analyses." This is a section requiring AT&T to provide documentary proof of its compliance with LCP in Indiana.
 - The section on LCP was a surprise to the AT&T E-Rate team.
 - In her e-mail, Montgomery did not comment on any aspect of the proposed draft in her transmission.
 - Source: E-mail from S. Montgomery to E-Rate team, 12/17/2008, attaching e-mail from M. Ellison, FCC, et al. to S. Montgomery and M. Henze, 12/17/2008 (Tab J)

December 18, 2008

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- Cyndee Wales emailed Montgomery, Romano, Baker, TCM, Mason and Henze with a one-line question: “*Theo what is the code they are ref re pricing.*” (emphasis added)
 - This date, it would turn out, would be the first time any of the recipients (other than Montgomery) had heard of LCP.
 - TCM is not aware whether Montgomery answered Wales’ question, but TCM does not have any document indicating that she did.
 - Source: E-mail from C. Wales to Montgomery, Romano, Baker, TCM, Mason and Henze, 12/18/2008 (Tab K)

December 19, 2008

- On December 19, 2008, there was significant e-mail activity involving members of Keith Epstein’s group, including John Mason, Epstein, Kelly Murray and, ultimately, Paul Mancini, to whom Epstein reports. In the initial transmission, from Mason to Murray, Mason expressed surprise at the terms of the proposed compliance plan, and noted its inclusion of compliance “with ambiguous pricing rules” requirements.
 - Murray forwarded the email to Mancini, with copies to Mason and Epstein, and re-forwarded it to Gary Phillips.
 - After he received it, Phillips e-mailed TCM, asking: “are you [TCM] involved in this.”
 - TCM responded to Phillips at 10:53 a.m.: “Yes, I’m providing input, but the shots are being called in Dallas.”
 - Phillips replied: “why are you not on the email chain?”
 - TCM responded “I don’t know; there are separate chains apparently. We had a conference call to discuss the draft yesterday afternoon, the first of what will probably be several discussions, I expect.”
 - Phillips replied: “you should send an email asking that you be included on future emails,” to which TCM answered: “yes sir.”
 - Thereafter, TCM notified Epstein et al to include him in further emails, to which Epstein agreed, with apologies for earlier omissions.
 - At 10:58 a.m., Mancini advised Murray, Mason and Epstein that the proposed agreement was “really burdensome. Stay on top of this. Keep me informed,” to

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which Murray responded: “will do. Copying Gary and Theo, who are working this in the DC office.”

- At 4:26 p.m., David Baker sent a response to a request for input from Mary Henze. He indicated that he was still reviewing the report, but agreed that it was going to be a “difficult environment for negotiation.”
- At 4:23 p.m., TCM similarly notified Henze that he was still reviewing the draft, but that it seemed “overall, to be onerous and perhaps unduly so.”
 - Source: Various e-mails, 12/19/2008 (Tab L)
- That same day, Baker sent a separate e-mail to Mason, Wales, TCM and Henze discussing questions raised in a [beneficiary? or internal?] audit call by auditors about LCP. Baker noted that the auditors “raised questions regarding processes we had in place to ensure lowest corresponding price, as required in 54.511(b). I’m not sure what processes existed in with respect to BCS and I’m not sure what processes are in place elsewhere. It is a focus of questions here and the Indiana compliance agreement as well. I think we need to discuss and investigate this.”³
 - Source: E-mail from Baker to Mason, Wales, TCM and Henze, 12/19/2008 (Tab M)
- Henze responded to Baker’s email at 2:17 p.m. She agreed it was “a good idea to look into this further,” and also noted that she and Ernie Bond had “*lived through the debate over LCP but it seemed to disappear as an issue once e-rate was implemented. I’m a little puzzled as to why it’s cropping up everywhere now.*” (emphases added)
 - Source: E-mail from Henze to Baker, Wales, TCM and E. Bond, 12/19/2008 (Tab N)

December 22, 2008

- At 6:59 a.m., TCM emailed Montgomery and asked her to provide him copies of any “narrative/briefing on this matter [that was being put to] internal use at this point (*i.e.*, post-USAO draft narrative to describe resolution, etc.)

³ From the earliest conversations around this time, Baker very candidly admitted that he had never heard of LCP. Baker openly expressed concern and remorse about that fact, even though he had only become the GEM E-Rate legal SME around 2006, well after these rules had gone into effect and, thus, in all likelihood inherited LCP SME gaps from his predecessors. This was certainly the case in TCM’s experience: there was no discussion of LCP in any of the training TCM received as a part of the hand-off to him, or the initial review from his predecessors when TCM was given E-Rate as part of his portfolio in 2007.

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- Montgomery responded that “there’s not, although I understand Ed is working on one today. I understand it’s going to list some of the problematic sections and conclude that we’ll try to negotiate them out.” Montgomery did not say anything about the LCP aspects of the agreement.
 - Source: E-mails between TCM and Montgomery, 12/22/2008 (Tab O)
- Later, at 4:26 p.m., Montgomery e-mailed the Barillari briefing made to W. Watts earlier that afternoon, “as promised.”
 - The briefing describes the proposed “Plan”, and argues that the Plan reflects FCC “overreaching and attempting to place auditing and other burdens on AT&T that place it at a competitive disadvantage with its competitors.”
 - The briefing lists seven bullet points. The fifth bullet point says that the Plan “requires AT&T to analyze and document that the price it is offering is the ‘lowest corresponding price.’” It goes on: “While the E-Rate regulations require that bidders provide their lowest corresponding price, this provision places some fairly extensive record keeping and analytical burdens on AT&T not found in current E-Rate regulations.
 - Barillari expresses an intent to “work with our federal regulatory colleagues to negotiate a more palatable Plan”
 - Barillari does not mention in this briefing memorandum anything about AT&T’s (pre- or post-merger) state of compliance consciousness, awareness, *etc.* regarding LCP, nor does he suggest in the memo that the LCP provisions were clearly linked to the arguments advanced in the negotiations with federal criminal and civil investigators and lawyers in Indiana. By this time, however, questions are beginning to be raised inside the E-Rate team about LCP: what are the rules and who, if anyone, knew about them.⁴

⁴ At some point between roughly December 2008 and January 2009, Mary Henze walked into TCM’s office and handed him a copy of the *ex parte* letter that was sent to the FCC on April 4, 1997, with a post-it note stated: “A little history reading.” (Cover Tab). The document is in two parts: (1) the substantive *ex parte* letter; and (2) a transmittal cover letter sent from, and signed by, Henze. This was the first time TCM became aware of the existence of that letter, or of those efforts, or of the identity of the parties who were actively advocating on those issues at the FCC. The letter reveals targeted advocacy regarding the LCP rules, then under consideration at the FCC as part of its overall development of the E-Rate program. The letter was sent on behalf of “Ameritech, BellSouth, GTE, SBC and US West” to the Common Carrier Bureau Chief Keeney.

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- Source: E-mail from S. Montgomery to TCM, 12/22/2008 (Tab P)

December 23, 2008

- At 9:05 a.m., TCM forwarded the Barillari briefing document to Gary Phillips and Jack Zinman.
 - Source: E-mail from TCM to G. Phillips and J. Zinman, 12/23/2008 (Tab Q)
- At 9:30 a.m., in response to Montgomery's October 7, 2008 e-mail regarding the meeting she and Ed were having with DOJ that week and the proposed draft response to DOJ/USAO (*i.e.*, it does not appear that TCM saw or responded to the earlier draft), TCM asked whether there was "a particular reason that this document (at page 4 specifically) references 47 C.F.R. § 54.504(e) as the "only relevant regulation on pricing? . . . I notice that the White Paper essentially takes the same position."
 - TCM believes this is when he first became aware of the fact that affirmative statements were made to federal prosecutors and investigators relating to LCP compliance by the T. Corp. team on July 11, 2008. Prior to that point, TCM believes he read some of the White Paper, but did not get to the LCP argument, which appears around page 23 of that single-spaced document (*Note: there is a vague reference to the argument in the White Paper's executive summary. However, the summary does not cite "LCP" or "lowest corresponding price" in that brief discussion; rather, it only describes the issue, at page 2-3, as the rules "authoriz[ing] whatever rates result from competitive bidding unless it was shown by a school or library that the rates exceed those charged similarly situated business customers . . . – and no such showing was made here.")⁵

⁵ The July 2008 White Paper and power point were sent on an "fyi" or "heads-up" basis, essentially. TCM does not recall being asked to review or consider any aspects of these documents prior to their creation and use, or to comment on their substance for purposes of the T. Corp. team's oral presentation. TCM does not believe that David Baker or John Mason – who would have been the logical persons to field such questions – were consulted either, although they were clearly "fyi'd" as well. As indicated on the face of the July 11, 2008 e-mail, the recipients of those documents were getting them after the presentation to the government had already occurred. Additionally, TCM was in the Legal/Regulatory group throughout this time period; it would not have been efficient or useful for TCM to review essentially 60+ pages of textual litigation documents without the context of a request for guidance or specific input. At most, TCM skimmed the first few pages out of interest to have an idea of the subject matter, *i.e.*, as a "heads-up" for what might have evolved into a matter for substantive work-up by the Legal/Regulatory/EA groups (as turned out to be the case).

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- This is also the first time that TCM believes he viewed the FCC's compliance agreement as a *reaction* to the T. Corp. team's presentation, though TCM had no further knowledge of the FCC's and USAC's record of non-guidance and non-administration of the rules at this point.
- TCM's initial view of the issue – at that point – was that the T. Corp. team's White Paper had started a difficult ball rolling. But, all of the implications surrounding this event were hardly clear by this point.
- Further, even though TCM reviewed the White Paper more closely at this point, as well as the power point deck, TCM failed to make a connection between the arguments advanced in those documents and Barillari and Montgomery as direct sponsors of those statements (and, thus, direct parties to the omissions and matters presumably not revealed to investigators in the presentations).
 - This is because TCM, in looking at the cover of the White Paper, saw only outside counsel indicated as authors (the Barnes & Thornburgh firm, particularly Mssrs. Bickham, Mackey and Barclay) – no one from AT&T was on the face of the document. And, in looking at the power point, which was on a hybridized Barnes & Thornburgh/AT&T masthead (but with the B & T logo at the top left-hand corner), TCM believes he only viewed the cover sheet as confirming law firm authorship.
 - In March of 2011, however, in re-reviewing the power point more closely, TCM realized for the first time that the document: (1) also bore the AT&T logo (at the bottom right-hand corner); and that (2) Barillari and Montgomery are the first names listed as “presenters” of that presentation.
 - This is the first time TCM actually understood that Barillari and Montgomery had taken affirmative steps to sponsor the statements made to the government in July 2008 and, in all likelihood materially contributed to the discussion in the July 11, 2008 meeting.
 - Before March 2011, TCM – relying on his impressions based on the White Paper's authorship – believed that the entire presentation was essentially an advocacy piece crafted by outside counsel with supervision by Barillari and Montgomery. TCM assumed that the arguments advanced on LCP were a regrettable oversight error – one about which Barillari and Montgomery were undoubtedly concerned but that, at the end of the day, couldn't fairly be ascribed to them directly. Thus, TCM gave Barillari and Montgomery the benefit of the doubt; that is, TCM believed at the time that although the arguments were definitely a “fuck up” given the brewing compliance consequences with the FCC, they were more the unfortunate

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results of negligence by Barillari and Montgomery, not potential misconduct on their part.

- Moreover, because TCM, at this time, was himself totally unfamiliar with the LCP rules, the government's record of non-enforcement, non-guidance and non-administration of the rules, and service providers' overall compliance history with respect to them over the 12 years of the program's life (all of which TCM would later learn through research, inquiry and discussion), TCM was in no position to understand the full context associated with these statements.
- Thus, not only did TCM initially view the statements solely as an oversight or tactical mistake (albeit a highly significant mistake) by Barillari and Montgomery concerning a minor argument in a complex white collar case that brought [what would turn out to be significant] unintended consequences, TCM was in no position to form judgments as to the scale or scope of the issues, consequences and overall problem at this point, even assuming there were no issues of potentially criminal false statements assignable to Barillari and Montgomery (which, of course, TCM did not suspect at this point).
- In sum, TCM was not focused on any potential misstatements (criminal or otherwise), as TCM believed the statements came from outside counsel without sufficient knowledge of the facts (or in-house expertise with respect to the regulatory subject matter) and without sufficient input or oversight from Barillari and Montgomery; thus, there would at most have only been professional negligence by and among these parties, but nothing ascribable to in-house attorneys. Because Barillari and Montgomery both presumably knew that the mistake was made by this point, TCM assumed that they were handling the matter in a fashion supported by Department leadership, or at least consistent with the expectations of leadership.⁶
- Despite ascribing essentially benign intent to Barillari and Montgomery, TCM nevertheless at this point began to express to others in conversation

⁶ In fact, TCM did not assume that the B&T lawyers responsible for the matter would continue to bill time to AT&T beyond the Indiana matter, in light of the LCP flap. It was a surprise to TCM, initially, that Barillari chose to continue to use B&T – although now with Sol Wisenberg as lead counsel, not Mackey and Bickham, when the Wisconsin matter arose. In light of subsequent events, however, TCM now has a different view of the continued and increased relationship: an effort, possibly, by Barillari not to make a “sea change” that would place a spotlight on the firm's prior performance and draw questions about that performance from top Department management.

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(e.g., Heimann, Phillips, Henze, Wales, Baker and Mason) his concern that it appeared that AT&T itself “had awakened a sleeping giant” *vis a vis* its White Paper; i.e., put the government on notice of an issue it hadn’t been aware of, or focusing on, in over a decade of E-Rate program administration.

- And, from this point forward, TCM proceeded on an operating assumption that Barillari and Montgomery had made a terrible, but essentially accidental, mistake in advancing, or allowing others to advance, a legal argument without evidentiary basis in the company’s organizational compliance history and institutional memory.⁷
 - Source: E-mail from TCM to S. Montgomery, 12/23/2008 (Tab R); White Paper and Power Point documents, 7/11/2008; TCM’s recollections

December 24, 2008

- Montgomery sends e-mail to C. Tacker, P. Mancini, J. Langhauser, M. Cavanaugh, M. Henze, C. Wales, J. Mason, TCM and D. Baker re: the Indiana Proposed Compliance Plan, with “cc” to Barillari.
 - She states that “Ed Barillari would like to schedule a call for Tuesday, December 30 to discuss a plan for responding to and negotiating out the problematic sections of the proposed compliance agreement.”
 - The call was to take place at 11 a.m. EST on Montgomery’s conference bridge.
 - TCM does not recall attending the call, but believes he would have attended it.
 - Because TCM does not recall attending the call (TCM’s calendar does not indicate the meeting was accepted by TCM), TCM can only assume that the call took place, that Barillari and Montgomery attended and led it, and that they did not discuss the likelihood that arguments made by the T. Corp. team were the obvious cause of the FCC’s interest in the LCP portion of the “problematic” material in the draft Plan.
 - Source: E-mail from S. Montgomery, 12/24/2008 (Tab S); TCM December 2008 Outlook calendar (Tab S); TCM recollections

December 30, 2008

⁷ This was a working assumption, however, that TCM decided -- part consciously and part instinctively -- to continue to evaluate over time.

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- TCM sends e-mail legal discussion memo to Henze, Baker, Mason, Wales and E. Bond discussing the E-Rate 4th *Report and Order*, 1997. In the e-mail, TCM notes his first-time LCP research which indicated, inter alia, that the FCC hadn't discussed the LCP rules since 1998, and that the LCP rules had apparently been "a dead letter in that sense for a decade."
 - TCM also advises that "we will need to understand what our processes or M&Ps are for establishing price, in any event, so that we can reach a conclusion as to potential exposure for 54.511(b) violations in light of those processes or M&Ps."
 - Thus, as of this point, TCM is still unaware of the pre- and post-merger LCP compliance picture either with respect to Indiana E-Rate or anywhere else in the company.
 - Source: E-mail from TCM to E-Rate team 12/30/2008 (Tab T)

January – February 2009

Background

- As per TCM's Outlook calendar, TCM was on vacation leave from January 1st through and including the end of the day January 7, 2009. During that time, TCM had visitation rights with his two older children from a previous marriage and, in all likelihood (as was his custom), completely "out of pocket" during that time.
 - However, there were at least 6 or 7 scheduled, Indiana Compliance Plan negotiation-related meetings/conference calls to which TCM was invited while on vacation. It does not appear that TCM accepted any of these meetings or calls, and TCM has no notes indicating his attendance while on vacation. Based on that, and his own customary practice concerning visitation with his children, as well as his recollections of that time, TCM does not believe that he attended any of those meetings.
 - It appears, at least based on TCM's Outlook calendar, that the first meeting in January 2009 with the FCC was a conference call at 11:00 a.m. on January 5th.
 - The most critical time frame for these negotiations was the beginning, as that set the stage for all that came after, in terms of strategy, tactics, roles, and participation. Montgomery was in every single meeting that is on TCM's Outlook calendar regarding the Compliance Plan negotiations, both those very few that TCM attended, and all the ones TCM did not. She was deeply and heavily involved in all discussions, and she was the lead legal voice with and to the FCC in these matters along with Henze.

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- It does not appear that TCM was the “Organizer” for any conference call or meeting in January 2009 or, for that matter, in early February 2009. Indeed, it appears that virtually all of the conference calls and meetings were organized by either Montgomery or Henze or Baker.
- Thus, there is no support for notion that TCM was a lead player, or even an involved player, save for some limited editing and meeting attendance during the negotiations with the FCC. TCM does recall one conference call with the FCC that he attended, which was conducted by Henze. In that call, TCM motioned to Henze, when the subject of LCP came up, in an effort to prevent her from making any misstatements, whether based on speculation or belief as to the facts. TCM took this step because no question was on the table, and AT&T was not making representations of fact at that moment that created any affirmative disclosure duty on the state of the Company’s LCP compliance, in TCM’s judgment. And, in any event, Henze was in no position to do anything more than speculate on a question the FCC was not asking, and there is no affirmative duty to offer such speculation in such circumstances, in TCM’s judgment. Nevertheless, TCM was not comfortable with the situation overall, and that particular moment only increased that discomfort, thereby giving TCM greater belief that it would be in the Company’s best interests to evaluate its LCP story, GEM-wide, as quickly as possible in order to get the facts in a reasonably prudent fashion.

- Source: TCM’s Outlook Calendar Entries, January-February 2009, TCM recollections, TCM’s Notes (Tab ____)

January 6, 2009

- T. Michael Payne sends e-mail to distribution, including GEM group clients (Xavier Williams and others) and C. Tacker, and cc’ing Watts, Cicconi, Lindner, Spears and Barillari, attaching a “memo outlining the issues that have surfaced as a result of the FCC’s demand for a Compliance Plan”
 - TCM was not a recipient of the Payne e-mail; however, G. Phillips forwarded the e-mail (not clear if the memo was attached) to TCM that day as “fyi.”
 - Source: E-mail from T. Payne to distribution, and forwarding e-mail from G. Phillips to TCM, 1/6/2009 (Tab U)

January 8, 2009

- Montgomery sends e-mail at 8:01 p.m. to Baker, Wales, Henze, Romano, Mason and TCM enclosing her mark-up to the FCC’s Compliance Plan draft.

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- Montgomery says that has “not yet tried to come up with some language on the LCP and audit issues, because it may turn on what we find out from the clients tomorrow and what they are comfortable with agreeing to.”
- Montgomery says nothing in the e-mail about her team’s role in initiating the LCP questions from the FCC (*i.e.*, through the arguments advanced in the criminal/civil matter on July 11, 2008).

- Source: E-mail from Montgomery, 1/8/2009 (Tab V)

January 14, 2009

- Montgomery has an exchange of emails with the FCC’s Enforcement Bureau (M. Ellison et al) with “proposed changes” to the FCC’s draft Compliance Plan. No other AT&T employees are cc’d. No substantive discussion of the LCP provisions.
- By 3:07 p.m., Montgomery emails the E-Rate team with the “latest from the FCC,” and notes that she “thinks we’re getting close but there are still significant unresolved issues.” She indicates that Watts had “weighed in” on a signature issue.⁸

- Source: Emails from Montgomery to various, 1/14/2009 (Tab W)

January 23, 2009 – February 3, 2009

⁸ Montgomery was the principal lawyer negotiating all aspects of the Compliance Agreement with the FCC, assisting Henze in that regard, and in providing all substantive “up the chain” briefings inside the Legal Department. TCM did not have a lead role, or any significant supporting role, in any of the negotiations or briefings, and often was not involved substantively in any of these events, but was engaged in assisting the Compliance team in receiving substantive guidance on the LCP rules and how to operationalize them. The negotiations ultimately resulted in a concluded Compliance Plan and full settlement agreement with the government around February 13, 2009. It is believed that at no time during any of these events did Montgomery or Barillari inform anyone at AT&T of the fact that the LCP issue arose because of their advocacy in the ATTSCO matter before the government on July 11, 2008. Moreover, TCM believes that, to this day, neither Barillari nor Montgomery has ever voluntarily offered that information internally, or supplied the background facts surrounding that advocacy, the specific statements made orally to the government, the speakers’ intent and knowledge at the time the arguments were advanced, and their specific roles in making the substantive statements. TCM certainly has not heard anything to that effect from any of the lawyers involved with whom he has spoken, or any of his co-workers intimately involved in these matters, or lawyers with outside counsel, B&T, with whom TCM has had multiple discussions that should have revealed such admissions if they had occurred.

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- During this time frame, John Mason takes a first cut at drafting an initial analysis on LCP for the corporate compliance client and Baker/TCM/Mason work to revise the draft. On this date, at 5:46 p.m., TCM responds to Baker and Mason that he is “still looking at the draft and supporting materials.”
- Baker responds in one e-mail that he had found substantive material on LCP and was attaching it.
- TCM begins to advise that there may be reg-based arguments against the FCC’s potential efforts to enforce LCP. TCM notes that although the Commission probably could “enforce the requirement that providers ascertain LCP, at least in the providers’ judgment”, the rules appeared to leverage the competitive bidding process “for ensuring LCP is offered.”
 - Source: E-mails between/among E-Rate team, 1/23/2009-2/3/2009 (Tab X)

February 6, 2009

- TCM completes and sends his revisions to the Mason LCP draft. This “preliminary” memorandum (Draft) is used to advise Wales and others on the nature of the LCP rules, their operation and other related matters. This is the first substantive legal memorandum or advice piece of which anyone in the E-Rate team is aware relating to the operationalizing of the LCP rules for AT&T.
 - Source: E-mails and attached memorandum from TCM et al. to Wales, cc to Henze, Baker, Mason, Romano and Montgomery, 2/6/2011 (Tab Y)

May 29, 2009

- *On May 29, 2009, a Legacy T network manager, Lou Mareello, was deposed in a Philadelphia, PA state tort case involving allegations of negligence against AT&T and others by a young male plaintiff who had been critically injured in a skateboarding accident when his skateboard rode over a dilapidated utility cut out. The plaintiff sued a number of entities, including the City, AT&T, Verizon and other utility cos. (Pildis v. City of Phil. Et al.). The case was a high profile matter in Montgomery’s “insured claims” portfolio.*
- *The co-defendants in the Pildis case all denied ownership of the cutout in question.*
- *Prior to giving his testimony in the case, Mareello received a copy of a utility drawing called an “as built” from one of his colleagues/vendors, which showed “ATT” on the cut-out in question. He received the drawing around May 14, 2009.*

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- *However, when he appeared for his deposition, Mareello denied having seen any documents establishing ownership of the cutout.*
- *Within five days after his deposition, Mareello ordered his colleague, John Caradonna, to “lift the AT&T logo” from the as-built. This despite having insisted in his deposition that he was unaware of any drawings that might clarify ownership of the cut-out.*
- *All of these events took place under Montgomery’s control of the docket and the case in particular.*
- *TCM, who was in Phillips’ organization and was having no thoughts about leaving that organization until the first quarter of 2010, was completely unaware of any of these events, the Pildis case, or any of these individuals.*
- *The Pildis matter, however, would become a significant part of the overall narrative in due course, as described below.*

▪ *Source: Letter from M. Conroy, October 22, 2010 (Tab ^1)*

July - December 2009

- The Wisconsin LCP investigation is initiated in July 2009 by the service of a subpoena on AT&T from the FCC’s OIG. TCM intercepts the subpoena from its ordinary handling process because of its sensitive nature, the EA/Regulatory/Legal group’s non-experience in handling such subpoenas (i.e., that indicated that AT&T was the “subject” of their investigation), and TCM’s expectation of the level of resources, experience and expertise that would be needed to manage the issues and the response.
- TCM immediately engaged the resources of the litigation team (Montgomery) to begin working through the subpoena and developing a coordinated response with the assistance of outside counsel and other document collection vendor resources. Barillari/Montgomery again turn to B&T for assistance, this time under the direction of Sol Wisenberg of the firm.
- TCM, at the direction of G. Phillips and pursuant to the personal request of Barillari, co-conducted multiple witness interviews to ascertain the facts and surrounding circumstances of the company’s LCP compliance with respect to Wisconsin E-Rate activities (as per the track of the subpoena).
- TCM assumed co-responsibility for co-managing negotiations with the government over the scope and breadth of the subpoena along with Montgomery.

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- Montgomery took full lead in collecting, reviewing and assembling responsive documents, with TCM monitoring the factual developments of the company's case as revealed in the documents.
- TCM assisted in the development of witness binders and the substantive interview outlines for the internal investigation in support of the subpoena response, and directed outside counsel with respect to same.
- TCM now convinced (as of the Wisconsin subpoena) that the LCP issue was not going to be "one off"; that is, that the government's interest in LCP compliance had been stimulated and that there may be a "woodwork effect" that AT&T would have to deal with going forward. TCM believed, at this point, that a strategic approach would be necessary to best position the company, one that assumed plausible "worst-case scenarios"; *i.e.*, full investigation of AT&T's entire E-rate portfolio for LCP compliance, going back to the fullest extent of the applicable criminal (false statements, fraud, etc.) and civil (false claims act, civil fraud) limitations periods.
 - Accordingly, TCM intensified his research on LCP, its regulatory and legislative history as part of the Universal Service Fund programs, industry and party comments in those and later proceedings, on-line postings and materials from the E-Rate community, and all state PSC treatment of the LCP requirements from 1997 through the present.
 - As the facts began to emerge in the Wisconsin investigation, TCM began to consider, for the first time, serious questions about the various invoices and certifications that providers and beneficiaries submit to the FCC/USAC as a part of, or condition to, participating in the E-Rate program. TCM's focus in this review and analysis was specifically: (1) the providers' annual certifications ("SPACs"), service providers' reimbursement invoices ("SPIFs") and the providers'/recipients' co-certifications for reimbursement ("BEARs"); (2) the nature of the penalties associated with mis-filings of those documents; (3) strong potential defenses to allegations of misconduct, whether civil or criminal; and (4) the best ways to position and/or mount those defenses – including pro-actively – in the appropriate forum(s).
 - TCM began assembling comprehensive notebooks of materials, work product, mental impressions and notes, research, *etc.*, in support of these strategic efforts. One of the earliest documents in this vein was an "LCP Draft Strategy Matrix" prepared by TCM identifying key gaps and issues in the rules/regulations/orders/USAC administrative guidance concerning LCP, which TCM used as part of an idea to develop an LCP declaratory ruling or clarification petition to be filed with the FCC.

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- TCM also reached out to his counterpart at Verizon, Chris Miller, to ascertain whether “LCP issues were ringing a bell” out there. When VZ confirmed that LCP was beginning to come to their attention – in Wisconsin -- at around the same time it was surfacing with AT&T (in Wisconsin), TCM organized conference calls for the companies’ respective Legal/EA reps to discuss public policy approach to addressing broader LCP issues that had never been addressed. At TCM’s suggestion, the parties conducted these discussions on a “common interest privilege-reserved” basis, as TCM recognized the potential for a joint defense approach immediately, and wanted to ensure that the parties’ earliest communications on the subject were protected against disclosure.
 - In support of this aspect of the plan, TCM developed a comprehensive, 12-page outline of arguments from which the ultimate petition for declaratory ruling/clarification on LCP would be based. That outline shaped the LCP petition that was ultimately filed by USTelecom and CTIA. TCM participated in the discussions and negotiations with the trade associations leading to their adoption of the initiative and development of the final filing (which was done in March 2010 and put out for comment by the FCC on April 14, 2010), as well as AT&T’s comments and reply comments in support of the LCP Petition.
- This was also the time that TCM’s concerns about the Indiana matter began to intensify. Although TCM remained convinced that Indiana was the cause of the piquing of the government’s LCP interest, TCM could not see any visible connection between the events in Indiana and the Wisconsin OIG subpoena, other than the subject matter of Wisconsin being LCP. Nevertheless, TCM recognized that the Indiana matter posed significant potential risk to AT&T being able to mount a successful, complex, multi-pronged defense to the broadening LCP investigation, especially if the government began to raise questions about the company’s good faith in the negotiations leading up to the Indiana settlement.
 - On the subject of Indiana, by this time, TCM still held the view that the company’s late 2008/early 2009 negotiations with the government were in good faith, that the company (to the best of TCM’s knowledge based on his own observations) did not fail to answer any questions truthfully and candidly with respect to reaching accord *on the compliance plan*, and that, with respect to the Settlement Agreement with the DOJ/USAO, the LCP issues appeared to be of such limited significance that AT&T was under no compulsion, *in the negotiations over the Compliance Plan*, to raise unvetted questions about its broader LCP compliance record when: (1) it didn’t yet have the facts about LCP compliance in any of its legacy companies; (2) it didn’t have the facts, and thus any negative facts, about LCP in the specific organizations to be bound in the Compliance Agreement (though questions were clearly being raised); and (3) didn’t specifically – I thought – have any facts about ATTSCO’s/T. Corp.’s

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legacy LCP compliance history. All of these issues were only in the early stages of coming to our attention (except for ATTSCO/T. Corp., which would have been, or should have been, in Barillari's and Montgomery's knowledge, but they raised no issues with any of the E-Rate team on the subject, thereby leaving a question in TCM's mind what the actual facts on that subject were).

- TCM's concerns about AT&T's risks in this evolving environment continued to sharpen and intensify, particularly with respect to the history of the negotiations over the Indiana compliance agreement and the non-disclosure to the government about the compliance picture that TCM, Baker, Wales, Mason *et al* learned in the course of addressing the issues in getting to settlement of Indiana. That non-disclosure may have been justifiable in the Indiana Compliance Plan negotiations, but that justification would not hold up, in TCM's view, in any future discussions regarding these issues with respect to Indiana, particularly in light of the picture that emerged throughout 2009.

▪ Source: Various (Tab Z)

First Quarter 2010

- Very early in 2010, Barillari began to express interest in TCM coming to work in his group. TCM understood that Barillari's interest was an outgrowth of his observation of TCM's work in the Wisconsin matter, which was the only basis for Barillari to have taken any interest, objectively, in TCM's joining his team.
- Montgomery began to lobby TCM directly for TCM to join Barillari's team, and also began to indicate her desire to "move out of New Jersey." Montgomery, who reported directly to Barillari, suggested to TCM that she wanted to "go to Dallas", but would also generally be happy "getting out of New Jersey."
- TCM, though not unhappy in Phillips' organization, saw the issue as one of "highest and best use" for AT&T of his services. That is, TCM had just completed a relatively successful year in the Legal/Reg group ("Meets most, and Exceeds Some Expectations" overall in the 2009 review) and was feeling that he had traction in the group after an uphill climb coming over from BellSouth in the merger with virtually zero regulatory experience to that point in 2007. However, TCM recognized that he had substantial background in "white collar" matters, internal investigations with respect to same, and dealing with the federal government in these matters. As a former criminal Assistant U.S. Attorney who is still tied in with that community, TCM recognized that the Company needed his background, experience and skill set for matters such as Wisconsin (and, by implication, Indiana) moreso than it needed TCM's writing skills and FCC advocacy (which, TCM acknowledges, was not always a natural fit "tone"-wise).
- TCM became convinced, based on experience and his knowledge of the issues, the LCP investigation was going to be a major continuing work item, and would in all likelihood

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expand. TCM was also convinced that, although he did not know the organizational and operational “ins and outs” of AT&T like Montgomery (TCM did not know any of the other persons in Barillari’s group), he brought much more seasoning, judgment, fortitude, professional assets and acumen and core skills to the table for matters like Wisconsin *than anyone in the litigation group or in the Department* that TCM had met to date.

- TCM asked Phillips for his advice and, essentially, his blessing with respect to the transfer. Phillips explained, as a mentor, that there was a real potential opportunity in joining Barillari’s group that seemed best suited to my skill set, that it would also mean that TCM would be reporting to a “Level 6” as opposed to a “Level 5”, and that, in any event, the opportunities for advancement within the Legal/Regulatory group were not likely to materialize in the foreseeable future. TCM asked Phillips whether the “situation (i.e., leaving Phillips’ organization and going to Barillari’s) could be trusted.” Phillips expressed his view that it could be trusted, but advised TCM to ensure that it was understood that TCM would not move from D.C. Phillips also conveyed that message personally, he advised TCM.
- Without more, TCM communicated his assent to Phillips that he would transfer to Barillari’s team, so long as there was “no bridge being burned” as between TCM and Phillips. Phillips assured TCM that there was no issue on that front. TCM asked Phillips whether he had any hesitation recommending TCM: Phillips replied that he would never recommend to Wayne that he transfer an attorney unless Phillips believed the attorney was a good asset. Phillips advised that he had “no problem recommending me to Wayne” in that regard.
- In March 2010, at the Legal Department Conference in Dallas, Phillips and Barillari, as part of their discussions with Department leadership (including Watts, apparently), expressed their mutual assent to the move. On the bus ride back to the airport from Dallas, Phillips confided to TCM that the discussion had taken place and Watts had approved it. TCM asked how quickly it would take place. Phillips replied that it would happen immediately, so TCM should begin transitioning work ASAP.
- Accordingly, TCM began the process of working with Barillari’s team – through Montgomery almost entirely – to effectuate the transition. TCM also began discussing the transfer of his portfolio to his colleagues in the Phillips organization.
- During the *entire first quarter 2010* time frame, however, TCM attended to all of his regular portfolio duties, particularly (but not exclusively) the Wisconsin investigation and the broader LCP strategic defense as well. All of these efforts, and this work product, took place while TCM was in Phillips’ organization.
 - Source: Various notes, emails, memoranda, FCC filings and attorney work product notebooks prepared by TCM (some of which are at Tab Z)

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April 2010

- By around April 1st, TCM had fully begun working in the Litigation group.
- Only after starting with the group did TCM learn that he would be reporting to Montgomery. This was not understood by TCM when he agreed to join the group; TCM had believed that he would be reporting to Barillari. Had TCM been aware of this decision, TCM would not have joined the group. TCM felt that this move was bad faith, but did not raise issues about it, having already joined the team.
- On the LCP front strategic defense front, TCM was continuing to wrestle with concerns about the company's LCP defense posture. TCM began to believe that it might be necessary to report his concerns about the origins of the government's investigation to Mr. Watts, as TCM's efforts to ensure that information "bubbled up" appeared to have gone nowhere; *i.e.*, there had been no directive about correcting the record through a targeted disclosure to the FCC, or any discussion about why the Company was not doing so. Out of this concern, on April 8, according to TCM's notes, TCM first reached out to a colleague who was personally familiar with Mr. Watts about the best way to approach Mr. Watts should TCM feel it necessary to inform him directly of TCM's concerns.
- At some point in April, Montgomery advised TCM that she was departing the Litigation group and transitioning to Langhauser's organization. TCM was not shocked by this news, as TCM knew that Montgomery was looking to "get out of New Jersey" for several weeks. However, TCM was puzzled when he learned that Montgomery, although leaving the Litigation group, wasn't, in fact, leaving New Jersey – rather, her new assignment would still be in Bedminster. Nonetheless, TCM assumed that this transitional step was consistent with the overall plan (which TCM had not been made aware of, of course), and that it would mean that TCM would be reporting to Barillari, as had been assumed.
- On or around April 13, 2010, on one of his pro-actively scheduled, bi-weekly trips to New Jersey (to facilitate integration with the new team), TCM had lunch with Moore. It was at this lunch that TCM learned, for the first time, that he would be reporting to Moore after Montgomery transitioned out of the group. TCM was surprised and troubled by this news, not because of any personal knowledge about Moore, but because it was not the understanding that TCM had and it seemed unnecessarily odd for the new group to make these kinds of confusing, demoralizing moves without full disclosure and discussion in advance. Though TCM's suspicions of bad faith were essentially locked in by now, as before, TCM did not raise issues about it, having already joined the team.
 - Source: TCM's Calendar notes, Other source material, TCM's recollections

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- *M. Conroy, the outside counsel handling the Pildis matter described above, sent a letter to Montgomery and others responsible for that matter. As of this date, it appears that no one is aware of Marelllo's credibility problems and misconduct regarding the as-built drawing, as there is no mention of it in this status letter.*
 - *Source: Letter from M. Conroy to S. Montgomery, 5/13/2010 (*Note, the secondary pages of the letter reference 5/17/2010 for some reason not known to TCM) (Tab ^1).*

May 14, 2010

- In the LCP Petition docket, comments were filed by a law firm (Shepherd, Finkelman) charging USTelecom and its members, essentially, with using the Petition to mask fraudulent conduct in failing to charge LCP in their E-Rate activities. As the firm put it, “apparently knowing that they have not complied with the LCP requirement for years, these service providers (through the Petitioners) filed the Petition in an effort to avoid responsibility for filing false [SPAC] certifications by suggesting that some ‘clarification’ of the LCP requirement is suddenly needed.”
 - This was precisely the kind of scenario and set of allegations that TCM had been most concerned about.
 - As a part of internal discussions of the LCP comments, particularly on the subject of the Shepherd, Finkelman filing, TCM began to reassert to his Legal/Reg and Compliance counsel colleagues that the pressure was mounting on the company to look at more affirmative steps beyond the mere LCP filing to be prepared for the possible expansion of the government's investigation amid revelations of wide-scale non-compliance.
 - TCM also shared this concern, under privilege, with his VZ counterpart, C. Miller. Miller was also concerned.
 - TCM began to specifically suggest that AT&T needed to consider conducting some kind of prophylactic “stress test”, *i.e.*, internal review of its E-Rate pricing history in the various sectors in order to be in position to maintain credibility with the government in the worst-case, and preserve its ability, in that event, to do a more fulsome review without a damaging, parallel government investigation into these activities. These ideas were listened to, but generally they promoted varying levels of resistance and heartburn.
 - These comments were shared with all E-Rate team members and their superiors, including Barillari. When AT&T filed its reply comments (and USTelecom as well), no one made any representations that, in fact, directly addressed – with particular “LCP” compliance policy evidentiary support – the firm's charges.

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That is, no one said in response (and in our internal AT&T work-up discussions) that: “the firm is wrong, we have always followed LCP, have always had it as a part of our compliance policy and metrics, etc.” Indeed, no comments were filed that even approximated this kind of definitive, affirmative rebuttal. This further caused TCM to have serious doubt that T. Corp. had any legacy compliance history with LCP, as was the case with all the other providers and all the other AT&T legacy E-Rate constituents.

- Source: Shepherd Finkelman Comments, 5/14/2010 (Tab ^2)

May 18, 2010

- TCM was summoned to a meeting in Barillari’s conference room in New Jersey attended by Barillari, Moore, Howard Spiers, and Paula Phillips.
 - In this meeting, Barillari announced decisions about matters in the team’s respective portfolios, including the distribution of Montgomery’s portfolio upon her impending transition to Langhauser’s organization. TCM was unaware that such a meeting and distribution was in the plans.
 - Barillari assigned roughly 20 tort matters (“insured claims”) to TCM, along with a few other commercial litigation matters. TCM would be responsible for “E-Rate” litigation as well. This was the first time that TCM became fully aware of the portfolio that Barillari intended for him. Prior to May 18, 2010, TCM believed that his services were being sought for the kinds of sensitive matters that marked the Wisconsin investigation. TCM had no idea that Barillari would be using him for the portfolio downloaded onto TCM in that meeting. It was quite clear, however, that Barillari and Montgomery had this in mind for quite some time, if not from the beginning. This act, combined with the other surrounding circumstances described, gave TCM considerable alarm about Barillari and Montgomery. From that point forward, TCM realized that they were not trustworthy and were venal characters. What TCM did not understand, however, was why they were acting in this fashion.

- Source: TCM’s notes, 5/18/2010 (Tab ^3)

May 25-26, 2010

- *TCM attended a conference call – his first -- on the Pildis matter. In this call, Montgomery notified the outside counsel and client team that she was transitioning the matter to TCM.*

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- *By this time, apparently, it was known by Montgomery and the Pildis team, that Mareello had engaged in presumed misconduct with respect to his deposition and his subsequent handling of a discoverable document.*
- *The phone call, as TCM recalls, was frenetic and counsel were highly agitated.*
- *After the call, TCM tried to get a handle on the gist of the representations in the call and the background from Montgomery. Montgomery explained that: "sometimes, clients do really stupid things. I don't think Lou intended to engage in anything wrong, but was just trying to do the right thing in correcting an obvious document error, in his judgment. He shouldn't have done it, but what we need to do now is move on and prepare our defense around it."*
- *Montgomery's response on the issue was directional for TCM; that is, she was not reacting to the situation and TCM was in no position whatsoever to challenge or second-guess her judgment. The matter had been going on for roughly two years.*
- *Accordingly, TCM's first instinct was to consider the ways in which the company could avoid trial and have the jury decide the ownership issue – particularly since AT&T was still steadfastly denying ownership, in light of the exposure potential for having such ownership established and the business risks that would pose. TCM's first statements to outside counsel on the matter were: "we need to get out of Philadelphia tort court and find a way to get before a dispassionate tribunal to decide the matter in rem." Thereafter, TCM pursued a strategy of pursuing the best evidence of non-ownership that we would locate in the vast archives of AT&T, as well as to convene a joint defense meeting to address the parties' positions on ownership. Without question, TCM viewed the case as a "loser" for AT&T, but because TCM was inheriting the case, TCM had to find some leverage for AT&T to get to a better result than could be gained at trial.*
- *Nevertheless, again, TCM was surprised at Montgomery's reaction to the situation, and was further surprised that she was being permitted to transfer this kind of case in this kind of condition to any other lawyer, given her history with the case, her long relationship with the clients and players, and the complexity and sensitivity of the internal circumstances. The "saddling" of TCM with this terribly postured case was another highly questionable act that further undermined TCM's trust in Barillari and Montgomery.*

▪ *Source: E-mails and notes, 5/24/2011-5/26-2011 (Tab ^4)*

August 2010

- **TCM continued to harbor concerns about the status of the government's LCP investigation and the time that AT&T may have been wasting by not acting pro-actively**

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in mounting its defense strategy. The LCP petition had been filed and put out for comments, which was a helpful development, but in TCM's view, that step, alone, was not likely going to give a full and effective shield to AT&T. Rather, it had been positioned at the earliest time by TCM as something that would "give the government pause," during which AT&T and others would be able to lobby on the policy side for a comprehensive solution.

- However, it was always recognized that there was no guarantee, or even likelihood, that there would be a full policy solution to AT&T's individual jeopardy in the Wisconsin matter (*which, it should be noted, was never declared by the government as not being a criminal matter; to this day, the government has opted not to rule out criminal consideration of that matter).
- TCM's belief that putting the company in position to be able to answer the government's presumed concerns about its LCP compliance history by taking some steps to address that internally, under attorney work product privilege, so that if and when the government pressed AT&T on those issues, the company could deflect intrusive government ramp up.

▪ Source: TCM's Recollections

August 6, 2010

- TCM attended a conference call, requested by David Baker, about the Detroit Public Schools (an E-Rate customer) letter to AT&T, referencing a "forensic audit" it had commissioned in which DPS was told that AT&T had not been charging lowest prices for services, as compelled by the E-Rate rules. Although the terminology used by DPS was not "LCP" verbatim, it was clear that their inartful letter was raising that concern.
 - TCM sent an email to the E-Rate team, including Heimann, noting his intensifying concern that AT&T was going to continue to be pressured by the LCP issue and that it would need to look at more comprehensive, affirmative strategic solutions to positioning its defense.
 - Heimann reacted negatively to TCM's concerns, and took issue with the DPS' language as being, essentially, ambivalent. TCM defended his position to Heimann.

▪ Source: TCM Notes, recollections and email, 8/5/2010 (Tab ^5)

August 9-16, 2010

- The combination of the Wisconsin investigation following closely on the heels of Indiana, the Shepherd Finkelman filing and the DPS "forensic audit" letter compelled

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TCM to take further steps to advance the discussion on more significant steps to position the company's ability to achieve a favorable result on its LCP exposure. Accordingly, TCM began to put his comprehensive defense strategy ideas into writing and to formulate an escalation next steps strategy.

- TCM began drafting notes/outline of these thoughts, along with a briefing notebook, over this time period. These notes included thoughts about criminal false statements, but at this time, TCM's thoughts were still focused on the SPINs, SPACs and BEAR forms submitted to USAC, not on the T. Corp. team's statements to the government in July 2008.
- One of the briefing targets that TCM identified, given his internal conversation with a colleague knowledgeable about Mr. Watts' expectations for this kind of escalation, was John Langhauser.
- Accordingly, around August 16, 2010, TCM called Langhauser to schedule an appointment to see him in N.J., and spoke with his assistant, Jacquelyne McCarroll for that purpose. McCarroll made a tentative suggestion for the meeting, but stated that she would need to confirm with Langhauser, as TCM recalls.

- Source: TCM Notes and emails, 8/9/2010-8/16-2010 (Tabs ^6 and ^7)

August 17, 2010

- TCM got an email response to his Langhauser meeting request, but not from Langhauser, from Barillari. Barillari, with a copy to Moore, advised TCM: "Theo – before you schedule meetings such as the one you are trying to schedule with John you should let Brian (or me) know. John called me and I had no idea what he was referring to when he mentioned your request. Thanks."
 - TCM was forced to explain to Moore and Barillari what the purpose of his call was and why TCM felt his effort to directly engage Langhauser was an innocent request.
 - TCM, however, was not able to schedule a meeting with Langhauser but instead ultimately met with Moore to share the contents of the "LCP Strategic Approach" notebook TCM had planned on sharing with Langhauser in an effort to gather his support for a more affirmative strategy of addressing the LCP exposure.
 - This set of events increased TCM's anxiety and concern about the motives of the department leadership in New Jersey, now extending beyond Barillari but to Langhauser and Moore as well.

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- Source: E-mail from Barillari to TCM, cc to Moore, 8/17/2010 (Tab 7)

Shortly after August 17, 2010

- TCM, in New Jersey, met with Moore in his office and presented Moore with a leave-behind copy of the “LCP Strategic Approach 2010” briefing book he had intended to walk through with Langhauser.
 - TCM walked Moore through the core details about each document so that Moore could understand the nature of TCM’s concerns and TCM’s desire to ensure that the company took advantage of the lag time to put more structure into its defense approach. Among the documents in the book was a copy of the criminal mail and wire fraud statutes, as well as the false statements statute, the false claims statute and relevant limitations research, along with the substantive LCP Petition documents and related material (e.g., the Shepherd Finkelman comments).
 - Moore listened with keen interest and asked some questions, but otherwise appeared not to have been very much “in the know” on the issues.
 - The focus of the criminal statute documents, in TCM’s mind, was the company’s E-Rate invoicing and certifications broadly, considering the known LCP compliance gaps historically inside the legacy E-Rate organizations. Given that history, TCM wanted to ensure decisionmakers were addressing the potential government liability theories, including criminal theories, that might be applied to that history, if revealed – as TCM expected it would – as soon as the first witness was interviewed by the government in the Wisconsin matter (as the government had indicated it would seek in due course, consistent with what we learned they were doing with VZ’s witnesses).
 - After the meeting, which took about 30-45 minutes, TCM stepped out of Moore’s office either to go eat lunch in the cafeteria or to go to the men’s room. TCM believes it was the latter. When TCM returned, he went back to Moore’s office to touch on an additional point, only to find Moore in Barillari’s office, door open, with the briefing notebook open on Barillari’s desk. The body language of both men indicated stress and agitation.
 - The two were discussing the book, and seeing that, TCM walked up to the door and asked whether the two needed his input, seeing that they “were discussing the notebook I prepared.” Moore immediately looked up at TCM and quickly declared: “no, that’s not necessary.” The look on Moore’s face struck TCM as being one of significant stress.
 - Barillari’s and Moore’s reaction in these circumstances gave TCM the clear impression that there was some *personal* consciousness of wrongdoing, exposure,

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etc., that one or both persons was experiencing in relation to the notebook. However, TCM could not fix what that issue would be, other than a concern that the Indiana matter had been the genesis of the company's LCP investigatory problems, and presumably that they had never revealed that fact to Department leadership. TCM had not focused, at this point, on the statements made to the government on July 11, 2008.

- Source: TCM's recollections

September 2010

September 9, 2010

- *On September 9, 2010, Moore advised TCM that a fellow lawyer, John Grudus, had a bankruptcy matter – Niles -- with litigation needs, and that TCM needed to assist him with the matter. TCM had no experience – ever – with bankruptcy matters, but accepted the assignment and attended a conference call later that morning, at 10:30, that had already been set by Grudus. TCM attended a couple conference calls concerning this matter, but never became clear on what Grudus was asking of TCM, given that the client was Grudus' client and the stage the matter was in was clearly still a negotiation. TCM assisted in the discussions to attempt to leverage AT&T's position to break away from a co-defendant and reach its own settlement in the matter. This was ultimately achieved and, TCM thought, was considered a good result in New Jersey. TCM would later learn, according to Moore, that Grudus complained to Moore (Grudus never mentioned any concerns to TCM) about TCM's support and responsiveness.*

- Source: TCM's Notes, 9/9-9/10/2010 (Tab ^8)

September 10, 2010

- The government advised that they wanted to meet later in September with AT&T to discuss evidentiary issues in the Wisconsin matter. Our initial reaction to the requested meeting was essentially positive, as it reflected the government taking us up on an offer we had made to them at the outset of the matter a year earlier. TCM passed the information along to Barillari and Moore immediately.

- Source: E-mail from S. Wisenberg to TCM 9/10/2010, and from TCM to Barillari and Moore (Tab ^9)

September 13, 2010

- The government advised AT&T that it had four questions it wanted AT&T to address in the upcoming meeting. TCM immediately advised Barillari and Moore, and also began to formulate a path for developing the answers to the government's questions.

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- For the next several weeks (the meeting would actually take place, after an extension sought by AT&T, on October 12, 2010), TCM spent many hours engaging multiple resources, conducting numerous witness interviews and conference calls, drafting multiple emails and memos and work product, providing directions, responses and guidance to outside counsel, developing and revising strategic and tactical responses, coordinating the development of data to present with responses, preparing the team (TCM, Wisenberg, Hoskins – who was ultimately replaced by G. Phillips) for the presentation, and gathering information from VZ that would be helpful to AT&T's preparation, including arranging a pre-meeting session with VZ at AT&T's D.C. office attended by multiple stakeholders.
- Despite knowing the significance of the Wisconsin matter and the upcoming meeting and clearly having some sense of the scale and scope of effort necessary to handle that representation successfully, Moore inexplicably began to apply pressure to TCM regarding the insured claims (which are essentially the bailiwick of a "captive insured" entity with oversight requirements for counsel, save for the *Pildis* matter, which, as described, was in a separately toxic state) and the Grudus *Niles* claim. At one point, TCM was forced to plead to Moore that the pressure was an undue and unreasonable distraction considering the significance of the putting the company's best foot forward on October 12. Although it was not TCM's view that either of these matters was in any state of professional neglect, Moore was nevertheless pressuring TCM as though each was in a state of immediate and high need, worthy of equal attention and consideration at the same time as the fire drill needed to make ready for the government on October 12.
 - Source: TCM Notes, passim, recollections and voluminous e-mails in TCM's Outlook Database under "Wisconsin – Government Presentation" (Tabs ^10-^11)

October 2010

October 11, 2010

- At TCM's behest, Joint Defense meeting was held with VZ's reps at AT&T's D.C. offices. Valuable information was gained to assist in final talking points strategy. TCM kept Barillari and Moore apprised. Phillips attended meeting.
 - Source: TCM Recollections and Meeting Notes, Various E-mails
- That afternoon/early evening, TCM gave a briefing to Barillari and Moore about the data results that would be presented to the Government on October 12th. Moore contacted TCM earlier in the day to "walk TCM through" the questions Barillari would have and

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the way to answer them effectively. When the call happened, Barillari had Moore and Paula Phillips sitting in his office while he posed his questions. TCM answered each question in the direct, “stick to the question” style Moore advised. TCM did not understand the need for Phillips’ presence in the meeting.

- Source: TCM Recollections, notes

October 12, 2010

- Meeting with Government, 2.5 hours, to present AT&T’s answers to Government’s questions. TCM takes lead in responding on behalf of AT&T. Phillips addresses regulatory background issues, and Wisenberg addresses witness (presumed relator) credibility issues, all under TCM’s coordination. Meeting is attended by OIG, DOJ and USAO (Wisconsin) attorneys (five in all).
 - Phillips’ reaction to the meeting, as expressed to TCM and others afterwards was: “the government is out to get us.” Phillips advised TCM that TCM handled the meeting well, and gave additional feedback for follow up with government.
 - Source: 10/12/2010-10/13/2010 TCM Meeting Notes and Recollections, TCM Briefing memo (To Be Provided)

October 12-14, 2010

- TCM provides all necessary briefings and consolidates/reports on follow-up items and next steps to in-house team, reporting structures and client groups.
 - Source: TCM Recollections and E-mails to clients and stakeholders, 10/12/2010-10/14/2010 (To be Provided)

October 15, 2010

- TCM is advised, by Liz Ferrell and/or John Garza, that there is an Oversight Committee that Watts is on and that, as part of that Committee’s regular meetings, a “Hot Topics” memo was prepared. TCM was advised that the Wisconsin investigation was on the list and that there needed to be some input for that purpose. TCM contacts Farrell by phone to get a read on the nature of this requirement and the atmosphere involved.
 - TCM immediately drafts flow chart of his overall thoughts and concerns about the needed strategic direction in managing the company’s holistic response to the exposure environment.
 - Source: TCM Recollections and Notes, E-mails, 10/15/2010 (Tab ^12)

Between October 12, and October 22, 2010

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- TCM ultimately is identified by Ferrell and Garza (and others, presumably) as the point person for briefings, readouts and background on the Wisconsin investigation. In a series of multiple email exchanges, that role is made clear. During this time, TCM continues to advise Moore and Barillari of the requests that are being made for information, the groups requesting the info internally, and Theo's proposed handling of those requests.
 - Eventually, Ferrell would ask TCM to draft the input for Watts' briefing binder. TCM complies, and ensures that Barillari and Moore see the work product along the way.
 - In the evening of October 15, 2010, TCM and Ferrell speak by phone. In that discussion, TCM shares with Ferrell his concerns that Barillari – with Moore presumably running interference – may have some “skin in the game” because it was not apparently known at the highest levels of the GEM group or the Department that the Indiana matter appeared to have initiated the government's interest in LCP, and that prior to the Indiana argument, there had never been any activity by the government on LCP in a dozen years. As TCM observed: “pls bear in mind as you go that there has been very little info circulated on this matter to date, and there is good reason for that, I suspect.”
 - Ferrell advised TCM on October 17, 2010 that she was working “on a short summary” for TCM “to tweak.” TCM responded that day that he would assist as needed, and further noted: “Btw, it wouldn't be the worst thing for Mr. W to engage at this juncture. I've held the line, but there are significant moves to be made, and there are just too many layers for me to get things decided and initiated. Some you and I touched on, some we didn't. Bottom line, gulp, is I need the Watts grilling to get everything set up.”
 - From October 19-21, TCM was required to attend T University training in New Jersey. While there, TCM remained engaged in the transmission traffic on the Watts “Hot Topics” briefing issues.
 - On **October 18, 2010**, Moore advised Barillari on a subject of “High” importance, that TCM “had been asked to provide input into a memo that Wayne Watts will use to discuss E-Rate matters with Rick Lindner and other executives.” Moore indicates that TCM is to provide a draft to Moore and Barillari prior to sending to Ferrell.
 - Immediately thereafter, TCM advises Ferrell that he will have to send his draft language to Moore and Barillari for review before forwarding to Ferrell. (*By this point, neither Moore nor Barillari had asked for, or gotten, TCM's comprehensive view of the holistic approach to addressing the LCP exposure post Oct 12 meeting – they were only generally aware of one aspect of that approach,

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i.e., the “stress test” internal review idea that TCM had, by then shared with Phillips, Epstein and Barillari orally.)

- At 9:56 a.m., TCM sent his proposed draft edits to the Ferrell memo to Moore, who then immediately forwarded same to Barillari.
- Barillari revised the memo input at 4:43 p.m. **In that revision, Barillari struck the following section, in its entirety:**

“Whether AT&T has applied the LCP rules properly across the enterprise is the subject of some internal debate, especially during the pre-2009 time period. It is probable that treatment of these requirements has been uneven and inconsistent since the program’s outset, given the number of legacy entities and business segments involved in this business since the program’s inception. We may consider performing internal testing to determine whether AT&T’s application of LCP to the pricing of relevant interstate and intrastate services for E-rate customers (including, but not limited to Wisconsin) is in line with the FCC’s rules as reasonably construed.”

- Barillari then added a new section that read as follows:

“In 2009 AT&T implemented a LCP Pricing Policy for E-Rate customers in part to bring consistency and formality to this process. Previously, AT&T fulfilled their regulatory requirements consistent with its general non-discriminatory pricing obligations under the 1934 Communications Act.”

- In sending this version to Moore and TCM (as cc), Barillari said “let me know if you have questions, Thanks.” TCM did not view this as any opportunity to re-re-raise his concerns about the overall state of the company’s LCP exposure. On this subject, TCM believed he had already provided his input to Ferrell (and others in separate conversations). Suffice to say, however, TCM was very concerned and troubled by the liberties Barillari was taking with the record, and this only increased TCM’s belief that Barillari was behaving as though he had a consciousness of culpability. However, TCM still believed that the matter Barillari was concerned about was personal exposure and embarrassment over having incited the government to act via the Indiana LCP argument. TCM still was unaware that Barillari had actually sponsored statements himself in that investigation.
- At 5:56 p.m., Ferrell circulated the revised draft to Phillips and Ed, with copies to Epstein, Garza and Baker, noting that it “contained all of Ed’s revisions.”

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- On **October 19, 2010**, at 2:29 p.m., Ferrell sent a “final write-up” on the E-Rate portion of the Watts memo to TCM (lead addressee), Baker, Wales, Garza, and Barillari and Phillips as ccs. Ferrell asked the addressees to review it and advise of any further changes. TCM responded to Ferrell (without ccs) seeking her phone number at 2:33 p.m. TCM intended to re-iterate his overall concerns about the messaging from Barillari, but does not believe that call happened.
- At 10:43 [a.m.] on **October 20th**, TCM emailed Ferrell asking her to advise what the probability was that Watts would “want a discussion with me on this;” and (2) whether it “would not be helpful for that conversation to be in person.”
- Ferrell responded shortly thereafter that, in her “humble opinion,” there was a “50-75% chance that Wayne will want to talk about Wisconsin in detail, given the seriousness. Discussion in person is always much better.”
- Moments later, TCM replied that he would “like to come to Dallas to ensure that the conversation is effective. I’m trying to figure out how to accomplish that when I haven’t, yet, been summoned. Any suggestions?”
- Ferrell replied moments later, providing time and logistics information about Watts’ schedule and usual prep habits. She noted that she did “not know how much Wayne has been told about Wisconsin. I’m assuming he doesn’t know the details of how these meetings have gone in the past, and what the potential consequences are, so I’m quite sure he’s going to have some pretty detailed questions that I will not be able to answer. Your presence would be extremely helpful to Wayne. He is going to want direction on how to field questions from the Oversight Committee members on this issue. Ferrell further suggested that, if things went a certain way as expected, “it’s best that you be there in person to address all points.”
- TCM responded at 11:06 a.m.: “Thanks. I believe my bosses will challenge the travel and disapprove it, but I will try to line it up. I’m happy to pay for it myself, frankly, but I still need approval to be out of my office. I’ll make it happen.”
- Ferrell replied moments later: “Thco, thanks very much. I’ll keep you posted – maybe, once I send the memo to Wayne, he may have some immediate reaction about Wisconsin and he may want to have some sort of quick synch-up call to get his questions answered. We can only hope . . .”
- After TCM asked what time he should plan to get to Dallas the following Monday, Ferrell replied that he should plan to be there in the a.m., “the earlier the better.”

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- Immediately thereafter, TCM believes (also on October 20th), TCM initiated a travel request through the Company's Travel Process Center to go to Dallas, TX on October 25th. (Travel Req. No. TRV1010202551).
 - In that request, TCM requested approval for travel to Dallas for a "meeting with Mr. Watts." TCM explained, in the appropriate section of the on-line form, that the consequences of having the request rejected would be "failure to effectively brief Mr. Watts on significant matter in advance of his meeting with Compliance Committee."
 - TCM added the following comments on the request: "This is a meeting that I have been asked to make myself available for personally by those preparing Mr. Watts' briefing on Monday. I have been strongly advise [sic] to appear personally to address Mr. Watts' inquiries."
- Shortly thereafter, TCM heard from Moore, by phone, that Barillari (and Rodewald) would be responsible for the briefing for Wayne, and that TCM was not to attempt to provide the briefing. At 1:02 p.m. on the 20th, TCM relayed that message to Ferrell. Moore did not suggest to TCM at that time that he, Moore, would be involved in the briefing as well.
- Ferrell replied to TCM: "Ok, I'm going to suggest in my email to Wayne that if he has questions, we should contact Ed."
- Shortly thereafter, at around 1:40 p.m., TCM responded to Ferrell, asking her for her contact number, which she gave by reply. TCM called Ferrell, and advised her of the directives from his bosses, and his further concerns about the developments. TCM confirmed by email at 2:15 p.m. the state of the directives.
- For the next couple of hours, Ferrell, Rodewald, Moore and Barillari engaged in emails with questions about various aspects of the underlying briefing points.
- Ferrell, at 5:13 p.m., sent a list of 7 questions to TCM that, apparently, no one was able to answer to that point.
- Feeling terribly concerned that evening, TCM went to bed at the hotel in New Jersey. TCM felt certain that Watts would not be properly informed and, indeed, might be misinformed in the briefing.
- At roughly 4 a.m. **October 21st**, TCM drafted "an options outline memo concerning the [LCP] matter" and distributed to Barillari, Epstein and Phillips. Knowing that neither of them had consulted TCM on his thoughts in this regard since the October 12, 2010 meeting, and given that a Watts briefing was obviously imminent, TCM felt he had no alternative but to ensure that he had

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discharged his duties as an attorney to present his views as thoroughly and concisely and appropriately as possible.

- The memo was completed by 8:40 a.m., and TCM sent it to the distributees at that point. TCM was still at T University training and immediately re-joined the training session (which, ironically, was themed around being “pro-active” and “taking charge” and “taking ownership” of moving the company’s business forward) after sending the email.
- At 9:18 a.m., Moore entered a “Denial” of TCM’s travel request in the Travel Request Process Center’s on-line system. His comments were as follows: “Other arrangements will be made to address questions.”
- At 11:57 a.m. (Barillari was apparently in Dallas, so the time was 10:57 a.m. Eastern), Barillari forwarded the memo to Moore, asking him “what is this?”
- Moore asked TCM, at 11:05 a.m. Eastern, to send Moore the memo Barillari was asking about. TCM did so around 45 minutes later.
- At 1:56 p.m. on the 21st, Ferrell sent an email to Paula Poe, asking her for Watts’ “availability for tomorrow, “because she was “trying to coordinate a call with Theo Marcus, myself and Wayne.”
- Poe indicated moments later that Watts would be available “7:30 a.m. – 10 a.m. and 1-4:00 p.m. tomorrow, October 22nd.”
- At 3:08 pm (on Oct 21st), Ferrell forwarded to TCM, asking if a call at 8:30 a. m. eastern was “ok with my schedule.”
- However, Ferrell then sent another email to TCM setting the conference call with Watts, but advising TCM to forward the meeting information to “whoever you believe needs to attend in addition to you and me.”
- On these instructions, TCM was compelled to send the notice to Moore and Barillari, which he did at some point that afternoon/evening. **Thereafter, TCM got a call from Moore indicating Barillari’s desire that TCM not participate in any call to brief Watts.**
- **At 4:01 a.m. the next day, Friday October 22nd, TCM advised Ferrell that “there was some confusion as to whether Mr. Watts will be expecting me to attend this call. Unless I am directed by Mr. Watts or Mr. Barillari that I will not be needed for this call, I will plan to attend as requested by Mr. Watts.”**

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- At 7:28 a.m. the next morning, October 22nd, TCM forwarded a copy of his options memo to Ferrell under “Eyes Only” cover, stating: “this is background that I hope is helpful.”
- At 8:21 a.m., Ferrell forwarded TCM’s 4:01 a.m. email to Moore, Barillari and Epstein, as “FYI.” Immediately thereafter, Moore called TCM indicating Barillari’s instructions that TCM was “forbidden from attending the call.”
- At 8:23 a.m., on October 22nd (seven minutes before the call with Watts was to begin), Moore sent an email to Marcus, cc to Barillari, stating: “Theo – I’m handling the call. You should not attend.”
- At 8:24 a.m., TCM asked Poe and Ferrell to advise “whether my non-attendance on Mr. Watts’ call is acceptable.”
- Two minutes later, Ferrell replied: “Theo – I don’t think you need to attend.”
- At 8:31, Ferrell responded to TCM’s email attaching the options memo earlier that morning, stating: “Thanks Theo.”
- About 25 minutes later, TCM sent an email to Ferrell requesting she give him a call when she got free.
- Ferrell responded hours later: “been tied up on calls all day. The call with Wayne went well. Brian provided the update and Wayne is prepared. If I catch a break in my schedule, I’ll try to give you [a] call.” TCM never heard from Ferrell. Subsequent calls to Ferrell were un-returned. TCM did not speak with Ferrell again until the most recent Legal Department conference, March 2011, when she approached TCM and introduced herself.
- Later that day, or perhaps the next, Moore called TCM to chastise him about the memo, and to challenge the provenance of the memo, TCM’s motives in writing it (Moore attacked it as a plan for personal gain, among other things), and the efficacy of the recommendation for an internal review. Moore did not address any of the merits of the memo, however, preferring to stay on an ad hominem offensive, and to toss out that the internal review suggestion “was shot down by Watts” when it was floated in the meeting. Of course, TCM could not challenge the truth or accuracy of the statement, nor could TCM check the context, assuming it was “shot down.” In any event, TCM was convinced that Watts did not see the memo, and did not get a fair presentation of the overall approach, or even the “stress test” idea. The conversation ended as follows: (1) TCM

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apologized to Moore for not sending the memo to Moore first; and (2) Moore told TCM that “Wayne would have shot off your nuts if you had brought that idea up.”

- Source: E-mails between and among TCM and multiple parties, Travel Request Process Center Log TRV1010202551, TCM recollections, and TCM Notes, 10/15/2010-10/22/2010 (Tab ^B-^XYZ, and ^^1-^^13)

Between October 22, 2010 and March 2011

- Thoroughly demoralized, TCM moved forward to address himself to his matters. TCM now felt beaten down for having made a strong, principled effort to assist the company in the brewing LCP storm. Worse, without question at this point, TCM was convinced that his bosses were corrupt, and willing to go to great lengths in pursuit of their personal agenda.
- When the end of year review process came around in December, TCM was still smarting from the treatment leading up to October 22. Moore, by then, had had a vicious rant at TCM's expense over the Pildis matter, and was further executing even more vicious directives from Barillari to “put Theo on the bench” in the Pildis matter for alleged failings of TCM, despite TCM's efforts to rescue a lost case in only a few months time that had been in Montgomery's care for two years and which was ruined well before TCM came on board, and with respect to which Montgomery gave instructions not to overreact to Marelo's witness problems (which turned out to be deadly, as assumed). TCM accepted all these indignities, and more, with grace.
- When submitting his “significant accomplishments memo”, however, TCM decided to do precisely that: list those accomplishments that were, in fact, significant; i.e., that related to the highest value representation that TCM had provided in the time frame: (1) the LCP Petition development and filing; (2) the establishment of a joint defense agreement and joint defense team including Verizon, AT&T, and now Century Link; and (3) the October 12, 2010 presentation to the government and run-up efforts to that meeting.
- On or around March 4, 2011, Moore sent TCM his performance review (which otherwise appears to have been completed in December 2010). In this flagrantly hostile, retaliatory and meritless document, Moore and Barillari viciously and abusively maligned TCM on the *Pildis* and *Niles* matters, without commenting whatsoever on the “significant accomplishments” TCM had submitted to them. Moore had already conveyed his and Barillari's desire to have TCM write up his time sheets going forward so that they “would know what TCM was working on,” which was a uniquely nasty jab at a 20-year veteran attorney with TCM's accomplishments and experience.
- Further, even though TCM had provided a copy of his significant accomplishments memo to G. Phillips, in whose organization TCM was a member for the entire first quarter of 2010, Phillips did not, and apparently was not allowed to, submit any

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comments or thoughts into TCM's review. Phillips preceding evaluation had TCM rating in the '4s' overall, with a notation that TCM "met most, and exceeded some expectations." Barillari's and Moore's evaluation averaged around a "2" across the board, with only a '3' in diversity (presumably some comment on, or nod to – TCM is unsure -- the fact that TCM is Black).

- But, what was most interesting in the "evaluation" to TCM was not so much the declaration that despite 20 years of practicing law, TCM had no leadership potential and was not an "effective litigator," yet despite these criticisms, but that it would nonetheless be useful and recommended for TCM to remain in the group under its supervision and guidance for "2-3 years."
 - The 2-3 years triggered TCM's thinking, for the first time, that Barillari might have some personal concern about criminal false statements liability.
 - TCM reviewed the limitations period for 18 U.S.C. § 1001 and confirmed that it was 5 years.
 - TCM then re-looked at the materials from the July 8, 2008 presentation to the government, as that was the target time frame (*i.e.*, going back 5 years from roughly mid-2013, which would be the end of the prescribed TCM "supervision" period).
 - At this point, around March 7, 2011, TCM observed, for the first time, that Barillari and Montgomery were named on the power point document from the July 8, 2008 meeting, and thus TCM clearly was able to frame in his mind that they were actual sponsors of the statements made in that meeting, even though TCM did not know what was actually said in the meeting. This established a predicate for personal exposure to criminal liability for those statements, which occurred to TCM for the first time.
 - This realization placed Barillari's conduct into an understandable context, and also created overwhelming concern about Barillari's furtive behavior and transparent consciousness of wrongdoing, as described, in part, herein.
- On March 8, 2011, Moore phoned TCM and left a voice mail message regarding a recent meeting at the FCC's Enforcement Bureau attended by T. Hoskins and M. Henze. The subject of the meeting was a concern the FCC was expressing about the Company's compliance plan LCP submissions, and particularly the Company's methodology for certain price analyses. Although the matter had long since left the care and portfolio of the Litigation group, Barillari (and Rodewald, apparently), through Moore, was making serious inquiry about these events, and Moore was charged to find out from TCM what happened.

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- In his voice mail, Moore stated:

“Somebody apparently, I believe the situation was that somebody added a note about the meeting that Terri and Christopher had last week with the FCC to Wayne’s Hot topics list and of course I’ve been bombarded with questions since then by Ed and April . . . They don’t seem to get that nothing’s really happened yet, but . . . hey look do me a favor, just get your thoughts in a row, get your ducks in a row – it’s entirely possible that you and I will be beset upon when we’re down there in Dallas with questions about what happened at the meeting . . . and the fact that we’re keeping an eye on things and what could happen next, you don’t have to do anything crazy just be prepared to discuss that if it comes up. I’ll probably catch up with you at some point just to have us be on the same page in case we are approached or of course the real answer is they should talk to Heimann and Hoskins . . . but that would be to fucking easy, anyway, I did want to give you the heads up. I’ll send you the email chain so that you have it, no need to respond. I just want you to be aware that this got a little attention.”
- Source: Voice mail from B. Moore, 3/8/2011 12:29 p.m.
- March 9-11, 2011, TCM attended the Legal Department conference, still trying to figure out what steps to take, if any, with this new realization. There, TCM confirmed when reviewing the Department face guide, that Barillari had 27 years with the company (thus, was less than 3 years from having a full 30 years; although TCM is not aware of all of the significance of that milestone, its coincidence with the 2-3 year timeline proposed by Barillari for TCM’s supervision, and the remainder of the limitations period, was interesting).
- Moore met with TCM on March 10, 2011 to “go over” the written evaluation. TCM did not protest the writing at that time, other than to observe to Moore that it was “harsh.”
 - Moore advised TCM that Barillari had made numerous entries in the evaluation, despite not being TCM’s supervisor and despite having very little direct interactions with TCM throughout the period.
 - Moore stated that Barillari had insisted on significant negative commentary on the *Pildis* matter in the review, and had written several portions of the review himself.
 - Moore clearly attempted to distance himself from some of the harsher aspects of the review, and pointed out that he had argued with Ed in order to keep TCM on the *Pildis* case after Barillari insisted that “TCM be put on the bench.”
 - Moore also observed that TCM’s “performance had significantly improved in the first quarter of 2011.”

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- The conference ended March 11, 2011. Moore never mentioned the Indiana developments that he had left a voice mail about on March 8th (see above).
 - Source: TCM's Notes and Recollections
- After the Legal Conference, TCM was still under the impression that Watts had been made part of the decisions and directions over which TCM was principally concerned, and that a misstep in dealing with the revelation that Barillari and Montgomery were lead voices before the Government on July 8, 2008 might backfire terribly (*i.e.*, keeping in mind Moore's "Wayne would have shot your nuts off" comment from October). But, after Watts insisted to the audience of lawyers that he had "an open door" for any concerns the lawyers had, TCM determined (after consulting the DC Bar Professional Rules of Conduct and the ABA Model Rules) that it was necessary to attempt, one more time, to bring these matters to light.
- Accordingly, on March 15, 2011, TCM advised Watts of his concern about attorney misconduct involving Barillari, Montgomery and Moore.

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- On March 9, 2011, TCM attended the Legal Department conference, still trying to figure out what steps to take, if any, with this new realization. There, TCM confirmed when reviewing the Department face guide, that Barillari had 27 years with the company (thus, was less than 3 years from having a full 30 years; although TCM is not aware of the significance, if any, of that milestone, its coincidence with the 2-3 year timeline proposed by Barillari for TCM's supervision, and the remainder of the limitations period, was interesting).
- Most importantly, TCM was still under the impression that Watts had been made part of the decisions and directions over which TCM was principally concerned, and that a misstep in dealing with this latest issue might backfire terribly (i.e., keeping in mind Moore's "Wayne would have shot your nuts off" comment from October). But, after Watts insisted to the audience of lawyers that he had "an open door" for any concerns the lawyers had, TCM determined (after consulting the DC Bar Professional Rules of Conduct and the ABA Model Rules) that it was necessary to attempt, one more time, to bring these matters to light.
- Accordingly, on March 15, 2011, TCM advised Watts of his concern about attorney misconduct involving Barillari, Montgomery and Moore.

- Watts asks TCM: "Why are you bringing this up now?"

Next

- 1st mil. \$ internal investigation by White Collar Firm (Gibson, Dunn -- called a "special counsel" investigation) into TCM's allegations
- TCM in room for 3 days of intense questioning; 2-way mirror; hundreds of docs. Multiple witnesses interviewed.
- Unknown to TCM at time, AT&T preparing to announce merger -- biggest in wireless industry, major move
- TCM allegations & subject matter would have poisoned atmosphere for DOJ/FCC merger review
- Merger subsequently announced T-Mobile takeover bid (\$40 bil. - largest deal of 2011) a few days later.
- A few weeks later, Watts advises TCM through Draxel, that investigation could not ⁴⁴ conclusively find wrongful intent by Barillari and co.
- Then

TAB B

(Affidavit)

LAB 8

CONFIDENTIAL -- DRAFT

The undersigned, Theodore C. Marcus, General Attorney for AT&T,¹ hereby swears, affirms and attests to the following:

1. That on Friday, April 22, 2011, I advised (and am continuing to advise) AT&T that *it should disclose in its upcoming quarterly SEC filing (10-Q), and all future similar SEC reports (10-Q, 10-K, etc.), in an appropriate fashion, the existence of the pending "Independent Counsel" investigation (see, e.g., the recent report on the CompUSA whistleblower internal independent counsel investigation, in which CompUSA reported the existence of that investigation in its annual report 10-K)*² into allegations I have made about potential criminal and other wrongdoing by Ed Barillari and Suzanne Montgomery with respect to their roles and statements in relation to the federal government's Indiana Intelenet investigation, and Brian Moore, with respect to his role in punishing me, in Ed Barillari's and perhaps other officials' behalf, as a "whistleblower" concerning these matters;
2. That I advised "Independent Counsel", by "FYI" copy, of my effort as described above on April 22, 2011, and that *I am now advising "Independent Counsel" that it has a role in ensuring that the Company makes a legally valid and appropriate determination of its obligations to report the existence of the "Independent Counsel" investigation in its 10-Q, and thus have placed "Independent Counsel" on notice of its potential duties in that regard;*
3. That I have asked, and am continuing to ask, responsible officials in the AT&T Legal Department *to provide me -- at the Company's expense -- with competent counsel* to assist me in identifying, assessing and determining all issues associated with my abilities to provide appropriate, effective legal service to the Company and its shareholders in the present environment, including, but not limited to, (1) assessing potential conflicts of interest arising out of the subject matter, (2) assessing my duties to report and/or escalate matters arising out of the subject matter (both the allegations of criminal false statements and also the underlying but separate issues relating to the Company's compliance with the FCC's E-Rate "LCP" rules over the past 14 years), and (3) establishing an appropriate set of boundaries and protocols to ensure that I can practice law in behalf of the Company without fear of further reprisal and hostile activity by way of "Performance Reviews", travel and expense reviews, or other mechanisms of abuse, and that the

¹ All of the material in this Affidavit is the sole product of the undersigned. The undersigned has authored this Affidavit without advice, input, or guidance from any other person.

² See article at http://www.miamiherald.com/2011/04/18/2174125/president-of-compusa-tigerdirect.html?story_link=email_msg.

Company can suitably supervise me without engaging – knowingly or otherwise – in misconduct with respect to that supervision;

4. That I have orally advised the Company, repeatedly, and specifically in writing on October 21, 2010, *that it should conduct an internal review of its E-Rate LCP pricing compliance throughout its history of participating in the program, across its entire GEM organization, across all pre- and post-merger entities, across all Priority 1 and Priority 2 categories, across wireline and wireless services, and across both its ILEC footprint and states outside of that footprint;*
5. That I am advising the Company, and have suggested before, that a substantial number of persons in the Legal Department have “skin in the game,” that is, are associated with, or have exposure associated with, the Company’s problems with LCP compliance, *and that it is appropriate for the Company to ensure that no such persons, or persons they control via reporting relationships, supervise my work, or provide input to others to be used for evaluation of my work and performance;*
6. That I am concerned that the Company’s Legal Department may be actively attempting to selectively gather and selectively frame information for the purpose of *identifying so-called “deficiencies,” while ignoring positive performance (e.g., the 2010 review in which the Company refused to consider any of the “significant achievements” for that year, and further refused to seek or permit any input from my prior supervisor, despite the fact that I had served in his organization for the entire first quarter of 2010), and even ignoring entire evaluations in which my overall performance was identified as “Meets Most and Exceeds Some Expectations” (2009);*
7. That I am advising the Company’s Legal Department that it has a duty to provide honest, prudent and ethical service to its organizational client, the GEM organization, *which may include advising that organization’s leadership of any long-term failure by the Legal Department’s to provide advice, counsel and guidance on the Company’s LCP obligations, thereby exposing members of that organization (and its various predecessor organizations’ members) to exposure for multiple violations of those requirements, and to take all steps to provide counsel to affected individuals in the GEM organization so that they can have adequate representation, as needed, in addressing themselves to those exposures – which representation, in my judgment, should be paid for by the Company unless there are strong reasons for not doing so in any individual case;*
8. That I have provided specific, detailed documents and information to the Company’s “Independent Counsel” investigating the matters described above *that definitively establish that Suzanne Montgomery (with Ed Barillari directing her) and Mary Henze were the principal authors of the Company’s*

strategy for negotiating with the FCC toward a Compliance Plan to resolve the Indiana matter in late 2008 and early 2009, that my role was quite limited in that regard, and that, in fact, I was on vacation the first critical week of January in which much of the strategy for negotiations with the FCC over the Compliance Plan was formed, and initial consultation with the FCC took place and, thereafter, was in a very limited role on those matters as Montgomery (under Barillari's direction) took the full lead on all issues both within the Department and before the FCC in the Company's behalf. To the extent that there is any question as to my role before the FCC on these matters, or statements I made or that were made in my presence by others (e.g., the Henze conference call I attended in early 2009 with the FCC's EB, which I described in last week's interview with "Independent Counsel"), I am hereby requesting that the Company so advise me of such concern(s), and immediately provide a limited waiver of attorney-client and related privileges it may believe are in effect, so as to permit me to clarify such statements to the FCC's Enforcement Bureau and remove any potential taint associated with those statements – even though, as I have repeatedly stated, I am certain that I have neither made such misstatements, or permitted them to be made in my presence. If the Company does not so advise me of its position to that effect immediately, the Company's silence constitutes total agreement with my substantive position, thus described.;

9. That I have advised the Company, through its "Independent Counsel", that if the Company chooses not to discipline Barillari, Montgomery and Moore, including but not limited to, *removing them from the Company* and reporting them to their respective Bars and to the federal government if that is appropriate, *then I wish to have the Company waive all privileges that it may believe bar me from making such reports as described in the event that I determine it is my obligation to make such reports, and I am hereby renewing that request;*
10. That at the outset of the present "Independent Counsel" investigation, I provided the Company, through its "Independent Counsel," with a 45+-page chronological narrative and full set of source documents (a binder approximately 8-9 inches thick) describing the matters underlying my allegations and fully validating my "concerns" about wrongdoing by Barillari, Montgomery and Moore (and others, possibly), and have further endured sixteen (16) hours and counting of intense questioning, in person, concerning these matters (including with respect to LCP compliance). I have submitted these materials and evidence without the benefit of counsel, and without requesting or demanding counsel for these ends;
11. That I am hereby renewing my request that the Company make available to me competent legal counsel, at the Company's expense, to assist me and the Company in exploring an appropriate resolution of my current and future role in the Company for my benefit, and for the benefit of the institution to which

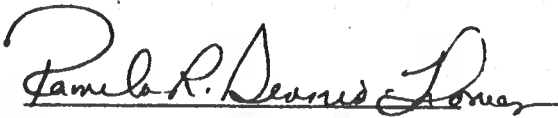
my legal obligations and duties run. It is unquestionably prudent for the Company to make such counsel available, and exceptionally ill-advised to refuse to do so, or to attempt to force me to retain such counsel at my own expense, when all of the causes for the need for counsel owe to the conduct and failings of the Company and its Legal Department, not me; and

12. That I am hereby *requesting, in behalf of the Company's shareholders, that the Company not engage in any efforts to discredit and/or punish me for bringing these and related matters to light*, and for acting in my best judgment and good faith in the premises. In this regard, I am appropriately concerned about potential missteps, some of which are detailed herein, that the Company is making, or may make, in handling these issues and in dealing with me.



Theodore C. Marcus, Esq.
General Attorney, AT&T
April 25, 2011

4/25/2011



(Notary)

April 25, 2011

**Pamela R. Dennis-Thomas
District of Columbia, Notary Public
My Commission Expires
September 14, 2016**

TAB C

(Acknowledgment)

7A/8A

Confidential – Acknowledgement Re: Initial Consult

April 28, 2011

I, Scott Shepherd, on behalf of myself and my firm, Shepherd Finkelman et al., hereby acknowledge the following:

1. That the meeting taking place today between myself and [J. Doe], and any future meetings or conversations as may be necessary to supplement today's meeting, is an *initial consultation* between a prospective client [J. Doe] and myself;
2. That the purpose of said *initial consultation* is for me to determine whether I, and my law firm, can and will offer to provide legal representation to [J. Doe];
3. That every aspect of today's and any future meetings, including the fact and date of the meeting itself, the actions taken to cause the meeting to take place, the nature of the subject matter, the substance of the meeting and communications therein, Doe's name, Doe's physical description, the place and time of the meeting, and anything I observe about Doe, are part of the scope and definition of the *initial consultation*;
4. That all matters within the *initial consultation* are subject to attorney-client privilege, including this Acknowledgment;
5. That any persons within my firm with whom I share information about the subject matter of the *initial consultation* shall be shown, and must sign, this Acknowledgement **before** any such information is shared;
6. That if, at any point, I believe or determine that I may have any cause to question the propriety of the attorney-client privilege concerning the *initial consultation*, I shall so advise Doe immediately and the *initial consultation* shall be terminated at that point. All matters, as described, up to that point shall remain subject to attorney-client privilege. Any failure by me to assert such cause or concern shall constitute full waiver of that concern and any right I or my firm may have to assert that I or the firm should be permitted to disclose any part of the subject matter of the *initial consultation* to any third party; and
7. That this Acknowledgment is fully binding on me and my firm, regardless of the nature and scope of any inquiry by any person or party or entity into any aspect of the *initial consultation*.

Scott Shepherd

[John Doe]

TAB D

(Servanthood)

18A

D-1

(Mentoring through Sport)

https://fredericksburg.com/sports/high-school/tennis/article_d09396fb-bf93-4882-a583-fc58b8ad481b.html

ALERT TOP STORY

High school fall sports preview: Marcus begins new chapter as FCS starts up new tennis program

Alex Murphy

Aug 23, 2025

G Prefer us on Google



New **Fredericksburg Christian** head tennis coach Theo Marcus described the timeline of events leading up to his hiring in January as a perfect storm, a “divine intervention” of sorts.

“It’s not a simple fit,” Marcus said. “... (AD Jonathan Crawford) had to be patient and the opportunity presented itself when people that I knew who knew him said ‘Hey, you would be perfect.’ ”

Formerly the tennis coach at Riverbend, a program that he helped reach **Virginia High School League (VHSL)** state finals and produced a number of college talents, Marcus was brought back into the sport at the high school level this year. It was an opportunity he couldn’t pass up with the Eagles.

People are also reading...

- 1 **Stafford man’s babysitter obsession results in prison term**
- 2 **Man pleads guilty to attack on waitress in Spotsylvania**

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PROGRESSIVE





Members of Fredericksburg Christian's girls tennis team practice with head coach Theo Marcus, left-center.
COURTESY OF THEO MARCUS

Tennis is a sport that FCS has been looking to integrate into its athletics department for some time, but the school wanted to find the right time and the right person to do so.

Marcus was exactly the person they were looking for and on the other side of the coin, Marcus found the ideal program for him to get back into coaching in the area.

"I realized that I still had something left in the tank for this," Marcus said. "There were a lot of families and kids in the community that had my back. It didn't feel right to stop (coaching). It felt right to keep going."



Fredericksburg Christian's girls tennis team is set for the inaugural season this fall.

COURTESY OF THEO MARCUS

It's going to take time for the Eagles to build a foundation and develop from there, but upon his hiring, roughly a dozen girls came out to try out and join the team, which is set to begin its inaugural season in September.

Marcus was both surprised and encouraged by the turnout. It could spur interest for the future addition of a boys tennis team either this year or next spring.

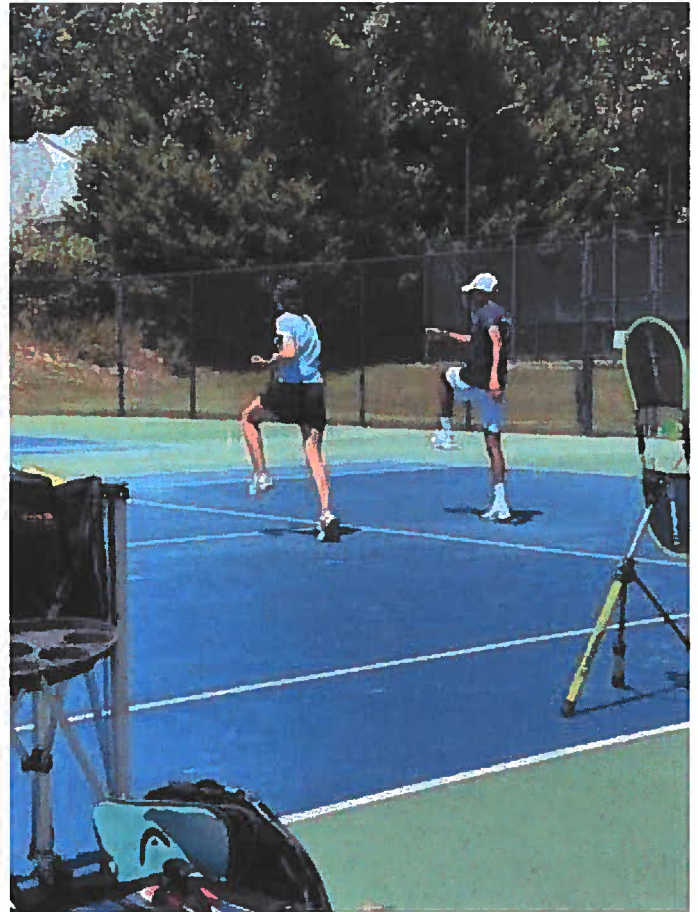
"For a small private school, that's a lot of kids who came out," Marcus said. "... (The boys) are going to watch these girls fly and say, 'Hey, I want to be a part of that.' "

Right now, it's a multi-year plan to success for the Eagles, starting with building friendships and chemistry this fall.

Next season, Marcus said the focus will be standards, setting the foundation for what's to be expected moving forward, and in year three, the focus will be achievement and success.

The girls team has been training all summer for this fall season and there's a newfound excitement for everyone involved to finally get things going next month.

"They're all very excited about the opportunity to develop the life skills that come with this unique sport," Marcus said. "I'm happy to be a part of teaching them."



Members of Fredericksburg Christian's girls tennis team warm up during the summer, getting ready for their inaugural 2025 season.

COURTESY OF THEO MARCUS



Light fixtures on the USTA courts in Flushing Meadows are designed to cut light pollution. The stadium complex is the only professional sports venue certified by DarkSky International, a group trying to preserve the night sky across the globe. (AP Video: Mary Conlon)

Alex Murphy

amurphy@freelancestar.com

@AlexMurphyJour on X

By Alex Murphy

Sports reporter

Coach Marcus Is Again Seeing the Horizon

The travesty that was the Riverbend High School swim program carried down, but couldn't drown, Theo Marcus. At Fredericksburg Christian School, he is preparing : a new day.

JAN 29, 2025



3



1



Sh



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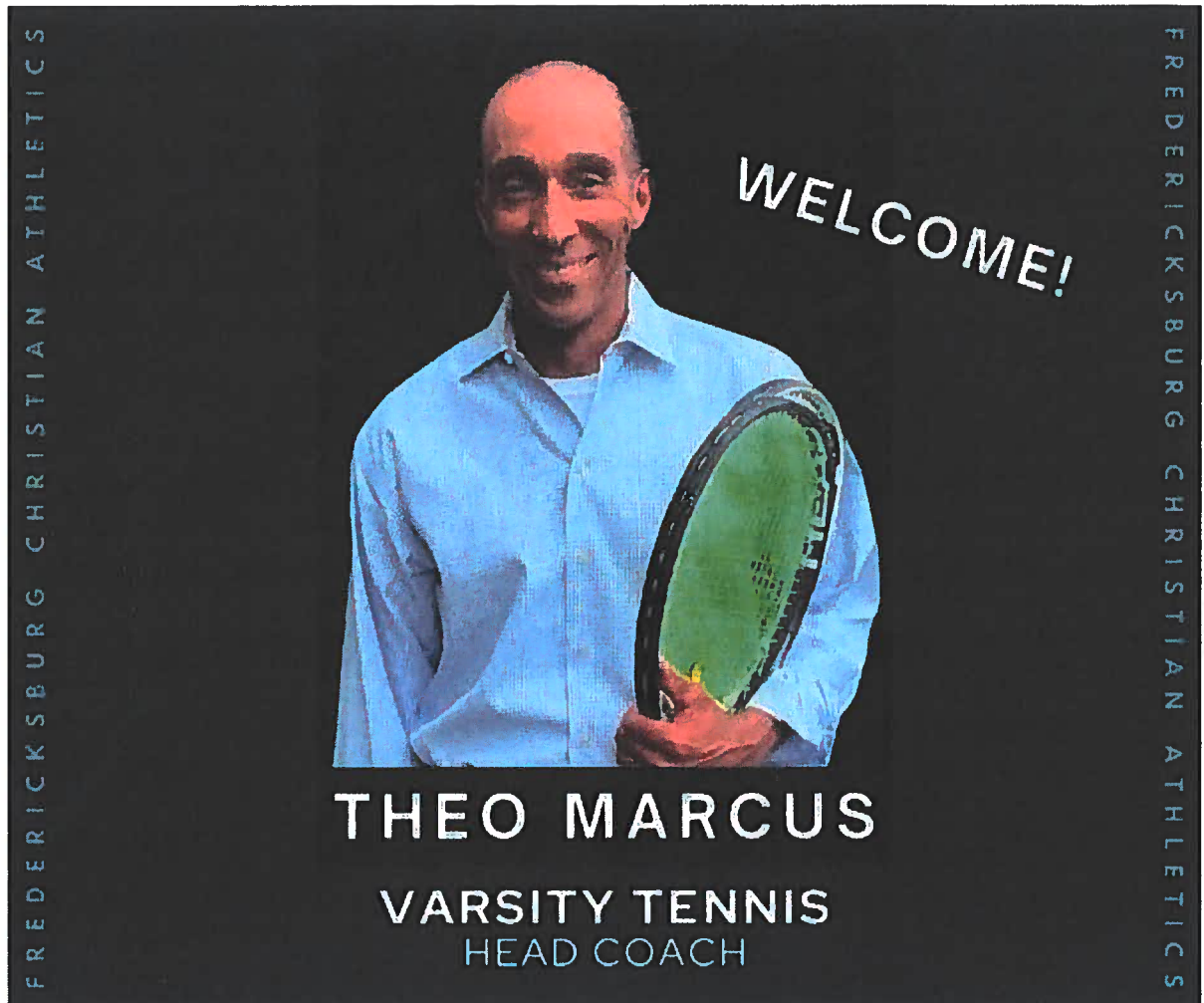
By Martin Davis

EDITOR-IN-CHIEF

Email Martin

*If you can force your heart and nerve and sinew
To serve your turn long after they are gone,
And so hold on when there is nothing in you
Except the Will which says to them: "Hold on!"*

— From *"If,"* by Rudyard Kipling

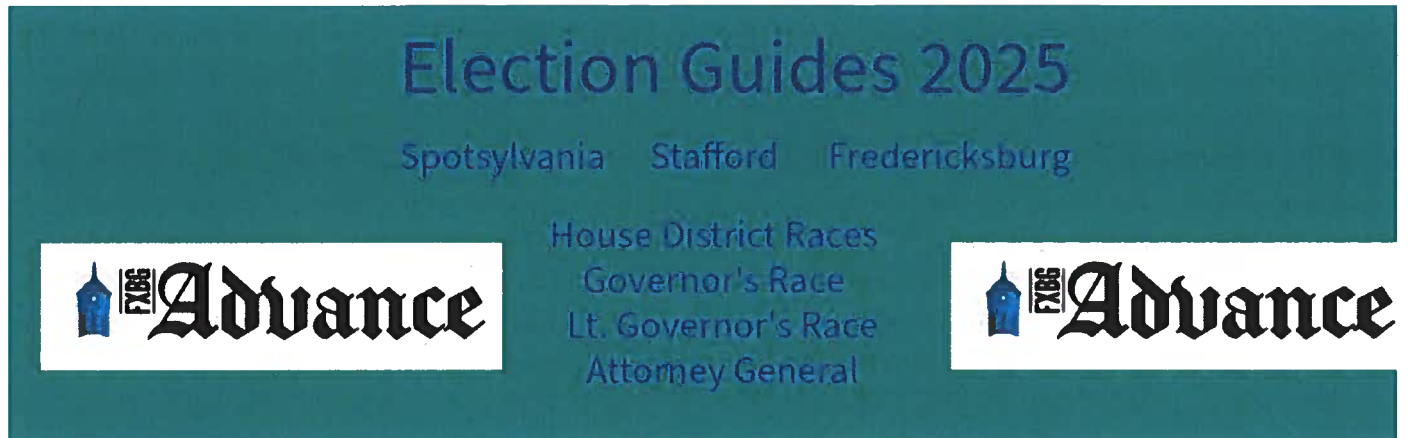


In the span of less than a month, Theodore Marcus watched as the Riverbend Swim team went from zenith to nadir in the late fall of 2023.

The collapse of that program brought Marcus to some challenging times, but he ha held on.

And now, he is again staring at a horizon, ready to build a new pathway for young people to stretch themselves athletically, learn to play collectively, and grow religiously.

This week, Fredericksburg Christian School announced that Marcus will be the school's new tennis coach.



The challenge before him at FCS, however, is about far more than the game of tennis.

It's about preparing young athletes to lift up humanity and embrace the struggles that life will bring through the Christian faith that is the burning heart of Marcus' life.

Tennis is the tool he will use.

A 'Protective Halo'

When Marcus first got into the game, his family was "very much on hard times," he told the Advance.

"My father, a WWII vet, was in the hard part of alcoholism. We were on food stamps and public assistance, and everything else."

His sister's boyfriend gave Marcus and his brother two wooden rackets for Christmas one year. They went to a local court with broken glass on the surface, and no ball to

— just the rocks they found lying on the ground.

[Subscribe](#)

Eventually, they discovered a ball in a trash can, fished it out — an old, bald ball, he told the Advance, and in the twilight of its usefulness — and started hitting it “as if were hitting rocks.

“I’ve been hitting that ball with that spirit for 48 years.”

The game of tennis, Marcus said, was the one thing he and his brother did that “didn’t involve having to run from people or fights” in his DC neighborhood.

“There was some kind of protective halo over that that I didn’t recognize at the time, but I absolutely knew that it was a gift, and I’ve only come into great understanding of that with time.”

Becoming ‘Coach’

Playing tennis would be a constant in his life; coaching was not.

The seeds that led him to become a coach, however, were planted early in life by his mother.

Marcus told the Advance that “In the last couple of weeks of her life, she said, ‘Beaver,’” calling him by his nickname, “stay connected to your church, and always make a contribution to your community.”

He has done both. But giving back through coaching is a recent change.

“The coaching piece wasn’t part of the deal,” Marcus said.

However, in 2019 his son Noah died unexpectedly, and coaching became the integral part that brought “all of those elements ... together.”

Marcus says in the weeks and months following his son's death, "I could feel the despair. I remember when I was at home and the pandemic was starting. ... I was on the edge of a pit," working to make sure "I didn't fall in."

He went on, saying: "I just started crying, and cried out to the Lord and said you've to give me something to do for you."

Shortly thereafter, he learned that there would be no tennis program at Riverbend because there would be no coach. He called the school, and "that's how I got into it

Marcus says that he "applied [himself] to that mission with all of the energy that [he has] for my son. People don't get it," he continued, "and I'm glad they don't. I don't want anyone to know what this feels like."

The situation that unfolded in late 2023 at Riverbend took coaching away from him. Marcus, however, needed to carry on.

"The joy I bring to coaching is in two parts," he told the Advance. "First: The love I have for my son. Second: The love I have for the Lord who loves me back."

What the Game Teaches

Life, as Marcus well knows, can be trying in the extreme. Tennis, he says, is a game that imparts the wisdom young people will need to face, and rise above, those challenges.

"In tennis," he says, "each person has to carry their own load. And to do that, players quickly learn there are no shortcuts."

The game is "thoroughly undermined by cheating," Marcus said. "You know you're getting better if you cheat. There's a gravitational pull toward doing it the right way. You don't have referees to regulate your cheating."

And the game itself is a struggle.

“There’s nobility in the struggle,” he said, “and all that it takes to struggle correctly. Good foot work, good racket preparation, hit the ball in the strike zone, and have a proper swing path, and impart good spin. That’s called shot-making.”

One also doesn’t undertake the game alone. In team tennis, it’s critical that all players support one another. And learning to lift up your teammates delivers its own critical lesson. It’s a course in how to encourage humanity within your own struggles.

“You’re going to have forced and unforced errors [in life],” Marcus said, “but in the end, humanity is lifted up. And that’s what tennis is about. It’s an ideal template for a young person walking in Christ’s way.”

Ready to Fly

Marcus is ready for this new beginning. The girls season begins in the fall, and the boys in spring 2026. But the work begins now.

FCS, Marcus says, has what it needs to fly — “Plenty of young people who want to get into the game and play at the varsity level.” It also has a coach who is confident in the discipline but is also a Christian disciple.

There’ll be no shortcuts for this program. And results will not be the goal. Rather, the attention, now and as long as Marcus is there, will be on the process — of proper strokes, positioning, shot-making, and supporting and building up one another.

“If the focus is on the results,” Marcus says, “you lose the process. But if you focus on the process and it’s a good process, you get good results.”

Marcus has known struggle, and loss, and love. And he will use tennis to teach a group of young Eagles to begin to fly and stay aloft as they navigate their own challenges in the years ahead.

It's a good process.

Marcus' life is evidence of that.



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SPORTS

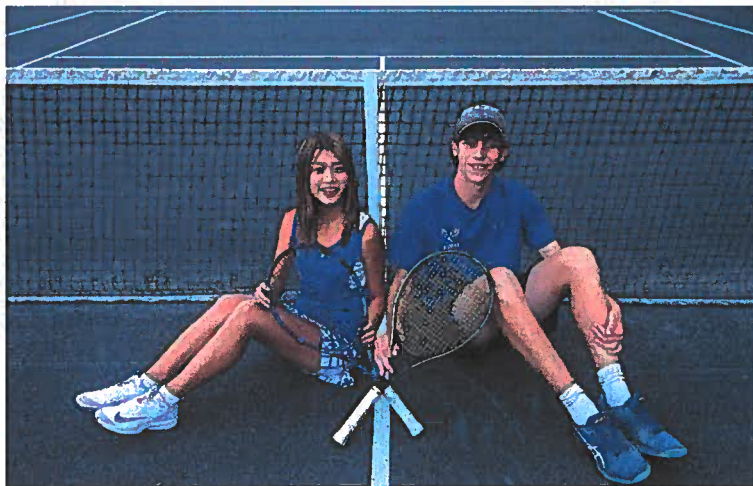


«NATS WIN TEXAS SERIES
Tennant is solid in his third career start
and he gets some help from Bell, Cruz. B2

WATSON TO LEARN HIS FATE?
Reports indicate Browns quarterback
will be meeting with the NFL this week. B5

INSIDE

SPRING ALL-AREA: TENNIS



Riverbend's Kendal Chang (left) and Alex Wexler are The Free Lance-Star's All-Area tennis players of the year.

Wexler, Chang served up strong encore seasons

BY STEVE DUSHAZO
THE FREE LANCE-STAR

Match points tend to leave the most lasting impressions. For Jack Wexler and Kendal Chang, their remarkably successful sophomore seasons ended with a bittersweet feeling—and motivation.

The Riverbend High School classmates accomplished plenty this spring en route to their second straight All-Area player of the year honors.

Wexler reached the VHSL Class 5 state singles and doubles finals (with fellow sophomore Chase Catullo). And Chang led the Bears to their second straight Commonwealth District girls' team title and a spot in the state tournament while also advancing to the Region 5D singles final.

Their only singles losses came in their final matches of the year, against eventual state champions, and have already spurred preparation to try to take the next step as juniors in 2023.

"It definitely leaves you thinking a little bit," Wexler said of his 6-3, 3-6, 7-5 loss to Princess Anne junior Harrison Lee in a marathon state singles final. "I'm trying to look at it as a positive, and to help me improve for future matches."

Likewise, Chang sees room for growth after falling 6-1, 7-5 in the Region 5D title match to fellow sophomore Bella De Lulse of Independence, who went on to win the state crown.

"I learned I need more weapons in my bag," she said. "My

SCHEDULE

SPRING ALL-AREA

This week, The Free Lance-Star unveils our spring All-Area sports teams. Here is the schedule:

TODAY: Tennis
Tuesday: Lacrosse
Wednesday: Track and field
Thursday: Softball
Friday: Baseball
Saturday: Girls' soccer
Sunday: Boys' soccer

Riverbend teams, Marcus described growth from both of his prize pupils—and the work ethic to get even better.

"They came in with high expectations, and they blew them away," Marcus said. "It's a testament to the work they put in during the summer to facilitate shorter points and more efficient matches. They were both more efficient."

Marcus credits improved serving for both players' success. Chang added movement and spin, while Wexler focused on velocity.

As a freshman, "the only slice Kendal knew was a pizza," Marcus joked. "This year, she really had a lot more range: topspin, flat serves and underspin. It was really a huge upgrade."

SEE TENNIS, B3

Rebels' 1st NCAA crown is truly wild

BY ERIC OLSON
ASSOCIATED PRESS

OMAHA, Neb.—Mississippi scored twice on wild pitches in a three-run eighth inning and the Rebels won their first national baseball title, sweeping Oklahoma in the College World Series finals with a 4-2 victory Sunday.

The Rebels (42-23) became the eighth national champion since 2009 to come out of the Southeastern Conference, and the trophy will stay in the Magnolia State for a second straight year. Mississippi State won the championship last year.

SEE BASEBALL, B7



Rebels players pile atop each other in celebration after beating the Sooners Sunday.

RESULT

NCAA COLLEGE WORLD SERIES
(Best-of-three series)
Sunday's Game 2
Mississippi 4,
Oklahoma 2
(Rebels win Series, 2-0)

In England, a case of who's here, who's not

BY HOWARD FENDRICH
AP TENNIS WRITER

TENNIS

WIMBLEDON, England—At least at the outset, before a tennis ball is struck, this edition of Wimbledon is as much about who—and what—is missing as who's here.

And that's even taking this into account: It is no small matter that the grass-court Grand Slam tournament marks the return of Serena Williams to singles play after a year away.

The No. 1-ranked man, Daniil Medvedev, was barred from competing by the All England Club, along with every other player from Russia and Belarus, because of the war in Ukraine.

"It's a mistake," International Tennis Hall of Fame member Martina Navratilova said about the ban. "What are they supposed to do, leave the country? I wouldn't wish that on my worst enemy."

Novak Djokovic, the No. 1 seed and three-time defending champion who will play in the first match in Centre Court on Monday, looked at the situation this way: "It's really hard to say what is right, what is wrong."

"As a child of a war—several wars, actually, during the '90s, I know what it feels like being in (the Ukrainians') position," the 35-year-old from Serbia said. "But at the other hand, I can't say I fully agree (with deciding) to ban Russian tennis players, Belarusian tennis players, from competing indefinitely. I just don't see how they have contributed to anything that is really happening. I mean, I don't feel it's fair."

The two professional tours reacted by pulling their ranking points from Wimbledon, an unprecedented move in a sport



Novak Djokovic has sympathy for both the Russian and Belarusian players who can't play at Wimbledon.

built around the rankings in so many ways. In turn, some athletes opted not to show up, including 2014 runner-up Eugenie Bouchard and four-time major champion Naomi Osaka.

For others, though, it was a no-doubt-about-it decision to show up. This is, after all, Wimbledon, with its unique surface and long-standing traditions, its powerful prestige and—let's face it—tens of millions in prize money.

"It's definitely hard to swallow that there are no points. I'm not going to sit here and tell you I'm happy

TUNE IN

CHAMPIONSHIPS at WIMBLEDON
All-England Club,
Monday-July 10
(ESPN)

about it. But the cards are dealt. At the end of the day, if I tell my mom I'm not playing Wimbledon, she'd be like, 'Are you nuts?!' So I'm going to go, no doubt," said Frances Tiafoe, an American who is seeded 24th in the men's field. "It's out of everybody's hands. It's a tough

SEE WIMBLEDON, B7

Chun holds off Thompson to win Women's PGA

BY NOAH TRISTER
ASSOCIATED PRESS

BETHESDA, Md.—In Gee Chun was an upbeat, smiling presence throughout the Women's PGA Championship—easy enough when you shoot 64 in the first round and lead comfortably for much of the tournament.

In the final round, all of her positive thinking was put to the test.

"Golf is never easy," the 27-year-old South Korean said.

Chun won her third major championship, playing her best in the first round on a wet day and then persevering through a steamy weekend at Congressional. On Sunday, she quickly lost what was left of a once-sizeable lead, then rallied to win by one when Lexi Thompson's putting faltered down the stretch.

Chun shot a 3-over 75 on each of the last two days of the tournament. She finished at 5-under 283.

SEE GOLF, B7

GOLF



In Gee Chun gives her major trophy a kiss.

TUNE IN

Here are the top finishers in Sunday's final round of the Women's PGA Championship at Congressional Country Club in Bethesda, Maryland:

1. In Gee Chun 283 -5
2. Minjee Lee 284 -4
3. L. Thompson 284 -4
4. Ashlyn Theildt 285 -3

Full leaderboard, B4

SPRING ALL-AREA: TENNIS

PLAYERS OF THE YEAR



JACK WEXLER
Riverbend

The sophomore earned Class 5 runner-up honors in singles and doubles (with Chase Catullo), going unbeaten in both until the state finals.



KENDAL CHANG
Riverbend

The sophomore went 17-1 in singles, falling one win short of the state semifinals, and went 16-1 in doubles with Maya Jani.



NOLAN BREWSTER
Massaponax

The senior posted a 10-4 record at No. 1 for singles and reached the regionals in singles and doubles (with Cameron Jennings).



CHASE CATULLO
Riverbend

Unbeaten in singles in two high school seasons, he went 15-0 as a sophomore (including 3-0 at No. 1) and was state doubles runner-up.



MICHAEL FOLEY
Brooke Point

The Black-Hawks' senior posted an 8-5 record at No. 1 singles and reached the Region 5D tournament quarterfinals.



MAX FRIETAG
King George

Bouncing between No. 1 and 2 singles, the senior class salutatorian posted a 10-2 record on the season for the Foxes.



BYRCE JOHNSON
Eastern View

The lone senior in the Cyclones' starting lineup set the tone at No. 1 singles, helping Eastern View reach the state semifinals.

COACHES OF THE YEAR



PRESTON WILL
Eastern View

His Cyclones won the Battlefield District boys' team title, were Region 4B runners-up and reached the VHSL state semifinal round.



THEO MARCUS
Riverbend

After going unbeaten in the Commonwealth District, his Bears were Region 5D runners-up and reached the girls' state quarterfinals.

GIRLS' TEAM



GRACE BURNER
Massaponax

The junior finished 14-6 at No. 1 singles and reached the Region 5D semifinals and also posted a 14-4 mark at No. 1 doubles.



COSTY CUMAN
Culpeper

An exchange student, she was Region 3B runner-up in singles and also reached the regional doubles semifinal round.



MAYA JANI
Riverbend

She's 23-0 at No. 2 singles in her two varsity seasons, including a 14-0 mark this spring, and reached the regional doubles semifinals.



PALOMA MARCUS
Riverbend

Playing behind two talented sophomores, she went 15-0 at singles, playing as high as No. 3, and 10-1 in regular season doubles.



MIRANDA MCCOY
Eastern View

The Cyclones' junior won Battlefield District and Region 4B singles titles and qualified for state competition.

HONORABLE MENTION

BOYS

Xavier Atkins, Caroline
Sam Emerson, Stafford
Connor Franklin, James Monroe
Julius Ferlazzo, Eastern View
Charlie Holewa, Caroline
Cameron Jennings, Massaponax
Hudson Luke, Culpeper
Tim Oravec, Stafford
Boone Orton, Colonial Forge
Bryce Putney, Colonial Forge
Nathan Scharf, James Monroe
Gavin Seely, Culpeper
Josh Shradar, Eastern View
Lucas Umberger, King George
Trey Williams, Brooke Point

GIRLS

Ainsley Ayers, Eastern View
Lauren Bata, Culpeper
Michelle Choi, Colonial Forge
Chandler Gustard, Caroline
Brooke Hyldahl, Massaponax
Sophia Long, Riverbend
Bella McDermott, James Monroe
Victoria Rios, Brooke Point
Isabelle Rouse, Stafford
Linnea Rouse, Stafford
Terry Scaife, King George
Madison Shea, Courtland
Bree Squiers, Orange
Mackenzie Watkins, Courtland

TENNIS

► FROM B1

The result was fewer long rallies and conservation of energy that kept the diminutive Chang fresher against bigger opponents, especially on busy weeks that included three singles and doubles matches.

"You don't want to mess with anything that's working," Marcus said, "but her body and her style of play didn't match. She needed to win shorter points."

It paid off when Chang rallied after dropping the first set 6-0 to Riverbend's Maddie Tran in the regional semifinals before taking the next two sets by 6-4 scores. "That was a really big accomplishment," she said.

A day later, Chang struggled early against De Luise before making things interesting in a 6-3, 7-5 loss.

"She really had something going," Marcus said. "She was moving [De Luise] around, and she was confusing her. I would have liked to have seen what would have happened in a third set."

Wexler did get to a decisive third set in the boys'

Class 6 final and held serve to make it 5-5 before Lee won eight straight points to claim the title. Wexler fell just short of joining James Monroe's Scott Grimmer (2003) as the only local state singles champions.

"I definitely noticed [Lee's] legs were cramping a little bit," Wexler said, "... but I think the biggest difference was that he played some of the bigger points better."

Part of the reason for Wexler's progress as a sophomore was improved strength from 6:30 a.m. summer workouts and a more powerful serve. He and Marcus spent two hours one evening at the Fawn Lake courts, standing at the net and pounding the ball straight down, trying to clear the fence behind the far baseline to improve power and wrist pronation.

"I think there's another 15-20 mph available on his serve," Marcus said. "That would be a big leap, and it could come any day now, and he could be absolutely lethal."

Both players will now spend the summer working on their games—Wexler at the Gomez Tennis Academy in Florida,

Chang locally and at a college showcase event in New Jersey.

Neither has lost a singles or doubles match to a local opponent in two varsity seasons, but there are tougher tests elsewhere in the state. Marcus would like to see Chang add a few pounds of muscle to com-

pete against taller foes, and preaches the value of pre-match nutrition to Wexler.

It may seem like nipping at two players who have experienced little adversity so far, but both have set high goals.

"What we're talking about with Jack, and Ken-

dal as well, is they're trying to build a legacy for the school, the program and the community. Those are big things to put on the shoulders of a 15- or 16-year-old. But he wants to put Riverbend on the map."

Steve DeShazo: 574-5443
edeshazo@freelancestar.com

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Fredericksburg Christian Athletics's Post



Fredericksburg Christian Athletics

January 27, 2025 · 🌐



The FCS athletic department is excited to announce that Theo Marcus has been hired as the new Boys and Girls Varsity Tennis Head Coach. Theo has over 45 years of tournament tennis experience. He was the varsity tennis head coach for both the boys and girls programs at Riverbend High School from 2020-2022 and has led both individuals and teams to the state finals.

Theo is a senior attorney and Legal Advisor at the Federal Communications Commission. He has been practicing law for 30 years. He and his family are members of the Wilderness Community Church where he has served on the praise team for many years. Welcome, Coach Marcus!



THEO MARCUS

VARSITY TENNIS
HEAD COACH

FREDERICKSBURG CHRISTIAN ATHLETICS

FREDERICKSBURG CHRISTIAN ATHLETICS



Comment as Theodore Marcus



https://fredericksburg.com/sports/columns/article_45a93b96-f393-11ed-919a-77fc3972a462.html

TOP STORY EDITOR'S PICK

STEVE DeSHAZO: Courtland transfer Kozhoev has aced every test so far

Steve DeShazo

May 15, 2023



Courtland's Keldibek Khozoev prepares a backhand return against Eastern View's Julius Ferlazzo during Monday's Battle of the Bricks tennis match. Photo by Tristan Lorei, The Free Lance-Star

 Prefer us on Google



Steve DeShazo

⊗
If anyone was concerned about Keldibek Kozhoev's assimilation into American culture, just ask him about his favorite meal.

"I love Chick-fil-A," said Courtland High School's Kyrgyzstani tennis import, proving he could pass for a native-born teenager.

"After every away match, he's always asking, 'Can we stop to eat?' " Cougars coach Alicia Knowles said with a laugh. "It's safe to say he has adjusted."

Besides developing a taste for fast food, Kozhoev has feasted on local competition as he prepares for tougher tests that lie ahead at the regional and state level. The junior wrapped up an unbeaten Battlefield District season with a 6-2, 6-2 victory over Eastern View's Julius Ferlazzo -- the only district player to take so much as a game from him -- in Monday's singles final at the University of Mary Washington.

People are also reading...

- 1 **Former resident gets 30 years for sexual assaults on girl**
- 2 **More charges filed in Fredericksburg shooting death**
- 3 **Suspected fraudsters from New York busted in Stafford**
- 4 **U.S. conducts further strikes on Iran**

Not bad for a guy who took up tennis just four years ago and who arrived in the states last August, just as the school year was beginning, with a limited English vocabulary.

"He's a really strong player. Big serve and a big forehand," said James Monroe coach Marshall Wood, himself a former Battlefield champion at his alma mater. "He has a lot of potential to be a strong college player. He's a little raw around the edges, if he finds a coach that can round him out a little bit he will definitely compete at a high level in college."

With few such options in his native Kyrgyzstan, a former Soviet Republic, Kozhoev got a visa and joined his sister Nargiza Wilcox's family in Spotsylvania County to pursue a future in tennis.

He grew up playing soccer and basketball and practicing martial arts in the Kyrgyzstani capital of Bishkek, but got his first taste of tennis while attending private school in the Dominican Republic at age 13. After barely a month of practice, he won his first tournament, beating players with far more experience. He decided that tennis was his future, but needed better coaching than he could get at home.

One of his sister's neighbors happened to know former Riverbend coach Theo Marcus' wife and set up an introduction. Marcus and longtime friend George Cheng became Khozoev's mentors, working on the finer points of a game that already featured plenty of power and athleticism.

"He's extremely athletic, and he's a bit of a savant," Marcus said. "He'll take what you're trying to tell him and apply it right away. He can mimic and tweak it."

Proof of that came in a couple of recent practice matches against Jack Wexler, a two-time Free Lance-Star player of the year at Riverbend who's spending his junior year at Gomez Academy in Naples, Fla. to improve his own game in hopes of a college and pro career.

Wexler dusted Kozhoev in their first meeting 6-0, 6-0, after which Kozhoev and Marcus huddled for a frank assessment of his play.

"It was mostly my unforced errors," Kozhoev said. "(Wexler) played really smart and capitalized. We sat down and analyzed my play, and Mr. Theo told me I needed to be more aggressive in finishing points."

Less than a week later, Kozhoev followed the new game plan and split two sets before dropping the tiebreaker.

"(Wexler) was really frustrated," Kozhoev said. "I sensed him getting really mad."

Even as Kozhiov absorbs lessons, he's also learned to share them. Knowles said that even as he immediately moved to the top of the Cougars' ladder, he has helped improve the level of his teammates' play as well.

"He's a good teammate," Knowles said. "Any time he plays with someone, he always gives them tips. He's not at every practice, but when he is, he encourages everyone on the team."

He's now fluent in English, one of several tongues he has mastered. Said Marcus: "He's kind of brilliant."

Of course, the universal language in sports is winning, and that education never ends. Kozhiov had mixed results at a Mid-Atlantic Tennis Association Level 5 junior event over the weekend at UMW against more experienced players. And he knows that tougher high school opponents like Lightridge's Sid Dabhade, the 2022 VHSL Class 4 runner-up, are awaiting him in the weeks ahead.

Marcus has been preaching the mental side of the game and trying to get Kozhiov to come to the net on every short return, the better to use his wingspan and powerful overhead. Then it's on to the summer tour, where Kozhiov hopes to earn the attention of Division I college coaches.

Marcus' goal is also to raise the overall level of youth play in the Fredericksburg area. If Wexler returns to Riverbend in the fall, he could join Kozhiov and the Bears' current No. 1, Chase Catullo, to form the deepest and most talented high school trio the area has ever seen.

Said JM's Wood: "From my competitive perspective: Do I wish I had a player like that? Absolutely, but I also am glad we have someone like that to play against. ... Having someone like Kel that is going to push their limits is encouraging for our team as well. You have to beat the best to be the best."

Steve DeShazo: 540.374.5443



S.O.L.A. SOCCER

CAMP 2012



Meet the Instructors:

Sophia Marcus

Hi! I'm Sophia, I'm 14 and a rising 10th Grader at The Potomac School in McLean, Virginia. Our house is right here in Fawn Lake, and I have two little sisters (Rachel, 8 and Paloma, 5) who are going to be in our camp. I've been playing soccer since I was 4! I'm a midfielder on the Varsity Girl's Team (Olivia and Laura are my BFFs AND my teammates!), which is one of the annually ranked teams in the Washington Post's "All Met" Rankings. In addition, I also am a starter at striker on the U-15 WAGS D.C. Metros Blue travel soccer team. I've played in so many

REPORT A 104

THE 9MAD

1. The purpose of this report is to provide a summary of the results of the study conducted by the 9MAD. The study was designed to evaluate the effectiveness of the 9MAD in detecting and identifying threats in the field. The results of the study are presented in the following sections.

2. The study was conducted over a period of six months, during which time the 9MAD was deployed to various locations in the field. The results of the study are presented in the following sections.

3. The results of the study show that the 9MAD is capable of detecting and identifying threats in the field. The 9MAD was able to detect and identify threats in the field with a high degree of accuracy. The results of the study are presented in the following sections.

4. The results of the study show that the 9MAD is capable of detecting and identifying threats in the field. The 9MAD was able to detect and identify threats in the field with a high degree of accuracy. The results of the study are presented in the following sections.

games, practiced soooooo many times, and gotten instruction from some of the best coaches in the area that I just can't wait to share what I've learned with the kids at Fawn Lake, just like I do when I tutor kids in D.C. I think soccer is huge fun, especially if we do it the right way, practice being good sports and learn good conditioning and safety habits. I'm so excited about this summer. Let's rock out!

Olivia Kobayashi

Hey, Fawn Lake Kids and parents! My name is Olivia. I'm 15 and a rising 10th Grader at The Potomac School in McLean, Virginia (Go Panthers!). I play left/right defense (winger!) for the Varsity Girl's Team with Sophia and Laura. Like Sophia, I play soccer year around and have been playing since I was five. The extra play that I've done with travel teams in Great Falls and Reston, Virginia has really helped sharpen my skills. I can't wait to meet the campers and help them learn to shoot, dribble, pass and mark like little beasts on defense. And, oh yeah, let's work on a good Fawn Lake cheer for next season, ok? See you soon.

Laura Persinski

AWWWWWO00000! Hello Fawn Lake Families. Are you ready for some SOLA soccer? I'm Laura, age 15, and a rising 10th Grader at The Potomac School. I play Forward and Center on the girl's Varsity Team with Olivia and Sophia – GO POTOMAC! I have a ball stuck on my foot or in my hand pretty much year round, because in addition to soccer, I also am a point guard on the varsity basketball team and a defenseman on the varsity lacrosse team. Soccer, though, is my real passion, and I've been playing travel soccer for FIVE years on top of school soccer. It is going to be so neat working with the Fawn Lake kids and showing them what I know about this "beautiful game," as they call it around the world. But it's not ALL about soccer, so I really am happy about the fun things we'll do during camp to make the learning and drills even more exciting!



The Action

We're going to help the campers become better soccer players. Even though this is only one week, we think every player will be able to operate with the ball, with either foot, more surely and with more purpose. We will help them receive the ball, dribble the ball under control, pass it to their teammates more sharply, and shoot the ball more crisply with both feet. Along the way, we'll scrimmage, drill, run, hydrate, stretch, and talk about the "mental side of the game"

(oh boy) in ways that really help kids learn without wearing them out. And, of course, we'll goof a little to keep things fun.

The Data

One week, four days, June 25-29 (*off day on Wednesday, June 27), 10:00 to 12:00. Girls and boys, ages 5-12 (*don't worry, we will ensure age and skill-appropriate training for all kids). \$40 per player (*Please make checks out to Theodore C. Marcus). Although we will supply balls (size appropriate) and other equipment, players are welcome to bring their own soccer balls if they want to. Players should wear cleats (not flats), shin guards and soccer length socks. Players should bring at least 24 ounces of cold water. Snacks will be provided (cheese sticks, gold fish, pretzels, for example), **but families decide if their children can eat any particular snack due to any food issues the players may have.* Camp begins promptly at 10 a.m. on the Fawn Lake soccer fields.

Getting In

Please email us at tcmarcus@live.com, or tmccardle@msn.com, or call Sophia's Dad (Theo) at (540) 972-0597 or (540) 623-2117 to enroll. Deadline for enrollment is June 18th, 5:00 p.m. **AND DON'T FORGET TO TELL YOUR FAWN LAKE FRIENDS!**

D-2

(FCC Public Service Excellence)



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Washington, D.C., November 11, 2024

A. Roark

Alejandro Roark, Bureau Chief
Consumer & Governmental Affairs Bureau
Federal Communications Commission



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Alejandro Roark | 11/11/24

D-3
(Community Appreciation)



Outlook

Fwd: A Collective Statement on Theodore Marcus

From Darren Long <darrenelong@gmail.com>**Date** Wed 1/31/2024 9:07 PM**To** Theodore Marcus <tcmarcus@live.com>

FYI

Begin forwarded message:

From: Darren Long <darrenelong@gmail.com>**Subject:** A Collective Statement on Theodore Marcus**Date:** January 31, 2024 at 9:06:04 PM EST**To:** kguempel@spotsylvania.k12.va.us, Lorita Daniels <ldaniels@spotsylvania.k12.va.us>, Nicole Cole <ncole@spotsylvania.k12.va.us>, Megan Jackson <mkjackson@spotsylvania.k12.va.us>**Cc:** Accousti Ken <Kenaccousti@yahoo.com>, Accousti Katherine <kaccousti@yahoo.com>, alberti meredith <albertimeredith@gmail.com>, Michael Bartlett <bartwing@msn.com>, Sun Bartlett <sunbart@msn.com>, Beecroft Kyla <superkyla@yahoo.com>, Beecroft Matt <mbeecroft@gmail.com>, jeet bhide <jeetbhide@hotmail.com>, Linda Catullo <lcatullo1@gmail.com>, Norman Chang <nchangmd@hotmail.com>, Chang Stephanie <nacs14@hotmail.com>, George Cheng <gchengmcv02@gmail.com>, ellenedwardscheng@gmail.com, Dayney Danielle <danielledayney@gmail.com>, Dayney Justin <Jdayneyesq@gmail.com>, Ellis Joanna <coryjoannaellis@msn.com>, frey dave <daveinspotsy@gmail.com>, Frey Tish <tish.frey@gmail.com>, hudson eleanor <ecjusino@yahoo.com>, "Jani Binoy R. MD" <brjani1@hotmail.com>, Mona Jani <monadjani@hotmail.com>, karrigoodsell@hotmail.com, kentjm@hotmail.com, Lisa Lapier <lisa_lapier@hotmail.com>, Gmail Robin's <rklong3@gmail.com>, Long Darren <darrenelong@gmail.com>, Rouse Charlotte <crouse@coldwellbankerelite.com>, Matt Sherman <Matt.sherman2@gmail.com>, Sherman Kelly <Kellybsherman@gmail.com>, chwalsh26@gmail.com, Watson Jerry <jerry.vt90@gmail.com>, Watson Melissa <melissa.vt90@gmail.com>, Wang Jodi <jodi4jesus@gmail.com>, "brianwexler@yahoo.com" <brianwexler@yahoo.com>, Wexler Tiane <tianewexler@yahoo.com>, Bruce Wexler <bewexler@gmail.com>, mkozhoeva@gmail.com

Dear SCPS School Board Members:

We are residents and families of Spotsylvania County with children who attend Riverbend High. We write this letter to support Theodore Marcus, a member of our community, a similarly situated parent, a Riverbend tennis and swim coach, and a long-time mentor to our children.

We continue to see, as I am sure you do, a deliberate and concerted online effort to defame Theo and destroy his reputation. This effort, led mostly by one person with an

apparent axe to grind (and others in her political orbit who have absolutely no knowledge of the situation), troubles us deeply. But because these allegations impugn his character, the signatories to this letter write to defend it.

Collectively and variously, we know Theo as a friend, a mentor to our children, a neighbor, and a coach. Most of us have known him for well over a decade. Some of us have vacationed with him. Some of our children have spent time at his house and his children at ours. We've traveled with him, his wife, and his daughters in buses, cars, and shuttles to school tennis matches and swim meets, to professional sporting events and tournaments, and to the future colleges and universities of our children. He has coached and mentored youth in this area on everything from tennis, to swim, to academics and college applications. We've played with him on tennis courts, and we know him from our churches and clubs, and we know him as a neighbor and friend. He has written recommendation letters for our children, motivated them in competition, encouraged them when they were down, and uplifted them in the face of many adversities.

In that journey, he has helped create players of the year and all area players in tennis, he has coached district champion, regional champion, and state qualifying tennis teams and players, and state singles and doubles finalists. And yes, he helped rebuild a swim team into a model of shared leadership, equity, and accountability.

Theo is not without fault. He gives too much of his time and effort and asks too little in return. He dedicates himself so immersively to causes that he fails to see when cynical forces align against him. That aside, there is no question but that Theo's character and reputation are impeccable in all of the spaces and communities he serves, and in the regard of those who know him well, or even casually. He is a consummate friend, a ready volunteer for any charity or cause, an upstanding citizen, and a selfless and devoted member of the community.

We hope you consider our words with the earnestness and seriousness with which we write. We invite you to reach out and speak to any of us if you so choose.

Thank you for your attention,
Friends and Colleagues of Theodore Marcus

Darren and Robin Long
Katherine and Ken Accousti
Meredith Alberti
Michael and Sun Bartlett
Kyla and Matt Beecroft

Jeet and Jennifer Bhide
Linda Catullo
Norman and Stephanie Chang
Ellen and George Cheng
Danielle and Justin Dayney
Cory and Joanna Ellis
Dave and Tish Frey
Eleanor Hudson
Binoy and Mona Jani
Michael and Karri Jantz
Jeff and Nicole Kent
Lisa and Sean Lapier
Charlotte and Jeff Rouse
Kelly and Matt Sherman
Cathy Walsh
Jerry and Melissa Watson
Jodi and Steve Wang
Brian and Tiane Wexler
Bruce and Susan Wexler
Clifton and Nargiza Wilcox

D-4

(Arts & Humanities)

2013 SESSION

INTRODUCED
REPRINT

13105196D

HOUSE RESOLUTION NO. 206

Offered February 15, 2013

Commending the Rappahannock Choral Society.

Patrons—Cole, Dudenhefer, Howell, W.J., and Orrock

WHEREAS, the Rappahannock Choral Society, a 73-voice, audition-only regional chorus, is dedicating its spring concerts on Mother's Day weekend, May 11 and 12, 2013, at Chancellor High School's auditorium in Spotsylvania County to a special remembrance of the Civil War and the 150th anniversary of the Battle of Chancellorsville; and

WHEREAS, to remember a war that cast brother against brother and friend against friend, the Rappahannock Choral Society will perform authentic songs that include period pieces expressing the feelings of Confederate and Union soldiers in battle and at rest, music from the home front, and songs from the Broadway musical, *Shenandoah*; and

WHEREAS, the Civil War concerts by the Rappahannock Choral Society will also include the Wilhousky arrangement of the "Battle Hymn of the Republic" as sung by the Mormon Tabernacle Choir; and

WHEREAS, some of the Rappahannock Choral Society's music will be familiar, some will be new; some songs will make the audience tap their feet to the beat and others will leave individuals with an ache in their hearts; and

WHEREAS, the Rappahannock Choral Society is under the award-winning artistic direction of Linda Monner, with the incomparable accompaniment of Marilla Haas; and

WHEREAS, these concerts are made possible in part by a grant from the Virginia Commission for the Arts and the National Endowment for the Arts and by the Rappahannock Choral Society, Inc., a nonprofit corporation that is a partner of Spotsylvania County Parks and Recreation, a Partner in Education with Spotsylvania County Schools, a member of the Fredericksburg Regional Chamber of Commerce, and a member of the Arts and Cultural Council of the Rappahannock; and

WHEREAS, the winners of the Rappahannock Choral Society graphic arts contest and the Anne Parker Memorial Scholarship will be recognized at the Saturday evening concert; now, therefore, be it

RESOLVED by the House of Delegates, That the Rappahannock Choral Society hereby be commended for their exemplary leadership as the premier community choral organization in Spotsylvania County and the Rappahannock Region; and, be it

RESOLVED FURTHER, That the Clerk of the House of Delegates prepare a copy of this resolution for presentation to the Rappahannock Choral Society as an expression of the House of Delegates' gratitude for the society's many valuable contributions to quality music education in the Commonwealth and best wishes in all future endeavors.

INTRODUCED

HR206

*TCM Note (6/30/26)

Marcus tenor soloist on "Go Down Moses"
For this event.

Theodore Marcus

From: Theodore Marcus <tcmarcus@live.com>
Sent: Monday, June 29, 2026 7:10 AM
To: Dean Manis
Subject: [EXTERNAL]: Fw: To Freedom--A Query from the Park Service
Attachments: Script for To Freedom.doc

CAUTION: This email originated from outside of the Federal Communications Commission. Do not click on links or open attachments unless you recognize the sender and trust the content to be safe. If you suspect this is a phishing attempt, please use the 'Report Message' feature in Microsoft Outlook or forward the email to the NSOC.

From: John_Hennessy@nps.gov <John_Hennessy@nps.gov>
Sent: Tuesday, April 10, 2012 9:40 AM
To: tcmarcus@live.com <tcmarcus@live.com>
Subject: To Freedom--A Query from the Park Service

(National Park Service official)

Mr. Marcus:

I was part of the effort to organize the Churches Remember program, and I admired very much FUMC's effort, and yours in particular. It was terrific all around.

We are working on a major event called "To Freedom," featuring Anthony Campbell, Jim Thomas, and a variety of other talents. The main event is the evening of May 5 (Saturday), down on the open space below city dock. The event will commemorate the crossing of 10,000 slaves to freedom during the spring and summer of 1862--a powerful human story. Our program that night will include music, poetry, the reading of names, and dramatic readings. It is for the latter that I write to you.

We have a number of quotes that I'd like to invite you to read as part of the program. I attach the script:

Page 5: Henry Brown
Page 6, William Grimes
Page 7: Henry Watson

No need for memorization....just your voice and your feeling.

We'd also be very happy if you joined in on the performance of the concluding song of the program. You have a terrific voice.

Might you be available to do it?

The commitment will entail the performance itself, plus a rehearsal on the evening of May 3. Because the program is scripted, it should be pretty

easy for people to follow.

We expect this to be a pretty compelling and important event. Let me know if this might work for you. Many thanks.

John Hennessy
Chief Historian/Chief of Interpretation
Fredericksburg and Spotsylvania NMP
120 Chatham Lane
Fredericksburg, VA 22405
(540) 654-5546
(See attached file: Script for To Freedom.doc)

To Freedom

Culminating Event: 7:30 p.m., May 5

Prelude: Shedding of the Stones

Rev. Hashmel Turner (summons forward all who bear stones)

We have borne these stones, symbolic of slavery, bound to the names of slaves who passed to freedom, to this place. For some of us, we do this as representatives of our forebears. For others, we do it with empathy for those who suffered enslavement. And for all, we carry the stones as symbols of the weight of slavery upon these people, this community and this nation.

Here and now, on the threshold of this river, at the very place where hundreds, perhaps thousands, crossed to freedom....

...We separate the names of the 208 men, women, and children whose names we know from the stones—symbolically separating them from their burden. [Audience removes the names.]

And we shed these stones, symbolically casting aside the weight and burden of slavery, a weight that has scarred this community and nation and so many within it. [Audience steps forward to cast the stones into a pile.]

We will use these stones, touched by you and symbolic of so much, to create a piece of public art—a memorial to freedom, a memorial to this night along this river.

For tonight we come together to celebrate their courage, their determination, and the path they blazed TO FREEDOM.

Drum Riff (African drums)

Reader—Jaraad Hines, James Monroe High School

From Langston Hughes

I've known rivers:

*I've known rivers ancient as the world and older than the flow
of human blood in human veins.*

My soul has grown deep like the rivers.

I bathed in the Euphrates when dawns were young.

*I built my hut near the Congo and it lulled me to sleep.
I looked upon the Nile and raised the pyramids above it.*

*I heard the singing of the Mississippi when Abe Lincoln went
down to New Orleans, and I've seen its muddy bosom turn
all golden in the sunset.*

I've known rivers:

Ancient, dusky rivers.

My soul has grown deep like the rivers.

Music—Anthony Campbell

Jordan River, by Vusi Mahlasela, performed by Anthony Campbell

<http://www.youtube.com/watch?v=A1l6-vyvW6M>

Narrator

Rivers were powerful symbols in the world of slaves. Sometimes they meant separation, fear. Slaves were often “sold down the river...”

But more often they were symbols of freedom to come—they, like the River Jordan, were a threshold to the Promised Land.

We stand today along the banks of the Rappahannock River, a river that fulfilled all the hopes and symbolism slaves had attached to rivers. In the spring of 1862—months before the Emancipation Proclamation—America had no greater gateway to Freedom than the Rappahannock. That spring and summer, as many as 10,000 slaves crossed into Union lines—undertaking a bold but uncertain journey.

Narrator

For these men and women and babies and toddlers and boys and girls, the journey to and across this river was the culmination of not just their own personal quest for freedom, but that of a People spanning generations.

As the first freedom-seekers rafted their way across, and as those who followed walked unsteadily over the pontoon bridge that stood at this spot and made their way up the distant slope, their ancestors surely cheered from on high—for those pioneers of 1862 fulfilled the hopes of many millions gone, people for whom freedom had been but a dream.

Music--Jim Thomas and choir

Good News: The Chariots are Coming

Narrator

For 243 years. Twelve generations of mothers and fathers watched their children grow up as slaves.

For 243 years slaves lived a life dominated by law and custom, afflicted by the fear of violence, tortured by the prospect of separation, and numbed by the unending toils of bondage.

Lifetime after lifetime. Silence was the required condition of slaves.

Laws that denied slaves learning did so to render them silent.

Laws required a white man present at all meetings—to impose silence.

The slave-owning world refused to recognize or record their births, marriages, deaths...or even their names. Silence.

Those voices that managed to trickle out met a society that had little interest in hearing.

And so...silence.

These were the imposed, required condition of America's slaves, weighing upon the spirit like stones.

And today, the silence of the slave reverberates like none other—as loudly as a falling tree...or a mother's cry. It has robbed history—it has robbed us--of a vital voice.

Our purpose tonight is to give them voice...to reclaim their humanity in the eyes of the nation...to learn from their courage and fortitude....to end their silence...to celebrate their spirit—their quest for freedom.

We start with their names. Of the ten thousand who crossed this river in 1862, we often know only a nickname...a trade...an age and a place of work...most unknown, though their descendants live among us.

Sunday School Union Reader 1 (From the Spotsylvania Sunday School Union)

Rose, 32, of Grafton Farm, Stafford

Kitty, 35, a washer and ironer, Fredericksburg

Willie Ann, an infant, Grafton Farm, Stafford

Jacob, with one eye, 55, of Boscobel, Stafford

Nancy Smallwood, Princess Anne Street, Fredericksburg

Lizzie, a delicate girl, about 17 years old, Princess Anne Street, Fredericksburg

Narrator

To understand the joy and hope that attended freedom, we must understand some of the pain that attended its absence...

Reader—Henry Brown

Though my body has escaped the lash of the whip, my mind has groaned under tortures that will never be related because language is inadequate to express them....The whip, the cowskin, the gallows, the stocks, the paddle, the prison...have no comparison with those internal pangs which are felt by the soul....

Narrator

Theirs was a life of tedium, of rhythms. Sow...tend...harvest. Cook...serve...clean. Heat...hammer...nail. Feed...groom...harness. Year after year, lifetime after lifetime.

S.J. Cordell-Robinson—Julia Frazier and Susan Jackson of Spotsylvania

We had to work from sun to sun. At night you could have meetings. Colored folks went to the white churches; couldn't have colored churches.....Pappy an' ma both lived on de same plantation. Ma was married on her 16th birthday an' had sixteen children.

At ten o'clock on work days dey would ring de bell an' dat was de sign fo' chillum to come fum the fiel'. Dey go back to de kitchen an' help Ant Hannah fix de food. She would take de cakes out.... De cook filled 'nother tray wid cabbage an' a bucket wid pot liquor. Den we take it all to de fiel', and de slaves lay down under a shade tree an' eat. Mos' times dey got half-hour, but nobody ain't gonna rush none. An' sometimes de ole overseer git impatient an' yell fo' de hands to come back to work fo' dey git done eatin'.

Narrator

Even children suffered tedium, devoid for most of any chance at education. John Washington, from whom you will hear often today, was a slave in Fredericksburg. He lived most of his youth in what is now the National Bank building on Princess Anne Street, a house servant to the operators of the Farmer's Bank.

Dominic Green—John Washington

I was dressed every morning (Except Sunday) in a neat white Apron and clean jacket and pants, and sent up to...see what Mistress might want me to do....I would be ordered to set down on a foot stool in her room for hours at a time when other children of my age would be out at play. Imagine a boy ... and many rollicking fun loving companions playing in full sight of the house on

*a bright Sunday morning ...and that boy only permitted to See all this from an open window....
Imagine...and you will have a very faint glimmer of my case at that time.*

Narrator

Law and custom limited movement, learning, and contact with family. But fear helped control too.

William Grimes from King George endured regular whippings until he escaped at age 20.

Reader—William Grimes

I had too much sense and feeling to be a slave; too much of the blood of my father, whose spirit feared nothing. I was therefore, perhaps, difficult to govern.... It indeed sometimes happened, that every morning I was taken and whipped severely for [an] act...when I was entirely innocent. ...It seemed as though I should not forget this flogging [even] when I die. It grieved my soul beyond the power of time to cure. I should not have been alive now if I had remained a slave, for I would have resisted with my life when I became older....

Narrator

Many slaves did not suffer physical punishment. But the punishment of one was often brutal and humiliating enough that it affected the behavior of all. Julia Sprow Frazier, after the war one of the most respected members of Shiloh Baptist Church, remembered how fear blunted her quest for education.

S.J. Cordell-Robinson—Julia Frazier

"My ma was cook, an' used to clean house. I liked dustin' part best 'cause I could git my hands on de books and pictures dat ole Master had spread out all over his readin' room....Dere was one book dat I was crazy about . . . didn't know nothin' of what it was 'bout, but it had a lot of pictures... One day while in de readin' room I heard a step comin' fum de kitchen. 'Fore I could move, de door open an' someone came in. It was Marsa. He looked at me an' saw what I was doin', but he never said nothin'. I closed de book up an' put it back in place. Was scared fo' many a day that I was gonna git a hidin'....Was a long time 'fore I fetched any more books.

Narrator

Some of us have come to this place tonight bearing stones—stones that symbolize the burden of slavery, stones that symbolize the powerful artifact on the corner of Charles and William—the slave auction block. Of all the fears of slavery, the pain of separation—sale—was perhaps the most intense. When Henry Watson of Caroline County was 11, his mother was sold.

Reader--Henry Watson

The last time I saw her, she placed me on the bed, which was in a room adjoining the kitchen, and bid me go to sleep, saying that she would be back again in a few moments. I did so; and when I awoke in the morning I found myself in the great house, wrapped up in a blanket, before the fire. I could not account for this change....

I asked for my mother, but no one spoke. I went out into the kitchen, where she used to work. She was not there, and it was evident to me, that she was gone; where, I knew not. I returned to the house, and implored my mistress, with tears in my eyes, to tell me where my mother had gone. She refused, though a mother herself, to give me any satisfaction whatever. Every exertion was made on my part to find her, or hear some tidings of her; but all my efforts were unsuccessful; and from that day have never seen or heard from her.

Narrator

All the legal and cultural efforts to dehumanize slaves—no given names, no marriages, no education, no freedom of movement, mandated submission—all built toward this moment, to make it possible for one human to dispense with another with little more moral thought than would be applied to the sale of a carriage or carthorse.

Sunday School Union Reader 2

Thornton 22 a good blacksmith, from Greenfield Plantation, Spotsylvania

Mary Agnace Upshur, 28, Greenfield Plantation, Spotsylvania

Silas Wright, 15, Greenfield Plantation

Addison Taliferrer, 46, Greenfield Plantation

Charles Henry 3, Greenfield Plantation

Music--Jim Thomas

You May Bury Me in the East"

Narrator

Fredericksburg, like America, wrestled with an immense inconsistency: the presence of oppression in a nation built on a foundation of liberty. This painful irony tormented the nation, and even affected some slaveholding residents in the region. After watching a coffle of women and children—chained and handcuffed—pass by her house on their way to steamboats waiting here at the town docks, one white woman recorded:

Woman's Voice

To day Finnall, the Negro trader, set off with a large gang of Slaves for the Southern Market. There were many women, girls and boys...the men coming afterwards. They were generally chained and handcuffed. Capt. Henry Philips, who lives very near us, has sold to this gang a little girl, twelve or thirteen years old, named Melinda, tempted by the high price, though he is rich. She was a favorite with those who knew her. My good neighbour, Mrs. Stevenson, told me that when [the girl] came to take leave of her 'every limb of her delicate frame trembled.'... I saw companies of females weeping as they walked before the Drivers, stopping occasionally as they proceeded to take leave of their relatives and friends as they met them.....

The frequency of these sales and the high prices offered by the Traders and above all the deadening effects of Slavery upon the feelings have steeled the hearts of the people to its enormity.

Narrator

Against this world, slaves resisted—sometimes overtly.

S.J. Cordell-Robinson--Susan Broaddus

I was serving gal for Missus. Used to have to stand behind her at the table and reach her the salt and syrup and anything else she called for. Ole Marsa would spell out real fas' anything he don't want me to know about. One day Marsa was fit to be tied, he was in setch a bad mood. Was ravin' 'bout de crops, an' taxes, an' de trifling niggers he got to feed. "'Gonna sell em, I swear fo' Christ, I gonna sel 'em,'" he says. Den ole Missus ask which ones he gonna sell an' tell him quick to spell it. Den he spell out G-A-B-E and R-U-F-U-S. Course I stood dere without battin' an eye, an' makin' believe I didn't even hear him.... As soon as I finished dishes I rushed down to my father an' tol' him [the letters] jus' like Marsa say em'. Father said quiet-like: "Gabe and Rufus." ... Next day Gabe and Rufus was gone—dey had run away.

Marsa nearly died, got to cussin' and ravin' so, he took sick.

Narrator

More often, resistance took more subtle forms. Time and space were the goal; quiet and family and occasionally adventure were the rewards. The pursuit of free moments often entailed cleverness, and sometimes outright trickery, as John Washington remembered.

Dominic Green—John Washington

Notwithstanding such stringent rules as there was laid down for me on Sundays, I resorted to deception in order to get a few hours play that was not allowed to me during the week. Often I would steal somebody's boat and with a lot of bad boys as I could find go up or down the river [for] a row instead of going to church.

I had the greatest love for the river and boats and such rides as I passed through then for fun I would not now undertake for any price.

Narrator

One day Washington skipped church to go swimming with some friends across the river in front of Chatham, one of the largest plantations in the region. The boys frolicked, but knew they were at risk. When one yelled, "Here comes the overseer," the scrambled out of the water.

Dominic Green—John Washington

All of us hastened out of the water to get our clothes and hide in the bushes. I unfortunately ran in some vines of "Poison Oak." We remained hid long enough to see there was no one after us. After playing among the wild flowers and Blackberrys till near Sundown, we went to our houses, most of us with a lie in our Mouths. All passed off well until the latter part of the following week, when I broke out all over with "Poison Oak."

Narrator

Young John even turned this bit of painful misfortune to his advantage.

Dominic Green—John Washington

The Doctor told Mrs. Taliaferro I had the humor in the blood and...advised that I be sent out in the country for a few weeks, in order to save my life. And as the Old Lady was awful afraid of sickness and the Doctors Bill, she concluded I should be sent to Staunton Virginia and allowed to

stay about 4 weeks with my family. I was delighted with the proposition and for fear she should change her mind, I very conveniently began to get sicker than ever.

But hearing her remark one day that she thought I was too sick to travel, I made haste to be almost well the next day...The meeting between Mother and Sisters and Brother was a most happy one.

Narrator

Slaves quickly learned that the appearance of contentedness was far less likely to bring the attention of an unhappy owner or overseer. And so, sometimes, they sang. Music would become a powerful part of the slaves' life. White owners and passersby heard the slaves' music and invariably saw it as a sign of their happiness.

Slaves used music as a form of resistance. Its symbolism gave hope. Songs sung in the field often set the pace of work. The slower the song, the slower the work—perhaps to match the pace of the slowest worker in the group. Later studies showed that as slaves, men and women were almost exactly 3/5ths as productive as they were later in life as freedmen—working for themselves rather than a master.

Music—Jim Thomas

Two numbers introduced and performed by Jim Thomas

Live-a-Humble

I woke up this morning with Freedom on my mind

Narrator

This constant struggle for dignity and freedom within the bonds of slavery marks the beginning of a journey that ultimately led to freedom itself, and eventually equality. It is the forgotten story of American history.

Boom of the Drum

Narrator

Throughout almost every slave memoir written or spoken by former slaves, one theme runs constant.

Freedom.

In April 1861, Southern guns fired on Fort Sumter, in Charleston Harbor, South Carolina, commencing a war that would render this river, the Rappahannock, historic and world famous.

While some might still debate what caused the Civil War, for the four million slaves in the South and in the border states, there was little doubt what the war meant. John Washington remembered the beginning of war joyfully, *"Little did they then think that they were firing the Death knell of slavery, and little did I think that my deliverance was so near at hand."*

Narrator

On April 18, 1862, Good Friday, the Union army arrived here on the Rappahannock. While white residents either fled or hid themselves, many slaves rejoiced at the arrival of the Yankees.

Dominic Green—John Washington

April 18th 1862. Was "Good-Friday," the Day was a mild pleasant one with the Sun Shining brightly, and every thing unusually quiet ...until every body Was Startled by Several reports of cannon. In an instant all Was Wild confusion as a cavalryman dashed into the Dining Room and said "the yankees is in Falmouth." Every body Was on their feet at once,

In less time than it takes me to write these lines, every White man was out the house.

*But every man servant was out on the house **top** looking over the River at the Yankees for their glistening bayonets could easily be Seen.*

I could not begin to express my new born hopes for I felt already like I Was certain of My freedom now.

Narrator

After the proprietor of the hotel fled, Washington summoned all the slaves working at the place.

Dominic Green—John Washington

I called all the Servants in the Bar-Room and treated them all around plentiful, and after drinking "the Yankees" health" I paid each one according to Orders. I told them they could go just where they pleased.

Within 2 hours from the firing of the first gun, every store in town was closed. Every White Man had run away or hid himself. Every White Woman had shut themselves in doors. No one could be seen on the Streets but the colored people, and every one of them seemed to be in the best of humors.

Sunday School Reader 1

Names

Narrator

After locking up the hotel, John Washington returned to his owner's house on Princess Anne Street. There, he found his mistress busily packing her silver for a trip to the country. "Child," she said to this 24-year old man, "you better come...to the country with me, so as to keep you away from the Yankees."

"Yes Ma'am," replied John Washington, and he went out the door into the excited streets of Fredericksburg. He would never return.

Narrator

The arrival of the Union army presented slaves with choices they had never before had.

To stay or to go?

This was no simple and obvious choice, for leaving meant leaving all one had known to venture into the unknown, into a society hardly ready or happy to receive them.

At Fall Hill, just above Fredericksburg, Hester and Abraham Tuckson faced a frightening choice. They had two small children, and Hester was pregnant again. Abraham wanted freedom—to cross the river to Union lines. But Hester would not go—would not subject her children to such risks. They made the clearly difficult decision to separate. He ran for freedom, with the promise to return to get Hester and the children.

Abraham did return, but was driven away by his owner. This husband and wife would never see each other again. Abraham enlisted in the Union army and was killed at the Battle of the Crater in 1864.

Hester remained at Fall Hill until the war's end.

Song: Dana Foddrell-Bland

Do Lord Remember Me

Narrator

Fannie Lee, a slave at Santee about 10 miles south of Fredericksburg, likewise decided not to run. And her calculation was carefully made. Like Hester a mother, Fannie decided to wait for freedom—and Union victory—to come to her. One day she angrily confronted her owners. God was in charge, she said. God was the Captain.

S.J. Cordell-Robinson

He started this war, and he's right in front...[and] our Captain ain' never been beaten. Soon He'll start out ag'in, and yo'll hear the bugle blow, and He'll march on to victory. I tell yo' we 're goin' to be a free people. You-all will be gittin' yo' pay sho' for the way you've done treated us poor black folks. We been killed up like dogs, and the stripes you've laid on us hurt jus' as bad as if our skin was white as snow. But I ain' goin' to run away or from my children in the river as some slaves have, for I'm as certain this war will set us free as that I stand here.

I tol' her jus' what I thought, and my mistress said, "Fanny, you is foolish," and my master said, "You ain't got no sense."

Narrator

Fannie Lee and her husband John had thirteen children. Union victory and freedom did come to them. After the war, they took up residence at what is today 228 Princess Anne Street. Fannie died there in 1918, age 96.

Narrator

Hester Tuckson and Fannie White stayed, but thousands of others did not. As word of the Union army in Stafford County and Fredericksburg spread, slaves from Spotsylvania, Caroline, Orange, King George came into Union lines; some even crossed the Potomac from Maryland. For many, it was a difficult, perilous journey. This slave came to Fredericksburg from Chesterfield County, south of Richmond.

Dominic Green—Unknown Slave

Five of us started for Fredericksburg, sixty-two miles distant. We made what way we could that night, and through the heavy rain of Sunday; but a river stopped us on Sunday evening. We turned into the woods and slept as best we could. In the morning three of our party seemed to give up, and I and another left them... At night we took the railroad, the bridges having been all destroyed.... It was hard travelling by day and night. We had many streams to cross and much trouble in crossing them. We soon became hungry, having brought but little food, and that having been spoiled by the rain... At 3 p.m. on Tuesday we spoke to some colored men at work in a field, and stayed near them till dusk, when they brought us food, our first morsel since Sunday. They told us that the white men had gone to Fredericksburg, fifteen miles off, to recover their slaves... Two of these people walked with us a couple of miles and put us on the right track. I gave one of them a Confederate five dollar note...which was no longer of use to me, at which he seemed to be very much pleased.

Narrator

That journey and a thousand like it soon brought a steady stream of freedom seekers to the banks of this river.

Voice—Union Soldier

They came in singly, by twos, and in squads; sometimes on foot, or in an old cart with a lank mule attached....I quartered and fed them in the basement of the Court House. Here they would sometimes form a large circle of boys and girls, join hands and dance, rocking right to left....and sing...They all seemed as happy as though they owned the town.

Narrator

Among the first of the slaves to cross the Rappahannock—in fact, perhaps the very first—was John Washington, the 24-year old who had grown up a slave in Fredericksburg. That Good Friday turned out to be the day he had been waiting for; it would be one of the great days of his life.

He, his cousin, and a free black man ventured from downtown up the Rappahannock to what is today Old Mill Park.

Of the thousands of slaves who crossed here to freedom that year, John Washington is the only one who left behind an account of his passage. It is his account that gives voice to the faceless thousands.

Sunday School Reader 2: Names

Dominic Green—John Washington

We left the town near the Woolen Mills and proceeded up the road leading to Falmouth, our object being to get opposite the "Union Camp" and listen to the great number of Bands then playing those touching tunes [like] "the Star Spangled Banner" and "Red, White, and Blue."

We left the road just before we got to "Ficklin's Mill," and walked down to the river. The long line of Sentinels [was] on the other Side doing duty close to the water's Edge. Very soon one of a party of Union Soldiers, in a boat called out, "Do any of you want to come [over]?"

Everybody said "no." But I hallowed out, "Yes, I want to come over,"

After we had landed on the other Side, a large crowd of the Soldiers gathered around Us and asked all kinds of questions... I told them I was most happy to see them all--that I had been looking for them for a long time.

Just here one of them asked me...

"Do you want to be free?"

"By all means." I answered.

I did not know What to Say for I Was dumb With Joy and could only thank God and Laugh.

This was the first night of my freedom.

[10,000 lights begin to march up the hill on the opposite shore]

Music—Jim Thomas and Choir

Oh Freedom...or Woke up this morning with my mind stayed on Freedom

Narrator

Over the next four months, 10,000 slaves crossed into Union lines at or near Fredericksburg. Many of them crossed the river on a floating bridge that stood at this site.

The bold act of these slaves—men and women whom society had for so long attempted to quell and silence—did more than just bring individual freedom. They challenged the nation. “Here we are! What now?”

Voice—Union Soldier

That strong attachment to "Massa" and "Misses", which I often heard it said at the North would lead them to...refuse freedom even if it were offered, I haven't yet happened to see. With one voice they breathe longing for a Northern home, eager to turn their backs upon their masters forever, if they can only carry their families with them. It is impossible to look upon these poor people, as abject [and] meek as they seem, so anxious to emerge from their condition of involuntary servitude...without feeling one's sympathies strongly enlisted. One finds the question rising involuntarily, Is not the negro a man?

Narrator

For days, weeks, the flow of freedom seekers continued. One soldier wrote, “Almost any hour, from the hill where I sit writing, one can count a half-dozen of them rafting their way across the Rappahannock, ‘comin,’ as they say, ‘to be free.’

Dominic Green—John Washington

Day after day the Slaves came into camp and everywhere that the "Stars and Stripes," waved. They seemed to know freedom had dawned to the slave.

Narrator

Many Union soldiers opposed emancipation as a policy; many were as profoundly racist as their Southern opponents. But when confronted by men and women seeking freedom, not even the most bitter among the soldiers could deny that the war, the Union army, and freedom had become inextricably linked. "No system of abolition could have swept away the system more effectually than does the advance of our army. Behind us the slaves, if they choose, are free."

Voice—Soldier

It would astonish you if you should see the number of Negroes a running around our and all the other camps in this vicinity. I would hardly believe there could be the number in Slavery in the whole of Virginia. They come across the river nights in Boats to get away from their masters. I saw a couple today who came some fourteen miles from here last night in the rain. They took a couple of their Masters Horses and rode in and then sold them for five Dollars a piece. And nice Horses they were too. The slave holders will not have one twentieth part of their Slaves left if this army should stay here....

Narrator

From the river, former slaves travelled north—10,000 on a trail to freedom, symbolized tonight by 10,000 lights on the north side of the river

Sunday School Union Reader 1: Names...

Lights and figures extend up the hill.

Narrator

Some stopped and took work with the army. More continued on, traveling in small groups, their belongings in wagons or push carts, winding their way north along the railroad to Aquia Landing. There they would board a steamboat for the final leg of their trek to Washington and beyond—to Freedom.

To be sure, the nation still called them “contrabands,” not citizens, and much work remained. It remained for the government to end its alliance with oppression; on January 1 1863, Abraham Lincoln signed the Emancipation Proclamation, ending our nation’s centuries’ old support of slavery.

When Dr. Martin Luther King stood on the steps of the Lincoln Memorial 100 years later, he spoke of his dream, but he also spoke of the basic freedom that underlay it.

Jaraad Hines—Martin Luther King

Five score years ago, a great American, in whose symbolic shadow we stand today, signed the Emancipation Proclamation. This momentous decree came as a great beacon light of hope to millions of Negro slaves who had been seared in the flames of withering injustice. It came as a joyous daybreak to end the long night of their captivity.

Dominic Green—John Washington

A Most MEMORABLE night it was when the Solders assured me that I was a free man...Before Morning I had began to feel like I had truly escaped from the hands of the Slaves Master and with the help of God, I never would be a Slave no more. I felt for the first time in my life that I could now claim every cent that I should work for as my own. It was Good Friday—indeed the best Friday I had ever seen. Thank God.Life had a new Joy awaiting me.

Narrator

Freedom did not mean equality, and much anguish, blood, and toil lay ahead. Postwar generations of African Americans carried the strident legacy of their forebears.

Poem: Naomi Long Madgett, *Midway*, read by Cheryl Carroll

MIDWAY, by Naomi Long Madgett

I've come this far to freedom and I won't turn back
I'm climbing to the highway from my old dirt track
 I'm coming and I'm going
 And I'm stretching and I'm growing
And I'll reap what I've been sowing or my skin's not black

I've prayed and slaved and waited and I've sung my song
You've bled me and you've starved me but I've still grown strong

You've lashed me and you've treed me
And you've everything but freed me
But in time you'll know you need me and it won't be long.

I've seen the daylight breaking high above the bough
I've found my destination and I've made my vow;
so whether you abhor me
Or deride me or ignore me
Mighty mountains loom before me and I won't stop now.

Jim Thomas

The story of slavery is a painful one: for the descendants of slaves... for Southerners... for all Americans. It was a time when the power of government aligned itself with the forces that would oppress.

But the story of slavery is more than the story of oppression. Rather, it is the story of a constant struggle by millions of men, women, and children seeking freedom in small and large ways, both within and beyond bondage itself. This is one of America's most compelling and important stories, one that both teaches and inspires--one, in its triumph, that we should celebrate and teach not just tonight, but constantly.

Dana Foddrell-Bland

At this place and at this time 150 years ago, slaves of central Virginia found freedom.

For many, the crossing of the Rappahannock River marked the passage into a new life—one filled with uncertainty to be sure, but one absent of bondage. A life of freedom.

Their footsteps to freedom did as much to change the nature and outcome of the Civil War than any battlefield charge by soldiers North or South or any decision made by Lee or Grant. The actions of the slaves themselves helped force our nation down an inexorable path toward emancipation.

Tonight we come to this river once again, as 10,000 others did 150 years ago. Tonight we have heard their voices--their silence is broken! We witness the lights on the distant hillside that symbolize their spirit. We rejoice in their triumph. And we give thanks for the freedom they helped deliver to us.

Anthony Campbell

John Washington's memoir of his life in bondage began, as all slave memoirs might have, with the words, "I was born a slave." Think for a moment of all that went into slaves being able to shed that label. Unrelenting optimism, determination, cleverness, courage, and endurance—a daily struggle for freedom at every level, in every detail of life, rewarded ultimately by the freedom to be free.

The struggle for freedom and emancipation did not simply elevate this nation's African-American community. Nor did its success simply improve the South. Rather, the struggles and triumphs of slaves **uplifted this nation in absolutely essential ways**, allowing it to resolve the agonizing dilemma—the presence of oppression within a nation conceived on liberty.

The men, women, and children who crossed this river—people whose names were not recorded, whose lives have rarely been honored—helped force a wayward nation onto a path that permitted greatness. It was the slaves themselves who by simple acts helped unleash a heroic struggle for liberty and equality that has overspread the world, enriched the life of every single American, and continues still.

Music: Battle Hymn of the Republic. Dana, Anthony, Jim each sing a verse...with Jaarad and the choir joining in....

Dana Foddrell-Bland

Mine eyes have seen the glory of the coming of the Lord:
He is trampling out the vintage where the grapes of wrath are stored;
He hath loosed the fateful lightning of His terrible swift sword:
His truth is marching on.
(Chorus)
Glory, glory, hallelujah!
Glory, glory, hallelujah!
Glory, glory, hallelujah!
His truth is marching on.

Anthony Campbell

I have seen Him in the watch-fires of a hundred circling camps,
They have builded Him an altar in the evening dews and damps;

I can read His righteous sentence by the dim and flaring lamps:
His day is marching on.

(Chorus)

Glory, glory, hallelujah!
Glory, glory, hallelujah!
Glory, glory, hallelujah!
His day is marching on.

Jim Thomas

He has sounded forth the trumpet that shall never call retreat;
He is sifting out the hearts of men before His judgment-seat:
Oh, be swift, my soul, to answer Him! be jubilant, my feet!
Our God is marching on.

(Chorus—all three)

Glory, glory, hallelujah!
Glory, glory, hallelujah!
Glory, glory, hallelujah!
Our God is marching on.

(Chorus—everyone, including audience)

Glory, glory, hallelujah!
Glory, glory, hallelujah!
Glory, glory, hallelujah!
Our God is marching on.

D-5

(Democratic Process Integrity)

Latest Filings in Spotsylvania FOIA Case Request Reversal of October 15 Ruling

Court's ruling was "erroneous, prejudicial, and improper," petitioner Theodore Marc an attorney, argues.



ADELE UPHAUS

OCT 21, 2024



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By Adele Uphaus

MANAGING EDITOR AND CORRESPONDENT

Email Adele



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Spotsylvania's General District Court was wrong to rule last week that a lawsuit seeking release of documents responsive to a request under the Virginia Freedom of Information Act could be dismissed due to "improper service," **petitioner Theodore Marcus argues.**

In documents filed on Friday, Marcus asks the Court to reverse its ruling of October dismissing the case; agree that the respondents in the case—the Spotsylvania School Board, individual members April Gillespie and Lisa Phelps, and superintendent Cliff Mitchell—received full notice as required by Virginia Code; and sanction the respondents for "causing (or approving) the making of false and improper legal and factual arguments."

“Respondents’ counsel’s arguments to Court were improper and in opposition to the governing law and standards found in the Virginia Freedom of Information Act, specifically Va. Code § 2.23713(C),” Marcus wrote in a Motion for Reconsideration, Sanctions, and Recusal. “Moreover, the Court’s acceptance of those arguments, or its independent view as to Petitioner’s non-compliance with VFOIA’s requirements, was erroneous, prejudicial to Petitioner’s rights under the VFOIA, and highly improper. The Court’s serious apparent judicial failings on the issues presented suggest a high degree of incompetence at best or, at worst, a lack of judicial ethics.”

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In court on October 15, attorneys John Thomas and Evan Tucker with the firm McGuire Woods, representing the respondents, argued that Marcus did not properly follow the process laid out in Virginia Code for serving notice of the petition, mainly because he served the petition himself and did so via email, instead of enlisting the Sheriff’s Office or a third-party civil process server.

Judge Jane Reynolds agreed with these arguments and was prepared to continue the case and schedule a trial in December, but Marcus—who works as an attorney for the federal government—asked her instead to dismiss the case so that he could bring it back and have it heard again within seven days, as Virginia Code requires.

In Friday’s filing, Marcus points out that Virginia Code specifically does not require FOIA lawsuits be “served,” only that they must be “received” by the party against whom the petition is brought.

“That language is intentional,” Megan Rhyne, executive director of the Virginia Coalition for Open Government, told the Advance last week. “These procedures are not put in place to be procedural booby traps for citizens who are trying to enforce their rights.”

This language has been in Virginia Code since 2011, but the 2023 edition of Virginia Judicial District Court Benchbook “appears utterly to misstate [Virginia Code’s] no (not ‘service’) requirements,” Marcus wrote in an addendum to his motion for reconsideration, which he filed on Monday morning.

In contrast to Virginia Code, the Benchbook states: “Providing a copy of a petition before filing is not a substitute for service of process after filing.”

Marcus’s addendum argues that “Although a court’s Benchbook is, presumably, not precedent of any type for the rendering of a decision ... it seems inescapably clear that both [Judge Jane Reynolds] and Respondents’ counsel leveraged it to deprive Petitioner of his day in court.”

Reynolds, who presided over last week’s hearing, was on the committee that authored the 2023 Benchbook, Marcus points out in the addendum.

“This raises the question, objectively, whether the Court has ‘skin in the game,’” the addendum states.

“If there is another ‘Judge Jane Reynolds’ associated with the Benchbook, Petitioner humbly apologizes for this particular averment and withdraws it,” it continues.

“Petitioner was unable to locate any other ‘Judge Jane Reynolds’ in the Commonwealth or elsewhere through his research, it should be noted.”

Previous editions of the Benchbook do not contain the sentence about providing notice not being a substitute for service of process, the addendum states.

“Thus, the inclusion of the language about ‘service of process’ may have been a deliberate effort to alter the General Assembly’s intended outcomes for VFOIA enforcement,” it reads.

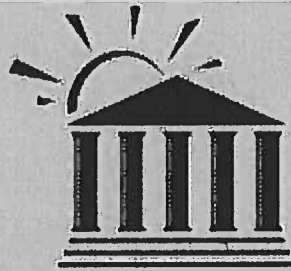


VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL COMMONWEALTH OF VIRGINIA

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VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

Wednesday, December 4, 2024 - 1:00 PM
House Room A, General Assembly Building
Richmond, VA

Note: This meeting will be held in person and live streamed at
http://virginia-senate.granicus.com/ViewPublisher.php?view_id=3

SUGGESTED AGENDA ***ANNOTATED***

- 1. Call to Order; introduction of members.**
- 2. SB 324 Workgroup Report.** *The third enactment clause of SB 324 (Roem, 2024) directed the formation of a workgroup "to examine the current FOIA provisions on charges and make recommendations on ways to amend such provisions to make the assessment of charges by public bodies for the production of public records more uniform, more transparent, easier to understand, and less costly." The workgroup has met seven times this year and has by consensus has recommended a guide to Best Practices for Making Requests which has been published on the Reference Materials webpage of the Council website. The workgroup also considered draft legislation as summarized below:*
 - **Virginia Freedom of Information Act; procedure for responding to requests; charges; posting of notice of rights and responsibilities.** Limits the fees charged for producing public records to the median hourly rate of pay of employees of the public body or the actual hourly rate of pay of the person performing the work,

whichever is less, and provides that a public body may petition a court for relief from this fee limit if there is no one who can process the request at the median hourly rate of pay or less. The bill makes corresponding amendments to the required statement on charges in the notice of rights and responsibilities that must be posted on a public body's website. The bill also amends existing law providing that a public body may petition a court for additional time to respond to a request for public records to allow such petitions to be heard in either general district or circuit court, to give such petitions priority on the court's docket, and to toll the response time while such a petition is pending before a court. The bill makes technical amendments, including moving provisions regarding charges for the production of public records into a separate section of the Virginia Freedom of Information Act.

However, while some participants expressed support for the draft legislation, the work group did not establish consensus on it as several participants indicated that organizations they represent either were divided or had not yet taken a position on the draft.

As directed by SB 324, "The work group shall complete its meetings by November 30, 2024, and present its findings and recommendations for consideration by the FOIA Council at its meeting in December 2024. The chairman of the FOIA Council shall submit to the Division of Legislative Automated Systems an executive summary of the work group's findings and recommendations with any additional comments by the FOIA Council no later than the first day of the 2025 Regular Session of the General Assembly. The executive summary shall state whether the FOIA Council intends to submit to the General Assembly and the Governor a report of its findings and recommendations for publication as a House or Senate document. The executive summary and report shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website." Staff has prepared an executive summary and report for the Council's consideration.

3. **Legislative Preview.** *Each year the Council makes itself available to interested parties as a forum for legislative proposals involving FOIA or other access-related issues. By acting as a forum, the FOIA Council hopes that all persons interested in proposed FOIA amendments will be informed of these proposed amendments well in advance of the next session of the General Assembly and have the opportunity to address any disagreements or other issues before the next session.*
4. **Staffing Proposal; discussion.**
5. **Other Business.**
 - **Virginia Association of Counties (VACo); impact of FOIA requirements on local governments during public emergencies.** *Please see "VACo FOIA Council Chair Letter 24" included with today's meeting materials for full background.*
 - **General District Court Benchbook & FOIA Procedure for Petitions for Mandamus or Injunction.** *Please see "VFOIA Council Issue Presentation (11-27-24)" prepared by citizen Theodore Marcus, Esq., included with today's meeting materials for full background.*

6. Public Comment.

7. Set Future Meeting Dates.

8. Adjournment.

Council Members

Delegate Marcus B. Simon, Chair
Senator Richard H. Stuart
Dennis Clark
Ryan Ferguson
Maria J.K. Everett
Corrine Louden
Lindsay Fisher

Senator Mamie E. Locke, Vice- Chair
Delegate Elizabeth B. Bennett-Parker
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Lauren Waller, Research Associate

The FOIA Council's website is: [http:// foiacouncil.dls.virginia.gov](http://foiacouncil.dls.virginia.gov). To assist us in providing Internet dissemination of materials, presenters are requested to submit written comments and handouts in electronic format by email to staff prior to meetings. Presenters are also requested to bring 20 copies of their remarks or handouts to meetings. These copies will be provided to FOIA Council members and the public.
E-mail: foiacouncil@dls.virginia.gov.

FOIA can reconnect people with their government

Citizen discontent is real. Fighting their FOIA requests doesn't help.



MEGAN RHYNE

DEC 05, 2024



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We've read a lot in the past several months about how voters are mad. All over the world, left and right-leaning regimes are being turfed out or have lost their majorities. It almost doesn't matter who the candidates are, so long as they are not the current ones.

From my own observations (I am a devout reader of *The Economist* because of its news from around the world), this has been simmering for years, but the pandemic laid it bare. No matter how a country handled the pandemic, populations were traumatized by the chaos and uncertainty it unleashed. COVID ripped the Band-Aid off our general indulgence of governmental *status quo* and gave voice to our collective discontent.

People — not voters: people — are more and more alienated from their government. Government is not serving their needs. Government is not responsive to us.

And it's that last point that brings me here today. Yesterday at the FOIA Council, I heard examples of how frustrated, disheartened, even sad, people are about how government fights them when they try to learn more about what's happening around and sometimes to them.

Ramin Seddiq, a citizen from Northern Virginia, and Maria Everett¹, a citizen appointee to the council, expressed frustration with the work-group study FOIA fees. Everett noted all the many concessions to government that were made during the work group's meetings aimed at balancing the public's need for lower fees against the government's need for staff, funding, and relief from the outlier requesters who overburden government offices. And yet, Everett said, several individuals who participated in all or most of the meetings and who had access to draft legislation would not commit their organizations to the final product. Seddiq was frustrated that there'd been any concessions at all, given the resistance to many pro-requester suggestions.

Then there was Kandise Lucas, an advocate for families with special education children. For decades, Lucas has stepped in to empower families who have been unable to get free electronic copies of their children's records, even though FOIA would allow both. Why? Because school districts and their zealous attorneys treat their requests as ones made under the Family Educational Rights and Privacy Act (FERPA) instead of FOIA. They insist that FERPA allows them to charge, that FERPA says that handing over a box of paper records is fine, that FERPA allows them 45 days to respond instead of the 5 working days set out in FOIA.²

Then there was Theo Marcus, a Spotsylvania parent and former high school swim coach whose FOIA suit against the county school board was thrown out by a judge who imposed a procedural hurdle (service of process by a sheriff's process-serving company) that does not exist in FOIA. His frustration was palpable because he had not only been stonewalled by the school division, but he had not been able to get satisfactory answers from the authors of a general district court manual that seems to support the errant interpretation.

And for me, just this week, I've heard from an out-of-state journalist who was turned away by Virginia Tech precisely for being out of state when he tried to get records related to a university professor who has a consulting agreement of sorts with the journalist's hometown.

There's a man in Virginia Beach who has been trying for a year to get police camera footage of an incident involving him and an aggressive dog. Some time within that year, the video was deleted.

A school district has ignored a parent's request for records about the training school staff gets for responding to emergencies, like three tornado warnings in one day where her kids' school went on lockdown.

A member of a county board of supervisors won't turn over any records about public business that are on his phone and he's so indignant that he's been asked to do so that he's also suggested that the board review anything sent out under FOIA.

That's just half of the calls I've received in the past three days.

Last week it was the attorney general's office citing the ongoing criminal investigative files exemption to withhold its own financial records from more than four years ago.

Cost projections for a water project were withheld as proprietary records.

A school district secured the dismissal of a parent's pro se FOIA petition on procedural technicality, thus further delaying his attempt to get records related to the injury his small child suffered from sloppy school bus driving.

Every time these people encounter obstacles, they go through a series of emotions not unlike the stages of grief. They are disbelieving. They are

suspicious. They are angry. They feel isolated.

It may not seem like a big deal to the government — it's just another no, and the statute (may) allow it, what's the big deal? The big deal is that for citizen requesters, this feels like David and Goliath. This is often THE most important thing to them at that moment.

When they call VCOG and seek answers, explanations, guidance and, sadly, more help than I can give them, I often find myself in a role more similar to therapist than an advocate. They need someone to listen to them. They are consumed. Bereft. They take cold comfort in knowing that people like them over the state (all over the country) are in similar straits. What good does it the Spotsylvania parent to know that someone in Danville is suffering through equally awful attempts to get information?

If only they could exercise their statutorily bestowed right to access government information, within the bounds of the law, but without antagonism, disregard for procedures or official-sounding but unsupported statement about why the government must charge more or take more time keep more information away from them.

It's always struck me oddly that governments will spend millions of dollars on their annual budget on public relations and communications to tell us about all the wonderful things they do for us, while simultaneously insisting that they just don't have the time and resources to respond to FOIA requests. It's odd because if FOIA requests are handled timely, efficiently, in a friendly manner, most requesters are going to walk away feeling better about their government than they would from seeing posters of smiling models enjoying a new bike path.

If citizens feel disconnected from their governments — elected officials and the public bodies they represent — an important step towards reconnecting would be to stop fighting those citizens over the knowledge that access to information brings.

- 1 Everett is the current president of VCOG's board of directors.
- 2 On this point, I wrote to the U.S. Department of Education's FERPA office and was told that the 45 days is a ceiling. A school district can't wait MORE than 45 days, "if there were a State law that required schools to provide parents with access to their children's education records in less than 45 days, then that would not be seen as a 'conflict' with FERPA because it provides more rights to parents."

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By Megan Rhyne · Launched 5 years ago

FOIA, Transparency and Access in Virginia

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Discussion about this post

Comments Restacks

Write a comment...



Theodore C Marcus  Dec 6, 2024

 Liked by Megan Rhyne

Thank you, Megan, for hearing me, and for hearing us. We can't help our communities in any direction except by the graces of capricious governing people who seem to enjoy the fact that we're paying for it, and then some. The anger -- at the surface -- is better than burying it. It is more healthy to be angry if it means you have indignation in the right place. Once you give up, the anger has to have some outlet. We tax our resources in this way at our personal peril and at the community's peril (dead community tissue isn't good tissue). And that's just people who responsibly handle their rage and sadness. Many don't have those coping skills, so they're time bombs. All because it's funny to stay out-of-touch and watch these dances. It's lucrative to the VFOIA defense bar who upload partners' corporate defense ethics into these matters wholesale, despite there being diametrically opposite goals and objectives between fictional entities beholden to institutional investor shareholders to produce profit -- revenues minus costs, not transparency, and our government, which is beholden to "we, the people."

 LIKE (1)  REPLY

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Theodore Marcus
11811 Sumner Glen Drive
Spotsylvania, VA 22551

**COMMENTS BEFORE THE VIRGINIA FREEDOM OF INFORMATION ACT
ADVISORY COUNCIL, DECEMBER 3, 2024**

I, Theodore C. Marcus, Esq. (*Not Admitted in Virginia), hereby submit these comments to the Virginia Freedom of Information Act (Va. Code §§ 2.2-3700 et seq.; “VFOIA”) Advisory Council (“Council”). The comments specifically describe events associated with my personal experience and [unsuccessful] efforts in attempting to utilize the mandates of the VFOIA, specifically Va. Code § 2.2-3713’s enforcement provisions, to achieve the good governance results the VFOIA contemplates. It is hoped these comments, and the underlying experience(s) described, will be put to good use by this Council swiftly and justly.

I. Background – Why VFOIA Was Invoked: the Riverbend High School Swim Program Debacle, Winter 2023-24.

On November 27, 2023, Spotsylvania County’s Riverbend High School was a few days away from its first Winter season meet. That evening, its Head Coach, Rachael Adriani, as was her custom, announced the names of several co-captains, with roles and responsibilities for their respective portfolios (“Bear Pods”, named after the several bear species, so named in alignment with Riverbend’s mascot). One of the named co-captain’s parents, Mrs. H., reacted very negatively to those choices, the Bear Pods model, and the aspirations underlying the model. Mrs. H. immediately began, orally and in writing, to assail the model and proceeded to undo it in relentless fashion.¹

The pressure Mrs. H. applied to the coaches, the student-athletes, other parents, the administrators at Riverbend -- including the Athletic Director and the Principal (now ex-Principal, Xavier Downs – terminated in association with the events described here)², and even the Superintendent of the SCPS Division, Mark Taylor (also terminated in the

¹ The account of this matter is well-documented in the public record via several articles. Those articles, though not re-produced here as exhibits, can be found at: (1) [Emails Show Riverbend Parent Involving School Board \(substack.com\)](#); (1) [Investigation, Legal Fees in Spotsylvania - by Adele Uphaus \(substack.com\)](#); (1) [FOIA Requests Ignored in Spotsylvania - by Adele Uphaus \(substack.com\)](#); (1) [Lisa Phelps, Mark Taylor Failed to Fully Comply with FOIA Request \(substack.com\)](#); (1) [FOIA Requests Ignored in Spotsylvania - by Adele Uphaus \(substack.com\)](#); (1) [Judge Dismisses Assault Case Brought by Former Riverbend Principal Xavier Downs \(substack.com\)](#); (1) [Text Messages Reveal Change in Tone about Mentoring \(substack.com\)](#); (1) [Riverbend Swim Team Investigation Status Unclear \(substack.com\)](#); (1) [Spotsy Wire Issued 'Cease and Desist' Order \(substack.com\)](#); (1) [Parents-Coaches-Admin Dispute Comes Poolside; Team in Disarray \(substack.com\)](#); (1) [COMMENTARY: Parents' Rights, Students Wronged, and a Community Searching for a Way Forward \(substack.com\)](#).

² <https://www.fredericksburgfreepress.com/2024/03/04/spotsylvania-school-board-terminates-riverbend-principal-downs/>

context of these events)³, and several members of his staff to overturn what she labeled a "social equity program for overweight kids" was successful in causing great chaos around the Program, chaos that, in short order, unraveled it entirely.

One coach, this commenter, resigned due to the unchecked and undue pressure Mrs. H.'s campaign created on him professionally (as a senior official and attorney serving in the Federal government) and personally (as a husband, father of three children, and respected member of the Spotsylvania community). The other coach, the long-time RHS Program leader and a central and respected figure in the Rappahannock area swim community as well as a wife and mother of two small children, was involuntarily placed on leave for approximately a month by Mr. Taylor for doing nothing more than defending her Program and choices of leadership. The Principal, at a December 20, 2023 meeting called for the parents of the kids in the Program to get answers, advocate for their coaches, and to stabilize the Program around their children, lost his composure at the meeting and, by almost all eye-witness accounts (and corroborated by a cell phone video), charged the Head Coach's husband, challenging him to a fight.⁴

Students were dismayed and left with an abrupt, confusing, hurtful and frustrating interruption to what had been a very promising swim season including months of pre-season effort and activity. Seniors, including those with post-secondary aspirations with swim, were left scrambling to secure their goals. The structure of the Program that provided order to practices, goal-setting for individual and team seasonal and post-seasonal targets, and peace of mind for the student-athletes and their families was shredded. Other adults without any, or with very little, connection to the student-athletes and their families were hurriedly pressed into service as "coaches" to salvage the season.

Rushed, undisciplined "investigations" were initiated under unclear mandates, unclear instructions, and unclear methods, procedures, protocols and controls, and carried out by unseasoned, fretting Division personnel who only made matters even worse. Goodwill, hopes for the season and its promise of a cohesive, competent, mutually supportive and mutually sacrificing "Team", success in the water and the essential quietude that 45 kids (and their families) needed for that success -- were dashed.

This shouldn't have happened. Basic checks and balances, escalation processes, presumptions, chain of command, years of service, realities of vetting, and simple common sense should have produced far different, and vastly more beneficial outcomes. All the responsible athletic/administrative governance and system assurance mechanisms collapsed in the face of a single parent's pressure campaign as though they

³ <https://wjla.com/news/local/spotsylvania-county-public-schools-superintendent-fired-mark-taylor-controversy-school-board-budget-students-parents-teachers-libraries-education-experience>;
<https://www.fox5dc.com/news/former-spotsylvania-county-superintendent-claims-he-was-fired-holding-christian-book-fair-lawsuit>.

⁴ <https://www.facebook.com/SpotsyParentForPublicEducation/videos/update-at-bottom-of-this-textxavier-downs-who-is-the-principal-of-riverbend-high/3731091580548512/>.

didn't exist at all or, worse, were somehow her personal assets. The events, including their sequence, were so bizarre and troubling that this Petitioner was compelled to seek explanation beyond what could easily be seen or assessed. Petitioner immediately resorted to the VFOIA to determine the real roots of what happened (and was happening) and, thus, identify a path to suitable remedial action including, possibly, restoring the Program to its legitimate *status quo*.

That information gathering began on December 23, 2023, *i.e.*, two days after the disastrous Swim Program parents meeting at Riverbend. The returns on those initial VFOIA requests shed some of the critical light, including this: [then] SCPS Chairperson, Lisa Phelps, a politically aligned, close friend of Mrs. H.'s, was personally involved, and actually co-directing the traffic associated with Mrs. H's efforts. Emails and text messages were produced (by others) showing Mrs. Phelps' involvement, her motives and her directions to Taylor and other Division top-end staff to serve her and Mrs. H.'s interests and desired outcomes.⁵

Further productions over the ensuing months bolstered that conclusion substantially. Still, despite the many records produced thus far (and thorough press reporting analyzing those records) that show the misfeasance, nonfeasance or doctrinal capture of so many top administrators, including Mrs. Phelps and other Board leaders (Mrs. April Gillespie was also corralled into the effort), the main sources of critical info that the public needs to assess the conduct of its servants in this matter -- *personal device text messages and personal emails between and among Mrs. Phelps, Ms. Gillespie, Mrs. H., the athletic Director of RHS (Jesse Lohr), Mr. Taylor, and Mr. Downs* -- concerning the RHS Swim Program and other programs experiencing similar dynamics involving Mrs. H. -- have not been produced despite months of steady, respectful and costly efforts by Petitioner through VFOIA. The cause appears solely to be the contumacy of the SCPS Respondents, the institution's internal intrigues, and its apparent organization-wide desire to escape appropriate scrutiny.

Another critical thread of accountability and transparency, however, was introduced by the SCPS in the form of an "independent third-party investigation". The stated goal and intent of this investigation was to shed light on what happened at RHS Swim. Its origins were murky, and it was somewhat hastily put together, but the investigation appears to have begun at some point in January 2024. It began with Ms. Amy Williams, SCPS's Human Resources chief,⁶ assisted in some fashion at some later

⁵ The record to date tends to show a mixed set of objectives. First, it is clear that Mrs. H. wanted a different leadership choice, one that centered on her daughter, a senior on the team at that time who was applying to one of the nation's military academies and needed leadership material for her application. Second, it is also clear that both Mrs. H. and SCPS Board Chairwoman Phelps -- who consider themselves staunchly "anti-woke" -- viewed the Swim Program leadership model as some form of inclusiveness or "equity" experiment and, thus, anathema to their political worldview.

⁶ This contention is based on a letter, dated January 28, 2024, from Ms. Williams to "Distribution." It is unclear if "Distribution" included all SCPS staff and Board members, or some subset thereof. The letter stated, among other things, the following: "Your responsibility is to preserve all Relevant Information in

point by counsel at the McGuire Woods law firm who apparently guided Ms. Williams through the gathering of documents and interviews of witnesses, which she conducted herself. This set-up, apparently, was deemed unfavorable after a few weeks. And, eventually, the SCPS relieved both Ms. Williams *and* McGuire Woods of their roles in favor of the retained services of Ms. Deb Yeng Collins, an attorney out of Norfolk, Virginia, who was brought in to conduct, as SCPS' accounting department coded it, a "Division Investigation."

Over the course of several weeks in the spring/summer of 2024, Ms. Yeng Collins -- as part of her "Division Investigation", interviewed several witnesses, including parents (some of whom were also SCPS employees) of student-athletes, their coaches and others (presumably the RHS Athletic Director, Jesse Lohr, and perhaps the former principal, former Superintendent, Board Members, etc. -- though this is not known by this commenter). Ms. Yeng Collins also reviewed voluminous records, including e-records (e.g., texts and emails) associated with her "Division Investigation".⁷

It appears that, in the interviews, Ms. Yeng Collins made no affirmative effort to ensure that the witnesses understood the nature or parameters of her representation of the SCPS and any privileges that might apply to her activities. It does not appear that Ms. Yeng Collins gave any instructions to the interviewees, for example, about the confidentiality of their discussions with Ms. Yeng Collins or the need to maintain such confidentiality going forward, including with respect to whether the interviewees were permitted to discuss the proceedings with others (which many of the witnesses certainly did). And, Ms. Yeng Collins, apparently, took no steps to disabuse the witnesses of the notion that their cooperation might not (or, as it turns out, would not) lead to a public airing of the facts through some appropriate form, which was the sole motivation for several witnesses to sit for interviews in the first place.

Instead, it appears that Ms. Yeng Collins and SCPS caused, or allowed, the interviewees to believe their cooperation was part of an appropriate and civically responsible effort by SCPS to provide accountability, starting with useful, comprehensive

any location in which it exists, including, but not limited to, electronic communications (such as emails, text messages, instant messages, online chats, communications sent via messaging applications including but not limited to WhatsApp, Snapchat, iMessage, Facebook Messenger, Twitter, and Instagram, voicemail messages, and audio or video recordings). It also includes Relevant Information stored as electronic documents and data on your laptop and/or desktop, the cloud, shared intranet sites, external media (such as thumb drives or personal backup drives), *personal laptops*, or other *personal devices (such as cellular telephones and tablets)*, as well as Relevant Information stored as hard copy or paper documents or files." (emphases added).

⁷ Some of these records may include material requested by this commenter in VFOIA requests but not given to him, e.g., the Phelps and Downs text and personal email records, though only the SCPS's officials know for certain and have not disclosed that to this commenter.

transparency, about the RHS Swim Program matter.⁸ And, benefitting from those impressions, Ms. Yeng Collins procured their evidence and then supplied the material (in yet unknown form) to her client, SCPS. ***But, SCPS has refused to produce the presumed report pursuant to VFOIA*** and has given duplicitous answers about whether such a ‘report’ (if that’s the right term) actually exists or, if it doesn’t technically exist, SCPS has refused to explain what form Ms. Yeng Collins’ “Division Investigation” was presented to them so that VFOIA can effectively be utilized to gain appropriate transparent access to that information or its contents (with any *appropriate* redactions).

Worse, it appears that the SCPS changed, or has attempted to change, the character of Ms. Yeng Collins’ work midstream, *i.e.*, by re-classifying it from a “Division Investigation” (read: fact-finding investigation) by an independent third-party, to ordinary “Legal Services”. That is, after running up a bill with Ms. Yeng Collins of roughly \$81,587⁹ from some point in February or March to late July/early August – all associated

⁸ On this point, the following statement from Mr. Taylor to new-Chairperson Lorita Daniels on January 27, 2024, is instructive:

Amy Williams and I are working on this set of issues. We are working closely with Daniel Masakayan with McGuire Woods, our HR attorney. I have also gotten input from Kelly Guempel, Allen Hicks and others. Ms. Williams is currently leading the investigation into concerns raised about the swim coaches and Mr. Downs, and she has gotten input from parents and additional SCPS staff who have been directly involved in swim team concerns and events.

A third party investigation may be advisable, if only *to enhance public confidence* in our resolution of these concerns. Frankly, I had wanted to discuss with the Board whether a 3rd party investigator should be brought in. I don’t want any Board member thinking that I am just taking direct orders from Ms. Phelps. I am entirely aware that you are the Board Chair, Dr. Daniels.

Amy Williams first suggested a third party investigation due to the complexity of the concerns, the volume of information to be reviewed, *and the public’s perception*. Many people have weighed in on this issue and media and social media have contributed to the complexity of the investigation and, perhaps, the *need for an independent third party Investigator*."

Email Memorandum from M. Taylor, SCPS Superintendent, to L. Daniels, SCPS Board Chair, January 27, 2024.

⁹ The figures are derived from accessing SCPS’ “Open Checkbook”, a supposed transparency and accountability device offered at its website. The site shows payments (rounded up or down) of \$10,200 around May 24, 2024, and \$28,441 on June 21, 2024. Thereafter, there was a long pause in payments despite, presumably, regular presentation of invoices as per Ms. Yeng Collins’ retainer agreement with SCPS, before payments resumed in August: \$25,531 on August 9, 2024, and \$17,415 on August 15, 2024. It is believed that every dollar shown is associated with the RHS Swim Program debacle and related matters. This \$81,587, however, does not represent the full sum of expenditures with that matter, as there are almost certainly billed amounts from multiple other law firms associated with the effort including, but not limited to, the McGuire Woods firm, the Sands Anderson firm, and the Williams Mullen firm. All told, based on review of the Open Checkbooks account entries, the SCPS has spent some \$500,000 in legal fees in 2024 as of August -- Petitioner does not know the exact figures from that amount (or later tallies) associated with the RHS Swim Program matter at this time, though SCPS clearly does. The amount of

with the “Division Investigation” as it was originally framed – the SCPS *paused payments in mid-summer to Ms. Yeng Collins* and then, after re-setting the accounting and description to “Legal Services”, decided then to resume payments to her. SCPS has provided no information or explanation about the re-classification, the pause in payments, or the underlying rationale for it, thus fortifying the impression that Ms. Yeng Collins was forced to go along with the change in retention purposes – which is material to VFOIA – in order to paid for services already provided. And, when Ms. Yeng Collins’ report (or whatever stands in its place that represents or contains her findings – not advice, but investigative findings) was requested through VFOIA both by the press and by this commenter (separately), the SCPS has simply refused to provide it, loosely claiming privilege to the extent such material exists, which SCPS apparently also will not confirm or sufficiently explain. And, of course, SCPS has not explained the payments pause and accounting ‘adjustment’ from “Division Investigation” to “Legal Services” associated with Ms. Yeng Collins’ work.

II. A Debacle in the Courts – VFOIA Mandamus Enforcement

This commenter, faced with a stonewall at the SCPS, petitioned the courts (General District Court, Spotsylvania County, Judge Jane Reynolds) as the only option to get the final factual accounting promised to Virginia citizens through VFOIA’s transparency mandates.

Because it was clear the SCPS Respondents were not going to comply with the VFOIA with respect to the public records in question, this commenter – appropriately – sought relief in Court as per the enforcement provisions of the VFOIA. Specifically, Section 2.2-3713 states as follows:

C. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made, provided the party against whom the petition is brought has received a copy of the petition at least three working days prior to filing. However, if the petition or the affidavit supporting the petition for mandamus or injunction alleges violations of the open meetings requirements of this chapter, the three-day notice to the party against whom the petition is brought shall not be required. The hearing on any petition made outside of the regular terms of the circuit court of a locality that is included in a judicial circuit with another locality or localities shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law.

Va. Code § 2.2-3713(C) (emphases added).

money spent on this matter, which is clearly north of \$100,000 and likely close to \$200,000 or more, speaks to the matter’s significance and relevance to the public without having to say more.

In open court, this commenter carefully explained and described the steps taken to provide “a copy of the Petition” to the Respondents, including via email to their Counsel, Micah Schwartz (which occurred the requisite three working days before filing and was acknowledged by Mr. Schwartz via email) and through hand-delivery to the SCPS, including verifying receipt, via email, of the Petition both via Mr. Schwartz and the SCPS VFOIA Compliance Officer, Dr. Dennis Martin. By recollection, counsel for the SCPS Respondents affirmed all of those facts or, in any event, did not deny them.¹⁰ This commenter also included in those submissions to Respondents an appropriate affidavit, on Form DC-495 (of the General District Court), which complied with all the affidavit requirements under VFOIA for mandamus petitions.¹¹ Petitioner also walked the Court through the Affidavit completion steps Petitioner took to comply with § 2.2-3713(C).

However, SCPS Respondents’ counsel contended that this commenter’s “service” of the Petition to the Respondents *was defective* in that (a) Petitioner “served” it himself, which counsel alleged was improper “service” because a party cannot “serve process” under Virginia’s civil code – “service” must be via private process server or the County Sheriff; (b) “service” cannot be effectuated by electronic mail under the Code provisions cited by counsel (not VFOIA’s provisions); and (c) “service” by hand to the SCPS front desk clerk, despite acknowledgement of receipt by the SCPS VFOIA Officer (and even coupled with the e-mailing of the Petition to SCPS Counsel, as described) was not sufficient to cure the “service defects” alleged.

Judge Reynolds not only agreed with Respondents’ arguments about “defective service”, but she advised that she had “skimmed the Petition” earlier in the morning (or, in any event, prior to the hearing) and, after indicating that “it was long”, had reached her own view that it could not proceed, i.e., due to the modes and manners of “service”, *etc.* Ultimately, the Court determined that the hearing required by the VFOIA could not go forward due to the Respondents having not been properly “served” and proceeded to advise Petitioner that “service” would need to be cured, including through “service” via Sheriff or private process server, and that the Affidavit would also need to be revised to conform to the requirements of law.¹²

¹⁰ All of the factual recitation herein is based on this commenter’s recollections. This commenter does NOT have a copy of any transcript of the proceedings. Indeed, although a transcript was made, Petitioner has learned, after the fact, that the transcription was done at the request of, and for the sole benefit of, the Respondents. Petitioner has requested the Clerk of the General District Court to investigate the matter on the grounds of fundamental unfairness, lack of transparency, and abuse of the proceedings. No response has been made to that request.

¹¹ The affidavit was specifically designed to comply with VFOIA, which is noted on the face of the document (“Va. Code §§ 2.2-3713, 2.2-3816”). The Form DC-495 is entitled: “Petition for Injunction or Mandamus—Freedom of Information Act and Affidavit for Good Cause or Protection of Social Security Numbers Act”. The Affidavit was duly executed in all its parts and affixed with the Petition as part of Petitioner’s filing and submission to the Court and Respondents, as Petitioner advised the Court.

¹² On this point, the Court actually remonstrated with Petitioner that he needed to “write this down” (*i.e.*, the incorrect code cites for service and affidavits for good cause) and be certain to correct the defects. It should be noted the Court appeared to apply a heightened standard for conformance/compliance to

Then, the Court announced its intent to “continue” the hearing to a future date, and proceeded to a discussion of the parties’ respective schedules and the court’s own calendar. When the Court turned to this commenter, I asked the Court whether the Court was *requiring* a continuance, or whether I would be permitted to dismiss my Petition without prejudice, *i.e.*, to preserve my *seven-day hearing rights* as articulated in VFOIA for enforcement. The Court looked bemused, shaking her head as if to suggest I was possibly making a misstep, but I made clear that I was looking to preserve the expedited hearing in section 2.2-3713 and didn’t want to waive it by *agreeing* to some movable date in the relatively distant future. I asked, and was granted, dismissal of my Petition, with the Court advising me to cure the “service” and affidavit defects prior to any re-filing of the Petition for Mandamus.

Subsequently, this commenter moved the Court to reconsider its ruling. That motion was denied. This commenter appealed, but was compelled to withdraw the appeal as being ‘time-barred’ – *i.e.*, I had 10 days to note my appeal and I missed that cut-off by a day (or two) due to the timing of the motion for reconsideration (the Judge left town after her ruling and didn’t return for several days). Rather than argue to the Circuit Court on appeal that the time for the Court to reconsider the motion should have tolled the time for appeal, this commenter ‘gave up the ghost’ and, instead, decided the correct path for Justice in this matter lay in the present course, as described more fully now.

III. How This Was *Supposed* to Go . . .

A. “The Legal Piece” -- Mandamus or Injunction Petitions by “Notice”, not “Service”

The Court was wrong in (i) determining that “service of process” under the ordinary requirements of Virginia civil litigation and civil procedure was required for a Petition under Va. Code 2.2-3713(C), and (ii) for deciding, based on that erroneous conclusion, that jurisdiction over the Respondents and the matter was lacking.

The plain language of the VFOIA mandamus provision eschews the use of “service” in favor of the phrases “received a copy”, *i.e.*, of the Petition, and “notice”. By those choices, it is abundantly clear that the legislative intent behind the enforcement mechanism for VFOIA is NOT the same as what might apply in other contexts not germane to VFOIA enforcement. For example, the plain meaning of the term “notwithstanding” is as follows:

Petitioner because, as the Court repeatedly observed, Petitioner “is a lawyer”, despite Petitioner stating in the Petition and in open Court that Petitioner is just a citizen proceeding ‘pro se’ and not licensed in Virginia and not an expert either in VFOIA or Virginia law more generally. Of course, VFOIA enforcement shouldn’t be this hard; after all, it is for ordinary citizens without law degrees to use to seek their rights to open government.

without being prevented by (something) : despite — used to say that something happens or is true even though there is something that might prevent it from happening or being true.

Britannica [Online] Dictionary, <https://www.britannica.com/dictionary/notwithstanding#>
In other words, proposition 'x' is true even though proposition 'y' would otherwise be true but for the specific proposition 'x.'

Following that, § 2.2-3713(C) connects “notwithstanding” to Va. Code § 8.01-644. In other words, § 2.2-3713 is to be found “true” or is “to happen despite” what might otherwise be the state of the law, i.e., via application of Va. Code § 8.01-644. The latter provision states:

§ 8.01-644. Application for mandamus or prohibition.

Except as provided in § 2.2-3713, application for a writ of mandamus or a writ of prohibition shall be on petition verified by oath, after the party against whom the writ is prayed has been served with a copy of the petition and notice of the intended application a reasonable time before such application is made.

Viewing both Va. Code § 2.2-3713 and 8.01-644 together (as one must, especially given that each refers to the other!), one *must* conclude that the requirements for mandamus petitions in the ordinary civil context – 8.01-644 – do not apply in the VFOIA context and that, instead, *only* what is written in 2.2-3713 governs a petitioner’s VFOIA enforcement action. This is not merely the implied will of the legislature, but is its express will by force of language in *both* provisions.¹³

The Virginia Supreme Court, in *Cartright v. Commonwealth*, describes how VFOIA Petitions *are supposed to work*, and makes clear that mandamus, for these purposes, is not supposed to be a minefield for petitioners to be exploited by wily counsel and their scofflaw respondents, and ignored by ill-advised judges who “skim” thoroughly

¹³ This is consistent, of course, with the legislative history on the underlying house and senate bills that form 2.2-3713. See Rights and Remedies Subcommittee Report, VFOIA Advisory Council Meeting Summary, July 22, 2010 (“The Subcommittee next discussed HB 976/SB 147 concerning when notice of a FOIA petition must be given to a public body. Staff advised that this issue was brought before the FOIA Council in 2009 by Prince William County Public Schools in response to a specific issue there. The FOIA Council had recommended language to resolve the issue of when notice is to be given. However, during the General Assembly Session, Prince William County Public Schools objected to the language. As a result, both bills were again sent to the FOIA Council. The difference between the two bills was that in SB 147 notice was to be served on a public body, while in HB 976 notice was to be received by the public body. Mr. Wiley noted that the use of the word “served” means by the sheriff or other process server and that unnecessarily delays the process. Mr. Wiley suggested that notice be given to the public body, but that the length of time before the FOIA suit may be filed be specified. By consensus the Subcommittee agreed to recommend the following language. “Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made provided the party against whom the writ is brought has received a copy of the petition at least three working days prior to filing.”)

crafted and appropriately framed Petitions hoping, apparently, to force VFOIA enforcement into more traditional modes of resolution, including denial of the seven-day hearing right:

The intent of the General Assembly in enacting the FOIA *is clearly expressed in its provisions*. As pertinent here, the General Assembly's intent is to 'ensure[] the people of the Commonwealth ready access to records in the custody of a public body or its officers and employees' so as 'to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.' Code § 2.2-3700(B). To effectuate that intent, the General Assembly has expressly provided that the provisions of the FOIA are to be 'liberally construed.' *Id.*; see also *Beck v. Shelton*, 267 Va. 482, 487, 593 S.E.2d 195, 197 (2004); *City of Danville v. Laird*, 223 Va. 271, 276, 288 S.E.2d 429, 431 (1982).

Specific provisions of the FOIA foster *its salutary statutory scheme to provide freedom of information consistent with open government*. Code § 2.2-3713(A) expressly authorizes '[a]ny person . denied the rights and privileges conferred by this chapter . to enforce such rights and privileges by filing a petition for mandamus.' In addition, the statute further provides that the petition for mandamus may be filed in either the general district court or the circuit court of the jurisdiction in which the denial of the right or privilege under the FOIA is alleged to have occurred. *Id.* This is the only instance in which the general district courts are given concurrent jurisdiction with the circuit courts to hear mandamus proceedings. See Code § 16.1-77(6).

The statute further provides that '[t]he petition for mandamus . . . shall be heard within seven days of the date when the same is made.' Code § 2.2-3713(C). 'A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein.' Code § 2.2-3713(D). And if the court finds the denial to constitute a violation of the FOIA, 'the petitioner shall be entitled to recover reasonable costs and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust.' *Id.*

Finally, and perhaps most significantly, the statute provides that in such proceedings 'the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.' Code § 2.2-3713(E). This is contrary to the rule in common law mandamus proceedings which places the burden on the petitioner to prove the violation of a right or privilege and in which there is a presumption of

regularity in the conduct of government business. *See Legum v. Harris*, 205 Va. 99, 103, 135 S.E.2d 125, 128 (1964).¹⁴

Section 2.2-3713(C)'s express language, its legislative history, and relevant precedent make unmistakably clear VFOIA's citizen-centric character and the design of the General Assembly to give to the citizens of the Commonwealth a simple and streamlined way to enforce the transparency and open government requirements established by VFOIA by focusing on simply ensuring the "receipt" of "notice" of the Petition.¹⁵

Similarly, VFOIA's affidavit requirements are not, and are not intended to be, applications for federal top secret clearance. Va. Code § 2.2-3713(A) simply states that "[a]ny person . denied the rights and privileges conferred by [FOIA] may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause."¹⁶ All requirements for the affidavit, accordingly, are met when the affiant "swear[s] that he believes it to be true."¹⁷ These requirements certainly were met in this case.

¹⁴ *Cartright v. Commonwealth Transportation Board*, 270 Va. 58, 613 S.E.2d 449 (2005) (emphases added). As the Supreme Court of Virginia further observed: "The provisions of Code § 2.2-3713 significantly distinguish the right to mandamus it provides from the common law right to mandamus. By granting concurrent jurisdiction to the circuit and general district courts, expediting the proceedings, providing for an award of costs and attorneys' fees, and shifting the burden of proof to the public body, the General Assembly has evinced an intent to provide mandamus relief under Code § 2.2-3713(A) different from that of common law mandamus. These distinctions are entirely consistent with the *express purpose of the FOIA and manifestly facilitate access to appropriate governmental records*. Contrary to VDOT's contention, we are of opinion that the lack of any reference in this statute to the common law requirement that the petition prove a lack of adequate remedy at law evinces the intent of the General Assembly to eliminate that common law prerequisite to the issuance of a writ of mandamus. Such is clearly consistent with the salutary statutory scheme of the FOIA." *Id.* (emphases added). Here, the Court (and Respondents' counsel in putting forth improper argument that induced, or may have induced, error, it would appear) has improperly applied ex-VFOIA law standards, i.e., service and affidavits, where they do not belong, both expressly and impliedly. This is egregious error by the Court.

¹⁵ Petitioner is not suggesting that there are not VFOIA petitioners in the Commonwealth who use process servers or Sheriffs to provide the "notice" § 2.2-3713(C) requires in its "received by" language. Presumably, there is nothing *wrong* with a given petitioner going that route, especially if concerned about attempting to provide notice through other means, or simply unable to ensure that notice other than through the aid of process servers and Sheriffs. Nonetheless, even in those situations, VFOIA is satisfied by proof of receipt three days ahead of filing, not the arcana of "service of process" proofs to haul respondents into court. That there are many VFOIA Mandamus petitions actively prosecuted in the Commonwealth is clear. *See, e.g.*, [FOI 2017-10-31 petition for writ of mandamus.pdf \(rcfp.org\)](#); [4.23.20-Notice-of-suit-to-VA-OAG.pdf \(climatelitigationwatch.org\)](#); [GetFile.cfm \(virginia.gov\)](#); [Pieron Petition for Writ \(schillingshow.com\)](#); [Kessler FOIA Lawsuit \(FINAL\).pdf | DocDroid](#).

¹⁶ *See Bragg v. Rappahannock Board of Supervisors* (2018).

¹⁷ *Id.*

This commenter, in his VFOIA enforcement efforts, used the very form designed for the express purpose of satisfying the VFOIA's affidavit requirements under 2.2-3713(A). It was the very form provided in the General District Court's online directory and, in any event, the very form available with the Clerk's office for these purposes. Far from it constituting mistaken reliance by Petitioner on "legal advice" from the Clerk (another erroneous suggestion by Respondents' counsel that the Court eagerly embraced), it is actually *the* sufficient instrument to ensure the VFOIA requirements are met. To put it bluntly: the Form DC-495 *is the* affidavit, and no further document is needed in supplement to satisfy VFOIA's 2.2-3713(A)'s requirements.

In every way, this commenter met the requirements – and no Commonwealth citizen should have to do more – to have been able to go forward on October 15, 2024 with his Petition. But the doors of the Court were shut anyway.

2. The General District Court Likely – and Improperly – Relied on its
"Benchbook" Instead of the Law in Granting Respondents' Special Appearance
Challenge.

The Court's confidence in its position about "service" being required instead of "notice", as I argued and 2.2-3713 states, gave me pause. Not only did it raise questions that perhaps an improper *ex parte* contact between Respondents (through counsel, presumably) and the Court took place, but it defied what seemed to be the clear realities of Va. Code § 2.2-3713 (as discussed above, argued in Court and as reported in the Press after consultation with experts on the subject matter). This caused me to try to get to the bottom of these anomalies.

After further research, I learned that the 2023 edition (and editions going back to 2013 apparently, i.e., two years after the amendments to VFOIA that established the 3 + 7 day shot clock for notice and commencement of hearings, as discussed above) of the Judicial District Court Benchbook contains material, found at page 202, that *utterly misstates* § 2.2-3713's notice (not "service") requirements for initiating enforcement proceedings through mandamus or injunction.¹⁸ Specifically, it reads:

The Seven-Day Hearing Requirement. Section 2.2-3713.C requires that a hearing on a FOIA petition be held within seven days after filing, "provided the party against whom the petition is brought has received a copy of the petition at least three days prior to filing." The three-day notice requirement is not required if the petition alleges a violation of FOIA's open meetings requirements. This presumably is an effort by the General Assembly to promote settlement of FOIA conflicts, while providing for a quick hearing in the event an injunction is

¹⁸ See <https://www.vacourts.gov/static/courts/gd/resources/manuals/districtcourtbenchbook.pdf>

needed. *Providing a copy of a petition before filing is not a substitute for service of process after filing.*"¹⁹

There is no reference given in the Benchbook for the italicized/bolded language and, in all candor, Petitioner has been unable to unearth any despite extensive research and further effort with officials at the Virginia Supreme Court who oversee the Judicial Benchbook's Committee and its publication.

Although a court's Benchbook is, presumably, not precedent²⁰ of any type for the rendering of a decision (and, in any event, the Court – perhaps deliberately -- did not cite it as support for its ruling on the “service” issue raised by both the Court and the Respondents’ counsel), it seems inescapably clear that it was leveraged to deprive Petitioner of his day in court, i.e., as the General Assembly intended it under § 2.2-3713, and not as per the dictates of judges’ calendars.²¹

III. Remedies Requested From *This* Body.

¹⁹ *Id.* (emphasis added). Needless to say, and in light of the foregoing arguments, the Benchbook would appear to be dangerously in error and likely to place extraordinary burdens on VFOIA petitioners throughout the Commonwealth in deprivation of their rights and in contravention of the General Assembly’s express intent.

²⁰ See, e.g., Benchbook for U.S. District Court Judges, at <https://www.govinfo.gov/content/pkg/GOVPUB-JU13-PURL-gpo36767/pdf/GOVPUB-JU13-PURL-gpo36767.pdf> (“It is important to emphasize that while much of the material in the Benchbook comes from case law, federal rules, and statutes, the particulars of the procedures suggested here represent only the recommendations of the Benchbook Committee. The information provided is deemed to be accurate and valuable, but it is not intended to serve as legal authority and should not be cited as such. And because circuit law may vary, particularly with respect to procedures, judges should always familiarize themselves with the requirements of their circuit’s law.”). Petitioner did not see a similar label warning, as it were, for the 2023 Benchbook at issue here, but assumes Virginia law is consistent with federal law and that benchbooks are not legal precedent for anything.

²¹ “[S]hall be heard”, means “shall be heard”. See Va. Code § 2.2-3713. This is the will of the General Assembly and further evidence of the legislative intent NOT to gum the works with the often undue labors and intricacies of “service of process” too often seen in ordinary civil litigation. (See, e.g., https://www.reddit.com/r/AskReddit/comments/p3wckq/process_servers_whats_the_most_bizarre_scenario/ (“Not a process server, but I do hire them. One of my clients had a girlfriend who had a mental breakdown and took off with their 5 year old. She'd been destabilizing for a few weeks and he'd already hired me to figure out his rights as far as custody and what not, and also to help figure out how to get this woman out of his house and into a facility. She got wind of it - we found out later her equally crazy mother snitched - and took off kid in tow. I got an emergency custody order from the court, but in order for it to go into effect she had to be served. Cue the world's best process server tracking this woman down all over the city. She had an open facebook account and kept checking in at different locations, so he basically drove all around town looking for her. She was switching between buses and ubers, and dragging that poor kid along with her the whole time.”).

At pages 32-33 of the *2012 Benchbook*, the first after the 2011 amendments at issue, contained the following (appropriate) language, in pertinent part:

8. The Virginia Freedom of Information Act (FOIA) (§ 2.2-3700 et seq.) may be enforced in the general district court or in circuit court. See §§ 16.1-77, -83, -106. Note that certain injunctive powers are given the general district court.

a. Special time requirements apply to hearings on FOIA actions. Section 2.2-3713 mandates a hearing on a FOIA claim within seven (7) days if the party against whom the FOIA petition has received a copy of the petition at least three (3) working days prior to the filing of the petition.

This language would appear to be correct and consistent with the express language of section 2.2-3713. However, by the time of the 2013 Benchbook, the language had been changed to what appears there now (see above) in the 2023 Benchbook. Thus, something happened between 2012's publication and 2014's that clearly was the result of planned, intentional and likely discussed effort. Of course, an inquiry is needed to understand the scope and circumstances of that effort. If misconduct was involved, as seems possible, that misconduct requires appropriate correction. And, even if no "misconduct" was involved, the idea of the Benchbook overriding the legislative will should not be considered a small matter and, indeed, the Benchbook should be appropriately reviewed to determine if there are other similar maltreatments of law and the facts and circumstances associated with whatever is unearthed.

And, presently with respect to the instant VFOIA 2.2-3713 matter, please urgently consider and take the following steps:

1. **Issue a 'bulletin'** or similar document over the appropriate authorship and letterhead to distribution (all district court and circuit judges, their Benchbook Committee leadership and staff, general district court and circuit court clerks, the top administrative officials in the VA Supreme Court, and the key legislative stakeholders) that says, essentially:
 - there "appears to be a material discrepancy between the judicial benchbook guidance on VFOIA mandamus/injunction cases and the plain language and legislative history of section 2.2-3713 that is resulting in, or may result in, depriving litigants of the statute's intended operation;
 - the discrepancy, and its origins and impact, are under review by the appropriate General Assembly personnel, the Virginia FOIA Advisory subject matter experts and Judicial branch administrative personnel for appropriate remedial action; and
 - until further notice, judges and their courthouse staff are advised to disregard the general district court benchbook guidance stating or suggesting that service of process, either via private process server or the local Sheriff's

office, is required in order to secure personal jurisdiction over respondents in section 2.2-3713 enforcement cases.”

2. **Establish an emergency committee** (if 'emergency' is too strong a word, then such other word that suggests the proper urgency) of judiciary oversight personnel from both the general assembly and the Virginia Supreme Court to review the facts, identify the scope of error and potential harm, and develop an appropriate remedy to ensure full compliance with, and understanding of, the law at all levels of the Judiciary.
3. **Notify the VFOIA Bar (or the entire Virginia Bar if appropriate), as well as members of the Press** of the ongoing review, Bulletin and related facts/issues to ensure appropriate public awareness and that pending or future cases are properly litigated under the statute's process requirements, not the courts' ordinary process requirements.

Conclusion

I have done what/all I can do to assist the process here. I am now asking that you allow me to hand this over to this body to take from here. Faith in government is the “tie that binds” us as citizens. Nothing else has the same effect in ensuring and assuring the federalist system established by the Framers.

Please take action to fix the problems I have placed before you. This matter is, essentially, non-justiciable (the judges know what their benchbook says but they'll never say they're using it to override statutory requirements in clear violation of separation of powers, of judicial ethics, and faithful stewardship of the law). Too many district courts have the poisoned well of that benchbook for responsible officials to allow them to just 'use their best judgments' to ignore its misstatement(s?) of law. Indeed, some probably believe fully that service of process is required for every civil case, including VFOIA enforcement.

Practitioners naturally think they have to follow what the judges require and, in any event, they're so used to traditional means for initiating civil cases that they assume service of process is required anyway. So lore, myth, legend and habits combine to deprive citizens of the VFOIA mechanism to which they are entitled, and with respect to which they have at least some chance at ensuring honest and transparent government of their communities.

It's a total, total mess.

Respectfully submitted,

/s/

COMMENTS BEFORE THE VIRGINIA FREEDOM
OF INFORMATION ACT ADVISORY COUNCIL
DECEMBER 3, 2024
Theodore C. Marcus, Esq.

Theodore C. Marcus, Esq. (Pro Se – NOT Admitted in Virginia)

FOIA Enforcement Bill with a Local Tie Passes Virginia House of Delegates Unanimously

Legislation introduced this session would fix a discrepancy uncovered by a local lawsuit.

FEB 02, 2026



Sh



By Adele Uphaus

MANAGING EDITOR AND CORRESPONDENT

[Email Adele](#)

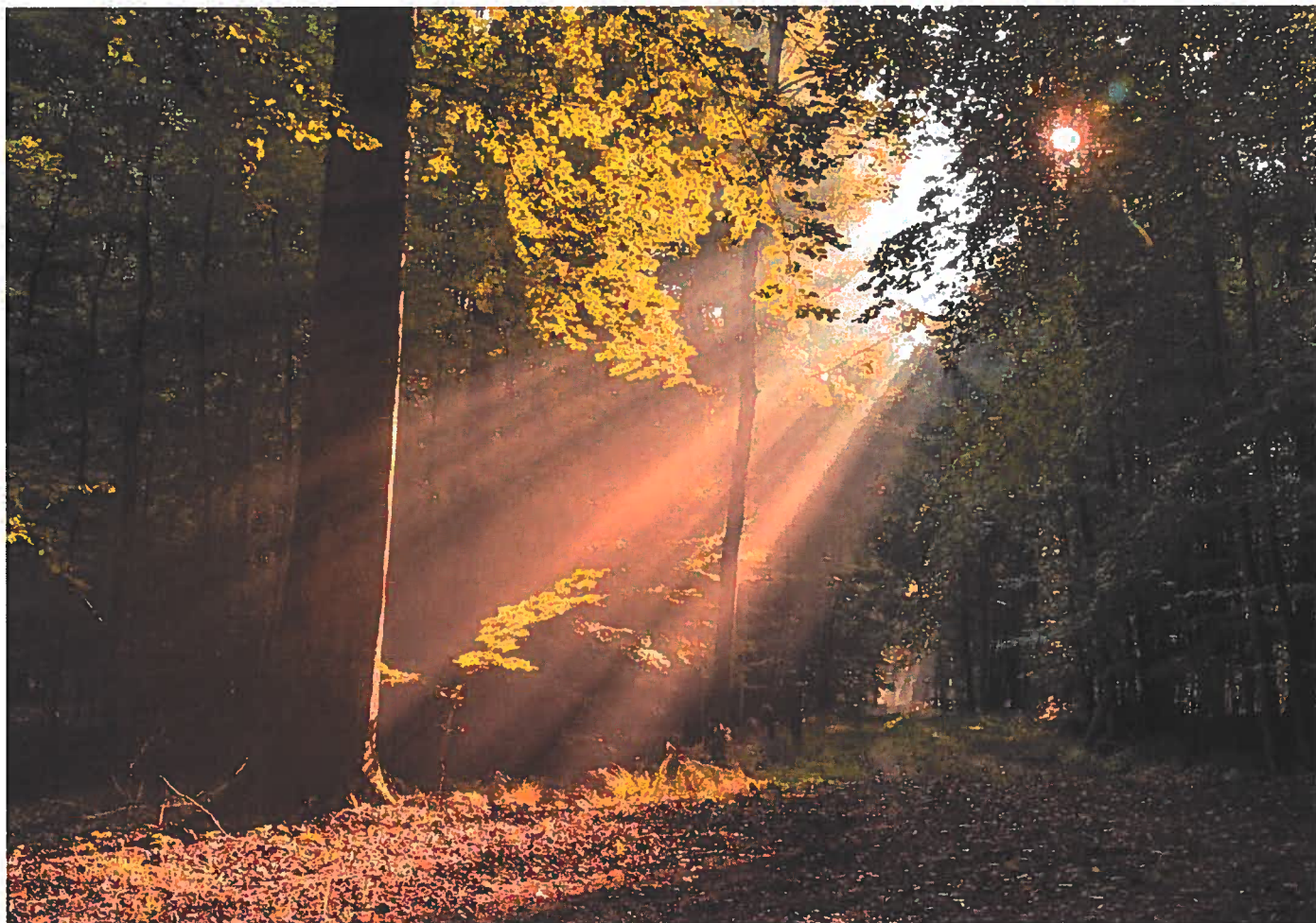


Photo by [Michael Held](#) on [Unsplash](#)

The Virginia House of Delegates last week unanimously passed a bill that would so an issue [brought to light in 2024](#) during [court hearings](#) on a [petition](#) seeking the release of records by the Spotsylvania School Board.

[House Bill 159](#)—introduced by Del. Marcus Simon, Chair of the General Assembly's Freedom of Information Advisory Council—specifies that “service of process or a summons for a hearing shall not be required” when a citizen files a petition seeking enforce their rights under the Virginia Freedom of Information Act (VFOIA).

The state Senate will now take up the legislation.

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The bill aims to fix an issue that came to light in the fall of 2024, when attorneys with the law firm McGuire Woods, representing Spotsylvania School Board members Lisa Phelps and April Gillespie and superintendent Clint Mitchell, argued successfully before a district court judge that a petition seeking the release of emails related to the Riverbend High School swim team should be dismissed because it was “improperly served.”

The attorneys argued that the petitioner, Theo Marcus, did not properly follow the process for serving notice of the petition, mainly because he served the petition himself and did so via email, rather than enlisting the Sheriff’s Office or a third-party civil process server.

But [Virginia Code](#) specifically does not require FOIA lawsuits be “served,” only that they must be “received” by the party against whom the petition is brought.

Megan Rhyne, executive director of the Virginia Coalition for Open Government, [told the Advance in 2024](#) that this language is intentional, and that a service of process requirement would be “a procedural booby trap” and a barrier to citizens attempting to enforce their rights under FOIA.

HB 159 adds the following sentence to Code to strengthen the existing language: “Nothing in this section shall be construed to require service of process or a summons.”

for a hearing when a petition” has been filed by a citizen seeking to enforce their rights under FOIA.

As originally introduced, the bill would also have required the Office of the Executive Secretary of the Supreme Court to update “any district court materials, including all manuals, procedures, guidelines, and bench books, in accordance with the provisions of this act.”

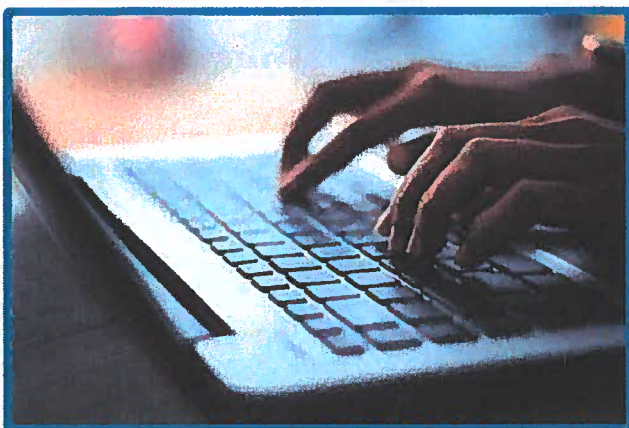
This language was stricken from the bill while it was being discussed in a subcommittee of the House Committee on General Laws.

The 2023 edition of the Virginia Judicial District Court Benchbook states that “Providing a copy of a petition before filing is not a substitute for service of process after filing.” Attorneys for the Spotsylvania School Board pointed to this language to support their argument.

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E-1



price” or “LCP.” 47 C.F.R. §§ 54.511(b); 54.500. The Government then reimburses the telecommunications carriers for the amount they charge to E-Rate customers.

According to the complaint, “AT&T did nothing to institutionalize LCP compliance” for many years. *See* Compl. [Dkt. # 1] ¶ 61. As a result, Heath alleges that AT&T overcharged E-Rate customers and received inflated reimbursements from the Government. Heath alleges that these reimbursement requests violate the False Claims Act, which makes it unlawful to, *inter alia*, “knowingly present[], or cause[] to be presented, a false or fraudulent claim for payment[.]” 31 U.S.C. § 3729(a)(1)(A). Heath also brings claims under a bevy of state False Claims Act analogues. *See generally* Compl.

AT&T’s current motion, however, does not concern the merits of Heath’s allegations. Rather, AT&T asks this Court to use its inherent authority to dismiss this case as a *sanction* for misconduct by Heath and his counsel. AT&T alleges that Heath and his previous lawyers—Scott Shepherd and Doug Dehler¹—received confidential information and documents critical to their case from a former AT&T regulatory lawyer named Theo Marcus. *See* Memorandum of Law In Support of Motion for Sanctions (“Sanctions Mot.”) [Dkt. # 73-2] at 5–14; *accord* Declaration of Ethan A. Hastert (“Hastert Decl.”) [Dkt. # 73-

¹ Heath is currently represented by different counsel. Scott Shepherd stopped actively participating in this matter in June 2015 and withdrew from the case on November 7, 2016. *See* Notice of Withdrawal of Appearance [Dkt. # 49]; *accord* Declaration of Ethan A. Hastert (“Hastert Decl.”) [Dkt. # 73-3] ¶¶ 11, 12, Ex. 22 [Dkt. # 73-25] at 272:6–9, 273:8–11, Ex. 25 [Dkt. # 73-29] at 63:12–64:17. Doug Dehler never filed a formal appearance in this matter and testified that he was only ever minimally involved in this case. Declaration of Benjamin Prinsen (“Prinsen Decl.”) [Dkt. # 77-3] ¶ 4, Ex. 3 [Dkt. # 77-6] at 104:25–105:5; Hastert Decl. ¶ 12, Ex. 26 [Dkt. # 73-30] at 152:24–153:5. While Dehler’s name appeared on the complaint, *see* Compl. at 83, there is no dispute that he is not involved in this case and has not been for years.

3] ¶¶ 2–5, 18, Exs. 1–17 [Dkt. ## 73-4–20], 31 [Dkt. # 73-35]. In turn, AT&T says, Shepherd offered to give Marcus a cut of the winnings as a “silent co-relator.”² Sanctions Mot. at 8–9; *accord* Hastert Decl. ¶ 12, Ex. 25 [Dkt. # 73-29] at 80:11–15. Heath’s counsel then affixed to the complaint in this case the ill-gotten documents from Marcus. *See* Sanctions Mot. at 9–13; *accord* Compl. Exs. 1, 3, 4. AT&T argues that the actions of Heath, Marcus, Shepherd, and Dehler violated various ethical rules and that—as a remedy for this misconduct—I should sanction Heath and his counsel by dismissing this action with prejudice. *See* Sanctions Mot. at 22–42.

LEGAL STANDARD

Courts have “the inherent power” to “protect their integrity and prevent abuses of the judicial process.” *Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991)). This power encompasses “the use of dismissal or default judgment as a sanction for misconduct.” *Webb v. D.C.*, 146 F.3d 964, 971 (D.C. Cir. 1998). However, dismissal is generally disfavored as a sanction. *See Shepherd*, 62 F.3d at 1475 (citations, quotations, and alterations omitted) (“Because inherent powers are shielded from direct democratic

² While the parties discussed this arrangement—going so far as to even prepare the paperwork, Hastert Decl. Ex. 22 at 291:3–292:4, Ex. 25 at 76:24–81:6, Ex. 26 at 162:20–169:21; Prinsen Decl. ¶ 2, Ex. 1 [Dkt. # 77-4] at 229:4–230:10, 250:15–252:12—there is no such agreement in place. Marcus is not a relator—silent or otherwise—and he is not entitled to any financial compensation stemming from this case. *See* Prinsen Decl. Ex. 1 at 62:20–65:17, 147:4–14, 150:24–151:21, 249:11–250:14, 252:13–254:3; Hastert Decl. Ex. 25 at 82:24–83:4; Declaration of Todd Heath (“Heath Decl.”) [Dkt. # 77-1] ¶ 11–12.

controls, they must be exercised with restraint and discretion.”), 1478 (“[D]ismissal is a drastic step, normally to be taken only after unfruitful resort to lesser sanctions.”).

A party seeking dismissal must make two threshold showings. *First*, the party must establish “clear and convincing evidence of misconduct[.]” *Id.* at 1478. “The clear and convincing standard generally requires the trier of fact, in viewing each party’s pile of evidence, to reach a firm conviction of the truth on the evidence about which he or she is certain.” *Parsi v. Daiouleslam*, 778 F.3d 116, 131 (D.C. Cir. 2015) (citations and quotations omitted). *Second*, the party must establish that dismissal is an appropriate remedy for the misconduct. Under this second step, the Court must consider the “three basic justifications that support the use of dismissal . . . as a sanction for misconduct”: (1) “the errant party’s behavior has severely hampered the other party’s ability to present his case—in other words, that the other party has been so prejudiced by the misconduct that it would be unfair to require him to proceed further in the case”; (2) “the party’s misconduct has put an intolerable burden on a district court by requiring the court to modify its own docket and operations in order to accommodate the delay; and (3) “the need to sanction conduct that is disrespectful to the court and to deter similar misconduct in the future.” *Webb*, 146 F.3d at 971 (citations and quotations omitted). In addition, I “may not rely on [the Court’s] inherent power to impose a sanction of either default or dismissal” unless “lesser sanctions will not adequately deter and punish the misconduct[.]” *Shepherd*, 62 F.3d at 1479.

DISCUSSION

Even assuming misconduct by Marcus, Shepherd, and Dehler, I find that under both of AT&T’s proffered rationales—(1) prejudice and (2) punishment and deterrence—it has

failed for the following reasons to establish that the extraordinary sanction it seeks in this case is warranted.

A. Prejudice to Defendant

AT&T first contends that it has been prejudiced by the misconduct in this case because the documents provided by Marcus formed the basis for the complaint and allowed the complaint to survive AT&T's motion to dismiss. *See* Sanctions Mot. at 37–41; *see also* Reply In Support of Motion for Sanctions (“Reply”) [Dkt. # 85] at 23. According to AT&T, this prejudice has thus infected the entire case, rendering dismissal the only appropriate remedy. *See id.* I disagree.

Heath's attachment of privileged and confidential documents to the complaint fails to establish the degree of prejudice necessary to warrant dismissal. AT&T had available to it a remedy that would have eliminated any such prejudice: an order “compel[ling] plaintiff's counsel to return the [privileged or confidential documents] and . . . bar[ring] plaintiff from using [them] as evidence.”³ *See Carmody v. Bd. of Trustees of Univ. of Illinois*, 893 F.3d 397, 405–07 (7th Cir. 2018) (upholding such an order). Because this remedy would have resolved the prejudice stemming from the wrongful disclosure, it is

³ AT&T has likely waived any privilege and confidentiality protections for these documents by failing to immediately take steps to rectify their disclosure. *See, e.g., Fischman v. Mitsubishi Chem. Holdings Am., Inc.*, No. 18-CV-8188 (JMF), 2019 WL 3034866, at *4 (S.D.N.Y. July 11, 2019) (“Defendants waived any privilege (or confidentiality protections) with respect to the contents of the Complaint by failing to take immediate steps to remedy any misuse by [the plaintiff].”); *United States v. HCA Holdings Inc.*, No. 12-20638-CIV, 2015 WL 11198933, at *5–*7 (S.D. Fla. July 21, 2015) (similar). But AT&T's failure to promptly invoke the proper remedy for the release of its documents is not a justification for imposing a drastic and more punitive sanction at this juncture.

not “unfair to require [AT&T] to proceed[.]” *Webb*, 146 F.3d at 971 (citations and quotations omitted). In addition, this remedy demonstrates the availability of a “lesser sanction” that would have “overcome any prejudice[.]” *See id.* at 974; *accord Shepherd*, 62 F.3d at 1478–79 (Court may dismiss case only after “rejecting lesser sanctions,” such as “adverse evidentiary rulings.”).

AT&T also claims prejudice from plaintiff’s behind-the-scenes use of its privileged and confidential information. *See Reply* at 22 (“[T]his case is not only about the public disclosure of three AT&T documents.”). In particular, it contends that Marcus served as a “shadow conduit” for confidential information that enabled Heath and his counsel to build their case. *See id.* at 22–25; Sanctions Mot. at 37–41.

This allegation suffers from the same defect as the publicly disclosed documents. After AT&T became aware of the complaint, it could have moved for an order requiring the return and/or destruction of *all* such documents, including those that were not attached as exhibits to the complaint. And to the extent AT&T believed material information in the complaint was based on unethical disclosures, it could have moved to strike that information. *See, e.g., Whitehead v. Gateway Chevrolet*, No. 03 C 5684, 2004 WL 316413, at *3–*5 (N.D. Ill. Feb. 2, 2004) (striking individual paragraphs in complaint based on “inclusion of [party]’s confidential information”); *accord Low-Iacovino v. Benefit Plan Comm. of Nonbargained Program of AT&T Benefit Plan*, No. CV-16-06614-AB, 2018 WL 6984850, at *5 (C.D. Cal. June 20, 2018) (using sanction power to strike from declaration individual paragraphs that revealed confidential information); *cf. Sanctions Mot.* at 10; *Reply* at 23–25 (alleging specific elements of the complaint were necessarily derived from

Marcus's disclosures). The availability of this remedy both undermines AT&T's claim of incurable prejudice and affords the Court a lesser sanction.⁴ Accordingly, I do not find that AT&T is so "severely hampered" in its "ability to present [its] case" that dismissal is warranted. *Webb*, 146 F.3d at 971 (citations and quotations omitted).

B. Punishment and Deterrence

AT&T also contends that dismissal is necessary to punish the alleged ethical violations in this case. However, our Circuit Court "has been notably reluctant to affirm dismissal under the punishment or deterrence rationale unless the client himself is shown to deserve the sanction." *Shea v. Donohoe Const. Co.*, 795 F.2d 1071, 1077 (D.C. Cir. 1986) (citations omitted). Here, there is not clear and convincing evidence that Heath himself engaged in misconduct. Indeed, Heath did not even know that Shepherd and Dehler received confidential information from an in-house attorney until *years* after this case had been filed. *See* Declaration of Benjamin Prinsen ("Prinsen Decl.") [Dkt. # 77-3] ¶ 7, Ex. 6 [Dkt. # 77-9] at 232:3–15; Hastert Decl. ¶ 11, Ex. 22 [Dkt. # 73-25] at 82:2–6, 186:6–188:22, Ex. 24 [Dkt. # 73-28] at 5, 7; Declaration of Todd Heath ("Heath Decl.") [Dkt. # 77-1] ¶ 10. While he was aware, of course, that Shepherd and Dehler had obtained

⁴ This remedy also distinguishes this case from *United States v. Quest Diagnostics Inc.*, 734 F.3d 154 (2d Cir. 2013). In that case, lesser sanctions were not possible because it "would [have] be[en] virtually impossible to identify and distinguish each improper disclosure." *Quest Diagnostics*, 754 F.3d at 167 (citations and quotations omitted)). In this case, however, it would be possible to sever the improper disclosures because of the remedies discussed above and because Heath and his current counsel were not exposed to the improper disclosures from Marcus and thus may not use the ill-gotten information prospectively. *See infra* notes 6 & 7; *compare with Quest Diagnostics*, 754 F.3d at 167 (citing "unrestricted sharing of confidential information with the other individual relators").

internal AT&T documents, they never told him that the source was an in-house attorney.⁵ Heath Decl. ¶ 10; Prinsen Decl. Ex. 6 at 188:15–22; Hastert Decl. Ex. 22 at 185:10–16, Ex. 24 at 6, 10. Marcus eventually reached out to Heath in June 2015, but those communications were minimal, documented, and did not involve the exchange of confidential or privileged information.⁶ *See* Hastert Decl. Ex. 22 at 186:14–188:22, 197:3–205:16. In addition, Heath’s current lawyers are not alleged to have engaged in *any* misconduct.⁷ Finally, even assuming Shepherd, Dehler, and Marcus committed misconduct, lesser sanctions specifically targeted at those individuals—such as prohibiting them from receiving any winnings from this case—would provide sufficient deterrence and

⁵ It was also reasonable for Heath to not have realized Marcus was the source of the disclosures when the complaint was filed because (1) Heath knew only of an “anonymous source” prior to 2015, and (2) Heath’s counsel was investigating other leads at the time. *See* Hastert Decl. Ex. 24 at 4–5 (listing former AT&T employees interviewed by an investigator hired by Heath’s counsel); *accord* Hastert Decl. Ex. 22 at 105:16–110:24, 186:15–17, 270:15–271:23, Ex. 25 at 95:25–97:25, 103:6–12, Ex. 26 at 37:10–41:24, Ex. 29 [Dkt. # 73-33].

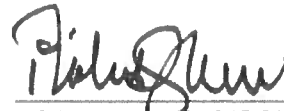
⁶ Marcus sent Heath an email and followed up with a phone call in late June 2015. Hastert Decl. Ex. 22 at 189:18–22, 197:3–206:4. Heath recorded the phone call. *Id.*; *see also* Hastert Decl. Ex. 4 [Dkt. # 73-7]. Marcus did not share confidential information or offer any substantive input on the case. *See id.* Rather, Marcus wanted Heath to ask Shepherd to call him. *See id.* Marcus sent a follow-up email on July 1, 2015 and a LinkedIn request around the same time, but Heath never responded to these communications. Prinsen Decl. Ex. 6 at 229:17–230:14; Ex. 11 [Dkt. # 77-14]. These interactions represent the entirety of communications between Heath and Marcus. Hastert Decl., Ex. 22 at 188:7–14, 198:6–7, Ex. 24 at 6; Heath Decl. ¶ 14; Prinsen Decl. Ex. 1 at 221:2–24, 223:4–224:22.

⁷ In fact, neither Heath nor his current lawyers have seen any non-public privileged or confidential information disclosed by Marcus. Heath Decl. ¶ 10; Declaration of Matthew K. Organ [Dkt. # 77-22] ¶¶ 3–4, 8–11; Declaration of Colette G. Matzzie [Dkt. # 77-23] ¶¶ 3–4; *accord* Hastert Decl., Ex. 1 [Dkt. # 73-4]; Ex. 26 at 187:6–20; Prinsen Decl. Ex. 1 at 189:13–15, 248:21–24; Ex. 6 at 177:3–8; Declaration of Scott Shepherd [Dkt. # 77-26] ¶ 5.

punishment. I therefore decline to punish Heath and his current counsel under these circumstances.

CONCLUSION

In light of the foregoing, defendants' Motion for Sanctions is **DENIED**. A separate Order consistent with this decision accompanies this Memorandum Opinion.

A handwritten signature in black ink, appearing to read "Richard J. Leon", written over a horizontal line.

RICHARD J. LEON
United States District Judge

E-2



August 19, 2022

VIA U.S. MAIL AND EMAIL (PERRYJ@DCODC.ORG)

PERSONAL AND CONFIDENTIAL

Joseph C. Perry, Esquire
D.C. Office of Disciplinary Counsel
515 Fifth Street, N.W.
Building A, Room 117
Washington, DC 20001

Re: Disciplinary Docket No. 2021-D050
Complainant: Thomas J. Green, Esquire
Respondent: Theodore C. Marcus, Esquire

Dear Mr. Perry,

Please accept this letter as a response on behalf of the Respondent, Theodore C. Marcus, to your correspondence dated June 22, 2022 in the above-referenced matter. Thank you for your courtesy in extending the time for Mr. Marcus to submit his response. For the reasons set forth below, Mr. Marcus respectfully submits that this matter is not disciplinary in nature, and therefore, should be dismissed by your office.

Summary of Facts

This matter arises out of actions taken by Mr. Marcus as a whistleblower in connection with the conduct of AT&T and some of its predecessor and subsidiary companies relating to their participation in the Federal Communication Commission's ("FCC") Universal Service Schools and Libraries Education Rate ("E-Rate") Program.

The E-Rate Program

The E-Rate program is a federal subsidy program overseen by the FCC and operated by the Universal Service Administrative Company ("USAC") in which the federal government, substantially through fees charged to telecommunications residential and business customers, subsidizes internet, wireless, and other telecommunications "universal services" to schools and libraries throughout the United States based on the demonstrated levels of recipients' needs. Those



subsidies can be up to 90 percent off service providers' billed rates and are paid by the federal government to the communications companies that are chosen to provide services to qualified recipients. The program is intended to ensure that schools and libraries, particularly in underprivileged communities, have access to affordable telecommunications and information services. The E-Rate program, at its outset in 1997, had an annual capped budget of \$2.25 billion to cover the annual internet access, telecommunications services, and internal wiring and connections needs of the entire nation's eligible schools and libraries (around 2014-15, the cap was expanded to just over \$3 billion and indexed to inflation – it is now roughly \$4.2 billion). Because of the limited budget for the program and the extensive needs for digital communications services, pricing discipline for the E-Rate Program is and always has been imperative to ensure that the funding is spread as widely as possible to meet the digital services needs of the nation's underprivileged schools and libraries. The E-Rate program is critical to addressing the deficits in resources (the “digital divide”) available to libraries and schools in underprivileged communities.

The E-Rate program has strict competitive bidding and certification requirements to ensure maximum coverage of annual needs. Included in these requirements, among other things, is a mandate that participating service providers bid, charge, and invoice their offerings at their “lowest corresponding price.” “Lowest corresponding price” or “LCP” is defined as “the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services.” 47 C.F.R. § 54.500; *see also* FCC *Universal Service Order*, FCC-97-157, 12 FCC Rcd 8776 at ¶¶ 484-490, CC Docket No. 96-45 (rel. May 8, 1997); *Fourth Order on Reconsideration et al.*, FCC 97-420, CC Docket No. 96-45, ¶¶ 133-143 (rel. Dec. 30, 1997). Generally, eligible schools and libraries are required to seek competitive bids for the services sought and are required to select “the most cost-effective service offering,” 47 C.F.R. §§ 54.503, 54.511(a), with price being the most significant factor. The service providers, such as AT&T, are prohibited from submitting bids for, charging (or, later, invoicing, or being reimbursed regarding) eligible schools or libraries at “a price above the lowest corresponding price for supported services, unless the [FCC], with respect to interstate services or the state commission with respect to intrastate services, finds that the lowest corresponding price is not compensatory.” 47 C.F.R. § 54.511(b).

Once a contract was negotiated and selected by the school or library and approved by USAC, USAC pays the discounted portion of the services through the end of the contract term. Notably, service providers are required to retain documents related to the delivery of supported services for at least 10 years, as well as “[a]ny other document that demonstrates compliance with the statutory or regulatory requirements for the schools and libraries mechanism.” 47 C.F.R. § 54.516(a)(2). Service providers are further required to produce records at the request of any state education department, USAC, the FCC, or any local, state or federal agency with jurisdiction over the entity. 47 C.F.R. § 54.516(b). Service providers are also subject to pre-service and post-service audits and other reviews (including investigations) to ensure their compliance with the statutory and regulatory requirements of the E-Rate program, and must permit representatives of state education departments, USAC, the FCC or any local, state or federal agency with jurisdiction over the service



providers “to enter their premises to conduct E-rate compliance inspections.” 47 C.F.R. §§ 54.516(c)-(d). In other words, service providers who participate in the E-Rate program are obligated to maintain and permit inspection of the information and documentation necessary to establish their compliance with the statutory and regulatory requirements of the E-Rate Program.

In addition to the record-keeping requirements outlined above, service providers who participate in the E-Rate program also must file a Service Provider Annual Certification (“SPAC”) Form (Form 473). 47 C.F.R. § 54.504(f). If a Service Provider chooses to conduct E-Rate business through multiple affiliates (typical of large providers, including AT&T), each entity given an identification number called a “SPIN” has an independent obligation to submit such a SPAC every year in order to participate lawfully in the Program. The SPAC Form requires service providers to certify annually that they will comply with E-Rate program rules. As part of the SPAC, service providers are required to certify, among other things, that the invoices they submit under the E-Rate program “are accurate and represent payments...for equipment and services provided pursuant to E-rate program rules.” 47 C.F.R. § 54.504(f)(4). In addition, invoices submitted by Service Providers to USAC for E-Rate reimbursement (monthly) also bear certifications of similar language (see FCC Form 474 – Service Provider Information Form).¹

Mr. Marcus’ Employment by AT&T and Work Relating to the E-Rate Program

Mr. Marcus joined AT&T as in-house counsel in or about 2006 when his prior employer, BellSouth Corporation (where he began work as Senior Compliance Counsel in 2000) merged with AT&T. In or around 2008 or 2009, Mr. Marcus was Co-Chair of the regulatory group at AT&T that provided regulatory advocacy and support to the Company for E-Rate program matters. At that time, the Company was integrating operations from at least four formerly distinct, major competitors – SBC, BellSouth, AT&T Corp. and Ameritech – assembled through various acquisitions and mergers by the former SBC over the prior decade. Mr. Marcus’s understanding

¹ Form 474 contains the following relevant certifications required from the service provider:

I declare under penalty of perjury that the foregoing is true and correct and that I am authorized to submit this Service Provider Invoice Form (FCC Form 474) and acknowledge to the best of my knowledge, information and belief, as follows:

- A. I certify that this Service Provider is in compliance with the rules and orders governing the schools and libraries universal service support program and I acknowledge that failure to be in compliance and remain in compliance with those rules and orders may result in the denial of discount funding and/or cancellation of funding commitments.
- B. I certify that the certifications made on the Service Provider Annual Certification Form (FCC Form 473) by this Service Provider are true and correct.
- C. I acknowledge that failure to comply with the rules and orders governing the schools and libraries universal service support program could result in civil or criminal prosecution by law enforcement authorities.



was that the in-house E-Rate team was created in whole or in part in response to multiple pending matters relating to pre- and post-integrated AT&T's participation in the E-Rate program, including: (1) a then-pending federal criminal investigation by the United States Attorney's Office in Indiana into a legacy AT&T company's (T-Corp.) E-Rate program participation (the "Intelenet Investigation"); (2) a 2008 False Claims Act *Qui Tam* case filed against AT&T in U.S. District Court in Wisconsin by relator Todd Heath involving another AT&T affiliate, Wisconsin Bell's, E-Rate program participation (the "Wisconsin Case"); (3) inquiries initiated by the FCC's Office of Inspector General and FCC's Enforcement Bureau relating to AT&T's participation in the E-Rate program in other areas of its footprint; and legacy obligations associated with prior FCC enforcement against SBC and other AT&T entities concerning E-Rate.

Among other things, Mr. Marcus's group was assigned to conduct an internal review of AT&T's participation in the E-Rate program, primarily in the context of the allegations in the Wisconsin Case. Mr. Marcus's E-Rate group focused its investigation in part on the participation of AT&T's affiliated companies in the E-Rate program in Wisconsin and, from there, other relevant areas, from approximately 1997 until 2010. Mr. Marcus recalls that the group discovered as part of its internal review that by 2009 or 2010, AT&T (i.e., the amalgam of multiple "legacy entities" formed after a breakup of the Bell communication system in the 1980s) had performed hundreds of millions, if not several billion, dollars of E-Rate business in the United States, and as part of that participation, had submitted dozens of annual certifications, and many monthly invoices' certifications, claiming – *falsely* – that the AT&T entities were in full compliance with the E-Rate program rules, including its LCP requirement, since as early as 1997.

Specifically, during the course of the in-house counsel group's review, Mr. Marcus and several others on the review team discovered that, despite repeated representations to the government that it complied with the E-Rate program rules, there was no evidence that AT&T or any of its affiliates had ever implemented any plan, policy, procedure, training, monitoring or auditing activities to ensure any awareness of the requirement by anyone associated with E-Rate business, or to verify or ensure compliance with the LCP requirements of the E-Rate program until approximately 2009 – i.e., after the allegations made in the Wisconsin matter – when AT&T modified its pricing program to comply with LCP standards in the wake of the filing of the Wisconsin Case (which was contemporaneous with the Company's affirmative and false representations of LCP compliance in the Intelenet investigation). However, *several of the companies that were now part of AT&T had actually lobbied the FCC in approximately 1996 and 1997 concerning the granular aspects of the LCP requirement*, including through personnel who were with the company when the allegations first arose in the Wisconsin Case. It appeared to Mr. Marcus that, despite those lobbying efforts which made clear that the companies were aware of the LCP requirement, AT&T's behavior in this regard may have taken place since the very inception of the LCP requirement.²

² Mr. Marcus cannot affirmatively represent the scale, scope and timeframe because the Company forbade him or other counsel, internal or external, to extend the review into any of those or related areas.



During the time period covered by Mr. Marcus's investigation, he was unaware of any staff or subject matter experts that the group interviewed who understood or even knew about the program's LCP requirement. Mr. Marcus recalls that AT&T's auditing, training and monitoring protocols revealed no recognition, discussion, awareness or institutional plan for LCP compliance, despite the company and its affiliates having repeatedly certified to the government that it was in full compliance with the E-Rate program rules, *including the LCP requirement*. Thus, Mr. Marcus determined that AT&T, potentially in all of its legacy components and lines of business, charged prices to E-Rate customers without conducting any LCP analysis, and left it to E-Rate purchasers to raise any questions they may have regarding pricing. Moreover, some of the pricing behavior Mr. Marcus learned about demonstrated conduct expressly forbidden by the FCC (*e.g.*, consideration of whether a given bid opportunity would have any "competitive offers," *i.e.*, whether AT&T would have no one to bid against and, thus, wouldn't need to be concerned about being undercut). Mr. Marcus recalls discovering that, if an E-Rate customer did complain, the company sometimes conducted a post-hoc analysis of its prices, but the company would typically either self-servingly conclude its prices were in line with the LCP or provide a refund to a complaining purchaser. These tactics were not in Mr. Marcus's view compliant with the E-Rate program's rules, interpretative orders, or the legacy companies' express, written understanding of, and commitment to, what LCP would require.

Mr. Marcus also learned during the investigation that the company (the T. Corp. affiliate) had made statements to the United States Attorney's Office in the mid-2000s' Indiana Intelenet Investigation that its prices were "LCP compliant." *See Exhibit 1* (February 13, 2009 Department of Justice Press Release). That is, he learned that in-house and external attorneys for AT&T had argued successfully to federal prosecutors that the government's prosecution theory (*i.e.*, a kickback bribe theory in which the company was alleged to have charged higher prices for services in order to furnish kickbacks) was legally infirm because the company's prices were "federally mandated" under the LCP requirement of the E-Rate program. It appeared to Mr. Marcus that these statements were made to government prosecutors despite the fact that the company did not have any policy or procedure in place at the time that would have enabled it to justify the assertion in the first instance or, if challenged, to verify whether the prices offered complied with the LCP requirement. In fact, during his investigation, Mr. Marcus learned that no one associated with the making of those statements to the government prosecutors had any actual knowledge or understanding of the LCP requirement, but were, at best, assuming the Company was complying with the requirements given years of certifications to full E-Rate compliance. Thus, it was unclear to Mr. Marcus how such statements could have been made in good faith.

Mr. Marcus was particularly concerned about AT&T's representations regarding LCP compliance because, based on his research, the FCC's orders, rules and regulatory framework were clear that the prices charged under the E-Rate program – upon which the discounts were then to be applied – needed to be based on a good faith analysis of comparative prices and enumerated factors (*i.e.*, those factors logically related to cost of service) offered to similarly situated customers. In other words, as it was aware before the E-Rate program even began, AT&T was legally required to affirmatively analyze its pricing under the E-Rate program and ensure LCP compliance before it



could certify to the government that it had complied with the E-Rate program rules. Given that AT&T had not been conducting any such analysis (or training, monitoring or auditing) to ensure compliance with the LCP requirement, Mr. Marcus did not see how AT&T could justify its statements that it was meeting the E-Rate program rules, including the LCP requirement. In fact, Mr. Marcus believed that there were potentially thousands of price points that needed to be reviewed by AT&T to determine whether the company had, in fact, complied with the LCP requirement.

Given the group's findings, Mr. Marcus raised questions with his supervisors as to whether there was any valid basis AT&T or its affiliates could represent to the government and others that it had, in fact, complied with the LCP requirements anywhere, let alone the business under investigation or review. Given the serious probability of mischarges – putting aside the false certifications of compliance, which were independent criminal and civil exposures – resulting from AT&T's apparent long-term, company-wide LCP non-compliance (if not likelihood, as there were specific instances of suspect charges uncovered in the investigation), Mr. Marcus inquired about AT&T's duty to investigate the extent of the potentially false certifications that had been made in connection with the E-Rate program and whether the government or AT&T's E-Rate customers were entitled to recoup any excess funds received by AT&T during the years in which it or its affiliates had participated in the program. Mr. Marcus advised his supervisors that, at a minimum, he believed that AT&T had a duty to retract its affirmative statements of LCP compliance to the United States Attorney's Office in the Intelnet Investigation given AT&T's inability to verify its compliance with the LCP requirement, and emerging knowledge of apparent non-compliance with the program's competitive bidding rules.

Mr. Marcus's supervisors, however, generally did not follow his advice or address his concerns.

Ultimately, AT&T settled the Intelnet Investigation with the FCC in or about February 2009 for \$8.266 million. *See Exhibit 1.* As is clear from the press release, the government alleged specifically that AT&T received E-Rate program funds for services that were ineligible for the program and that AT&T had overbilled the E-Rate program. *See Exhibit 1.*

Mr. Marcus later transitioned to a litigation group at AT&T, where he was assigned litigation cases, including E-Rate litigation matters. Among other things, he was charged with assisting AT&T in responding to an FCC subpoena in the Wisconsin Case. In conjunction with his duties, Mr. Marcus, consistent with his experience and training as a former Assistant United States Attorney, experience as litigation counsel in a large law firm, and other prior experience, suggested to his supervisors that AT&T work diligently to investigate the facts of its apparent long-term LCP non-compliance. Mr. Marcus believed doing so was necessary to (a) verify the extent of non-compliance, (b) enable AT&T to disclose such non-compliance as would have been necessary under the circumstances, (c) enable AT&T to meet its various and extensive duties of candor and good conduct as a Carrier of Last Resort and as a federal and multi-state telecommunications licensee, and (d) eventually enable AT&T to be viewed and treated by investigators as



“cooperating”, *i.e.*, addressing itself seriously to the facts at hand.³ When his immediate supervisors ignored his pleas, seemingly without legitimate bases, Mr. Marcus attempted to notify his supervisors’ superiors of his concerns, but he was unable to convince any supervisor to take any action even to superficially review AT&T’s LCP compliance.

Throughout Mr. Marcus’s tenure at AT&T, he escalated his concerns to high-level supervisors at the company. Those supervisors generally ignored his pleas to investigate and implement policies and protocols that would enable AT&T to verify its compliance with the LCP requirements. Those supervisors had also refused to correct AT&T’s representations regarding its LCP compliance even though Mr. Marcus was confident those representations were false or, at a minimum, unsupported by any legitimate analysis. At one point, and as an apparent result of Mr. Marcus’ express concerns about the intensifying Federal investigative activity and the misstatements made to prosecutors in Indiana in the 2008-2009 timeframe, AT&T retained an outside law firm, Gibson Dunn, to conduct an “independent review” and to opine as to whether AT&T was required to disclose its failure to verify compliance with the LCP requirement. Mr. Marcus was later informed that Gibson Dunn concluded the company had no “affirmative duty” to make any disclosures to the government regarding its LCP compliance issues.

Given his knowledge of the E-Rate program rules and the statements made by AT&T, Mr. Marcus was not satisfied that Gibson Dunn had conducted a legitimate investigation of the issue. Thus, Mr. Marcus remained concerned that the company had repeatedly certified in SPACs and invoices (SPIFs), and had argued to the United States Attorney’s Office, that it was complying with the LCP requirement when it could not in good faith verify that it had done so. Mr. Marcus was concerned that, if the government or others conducted a thorough investigation, it would be proven that those statements were false. Further, he wanted there to be clarity, and beyond argument to the contrary, that he, or his group, aided AT&T in committing fraud, perjury, or obstructing a government agency given the assistance he had provided on E-Rate matters.

Mr. Marcus’s concerns stemmed from his ethical duties as an attorney, as a senior director of a publicly traded and heavily regulated Fortune 25 concern, and the duty of candor and truthfulness that is incumbent upon every person appearing before the FCC. Indeed, under 47 CFR § 1.17, in any FCC investigatory or adjudicatory matter, no person is permitted in any written or oral statement of fact to “intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading.” *See* 47 CFR § 1.17(a)(1). In addition, Mr. Marcus was aware that in 2002, SBC Communications, Inc., a predecessor to AT&T and the acquiring entity of BellSouth, Ameritech, etc., had entered into a Consent Decree with the Commission’s Enforcement Bureau that included a multi-year Compliance Agreement in which SBC (now AT&T) had agreed to taking steps “to ensure that all of its employees who engage in contacts with the FCC are properly educated and thus made aware of their obligations to provide truthful,

³ *See* 18 U.S.C. § 3553(e) and Section 5K1.1 of the United States Sentencing Guidelines (regarding cooperation credit for corporate criminal defendants); *see also* DOJ’s Principles of Federal Prosecution of Business Organizations, § 9-28.720.



accurate, and complete information to the [FCC].” See **Exhibit 2** (May 28, 2002 FCC Press Release).

Mr. Marcus was concerned as to whether his participation in the team that was in part responsible for formulating AT&T’s representations to the government in the Intelenet Investigation and other E-Rate matters before the FCC would violate the ethics rules or rules relating to representation before the FCC. In addition, while AT&T had by 2009 made changes to its pricing policies and internal pricing model to account for LCP in *new* E-Rate contracts, it refused to undertake any retroactive audit of prior E-Rate program contracts – even though many of those contracts were still being performed at the previously set contract rates – in connection with which it was still issuing invoices and certifying to the government compliance with the LCP requirement. Mr. Marcus did not understand how AT&T could do so when it could not verify LCP compliance when it entered into those E-Rate contracts, and he was concerned that AT&T was making ongoing misrepresentations, either consciously and willfully or through “willful blindness.” Mr. Marcus’s concerns were heightened by the law firm’s “findings” of “no *affirmative* duty to disclose” AT&T’s conduct in any of the investigations at issue. Mr. Marcus, therefore, requested – in writing -- that AT&T authorize him to obtain independent legal advice with respect to his duties and obligations as a senior lawyer with duties of care to shareholders, an officer of the court, a lawyer appearing before the FCC, and a member of the Bar. AT&T denied those requests.

The Conclusion of Mr. Marcus’s Employment and His Actions as an FCA Whistleblower

Feeling that he had exhausted his efforts to attempt to rectify the conduct of the company internally, Mr. Marcus became convinced that he had no choice under the Rules of Professional Conduct but to take action externally to prevent what he believed was fraud being committed by AT&T and attempt to rectify potentially millions of dollars (or more) of harm caused by AT&T’s failure to ensure LCP compliance as part of its participation in the E-Rate program. Mr. Marcus reviewed the Rules of Professional Conduct, including Rules 4.1 and 1.6, and conducted other research, including research relating to the “crime-fraud” exception to attorney-client privilege and the protocols of disclosure under the Sarbanes-Oxley Act. Mr. Marcus concluded based on his research that his ethical obligations as an attorney, his obligations to the shareholders of AT&T, and his duties as a person appearing before the FCC in the matters described (or in future matters), required him to disclose AT&T’s conduct to cure the affirmative misrepresentation(s) and misrepresentations by omission he believed had been made, rectify any financial or other harm that had been caused by those misrepresentation, and prevent future harm caused by AT&T’s conduct.

Accordingly, Mr. Marcus contacted the Department of Justice to attempt to inform that agency of AT&T’s misrepresentations. The Department of Justice, however, refused to receive the information Mr. Marcus sought to offer, which Mr. Marcus believes was based on a general Department policy of refraining from contact with counsel/former counsel of a civil or criminal subject or target. Mr. Marcus concluded that his next avenue for disclosure was to pursue *qui tam* claims under the False Claims Act (“FCA”). Given that Mr. Heath had already initiated the Wisconsin Case – an FCA action relating to AT&T’s E-Rate program participation – Mr. Marcus contacted the attorneys handling the Wisconsin Case to seek legal advice and possible



representation regarding his options for joining as potential *qui tam* relator. Mr. Marcus initially used aliases, as is typical in whistleblower cases, to communicate with counsel to protect his anonymity given that he did not know whether counsel would assist him, and he believed that AT&T would retaliate against him.

Mr. Marcus provided to the Wisconsin Case attorneys documents that he had obtained during his employment at AT&T, though given the amount of time that has passed since doing so in 2011, Mr. Marcus cannot recall with specificity what documents he provided to counsel. In his Complaint, Mr. Green asserts that Mr. Marcus provided counsel with confidential memoranda from AT&T's outside counsel, Crowell & Moring LLP and the following three documents that were attached as Exhibits to the Complaint filed by relator Todd Heath in the matter styled *United States of America, et al., ex rel. Todd Heath v. AT&T, et al.*, Case No. 11-cv-01897 in the United States District Court for the District of Columbia (the "D.C. Case"): (1) E-Rate Compliance Training presentation slides dated September 2007; (2) slides from a presentation at an E-Rate Conference dated March 10 & 11, 2008; and (3) an Agenda dated August 4, 2010 created by Detroit Public Schools in connection with an audit of AT&T's services.

Mr. Marcus has no recollection of any documents from Crowell & Moring relating in any way to AT&T's E-Rate issues, and thus, Mr. Marcus does not believe he provided any Crowell & Moring memoranda to anyone. Mr. Marcus simply cannot recall, however, whether he did, in fact, provide the other materials identified by Mr. Green to counsel.

After providing documents to counsel, Mr. Marcus determined that he could not continue to represent his institutional client, AT&T, without serious conflicts of interest arising from the company's E-Rate LCP non-compliance, its refusal to make any effort to review its pricing (both within the 10-yr frame of the E-Rate audit rules, but also within the term of existing contracts, many of which had begun years prior to the LCP revelations and were still ongoing at that time), and related misconduct. He believed that, effectively, the only way to disassociate himself from the Company's conduct and, obviously, withdraw representation of the Company was through acknowledging the termination of his employment with AT&T. Accordingly, he resigned his position from AT&T. While Mr. Marcus thereafter had additional discussions with counsel about becoming involved as a relator in a *qui tam* case against AT&T, he never signed on as a relator or other party in any such lawsuit. Contrary to Mr. Green's allegations, Mr. Marcus, as Judge Leon affirmatively found in denying AT&T's sanctions motion, never reached any point in any case wherein he would have been entitled to, or had any expectancy to receive, any financial compensation as a *qui tam* relator or on any other basis. Counsel in the *qui tam* lawsuit also never returned any of the documents he provided, and thus, Mr. Marcus does not have records of what he provided to them or that the company has averred were from Mr. Marcus. He also has no personal knowledge of whether or to what extent counsel in the *qui tam* cases may have used any materials or information provided by Mr. Marcus.



Mr. Marcus's Communications with the Press

Mr. Green alleges in his complaint that Mr. Marcus shared “privileged matters” with ProPublica, an online news organization. Mr. Green does not, however, identify what privileged materials or information he claims Mr. Marcus shared. Mr. Marcus acknowledges that he spoke with a reporter for ProPublica in approximately 2012. However, he does not recall what information he may have shared with that reporter, but believes it was in the nature of background tutorial information about the E-Rate program and the LCP requirements. To the extent he did share information with that reporter, Mr. Marcus submits that he did not reveal anything more than he reasonably believed was necessary to serve the interests of justice.

In or about 2020 to 2021, Mr. Marcus communicated and shared documents relating to AT&T and the E-Rate program with reporters from the Washington Post, but only after AT&T had filed a Motion for Sanctions (*i.e.*, requested dismissal) in the public record in the D.C. Case without any effort to confirm facts with Mr. Marcus or permit rebuttal – a motion containing incendiary allegations that were published largely verbatim by an online news outlet, Law360.com – in which AT&T asserted that Mr. Marcus had violated his ethical duties. By that time, AT&T had made the allegations of misconduct against Mr. Marcus, as well as many of the documents it is claiming were privileged and confidential, public. Mr. Marcus only shared information with the Washington Post that was related to the allegations made against him in public court filings by AT&T and passed on to Law360.com.

Response to Allegation that Mr. Marcus Violated Rule of Professional Conduct 1.6

In his Complaint, Mr. Green first alleges that Mr. Marcus violated D.C. Rule of Professional Conduct 1.6(a) by revealing to *qui tam* counsel and the press “confidences” and/or “secrets” he obtained during his representation of AT&T as in-house counsel. For the reasons set forth below, however, Mr. Marcus submits that he did not violate Rule 1.6.

First, Rule 1.6(a) only requires the protection of “confidences” and “secrets” of the lawyer’s client. “‘Confidence’ refers to information protected by the attorney-client privilege under applicable law, and ‘secret’ refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.” DCRPC Rule 1.6(b). It is clear from the context of Mr. Green’s complaint that the primary thrust of his claims arise from his allegation that the Mr. Heath and his attorneys utilized confidential documents received from Mr. Marcus to advance Mr. Heath’s *qui tam* claims against AT&T in the Wisconsin Case and the D.C. Case. However, the only documents that Mr. Green contends were used by the plaintiff were three exhibits attached to the Complaint in the D.C. Case. *See* Mr. Green’s February 6, 2021 letter at p. 2. Those documents, however, were not “confidences” or “secrets” entitled to protection under Rule 1.6(a) in the context of the Wisconsin Case or the D.C. Case.

Two of the documents purport to be internal training materials (presentation slides) created by AT&T’s E-Rate Compliance Coordination Committee for in-house presentations in 2007 and



2008. *See* Mr. Green's February 6, 2021 letter at p. 2. Mr. Green contends that these materials were "confidential" and "proprietary," *i.e.* "secrets," that were entitled to protection under Rule 1.6. Those materials, however, were not "secrets" in the context of the Wisconsin Case or the D.C. Case. In fact, according to a Declaration filed in the D.C. Case by the plaintiff's current counsel, Matthew K. Organ, AT&T produced both sets of training materials (one of which with only minor redactions) in the Wisconsin Case. *See Exhibit 3* (Declaration of Matthew K. Organ) at ¶¶ 6-7. Such documents were clearly discoverable in the Wisconsin Case and the D.C. Case to show AT&T's knowledge and internal training on E-Rate issues, and unsurprisingly, were therefore produced by AT&T in those cases.

The third document about which Mr. Green complains is a summary created by Detroit Public Schools ("DPS") in connection with DPS's audit of AT&T's E-Rate billings. *See* Mr. Green's February 6, 2021 letter at p. 2. The document was not created by nor did it belong to AT&T. Thus, AT&T has no right to contend that the document was confidential or "secret," and it is not protected under Rule 1.6.

It is also worth noting that the documents that Mr. Green complains were used by *qui tam* counsel have been in the public records for years. During that time, AT&T made no effort whatsoever to seal the documents, seek their return, or otherwise contend they were confidential until its counsel filed a Motion for Sanctions *almost nine years* after the documents were filed with the Complaint in the D.C. Case. This fact was noted by the Court in the D.C. Case when it denied AT&T's Motion for Sanctions. In fact, the Court ruled:

AT&T has likely waived any privilege and confidentiality protections for these documents by failing to immediately take steps to rectify their disclosure. *See, e.g., Fischman v. Mitsubishi Chem. Holdings Am., Inc.*, No. 18-CV-8188 (JMF), 2019 WL 3034866, at *4 (S.D.N.Y. July 11, 2019) ("Defendants waived any privilege (or confidentiality protections) with respect to the contents of the Complaint by failing to take immediate steps to remedy any misuse by [the plaintiff]."); *United States v. HCA Holdings Inc.*, No. 12-20638-CIV, 2015 WL 11198933, at *5-*7 (S.D. Fla. July 21, 2015) (similar). But AT&T's failure to promptly invoke the proper remedy for the release of its documents is not a justification for imposing a drastic and more punitive sanction at this juncture.

See Exhibit 4 (Memorandum Opinion in D.C. Case denying AT&T's Motion for Sanctions) at p. 5, fn. 3. Given that AT&T clearly waived the attorney-client privilege and confidentiality in connection with these documents, there is no basis for concluding that Mr. Marcus violated Rule 1.6 if he provided them to *qui tam* counsel.

Even if the materials Mr. Green contends Mr. Marcus shared with counsel (counsel for both the Wisconsin Case and the D.C. Case, initially, was the same firm, Shepherd Finkelman, that Mr. Marcus sought advice from and that now is removed from both cases) in the Wisconsin Case and



the D.C. Case had been “confidences” or “secrets” as defined in Rule 1.6(b), Mr. Marcus’s provision of those documents to counsel as an FCA whistleblower was permissible under Rule 1.6(d). D.C. Rule of Professional Conduct 1.6(d) reads:

(d) When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

(1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of the crime or fraud.

Comment 18 to Rule 1.6 states in pertinent part:

[18] Paragraph (d)(2) refers to situations in which the crime or fraud has already commenced and is on-going or completed such that complete prevention is not an option. Thus, the client no longer has the option of preventing disclosure by refraining from the wrongful conduct. In these circumstances, there may be situations in which the loss suffered by an affected person can be prevented, rectified, or mitigated. *In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses.*

(emphasis added). Moreover, Comment 19 to Rule 1.6 states:

In some instances when a lawyer's services have been or are being used to further a client's crime or fraud, a lawyer may conclude that more than withdrawal and disaffirmance is required to avoid assisting in the client's crime or fraud and that disclosure of client information protected by this rule is warranted. If the lawyer has such a reasonable belief, the lawyer may make such disclosures to the extent reasonably necessary to permit corrective action, for example, prompt initiation of proceedings in order to seize or recover assets fraudulently obtained by the client.

(emphasis added). Disclosure is permissible under Rule 1.6(d) “to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified.” See DCRPC 1.6, Comment 21. In other words, the critical inquiry in determining whether disclosure was



permissible is whether the lawyer “reasonably believed” disclosure was necessary to accomplish the purpose of the Rule.

As set forth in detail above, Mr. Marcus spent years of his career at AT&T investigating the company’s compliance – or lack thereof – with the rules of the E-Rate program, including the LCP requirement. Mr. Green even acknowledges in his complaint that Mr. Marcus was a chair of AT&T’s E-Rate Legal/Regulatory Compliance Committee. *See* Mr. Green’s February 6, 2021 letter at p. 1. During that time, it became clear to Mr. Marcus that AT&T was using his services, as well as the services of other in-house and external lawyers, to make representations to government investigators and others relating to AT&T’s E-Rate/LCP compliance that were demonstrably false. It appeared that AT&T was doing so as part of a coordinated effort to mislead the government and avoid responsibility for the company’s fraudulent E-Rate practices. It was also clear that AT&T had charged prices to E-Rate program participants – schools and libraries in underprivileged areas – that AT&T could not verify were compliant with the LCP requirement.

Other company lawyer and non-lawyer witnesses to these activities were aware of the developments and were actively paying attention to how they were being resolved. Indeed, Mr. Marcus first learned of the potential depth of the problems in this regard when one of his regulatory colleagues at AT&T and, thus, “clients,” brought him a 1997 *ex parte* letter submitted to the FCC containing advocacy by all the legacy companies as to what the LCP rule under consideration should and should not say, how the companies would apply it, and how the FCC should frame the rules accordingly. Thus, any claim by AT&T that it lacked knowledge of the LCP requirement and that any overcharges were “accidental,” would not have been accurate. As in-house counsel, Mr. Marcus knew his efforts would have an impact on in-house personnel associated with representing the company to federal officials and, thus, would either empower or snuff any future efforts to ensure that the company maintained standards of good corporate citizenship.

Mr. Marcus reasonably believed that an audit of AT&T’s E-Rate pricing would reveal that AT&T had caused millions of dollars in financial harm to the government and E-Rate program participants – most of which serve the needs of children in underprivileged communities – by failing to comply with the LCP requirement for years. In addition, he was concerned that AT&T continued to issue invoices and collect revenue on E-Rate contracts that were agreed to at a time when AT&T had no protocol in place for ensuring LCP compliance. Thus, it was likely in Mr. Marcus’s view that AT&T’s fraudulent E-Rate invoicing and false certifications that its pricing was LCP compliant was continuing. Mr. Marcus was terribly concerned that the company’s apparent effort to hide the facts of its non-compliance (*i.e.*, by not investigating them in the first place) placed it and its shareholders at great risk on multiple levels, starting with depriving it of the ability to be seen as cooperating with investigatory entities, and indefinitely putting off an unavoidable reckoning on the subject matter. Mr. Marcus was confident that the only way to rectify the past and future harm caused by AT&T and the inadvisable decisions of its legal officers and managers was to make disclosures as permitted under Rule 1.6(d).

Before doing so, Mr. Marcus made repeated oral and written efforts to alert his supervisors to the issue and persuade them to address the matters in a manner that would obviate the need for him to



make disclosures under Rule 1.6. Those efforts, however, were continuously ignored or rejected by his supervisors. Once Mr. Marcus concluded that the issues would not be seriously and properly addressed internally at AT&T, he was permitted to disclose confidential information in order to rectify potentially millions of dollars in financial harm caused by AT&T's E-Rate practices.

Mr. Marcus also concluded, however, that he was *obligated* to make disclosures under Rule 4.1(b). Indeed, under Rule 4.1(b), attorneys are forbidden from "[f]ail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Mr. Marcus firmly believed that AT&T had used and was continuing to use his services to make false and fraudulent statements to the government and others regarding its E-Rate program compliance, and that disclosing the issue was the only way to avoid allegations that he had assisted the company making false statements to the government. In light of what Mr. Marcus uncovered during his time at AT&T, as outlined above, Mr. Marcus's belief that disclosure was necessary under Rules 4.1 and 1.6 was reasonable and permissible. Mr. Marcus's position is further supported by the fact that AT&T paid more than \$8 million to settle the Intelenet Investigation and that AT&T remains involved in litigation regarding its E-Rate compliance more than 13 years after Mr. Heath initially filed the Wisconsin Case alleging that AT&T violated the E-Rate program rules. It stands to reason that, if there were no basis for allegations that AT&T did not comply with E-Rate program rules, AT&T would not have paid millions of dollars to settle the Intelenet Investigation and the D.C. Case would not still be pending.

Mr. Marcus also submits that he was entitled under Rule 1.6 to disclose "confidences" and "secrets" to *qui tam* counsel "to the extent reasonably necessary to secure legal advice about the lawyer's compliance with law...." See DCRPC 1.6(e)(6). Mr. Marcus has been clear from the outset, and Mr. Green appears to acknowledge, that Mr. Marcus provided information and documents to counsel in the Wisconsin Case and the D.C. Case in effort to seek counsel regarding his rights as a whistleblower under the FCA. The law is clear that Mr. Marcus was permitted to reveal confidential information to counsel under Rule 1.6(e)(6) because it was reasonably necessary to seek legal advice about his rights and obligations under the law, including potential claims he could make as a relator under the FCA.

It is also worth noting that Mr. Green's complaint arises principally from Mr. Marcus's alleged disclosures to counsel in the Wisconsin Case, and D.C. Case, both of which are federal *qui tam* actions. Under Rule of Professional Conduct 8.5(b), "[f]or conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise[.]" The FCA is a *federal* whistleblower law. See 31 U.S.C. §§ 3722-3733. When the Board on Professional Responsibility considers alleged violations of Rule 1.6 in connection with a federal law proceeding, it is required to examine the matter under the ABA Model Rule rather than the D.C. Rule of Professional Conduct. See *In re Koeck*, Board Docket No. 14-BD-061, Board Report at 19-25 (Aug. 30, 2017). Unlike the D.C. Rule, the ABA Model Rule permits an attorney to disclose confidential information "to establish a claim...on behalf of the lawyer in a controversy between the lawyer and the client." See ABA Model Rule 1.6(b)(5).



In *In re Koeck*, which involved the filing of a Sarbanes-Oxley retaliation claim by a former in-house attorney for GE, the Respondent had allegedly revealed confidential information belonging to GE as part of her claim filed with the Department of Labor. The Board concluded that an examination of ABA Model Rule 1.6 was appropriate to determine whether the Respondent had violated her duty of confidentiality. The Board further concluded that, in revealing confidential information as part of her retaliation claims under federal law, the Respondent did not violate ABA Model Rule 1.6 because it permitted her to use the information to make an affirmative claim. *See generally In re Koeck*, Board Docket No. 14-BD-061, Board Report at 19-25 (Aug. 30, 2017).

A similar analysis applies here. Indeed, even if your office were to assume that Mr. Marcus did reveal confidential information to counsel in an effort to take part in a federal FCA *qui tam* action as is alleged by Mr. Green, he was plainly authorized to do so under ABA Model Rule 1.6(b)(5) to explore pursuing an affirmative *qui tam* claim.

As for Mr. Marcus's alleged disclosures to ProPublica, Mr. Green has not identified what, if any, confidential or privileged information he contends that Mr. Marcus provided to ProPublica. Thus, one cannot conclude that Mr. Marcus violated Rule 1.6 in connection with any such disclosures, particularly where, as here, Mr. Marcus does not recall providing any such material to ProPublica.

Regarding Mr. Marcus's disclosures to the Washington Post, Mr. Green alleges that Mr. Marcus provided information and documents to the Washington Post but does not identify what he contends was provided that would have been entitled to protection under Rule 1.6. Critically, however, by September 15, 2020, AT&T had filed its Motion for Sanctions in the D.C. Case which outlined in detail the documents and information Mr. Green now contends was privileged and/or confidential. That information and those documents are accessible in the public record, and by raising AT&T's allegations of misconduct against Mr. Marcus in the public record, AT&T waived any claim of confidentiality or privilege it may have had. Accordingly, AT&T cannot claim that Mr. Marcus breached Rule 1.6 by responding via the press to its allegations of misconduct that are contained in the public record.

Response to Allegation that Mr. Marcus Violated Rule of Professional Conduct 1.9

Mr. Green also contends that, by sharing information and documents with *qui tam* counsel, Mr. Marcus violated Rule 1.9. Mr. Green contends that Mr. Marcus "changed sides," thereby creating a conflict of interest.

D.C. Rule of Professional Conduct 1.9 reads:

A lawyer who has formerly represented a client in a matter ***shall not thereafter represent another person*** in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.



The language of Rule 1.9 is clear in that it bars an attorney who has represented on client in a matter from representing another client in the same or a substantially related matter unless the former client gives informed consent. In this case, there is no allegation, nor could there be, that Mr. Marcus ever represented anyone against AT&T in a matter that was the same or substantially related to any matter he worked on as in-house counsel at AT&T.

Mr. Green appears to believe that, despite the clear language of the Rule barring an attorney from representing another person in the same or substantially related matter, the Rule should be construed to bar an attorney from acting as a party in such a matter. Specifically, he complains that Mr. Marcus attempted to become a relator in a *qui tam* action against AT&T. First, Mr. Marcus never became a party to any action against AT&T. Nonetheless, even if he had, the plain language of 1.9 does not prevent him from doing so. Had the D.C. Bar wanted to implement such a prohibition, it could, and would, do so. Unless and until the Bar modifies the language of Rule 1.9 to apply in such circumstances, however, the plain language of the Rule applies only in instances where an attorney is representing another person in the same or substantially related matter. There is no dispute that Mr. Marcus did not do so in this case. Accordingly, he did not violate Rule 1.9.

Conclusion

It is worth noting that Mr. Marcus has been a member of the D.C. Bar for more than 28 years and is a member of the Maryland Bar and has no prior disciplinary history. Mr. Marcus is a former federal prosecutor, having served as an Assistant United States Attorney in the Criminal Division of the U.S. Attorney's Office in Washington, D.C. He is now employed with the FCC in its Consumer and Governmental Affairs Bureau where, over the past ten (10) years, he has served in multiple Supervisory Attorney positions, including as an Attorney Advisor in its Enforcement Bureau's Investigations and Hearings Division. In his tenure at the FCC, Mr. Marcus has mentored and supervised over a dozen attorneys, several of whom have advanced to significant positions of responsibility in their respective public or private places of employment. In his decade of service at the FCC, Mr. Marcus has routinely received annual performance ratings of "outstanding" and "excellent" across all categories, including "integrity" and "ethics." Mr. Marcus routinely has received awards at the highest levels in his divisions for outstanding performance and service.

In addition to his professional duties, Mr. Marcus has served his community in multiple roles. For example, over the past three years – most of which taking place during the pandemic – Mr. Marcus has served as Riverbend High School's Varsity Tennis Program Head Coach (ladies team starting in 2020, and both men's and ladies this past season), where he has guided the teams and players to multiple championships and accolades. Mr. Marcus was recently awarded Coach of the Year by the Fredericksburg Free Lance-Star and coached several (6) male and female student-athletes to All-Area recognition and both the young men's and young ladies Players of the Year. Mr. Marcus has also served his church, Wilderness United Methodist, on its Board, and also as a tenor soloist with its Praise Group (and also as tenor soloist at Fredericksburg United Methodist Church). Mr. Marcus has been a principal, or been a contributor, for multiple community projects and efforts in the Spotsylvania-Fredericksburg area where he lives, both for youth and adults (e.g., Rappahannock Choral Society, Massad YMCA, Rappahannock Youth Symphony Orchestra,



Dept. of Interior's "To Freedom: Reenactment of the Slaves Crossing the Rappahannock River," and others).

As a husband, father, neighbor, attorney, coach and in any other walk of life, Mr. Marcus holds himself to the highest ethical standards. For the reasons set forth above, Mr. Marcus respectfully submits that he did not violate the Rules of Professional Conduct and has made all due efforts to behave at the highest standards set by the Bar for the practice of law. Therefore, this matter should be dismissed by your office. Of course, should you need any additional information to assist in your investigation, please do not hesitate to contact me.

Sincerely,

FROST LAW

Richard J. Berwanger, Jr.

I, Theodore C. Marcus, have read the foregoing letter and certify that the facts contained therein are true and correct to the best of my knowledge, information, and belief.

Theodore C. Marcus

Date

Enclosures

cc: Theodore C. Marcus, Esquire (w/ encls.) (via email)

E-3

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CONFIDENTIAL

VIA EMAIL

APRIL 12, 2021

Hendrik R. deBoer

Assistant Disciplinary Counsel
Office of Disciplinary Counsel
District of Columbia Bar Association
515 5th Street NW, Building A, Room 117
Washington, D.C. 20001

Re: Request for Extension or Deferral (Theodore Marcus, Disciplinary Docket No. 2021-D050)

Dear Mr. deBoer:

I have been retained by respondent and D.C. Bar member Theodore Marcus in the above-referenced matter (2021-D050). I am writing to request an extension of the deadline to respond to the March 30, 2021 letter from the D.C. Bar's Office of Disciplinary Counsel. Specifically, I request that the deadline be extended from April 30, 2021, to forty-five (45) days after the U.S. District Court for the District of Columbia issues a ruling on a motion for sanctions ("Motion") filed by AT&T seeking dismissal of a massive False Claims Act case brought against the company in 2011, Case No. 11-cv-01897 (J. Leon) ("FCA Litigation").¹ Alternatively, I am requesting deferral pursuant to Rule 4.1 of the Board Rules of the District of Columbia Court of Appeals Board of Professional Responsibility.

The request is supported by good cause. The Motion in the FCA Litigation tracks the misconduct allegations in AT&T's complaint to the D.C. Bar. A ruling on the Motion, necessarily, will address salient and complicated factual and legal issues raised in the Bar complaint. To be clear, we are *not* requesting at the present time that the response deadline be suspended until that federal case has run its course. Rather, given the overlap in the complex issues presented in the Motion and the Bar complaint, we respectfully submit that an extension of the response date (or a deferral) is warranted, permitting Mr. Marcus to respond forty-five (45) days after an order on the Motion is issued by Judge Leon.

¹ A copy of AT&T's Motion is enclosed as Exhibit D to this Letter. Several exhibits to the Letter constituting District Court filings contain a high number of exhibits, themselves. Those have not been included here, as part of an effort to limit the size of this Letter. Were they to be included, this Letter, and the complete set of exhibits, would span several hundred pages. With that being said, we are happy to download and forward any and all exhibits that Bar Counsel believes is important to review, at the present juncture, in order to render a decision on the extension request.

Parke pllc, 300 New Jersey Ave. N.W., STE 900, Washington, D.C. 20001

Note: This is a shared, virtual-type office setting. Please call ahead to schedule any appointments. During the pandemic, to expedite the receipt of any shipments, please consider using the home mailing address indicated on the last page of the letter.

At the outset, we respectfully submit that Mr. Marcus is an esteemed government attorney and former in-house attorney with an impeccable and unblemished record of over thirty (30) years of service as an attorney. Mr. Marcus is a former criminal prosecutor at the U.S. Attorney's Office in Washington, D.C. For the last decade he has held important positions at the Federal Communications Commission, including Senior Counsel in the front office of a Bureau and Deputy Chief of two Divisions. As far as I am aware, there has not been a single prior complaint filed with the D.C. Bar relating to Mr. Marcus's services over his three decades of practice.

Mr. Marcus is not a party in the federal suit and has no financial interest in that matter. The D.C. Bar might be inclined to believe otherwise, given the nature of AT&T's Bar complaint and in light of an online comment by an in-house AT&T executive director (and attorney), enclosed as Exhibit A, which tracks the positions that AT&T has taken in the Motion and before the Bar, for which Mr. Marcus reserves all rights.

Although we are not presently requesting an extension until the FCA Litigation has completed—rather, as noted, we are seeking an extension until after the court rules on the Motion—it may be helpful for the D.C. Bar to understand the underlying FCA Litigation in greater detail and, in particular, how it relates to the Motion and AT&T's Bar complaint against Mr. Marcus, in determining whether to grant the request for an extension. Briefly, the FCA Litigation was commenced on behalf of Plaintiff-relator Todd Heath and on behalf of the United States, seventeen states and two cities against AT&T and nineteen of its wholly owned subsidiaries. The states and cities who are plaintiffs in the suit includes the following:

California	Delaware	Florida
Hawaii	Illinois	Indiana
Massachusetts	Minnesota	Montana
Nevada	New Jersey	New Mexico
New York	North Carolina	Rhode Island
Tennessee	Virginia	District of Columbia
City of Chicago	City of New York	

See Docket, enclosed as Exhibit B; Complaint, enclosed as Exhibit C. The Complaint asserts twenty-one counts premised on widespread and possibly criminal violations of the False Claims Act from 1997 through 2009. Exhibit C. In particular, the plaintiffs alleged that AT&T engaged in a massive fraud on the United States government and on the identified states and cities, overbilling school districts and libraries for telecommunications services provided as part of the federal E-Rate program, falsely asserting in sworn certifications subject to federal criminal penalties that AT&T was offering the lowest corresponding price when, in actuality, that allegedly was not the case. The Complaint sought damages in the form of extensive penalties and fines as well as attorney's fees expended by the twenty-one plaintiffs.

On June 10, 2014, the court dismissed the lawsuit. On August 5, 2015, the United States Court of Appeals for the D.C. Circuit reversed and remanded. AT&T sought relief from the United States Supreme Court, but the Court refused to grant certiorari. On September 15, 2020, after almost a decade of litigation, AT&T filed the Motion that accused Mr. Marcus of engaging in attorney misconduct. The undersigned is unaware of any prior accusations by AT&T that Mr. Marcus engaged in wrongdoing.

Simply put, (A) after ten years of being tied up in a massive lawsuit that threatens to hold AT&T liable for billions of dollars in penalties, which accuses several AT&T attorneys and non-attorneys of lying to federal agents and falsely certifying to facts, in an attempt to extract profits from the federal E-Rate program that, instead, should have been devoted to providing services to America's most needy school children (primarily those with black and brown skin), and (B) after AT&T has been forced to examine the very real possibility of an adverse ruling in the FCA Litigation that, in turn, could jeopardize its regulatory capability to participate in the telecommunications sector and, thus, could expose it to bankruptcy and extensive shareholder lawsuits (and could expose AT&T representatives to possible criminal liability), AT&T has resorted to character assassination of Mr. Marcus as a collateral attack on that litigation and to ward off other repercussions.

It is notable that AT&T waited *ten years* after the commencement of the litigation to raise its concerns about Mr. Marcus's conduct. Also notable is that the plaintiff in the FCA Litigation has informed the judge, in no uncertain terms, that the positions advanced by AT&T in its Motion are based on "fundamental misrepresentations":

AT&T seeks dismissal of this case as a sanction for what it calls "shocking" misconduct, based primarily on the actions of its own former in-house attorney, Theodore Marcus, who was so alarmed that AT&T lied to federal investigators about its compliance with the Lowest Corresponding Price ("LCP") rule—the rule at the heart of this case—that he felt compelled to report AT&T to the United States Department of Justice and to then-counsel for Relator Heath.

What is "shocking" here is the conduct of AT&T itself in filing a motion before this Court premised on a series of fundamental misrepresentations. At the heart of AT&T's motion is its allegation that Marcus was a "turncoat lawyer" who shared privileged information for profit, becoming a "silent co-relator" in this case. But AT&T never bothered to speak with, let alone depose, its own former counsel to determine the truth of the damaging allegations it has carelessly thrown about.

See Opposition to Motion, enclosed herein as Exhibit , at 1. Mr. Marcus reserves the right to more fully respond to AT&T's Bar Complaint in due course. However, we note that the Opposition makes it clear—citing excerpts of Mr. Marcus's deposition—that Mr. Marcus *never* has been a co-relator with the plaintiff in the FCA Litigation, silent or otherwise, and *has never had any expectation of any financial interest in this case*. The Opposition also indicates that Mr. Marcus witnessed AT&T lying to federal investigators in connection with the E-Rate program and the LCP rule. The nature and scope of the fraud, and criminal and financial ramifications thereof warranted disclosure, consistent with applicable ethics rules, including to the United States Department of Justice.²

Thus, the FCA Litigation and the Bar complaint raise complex and serious issues that extend beyond the license held by Mr. Marcus, but likewise implicate the Bar licenses held by AT&T's in-house and outside counsel and, again, the regulatory licenses held by AT&T, as a company. This further supports the good cause showing, outlined above, for why the response date should be reset to forty-five (45) days after Judge Leon issues his ruling on the Motion.

² Mr. Marcus will respond (and reserves the right to respond) to the allegations in AT&T's Bar complaint greater detail in his formal response to the Bar Counsel inquiry.

Please contact me if you'd like to discuss further.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'E. Parke', with a stylized flourish at the end.

Evan A. Parke
FOUNDER

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(for use during pandemic)
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