

NO. 71611-5-I

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON, DIVISION ONE

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FOSS MARITIME COMPANY,

*Respondent*

v.

JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the  
marital community comprised thereof; and BRANDEWIEDE  
CONSTRUCTION, INC,

*Petitioners*

CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG, and  
the marital community comprised thereof; FRANK GAN and JANE DOE  
GAN, and the marital community comprised thereof,

*Defendants*

ON APPEAL FROM KING COUNTY SUPERIOR COURT

Honorable Dean S. Lum

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**FOSS MARITIME CO.'S RESPONSE BRIEF**

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## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. STATEMENT OF FACTS .....	2
A. CBS asks for and obtains privileged and proprietary documents from a former Foss project-manager but does not tell Foss until after the close of discovery .....	2
B. Foss demands production of the documents obtained by Welch and alerts Welch that they contain privileged communications, but Welch gives no assurance that CBS has ceased review .....	5
C. The trial court reviews in camera the documents obtained by Welch, determines they are privileged, and disqualifies Welch and CBS.....	8
D. Does CBS represent Brandewiede or itself? .....	10
III. ISSUES ON APPEAL .....	11
IV. ARGUMENT .....	13
A. Standard of Review.....	13
B. The trial court adhered to longstanding Washington law when it disqualified Welch and CBS .....	13
1. Disqualification of CBS is proper under the Washington Supreme Court’s decisions in Fisons and Firestorm.....	14
2. Attorney disqualification is not a CR 37(b) discovery sanction subject to Burnet .....	19
3. Any doubts should be resolved in favor of disqualification.....	22
C. The trial court’s disqualification order is proper under the Meador test, which this Court should apply.....	23

## TABLE OF CONTENTS

(continued)

	<b>Page</b>
1. The Meador test comports with Washington case law governing attorney disqualification, and should be adopted and applied by this Court .....	23
2. Disqualification of CBS is proper under the Meador test.....	25
a. Welch knew or should have known he had received privileged material .....	26
b. CBS delayed notifying Foss that it had received privileged material.....	28
c. CBS reviewed and digested privileged Foss information sufficiently to include it as a trial exhibit .....	29
d. The privileged information is significant to Foss’s litigation strategy and claims against Brandewiede .....	29
e. Foss is not at fault for the disclosures.....	30
f. Brandewiede will not suffer undue prejudice from the disqualification of CBS.....	33
D. CBS’s collateral attacks on disqualification fail.....	36
1. The trial court correctly determined that the Vorwerk Letter and thumb-drive obtained and reviewed by Welch contain communications protected by the attorney-client privilege .....	36

2.	Petitioners' contention that Foss waived privilege is baseless because Vorwerk (not Foss) provided the materials to Welch, and he did so in violation of Foss's policies prohibiting terminated employees from retaining Foss documents.....	38
E.	The trial court properly excluded only evidence from a source tainted by CBS's wrongful conduct.....	40
F.	If the trial court failed to make adequate findings, the correct remedy is remand, not reversal .....	41
G.	CBS's continued representation of Brandewiede on appeal is improper.....	42
H.	Under RAP 14.2, Foss is entitled to reasonable attorneys' fees and costs .....	45
V.	CONCLUSION.....	45

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>All Am. Semicon., Inc. v. Hynix Semicon., Inc.</i> , 2009 U.S. Dist. LEXIS 12315, at 16 (N.D. Cal. 2009).....	44
<i>Barbee v. Luong Firm</i> , P.L.L.C., 126 Wn. App. 148, 107 P.3d 762 (2005) .....	33
<i>Blair v. Ta-Seattle East No. 176</i> , 171 Wn.2d 342, 254 P.3d 797 (2011)..	20
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997)..	19, 20, 21
<i>Chugach Elec. Assn. v. United States District Court</i> , 370 F.2d 441 (9th Cir.1966).....	14, 22
<i>Deep Water Brewing, LLC v. Fairway Resources, Ltd.</i> , 170 Wn. App. 1, 11, 282 P.3d 146 (2012).....	12, 24
<i>Dietz v. Doe</i> , 131 Wn.2d 835, 935 P.2d 611 (1997).....	1, 13, 23
<i>Duskey v. Bellasaire Invs.</i> , 2007 U.S. Dist. LEXIS 95501, at *10-11 (C.D. Cal. 2007).....	44
<i>Eubanks v. Klickitat County</i> , 181 Wn. App. 615, 326 P.3d 796 (2014) ..	33, 34, 35
<i>First Small Bus. Inv. Co. v. Intercapital Corp. of Oregon</i> , 108 Wn.2d 324, 738 P.2d 263 (1987).....	24, 33
<i>First Wis. Mortg. Trust v. First Wis. Corp.</i> , 584 F.2d 201 (7th Cir. 1987) .....	44
<i>Foss Maritime Co. v. Core Logistics Services et al.</i> , King County Superior Court No. 12-2-23895-2, The Honorable Dean S. Lum Presiding (Jan. 17, 2014) (Appendix B) .....	3
<i>Harris By and Through Ramseyer v. Blodgett</i> , 853 F.Supp. 1239 (W.D. Wash.1994).....	14, 22
<i>Harrison v. Cynthia Constantino and Trevett</i> , 2 A.D.3d 1315 (N.Y.A.D.	

2003) .....	44
<i>Harsh v. Kwait</i> , 2000 Ohio App. LEXIS 4636, at 8 .....	44
<i>In re Disciplinary Proceeding Against Schafer</i> , 149 Wn.2d 148, 66 P.3d 1036 (2003).....	22, 23
<i>In re Marriage of Wixom and Wixom</i> , 332 P.3d 1063 at ¶ 54 (2014) 24, 34, 35, 43	
<i>In re Meador</i> , 968 S.W.2d 346, 351-52 (Texas, 1998).....	23, 25, 26, 28
<i>Iowa Supreme Court Attorney Disciplinary Bd. v. Wengert</i> , 790 N.W.2d 94 (2010).....	44
<i>Jones v. City of Seattle</i> , 179 Wn.2d 322, P.3d 380 (2013) .....	20
<i>Kleven v. City of Des Moines</i> , 111 Wn. App. 284, 44 P.3d 887 (2002) ...	43
<i>Kurbitz v. Kurbitz</i> , 77 Wn.2d 943, 468 P.2d 673 (1970) .....	14
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989) .....	12, 24
<i>Laue v. Estate of Elder</i> , 106 Wn. App. 699, 25 P.3d 1032 (2001) .....	42
<i>Magana v. Hyundai Motor America</i> , 167 Wn.2d 570, 220 P.3d 191 (2009) .....	20
<i>Maldonado v. New Jersey ex rel. Administrative Office of Courts- Probation Division</i> , 225 F.R.D. 120 (D.N.J. 2004).....	27, 30, 34, 35
<i>Manna Funding, LLC v. Kittitas County</i> , 173 Wn. App. 879, 295 P.3d 1197 (2013).....	42
<i>Matter of Firestorm 1991</i> , 129 Wn.2d 130, 916 P.2d 411 (1996).....	passim
<i>Matter of Grand Jury Subpoena Issued to Chesnoff</i> , 62 F.3d 1144 (9th Cir. 1995) .....	43
<i>Mayer v. Sto Industries, Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006) .	20, 21
<i>Morgan v. Kingen</i> , 141 Wn. App. 143, 169 P.3d 487 (2007).....	42
<i>Ragar v. Brown</i> , 3 F.3d 1174 (8th Cir. 1993).....	44

<i>Richards v. Jain</i> , 168 F.Supp.2d 1195, 1209 (W.D. Wn. 2001).....	passim
<i>Richardson-Merrell, Inc. v. Koller</i> , 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985).....	43
<i>Rivers v. Washington State Conf. of Mason Contractors</i> , 145 Wn.2d 674, 41 P.3d 1175 (2002).....	20
<i>Shaw v. London Carrier, Inc.</i> , 2009 U.S. Dist. LEXIS 109862, at 24-25 (W.D. Mich. 2009).....	44
<i>Sitterson v. Evergreen School Dist. No. 114</i> , 147 Wn. App. 576, 196 P.3d 735 (2008).....	39
<i>Snedigar v. Hodderson</i> , 53 Wn. App. 476, 768 P.2d 1 (1989), <i>rev'd on other grounds</i> , 114 Wn.2d 153, 786 P.2d 781 (1990) .....	21
<i>State v. Hampton</i> , 332 P.3d 1020 (2014) .....	21
<i>State v. Schmitt</i> , 124 Wn. App. 662, 102 P.3d 856 (2004) .....	13
<i>State v. Stark</i> , 334 P.3d 1196 (2014) .....	13
<i>Teter v. Deck</i> , 174 Wn.2d 207, 274 P.3d. 336 (2012) .....	20
<i>United States v. Nabisco, Inc.</i> , 1987 U.S. Dist. LEXIS 14681 (E.D.N.Y. 1987).....	44
<i>Upjohn Co. v. United States</i> , 449 U.S. at 396.....	37
<i>Washington Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.</i> , 168 Wn. App. 710, 282 P.3d 1107 (2012) .....	20
<i>Washington State Physicians Ins. Exch. &amp; Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	14, 15
<i>Youngs v. Peacehealth</i> , 179 Wn.2d 645, 316 P.3d 1035 (2014).....	37

**Statutes**

RCW 5.60.060(2)(a) .....	36
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**Administrative Decisions**

Richard E. Flamm, LAWYER DISQUALIFICATION: DISQUALIFICATION OF

ATTORNEYS AND LAW FIRMS, § 33.3 at p. 864 (2d e. 2014)..... 44

**Rules**

CR 11 ..... 14

CR 26 ..... 14

CR 26(b)..... 14

CR 26(g)..... 14

CR 37 ..... 14

CR 37(b)..... 19

CR 37(b)(2)..... 19, 21

CR 37(b)(2)(A)-(E) ..... 21

CR 37(b)(2)(B)..... 19

RAP 14.2..... 45

RAP 14.3(a) ..... 45

## I. INTRODUCTION

The trial court disqualified John Welch and Carney Badley Spellman (“CBS”) as counsel for Defendant-Petitioners Jeff Brandewiede and Brandewiede Construction, Inc. (“Brandewiede”) because CBS obtained Plaintiff-Respondent Foss Maritime Co. (“Foss”)’s privileged and proprietary information from a third-party, failed to disclose to Foss that it had the documents until six weeks later, and, ignoring Foss’s demand to provide the documents for review, instead submitted some of the privileged communications as part of a proposed trial exhibit. The trial court reviewed *in camera* the documents obtained by CBS and determined that they contained Foss’s privileged communications. And since CBS had submitted some as a trial exhibit, it could not be denied that CBS’s review was sufficient to determine their relevance to the litigation. In the face of longstanding case law establishing the sanctity of the attorney-client privilege<sup>1</sup> (and the fact that CBS cited no case law whatsoever in opposition to disqualification, as noted in the order), the trial court had little alternative but to disqualify Welch and CBS.

CBS now asks this Court to carve out exceptions to the attorney-client privilege that would allow them to continue as counsel for Brandewiede. If there were ever a case to warrant making exceptions to the attorney-client privilege, this is not it. The facts are not good for CBS

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<sup>1</sup> See, e.g., *Dietz v. Doe*, 131 Wn.2d 835, 851, 935 P.2d 611 (1997) (“The privilege is imperative to preserve the sanctity of communications between clients and attorneys”); see also *Richards v. Jain*, 168 F.Supp.2d 1195, 1209 (W.D. Wn. 2001).

and if they are allowed to continue as counsel, those facts will make equally bad law. The trial court's order should be affirmed.

## II. STATEMENT OF FACTS

As some of the facts quoted by Petitioners in their brief require additional context and clarification, Foss offers the following:

**A. CBS asks for and obtains privileged and proprietary documents from a former Foss project-manager but does not tell Foss until after the close of discovery.**

This is a case for breach of contract, unjust enrichment, and fraud against Core Logistic Services (“CLS”), a partnership comprised of Defendants Frank Gan, Lisa Long, and Jeff Brandewiede. CLS subcontracted with Foss for renovation of a luxury research vessel, the Alucia. Foss alleges that CLS failed to perform and fraudulently pocketed funds advanced by Foss rather than applying these funds to the project. The Alucia project was managed by former Foss employee Van Vorwerk.<sup>2</sup>

Vorwerk's role is important because Petitioners argue that no communications between Vorwerk and Foss's counsel could possibly be privileged based on the assertion that Vorwerk was a “low-level employee.” In this regard, CBS's recitation of the facts requires clarification.

Vorwerk's declaration, solicited and drafted by CBS, says he had “no *direct* responsibility for the overall management of the shipyard or the

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<sup>2</sup> Declaration of Lisa Sulock in Support of Motion of Plaintiff Foss Maritime Company to Disqualify Counsel for Defendant Jeff Brandewiede and Seeking Sanctions (Appendix A), ¶ 5. [CP 49]

company, which was handled by Foss's *upper* management."<sup>3</sup> For obvious reasons, the declaration attempts to downplay Vorwerk's managerial role. But in fact Vorwerk was the project manager responsible for, and oversaw the execution of, Foss's multi-million dollar Alucia project. Brandewiede certainly knew this, as Vorwerk had hired Brandewiede to work at CLS, and he worked at Vorwerk's direction throughout the project. As Welch stated to the trial court, "[Vorwerk] was the only guy for Foss that managed this project."<sup>4</sup> It can hardly be denied that from the outset of this case, all parties knew Vorwerk managed the daily operations of the Alucia project and reported directly to "upper" management.

Further, the privileged communications reviewed by Welch made clear that Vorwerk consulted with Foss's general counsel on legal matters as part of his job and with outside counsel as part of this litigation.<sup>5</sup> Foss's outside counsel, Garvey Schubert Barer, worked directly with Vorwerk in preparation for this lawsuit against CLS because as manager of the Alucia project, Vorwerk routinely communicated with Long, Gan, and Brandewiede. The document reviewed by CBS and submitted as a proposed trial exhibit specifically references Vorwerk's work with Foss's counsel in this lawsuit.<sup>6</sup> Accordingly, Foss disclosed Vorwerk as both a

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<sup>3</sup> Brandewiede's Opening Brief at 4 (emphasis added).

<sup>4</sup> Filing of VRP by Court Reporter Reed Jackson Watkins of January 17, 2014 Hearing (May 27, 2014) (Appendix B), 21, ll. 19-20.

<sup>5</sup> See documents filed under seal pursuant to the April 14, 2014, order of Court Commissioner Masako Kanazawa; *see also* App. A. [CP 48-80]

<sup>6</sup> See "The Wrongful Termination of Van Vorwerk," filed under seal pursuant to the April 14, 2014, order of Court Commissioner Masako Kanazawa (hereinafter, the "Vorwerk Letter").

person with knowledge of the facts giving rise to the claims and as a person who assisted in preparing Foss's responses to discovery.

Towards the end of discovery, in September, 2013, CBS finally decided to depose Vorwerk. Welch knew Vorwerk no longer worked for Foss and therefore asked Foss for Vorwerk's direct contact information to issue a subpoena.<sup>7</sup> So when Welch contacted Vorwerk, he knew Vorwerk managed the Alucia project, he knew Vorwerk had assisted counsel to prepare interrogatory answers, and he knew Vorwerk was not represented by counsel.

Rather than issuing a subpoena for deposition, Welch contacted Vorwerk, met with him in person, and obtained first (on September 24, 2013) the "Wrongful Termination" letter (hereafter the "Vorwerk Letter") and later (on October 24, 2013), ten days after the close of discovery, a thumb-drive containing Vorwerk's Foss Outlook file, including additional privileged communications related to this lawsuit and Foss's confidential and proprietary business information unrelated to this lawsuit.<sup>8</sup>

The privileged communications in the Vorwerk Letter identified the sender as Foss's General Counsel and the letter specifically referenced Vorwerk's communications with Foss's outside counsel.<sup>9</sup> But Welch did not disclose to Foss that he had obtained Foss's documents until

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<sup>7</sup> Declaration of John R. Welch in Support of Brandewiede's Response RE: Foss' Motion to Disqualify Counsel (Appendix C), Ex. C. [CP 150-157]

<sup>8</sup> Declaration of John Crosetto in Support of Motion of Plaintiff Foss Maritime Company to Disqualify Counsel for Defendant Jeff Brandewiede and Seeking Sanctions (Appendix D), ¶ 10, Ex. 8. [CP 83; 102-105]

<sup>9</sup> See documents filed under seal pursuant to the April 14, 2014, order of Court Commissioner Masako Kanazawa.

November 8, 2013—six weeks after obtaining the letter, over three weeks after the close of discovery, and over two weeks after obtaining the Outlook file, which contained over forty privileged and protected emails.<sup>10</sup>

Further, CBS had the letter containing Foss's privileged and protected information over a week before Brandewiede's October 3, 2014, deposition. Brandewiede was asked under oath if he had met with anyone or reviewed any documents in preparation for his deposition.<sup>11</sup> He disclosed that he and his counsel had met with Vorwerk. But despite being asked to describe the discussions in detail, Brandewiede made no mention of receiving documents of any kind from Vorwerk. And his counsel sat mum, while in fact at that very meeting Vorwerk had provided to them what would become Brandewiede's Trial Exhibit 80: the "Wrongful Termination" letter containing correspondence with Foss's General Counsel and specifically referencing communications with Garvey Schubert Barer in preparation for this very litigation.<sup>12</sup>

**B. Foss demands production of the documents obtained by Welch and alerts Welch that they contain privileged communications, but Welch gives no assurance that CBS has ceased review.**

On November 8, 2013, when Foss first learned that CBS had obtained Vorwerk's Foss Outlook file, Foss immediately requested the

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<sup>10</sup> See documents and privilege log filed under seal pursuant to the April 14, 2014, order of Court Commissioner Masako Kanazawa.

<sup>11</sup> Declaration of John Crosetto in Support of Reply on Plaintiff Foss Maritime Company's Motion to Disqualify Counsel for Defendant Jeff Brandewiede and Seeking Sanctions (Appendix E) ¶ 2, Ex. 1. [CP 414; 416-418]

<sup>12</sup> Because it was drafted after his termination on his personal computer, Vorwerk's letter was not in Foss's system when it collected Vorwerk's work-related emails and documents. See App. A at ¶ 7. [CP 49]

documents as responsive to its discovery requests. CBS did not respond. Foss reiterated its request on November 12, 2013, and advised Welch that the files might contain privileged communications, which turned out to be true. CBS's only response was to submit the Vorwerk Letter and the privileged communications contained in it as proposed Trial Exhibit 80.

Foss made every effort to resolve the issue of CBS's improper review and use of privileged documents without involving the court by repeatedly asking Welch to explain why he believed CBS was entitled to hold onto Foss's privileged communications. But Foss received no explanation from CBS.<sup>13</sup>

In fact, CBS told Foss and the trial court that it was holding onto the documents to complete its review. In a letter of November 19, 2013, Foss confirmed to Welch that he had Foss's privileged documents in both the Vorwerk Letter and the Outlook file obtained from Vorwerk.<sup>14</sup> The letter warned Welch of the seriousness of the matter, laid out the argument for disqualification, including citations, and attached a copy of *Richards v. Jain*, under which counsel was disqualified on parallel facts. But rather than telling Foss he had ceased review a week earlier (when Foss told him that the Vorwerk documents may contain privileged communications), or even that he would cease review now that Foss confirmed that he had Foss's privileged documents, Welch stated that CBS intended to continue to read the both Vorwerk's letter and the Outlook file:

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<sup>13</sup> App. D at ¶¶ 6 to 8. [CP 82-83]

<sup>14</sup> App. D, Ex. 4. [CP 91-93]

“...I still have not had a chance to get through all of the information I received from Vorwerk, but I have found documents that should have been produced by Foss in response to Brandewiede’s discovery but we’re (sic) not.”<sup>15</sup>

Again, three days later (on November 22, 2013), Welch said he was going to review the letter and the Outlook file documents before responding to Foss’s demand:

“Arrived back in town Wednesday and wanted to take a read through Van’s [Vorwerk] post-termination letter before responding to your email from Tuesday [November 19].”<sup>16</sup>

In other words, rather than stopping review when Foss told him that he had privileged documents (both on November 12 and November 19), Welch said he would review the documents himself to make that determination.

Welch then told the trial court in CBS’s late Confirmation of Trial Readiness that he was reviewing documents from Vorwerk, but had not yet completed the review:

“Defendants Brandewiede’s Confirmation of Trial Readiness was delayed due to receiving the Ex-Project Manger’s [Vorwerk] records on October 24, 2013. Defendant Brandewiede has still not finished review of such files to determine whether such documentation is relevant to the issues before the Court.”<sup>17</sup>

Needless to say, Welch’s statements to Foss’s counsel and to the trial court gave little assurance that he had immediately stopped review of the Vorwerk documents after being told they contained privileged

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<sup>15</sup> App. D, Ex. 5. [CP 94-95]

<sup>16</sup> App. D, Ex. 8. [CP 102-105]

<sup>17</sup> Pre-Trial Report/Joint Confirmation (DKT. No. 67) (pleading title “Defendant Brandewiede’s Confirmation of Trial Readiness”) (Appendix F), 1. [CP 385]

communications.

Further, the allegation that Foss had not produced all responsive documents is telling: it confirms that Welch did review privileged documents in Vorwerk's Outlook file. Brandewiede filed a Motion for Sanctions against Foss based on the allegation that Foss had withheld responsive documents. But after CBS turned over the documents received from Vorwerk, Foss conducted a review and confirmed to the trial court that all responsive documents in the Outlook file received from Vorwerk had already been produced during discovery.<sup>18</sup> The only documents not produced were privileged or protected. The trial court confirmed the same by reviewing the documents *in camera*, and it denied CBS's motion. Thus, if CBS claims Foss withheld documents from Vorwerk's Outlook file, it confirms that Welch reviewed Foss's privileged and protected information.

**C. The trial court reviews *in camera* the documents obtained by Welch, determines they are privileged, and disqualifies Welch and CBS.**

Having received no explanation from CBS justifying Welch's review of Foss's privileged documents, Foss moved to disqualify CBS.<sup>19</sup> The Superior Court heard argument on January 17, 2014, and ordered Foss to file under seal its privileged documents withheld from discovery along with a privilege log for *in camera* review. CBS did not object. On

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<sup>18</sup> Declaration of Verna Seal in Response to Defendant Brandewiede's Motion for Discovery Sanctions (Appendix G). [CP 261-262]

<sup>19</sup> See App. D, ¶ 9, Ex. 4-7. [CP 83; 91-101]

February 5, 2014, Foss complied with the order and sent a Notice of Filing under Seal to CBS. CBS asked Foss's counsel to provide the documents filed under seal, but as the Superior Court had ordered the filing for *in camera* review, Foss's counsel proposed consulting the court. CBS did not take Foss up on the offer.<sup>20</sup>

On February 14, 2014, the Court disqualified CBS as counsel for Brandewiede, finding "that Brandewiede's counsel did not address case law cited in Plaintiff's brief and that some (but not all) documents he reviewed were clearly attorney-client communications."<sup>21</sup> CBS submits that the trial court did not identify the wrongful conduct.<sup>22</sup> Foss submits that Welch's review of documents that are "clearly attorney-client communications" is the wrongful conduct identified by the trial court.

The trial court order also granted Foss's motion to exclude the privileged communications obtained and reviewed by CBS. In its motion for discretionary review, CBS mischaracterized the order as excluding "*all* documents received from Vorwerk."<sup>23</sup> Again, CBS's recitation of the facts requires clarification. The trial court order actually says: "The Court excludes evidence tainted by Vorwerk's and Welch's wrongful conduct. . . unless defendants obtain that information from a source untainted by the wrongful conduct."<sup>24</sup> Thus, the trial court order specifically allows

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<sup>20</sup> Petitioners' Motion for Discretionary Review (Appendix H), App. K, Ex. E.

<sup>21</sup> Order to Disqualify Counsel for Defendant Jeff Brandewiede and Seeking Sanctions (Appendix I). [CP 276-277]

<sup>22</sup> Brandewiede's Opening Brief at 8 (quoting App. I at 2 [CP 276]).

<sup>23</sup> Petitioners' Motion for Discretionary Review (Appendix J), 12.

<sup>24</sup> App. I at 2 (emphasis added). [CP 276]

Brandewiede to obtain any information through proper discovery. As Foss already produced all responsive, non-privileged documents from Vorwerk's Outlook file during discovery, the trial court has allowed Brandewiede to obtain the Vorwerk Letter once the privileged communications have been redacted. The Superior Court ordered that a new trial date and trial schedule be set, which will allow Brandewiede to properly obtain discoverable documents.

**D. Does CBS represent Brandewiede or itself?**

Foss was surprised to see that CBS continued to act as Brandewiede's counsel after being disqualified. Foss's counsel contacted CBS the same day it received the Notice of Motion for Discretionary Review to inquire if CBS was continuing to represent Brandewiede (on appeal or otherwise) despite being disqualified. A principal of CBS, Kenneth S. Kagan, responded the same day in a voicemail. Contrary to the face of CBS's Notice stating that it was filed on behalf of Brandewiede,<sup>25</sup> Mr. Kagan specifically stated that the Notice for Discretionary Review was not filed on behalf of Brandewiede: "I learned that John Welch filed a motion, apparently, a Motion for Discretionary Review. He believes that Judge Lum decided in error, but he does agree that right now he is not acting on his client's behalf, former client's behalf."<sup>26</sup> Accordingly, Mr. Kagan clarified that CBS no longer represented Brandewiede, and that

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<sup>25</sup> Notice for Hearing of Motion for Discretionary Review (Appendix K).

<sup>26</sup> Declaration of John Crosetto in Support of Answer in Opposition to Emergency Motion for Stay (Appendix L), ¶ 2.

CBS was no longer offering Brandewiede legal advice:<sup>27</sup>

“We let the client know that the Motion for Discretionary Review had been filed. We let him know that there is the possibility of a fee application or a fee award and we let him know that somebody from Garvey Schubert might be contacting him. That's all we did. Didn't give him any advice, just let him know what was going on.”<sup>28</sup>

So according to Mr. Kagan, CBS filed the Motion for Discretionary review on CBS's behalf before consulting Brandewiede, though CBS now claims it is representing Brandewiede's interests.

### III. ISSUES ON APPEAL<sup>29</sup>

1. Washington law permits disqualification where counsel obtains, reviews, and uses attorney-client privileged communications of the opposing party.<sup>30</sup> Welch obtained privileged Foss communications from a former Foss project manager, reviewed them, and over Foss's objections, included some privileged communications as part of a trial exhibit. Did the trial court properly disqualify Welch and his firm (CBS) under Washington law based on the finding that Welch had obtained, reviewed, and used Foss's privileged information?
2. Washington federal courts have applied the six-factor *Meador* test to determine if counsel's receipt of privileged information outside the normal course of discovery necessitates disqualification. Each of

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Brandewiede mistakenly identifies the trial court's denial of its Motion for Sanctions against Foss as an issue for review by this Court. Brandewiede's Motion for Discretionary Review only asked this Court to review two issues: disqualification and the exclusion of evidence obtained from a source tainted by CBS's review of privileged documents. *See* Motion for Discretionary Review at 1 (“to accept review of the trial court's order of February 14, 2014 that disqualifies legal counsel for Jeff Brandewiede and excludes from evidence certain and specific information obtained by Brandewiede's counsel. . . .”). Brandewiede did not request review of the trial court's denial of its sanctions motion. Accordingly, the Commissioner's Ruling Granting Discretionary Review clearly states that Brandewiede's “separate motion[] for discovery sanctions” is “not at issue in this ruling.” Commissioner's Ruling Granting Discretionary Review at 5. Foss therefore will not address the trial court's denial of sanctions unless specifically requested by this Court.

<sup>30</sup> *See Matter of Firestorm 1991*, 129 Wn.2d 130, 139, 916 P.2d 411 (1996).

the *Meador* factors weighs in favor of CBS's disqualification:

- Welch knew or should have known the material was privileged because the emails identified the sender as Foss General Counsel and referenced work with Foss's outside counsel in this litigation;
- Welch took six weeks to turn over the privileged information and gave no assurance that he had ceased review, despite being told that the materials contained privileged communications;
- Welch reviewed the materials sufficiently to deem them relevant to the litigation and worth including as a trial exhibit;
- The material is significant because it addresses Foss's legal advice regarding the central issue of the litigation—Brandeweide's status as a partner with co-defendants CLS;
- Foss is not at fault for the disclosure because the material was disclosed by Vorwerk, a terminated employee, in violation of two explicit Foss policies prohibiting retention or disclosure of Foss materials after termination; and
- Any expense incurred by Brandeweide to retain new counsel does not rise to the level of severe prejudice necessary to make otherwise-proper disqualification improper.

Should the Court of Appeals affirm disqualification under the *Meador* factors?<sup>31</sup>

3. The attorney-client privilege protects attorney-client communications from discovery. The materials obtained by CBS contain some privileged communications and some not. Did the

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<sup>31</sup> The Court of Appeals can affirm on any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *LaMon v. Butler*, 112 Wn.2d 193, 201, 770 P.2d 1027 (1989) (citing *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984)); see also *Deep Water Brewing, LLC v. Fairway Resources, Ltd.*, 170 Wn. App. 1, 11, 282 P.3d 146 (2012) (noting that the Court of Appeals "may affirm on any grounds contained within the record").

trial court correctly exclude the privileged materials but order that Brandeweide could obtain the remaining, unprivileged materials from a source untainted by Welch's improper review of privileged Foss communications?

#### IV. ARGUMENT

##### A. Standard of Review.

Washington courts “review the question of whether to disqualify an attorney under the abuse of discretion standard.”<sup>32</sup> Similarly, Washington courts “review the. . . decision to admit or exclude evidence for an abuse of discretion.”<sup>33</sup> The abuse of discretion standard applies to the trial court order disqualifying CBS as counsel for Petitioners<sup>34</sup> and excluding evidence from a tainted source.<sup>35</sup>

##### B. The trial court adhered to longstanding Washington law when it disqualified Welch and CBS.

Washington courts have long upheld the sanctity of the attorney-client privilege.<sup>36</sup> The trial court did the same when it determined that the Vorwerk Letter and thumb-drive contained privileged materials, found that Welch reviewed those materials, and on that basis ordered disqualification of Welch and his firm. Because Welch accessed, reviewed, and used attorney-client privileged communications in direct

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<sup>32</sup> *State v. Schmitt*, 124 Wn. App. 662, 666, 102 P.3d 856, 858 (2004) (citing *Pub. Util. Dist. No. 1 (PUD) v. Int'l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994)).

<sup>33</sup> *State v. Stark*, 334 P.3d 1196, 1201-02 (2014) (citing *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001)).

<sup>34</sup> *Schmitt*, 124 Wn. App. at 666 (“We review the question of whether to disqualify an attorney under the abuse of discretion standard.”) (citing *PUD*, 124 Wn.2d at 812).

<sup>35</sup> See, e.g., *Stark*, 334 P.3d at 1201-02 (“We review the court’s decision to admit or exclude evidence for an abuse of discretion.”) (citing *Demery*, 144 Wn.2d at 758).

<sup>36</sup> See, e.g., *Dietz v. Doe*, 131 Wn.2d 835, 851, 935 P.2d 611 (1997) (“The privilege is imperative to preserve the sanctity of communications between clients and attorneys”).

violation of CR 26(b), Washington law requires CBS's disqualification.<sup>37</sup>

CBS mistakenly argues that *Burnet v. Spokane Ambulance* and its progeny should apply. But those cases apply to Rule 37 sanctions such as dismissal and the exclusion of evidence or testimony. Because Welch violated CR 26(b), rather than CR 37(b), sanctions imposed against him and CBS must comport with the Washington Supreme Court's decisions in *Matter of Firestorm 1991* and *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, just as the trial court's decision does. And because courts "should resolve any doubts in favor of disqualification,"<sup>38</sup> this Court should affirm the trial court's order disqualifying CBS.

1. *Disqualification of CBS is proper under the Washington Supreme Court's decisions in Fisons and Firestorm.*

By reviewing and using Foss's privileged materials, Welch violated CR 26 governing discovery. CR 26(b) provides that privileged matters generally are shielded from discovery: "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action. . . ."<sup>39</sup> Under *Firestorm*, trial courts have discretion to fashion and impose appropriate sanctions for violations of CR 26(b),<sup>40</sup> and such sanctions must comport with the

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<sup>37</sup> See *Matter of Firestorm 1991*, 129 Wn.2d at 140 (citing *Kurbitz v. Kurbitz*, 77 Wn.2d 943, 946, 468 P.2d 673 (1970)).

<sup>38</sup> *Richards v. Jain*, 168 F.Supp.2d 1195, 1209 (W.D. Wn. 2001) (quoting *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F.Supp.2d 1055, 1066 (W.D.Wn. 1999)); see also *Chugach Elec. Assn. v. United States District Court*, 370 F.2d 441, 444 (9th Cir.1966); *Kurbitz*, 77 Wn.2d at 946; *Harris By and Through Ramseyer v. Blodgett*, 853 F.Supp. 1239, 1273 (W.D.Wash.1994).

<sup>39</sup> CR 26 (emphasis added).

<sup>40</sup> *Matter of Firestorm 1991*, 129 Wn.2d at 139 ("Sanctions for violations of CR 26(b) are not specifically addressed in CR 26(g), CR 37, or CR 11. Nevertheless, the trial court is

Washington Supreme Court's decision in *Fisons*.<sup>41</sup> *Fisons* requires that sanctions, including attorney disqualification,<sup>42</sup> are:

the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.

The purposes of sanctions orders are to deter, to punish, to compensate and to educate.<sup>43</sup>

Disqualification of Welch and CBS fulfills all of *Fisons*'s requirements. Disqualification is not only appropriate, but necessary, to serve the purpose for which it was imposed, which is to remove the taint of Welch's wrongful access to and use of privileged Foss information from the proceedings. Disqualification serves the purpose of discovery; ensures CBS does not profit from its wrongful conduct; and takes into consideration Foss's considerable efforts to mitigate the damage Welch has caused. No other remedy serves the purposes of sanctions set forth in *Fisons*.

Petitioners repeatedly point to *Firestorm* as absolving Welch because his access to privileged Foss information did not result from a

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not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation").

<sup>41</sup> *Id.*; *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 354-55, 858 P.2d 1054 (1993).

<sup>42</sup> *See id.*

<sup>43</sup> *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d at 355-56 (internal citations omitted).

conflict of interest.<sup>44</sup> *Firestorm* clearly states, however, that unauthorized access to privileged communications requires disqualification: “One situation *requiring* the drastic remedy of disqualification arises when counsel has access to privileged information of an opposing party.”<sup>45</sup> While it is true that the *Firestorm* court ultimately found disqualification too drastic a remedy under the specific circumstances of that case, the facts of *Firestorm* are readily distinguishable from the case at hand.

The *Firestorm* court found that an order disqualifying Plaintiffs’ counsel for conducting an ex-parte interview with one of Defendants’ expert witnesses failed to comport with *Fisons* for three primary reasons. First, the trial court in *Firestorm* not only failed to consider less severe sanctions, it did not make any findings on any issue whatsoever.<sup>46</sup> Second, the expert witness “represented himself as an expert for a nonparty” and approached Plaintiffs, rather than the other way around.<sup>47</sup> And most importantly, the *Firestorm* court found that the expert witness did not have access to (and thus could not divulge) privileged information belonging to Defendants.<sup>48</sup> This case is distinguishable on all three counts.

First, the record here reflects that the trial court carefully

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<sup>44</sup> See Brandewiede’s Opening Brief at 17-18.

<sup>45</sup> *Firestorm*, 129 Wn.2d at 140 (emphasis added) (citing *Kurbitz*, 77 Wn.2d at 947).

<sup>46</sup> *Id.* at 135 (“No testimony was heard by the trial court. The trial court made no findings of fact. . . . The record does not reveal whether the trial judge considered any other sanction before ordering [counsel] disqualified; in fact, the trial court made no findings on this or any other issue”).

<sup>47</sup> *Id.* at 143.

<sup>48</sup> *Id.* at 134 (“The [trial] court based its decision on its belief that [counsel] should have been on notice as to. . . the potential for the disclosure of privileged information. However, the court did not find any of the information disclosed was privileged”).

considered whether disqualification was proper while recognizing that disqualification “is a pretty Draconian remedy.”<sup>49</sup> The trial court heard oral argument from both CBS and Foss’s counsel on January 17, 2014.<sup>50</sup> Afterwards, the trial court not only “[took] another look at the case law,”<sup>51</sup> it also reviewed Foss’s privilege log and privileged documents withheld from production contained on the thumb-drive.<sup>52</sup> The trial court found that some of these materials were “clearly privileged” and that disqualification therefore was proper.<sup>53</sup>

Second, unlike the expert witness in *Firestorm*, Vorwerk did not “simply present[] himself” to CBS. Rather, CBS affirmatively contacted Vorwerk for an interview and met with him twice in the Fall of 2013.<sup>54</sup> Even if CBS did not know that the Outlook file Welch requested from Vorwerk contained attorney-client privileged communications, it certainly should have suspected so, given that Foss had identified Vorwerk as a person who assisted in preparing its discovery responses, and the Vorwerk Letter obtained four weeks earlier specifically referenced Vorwerk’s work with Foss’s counsel in this litigation. Vorwerk even warned Welch that the thumb-drive contained his *entire* Outlook file from Foss (his former employer), and Welch knew that Vorwerk “was the only guy for Foss that

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<sup>49</sup> App. B at 49, ll. 4-5.

<sup>50</sup> See App. B.

<sup>51</sup> App. B at 50 l. 15.

<sup>52</sup> See documents filed under seal pursuant to the April 14, 2014, order of Court Commissioner Masako Kanazawa.

<sup>53</sup> App. I at 2. [CP 276]

<sup>54</sup> See App. C at ¶¶ 5-7. [CP 114-115]

managed this project.”<sup>55</sup> Under these circumstances, CBS and Welch should have known that the materials from Vorwerk would likely contain communications with in-house and outside counsel.

Finally and most importantly, it cannot be disputed that Vorwerk disclosed to CBS Foss’s privileged communications. The *Firestorm* court reversed the disqualification order in large part because the expert witness with whom Plaintiffs had ex-parte contact was neither an “integral employee” of Defendants nor “privy to litigation strategy because no litigation was pending at the time of his association with” Defendants.<sup>56</sup> Accordingly, the witness did not have access to Defendants’ privileged information,<sup>57</sup> and indeed, the trial court in *Firestorm* “did not find any of the information disclosed was privileged.”<sup>58</sup> Had the witness possessed privileged information and disclosed it to counsel, as here, disqualification would have been not only proper, but required.<sup>59</sup> In sharp contrast to the *Firestorm* witness, Vorwerk was an integral employee of Foss;<sup>60</sup> he was directly involved in the pending litigation;<sup>61</sup> and CBS did obtain access to privileged communications between Vorwerk and attorneys, both at Foss and at Garvey Schubert Barer, regarding the underlying litigation.<sup>62</sup>

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<sup>55</sup> App. B at 21, ll. 19-20.

<sup>56</sup> *Matter of Firestorm 1991*, 129 Wn.2d at 140.

<sup>57</sup> *Id.* (“Neither of those factors are present here to support a finding that [the expert witness] had access to privileged information”).

<sup>58</sup> *Id.* at 134.

<sup>59</sup> *Id.* at 140 (emphasis added) (citing *Kurbitz*, 77 Wn.2d at 947).

<sup>60</sup> App. A at ¶ 5. [CP 49]

<sup>61</sup> See App. A at ¶ 6 [CP 49]; Vorwerk Letter filed under seal pursuant to the April 14, 2014, order of Court Commissioner Masako Kanazawa.

<sup>62</sup> See documents filed under seal pursuant to the April 14, 2014, order of Court Commissioner Masako Kanazawa.

*Firestorm* not only permits the disqualification of CBS, it requires it.<sup>63</sup>

2. *Attorney disqualification is not a CR 37(b) discovery sanction subject to Burnet.*

Petitioners argue that the trial court erred by failing to “balance the *Burnet* factors” prior to disqualifying CBS, and that such failure, alone, necessitates reversal of the trial court order.<sup>64</sup> But Petitioners misread *Burnet* and its progeny: *Burnet* has never been applied to disqualification under Rule 26, nor is the *Burnet* analysis required for disqualification.

*Burnet* involved a CR 37(b)(2)(B) discovery order excluding Plaintiffs’ negligent credentialing claim against a hospital that had treated Plaintiffs’ daughter and prohibiting Plaintiffs from seeking further discovery regarding the claim.<sup>65</sup> The *Burnet* court held that, before imposing “one of the harsher remedies allowable under CR 37(b),” courts must consider three factors: (1) whether a discovery violation was willful or deliberate; (2) whether the violation has substantially prejudiced the opponent’s ability to prepare for trial; and (3) whether a lesser sanction would probably suffice.<sup>66</sup> Petitioners’ argument for reversal ignores the italicized language, which makes clear that *Burnet*’s three-factor test is not required prior to imposition of any and all “harsh” remedies. Rather, *Burnet* “applie[s] to [violations of] CR 37(b)(2),” which rule empowers trial courts to sanction persons who “fail[] to obey an order or permit

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<sup>63</sup> *Matter of Firestorm 1991*, 129 Wn.2d at 140.

<sup>64</sup> Brandewiede’s Opening Brief at 14.

<sup>65</sup> *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

<sup>66</sup> *Id.* at 494 (emphasis added) (internal quotation omitted).

discovery.”<sup>67</sup> Specifically, “the reference in *Burnet* to [harsh remedies] applies to such remedies as dismissal, default, and the exclusion of testimony—sanctions that affect a party’s ability to present its case. . . .”<sup>68</sup> Washington courts consistently have applied *Burnet* to orders excluding witnesses,<sup>69</sup> dismissing claims,<sup>70</sup> or granting a default judgment<sup>71</sup>—*Burnet* has never been applied to orders disqualifying counsel.<sup>72</sup>

This makes ample sense, given the *Burnet* court’s emphasis of due-process considerations. In announcing its three-factor test, the *Burnet* court relied on a 1989 Court of Appeals decision, *Snedigar v. Hodderson*, which held that prior to ordering default or dismissal—the “most severe sanction[s]” that are “allowable under CR 37(b)” —courts must find that specific “due process factors” are present and consider whether a lesser

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<sup>67</sup> *Washington Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.*, 168 Wn. App. 710, 715-16, 282 P.3d 1107 (2012) (citing CR 37(b)(2), *Burnet*, 131 Wn.2d 484).

<sup>68</sup> *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 690, 132 P.3d 115 (2006) (quoting *Burnet*, 131 Wn.2d at 494).

<sup>69</sup> *See, e.g., Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013) (exclusion of late-disclosed witnesses); *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011) (exclusion of witnesses); *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) (exclusion of expert witness); *In re Dependency of M.P.*, 336 P.3d 624 (2014) (exclusion of late-disclosed witnesses).

<sup>70</sup> *See Rivers v. Washington State Conf. of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002).

<sup>71</sup> *See Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009).

<sup>72</sup> In fact, the trial court in this case considered *Burnet* and its progeny during the January 17, 2014 hearing in the context of Foss’s request for dismissal of Brandeweide’s counterclaims in light of his late disclosure of 600 pages of documents: “the court needs to engage in a balancing of the *Burnet* factors, . . . making it pretty clear that it’s virtually impossible to get *dismissal or exclusion of evidence or dismissal of a claim or counterclaim* without some pretty stringent findings. It almost has to be intentional misconduct and prejudice in order to get *those* extreme remedies. . . . so that’s why I stated a little bit earlier *those issue* (sic) are really off the table as a practical matter.” App. B at 45, ll. 7-22 (emphasis added). The trial court correctly understood when to apply *Burnet*. *See id.*

sanction would likely have sufficed.<sup>73</sup> The “due process factors” consist of (1) a “willful or deliberate refusal to obey a discovery order” and (2) resulting “substantial prejudice[ to] the opponent’s ability to prepare for trial” (what became the first two *Burnet* factors).<sup>74</sup> Under *Snedigar*, courts must determine whether due process permits default or dismissal and consider, on the record, whether less severe sanctions would probably suffice (which became the third *Burnet* factor).<sup>75</sup> The *Burnet* court extended the *Snedigar* test beyond the “most severe sanctions of dismissal or withdrawal” to “all of the sanctions described in CR 37(b)(2)(A)-(E)” — which do not include disqualification of counsel.<sup>76</sup> In fact, “nothing in *Burnet* suggests that trial courts must go through the *Burnet* factors every time they impose sanctions for discovery abuses,”<sup>77</sup> even severe sanctions. Disqualification of counsel is not a discovery sanction pursuant to CR 37(b)(2), and does not present the same due-process concerns as sanctions set forth in that rule, such as dismissal or exclusion of witnesses.<sup>78</sup> The trial court was not required to perform a *Burnet* analysis prior to

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<sup>73</sup> *Burnet*, 131 Wn.2d at 494 (citing *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989), *rev’d on other grounds*, 114 Wn.2d 153, 786 P.2d 781 (1990)).

<sup>74</sup> *Snedigar*, 53 Wn. App. at 487 (citing *Assoc. Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 228-29, 548 P.2d 558 (1976), *review denied*, 87 Wn.2d 1006 (1976)).

<sup>75</sup> *Id.*

<sup>76</sup> *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006).

<sup>77</sup> *Id.*

<sup>78</sup> While parties do have a right to counsel of their choice, that right—even in criminal proceedings—is not absolute, and in fact is “circumscribed in several important respects.” *State v. Hampton*, 332 P.3d 1020, 1027 (2014) (quoting *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1998)). Indeed, trial courts have “wide latitude in balancing the right to counsel of choice against the needs of fairness. . . and against the demands of its calendar.” *Id.* at 1028 (internal quotation and citation omitted).

disqualifying CBS as counsel.

3. *Any doubts should be resolved in favor of disqualification.*

Finally, this Court “should resolve any doubts in favor of disqualification.”<sup>79</sup> The attorney-client privilege provides “fundamental benefits that accrue to society at large” and is “pivotal in the orderly administration of the legal system, which is the cornerstone of a just society.”<sup>80</sup> The privilege is simply too important to permit counsel who has accessed, reviewed, used, and submitted as a trial exhibit attorney-client privileged emails to continue its representation: “The dynamics of litigation are far too subtle, the attorney’s role in that process is far too critical, and the public’s interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer’s representation in a given case.”<sup>81</sup> As the Washington Supreme Court recognized in *Firestorm*, “[r]equiring disqualification after counsel has had access to privileged information preserves the public’s confidence in the legal profession.”<sup>82</sup> To remove the taint of CBS’s wrongful review of privileged Foss information and to preserve public confidence in the justice system, this Court should resolve any doubts in favor of

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<sup>79</sup> *Richards*, 168 F.Supp.2d at 1209 (quoting *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F.Supp.2d 1055, 1066 (W.D.Wn. 1999); see also *Chugach Elec. Assn. v. United States District Court*, 370 F.2d 441, 444 (9th Cir.1966); *Kurbitz*, 77 Wn.2d at 946; *Harris By and Through Ramseyer v. Blodgett*, 853 F.Supp. 1239, 1273 (W.D.Wn.1994).

<sup>80</sup> *In re Disciplinary Proceeding Against Schafer*, 149 Wn.2d 148, 160, 66 P.3d 1036 (2003).

<sup>81</sup> *Richards*, 168 F.Supp.2d at 1209 (quoting *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2nd Cir.1973)).

<sup>82</sup> *Matter of Firestorm 1991*, 129 Wn.2d at 140 (citing *Intercapital Corp. v. Intercapital Corp.*, 41 Wn. App. 9, 16, 700 P.2d 1213 (1985), review denied, 104 Wn.2d 1015 (1985)).

disqualifying CBS.

**C. The trial court's disqualification order is proper under the Meador test, which this Court should apply.**

1. *The Meador test comports with Washington case law governing attorney disqualification, and should be adopted and applied by this Court.*

As discussed above, Washington courts have long emphasized that the attorney-client privilege is both “imperative to preserve the sanctity of communications between clients and attorneys”<sup>83</sup> and “pivotal in the orderly administration of the legal system.”<sup>84</sup> In order to protect attorney-client relationships, the orderly administration of justice, and public faith in the legal system<sup>85</sup> where counsel accesses, reviews, and uses privileged communications of an opposing party, federal courts frequently apply the “Meador test,” announced by the Texas Supreme Court in *In re Meador*. Like the Washington Supreme Court in *Firestorm*, the Meador test looks to “prejudice, bad faith, and knowledge” of counsel in a six-part analysis to determine whether disqualification is appropriate under circumstances such as those here.

The District Court for the Western District of Washington has held that the six Meador factors “neatly incorporate the concepts of prejudice, bad faith, and knowledge elucidated by the Washington Supreme Court as elements to be weighed in evaluating a motion to disqualify.”<sup>86</sup> That the

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<sup>83</sup> *Dietz v. Doe*, 131 Wn.2d 835, 851, 935 P.2d 611 (1997).

<sup>84</sup> *In re Disciplinary Proceeding Against Schafer*, 149 Wn.2d 148, 160, 66 P.3d 1036 (2003).

<sup>85</sup> See *Richards*, 168 F.Supp.2d at 1209.

<sup>86</sup> *Id.* at 1205 (citing *Matter of Firestorm 1991*, 129 Wn.2d at 130, *First Small Business*

*Meador* test has not yet been applied by Washington state courts poses no obstacle to this Court relying on it: a Washington Court of Appeals recently relied entirely on federal court decisions to hold that courts may, on their own initiative, disqualify counsel.<sup>87</sup> The *Meador* factors serve Washington courts' longstanding protection of the attorney-client privilege as vital to the justice system and "neatly incorporate" the concepts already weighed by Washington courts in analyzing attorney disqualification.<sup>88</sup> This Court should explicitly adopt the *Meador* test and affirm the trial court order, which complies with *Meador*.<sup>89</sup>

The *Meador* factors include:

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*Investment Co. v. Intercapital Corp. of Oregon*, 108 Wn.2d 324, 331, 738 P.2d 263 (1987)).

<sup>87</sup> *In re Marriage of Wixom and Wixom*, 332 P.3d 1063 at ¶ 54 (2014) (“[w]e . . . see no reason to distinguish between a state court and a federal court for purposes of enforcing ethical standards”).

<sup>88</sup> *Richards*, 168 F.Supp.2d at 1209

<sup>89</sup> *LaMon v. Butler*, 112 Wn.2d 193, 201, 770 P.2d 1027 (1989) (The Court of Appeals can affirm on any theory established by the pleadings and supported by the proof, even if the trial court did not consider it.); citing *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984); see also *Deep Water Brewing, LLC v. Fairway Resources, Ltd.*, 170 Wn. App. 1, 11, 282 P.3d 146 (2012) (The Court of Appeals can affirm on any grounds contained in the record).

- 1) whether the attorney knew or should have known that the material was privileged;
- 2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
- 3) the extent to which the attorney reviews and digests the privileged information;
- 4) the significance of the privileged information; *i.e.*, the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;
- 5) the extent to which movant may be at fault for the unauthorized disclosure;
- 6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.<sup>90</sup>

2. *Disqualification of CBS is proper under the Meador test.*

Each of the six *Meador* factors, discussed in detail below, weighs in favor of CBS's disqualification: (1) Welch knew or, at minimum, should have known that Vorwerk's disclosures contained privileged information; (2) CBS delayed notifying Foss that it had received privileged information for six weeks; (3) CBS reviewed the Foss materials sufficiently to deem them relevant to the litigation and include some privileged Foss communications in a proposed trial exhibit; (4) the Vorwerk letter and thumb-drive contain privileged information that is highly significant to Foss's legal strategy in the underlying litigation; (5) Foss bears no fault for the disclosures; and (6) disqualification of CBS, particularly since no trial date has been set, will not unduly prejudice

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<sup>90</sup> *In re Meador*, 968 S.W.2d 346, 351-52 (Texas, 1998).

Petitioners.<sup>91</sup>

**a. Welch knew or should have known he had received privileged material.**

The emails at issue were easily identified as privileged. Those pasted into the Vorwerk Letter declare on their face that the sender is Foss General Counsel, and the letter specifically references communications with Foss's outside counsel in this litigation. It therefore stretches all reason to conclude that Welch did not realize (let alone should not have realized) that he was looking at privileged information. Further, it's difficult to see how Welch could not have expected that the former Alucia project manager's *entire* Foss Outlook file would contain similarly-protected communications. Emails in both the Letter and thumb-drive reveal communications between and among Foss managers, including Vorwerk; Frank Williamson, Foss's General Counsel; and various attorneys at Garvey Schubert Barer. The email signatures of Mr. Williamson and the Garvey Schubert Barer attorneys warn that their emails may contain confidential and/or privileged information.<sup>92</sup> Not only that, several emails (including those pasted into the Vorwerk Letter) explicitly discuss Foss's legal strategy with regard to the Alucia project and various subcontractors employed by Foss. Courts applying *Richards v. Jain* and *Meador* have held that correspondence between a client and its counsel "regarding information relevant to pending or future litigation is

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<sup>91</sup> See *In re Meador*, 968 S.W.2d at 351-52; *Richards*, 168 F.Supp.2d 1195.

<sup>92</sup> See Vorwerk Letter and documents filed under seal pursuant to the April 14, 2014, order of Court Commissioner Masako Kanazawa.

equally conspicuous to the eyes of an attorney,” as files marked “Privileged.”<sup>93</sup> Welch surely knew that these emails were privileged attorney-client communications.

If, however, as Petitioners claim,<sup>94</sup> Welch did not realize that the Vorwerk Letter and thumb-drive contained privileged information, as an experienced attorney with knowledge of Vorwerk’s managerial role on the project at the heart of this litigation, then he certainly should have known. Both Brandeweide, whom Vorwerk hired to work on the Alucia as part of CLS and whom Vorwerk supervised throughout the project, and Welch were aware of Vorwerk’s leadership role with Foss on the project that is the subject of this litigation. In fact, Welch admitted as much to the trial court: “[Vorwerk] was the only guy for Foss that managed this project.”<sup>95</sup> Vorwerk managed the entire multi-million dollar Alucia project for Foss and, in doing so, kept in regular contact with co-defendant CLS; co-defendant and CLS-partner Brandeweide; CLS’s other constituent partners; and both general and outside counsel for Foss. The Vorwerk Letter shows this: Vorwerk copied and pasted into that Letter email communications between himself and Foss’s General Counsel regarding Foss’s legal strategy in dealing with CLS and Brandeweide. When Vorwerk, a former key Foss employee who managed and oversaw the execution of the Alucia project, produced a thumb-drive containing every

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<sup>93</sup> *Maldonado v. New Jersey ex rel. Administrative Office of Courts-Probation Division*, 225 F.R.D. 120, 139 (D.N.J. 2004).

<sup>94</sup> See Brandeweide’s Opening Brief at 29.

<sup>95</sup> App. B at 21, ll. 19-20.

email from his Foss Outlook account, Welch had constructive knowledge that the drive contained privileged communications.<sup>96</sup> Welch knew, or at minimum should have known that he had received privileged information belonging to Foss, satisfying the first *Meador* factor.<sup>97</sup>

**b. CBS delayed notifying Foss that it had received privileged material.**

Welch's failure to notify the opposing party "*upon receiving* the [privileged] documents" weighs in favor of disqualification.<sup>98</sup> Welch obtained the Vorwerk Letter on September 24, 2013, over a week prior to Mr. Brandewiede's October 3, 2014, deposition.<sup>99</sup> At that deposition, however, neither Brandewiede nor Welch gave any indication that they had received documents from Vorwerk, despite Brandewiede being asked under oath if he had reviewed any documents to prepare for his deposition and being asked to describe the meeting in detail.<sup>100</sup> Welch received the thumb-drive three weeks later, on October 24, 2013.<sup>101</sup> Yet he did not notify Foss that he had obtained, outside the normal course of discovery and after the discovery deadline of October 14, 2013, privileged Foss communications until November 8, 2013, a few weeks before trial was scheduled to begin.<sup>102</sup> In addition, Welch withheld the thumb-drive for

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<sup>96</sup> *Richards*, 168 F.Supp.2d at 1203 ("The Court finds that upon requesting the Disk and learning that it contained every e-mail from [former employee's] hard drive, [counsel] had constructive knowledge that the Disk contained privileged e-mail").

<sup>97</sup> See *In re Meador*, 968 S.W.2d at 351-52, *Richards*, 168 F.Supp.2d 1195.

<sup>98</sup> *Id.* at 352 (emphasis added).

<sup>99</sup> App. C. at ¶ 6. [CP 114]

<sup>100</sup> App. E at ¶ 2, Ex. 1. [CP 430; 432-433]

<sup>101</sup> App. C at ¶ 7. [CP 114]

<sup>102</sup> App. D at ¶ 2. [CP 81-82]

seven days following Foss's counsel's request for any other privileged information CBS may have.<sup>103</sup> The second *Meador* factor weighs in favor of disqualification.

**c. CBS reviewed and digested privileged Foss information sufficiently to include it as a trial exhibit.**

CBS reviewed and digested the Vorwerk Letter, including the privileged emails, sufficiently to decide to include the letter as Petitioners' Proposed Trial Exhibit No. 80. The *Richards* court makes clear that "[a]ny review of documents" that enables counsel to determine which documents are relevant to the litigation at hand "would have put him on notice" that a hard disk's contents included attorney-client privileged emails.<sup>104</sup> Further, rather than assuring Foss they had ceased review, Welch and CBS, repeatedly said that they were not yet finished reviewing the Vorwerk Letter and Foss Outlook file, strongly suggesting that CBS had made significant progress reviewing the privileged information and that they intended to complete their review of the *entire* contents. The third *Meador* factor is satisfied.<sup>105</sup>

**d. The privileged information is significant to Foss's litigation strategy and claims against Brandewiede.**

The emails contained in the Vorwerk Letter and, even more so, the thumb-drive, disclose both internal and external communications between Foss managers and Foss's counsel. These communications reveal, in

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<sup>103</sup> App. D at ¶¶ 3-5, Ex. 1-3. [CP 82; 85-90]

<sup>104</sup> *Richards*, 168 F.Supp.2d at 1205-06.

<sup>105</sup> *See id.* at 1207.

relevant part, Foss's legal strategies on how to manage, obtain payment from, and eventually litigate against defendant CLS, Brandewiede, and CLS's other constituent partners. The highly-sensitive nature of the information contained in these emails is why Foss took numerous steps to protect it from disclosure, including through the Business Ethics and Email Policies, which Vorwerk agreed to while at Foss.<sup>106</sup> CBS's access to and review and use of this information is plainly prejudicial to Foss, satisfying the fourth *Meador* factor.<sup>107</sup>

**e. Foss is not at fault for the disclosures.**

Neither Foss nor Foss's counsel disclosed the privileged information at issue. As in *Richards v. Jain*, "[t]his is not a case of inadvertent disclosure during the normal discovery process that could potentially constitute a waiver. . . ." <sup>108</sup> Because Foss did not provide any of the "contested documents" to CBS, Foss bears no actual fault, "nor can fault be imputed" on Foss for the disclosure.<sup>109</sup>

Not only is Foss not to blame for the disclosures, Foss took every reasonable measure to prevent them. The *Richards* court held that, by requiring employees to sign a Non-Disclosure Agreement ("NDA"), movant InfoSpace had "*made every effort* to protect their privileged and confidential documents."<sup>110</sup> That NDA required employees to refrain from

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<sup>106</sup> See App. A, Ex. 1-3. [CP 50 – 80]

<sup>107</sup> *Richards*, 168 F.Supp.2d at 1207-08.

<sup>108</sup> *Richards*, 168 F.Supp.2d at 1208; see also *Maldonado*, 225 F.R.D. at 141.

<sup>109</sup> *Maldonado*, 225 F.R.D. at 141.

<sup>109</sup> *Id.*

<sup>110</sup> *Richards*, 168 F.Supp. at 1208 (emphasis added).

disclosing “any confidential or proprietary information which is circulated within InfoSpace through its internal email system or otherwise” at “all times during. . . employment and thereafter.”<sup>111</sup> Like InfoSpace, Foss took ample precautions to prevent unauthorized disclosure of its confidential information by employees and former employees through its employment and technology policies.

Specifically, Vorwerk consented to two confidentiality policies during his employment at Foss. First, he agreed to Foss’s Electronic Mail Policy when he used Foss’s electronic mail access: “By using the e-mail access provided, every employee agrees that he or she is aware of this policy. . . .”<sup>112</sup> This policy states that “[m]essages sent through e-mail and the contents of any employee’s computer are the sole property of the company. . . .”<sup>113</sup> In addition, Vorwerk certified his understanding of and compliance with Foss’s Business Ethics Policy, which provides that, “Except as authorized and in furtherance of the Company’s business, Employees may not disclose confidential information that they acquire by virtue of their employment by or affiliation with the Company....”<sup>114</sup> That Policy also states,

“[E]mployees must safeguard proprietary information, which includes information that is not generally known to the public and has commercial value in the Company’s business. Proprietary information includes, among other things,. . . strategic planning,. . . internal communications,. . . and relationships between the

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<sup>111</sup> *Id.*

<sup>112</sup> App. A at ¶ 2, Ex. 1. [CP 48; 50 – 51]

<sup>113</sup> *Id.*

<sup>114</sup> App. A at ¶¶ 3-4, Ex. 2, 3. [CP 49; 52-80]

Company and other companies with which it has business dealings. *The obligation to preserve proprietary information continues even after employment ends.*"<sup>115</sup>

Under both the Electronic Mail Policy and Business Ethics Policy, Vorwerk agreed to not disclose Foss's confidential information and Vorwerk's confidentiality obligations continued after his termination. Like the movant in *Richards v. Jain*, Foss "made every effort" to protect its confidential information.<sup>116</sup> The fault for this disclosure lies squarely with Vorwerk for downloading and distributing the contents of his entire Foss Outlook, in violation of the Electronic Mail Policy and Business Ethics Policy, and CBS for "not implementing appropriate safeguards to avoid disclosure of privileged documents"<sup>117</sup> when it should well have expected to find privileged and confidential information in the Outlook file.

Finally, Foss diligently sought to protect its privileged information once it learned of the disclosure: Foss's counsel repeatedly informed CBS that it was wrongfully in possession of privileged information and, when CBS proved unwilling to timely work towards an amicable resolution, Foss promptly moved for disqualification.<sup>118</sup> Courts consider efforts to mitigate the effects of attorney-misconduct, including the timeliness of a disqualification motion:<sup>119</sup> The Washington Supreme Court has held that "[a] motion to disqualify should be made with reasonable promptness after

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<sup>115</sup> App. A Ex. 2 (emphasis added). [CP 52- 78]

<sup>116</sup> *Richards*, 168 F.Supp.2d at 1208.

<sup>117</sup> *Id.*

<sup>118</sup> App. D at ¶¶ 4-9, Ex. 2, 4, 6, 7. [CP 82 – 83; 87 – 88; 91 – 93; 96- 101]

<sup>119</sup> *Matter of Firestorm 1991*, 129 Wn.2d at 144 ("Paine Hamblen may have failed to mitigate the effects of this ex-parte contact. Instead of immediately going to a judge, they waited nine months to bring this motion").

a party discovers the facts which lead to the motion.”<sup>120</sup> Washington courts have found unreasonable a delay of 18 months<sup>121</sup> and a delay of nine months during which the nonmovant “expend[ed] over 640 hours and incur[ed] corresponding expenses.”<sup>122</sup> Foss learned CBS had obtained privileged Foss communications on November 8, 2013, and moved for disqualification on November 22, 2013.<sup>123</sup> Because Foss’s motion for disqualification was reasonably prompt<sup>124</sup> and Foss bears no responsibility whatsoever for the disclosure, the fifth *Meador* factor weighs in favor of disqualification.

**f. Brandewiede will not suffer undue prejudice from the disqualification of CBS.**

The sixth *Meador* factor is “the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.”<sup>125</sup> While Foss is mindful that Brandewiede may incur expense as a result of CBS’s disqualification, such expense is insufficient, on its own, to render disqualification improper. “Prejudice” to the nonmovant means more than just the expense of retaining new counsel. “If expense is an exception [to

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<sup>120</sup> *First Small Bus. Inv. Co. v. Intercapital Corp. of Oregon*, 108 Wn.2d 324, 337, 738 P.2d 263 (1987) (quoting *Cent. Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992 (8th Cir.1978)); see also *Barbee v. Luong Firm, P.L.L.C.*, 126 Wn. App. 148, 159-60, 107 P.3d 762 (2005) (“waiting too long to bring a motion to disqualify. . . may mean that it will be denied as too late”) (citing *PUD 1 of Klickitat Cty. v. Int’l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994)).

<sup>121</sup> *Eubanks v. Klickitat County*, 181 Wn. App. 615, 621, 326 P.3d 796 (2014) (holding movant had waived his right to seek disqualification of opposing counsel due in large part to the 18 month-delay between his first claim that counsel had a conflict of interest and his motion to disqualify).

<sup>122</sup> *Matter of Firestorm 1991*, 129 Wn.2d at 144-45.

<sup>123</sup> App. D at ¶¶ 2, 9. [CP 81-82; 83]

<sup>124</sup> See *First Small Bus. Inv. Co.*, 108 Wn.2d at 337.

<sup>125</sup> See *Richards*, 168 F.Supp.2d at 1205 (citing *In re Meador*, 968 S.W.2d 346).

otherwise-proper disqualification], the exception would soon swallow the rule.”<sup>126</sup> Rather, “prejudice” is incurred by nonmovants who cannot argue, or would face significantly more difficulty arguing, their case successfully should their chosen attorney be disqualified.

Nonmovants suffer prejudice, for example, if “substituting new counsel. . . will affect the outcome of the case.”<sup>127</sup> Several courts applying *Meador* have looked at the complexity of issues and the number of parties involved in the litigation to determine whether the nonmovant likely could retain capable substitute counsel.<sup>128</sup> Where the nonmovant’s attorney is not the only attorney who “could or would handle the case,” that attorney’s disqualification does not severely prejudice the nonmovant.<sup>129</sup> Courts may also look at whether disqualification of counsel would harm the nonmovant him- or herself. In *Eubanks v. Klickitat County*, a sexual

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<sup>126</sup> *Wixom*, 332 P.3d 1063 at ¶ 55 (2014) (citing *Premium Products, Inc. v. Pro Performance Sports, LLC*, 997 F.Supp.2d 433, 2014 WL 644398 (E.D.Va. Feb. 19); *United States v. Peng*, 766 F.2d 82, 87 (2d Cir.1985); *Universal Athletic Sales Co. v. Am. Gym, Recreational & Athletic Equip. Corp.*, 546 F.2d 530, 538 n. 21 (3d Cir.1976); *Wickes v. Ward*, 706 F.Supp. 290, 293 (S.D.N.Y.1989); *Fed. Deposit Ins. Corp. v. Sierra Res., Inc.*, 682 F.Supp. 1167, 1171 (D.Colo.1987); *Kalmanovitz v. G. Heileman Brewing Co.*, 610 F.Supp. 1319, 1326 (D.Del.1985); *May’s Family Ctrs., Inc. v. Goodman’s Inc.*, 590 F.Supp. 1163, 1165 (N.D.Ill.1984); *Teleprompter of Erie, Inc. v. City of Erie*, 573 F.Supp. 963, 966 (W.D.Pa.1983); *MacArthur v. Bank of New York*, 524 F.Supp. 1205, 1210 (S.D.N.Y. 1981)).

<sup>127</sup> *Eubanks*, 181 Wn. App. at 621 (noting that “there [was] no evidence that substituting new counsel. . . will affect the outcome of the case,” but finding nonmovants would suffer prejudice were counsel disqualified for other reasons).

<sup>128</sup> See, e.g., *Richards*, 168 F.Supp. at 1208 (“There is nothing to suggest that other counsel could not be found to represent Plaintiffs. Although RICO is more complex and involved than a standard breach of contract claim, the Court rejects the contention that Hagens Berman is the only firm that could or would handle the case”); *Maldonado*, 225 F.R.D. at 141 (“there is nothing to suggest that new counsel could not be found to represent Maldonado. Although Title VII and LAD claims present complex issues, the Court preemptively rejects the contention that Matos or Hodulik are the only attorneys that could or would handle the case”).

<sup>129</sup> *Richards*, 168 F.Supp.2d at 1208; *Maldonado*, 225 F.R.D. at 141.

harassment action, the Washington Court of Appeals affirmed the trial court's order denying a motion to disqualify Plaintiffs' counsel largely because Plaintiffs would suffer "significant [negative] psychological impact" should their counsel be disqualified.<sup>130</sup>

CBS does not, and cannot, assert that Brandewiede would be prejudiced by CBS's disqualification in any way save for financial. The underlying litigation regarding breach of contract, unjust enrichment, and fraud, is relatively straightforward, and certainly less complex than the litigation in *Richards v. Jain* (involving the Racketeer Influenced and Corrupt Organizations Act)<sup>131</sup> or *Maldonado v. New Jersey* (involving Title VII and the New Jersey Law Against Discrimination).<sup>132</sup> CBS simply is not "the only firm that could or would handle the case,"<sup>133</sup> particularly in light of the fact that no trial date is set. Furthermore, the lack of a trial date eliminates any concern that substituting new counsel—who will have ample time to get up to speed—would affect the outcome of Brandewiede's case.<sup>134</sup> Finally, Petitioners have offered no evidence that Brandewiede would suffer psychological or other personal harm should CBS be disqualified. Where disqualification is otherwise proper, as it is here, expense alone does not warrant exception.<sup>135</sup> And to the extent

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<sup>130</sup> *Eubanks*, 181 Wn. App. at 621.

<sup>131</sup> *Richards*, 168 F.Supp.2d at 1208.

<sup>132</sup> *Maldonado*, 225 F.R.D. at 141.

<sup>133</sup> *Richards*, 168 F.Supp.2d at 1208.

<sup>134</sup> See *Eubanks*, 181 Wn. App. 615.

<sup>135</sup> *Wixom*, 332 P.3d 1063 at ¶ 55 (disqualifying counsel for representing conflicting interests, his own and his client's, in violation of RPC 1.7 and stating "We are mindful of the delay and financial hardship [the parties] face as a result of our order of disqualification. . . . But the rules do not permit exception to the ethical precepts

Brandewiede does incur expense as a result of CBS's disqualification, Foss is not the party who should bear that burden. If anyone bears the burden, it should be the party whose conduct resulted in disqualification. The final *Meador* factor weighs in favor of disqualification.

**D. CBS's collateral attacks on disqualification fail.**

CBS submits that the trial court was wrong when it determined that some of the Foss materials were privileged or that Foss waived the privilege. Both contentions are unsupported by the record.

1. *The trial court correctly determined that the Vorwerk Letter and thumb-drive obtained and reviewed by Welch contain communications protected by the attorney-client privilege.*

The materials on the thumb-drive and in the Vorwerk Letter are protected by the attorney-client privilege because they are communications from Foss's in-house counsel and outside counsel providing legal advice related to this litigation to Foss managers, including the Alucia project-manager, Vorwerk. Communications between a client and its counsel for the purpose of obtaining legal advice are protected by the attorney-client privilege.<sup>136</sup> The privilege protects both the attorney and the client from discovery as to "*any communication made by the client to [the lawyer].*"<sup>137</sup>

Petitioners argue that these communications are not privileged

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enshrined in the rules of professional conduct. If expense is an exception, the exception would soon swallow the rule") (internal citations omitted).

<sup>136</sup> RCW 5.60.060(2)(a).

<sup>137</sup> *Id.* (emphasis added).

because Vorwerk was a “lower-level employee,” to whom Foss’s corporate attorney-client privilege did not extend.<sup>138</sup> That contention flies in the face of Welch’s acknowledgment that “[Vorwerk] was the only guy for Foss that managed [the Alucia] project.”<sup>139</sup> But even ignoring that fact, the communications between Vorwerk and Foss were protected. The “central policy concern” of the corporate attorney-client privilege is the facilitation of frank communication about alleged wrongdoing.<sup>140</sup> This communication flows two ways: from counsel to corporate employees to give legal advice, and from corporate employees to counsel during investigation, so that counsel can “determine what happened” to trigger potential litigation.<sup>141</sup>

Petitioners argue that, because the determination of “Foss’s legal strategy” was beyond Vorwerk’s job duties, no communications he had

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<sup>138</sup> Petitioners’ Opening Brief at 25. To reach this conclusion, Petitioners misapply the Washington Supreme Court’s recent decision in *Youngs v. Peacehealth*, which Petitioners claim sets forth eight factors courts use to determine whether communications between corporate counsel and an employee are privileged. *Id.* (citing *Youngs v. Peacehealth*, 179 Wn.2d 645, 662, 316 P.3d 1035 (2014)). The *Youngs* court, however, neither applied those eight factors nor analyzed whether the corporate attorney-client privilege applied to a particular employee. The *Youngs* court included the factors quoted by Petitioners in a footnote, noting they were used by the United States Supreme Court in *Upjohn Co. v. United States* “as relevant to its decision *in that case*,” which involved written questionnaires from a pharmaceutical manufacturer’s general counsel to its foreign managers as part of an internal investigation. *Id.* at 663-64, n. 7 (emphasis added) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct.677, 66 L.Ed.2d 584 (1981)). Far from holding the factors applicable to all questions of corporate attorney client privilege generally, the *Upjohn* court emphasized that it decided “only the case before” it, because “the recognition of a privilege based on a confidential relationship. . . should be determined on a case-by-case basis.” *Upjohn Co. v. United States*, 449 U.S. at 396 (quoting S.Rep. No. 93-1277, p. 13 (1974)).

<sup>139</sup> App. B at 21, ll. 19-20.

<sup>140</sup> *Youngs*, 172 Wn.2d. at 664.

<sup>141</sup> *Upjohn Co.*, 449 U.S. at 392.

with Foss's counsel are privileged.<sup>142</sup> Petitioners, however, ignore the United States Supreme Court's reasoning in *Upjohn Co. v. United States*, explicitly adopted by the Washington Supreme Court,<sup>143</sup> that the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it, *but also the giving of information to the lawyer to enable him to give sound and informed advice.*"<sup>144</sup> The communications contained in the Vorwerk Letter and thumb-drive contain both types of protected communications—factual information from Vorwerk and other Foss managers, and legal advice based on those facts from Foss's General Counsel and attorneys at Garvey Schubert Barer. These are exactly the type of attorney-client communications the privilege is designed to protect. The trial court was therefore correct in deeming them to be protected by the attorney-client privilege.

2. *Petitioners' contention that Foss waived privilege is baseless because Vorwerk (not Foss) provided the materials to Welch, and he did so in violation of Foss's policies prohibiting terminated employees from retaining Foss documents.*

Petitioners' assertion that Foss waived the attorney-client privilege ignores the facts and misapplies the law. Petitioners' claim that Foss "failed to take any reasonable steps to prevent disclosure"<sup>145</sup> ignores that (1) Foss didn't provide CBS any privileged documents, Vorwerk did; (2) Foss had explicit policies, to which Vorwerk agreed, prohibiting

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<sup>142</sup> Brandewiede's Opening Brief at 26.

<sup>143</sup> See *Youngs*, 179 Wn.2d at 664.

<sup>144</sup> *Id.* (emphasis added) (quoting *Upjohn*, 449 U.S. at 390).

<sup>145</sup> Brandewiede's Opening Brief at 27.

terminated employees from taking or disclosing Foss documents;<sup>146</sup> (3) Foss immediately requested a copy of the materials provided by Vorwerk when Welch finally disclosed that he had them;<sup>147</sup> and (4) Foss immediately objected to Welch's possession and review of the privileged documents when it learned the materials contained protected communications.<sup>148</sup> Petitioners' allegation that Foss took no steps to protect its privileged documents is simply wrong.

Similarly, Petitioners cite inapplicable law. Petitioners cite ER 502(b), which governs inadvertent disclosures, and *Sitterson v. Evergreen School Dist. No. 114*,<sup>149</sup> in which the defendant inadvertently produced four letters from its attorney in discovery. But a lawyer receiving protected materials as a result of anything other than *the sender's* inadvertence is not governed by the rules governing inadvertent disclosures.<sup>150</sup> Neither ER 508(b) nor *Sitterson* applies because the disclosures at issue were neither made by Foss nor inadvertent. Rather, CBS received *unauthorized* disclosures of Foss's information from a non-party (Vorwerk). Vorwerk gave Foss's privileged and protected materials to CBS without Foss's permission or knowledge. Foss was not the *sender*, and nothing about CBS's receipt of the Vorwerk Letter or the drive was "inadvertent."<sup>151</sup>

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<sup>146</sup> App. A, Ex. 1-3. [CP 50 – 80]

<sup>147</sup> App. D, Ex. 1. [CP 85-86]

<sup>148</sup> App. D, Ex. 4. [CP 91-93]

<sup>149</sup> *Sitterson v. Evergreen School Dist. No. 114*, 147 Wn. App. 576, 196 P.3d 735 (2008).

<sup>150</sup> ABA Comm. On Ethics and Prof. Responsibility, Formal Op. 06-440 (2006).

<sup>151</sup> Even if the rules for inadvertent disclosure applied, Foss took ample precautions to prevent unauthorized disclosure of its confidential information. See *Richards*, 168 F.Supp.2d 1195.

Foss did not waive the attorney-client privilege.

**E. The trial court properly excluded only evidence from a source tainted by CBS's wrongful conduct.**

As discussed above, trial courts have discretion to fashion and impose appropriate sanctions for violations of CR 26(b).<sup>152</sup> In addition to disqualifying counsel, the court may exclude evidence as a sanction for CBS's review and use of attorney-client privileged communications in violation of CR 26(b).<sup>153</sup> Here, the exclusion of tainted evidence was well within the trial court's discretion.

Petitioners misconstrue the evidence actually excluded in their Opening Brief. Petitioners allege that the trial court's exclusion of evidence from a tainted source encompasses "all the Vorwerk evidence"<sup>154</sup> and inflicts prejudice on Brandewiede.<sup>155</sup> These concerns are wholly unfounded. The only evidence the trial court excluded is evidence derived from CBS's wrongful conduct.<sup>156</sup> The trial court's order explicitly states that Brandewiede can use as evidence any and all information "from a source untainted by the wrongful conduct."<sup>157</sup> Brandewiede is free to offer into evidence the same information contained in the excluded evidence, to the extent that such information is available from proper sources and is not, itself, privileged. This means that Brandewiede can offer the Vorwerk

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<sup>152</sup> *Matter of Firestorm 1991*, 129 Wn.2d at 172.

<sup>153</sup> *Id.*

<sup>154</sup> Brandewiede's Opening Brief at 31.

<sup>155</sup> *Id.* at 40.

<sup>156</sup> App. I at 2. [CP 276]

<sup>157</sup> *Id.*

Letter (properly redacted to remove privileged communications); non-privileged, non-proprietary, and non-confidential information on the thumb-drive (all of which Foss has already produced in discovery); and any other non-privileged, relevant information into evidence.<sup>158</sup> The only information Brandewiede may not use is information protected by an evidentiary privilege, such as attorney-client communications—and, indeed, no litigant is ever entitled to use such evidence.

Furthermore, the trial court gave Brandewiede additional time to compile the non-tainted evidence.<sup>159</sup> The order states that a new trial date and case schedule shall be submitted by separate motion.<sup>160</sup> The trial court properly removed the taint of CBS's wrongful conduct while allowing Brandewiede to obtain, review, and rely on information disclosed through proper discovery channels. In short, affirming the trial court's order for the exclusion of evidence from a tainted source does not affect any substantive arguments that Brandewiede can bring. It merely ensures that the evidence to support those arguments comes from admissible sources.

**F. If the trial court failed to make adequate findings, the correct remedy is remand, not reversal.**

For the reasons stated above, the trial court properly disqualified CBS as counsel for Brandewiede and properly excluded evidence that is

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<sup>158</sup> *Id.* The Vorwerk Letter was not produced in the first discovery request because Foss did not have it—it was given to an employee of a separate entity from Foss in hard copy only. But Foss diligently collected all ESI and documents and sent CBS everything it had found. *See* App. G. [CP 261 – 262]

<sup>159</sup> App. I at 2. [CP 276]

<sup>160</sup> *Id.*

protected by the attorney-client privilege. This Court should affirm the trial court order.

In the alternative, if this Court finds that the trial court made inadequate on-the-record findings before entering its order, then the proper remedy is to remand to the trial court with instructions to make a record of these findings.<sup>161</sup>

**G. CBS's continued representation of Brandewiede on appeal is improper.**

Petitioners' Opening Brief purports to be on behalf of Jeff Brandewiede and Brandewiede Construction.<sup>162</sup> So too does CBS's Notice of Motion for Discretionary Review.<sup>163</sup> When Foss's counsel contacted CBS to inquire if CBS was still representing Brandewiede, however, CBS-principal Kenneth Kagan stated that the Notice of Motion for Discretionary Review was not filed on behalf of Brandewiede:

I was finally able to figure out what was going on with the Foss matter. So, here's what I can tell you. I learned that John Welch filed a motion, apparently, a Motion for Discretionary Review. He believes that Judge Lum decided in error, but *he does agree that right now he is not acting on his client's behalf, former client's behalf*. . . .So, I would say that if you [Garvey Schubert Barer attorney David West], wish to speak with [Brandewiede], you or [Garvey Schubert Barer attorney John] Crosetto, you're able because *he is not currently represented*.<sup>164</sup>

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<sup>161</sup> See, e.g., *Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 879, 902, 295 P.3d 1197 (2013) ("When a trial court fails to create the appropriate record, the remedy is to remand for entry of proper findings and conclusions") (internal citation omitted); see also *Laue v. Estate of Elder*, 106 Wn. App. 699, 702, 25 P.3d 1032 (2001); *Morgan v. Kingen*, 141 Wn. App. 143, 150, 169 P.3d 487 (2007).

<sup>162</sup> See Brandewiede's Opening Brief.

<sup>163</sup> See App. K.

<sup>164</sup> App. L at ¶ 2 (emphasis added).

CBS apparently moved this Court for discretionary review of its disqualification without even consulting Brandewiede. Only afterwards did Welch seek input from his former client. This appeal initially was brought to protect CBS's interests—not Brandewiede's.<sup>165</sup>

Now, however, CBS purports to represent Brandewiede.<sup>166</sup> If this is true and CBS is appealing on Brandewiede's behalf (albeit without his knowledge or permission), then CBS's continued representation may create an improper conflict of interest between CBS and Brandewiede: The United States Supreme Court has held that the decision to appeal a disqualification order "should turn entirely on the client's interest."<sup>167</sup> This is especially true "[g]iven an attorney's personal and financial interest in the disqualification decision;" a disqualified firm's concern for its professional reputation; and disqualified counsel's "personal desire for vindication."<sup>168</sup> The Washington Supreme Court also has held that conflicts of interest may arise from a lawyer's own interest, which may be financial or may "aris[e] from the lawyer's exposure to culpability."<sup>169</sup> CBS has immensely powerful financial, reputational, and personal

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<sup>165</sup> If it is true that CBS filed this appeal on its own behalf—not Brandewiede's—then CBS lacks standing to proceed. Standing in Washington requires a claimant to have a personal stake in the outcome of the case. *Kleven v. City of Des Moines*, 111 Wn. App. 284, 290, 44 P.3d 887 (2002). The Ninth Circuit has held that attorneys appealing a disqualification order in their individual capacities must show the disqualification injured them personally. *See, e.g., Matter of Grand Jury Subpoena Issued to Chesnoff*, 62 F.3d 1144 (9th Cir. 1995).

<sup>166</sup> *See* Brandewiede's Opening Brief.

<sup>167</sup> *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985) (citing ABA Model Rules of Professional Conduct 1.7(b), 2.1 (1985)).

<sup>168</sup> *Id.* at 434-35.

<sup>169</sup> *Wixom*, 332 P.3d at 1072 (citing *In Re Pers. Restraint of Stenson*, 142 Wn.2d 710, 740, 16 P.3d 1 (2001)).

incentives to appeal the trial court's order of disqualification—regardless of whether the appeal serves Brandewiede's interests (e.g., settlement or leaving the disqualification order in place). Simply put, CBS's "professional judgment may be clouded" by its disqualification.<sup>170</sup> Because "independent judgment is essential to a lawyer's representation of a client,"<sup>171</sup> CBS's continued representation on appeal is improper.

Other courts have similarly disallowed continued representation after an attorney's disqualification: A lawyer who has been disqualified is usually prohibited from representing that client with respect to any claim or issue in the case, and against all parties.<sup>172</sup> After disqualification, courts typically entertain no further submissions from the disqualified attorney, nor allow him or her to continue participating in the case in any way, including "behind the scenes."<sup>173</sup> Several courts have even held attorneys in contempt for continued representation after disqualification.<sup>174</sup> To achieve the purpose of disqualification and to prevent a conflict of interest, this Court should find CBS's continued representation on appeal improper.

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<sup>170</sup> *Id.* (citing RPC 1.7 cmt. 1).

<sup>171</sup> *Id.*

<sup>172</sup> See, e.g., *United States v. Nabisco, Inc.*, 1987 U.S. Dist. LEXIS 14681 (E.D.N.Y. 1987); *Shaw v. London Carrier, Inc.*, 2009 U.S. Dist. LEXIS 109862, at 24-25 (W.D. Mich. 2009); *Harsh v. Kwait*, 2000 Ohio App. LEXIS 4636, at 8; *All Am. Semicon., Inc. v. Hynix Semicon., Inc.*, 2009 U.S. Dist. LEXIS 12315, at 16 (N.D.Cal. 2009)); see also Richard E. Flamm, *LAWYER DISQUALIFICATION: DISQUALIFICATION OF ATTORNEYS AND LAW FIRMS*, § 33.3 at p. 864 (2d e. 2014).

<sup>173</sup> See, e.g., *Harrison v. Cynthia Constantino and Trevett*, 2 A.D.3d 1315 (N.Y.A.D. 2003); *First Wis. Mortg. Trust v. First Wis. Corp.*, 584 F.2d 201, 207 (7th Cir. 1987); *Duskey v. Bellasaire Invs.*, 2007 U.S. Dist. LEXIS 95501, at \*10-11 (C.D.Cal. 2007).

<sup>174</sup> See, e.g., *Ragar v. Brown*, 3 F.3d 1174 (8th Cir. 1993) (attorney held in contempt for continuing to represent former client after order for disqualification was issued); *Iowa Supreme Court Attorney Disciplinary Bd. v. Wengert*, 790 N.W.2d 94 (2010) (attorney held in contempt for discussing the case with her former client after she had been disqualified).

**H. Under RAP 14.2, Foss is entitled to reasonable attorneys' fees and costs.**

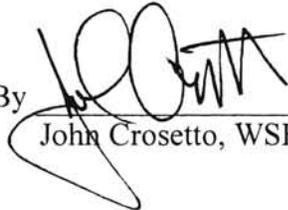
Under RAP 14.2, the commissioner or clerk of the appellate court will award costs to the party that substantially prevails on appeal, unless the court directs otherwise.<sup>175</sup> This award includes statutory attorney fees and certain costs, if reasonably necessary and actually incurred.<sup>176</sup> If Foss substantially prevails on this appeal, Foss respectfully asks this Court to order Brandewiede to pay Foss's statutory attorney fees and costs permitted under the RAP.

**V. CONCLUSION**

For all the reasons stated above, Foss respectfully requests that this Court affirm the trial court's orders disqualifying CBS as counsel for Petitioners and excluding the evidence from a source tainted by CBS's misconduct.

DATED this 3rd day of December, 2014.

GARVEY SCHUBERT BARER

By   
John Crosetto, WSBA #36667

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<sup>175</sup> RAP 14.2.

<sup>176</sup> RAP 14.3(a).

# APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR COUNTY OF KING

FOSS MARITIME COMPANY,

Plaintiff,

v.

CORE LOGISTIC SERVICES; LISA LONG  
AND JOHN DOE LONG, AND THE  
MARITAL COMMUNITY COMPRISED  
THEREOF; FRANK GAN AND JANE DOE  
GAN, AND THE MARITAL COMMUNITY  
COMPRISED THEREOF; JEFF  
BRANDEWIEDE AND JANE DOE  
BRANDEWIEDE, AND THE MARITAL  
COMMUNITY COMPRISED THEREOF;  
AND BRANDEWIEDE CONSTRUCTION,  
INC.,

Defendant.

NO. 12-2-23895-2 SEA

**DECLARATION OF LISA SULOCK  
IN SUPPORT OF MOTION OF  
PLAINTIFF FOSS MARITIME  
COMPANY TO DISQUALIFY  
COUNSEL FOR DEFENDANT JEFF  
BRANDEWIEDE AND SEEKING  
SANCTIONS**

I, Lisa Sulock, declare as follows:

1. I am the Director of Human Resources at Foss Maritime Company, plaintiff in this action. I make this declaration from my own personal knowledge and from my review of the records referenced herein.

2. Attached hereto as **Exhibit 1** is a true and correct copy of Foss's Electronic Mail Policy. This Policy is accessible via the Foss Web Portal, to which all Foss employees have

DECLARATION OF LISA SULOCK IN SUPPORT OF MOTION TO  
DISQUALIFY COUNSEL FOR DEFENDANT - 1

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

SEA\_DOCS 1126633.1

1 access.

2 3. Attached hereto as **Exhibit 2** is a true and correct copy of the Marine Resources  
3 Group ("MRG") Business Ethics and Conduct Policy and Principles. This policy was revised  
4 on April 30, 2009. Exhibit 2 at 1.

5 4. Van Vorwerk signed the MRG Business Ethics Policy Employee Certification  
6 on December 10, 2009. The Certification states that the signatory is "familiar with the  
7 Company's Business Ethics Policy and. . . ha[s] complied with its terms." A true and correct  
8 copy of the Certification signed by Mr. Vorwerk is attached hereto as **Exhibit 3**.

9 5. Van Vorwerk was the project manager on the Alucia project that is at issue in  
10 this litigation. On information and belief, he communicated with several Foss managers, as well  
11 as in-house and external counsel to Foss, regularly as part of his project management and other  
12 responsibilities.

13 6. Van Vorwerk's employment at Foss was terminated on May 14, 2012.

14 7. I have never received from Mr. Vorwerk a copy of the June 27, 2012 letter titled  
15 "The Wrongful Termination of Van V. Vorwerk." As the Director of Human Resources, such a  
16 letter typically would be sent to me and/or brought to my attention.

17

18 DATED this 22nd day of November, 2013.

19

20

21

By   
\_\_\_\_\_  
Lisa Sulock, Foss Maritime Company

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# EXHIBIT 1

## ELECTRONIC MAIL POLICY

Loss Maritime Company provides an electronic mail system (e-mail) to its employees to assist and facilitate business communications. It is provided for legitimate business use in the course of employees' assigned duties. These communications are formal business documents and not personal, private communications. E-mail and internet usage, again, is primarily, and at highest priority, for company business; see below for discretionary use policy. Messages sent through e-mail and the contents of any employee's computer are the sole property of the company. Accordingly, they may be used in administrative, judicial, or other proceedings. Users should exercise the same restraint in writing e-mail messages that they do when writing business letters or memos.

The e-mail system shall be treated as a shared filing system and employees shall expect that e-mail sent or received will be available for review, use and disclosure by any authorized representative of the company without prior notice to employees. In the course of their duties, systems operators and managers may monitor use of the e-mail system or review the contents of stored e-mail records. Anyone using this system expressly consents to such monitoring and is advised that if such monitoring reveals possible criminal activity, system personnel or the company may provide the evidence of such monitoring to law enforcement officials without any prior notice. Further, evidence of criminal activity or inappropriate use may be provided to company supervisory personnel without prior notice.

Employees permitted e-mail access will be provided an individual password. It will be each employee's responsibility to protect such password from unauthorized use by others. Employees are not to reveal such password to any other individuals, other than company system operators or managers, and doing so may subject such employees to disciplinary action up to and including termination. The company may override an employee's password or require the employee to disclose the password to facilitate access by the company to the e-mail and to any and all information or material the employee retrieves, is sent from, and/or places on the e-mail system.

Personal use - Reasonable and prudent personal use of the e-mail and/or internet systems is permitted per existing departmental standards of use, similar to telephone usage. The presence of the e-mail and internet systems does not imply any inherent right for an employee to be granted e-mail or internet privileges. E-mail and/or internet access will be granted to employees based upon business needs for the employee's position in the company. At any time, the company reserves the right to further limit or revoke any personal, discretionary use of the e-mail and/or internet systems. Maintenance and support activities by ITS, or any other company resource, will not be provided for discretionary use activities/issues. No discretionary/personal use shall include inappropriate use as stated below.

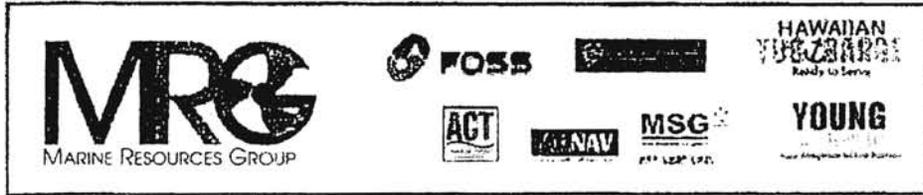
Inappropriate use may result in loss of access privileges and disciplinary action up to and including termination. Inappropriate use includes, but is not limited to:

- Unauthorized attempts to access another's e-mail account;
- Transmission of sensitive or proprietary information to unauthorized persons or organizations;
- Transmission of obscene, pornographic, abusive, slanderous, defamatory, harassing, vulgar, threatening, and/or offensive messages;
- Communication, dissemination, or printing of any copyrighted materials in violation of copyright laws; or
- Any illegal or unethical activity or any activity that could adversely affect the company.

Since e-mail is designed for communications of an immediate nature, there is no need for long-term retention of e-mail messages. Therefore, there will be no backups made of e-mail messages. Users shall not save e-mail messages on their personal computers.

By using the e-mail access provided, every employee agrees that he or she is aware of this policy and that e-mail records may be read or monitored by authorized individuals. Employees should not expect that e-mail is confidential or private, and, therefore, should have no expectation of privacy related to their usage of this system. Even when a message is erased, it is still possible to recreate the message, therefore privacy of messages cannot be ensured to anyone.

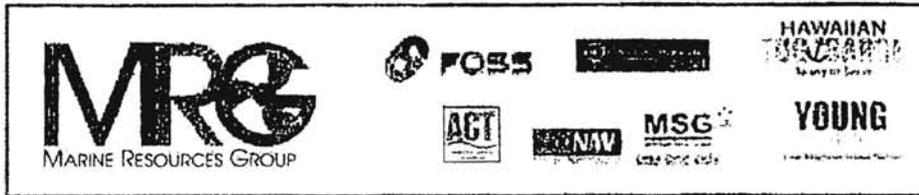
## EXHIBIT 2



**MARINE RESOURCES GROUP**

**BUSINESS ETHICS  
AND CONDUCT  
POLICY AND PRINCIPLES**

Revised April 30, 2009



## MARINE RESOURCES GROUP

### BUSINESS ETHICS AND CONDUCT PRINCIPLES

**The Companies of the Marine Resources Group are committed to maintaining the highest standards of integrity and ethical behavior in the way our businesses are run. Every employee of our Companies is responsible for meeting this standard of conduct.**

This Statement of Business Ethics and accompanying Policies were developed to help our employees better understand MRG's policies concerning ethical business conduct. We start with the premise that our principal social role as a business enterprise is to make an economic contribution to the communities in which we operate. We finish with the premise that our right to earn a profit is conditioned on ethical business conduct and compliance with the letter and spirit of applicable laws.

All employees should acquaint themselves with this Statement and Policies and comply with their course of action. Questions of interpretation should be directed to your Manager or to the General Counsel of Foss (for Foss companies) or the General Counsel of MRG.

#### A Basic Philosophy

**We believe that honesty, personal integrity, and fair and open dealings with others are the cornerstone of the way we want to interact with each other, our customers, vendors, and stakeholders.**

We want our companies to be the kind of place that we would want our children to work. We expect the employees at all of our companies at all times to observe honest and ethical conduct in the performance of their Company's business, and adhere to the highest standards of business behavior.

**We believe that the success of our business, now and in the future, can best be assured by the perpetuation of a market economy.**

Specifically, we believe that the goods and services demanded by society can be most efficiently supplied by companies which succeed in open competition with a minimum of government regulation.

#### **Safety and the Environment**

**We believe in operating our businesses safely, in a way that protects our people, preserves the natural environment, and complies with the laws and regulations for the protection of the environment.**

We are committed to a safe workplace. It is the responsibility of every employee, not just management employees, to insure that our operations are performed in a safe manner. Every employee has the right, and responsibility, to stop an unsafe act.

We are dedicated to continual, aggressive improvement of our operation in order to minimize environmental incidents. Our goal is zero incidents. We recognize our responsibility to work with the public, the government and others in the fulfillment of this task.

Wherever feasible, we exercise technical and managerial leadership to help achieve cleaner air and water, abatement of noise, and preservation of historical sites and scenic views. We practice sound energy conservation measures. We strive to prevent waste of our precious resources and to make the most of those we use.

#### **Respect for our People**

**We believe that the company can best succeed if the personal dignity and achievements of each employee are respected and recognized.**

Just as we, the Company, believe that open competition and a market economy best satisfy the material needs of our society, equal opportunity best provides the work force and talents that assure superior job performance. Discrimination has no place in our company. Our ethnic origins are as diverse as the peoples we serve. A person's sex is no barrier to advancement or the assumption of greater responsibilities. Hard work, ability, and results are the principal determinants of a person's opportunities for advancement in our company.

We expect each employee to treat others with dignity and respect, including employees, customers, vendors, and stakeholders. We believe in equal job opportunities for all persons, regardless of race, color, sex, national origin, religion, creed, age, marital status, veteran's status, or the presence of any sensory, physical or mental disability, except where such characteristics are a bona fide occupational qualification, as defined under applicable laws.

We are intent on developing employees who can grow and take on additional responsibilities as the company grows. Our personnel management practices are directed at fostering individual initiative and creativity and providing our employees with the opportunity to broaden their supervisory and management responsibilities.

We encourage employees to contribute their spare hours to civic, social, church, governmental and charitable organizations. It is only by such individual contributions that the communities in which we live and do business can become cleaner, safer, more attractive and harmonious places in which to live.

#### Commercial Relationships

**We believe in fair and ethical conduct in our commercial relationships.**

We believe that fair and open competition protects our market economy. We must avoid any association with price fixing, bid rigging, dividing markets, false advertising or other anticompetitive activities. Such activities are not only bad business, but they are also against the law.

We will not seek or give business with customers and vendors based upon improper payments.

#### Citizenship and Social Responsibility

**We believe our primary social responsibility is to be an economic and social asset to each community in which we operate.**

We must observe local laws and customs. We must also use our energies and resources to their best economic advantage; this benefits customers, employees and everyone who has an interest in what we do.

Consistent with our commitment to be a social and economic asset to the communities in which we live and do business, we are committed to conduct our business activities in a manner that reflects the company's concern for the quality of life of these communities. We recognize that this commitment might impose short-range increased costs, but we believe that in the long run such costs will be more than offset by a continuing opportunity to do business in these communities.

#### No Retaliation

We fully support Federal and State "whistleblower" statutes protecting employees who complain or provide truthful information about health and safety issues or fraudulent business activities. We believe employees should express their concerns, without fear of retaliation, on any employment or company matter they believe is not meeting ethical standards outlined in this document.

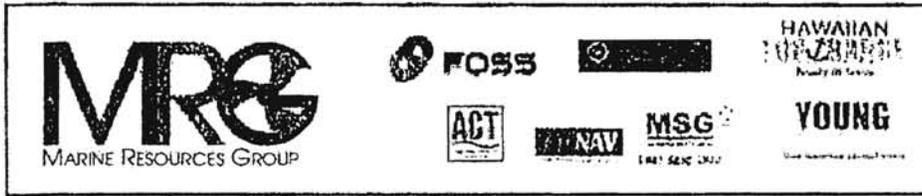
In Closing...

It is well to remember that the ethical standards discussed here are enforced by laws in virtually every instance, everywhere we do business. But our commitment is not merely to conduct our business in a manner which complies with laws. Rather it is to the highest ethical standards even where laws do not exist or may not be enforced or observed.

To meet the highest ethical standards, we must apply the same degree of thoughtfulness, energy and dedication which we bring to bear in achieving profit objectives.

The standards set forth in this Statement of Corporate Ethics and accompanying Policies will be periodically reviewed and should be discussed with employees in order to assure understanding and compliance. Suggestions are welcomed.

Ethical conduct of our business is a responsibility of all MRG employees.



MARINE RESOURCES GROUP  
BUSINESS ETHICS AND CONDUCT POLICY

Policy

It is the policy of MRG that each of its Companies will maintain an honorable reputation as a company of the highest standards of responsibility and accountability. All employees shall at all times comply with both the laws and the highest standards of business ethics and conduct in every area in which MRG and its Companies do business.

Guidelines

**I. Business Practices**

**(1) Fair Dealing and Antitrust Compliance**

**(a) Overview**

Every employee is required without exception to strictly comply with federal and state antitrust law. No conduct in violation of the antitrust laws will be tolerated by any employee of an MRG Company, and no employee will ever be asked or expected, either expressly or by inference, to violate the antitrust laws.

Each employee should deal fairly and in good faith with the Company's other employees, customers, suppliers, regulators, business partners and others. No employee may take unfair advantage of anyone through manipulation, misrepresentation, inappropriate threats, fraud, misuse of confidential information, or other related conduct.

The Company believes in the free enterprise system. That means an open, competitive marketplace where firms compete vigorously and fairly. That is also a marketplace where competitors really compete with each other - where they don't conspire with each other to fix prices, to rig bids, to allocate business, to boycott somebody or something, or to restrict innovation. It is the purpose of the antitrust laws to preserve that open, competitive marketplace. It is the responsibility of every Employee within the Company to comply with those laws.

One fundamental, precautionary rule employees must follow is *never to discuss (in person, by phone, mail, fax, or by any other means) with a competitor:*

- rates, prices or other money terms of sale;
- going or not going after particular business (particular job or customer, geographic area, type of customer or business);
- rigging bids, including arrangements with a competitor as to the bids to be submitted by each, agreements to rotate bids, agreements not to bid, and agreements to submit "complementary bids"
- offering or not offering a particular service or product or changing its quality; expanding or not expanding capacity;
- dealing or not dealing, or terms of dealing, with particular customers or suppliers;
- revenue, costs, profit or loss, market share, plans, or other business information concerning competitive performance.

It is appropriate to discuss with a customer or supplier who is also our competitor the price of our specific bona fide transaction so long as it is the terms of only that specific transaction that are being discussed. However, you should not enter into oral agreements with competitors, and therefore should insure that any agreement with a competitor is documented.

Trade associations serve legitimate and useful functions, but also bring employees in contact with competitors that raises a potential for improper discussions. If any of the matters noted above are raised during the course of conversation with any party, you

should immediately halt the conversation – or leave – and promptly inform the Legal Department.

(b) *SERIOUSNESS AND COSTS OF ANTITRUST VIOLATIONS*

Litigation arising from actual or alleged violations of the antitrust laws is long and expensive -- both in management time and in legal costs. The penalties for violations are serious. The most important antitrust law (the Sherman Act) is a criminal law. A person who is convicted of violating it is guilty of a federal felony; the recommended minimum penalty is a four-month jail term and a \$20,000 fine, and the maximum penalty is a fine of \$350,000 and three years in jail. The company will not pay this fine for the employee. In addition, private companies or individuals (usually competitors or customers or both) can sue for violations of the antitrust laws. If they win, they are entitled to recover three times their actual damages, plus their attorneys' fees. This is a powerful incentive for competitors or customers to file an antitrust case, even if there is not a clear violation.

(c) *QUESTIONS ABOUT ANTITRUST ISSUES AND COMPLIANCE*

This Policy contains a general summary of ant-trust rules and guidelines for all employees. Any employee regularly engaged in pricing, chartering, or dealings with competitors, whether through a trade association or otherwise, must review and be familiar with MRG's Antitrust Guidance Policy, which contains a more detailed description of the antitrust laws.

You should get advice from the Legal Department before participating in a trade association, engaging in any kind of joint venture, entering into an exclusive arrangement to buy or to sell, requiring a customer to buy a service or product in order to get another, or before submitting a below-cost bid or quotation.

*Any employee who has a question about whether any Company conduct complies with the antitrust laws should contact the MRG General Counsel or, for Foss companies, the Foss General Counsel, to obtain legal guidance.*

*If you believe that any employee is engaging in conduct that could be considered a violation of antitrust laws, or if you believe that you are being pressured to commit an antitrust violation, you MUST contact the MRG General Counsel or, for Foss companies, the Foss General Counsel, to obtain legal guidance, or you MUST call the Ethics Hotline as outlined in Section IX of this Ethics Policy.*

The idea of competition is to win business away from somebody else, but there are some limits to that. Get advice before taking action that will have a severe economic impact on an actual or potential competitor, customer, or supplier, particularly, if that entity is small or in bad financial condition.

Also report to the Legal Department instances where you believe that the Company has been or is being hurt by another company's antitrust violation.

**(2) Accurate books**

No payment shall be approved or made with the express or implied agreement that any part of such payment is to be used for any purpose other than that described by the documents supporting the payment. Accordingly, each arrangement for the employment of a sales agent, business consultant or professional shall be based upon documentation which reflects the true nature of the arrangement.

No undisclosed or unrecorded fund or asset of any MRG Company shall be established for any purpose.

No false, misleading or artificial entries and no misclassifications of expenditures shall be made in the books and records of an MRG company for any reason, and no employee shall engage in any arrangement that results in such entries.

All business must be conducted within an environment of internal control. All transactions involving the Company's funds must be properly recorded in appropriate Company books in such a manner that the true nature of the transaction is evident. Consequently, all transactions involving the Company's funds must be

- fully supported by written documentation (appropriate to the level of spending and in line with agreed-upon processes) that adequately and accurately describe the business purpose of the transaction

- independently approved by the appropriate management which has been delegated the relevant signing authority

- for purposes that are in the interest of and accrue proper benefit to the company

**(3) Invoicing and Discounts**

As a general rule, all invoices should reflect the actual amount billed to the customer. At no time should anyone agree to double invoicing or other types of agreements intended to mislead, or assist our customer in misleading, another party.

However, it is permissible to provide discounts to customers on the basis of objective criteria reflecting some benefit to us. For example, it is appropriate to give volume discounts, or discounts for early payment. Any agreement with a customer to provide a discount should be documented. The agreement should document the parameters for the discount. For example, if we are giving a volume discount, there should be documentation between the customer and the Company setting the volume requirements, and either withholding discounts until the volume threshold is met, providing rebates after the volume threshold is met, or, if volume discounts are given based upon an assumed volume, the agreement should provide the mechanism for recovering the discount if the volume threshold is not met.

It is permissible to present an invoice with the undiscounted price. However, the phrase "Invoice May Be Subject To Discounts or Commissions" should appear on the

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face of all invoices, and discounts should only be applied in accordance with the documented agreement and accurately identified on the Company's books.

**(4) Proper payments**

Company employees should pay for and receive only that which is proper. Company employees should not make or promise payments to influence another's acts or decisions, and Company employees must not give gifts beyond those extended in normal business.

No employee shall receive, accept, or condone a bribe, kickback, or other unlawful payment, or attempt to initiate such activities.

**(5) Proper use of company assets**

No Company funds or assets may be used for any unlawful purpose. Company assets, including facilities, materials, supplies, time, information, intellectual property, software, and other assets owned or leased by the Company, or that are otherwise in the Company's possession, may be used only for legitimate business purposes. Except for insignificant use (such as using the copier to make a small number of copies), the personal use of the Company's assets without the Company's approval is prohibited.

**II. Dealing with the Government**

MRG Companies may be visited by or receive information requests or subpoenas from representatives of the FBI, Department of Justice, Federal and State agencies, ICC, FMC, Congressional or State Legislative Committees, and/or the State Attorney General's Office. If this occurs, contact your supervisor and the General Counsel immediately. You should be cooperative, and make clear that you will do whatever is legally required, but that you want to contact the Company's lawyer.

If you are involved in an incident and are questioned by government authorities, your responses may subject you and the Company to civil or criminal liability. Although the Company does not prohibit you from responding if you wish, you have a right to

consult with counsel before responding, and you are encouraged to tell the government investigators that you want to talk to counsel before responding. You should then contact the Legal Department immediately.

*Under no circumstances shall any employee knowingly provide false or misleading information to government investigators, either orally or through falsified records.*

### **III. Gifts and Entertainment**

#### **(1) Government Employees**

Federal, state and local agencies are governed by laws and regulations concerning acceptance by their employees of entertainment, meals, gifts, gratuities, and other things of value from firms and persons with whom those government agencies do business or over whom they have regulatory authority. We are to comply strictly with those laws and regulations. These laws and regulations vary and you must refer to those laws and regulations before offering a government employee anything of value.

#### **(2) Customers, Contractors, and Vendors**

It is permissible to provide or accept meals, refreshments, entertainment and other business courtesies of reasonable value to or from non-government persons in support of business activities provided the business courtesy is consistent with marketplace practices, infrequent in nature, and is not lavish or extravagant. Company employees and members of their families must not give or receive valuable gifts to or from any person associated with the Company's vendors or customers. Acceptance of a gift in the nature of a memento, such as a conference gift or other inconsequential gift, is permitted providing that such gifts are received under circumstances that are customary for receiving such gift and the giving or receiving of such gift is legal under all applicable laws. Giving or receiving gifts of cash, or providing loans (other than bona fide business loans) is never acceptable.

Substantial favors which cannot be easily reciprocated under normal expense account procedures should not be extended and, if offered, should be refused or returned to the provider; in other words, do not accept entertainment, meals, gifts, or other business courtesies if you believe that providing the same type of courtesy would not be approved by your supervisor if you were providing it at Company expense. Do not extend or accept gifts or entertainment which could affect or give the appearance of affecting the integrity of you or the other person.

### (3) Foreign Government Personnel and Public Officials

The Foreign Corrupt Practices Act (FCPA) prohibits offering anything of value to a foreign official if the purpose is to get the recipient to assist in obtaining or retaining business or to secure an improper advantage. The FCPA also prohibits unlawful political contributions to foreign officials to obtain or retain business. Finally, the FCPA prohibits the making of false records or accounts in the conduct of foreign business.

The FCPA contains important exceptions. For example, it does not prohibit “grease” or “facilitating” payments to foreign officials to perform non-discretionary duties which are essentially ministerial or clerical, nor does it prohibit payments specifically allowed by the laws of the foreign country. However, these exceptions are narrowly construed.

The FCPA contains both civil and criminal penalties for the individual authorizing the payment, and prohibits the Company from indemnifying an officer who is fined. Officers and employees involved in international business operations must be familiar with the FCPA and strictly comply with its terms. If there is any question about the propriety of a payment to a foreign official, you should obtain advice from the MRG General Counsel or, for the Foss companies, the Foss General Counsel, before making the payment.

*NOTE: this Policy contains a summary of rules pertaining to the Foreign Corrupt Practices Act. Employees regularly dealing with situations where involvement with or payments to foreign governments or officials may be required should request additional FCPA training from the MRG General Counsel.*

#### **IV. Conflicts of Interest**

Employees are expected to make or participate in business decisions and actions in the course of their employment or affiliation with the Company based on the best interests of the Company as a whole, and not based on personal relationships or benefits. A conflict of interest, which can occur or appear to occur in a wide variety of situations, can compromise employees' business ethics. Generally speaking, a conflict of interest occurs when an employee's or an employee's immediate family's personal interest interferes with, or has the potential to interfere with, the interests or business of the Company. For example, a conflict of interest may occur where an employee or his/her family member receives a gift, a unique advantage, or an improper personal benefit as a result of the employee's position at the Company. A conflict of interest could make it difficult for an employee to perform corporate duties objectively and effectively because he or she is involved in a competing interest. The following is a discussion of certain common areas that raise conflict of interest issues. However, a conflict of interest can occur in a variety of situations. You must be alert to recognize any situation that may raise conflict of interest issues and must disclose any material transaction or relationship that reasonably could be expected to give rise to actual or apparent conflicts of interest with the Company.

##### **(1) Outside Activities**

Any outside activity must not significantly encroach on the time and attention employees devote to their corporate duties and should not adversely affect the quality or quantity of their work. Except for insignificant use (such as using the copier to make a small number of copies), employees may not make use of corporate equipment, facilities or supplies related to outside activities. Employees also may not imply (without the Company's approval) the Company's sponsorship or support of any outside activity, and under no circumstances are employees permitted to take for themselves or their family members business opportunities that are discovered or made available by virtue of their positions at the Company.

In the course of their employment, employees may be approached to participate in activities for other organizations outside of MRG. While participation in many organizations is appropriate, it can be inappropriate in others. MRG endorses the concept of employees serving selected entities, with limitations, but employees may not allow efforts put forth in secondary activities to impact their primary responsibility and duties as an employee of an MRG Company.

**(2) Professional Association Participation**

Employees are encouraged to join and serve professional organizations where they are afforded the opportunity to create industry contacts, enhance their knowledge of industry issues and challenges, and be exposed to other points of view.

**(3) Community and Elected Office Participation**

MRG encourages its employees to be active in responsible community service, volunteer, religious or charitable organizations, as well as to participate in local government activities. Such participation is beneficial to the community as a whole, helps develop the individual by broadening his or her knowledge and acquaintances, and enhances the image of the individual and the Company. However, in serving these organizations, employees should endeavor to maintain a separation of their personal beliefs and support of these organizations from their employment activities at their MRG Company, and make certain that the opinions expressed while serving the community and elected organizations are in no way represented as the opinions and beliefs of MRG.

**(4) Outside Employment**

No employee shall be employed by or perform any services for any competitor while employed by an MRG Company. In addition, no employee shall be employed by or perform services for any supplier of an MRG Company, whether or not he or she receives any compensation, or be otherwise employed or render services where it might cause embarrassment or jeopardize the interests of MRG or its companies, interfere with his or her work schedules or adversely affect the Company's productivity or that of fellow employees.

**(5) Interests in Competitors, Customers or Suppliers**

No employee or member of his or her immediate family shall serve as a director of or have a substantial investment in or business relationship with a competitor, customer or supplier which could create a divided loyalty or the appearance of one, except with the specific written approval of the Company President, or, for Company Presidents, the CEO of MRG. Employees may have a passive investment in up to one percent of the total outstanding shares of an entity that is a vendor or competitor if the entity is listed on a national or international exchange, or quoted on NASDAQ, the OTC Bulletin Board or a similar quotation service, provided that the investment is not so large financially either in absolute dollars or percentage of the employee's total investment that it creates the appearance of a conflict of interest.

**(6) Interest in Transactions**

No employee shall engage in any transaction involving an MRG Company if the employee or member of his or her immediate family has a substantial interest in the transaction or can benefit directly or indirectly, other than through the employee's normal compensation, except with the specific written approval of the President of the Company, or, for Company Presidents, the CEO of MRG.

**V. Intellectual Property, Confidential and Proprietary Information, and Trade Secrets**

**(1) Protection of MRG Company Confidential Proprietary Information and Trade Secrets**

Except as authorized and in furtherance of the Company's business, Employees may not disclose confidential information that they acquire by virtue of their employment by or affiliation with the Company, including information concerning customers, vendors, competitors and other employees, except where disclosure is approved by the Company or otherwise legally mandated.

In addition, employees must safeguard proprietary information, which includes information that is not generally known to the public and has commercial value in the Company's business. Proprietary information includes, among other things, products and services offered, innovations, designs, ideas, plans, secrets, distribution and sales methods and systems, sales and profit figures, rate forecasts, logistics models, financial data and analyses, market analyses, strategic planning, compensation for the Company's employees, equipment performance, internal communications, presentations, customer lists, and relationships between the Company and other companies with which it has business dealings. The obligation to preserve proprietary information continues even after employment ends. These requirements pertaining to the protection and non-disclosure of confidential and proprietary information, which constitutes the Company's trade secrets, shall be governed by the Washington Trade Secrets Act, RCW §19.108 et seq..

**(2) Intellectual Property**

MRG will (1) protect its intellectual property rights; (2) avoid infringement of intellectual property rights of other parties; and (3) accomplish the sale, licensing, and acquisition of intellectual property rights by proper means.

All software used on Company computers shall be properly licensed.

Intellectual property developed by employees within the scope of their employment belongs to the Company.

In consideration for employment, or, the continuation of employment by the Company, Employees will disclose promptly to the Company and assign and agree to assign to the Company, free from any obligation to the Employee, all rights, titles and/or interest in and to any and all ideas, concepts, processes, computer programs, improvements, copyrightable works, and inventions made, conceived, disclosed, written or developed by the Employee, solely or jointly with others, during the period of employment, which relate to the business, activities, and/or facilities of the Company, or result from or are suggested by any work the Employee may do for the Company or at its request. Employees further agree to deliver to the Company any and all drawings, notes, specifications, memorandum, writings, and data relating to such ideas, concepts, processes, computer programming materials, improvements, copyrightable works, and

inventions, to cooperate fully during employment and thereafter in the securing of patent and/or copyright protection and/or other similar rights in the United States and foreign countries, and to execute and deliver to the Company all papers requested by it in connection therewith.

#### **IV. Political Activity**

MRC encourages its employees to be active in the political process, so long as such participation does not encroach on the time and attention they are expected to devote to their company-related duties. Such activities are to be conducted in a manner that does not involve the Company or its assets or facilities, and does not create an appearance of the Company's involvement or endorsement unless specifically authorized.

Corporate political activity is governed by federal, state, and local law, and employees will comply with the requirements of those laws. Federal law prohibits any corporate contributions for the purpose of influencing the outcome of any aspect of a federal election. It also regulates a corporation's partisan and nonpartisan communications made in connection with a federal election. However, federal law allows companies to set up political action committees, which may make contributions to federal candidates. In addition, certain states permit political contributions by corporations. No funds, facilities or services of any MRC Company shall be paid or furnished to any political party or any candidate for, or incumbent of, any public office, or to any initiative or referendum campaign, except with the prior, written approval of MRC's General Counsel and CEO.

This policy is in no way intended to discourage eligible employees from making personal contributions to the Company's Political Action Committee or employees from making personal political contributions not related to the Company's activities.

#### **VII. Respect for People**

Interactions between employees must be conducted in a business-like manner, reflecting dignity and respect. A good working environment helps support our Code of Business Conduct. It helps protect our most valuable resource, our employees, and

allows us to reach our greatest potential. We all are responsible for promoting the most productive and positive working environment possible.

**(1) Equal Opportunity and Diversity**

All employment-related decisions will be made without regard to race, color, religion, sex, sexual orientation, national origin, age, marital status, or the presence of any sensory, physical or mental disability, except where such characteristics are a bona fide occupational qualification, as defined under applicable laws. Every MRG Company will have a Policy that reaffirms this commitment at the Company level, and provides a mechanism for reporting violations.

**(2) Workplace Harassment**

MRG will not tolerate harassment of any kind on the basis of a person's race, color, sex, national origin, religion, creed, age, marital status, veteran's status, or the presence of any sensory, physical or mental disability. MRG will not permit any conduct that interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment. Every MRG Company will have a Policy that reaffirms this commitment at the Company level, and provides a mechanism for reporting violations.

**VIII. Compliance, Safety and Environment**

A variety of laws apply to the Company and its operations. Each Company employee and independent contractor while engaged by and conducting business for the Company, is expected to comply with all such laws. Examples of criminal violations under these laws include:

- stealing, embezzling or misapplying corporate or bank funds,
- using threats, physical force or other unauthorized means to collect money,
- making false entries in the books and records of the Company, or engaging in any conduct that results in the making of such false entries,

- making a payment for an expressed purpose on the Company's behalf to an individual who intends to use it for a different purpose; and
- utilizing Company funds or other assets or services to make a political contribution or expenditure if prohibited by local, state or federal law.
- Making false statements to government investigators

The Company must and will report all suspected criminal violations to the appropriate authorities for possible prosecution, and will investigate, address and report, as appropriate, non-criminal violations.

**(1) Safe Operations**

MRG is committed to conducting its operations safely. Every employee is responsible to perform his or her job safely, to request help or resources if required to perform the job safely, and to raise safety concerns with his or her manager. **Every employee has the authority to stop and unsafe act.**

**(2) Document destruction.** No employee may destroy or alter any document that is relevant to a threatened or pending lawsuit or governmental investigation.

**(3) Environmental Stewardship**

MRG is a marine transportation services and support company and recognizes that many of our operations are in environmentally and ecologically sensitive areas. We are dedicated to continual, aggressive improvement of our operations, in order to minimize environmental hazards and reduce the potential for environmental incidents. We recognize our responsibility to work with the public, the government and others in the fulfillment of this task.

Our environmental stewardship commitment is evidenced by the following principles:

- Accident prevention, safety and environmental protection are a priority in our business planning, the overall conduct of our business and the operation and maintenance of our vessels and facilities.

- Company programs that address education, training and communication of environmental policies and procedures are continually updated, with emphasis on the importance of strict compliance with federal, state and local laws and regulations.
- We actively participate with the government, the public and others in creating responsible laws, regulations and standards which safeguard the environment.
- Emergency response plans are maintained that will facilitate swift response to any environmental incident in order to minimize environmental damage.
- We are committed to develop and implement an effective hazardous substance use and waste reduction plan. When waste cannot be avoided, we are committed to recycling, treating and disposing of waste in ways that minimize undesirable effects on air, water, land and human health.
- We promote environmental stewardship with others in our business community and actively participate in environmental stewardship projects where we work and play.

It is illegal under the Oil Pollution Act of 1990 and state law to discharge any pollutant into surface waters (including rivers, streams, bays or oceans) whether the discharge is accidental or deliberate. Other discharge of pollutants are prohibited by various other laws, including the Superfund Law and laws regulating above ground and underground storage tanks. Lubricating oil, diesel fuel and other petroleum products are pollutants under these laws.

For all petroleum products, any spill great enough to cause even a sheen on the waters, or the equivalent on land, must be reported and cleaned up. Failure to comply with those laws and to take prompt, effective action in response to spills can result in: fines and, possibly, other penalties not only for the Company but for responsible

employees, substantial costs for clean-up and significant damage to the natural environment.

The Company believes it is the responsibility of every employee to avoid spills from our or others' vessels during the loading, unloading, carriage of cargo, as well as from our shoreside facilities.

Careful observance of all the Company's Safety Management System ("SMS") operational, maintenance and environmental procedures will reduce, if not eliminate, spills. If, despite your best efforts, a spill occurs, the Company's policy is to take prompt action to make sure it is properly reported and cleaned up as required by law. It is essential that the safety training which is given to every employee be understood and that contingency plans be learned and implemented when necessary. If there is a spill or discharge that may affect the environment, you should follow the contingency plan and notify your immediate supervisor or vessel Captain.

Employees will adhere to the following requirements:

- Perform your job safely, in conformity with the law. Do not bypass or modify any pollution control equipment.
- If, despite your best efforts, you have an incident, report it immediately, as required by law
- Respond appropriately to mitigate the harm; and
- Do not, under any circumstances, provide knowingly false information to government investigators, either orally or through falsified records.

## **IX. Administration and Enforcement of this Policy**

Employees who observe, learn of, or, in good faith, suspect a violation of the Policy must immediately report the violation, in accordance with the procedures set out in this Policy.

When you want to report a suspected violation of this Policy, or have questions or concerns about business conduct or the application of this Policy, you should use the following reporting channels:

**Supervisor/Captain** – it is often most effective to report concerns to you immediate supervisor or your vessel Captain.

**Next level(s) of Management** -- In the event an issue is not handled to your satisfaction or you are not comfortable discussing it with your immediate supervisor or Captain, you may take the matter to the next level(s) of management.

**President** – If the previous steps do not resolve the issue, you may bring the matter to the attention of the Company President.

**Human Resources or Legal Departments** – Another effective channel for problem solving is Human Resources, which has the primary role to support the employee. In addition, the Legal Department of Foss (for Foss companies) or MRG (for other MRG companies) is available to assist with legal issues.

**ETHICS HOTLINE** – If the above channels do not provide a satisfactory resolution, or if you are reporting a violation of this Policy involving improper or illegal actions by Company employees or financial misconduct within your Company, you may contact the Ethics Hotline. The Ethics Hotline is staffed 24 hours per day.

When calling the Ethics Hotline you may generally choose to remain anonymous; note, however, that if believe you are a victim of harassment or discrimination which is prohibited by the harassment or discrimination policies of MRG or your Company, you will generally be asked to give contact information so that we can properly investigate and, if necessary, remedy the situation in accordance with those policies.

All concerns reported to the Ethics Hotline will be evaluated to determine the appropriate course of action.

**THE ETHICS HOTLINE NUMBER:**

**1-800-270-7513**

The Company will provide you with a wallet card with the Hotline number. You should carry this card with you.

**(1) Protection Against Retaliation**

Retaliation in any form against an individual who reports an alleged violation of this Business Ethics Policy, even if the report is mistaken, may itself be a violation of law and is a serious violation of this Business Ethics Policy. Any alleged act of retaliation must be reported immediately to the appropriate manager in your Company pursuant to your Company's policies, the MRG General Counsel, or the Hotline. If determined to have in fact occurred, any act of retaliation will result in appropriate disciplinary action, which may include termination of employment.

**(2) Adherence to Policy; Disciplinary Action**

All Company employees and non-employee directors have a responsibility to understand and follow this Business Ethics Policy. In addition, all Company employees are expected to perform their work with honesty and integrity in all areas not specifically addressed in this Policy. A violation of this policy may result in appropriate disciplinary action, including the possible termination from employment with the Company.

**(3) Communications; Training; Annual Certification**

The Company strongly encourages dialogue among employees and their supervisors to make everyone aware of situations that give rise to ethical questions and to articulate acceptable ways of handling those situations. Employees will receive periodic training on the contents and importance of the Business Ethics Policy and related policies and the manner in which violations must be reported and waivers must be requested. In addition, each employee must certify that he or she has read this Business Ethics Policy and to the best of his or her knowledge is in compliance with all its provisions.

**(4) Responsibility of Senior Employees**

All Company officers and other managerial employees will be responsible for the enforcement of, and compliance with, this Business Ethics Policy, including necessary distribution to assure employee knowledge and compliance. Officers and other managerial employees are expected to promote honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships. Managerial employees may be disciplined if they condone misconduct, do not report misconduct, do not take reasonable measures to detect misconduct, or do not demonstrate the appropriate leadership to insure compliance.

**MRG BUSINESS ETHICS POLICY  
EMPLOYEE CERTIFICATION**

I certify that I have read the MRG BUSINESS ETHICS AND CONDUCT POLICY AND PRINCIPLES (rev. 4/30/2009) and acknowledge that I am required to comply with its terms.

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Signature

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Name (please print)

---

MRG Company

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Date

## EXHIBIT 3



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## MRG BUSINESS ETHICS POLICY EMPLOYEE CERTIFICATION

I certify that I am familiar with the Company's Business Ethics Policy and that I have complied with its terms.

**ONLY MANAGEMENT AND ADMINISTRATIVE EMPLOYEES ARE REQUIRED TO SIGN THIS CERTIFICATION**

Van V Vorwerk

Signature

Van V Vorwerk

Name (please print)

Foss Maritime Co

MRG Company

12/10/09

Date

# APPENDIX B

THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

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FOSS MARITIME COMPANY, )  
 Plaintiff, ) Superior No. 12-2-23895-2  
 vs. )  
 CORE LOGISTIC SERVICES; LISA )  
 LONG and JOHN DOE LONG, and the )  
 marital community comprised )  
 thereof; FRANK GAN and JANE DOE )  
 GAN, and the marital community )  
 comprised thereof; JEFF )  
 BRANDEWIEDE and JANE DOE )  
 BRANDEWIEDE, and the marital )  
 community comprised thereof; and )  
 BRANDEWIEDE CONSTRUCTION, INC., )  
 Defendants. )

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MOTION HEARING

January 17, 2014

The Honorable Dean S. Lum Presiding

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Transcribed by: Marjorie Jackson, CETD  
 Reed Jackson Watkins  
 206.624.3005

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APPEARANCES

FOR THE PLAINTIFF:  
JOHN CROSETTO  
Garvey Schubert Barer  
1191 Second Avenue  
Suite 1800  
Seattle, Washington 98101

ARTHUR VOLKLE, JR  
Foss Maritime Company  
1151 Fairview Avenue North  
Seattle, Washington 98109

FOR THE DEFENDANTS:  
JOHN R. WELCH  
Carney Badley Spellman, P.S.  
701 Fifth Avenue  
Suite 3600  
Seattle, Washington 98104

1 January 17, 2014

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4 THE COURT: Good afternoon, Counsel.

5 MR. CROSETTO: Good afternoon, Your Honor.

6 MR. WELCH: Good afternoon, Your Honor.

7 THE COURT: Counsel, let's see. We're being recorded.

8 Will Plaintiff's counsel please enter your appearance  
9 orally.

10 MR. CROSETTO: My name is John Crosetto here for Foss  
11 Maritime and I'm here today with Skip Volkle, general  
12 counsel and Vice President of Foss Maritime.

13 THE COURT: All right, thank you. Good afternoon.

14 MR. WELCH: Good afternoon, Your Honor. John Welch,  
15 Carney Badley Spellman, here representing Brandewiede  
16 Construction, Jeff Brandewiede and the marital community.

17 THE COURT: All right. Thank you very much.

18 MR. WELCH: Thank you.

19 THE COURT: All right. Counsel, we have several motions  
20 pending, and I thought I would invite you in, given the  
21 nature of these motions, for you to talk to me in person.

22 There are several motions. What I'd like to do is I'm  
23 going to invite -- let's see, I think Plaintiff's counsel  
24 filed first so I'm going to invite you to come up first.  
25 I'll give you 20 minutes to talk about any of the three

1 pending matters you want to talk about.

2 MR. CROSETTO: Okay.

3 THE COURT: All right? So you divide your time the way  
4 you want. You get 20 minutes to respond, you have five  
5 minutes to rebut, and then you have five minutes on that  
6 side.

7 Okay? Go ahead.

8 MR. WELCH: And, Your Honor, do you want us to approach  
9 the bench?

10 MR. CROSETTO: Would you like us to approach, Your Honor?

11 THE COURT: Yeah, actually. You're kind of soft spoken,  
12 so why don't you get a little closer.

13 MR. CROSETTO: Sure.

14 MR. WELCH: Yeah, if you don't mind.

15 THE COURT: That's fine, that's fine. Thank you. All  
16 right. So you got a DQ motion; you got a motion for  
17 discovery sanctions; and you have a motion for discovery  
18 sanctions.

19 Go ahead, Counsel, I'm not going to -- I'll try not to  
20 pepper you with questions. You go ahead and take 20  
21 minutes.

22 MR. CROSETTO: Your Honor, just for context, this lawsuit  
23 has to do with a renovation of a luxury research vessel  
24 called the Alucia at the Foss shipyard. And Foss Maritime  
25 brought this claim against Frank and Lisa Long and Jeff

1 Brandewiede who were working on this project as Core  
2 Logistic. And the current motion that's before the Court,  
3 the motion to disqualify, came about because on  
4 November 8th, Foss counsel, myself, learned that  
5 Mr. Brandewiede's counsel had obtained privileged and  
6 confidential communications from a former Foss employee who  
7 was the project manager on the Alucia project. We were  
8 unable to resolve that --

9 THE COURT: Can it be privileged if he was a former  
10 employee?

11 MR. CROSETTO: Certainly. He was Mr. Vorwerk, the former  
12 employee, was a project manager and he was communicating  
13 directly with both in-house counsel and my law firm in  
14 preparation of this very lawsuit.

15 And so under the rules, that is a privileged  
16 communication. He was dealing directly with counsel, as  
17 either privileged and, certainly it would be work product,  
18 he was receiving legal advice from counsel and responding  
19 with information to counsel.

20 The law is fairly clear on this point. It's -- we have  
21 cited Richards v. Jain, In Re Firestorm, our Washington  
22 case. It simply says even though this is a drastic measure  
23 in disqualification, quote, "one situation requiring the  
24 drastic remedy of disqualification arises when Counsel" --  
25 "when Counsel has access to privileged information of an

1 opposing party."

2 And that is the case here. The information was obtained  
3 around September 24th. It wasn't even learned by my firm  
4 that documents had been obtained until six weeks later.  
5 Those documents were reviewed, deemed relevant, and even  
6 included in a trial exhibit, at least some of those  
7 communications.

8 We brought this motion because we could not see another  
9 avenue under the law to deal with the situation. Again,  
10 Richards v. Jain, which relies on Firestorm, the law is  
11 clear that there is, in determining whether there is --  
12 whether to exercise the discretion to disqualify counsel  
13 involving the protection of a privilege, the court should  
14 resolve any doubts in favor of disqualification. And in  
15 Richards v. Jain we had a very similar situation where  
16 opposing counsel had obtained privileged documents, reviewed  
17 them, deemed them relevant, and Counsel was therefore  
18 disqualified. This is not a --

19 THE COURT: What would you propose to do with the  
20 exhibits? Well, in theory the cat is out of the bag  
21 already. He has actually made it a trial exhibit, some of  
22 the documents that you say are privileged. What would you  
23 propose to do, given that the cat is out of the bag and,  
24 frankly, injected into the public record already.

25 MR. CROSETTO: Well, I believe they have been exchanged

1 by the parties. I don't believe they have been filed with  
2 the court --

3 THE COURT: They haven't been filed? Are you sure about  
4 that now?

5 MR. CROSETTO: I don't believe they have.

6 THE COURT: Okay.

7 MR. CROSETTO: I think we have simply exchanged the  
8 documents between parties.

9 THE COURT: All right. Okay.

10 MR. CROSETTO: And at this point, it also has not so much  
11 to do with, you know, the very document that is in the trial  
12 exhibit. There are a number of documents that were provided  
13 that were privileged and confidential that are relevant to  
14 this lawsuit. And the law is clear that the purpose of the  
15 disqualification is to remove this, as they say, a taint  
16 from the judicial process.

17 So it's not just about that exhibit for this trial; it's  
18 about this process. And under these circumstances, the  
19 disqualification is called for.

20 If you like, I can also address the motion for sanctions.

21 THE COURT: Yes, go ahead. Yes.

22 MR. CROSETTO: The motion for sanctions is based on  
23 separate facts. We were provided approximately 600 pages of  
24 documents on December 2nd, which was the scheduled first day  
25 of trial. And they were, according to Mr. Brandewiede,

1 invoices received, et cetera, that presumably would be used  
2 to substantiate his damages claims. And we had a brief  
3 conversation with Mr. Welch in advance. He offered to let  
4 us have a deposition while we're on standby for trial. That  
5 was really not a workable situation. And as we can see in  
6 his response to our motion, we still don't really have a  
7 good explanation for why those documents weren't produced  
8 earlier.

9 Mr. Brandewiede is apparently a sole proprietor.  
10 Presumably he keeps his documents at his own place of  
11 business and has control of those. He brought them in to  
12 prepare for trial but they hadn't been produced. And we  
13 have asked for, in the first instance, dismissal for that  
14 because that is what is called for when not producing or  
15 failure to produce is willful.

16 And, again, willful in this context does not have to do  
17 with intent; it has to do with not having a reasonable  
18 explanation for why the documents were not produced earlier.  
19 And here we don't have that.

20 It would certainly be appropriate to exclude those  
21 documents from trial, given that the prejudice to Foss that  
22 has already prepared for trial without having these  
23 documents which could have been made available during  
24 discovery, so certainly we would ask for their exclusion if  
25 the Court did not dismiss the counterclaim of

1 Mr. Brandewiede.

2 And, finally, even if those documents were to be  
3 admitted, I think Foss would certainly be entitled to a  
4 supplemental deposition of Mr. Brandewiede to discuss those  
5 documents.

6 THE COURT: All right.

7 MR. CROSETTO: I will address the motion for sanctions  
8 against Foss.

9 THE COURT: Why don't you address them now.

10 MR. CROSETTO: Oh, address them now?

11 THE COURT: Yeah.

12 MR. CROSETTO: Sure. So Mr. Brandewiede has brought a  
13 motion for sanctions against Foss alleging that there is an  
14 email out there written by Mr. Vorwerk, the former Foss  
15 employee who was a project manager, stating early on in this  
16 Alucia project that Mr. Brandewiede was not a partner with  
17 Frank Gan and Lisa Long. And again, if you recall, Frank  
18 Gan and Lisa Long were the subcontractors to Foss, working  
19 with Mr. Brandewiede. They walked off the project right in  
20 the middle, resulting in a fair amount of damages.

21 So what the circumstances were is that apparently  
22 Mr. Brandewiede's counsel met with Mr. Vorwerk, who by  
23 Mr. Brandewiede's interpretation had drafted this email,  
24 quote/unquote "early on in the project," stating that  
25 Mr. Brandewiede was not a partner. That was not -- the

1 issue was not raised back in September during discovery. It  
2 only came up on November 8th when Counsel revealed that it  
3 had received documents from Mr. Vorwerk and maybe there was  
4 some there that Foss should have produced.

5 So, in response, Foss has gone back, looked at the  
6 documents it's collected, looked at the documents it  
7 produced. There is nothing it saw either on the thumb drive  
8 that Mr. Vorwerk provided to opposing counsel or in its  
9 original collection that really fits the description.  
10 That's, again, in an email written early on in the project  
11 that said Mr. Brandewiede wasn't a partner with Frank Gan  
12 and Lisa Long.

13 All of the emails we have seen from Mr. Vorwerk early on  
14 in that project confirmed that Mr. Brandewiede was indeed a  
15 partner. That's how Mr. Vorwerk described Mr. Brandewiede  
16 early on in the project. It just doesn't fit the  
17 description of what -- of the contemporaneous emails that  
18 Foss has produced.

19 So what Foss has done, we also went back and looked at  
20 privileged communications and work product that was not  
21 produced. And while it can identify that the subject of  
22 Mr. Brandewiede's status as a partner in his liability was  
23 discussed by Mr. Vorwerk with his boss, including in-house  
24 counsel, that would be a privileged email or work product,  
25 again, which Foss is happy to provide the Court for review

1 in camera to determine whether they were properly withheld,  
2 and we deem they are.

3 That said, even those privileged communications and work  
4 product do not fit the description that Mr. Brandewiede has  
5 provided for this allegedly withheld email because these  
6 emails were drafted well -- virtually at the end of the  
7 project when Foss was already contemplating this lawsuit.  
8 And so they were emails from Mr. Vorwerk in conjunction with  
9 preparing this very lawsuit.

10 For that reason, because the email doesn't exist, and  
11 even if something like it does, it was properly withheld.  
12 Foss maintains that the motion for sanctions against it  
13 should be denied.

14 THE COURT: All right, thank you.

15 All right. Counsel, go ahead.

16 MR. WELCH: Your Honor, we will maybe go a little out of  
17 order just because I think the motions for sanctions is --  
18 both motions, the counter-motions for sanctions are probably  
19 grouped. So let me -- the motion to exclude me as counsel  
20 for Brandewiede, it's premised on my contact with Mr. Van  
21 Vorwerk, Van Vorwerk in October of -- first on September 24,  
22 2013. I think the time frame is pretty important, so if I  
23 could go through it.

24 It's our contention that Foss is purposely trying to bury  
25 Mr. Vorwerk as a witness that I could have contacted early

1 on. In response to initial interrogatories that we sent out  
2 as soon as the lawsuit was filed, we asked them to identify  
3 all witnesses that they would use at trial and we asked them  
4 to identify people, actually, that were helping them prepare  
5 responsive interrogatories.

6 In response to that question, they identified  
7 Mr. Vorwerk, Mr. Van Vorwerk. Unbeknownst to us, Mr. Van  
8 Vorwerk hadn't been employed with Foss for about six months  
9 at that time. They also identified Mr. Van Vorwerk as a  
10 potential witness and identified Garvey Schubert as the  
11 contact information. They never said he was a former  
12 employee, by the way, at that point.

13 THE COURT: So you thought he was a current employee?

14 MR. WELCH: We thought he was a current employee at that  
15 time.

16 THE COURT: So if you saw current employee communication  
17 with counsel, why didn't that raise a red flag?

18 MR. WELCH: Well, again, this is way back in 2012. At  
19 that point we hadn't seen any communications, right, from  
20 Mr. Van Vorwerk at all. We then exchanged primary witnesses  
21 and I was then again told by Foss's -- or, yeah, Foss's  
22 counsel that Mr. Van Vorwerk was identified with the contact  
23 information through Garvey Schubert. Again, the assumption  
24 being that he's an employee, a present employee of Foss.  
25 That was eight months after the initial interrogatories.

1           On September 19, 2013, I wrote Foss's counsel and asked  
2           them to take a deposition of Mr. Van Vorwerk, and at that  
3           point I was notified that they don't have any control over  
4           him and I was given a number in which I could contact him.  
5           First time. This is a year after the lawsuit was started  
6           and everything else, the first time given some contact  
7           information for Mr. Van Vorwerk.

8           I then contacted Mr. Van Vorwerk by phone, and instead of  
9           deposing him, agreed to meet with him. So I met with him up  
10          in Bothell on September 24th and talked to him about what he  
11          knew about the case and his involvement with the -- both the  
12          rebuilding of the M/V Alucia, but also the contract that  
13          Foss had with Core Logistic Services and later with  
14          Brandewiede Construction.

15          Go back a little bit, Foss wants to say that Brandewiede  
16          Construction and/or Jeff Brandewiede was a partner with Core  
17          Logistic. That's simply not the case. And, in fact, once  
18          Core Logistic was fired from the project, Brandewiede  
19          Construction continued and actually finished up the project  
20          for Foss and so was not a part at all of Core. That's our  
21          position.

22          So in any event, met with Mr. Van Vorwerk on September  
23          24, 2013. At that point I was told that Mr. Van Vorwerk had  
24          some communications that he had that would support his  
25          recollection that he actually sent an email to his bosses

1 telling him his understanding that Mr. Brandewiede,  
2 Brandewiede Construction was not a partner to Core Logistic.  
3 It's a central question of Foss's claim against Brandewiede  
4 Construction and Jeff Brandewiede.

5 I asked him if he would provide me that information. He  
6 said he would. Time went by. On October 24th I again met  
7 him a month later. October 24th, 2013, met with Mr. Van  
8 Vorwerk again up in Lake City, and at that point I was  
9 provided a large amount of digital data from Mr. Van  
10 Vorwerk. He could not -- he told me at that point that he  
11 could not segregate out the Brandewiede -- or the Alucia  
12 project emails, and so he just provided me everything he had  
13 at that point.

14 So on November 8, 2013, two weeks after I received these  
15 emails, email communication from Mr. Van Vorwerk, I informed  
16 Foss's counsel that I had received these things. And then  
17 four days later -- and I had, by the way, I had started  
18 reviewing them, hadn't got through even a percentage of  
19 them, a small percentage of them. Two weeks later, I  
20 informed Mr. Crosetto that I had these documents. Four days  
21 later he's telling me that they're privileged, confidential,  
22 proprietary, what have you. I stopped reviewing them,  
23 provided him a copy of them. And I didn't look at them any  
24 further, just stopped looking at them all together.

25 In preparation of trial exhibits, one of the documents I

1 was provided that was actually a hard copy provided by  
2 Mr. Van Vorwerk was the document that was provided in camera  
3 to the court by Foss's counsel. It is a document prepared  
4 by Mr. Van Vorwerk that gives his recollection of not only  
5 his employment with Foss but also the problems with the  
6 Alucia project -- the Alucia project and also kind of status  
7 of the contracts and what happened that eventually led to  
8 his termination from Foss.

9 I include that -- what's interesting is that document was  
10 never provided to us. I believe it should have been  
11 provided to us, even redacted. Even if it had some  
12 attorney-client emails interior to that, a redacted version  
13 should have been provided to Brandewiede as a response to  
14 interrogatories. Request for Production No. 6 that went to  
15 Foss from Brandewiede asked for all documents relating in  
16 any way to your contracts and work relating to the R/V  
17 Alucia. I believe that contract -- or that document would  
18 have fit neatly within responsive documents that they should  
19 have provided -- Foss should have provided to us, but they  
20 did not.

21 THE COURT: The document itself as opposed to the email  
22 chains, the drafting, the re -- you believe those should  
23 have been redacted and the document itself should have been  
24 produced?

25 MR. WELCH: I believe it should have been provided to us,

1 and it was not provided to us. So Mr. -- now, going into  
2 kind of the bigger picture of the motions to exclude or  
3 motions for sanctions, discovery sanctions, Mr. Crosetto  
4 wants to say that, look, we have these documents from  
5 Mr. Van Vorwerk, believe me, there's nothing in there that  
6 should have been produced, it's all proprietary.

7 We don't know that. We have to take their word for it,  
8 but we already know that they didn't produce one document to  
9 us. That's Mr. Van Vorwerk's letter. We already know that  
10 exists. We also have a declaration from Mr. Van Vorwerk  
11 that says he did write an email to his bosses telling them  
12 that he did not believe that Mr. Brandewiede was a partner  
13 to Core Logistic.

14 He also states in his declaration that he was told by his  
15 bosses to actually put that in his emails, subsequent emails  
16 that Mr. Brandewiede or Brandewiede Construction was a  
17 partner. So in any event -- but he states and he clearly  
18 states that he sent an email to his superior, Mr. Houghton,  
19 stating his belief that Mr. Brandewiede and Brandewiede  
20 Construction wasn't a partner to CLS. That -- we haven't  
21 seen that email, we haven't seen that communication. Foss  
22 wants us to just take their word that that email doesn't  
23 exist; although we know they already didn't produce all  
24 their documents.

25 What they should do, and I believe they should do, is

1       they should review all of Mr. Brandewiede's documents. They  
2       should produce every one of those documents, those emails to  
3       Brandewiede that are not privileged, not confidential. The  
4       ones that are, they should actually list those in a  
5       privilege log, and the rest of them should be provided to  
6       us.

7             That has not been done. Again, I have those documents.  
8       I provided full copies to Foss's counsel, but I have not  
9       looked at them. I've maybe looked at 1 percent, maybe 2  
10      percent of them. I didn't look at them all. And I  
11      certainly didn't run across anything that I saw as  
12      attorney-client privilege. But, again, once I was told they  
13      were attorney-client and/or proprietary -- and I don't even  
14      know what that means with emails -- once I was told that, I  
15      stopped looking at them, I just simply stopped looking at  
16      them.

17            THE COURT: So what does that mean, "proprietary"?

18            MR. WELCH: Well, proprietary has a definition in  
19      Washington, usually it's called trade secrets, right, or  
20      proprietary information. It's information that's developed  
21      by a company that they think is private and they have to  
22      keep private, right? So if an employee leaves your employ,  
23      you have to take affirmative steps to protect that  
24      information. If you fail to do that and that information  
25      gets out, you no longer can claim proprietary information of

1 that.

2 With Mr. Van Vorwerk, which is interesting, Mr. Van  
3 Vorwerk will tell you that he had no exit interview  
4 whatsoever when he was fired after working for Foss for so  
5 many years. Nobody ever asked him if he had any documents.  
6 Nobody ever asked him if he had any emails, right?

7 THE COURT: Of course, you have a ton of proprietary  
8 information. If and when you leave your firm, you're not  
9 going to disclose it, even regardless of whether or not you  
10 have an exit interview, right? You're just not going to  
11 disclose. You know that you're not supposed to disclose it.

12 MR. WELCH: I know I'm not supposed to disclose it, but I  
13 also, if I had something, if I worked for a company that was  
14 giving me proprietary information, whether it's a list of  
15 customers that I'm regularly working with or what have you,  
16 typically, and I think the case law is pretty clear, if you  
17 want to maintain the propriety nature of those documents,  
18 you have to protect that. You have to take steps to  
19 affirmatively protect that proprietary information.

20 These are emails. There is nothing in the nature of an  
21 email that in and of itself is proprietary. So it has to --  
22 you have to first look at whether it actually contains any  
23 information that is propriety to Foss, right? If it's  
24 attorney-client, we'd know that. If it's work product, we'd  
25 know that. That can be excluded, that information could be

1 set aside. Well, how normally people deal with proprietary  
2 information is they put a protective order in place, but  
3 they still produce their records because the records -- the  
4 rules require them to produce the records that are  
5 responsive to discovery. And, again, it seems to me pretty  
6 clearly Foss has not done that.

7 THE COURT: So what you -- you obviously don't trust Foss  
8 at this point. You think you have found one document that  
9 you think should have been disclosed at a minimum in  
10 redacted form.

11 MR. WELCH: That's correct.

12 THE COURT: So there's been some suggestion that perhaps  
13 I should look at this stuff in camera. How would I do that  
14 and do we have any idea how voluminous? Sometimes -- I've  
15 spent weeks sometimes looking at documents in camera. Do we  
16 have any idea how much we're talking about?

17 MR. WELCH: Yeah, sounds like fun.

18 THE COURT: It's not. I can tell you.

19 MR. WELCH: I think the best approach here, and this kind  
20 of dove-tails into the Brandewiede documents -- which I need  
21 to address and I hope I don't forget that -- but I think the  
22 best way to approach this, is the Van Vorwerk emails which  
23 were provided to me, not in any, you know, strange way. It  
24 was provided to me from Mr. Van Vorwerk after I was given  
25 the contact information from Foss after they, I think, tried

1 to hide that information, in fact, that he wasn't  
2 independent for over a year. But once I got the  
3 information, I contacted him. It was late in the game.  
4 They're now trying to say, hey, you sat on it and didn't do  
5 anything for a year, although we misled you for a year that  
6 he was an employee.

7 Again, I represent Brandewiede Construction. They're out  
8 of business. They don't have any money. They don't have  
9 any money to conduct discovery. They're looking at a  
10 \$2 million claim against them, claiming that he's somehow a  
11 partner to this Core Logistic Services, which, by the way,  
12 they have a judgment against and they have a claim for fraud  
13 and all this other stuff, which doesn't involve my guy at  
14 all.

15 So anyway, my guy is out of business. He has no money.  
16 Of course I'm going to take the path of least resistance and  
17 interview people rather than depose them if I can. And  
18 that's exactly what happened to Mr. Van Vorwerk late in the  
19 game after they finally -- the curtain came down, they  
20 realized they couldn't hide him anymore as a non-employee,  
21 and he gave me contact information, which he should have  
22 done, by the way, as part of discovery. That's required by  
23 the rules.

24 THE COURT: Well, I guess I'm kind of curious, though.  
25 So you thought he was an employee.

1 MR. WELCH: Right.

2 THE COURT: If you had -- okay, let's put aside the cost  
3 issue, which I understand, but it wasn't like they were  
4 trying to bury him as a witness. They named him as a  
5 witness.

6 MR. WELCH: Right.

7 THE COURT: You could have taken his deposition any time.

8 MR. WELCH: Absolutely.

9 THE COURT: And if you had noted it up, if you had wanted  
10 to take a deposition a year ago, you could have --

11 MR. WELCH: I could have.

12 THE COURT: -- and you would have found out right then  
13 that, you know --

14 MR. WELCH: I could have, but I also expected them to  
15 fully produce everything that they had, even Mr. Vorwerk --  
16 Mr. Van Vorwerk was the project manager. It should have  
17 been the first place they went, to Mr. Van Vorwerk, said,  
18 hey, where's your records from this project? He was the guy  
19 for Foss. He was the only guy for Foss that managed this  
20 project.

21 THE COURT: I guess I'm having trouble understanding just  
22 your point about them burying him. If they were trying to  
23 bury him, why did they give you the number and let you talk  
24 to him?

25 MR. WELCH: Again, when I first -- when we first got

1 sued, we immediately sent interrogatories to Foss, said,  
2 hey, tell us everybody who is actually providing answers,  
3 you know, help with your answers to these interrogatories.  
4 They named Mr. Van Vorwerk.

5 THE COURT: Okay.

6 MR. WELCH: Six months, he was not employed by them for  
7 six months. Mr. Van Vorwerk didn't provide any answers to  
8 those interrogatories, not at all. That was a  
9 misrepresentation by Foss, a total misrepresentation.

10 THE COURT: Well, they're saying no, that's not true  
11 because they had communications with him and that's part of  
12 the --

13 MR. WELCH: Not in that time frame.

14 THE COURT: -- beef that they have.

15 MR. WELCH: Not in that time frame. And that is --  
16 that's irritating to me. I can use a number of different  
17 words, but they look back in the file, they say, oh, there's  
18 an email communication from Mr. Van Vorwerk to Mr. Houghton,  
19 oh, he's obviously helping me answer these interrogatories.

20 What is that? I mean, I have never even heard anything  
21 like that. They're looking back at a historical record of a  
22 project, project records, and somehow claiming that  
23 communications as part of that project, performing a project  
24 was helping them answer interrogatories. I mean, I'm sure,  
25 Your Honor, you have seen those interrogatories. And the

1 first interrogatory that almost everybody puts out there is:  
2 Tell us who's helping you answer those interrogatories? And  
3 there it is: Mr. Van Vorwerk. Mr. Van Vorwerk did not help  
4 them answer those interrogatories.

5 THE COURT: I'm just having trouble understanding your  
6 position that they were burying him, though. He's right  
7 there.

8 MR. WELCH: Well, but it's a matter of, if I knew he was  
9 no longer employed at that time, I would have called him  
10 then, right? Again, it's a matter of, do I spend the money  
11 taking his deposition if I can get the records from them,  
12 and the records are usually -- in construction matters, the  
13 records are all important, right? I mean, then you  
14 expose -- you depose people on the records. But if I had  
15 known -- and something I regularly do if a witness is no  
16 longer part of the control group or part of a party, I give  
17 them a call, find out what they know, find out what they can  
18 give me, whether they'll give me declarations, what have  
19 you.

20 I couldn't do that when I thought that he was employed by  
21 Foss for over a year after this lawsuit was started because  
22 three times they've told me and represented to me that Mr.  
23 Van Vorwerk should be contacted through Foss's counsel;  
24 although Foss had never -- after Mr. Van Vorwerk left his  
25 employ with Foss, he had no contact whatsoever with Foss's

1 counsel until recently when they had been sending him  
2 letters, you know, threatening to sue him because of those  
3 records that he had taken from his employ. In fact, I  
4 understood from a conversation I had with Mr. Van Vorwerk  
5 this morning that Mr. Crosetto talked to him as early as  
6 January 3rd and actually got the records that -- a copy of  
7 the records that Mr. Van Vorwerk provided me back in  
8 October.

9 So anyway, my point is that I think, it looks to me like  
10 Foss took a position early on that they were going to  
11 represent that Van Vorwerk was still -- Mr. Van Vorwerk was  
12 still employed with them in order to at least make it for  
13 difficult for Mr. Brandewiede to get information from  
14 Mr. Van Vorwerk.

15 And I think it's true with Mr. Houghton, too.  
16 Mr. Houghton is Mr. Van Vorwerk's boss. He's no longer with  
17 Foss either; although they did the same representations with  
18 Mr. Houghton. They represented Mr. Houghton helped them  
19 answer interrogatories, and think Mr. Houghton is no longer  
20 employed and hadn't been employed with Foss at the time they  
21 made those representations as well.

22 THE COURT: So let's go back. We talked about your  
23 motion for sanctions.

24 MR. WELCH: Right.

25 THE COURT: Let's go back to -- let's go to their motion

1 for sanctions and disqualification motion. Why don't you  
2 elaborate on your response to that.

3 MR. WELCH: Their motion for sanctions. A recent case,  
4 Jones vs. City of Seattle, you may be aware of it.

5 THE COURT: Yes, I am.

6 MR. WELCH: My firm certainly is. We were involved in  
7 it. But what that case did is, as the Court knows, is it  
8 reaffirmed Burnet and it reaffirmed that the late  
9 disclosure --

10 THE COURT: So let's assume that we're not excluding  
11 or --

12 MR. WELCH: Right.

13 THE COURT: -- you know, let's assume that we're not  
14 dismissing or excluding evidence. There may be other issues  
15 regarding exclusion, regarding attorney-client issues, but  
16 in terms of late disclosure, let's assume that that's not on  
17 the table but potential sanctions are, so let's talk about  
18 that.

19 MR. WELCH: Well, Your Honor, it's -- I think sanctions  
20 have to be based on a willful violation and substantial  
21 prejudice. Mr. Brandewiede, again, sole proprietor, small  
22 shop, single employee, as part of Brandewiede Construction.  
23 When he provided his records that were responsive, what he  
24 believed were responsive to interrogatories and requests for  
25 production of documents, we made those records available.

1 And that was part of the whole discovery process.

2 In preparation for trial, I discovered that he had  
3 additional documents he had not provided. And so I asked  
4 him to make them available and so he brought them in, at the  
5 day of trial, brought them in, and I immediately made them  
6 available to opposing counsel, made Mr. Brandewiede  
7 available to take a deposition if they wanted to take him  
8 because we were on hold, still hadn't gone out to trial.  
9 And they just -- they haven't taken me up on that, so --

10 THE COURT: Remind me when the current trial date is.

11 MR. WELCH: There isn't one.

12 THE COURT: Okay.

13 MR. WELCH: That's another thing I wanted to say.

14 THE COURT: Okay, all right.

15 MR. WELCH: We need to set a trial date more than  
16 anything else.

17 THE COURT: Okay, all right.

18 MR. WELCH: But anyway, it certainly wasn't willful. And  
19 willful isn't just the fact it happened, like Mr. Crosetto  
20 represented. Willful is actually having to willfully  
21 withhold documents, like I believe they willfully withheld  
22 Mr. Van Vorwerk's records or document that was provided to  
23 you in camera. Certainly not any prejudice. We don't have  
24 a trial date. So, you know, those documents can be both  
25 reviewed and, like I said, they can take a deposition of

1 Mr. Brandewiede as well to examine him fully on those  
2 documents.

3 And so I don't think -- I don't think sanctions are  
4 appropriate. Given the circumstances here, I don't think  
5 sanctions are appropriate. If we were sitting at trial,  
6 maybe it would make sense to do some cost shifting, but  
7 that's not -- I don't think that's appropriate now. No  
8 matter where we set the trial, I believe there will be  
9 sufficient time for Foss to examine Mr. Brandewiede on those  
10 documents.

11 THE COURT: So talk about the disqualification motion.

12 MR. WELCH: Your Honor, it goes back to I think the time  
13 frame. What I did in contacting Mr. Van Vorwerk and then  
14 what I did in making the documents that were provided by  
15 Mr. Van Vorwerk available to Foss, I think is nothing more  
16 than normal and regular. It certainly isn't -- I didn't  
17 somehow get some kind of advantage. Foss relies on one case  
18 in which it was an ex-employee and they sat on the  
19 information for almost a year before making it available to  
20 the other side in order to get a distinct advantage. The  
21 court I think hit them hard because of that.

22 And that's not the case here at all. Once I got the  
23 number for Mr. Van Vorwerk I met with him. A month later I  
24 got the documents from him. Two weeks later, let the  
25 opposing counsel know that I had them and that I was

1 reviewing them. He let me know four days later that he  
2 thought they were proprietary and confidential even though  
3 he had never seen them before, and then I stopped looking at  
4 them and made them available to him. So there is no  
5 authority that would support their position of  
6 disqualification of me from representing Brandewiede or  
7 Brandewiede Construction.

8 THE COURT: Okay. You can save five minutes for  
9 rebuttal.

10 MR. WELCH: I will save the five. That's all.

11 THE COURT: So, Counsel, what does "proprietary" mean? I  
12 know oftentimes we enter into -- parties propose a  
13 stipulated protection order just to make sure that trade  
14 secrets don't leak out to the world.

15 MR. CROSETTO: Sure.

16 THE COURT: But certainly if the trade secrets are part  
17 of the -- or the alleged trade secrets are part of the  
18 litigation or arguably part of the litigation, oftentimes  
19 they're fair game, and I'm sure you have entered into many  
20 of them before. So what is this about -- is it a problem  
21 that it has propriety information or is your beef, really,  
22 that he has attorney-client and attorney-client privilege  
23 and work-product documents?

24 MR. CROSETTO: Our primary beef is that he has privileged  
25 and work-product documents --

1 THE COURT: I understand that, okay. I understand that  
2 part.

3 MR. CROSETTO: There are -- this thumb drive that was  
4 given to Mr. Welch, I believe contained 6.5 gigabytes of  
5 information from Foss covering a wide range of projects,  
6 including Foss pricing, et cetera, which is proprietary, is  
7 trade secrets. It was pricing for a different project not  
8 necessarily relative to this lawsuit, but it certainly would  
9 fall within the Washington Trade Secrets Act. It certainly  
10 falls under the documents that Mr. Vorwerk signed as an  
11 employee of Foss to return to Foss when he left.

12 THE COURT: But your remedy for that is against, which I  
13 you guess you have threatened him -- your primary remedy is  
14 against the former employee for taking the stuff. I mean,  
15 he's not -- it's not a sanction against him for actually  
16 possessing the propriety stuff. Isn't -- the only remedy  
17 you have against him or the only sanctionable conduct you  
18 have against him is arguably this attorney-client and  
19 work-product stuff, isn't it? I mean, you don't have a  
20 sanctionable cause of action against him. He never signed a  
21 proprietary trade secret agreement, right?

22 MR. CROSETTO: A couple of points. I would like to first  
23 clarify the record regarding the threat to sue Mr. Vorwerk.  
24 When we found out that Mr. Vorwerk still had in his  
25 possession Foss Maritime's both proprietary information and

1 privileged and confidential information, certainly we have a  
2 duty to mitigate. If we don't --

3 THE COURT: Sure.

4 MR. CROSETTO: -- protect that information, it's no  
5 longer proprietary, it's no longer trade secrets.

6 THE COURT: Understood. I understand that.

7 MR. CROSETTO: And our approach -- and, you know, I was  
8 signing those letters. We did not come in there with the  
9 iron hammer. We came in there, you know, this is serious,  
10 certainly, we need this information back, we need to know  
11 who you sent it to. And there is, you know, liability,  
12 there is potential liability there. If he had passed it off  
13 to a competitor of Foss, that would have been a big deal.

14 THE COURT: Yeah.

15 MR. CROSETTO: We really had no idea.

16 THE COURT: But you can't sanction him for that.

17 MR. CROSETTO: And to that point, yes. And our motion is  
18 not moving for sanctions based on proprietary information.

19 THE COURT: Right.

20 MR. CROSETTO: We're talking about an employee -- and  
21 this also goes to what were correct responses to the  
22 interrogatories, that Mr. Vorwerk did indeed help with and  
23 prepare interrogatories to the extent that he was the  
24 project manager for the Alucia. Trial Exhibit 80 that  
25 Mr. Brandewiede submitted has a line in there saying

1 "provided information." And we've filed this information  
2 under seal with the court that we -- that Mr. Vorwerk was  
3 working directly with Garvey Schubert Barer's attorneys to  
4 prepare this lawsuit. If we had not put Mr. Vorwerk in that  
5 discovery response, that would have been a much more  
6 significant issue. By all means, his name belonged front  
7 and center in our discovery responses, and that's what we  
8 did.

9 THE COURT: Okay.

10 MR. CROSETTO: Does the Court have other questions on --

11 THE COURT: No, not on proprietary.

12 MR. CROSETTO: And so, yes, our motion for  
13 disqualification is based on the fact that there were  
14 communications there between Mr. Vorwerk, his boss,  
15 Mr. Houghton and in-house counsel at Foss. And it's -- it  
16 is unfortunate that this comes to light at this point in the  
17 litigation, but we're not relying on one case. There are  
18 several cases here, Washington cases. It's not ambiguous.

19 When we're talking about privileged communications and  
20 work product, we're talking about something that really  
21 taints the whole process and the law calls for a do-over.  
22 It does call for the drastic measure of disqualification  
23 when opposing counsel has access to privileged  
24 communications. And I would point out that in Richards v.  
25 Jain, in which case opposing counsel had collected,

1 reviewed, deemed relevant privileged-communications, the  
2 Court certainly disqualified that counsel.

3 Here we have even a communication which the Court can see  
4 in the sealed exhibit we filed with the court, there are  
5 communications with counsel in a submitted trial exhibit, so  
6 clearly they were reviewed and deemed relevant by opposing  
7 counsel. And, again, it doesn't boil down to just that  
8 communication and just that exhibit. The idea is that it  
9 taints the process. And --

10 THE COURT: So you don't believe him, what he says that  
11 he quit reviewing it pretty quickly.

12 MR. CROSETTO: I don't need to make that judgment. I can  
13 suspend that judgment because what the law says is -- and I  
14 can quote it from Richards v. Jain -- is that when you --  
15 it's that the, quote, "dynamics of litigation are far too  
16 subtle, the attorney's role in that process is far too  
17 critical, and the public's interest in the outcome is far  
18 too great to leave room for even the slightest doubt  
19 concerning the ethical propriety of a lawyer's  
20 representation in a given case."

21 And this is cited in Richards v. Jain by the court as a  
22 basis for disqualification. Again, my point being is it  
23 doesn't boil down to just this email, but we have a number  
24 of emails which we can submit to the court in camera for  
25 review, and it really goes to the process.

1 THE COURT: Okay. All right. So, all right, okay. All  
2 right. So tell me a little bit about -- okay. Tell me a  
3 little bit about this trial exhibit. I think we need to be  
4 a little opaque about discussing it on the record here, but  
5 I think we're clear about which trial exhibit we're looking  
6 at.

7 MR. CROSETTO: Yeah.

8 THE COURT: What about the position that, well, you  
9 should have disclosed a portion of that agreement and  
10 redacted the attorney-client privileged communications?

11 MR. CROSETTO: Again, let me clarify. When Foss did its  
12 data collection in response to -- in response to discovery  
13 requests, they sent a third-party vendor up to Foss, they  
14 collected everyone's -- every post, had the data collected.  
15 Uploaded it to a review system. And the data we got on that  
16 thumb drive from Mr. Vorwerk, all of that that was  
17 responsive and non-privileged was produced.

18 So the letter we're talking about, we do not see it on  
19 that thumb drive. We didn't see it in the documents we  
20 collected from Foss. We first became aware of this -- "we,"  
21 being counsel, first became aware of this document when it  
22 was sent over by opposing counsel. In turn, we went back to  
23 Foss and found this was never an electronic document that we  
24 searched. This was not put in an Alucia file. Mr. Vorwerk  
25 had met with I believe a vice president at Foss who he had

1 worked with before, and that was the only person who had  
2 seen the letter. It went to a hard file and was not even on  
3 the radar for collection.

4 And, again, the point being is that opposing counsel  
5 with -- and it's stated in the pleadings -- opposing counsel  
6 met with Mr. Vorwerk, whose information was provided by Foss  
7 as soon as it was requested, contacted Mr. Vorwerk, learned  
8 of the letter still during discovery, could have then gone  
9 to Foss, said, Foss, what is this letter? And my response  
10 would have been: We've never seen it, let's go find out  
11 what it is. That would have been taken care of in  
12 discovery.

13 That was six weeks prior to when we actually learned that  
14 Mr. Vorwerk had provided any documents to opposing counsel.  
15 So certainly if we'd had the document in advance -- I mean,  
16 granted it's in a file, a hard file somewhere with Foss. It  
17 did not come up in our search, our initial search for  
18 documents that were relevant to the project, because frankly  
19 the -- and I've read the letter and by and large it deals  
20 with a number of projects that don't have to do with the  
21 Alucia, but if (inaudible) ultimately, now that we do have  
22 the document which was available in discovery, could have  
23 been raised early in discovery by opposing counsel, we would  
24 have no problem submitting it. But the fact is, if it  
25 contains privileged communications, those parts should have

1       been -- should not have been reviewed, should have been  
2       returned to Foss and are certainly a basis, in and of  
3       themselves, for disqualification, not to mention the other  
4       privileged communications that were on the thumb drive  
5       provided to opposing counsel.

6           THE COURT: He's saying he didn't look at those.

7           MR. CROSETTO: Well, again, that's not the analysis that  
8       the Court does. In fact, the very same argument was made in  
9       Richards v. Jain where these documents were taken in by a  
10      paralegal, lead counsel got up and said, well, you know, we  
11      didn't really review those documents, it was done by a  
12      paralegal.

13           It didn't matter. That was -- the review by the  
14      paralegal was imputed to the law firm. Somebody deemed this  
15      email, this information relevant enough to include as a  
16      trial exhibit. And that's the issue.

17           THE COURT: Okay. All right. So do you want to save  
18      some time for rebuttal now?

19           MR. CROSETTO: Sure.

20           THE COURT: All right. Thank you.

21           Counsel, five minutes. We need to move on at three  
22      o'clock.

23           MR. WELCH: I understand and I, in fact, deemed Mr. Van  
24      Vorwerk's pretty extensive letter relevant and made it a  
25      trial exhibit. Me, not a paralegal or anybody else. And in

1 fact, it's pretty -- I don't know, it's like 20 pages or  
2 something like that. I didn't even realize it had  
3 attorney-client privilege in it, quite frankly, until it was  
4 pointed out by opposing counsel. And because, again,  
5 nothing salacious. I mean, you have it so you can actually  
6 review it. It actually -- it's under I think it's a title,  
7 the gentleman who it was either sent to or sent it was the  
8 safety guy, so it didn't really jump to my attention as  
9 in-house counsel, which I guess he was, and I have seen  
10 since then from Mr. Crosetto that he was in fact in-house  
11 counsel.

12 So in any event, here I didn't look at -- once again, I  
13 had the documents for two weeks from Mr. Van Vorwerk. This  
14 is, if the Court is going to do something, disqualify me or  
15 sanctions, it's kind of a "gotcha" and I think it's horribly  
16 unfair. You don't make somebody -- you're not  
17 straightforward.

18 Mr. Crosetto wants to say that he talked Mr. Van Vorwerk  
19 while he was still an employee and that he or somebody from  
20 his firm actually consulted with him regarding this matter  
21 before they brought the lawsuit. What he's not saying is  
22 that by the time he answered the interrogatories, Mr. Van  
23 Vorwerk was gone for six months, but he's still saying  
24 Mr. Van Vorwerk helped answer those interrogatories. They  
25 then don't say, don't give, even though they're required to

1 give -- and my instructions, my discovery instructions say,  
2 give me contact information. They don't give me that  
3 contact information until I try to set that deposition and  
4 then I'm told: Here's his number. Again, that's in late  
5 2013.

6 I finally talked to the guy on September 24th, meet with  
7 him, in 2013. Get the documents on October 24th. These  
8 guys have them three weeks later. Three weeks later. And,  
9 again, I don't review them once I'm told that they're  
10 proprietary. Nobody else in my firm reviewed them. I know  
11 the paralegal working on this case, so nobody else reviewed  
12 them.

13 So it's not the same case at all. It's kind of like,  
14 like I said, it seems to me more of a "gotcha." We didn't  
15 give you good information about where this guy is. You  
16 finally decided to call him once we gave you the number and  
17 you got the information fro him, and now that you got the  
18 information that we didn't want to give you in the first  
19 place, now I'm going to try to get you disqualified. It  
20 doesn't seem fair.

21 Now, Mr. Crosetto for the first time is saying, hey, we  
22 actually reviewed the Van Vorwerk documents that were  
23 provided and they're the same documents that have previously  
24 been provided. I don't know if that's the case or not. I  
25 have no idea. I mean, this is the first time I have heard

1       this.

2           What they should have done, as part of the discovery, is  
3       gone back to their project manager, who manages the project,  
4       and said, what do you have? And that's what happens. What  
5       do you have? What did you -- if he had actually went to  
6       them, they would have got the Van Vorwerk letter that we're  
7       talking about then. They would have got that from him. But  
8       they didn't do that. They never went to Van Vorwerk and  
9       said, what do you have, we need to make discovery available.

10          They want to say he's such an important witness and he  
11       has such ties to their whole legal counsel, but they don't  
12       even bother going to him and asking him what they have to  
13       make him available. They don't bother with that. So what  
14       do I do? I get the information and instead of -- and  
15       instead -- and then give it to opposing counsel. Instead of  
16       them producing that document, those documents, the Van  
17       Vorwerk documents, they're just representing that, hey,  
18       they're the same stuff we have already produced, even though  
19       we know it's not fully true.

20          So in any event, go back. If you listen carefully,  
21       they're saying, hey, we didn't provide this Van Vorwerk  
22       document because it was in printed form. They're still  
23       admitting that they didn't fully comply with the discovery,  
24       but yet they want to hammer me and my client for not fully  
25       complying with discovery. I think, given the fact that we

1 have a -- we don't have a trial date. We're probably going  
2 to be three months out, four months out at the most to get  
3 back on the trial date. I think discovery on these issues  
4 should be reopened, and I think the parties should both be  
5 able to fully engage in further discovery in order to work  
6 through these issues, and I think then we should be prepared  
7 for trial.

8 THE COURT: All right. Thank you.

9 Counsel?

10 MR. CROSETTO: I think the situation -- well, one, the  
11 response to the motion to disqualify has always been, oh,  
12 let's look at this motion for sanctions against Foss. First  
13 of all, they're apples and oranges. One is about reviewing  
14 privileged communications. The other is about a discovery  
15 dispute that could have been handled in discovery.

16 The law is clear that if opposing counsel has available  
17 to it privileged communications, disqualification -- granted  
18 it's a drastic remedy -- is still required. And again, the  
19 dispute is not about simply that email and that exhibit.  
20 There are additional emails -- and if the Court would like  
21 to review them, we have them -- that came from that drive.  
22 And, again, when -- with regard to the motion for sanctions  
23 against Foss, when Mr. Brandewiede's counsel that says that  
24 Foss is saying it produced all the documents, we did. We  
25 went and collected all of the ESI, produced all those

1 documents --

2 THE COURT: I guess the question is, once you -- okay.  
3 So if somebody inadvertently receives -- okay, so for  
4 example, somebody gets a document where it's not readily  
5 apparent that it's attorney-client privileged, it's Person A  
6 to Person B and it doesn't have a title, but I understand  
7 some of these do have titles. But if a document doesn't  
8 have a title and he doesn't know who Person A is and doesn't  
9 realize it's attorney-client privilege until you arguably  
10 get down into the body of the document and then you kind of  
11 go, oh, gee, this looks like advice or something, but you  
12 need to read it first in order to get there, that doesn't  
13 call for automatic disqualification, does it? I mean, if  
14 it's not readily apparent that it's attorney-client  
15 privilege until somebody actually points out that, hey, this  
16 guy is general counsel, this is legal advice and this --  
17 case law doesn't require disqualification, does it, at that  
18 point?

19 MR. CROSETTO: Well, what the facts here are, is that the  
20 face of --

21 THE COURT: Which is a different issue, right? Which is  
22 a different issue. If it's obvious that it's general --  
23 this person is Person A, general counsel, and it's marked,  
24 it's stamped "attorney-client privileged," that's a  
25 different situation, right? And so you're saying that

1       there -- I guess my question is, there are both kind of  
2       documents in this production, right? There are some that  
3       you say are clearly attorney-client privileged and there are  
4       some that you would actually have to know who the players  
5       are in order to figure out that's it attorney-client  
6       privileged work product, right? Isn't that the scenario?

7           MR. CROSETTO: Well, the document we're talking about as  
8       a trial exhibit has on its face identifying Frank  
9       Williamson, general counsel. So --

10        THE COURT: So that's what -- that's the obvious one,  
11       right?

12        MR. CROSETTO: And, again, what we're talking -- the  
13       issue is emails that were pasted into another document.

14        THE COURT: Right.

15        MR. CROSETTO: The narrative of that document also  
16       identifies working with Garvey Schubert Barer attorneys who  
17       are of record in this case.

18        THE COURT: Right.

19        MR. CROSETTO: So we're not dealing with a situation  
20       where the document doesn't tell us on its face that there's  
21       an issue.

22        THE COURT: Okay.

23        MR. CROSETTO: The -- it's also an issue that when you do  
24       talk to a former employee and that former employee says "I'm  
25       going to give you some documents," I think a prudent

1 question at that point would be: Is there going to be  
2 anything in there that's communication with counsel or --  
3 inside counsel or outside counsel? Especially when an  
4 interrogatories answer identifies that individual as someone  
5 who helped prepare answers to the interrogatories.

6 Apparently in this case that didn't happen. Ultimately  
7 we ended up with privileged communications in the hands of  
8 opposing counsel. And, again, I would point out that the  
9 language in -- is that when opposing counsel has access to  
10 privileged information, that taints the entire process.

11 THE COURT: So what about this concept, separate and  
12 apart from the disqualification motion? What about this  
13 idea that you should have -- well, I guess you should have  
14 gone to this former -- if you knew this former employee  
15 helped prepare discovery responses or at least had obviously  
16 relevant information, that you should have gone to him,  
17 gotten documents, and then you would have discovered this  
18 exhibit, that you would have gone through an analysis,  
19 redacted the attorney-client privileged material and  
20 actually handed over the agreement itself, which he says is  
21 not privileged.

22 So what about that issue?

23 MR. CROSETTO: Well, first, I would point out that Foss  
24 had provided this employee with a policy and an employee  
25 agreement that said: You will give back to Foss everything

1 that belongs to Foss. So, first of all, Foss should have  
2 had any files related to the Alucia project, Foss should  
3 have had those from this employee, if he had taken them home  
4 or done otherwise.

5 THE COURT: Sound likes you guys didn't ask him to make  
6 sure, right? So it kind of slipped through the cracks, you  
7 didn't ask him to make sure that that was the case?

8 MR. CROSETTO: Well, we had possession of his computer  
9 and that's where we went. Everything -- Foss is a modern  
10 company. They operate electronically. All communications  
11 are going in and out of that email account, all the files --

12 THE COURT: You know, I have always wondered about  
13 e-discovery. I mean, it just, you know, in the old days you  
14 just go back, you would go to -- I mean, a really cumbersome  
15 process. You had to go from this person to that person to  
16 that person to that person. And, you know, and then -- and  
17 now with e-discovery, you kind of go to their computer. And  
18 I always wonder about, that stuff gets missed that's not on  
19 the computer, right?

20 MR. CROSETTO: Right. Well, if this were an employment  
21 discrimination case and there were issues of pain and  
22 suffering, emotional distress damages and you wanted to  
23 collect diaries and calendars, well, one, Mr. Vorwerk's  
24 calendars will all be with Foss. This is not a case about  
25 Mr. Vorwerk, his termination, in which case you would get

1       some personal documents on his personal computer that he  
2       wrote regarding this project. And, again, because Foss put  
3       Mr. Vorwerk front and center in its discovery responses, and  
4       in fact he was contacted during discovery, if this document  
5       came up, of which Foss, again -- and I say "Foss" being its  
6       counsel in the context of this litigation was not aware that  
7       this letter regarding Mr. Vorwerk's termination even  
8       existed -- if it had come up, Foss could have addressed at  
9       that point, gone back to Mr. Vorwerk and said, oh, we see  
10      you have this document you drafted on your personal computer  
11      that relates to Foss and the Alucia, do you have anything  
12      else? And that would have been something we could have  
13      resolved easily during the course of discovery.

14           THE COURT: All right. Thank you very much.

15           Counsel, thank you very much for your presentations. A  
16      couple things are clear to me now after having the benefit  
17      of your oral presentations. Others are still problematic.  
18      Let me -- so we have actually four issues or four matters  
19      that need to be decided.

20           First, there is the plaintiff's motion for discovery  
21      sanctions. There is the plaintiff's motion to disqualify  
22      counsel. There is the defendants' motion for discovery  
23      sanctions. And then separate and apart from those first  
24      three motions, you have the issue of, what do you do with  
25      the trial date? And obviously, you need to select a new

1 trial date regardless of the outcome of the disqualification  
2 motion, and, frankly, regardless of the outcome of the  
3 discovery sanctions.

4 Let me just say that the world has changed I think for  
5 anybody seeking discovery sanctions with the decision, The  
6 City of Seattle vs. Jones, which affirmed that the court  
7 needs to engage in a balancing of the Burnet factors, but  
8 making it pretty clear that it's virtually impossible to get  
9 dismissal or exclusion of evidence or dismissal of a claim  
10 or counterclaim without some pretty stringent findings.

11 It almost has to be intentional misconduct and prejudice  
12 in order to get those extreme remedies, and one needs to  
13 engage in a less drastic alternative analysis, including  
14 monetary sanctions or continuances. And I think it's a fair  
15 statement to say that, given the state of the law under  
16 Jones, that exclusion or dismissal is virtually impossible  
17 to obtain.

18 I know that there's language in that case which says  
19 otherwise, but as a practical matter it's very difficult  
20 these days, given the current state of law, to get those  
21 remedies, so that's why I stated a little bit earlier those  
22 issue are really off the table as a practical matter.

23 Let's first take Plaintiff's motion for discovery  
24 sanctions. Now, given that we don't have a trial date, I  
25 guess the issue of actual prejudice is a little less

1       pressing right now in theory. And how I have handled this  
2       many times is, you know, when you have light disclosure of  
3       documents it's very hard to say you have actual prejudice  
4       until you actually see the documents and actually have gone  
5       through and reviewed them.

6           And I haven't seen any actual prejudice yet; although I  
7       think clearly what needs to occur here is that I'm going to  
8       deny the motion for discovery sanctions in terms of  
9       exclusion or dismissal or monetary sanctions, but I will  
10      require that the -- I will allow the plaintiff to take the  
11      defendant's deposition and examine the defendant on these  
12      documents if they wish to do so.

13           And that will be -- my first preference would be that the  
14      parties meet and confer and come up with a mutually  
15      agreeable date and time and place for that to occur. But if  
16      parties can't agree within a two-week period of time on when  
17      that date, time and place will be, that it will occur at  
18      Foss's option. So I don't want to have a situation where  
19      you end up, you know, not being able to agree and then  
20      basically you get denied the opportunity to take the  
21      deposition. Of course you should meet in good faith first  
22      to figure out whether you can mutually agree on a date, but  
23      if you guys can't agree, then you get to decide, okay?

24           So that's -- and then if you actually have some actual  
25      prejudice, given that ability to take the deposition, then

1       you're actually in a position to actually state what your  
2       actual prejudice is, so I think that's the practical result,  
3       not only in this case but in many other cases, post-Jones.

4       Frankly, I think that Division I, that's Division --  
5       that's the approach Division I would I think adopt. And it  
6       actually has adopted in many unpublished decisions, which I  
7       can't actually cite to. So that's on the motion for  
8       discovery sanctions.

9       Now, as to Defendants' motion for discovery sanctions,  
10       that will be granted in part and denied in part in the sense  
11       that first I'm denying any monetary sanctions at this time.  
12       I'm going to require Foss to go back and re-review whether  
13       you have disclosed all documents responsive. Then I'm going  
14       to require that you file a privilege log with me and I will  
15       engage in an in camera review.

16       Counsel, I'm going to have you confer with in-house  
17       counsel regarding what a reasonable amount of time it is for  
18       you to put that privilege log together. I think in theory,  
19       that -- I think that would probably withstand appellate  
20       scrutiny if you were to actually file a privilege log with  
21       you me and review in camera, allow me to engage in an in  
22       camera review.

23       I would then file under seal those documents which I  
24       reviewed in camera and issue an order either affirming that,  
25       indeed, these are attorney-client privileged documents or

1 not -- excuse me, attorney-client privileged and  
2 work-product.

3 We had an earlier discussion about these trade secrets,  
4 and, again, I think your sanction or your appropriate remedy  
5 is, number one, entry into what is normally a stipulated  
6 protection order protecting these documents from being  
7 disclosed to the public in general, if indeed they are  
8 relevant at all in the first place. And obviously there's  
9 an issue about whether he has actually ever asked for them  
10 and whether they're relevant to this proceeding. And I  
11 think you're going to make that determination when you  
12 review your discovery responses making sure that you  
13 actually have been responsive. But I don't think this --  
14 you can sanction this counsel for the witness's disclosure  
15 or breach of his employment agreement. I'm not sure it's  
16 Counsel's -- Counsel can be sanctioned for that. You might  
17 have a remedy against the former employee, but that's a  
18 different issue. All right.

19 So the motion -- Defendants' motion is denied in part and  
20 granted in part, but all monetary sanctions are denied, but  
21 you are going to have to go back, take a look at your  
22 discovery responses, make sure they are responsive, and  
23 you're going to get me that privilege log and you're going  
24 to, after you confer with the clients, you're going to tell  
25 me what a reasonable amount of time it is you're going to be

1       able to get that to me, okay?

2           All right. Now, the issue of disqualification, and  
3       that's one I'm going to take under consideration over the  
4       weekend. I want to take another look at the case. It is a  
5       pretty Draconian remedy, but if indeed the law requires a  
6       Draconian remedy, then so be it.

7           I guess my initial reaction is there are two categories  
8       of documents, some of which are -- it's not that readily  
9       apparent that it's attorney-client privileged documents.  
10       And I think the law treats those documents a little  
11       differently than if an attorney knows that he or she is  
12       reviewing attorney-client privileged or should reasonably  
13       know that they're reviewing attorney-client privileged  
14       documents. I think we all have had situations of practice.  
15       I can recall one where my secretary sent opposing counsel  
16       the client recommendation and litigation strategy letter.  
17       And the guy -- and this was an old (inaudible) guy, I won't  
18       name his name and he's no longer with us. But he read it  
19       and then taunted me with it over the phone. And of course  
20       Judge Rothstien wasn't terribly happy with him when I told  
21       her about what he had done, but anyway, that's another whole  
22       issue.

23           But I think the analysis is, it's one thing if you have  
24       an inadvertent review of documents or emails where it's not  
25       that readily apparent who these people are or what they're

1 really discussing, and then it turns out, whoops, it  
2 actually is an attorney-client privileged document or it is  
3 actually work product. And after the fact then, with  
4 hindsight then you can say, okay, oh, this person was  
5 general counsel, it's not that clear.

6 I think that's a different set of communications than a  
7 situation where it is readily apparent is whether somebody  
8 is an attorney or outside counsel, either in-house or  
9 outside counsel, and they're talking about litigation  
10 strategy or something else like that from the body of the  
11 content of the letter itself. That's a different category.  
12 And if I understand the motion, the motion is that, no,  
13 we're talking about the latter category here at least in  
14 part.

15 So I want to take another look at the case law, see what  
16 it compels me to do. And I will so advise hopefully on  
17 Monday or Tuesday.

18 After I do that, then we will take up the fourth issue,  
19 after we figure out whether, actually, frankly, Counsel is  
20 going to be disqualified or not, then we're going to figure  
21 out what the trial date is. And what I'll do is I'm going  
22 to call you next week probably just to talk to you about  
23 that, okay?

24 MR. WELCH: Okay.

25 THE COURT: So we'll set up a conference call. And,

1       actually, let's do this: We'll set up the conference call  
2       next week, I'll tell you what my decision is, I'll tell you  
3       what I think we should do with the trial date, and then  
4       you're going to tell me when you get me the documents, okay?  
5       So let's -- I will talk to my bailiff and we'll set  
6       something up. She'll call your secretaries or assistants  
7       and we'll figure out some mutually convenient time to do it  
8       next week, all right?

9               MR. CROSETTO: Sounds great.

10              THE COURT: Counsel, thank you very much. Thank you very  
11       much to the clients.

12              MR. WELCH: Thank you, Your Honor.

13              MR. VOLKLE: Thank you.

14              THE COURT: Thank you.

15              THE CLERK: Please rise. Court is in recess.

16                               (Proceeding was adjourned.)

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1 C E R T I F I C A T E

2 STATE OF WASHINGTON )

3 )

4 COUNTY OF SNOHOMISH )

5 I, the undersigned, under my commission as a  
6 Notary Public in and for the State of Washington, do hereby  
7 certify that the foregoing recorded statements, hearings and/or  
8 interviews were transcribed under my direction as a  
9 transcriptionist; and that the transcript is true and accurate  
10 to the best of my knowledge and ability; that I am not a  
11 relative or employee of any attorney or counsel employed by the  
12 parties hereto, nor financially interested in its outcome.

13  
14 IN WITNESS WHEREOF, I have hereunto set my hand and  
15 seal this *17th* day of *April* 2014.

16  
17  
18 *[Handwritten Signature]*

19 NOTARY PUBLIC in and for  
20 the State of Washington,  
21 residing at Lynnwood.  
22 My commission expires 4-27-18.



23  
24  
25

THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

-----

FOSS MARITIME COMPANY, )  
 Plaintiff, ) Superior No. 12-2-23895-2  
 vs. )  
 CORE LOGISTIC SERVICES; LISA )  
 LONG and JOHN DOE LONG, and the )  
 marital community comprised )  
 thereof; FRANK GAN and JANE DOE )  
 GAN, and the marital community )  
 comprised thereof; JEFF )  
 BRANDEWIEDE and JANE DOE )  
 BRANDEWIEDE, and the marital )  
 community comprised thereof; and )  
 BRANDEWIEDE CONSTRUCTION, INC., )  
 Defendants. )

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MOTION HEARING

January 17, 2014

The Honorable Dean S. Lum Presiding

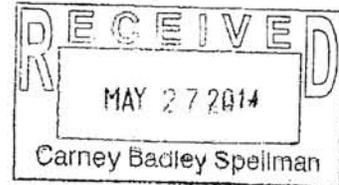
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Transcribed by: Marjorie Jackson, CETD  
 Reed Jackson Watkins  
 206.624.3005

**NOTICE OF FILING OF VERBATIM REPORT OF PROCEEDINGS**  
**FORM 15A**

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**  
**FOR APPEAL IN DIVISION I COURT OF APPEALS**

FOSS MARITIME COMPANY,	)	Cause No.: 12-2-23895-2 SEA
Plaintiff/Appellant,	)	Appeal No.: 71611-5-1
vs.	)	
CORE LOGISTIC SERVICES; LISA LONG	)	NOTICE OF FILING VERBATIM
and JOHN DOE LONG, and the marital community	)	REPORT OF PROCEEDINGS
comprised thereof; FRANK GAN and JANE DOE	)	(RAP 9.5)
GAN, and the marital community comprised thereof;	)	
JEFF BRANDEWIEDE and JANE DOE	)	
BRANDEWIEDE, and the marital community	)	
comprised thereof; and BRANDEWIEDE	)	
CONSTRUCTION, INC.,	)	
Defendants/Respondents.	)	



**DECLARATION**

Reed Jackson Watkins, court-approved transcription company, hereby files the verbatim reports of proceedings for the hearing in the above matter for the date/s of January 17, 2014 and provided copies to the party who ordered transcription.

**CERTIFICATE OF SERVICE**

I certify that on the 23rd day of May, 2014, I caused a true and correct copy of this Notice to be served on the following in the manner indicated below:

King County Superior Court  
516 Third Avenue  
Seattle, WA 98104

( ) U.S. Mail  
(X) Hand Delivery; KNR Couriers  
( ) UPS Delivery

Clerk's Office  
Court of Appeals, Division I  
600 University Street  
Seattle, WA 98104

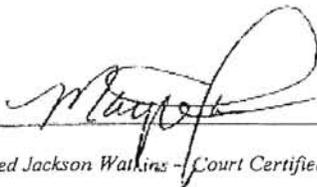
(X) U.S. Mail  
( ) Hand Delivery  
( ) UPS Delivery

Gregory M. Miller  
Carney Bradley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104

(X) U.S. Mail  
( ) Hand Delivery, KNR Couriers  
( ) UPS Delivery

John Crosetto  
Tyler W. Arnold  
Garvey Schubert Barer  
1191 Second Avenue, Suite 1800  
Seattle, WA 98101

(X) U.S. Mail  
( ) Hand Delivery, KNR Couriers  
( ) UPS Delivery

By: 

*Reed Jackson Watkins - Court Certified Transcription - 1402 Third Avenue, Suite 210, Seattle, Washington 98101*  
*p 206.624.3005 / f -206.624.3007*  
*www.rjwtranscripts.com*

**SCANNED**

# APPENDIX C

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SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN THE COUNTY OF KING

FOSS MARITIME COMPANY,

Plaintiff,

v.

CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG, and the marital community comprised thereof; FRANK GAN and JANE DOE GAN, and the marital community comprised thereof; JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the marital community comprised thereof; and BRANDEWIEDE CONSTRUCTION, INC.,

Defendants.

NO. 12-2-23895-2 SEA

DECLARATION OF JOHN R. WELCH  
IN SUPPORT OF BRANDEWIEDE'S  
RESPONSE RE: FOSS' MOTION TO  
DISQUALIFY COUNSEL

Hearing Date: December 2, 2013

I, John R. Welch, hereby declare and state as follows:

1. I am an attorney with the law firm of Carney Badley Spellman, and the attorney for Defendants Jeff Brandewiede, Melanie O'Cain Brandewiede and Brandewiede Construction, Inc., (collectively referred to herein as "Brandewiede") in this matter. I am over 18 years of age, competent to testify and have personal knowledge of the statements provided in this declaration.

DECLARATION OF JOHN R. WELCH  
IN SUPPORT OF BRANDEWIEDE'S  
RESPONSE RE: FOSS' MOTION TO  
DISQUALIFY COUNSEL -- 1

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CARNEY  
BADLEY  
SPELLMAN

Law Offices  
A Professional Service Corporation  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010  
T (206) 622-8020  
F (206) 467-8215

COPY

1           2.     Attached as **Exhibit A** is a true and correct copy of Foss' Answers to  
2 Brandewiede's First Interrogatories and Request for Production of Documents to Foss,.

3           3.     Attached as **Exhibit B** is a true and correct copy of Foss' Disclosure of  
4 Primary Witnesses dated July 1, 2013, which includes Mr. Van Vorwerk as a potential  
5 primary witness and identifies his contact information as "c/o Garvey Schubert Barer,  
6 1191 Second Avenue, Suite 1800, Seattle, Washington 98101", Foss' attorneys.

7           4.     Attached as **Exhibit C** is a true and correct copy of my e-mail to Foss'  
8 counsel dated September 19, 2013. At the time I had heard that Mr. Vorwerk was no  
9 longer employed by Foss and wanted to know if Foss would make Mr. Vorwerk available  
10 for deposition or if Brandewiede would need to subpoena Mr. Vorwerk. In response,  
11 Foss' counsel provided Mr. Vorwerk's contact information.  
12

13           5.     I then contacted Mr. Vorwerk regarding his availability for a deposition. In  
14 this initial conversation Mr. Vorwerk agreed that in lieu of sitting for a deposition he  
15 would meet with Jeff Brandewiede myself on September 24, 2013 at a restaurant in Lake  
16 City to discuss his involvement with the Alucia project.  
17

18           6.     During the meeting with Mr. Vorwerk on September 24, 2013, Mr.  
19 Vorwerk stated that early on in the Alucia project he had sent an e-mail to his boss, Mark  
20 Houghton, and informed him that Brandewiede Construction did want to be in partnership  
21 with CLS but CLS's owners rejected this arrangement and hired Jeff as a subcontractor. I  
22 asked Mr. Vorwerk if he would have a copy of the e-mail he was referring to and he stated  
23 that he might and that he would check. He also noted that he had other e-mail  
24 communications regarding the Alucia project that he would make available to  
25 Brandewiede. Additionally, Mr. Van Vorwerk had brought with him a 38 page document  
26

DECLARATION OF JOHN R. WELCH  
IN SUPPORT OF BRANDEWIEDE'S  
RESPONSE RE: FOSS' MOTION TO  
DISQUALIFY COUNSEL - 2  
BRA053 0001 ok272r45eh.002

CARNEY  
BADLEY  
SPELLMAN

Law Offices  
A Professional Service Corporation  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010  
T (206) 622-8020  
F (206) 467-8215

1 titled "The Wrongful Termination of Van V. Vorwerk", dated June 27, 2012, that he had  
2 drafted after his termination. Mr. Van Vorwerk offered to provide a copy of his June 27,  
3 2012 letter.

4 7. On October 24, 2013, I again met with Mr. Vorwerk in Lake City for the  
5 purpose of obtaining Mr. Vorwerk's e-mail communications regarding his work on the  
6 Alucia. During this meeting, Mr. Vorwerk explained that he was unable to separate out  
7 just the Alucia related communications and, instead provided a hard drive that contained  
8 two folders of communications regarding his work as an estimator and project manager for  
9 Foss.

10 8. On Friday November 8, 2013, two weeks after receiving Van Vorwerk's e-  
11 mail communications, I informed Foss' counsel that we had received documents from Mr.  
12 Vorwerk. I also noted that we had information that Foss did not fully comply with  
13 Brandewiede's discovery requests and informed Foss' counsel that I had only reviewed a  
14 portion of Van Vorwerk's records.

15 9. On Friday November 15, 2013, I provided Foss with a thumb drive  
16 containing the entire file received from Van Vorwerk. Attached hereto as Exhibit D is a  
17 true and correct copy of my cover letter to Foss' counsel.

18 10. Given the recent receipt of Mr. Van Vorwerk's files, the pending trial date,  
19 and other professional commitments, I have been unable to review all the files provided by  
20 Van Vorwerk and compare them to the information provided by Foss in response to  
21 Brandewiede's discovery requests. Moreover, except for possible attorney client  
22 communications contained within the document titled "The Wrongful Termination of Van  
23  
24  
25  
26

DECLARATION OF JOHN R. WELCH  
IN SUPPORT OF BRANDEWIEDE'S  
RESPONSE RE: FOSS' MOTION TO  
DISQUALIFY COUNSEL - 3  
BRA053 0001 ok272r45eh.002

CARNEY  
BADLEY  
SPELLMAN

Law Offices  
A Professional Service Corporation  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010  
T (206) 622-8020  
F (206) 467-8215

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V. Vorwerk", I am unaware of any attorney client communications in the files that I have reviewed.

11. I did not notice any attorney-client communications in the document titled "The Wrongful Termination of Van V. Vorwerk" and was unaware of the existence of potential attorney-client communications until it was brought to my attention by Foss' counsel.

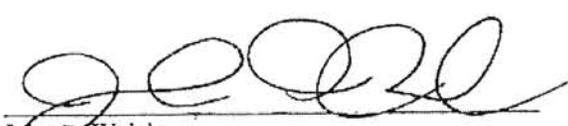
12. Upon being informed of the existence of attorney-client communications in the document titled "The Wrongful Termination of Van V. Vorwerk", which had then been identified as a trial exhibit, I offered to redact the communications from the exhibit. Foss has not responded to this offer.

13. Once Foss asserted that Mr. Van Vorwerk's e-mail communications contain attorney-client communications, I stopped reviewing them.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED this 27th day of November, 2013, at Seattle, Washington.

27

  
John R. Welch

DECLARATION OF JOHN R. WELCH  
IN SUPPORT OF BRANDEWIEDE'S  
RESPONSE RE: FOSS' MOTION TO  
DISQUALIFY COUNSEL - 4

BRA053 0001 ok272r45eh.002

CARNEY  
BADLEY  
SPELLMAN

Law Offices  
A Professional Service Corporation  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010  
T (206) 622-8020  
F (206) 467-8215

Foss v. Brandewiede  
Motion to Disqualify  
Decl. of J. Welch

**Exhibit A**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

FOSS MARITIME COMPANY,  
  
Plaintiff,  
  
v.  
  
CORE LOGISTIC SERVICES; LISA LONG  
and JOHN DOE LONG, and the marital  
community comprised thereof; FRANK GAN  
and JANE DOE GAN, and the marital  
community comprised thereof; JEFF  
BRANDEWIEDE and JANE DOE  
BRANDEWIEDE, and the marital community  
comprised thereof; and BRANDEWIEDE  
CONSTRUCTION, INC.,  
  
Defendants.

NO. 12-2-23895-2 SEA  
  
PLAINTIFF FOSS MARITIME  
COMPANY'S DISCLOSURE OF  
PRIMARY WITNESSES

COMES NOW Plaintiff Foss Maritime Company ("Foss"), and pursuant to King  
County LR 26(b), submits the following list of possible lay and expert primary witnesses who  
may be called to testify at the trial of this matter.

I. PRELIMINARY STATEMENT

1. As discovery is still ongoing and incomplete at this point, Plaintiff Foss  
Maritime Company reserves the right to supplement this list to include additional lay and/or  
expert witnesses who may be revealed by continuing discovery and investigation.

PLAINTIFF FOSS MARITIME COMPANY'S DISCLOSURE OF  
PRIMARY WITNESSES- 1

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 484 3939



1 Mr. Gan may be called to testify regarding contracts with Foss to perform work on the R/V  
2 Alucia, performance of the work under those contracts, and the conduct of Core Logistics  
3 Services giving rise to Foss's claims in this matter.

4  
5 3. Lisa M. Fernandez  
6 24218 Redmond Fall City Road  
7 Redmond, WA 98053

8 Ms. Fernandez may be called to testify regarding contracts with Foss to perform work on the  
9 R/V Alucia, performance of the work under those contracts, and the conduct of Core Logistics  
10 Services giving rise to Foss's claims in this matter.

11 4. John A. Long  
12 Attorney at Law  
13 300 NE Gilman Blvd., Suite 100  
14 Issaquah, WA 98027  
15 425-427-9660

16 Mr. Long may be called to testify regarding Core Logistics Services and transfers to and from  
17 his law firm's IOLTA account for Core Logistic Services.

18 5. Van Vorwerk  
19 c/o Garvey Schubert Barer  
20 1191 Second Avenue, Suite 1800  
21 Seattle, WA 98101

22 Mr. Vorwerk may be called to testify regarding contracts with Foss to perform work on the R/V  
23 Alucia, performance of the work under those contracts, and the conduct of Core Logistics  
24 Services giving rise to Foss's claims in this matter.

25 6. Mark Houghton  
26 c/o Garvey Schubert Barer  
1191 Second Avenue, Suite 1800

PLAINTIFF FOSS MARITIME COMPANY'S DISCLOSURE OF  
PRIMARY WITNESSES- 3

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

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Seattle, WA 98101

Mr. Houghton may be called to testify regarding contracts with Foss to perform work on the R/V Alucia, performance of the work under those contracts, and the conduct of Core Logistics Services giving rise to Foss's claims in this matter.

7. Dave Palmer  
c/o Garvey Schubert Barer  
1191 Second Avenue, Suite 1800  
Seattle, WA 98101

Mr. Palmer may be called to testify regarding contracts with Foss to perform work on the R/V Alucia, performance of the work under those contracts, and the conduct of Core Logistics Services giving rise to Foss's claims in this matter.

8. Matthew J. Callendar  
Baemarine Services Ltd  
Email: mjc@baemarine.co.uk  
US Mobile: +1 206 669 3214  
US Office: +1 206 270 4884  
UK Mobile: +44 758 555 2616

Mr. Callendar may be called to testify regarding contracts with Foss to perform work on the R/V Alucia, performance of the work under those contracts, and the conduct of Core Logistics Services giving rise to Foss's claims in this matter.

9. Steven Leonard  
Barr-Leonard Company  
17907 NE 19<sup>th</sup> Pl.  
Bellevue, WA 98008

Mr. Leonard may be called to testify regarding contracts with Foss to perform work on the R/V Alucia, performance of the work under those contracts, and the conduct of Core Logistics

PLAINTIFF FOSS MARITIME COMPANY'S DISCLOSURE OF  
PRIMARY WITNESSES- 4

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 484 3939

1 Services giving rise to Foss's claims in this matter. Mr. Leonard may be called to testify  
2 specifically on the design, installation, and performance of the HVAC system for the R/V  
3 Alucia.

4  
5 10. Michael Magill  
6 Vice-President, Fleet Services, Foss Maritime  
7 c/o Garvey Schubert Barer  
8 1191 Second Avenue, Suite 1800  
9 Seattle, WA 98101

10 Mr. Magill may be called to testify regarding contracts with Foss to perform work on the R/V  
11 Alucia, performance of the work under those contracts, and the conduct of Core Logistics  
12 Services giving rise to Foss's claims in this matter.

13 11. Ken Leroy  
14 Manager of Sales (retired), Foss Maritime  
15 c/o Garvey Schubert Barer  
16 1191 Second Avenue, Suite 1800  
17 Seattle, WA 98101

18 Mr. Leroy may be called to testify regarding contracts with Foss to perform work on the R/V  
19 Alucia, performance of the work under those contracts, and the conduct of Core Logistics  
20 Services giving rise to Foss's claims in this matter.

21 12. Sub-contractors of Core Logistic Services and Brandewiede Construction  
22 Discovery is ongoing, and Foss reserves the right call sub-contractors who performed work on  
23 the R/V Alucia to testify at trial regarding contracts with Foss to perform work on the R/V  
24 Alucia, performance of the work under those contracts, and the conduct of Core Logistics  
25 Services giving rise to Foss's claims in this matter.  
26

PLAINTIFF FOSS MARITIME COMPANY'S DISCLOSURE OF  
PRIMARY WITNESSES- 5

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
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III. EXPERT WITNESSES

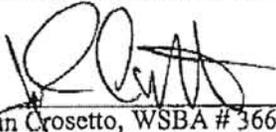
Foss has not identified an expert witness at this time but reserves the right to do so.

IV. RESERVATIONS

Plaintiff Foss Maritime Company reserves the right to amend and supplement this list to add additional witnesses, lay and expert, as may become necessary through the course of discovery. Plaintiff Foss Maritime Company reserves the right to call any witness identified and/or disclosed by any other party here. Plaintiff Foss Maritime Company reserves the right to call any witness necessary to authenticate any document or evidence. Plaintiff Foss Maritime Company further expressly reserves the right to call any lay and expert witnesses necessary to rebut the testimony of any other party's witnesses.

DATED this 1<sup>st</sup> day of July, 2013.

GARVEY SCHUBERT BARER

By   
Jenn Crosetto, WSBA # 36667  
Tyler Arnold, WSBA # 43129  
Attorneys for Plaintiff Foss Maritime Co.  
1191 Second Avenue, 18<sup>th</sup> Floor  
Seattle, Washington 98101-2939  
Phone: 206-464-3939  
Fax: 206-464-0125  
Email: [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)  
[tarnold@gsblaw.com](mailto:tarnold@gsblaw.com)

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**CERTIFICATE OF SERVICE**

I, Lisa Tardiff, certify under penalty of perjury under the laws of the State of Washington that I served PLAINTIFF FOSS MARITIME'S DISCLOSURE OF PRIMARY WITNESSES on the person(s) listed below in the manner shown:

John R. Welch  
Carney Badley Spellman  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010

- By US Mail, first class
- By Legal Messenger
- By Email

DATED this 1<sup>st</sup> day of July, 2013, at Seattle, Washington .

  
 Lisa Tardiff, Legal Assistant

PLAINTIFF FOSS MARITIME COMPANY'S DISCLOSURE OF  
PRIMARY WITNESSES- 7

GARVEY SCHUBERT BARER  
 A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
 eighteenth floor  
 1191 second avenue  
 seattle, washington 98101-2939  
 206 464 3939

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Carney Badley Spellman  
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8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
9 IN AND FOR THE COUNTY OF KING

10 FOSS MARITIME COMPANY,

11 Plaintiff,

12 v.

13 CORE LOGISTIC SERVICES; LISA LONG  
14 and JOHN DOE LONG, and the marital  
15 community comprised thereof; FRANK GAN  
16 and JANE DOE GAN, and the marital  
17 community comprised thereof; JEFF  
18 BRANDEWIEDE and JANE DOE  
19 BRANDEWIEDE, and the marital community  
20 comprised thereof; and BRANDEWIEDE  
21 CONSTRUCTION, INC.,

22 Defendants.

NO. 12-2-23895-2 SEA

PLAINTIFF FOSS MARITIME  
COMPANY'S DISCLOSURE OF  
PRIMARY WITNESSES

23 COMES NOW Plaintiff Foss Maritime Company ("Foss"), and pursuant to King  
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25 may be called to testify at the trial of this matter.

26 I. PRELIMINARY STATEMENT

1. As discovery is still ongoing and incomplete at this point, Plaintiff Foss  
Maritime Company reserves the right to supplement this list to include additional lay and/or  
expert witnesses who may be revealed by continuing discovery and investigation.

PLAINTIFF FOSS MARITIME COMPANY'S DISCLOSURE OF  
PRIMARY WITNESSES- 1

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

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1 Mr. Gan may be called to testify regarding contracts with Foss to perform work on the R/V  
2 Alucia, performance of the work under those contracts, and the conduct of Core Logistics  
3 Services giving rise to Foss's claims in this matter.

4  
5 3. Lisa M. Fernandez  
6 24218 Redmond Fall City Road  
7 Redmond, WA 98053

8 Ms. Fernandez may be called to testify regarding contracts with Foss to perform work on the  
9 R/V Alucia, performance of the work under those contracts, and the conduct of Core Logistics  
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11 4. John A. Long  
12 Attorney at Law  
13 300 NE Gilman Blvd., Suite 100  
14 Issaquah, WA 98027  
15 425-427-9660

16 Mr. Long may be called to testify regarding Core Logistics Services and transfers to and from  
17 his law firm's IOLTA account for Core Logistic Services.

18 5. Van Vorwerk  
19 c/o Garvey Schubert Barer  
20 1191 Second Avenue, Suite 1800  
21 Seattle, WA 98101

22 Mr. Vorwerk may be called to testify regarding contracts with Foss to perform work on the R/V  
23 Alucia, performance of the work under those contracts, and the conduct of Core Logistics  
24 Services giving rise to Foss's claims in this matter.

25 6. Mark Houghton  
26 c/o Garvey Schubert Barer  
1191 Second Avenue, Suite 1800

PLAINTIFF FOSS MARITIME COMPANY'S DISCLOSURE OF  
PRIMARY WITNESSES- 3

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Seattle, WA 98101

Mr. Houghton may be called to testify regarding contracts with Foss to perform work on the R/V Alucia, performance of the work under those contracts, and the conduct of Core Logistics Services giving rise to Foss's claims in this matter.

7. Dave Palmer  
c/o Garvey Schubert Barer  
1191 Second Avenue, Suite 1800  
Seattle, WA 98101

Mr. Palmer may be called to testify regarding contracts with Foss to perform work on the R/V Alucia, performance of the work under those contracts, and the conduct of Core Logistics Services giving rise to Foss's claims in this matter.

8. Matthew J. Callendar  
Baemarine Services Ltd  
Email: mjc@baemarine.co.uk  
US Mobile: +1 206 669 3214  
US Office: +1 206 270 4884  
UK Mobile: +44 758 555 2616

Mr. Callendar may be called to testify regarding contracts with Foss to perform work on the R/V Alucia, performance of the work under those contracts, and the conduct of Core Logistics Services giving rise to Foss's claims in this matter.

9. Steven Leonard  
Barr-Leonard Company  
17907 NE 19<sup>th</sup> Pl.  
Bellevue, WA 98008

Mr. Leonard may be called to testify regarding contracts with Foss to perform work on the R/V Alucia, performance of the work under those contracts, and the conduct of Core Logistics

PLAINTIFF FOSS MARITIME COMPANY'S DISCLOSURE OF  
PRIMARY WITNESSES- 4

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 484 3939

1 Services giving rise to Foss's claims in this matter. Mr. Leonard may be called to testify  
2 specifically on the design, installation, and performance of the HVAC system for the R/V  
3 Alucia.

4  
5 10. Michael Magill  
6 Vice-President, Fleet Services, Foss Maritime  
7 c/o Garvey Schubert Barer  
8 1191 Second Avenue, Suite 1800  
9 Seattle, WA 98101

10 Mr. Magill may be called to testify regarding contracts with Foss to perform work on the R/V  
11 Alucia, performance of the work under those contracts, and the conduct of Core Logistics  
12 Services giving rise to Foss's claims in this matter.

13 11. Ken Leroy  
14 Manager of Sales (retired), Foss Maritime  
15 c/o Garvey Schubert Barer  
16 1191 Second Avenue, Suite 1800  
17 Seattle, WA 98101

18 Mr. Leroy may be called to testify regarding contracts with Foss to perform work on the R/V  
19 Alucia, performance of the work under those contracts, and the conduct of Core Logistics  
20 Services giving rise to Foss's claims in this matter.

21 12. Sub-contractors of Core Logistic Services and Brandewiede Construction  
22 Discovery is ongoing, and Foss reserves the right call sub-contractors who performed work on  
23 the R/V Alucia to testify at trial regarding contracts with Foss to perform work on the R/V  
24 Alucia, performance of the work under those contracts, and the conduct of Core Logistics  
25 Services giving rise to Foss's claims in this matter.  
26

PLAINTIFF FOSS MARITIME COMPANY'S DISCLOSURE OF  
PRIMARY WITNESSES- 5

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 484 3939

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III. EXPERT WITNESSES

Foss has not identified an expert witness at this time but reserves the right to do so.

IV. RESERVATIONS

Plaintiff Foss Maritime Company reserves the right to amend and supplement this list to add additional witnesses, lay and expert, as may become necessary through the course of discovery. Plaintiff Foss Maritime Company reserves the right to call any witness identified and/or disclosed by any other party here. Plaintiff Foss Maritime Company reserves the right to call any witness necessary to authenticate any document or evidence. Plaintiff Foss Maritime Company further expressly reserves the right to call any lay and expert witnesses necessary to rebut the testimony of any other party's witnesses.

DATED this 1<sup>st</sup> day of July, 2013.

GARVEY SCHUBERT BARER

By   
John Crosetto, WSBA # 36667  
Tyler Arnold, WSBA # 43129  
Attorneys for Plaintiff Foss Maritime Co.  
1191 Second Avenue, 18<sup>th</sup> Floor  
Seattle, Washington 98101-2939  
Phone: 206-464-3939  
Fax: 206-464-0125  
Email: [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)  
[tarnold@gsblaw.com](mailto:tarnold@gsblaw.com)

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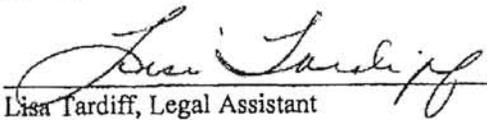
**CERTIFICATE OF SERVICE**

I, Lisa Tardiff, certify under penalty of perjury under the laws of the State of Washington that I served PLAINTIFF FOSS MARITIME'S DISCLOSURE OF PRIMARY WITNESSES on the person(s) listed below in the manner shown:

John R. Welch  
Carney Badley Spellman  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010

- By US Mail, first class
- By Legal Messenger
- By Email

DATED this 1<sup>st</sup> day of July, 2013, at Seattle, Washington .

  
Lisa Tardiff, Legal Assistant

PLAINTIFF FOSS MARITIME COMPANY'S DISCLOSURE OF  
PRIMARY WITNESSES- 7

SEA\_DOCS:1107461.1 [03404.05500]

GARVEY SCHUBERT BARER  
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eighteenth floor  
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seattle, washington 98101-3939  
206 464 3939

Foss v. Brandewiede  
Motion to Disqualify  
Decl. of J. Welch

**Exhibit B**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

FOSS MARITIME COMPANY,

Plaintiff,

v.

CORE LOGISTIC SERVICES; LISA LONG  
and JOHN DOE LONG, and the marital  
community comprised thereof; FRANK GAN  
and JANE DOE GAN, and the marital  
community comprised thereof; JEFF  
BRANDEWIEDE and JANE DOE  
BRANDEWIEDE, and the marital community  
comprised thereof; and BRANDEWIEDE  
CONSTRUCTION, INC.,

Defendants.

NO. 12-2-23895-2 SEA

PLAINTIFF'S ANSWERS AND  
RESPONSES TO DEFENDANTS  
BRANDEWIEDE AND BRANDEWIEDE  
CONSTRUCTION, INC.'S FIRST  
INTERROGATORIES AND REQUESTS  
FOR PRODUCTION

TO: FOSS MARITIME COMPANY,

AND TO: Foss Maritime Company's attorneys at Garvey Schubert Barer, John Crosetto  
and Tyler W. Arnold.

Pursuant to Rules 33 and 34, Plaintiff Foss Maritime Company ("Foss") respond to  
First Interrogatories and Requests for Production ("First Discovery") as follows.

PLAINTIFF'S ANSWERS AND RESPONSES TO DEFENDANTS  
BRANDEWIEDE AND BRANDEWIEDE CONSTRUCTION, INC.'S  
FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION -  
1

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

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## OBJECTIONS

In addition to the specific objections set forth separately in response to each interrogatory, Foss objects generally to each interrogatory and request for production on the following grounds, whether or not the objection is specifically stated.

- 1 Foss objects to the First Discovery "Instructions and Definitions" to the extent that they impose on Foss a burden of response beyond that required by Rules 26, 33, 34 and applicable Local Rules. Foss declines to comply with such instructions, except to the extent to which they are consistent with those rules.
2. Foss objects to the First Discovery to the extent that it seeks disclosure of information protected by the attorney/client, work product, or other applicable privileges and declines to produce documents containing such information. Foss further declines to produce documents containing confidential information pending entry of a protective order agreed to by the parties.
3. Foss objects to the First Discovery to the extent that it seeks the disclosure of information already in the possession, custody, or control of Defendants, as being overly broad, unduly burdensome and expensive, and not consistent with the Rules of Civil Procedure.
4. Foss objects to the First Discovery to the extent that it seeks facts, documents, or information already known and equally available to Defendants as being unduly burdensome.
5. Foss objects to the First Discovery to the extent that it seeks information or documents that are beyond the control of Foss, as being beyond the scope of the Rules of Civil Procedure.
6. To the extent that the First Discovery calls for documents or information originated by persons or entities other than Foss or now in the possession of persons or entities other than Foss, Foss objects to each such request on the ground that it is unduly burdensome

PLAINTIFF'S ANSWERS AND RESPONSES TO DEFENDANT'S  
BRANDEWIEDE AND BRANDEWIEDE CONSTRUCTION, INC.'S  
FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION -  
2

GARVEY SCHUBERT BARER  
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eighteenth floor  
1191 Second Avenue  
Seattle, Washington 98101-2939  
206 464 3939

1 and expensive, overly broad and oppressive, and that each such request is more properly  
2 directed to such other parties.  
3 7. Discovery is ongoing, and additional objections may be discovered that are not set forth  
4 herein. Foss reserves the right to supplement, amend, revise, change, correct or clarify  
5 its answers, responses, and objections, based on continued discovery and investigation.  
6 Foss also reserves the right to object to the use of any responses or the subject matter  
7 thereof in this action, or in any other proceeding.

8  
9  
10 **INTERROGATORY NO. 1:** Identify all persons who prepared, assisted with, or furnished  
11 information used in the preparation of, the answers to these interrogatories and requests for  
12 production.

13 **ANSWER:**  
14 Foss objects to this request to the extent it seeks information protected by attorney-client  
15 privilege and the work product doctrine. Without waiving these objections,  
16 David Palmer, Foss Maritime Company  
17 c/o John Crosetto  
18 Garvey Schubert Barer  
19 1191 Second Ave.  
20 Seattle, WA 98101  
21 (206) 464-3939  
22 Van Vorwerk  
23 Mark Houghton

24 **INTERROGATORY NO. 2:** Identify each individual likely to have discoverable information  
25 —along with the subjects of that information and a summary of the information known to them  
26 —relative to the allegations and claims asserted in your Complaint and any defenses that you  
may have to the Counterclaim asserted by Brandewiede.

27 **ANSWER:**  
28 Foss objects to this request as vague and unduly burdensome. Without waiving these  
29 objections, the following individuals are likely to have information regarding work performed  
30 on the R/V Alucia and the relationship between the defendants named in this lawsuit.  
31 Frank Gan

32 PLAINTIFF'S ANSWERS AND RESPONSES TO DEFENDANT'S  
33 BRANDEWIEDE AND BRANDEWIEDE CONSTRUCTION, INC.'S  
34 FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION -  
35 3

GARVEY SCHUBERT BARER  
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eighteenth floor  
1191 second avenue  
Seattle, Washington 98101-2939  
206 464 3939

1 Lisa Long (aka Lisa Fernandez; aka Lisa Tobolski)

2 Jeff Brandewiede

3 Matthew Callender

4 Jim Cutler

5 Bruce Anderson

6 Van Vorwerk

7 David Palmer, Foss Maritime Company  
8 c/o John Crosetto  
9 Garvey Schubert Barer  
10 1191 Second Ave.  
11 Seattle, WA 98101  
12 (206) 464-3939

13 Mark Houghton

14 Mike Magill  
15 c/o John Crosetto  
16 Garvey Schubert Barer  
17 1191 Second Ave.  
18 Seattle, WA 98101  
19 (206) 464-3939

20 Various subcontractors on the Alucia project may also have discoverable information.  
21 Discovery is ongoing and Foss reserves the right to supplement this response.

22 **REQUEST FOR PRODUCTION NO. 1:** Please produce any and all documents identified or  
23 relied upon in answer to Interrogatory No.2, above.

24 **RESPONSE:**

25 Subject to the general objections above, see attached documents.

26 **INTERROGATORY NO. 3:** Identify all documents, regardless of how such documents are  
27 stored, and other tangible things that you have in your possession, custody, or control that you  
28 intend to use to support each of the claims asserted in your Complaint and any defenses that  
29 you may have to the Counterclaim asserted by Brandewiede.

30 **ANSWER:**

31 PLAINTIFF'S ANSWERS AND RESPONSES TO DEFENDANTS  
32 BRANDEWIEDE AND BRANDEWIEDE CONSTRUCTION, INC.'S  
33 FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION -  
34 4

35 GARVEY SCHUBERT BARER  
36 A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
37 *eighteenth floor*  
38 *1191 second avenue*  
39 *seattle, washington 98101-2939*  
40 *206 464 3939*

1 Foss objects to Interrogatory No. 3 as vague, overly broad, and unduly burdensome. Foss is not  
2 required to put on its entire case in advance of trial. Subject to the specific and general  
3 objections above, Foss identifies each and every document provided in response to  
4 Brandewiede and Brandewiede Construction, Inc.'s First Discovery.

5 **REQUEST FOR PRODUCTION NO. 2:** Please produce any and all documents identified or  
6 relied upon in answer to Interrogatory No.3, above.

7 **RESPONSE:**

8 See Answer to Interrogatory No. 3.

9  
10 **INTERROGATORY NO. 4:** Regarding your allegation that "Long, Gan, and Brandewiede  
11 were partners in Core Logistic Services, please identify:

- 12 a) All persons with any knowledge or information that would support and/or  
13 contradict the allegation;  
14 b) All facts known by such persons identified above that would support and/or  
15 contradict the allegation; and  
16 c) All documents known to you that support and/or contradict the allegation.

17 **ANSWER:**

18 Foss objects to Interrogatory No. 4 to the extent its discrete subparts constitute multiple  
19 interrogatories.

20 a) See Answer to Interrogatory 2.

21 b) The individuals identified above are likely to have knowledge regarding the work  
22 performed on the R/V Alucia and the relationship between the defendants named in this  
23 lawsuit.

24 c) Foss identifies each and every document provided in response to Brandewiede and  
25 Brandewiede Construction, Inc.'s First Discovery.

26 **REQUEST FOR PRODUCTION NO. 3:** Please produce any and all documents identified or  
relied upon in answer to Interrogatory No.4, above.

**RESPONSE:**

See Answer to Interrogatory No. 4.

PLAINTIFF'S ANSWERS AND RESPONSES TO DEFENDANTS  
BRANDEWIEDE AND BRANDEWIEDE CONSTRUCTION, INC.'S  
FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION -  
5

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GARVEY SCHUBERT BARER  
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eighteenth floor  
1197 second avenue  
seattle, washington 98101-2939  
206 464 3939

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**INTERROGATORY NO. 5:** Provide a computation of damages claimed by you against Brandewiede for each claim asserted against Brandewiede.

**ANSWER:**

Foss objects to Interrogatory No. 5 as premature, as discovery is ongoing. Foss incorporates by reference the damages calculation already provided in its Complaint.

**REQUEST FOR PRODUCTION NO. 4:** Please produce any and all documents identified or relied upon in answer to Interrogatory No. 5, above, including materials bearing on the nature and extent of damages claimed by you in this litigation.

**RESPONSE:**

Foss objects to the extent this request seeks information protected by the work product doctrine or attorney client privilege, and objects to the production of confidential information prior to the parties entering an agreed protective order. Subject to the above general and specific objections, see attached documents.

**REQUEST FOR PRODUCTION NO. 5:** Please produce any and all documents relating to contracts by or between Foss Maritime Company and any other person or entity relative to repairs and upgrade work relative to the R/V Alucia, including, but not limited to your contracts with Beta Marine Limited, Core Logistics Services and Brandewiede Construction, Inc. Such documents shall include, but not be limited to, proposals (whether or not such proposals were accepted), bids, estimates, draft contracts, purchase orders, invoices, payment receipts, and cancelled checks.

**RESPONSE:**

Foss objects to Request No. 5 as overly broad, unduly burdensome, and not reasonably calculated to lead to discoverable information. Subject to the objections above, see attached documents.

**REQUEST FOR PRODUCTION NO. 6:** Please produce any and all documents relating in any way to your contracts and work relative to the R/V Alucia, including, but not limited to design documents, engineering documents, correspondence, e-mail, memorandum, summaries, notes, progress reports, daily reports, schedules, time sheets and cost reports.

**RESPONSE:**

Foss objects to Request No. 6 as redundant, overly broad, unduly burdensome, and not reasonably calculated to lead to discoverable information. Subject to the objections above, see attached documents.

1 **INTERROGATORY NO. 6:** With respect to each person whom you expect or intend to call  
2 as an expert witness at trial in this action, please:

- 3 a. State such person's name, address, and telephone number;  
4 b. State such person's profession or occupation;  
5 c. State such person's specialty or other specific field of expertise;  
6 d. State the name and address of such person's employer;  
7 e. Describe briefly such person's education, training and experience, and state  
8 whether such person has a resume or curriculum vitae;  
9 f. Identify the subject matter or areas on which such person will or is expected to  
10 testify;  
11 g. Identify all documents or writings supplied or made available to such person;  
12 h. State the substance of the facts and opinions to which such person will or is  
13 expected to testify and summarize the grounds for each such opinion; and  
14 i. Identify by date, title, addressee and subject each and every written report or  
15 other document made by such person in connection with work performed on  
16 your behalf in this action and identify the present custodian of all such reports or  
17 other documents.

18 **ANSWER:**

19 Foss objects to Interrogatory No. 6 as premature. Foss has not identified any testifying experts  
20 at this time.

21 **REQUEST FOR PRODUCTION NO. 7:** Please produce any and all documents identified or  
22 relied upon in answer to Interrogatory No.6, above.

23 **RESPONSE:**

24 See Answer to Interrogatory No. 6.

25 **INTERROGATORY NO. 7:** State the basis for the following contentions in your Complaint  
26 as they relate to Brandewiede, including but not limited to, the identity of all persons,  
documents, communications, and other evidence, including, without limitation, contract  
clauses, that support the contentions:

- 27 a. Paragraphs 3.3.-3.7 of the Complaint: Regarding Long's Proposals to Foss to  
28 perform work on the R/V Alucia that you contend were submitted by Long on  
29 behalf of other Defendants.  
30 b. Paragraph 3.8-3.9 of the Complaint: Regarding Foss' "Purchase Orders" that it  
31 alleges were sent to the Defendants.  
32 c. Paragraph 3.9 of the Complaint: Regarding Foss' allegations of its agreement to  
33 pay Defendants the "Contract Price."  
34 d. Paragraph 3.10 of the Complaint: Regarding Foss' allegation of expected and/or  
35 factored in 15% profit margin on the Purchase Orders

36  
PLAINTIFF'S ANSWERS AND RESPONSES TO DEFENDANTS  
BRANDEWIEDE AND BRANDEWIEDE CONSTRUCTION, INC.'S  
FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION -  
7

GARVEY SCHUBERT BARER  
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eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

- 1 e. Paragraphs 3.11-3.13 of the Complaint: Regarding Foss' allegation of
- 2 Defendants' acceptance of the Purchase Orders.
- 3 f. Paragraph 3.16 of the Complaint: Regarding Foss' allegation of progress
- 4 payments to Defendants.
- 5 g. Paragraphs 3.17-3.19 of the Complaint: Regarding Foss' allegation that
- 6 Defendants stopped performing the work.
- 7 h. Paragraph 3.20 of the Complaint: Regarding Foss' allegation of subcontracts
- 8 entered into directly by Foss with subcontractors hired by Defendants.
- 9 i. Paragraph 3.21 of the Complaint: Regarding Foss' allegation that some or all of
- 10 Defendants' work that did not meet standards in the Purchase Orders and that
- 11 Foss had to repair and/or redo certain portions of said work.
- 12 j. Paragraph 3.22 of the Complaint: Regarding Foss' allegation that Defendants
- 13 did not use some or all of Foss' down payment and progress payments to
- 14 purchase supplies and pay subcontractors.
- 15 k. Paragraphs 4.1-4.11 of the Complaint: Regarding Foss' allegation that
- 16 Defendants breached their agreement with Foss.
- 17 l. Paragraphs 5.1-5.9 of the Complaint: Regarding Foss' allegation that
- 18 Defendants have been unjustly enriched and that they are jointly and severally
- 19 liable to Foss for unjust enrichment.
- 20 m. Paragraphs 6.1-6.11 of the Complaint: Regarding Foss' allegation that it has
- 21 been defrauded by Defendants.

22 **ANSWER:**

23 Foss objects to Interrogatory No. 7 to the extent its discrete subparts constitute multiple  
 24 interrogatories and exceed the number of Interrogatories allowed under the rules. Subject to  
 25 the specific and general objections above, see Answers to Interrogatories No. 2 to 6.

26 **REQUEST FOR PRODUCTION NO. 8:** Please produce any and all documents identified or  
 relied upon in answer to Interrogatory No. 6(a)-(m), above.

**RESPONSE:**

See Responses to Requests No. 1 to 8.

**REQUEST FOR PRODUCTION NO. 9:** Please produce any insurance agreement under  
 which an insurance business may provide coverage for any or all of the claims made by you in  
 this litigation.

**RESPONSE:**

None.

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DATED this 11th day of September, 2012.

CARNEY BADLEY SPELLMAN, P.S.

By \_\_\_\_\_  
John R. Welch, WSBA #26649  
Christine Sanders, WSBA #40736  
Attorneys for Jeff Brandewiede, Melanie  
O'Cain Brandewiede and Brandewiede  
Construction, Inc.

PLAINTIFF'S ANSWERS AND RESPONSES TO DEFENDANT'S  
BRANDEWIEDE AND BRANDEWIEDE CONSTRUCTION, INC.'S  
FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION -  
9

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
119 second avenue  
seattle, washington 98101-2939  
206 464 3939

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1 STATE OF WASHINGTON )  
2 COUNTY OF KING ) ss.

3 \_\_\_\_\_, being first duly sworn, upon oath deposes and says: I have  
4 read the within and foregoing Defendants BRANDEWIEDE AND BRANDEWIEDE  
5 CONSTRUCTION'S First Interrogatories and Request for Production of Documents to  
6 Plaintiffs and the Answers thereto, know the contents thereof, and believe the same to be true.

7 IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the  
8 day and year first above written.

9 \_\_\_\_\_ (Print Name)  
10 Notary Public in and for the State of  
11 Washington, residing at \_\_\_\_\_  
12 My Commission Expires: \_\_\_\_\_

13 Pursuant to CR 26(g), I certify that I have read the foregoing answers, responses, or objections,  
14 and to the best of my knowledge, information and belief, formed after a reasonable inquiry,  
15 such answers, responses or objections are (1) consistent with the Rules of Civil Procedure and  
16 warranted by existing law or a good faith argument for the extension, modification or reversal  
17 of existing law; (2) not interposed for any improper purpose, such as to harass or to cause  
18 unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonably or  
19 unduly burdensome or expensive, given the needs of the case, the discovery already had in the  
20 case, the amount in controversy, and the importance of the issues at stake in the litigation.

21 DATED this 12<sup>th</sup> day of October, 2012.

22 GARVEY SCHUBERT BARER

23 By   
24 John B. Crosetto, WSBA #36667  
25 Tyler W. Arnold, WSBA #43129  
26 Attorneys for Plaintiff Foss Maritime  
Company

PLAINTIFF'S ANSWERS AND RESPONSES TO DEFENDANTS  
BRANDEWIEDE AND BRANDEWIEDE CONSTRUCTION, INC.'S  
FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION -  
10

GARVEY SCHUBERT BARER  
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206 224 3939

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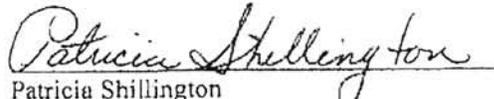
**CERTIFICATE OF SERVICE**

I, Patricia Shillington, certify under penalty of perjury under the laws of the State of Washington that I caused to be served **PLAINTIFF'S ANSWERS AND RESPONSES TO DEFENDANT BRANDEWIEDE CONSTRUCTION, INC.'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION** on the persons listed below in the manner shown:

John R. Welch  
Camey Badley Spellman  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010

- By US Mail, first class
- By Legal Messenger
- By Email

DATED this 12<sup>th</sup> day of October, 2012, at Seattle, Washington .

  
Patricia Shillington

PLAINTIFF'S ANSWERS AND RESPONSES TO DEFENDANT'S  
BRANDEWIEDE AND BRANDEWIEDE CONSTRUCTION, INC.'S  
FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION -  
11

GARVEY SCHUBERT BARER  
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eighteenth floor  
1101 second avenue  
seattle, washington 98101-2939  
206 464 3939

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SEATTLE OFFICE  
eighteenth floor  
second & space building  
1191 second avenue  
seattle, washington 98101-2939  
TEL 206 461 3939 FAX 206 461 0125

OTHER OFFICES  
beijing china  
new york new york  
portland, oregon  
washington, d.c.  
GSBLAW.COM

GARVEY SCHUBERT BARER

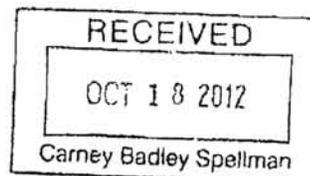
## MEMORANDUM OF TRANSMITTAL

TO: John R. Welch  
Carney Badley Spellman  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010

FROM: Joni Lagenour

DATE: October 17, 2012

RE: *Foss Maritime v. Core Logistic Services*



Enclosed please find the original signed certification page from Foss' Answers and Responses to Brandewiede's First Interrogatories and Requests for Production.

Garvey Schubert Barer

By

A handwritten signature in cursive script, appearing to read "Joni L. Lagenour".

Joni L. Lagenour  
Legal Assistant to John B. Crosetto

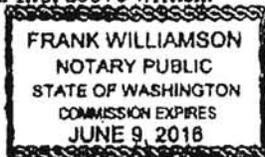
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STATE OF WASHINGTON )  
COUNTY OF KING ) ss.

Mike Magill, being first duly sworn, upon oath deposes and says: I have read the within and foregoing Defendants BRANDEWIEDE AND BRANDEWIEDE CONSTRUCTION'S First Interrogatories and Request for Production of Documents to Plaintiffs and the Answers thereto, know the contents thereof, and believe the same to be true.

Michael Magill

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Frank William  
Frank Williamson (Print Name)  
Notary Public in and for the State of Washington, residing at Seattle, WA  
My Commission Expires: \_\_\_\_\_

Pursuant to CR 26(g), I certify that I have read the foregoing answers, responses, or objections, and to the best of my knowledge, information and belief, formed after a reasonable inquiry, such answers, responses or objections are (1) consistent with the Rules of Civil Procedure and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonably or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

DATED this \_\_\_ day of \_\_\_\_\_, 2012.

GARVEY SCHUBERT BARER

By \_\_\_\_\_  
John B. Crosetto, WSBA #36667  
Tyler W. Arnold, WSBA #43129  
Attorneys for Plaintiff Foss Maritime Company

PLAINTIFF'S ANSWERS AND RESPONSES TO DEFENDANTS  
BRANDEWIEDE AND BRANDEWIEDE CONSTRUCTION, INC.'S  
FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION.  
10

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

To	Subject	Sent	Cat...
<b>Date: Yesterday</b>			
brandewiede...	RE: read this	Tue 11/26/2013 7:42 PM	
<b>Date: Monday</b>			
Marie Jensen ...	pldg Brandewiede Trial Brief ('ni045h45m.002').docx	Mon 11/25/2013 4:07 PM	
<b>Date: Last Week</b>			
John Crosetto	Re: Vorwerk Emails	Fri 11/22/2013 6:14 PM	
John Crosetto	Re: Vorwerk Emails	Fri 11/22/2013 4:15 PM	
John Crosetto	Re: Vorwerk Emails	Fri 11/22/2013 11:30 AM	
John Crosetto	Re: Vorwerk Emails	Tue 11/19/2013 12:00 PM	
<b>Date: Two Weeks Ago</b>			
Terry, Jay, Ke...	Johansen	Thu 11/14/2013 12:45 PM	
Welch, John	Motion for Injunctive Relief ('kf16dp10') (3).doc	Thu 11/14/2013 12:38 PM	
Welch, John	Declaration of Debbie Welch In Support of Motion for Preliminary Injunction ('kf17a...	Thu 11/14/2013 12:37 PM	
Welch, John	Final Declaration of Debbie Welch ('kf15dp14').doc	Thu 11/14/2013 12:34 PM	
Jensen, Marie	Re: Morning	Tue 11/12/2013 8:24 AM	
Jensen, Marie	Morning	Tue 11/12/2013 8:22 AM	
<b>Date: Three Weeks Ago</b>			
McDowall, John	Re: 13-34015-elp11 Ch11 Notice of Hearing	Mon 11/4/2013 10:16 PM	
Marie Jensen ...	pldg written request for hearing re objection to claim ('ok045m52p2').docx	Mon 11/4/2013 6:53 PM	
<b>Date: Last Month</b>			
Marie Wester...	RE: Mmmmmmm	Thu 10/31/2013 4:25 PM	
Unger, Jacque...	Fwd: Just Released: Business Law Today - October 2013	Thu 10/24/2013 8:50 PM	
Unti, Dan	Itr to Joseph Vance re Millennium Bulk Terminals - Longview LLC ('oj226h737x').docx	Thu 10/24/2013 11:53 AM	
'V V V'	RE: Foss - Brandewiede	Thu 10/24/2013 10:19 AM	
V V V	Re: Foss - Brandewiede	Thu 10/24/2013 9:56 AM	
Jensen, Marie	Re: Foss - Brandewiede	Thu 10/24/2013 8:43 AM	
scott@doveta...	FW: Western Sazerac LLC 13-17464-MLB Ch 11 Order Closing Dismissed Case	Wed 10/23/2013 3:37 PM	
mwestermeler...	FW: Vandenberg Johnson	Tue 10/22/2013 12:31 PM	
Jensen, Marie	RE: MMFS Aggreko	Mon 10/14/2013 10:28 AM	
'Jeff Brandewi...	RE: Foss	Fri 10/11/2013 8:49 AM	
jeff brandewie...	Foss	Fri 10/11/2013 8:41 AM	
Jensen, Marie	RE: Foss - Brandewiede	Mon 10/7/2013 12:58 PM	
Marie Jensen ...	FW: Western Sazerac LLC 13-17464-MLB Ch 11 9NC Certificate of Notice	Fri 10/4/2013 2:28 PM	
'Jeff Brandewi...	RE: update	Fri 10/4/2013 2:28 PM	
Adam Turner ...	FW: Valuation Expert	Fri 10/4/2013 2:26 PM	
'Gregory S. Po...	RE: Valuation Expert	Fri 10/4/2013 2:25 PM	
Michael FitzSi...	Form 17	Fri 10/4/2013 12:42 PM	
McDowall, John	RE: 13-34015-elp11 Ch11 Objection to Claim	Fri 10/4/2013 9:51 AM	
Brandewiede...	RE: Foss - Brandewiede	Tue 10/1/2013 8:36 AM	
Welch, John	FW: Alucia Final Invoices	Tue 10/1/2013 6:39 AM	
<b>Date: Older</b>			
jeff brandewie...	FW: Foss - Brandewiede	Mon 9/30/2013 4:08 PM	
'tripleveew@y...	Foss - Brandewiede	Mon 9/30/2013 4:03 PM	
Marie Jensen ...	FW: Voice Mail Message	Mon 9/30/2013 2:18 PM	
'Jeff Brandewi...	RE: R/V ALUCIA - Foss	Mon 9/30/2013 11:23 AM	
Welch, John		Mon 9/30/2013 11:18 AM	
Jensen, Marie	RE: Van Vorwerk	Wed 9/25/2013 2:47 PM	
Marie Jensen ...	pldg Subpoena to van vorerk ('oi204t52x6').docx	Tue 9/24/2013 1:31 PM	
jeff brandewie...	Foss	Mon 9/23/2013 4:41 PM	
'Jeff Brandewi...	RE: R/V ALUCIA - Foss	Mon 9/23/2013 2:41 PM	
Jensen, Marie	RE: Western Sazerac LLC 13-17464-MLB Ch 11 Notice to Court of Intent to Argue	Mon 9/23/2013 12:53 PM	
Marie Jensen ...	FW: Western Sazerac LLC 13-17464-MLB Ch 11 Notice to Court of Intent to Argue	Mon 9/23/2013 11:58 AM	

EA	To	Subject	Sent	Cat...
	'Jeff Brandewi...	RE: R/V ALUCIA - Foss	Fri 9/20/2013 4:59 PM	
	'John Crosetto'	RE: Foss v. Brandewiede	Fri 9/20/2013 3:25 PM	
	Marie Jensen ...	Brandewiede	Fri 9/20/2013 1:29 PM	
	jeff brandewie...	FW: Foss v. Brandewiede	Fri 9/20/2013 1:25 PM	
	'John Crosetto'	RE: Foss v. Brandewiede	Thu 9/19/2013 12:12 PM	
	'jeff brandewi...	RE: info. you requested	Tue 9/17/2013 10:34 PM	
	Marie Jensen ...	FW: Warranty Exclusions - Washington	Mon 9/16/2013 4:37 PM	
	Marie Jensen ...	FW: Carl Nelson v. Expert Drywall, Inc. (WA Asbestos); King County Cause No. 13-2-...	Wed 9/4/2013 11:50 AM	
	McDowall, Jo...	FW: Robinson BK - Proposed Order	Thu 8/22/2013 11:08 AM	
	McDowall, John	RE: 13-34015-elp11 Ch11 Transcript	Thu 8/22/2013 10:32 AM	
	'Margaret King'	RE: photos	Tue 8/20/2013 11:14 AM	
	Marie Jensen ...	FW: 13-34015-elp11 Ch11 Order on Application to Employ	Wed 8/14/2013 11:02 AM	
	Marie Jensen ...	FW: 13-34015-elp11 Ch11 Notice of Requirement to Serve Documents	Wed 8/14/2013 11:02 AM	
	Marie Jensen ...	FW: 13-34015-elp11 Ch11 Memorandum	Mon 8/12/2013 10:04 AM	
	Marie Jensen ...	FW: 13-34015-elp11 Ch11 Memorandum	Mon 8/12/2013 10:02 AM	
	Marie Jensen ...	FW: 13-34015-elp11 Ch11 Request to Appear by Telephone	Fri 8/9/2013 11:31 AM	
	Welch, John	Kittitas County - Bill Grady	Fri 7/19/2013 4:28 AM	
	Marty Holber...	FW: Carl Nelson v. Expert Drywall, Inc. (WA Asbestos); King County Cause No. 13-2-...	Mon 7/8/2013 11:43 AM	
	'Chris Vondra...	RE: the next week or two in your basement	Mon 7/1/2013 5:49 PM	
	'jeff brandewi...	Foss:	Mon 7/1/2013 10:11 AM	
	Welch, John	FW: Robinson Group - Bankruptcy Petition and First Day Motions [WVOV-PDX.FID78...	Mon 7/1/2013 2:43 AM	
	'Amy Summers'	RE: Team Photo and baseball camp	Tue 6/25/2013 11:36 AM	
	outlawcharlie...	FW: Team Photo and baseball camp	Tue 6/25/2013 11:32 AM	
	'Marie Wester...	RE: Tomorrow's game	Tue 6/18/2013 12:01 PM	
	Marie Wester...	Fwd: Game tomorrow & celebration -- please respond	Sun 6/9/2013 9:40 PM	
	'Winship, Scott'	RE: Proposed Stip & Order	Thu 5/30/2013 9:52 AM	
	Marie Jensen ...	FW: Proposed Stip & Order	Thu 5/30/2013 9:51 AM	
	'Winship, Scott'	RE: Proposed Stip & Order	Fri 5/24/2013 12:33 PM	
	mwestermeier...	FW: All Attorney Dinner with spouses/significant others	Wed 5/22/2013 3:20 PM	
	mwestermeier...	FW: STRIKE OUT HUNGER THIS WEEKEND	Thu 5/16/2013 8:10 AM	
	Marie Jensen ...	FW: Reeve v. Expert Drywall, Inc. - MSJ Denied	Mon 5/13/2013 9:16 AM	
	Marie Jensen ...	FW: Reeve v. Expert Drywall, Inc. - MSJ Denied - RESPONSE NEEDED	Mon 5/13/2013 9:15 AM	
	Marie Jensen ...	FW: Reeve v. Expert Drywall, Inc. - MSJ Denied - RESPONSE NEEDED	Mon 5/13/2013 9:15 AM	
	Bishop, Allen	RE: vanguard	Fri 5/10/2013 12:11 PM	
	Bishop, Allen	vanguard	Fri 5/10/2013 11:49 AM	
	Marie Jensen ...	Heritage	Fri 5/10/2013 11:25 AM	
	grace.pleasan...	Proposed Stip & Order	Fri 5/10/2013 10:15 AM	
	Marie Jensen ...	FW: Reeve v. Expert Drywall, et al. -- Settlement Authority & Dr. Churg's Deposit -- ...	Fri 5/10/2013 9:03 AM	
	Jensen, Marie	RE: Proposed Stip & Order	Thu 5/9/2013 3:49 PM	
	grace.pleasan...	Fwd: Proposed Stip & Order	Thu 5/9/2013 3:28 PM	
	'Winship, Scott'	Re: Proposed Stip & Order	Thu 5/9/2013 2:40 PM	
	Marie Wester...	Re: Saturday's game -- Mountlake Terrace at 12noon	Thu 5/9/2013 1:52 PM	
	mwestermeier...	FW: Saturday's game -- Mountlake Terrace at 12noon	Thu 5/9/2013 10:34 AM	
	mwestermeier...	FW: Extra batting practice	Wed 5/1/2013 1:39 PM	
	mwestermeier...	FW: TIME CHANGE for 4/27/13 -- new time 2:30 start	Thu 4/25/2013 11:01 AM	
	Dillard, Debor...	RE: Chnage of Address	Tue 4/23/2013 1:26 PM	
	Dillard, Debor...	Chnage of Address	Tue 4/23/2013 1:11 PM	
	'vstrauss@chu...	RE: Reeve v. Expert Drywall, Inc. - MSJ Denied - RESPONSE NEEDED	Fri 4/19/2013 1:00 PM	
	'vstrauss@chu...	RE: Reeve v. Expert Drywall, Inc. - MSJ Denied - RESPONSE NEEDED	Fri 4/19/2013 12:52 PM	
	'vstrauss@chu...	RE: Reeve v. Expert Drywall, Inc. - MSJ Denied - RESPONSE NEEDED	Thu 4/18/2013 6:02 PM	
	Matt Graham	Re: Welcome to 2013 SPB Pirates Baseball Team	Wed 3/6/2013 8:14 PM	
	'Alicia Hoare'	RE: Welch / Westermeier	Mon 3/4/2013 5:36 PM	

To	Subject	Sent	Cat...
Marie Jensen ...	Expert - Reeve	Thu 2/28/2013 8:23 AM	
'david.lackie@...	RE: Initial Loan Disclosures	Wed 2/27/2013 3:40 PM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff's Discovery Requests to Certain...	Wed 2/27/2013 11:31 AM	
Welch, John	/data/top/prd/vad/remake/conversion/remake_traffic/jobs/PDF/INSTDC_PDFS/PDF...	Tue 2/26/2013 8:52 PM	
Welch, John		Tue 2/26/2013 8:49 PM	
'Alicia Hoare'	RE: Welch / Westermeier	Mon 2/25/2013 1:15 PM	
'Marie Wester...	RE: Welch / Westermeier	Mon 2/25/2013 1:09 PM	
Alicia Hoare	RE: Welch / Westermeier	Mon 2/25/2013 12:59 PM	
'Marie Wester...	RE: Welch / Westermeier	Mon 2/25/2013 12:52 PM	
'Alicia.Hoare...	RE: Welch / Westermeier	Mon 2/25/2013 12:24 PM	
Welch, John		Mon 2/25/2013 11:01 AM	
'Alicia.Hoare...	Welch / Westermeier	Sun 2/24/2013 5:15 PM	
mwestemeier...	JRW Vanguard 4/1/2012 - 6/30/2012	Sun 2/24/2013 4:01 PM	
mwestemeier...	JRW Vanguard Statement	Sun 2/24/2013 3:43 PM	
Welch, John		Sun 2/24/2013 3:41 PM	
Gina McMann...	Re: Checking in	Sat 2/23/2013 12:49 PM	
'Gina.McMan...	RE: Checking in	Fri 2/22/2013 4:29 PM	
'Gina.McMan...	RE: Checking in	Fri 2/22/2013 4:15 PM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Notice of Video Deposition of M...	Fri 2/15/2013 1:36 PM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff's Discovery Requests to Georgia...	Thu 2/14/2013 10:30 AM	
Marie Jensen ...	FW: Albers Mill LLC 11-42886-PBS Ch 11 BNC Certificate of Notice	Thu 2/14/2013 9:22 AM	
'megs@icl...	FW: Whistler Blackcomb 72 hour sale - Amazing lodging deals	Tue 2/12/2013 7:28 PM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1)-Plaintiff's Objections to Notice of Depositi...	Tue 2/12/2013 10:17 AM	
Jensen, Marie	Fwd: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff's Discovery Requests to Scott P...	Mon 2/11/2013 9:31 AM	
Jensen, Marie	Fwd: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff's Discovery Requests to Intalco ...	Mon 2/11/2013 9:30 AM	
Jensen, Marie	Fwd: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Offer of Expert Depositions	Mon 2/11/2013 9:26 AM	
Marie Jensen ...	FW: Albers Mill LLC 11-42886-PBS Ch 11 Request for No Future Electronic Notice fil...	Fri 2/8/2013 3:39 PM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Notice of Video Deposition of M...	Fri 2/8/2013 2:52 PM	
grace.pleasan...	FW: Albers Mill LLC 11-42886-PBS Ch 11 Notice to Court Unopposed Motion, Orde...	Fri 2/8/2013 2:06 PM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Notice of Video Deposition of M...	Fri 2/8/2013 1:41 PM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Offer of Expert Depositions	Fri 2/8/2013 1:41 PM	
grace.pleasan...	Fwd: Albers Mill LLC 11-42886-PBS Ch 11 Notice to Court Unopposed Motion, Ord...	Fri 2/8/2013 11:09 AM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Amended Offer of Expert Deposi...	Mon 2/4/2013 5:23 PM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Amended Offer of Expert Deposi...	Mon 2/4/2013 10:24 AM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff's Discovery to Lockheed Shipbuil...	Fri 2/1/2013 12:25 PM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1)- Plaintiff's Discovery Responses to The Bo...	Fri 2/1/2013 9:16 AM	
Welch, John	FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff's Discovery Responses to The Bo...	Fri 2/1/2013 3:20 AM	
'daniel.drais@...	RE: amusing	Fri 1/25/2013 11:02 AM	
'daniel.drais@...	RE: workout	Thu 1/24/2013 3:29 PM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Offer of Expert Depositions	Wed 1/23/2013 12:42 PM	
Marie Jensen ...	FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff's Supplemental Discovery (Medi...	Wed 1/23/2013 12:42 PM	
Marie Jensen ...	FW: Albers Mill LLC 11-42886-PBS Ch 11 BNC Certificate of Notice	Tue 1/22/2013 11:51 AM	
'Winship, Scott'	RE: Proposed Stip & Order	Fri 1/18/2013 10:40 AM	
Jensen, Marie	RE: LHHC	Fri 1/4/2013 8:53 AM	
Jensen, Marie	Re: LHHC	Fri 12/21/2012 10:27 PM	
Bishop, Allen	RE: Vangaard address change	Tue 12/18/2012 5:21 PM	
Bishop, Allen	Re: Vangaard address change	Tue 12/18/2012 11:12 AM	
Marie Jensen ...	FW: LHHC	Fri 12/14/2012 12:58 PM	
'John Leddy'	RE: Larry's Powder Alert - December 13, 2012 - 7:18pm	Fri 12/14/2012 11:41 AM	
Dillard, Debor...	RE: Vangaard address change	Fri 12/14/2012 11:38 AM	
Dillard, Debor...	Vangaard address change	Fri 12/14/2012 11:25 AM	
'John Leddy'	RE: Larry's Powder Alert - December 13, 2012 - 7:18pm	Fri 12/14/2012 11:23 AM	

From	To	Subject	Sent	Cat...
Bishop, Allen		401 for 2012	Thu 12/13/2012 4:27 PM	
'Marla Zink'		LHHC	Thu 12/13/2012 10:39 AM	
Marie Jensen ...		FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Second Amended Notice of Dep...	Tue 12/4/2012 9:59 AM	
Jensen, Marie		Re: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Video Deposition - December 13t...	Mon 12/3/2012 11:34 AM	
Marie Jensen ...		FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Video Deposition - December 13...	Mon 12/3/2012 8:04 AM	
Marie Jensen ...		FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Discovery & Witness List	Mon 11/26/2012 5:17 PM	
Marie Jensen ...		FW: Reeve v. UCC, et al.	Wed 11/14/2012 11:59 AM	
Marie Jensen ...		FW: Reeve, Gordon - (No. 12-2-11999-1) - Notice of Video Deposition	Mon 11/12/2012 5:26 PM	
Marie Jensen ...		FW: Reeve, Gordon - (No. 12-2-11999-1) - Notice of Video Deposition	Mon 11/12/2012 5:25 PM	
Marie Jensen ...		FW: something new	Thu 11/1/2012 6:00 PM	
mwestermeyer...		FW: General information for laser tag	Fri 10/19/2012 12:32 PM	
mwestermeyer...		FW: Laser Tag information	Fri 10/19/2012 12:32 PM	
Marie Jensen ...		FW: Office addition	Mon 10/15/2012 1:36 PM	
Welch, John		FW: Western Sazerac Tenancy/Dovetail Lien Claim	Mon 10/15/2012 11:47 AM	
Marie Jensen ...		FW: Re: Office addition	Fri 10/12/2012 3:35 PM	
'Adam Turner'		RE: Re: Office addition	Fri 10/12/2012 2:06 PM	
'Adam Turner'		RE: Re: Office addition	Fri 10/12/2012 1:08 PM	
'Scott Edwards'		RE: Western Sazerac Tenancy/Dovetail Lien Claim	Fri 10/12/2012 10:47 AM	
Marie Jensen ...		FW: draft response to SS on closet build-out.	Fri 10/12/2012 9:58 AM	
'Adam Turner'		RE: draft response to SS on closet build-out.	Fri 10/12/2012 9:13 AM	
Marie Jensen ...		FW: glostern	Fri 10/12/2012 9:10 AM	
Marie Jensen ...		FW: Office addition	Thu 10/11/2012 8:57 AM	
'Adam Turner'		RE: Office addition	Wed 10/10/2012 7:17 PM	
Zakhari, Lydia ...		Fwd: Reeve v. Union Carbide Corp., et al.	Tue 10/9/2012 11:15 AM	
Zakhari, Lydia ...		FW: Reeve, Gordon - (No. 12-2-11999-1) - Plaintiff Authorizations	Wed 10/3/2012 1:18 PM	
Marie Jensen ...		FW: Reeve v. Union Carbide Corp., et al.	Tue 10/2/2012 2:31 PM	
Zakhari, Lydia ...		FW: Reeve v. Union Carbide Corp., et al.	Tue 10/2/2012 2:26 PM	
Dippold, John		FW: Work in Canada	Mon 10/1/2012 9:14 AM	
Scott Edwards		RE: Western Sazerac Tenancy/Dovetail Lien Claim	Fri 9/28/2012 2:14 PM	
Sanders, Chris...		FW: Western Sazerac Tenancy/Dovetail Lien Claim	Tue 9/11/2012 12:50 PM	
'Doug Stillgeb...		RE: Letter to TFT termination.doc	Tue 9/11/2012 11:10 AM	
Welch, John		Letter to TFT termination 9 11 2012 clean ('ni11e945k9').doc	Tue 9/11/2012 11:07 AM	
Welch, John		Letter to TFT termination 9 11 2012 redline ('ni11e945k9').doc	Tue 9/11/2012 11:06 AM	
Welch, John		Letter to TFT termination 9 11 2012 ('ni11e945k9').doc	Tue 9/11/2012 11:01 AM	
Marie Jensen ...		pldg jrw motion to vacate default judgment ('ni107e45dn').docx	Mon 9/10/2012 6:11 PM	
Dippold, John		Fwd: TFT	Sat 9/8/2012 11:36 AM	
'Michael Lee'		RE: TFT	Fri 9/7/2012 2:23 PM	
'rta@bhlaw.co...		City of Vancouver - Lakeside - TFT	Fri 9/7/2012 1:57 PM	
'Michael Lee'		RE: TFT	Fri 9/7/2012 11:54 AM	
'Michael Lee'; ...		RE: TFT	Fri 9/7/2012 10:53 AM	
Dippold, John		RE: TFT	Fri 9/7/2012 9:46 AM	
mwestermeyer...		FW: St. Joseph Fourth Grade Class Contact List	Thu 9/6/2012 10:27 PM	
'mgpettijohn...		RE: St. Joseph Fourth Grade Class Contact List	Thu 9/6/2012 10:24 PM	
Jeff Brandewie...		Re: Please be advised: FAILURE IS NOT AN OPTION	Wed 9/5/2012 5:43 PM	
Marie Wester...		Fwd: St. Joseph Fourth Grade Class Contact List	Wed 9/5/2012 1:24 PM	
'Jamaal Botley'		RE: Sound Ford in Renton - WA's #1 Volume Ford Dealer For 34 Years	Thu 8/30/2012 6:44 PM	
Sanders, Chris...		FW: Western Sazerac Tenancy/Dovetail Lien Claim	Fri 8/24/2012 7:17 PM	
'Buck, David'		RE: Western Sazerac Tenancy/Dovetail Lien Claim	Fri 8/24/2012 7:15 PM	
scott@doveta...		FW: Western Sazerac Tenancy/Dovetail Lien Claim	Fri 8/24/2012 2:22 PM	
Marie Jensen ...		FW: Western Sazerac Tenancy/Dovetail Lien Claim	Wed 8/22/2012 6:16 PM	
'Scott Edwards'		RE: Western Sazerac Tenancy/Dovetail Lien Claim	Wed 8/22/2012 6:16 PM	

Foss v. Brandewiede  
Motion to Disqualify  
Decl. of J. Welch

**Exhibit C**

**Welch, John**

---

**From:** Welch, John  
**Sent:** Friday, September 20, 2013 3:25 PM  
**To:** 'John Crosetto'  
**Cc:** Marie Jensen (jensen@carneylaw.com)  
**Subject:** RE: Foss v. Brandewiede

Thank you.

---

**From:** John Crosetto [mailto:jcrosetto@gsblaw.com]  
**Sent:** Friday, September 20, 2013 3:07 PM  
**To:** Welch, John  
**Cc:** Jensen, Marie; Verna Seal; Tyler Arnold  
**Subject:** RE: Foss v. Brandewiede

John:

This is the last known address and phone number we have for Van Vorwerk:

PO Box 1172  
Bothell, WA 98041  
425-481-7278

**JOHN CROSETTO**

Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)

GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ► [GSBLaw.com](http://GSBLaw.com)

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---

**From:** Welch, John [mailto:Welch@carneylaw.com]  
**Sent:** Thursday, September 19, 2013 12:12 PM  
**To:** John Crosetto  
**Cc:** Jensen, Marie  
**Subject:** RE: Foss v. Brandewiede

John:

Following up on your e-mails and your voice mail from yesterday. Unfortunately, the date you had set Mr. Brandewiede's deposition will not work. Mr. Brandewiede can be available for a deposition the following week, October 2 or October 3. Please let me know if either of these days will work with your schedule.

Also, we would like to take the deposition of the project manager Van Vorwerk. I understand that he is no longer employed by Foss although you list him as someone that helped Foss prepare its discovery responses and identify his contact as c/o Garvey Schubert in Foss' disclosure of witnesses. Does Foss want to make Mr. Van Vorwerk available through a notice of deposition or should I be getting a subpoena out to him? If by subpoena, I will need Foss to fully answer Brandewiede's Interrogatory No. 2, that requests the address (home and business) and phone numbers of those individuals likely to have discoverable information (see definition of "Identify").

Regards, John Welch

Foss v. Brandewiede  
Motion to Disqualify  
Decl. of J. Welch

**Exhibit D**

CARNEY  
BADLEY  
SPELLMAN

John R. Welch

Law Offices  
A Professional Service Corporation

701 Fifth Avenue, Suite 3800  
Seattle, Washington 98104-7010  
T (206) 822-8020  
F (206) 467-8215

Email: Welch@carneylaw.com

November 15, 2013

HAND DELIVERED

John Crosetto  
Garvey Schubert Barer  
1191 Second Avenue, 18th Floor  
Seattle, WA 98101

Re: *Foss v. Core Logistics, et al*  
King County Superior Court, No. 12-2-23895-2 SEA

Dear John:

Enclosed please find a thumb drive containing the entire file we received from Van Vorwerk. Please return the thumb drive after you are done downloading the file. Thank you.

Sincerely,

CARNEY BADLEY SPELLMAN, P.S.



John R. Welch

JRW:mj  
Enclosure

www.CARNEYLAW.com

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App. C-41

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Foss v. Brandewiede  
Motion to Disqualify  
Decl. of J. Welch

**Exhibit E**

## Welch, John

---

**From:** Welch, John  
**Sent:** Friday, November 22, 2013 11:30 AM  
**To:** John Crosetto  
**Cc:** Jensen, Marie  
**Subject:** Re: Vorwerk Emails

John;

Arrived back in town Wednesday night and wanted to take a read through Van's post termination letter before responding to your e-mail from Tuesday. I did not get a chance yesterday and am in a deposition now. I don't recall seeing any attorney-client communications within Van's letter - if there is, I would agree to a redaction of same. Also, I wanted to check when I received Van's data, which looks to be Thursday October 24, 2013 but I still need to confirm. Don't know when I will be finished today but I will try and call you later today.

John R. Welch  
Carney Badley Spellman  
701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104  
(206) 622-8020  
(206) 607-4198 (direct)

> On Nov 22, 2013, at 10:47 AM, "John Crosetto" <jcrosetto@gsblaw.com> wrote:

>

> John-

> I was disappointed to see that you did not respond to my Tuesday email. We would have liked to have heard your side of the story, but we cannot prejudice Foss by failing to bring this to the court's attention. So we are now drafting the motion and will file today. Please contact me if you have any information you'd like to share.

> John

>

> JOHN CROSETTO

> Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax |

> jcrosetto@gsblaw.com GARVEY SCHUBERT BARER | 18th Floor | 1191

> Second Avenue | Seattle, WA 98101 | ► GSBLaw.com

>

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>

> -----Original Message-----

> From: John Crosetto

> Sent: Tuesday, November 19, 2013 2:33 PM

> To: 'Welch, John'

> Cc: Jensen, Marie; David West

> Subject: RE: Vorwerk Emails

>

> John,

>

> If we do not have your response to our questions about the privileged information before Thursday, we risk missing the Friday deadline for filing our motion in limine. We do prefer to work out these kinds of issues with counsel rather than burden the Court, so to give you time to fully respond to our letter, would you be willing to stipulate to an extension for us to bring a motion in limine on this issue? If we get your response by close of business on Thursday, we would need until Tuesday close of business to draft and file our motion (if it is still needed). If you agree with this extension, we will confirm the Court agrees to allow the extension of the court deadline.

>

> My letter was intended as a courtesy to put you on notice of a potentially serious issue and give you a fair opportunity to respond and mitigate. We hope you will take this opportunity to fully respond and hopefully clear up some of the concerns with more facts or perhaps some law that would support your position.

>

> You ask how Exhibit 80 implicates Foss's privileged information. Did you read the pages of the letter that include emails from Foss managers seeking and receiving legal advice from Foss legal counsel? You assert the letter is relevant, so you believe the letter's content is relevant to this trial and we assert the contents include privileged information. The thumb drive also has emails to and from Foss legal counsel with legal advice followed by a footer showing the author's title as General Counsel and warning that the content may be confidential. The drive also contains confidential business information irrelevant to this trial which may also be protected from disclosure and use.

>

> Please clarify regarding your request for us to return your "personal property" – do you mean you want us to take the documents off the drive and return the drive to you?

>

> We look forward to hearing by close of business on Thursday (assuming  
> the extension for motions) how you believe you have complied with the  
> RPC and why we should not bring a motion to disqualify and sanction,

>

> John

>

> JOHN CROSETTO

> Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax |

> jcrosetto@gsblaw.com GARVEY SCHUBERT BARER | 18th Floor | 1191

> Second Avenue | Seattle, WA 98101 | ► GSBLaw.com

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>

>

> -----Original Message-----

> From: Welch, John [mailto:Welch@carneylaw.com]

> Sent: Tuesday, November 19, 2013 12:00 PM

> To: John Crosetto

> Cc: Jensen, Marie

> Subject: Re: Vorwerk Emails

>

> John:

> As an initial response to your letter of today's date, I am out of state conducting discovery in another matter and won't be back in the office until Thursday morning.

> I did a quick read through and although I am not able to fully respond until Thursday, The one document from Van Vorwerk that we included as an exhibit and that you reference is a letter authored by Mr. Vorwerk after his employment was terminated by Foss that we believe is relevant to the defense of the claims being asserted by Foss. Perhaps you can help me understand how Mr. Vorwerk's letter can be considered privileged or confidential.

> Also, I still have not had a chance to get through all of the information I received from Mr. Vorwerk but I have found documents that should have been produced by Foss in response to Brandewiede's discovery but we're not. At this point, we have decided not to proceed with discovery sanctions against Foss but perhaps we should reconsider.

> Also, for cost reasons, we are going to waive our jury request. Please let me know if Foss wants to go forward with a jury.

> Finally, if you have not done so already, please return the data card that was sent over with Mr. Vanwerk's data. It's my personal property.

> John R. Welch

> Carney Badley Spellman

> 701 Fifth Avenue, Suite 3600

> Seattle, Washington 98104

> (206) 622-8020

> (206) 607-4198 (direct)

>

>> On Nov 19, 2013, at 8:12 AM, "John Crosetto" <jcrosetto@gsblaw.com> wrote:

>>

>> John-

>> Please see the attached letter.

>> John

>>

>> JOHN CROSETTO

>> Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax |

>> jcrosetto@gsblaw.com GARVEY SCHUBERT BARER | 18th Floor | 1191

>> Second Avenue | Seattle, WA 98101 | ►

>> GSBLaw.com<<http://www.gsblaw.com>>

>>

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>> <Letter to John Welch 11192013.pdf>

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SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN THE COUNTY OF KING

FOSS MARITIME COMPANY,

Plaintiff,

v.

CORE LOGISTIC SERVICES; LISA  
LONG and JOHN DOE LONG, and the  
marital community comprised thereof;  
FRANK GAN and JANE DOE GAN, and  
the marital community comprised thereof;  
JEFF BRANDEWIEDE and JANE DOE  
BRANDEWIEDE, and the marital  
community comprised thereof; and  
BRANDEWIEDE CONSTRUCTION,  
INC.,

Defendants.

NO. 12-2-23895-2 SEA

DECLARATION OF SERVICE

I, the undersigned, hereby certify that on this 27<sup>th</sup> day of November, 2013, I caused the following pleadings:

- Brandewiede's Response re: Foss' Motion to Disqualify Counsel
- Declaration of John Welch in Support of Brandewiede's Response re: Foss' Motion to Disqualify Counsel

to be served on opposing counsel by delivering a true and correct copy thereof via electronic mail and legal messenger addressed as follows:

DECLARATION OF SERVICE - 1

**CARNEY  
BADLEY  
SPELLMAN**

Law Offices  
A Professional Service Corporation  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010  
T (206) 622-8020  
F (206) 467-8215

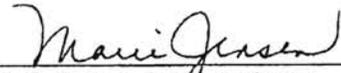
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John Crosetto, WSBA #36667  
Tyler W. Arnold, WSBA #43129  
Garvey Schubert Barer  
1191 Second Avenue, 18<sup>th</sup> Floor  
Seattle, WA 98101  
Tel: (206) 464-3939  
Fax: (206) 464-0125  
Email: [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)  
[tarnold@gsblaw.com](mailto:tarnold@gsblaw.com)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27<sup>th</sup> day of November, 2013 at Seattle, Washington.

  
\_\_\_\_\_  
Marie Jensen, Legal Assistant

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SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN THE COUNTY OF KING

FOSS MARITIME COMPANY,

Plaintiff,

v.

CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG, and the marital community comprised thereof; FRANK GAN and JANE DOE GAN, and the marital community comprised thereof; JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the marital community comprised thereof; and BRANDEWIEDE CONSTRUCTION, INC.,

Defendants.

NO. 12-2-23895-2 SEA

DECLARATION OF SERVICE

I, the undersigned, hereby certify that on this 27<sup>th</sup> day of November, 2013, I caused the following pleadings:

- Brandewiede's Response re: Foss' Motion to Disqualify Counsel
- Declaration of John Welch in Support of Brandewiede's Response re: Foss' Motion to Disqualify Counsel

to be served on opposing counsel by delivering a true and correct copy thereof via electronic mail and legal messenger addressed as follows:

DECLARATION OF SERVICE - 1

CARNEY  
BADLEY  
SPELLMAN

Law Offices  
A Professional Service Corporation

701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010  
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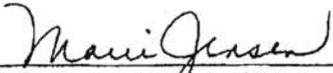
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John Crosetto, WSBA #36667  
Tyler W. Arnold, WSBA #43129  
Garvey Schubert Barer  
1191 Second Avenue, 18<sup>th</sup> Floor  
Seattle, WA 98101  
Tel: (206) 464-3939  
Fax: (206) 464-0125  
Email: [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)  
[tarnold@gsblaw.com](mailto:tarnold@gsblaw.com)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27<sup>th</sup> day of November, 2013 at Seattle, Washington.

  
\_\_\_\_\_  
Marie Jensen, Legal Assistant

DECLARATION OF SERVICE -- 2

CARNEY  
BADLEY  
SPELLMAN

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A Professional Service Corporation  
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T (206) 622-8020  
F (206) 467-8215

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# APPENDIX D

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR COUNTY OF KING

FOSS MARITIME COMPANY,  
Plaintiff,

NO. 12-2-23895-2 SEA

v.

CORE LOGISTIC SERVICES; LISA LONG  
AND JOHN DOE LONG, AND THE  
MARITAL COMMUNITY COMPRISED  
THEREOF; FRANK GAN AND JANE DOE  
GAN, AND THE MARITAL COMMUNITY  
COMPRISED THEREOF; JEFF  
BRANDEWIEDE AND JANE DOE  
BRANDEWIEDE, AND THE MARITAL  
COMMUNITY COMPRISED THEREOF;  
AND BRANDEWIEDE CONSTRUCTION,  
INC.,  
Defendant.

**DECLARATION OF JOHN  
CROSETTO IN SUPPORT OF  
MOTION OF PLAINTIFF FOSS  
MARITIME COMPANY TO  
DISQUALIFY COUNSEL FOR  
DEFENDANT JEFF BRANDEWIEDE  
AND SEEKING SANCTIONS**

I, John Crosetto, declare as follows:

1. I am an attorney at Garvey Schubert Barer, attorneys for plaintiff. I make this declaration from my own personal knowledge and from my review of the records referenced herein.
2. On November 8, 2013, John Welch informed me by phone that he had received documents from former Foss employee Van Vorwerk related to the Alucia project. Foss had

DECLARATION OF JOHN CROSETTO IN SUPPORT OF MOTION  
TO DISQUALIFY COUNSEL FOR DEFENDANT - 1

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

1 provided Mr. Welch with Mr. Vorwerk's contact information as a person with knowledge of  
2 relevant facts. But this was the first time I learned that Mr. Welch had obtained documents  
3 from Mr. Vorwerk.

4 3. On November 8, 2013, I followed up with Mr. Welch by email to request that he  
5 provide Foss with all documents provided by Mr. Vorwerk (as required under CR26(e)), as  
6 well as the dates on which the documents were requested and provided. A true and correct copy  
7 of my November 8 email is attached hereto as **Exhibit 1**.

8 4. Mr. Welch did not respond to my November 8 email. Therefore, I emailed him  
9 again on November 12, 2013, in large part to reiterate my request that he provide Foss with the  
10 documents he had received from Mr. Vorwerk. My November 12 email stated "one of my  
11 concerns is that Van has provided documents that should have been returned to Foss (as Foss's  
12 property), or that he has provided documents protected by privilege and/or the work product  
13 doctrine." A true and correct copy of my November 12 email is attached hereto as **Exhibit 2**.

14 5. On November 15, 2013, I received a letter from Mr. Welch, as well as a thumb  
15 drive containing hundreds of emails from Mr. Vorwerk's Foss Outlook account. Mr. Welch's  
16 letter requested that I return the thumb drive to him after downloading the file(s). A true and  
17 correct copy of Mr. Welch's November 15 letter is attached hereto as **Exhibit 3**.

18 6. On November 19, 2013, I sent Mr. Welch a letter detailing Foss's concerns  
19 regarding his possession of privileged and confidential information belonging to Foss and  
20 informing him that Foss believed a motion to disqualify him as counsel for Jeff Brandewiede  
21 was possibly necessary as a result of those concerns. And I requested that he provide any  
22 reasons or facts that would suggest such a motion was not appropriate. A true and correct copy  
23 of my November 19 letter is attached hereto as **Exhibit 4**.

24 7. On November 19, 2013, I received an email from Mr. Welch, a true and correct  
25 copy of which is attached hereto as **Exhibit 5**. In this email, Mr. Welch stated he was out of  
26 state and would not be able to fully respond to my November 19 letter until Thursday,

DECLARATION OF JOHN CROSETTO IN SUPPORT OF MOTION  
TO DISQUALIFY COUNSEL FOR DEFENDANT - 2

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

SEA\_DOCS:1126621.1

1 November 21. Also in this email, Mr. Welch asked whether I could “[p]erhaps. . . help [him]  
2 understand how Mr. Vorwerk’s letter can be considered privileged or confidential.” **Exhibit 5.**  
3 He also requested return of the thumb drive. *Id.*

4 8. On November 19, 2013, I responded by email to Mr. Welch’s email of the same  
5 date. A true and correct copy of my November 19 email to Mr. Welch is attached hereto as  
6 **Exhibit 6.** In this email, I asked whether Mr. Welch would be willing to stipulate to an  
7 extension for Foss to bring a motion in limine regarding this issue, to give us more time to  
8 address Foss’s concerns directly with Mr. Welch rather than burdening the Court. I requested  
9 that Mr. Welch respond no later than close of business on Thursday, November 21, to give Foss  
10 time to file a motion to disqualify if necessary by the November 22 deadline for motions in  
11 limine and six-day motions. **Exhibit 6.**

12 9. Mr. Welch failed to respond by close of business on November 21. Therefore, I  
13 informed him by email on November 22 that Foss would be filing a motion to disqualify him  
14 that same date. A true and correct copy of my November 22 email is attached hereto as **Exhibit**  
15 **7.**

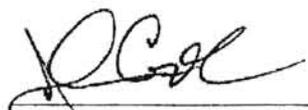
16 10. Mr. Welch responded by email to my November 22 email the same day. A true  
17 and correct copy of Mr. Welch’s November 22 email is attached hereto as **Exhibit 8.** In this  
18 email, Mr. Welch stated that he didn’t “recall seeing any attorney-client communications within  
19 Van’s letter” but that “if there is, I would agree to a redaction of same.” **Exhibit 8.**  
20 Additionally, Mr. Welch stated that he believed he first received “Van’s data” on October 24,  
21 2013—a week after the discovery cutoff. *Id.*

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DATED this 22nd day of November, 2013.

GARVEY SCHUBERT BARER

By   
John Crosetto, WSBA # 36667  
Attorney for Plaintiff Foss Maritime Company

DECLARATION OF JOHN CROSETTO IN SUPPORT OF MOTION  
TO DISQUALIFY COUNSEL FOR DEFENDANT - 4

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

# EXHIBIT 1

**Colleen Hannigan**

---

**From:** John Crosetto  
**Sent:** Friday, November 08, 2013 1:57 PM  
**To:** 'Welch, John'  
**Cc:** 'Jensen, Marie'  
**Subject:** Brandewiede Production

John-

Thanks for the call today. You mentioned that you had asked Van Vorwerk for documents related to the Alucia project, which he provided. They are no doubt responsive to Foss's discovery requests (see e.g., RFP's 15 and 25), so Foss asks that you immediately supplement Mr. Brandewiede's responses per CR 26(e) with all documents provided by Mr. Vorwerk. Please also provide the date on which the documents were requested and the date Mr. Vorwerk provided them.

Thanks again,  
John

**JOHN CROSETTO**

Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)

GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ► [GSBLaw.com](http://GSBLaw.com)

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## EXHIBIT 2

**Colleen Hannigan**

---

**From:** John Crosetto  
**Sent:** Tuesday, November 12, 2013 2:26 PM  
**To:** 'Welch, John'  
**Cc:** 'Jensen, Marie'; Verna Seal; Tyler Arnold; David West  
**Subject:** Foss v. CLS/Brandewiede  
**Attachments:** Joint Confirmation of Trial Readiness (1123939v2).DOC

John-

When we spoke last week, you were going to check with your client about his settlement position. Having not heard anything, please see the Joint Confirmation attached. If you have anything to add or change, please do so, and I will go ahead and get it filed. I also didn't hear back on my request for supplementation for the documents you said Van Vorwerk provided you. I don't want to jump to conclusions, but one of my concerns is that Van has provided documents that should have been returned to Foss (as Foss's property), or that he has provided documents protected by privilege and/or the work product doctrine. As you know, in communicating with a former employee, an attorney "must not use methods of obtaining evidence that violate the legal rights of the organization." RPC 4.2, Comment 7. While I hope that's not an issue, I reiterate my request that you immediately provide Foss with the documents received from Van.

Thanks,  
John

**JOHN CROSETTO**

Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)

GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ► [GSBLaw.com](http://GSBLaw.com)

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# EXHIBIT 3

CARNEY  
BADLEY  
SPELLMAN

John R. Welch

Law Offices  
A Professional Service Corporation

701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104-7010  
T (206) 622-8020  
F (206) 467-8215

Email: Welch@carneylaw.com

November 15, 2013

**HAND DELIVERED**

John Crosetto  
Garvey Schubert Barer  
1191 Second Avenue, 18th Floor  
Seattle, WA 98101

Re: *Foss v. Core Logistics, et al*  
King County Superior Court, No. 12-2-23895-2 SEA

Dear John:

Enclosed please find a thumb drive containing the entire file we received from Van Vorwerk. Please return the thumb drive after you are done downloading the file. Thank you.

Sincerely,

CARNEY BADLEY SPELLMAN, P.S.



John R. Welch

JRW:mj  
Enclosure

www.CARNEYLAW.com

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# EXHIBIT 4



SEATTLE OFFICE  
eighteenth floor  
second & seneca building  
1191 second avenue  
seattle, washington 98101-2939  
TEL 206 464 3939 FAX 206 464 0125

OTHER OFFICES  
beijing, china  
new york, new york  
portland, oregon  
washington, d.c.  
GSBLAW.COM

GARVEY SCHUBERT BARER

Please reply to JOHN CROSETTO  
jcrosetto@gsblaw.com TEL EXT 1529

November 19, 2013

John Welch  
Carney Badley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104

Re: *Privileged and confidential communications*

John:

As you know, when you informed me on Friday, November 8 that you had received documents from former Foss project manager Van Vorwerk, I requested that you immediately provide them, as required under CR 26(e). I also asked that you provide the date you requested them and the date Mr. Vorwerk provided them. You did not respond.

I followed up the following Tuesday (November 12) with the same request and specifically expressed my concern that you had acquired privileged or protected documents in violation of RPC 4.2. Once again, I received no response.

I was disappointed to see that Exhibit 80 to Defendant's proposed trial exhibits included precisely the type of privileged and protected communications referenced in my November 12 email. I am also concerned by the presence of Foss's privileged emails stored on the thumb drive you said was provided to you by Vorwerk.

As a courtesy, I am writing to inform you that Foss is considering filing a motion for sanctions including to disqualify you as Jeff Brandewiede's counsel due to your possession and use of these privileged communications. While we recognize disqualification and sanctions are a serious matter, Foss has been and will be prejudiced by your use of these privileged and confidential emails, and under Washington law, disqualification is required when counsel has had access to an opposing party's privileged information. *In re Firestorm 1991*, 129 Wn.2d 130, 140, 916 P.2d 411 (1996), citing *Kurbitz v. Kurbitz*, 77 Wn.2d 943, 947, 468 P.2d 673 (1970).

If you believe that the emails in Exhibit 80 and on the thumb drive are not privileged, please provide the basis for that contention. Also, I must assume you believe that your possession and use of Foss's privileged communications do not violate the Rules of Professional Conduct (one of which I cited in my November 12 email). Please provide as well your reasoning why this would not be the case.



GARVEY SCHUBERT BARER

John Welch  
November 19, 2013  
Page 2

John, I recognize that disqualification at this late stage is a serious matter. But the law is not ambiguous on the impropriety of possessing and using privileged documents. RPC 4.4 prohibits lawyers from using methods of obtaining evidence that violate the legal rights of a third person; CR 26(b) prohibits discovery of privileged matters and provides that

“...if information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified.”

And, in addition to *In re Firestorm 1991* cited above, see also *Richards v. Jain*, 168 F.Supp.2d 1195 (W.D.Wash. 2001) (“An attorney who receives privileged documents has an ethical duty upon notice of the privileged nature of the documents to cease review of the documents, notify the privilege holder, and return the documents. . . . A failure by an attorney to abide by these rules is grounds for disqualification. . . . [and the suggestion] that an attorney in possession of attorney-client privileged documents has no obligation except to give copies back or otherwise disclose the possession of the documents shocks the conscience of th[e] Court”), citing ABA Comm. On Ethics and Professional Responsibility, Formal Op. 94-382 (1994).

Based on the facts as we know them now, it appears that a motion is appropriate. Of course, we do not want to take up the Court or parties’ resources on unnecessary motions, so if there are reasons or facts that you believe refute Foss’s contentions, please let me know immediately. I would rather confer and resolve this issue without Court intervention if possible. Please respond to this letter as soon as possible, but no later than **5:00 p.m. on Tuesday, November 19, 2013.**

Sincerely,

GARVEY SCHUBERT BARER

By

  
John Crosetto

# EXHIBIT 5

## Colleen Hannigan

---

**From:** Welch, John [Welch@carneylaw.com]  
**Sent:** Tuesday, November 19, 2013 12:00 PM  
**To:** John Crosetto  
**Cc:** Jensen, Marie  
**Subject:** Re: Vorwerk Emails

John:

As an initial response to your letter of today's date, I am out of state conducting discovery in another matter and won't be back in the office until Thursday morning.

I did a quick read through and although I am not able to fully respond until Thursday, The one document from Van Vorwerk that we included as an exhibit and that you reference is a letter authored by Mr. Vorwerk after his employment was terminated by Foss that we believe is relevant to the defense of the claims being asserted by Foss. Perhaps you can help me understand how Mr. Vorwerk's letter can be considered privileged or confidential.

Also, I still have not had a chance to get through all of the information I received from Mr. Vorwerk but I have found documents that should have been produced by Foss in response to Brandewiede's discovery but we're not. At this point, we have decided not to proceed with discovery sanctions against Foss but perhaps we should reconsider.

Also, for cost reasons, we are going to waive our jury request. Please let me know if Foss wants to go forward with a jury.

Finally, if you have not done so already, please return the data card that was sent over with Mr. Vanwerk's data. It's my personal property.

John R. Welch  
Carney Badley Spellman  
701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104  
(206) 622-8020  
(206) 607-4198 (direct)

> On Nov 19, 2013, at 8:12 AM, "John Crosetto" <jcrosetto@gsblaw.com> wrote:

>

> John-

> Please see the attached letter.

> John

>

> JOHN CROSETTO

> Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)

> GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ▶

> [GSBLaw.com<http://www.gsblaw.com>](http://www.gsblaw.com)

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>

> <Letter to John Welch 11192013.pdf>

> <Richards v Jain (3).pdf>

# EXHIBIT 6

-----Original Message-----

From: John Crosetto  
Sent: Tuesday, November 19, 2013 2:33 PM  
To: 'Welch, John'  
Cc: Jensen, Marie; David West  
Subject: RE: Vorwerk Emails

John,

If we do not have your response to our questions about the privileged information before Thursday, we risk missing the Friday deadline for filing our motion in limine. We do prefer to work out these kinds of issues with counsel rather than burden the Court, so to give you time to fully respond to our letter, would you be willing to stipulate to an extension for us to bring a motion in limine on this issue? If we get your response by close of business on Thursday, we would need until Tuesday close of business to draft and file our motion (if it is still needed). If you agree with this extension, we will confirm the Court agrees to allow the extension of the court deadline.

My letter was intended as a courtesy to put you on notice of a potentially serious issue and give you a fair opportunity to respond and mitigate. We hope you will take this opportunity to fully respond and hopefully clear up some of the concerns with more facts or perhaps some law that would support your position.

You ask how Exhibit 80 implicates Foss's privileged information. Did you read the pages of the letter that include emails from Foss managers seeking and receiving legal advice from Foss legal counsel? You assert the letter is relevant, so you believe the letter's content is relevant to this trial and we assert the contents include privileged information. The thumb drive also has emails to and from Foss legal counsel with legal advice followed by a footer showing the author's title as General Counsel and warning that the content may be confidential. The drive also contains confidential business information irrelevant to this trial which may also be protected from disclosure and use.

Please clarify regarding your request for us to return your "personal property" – do you mean you want us to take the documents off the drive and return the drive to you?

We look forward to hearing by close of business on Thursday (assuming the extension for motions) how you believe you have complied with the RPC and why we should not bring a motion to disqualify and sanction,

John

JOHN CROSETTO

Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | jcrosetto@gsblaw.com GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ► GSBLaw.com

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-----Original Message-----

From: Welch, John [mailto:Welch@carneylaw.com]  
Sent: Tuesday, November 19, 2013 12:00 PM  
To: John Crosetto

# EXHIBIT 7

> On Nov 22, 2013, at 10:47 AM, "John Crosetto" <jcrosetto@gsblaw.com> wrote:  
>  
> John-  
> I was disappointed to see that you did not respond to my Tuesday email. We would have liked to have heard your side of the story, but we cannot prejudice Foss by failing to bring this to the court's attention. So we are now drafting the motion and will file today. Please contact me if you have any information you'd like to share.  
> John  
>  
> JOHN CROSETTO  
> Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | jcrosetto@gsblaw.com  
> GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ▶  
GSBLaw.com  
>  
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>  
> -----Original Message-----  
> From: John Crosetto  
> Sent: Tuesday, November 19, 2013 2:33 PM  
> To: 'Welch, John'  
> Cc: Jensen, Marie; David West  
> Subject: RE: Vorwerk Emails  
>  
> John,  
>

> If we do not have your response to our questions about the privileged information before Thursday, we risk missing the Friday deadline for filing our motion in limine. We do prefer to work out these kinds of issues with counsel rather than burden the Court, so to give you time to fully respond to our letter, would you be willing to stipulate to an extension for us to bring a motion in limine on this issue? If we get your response by close of business on Thursday, we would need until Tuesday close of business to draft and file our motion (if it is still needed). If you agree with this extension, we will confirm the Court agrees to allow the extension of the court deadline.

>

> My letter was intended as a courtesy to put you on notice of a potentially serious issue and give you a fair opportunity to respond and mitigate. We hope you will take this opportunity to fully respond and hopefully clear up some of the concerns with more facts or perhaps some law that would support your position.

>

> You ask how Exhibit 80 implicates Foss's privileged information. Did you read the pages of the letter that include emails from Foss managers seeking and receiving legal advice from Foss legal counsel? You assert the letter is relevant, so you believe the letter's content is relevant to this trial and we assert the contents include privileged information. The thumb drive also has emails to and from Foss legal counsel with legal advice followed by a footer showing the author's title as General Counsel and warning that the content may be confidential. The drive also contains confidential business information irrelevant to this trial which may also be protected from disclosure and use.

>

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> We look forward to hearing by close of business on Thursday (assuming the extension for motions) how you believe you have complied with the RPC and why we should not bring a motion to disqualify and sanction,

>

> John

>

> JOHN CROSETTO

> Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)

> GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | [GSBLaw.com](http://GSBLaw.com)

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>

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> -----Original Message-----

> From: Welch, John [<mailto:Welch@carneylaw.com>]

> Sent: Tuesday, November 19, 2013 12:00 PM

> To: John Crosetto

> Cc: Jensen, Marie

> Subject: Re: Vorwerk Emails

>

> John:

> As an initial response to your letter of today's date, I am out of state conducting discovery in another matter and won't be back in the office until Thursday morning.

> I did a quick read through and although I am not able to fully respond until Thursday, The one document from Van Vorwerk that we included as an exhibit and that you reference is a letter authored by Mr. Vorwerk after his employment was terminated by Foss that we believe is relevant to the defense of the claims being asserted by Foss. Perhaps you can help me understand how Mr. Vorwerk's letter can be considered privileged or confidential.

> Also, I still have not had a chance to get through all of the information I received from Mr. Vorwerk but I have found documents that should have been produced by Foss in response to Brandewiede's discovery but we're not. At this point, we have decided not to proceed with discovery sanctions against Foss but perhaps we should reconsider.

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> Finally, if you have not done so already, please return the data card that was sent over with Mr. Vanwerk's data. It's my personal property.

> John R. Welch  
> Carney Badley Spellman  
> 701 Fifth Avenue, Suite 3600  
> Seattle, Washington 98104  
> (206) 622-8020  
> (206) 607-4198 (direct)  
>

>> On Nov 19, 2013, at 8:12 AM, "John Crosetto" <jcrosetto@gsblaw.com> wrote:  
>>  
>> John-  
>> Please see the attached letter.  
>> John  
>>  
>> JOHN CROSETTO  
>> Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | jcrosetto@gsblaw.com  
>> GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ►  
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>>  
>> <Letter to John Welch 11192013.pdf>  
>> <Richards v Jain (3).pdf>

# EXHIBIT 8

**Colleen Hannigan**

---

**From:** Welch, John [Welch@carneylaw.com]  
**Sent:** Friday, November 22, 2013 11:30 AM  
**To:** John Crosetto  
**Cc:** Jensen, Marie  
**Subject:** Re: Vorwerk Emails

John;

Arrived back in town Wednesday night and wanted to take a read through Van's post termination letter before responding to your e-mail from Tuesday. I did not get a chance yesterday and am in a deposition now. I don't recall seeing any attorney-client communications within Van's letter - if there is, I would agree to a redaction of same. Also, I wanted to check when I received Van's data, which looks to be Thursday October 24, 2013 but I still need to confirm. Don't know when I will be finished today but I will try and call you later today.

John R. Welch  
Carney Badley Spellman  
701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104  
(206) 622-8020  
(206) 607-4198 (direct)

> On Nov 22, 2013, at 10:47 AM, "John Crosetto" <jcrosetto@gsblaw.com> wrote:

>

> John-

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> John

>

> JOHN CROSETTO

> Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | jcrosetto@gsblaw.com

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> From: John Crosetto

> Sent: Tuesday, November 19, 2013 2:33 PM

> To: 'Welch, John'

> Cc: Jensen, Marie; David West

> Subject: RE: Vorwerk Emails

>

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>

> If we do not have your response to our questions about the privileged information before Thursday, we risk missing the Friday deadline for filing our motion in limine. We do prefer to work out these kinds of issues with counsel rather than burden the Court, so to give you time to fully respond to our letter, would you be willing to stipulate to an extension for us to bring a motion in limine on this issue? If we get your response by close of business on Thursday, we would need until Tuesday close of business to draft and file our motion (if it is still needed). If you agree with this extension, we will confirm the Court agrees to allow the extension of the court deadline.

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> John

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> JOHN CROSETTO

> Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | jcrosetto@gsblaw.com

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>

>

> -----Original Message-----

> From: Welch, John [mailto:Welch@carneylaw.com]

> Sent: Tuesday, November 19, 2013 12:00 PM

> To: John Crosetto

> Cc: Jensen, Marie

> Subject: Re: Vorwerk Emails

>

> John:

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> I did a quick read through and although I am not able to fully respond until Thursday, The one document from Van Vorwerk that we included as an exhibit and that you reference is a letter authored by Mr. Vorwerk after his employment was terminated by Foss that we believe is relevant to the defense of the claims being asserted by Foss. Perhaps you can help me understand how Mr. Vorwerk's letter can be considered privileged or confidential.

> Also, I still have not had a chance to get through all of the information I received from Mr. Vorwerk but I have found documents that should have been produced by Foss in response to Brandewiede's discovery but we're not. At this point, we have decided not to proceed with discovery sanctions against Foss but perhaps we should reconsider.

> Also, for cost reasons, we are going to waive our jury request. Please let me know if Foss wants to go forward with a jury.

> Finally, if you have not done so already, please return the data card that was sent over with Mr. Vanwerk's data. It's my personal property.

> John R. Welch

> Carney Badley Spellman

> 701 Fifth Avenue, Suite 3600

> Seattle, Washington 98104

> (206) 622-8020

> (206) 607-4198 (direct)

>

>> On Nov 19, 2013, at 8:12 AM, "John Crosetto" <jcrosetto@gsblaw.com> wrote:

>>

>> John-

>> Please see the attached letter.

>> John

>>

>> JOHN CROSETTO

>> Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | jcrosetto@gsblaw.com

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>> <Letter to John Welch 11192013.pdf>

>> <Richards v Jain (3).pdf>

# APPENDIX E

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR COUNTY OF KING

FOSS MARITIME COMPANY,  
  
Plaintiff,  
  
v.  
  
CORE LOGISTIC SERVICES; LISA LONG  
and JOHN DOE LONG, and the marital  
community comprised thereof; FRANK GAN  
and JANE DOE GAN, and the marital  
community comprised thereof; JEFF  
BRANDEWIEDE and JANE DOE  
BRANDEWIEDE, and the marital community  
comprised thereof; and BRANDEWIEDE  
CONSTRUCTION, INC.,  
  
Defendant.

NO. 12-2-23895-2 SEA

**DECLARATION OF JOHN  
CROSETTO IN SUPPORT OF REPLY  
ON PLAINTIFF FOSS MARITIME  
COMPANY'S MOTION TO  
DISQUALIFY COUNSEL FOR  
DEFENDANT JEFF BRANDEWIEDE  
AND SEEKING SANCTIONS**

I, John Crosetto, declare as follows:

1. I am an attorney at Garvey Schubert Barer, attorneys for plaintiff. I make this declaration from my own personal knowledge and from my review of the records referenced herein.
2. Attached hereto as **Exhibit 1** is a true and correct copy of pages 8 and 9 of the Condensed Transcript of the Deposition Upon Oral Examination of Jeff Brandewiede.

DECLARATION OF JOHN CROSETTO IN SUPPORT OF REPLY ON  
PLAINTIFF FOSS MARITIME - 1

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

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DATED this 29th day of November, 2013.

GARVEY SCHUBERT BARER

By /s/ John Crosetto  
John Crosetto, WSBA # 36667

DECLARATION OF JOHN CROSETTO IN SUPPORT OF REPLY ON  
PLAINTIFF FOSS MARITIME - 2

SEA\_DOCS:1127270.1

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
*eighteenth floor*  
*1191 second avenue*  
*seattle, washington 98101-2939*  
*206 464 3939*

# **Exhibit 1**



Page 6

1 SEATTLE, WASHINGTON; OCTOBER 3, 2013  
 2 9:29 A.M.  
 3 --cOo--  
 4  
 5 JEFFREY BRANDEWIEDE,  
 6 sworn as a witness by the Certified Court Reporter,  
 7 testified as follows:  
 8 EXAMINATION  
 9 BY MR. CROSETTO:  
 10 Q. Could you state your name and address for the  
 11 record.  
 12 A. Jeffrey Edward Brandewiede, 6216 45th Avenue  
 13 Northeast, Seattle, WA 98115.  
 14 Q. Thank you, Mr. Brandewiede.  
 15 My name's John Crosetto. I'm the attorney for  
 16 Posa Maritime in this lawsuit. I'll be taking your  
 17 deposition today.  
 18 Have you had your deposition taken before?  
 19 A. No.  
 20 Q. So, I'll go over a couple ground rules. Most  
 21 of these are for the benefit of the reporter, because  
 22 she needs to take down everything we say, and if we have  
 23 our conversation in a way that makes it easier for her,  
 24 that's good for everybody.  
 25 A. Okay.

Page 7

1 Q. So, the -- Well, the first one: You just took  
 2 an oath. This is just like in court. Tell the truth,  
 3 whole truth, and nothing but the truth. When I ask you  
 4 a question, even if you might be able to anticipate what  
 5 the answer is, I ask that you let me finish the question  
 6 and I'll do the same when you're giving answers. I'll  
 7 let you complete your answer, again, so the court  
 8 reporter can get down everything we say. Also, if you  
 9 could give yes-or-no answers, verbal answers, rather  
 10 than head nods or uh-huhs, that also helps the court  
 11 reporter make a clean record.  
 12 A. Yes.  
 13 Q. Is that good?  
 14 Great, thank you.  
 15 And if you need to change an answer at any  
 16 time, if we're farther on in the deposition and you  
 17 recall that something you said earlier either you didn't  
 18 remember or your answer was -- you want to make it a  
 19 little bit different, feel free to go ahead and change  
 20 that.  
 21 And if I ask you a question that's not clear,  
 22 you don't understand it, please ask me to rephrase it  
 23 and I'll try to do that in a way that makes sense.  
 24 A. Okay.  
 25 Q. And, occasionally, your counsel will make an

Page 8

1 objection, and I'd ask that you simply go ahead and  
 2 answer the question unless your counsel says not to  
 3 answer the question.  
 4 A. Okay.  
 5 Q. Is that clear? All right.  
 6 Finally, if you want to take a break at any  
 7 time, that's fine. Just let me know. This is not an  
 8 endurance test. And -- But if I do have a question  
 9 pending, a question to you, I ask that you finish the  
 10 question before we take a break.  
 11 And, finally, we have to ask this of everyone:  
 12 Any medications or anything else that would keep you  
 13 from giving complete answers to my questions or  
 14 understanding what my questions are?  
 15 A. I am medication free.  
 16 Q. Great. So, what did you do to prepare for  
 17 your deposition today? And, again, I don't want to hear  
 18 about any conversations with your attorney, but, simply,  
 19 did you speak to anyone or review any documents?  
 20 A. No. I got a good night's sleep.  
 21 Q. All right. And did you bring any documents  
 22 with you today?  
 23 A. No.  
 24 Q. Did you talk to anyone about the deposition in  
 25 advance? Other than your attorney.

Page 9

1 A. I think it's -- Yes. I did get together last  
 2 week -- John and myself met with Van Vorwerk last week.  
 3 Q. And last week, do you remember what day that  
 4 was?  
 5 A. Wednesday.  
 6 Q. And how long did you meet with Mr. Vorwerk?  
 7 A. Two, three hours.  
 8 Q. And can you tell me the nature of the  
 9 conversation?  
 10 A. Really haven't seen him or spoken to him since  
 11 his termination from Posa and the project being over,  
 12 and he was telling me how he's doing and where life is  
 13 today for him and -- you know, as much as we didn't --  
 14 We -- It was catching up. You know, it was, like, maybe  
 15 this day would come, maybe this day wouldn't come, we'd  
 16 see each other again, but I was aware that I had  
 17 deposition and, you know, John, my attorney, in this  
 18 process, you know, some of the witnesses that we might  
 19 want to talk to.  
 20 You know, Van was one of the names that I gave  
 21 him to, you know, give us an account of what might be  
 22 going on or how Posa did or any of that stuff, so, we  
 23 just chatted.  
 24 Q. I'm just going to unpack that a little bit.  
 25 You said you talked about his termination from Posa. Do



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 court reporting, video and videoconferencing  
 800.831.6973 206.622.6875  
 production@yomreporting.com  
 www.yomreporting.com

# APPENDIX F

1  
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SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN THE COUNTY OF KING

FOSS MARITIME COMPANY,

Plaintiff,

v.

CORE LOGISTIC SERVICES; LISA  
LONG and JOHN DOE LONG, and the  
marital community comprised thereof;  
FRANK GAN and JANE DOE GAN, and  
the marital community comprised thereof;  
JEFF BRANDEWIEDE and JANE DOE  
BRANDEWIEDE, and the marital  
community comprised thereof; and  
BRANDEWIEDE CONSTRUCTION,  
INC.,

Defendants.

NO. 12-2-23895-2 SEA

DEFENDANT BRANDEWIEDE'S  
CONFIRMATION OF TRIAL  
READINESS

(CLERK'S ACTION REQUIRED)  
DUE DATE: 11/12/2013

Defendants and Counterclaimants Jeff Brandewiede, Melanie O'Cain Brandewiede and Brandewiede Construction, Inc. ("Brandewiede") submit the following Confirmation of Trial Readiness. Parties were unable to confer jointly, therefore they submit their own separate confirmation. Defendants Brandewiede's Confirmation of Trial Readiness was delayed due to receiving the Ex-Project Manager's records on October 24, 2013. Defendant Brandewiede has still not finished review of such files to determine whether such documentation is relevant to the issues before the Court.

DEFENDANT BRANDEWIEDE'S  
CONFIRMATION OF TRIAL  
READINESS - 1

BRA053 0001 ok25cv52pq

CARNEY  
BADLEY  
SPELLMAN

Law Offices  
A Professional Service Corporation

701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010  
T (206) 622-8020  
F (206) 467-8215

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- A. Defendants Brandewiede are represented by counsel.
- B. This trial is a  jury  non-jury trial. Defendants Brandewiede waive their jury trial request.
- C. It is estimated, based upon a maximum of five (5) trial hours per day that this trial will last two (2) days.
- D. Alternative Dispute Resolution (ADR) with a neutral third party **WAS** accomplished.  
 Yes  No  
 If ADR with a neutral third party **WAS NOT** accomplished, you must provide a detailed explanation and identify what arrangements have been made to complete ADR before trial. Counsel/party(ies) may be sanctioned for failure to comply with this requirement.  
An ADR settlement conference is scheduled for November 27, 2013 at Noon before Judge Catherine Shaffer.
- E. Interpreter(s):  Yes  No Language: \_\_\_\_\_

F. OTHER:

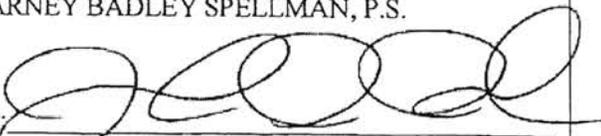
1. **CR 16 CONFERENCE:**  
 Defendants Brandewiede have not filed a motion for CR16 Conference.

2. **TRIAL WEEK AVAILABILITY:**  
 If counsel has another trial scheduled at the same time, identify name, cause number, venue of case, and dates of trial. Unusual problems scheduling witnesses should be noted.  
**NOTICE: Cases otherwise ready may be held on standby status during the week trial is scheduled to start. Counsel must be within two hours of the designated courthouse while on standby.**  
 Counsel for Defendants Brandewiede are available December 2-4, 2013.

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DATED this 25<sup>th</sup> day of November, 2013.

CARNEY BADLEY SPELLMAN, P.S.

By: 

John R. Welch, WSBA #26649  
Christine Sanders, WSBA #40736  
Attorneys for Defendants and Counterclaimants  
Jeff Brandewiede, Melanie O'Cain Brandewiede  
and Brandewiede Construction, Inc.

DEFENDANT BRANDEWIEDE'S  
CONFIRMATION OF TRIAL  
READINESS - 3

BRA053 0001 ok25ev52pq

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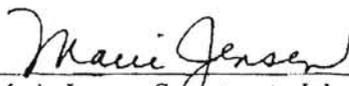
DECLARATION OF SERVICE

I, the undersigned, hereby certify that on this 25<sup>th</sup> day of November, 2013, I caused the foregoing pleading to be served on opposing counsel by delivering a true and correct copy thereof via messenger addressed as follows:

John Crosetto, WSBA #36667  
Tyler W. Arnold, WSBA #43129  
Garvey Schubert Barer  
1191 Second Avenue, 18<sup>th</sup> Floor  
Seattle, WA 98101  
Tel: (206) 464-3939  
Fax: (206) 464-0125  
Email: [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)  
[tarnold@gsblaw.com](mailto:tarnold@gsblaw.com)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25<sup>th</sup> day of November, 2013 at Seattle, Washington.

  
Marie Jensen, Secretary to John R. Welch

DEFENDANT BRANDEWIEDE'S  
CONFIRMATION OF TRIAL  
READINESS - 4

BRA053 0001 ok25ev52pq

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SPELLMAN

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Seattle, WA 98104-7010  
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# APPENDIX G

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR COUNTY OF KING

FOSS MARITIME COMPANY,

Plaintiff,

v.

CORE LOGISTIC SERVICES; LISA LONG  
and JOHN DOE LONG, and the marital  
community comprised thereof; FRANK GAN  
and JANE DOE GAN, and the marital  
community comprised thereof; JEFF  
BRANDEWIEDE and JANE DOE  
BRANDEWIEDE, and the marital community  
comprised thereof; and BRANDEWIEDE  
CONSTRUCTION, INC.,

Defendant.

NO. 12-2-23895-2 SEA

**DECLARATION OF VERNA SEAL IN  
RESPONSE TO DEFENDANT  
BRANDEWIEDE'S MOTION FOR  
DISCOVERY SANCTIONS**

I, Verna Seal, declare as follows:

1. I am a Paralegal at Garvey Schubert Barer, attorneys for Plaintiff Foss Maritime Company. I make this declaration from my own personal knowledge and from my review of the records referenced herein.
2. On September 12, 2012, Plaintiffs were served with Defendant Brandewiede's First Set of Interrogatories and Requests for Production of Documents.
3. TERIS, a litigation support firm, through its subcontractor e-Discovery, performed

DECLARATION OF VERNA SEAL IN RESPONSE TO DEFENDANT  
BRANDEWIEDE'S MOTION FOR DISCOVERY SANCTIONS - 1

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

1 an on-site data collection of Foss's documents, including electronically stored documents such as  
2 PST (email) files. The collection included Van Vorwerk's emails.

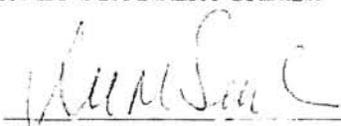
3 4. The PST files were loaded into a Relativity database, a document review platform,  
4 and the files were then reviewed for responsiveness, relevance, and privilege.

5 5. On October 12, 2012, Plaintiff served their Responses to Defendant Brandewiede's  
6 First Set of Interrogatories and Requests for Production. Included in that response, Defendant  
7 was provided with a disk containing 15,097 pages of documents responsive to their document  
8 request.

9 6. To respond to Defendant Brandewiede's allegation that Foss failed to produce an  
10 email between Van Vorwerk and Mark Houghton, I performed additional searches on the above-  
11 referenced data in the Relativity database. I understood that Mr. Vorwerk believed he wrote an  
12 email to his boss, Mark Houghton, "early on in the project" regarding Mr. Brandewiede's status as  
13 a partner with Frank Gan, Lisa Long, and Core Logistic Services. I spent 6.1 hours performing  
14 searches on all documents and reviewing documents in the search results for emails between Mr.  
15 Vorwerk and Mr. Houghton written throughout the project and confirmed that all responsive and  
16 non-privileged emails were produced on October 12, 2012.

17  
18 DATED this 12th day of December, 2013.

19 GARVEY SCHUBERT BARER

20  
21 By  \_\_\_\_\_

22 Verna Seal

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DECLARATION OF VERNA SEAL IN RESPONSE TO DEFENDANT  
BRANDEWIEDE'S MOTION FOR DISCOVERY SANCTIONS - 2

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

# APPENDIX H

No. 71611-5

COURT OF APPEALS DIVISION I  
OF THE STATE OF WASHINGTON

---

FOSS MARITIME COMPANY,

*Respondent / Plaintiff.*

v.

JEFF BRANDEWIEDE and JANE DOE  
BRANDEWIEDE, and the marital community comprised  
thereof; and BRANDEWIEDE CONSTRUCTION, INC.,

*Petitioner / Defendants*

and

CORE LOGISTIC SERVICES; LISA LONG and JOHN  
DOE LONG, and the marital community comprised  
thereof; FRANK GAN and JANE DOE GAN, and the  
marital community comprised thereof,

Defendants.

---

**PETITIONER'S MOTION FOR DISCRETIONARY REVIEW**

---

Gregory M. Miller, WSBA No. 14459  
John R. Welch, WSBA #26649  
CARNEY BADLEY SPELLMAN, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104-7010  
Telephone: (206) 622-8020  
Facsimile: (206) 467-8215  
*Attorneys for Petitioner / Defendants*

# **APPENDIX**

# **K**

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SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN THE COUNTY OF KING

FOSS MARITIME COMPANY,  
Plaintiff,

v.

CORE LOGISTIC SERVICES; LISA  
LONG and JOHN DOE LONG, and the  
marital community comprised thereof;  
FRANK GAN and JANE DOE GAN, and  
the marital community comprised thereof;  
JEFF BRANDEWIEDE and JANE DOE  
BRANDEWIEDE, and the marital  
community comprised thereof; and  
BRANDEWIEDE CONSTRUCTION,  
INC.,  
Defendants.

NO. 12-2-23895-2 SEA

SUPPLEMENTAL DECLARATION  
OF JOHN R. WELCH IN SUPPORT  
OF BRANDEWIEDE'S MOTION  
FOR RECONSIDERATION

I, John R. Welch, hereby declare and state as follows:

1. I am an attorney with the law firm of Carney Badley Spellman, and the attorney for Defendants Jeff Brandewiede, Melanie O'Cain Brandewiede and Brandewiede Construction, Inc., (collectively referred to herein as "Brandewiede") in this matter. I am over 18 years of age, competent to testify and have personal knowledge of the statements provided in this declaration.

SUPPLEMENTAL DECLARATION OF  
JOHN R. WELCH IN SUPPORT OF  
BRANDEWIEDE'S MOTION FOR  
RECONSIDERATION - 1

BRA053 0001 ok272r45ch.003

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SPELLMAN

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Seattle, WA 98104-7010  
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F (206) 467-8215

1           2.     Attached as **Exhibit A** is a true and correct copy of the November 8,  
2 2013 e-mail from John Crosetto to John Welch.

3           3.     Attached as **Exhibit B** is a true and correct copy the November 12, 2013  
4 e-mail from John Crosetto to John Welch. At the time of receipt of Mr. Crosetto's  
5 November 12, 2013 e-mail, I had only reviewed a portion of the e-mail  
6 communications provided by Van Vorwerk and had not reviewed any e-mail  
7 communication that would even remotely indicate to me that the e-mail documents  
8 contained attorney-client communications or attorney work product. However, given  
9 Mr. Crosetto's expressed concerns, I immediately stopped reviewing the e-mail  
10 communications received from Mr. Van Vorwerk.

11           4.     Attached as **Exhibit C** is a true and correct copy the February 10, 2014  
12 e-mail from John Welch to John Crosetto in which I request a copy of the privilege log  
13 and declaration that are referenced in the Notice as documents filed under seal on  
14 February 5, 2014. Foss's counsel did not respond to the request.

15           5.     Attached as **Exhibit D** is a true and correct copy the February 20, 2014  
16 e-mail from John Welch to John Crosetto in which I let Mr. Crosetto know that  
17 Brandewiede was considering filing a Motion for Reconsideration and again requested  
18 copies of the privilege log and declaration that was filed under seal.

19           6.     Attached as **Exhibit E** is a true and correct copy of the February 24,  
20 2014 e-mail string by and between John Welch to John Crosetto in which Foss'  
21 counsel states that he believes he needs direction from the court before providing any  
22 sealed documents. In response, I questioned why documents not privileged would be  
23 submitted to the court under seal and asserted Brandewiede's right to see a privilege  
24 log of what has been filed under seal and under a claim of attorney-client privilege.  
25 Foss' attorney did not respond.

26

SUPPLEMENTAL DECLARATION OF  
JOHN R. WELCH IN SUPPORT OF  
BRANDEWIEDE'S MOTION FOR  
RECONSIDERATION - 2

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CARNEY  
BADLEY  
SPELLMAN

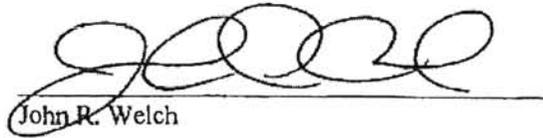
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F (206) 467-8215

APPENDIX K, PAGE 2 of 13

1 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE  
2 OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE  
3 BEST OF MY KNOWLEDGE.

4  
5 DATED this 28th day of February, 2014, at Seattle, Washington.

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8 John R. Welch

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SUPPLEMENTAL DECLARATION OF  
JOHN R. WELCH IN SUPPORT OF  
BRANDWIEDE'S MOTION FOR  
RECONSIDERATION - 3

BRA053 0001 ok272r45eh.003

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APPENDIX K, PAGE 3 of 13

Supplemental Declaration of John Welch  
In Support of Motion for Reconsideration

# **Exhibit A**

**Welch, John**

---

**From:** John Crosetto <jcrosetto@gsblaw.com>  
**Sent:** Friday, November 08, 2013 1:57 PM  
**To:** Welch, John  
**Cc:** Jensen, Marie  
**Subject:** Brandewiede Production

John-

Thanks for the call today. You mentioned that you had asked Van Vorwerk for documents related to the Alucia project, which he provided. They are no doubt responsive to Foss's discovery requests (see e.g., RFP's 15 and 25), so Foss asks that you immediately supplement Mr. Brandewiede's responses per CR 26(e) with all documents provided by Mr. Vorwerk. Please also provide the date on which the documents were requested and the date Mr. Vorwerk provided them.

Thanks again,  
John

**JOHN CROSETTO**

Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)

GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ► [GSBLaw.com](http://GSBLaw.com)

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Supplemental Declaration of John Welch  
In Support of Motion for Reconsideration

## **Exhibit B**

**Welch, John**

---

**From:** John Crosetto <jcrosetto@gsblaw.com>  
**Sent:** Tuesday, November 12, 2013 2:26 PM  
**To:** Welch, John  
**Cc:** Jensen, Marie; Verna Seal; Tyler Arnold; David West  
**Subject:** Foss v. CLS/Brandewiede  
**Attachments:** Joint Confirmation of Trial Readiness (1123939v2).DOC

John-

When we spoke last week, you were going to check with your client about his settlement position. Having not heard anything, please see the Joint Confirmation attached. If you have anything to add or change, please do so, and I will go ahead and get it filed. I also didn't hear back on my request for supplementation for the documents you said Van Vorwerk provided you. I don't want to jump to conclusions, but one of my concerns is that Van has provided documents that should have been returned to Foss (as Foss's property), or that he has provided documents protected by privilege and/or the work product doctrine. As you know, in communicating with a former employee, an attorney "must not use methods of obtaining evidence that violate the legal rights of the organization." RPC 4.2, Comment 7. While I hope that's not an issue, I reiterate my request that you immediately provide Foss with the documents received from Van.

Thanks,  
John

**JOHN CROSETTO**

Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)

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Supplemental Declaration of John Welch  
In Support of Motion for Reconsideration

## **Exhibit C**

**Welch, John**

---

**From:** Welch, John  
**Sent:** Monday, February 10, 2014 10:18 AM  
**To:** John Crosetto  
**Cc:** Marie Jensen (jensen@carneylaw.com)  
**Subject:** RE: Foss Maritime v. Core Logistics Services ( 12-2-23895-2 SEA)

John:

Would you please provide me with the privilege log and declaration that are referenced in the documents filed under seal.

Regards, John Welch



John R. Welch, Principal  
206-607-4198 Direct | 206-622-8020 Main  
Bio | vCard | Address | Website  
[welch@carneylaw.com](mailto:welch@carneylaw.com)

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*Pursuant to U.S. Treasury Circular 230, this communication is not intended or written by Carney Badley Spellman, P.S. to be used, and it may not be used by you or any other person or entity, for the purpose of (i) avoiding any penalties that may be imposed on you or any other person or entity under the United States Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any transaction or matter that is addressed herein.*

---

**From:** Adina Davis [<mailto:adavis@gsblaw.com>]  
**Sent:** Wednesday, February 05, 2014 2:10 PM  
**To:** Welch, John  
**Cc:** John Crosetto; Lisa Tardiff  
**Subject:** Foss Maritime v. Core Logistics Services ( 12-2-23895-2 SEA)

Dear Mr. Welch:

Attached please find Plaintiff Foss Maritime Company's Notice of Filing Under Seal.

Thank you,

ADINA DAVIS

Legal Assistant | 206.464.3939 x1512 Tel | 206.464.0125 Fax | [adavis@gsblaw.com](mailto:adavis@gsblaw.com)

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Supplemental Declaration of John Welch  
In Support of Motion for Reconsideration

# **Exhibit D**

**Welch, John**

---

**From:** Welch, John  
**Sent:** Thursday, February 20, 2014 11:23 AM  
**To:** 'John Crosetto'  
**Cc:** Jensen, Marie  
**Subject:** RE: Foss Maritime v. Core Logistics Services ( 12-2-23895-2 SEA)

John:

We are considering a Motion for Reconsideration of the Court's Order to Disqualify. I requested copies of the privilege log and declaration that accompanied the documents you filed under seal back on February 10, 2014 (see below) and have not received a response from you. Please provide the requested documents by tomorrow, Friday February 21, 2014.

Regards, John Welch

**CARNEY  
BADLEY  
SPELLMAN**

John R. Welch, Principal  
206-607-4198 Direct | 206-622-8020 Main  
Bio | vCard | Address | Website  
[welch@carneylaw.com](mailto:welch@carneylaw.com)

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---

**From:** Welch, John  
**Sent:** Monday, February 10, 2014 10:18 AM  
**To:** John Crosetto  
**Cc:** Marie Jensen ([jensen@carneylaw.com](mailto:jensen@carneylaw.com))  
**Subject:** RE: Foss Maritime v. Core Logistics Services ( 12-2-23895-2 SEA)

John:

Would you please provide me with the privilege log and declaration that are referenced in the documents filed under seal.

Regards, John Welch

**CARNEY  
BADLEY  
SPELLMAN**

John R. Welch, Principal  
206-607-4198 Direct | 206-622-8020 Main  
Bio | vCard | Address | Website  
[welch@carneylaw.com](mailto:welch@carneylaw.com)

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*Pursuant to U.S. Treasury Circular 230, this communication is not intended or written by Carney Badley Spellman, P.S. to be used, and it may not be used by you or any other person or entity, for the purpose of (i) avoiding any penalties that may be imposed on you or any other person or entity under the United States Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any transaction or matter that is addressed herein.*

Supplemental Declaration of John Welch  
In Support of Motion for Reconsideration

# **Exhibit E**

**Welch, John**

---

**From:** Welch, John  
**Sent:** Monday, February 24, 2014 7:21 PM  
**To:** 'John Crosetto'  
**Cc:** Jensen, Marie  
**Subject:** RE: Foss Maritime v. Core Logistics Services ( 12-2-23895-2 SEA)

John:

I guess I don't understand why you would file a privilege log and declaration under seal. I would think such documents are not appropriately sealed. Also, I believe my client has a right to see a privilege log of what has been filed under seal and under a claim of attorney-client privilege.

Regards, John Welch



John R. Welch, Principal  
206-607-4198 Direct | 206-622-8020 Main  
Bio | vCard | Address | Website  
[welch@carneylaw.com](mailto:welch@carneylaw.com)

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*Pursuant to U.S. Treasury Circular 230, this communication is not intended or written by Carney Badley Spellman, P.S. to be used, and it may not be used by you or any other person or entity, for the purpose of (i) avoiding any penalties that may be imposed on you or any other person or entity under the United States Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any transaction or matter that is addressed herein.*

---

**From:** John Crosetto [<mailto:jcrosetto@gsblaw.com>]  
**Sent:** Monday, February 24, 2014 9:14 AM  
**To:** Welch, John  
**Cc:** Jensen, Marie; Lisa Tardiff; David West  
**Subject:** RE: Foss Maritime v. Core Logistics Services ( 12-2-23895-2 SEA)

Hi John,  
Sorry for the late response, but I'm back in the office now. Under the circumstances, I think we'd need direction from the Court on providing any sealed documents. I'm generally available this week, except Thursday.  
Thanks,  
John

**JOHN CROSETTO**

Attorney | 206.464.3939 x 1529 Tel | 206.464.0125 Fax | [jcrosetto@gsblaw.com](mailto:jcrosetto@gsblaw.com)  
GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ► [GSBLaw.com](http://GSBLaw.com)

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# APPENDIX I

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Honorable Dean S. Lum  
Dept. 12  
Ex Parte

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

FOSS MARITIME COMPANY,  
Plaintiff,

v.

CORE LOGISTIC SERVICES; LISA LONG  
and JOHN DOE LONG, and the marital  
community comprised thereof; FRANK GAN  
and JANE DOE GAN, and the marital  
community comprised thereof; JEFF  
BRANDEWIEDE and JANE DOE  
BRANDEWIEDE, and the marital community  
comprised thereof; and BRANDEWIEDE  
CONSTRUCTION, INC.,  
Defendants.

NO. 12-2-23895-2 SEA  
*DSL*  
~~PROPOSED~~ ORDER TO DISQUALIFY  
COUNSEL FOR DEFENDANT JEFF  
BRANDEWIEDE AND SEEKING  
SANCTIONS

THIS MATTER came before the Court on Plaintiff's Motion to Disqualify Counsel for Defendant Jeff Brandewiede and Seeking Sanctions ("the Motion"). The Court reviewed the pleadings on file herein regarding the Motion, including the following. The Court considered the pleadings filed herein, and fully considered the following:

1. Plaintiff's Motion;
2. The Declaration of John Crosetto;

*DSL*  
PROPOSED ORDER TO DISQUALIFY COUNSEL FOR  
DEFENDANT JEFF BRANDEWIEDE AND SEEKING  
SANCTIONS- 1

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3939

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- 3. The Declaration of Lisa Sulock;
- 4. Documents filed and served in response to this Motion; and
- 5. Documents filed and served in reply to the response.

The Court hereby finds: that Brandewiede counsel did not address evidence cited in plaintiff's brief and that some (but not all) documents he reviewed were

1. The Court excludes evidence tainted by Mr. Vorwerk's and Mr. Welch's wrongful conduct - specifically, Defendant Brandewiede's Trial Exhibit 80; all of the information contained on the Drive; and any additional information containing or derived from privileged and/or confidential information belonging to Plaintiff that might be in Mr.

Welch's, Mr. Brandewiede's, or Mr. Vorwerk's possession unless defendant obtains that information from a source untainted by the wrongful conduct.

3. Grant to Plaintiffs attorneys fees to bring this motion and sanctions.

*check  
a to 1/24/  
client  
complaint*  
*(DSC)*

Based on the above findings, it is hereby ORDERED:

1. Plaintiff's motion is GRANTED. Counsel for defendant Brandewiede is disqualified. Real counsel for plaintiff shall prepare a new motion.

DONE IN OPEN COURT this 14 day of February, 2014. date and case

*substantiated by  
separate motion,*  
*DSC*  
KING COUNTY SUPERIOR COURT  
JUDGE

Presented By:  
GARVEY SCHUBERT BARER

By: s/ John Crosetto  
John Crosetto, WSBA # 36667  
Tyler W. Arnold, WSBA #43129  
Attorneys for Judgment Creditor-Plaintiff  
Foss Maritime Company

*(DSC)*  
PROPOSED ORDER TO DISQUALIFY COUNSEL FOR  
DEFENDANT JEFF BRANDEWIEDE AND SEEKING  
SANCTIONS- 2

GARVEY SCHUBERT BARER  
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS  
eighteenth floor  
1191 second avenue  
seattle, washington 98101-2939  
206 464 3038

# APPENDIX J

No. 71611-5

COURT OF APPEALS DIVISION I  
OF THE STATE OF WASHINGTON

---

FOSS MARITIME COMPANY,

*Respondent / Plaintiff,*

v.

JEFF BRANDEWIEDE and JANE DOE  
BRANDEWIEDE, and the marital community comprised  
thereof; and BRANDEWIEDE CONSTRUCTION, INC.,

*Petitioner / Defendants*

and

CORE LOGISTIC SERVICES; LISA LONG and JOHN  
DOE LONG, and the marital community comprised  
thereof; FRANK GAN and JANE DOE GAN, and the  
marital community comprised thereof,

Defendants.

---

**PETITIONER'S MOTION FOR DISCRETIONARY REVIEW**

---

Gregory M. Miller, WSBA No. 14459  
John R. Welch, WSBA #26649  
CARNEY BADLEY SPELLMAN, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104-7010  
Telephone: (206) 622-8020  
Facsimile: (206) 467-8215  
*Attorneys for Petitioner / Defendants*

On January 17, 2014, the parties appeared before the court to present their outstanding discovery motions and to argue Foss' Motion to Disqualify Counsel of Defendant Jeff Brandewiede. At the hearing, the Court denied the discovery motions (App. H) and reserved its decision on Foss Motion to Disqualify Counsel.

On February 5, 2014, Foss filed a Notice of Filing Under Seal and submitted to the court for in camera review the following documents: 1) Privilege and protected communications of Foss Maritime; 2) Privilege log; and 3) Declaration of Verna Seal. (App. G).

On February 10, 2014, counsel for Brandewiede wrote counsel for Foss and requested a copy of the privilege log and declaration that are referenced in the Notice as documents filed under seal on February 5, 2014. Foss's counsel did not respond to the request. (App. K, pp. 2 and 9).

On February 14, the court entered its order excluding all documents received from Mr. Vorwerk, disqualifying Brandewiede's counsel and granting Foss its attorney's fees relative to its motion. (App. I).

On February 20, 2014, after receipt of the Order Disqualify Jeff Brandewiede's Counsel, counsel for Brandewiede again wrote counsel for Foss, let him know that Brandewiede was considering filing a Motion for

Reconsideration and requested copies of the privilege log and declaration that was filed under seal. (App. K, pp. 2 and 11).

Foss' counsel responded on February 24, 2014 stating that he believes he needs direction from the court before providing any sealed documents. In response, Brandewiede questioned why documents not privileged would be submitted to the court under seal and asserted Brandewiede's right to see a privilege log of what was filed under seal and under a claim of attorney-client privilege. Foss' attorney did not respond. (App. K, pp. 2 and 13).

On February 28, 2014, the court issued an Order on Foss' Motion to Seal the document titled "The Wrongful Termination of Van V. Vorwerk", although the Motion was not noted or otherwise properly before the court. (App. L).

Also on February 28, 2014, the court issued its Order to Seal, noting that "the exhibit contains attorney-client communications and work product, the disclosure of which was the subject of the disqualification of counsel." The Order requires "Sub No. 72" filed on 12/2/2013, titled Reply/Plaintiff, to be sealed. Apparently, the court felt the entire pleading and any exhibits were subject to being sealed. (App. M).

# APPENDIX K

NO. 71611-5

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

JEFF BRANDEWIEDE and JANE  
DOE BRANDEWIEDE, and the  
marital community comprised  
thereof; and BRANDEWIEDE  
CONSTRUCTION, INC.,

*Petitioner-Defendants,*

v.

FOSS MARITIME COMPANY,

*Respondent-Plaintiff.*

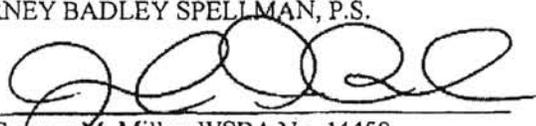
NOTICE FOR HEARING OF  
MOTION FOR  
DISCRETIONARY REVIEW

TO: Clerk of the Court

JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and  
the marital community comprised thereof; and BRANDEWIEDE  
CONSTRUCTION, INC., Petitioners, hereby note their Motion for  
Discretionary Review to be heard on the Court's Discretionary Review  
Calendar for May 2, 2014 at 9:30 a.m.

DATED this 31<sup>st</sup> day of March, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By 

Gregory M. Miller, WSBA No. 14459

John R. Welch, WSBA #26649

Of Attorneys for Petitioners-Defendants

NOTICE FOR HEARING OF  
MOTION FOR DISCRETIONARY  
REVIEW - 1

# APPENDIX L

NO. 71611-5

KCSC No. 12-2-23895-2SEA

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COURT OF APPEALS DIVISION I  
OF THE STATE OF WASHINGTON

---

FOSS MARITIME COMPANY  
*Respondent / Plaintiff,*

v.

JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the  
marital community comprised thereof; and BRANDEWIEDE  
CONSTRUCTION, INC.  
*Petitioner / Defendants*

and

CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG, and  
the marital community comprised thereof; FRANK GAN and JANE DOE  
GAN, and the marital community comprised thereof,  
*Defendants.*

---

**DECLARATION OF JOHN CROSETTO**

---

John Crosetto declares as follows:

1. I am an attorney at Garvey Schubert Barer, attorneys for plaintiff.

I make this declaration from my own personal knowledge and from my  
review of the records referenced herein.

2. The following is a true and correct transcription of a voicemail

- 1 -

SEA\_DOCS:1143097.1 [03404.05500]

from Kenneth S. Kagan of Carney Badley Spellman to David West of Garvey Schubert Barer regarding the above captioned lawsuit: “Hi, David, it’s Ken Kagan at Carney Babley Spellman. Ten after five. I was finally able to figure out what was going on with the Foss matter. So, here’s what I can tell you. I learned that John Welch filed a motion, apparently, a Motion for Discretionary Review. He believes that Judge Lum decided in error, but he does agree that right now he is not acting on his client’s behalf, former client’s behalf. We let the client know that the Motion for Discretionary Review had been filed. We let him know that there is the possibility of a fee application or a fee award and we let him know that somebody from Garvey Schubert might be contacting him. That’s all we did. Didn’t give him any advice, just let him know what was going on. so, I would say that if you wish to speak with him, you or Crosetto, you’re able because he is not currently represented. And then he can decide whether or not he wishes to speak. So, if that satisfies what you called me about, great. If not, do let me know. You can reach me on my direct line 607-4164. Thanks.”

3. The attached is a true and correct copy of an email that I received from Jeff Brandewiede on April 3, 2014. Exhibit 1.

I declare under penalty of perjury under the laws of the State of

- 2 -

SEA\_DOCS:1143097.1 [03404.05500]

Washington that the foregoing is true and correct to the best of my  
knowledge and belief.

DATED this 7th day of April, 2014.

GARVEY SCHUBERT BARER

By /s/ John Crosetto  
John Crosetto, WSBA # 36667

## **Exhibit 1**

---

**From:** Jeff Brandewiede [brandewiedeinc@hotmail.com]  
**Sent:** Thursday, April 03, 2014 4:28 PM  
**To:** John Crosetto  
**Subject:** Fwd: Disqualified Council

....Best Jeff Brandewiede  
206-250-6017

Begin forwarded message:

**From:** Jeff Brandewiede <brandewiedeinc@hotmail.com>  
**Date:** April 3, 2014, 4:07:46 PM PDT  
**To:** "jcrosetto@gsblae.com" <jcrosetto@gsblae.com>  
**Subject:** Disqualified Council

John

As we just spoke on the phone and you asked me if "I am being represented by any legal council", I responded with no. I have no attorney and can not afford new council after the ruling of the judge and disqualifying my council.

To further that, I called you yesterday to inform you, that I have no council ,I can not afford new council, I am also in no position to pay 200k to settle.If this matter is going to go further, then I will be representing myself. I have not instructed anyone to file anything on my behalf.

I have had communication with my disqualified attorney ,as I have asked for clarification on rulings from the judge. I wanted to know if I am on the hook for any fees for his disqualification ? Why my name is on the order for payment of Foss legal fees, as he is the one that got disqualified for his wrong doing .

....Best Jeff Brandewiede  
206-250-6017

NO. 71611-5-I

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON, DIVISION ONE

---

FOSS MARITIME COMPANY,

*Respondent*

v.

JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the  
marital community comprised thereof; and BRANDEWIEDE  
CONSTRUCTION, INC,

*Petitioners*

CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG, and  
the marital community comprised thereof; FRANK GAN and JANE DOE  
GAN, and the marital community comprised thereof,

*Defendants*

ON APPEAL FROM KING COUNTY SUPERIOR COURT

Honorable Dean S. Lum

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**CERTIFICATE OF SERVICE**

John Crosetto, WSBA #36667  
Colleen Hannigan, WSBA #45535  
GARVEY SCHUBERT BARER  
1191 Second Avenue, 18<sup>th</sup> Fl.  
Seattle, Washington 98101-2939  
(206) 464-3939

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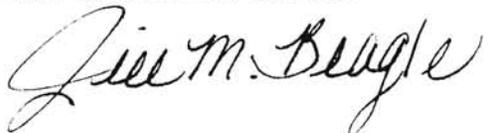
I, Jill M. Beagle, certify under penalty of perjury under the laws of the State of Washington that on December 3, 2014, I caused to be served on the person below, in the manner indicated, true and correct copies of the following:

- Foss Maritime Co.'s Response Brief; and
- this Certificate of Service.

Gregory M. Miller  
Carney Badley Spellman  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010  
*Via Legal Messenger*

DATED this 3<sup>rd</sup> day of December, 2014.

GARVEY SCHUBERT BARER

By   
Jill M. Beagle  
Legal Assistant