STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 18-CVS-014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

Representative David R. LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al.,

Defendants.

LEGISLATIVE DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* TO ADMIT CERTAIN FILES OF DR. THOMAS B. HOFELLER

Plaintiffs' motion *in limine* "to establish the admissibility of certain files of Dr. Thomas B. Hofeller" should be denied. The Court is in no position to admit any exhibits at this stage, and that is especially so given the serious questions that remain surrounding Plaintiffs' possession of documents from storage devices allegedly from Dr. Hofeller's personal residence. If the Court is to take its duty to enforce the rules of ethics seriously, *see Matter of Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977), it must investigate the factual discrepancies that plague Plaintiffs' filings, which are set forth below. Plaintiffs' attempt to sweep these issues under the rug by asking this Court to "admit" documents in evidence prior to trial is legally baseless and, if granted, would be so prejudicial as to undermine the fundamental fairness of the trial.

Setting aside Plaintiffs' ethical indiscretions and the procedural impropriety of moving *in limine* to *admit* evidence, Plaintiffs do not even identify *which* documents they seek to admit in evidence. It could be a handful of documents, it could be all 75,000+ documents allegedly recovered from the storage devices. Plaintiffs do not say. Plaintiffs then argue that the Court should

rule in their favor now on a host of authenticity, foundation, and hearsay issues. Their arguments on these points fail as a matter of law and are unsupported as a matter of fact.

In the end, the files at issue are a side-show. While they may provide Plaintiffs media coverage and fundraising opportunities, the files are not the enacted plans, they provide no useful evidence of the enacted plans, and they do not belong in this case.

ARGUMENT

I. The Court Should Not Admit Documents When Questions Surrounding the Conduct of Ms. Lizon and Plaintiffs' Counsel Remain Unresolved

It is doubtful at best that "Plaintiffs and their counsel have acted ethically and otherwise appropriately." Pls' *In Limine* Mot. To Admit Certain Files of Dr. Hofeller ("*Limine* Mot.") 29. Plaintiffs do not possess 75,000 of Dr. Hofeller's files by chance, but rather by cutting corners, to put it charitably. Plaintiffs' extensive discussions with Ms. Lizon undermine their assertion that this was an arms-length transaction. And they identify no effort on their part to independently verify Ms. Lizon's legal title to the documents or assertions of permission. Worse, Plaintiffs acted in total disregard for the plain fact that Ms. Lizon clearly lacked title to documents created by Dr. Hofeller as an agent for his clients or in a role as a principal in Geographic Strategies.

Plaintiffs should have asked this Court for "direction" last November when they filed their complaint, discovery opened, and they were aware that Ms. Lizon had possession of potentially relevant materials. The Court and the Parties could have used the intervening *seven months* to work through a process for Dr. Hofeller's estate and his former clients to produce any relevant and non-privileged documents. Instead, and alarmingly, Plaintiffs elected to take control of a trove of privileged materials, engage in a discovery shell game, and start distributing those materials to national media. This factual record cries out for a fulsome investigation of Plaintiffs' conduct. The

Court should exercise its power to investigate all of this before making any admissibility determinations.[1]

A. Plaintiffs' Counsel Gave Legal Advice

Contrary to Plaintiffs' assertions (Reply 25), the record is clear that Plaintiffs' counsel gave Ms. Lizon legal advice—and *never* gave Ms. Lizon the only advice it should have given her: to obtain her own attorney for independent advice. Ms. Lizon testified: "And it was explained to me that—that this was quite clear—that anyone, either the—the legislative defendants or the plaintiffs, were only properly entitled to even look at the content of files that were explicitly and obviously related to this case." Lizon Dep. 116:17–23.[2] Ms. Lizon testified: "That's what they [Plaintiffs' counsel] told me their understanding was." *Id.* 129:3–13. An opinion about what parties in this specific case are "entitled to even look at" is a legal opinion (and a dead wrong one at that).[3]

Plaintiffs' counsel also offered a legal opinion about what "would be best recognized in court as…a good chain of custody, transparency." *Id.* 67:7–18. The advice was to avoid any "accusation of picking and choosing" by turning the "media…over to a third party in its exact

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[1] Plaintiffs assert that Legislative Defendants "ignore the basic facts," Pls' Reply ISO Mot. for Direction ("Reply") at 1, but only identify a single factual error in their filing: that David Daley is, apparently, not formally affiliated with Common Cause. That, of course, is immaterial, especially when Bob Phillips, the president of Common Cause, has made public statements similar to Mr. Daley's. What Next: The GOP Operative Haunting Republicans From the Grave, Slate Daily Feed (June 4, 2019), https://podcasts.apple.com/ca/podcast/what-next-gop-operative-haunting-republicans-from-grave/id75089978?i=1000440577816. For example, Mr. Phillips observed that "hearing about the size" of the files Ms. Lizon offered Common Cause, "that's when one begins to think, 'Wow, you know, this really could be some significant things that might indeed, you know, help us in this case.'" Common Cause had an interest in maximum disclosure of the documents, and Plaintiffs do not deny this.

[2] A copy of Ms. Lizon's deposition was filed as Exhibit B to Plaintiffs' Reply Brief in Support of their Motion for The Court to Issue Direction to Legislative Defendants.

[3] Examples of legal advice include the statement that "a settlement would avoid litigation" and "personal exposure," that an insurer's failure to defend would mean that the insured "might have personal exposure for payment of part of the judgment," and that a lawyer paid by the insurer "will be divided" in loyalties. Op. RPC 194, N.C. State Bar (Jan. 13, 1995).

state." *Id.* Opinion about how to create a chain of custody "recognized in court" in a specific case is legal opinion, and advice to turn over "media" in its "exact state" for that purpose is as well. Plaintiffs respond that this was Ms. Lizon's idea, not theirs. Pls' Reply ISO Mot. for Direction ("Reply") 25–26. But her testimony is that this was the conclusion reached "in the discussion that I had with the attorneys Caroline Mackie and Eddie Speas." Lizon Dep. 67:9–11. Plaintiffs' citation (Reply 26) to Ms. Lizon's testimony that "[t]hey didn't say that it would be best" ignores the very next line: "*They said* it would be a…better preservation of the integrity…of the potential evidence." Lizon Dep. 115:12–17 (emphasis added). This was clearly Plaintiffs' counsel's advice to Ms. Lizon, not an idea she arrived at on her own. That Plaintiffs' counsel may have said "better" rather than "best" is immaterial.

Plaintiffs' reliance on Ms. Lizon's affidavit statement that the discussions did not contain legal advice is misplaced. Lizon Aff. ¶ 17.[4] What is and is not legal advice is itself a legal question, and Ms. Lizon is a fact witness. Nor does it help that Plaintiffs' counsel may have informed her that they represent Common Cause and could not give her legal advice. It is an ethical error for a lawyer to say: "I am not your lawyer. I can't give you advice. But if I were you I would…."[5] That is why the Rule requires a lawyer to stop at "the advice to secure counsel." N.C. R. Pfo's Conduct ("N.C. RPC") 4.3(a). No "discussion…with the attorneys" regarding "a good chain of custody," Lizon Dep. 67:9–14, should have occurred. And, notably, neither Ms. Lizon nor Plaintiffs assert that Plaintiffs' counsel recommended that Ms. Lizon should obtain counsel.

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[4] Ms. Lizon's Affidavit is attached as Exhibit A to Plaintiffs' Reply Brief in Support of their Motion for The Court to Issue Direction to Legislative Defendants.

[5] *See* Ethics Op. 316, D.C. Bar § II & n.13 (discussing the problem of disclaimers where subsequent conduct is at odds with the disclaimer).

B. Plaintiffs' Counsel Knew or Should Have Known of a "Reasonable Possibility" of an Ethical Conflict

Plaintiffs dismiss even a "possibility" of conflict between Common Cause's interests and Ms. Lizon's by asserting simply that "no one" they deem important has "accused Ms. Hofeller of any wrongdoing." Reply 27. The position reflects a continued willful blindness.

To begin, Ms. Lizon had been not only accused but also convicted of wrongdoing. On May 9, 2018—just months before engaging with Plaintiffs' counsel—Ms. Lizon pleaded guilty to "theft by unlawful taking" in Kentucky.[6] Yet Plaintiffs placed full reliance for their view that Ms. Lizon has no chance of legal jeopardy on her own representations to that effect.

Next, Plaintiffs' assertion that the allegations in the competency proceeding "have never been found to be true by any court," Reply 12, inexplicably ignores Exhibit 5 to Legislative Defendants' June 17 filing, which states in all-caps typeface: "COURT ADOPTS ALL STATEMENTS CONTAINED IN THE MOTION FOR APPOINTMENT, TO INCLUDE...ESTRANGED DAUGHTER RECENTLY INVOLVED NOW ACCOMPANIED [MRS. HOFELLER] TO CHANGE HER POWER OF ATTORNEY IN POSSIBLE ATTEMPT TO REROUTE MONEY BACK INTO OTHER ACCOUNTS TO ENABLE DAUGHTER TO ACCESS IT." Legis. Defs' Response to Mot. for Direction ("Response") Ex. 5, at 1. This was under the recommendation of the court-appointed guardian *ad litem*, who stated: "The undersigned is concerned that both Respondent's well-being and estate are at risk" based on the guardian *ad litem*'s understanding of the "estranged relationship with her daughter, Stephanie Lizon." *See* Response Ex. 6, at 3. That is not only "a court" but this very Court, the General Court of Justice, Superior Court Division, Wake County.

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[6] District Court News for May 19, 2018, Winchester Sun (May 19, 2018), https://www.winchestersun.com/2018/05/19/district-court-news-for-may-19-2018/.

Further, the resolution of the proceeding by a settlement rather than a judgment did not turn these red lights into green lights. The settlement had not occurred when Plaintiffs' counsel was giving legal advice to Ms. Lizon, so at that time, the interim order stated the position of the Court. Ms. Lizon reached out to Common Cause in November 2018, and the above-quoted court order was issued November 6, 2018. Moreover, the court-appointed guardian *ad litem* only recommended the settlement ultimately approved because the guardian believed it "would protect both the Respondent's person and her estate from further harm" from Ms. Lizon.[7] Response Ex. 3, at 4. The settlement was not a vindication of Ms. Lizon. And the very fact that Ms. Lizon reached out for assistance in these proceedings reflects both doubt as to their resolution and a warning to Common Cause and its counsel that independent, non-interested legal advice to Ms. Lizon was warranted. She had legal problems and needed her own counsel; Plaintiffs' counsel did not advise her to obtain it.

All that aside, Plaintiffs have no response to the simple fact that adversity was created by the existence of legal process served by Plaintiffs on Ms. Lizon. That is an independent source of adversity. If Plaintiffs believe no adversity existed, why did they subpoena her? Why didn't Plaintiffs seek direction from the Court *seven months ago* when they alone knew they could get these materials "voluntarily" from Ms. Lizon? If Plaintiffs truly were interested in only relevant, non-privileged materials that would have been the only prudent path. Their choice speaks volumes.

C. Plaintiffs Acted in Disregard for the Property Rights and Privileges of Others

Reasonable counsel would have viewed these circumstances as a stop sign, or at least a sign that further investigation was necessary before dealing with Ms. Lizon and advising her.

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[7] Plaintiffs' contention that Mrs. Hofeller simply must be competent because she entered the settlement ignores that the protection of her interests was ensured by the signature of the guardian *ad litem*, the court appointed interim guardian, and an attorney for the interim guardian. Response Ex. 7.

Instead, Plaintiffs' counsel relied entirely on Ms. Hofeller's representations that the allegations were false and plowed ahead with discussions, advice, and the transfer of 75,000 files.

Plaintiffs defend this course of action on the ground that they "obtained [the 75,000 files] through lawful court process." Reply 16. But this was not truly an arms-length transaction, nor do Plaintiffs meaningfully contend it was—since they claim no adversity to the adverse party in that "court process." Plaintiffs' contention (Reply 20) that the U.S. Supreme Court has blessed this complicity ignores the Supreme Court's own careful observation that the subpoenaing party in the case Plaintiffs cite "had no part in wrongfully obtaining" the materials. *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921). As the Seventh Circuit explained in *Knoll Assocs., Inc. v. F. T. C.*, it is the "antithesis" of *Burdeau* where a "disloyal employee" furnished to another complicit party recently stolen "information." 397 F.2d 530, 535 n.5 (7th Cir. 1968); *see also Couch v. United States*, 409 U.S. 322, 331 n.14 (1973) (clarifying that *Burdeau* applies only where there is no "knowledge or complicity"). Plaintiffs' contrary view that a subpoena cures their complicity would bless subpoenas to (and collaboration with) mail-room employees, janitors, secretaries, family members, trash collectors, house cleaners, yard-maintenance workers, baby sitters, etc., in conversion or theft. *But see* N.C. RPC 8.4(a) (providing that a lawyer may not "assist or induce another to" act unethically); *id.* 8.4(b) (prohibition on criminal acts). It would also bless efforts to obtain blatantly irrelevant and privileged information beyond the scope of discovery.

Colluding with Dr. Hofeller's estranged daughter to obtain Dr. Hofeller's clients' documents (that she had no right to) from Mrs. Hofeller (who also did not own them) is wrong, and the subpoena does not make it right, especially when the overwhelming majority of documents at issue are irrelevant to this case and thus beyond the scope of discovery. Plaintiffs' actions are legally indistinguishable from obtaining non-public corporate records from a "disgruntled

employee" who converted them, *Glynn v. EDO Corp.*, 2010 WL 3294347, at *5 (D. Md. Aug. 20, 2010), or a disloyal shareholder, *Xyngular v. Schenkel*, 890 F.3d 868, 872–75 (10th Cir. 2018). As noted, Plaintiffs' counsel was aware of the competency proceedings, and even a cursory review of the record, including the interim court order, would have created doubt as to whether Ms. Lizon was a proper party with whom to collaborate to get *anything* from the Hofeller household, much less Dr. Hofeller's client files. The filings presented allegations that Ms. Lizon was stealing from her mother and that an accounting assistant to her mother quit because she felt physically threatened by Ms. Lizon. A few moments of internet research would have revealed that Ms. Lizon had a very recent theft conviction. Yet Plaintiffs relied on Ms. Lizon's assertions of right, apparently did no independent vetting of her credibility, encouraged her to maintain possession of the materials, and collaborated with her to accomplish this.

Plaintiffs' effort to disclaim this complicity fails. Their assertion that they "knew virtually nothing about what was on the device or devices Ms. Hofeller possessed," Reply 18, contradicts Ms. Lizon's testimony that Plaintiffs' counsel in January 2019 sought "an accurate survey of what information, what format, anything else that might be includable" was on the devices, and by that time they had already "established" that some information on "the media…was relevant to…the case" and included her "father's work data." Lizon Dep. 126:20–127:3; *Id.* 127:25. She told them that "there were things that were related to my father's work in that everything was related to his work," including "certain statements where the—the business [was] mentioned…." *Id.* 127:7–11. She also told them that "[t]here was stuff relevant to my work as well as my personal life on all of them." *Id.* 128:1–3. In short, Ms. Lizon told them that the information "was both data related to [her] father's work as well as personal data with regards to [her] father[,]… [her] mother and personal data for [herself]." *Id.* 128:14–21. Simply because the discussions may not have occurred

on a document-by-document level does not mean Plaintiffs' counsel "knew virtually nothing." To the contrary, Plaintiffs' counsel knew they were advising Ms. Lizon to turn over all kinds of client files as well as all kinds of personal data from multiple people.

Knowing that, they knew they were getting irrelevant material—i.e., material not properly or ethically sought by a subpoena—privileged information, and information belonging to a variety of third parties. Plaintiffs' counsel knew Dr. Hofeller had a career of over 40 years as a redistricting expert, that he worked for clients in dozens of states, that he served as an expert witness, and that he worked closely with lawyers who advise states and other stakeholders in redistricting. They knew Dr. Hofeller served his clients alongside lawyers. And, in fact, their own pictures of the devices show law firm names on multiple devices Ms. Hofeller handed over to them. *See* Ex. A to this filing, at 12, 13, 40, 41, 47, 48. Other pictures of the devices show that Plaintiffs were aware—before they loaded a single document to their review platform—that they were receiving an entire "system backup" of Dr. Hofeller's computer from 2012 and 2013, years before the maps challenged in this case were passed, *Id.* at 7–8, and that they were receiving materials related to discovery in other cases, *Id.* at 17. They knew plenty about what they were getting and knew it went well beyond the scope of discovery.

Plaintiffs' contention (Reply 19–20) that the legal ownership to the documents has not been established defies the record and common sense. For one thing, a third party, Dale Oldham, is asserting ownership in this proceeding. For another, they concede (Reply 22–23) that they have received letters from Dr. Hofeller's clients demanding their property—overtures Plaintiffs have rebuffed. For another, money for the Hofeller family did not grow on trees. Dr. Hofeller was paid by clients to do work, just as a lawyer is paid and thus earns a living. And, like a lawyer, Dr. Hofeller worked as an agent for these various principles, meaning that the work product he created

was theirs, not his. Plaintiffs' feigned ignorance of these obvious facts is belied by the fact that they care about Dr. Hofeller only because he was the "agent" of parties to which they and their counsel are adverse in redistricting litigation. *See Limine* Mot. 10–11 (Describing Dr. Hofeller as the General Assembly's "agent").[8] It is as obvious that Dr. Hofeller's files belong to dozens of third parties as it is obvious that a lawyer's files do not transfer to the lawyer's spouse or children on death; some belong to partners, most to clients.

D. Plaintiffs' Actions Warrant, at a Minimum, Exclusion of the Lizon Files

Because of their actions, Plaintiffs are in possession of nearly 1,300 emails and thousands of additional attachments containing an objective assertion of privilege. Even after plowing through multiple red lights, Plaintiffs could have at least applied the most basic filter for privileged materials to avoid review; they could have filtered out all materials that included the terms "privilege" or "confidential" or "work product," or the like, but they have assured the Court of no such effort. Even in the absence of an ethical violation, opening a privileged document can result in disqualification. *See Maldanado v. N.J. ex rel. Admin. Office of the Court-Probation Div.*, 225 F.R.D. 120, 136–142 (D.N.J. 2004); *Richards v. Jain*, 168 F. Supp. 2d 1195, 1201 (W.D. Wash. 2001) (granting motion to disqualify because a paralegal read privileged information). As relevant here, the Court should not affirmatively admit any documents until it has investigated this matter fully.

Plaintiffs' claim that Legislative Defendants gave up their right to assert privilege in February 2019 when the subpoena was noticed ignores the black-letter rule cited in their own cases: "The failure to act to prevent or object to the disclosure of confidential communications

[8] That Dr. Hofeller was, in fact, *not* the North Carolina legislature's agent in creating the documents Plaintiffs reference in their motion *in limine* does not mean thousands upon thousands of files Ms. Lizon produced were not created in his capacity as an agent. Clearly, they were.

when a party *knows or should know that privileged documents may be disclosed by another party* waives the privilege with respect to the party failing to act." *Am. Home Assur. Co. v. Fremont Indem. Co.*, 1993 WL 426984, at *4 (S.D.N.Y. Oct. 18, 1993) (emphasis added). It is untenable that Legislative Defendants knew or should have known that Ms. Lizon, estranged from Dr. Hofeller for years, was about to hand over thousands of the legislature's privileged documents.[9] Moreover, given the requirement that an assertion of privilege be specific (a point Plaintiffs emphasize (Reply 22)), Legislative Defendants were not in a position to assert privilege until they had received and uploaded the more than 75,000 files.[10] When that occurred, Legislative Defendants promptly wrote to Plaintiffs' counsel notifying them of privileged files. But, even to this day, Legislative Defendants have not come close to reviewing all the documents at issue.

And Plaintiffs' assertion (Reply 24) that Legislative Defendants waived privilege by invoking Rule 45 is baffling. At that time, Plaintiffs had the Lizon files; Legislative Defendants did not. Plaintiffs' argument is, in essence, that, in that conundrum, Legislative Defendants had to choose between (1) obtaining the documents or (2) claiming privilege. As Plaintiffs would have it, Legislative Defendants either had to litigate at a disadvantage with none of the files or they had to waive privilege over all—without knowing at any level of detail what existed. That amounts to a Catch-22 scenario, a ransom rule of privilege, that cannot be the law. True, the consequence of Rule 45 was that all parties received the files. But Legislative Defendants had no other way to

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[9] Nor does failure to object to other subpoenas, such as those to Mrs. Hofeller and the non-existent "Estate of Dr. Hofeller," waive anything here, when no documents were produced in response to those subpoenas. The notion that Legislative Defendants should have known that Dr. Hofeller even had work documents at his house and with his family is mystifying.

[10] Plaintiffs' suggestion (Reply 21) that they and Legislative Defendants were similarly situated as to potentially privileged documents ignores that they were the ones talking to Ms. Lizon about the files before they were formally produced; Legislative Defendants had no contact with her. Moreover, Legislative Defendants were only in a position to assert their own privilege, whereas Plaintiffs had the obligation to take care for the rights of any "third person." N.C. RPC 4.4(a).

proceed. Given Rule 45's plain text, they could not have plausibly claimed (as Plaintiffs did) the right to the Lizon files to the exclusion of Intervenors and the North Carolina Attorney General. What else were Legislative Defendants to do than assert that the law be followed?[11]

That leaves only Plaintiffs' vague assertion that they have "acted transparently and prudently with respect to possible privilege issues, and have avoided reviewing materials that conceivably could be subject to a legitimate privilege claim by Legislative Defendants or anyone else." Reply 21–22. But a naked assertion by counsel is not good enough. Their claim requires vetting before this case can proceed. What steps have been taken? Who has reviewed what documents? With whom have these documents been shared?[12] Will Plaintiffs provide a report from their document-review platform (e.g., Relativity) indicating which documents have and have not been accessed? Will Plaintiffs put these assertions in an affidavit signed by a supervising attorney?

These and other questions must be answered before the Court can know what remedy is appropriate. Plaintiffs' assertions that their version of the facts—in contrast to, say, the version in public court filings and records—is correct need not be decided between parties exchanging "*ipse dixit*" assertions. Reply 27. Nor need it be decided on Ms. Lizon's testimony, when her own credibility is at issue. The Court has the power to hear from third parties, including individuals who were prepared to testify at the Hofeller competency proceeding before it settled. Legislative

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[11] A similar problem inheres in Plaintiffs' protestation that Legislative Defendants waived rights by failing "to confer…on privilege issues." Reply 23. Legislative Defendants' letter to Plaintiffs of May 31 attempted to do that. In response, Plaintiffs filed this motion asking the Court to direct Legislative Defendants to cease such communications, going so far as to hint that even discussing these matters was unethical. That put an abrupt halt to any meet-and-confer possibilities.

[12] Notably, documents from the Lizon files have appeared in court filings by other law firms, including Covington & Burling, indicating that the scope of Plaintiffs' dissemination of these materials may be very broad.

Defendants have information on such individuals and will be prepared to discuss possible inquiries with the Court at the July 2 hearing.

II. Plaintiffs' Motion is Procedurally Irregular And Should Be Denied To Prevent Undue Prejudice.

Setting aside those issues, Plaintiffs' motion is procedurally irregular. Plaintiffs seek a pre-trial decision to *admit* evidence, not "to exclude anticipated prejudicial evidence before such evidence is actually offered in the hearing of the jury." *State v. Hightower*, 340 N.C. 735, 746, 459 S.E.2d 739, 745 (1995). "A 'motion in limine' is customarily defined as one seeking *to avoid injection into trial* of matters which are irrelevant, inadmissible and prejudicial, and is not usually employed for the purpose of seeking the *admission* of evidence." *State v. Fearing*, 315 N.C. 167, 168, 337 S.E.2d 551, 552 (1985) (emphasis in original) (quotation marks omitted). The Court is not in a position to admit documents into evidence until they are presented at trial. *Heatherly v. Indus. Health Council*, 130 N.C. App. 616, 619–20, 504 S.E.2d 102, 105 (1998).

Nor does it make sense to address Plaintiffs' arguments even on a provisional basis when Plaintiffs present only a foggy idea of what documents they want admitted. Plaintiffs vaguely ask for an order establishing the admissibility of "certain files of Dr. Thomas B. Hofeller that Plaintiffs obtained," *Limine* Mot. 1, without providing a list or otherwise identifying the files with particularity. Plaintiffs received "over 75,000 files" from Ms. Lizon, so a motion to admit "certain files" is hardly helpful in providing "fulsome briefing on the issues in advance of trial." *Limine* Mot. 1.

Although Plaintiffs at times reference "relevant Hofeller files relied upon by Plaintiffs' experts," *Limine* Mot. 1, that is insufficient without more specificity. Plaintiffs' experts referenced

approximately nine separate backup folders, Chen Dep[13]. 324:2–25, 325:17–20, 327:3–14, and "a pretty lengthy number of Microsoft Excel files" and "Microsoft Word documents," Chen Dep. 348:5–7. More problematically, Plaintiffs reference these files together as a group and, in the next breath, differentiate among them ambiguously. This makes it impossible to know which arguments apply to which documents. Plaintiffs assert that "most" of the files do not "contain 'assertions' that could constitute hearsay," *Limine* Mot. 9, but fail to specify which ones they believe do and do not contain assertions. They likewise assert that "many of the files" do not need to be admitted "for the truth of the matter asserted," *id.*, but give no indication of which ones. "[N]early all of the Maptitude and Excel files' contents are not 'statements'" they say. *Limine* Mot. 17. Which ones do contain statements? And "a large number of the Hofeller files that Plaintiffs will seek to admit into evidence call into question…statements made to the *Covington* court," Plaintiffs tell the Court. *Limine* Mot. 28. But, again, there is no indication of what that "large number" encompasses. None of these files are attached as exhibits.

Plaintiffs encourage the Court to admit the documents into evidence to find out what they are. Plaintiffs' approach is deeply prejudicial. Vetting their arguments requires a document-specific understanding of what files are at issue and what objections may apply. Sweeping those issues aside and admitting the documents in bulk would deprive Legislative Defendants of their right to have evidence properly vetted by the trier of fact, and of their right to contest the admission of evidence. Proper vetting of evidence is one of the most basic due process protections known to the American legal system; depriving Legislative Defendants of that protection undermines the fundamental fairness of the trial. More fundamentally, Plaintiffs have proven to be incredibly poor

[13] Excerpts of Dr. Chen's deposition can be found at Exhibit 1 to Legislative Defendants' Motion to Exclude Files and Materials Produced by Stephanie Lizon.

translators of what these documents actually *mean*, Leg. Defs' Mot. *in Limine*, to Exclude Lizon Files 25–28, and skipping the most important step in understanding evidence—thoroughly vetting admissibility—would rob the Court of clarity.

The Court's Case Management Order, as amended, provides a better path forward. The parties are to exchange exhibit lists on July 1 and objections on July 8. The Court will then address these matters at a July 10 hearing. Assuming the Court would consider admitting any of the Lizon Files (it should not), the Court should address these matters at that time, once the issues are narrowed and clarified.[14]

III. Plaintiffs' Arguments on Authenticity and Hearsay Fail

To the extent any analysis of Plaintiffs' positions are even possible at this time, Plaintiffs have failed to meet their burden to show their proffered documents are admissible. That is for several reasons.

No Witness. The only witnesses Plaintiffs have lined up to discuss the Lizon Files are expert witnesses, and, for reasons set forth in Legislative Defendants' motion to exclude the rebuttal reports of those witnesses, this proposed testimony is inadmissible. The Lizon Files do not speak for themselves, Ms. Lizon knows nothing personally about them, and they provide no helpful information to this Court.

No Authenticity. Plaintiffs cannot establish authenticity. For the documents—whatever they are—to be admissible, there must be "evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1 ("N.C. R. Evid."), Rule 901(a). Plaintiffs state that these documents are "[1] files that Dr. Hofeller possessed and [2] that reflect

[14] For that reason, it is not clear whether Legislative Defendants have a privilege claim over documents Plaintiffs will proffer and will assert privilege as appropriate once they clarify what documents are at issue.

his work on the 2017 Plans." *Limine* Mot. 7. At best, their evidence suggests the former, that Dr. Hofeller may have possessed the material. But his mere possession of items is irrelevant to this case. What might be relevant is the latter assertion, that the documents "reflect [Dr. Hofeller's] work on the 2017 Plans." And that is what Plaintiffs cannot show.

Plaintiffs rely predominantly on Ms. Lizon's personal testimony to authenticate the documents, *Limine* Mot. 7–8, but she was not involved in the 2017 redistricting and could not identify what documents were created in conjunction with it. (This is no surprise given that Ms. Lizon had been estranged from Dr. Hofeller for years at the time.) Nor did she testify that she even looked at the files at issue. And Plaintiffs fare even worse in asserting that these files were among "75,000 files" that "contain a combination of Hofeller family files and documents aligning with Dr. Hofeller's work over the last 20 years." *Limine* Mot. 7. They provide no reason to think that *all* documents in Dr. Hofeller's files "reflect [Dr. Hofeller's] work on the 2017 Plans."

Next, Plaintiffs cite metadata in the files. This assertion underscores the prejudice of litigating this issue without knowing what documents are covered. Each document should contain its own metadata. Yet Plaintiffs discuss all the metadata together on a bulk basis. That is no basis to admit anything.

Anyway, what Plaintiffs have provided is woefully insufficient. For one thing, Plaintiffs make assertions about metadata with no backup evidence. All metadata is not created equal:

> Sometimes the metadata can be inaccurate, as when a form document reflects the author as the person who created the template but who did not draft the document. In addition, metadata can come from a variety of sources; it can be created automatically by a computer, supplied by a user, or inferred through a relationship to another document.

Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 646–47 (D. Kan. 2005) (footnotes omitted). Much of the metadata here is from Maptitude files, and neither Plaintiffs nor the Court nor even

Plaintiffs' experts are in a position to know what it means.[15] *Cf. Steak in a Sack, Inc. v. Covington Specialty Ins. Co.*, 2018 WL 4679947, at *6 n.9 (D. Md. Sept. 28, 2018) ("The Court is not a factual expert on email metadata, was not able to view the metadata as the documents were incompatible with the Court's computer system, and the Court cannot confirm the veracity of the emails.").

Nor has any evidence been presented on the reliability of the computer in Dr. Hofeller's home or the storage devices containing the Lizon Files. There is no corporate records custodian testifying about a regularly maintained corporate or government computer network, and there is no standardized file system using typical computer applications. The devices at issue were pulled haphazardly out of a retirement center, and the most probative files (the Maptitude files) were pulled from a bespoke GIS application. It is unknown for how many years Dr. Hofeller used the computers and storage devices, where they were in their useful life span, or what that span even is. Nor is there any evidence on Ms. Lizon's care for the devices when they were in her custody.

Moreover, much of the metadata is not "created automatically by a computer" but rather was "supplied by a user." *Williams*, 230 F.R.D. at 646–47. A human being entered it into the computer. For example, the notation "Tom/2017 Redistricting" appears not to have been created automatically by a computer; some person made a choice of that label. Thus, it is hearsay. And it is offered for the truth of the matter asserted: that Dr. Hofeller created the files in connection with the 2017 redistricting. Hearsay cannot authenticate otherwise unauthenticated documents. *See Barnes Found. v. Twp. of Lower Merion*, 982 F. Supp. 970, 996 (E.D. Pa. 1997). Nor does the metadata indicating last modified dates indicate that the documents were created at those dates or

[15] For example, it is entirely unclear what significance, if any, there is to the fact that "[t]he Administrator field is left blank for the Maptitude files analyzed by Dr. Chen and Dr. Cooper that contain draft House plans." *Limine* Mot. 9.

even who created them. "[T]he 'Created' date found in the metadata does not necessarily reflect the 'authoring date of a document, but ... more accurately reflects the date the file was 'created within the file system of a particular device." *Altman v. New Rochelle Pub. Sch. Dist.*, 2017 WL 66326, at *13 (S.D.N.Y. Jan. 6, 2017) (quotations omitted).

Further problems inhere in that the chain of custody if the Lizon Files is in doubt, as explained in Legislative Defendants motion *in limine* to exclude the Lizon files (at 11–14). Metadata on many files has "last modified" dates after Dr. Hofeller's death, and Plaintiffs have refused to provide a chain of custody—itself grounds for suspicion. In short, Plaintiffs have not authenticated, and apparently have no way to authenticate, any of the Lizon Files.

Hearsay. The documents are also hearsay. Plaintiffs' contention that they are excluded from hearsay because they do not contain statements is incorrect. *Limine* Mot. 16–18. The rule they cite, that "machine statements aren't hearsay," only applies where "the relevant assertion isn't made by a person." *United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015). When computer-stored records "are developed with human input," then there *is* a *human* declarant—the person who made the inputs. *United States v. Bates*, 665 F. App'x 810, 814 (11th Cir. 2016); *United States v. Shah*, 125 F. Supp. 3d 570, 576 n.2 (E.D.N.C. 2015). Here, the maps and spreadsheets Plaintiffs reference were not created by a machine, but by a human being (who may or may not have been Dr. Hofeller). *See Lizarraga-Tirado*, 789 F.3d at 1109 ("hand-drawn additions to a map" are hearsay). And the declarations Plaintiffs attribute to him (quite incorrectly) concern where the North Carolina legislature or legislators desired district lines.

For that reason, Plaintiffs cannot help but offer them for the truth of the matter asserted. Showing "Dr. Hofeller's intent," *Limine* Mot. 18, is not relevant to this case without a link to the intent of others. Dr. Hofeller's declarations must be a true statement of the intent of others for the

material to be of use. Plaintiffs' contentions bypass this simple fact. It is, for example, not relevant "that the draft maps existed" unless "the contours and forms" are true statements of the contours and forms legislators wanted. *Limine* Mot. 18.

No Hearsay Exception. Plaintiffs rightly focus on exceptions to hearsay, but their positions on this fail for the simple reason that they have not and cannot show that Dr. Hofeller created these maps in his capacity as an agent of the legislature. To be statements against a party opponent, Dr. Hofeller's files must be made in the scope of agency and during its existence. N.C. R. Evid. 801(d)(D); *Pearce v. S. Bell Tel. & Tel. Co.*, 299 N.C. 64, 68, 261 S.E.2d 176, 178–79 (1980) (finding employee's statements related to an earlier accident inadmissible hearsay for lack of "evidence that [employee] had the authority to make such statements on behalf of [company] or that such statements related to an act presently being done by [employee] within the scope of his employment."). And to be a public record, the files must record "the activities of the office or agency" or "matters observed pursuant to a duty imposed by law." N.C. R. Evid. 803(8).

Neither standard is met without evidence that Dr. Hofeller was creating these files in the course of his agency for the North Carolina legislature. The legislature itself denies this.[16] Plaintiffs' basis for disagreeing with that assertion is remarkably weak. Legislative Defendants have already demonstrated that the draft house map on Dr. Hofeller's computer contains more overlap with the *Covington* plaintiffs' map than with the enacted plans and that the overlap in senate maps is not meaningfully different. Leg. Defs' Mot. *in Limine*, to Exclude Lizon Files 25–30. So Plaintiffs are wrong in asserting that the maps on Dr. Hofeller's computers are materially identical to the enacted plans.

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[16] Legis. Defs' Response to Mot. for Direction Ex. 1; Joint Stipulation, *Covington v. North Carolina*, 1:15-cv-399, (M.D.N.C. July 26, 2017), ECF No. 178.

Plaintiffs cite the contract between Dr. Hofeller and the legislature, which was signed on June 27, 2017. But most of the "last modified" meta-data dates are on or before June 27, 2017, and the others are, for example, June 28. *See Limine* Motion 10–13. That is a poor basis for concluding, against the direct statement of Rep. Lewis, that Dr. Hofeller was creating the files—which could easily have been drawn months or years earlier—pursuant to his agency with the legislature or as an official government record. Indeed, most of Plaintiffs' argument is simply to opine that "he clearly was acting in furtherance of his agency relationship," *Limine* Mot. 12, but it is their burden to establish the hearsay exception. *State v. Hinnant*, 351 N.C. 277, 287, 523 S.E.2d 663, 669 (2000).

Plaintiffs' residual-exception argument (*Limine* Mot. 13–14) fares no better. First, the files are not "offered as evidence of a material fact," N.C. R. Evid. 804(b)(5), when it is irrelevant what Dr. Hofeller was doing without authorization of the legislature. Dr. Hofeller's private activities, occurring unbeknownst to any member of the North Carolina legislature, cannot form the basis to strike down formal legislation. And it is especially irrelevant that Plaintiffs allege Dr. Hofeller was looking at *racial* data when this is a *partisan*-gerrymandering case. Nor are the files "more probative on the point for which it is offered than any other evidence," *id.*, when Plaintiffs already have the 2017 plans themselves to analyze and the computer files on which Dr. Hofeller created them. Indeed, no "other evidence" is needed to "directly speak to Dr. Hofeller's intent and considerations," *Limine* Mot. 14, because the legislature is the only actor capable of violating the North Carolina Constitution. If Plaintiffs wanted to obtain the testimony of Rep. Lewis and Sen. Hise, they could; but they have successfully quashed those legislators' proposals to testify. Dr. Hofeller's intent is not "more probative" than theirs.

Furthermore, for reasons stated above, there are no "circumstantial guarantees of trustworthiness," N.C. R. Evid. 804(b)(5), since Dr. Hofeller's computer has not been established as reliable, a chain of custody has inexplicably been refused, metadata on the files shows suspicious activity after Dr. Hofeller's death, and the only "experts" Plaintiffs have to opine on these files know virtually nothing about the program on which it was created.

Finally, Plaintiffs' argument (*Limine* Mot. 14–15) that "[m]any of the relevant Hofeller files"—which ones?—are "against the interest of Dr. Hofeller" is incomprehensible. They assert with no support that Dr. Hofeller could somehow be "subjected…to liability" either for drawing unauthorized maps or using race in drawing those maps. Why would that be? There is no cause of action to sue a person who draws maps on a computer in his spare time, when "not 'authorized' to work on the 2017 Plans." *Limine* Mot. 15. And, even if Dr. Hofeller's work were for the legislature, the cause of action would be against the State, not Dr. Hofeller, and for equitable relief only. Dr. Hofeller's self-interest, as understood by the rule, is entirely unclear.

Plaintiffs suggest (*Limine* Mot. 15) that Dr. Hofeller must have been using his lump-sum $50,000 payment in an unlawful way, but they show no evidence that Dr. Hofeller billed for his time on the files Plaintiffs intent to use—nor would that even make sense when the $50,000 was a flat fee. Does an attorney of the North Carolina Department of Justice who reads a Supreme Court decision in the attorney's spare time violate North Carolina law? Does an accountant for the State who invests the accountant's own money on the accountant's own time commit a civil or criminal offense?

If Plaintiffs intend to press this argument, they should be required to explain it further. They should identify the statute or common-law doctrine they believe Dr. Hofeller may have violated and what precisely is against his interests in the files.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing in the above titled action upon all other parties to this cause by email transmittal to the following:

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Counsel for Common and the Individual Plaintiffs

This 1st day of July, 2019.

By: _____
Phillip J. Strach, N.C. State Bar No. 29456

39098342.1

CONCLUSION

Plaintiffs' procedurally improper and meritless motion should be denied.

This 1st day of July, 2019

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

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Exhibit A

STROZ FRIEDBERG

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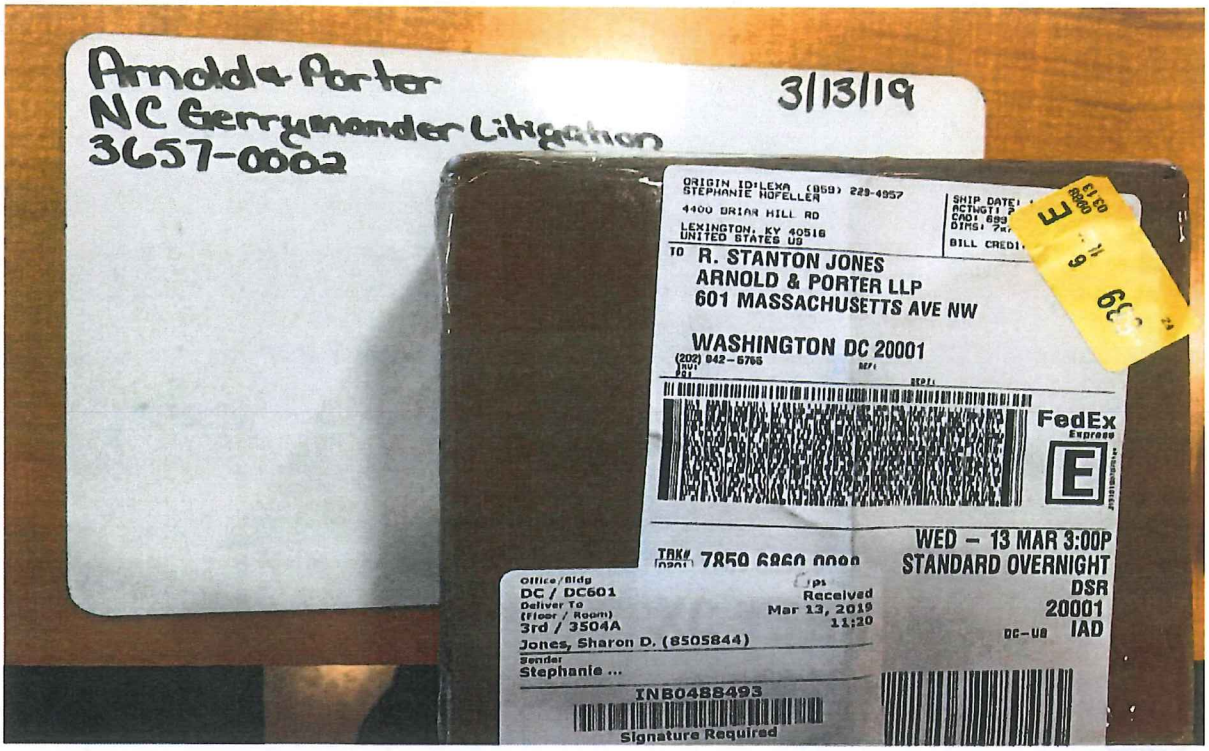
Pictures of T. Hofeller Media Received from Arnold & Porter Kaye Scholer LLP



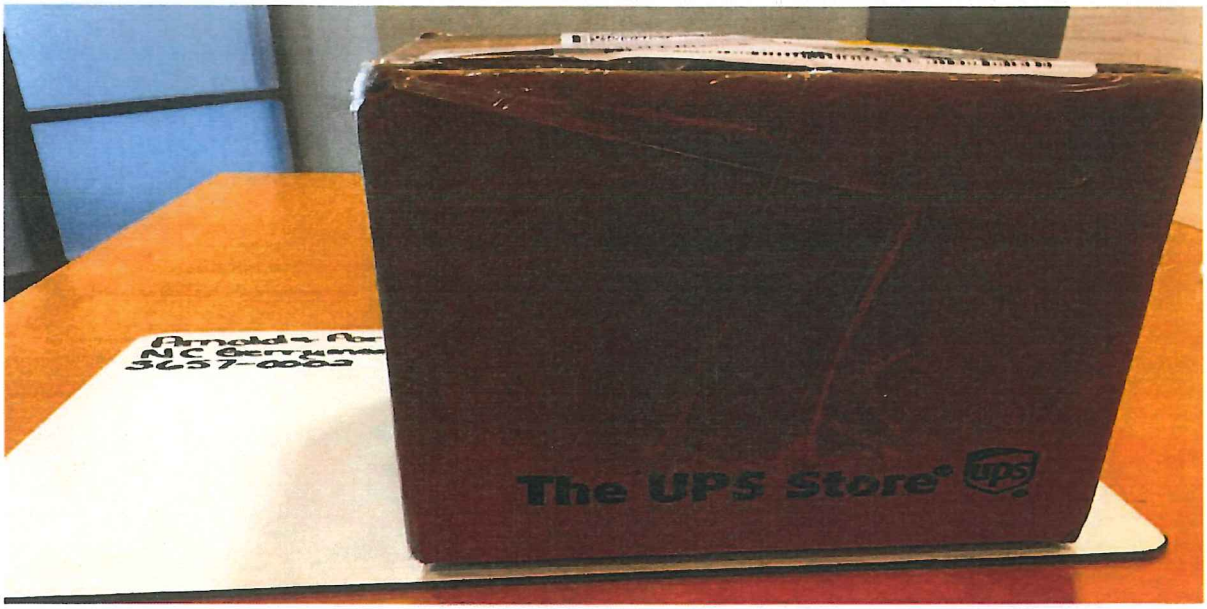


EXHIBIT 2
Hofeller 5/17/19
PENGAD 800-631-6989

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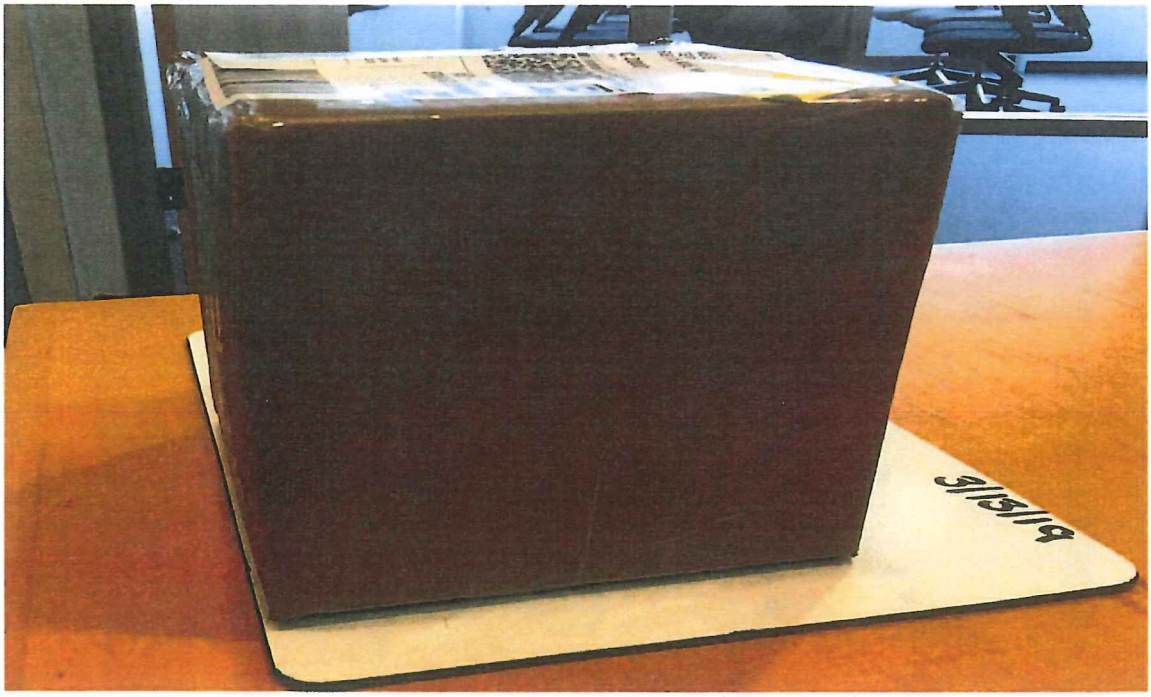

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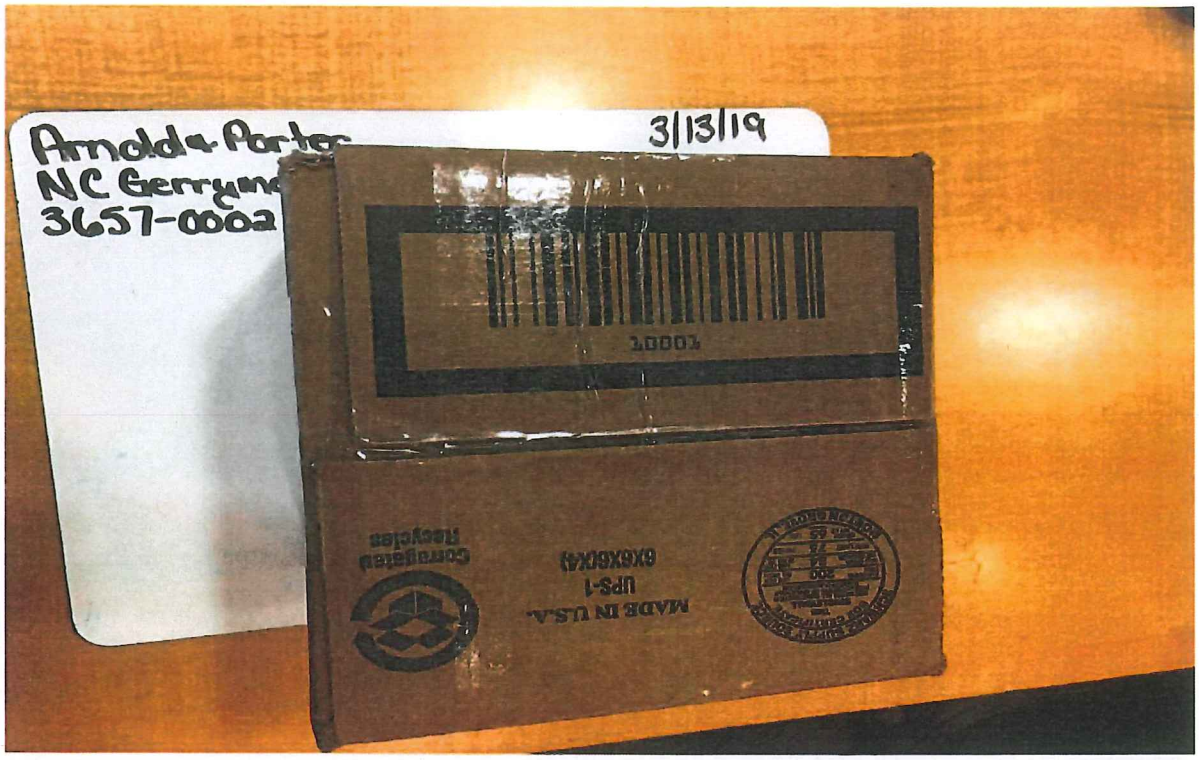

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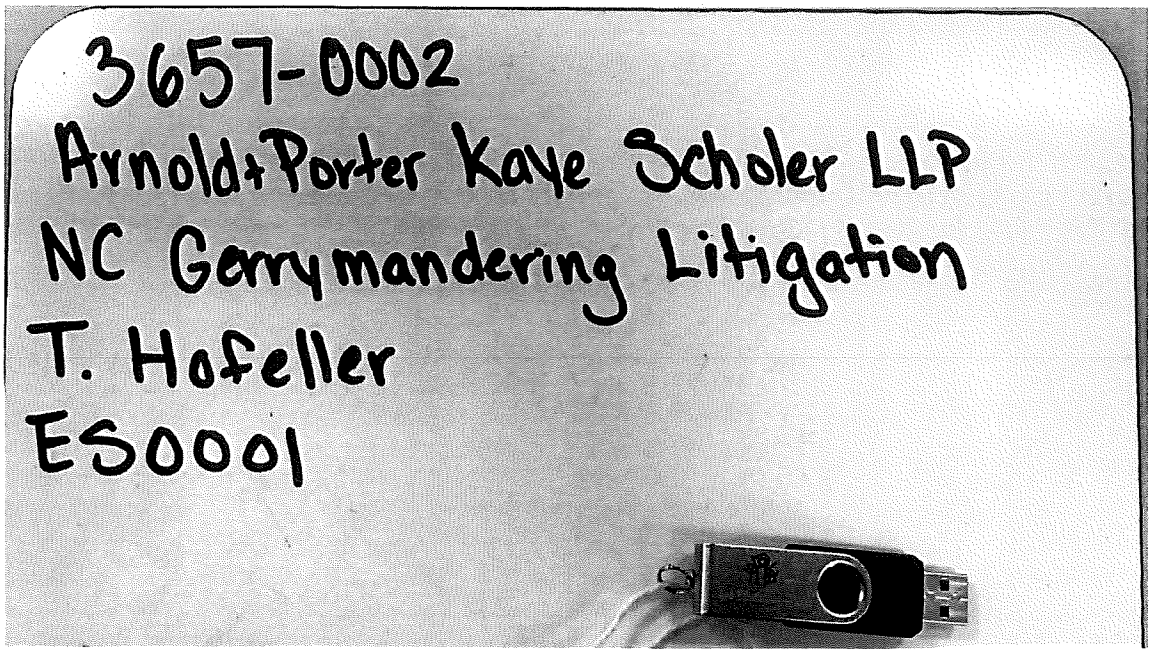

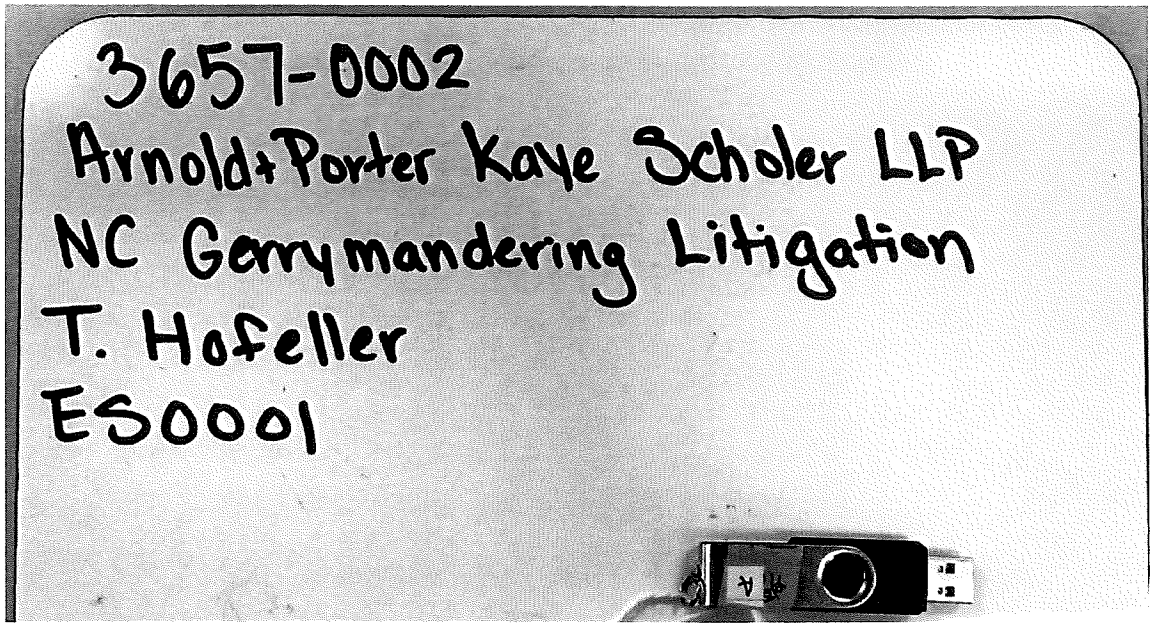

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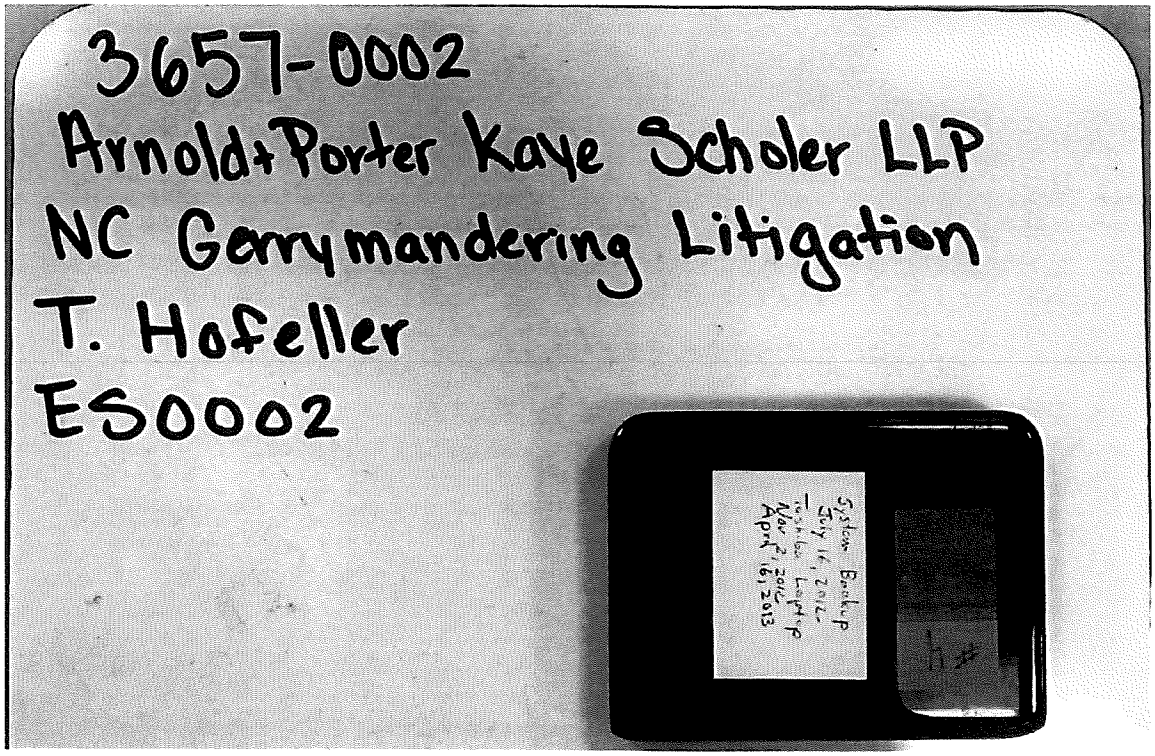

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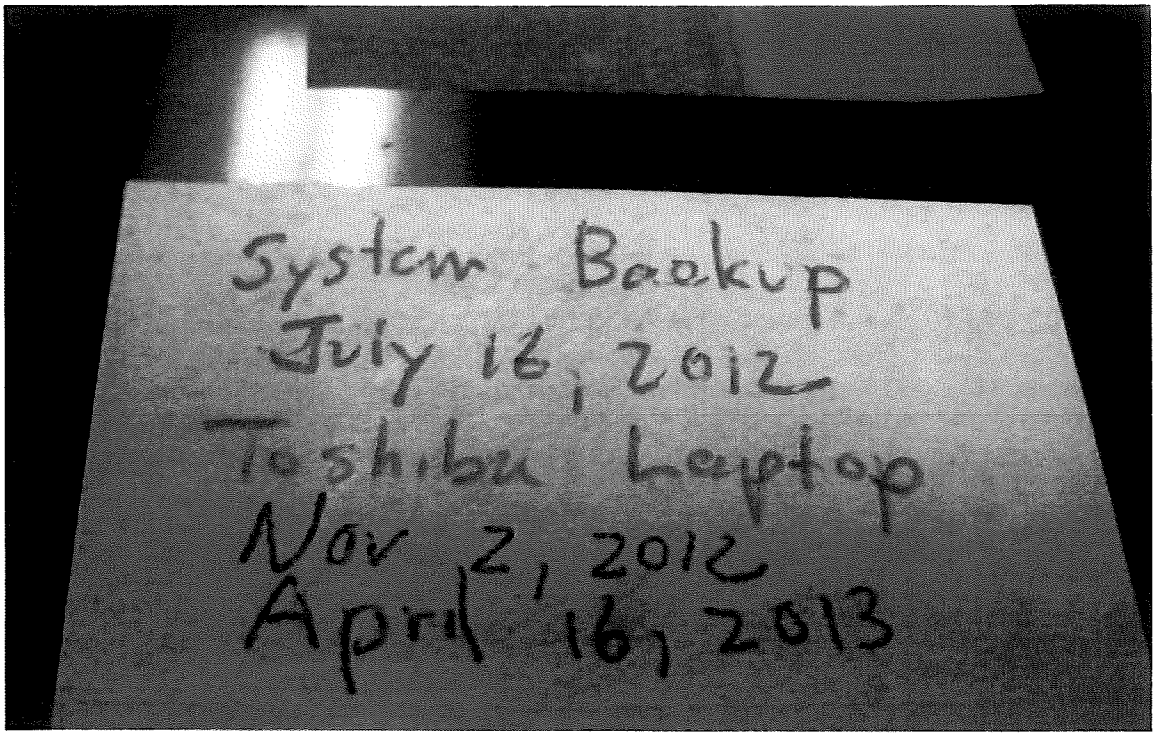

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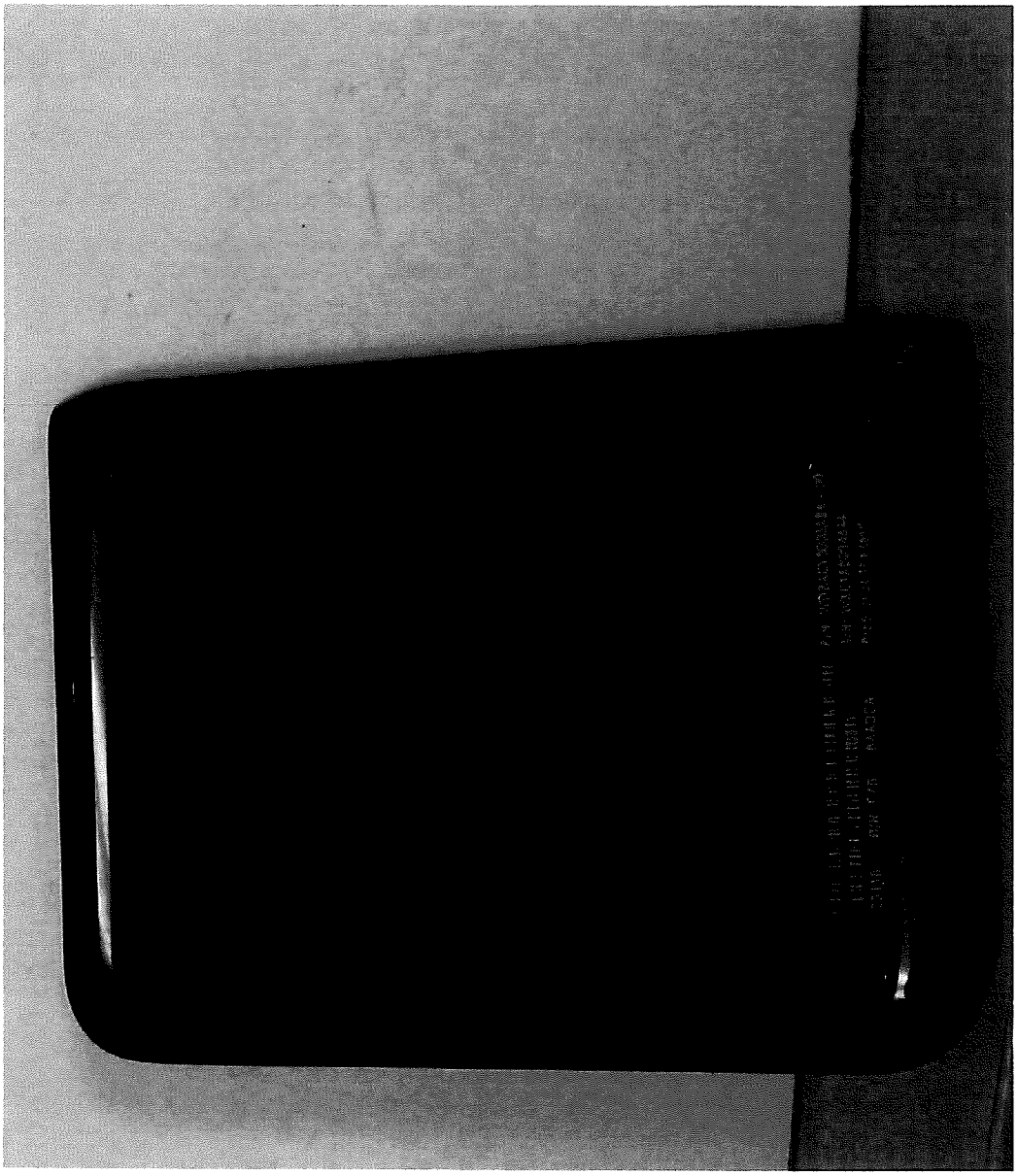

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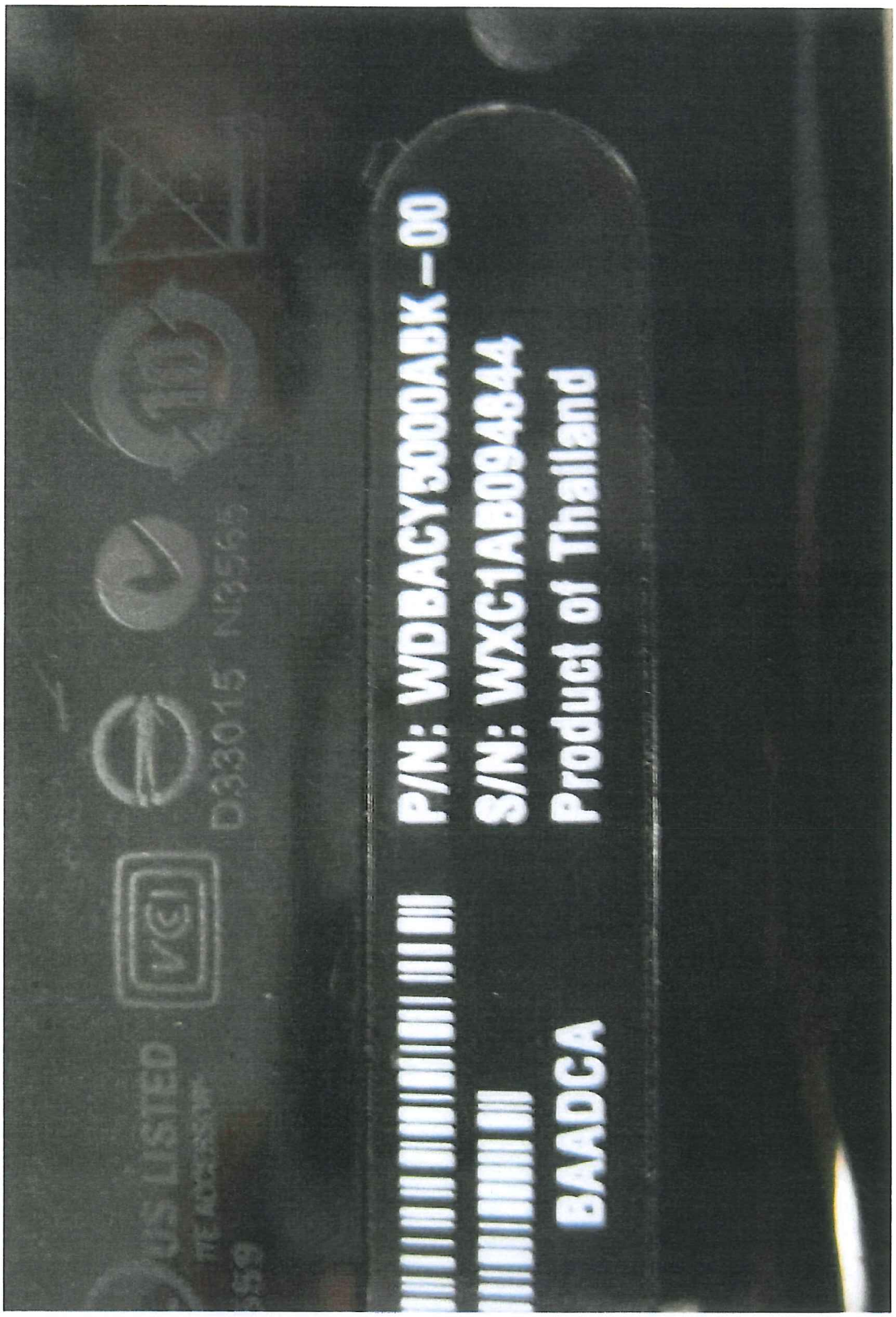

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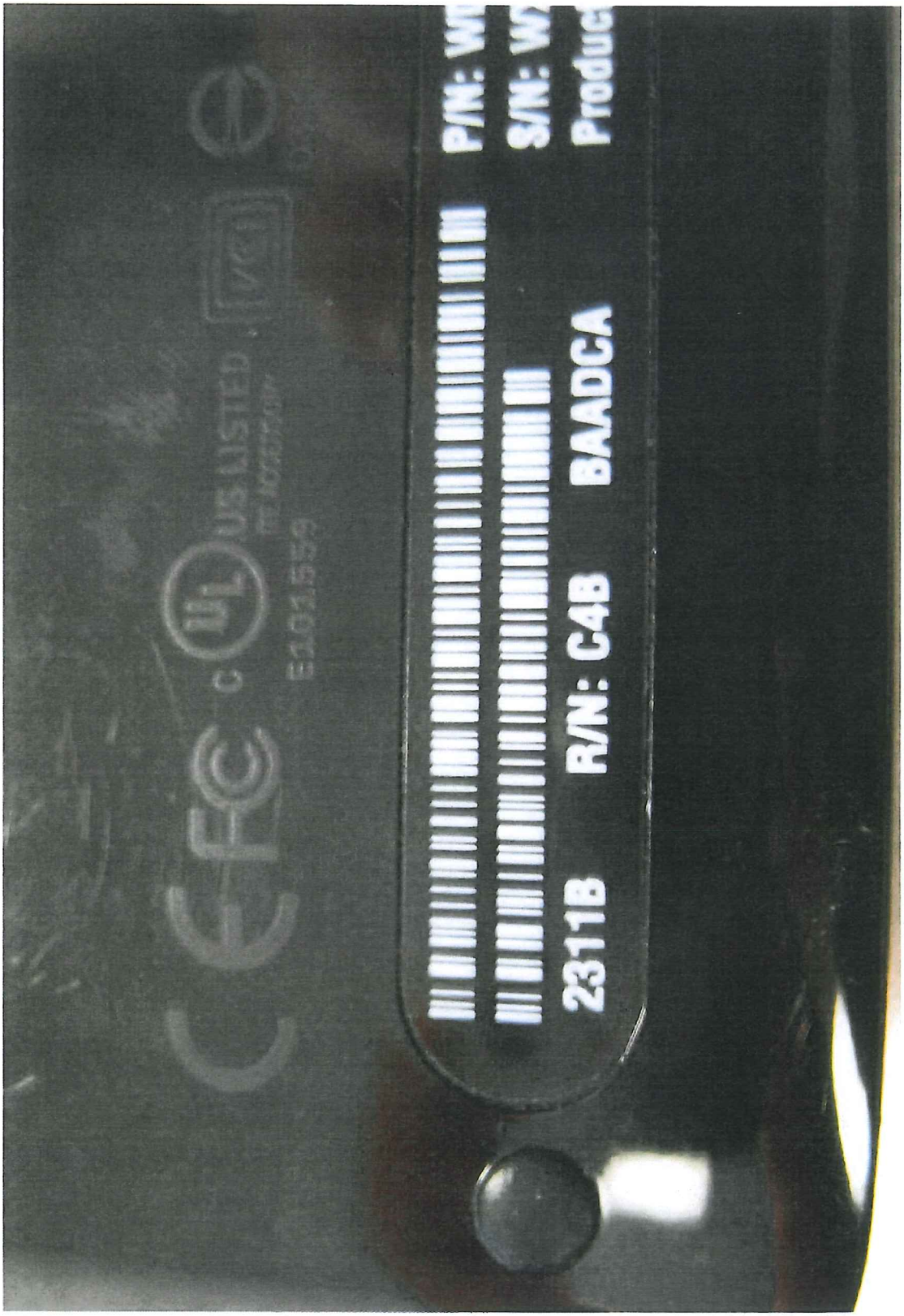

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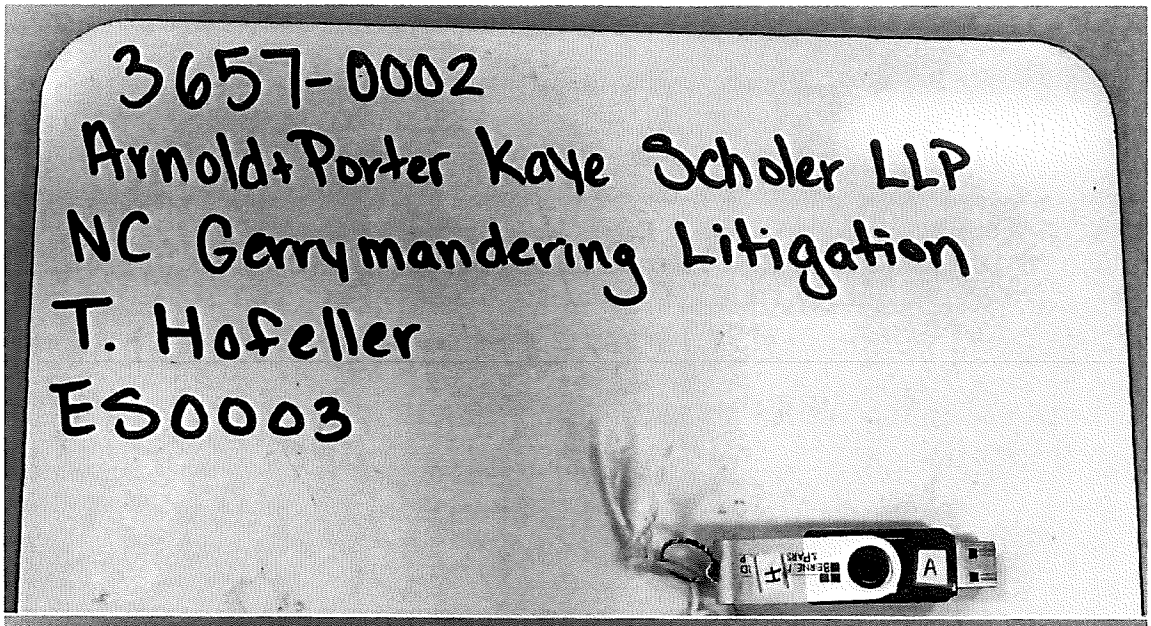

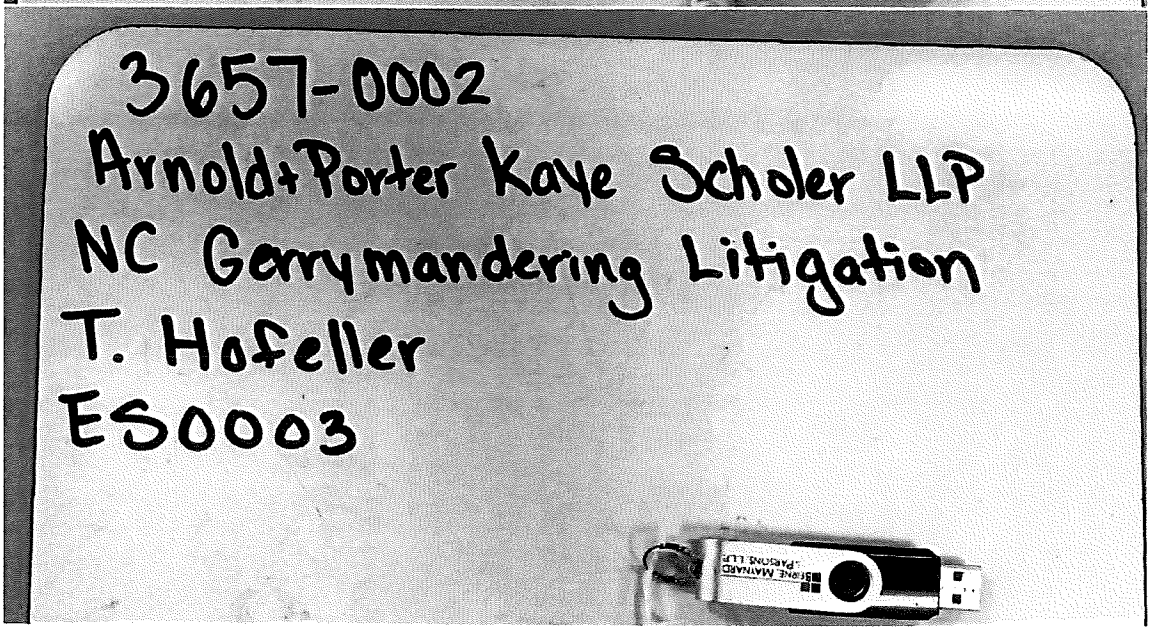

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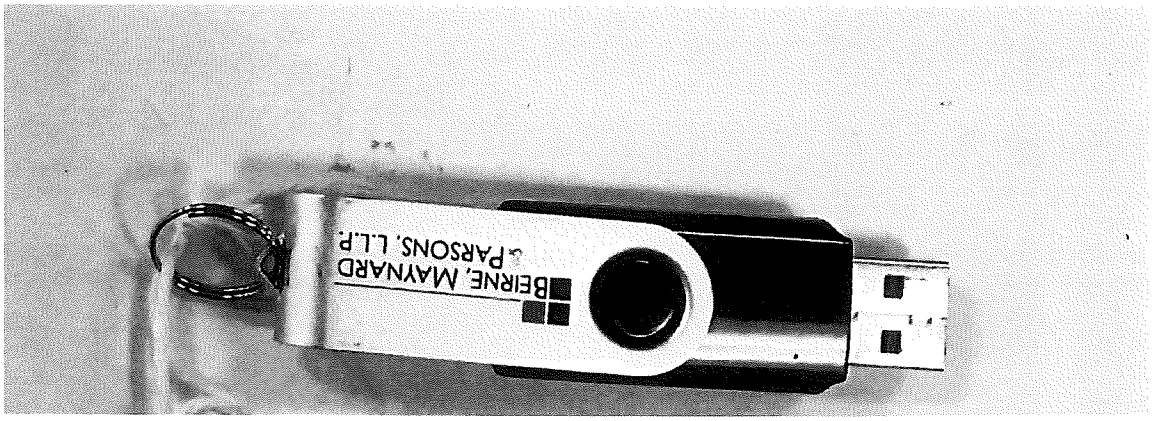

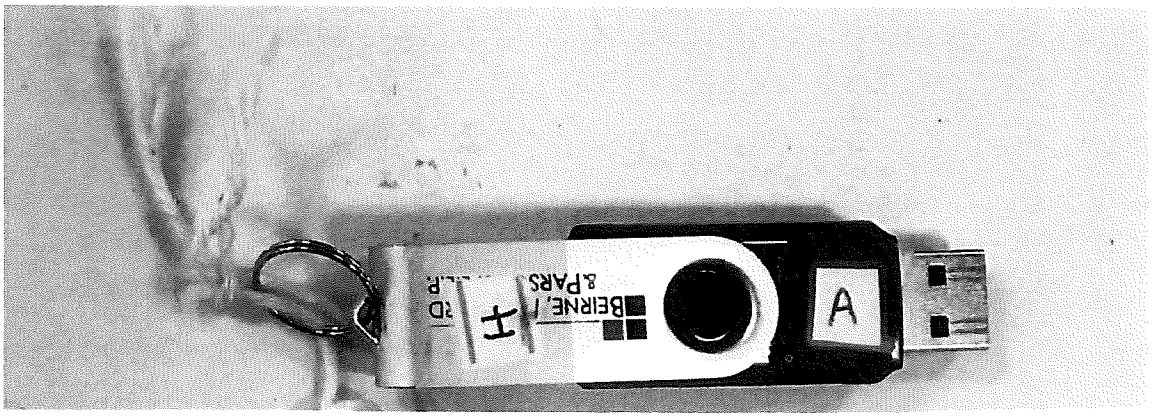

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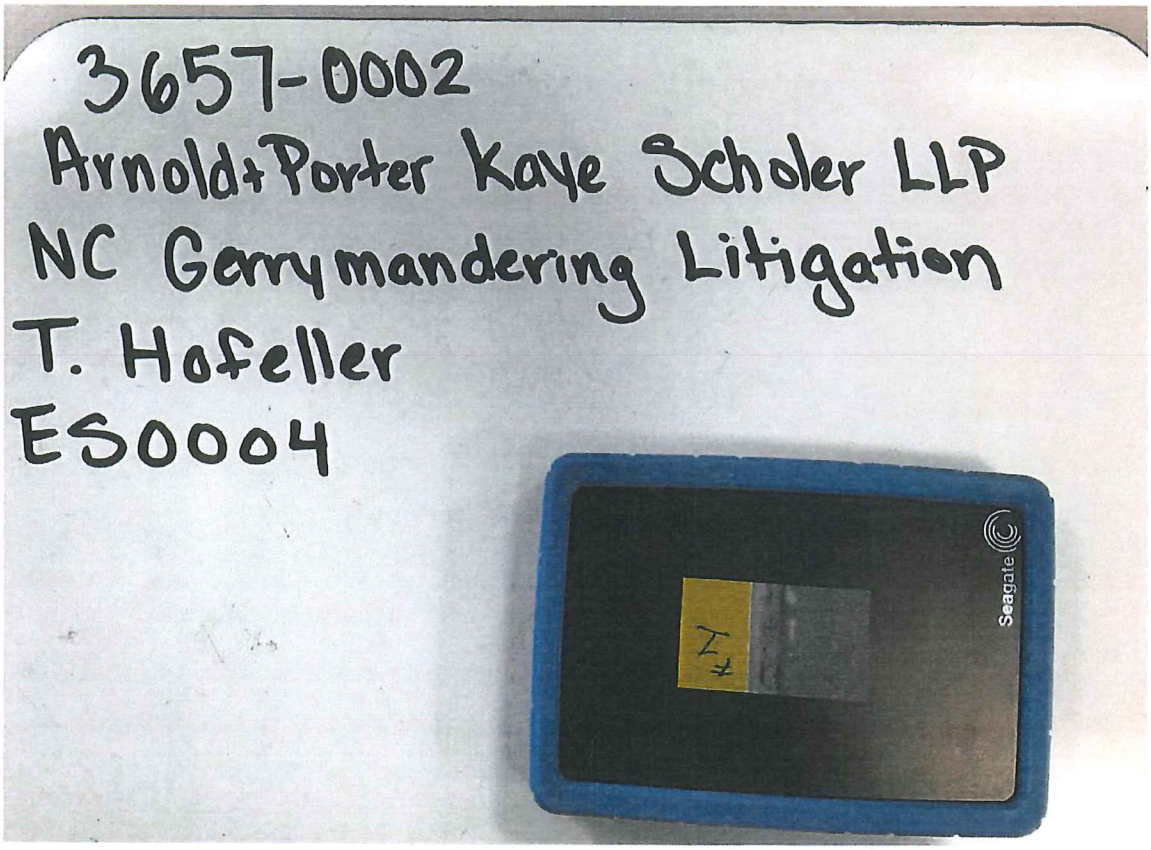

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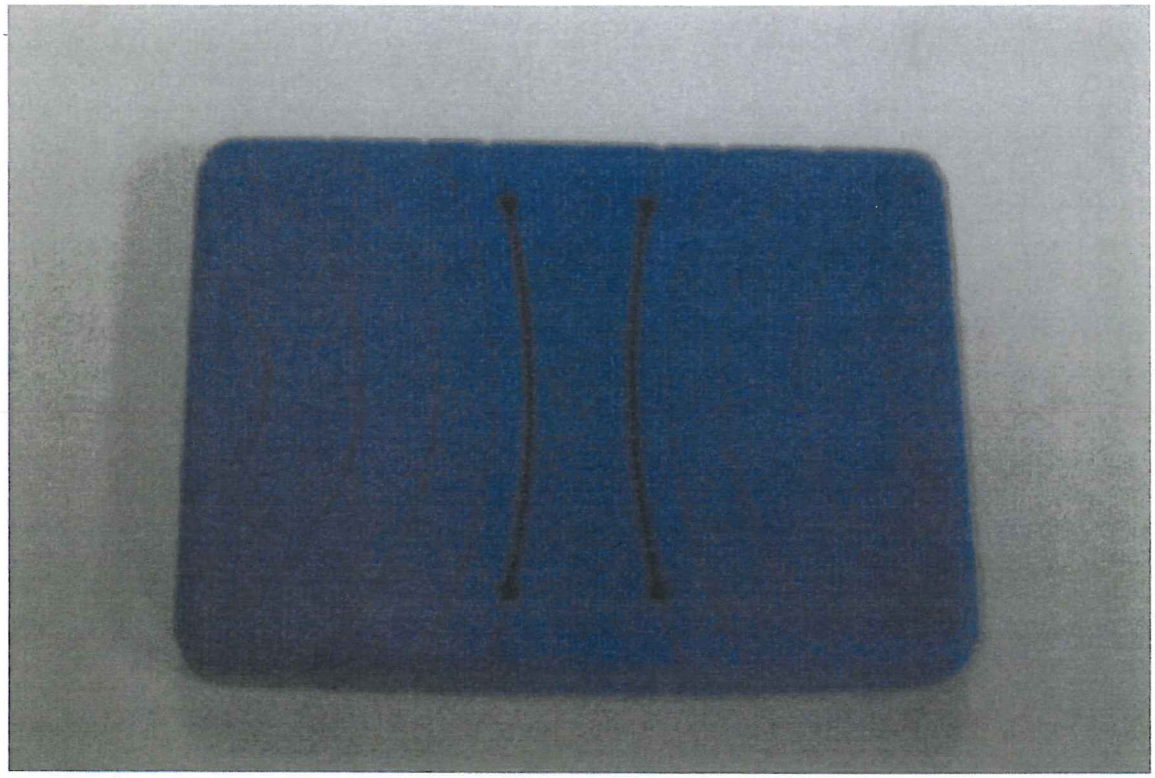

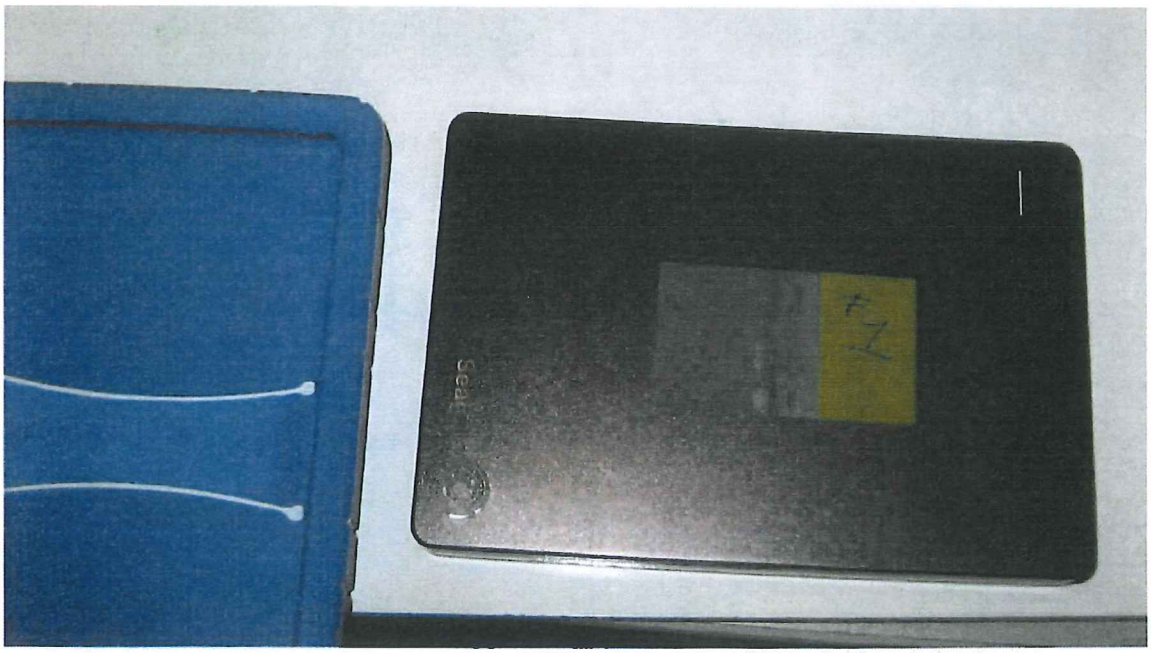

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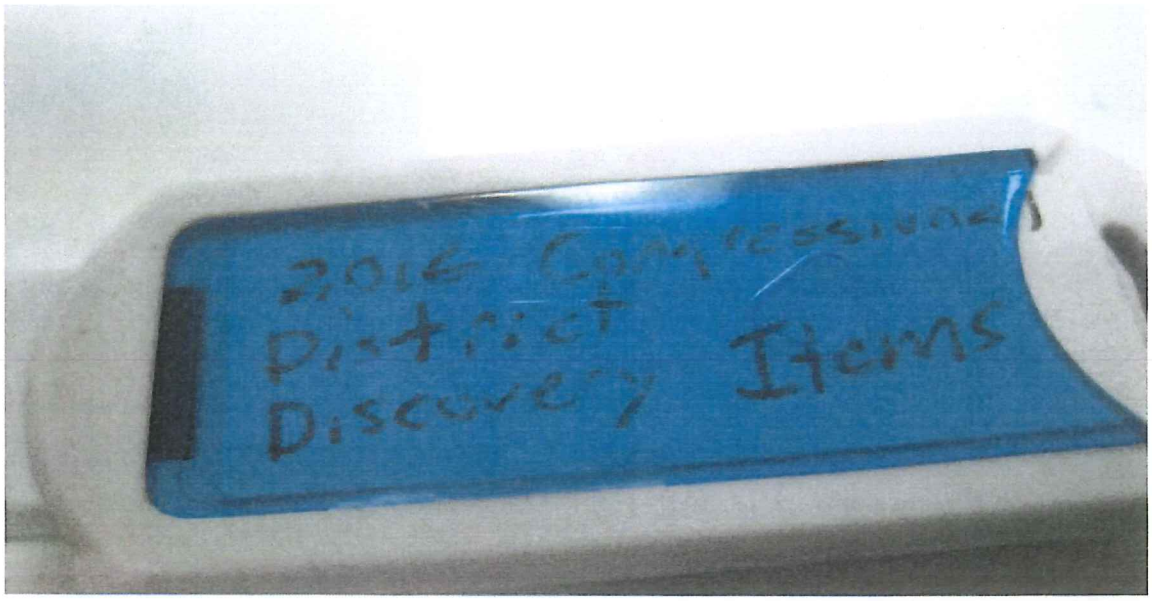

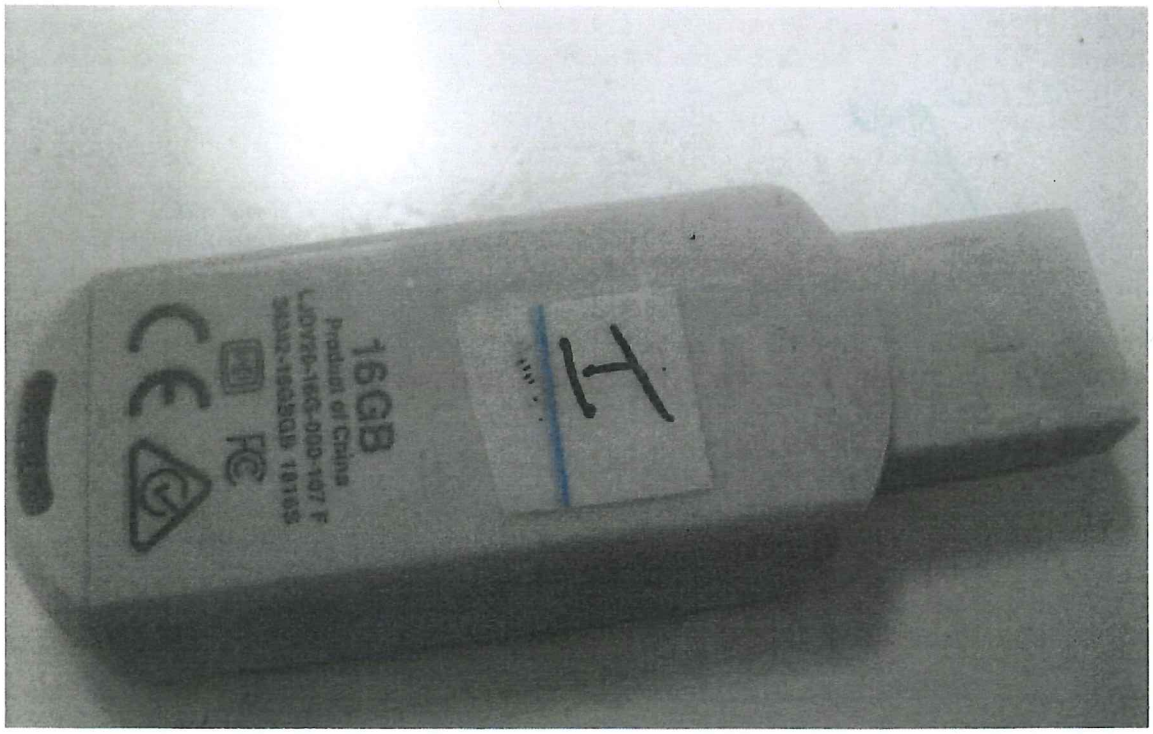

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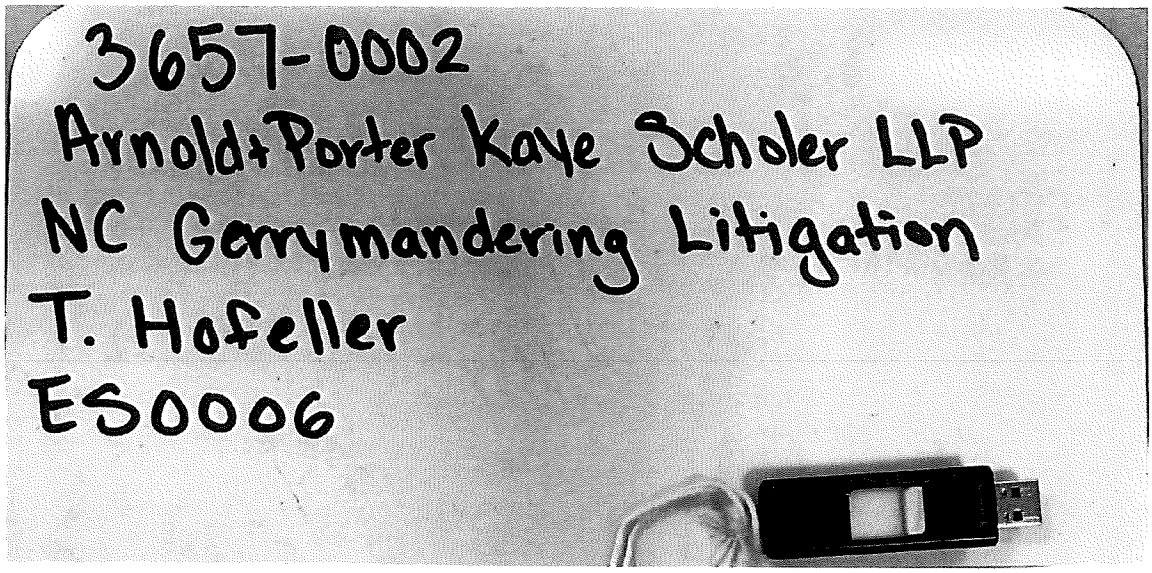

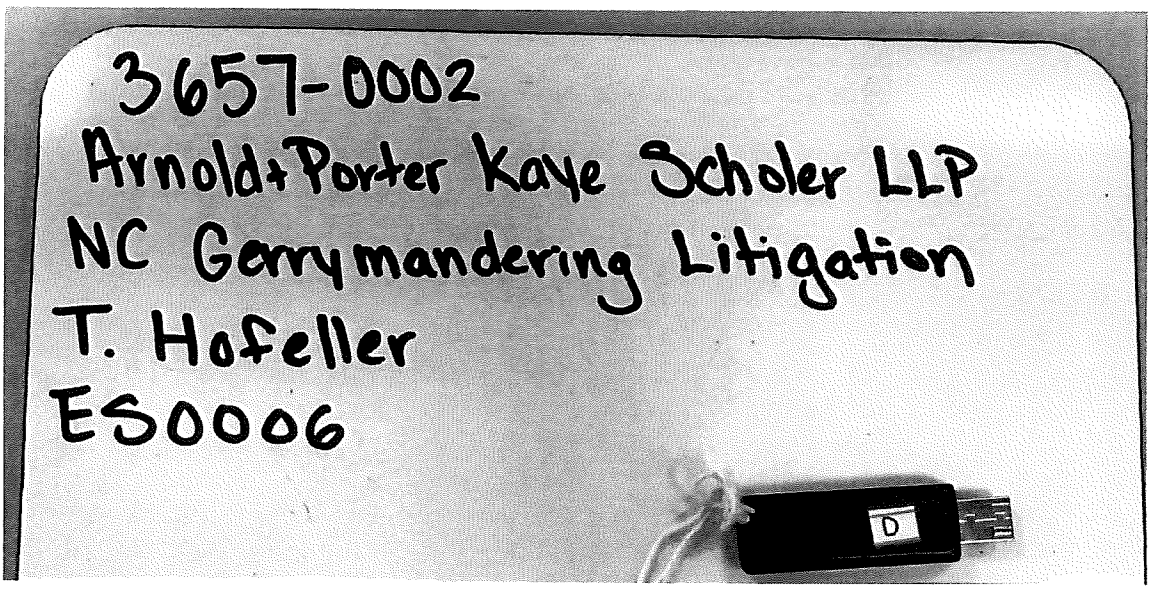

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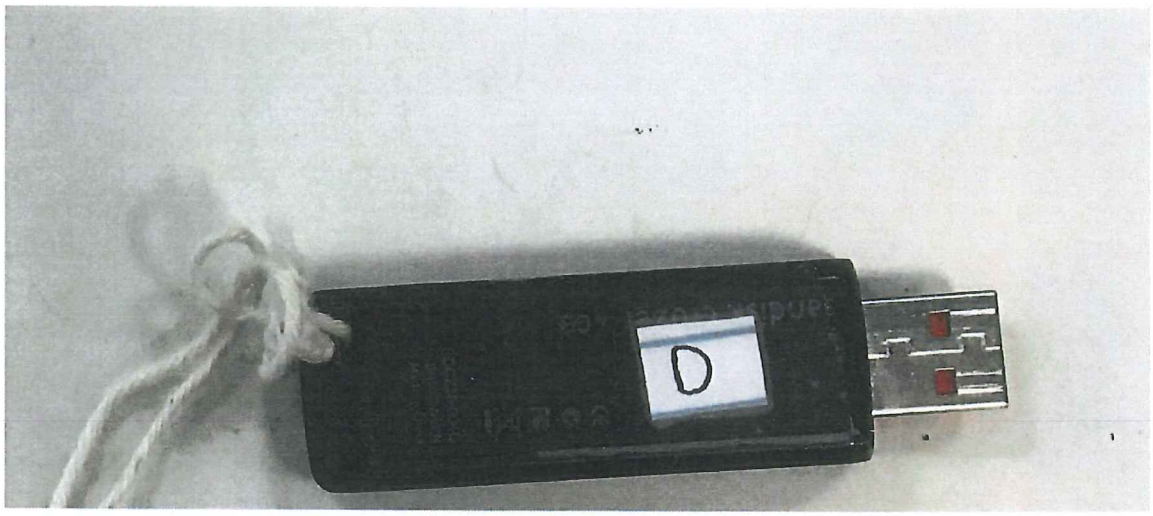

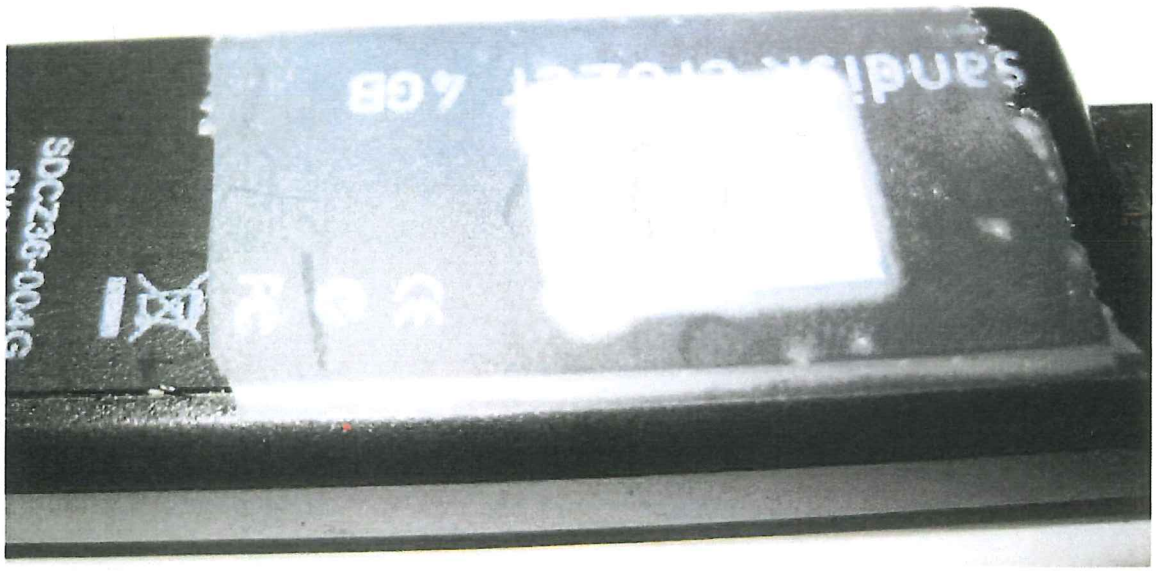

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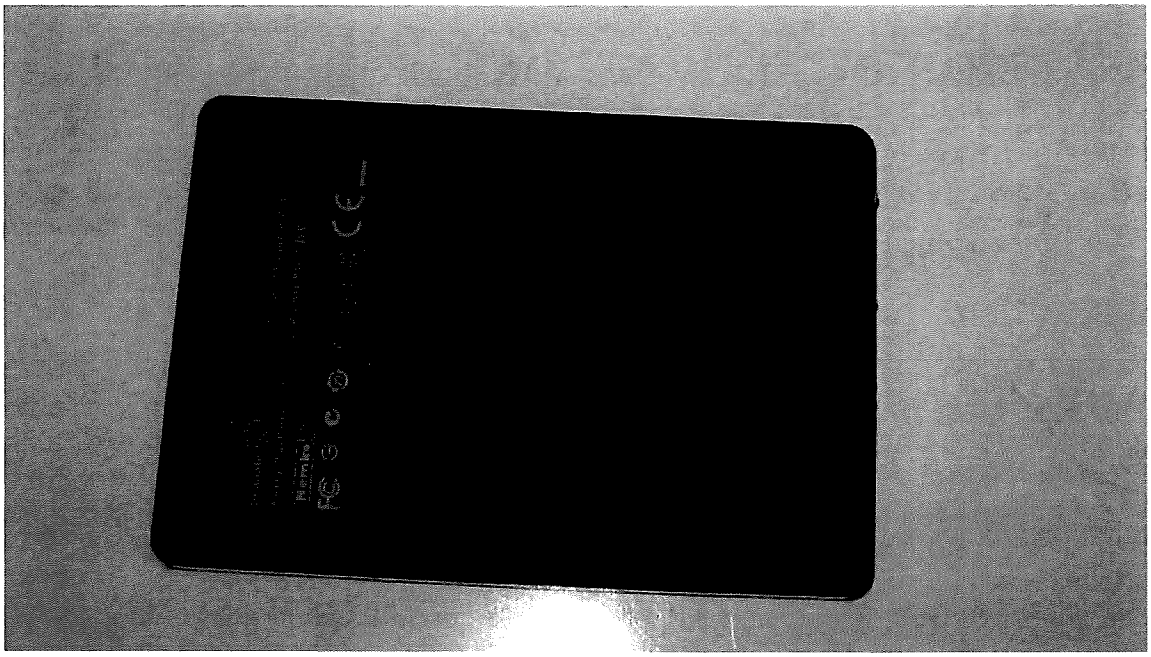

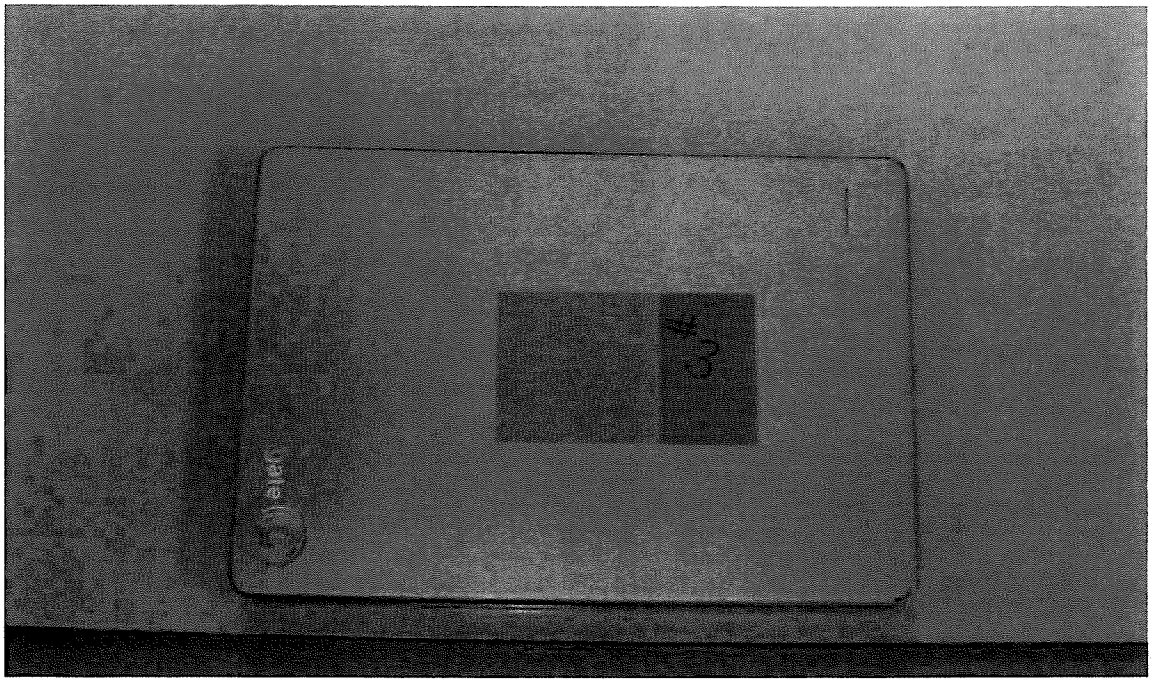

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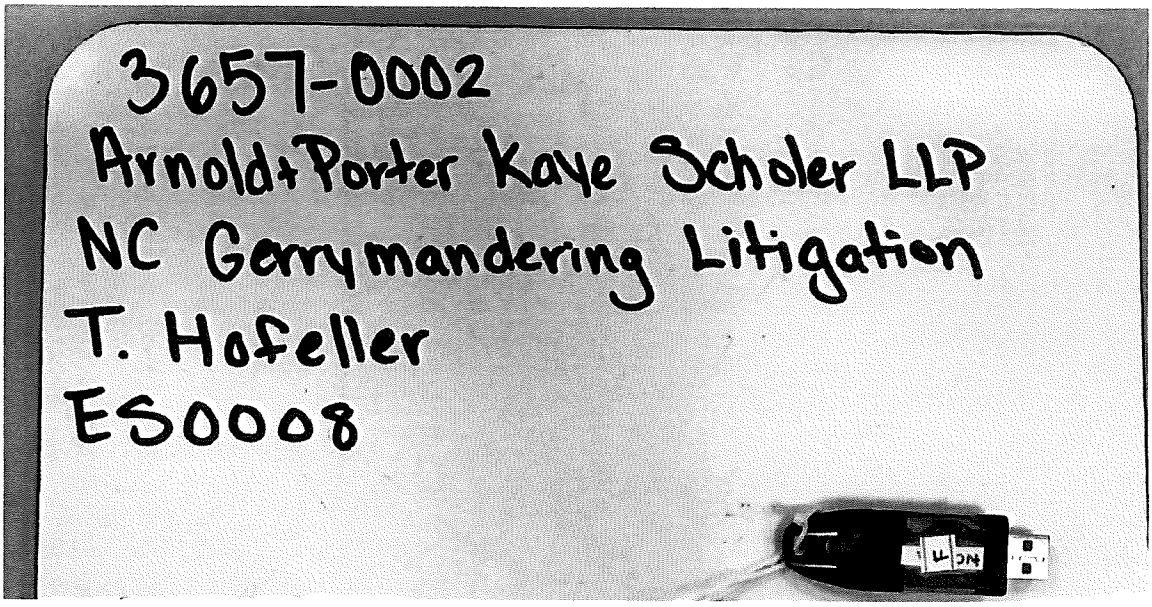

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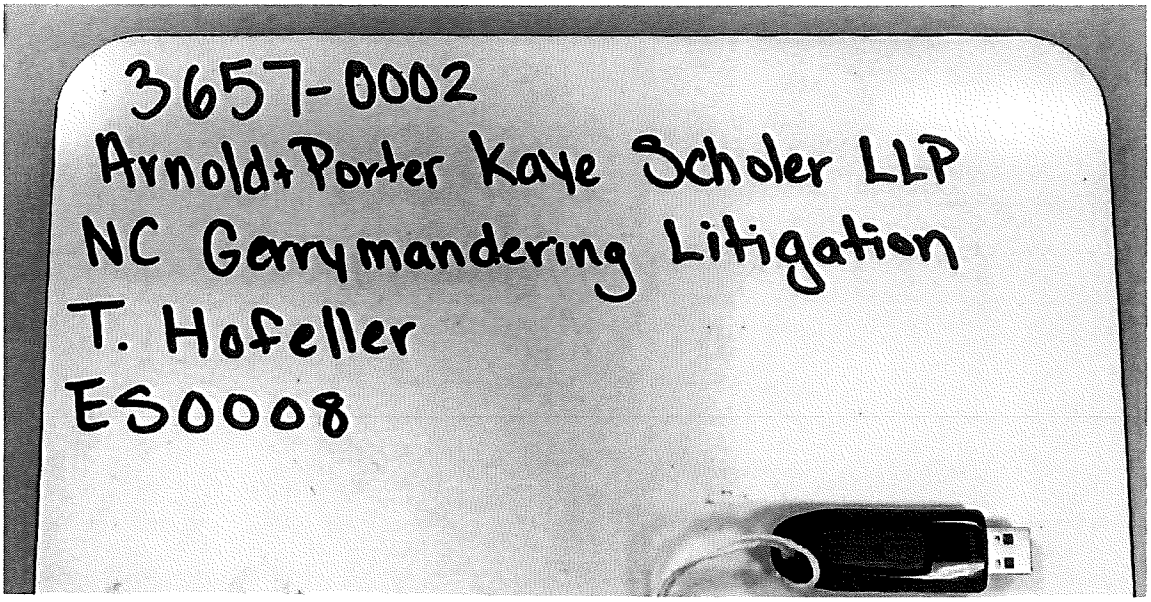

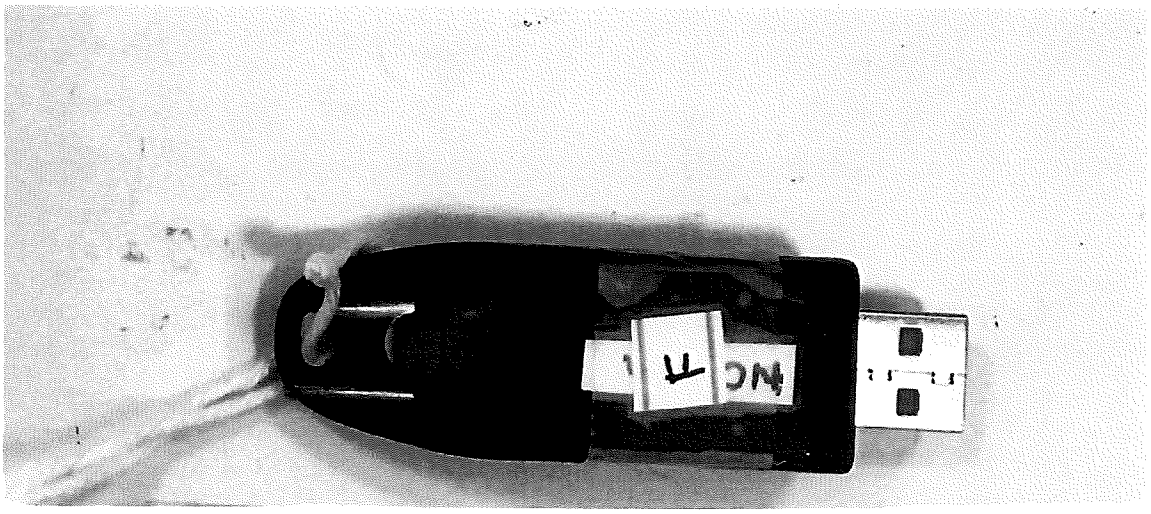

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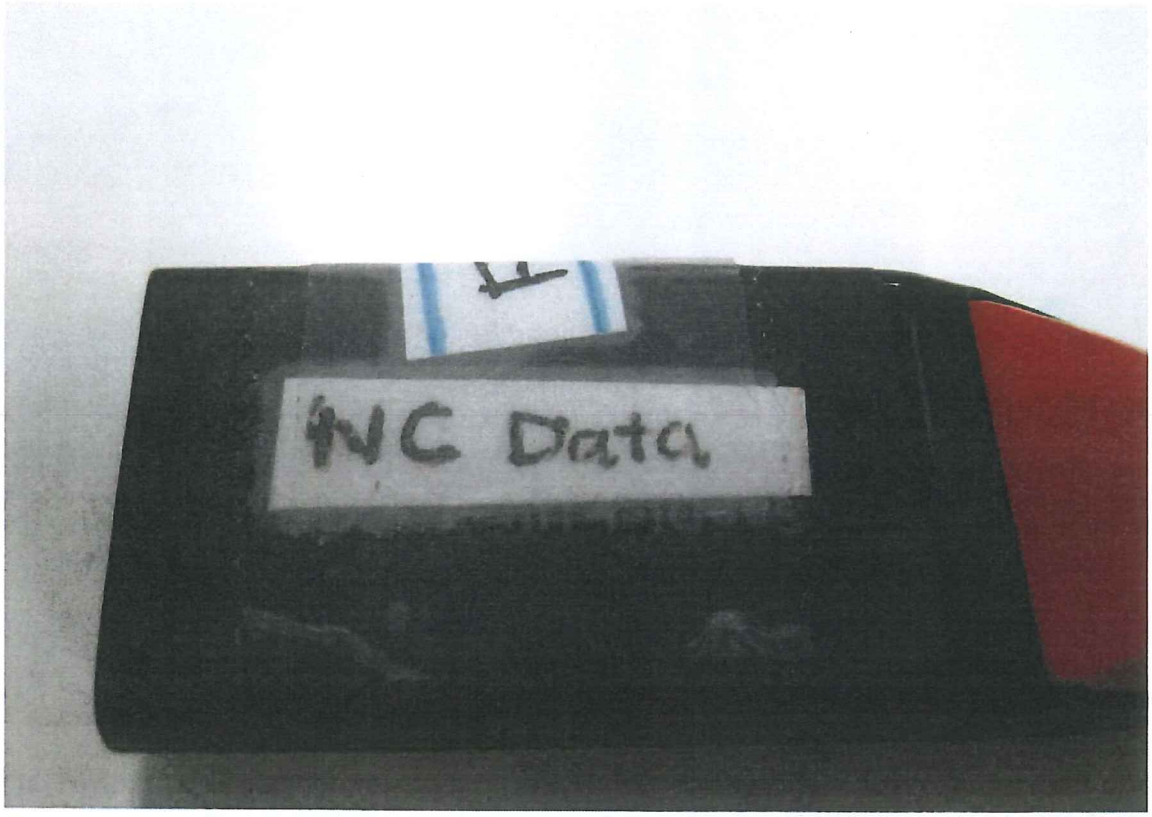

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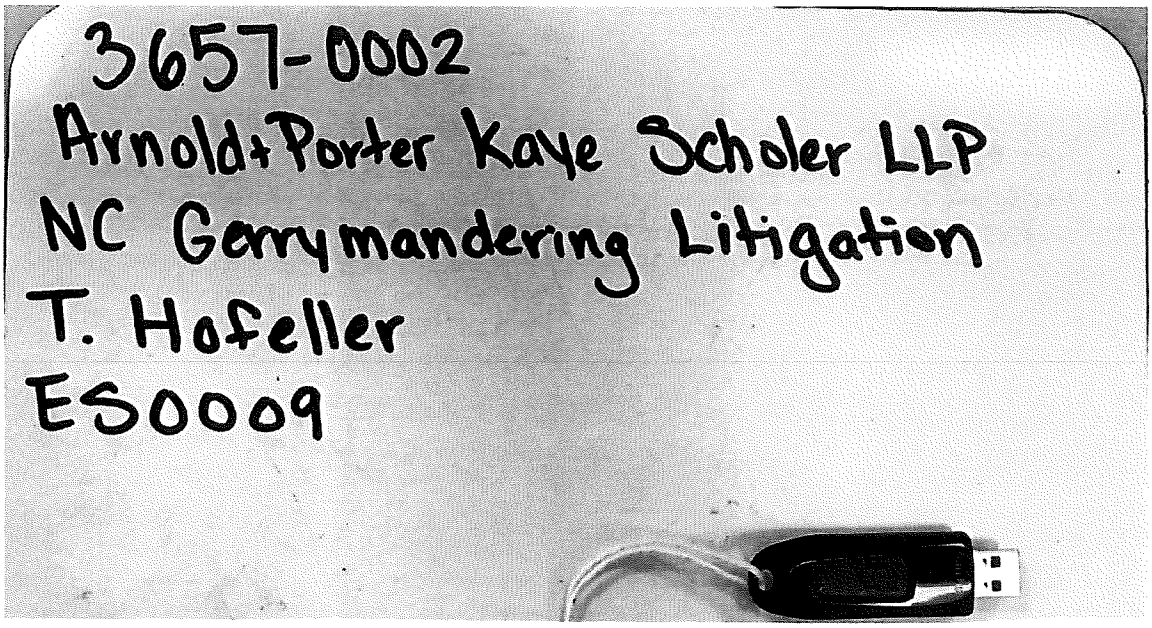

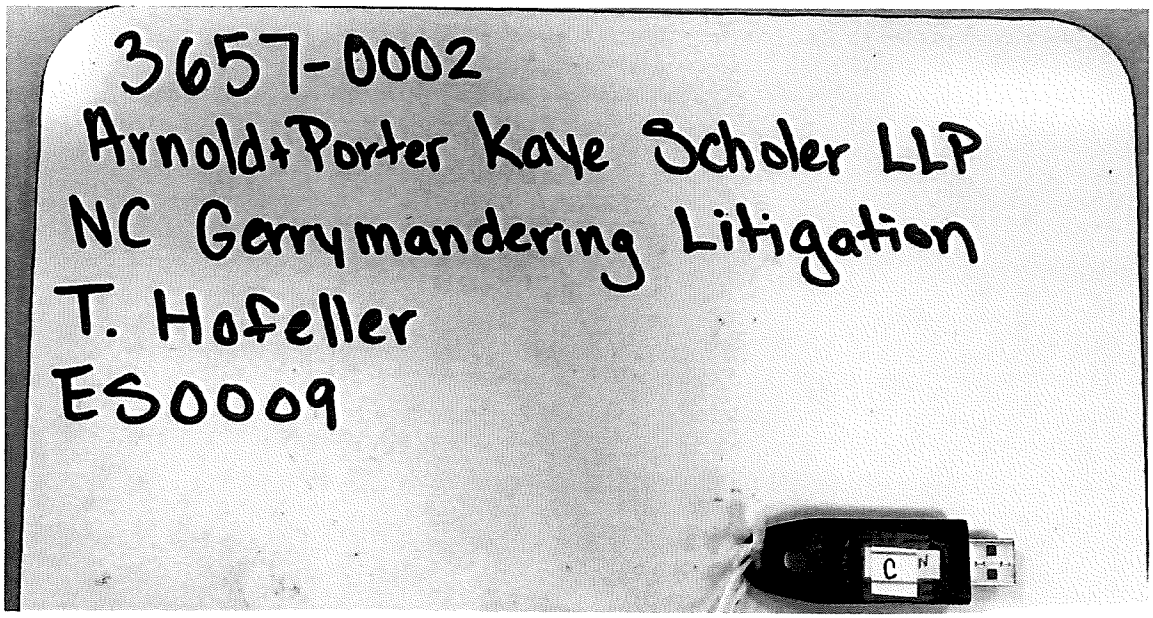

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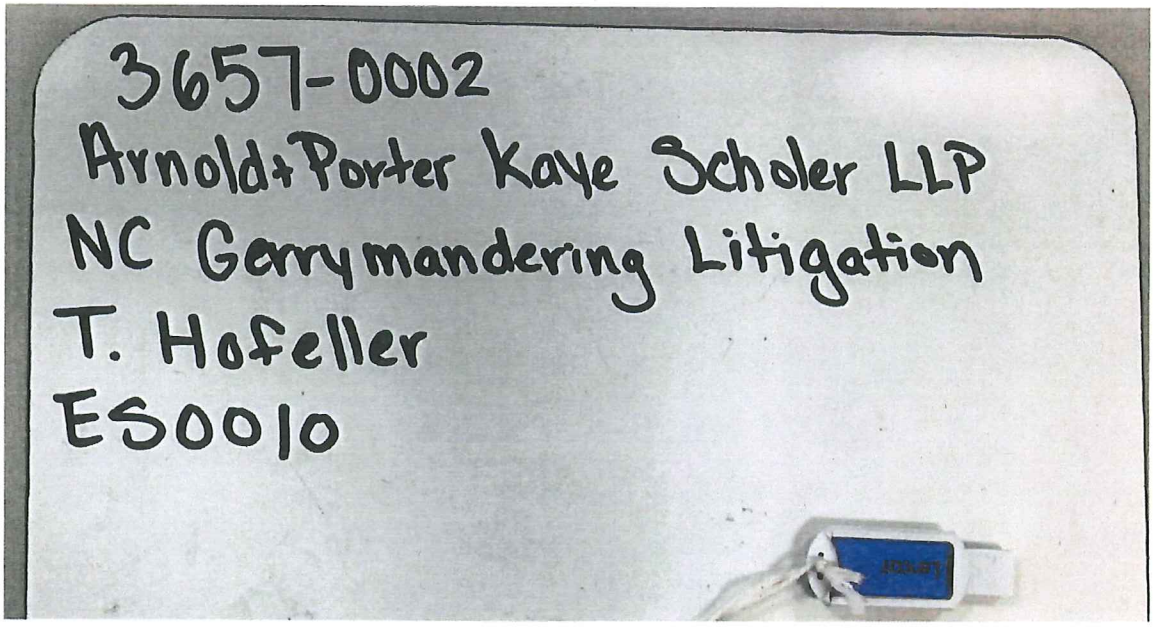

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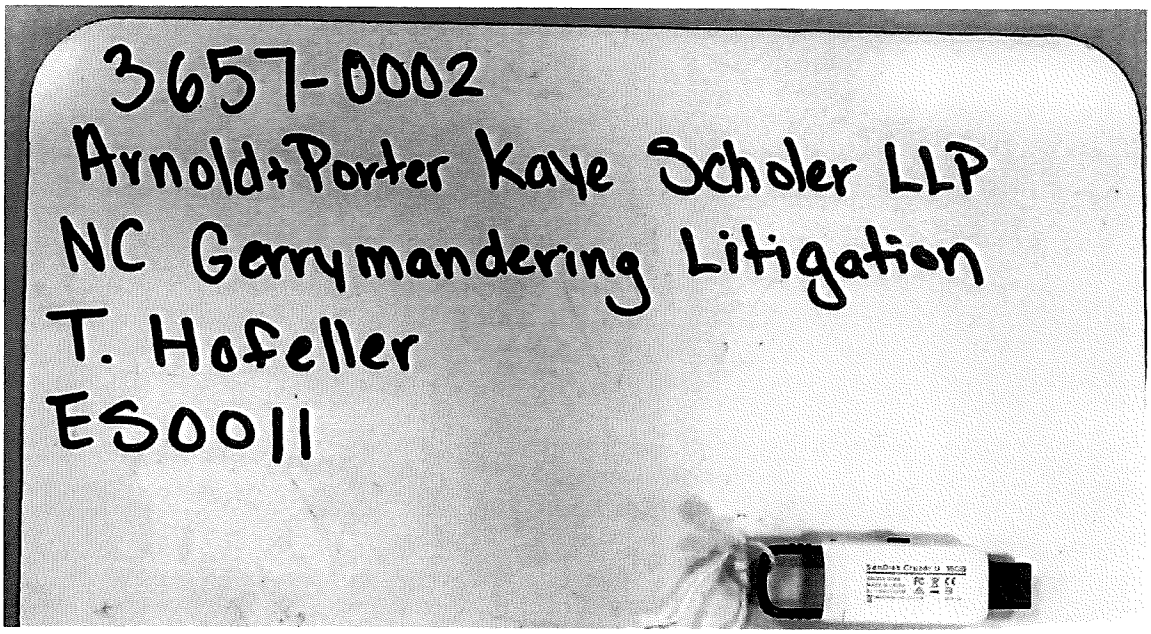

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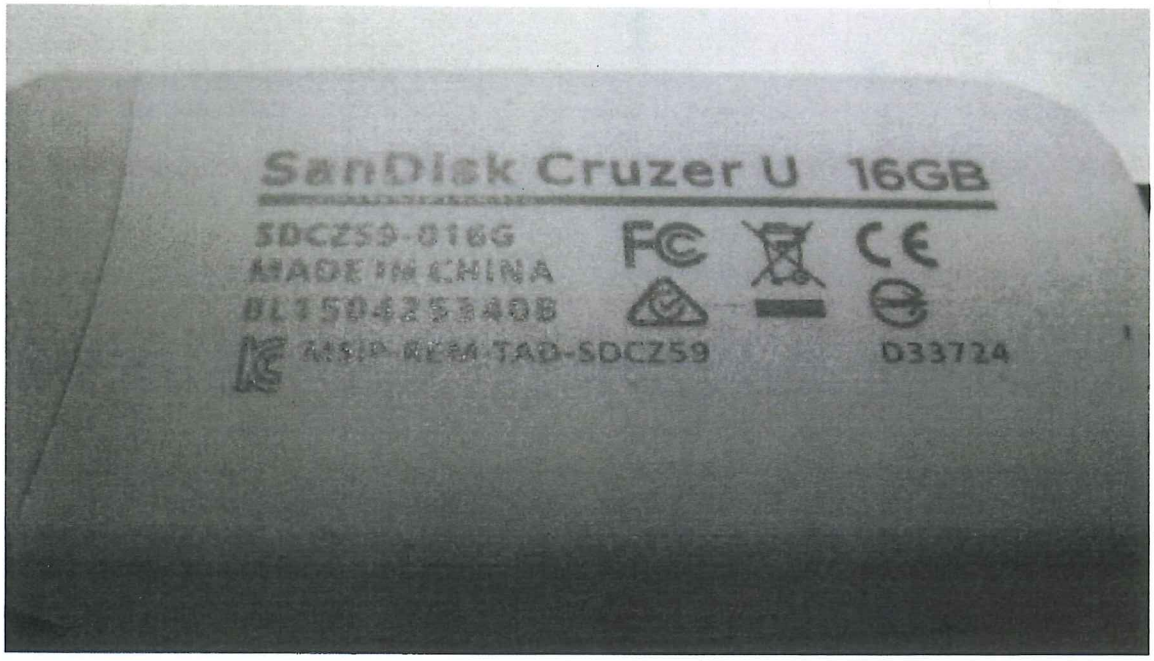

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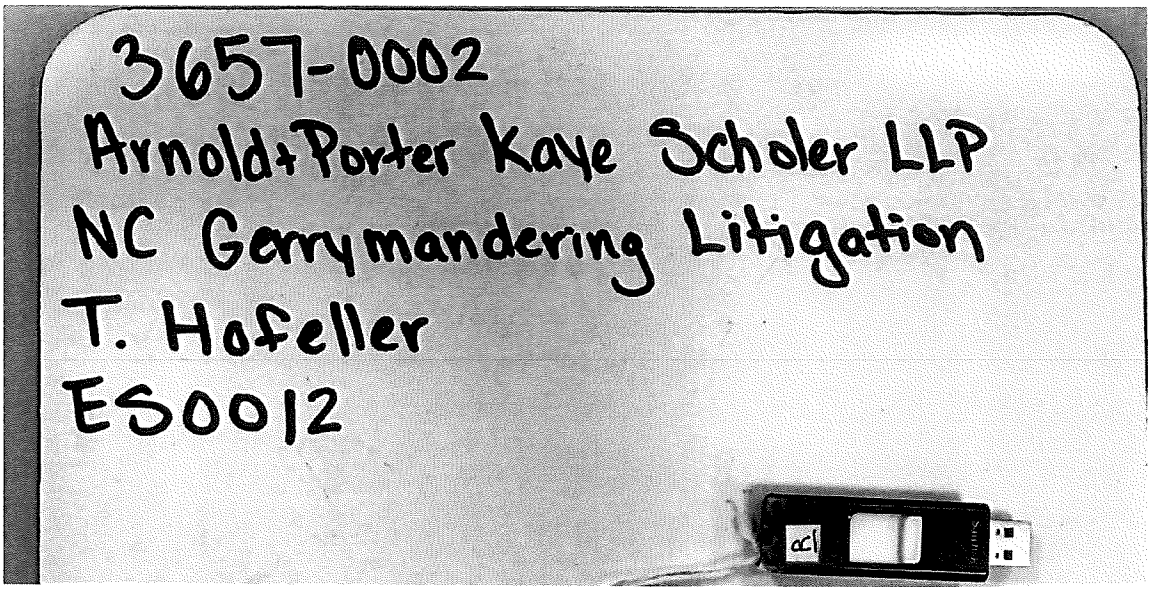

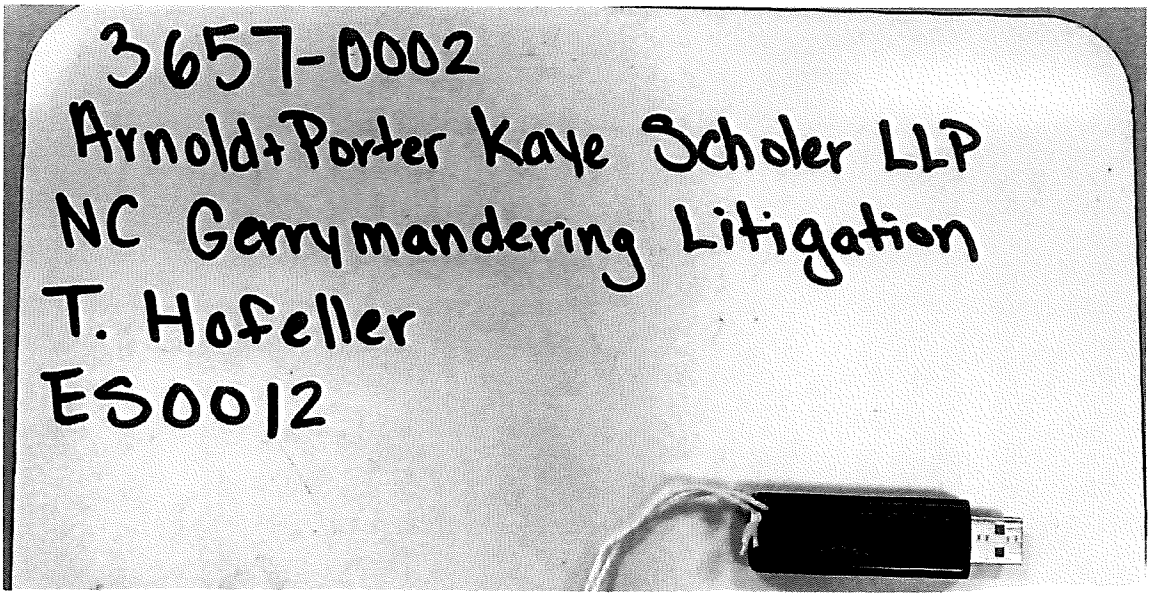

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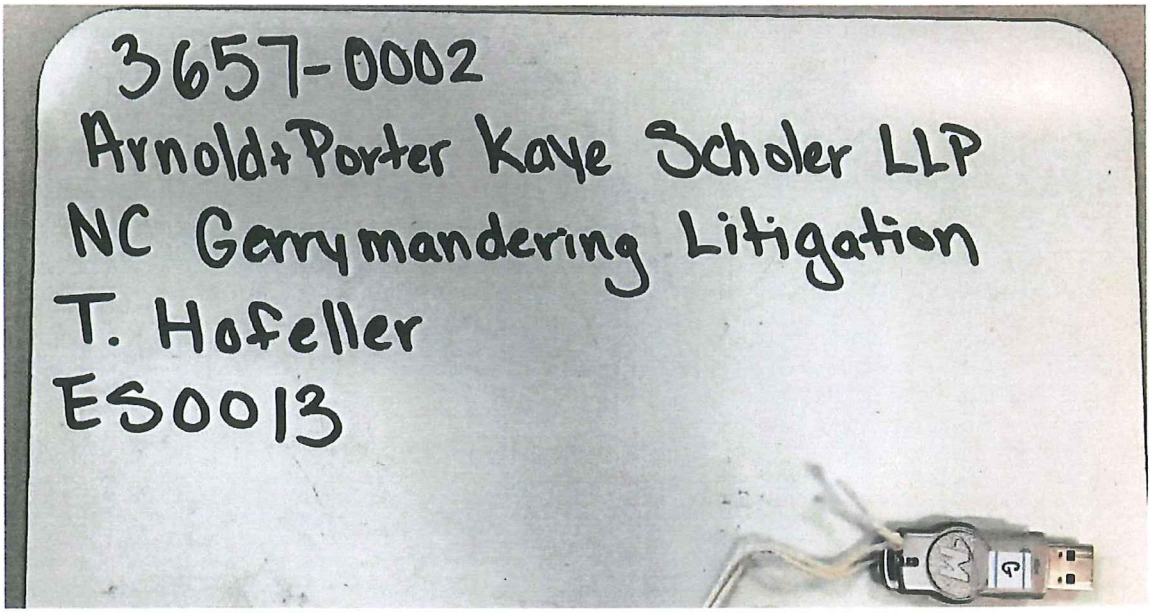

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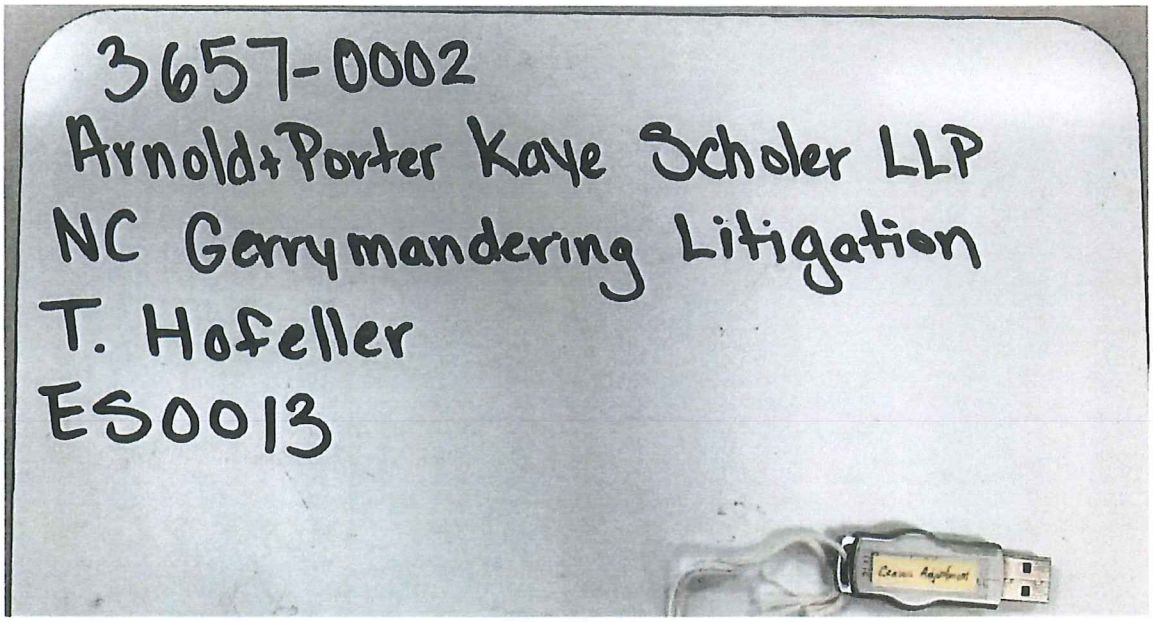

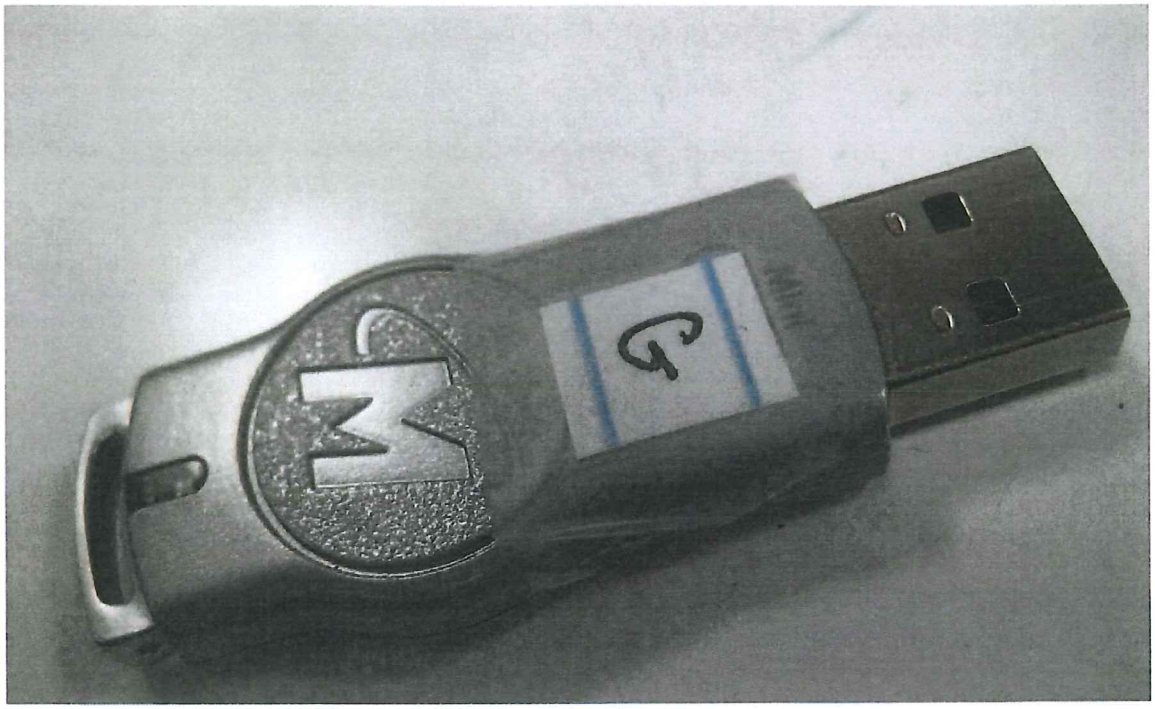

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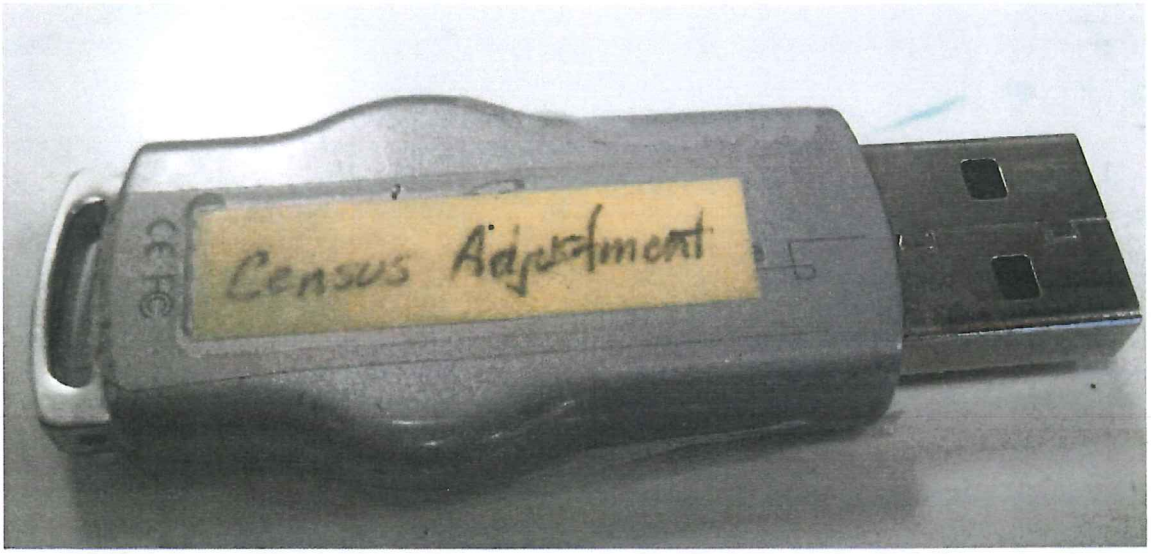

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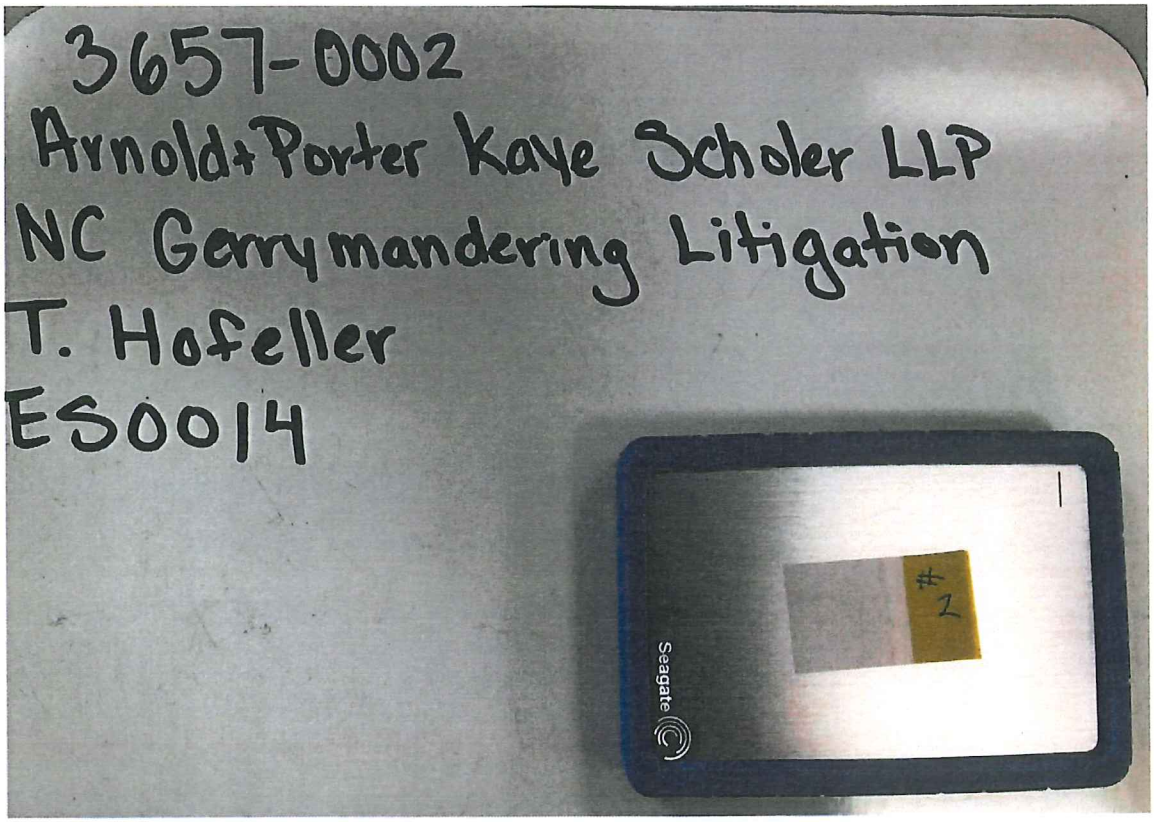

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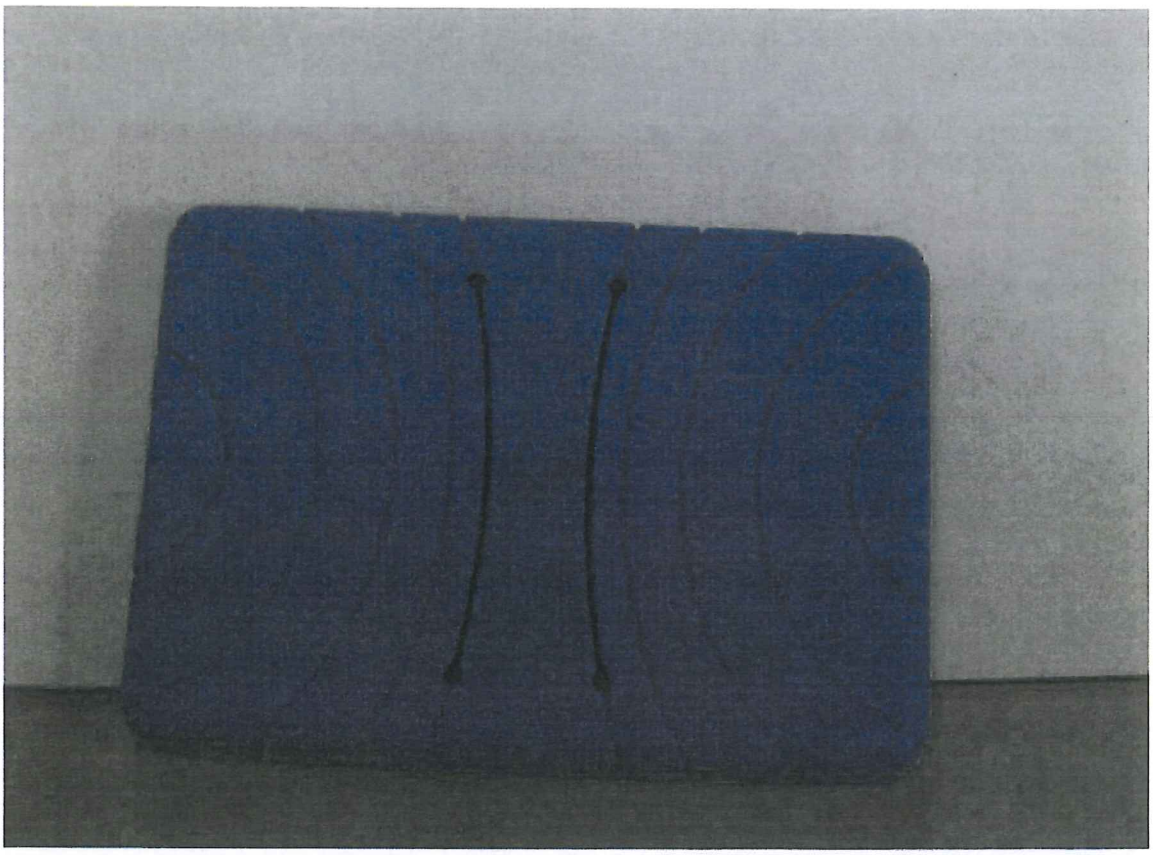

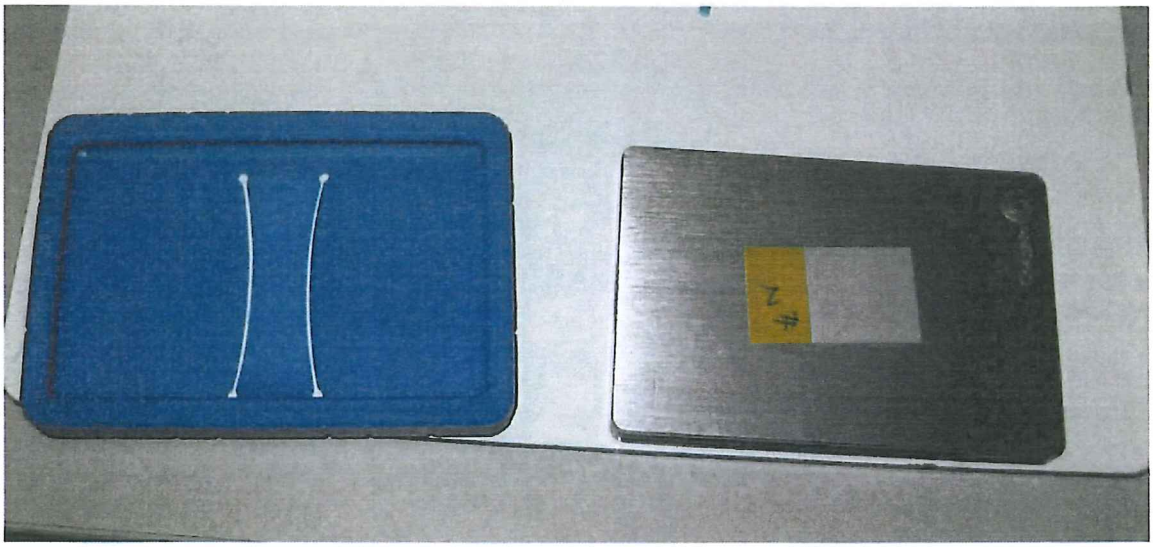

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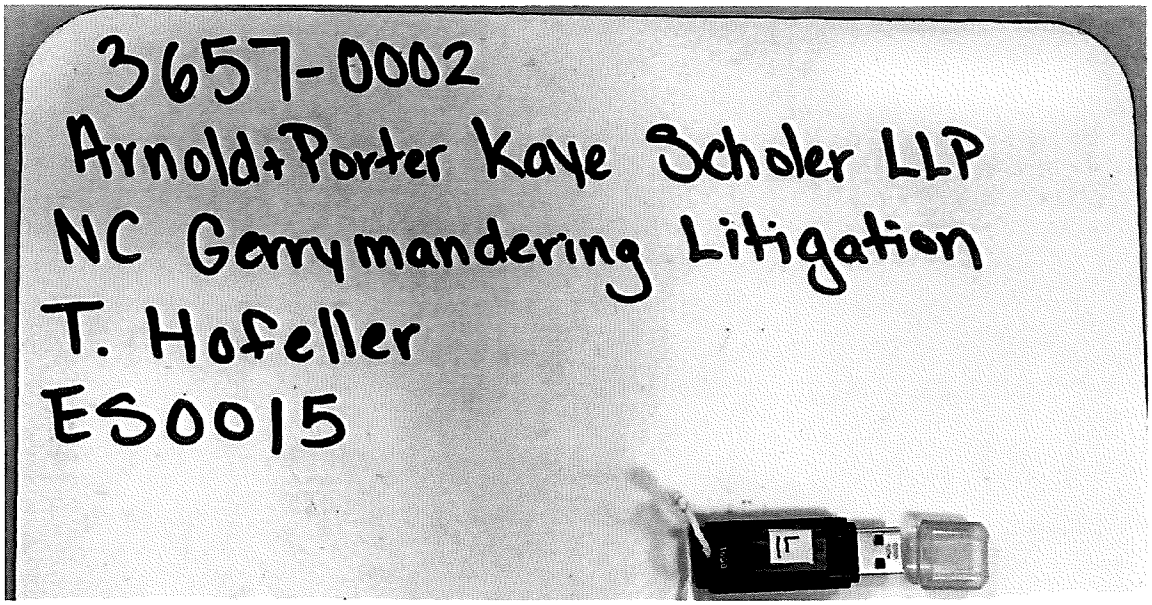

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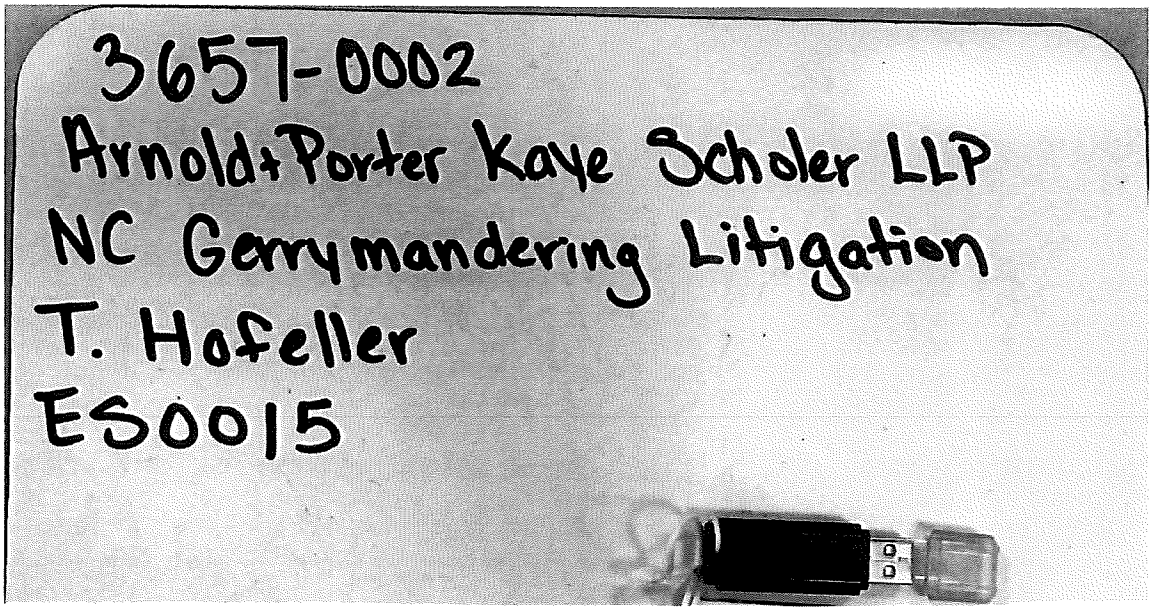

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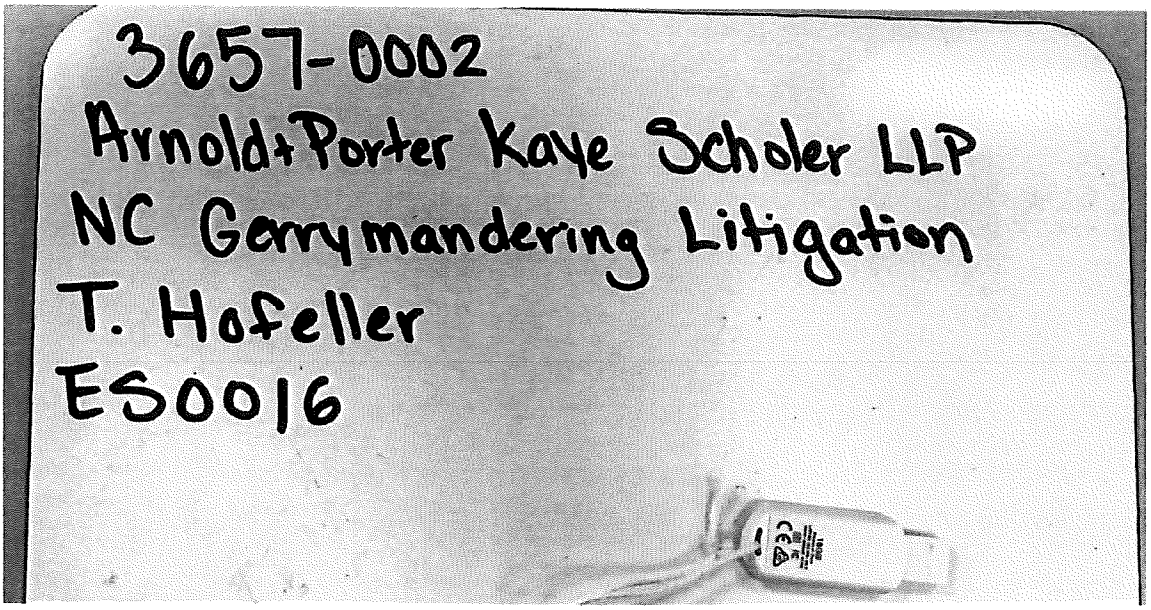

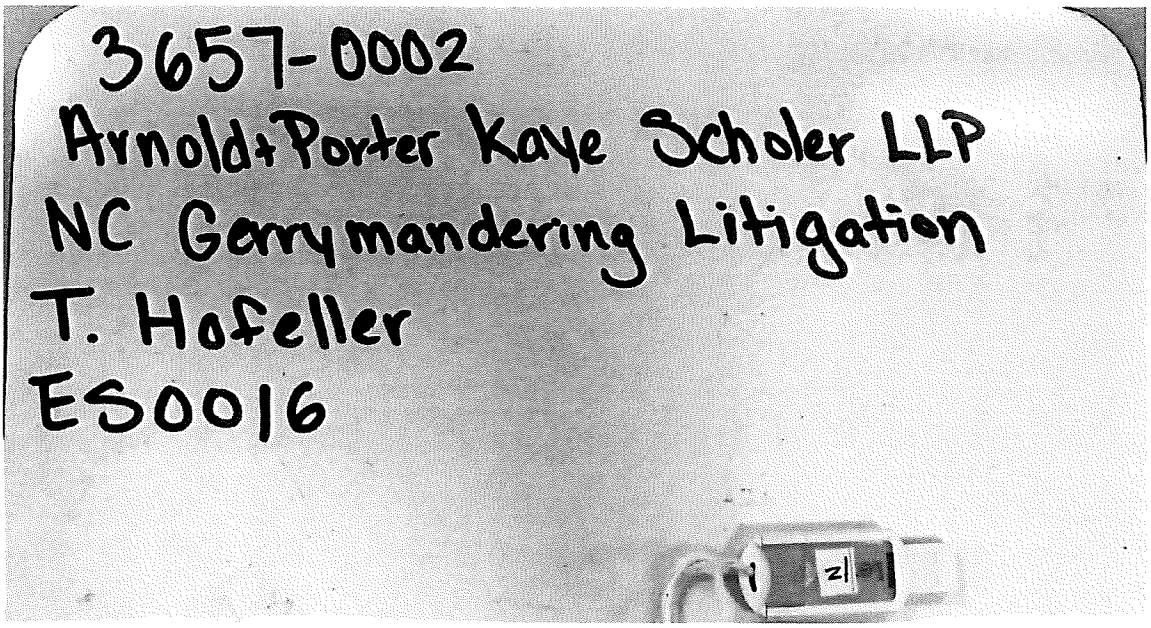

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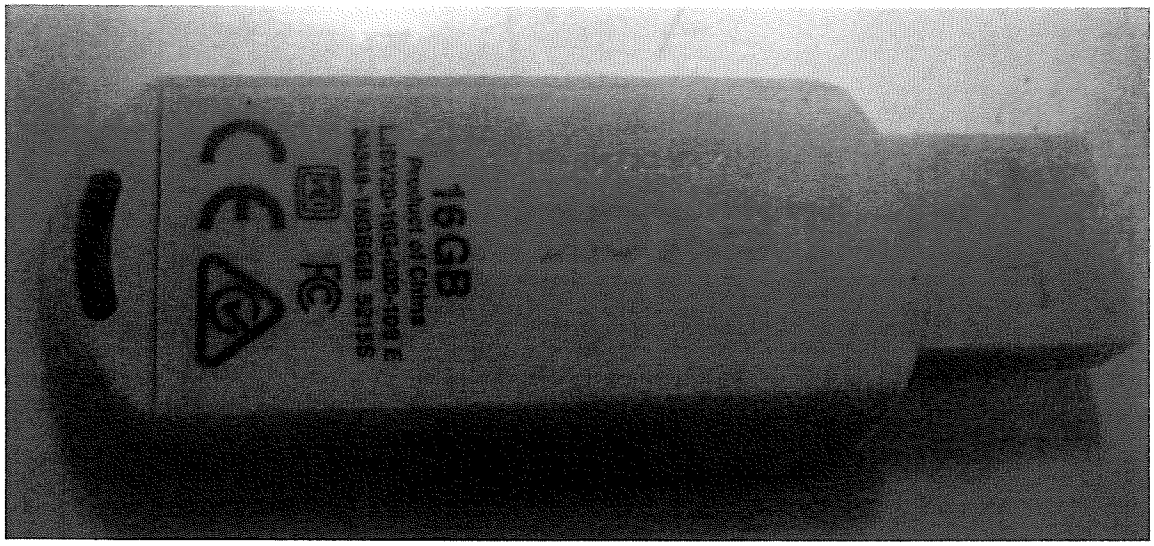

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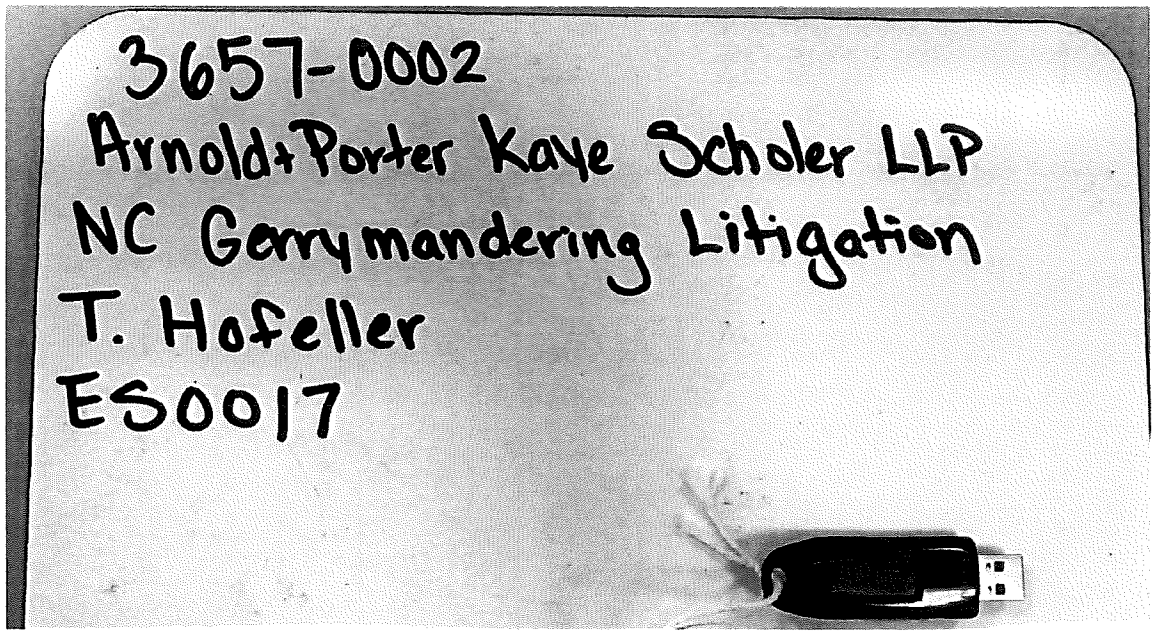

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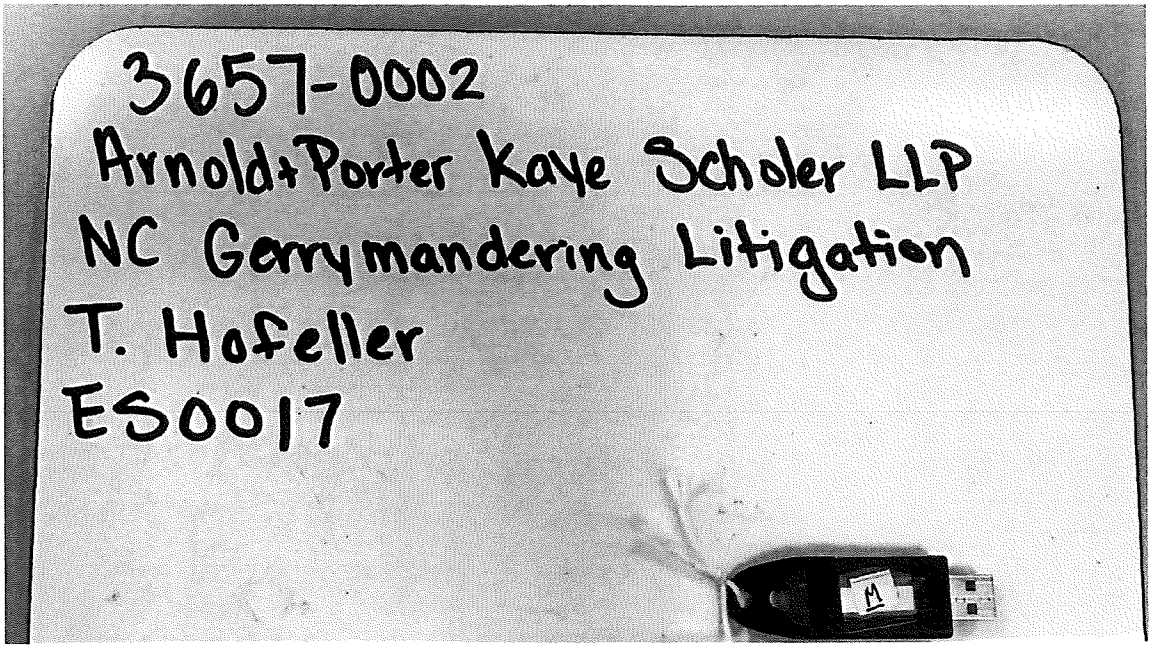

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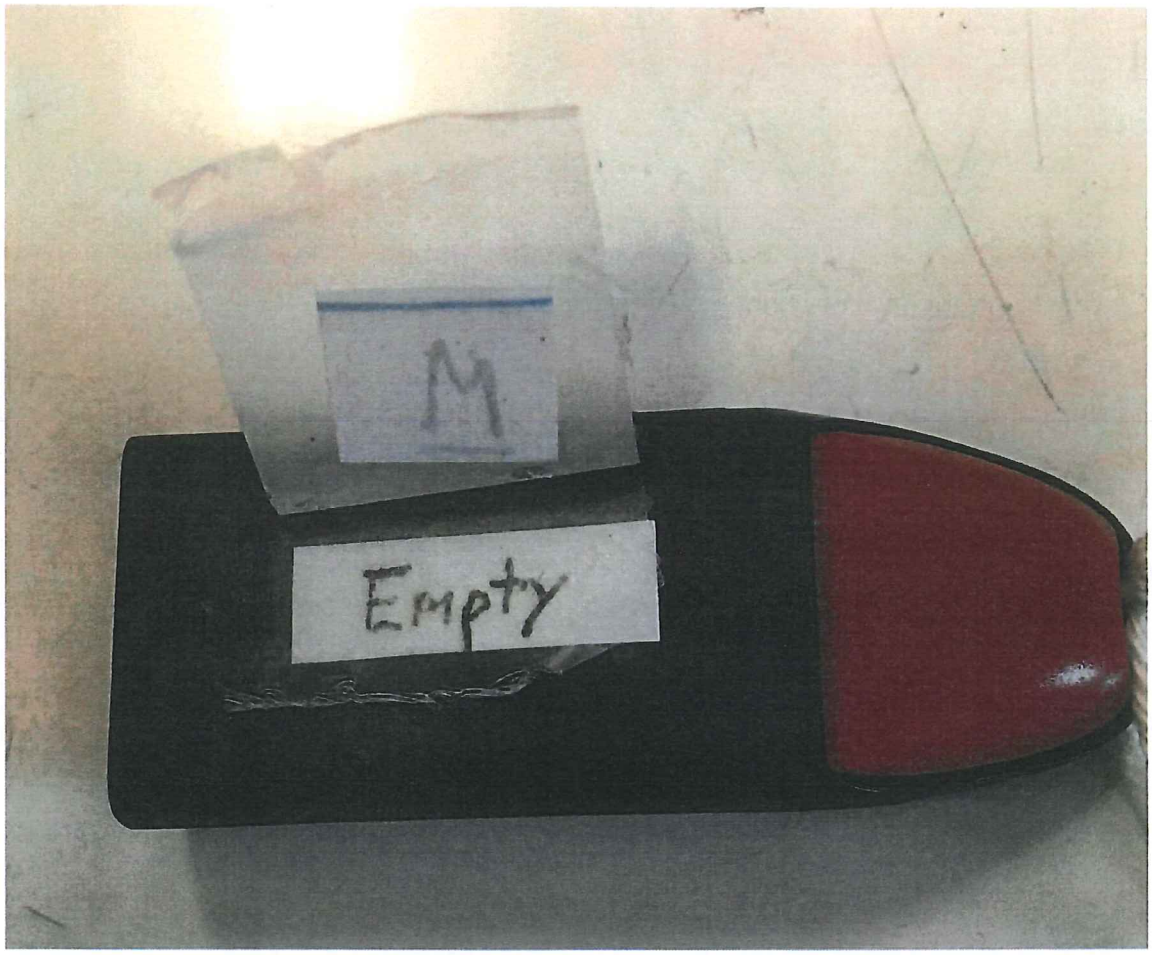

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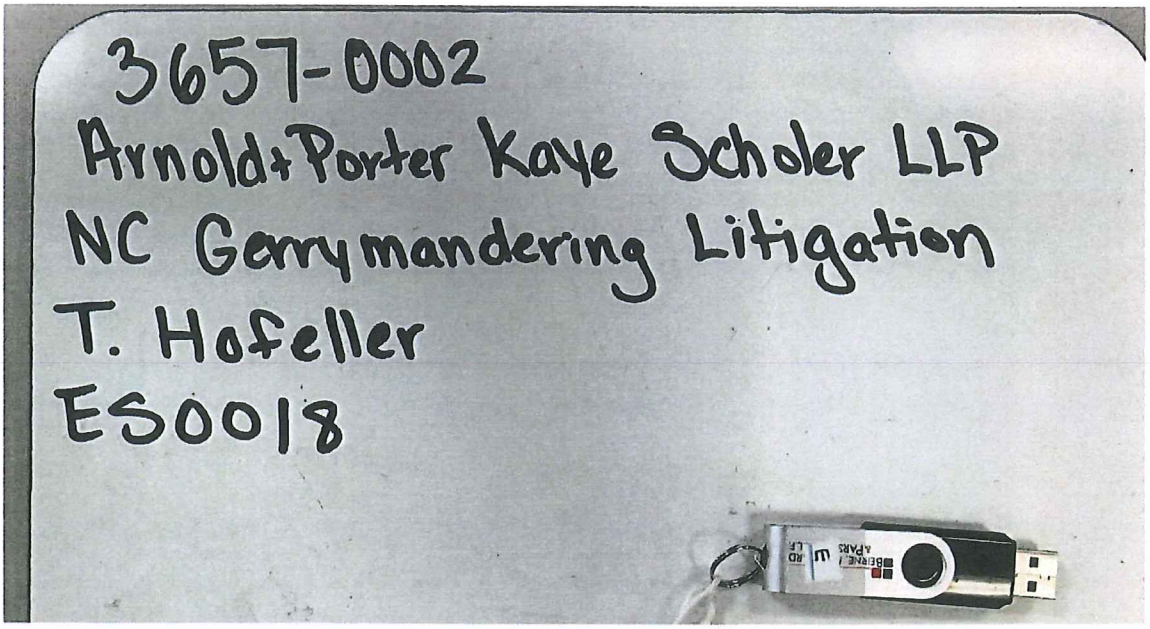

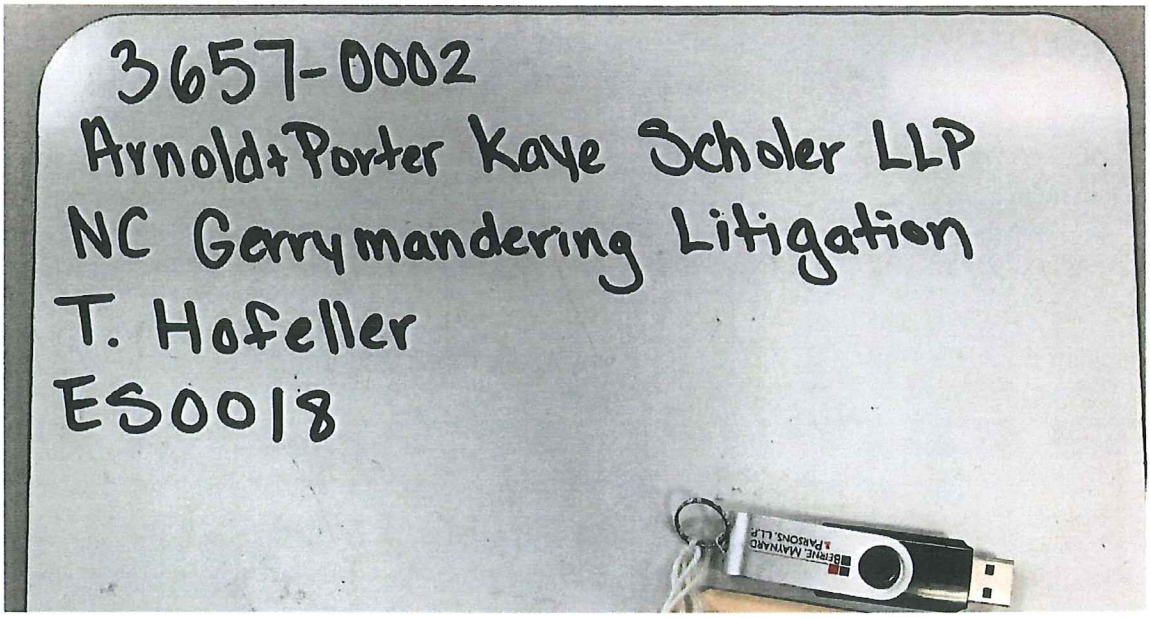

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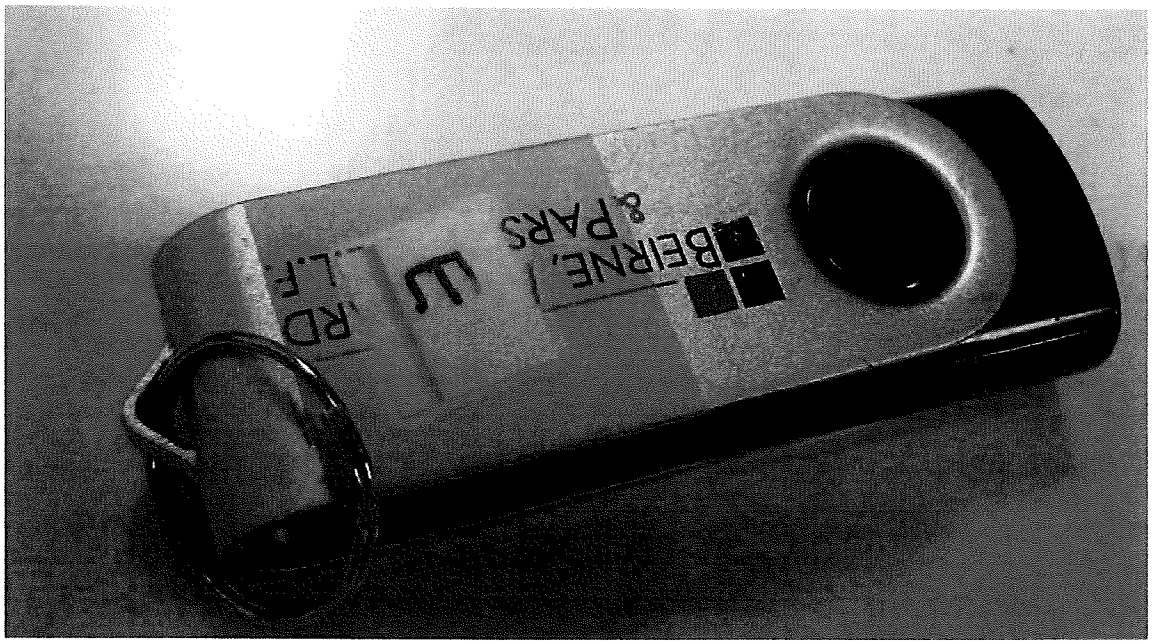

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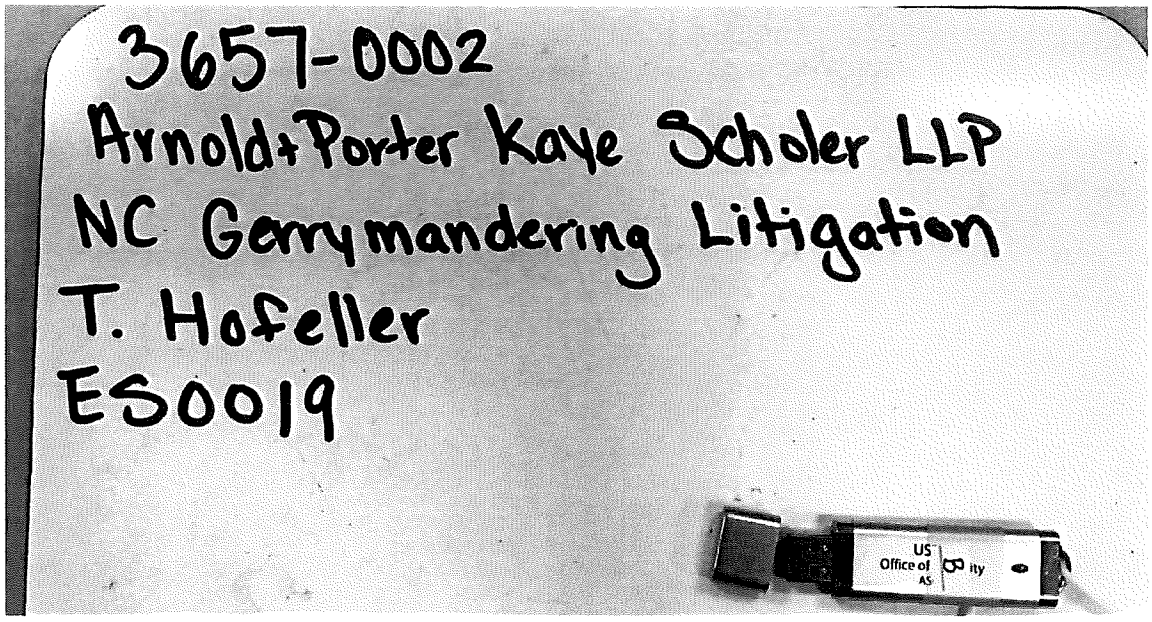

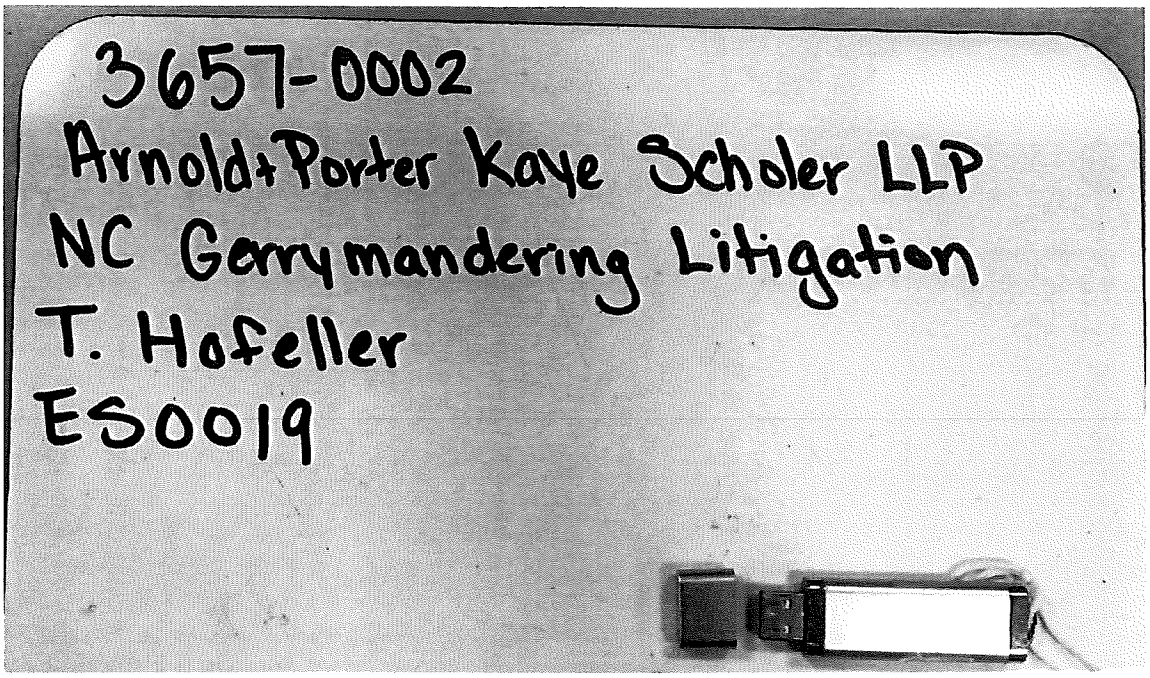
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NC Gerrymandering Litigation
T. Hofeller
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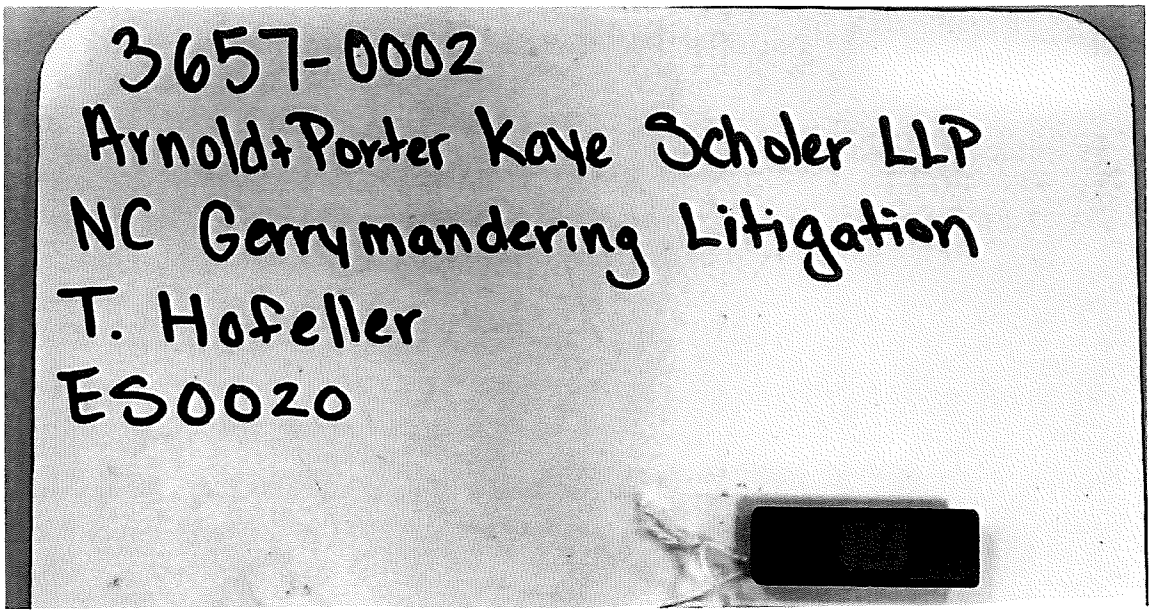
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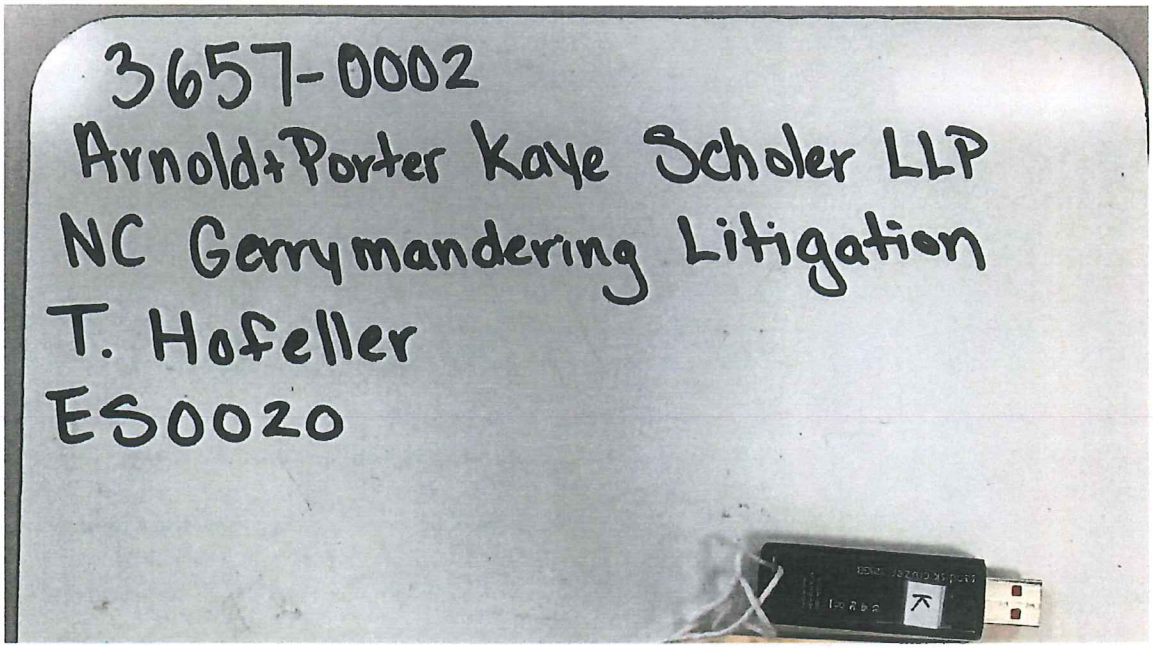

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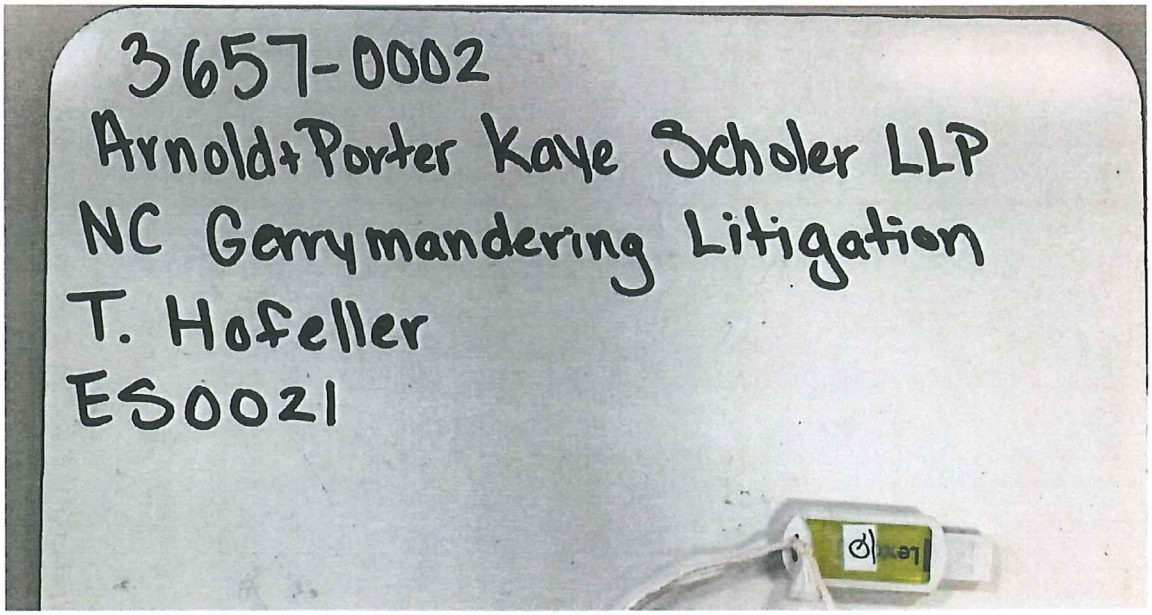

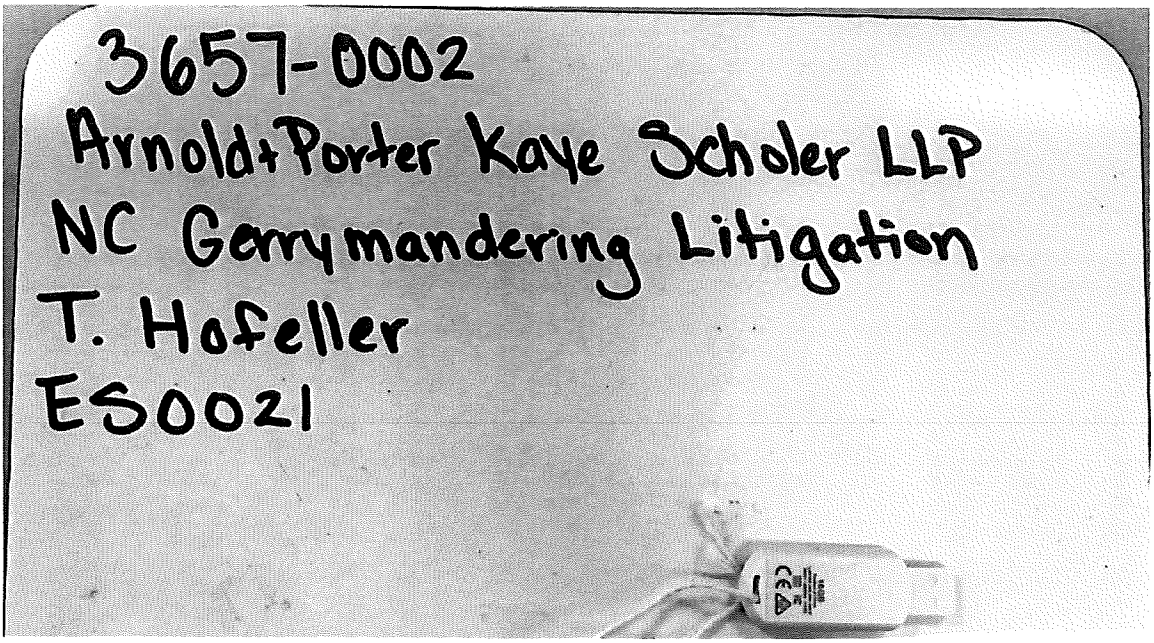
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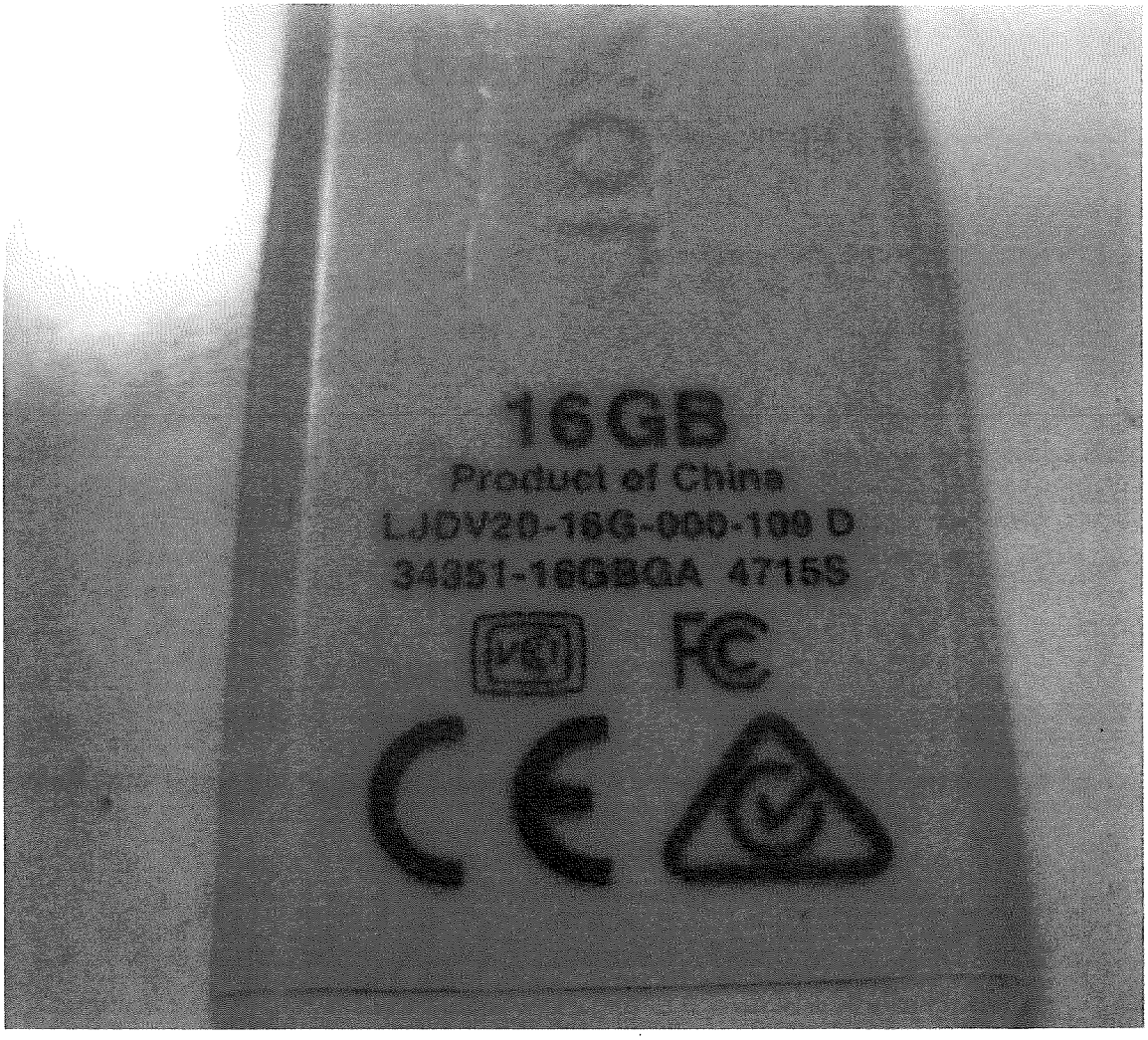

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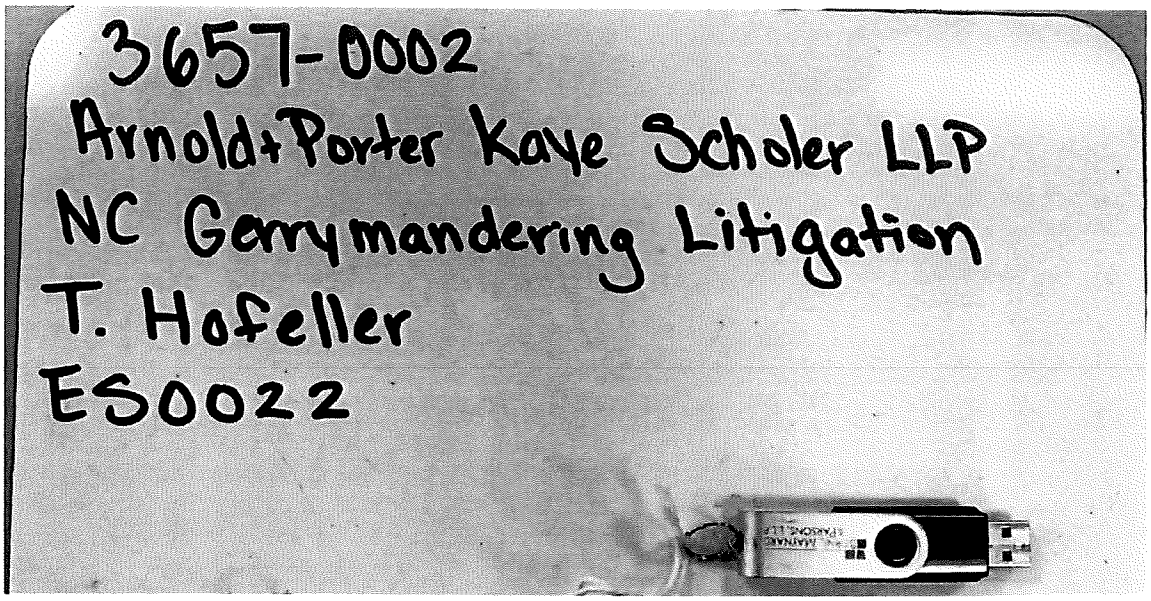

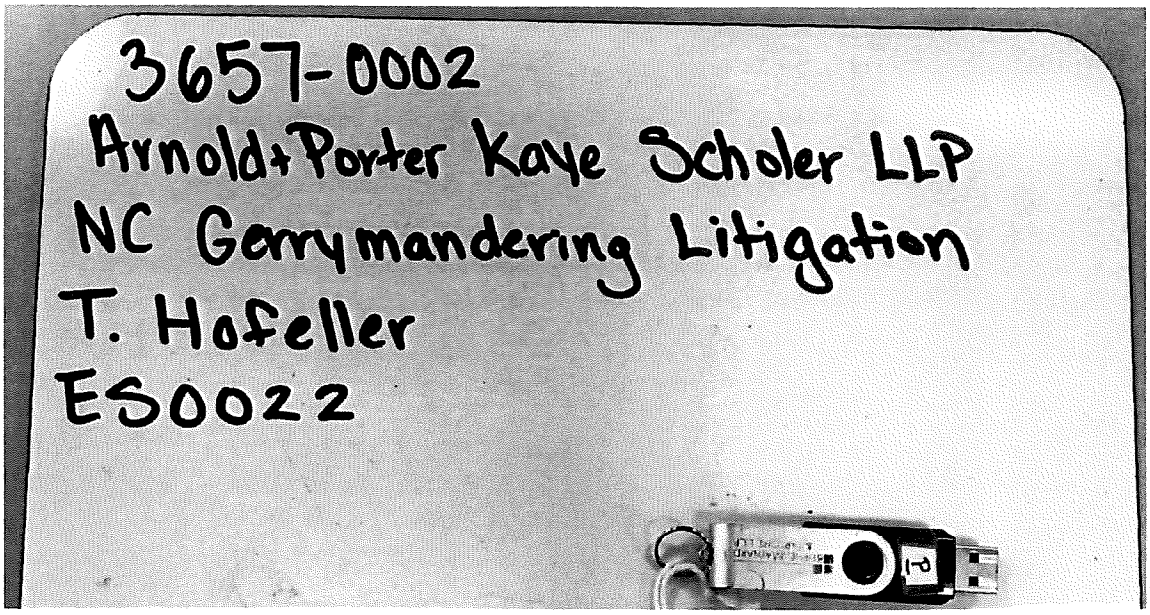

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