CAVEAT: WHAT GOES AROUND COMES AROUND. IF YOUR DEMANDS ARE ONEROUS, EXPECT TO RECEIVE SIMILAR DEMANDS BACK. AFTER INITIAL LETTER (& IF SOMETIMES EVEN BEFORE) MEET AND CONFER TO REACH AGREEMENT ON SCOPE OF PRESERVATION IS THE PREFERRED WAY TO PROCEED. PETE HASKEL August 31, 2011.

Form spoliation letter to opposing counsel [1]

[date]

[address]

re: [matter (, case number)]

Dear: _____,

[If litigation has not commenced, briefly indicate why you reasonably anticipate litigation and claim the right to require adversary preserve evidence.]

By this letter, you and your client{s} are hereby given notice not to destroy, conceal, transfer or alter any potential evidence, including tangible items [If any. Specify to the extent possible] and including paper or electronic files and other data generated by and/or stored on your client's {clients'} computers and storage media (e.g., flash drives, hard disks, floppy disks, backup tapes, online storage, cell phones, PDAs, VoIP networks, digital printers, digital fax machines), or any other electronic data, such as voice mail. As you know, your client's {clients'} failure to comply with this notice can result in severe sanctions being imposed by a court {and liability in tort} for spoliation of evidence or potential evidence. This request includes the cessation of all routine destruction of all potentially relevant paper and electronic documents.

Through discovery [in the event of litigation] we expect to obtain from you a number of documents and things, including files stored on your client's {clients'} computers and your client's {clients'} computer storage media. {As part of our initial discovery efforts, you [are hereby served with/will soon receive] [initial/supplemental] interrogatories and requests for documents and things.}

In order to avoid spoliation, you will need to provide the data requested on the original media. Do not reuse any media to provide this data and avoid altering any metadata.

{Although [we may bring/have brought] a motion for an order preserving documents and things from destruction or alteration, your client's {clients'} obligation to preserve documents and things for discovery in this [potential] case arises in law and equity independently from any order on such motion.}

Electronic documents and the storage media on which they reside contain relevant, discoverable information beyond that which may be found in printed documents. Therefore, even where a

[1] Brand names, technological process descriptions, case law, and other such variables should be used only after updating to reflect current practice. This form is intended to assist in thoughtful drafting, not to substitute for same.

paper copy exists, we [seek/will seek] all documents in their electronic form along with information about those documents contained on the media. We also [seek/will seek] paper printouts of only those documents that contain unique information after they were printed out (such as paper documents containing handwriting, signatures, marginalia, drawings, annotations, highlighting and redactions) along with any paper documents for which no corresponding electronic files exist.

Our discovery requests [ask/will ask] for certain data on the hard disks, floppy disks and backup media used in your client's {clients'} computers, some of which data are not readily available to an ordinary computer user, such as "deleted" files and "file fragments." As you may know, although a user may "erase" or "delete" a file, all that is really erased is a reference to that file in a table on the hard disk; unless overwritten with new data, a "deleted" file can be as intact on the disk as any "active" file you would see in a directory listing.

{Courts have made it clear that all information available on electronic storage media is discoverable, whether readily readable ("active") or "deleted" but recoverable. See, e.g., Easley, McCaleb & Assocs., Inc. v. Perry, No. E-2663 (Ga. Super. Ct. July 13, 1994; "deleted" files on a party's computer hard drive held to be discoverable, and plaintiff's expert was allowed to retrieve all recoverable files); Santiago v. Miles, 121 F.R.D. 636, 640 (W.D.N.Y. 1988; a request for "raw information in computer banks" was proper and obtainable under the discovery rules); Gates Rubber Co. v. Bando Chemical Indus., Ltd., 167 F.R.D. 90, 112 (D. Colo. 1996; mirror-image copy of everything on a hard drive "the method which would yield the most complete and accurate results," chastising a party's expert for failing to do so); and Northwest Airlines, Inc. v. Teamsters Local 2000, et al., 163 L.R.R.M. (BNA) 2460, (USDC Minn. 1999); court ordered image-copying by Northwest's expert of home computer hard drives of employees suspected of orchestrating an illegal "sick-out" on the Internet).}

Accordingly, electronic data and storage media that may be subject to our discovery requests and that your client{s} are obligated to maintain and not alter or destroy, include but are not limited to the following:

Introduction: description of files and file types sought

All digital or analog electronic files, including "deleted" files and file fragments, stored in machine-readable format on magnetic, optical or other storage media, including the hard drives or floppy disks used by your client's {clients'} computers and their backup media (e.g., other hard drives, backup tapes, floppies, Jaz cartridges, CD-ROMs) or otherwise, whether such files have been reduced to paper printouts or not. More specifically, your client{s} is {are} to preserve all of your e-mails, both sent and received, whether internally or externally; all word-processed files, including drafts and revisions; all spreadsheets, including drafts and revisions; all databases; all CAD (computer-aided design) files, including drafts and revisions; all presentation data or slide shows produced by presentation software (such as Microsoft PowerPoint); all

graphs, charts and other data produced by project management software (such as Microsoft Project); all data generated by calendaring, task management and personal information management (PIM) software (such as Microsoft Outlook or Lotus Notes); all data created with the use of personal data assistants (PDAs), such as PalmPilot, HP Jornada, Cassiopeia or other Windows CE-based or Pocket PC devices; all data created with the use of document management software; all data created with the use of paper and electronic mail logging and routing software; all Internet and Web-browser-generated history files, caches and "cookies" files generated at the workstation of each employee and/or agent in your client's {clients'} employ and on any and all backup storage media; and any and all other files generated by users through the use of computers and/or telecommunications, including but not limited to voice mail. Further, you are to preserve any log or logs of network use by employees or otherwise, whether kept in paper or electronic form, and to preserve all copies of your backup tapes and the software necessary to reconstruct the data on those tapes, so that there can be made a complete, bit-by-bit "mirror" evidentiary image copy of the storage media of each and every personal computer (and/or workstation) and network server in your control and custody, as well as image copies of all hard drives retained by you and no longer in service, but in use at any time from _____ to the present.

Your client{s} is {are} also not to pack, compress, purge or otherwise dispose of files and parts of files unless a true and correct image of such files is made.

Your client{s} is {are} also to preserve and not destroy all passwords, decryption procedures (including, if necessary, the software to decrypt the files); network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software, and any and all other information and things necessary to access, view and (if necessary) reconstruct the electronic data we [are requesting/will request] through discovery.

1. **Business Records:** [All documents and information about documents containing backup and/or archive policy and/or procedure, document retention policy, names of backup and/or archive software, names and addresses of any offsite storage provider.]

a. All e-mail and information about e-mail (including message contents, header information and logs of e-mail system usage) {sent or received} by the following persons:

[list names, job titles]

b. All other e-mail and information about e-mail (including message contents, header information and logs of e-mail system usage) containing information about or related to:

[insert detail]

c. All databases (including all records and fields and structural information in such databases), containing any reference to and/or information about or related to:

[insert detail]

d. All logs of activity (both in paper and electronic formats) on computer systems and networks that have or may have been used to process or store electronic data containing information about or related to:

[insert detail]

e. All word processing files, including prior drafts, "deleted" files and file fragments, containing information about or related to:

[insert detail]

f. With regard to electronic data created by application programs which process financial, accounting and billing information, all electronic data files, including prior drafts, "deleted" files and file fragments, containing information about or related to:

[insert detail]

g. All files, including prior drafts, "deleted" files and file fragments, containing information from electronic calendars and scheduling programs regarding or related to:

[insert detail]

h. All electronic data files, including prior drafts, "deleted" files and file fragments about or related to:

[insert detail]

2. **Online Data Storage on Mainframes and Minicomputers:** With regard to online storage and/or direct access storage devices attached to your client's {clients'} mainframe computers and/or minicomputers: they are not to modify or delete any electronic data files, "deleted" files and file fragments existing at the time of this letter's delivery, which meet the definitions set forth in this letter, unless a true and correct copy of each such electronic data file has been made and steps have been taken to assure that such a copy will be preserved and accessible for purposes of this litigation.

3. **Offline Data Storage, Backups and Archives, Floppy Diskettes, Tapes and Other Removable Electronic Media:** With regard to all electronic media used for offline storage,

including magnetic tapes and cartridges and other media that, at the time of this letter's delivery, contained any electronic data meeting the criteria listed in paragraph 1 above: Your client {clients} is {are} to stop any activity that may result in the loss of such electronic data, including rotation, destruction, overwriting and/or erasure of such media in whole or in part. This request is intended to cover all removable electronic media used for data storage in connection with their computer systems, including magnetic tapes and cartridges, magneto-optical disks, floppy diskettes and all other media, whether used with personal computers, minicomputers or mainframes or other computers, and whether containing backup and/or archive data sets and other electronic data, for all of their computer systems.

4. **Replacement of Data Storage Devices:** Your client {clients} is {are} not to dispose of any electronic data storage devices and/or media that may be replaced due to failure and/or upgrade and/or other reasons that may contain electronic data meeting the criteria listed in paragraph 1 above.

5. **Fixed Drives on Stand-Alone Personal Computers and Network Workstations:** With regard to electronic data meeting the criteria listed in paragraph 1 above, which existed on fixed drives attached to stand-alone microcomputers and/or network workstations at the time of this letter's delivery: Your client {clients} is {are} not to alter or erase such electronic data, and not to perform other procedures (such as data compression and disk de-fragmentation or optimization routines) that may impact such data, unless a true and correct copy has been made of such active files and of completely restored versions of such deleted electronic files and file fragments, copies have been made of all directory listings (including hidden files) for all directories and subdirectories containing such files, and arrangements have been made to preserve copies during the pendency of this litigation.

6. **Programs and Utilities:** Your client {clients} is {are} to preserve copies of all application programs and utilities, which may be used to process electronic data covered by this letter.

7. **Log of System Modifications:** Your client {clients} is {are} to maintain an activity log to document modifications made to any electronic data processing system that may affect the system's capability to process any electronic data meeting the criteria listed in paragraph 1 above, regardless of whether such modifications were made by employees, contractors, vendors and/or any other third parties.

8. **Personal Computers Used by Your Employees and/or Their Secretaries and Assistants:** The following steps should immediately be taken in regard to all personal computers used by your client's {clients'} employees and/or their secretaries and assistants.

a. As to fixed drives attached to such computers: (i) a true and correct copy is to be made of all electronic data on such fixed drives relating to this matter, including all active files and completely restored versions of all deleted electronic files and file fragments; (ii) full

directory listings (including hidden files) for all directories and subdirectories (including hidden directories) on such fixed drives should be written; and (iii) such copies and listings are to be preserved until this matter reaches its final resolution.

b. All floppy diskettes, magnetic tapes and cartridges, and other media used in connection with such computers prior to the date of delivery of this letter containing any electronic data relating to this matter are to be collected and put into storage for the duration of this lawsuit.

9. **Evidence Created Subsequent to This Letter:** With regard to electronic data created subsequent to the date of delivery of this letter, relevant evidence is not be destroyed and your client {clients} is {are} to take whatever steps are appropriate to avoid destruction of evidence.

In order to assure that your and your client's {clients'} obligation to preserve documents and things will be met, please forward a copy of this letter to all persons and entities with custodial responsibility for the items referred to in this letter.

Sincerely, etc.

P.S. Have a nice day! [DO NOT LEAVE THIS IN!!!]