



The *DOs* and *DON'Ts* of Litigation Holds: Deconstructing the Effective Litigation Hold Notice

PRESENTED BY:

**HONORABLE JOHN J. HUGHES, U.S.M.J. (RET.)
UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY**

**MARK S. SIDOTI, ESQ.
DIRECTOR & CHAIR OF GIBBONS' E-DISCOVERY TASK FORCE**

**MELISSA DEHONNEY, ESQ.
ASSOCIATE & MEMBER OF GIBBONS' E-DISCOVERY TASK FORCE**

What We Will Cover

- **Lessons From Key Recent Cases;**
- **Deconstructing The Litigation Hold Notice: Analyzing Why Specific Provisions Are Included, And Key Considerations For Tailoring Litigation Hold Notices In Individual Cases; and**
- **Q&A.**

Old Concept; New Name

“When senior management fails to establish and distribute a comprehensive document retention policy, it cannot shield itself from responsibility because of field office actions. The obligation to preserve documents that are potentially discoverable materials is an affirmative one that rests squarely on the shoulders of senior corporate officers.”

In re Prudential, 169 F.R.D. 598, 615 (D.N.J. 1997)

Recent Case Law

- Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC, S.D.N.Y., January 11/15, 2010 (Hon. Shira A. Scheindlin, U.S.D.J.);
- Orbit One Commc'n, Inc. v. Numerex Corp., S.D.N.Y., October 26, 2010 (Hon. James C. Francis, IV, U.S.M.J.);
- du Pont De Nemours and Co. v. Kolon Indus., Inc., E.D. Va., April 27, 2011 (du Pont) and July 21, 2011 (Kolon) (Hon. Robert E. Payne, U.S.D.J.); and
- NVE, Inc. v. Palmeroni, D.N.J., September 21, 2011 (Hon. Esther Salas, U.S.D.J.).

The Effective Litigation Hold Notice

DOCUMENT HOLD NOTICE REGARDING PLAINTIFF V. OUR COMPANY, INC.

TO: Mr. Don Taskme
FROM: Office of the General Counsel
RE: Document Hold Notice, Plaintiff v. Our Company, Inc.
DATE: November 3, 2011

On November 2, 2011, Plaintiff served Our Company, Inc. (the "Company") with a lawsuit relating to alleged defects in and misrepresentations concerning widgets the Company marketed and sold from 2001 to the present. The lawsuit also relates to the design and manufacturing of the widgets by Our Company's Foreign Parent, Inc.

As a person who has had prior involvement with this situation, or may be in possession of relevant documents, we need your urgent attention and assistance with respect to preserving information relating to this lawsuit.

By this notice you are asked to preserve in their current form, and refrain from destroying, discarding or altering, any documents and data from all sources, including electronically stored information, that may be relevant to this lawsuit including, without limitation, documents and data concerning:

- any dealings with the Plaintiff;
- the sale and marketing of the widgets, including prior versions of the Company's websites; and
- the design, development, manufacture and distribution of the widgets.

Please note that this list includes documents and data that the Company may contend are irrelevant and/or non-discoverable. Inclusion of documents or data in this notice does not constitute, and should not be construed as, the Company's agreement that they are relevant to Plaintiff's claims or discoverable in this lawsuit.

"Documents and data," as used in this notice, means not only hard copy documents, but e-mail and other electronic communications, word processing documents, spreadsheets, databases, calendars, telephone logs, presentations, graphs, charts, images, audio and visual recordings, and voicemail, as well as all copies and versions of such documents, including drafts, markups, revisions, and hand written documents, created, received and/or maintained by the Company or you personally.

"Sources," as used in this notice, means all hard copy files, computer hard drives, computer servers, removable media (e.g., CDs and DVDs), laptop computers, PDAs, Blackberry devices and smart phones, portable ("thumb") drives, and any other locations where hard copy and electronic data is stored. Keep in mind that any of the above-mentioned sources of relevant information may include personal computers or devices that you use or have access to at home, cloud-based data hosted by third-parties or other locations. It also includes inaccessible storage media, such as back-up tapes

To comply with its legal obligations, the Company must continue to make all reasonable efforts to preserve and collect all existing documents and data relevant to the lawsuit and suspend deletion, overwriting, or any other possible destruction of relevant documents and data. We ask for your cooperation in this process. Please segregate all documents and data currently in your possession relating to the subjects listed above, and retrieve any responsive documents kept in off-site storage. In light of the Company's existing Electronic Systems Policy, please be sure to gather and segregate emails relating to the subjects listed above from your Inbox, Deleted Items and Sent Items. Emails may be stored temporarily in a personal folder created in Outlook or on your Desktop.

Any uncertainty as to whether documents or data are subject to this notice should be resolved in favor of retention of the documents or data unless you are otherwise instructed. If you need assistance with the collection and segregation processes, or have IT related questions, please contact Mr. I.H. Counsel in the Company's legal department or Mary Metadata in the IT department. In any case, a representative of legal and/or the IT department will be contacting you in the next several days to assist you with this process, including the collection of documents and data that you have segregated, and answer any questions you may have. We will also be following up with you directly through further notices of this nature. For example, you will be notified if the scope of this notice is supplemented or reduced as well as when you are released from this litigation hold.

Electronically stored data could be an important and irreplaceable source of discovery and/or evidence in this matter. You must take every reasonable step to preserve this information until further written notice. Failure to do so could result in extreme penalties against the Company and could negatively affect the outcome of the litigation for the Company.

This is also a reminder that this lawsuit and the facts regarding the subject matter of this lawsuit are highly confidential and should not be discussed outside the Company or in any writing created outside the mechanisms embodied in this Document Hold Notice. ***We also ask that all communications in response to this notice be made by telephone. Please do not respond or request assistance by email or other written document.***

Please sign, date, and return a copy of this Document Hold Notice to the Office of the General Counsel to acknowledge your receipt and agreement to comply with these instructions.

Thank you for your attention to and assistance with this important obligation. We very much appreciate your efforts.

Office of the General Counsel

Received and Acknowledged: _____
Print Name: : _____
Signed:: _____

The Introduction

**PRIVILEGED & CONFIDENTIAL
ATTORNEY CLIENT COMMUNICATION AND ATTORNEY WORK PRODUCT**

TO: Mr. Don Taskme
FROM: Office of the General Counsel
RE: Document Hold Notice, Plaintiff v. Our Co., Inc.
DATE: November 3, 2011

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Identifying Recipients

As a person who has had prior involvement with this situation, or may be in possession of relevant documents, we need your urgent attention and assistance with respect to preserving information relating to this legal action.

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What We Are Asking For

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Case Specifics

- any dealings with the Plaintiff;
- the sale and marketing of the widgets, including prior versions of the Company's websites; and
- the design, development, manufacture and distribution of the widgets.

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Relevance / Discoverability Disclaimer

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Defining “Documents” And “Data”

“Documents and data,” as used in this notice, means not only hard copy documents, but e-mail and other electronic communications, word processing documents, spreadsheets, databases, calendars, telephone logs, presentations, graphs, charts, images, audio and visual recordings, and voicemail, as well as all copies and versions of such documents, including drafts, markups, revisions, and hand written documents, created, received and/or maintained by the Company or you personally.

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Defining “Sources” Of E-Discovery

“Sources,” as used in this notice, means all hard copy files, computer hard drives, computer servers, removable media (e.g., CDs and DVDs), laptop computers, PDAs, Blackberry devices and smart phones, portable (“thumb”) drives, and any other locations where hard copy and electronic data is stored. Keep in mind that any of the above-mentioned sources of relevant information may include personal computers or devices that you use or have access to at home, cloud-based data hosted by third-parties or other locations. It also includes inaccessible storage media, such as back-up tapes that may contain relevant electronic information, *if such back-up media is the sole source of relevant documents or data.*

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Specific Instructions

To comply with its legal obligations, the Company must continue to make all reasonable efforts to preserve and collect all existing documents and data relevant to the lawsuit and suspend deletion, overwriting, or any other possible destruction of relevant documents and data. We ask for your cooperation in this process. Please segregate all documents and data currently in your possession relating to the subjects listed above, and retrieve any responsive documents kept in off-site storage. In light of the Company's existing Electronic Systems Policy, please be sure to gather and segregate emails relating to the subjects listed above from your Inbox, Deleted Items and Sent Items. Emails may be stored temporarily in a personal folder created in Outlook or on your Desktop.

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Any uncertainty as to whether documents or data are subject to this notice should be resolved in favor of retention of the documents or data unless you are otherwise instructed. If you need assistance with the collection and segregation processes, or have IT related questions, please contact Mr. I.H. Counsel in the Company's legal department or Mary Metadata in the IT department. In any case, a representative of legal and/or the IT department will be contacting you in the next several days to assist you with this process, including the collection of documents and data that you have segregated, and answer any questions you may have. We will also be following up with you directly through further notices of this nature. For example, you will be notified if the scope of this notice is supplemented or reduced as well as when you are released from this litigation hold.

Electronically stored data could be an important and irreplaceable source of discovery and/or evidence in this matter. You must take every reasonable step to preserve this information until further written notice. Failure to do so could result in extreme penalties against the Company and could negatively affect the outcome of the litigation for the Company.

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Thank you for your attention to and assistance with this important obligation. We very much appreciate your efforts.

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Received and Acknowledged:

Print Name: _____
Date: _____

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Assistance Contacts, Follow-Up

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Thank you for your attention to and assistance with this important obligation. We very much appreciate your efforts.

Office of the General Counsel

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Print Name: _____
Date: _____

We Mean Business.

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that may contain relevant electronic information, if such back-up media is the sole source of relevant documents or data.

To comply with its legal obligations, the Company must continue to make all reasonable efforts to preserve and collect all existing documents and data relevant to the lawsuit and suspend deletion, overwriting, or any other possible destruction of relevant documents and data. We ask for your cooperation in this process. Please segregate all documents and data currently in your possession relating to the subjects listed above, and retrieve any responsive documents kept in off-site storage. In light of the Company's existing Electronic Systems Policy, please be sure to gather and segregate emails relating to the subjects listed above from your Inbox, Deleted Items and Sent Items. Emails may be stored temporarily in a personal folder created in Outlook or on your Desktop.

Any uncertainty as to whether documents or data are subject to this notice should be resolved in favor of retention of the documents or data unless you are otherwise instructed. If you need assistance with the collection and segregation processes, or have IT related questions, please contact Mr. Liu, Counsel in the Company's legal department or Mary Metadata in the IT department. In any case, a representative of legal and/or the IT department will be contacting you in the next several days to assist you with this process, including the collection of documents and data that you have segregated, and answer any questions you may have. We will also be following up with you directly through further notices of this nature. For example, you will be notified if the scope of this notice is supplemented or reduced as well as when you are released from this litigation hold.

Electronically stored data could be an important and irreplaceable source of discovery and/or evidence in this matter. You must take every reasonable step to preserve this information until further written notice. Failure to do so could result in extreme penalties against the Company and could negatively affect the outcome of the litigation for the Company.

This is also a reminder that this lawsuit and the facts regarding the subject matter of this lawsuit are highly confidential and should not be discussed outside the Company or in any writing created outside the mechanisms embodied in this Document Hold Notice. ***We also ask that all communications in response to this notice be made by telephone. Please do not respond or request assistance by email or other written document.***

Please sign, date, and return a copy of this Document Hold Notice to the Office of the General Counsel to acknowledge your receipt and agreement to comply with these instructions.

Thank you for your attention to and assistance with this important obligation. We very much appreciate your efforts.

Received and Acknowledged: _____ Office of the General Counsel

Print Name: _____
Date: _____

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Confidentiality, No Documentation Request

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Acknowledgment

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Cloud Based Litigation Hold Software

- Exterro Fusion Cloud; Zapproved's Legalhold Pro; Jordan Lawrence GRIP; kCura's Method;
- Benefits:
 - Ease of Hold Dissemination & Follow Up
 - Process Standardization
 - Scalable
 - Tracking & Documentation Of Hold Process
 - Automated Reporting
 - Interview Capabilities
 - Integration With Review Platforms
 - Cost Effective
 - Intangibles – Strengthens “Good Faith” Position In The Event Of Challenge