

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ROGER M. BELANICH and SUSAN P.
BELANICH, a Washington marital
community,

Plaintiffs,

v.

EMPLOYERS' FIRE INSURANCE
COMPANY, a foreign insurance company;
ONEBEACON AMERICAN INSURANCE
COMPANY, a foreign insurance company;
ONEBEACON INSURANCE COMPANY, a
foreign insurance company; JOHN DOE
INSURANCE COMPANIES 1-5,

Defendants.

NO. 12-2-14368-4 SEA

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' *FISONS* MOTION
AGAINST DEFENDANT EMPLOYERS'
FIRE INSURANCE COMPANY FOR
CIVIL RULE 34 VIOLATIONS**

THIS MATTER came before the undersigned judge, having heard oral argument on January 24, 2014 on Plaintiffs' *Fisons* Motion Against Defendant Employers' Fire Insurance Company for Civil Rule 34 Violations dated December 27, 2013, and the Court having considered the following:

1. Plaintiffs' *Fisons* Motion Against Defendant Employers' Fire Insurance Company for Civil Rule 34 Violations, dated December 27, 2013 (the "*Fisons* Motion");
2. Declaration of Stephanie L. Grassia in Support of the *Fisons* Motion, dated December 27, 2013;

ORDER GRANTING PLAINTIFFS'
FISONS MOTION AGAINST DEFENDANT
EMPLOYERS' FIRE INSURANCE COMPANY
FOR CIVIL RULE 34 VIOLATIONS - 1

ORIGINAL

HELSELL
FETTERMAN

Hellsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 WWW.HELSELL.COM

1 3. Declaration of Ron Hadley in Support of the *Fisons* Motion, dated December
2 27, 2013;

3 4. Defendant Employers' Fire Insurance Company's ("EFIC") Response to
4 Plaintiffs' *Fisons* Motion Against EFIC for Civil Rule 34 Violations dated January 7, 2013;

5 5. Declaration of Michael Hooks in Support of Defendant EFIC's Response to
6 Plaintiffs' *Fisons* Motion Against EFIC for Civil Rule 34 Violations dated January 7, 2014;

7 6. Declaration of Jean Young in Support of Defendant EFIC's Response to
8 Plaintiffs' *Fisons* Motion Against EFIC for Civil Rule 34 Violations dated January 7, 2014;

9 7. Declaration of Kevin Cooke in Support of Defendant EFIC's Response to
10 Plaintiffs' *Fisons* Motion Against EFIC for Civil Rule 34 Violations dated January 7, 2014;

11 8. Reply in Support of Plaintiffs' *Fisons* Motion Against Defendant EFIC for
12 Civil Rule 34 Violations dated January 10, 2014; and

13 9. The pleadings and files on record herein.

14 This case involves claims of breach of insurance contract, bad faith, violations of the
15 Consumer Protection Act (RCW 19.86), and the Insurance Fair Conduct Act (RCW
16 48.30.015). Plaintiffs are represented by Helsell Fetterman LLP, and the defendants are
17 represented by Forsberg & Umlauf. Pretrial litigation has been extensive and has required
18 the appointment of a Special Discovery Master.

19 The Court makes the following specific findings as required by *Fisons* to support a
20 motion for sanctions:

21 The Court finds that the requirements of CR 26(i) conference were satisfied. Even if
22 those requirements were not satisfied, the Court exercises its discretion to waive a CR 26(i)
23 conference to streamline the progress of the case, given that trial is scheduled for April 7,
24 2014.
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1 The Court finds that EFIC's failure to provide timely and complete production of
2 properly requested non-privileged documents, as well as EFIC's significant delays and
3 omissions in responding to Plaintiffs' discovery requests, were willful and dilatory and that
4 sanctions are appropriate under the circumstances. EFIC's document production has not
5 been helpful to the plaintiffs; in fact, it has been detrimental to plaintiffs' counsel's ability to
6 effectively investigate the claim, determine what coverage Belanich has available to him,
7 and to prepare the case for trial.

8 The Court will not tolerate the type of behavior outlined in the plaintiffs' briefing.
9 Plaintiffs' counsel has been stymied at every step and stage of the proceedings in this case.
10 The Court's goal is to protect the current trial date and avoid the necessity of plaintiffs'
11 counsel being required to ask for a continuance. However, plaintiffs reserve the right to
12 request a continuance as the situation merits.

13 The Court also finds that there is a question as to whether the representations and
14 testimony made by the defendants and their counsel in response to the *Fisons* Motion are
15 true. The only way to answer that question and determine whether the production is
16 complete is to employ a computer forensic engineer to review the hard drives at Sound
17 Legal Copy, EFIC, Resolute Management, Inc. ("Resolute"), and any other OneBeacon
18 Insurance Group company that has files relating to the Belanich Claim.

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20 The Court has considered other sanctions and has determined that the least severe
21 sanctions to serve the purpose of deterring, punishing, and educating EFIC is a monetary
22 sanction, combined with other relief as set forth below.

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IT IS HEREBY ORDERED that the *Fisons* Motion is **GRANTED** and that:

1. Plaintiffs **only** are relieved from the following deadlines in the Order Amending Case Schedule dated June 10, 2013:

- a. Disclosure of Possible Primary Witnesses: November 4, 2013
- b. Disclosure of Possible Additional Witnesses: December 16, 2013
- c. Change of Trial Date: December 30, 2013
- d. Discovery Cutoff: February 17, 2014

2. By no later than January 31, 2014, the parties will provide the name of an agreed-upon forensic expert. If the parties cannot agree, the Court will choose one.

3. The Court appoints [Jon Grace of Altep or Ken Shears] (hereinafter "Forensic Expert") to assist in resolving this dispute. EFIC, Resolute, OneBeacon America Insurance Company, and OneBeacon Insurance Company shall immediately allow Forensic Expert to access the computers, hard drives, and other electronic storage media, along with any peripherals or accessories, as may be necessary for them to perform their duties as set forth herein. Any action taken by defendants to interfere or obstruct Forensic Expert or its representatives or designees in or from the performance of their duties in connection with the examination, copying, or imaging shall be considered contempt of court. If Forensic Expert or its representatives or designees are unable to perform their duties because of interference or obstruction, they are directed to take actual possession of the computers, hard drives, and other electronic storage media, along with any peripherals or accessories and remove them to a safe location pending further order of the Court.

1 4. Defendants' counsel shall, within two days of entry of this order, submit to
2 the Court and plaintiffs' counsel all legal vendors that were used to produce discovery on
3 defendants' behalf in this lawsuit.

4 5. EFIC shall bear all costs associated with the examination, copying, or
5 imaging of the data stored on the computers, hard drives, or other electronic storage media
6 by Forensic Expert, including any attendant costs incurred by the plaintiffs to assist in
7 complying with this Order.

8 6. Forensic Expert shall examine, copy, and make images of all computers, hard
9 drives, and other electronic storage media for the purpose of preserving all information
10 having anything to do with this lawsuit and the Belanich/Westco claim, and to obtain
11 information relating to any Web sites accessed through the Internet wherein information
12 relating to this case may be stored. The procedure will be performed in a manner designed to
13 ensure the integrity and continued ability to perform work on the computers, hard drives,
14 and electronic storage media examined and will be performed in a completely nonintrusive
15 manner consistent with thorough and accurate imaging and examination techniques.

16 7. To the maximum extent feasible under the circumstances, all computers, hard
17 drives, and electronic storage media shall be examined, and the copying and imaging
18 performed without disturbing or harming the integrity of the original hard drives, including
19 without limitation the copying and imaging of all existing files, all deleted files, all hidden
20 files, all backup tapes, all renamed files, all slack space containing data or bits of data, the
21 file allocation table (FAT), the directory entry table (DET), and master file table (MFT),
22 both active and deleted, and slack space on which deleted files or fragment files may exist.
23 Forensic Expert shall keep a log of the hard drives and other media so accessed and imaged
24 and label each imaged copy generated and file the log with the Court within 72 hours of
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1 completing the task. Defendants may obtain copies thereof at their own expense. A copy
2 will also be provided to plaintiffs at defendants' expense.

3 8. The imaged disks or copies generated by Forensic Expert shall be
4 individually stamped or numbered and shall be maintained unaltered in a secure
5 environment by them.

6 9. The expert shall also examine the hard drives and files, electronic or
7 otherwise, at any of the vendors who processed documents on defendants' behalf in
8 discovery, including but not limited to Sound Legal Copy. Forsberg & Umlauf will identify
9 all vendors it used during the duration of this lawsuit. This examination will be limited only
10 to electronic and non-electronic information possessed by each vendor that is related to this
11 lawsuit. In addition to comparing the documents produced to date in this case and the
12 documents residing on the vendors' computers or files, the expert will answer the following
13 questions/provide the following information:

- 14 a. The dates Forsberg & Umlauf and/or the defendants provided
15 information to each vendor, the date the information was returned to
16 Forsberg & Umlauf, and the format in which the information was
17 returned to Forsberg & Umlauf (i.e., paper versus electronic format; if
18 electronic format, what type of files and in what media);
- 19 b. All correspondence between Forsberg & Umlauf and/or EFIC and
20 each vendor;
- 21 c. All invoices from each vendor to Forsberg & Umlauf from October
22 2012 to the present time, including information showing when the
23 invoices were paid;
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1 d. Confirmation of whether a portion of the original electronic files
2 produced to the vendors had mistakenly not been converted by the
3 vendor or had been converted into an unusable format by the vendors.

4 10. The scope of the forensic examination shall include the information outlined
5 at pages 3-6 of plaintiffs' October 24, 2012 Litigation Hold Letter, attached hereto.

6 11. The following individuals shall be included as part of the examination:

- 7 a) Kevin Cooke
8 b) Elizabeth Sackett
9 c) Brooke Green
10 d) Thomas M. Ryan
11 e) Bonnie McClements
12 f) Michael Stanley
13 g) Brian Bendig
14 h) Joseph Casaccio
15 i) Robert McCarthy
16 j) Christopher Goss
17 k) Clayton Budlong
18 l) Dan McCarthy
19 m) Yulia Levchuk
20 n) Jitendra Chaudhari
21 o) Catherine Murphy
22 p) Michaela Berkett
23 q) Diane Somers
24 r) Art Simmons (Simmonds?)
25

- 1 s) Stuart McKay at OneBeacon
2 t) And any other employee of Resolute Management, Inc., EFIC,
3 OneBeacon America Insurance Company, and OneBeacon Insurance
4 Company, or any company within the White Mountains or Berkshire
5 Hathaway group, wherever located, who had any involvement whatsoever
6 on the Belanich/Westco claim at issue in this lawsuit.

7 12. This order regarding forensic examination shall not be deemed to be a ruling
8 concerning the permissible scope of discovery herein, or a ruling upon admissibility.

9 13. The Court finds that Michael Hooks is not personally responsible for the
10 conduct complained of in the *Fisons* Motion.

11 14. EFIC shall pay monetary sanctions to serve the purpose of deterring,
12 punishing, and educating EFIC for engaging in discovery abuses. The Court reserves on the
13 amount of the monetary sanctions until it receives the results of the computer forensic
14 analysis described above.

15 15. EFIC shall pay reasonable attorneys' fees and costs that Plaintiffs incurred in
16 addressing irregularities in production, in an amount to be determined at a later date upon
17 Plaintiffs' separate application.

18 16. The Court reallocates all fees and costs for Special Discovery Master Steve
19 Scott's services to 100 percent for defendants and 0% for plaintiffs. EFIC shall pay \$1,900
20 to plaintiffs to reimburse plaintiffs for their payment of JDR's fees to date. EFIC shall
21 deliver this amount to Plaintiffs' counsel, Stephanie Grassia at Helsell Fetterman, within ten
22 (10) calendar days after entry of this Order.
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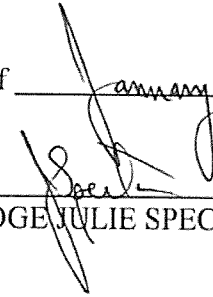
1 17. Any deposition that needs to be renoted because of EFIC's dilatory failure to
2 provide timely discovery may be done at EFIC's expense, including all of Ms. Grassia's
3 travel expenses and the cost of the depositions.

4 18. Plaintiffs' counsel is not required to hold any further CR 26(i) conferences
5 before filing any future motions for sanctions.

6 19. EFIC shall pay reasonable attorneys' fees and costs that Plaintiffs incurred in
7 bringing the *Fisons* Motion, in an amount to be determined at a later date upon Plaintiffs'
8 separate application.

9 **IT IS HEREBY FURTHER ORDERED that failure to comply with this Order**
10 **will subject defendant EFIC to further, harsher sanctions pursuant to CR 26, CR 37,**
11 **and KCLCR 26 or 37, or other applicable rule.**

12
13 DONE IN OPEN COURT this 30th day of January, 2014.

14
15 
16 _____
17 JUDGE JULIE SPECTOR

18 PREPARED AND PRESENTED BY:
19 HELSELL FETTERMAN

20 s/ Stephanie L. Grassia
21 Stephanie L. Grassia, WSBA No. 34907
22 1001 Fourth Ave., Ste. 4200
23 Seattle, WA 98154
24 T: 206.689.2126 / F: 206.340.0902
25 E-Mail: sgrassia@helsell.com

RESOLUTE MANAGEMENT
524 2nd Ave. Suite 500
Seattle, WA 98104
www.resoluteins.com

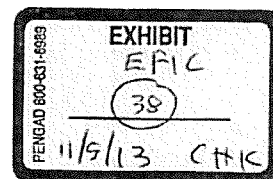
ATLANTA OFFICE
Office 206 587 0700
Fax 206 587 2506

CHS

October 24, 2012

VIA FEDERAL EXPRESS

OneBeacon America Insurance Company
f/k/a Commercial Union Insurance Company
Employers' Fire Insurance Company
601 Carlson Parkway Suite 600
Minnetonka, MN 55305
781-332-7000



VIA EMAIL

Mr. Kevin W. Cooke
Ms. Elizabeth Sackett
Resolute Management Inc.
New England Division
1000 Washington St., 4th Floor
Boston, MA 02118

Re: Insured: Roger M. Belanich
Claim : SRO/BV Holdings MTCA Lawsuit; PACCAR and Chase
NE 8th Property in Bellevue, Washington
Policy: Employers' Fire Insurance Company General Liability #FCW 524882
Commercial Union Insurance Company Umbrella #CC-8856-01
Insurers: Employers' Fire Insurance Company
Commercial Union Insurance Company
OneBeacon America Insurance Company
OneBeacon Insurance Company
(The above insurers shall be referred to as "clients" herein)

Dear Mr. Cooke and Ms. Sackett:

As you know, we represent Roger M. Belanich with respect to the above matter. We are writing to advise that Mr. Belanich will be pursuing legal remedies for OneBeacon's breach of contract and bad faith handling of the above claim. You will be receiving a copy of the summons and complaint from the Washington Insurance Commissioner in the near future. All notices in this letter are directed to Resolute Management Inc. and your clients.

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By this letter, you and your clients are hereby given notice not to destroy, conceal or alter any paper or electronic files and other data generated by and/or stored on your and your clients' computers and storage media (e.g., hard disks, floppy disks, backup tapes), or any other electronic data, such as voice mail. As you know, your or your clients' failure to comply with this notice can result in severe sanctions being imposed by a court and/or administrative adjudicatory entity for spoliation of evidence or potential evidence.

Through discovery we expect to obtain a number of documents and things, including files stored on your and your clients' computers and your and your clients' computer storage media. 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.

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 paper copy exists, we will seek all documents in their electronic form along with information about those documents contained on the media. We also will seek paper printouts of 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 will ask for certain data on the hard disks, floppy disks, and backup media used in your and your 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. 1990 (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

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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 clients are obligated to maintain and not alter or destroy, include but are not limited to the following:

1. Introduction: Description of Files and File Types Sought:
 - A. 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 and your clients' computers and your/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, you and your clients are to preserve all of your/their 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 or your 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 the time from the start of Mr. Belanich's claims until the present.

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- B. You and your clients are also not to pack, compress, purge or otherwise dispose of files and parts of files unless a true and correct copy of such files is made.
 - C. You and your clients 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 will request through discovery.
2. Records to be Preserved: Records to be preserved include, but are not limited to, the following:
- A. 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.
 - B. All e-mail and information about e-mail (including message contents, header information and logs of e-mail system usage) sent or received by anyone who worked on this file (including the Westco adjuster(s)), including but not limited to Kevin Cooke, Elizabeth Sackett, Clayton Budlong, and Christopher Goss.
 - C. 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 that refers in any way to Mr. Belanich's claim.
 - D. All word processing files, including prior drafts, "deleted" files and file fragments, containing information that refer in any way to Mr. Belanich's claim.
 - E. 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 that relates in any way to Mr. Belanich's claim.
 - F. All files, including prior drafts, "deleted" files and file fragments, containing information that refer in any way to Mr. Belanich's claim.
 - G. All electronic data files, including prior drafts, "deleted" files and file fragments containing information that refers in any way to Mr. Belanich's claim.

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3. Online Data Storage on Mainframes and Minicomputers: With regard to online storage and/or direct access storage devices attached to your or your clients' mainframe computers and/or minicomputers: you and 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.
4. 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 2 above: You and your clients 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 your/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.
5. Replacement of Data Storage Devices: You and your clients 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 2 above.
6. Fixed Drives on Stand-Alone Personal Computers and Network Workstations: With regard to electronic data meeting the criteria listed in paragraph 2 above, which existed on fixed drives attached to stand-alone microcomputers and/or network workstations at the time of this letter's delivery: You and your clients 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.
7. Programs and Utilities: You and your clients are to preserve copies of all application programs and utilities, which may be used to process electronic data covered by this letter.

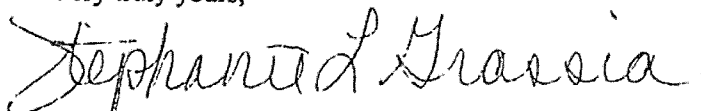
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8. Log of System Modifications: You and your clients are to maintain an activity log to document modifications made to any electronic data processing system that may affect the system's capability to process any electronic data meeting the criteria listed in paragraph 2 above, regardless of whether such modifications were made by employees, contractors, vendors and/or any other third parties.
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 you and your clients are to take whatever steps are appropriate to avoid destruction of evidence.

In order to assure that your and your 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.

Thank you in advance for your courtesy and cooperation.

Very truly yours,


Stephanie L. Grassia, CPCU

SLG:rtw

cc: Roger and Susan Belanich (via email)
James P. Wagner (via email)