

*Signature* Plaintiff  
*Signature* Defendants

- whether the privilege issue requires the redaction of the electronic discovery

## **II. PLAINTIFF PROPOSED SPOILIATION PREVENTION STIPULATION**

### **Data Preservation Order**

One of the most important issues in this action's electronic discovery is data preservation.

E-mail and electronic files are abundant, much of the data resides on backup tapes, which are frequently recycled, or on individual hard drives, on which data are altered and overwritten with each use. Now that litigation has initiated, the parties agree to protect against a potential spoliation accusation.

The parties agree to immediately halt all electronic document-handling policies that result in the recycling of tapes or other e-data destruction that may destroy potentially relevant files. Data destruction must cease at all locations of all parties.

Attorneys agree that the data on the hard drives of named individual defendants and key people be preserved through the use of mirror-imaging technology, which freezes the data in snapshot fashion. In addition, the attorneys agree preservation letters will be sent to all parties and nonparties in possession of potentially relevant data. The attorneys will prepare a preservation order draft by May 16<sup>th</sup>, 2003. As the case moves forward, the parties agree to monitor compliance and report current status and list of hard drives under effect each 60 days.

Plaintiff agrees not to pursue spoliation sanctions for US Bancorp Piper Jaffray's destruction of e-mail relevant to this case identified in the plea bargain to the SEC and NASD providing 1)all documentation related to the settlement and fine is delivered to the plaintiff , 2)the defense ceases to use the absence of e-mail records for the defined period subject to settlement to refute MSCI's claims as it did in it 10<sup>th</sup> circuit motion reply, 3) US Bancorp Piper Jaffray stipulates to this proposed order and participates fully in the monitoring requirement.

The parties further agree that further spoliation will result in sanctions at the discretion of the court including adverse inferences or presumptions (at either the case level or the issue level), preclusion of evidence, monetary sanctions, and dismissal or default.

The parties recognize that due to the nature of the complained of acts, spoliation may give rise to a separate cause of action in tort and that spoliation related to Sherman 1 and RICO allegations may result in criminal penalties for obstruction of justice through destruction of evidence.

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\* *In re Prudential Sales Practices Litigation*, 169 F.R.D. 598 (D.N.J. 1997). A plan for halting destruction of electronic records -- for example, disabling e-mail auto-delete features and suspending backup tape recycling -- is essential. Even with a plan in place, effective and continuous communication to all employees is critical. In *Prudential*, for example, the court found no willful misconduct, but determined the company's efforts to notify employees of the duty to preserve electronic information were "uncoordinated and haphazard." Finding that senior management should have implemented a comprehensive electronic document preservation plan, the court levied a \$1 million sanction

As *Prudential* illustrates, a court need not conclude that intentional data destruction occurred to impose a penalty. A finding of intent, however, can increase the severity of spoliation sanctions from monetary fines to an adverse jury instruction or even a default judgment. See *Linnen, supra* (defendant's continuing customary recycling of backup tapes during litigation was "inexcusable conduct"); *Lewy, supra* (defendant's inability to produce customer complaints supported negative inference instruction); *Carlucci, supra* (default judgment entered for defendant's intentional destruction of records pursuant to improper document retention policy).

### **III. PROPOSED EXPERT DISCOVERY STIPULATION**

#### **Expert Discovery Stipulation**

In order to avoid consuming the parties' and the Court's time and resources on potential discovery issues relating to experts, the parties have agreed to certain limitations on the scope of expert-related discovery and testimony in this matter. Neither the terms of the stipulation nor the parties' agreement to them implies that any of the information restricted from discovery in this stipulation would otherwise be discoverable.

The parties will make all disclosures required by Rule 26(a)(2)(B), as modified or limited by this Stipulation, at the times provided by this Court for the service of written expert reports.

The parties will supplement such disclosures at least three (3) business days before an expert's deposition. To the extent that the disclosures include exhibits, information or data processed or modeled by computer at the direction of a disclosed expert in the course of forming the expert's opinions, machine readable copies of the data along with the appropriate computer programs and instructions shall be produced, provided that no party need produce computer programs that are commercially available and provided further that databases and computer programs that (i) are used in the ordinary course of a party's business and (ii) are not practicable to copy need not be produced so long as reasonable access is timely offered for purposes of replication and analysis of disclosed results.

The following categories of data, information, or documents need not be disclosed by