ANDERSON & KARRENBERG
John T. Anderson (#0094), Of Counsel
50 West Broadway, Suite 700
Salt Lake City, Utah 84101-2006
Telephone: (801) 534-1700
Facsimile: (801) 364-7697

Counsel for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

BC TECHNICAL, INC., a Utah corporation, Plaintiff, v. **JONES, WALDO, HOLBROOK & McDONOUGH, PC**, a Utah professional corporation; **VINCENT C. RAMPTON**; and **DOE INDIVIDUALS I-V**, Defendants.	**COMPLAINT** (Jury Demanded) Civil No. 110917258 Judge NAUGHAN

$610

Plaintiff, BC Technical, Inc. ("BCT"), hereby complains against defendants, Jones, Waldo, Holbrook & McDonough ("Jones Waldo"), Vincent C. Rampton ("Rampton"), and Doe Individuals I-V (collectively "Doe Defendants") and, demanding trial by jury, seeks relief as follows:

NATURE OF CASE

1. This is a legal malpractice case. Through this Complaint, BCT seeks to recover the more than $10 million of damages caused by Jones Waldo's botched defense of BCT in a federal lawsuit. Jones Waldo's lawyering failures were both pervasive and egregious. They materially contributed to the court's striking BCT's pleadings, entering a default judgment on the issue of BCT's liability, and ordering it to pay several hundred thousand dollars of fees and costs. With its case gutted, BCT had no choice but to negotiate a settlement to contain its financial losses. Now that settlement has been reached, Jones Waldo must be held accountable for the massive damages it caused.

PARTIES

2. BCT is a Utah corporation that maintains its principal place of business in Salt Lake County, Utah. At all times relevant to this action, BCT operated as an independent provider of maintenance and repair services to owners of nuclear medical devices.

3. Jones Waldo is a law firm organized as a Utah professional corporation, with its principal place of business in Salt Lake County, Utah. At all times relevant to this action, Jones Waldo's lawyers engaged in the practice of law in the state of Utah and elsewhere.

4. Rampton is a resident of Salt Lake County, Utah who, since 1979, has been a licensed Utah lawyer. At all times relevant to this action, Rampton was a Jones Waldo shareholder and employee.

5. Doe Defendants are individual lawyers affiliated with Jones Waldo who may have participated in the conduct, occurrences and omissions alleged in this Complaint. BCT hereby reserves its right to name one or more such Doe Defendants as a named party defendant should discovery establish or suggest the need for such procedural action.

JURISDICTION AND VENUE

6. This court is vested with jurisdiction of this case pursuant to Utah Code Ann. § 78A-5-102(1).

7. Venue is proper in this court pursuant to Utah Code Ann. §§ 78B-3-304 and -307.

FACTS

A. Jones Waldo Touts Its Ability to Provide Exceptional Legal Expertise.

8. Jones Waldo promotes itself to the public as "one of Utah's most prestigious and pioneering law firms," as a firm committed to "finding innovative solutions" for its clients, and as a firm with the "expertise to solve complex client needs in nearly every area of business."

9. Jones Waldo touts its litigation department, of which Rampton is a member, as being experienced and skilled in a "broad spectrum of cases in state and federal courts," with "an emphasis on commercial and business-related litigation."

B. Rampton and Jones Waldo Represent BCT in Disputes and Litigation with Philips Electronics.

10. In early 2005, Jones Waldo began representing BCT in responding to, and seeking resolution of, various threatened claims ("Threatened Claims") by one of BCT's competitors, Philips Electronics North America Corporation and its affiliates (collectively "Philips").[1] The

[1] It is unclear whether the terms and conditions of this representation on the Threatened Claims in 2005 and 2006 were memorialized in a written engagement agreement.

Threatened Claims included allegations that BCT was unfairly and illegally competing against Philips by, among other things, infringing Philips' intellectual property, illegally distributing Philips' software, and improperly soliciting and hiring key Philips employees.

11. Rampton served as the Jones Waldo lawyer primarily responsible for representing BCT's interests in connection with the Threatened Claims and Philips' subsequent lawsuit against BCT ("Philips Lawsuit").[2] All of Rampton's actions and omissions in his representation of BCT were undertaken within the course and scope of his employment by Jones Waldo, rendering Jones Waldo liable for his misconduct under the doctrine of respondeat superior.

12. By early 2008, the Threatened Claims against BCT remained unresolved. Philips accordingly initiated the Philips Lawsuit in the United States District Court, Western District of Washington.[3] Several months later, the Philips Lawsuit was transferred to the United States District Court, District of Utah.

13. The principal claims that Philips asserted against BCT in the Philips Lawsuit were for the alleged misappropriation of Philips' trade secrets, unfair competition and infringement of its copyrights and trademarks (collectively "Philips Lawsuit Claims"). According to BCT's then-president, Charles Hale, Rampton assured him on May 21, 2009 that BCT "had a very strong case and the chances of a bad judgment were very low." Unfortunately, Rampton's assurance proved to be inaccurate, as he and Jones Waldo proceeded to make a series of crucial

[2] It is BCT's understanding that the other Jones Waldo lawyers who worked on the Philips Lawsuit took their instructions from Rampton who, on information and belief, retained ultimate decision-making responsibility in the case.

[3] Jones Waldo performed extensive legal services for BCT in the Philips Lawsuit during the first several months of 2008, even though the Lawsuit was filed and then-pending in Washington. Whether those services were performed pursuant to a written engagement agreement is currently unknown. What is known is that in mid-2009, when BCT's stock was sold to BCT Holdings, Inc., a written engagement agreement (dated June 25, 2009) was prepared and signed.

mistakes that deprived BCT of its ability to establish defenses to the Philips Lawsuit Claims, ultimately prompting him to recommend that BCT seek bankruptcy relief.

14. One such mistake was Jones Waldo's failure to recognize and conclude that BCT's policies of general liability insurance likely afforded coverage for some of the Philips Lawsuit Claims and/or created a duty on the part of the insurer to defend the Claims at its expense. Specifically, throughout 2008 and 2009 (when the Philips Lawsuit Claims were asserted in Philips' initial and amended complaints), BCT was the named insured under both a general liability and an umbrella excess liability policy with combined coverage of $6 million for losses arising from so-called "advertising injury." Fairly read, many of the Philips Lawsuit Claims and the facts on which they were based fell within the policies' definition of, and afforded coverage for, "advertising injury." Jones Waldo, however, concluded that no insurance coverage was in effect and therefore decided that no claim should be submitted to the insurer. This advice stripped BCT of nearly $6 million of likely coverage, and exposed it to a substantial attorney fee and cost payment obligation in the Philips Lawsuit that should have been borne by the insurer as part of its duty to defend.

15. In addition, the assertion and pendency of the Philips Lawsuit Claims imposed several important duties on Rampton and Jones Waldo in their representation of BCT. One such duty was to (a) ascertain from all BCT employees who had previously worked for, and signed expansive confidentiality agreements in favor of, Philips what confidential information, if any, they had taken from Philips for use by BCT, and (b) assure that such information was appropriately identified, segregated, secured and preserved. Another duty was to assure that BCT remained in good standing with the federal court by fully and diligently performing its

discovery response obligations. Yet another duty was to fully apprise BCT and its employees of their essential, ongoing legal obligation to identify, preserve and maintain all evidence relevant and even potentially relevant to the Philips Lawsuit. Jones Waldo, as detailed below, failed badly on all counts.

C. Rampton and Jones Waldo Mishandle the Discovery Phase of the Philips Lawsuit.

16. In early 2009 as the Philips Lawsuit moved into the critically important discovery phase, Rampton and Jones Waldo knew that BCT, as an organization, had little or no meaningful understanding of the nature and extent of its obligations to identify, disclose, preserve and secure documents relevant to the Philips Lawsuit Claims. Indeed, Rampton and Jones Waldo knew that although BCT had about 100 employees, BCT was largely overseen by its principal founders, Charles Hale ("Mr. Hale") and Beverly Hale (collectively "Hales") -- individuals who had little, if any, significant experience in or understanding of litigation requirements, in general, or document preservation obligations, in particular. Unfortunately, Rampton and Jones Waldo failed to recognize the risks posed by its client's lack of litigation experience. By doing so, they failed to competently guide BCT through the perilous minefield of potential pitfalls that characterize discovery in complex federal court lawsuits. These failures ultimately helped doom BCT's defense in the Philips Lawsuit.

17. Rampton's and Jones Waldo's approach to gathering information and conducting discovery in the Philips Lawsuit was a lethal blend of obstruction[4] and incompetence, resulting in at least five court orders (collectively "Discovery Orders") compelling BCT to perform its discovery obligations. The cumulative effect of the Discovery Orders was to irrevocably erode and ultimately eviscerate BCT's credibility with the court, and elevate the risk of an adverse outcome when Philips later asserted that BCT had destroyed evidence relevant to the Philips Lawsuit Claims.

18. The first of the Discovery Orders was entered on June 1, 2009. It granted Philips' first motion to compel, struck all of BCT's blanket objections to Philips' discovery requests, and ordered the immediate production of all relevant requested documents.

19. The second of the Discovery Orders was also entered on June 1, 2009. It granted Philips' motion for protective order, and denied BCT's cross-motion for the same relief.

20. The third of the Discovery Orders was entered on August 21, 2009 ("August 21 Discovery Order"). Entitled "Order Granting Plaintiff's Motion to Compel Defendant to Preserve Relevant Information," it directed BCT to prepare and circulate "a thorough litigation hold memo to employees," provide all "existing backup tapes to its attorneys," "suspend the practice of overwriting any information on those backup tapes," and cease "wiping" or "reimaging" the "hard drives of employees likely to have relevant information."

[4] For example, one of the central allegations in the Philips Lawsuit was that BCT had misappropriated copies of Philips' TAC database. According to BCT's former president (Mr. Hale), Rampton urged him to destroy this important evidence. Specifically, in an August 25, 2009 email to a former BCT executive, Mr. Hale wrote: "I remember that Vince [Rampton] had advices [sic] us to get rid of it [the TAC database] and we had that meeting and then had Mike Dennison purge it from the system."

21. The fourth of the Discovery Orders was entered on September 2, 2009. It granted Philips' third motion to compel, directing BCT to produce several categories of requested documents.

22. The fifth of the Discovery Orders was entered on September 28, 2009. It granted Philips' fourth motion to compel, (a) approving and adopting an arrangement for the preservation of electronically stored information ("ESI"), (b) compelling BCT to fully answer several interrogatories, and (c) imposing sanctions, through an award of attorney fees and costs, against BCT. [5]

23. The net effect of the Discovery Orders -- each of which flowed from Rampton's and Jones Waldo's inexplicable failure to assure that BCT complied with its discovery response obligations -- was devastating to BCT: It sorely tested the court's remaining patience, if any, with BCT's defense of the Philips Lawsuit Claims, generally, and strongly influenced its substantive response to Philips' ensuing motion for spoliation sanctions, specifically. Indeed, as the court later determined, "[h]ad BCT fulfilled its discovery obligations in the first place, the issue of [deletion of] personal information, relevant information, or what the employees subjectively thought likely would not [have become] an issue."[6]

[5] Rampton admitted at the September 23, 2009 court hearing that "we are where we are because I overlooked the necessity of getting these [discovery responses or objections] in," and that it was his "screwup." In an October 2, 2009 letter to BCT, he reconfirmed that this Discovery Order was attributable to "an inadvertence on my part."

[6] *Magistrate Judge Report and Recommendation, dated July 27, 2010* ("Report") at 101.

D. Rampton and Jones Waldo Fail to Assure That BCT and Its Employees Preserve Evidence Relevant to the Philips Lawsuit Claims.

24. During the Philips Lawsuit, neither Rampton nor any other Jones Waldo lawyer adequately advised BCT and its employees of their critically important, ongoing obligation to preserve and maintain documents, including ESI, relevant or potentially relevant to the parties' claims and defenses. Specifically, there is no indication that Rampton or Jones Waldo ever timely or adequately apprised BCT and its employees of: (a) the nature and extent of the Philips Lawsuit Claims; (b) the substance and extent of their obligation to identify and preserve all documents and ESI relevant and potentially relevant to the Philips Lawsuit Claims; and (c) the importance of BCT's need to comply with its discovery response obligations.[7]

25. It appears that it was not until June 23, 2009, for example, that Rampton or Jones Waldo even potentially counseled BCT about its obligation to preserve evidence. On that date -- just after being deposed in the Philips Lawsuit and acknowledging that BCT (under Jones Waldo's counsel) had done little to identify and preserve relevant documents -- BCT's chief operating officer sent an email to BCT's employees "remind[ing]" them to "save any electronic records that could possibly be associated in any way to the Philips litigation." The court in the Philips Lawsuit, however, later characterized this email as "cursory" and "ineffective."[8]

[7] Nor is there any indication that Rampton or Jones Waldo made any effort to ascertain from several BCT employees who had formerly worked for Philips whether and to what extent they had taken any Philips confidential information, in general, and had made or were making it available for use by BCT, in particular.

[8] As the court concluded: "Significantly, this email did not tell BCT employees what the Philips Lawsuit was about, nor did it identify what types or categories of documents should be preserved." *Report* at 93.

26. During the next few weeks, Rampton and Jones Waldo remained oblivious to the need to preserve relevant documents. By July 15, 2009, the Philips Lawsuit had been pending for over 18 months. At that point, Philips moved to compel BCT to preserve relevant information. In its motion, Philips expressed concerns that BCT had (a) failed to issue a litigation hold memo to its employees to preserve information, (b) failed to modify or suspend document destruction practices in light of the litigation, (c) failed to image the hard drives of its key custodians, (d) continued its practice of routinely overwriting back-up tapes, and (e) destroyed or was destroying key evidence. The court agreed, orally granting Philips' motion during a hearing on August 18, 2009, at which Rampton assured the court that he understood the order's requirements, and that BCT would "follow it." The court's oral ruling was embodied in the August 21, 2009 Discovery Order described in paragraph 20 above.

27. On August 25, 2009 -- nearly twenty months after the Philips Lawsuit was filed, more than five weeks after Philips complained to the court about deficiencies in BCT's document preservation practices, and only in response to the court's directive at the August 18 hearing -- Jones Waldo finally helped assure that a litigation hold memo ("August 2009 Litigation Hold Memo") was circulated by BCT to its employees.

28. However, the court concluded that the August 2009 Litigation Hold Memo was ultimately much too little, far too late. The court sharply criticized its timing, substance and effect, declaring:

> Simply sending the short June 23 memo and the Litigation Hold Memo by email [on August 25, 2009] was not enough of an active and earnest effort on BCT's part to effectively communicate with BCT's employees and to preserve evidence. Also, other commonsense actions were not taken to preserve evidence, such as interviewing key employees or even asking them to produce discoverable information. BCT appears to have been