UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAURA ZUBULAKE,	:	
Plaintiff,	:	**OPINION AND ORDER**
-against-	:	**02 Civ. 1243 (SAS)**
UBS WARBURG LLC, UBS WARBURG, and UBS AG,	:	
Defendants.	:	

SHIRA A. SCHEINDLIN, U.S.D.J.:

The world was a far different place in 1849, when Henry David Thoreau opined (in an admittedly broader context) that "[t]he process of discovery is very simple."[1] That hopeful maxim has given way to rapid technological advances, requiring new solutions to old problems. The issue presented here is one such problem, recast in light of current technology: To what extent is inaccessible electronic data discoverable, and who should pay for its production?

I. INTRODUCTION

The Supreme Court recently reiterated that our "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and

[1] Henry David Thoreau, A Week on the Concord and Merrimack Rivers (1849).

issues and to dispose of unmeritorious claims."[2] Thus, it is now beyond dispute that "[b]road discovery is a cornerstone of the litigation process contemplated by the Federal Rules of Civil Procedure."[3] The Rules contemplate a minimal burden to bringing a claim; that claim is then fleshed out through vigorous and expansive discovery.[4]

In one context, however, the reliance on broad discovery has hit a roadblock. As individuals and corporations increasingly do business electronically[5] -- using computers to create and store documents, make deals, and exchange e-mails -- the universe of discoverable material has expanded exponentially.[6] The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, "discovery is not just about uncovering the

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[2] Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512 (2002).

[3] Jones v. Goord, No. 95 Civ. 8026, 2002 WL 1007614, at *1 (S.D.N.Y. May 16, 2002).

[4] See Hickman v. Taylor, 329 U.S. 495, 500-01 (1947).

[5] See Wendy R. Liebowitz, Digital Discovery Starts to Work, Nat'l L.J., Nov. 4, 2002, at 4 (reporting that in 1999, ninety-three percent of all information generated was in digital form).

[6] Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (explaining that electronic data is so voluminous because, unlike paper documents, "the costs of storage are virtually nil. Information is retained not because it is expected to be used, but because there is no compelling reason to discard it"), aff'd, 2002 WL 975713 (S.D.N.Y. May 9, 2002).

truth, but also about how much of the truth the parties can afford to disinter."[7]

This case provides a textbook example of the difficulty of balancing the competing needs of broad discovery and manageable costs. Laura Zubulake is suing UBS Warburg LLC, UBS Warburg, and UBS AG (collectively, "UBS" or the "Firm") under Federal, State and City law for gender discrimination and illegal retaliation. Zubulake's case is certainly not frivolous[8] and if she prevails, her damages may be substantial.[9] She contends that key evidence is located in various e-mails exchanged among UBS employees that now exist only on backup tapes and perhaps other archived media. According to UBS, restoring those e-mails would cost approximately $175,000.00, exclusive of attorney time in

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[7] Rowe, 205 F.R.D. at 423.

[8] Indeed, Zubulake has already produced a sort of "smoking gun": an e-mail suggesting that she be fired "ASAP" after her EEOC charge was filed, in part so that she would not be eligible for year-end bonuses. See 8/21/01 e-mail from Mike Davies to Rose Tong ("8/21/01 e-Mail"), Ex. G to the 3/17/03 Affirmation of James A. Batson, counsel for Zubulake ("Batson Aff.").

[9] At the time she was terminated, Zubulake's annual salary was approximately $500,000. Were she to receive full back pay and front pay, Zubulake estimates that she may be entitled to as much as $13,000,000 in damages, not including any punitive damages or attorney's fees. See Memorandum of Law in Support of Plaintiff's Motion for an Order Compelling Defendants to Produce E-mails, Permitting Disclosure of Deposition Transcript and Directing Defendants to Bear Certain Expenses ("Pl. Mem.") at 2-3.

reviewing the e-mails.[10] Zubulake now moves for an order compelling UBS to produce those e-mails at its expense.[11]

II. BACKGROUND

A. Zubulake's Lawsuit

UBS hired Zubulake on August 23, 1999, as a director and senior salesperson on its U.S. Asian Equities Sales Desk (the "Desk"), where she reported to Dominic Vail, the Desk's manager. At the time she was hired, Zubulake was told that she would be considered for Vail's position if and when it became vacant.

In December 2000, Vail indeed left his position to move to the Firm's London office. But Zubulake was not considered for his position, and the Firm instead hired Matthew Chapin as director of the Desk. Zubulake alleges that from the outset Chapin treated her differently than the other members of the Desk, all of whom were male. In particular, Chapin "undermined Ms. Zubulake's ability to perform her job by, inter alia: (a) ridiculing and belittling her in front of co-workers; (b) excluding her from work-related outings with male co-workers and clients; (c) making sexist remarks in her presence; and (d)

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[10] See 3/26/03 Oral Argument Transcript ("3/26/03 Tr.") at 14, 44-45.

[11] Zubulake also moves for an order (1) directing UBS to pay for the cost of deposing Christopher Behny, UBS's information technology expert and (2) permitting her to disclose the transcript of Behny's deposition to certain securities regulators. Those motions are denied in a separate Opinion and Order issued today.

isolating her from the other senior salespersons on the Desk by seating her apart from them."[12] No such actions were taken against any of Zubulake's male co-workers.

Zubulake ultimately responded by filing a Charge of (gender) Discrimination with the EEOC on August 16, 2001. On October 9, 2001, Zubulake was fired with two weeks' notice. On February 15, 2002, Zubulake filed the instant action, suing for sex discrimination and retaliation under Title VII, the New York State Human Rights Law, and the Administrative Code of the City of New York. UBS timely answered on March 12, 2002, denying the allegations. UBS's argument is, in essence, that Chapin's conduct was not unlawfully discriminatory because he treated everyone equally badly. On the one hand, UBS points to evidence that Chapin's anti-social behavior was not limited to women: a former employee made allegations of national origin discrimination against Chapin, and a number of male employees on the Desk also complained about him. On the other hand, Chapin was responsible for hiring three new females employees to the Desk.[13]

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[12] Pl. Mem. at 2.

[13] See Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for an Order Compelling Defendants to Produce E-Mails, Permitting Disclosure of Deposition Transcript and Directing Defendants to Bear Certain Expenses ("Def. Mem.") at 2.

B. The Discovery Dispute

Discovery in this action commenced on or about June 3, 2002, when Zubulake served UBS with her first document request. At issue here is request number twenty-eight, for "[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff."[14] The term document in Zubulake's request "includ[es], without limitation, electronic or computerized data compilations." On July 8, 2002, UBS responded by producing approximately 350 pages of documents, including approximately 100 pages of e-mails. UBS also objected to a substantial portion of Zubulake's requests.[15]

On September 12, 2002 -- after an exchange of angry letters[16] and a conference before United States Magistrate Judge Gabriel W. Gorenstein -- the parties reached an agreement (the "9/12/02 Agreement"). With respect to document request twenty-eight, the parties reached the following agreement, in relevant part:

> Defendants will [] ask UBS about how to retrieve e-mails that are saved in the firm's computer system and will produce responsive e-mails if retrieval is

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[14] Plaintiff's First Request for Production of Documents ¶ 28, Ex. E to the Declaration of Kevin B. Leblang, counsel to UBS ("Leblang Dec.").

[15] See Defendants' Response to Plaintiff's First Request for Production of Documents, Ex. F to the Leblang Dec.

[16] See Exs. G and H to the Leblang Dec.

possible and Plaintiff names a few individuals.[17] Pursuant to the 9/12/02 Agreement, UBS agreed unconditionally to produce responsive e-mails from the accounts of five individuals named by Zubulake: Matthew Chapin, Rose Tong (a human relations representation who was assigned to handle issues concerning Zubulake), Vinay Datta (a co-worker on the Desk), Andrew Clarke (another co-worker on the Desk), and Jeremy Hardisty (Chapin's supervisor and the individual to whom Zubulake originally complained about Chapin). UBS was to produce such e-mails sent between August 1999 (when Zubulake was hired) and December 2001 (one month after her termination), to the extent possible.

UBS, however, produced no additional e-mails and insisted that its initial production (the 100 pages of e-mails) was complete. As UBS's opposition to the instant motion makes clear -- although it remains unsaid -- UBS never searched for responsive e-mails on any of its backup tapes. To the contrary, UBS informed Zubulake that the cost of producing e-mails on backup tapes would be prohibitive (estimated at the time at approximately $300,000.00).[18]

Zubulake, believing that the 9/12/02 Agreement included

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[17] 9/18/02 Letter from James A. Batson to Kevin B. Leblang, Ex. I to the Leblang Dec. (emphasis added). See also 9/25/02 Letter from Kevin B. Leblang to James A. Batson, Ex. K to the Leblang Dec. (confirming the above as the parties' agreement).

[18] See 3/26/03 Tr. at 14 (Statement of Kevin B. Leblang).

production of e-mails from backup tapes, objected to UBS's non-production. In fact, Zubulake knew that there were additional responsive e-mails that UBS had failed to produce because she herself had produced approximately 450 pages of e-mail correspondence. Clearly, numerous responsive e-mails had been created and deleted[19] at UBS, and Zubulake wanted them.

On December 2, 2002, the parties again appeared before Judge Gorenstein, who ordered UBS to produce for deposition a person with knowledge of UBS's e-mail retention policies in an effort to determine whether the backup tapes contained the deleted e-mails and the burden of producing them. In response, UBS produced Christopher Behny, Manager of Global Messaging, who was deposed on January 14, 2003. Mr. Behny testified to UBS's e-mail backup protocol, and also to the cost of restoring the relevant data.

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[19] The term "deleted" is sticky in the context of electronic data. "'Deleting' a file does not actually erase that data from the computer's storage devices. Rather, it simply finds the data's entry in the disk directory and changes it to a 'not used' status -- thus permitting the computer to write over the 'deleted' data. Until the computer writes over the 'deleted' data, however, it may be recovered by searching the disk itself rather than the disk's directory. Accordingly, many files are recoverable long after they have been deleted -- even if neither the computer user nor the computer itself is aware of their existence. Such data is referred to as 'residual data.'" Shira A. Scheindlin & Jeffrey Rabkin, Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?, 41 B.C. L. Rev. 327, 337 (2000) (footnotes omitted). Deleted data may also exist because it was backed up before it was deleted. Thus, it may reside on backup tapes or similar media. Unless otherwise noted, I will use the term "deleted" data to mean residual data, and will refer to backed-up data as "backup tapes."

C. UBS's E-Mail Backup System

In the first instance, the parties agree that e-mail was an important means of communication at UBS during the relevant time period. Each salesperson, including the salespeople on the Desk, received approximately 200 e-mails each day.[20] Given this volume, and because Securities and Exchange Commission regulations require it,[21] UBS implemented extensive e-mail backup and preservation protocols. In particular, e-mails were backed up in two distinct ways: on backup tapes and on optical disks.

1. Backup Tape Storage

UBS employees used a program called HP OpenMail, manufactured by Hewlett-Packard,[22] for all work-related e-mail

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[20] See 3/26/03 Tr. at 14 (Statement of Kevin B. Leblang).

[21] SEC Rule 17a-4, promulgated pursuant to Section 17(a) of the Securities Exchange Act of 1934, provides in pertinent part:

> Every [] broker and dealer shall preserve for a period of not less than 3 years, the first two years in an accessible place . . . [o]riginals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such.

17 C.F.R. § 240.17a-4(b) and (4).

[22] Hewlett-Packard has since discontinued sales of HP OpenMail, although the company still supports the product and permits existing customers to purchase new licenses. See http://www.openmail.com/.

communications.[23] With limited exceptions, all e-mails sent or received by any UBS employee are stored onto backup tapes. To do so, UBS employs a program called Veritas NetBackup,[24] which creates a "snapshot" of all e-mails that exist on a given server at the time the backup is taken. Except for scheduling the backups and physically inserting the tapes into the machines, the backup process is entirely automated.

UBS used the same backup protocol during the entire relevant time period, from 1999 through 2001. Using NetBackup, UBS backed up its e-mails at three intervals: (1) daily, at the end of each day, (2) weekly, on Friday nights, and (3) monthly, on the last business day of the month. Nightly backup tapes were kept for twenty working days, weekly tapes for one year, and monthly tapes for three years. After the relevant time period elapsed, the tapes were recycled.[25]

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[23] See 1/14/03 Deposition of Christopher Behny ("Behny Dep."), Ex. M to the Leblang Dec. Unless otherwise noted, all information about UBS's e-mail systems is culled from the Behny Dep. Because that document has been sealed, repeated pin cites are unnecessary and thus omitted.

[24] See generally VERITAS NetBackup Release 4.5 Technical Overview, available at http://www.veritas.com.

[25] Of course, periodic backups such as UBS's necessarily entails the loss of certain e-mails. Because backups were conducted only intermittently, some e-mails that were deleted from the server were never backed up. For example, if a user both received and deleted an e-mail on the same day, it would not reside on any backup tape. Similarly, an e-mail received and deleted within the span of one month would not exist on the monthly backup, although it might exist on a weekly or daily backup, if those tapes still exist. As explained below, if an e-

Once e-mails have been stored onto backup tapes, the restoration process is lengthy. Each backup tape routinely takes approximately five days to restore, although resort to an outside vendor would speed up the process (at greatly enhanced costs, of course). Because each tape represents a snapshot of one server's hard drive in a given month, each server/month must be restored separately onto a hard drive. Then, a program called Double Mail is used to extract a particular individual's e-mail file. That mail file is then exported into a Microsoft Outlook data file, which in turn can be opened in Microsoft Outlook, a common e-mail application. A user could then browse through the mail file and sort the mail by recipient, date or subject, or search for key words in the body of the e-mail.

Fortunately, NetBackup also created indexes of each backup tape. Thus, Behny was able to search through the tapes from the relevant time period and determine that the e-mail files responsive to Zubulake's requests are contained on a total of ninety-four backup tapes.

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mail was to or from a "registered trader," however, it may have been stored on UBS's optical storage devices.

2. Optical Disk Storage

In addition to the e-mail backup tapes, UBS also stored certain e-mails on optical disks. For certain "registered traders," probably including the members of the Desk,[26] a copy of all e-mails sent to or received from outside sources (i.e., e-mails from a "registered trader" at UBS to someone at another entity, or vice versa) was simultaneously written onto a series of optical disks. Internal e-mails, however, were not stored on this system.

UBS has retained each optical disk used since the system was put into place in mid-1998. Moreover, the optical disks are neither erasable nor rewritable. Thus, UBS has every e-mail sent or received by registered traders (except internal e-mails) during the period of Zubulake's employment, even if the e-

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[26] In using the phrase "registered trader," Behny referred to individuals designated to have their e-mails archived onto optical disks. Although Behny could not be certain that such a designation corresponds to Series 7 or Series 63 broker-dealers, he indicated that examples of registered traders include "equity research people, [and] equity traders type people." See Behny Dep. at 35. He admitted that members of the Desk were probably "registered" in that sense:

> Q: Do you know whether the Asian Equities Sales desk was registered to keep a secondary copy in 1999?
> A: I can't say conclusively.
> Q: Do you have an opinion?
> A: My opinion is yes.

Id. at 36. See also id. (admitting that the same was probably true in 2000 and 2001).

mail was deleted instantaneously on that trader's system.

The optical disks are easily searchable using a program called Tumbleweed.[27] Using Tumbleweed, a user can simply log into the system with the proper credentials and create a plain language search. Search criteria can include not just "header" information, such as the date or the name of the sender or recipient, but can also include terms within the text of the e-mail itself. For example, UBS personnel could easily run a search for e-mails containing the words "Laura" or "Zubulake" that were sent or received by Chapin, Datta, Clarke, or Hardisty.[28]

III. LEGAL STANDARD

Federal Rules of Civil Procedure 26 through 37 govern discovery in all civil actions. As the Supreme Court long ago explained,

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the

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[27] See generally http://www.tumbleweed.com/en/products/solutions/archive.html.

[28] Rose Tong, the fifth person designated by Zubulake's document request, would probably not have been a "registered trader" as she was a human resources employee.

> pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.[29]

Consistent with this approach, Rule 26(b)(1) specifies that,

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).[30]

In turn, Rule 26(b)(2) imposes general limitations on the scope of discovery in the form of a "proportionality test":

> The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

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[29] Hickman, 329 U.S. at 500-01 (emphasis added).

[30] Fed. R. Civ. P. 26(b)(1) (emphasis added).

> (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.[31]

Finally, "[u]nder [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests, but [it] may invoke the district court's discretion under Rule 26(c) to grant orders protecting [it] from 'undue burden or expense' in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery."[32]

The application of these various discovery rules is particularly complicated where electronic data is sought because otherwise discoverable evidence is often only available from expensive-to-restore backup media. That being so, courts have devised creative solutions for balancing the broad scope of discovery prescribed in Rule 26(b)(1) with the cost-consciousness of Rule 26(b)(2). By and large, the solution has been to consider cost-shifting: forcing the requesting party, rather than the answering party, to bear the cost of discovery.

By far, the most influential response to the problem of

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[31] Fed. R. Civ. P. 26(b)(2).

[32] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

cost-shifting relating to the discovery of electronic data was given by United States Magistrate Judge James C. Francis IV of this district in Rowe Entertainment. Judge Francis utilized an eight-factor test to determine whether discovery costs should be shifted. Those eight factors are:

> (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefits to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.[33]

Both Zubulake and UBS agree that the eight-factor Rowe test should be used to determine whether cost-shifting is appropriate.[34]

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[33] 205 F.R.D. at 429.

[34] Zubulake mistakenly identifies the Rowe test as a "marginal utility" test. In fact, "marginal utility" -- a common term among economists, see Istvan Mészáros, Beyond Capital § 3.2 (1995) (describing the intellectual history of marginal utility) -- refers only to the second Rowe factor, the likelihood of discovering critical information. See Rowe, 205 F.R.D. at 430 (quoting McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001)).

IV. DISCUSSION

A. Should Discovery of UBS's Electronic Data Be Permitted?

Under Rule 34, a party may request discovery of any document, "including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations. . . ."[35] The "inclusive description" of the term document "accord[s] with changing technology."[36] "It makes clear that Rule 34 applies to electronics [sic] data compilations." Thus, "[e]lectronic documents are no less subject to disclosure than paper records."[37] This is true not only of electronic documents that are currently in use, but also of documents that may have been deleted and now reside only on backup disks.[38]

That being so, Zubulake is entitled to discovery of the requested e-mails so long as they are relevant to her claims,[39] which they clearly are. As noted, e-mail constituted a substantial means of communication among UBS employees. To that

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[35] Fed. R. Civ. P. 34(a).

[36] Advisory Committee Note to Fed. R. Civ. P. 34.

[37] Rowe, 205 F.R.D. at 428 (collecting cases).

[38] See Antioch Co. v. Scapbook Borders, Inc., 210 F.R.D. 645, 652 (D. Minn. 2002) ("[I]t is a well accepted proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable."); Simon Property Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 640 (S.D. Ind. 2000) ("First, computer records, including records that have been 'deleted,' are documents discoverable under Fed. R. Civ. P. 34.").

[39] See Fed. R. Civ. P. 26(b)(1).

end, UBS has already produced approximately 100 pages of e-mails, the contents of which are unquestionably relevant.[40]

Nonetheless, UBS argues that Zubulake is not entitled to any further discovery because it already produced all responsive documents, to wit, the 100 pages of e-mails. This argument is unpersuasive for two reasons. First, because of the way that UBS backs up its e-mail files, it clearly could not have searched all of its e-mails without restoring the ninety-four backup tapes (which UBS admits that it has not done). UBS therefore cannot represent that it has produced all responsive e-mails. Second, Zubulake herself has produced over 450 pages of relevant e-mails, including e-mails that would have been responsive to her discovery requests but were never produced by UBS. These two facts strongly suggest that there are e-mails that Zubulake has not received that reside on UBS's backup media.[41]

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[40] See, e.g., 8/21/01 e-Mail.

[41] UBS insists that "[f]rom the time Plaintiff commenced her EEOC action in August 2001 . . . UBS collected and produced all existing responsive e-mails sent or received between 1999 and 2001 from these and other employees' computers." Def. Mem. at 6. Even if this statement is completely accurate, a simple search of employees' computer files would not have turned up e-mails deleted prior to August 2001. Such deleted documents exist only on the backup tapes and optical disks, and their absence is precisely why UBS's production is not complete.

B. Should Cost-Shifting Be Considered?

Because it apparently recognizes that Zubulake is entitled to the requested discovery, UBS expends most of its efforts urging the court to shift the cost of production to "protect [it] . . . from undue burden or expense."[42] Faced with similar applications, courts generally engage in some sort of cost-shifting analysis, whether the refined eight-factor Rowe test or a cruder application of Rule 34's proportionality test, or something in between.[43]

The first question, however, is whether cost-shifting must be considered in every case involving the discovery of electronic data, which -- in today's world -- includes virtually all cases. In light of the accepted principle, stated above, that electronic evidence is no less discoverable than paper evidence, the answer is, "No." The Supreme Court has instructed that "the presumption is that the responding party must bear the expense of complying with discovery requests. . . ."[44] Any principled approach to electronic evidence must respect this presumption.

Courts must remember that cost-shifting may effectively

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[42] Def. Mem. at 9 (quoting Fed. R. Civ. P. 26(c)).

[43] See, e.g., Byers v. Illinois State Police, No. 99 C. 8105, 2002 WL 1264004 (N.D. Ill. June 3, 2002); In re Bristol-Myers Squibb Sec. Litig., 205 F.R.D. 437, 443 (D.N.J. 2002); Rowe, 205 F.R.D. 421; McPeek, 202 F.R.D. 31.

[44] Oppenheimer Fund, 437 U.S. at 358.

end discovery, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases. This will both undermine the "strong public policy favor[ing] resolving disputes on their merits,"[45] and may ultimately deter the filing of potentially meritorious claims.

Thus, cost-shifting should be considered only when electronic discovery imposes an "undue burden or expense" on the responding party.[46] The burden or expense of discovery is, in turn, "undue" when it "outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[47]

Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is

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[45] Pecarsky v. Galaxiworld.com, Inc., 249 F.3d 167, 172 (2d Cir. 2001).

[46] Fed. R. Civ. P. 26(c).

[47] Fed. R. Civ. P. 26(b)(2)(iii). As noted, a court is also permitted to impose conditions on discovery when it might be duplicative, see Fed. R. Civ. P. 26(b)(2)(i), or when a reasonable discovery deadline has lapsed, see id. 26(b)(2)(ii). Neither of these concerns, however, is likely to arise solely because the discovery sought is of electronic data.

involved.[48] This makes no sense. Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying.[49]

In fact, whether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an accessible or inaccessible format (a distinction that corresponds closely to the expense of production). In the world of paper documents, for example, a document is accessible if it is readily available in a usable format and reasonably indexed. Examples of inaccessible paper documents could include (a) documents in storage in a difficult to reach place; (b) documents converted to microfiche and not easily readable; or (c) documents kept haphazardly, with no indexing system, in quantities that make page-by-page searches impracticable. But in the world of electronic data, thanks to search engines, any data that is

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[48] See, e.g., Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ.A. 99-3564, 2002 WL 246439, at *3 (E.D. La. Feb. 19, 2002) (suggesting that application of Rowe is appropriate whenever "a party, as does Flour [sic], contends that the burden or expense of the discovery outweighs the benefit of the discovery").

[49] See generally Scheindlin & Rabkin, Electronic Discovery, 41 B.C. L. Rev. at 335-341 (describing types of discoverable electronic data and their differences from paper evidence).

retained in a machine readable format is typically accessible.[50]

Whether electronic data is accessible or inaccessible turns largely on the media on which it is stored. Five categories of data, listed in order from most accessible to least accessible, are described in the literature on electronic data storage:

1. Active, online data: "On-line storage is generally provided by magnetic disk. It is used in the very active stages of an electronic records [sic] life -- when it is being created or received and processed, as well as when the access frequency is high and the required speed of access is very fast, i.e., milliseconds."[51] Examples of online data include hard drives.

2. Near-line data: "This typically consists of a robotic storage device (robotic library) that houses removable media, uses robotic arms to access the media, and uses multiple read/write devices to store and retrieve records. Access speeds can range from as low as milliseconds if the media is already in a read device, up to 10-30 seconds for optical disk technology, and between 20-120 seconds for sequentially searched media, such as magnetic tape."[52] Examples include optical disks.

3. Offline storage/archives: "This is removable optical disk or magnetic tape media, which can be

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[50] See Scheindlin & Rabkin, Electronic Discovery, 41 B.C. L. Rev. at 364 ("By comparison [to the time it would take to search through 100,000 pages of paper], the average office computer could search all of the documents for specific words or combination[s] of words in minute, perhaps less."); see also Public Citizen v. Carlin, 184 F.3d 900, 908-10 (D.C. Cir. 1999).

[51] Cohasset Associates, Inc., White Paper: Trustworthy Storage and Management of Electronic Records: The Role of Optical Storage Technology 10 (April 2003) ("White Paper").

[52] Id. at 11.

labeled and stored in a shelf or rack. Off-line storage of electronic records is traditionally used for making disaster copies of records and also for records considered 'archival' in that their likelihood of retrieval is minimal. Accessibility to off-line media involves manual intervention and is much slower than on-line or near-line storage. Access speed may be minutes, hours, or even days, depending on the access-effectiveness of the storage facility."[53] The principled difference between nearline data and offline data is that offline data lacks "the coordinated control of an intelligent disk subsystem," and is, in the lingo, JBOD ("Just a Bunch Of Disks").[54]

4. Backup tapes: "A device, like a tape recorder, that reads data from and writes it onto a tape. Tape drives have data capacities of anywhere from a few hundred kilobytes to several gigabytes. Their transfer speeds also vary considerably. . . The disadvantage of tape drives is that they are sequential-access devices, which means that to read any particular block of data, you need to read all the preceding blocks."[55] As a result, "[t]he data on a backup tape are not organized for retrieval of individual documents or files [because] . . . the organization of the data mirrors the computer's structure, not the human records management structure."[56] Backup tapes also typically employ some sort of data compression, permitting more data to be stored on each tape, but also making restoration more time-consuming and expensive, especially given the lack

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[53] Id.

[54] CNT, The Future of Tape 2, available at http://www.cnt.com/literature/documents/pl556.pdf.

[55] Webopedia, at http://inews.webopedia.com/TERM/t/tape_drive.html.

[56] Kenneth J. Withers, Computer-Based Discovery in Federal Civil Litigation (unpublished manuscript) at 15.

of uniform standard governing data compression.[57]

5. Erased, fragmented or damaged data: "When a file is first created and saved, it is laid down on the [storage media] in contiguous clusters. . . As files are erased, their clusters are made available again as free space. Eventually, some newly created files become larger than the remaining contiguous free space. These files are then broken up and randomly placed throughout the disk."[58] Such broken-up files are said to be "fragmented," and along with damaged and erased data can only be accessed after significant processing.[59]

Of these, the first three categories are typically identified as accessible, and the latter two as inaccessible.[60] The difference between the two classes is easy to appreciate. Information deemed "accessible" is stored in a readily usable format.

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[57] See generally SDLT, Inc., Making a Business Case for Tape, at http://quantum.treehousei.com/Surveys/publishing/survey_148/pdfs/making_a_business_case_for_tape.pdf (June 2002); Jerry Stern, The Perils of Backing Up, at http://www.grsoftware.net/backup/articles/jerry_perils.html (last visited May 5, 2003).

[58] Sunbelt Software, Inc., White Paper: Disk Defragmentation for Windows NT/2000: Hidden Gold for the Enterprise 2, at http://www.sunbelt-software.com/evaluation/455/web/documents/idc-white-paper-english.pdf (last visited May 5, 2003).

[59] See Executive Software, Inc., Identifying Common Reliability/Stability Problems Caused by File Fragmentation, at http://www.execsoft.com/Reliability_Stability_Whitepaper.pdf (last visited May 1, 2003) (identifying problems associated with file fragmentation, including file corruption, data loss, crashes, and hard drive failures); Stan Miastkowski, When Good Data Goes Bad, PC World, Jan. 2000, available at http://www.pcworld.com/resource/printable/article/0,aid,13859,00.asp.

[60] See generally White Paper 10-13.

Although the time it takes to actually access the data ranges from milliseconds to days, the data does not need to be restored or otherwise manipulated to be usable. "Inaccessible" data, on the other hand, is not readily usable. Backup tapes must be restored using a process similar to that previously described, fragmented data must be de-fragmented, and erased data must be reconstructed, all before the data is usable. That makes such data inaccessible.[61]

The case at bar is a perfect illustration of the range of accessibility of electronic data. As explained above, UBS maintains e-mail files in three forms: (1) active user e-mail files; (2) archived e-mails on optical disks; and (3) backup data stored on tapes. The active (HP OpenMail) data is obviously the most accessible: it is online data that resides on an active server, and can be accessed immediately. The optical disk (Tumbleweed) data is only slightly less accessible, and falls into either the second or third category. The e-mails are on optical disks that need to be located and read with the correct

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[61] A report prepared by the Sedona Conference recently propounded "Best Practices" for electronic discovery. See The Sedona Conference, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (March 2003), ("Sedona Principles"), available at http://www.thesedonaconference.org/publications_html. Although I do not endorse or indeed agree with all of the Sedona Principles, they do recognize the difference between "active data" and data stored on backup tapes or "deleted, shadowed, fragmented or residual data," see id. (Principles 8 and 9), a distinction very similar to the accessible/inaccessible test employed here.

hardware, but the system is configured to make searching the optical disks simple and automated once they are located. For these sources of e-mails -- active mail files and e-mails stored on optical disks -- it would be wholly inappropriate to even consider cost-shifting. UBS maintains the data in an accessible and usable format, and can respond to Zubulake's request cheaply and quickly. Like most typical discovery requests, therefore, the producing party should bear the cost of production.

E-mails stored on backup tapes (via NetBackup), however, are an entirely different matter. Although UBS has already identified the ninety-four potentially responsive backup tapes, those tapes are not currently accessible. In order to search the tapes for responsive e-mails, UBS would have to engage in the costly and time-consuming process detailed above. It is therefore appropriate to consider cost shifting.

C. What Is the Proper Cost-Shifting Analysis?

In the year since Rowe was decided, its eight factor test has unquestionably become the gold standard for courts resolving electronic discovery disputes.[62] But there is little

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[62] See In re Livent, Inc. Noteholders Sec. Litig., No. 98 Civ. 7161, 2003 WL 23254, at *3 (S.D.N.Y. Jan. 2, 2003) ("the attorneys should read Magistrate Judge Francis's opinion in [Rowe]. Then Deloitte and plaintiffs should confer, in person or by telephone, and discuss the eight factors listed in that opinion."); Bristol-Myers Squibb, 205 F.R.D. at 443 ("For a more comprehensive analysis of cost allocation and cost shifting regarding production of electronic information in a different factual context, counsel are directed to the recent opinion in

doubt that the Rowe factors will generally favor cost-shifting. Indeed, of the handful of reported opinions that apply Rowe or some modification thereof, all of them have ordered the cost of discovery to be shifted to the requesting party.[63]

In order to maintain the presumption that the responding party pays, the cost-shifting analysis must be neutral; close calls should be resolved in favor of the presumption. The Rowe factors, as applied, undercut that presumption for three reasons. First, the Rowe test is incomplete. Second, courts have given equal weight to all of the factors, when certain factors should predominate. Third, courts applying the Rowe test have not always developed a full factual record.

1. The Rowe Test Is Incomplete

a. A Modification of Rowe: Additional Factors

Certain factors specifically identified in the Rules are omitted from Rowe's eight factors. In particular, Rule 26 requires consideration of "the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in

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[Rowe].").

[63] See Murphy Oil, 2002 WL 246439; Bristol-Myers Squibb, 205 F.R.D. 437; Byers, 2002 WL 1264004.

resolving the issues."[64] Yet Rowe makes no mention of either the amount in controversy or the importance of the issues at stake in the litigation. These factors should be added. Doing so would balance the Rowe factor that typically weighs most heavily in favor of cost-shifting, "the total cost associated with production." The cost of production is almost always an objectively large number in cases where litigating cost-shifting is worthwhile. But the cost of production when compared to "the amount in controversy" may tell a different story. A response to a discovery request costing $100,000 sounds (and is) costly, but in a case potentially worth millions of dollars, the cost of responding may not be unduly burdensome.[65]

Rowe also contemplates "the resources available to each party." But here too -- although this consideration may be implicit in the Rowe test -- the absolute wealth of the parties is not the relevant factor. More important than comparing the relative ability of a party to pay for discovery, the focus should be on the total cost of production as compared to the resources available to each party. Thus, discovery that would be too expensive for one defendant to bear would be a drop in the

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[64] Fed. R. Civ. P. 26(b)(2)(iii).

[65] A word of caution, however: in evaluating this factor courts must look beyond the (often inflated) value stated in the ad damnum clause of the complaint.

bucket for another.[66]

Last, "the importance of the issues at stake in the litigation" is a critical consideration, even if it is one that will rarely be invoked. For example, if a case has the potential for broad public impact, then public policy weighs heavily in favor of permitting extensive discovery. Cases of this ilk might include toxic tort class actions, environmental actions, so-called "impact" or social reform litigation, cases involving criminal conduct, or cases implicating important legal or constitutional questions.

b. A Modification of Rowe: Eliminating Two Factors

Two of the Rowe factors should be eliminated:

First, the Rowe test includes "the specificity of the discovery request." Specificity is surely the touchstone of any good discovery request,[67] requiring a party to frame a request broadly enough to obtain relevant evidence, yet narrowly enough to control costs. But relevance and cost are already two of the Rowe factors (the second and sixth). Because the first and

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[66] UBS, for example, reported net profits after tax of 942 million Swiss Francs (approximately $716 million) for the third quarter of 2002 alone. See 11/12/02 UBS Press Release, available at http://www.ubswarburg.com/e/port_genint/index_genint.html.

[67] See Sedona Principles (Principle 4: "Discovery requests should make as clear as possible what electronic documents and data are being asked for, while responses and objections to discovery should disclose the scope and limits of what is being produced.").

second factors are duplicative, they can be combined. Thus, the first factor should be: the extent to which the request is specifically tailored to discover relevant information.

Second, the fourth factor, "the purposes for which the responding party maintains the requested data" is typically unimportant. Whether the data is kept for a business purpose or for disaster recovery does not affect its accessibility, which is the practical basis for calculating the cost of production.[68]

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[68] Indeed, although Judge Francis weighed the purpose for which data is retained, his analysis also focused on accessibility:

> If a party maintains electronic data for the purpose of utilizing it in connection with current activities, it may be expected to respond to discovery requests at its own expense. . . . Conversely, however, a party that happens to retain vestigal data for no current business purpose, but only in case of an emergency or simply because it has neglected to discard it, should not be put to the expense of producing it.

205 F.R.D. at 431 (emphasis added). It is certainly true that data kept solely for disaster recovery is often relatively inaccessible because it is stored on backup tapes. But it is important not to conflate the purpose of retention with accessibility. A good deal of accessible, easily produced material may be kept for no apparent business purpose. Such evidence is no less discoverable than paper documents that serve no current purpose and exist only because a party failed to discard them. See, e.g., Fidelity Nat. Title Ins. Co. of New York v. Intercounty Nat. Title Ins. Co., No. 00 C. 5658, 2002 WL 1433584, at *6 (N.D. Ill. July 2, 2002) (requiring production of documents kept for no purpose, maintained "chaotic[ally]" and "cluttered in unorganized stacks" in an off-site warehouse); Dangler v. New York City Off Track Betting Corp., No. 95 Civ. 8495, 2000 WL 1510090, at *1 (S.D.N.Y. Oct. 11, 2000) (requiring production of documents kept "disorganized" in "dozens of boxes").

Although a business purpose will often coincide with accessibility -- data that is inaccessible is unlikely to be used or needed in the ordinary course of business -- the concepts are not coterminous. In particular, a good deal of accessible data may be retained, though not in the ordinary course of business. For example, data that should rightly have been erased pursuant to a document retention/destruction policy may be inadvertently retained. If so, the fact that it should have been erased in no way shields that data from discovery. As long as the data is accessible, it must be produced.

Of course, there will be certain limited instances where the very purpose of maintaining the data will be to produce it to the opposing party. That would be the case, for example, where the SEC requested "communications sent by [a] broker or dealer (including inter-office memoranda and communications) relating to his business as such." Such communications must be maintained pursuant to SEC Rule 17a-4.[69] But in such cases, cost-shifting would not be applicable in the first place; the relevant statute or rule would dictate the extent of discovery and the associated costs.[70] Cost-shifting would also be inappropriate for another reason -- namely, that the regulation

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[69] See supra, note 20.

[70] However, while Zubulake is not the stated beneficiary of SEC Rule 17a-4, see Touche Ross & Co. v. Redington, 442 U.S. 560, 569-70 (1979), to the extent that the e-mails are accessible because of it, it inures to her benefit.

itself requires that the data be kept "in an accessible place."

c. A New Seven-Factor Test

Set forth below is a new seven-factor test based on the modifications to Rowe discussed in the preceding sections.

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

2. The Seven Factors Should Not Be Weighted Equally

Whenever a court applies a multi-factor test, there is a temptation to treat the factors as a check-list, resolving the issue in favor of whichever column has the most checks.[71] But "we do not just add up the factors."[72] When evaluating cost-shifting, the central question must be, does the request impose

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[71] See, e.g., Big O Tires, Inc. v. Bigfoot 4X4, Inc., 167 F. Supp. 2d 1216, 1227 (D. Colo. 2001) ("A majority of factors in the likelihood of confusion test weigh in favor of Big O. I therefore conclude that Big O has shown a likelihood of success on the merits.").

[72] Noble v. United States, 231 F.3d 352, 359 (7th Cir. 2000).

an "undue burden or expense" on the responding party?[73] Put another way, "how important is the sought-after evidence in comparison to the cost of production?" The seven-factor test articulated above provide some guidance in answering this question, but the test cannot be mechanically applied at the risk of losing sight of its purpose.

Weighting the factors in descending order of importance may solve the problem and avoid a mechanistic application of the test. The first two factors -- comprising the marginal utility test -- are the most important. These factors include: (1) The extent to which the request is specifically tailored to discover relevant information and (2) the availability of such information from other sources. The substance of the marginal utility test was well described in McPeek v. Ashcroft:

> The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense. The less likely it is, the more unjust it would be to make the [responding party] search at its own expense. The difference is "at the margin."[74]

The second group of factors addresses cost issues: "How expensive will this production be?" and, "Who can handle that expense?" These factors include: (3) the total cost of production compared to the amount in controversy, (4) the total

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[73] Fed. R. Civ. P. 26(b)(iii).

[74] 202 F.R.D. at 34.

cost of production compared to the resources available to each party and (5) the relative ability of each party to control costs and its incentive to do so. The third "group" -- (6) the importance of the litigation itself -- stands alone, and as noted earlier will only rarely come into play. But where it does, this factor has the potential to predominate over the others. Collectively, the first three groups correspond to the three explicit considerations of Rule 26(b)(2)(iii). Finally, the last factor -- (7) the relative benefits of production as between the requesting and producing parties -- is the least important because it is fair to presume that the response to a discovery request generally benefits the requesting party. But in the unusual case where production will also provide a tangible or strategic benefit to the responding party, that fact may weigh against shifting costs.

D. A Factual Basis Is Required to Support the Analysis

Courts applying Rowe have uniformly favored cost-shifting largely because of assumptions made concerning the likelihood that relevant information will be found. This is illustrated in Rowe itself:

> Here, there is a high enough probability that a broad search of the defendants' e-mails will elicit some relevant information that the search should not be precluded altogether. However, there has certainly been no showing that the e-mails are likely to be a gold mine. No witness has testified, for example, about any e-mail communications that allegedly reflect

> discriminatory or anti-competitive practices. Thus, the marginal value of searching the e-mails is modest at best, and this factor, too, militates in favor of imposing the costs of discovery on the plaintiffs.[75]

But such proof will rarely exist in advance of obtaining the requested discovery. The suggestion that a plaintiff must not only demonstrate that probative evidence exists, but also prove that electronic discovery will yield a "gold mine," is contrary to the plain language of Rule 26(b)(1), which permits discovery of "any matter" that is "relevant to [a] claim or defense."

The best solution to this problem is found in McPeek:

> Given the complicated questions presented [and] the clash of policies . . . I have decided to take small steps and perform, as it were, a test run. Accordingly, I will order DOJ to perform a backup restoration of the e-mails attributable to Diegelman's computer during the period of July 1, 1998 to July 1, 1999. . . . The DOJ will have to carefully document the time and money spent in doing the search. It will then have to search in the restored e-mails for any document responsive to any of the plaintiff's requests for production of documents. Upon the completion of this search, the DOJ will then file a comprehensive, sworn certification of the time and money spent and the results of the search. Once it does, I will permit the parties an opportunity to argue why the results and the expense do or do not justify any further search.[76]

Requiring the responding party to restore and produce responsive

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[75] 205 F.R.D. at 430. See also Murphy Oil, 2002 WL 246439, at *5 (determining that "the marginal value of searching the e-mail is modest at best" and weighs in favor of cost-shifting because "Murphy has not pointed to any evidence that shows that 'the e-mails are likely to be a gold mine'").

[76] 202 F.R.D. at 34-35.

documents from a small sample of backup tapes will inform the cost-shifting analysis laid out above. When based on an actual sample, the marginal utility test will not be an exercise in speculation -- there will be tangible evidence of what the backup tapes may have to offer. There will also be tangible evidence of the time and cost required to restore the backup tapes, which in turn will inform the second group of cost-shifting factors. Thus, by requiring a sample restoration of backup tapes, the entire cost-shifting analysis can be grounded in fact rather than guesswork.[77]

IV. CONCLUSION AND ORDER

In summary, deciding disputes regarding the scope and cost of discovery of electronic data requires a three-step analysis:

First, it is necessary to thoroughly understand the responding party's computer system, both with respect to active and stored data. For data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes.

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[77] Of course, where the cost of a sample restoration is significant compared to the value of the suit, or where the suit itself is patently frivolous, even this minor effort may be inappropriate.

Second, because the cost-shifting analysis is so fact-intensive, it is necessary to determine what data may be found on the inaccessible media. Requiring the responding party to restore and produce responsive documents from a small sample of the requested backup tapes is a sensible approach in most cases.

Third, and finally, in conducting the cost-shifting analysis, the following factors should be considered, weighted more-or-less in the following order:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

Accordingly, UBS is ordered to produce all responsive e-mails that exist on its optical disks or on its active servers (i.e., in HP OpenMail files) at its own expense. UBS is also ordered to produce, at its expense, responsive e-mails from any five backups tapes selected by Zubulake. UBS should then prepare an affidavit detailing the results of its search, as well as the time and money spent. After reviewing the contents of the backup tapes and UBS's certification, the Court will conduct the

appropriate cost-shifting analysis.

A conference is scheduled in Courtroom 12C at 4:30 p.m. on June 17, 2003.

SO ORDERED:

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Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
May 13, 2003

- Appearances -

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAURA ZUBULAKE,	:	
Plaintiff,	:	**OPINION AND ORDER**
-against-	:	**02 Civ. 1243 (SAS)**
UBS WARBURG LLC, UBS WARBURG, and UBS AG,	:	
Defendants.	:	

SHIRA A. SCHEINDLIN, U.S.D.J.:

On May 13, 2003, I ordered defendants UBS Warburg LLC, UBS Warburg, and UBS AG (collectively "UBS") to restore and produce certain e-mails from a small group of backup tapes. Having reviewed the results of this sample restoration, Laura Zubulake now moves for an order compelling UBS to produce all remaining backup e-mails at its expense. UBS argues that based on the sampling, the costs should be shifted to Zubulake.

For the reasons fully explained below, Zubulake must share in the costs of restoration, although UBS must bear the bulk of that expense. In addition, UBS must pay for any costs incurred in reviewing the restored documents for privilege.

I. BACKGROUND

The background of this lawsuit and the instant discovery dispute are recounted in two prior opinions,

familiarity with which is presumed.[1] In brief, Zubulake, an equities trader who earned approximately $650,000 a year with UBS,[2] is now suing UBS for gender discrimination, failure to promote, and retaliation under federal, state, and city law. To support her claim, Zubulake seeks evidence stored on UBS's backup tapes that is only accessible through costly and time-consuming data retrieval. In particular, Zubulake seeks e-mails relating to her that were sent to or from five UBS employees: Matthew Chapin (Zubulake's immediate supervisor and the alleged primary discriminator), Jeremy Hardisty (Chapin's supervisor and the individual to whom Zubulake originally complained about Chapin), Rose Tong (a human relations representative who was assigned to handle issues concerning Zubulake), Vinay Datta (a co-worker), and Andrew Clarke (another co-worker). The question presented in this dispute is which party should pay for the costs incurred in restoring and producing these backup tapes.

In order to obtain a factual basis to support the cost-shifting analysis, I ordered UBS to restore and produce e-mails from five of the ninety-four backup tapes that UBS had then

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[1] See Zubulake v. UBS Warburg, LLC, No. 02 Civ. 1243, 2003 WL 21087884 (S.D.N.Y. May 13, 2003) ("Zubulake I") (addressing the production of backup tapes); Zubulake v. UBS Warburg, LLC, No. 02 Civ. 1243, 2003 WL 21087136 (S.D.N.Y. May 13, 2003) ("Zubulake II") (addressing Zubulake's reporting obligations).

[2] See 6/20/03 Letter from James A. Batson, Zubulake's counsel, to the Court.

identified as containing responsive documents; Zubulake was permitted to select the five tapes to be restored.[3] UBS now reports, however, that there are only seventy-seven backup tapes that contain responsive data, including the five already restored.[4] I further ordered UBS to "prepare an affidavit detailing the results of its search, as well as the time and money spent."[5] UBS has complied by submitting counsel's declaration.[6]

According to the declaration, Zubulake selected the backup tapes corresponding to Matthew Chapin's e-mails from May, June, July, August, and September 2001.[7] That period includes the time from Zubulake's initial EEOC charge of discrimination (August 2001) until just before her termination (in the first week of October 2001).[8] UBS hired an outside vendor, Pinkerton Consulting & Investigations, to perform the restoration.[9]

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[3] See Zubulake I, 2003 WL 21087884, at *13.

[4] See 6/17/03 Oral Argument Transcript ("Tr.") at 3 (Statement of Kevin B. Leblang, UBS's counsel). But see 5/15/03 Letter from Christina J. Kang, Zubulake's counsel, to Norman C. Simon (indicating a total of sixty-eight potentially responsive backup tapes), Ex. B to 6/16/03 Declaration of Norman C. Simon ("Simon Decl."), UBS's counsel.

[5] Zubulake I, 2003 WL 21087884, at *13.

[6] See Simon Decl.

[7] See id. ¶ 7.

[8] See id.

[9] See id. ¶ 8.

Pinkerton was able to restore each of the backup tapes, yielding a total of 8,344 e-mails.[10] That number is somewhat inflated, however, because it does not account for duplicates. Because each month's backup tape was a snapshot of Chapin's server for that month -- and not an incremental backup reflecting only new material -- an e-mail that was on the server for more than one month would appear on more than one backup tape. For example, an e-mail received in January 2001 and deleted in November 2001 would have been restored from all five backup tapes. With duplicates eliminated, the total number of unique e-mails restored was 6,203.[11]

Pinkerton then performed a search for e-mails containing (in either the e-mail's text or its header information, such as the "subject" line) the terms "Laura", "Zubulake", or "LZ".[12] The searches yielded 1,541 e-mails,[13] or 1,075 if duplicates are eliminated.[14] Of these 1,541 e-mails, UBS deemed approximately 600 to be responsive to Zubulake's

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[10] See id. ¶ 11.

[11] See id. ¶ 14(a).

[12] See id. ¶ 9.

[13] See id. ¶ 12.

[14] See id. ¶ 14(a).

document request and they were produced.[15] UBS also produced, under the terms of the May 13 Order, fewer than twenty e-mails extracted from UBS's optical disk storage system.[16]

Pinkerton billed UBS 31.5 hours for its restoration services at an hourly rate of $245, six hours for the development, refinement and execution of a search script at $245 an hour,[17] and 101.5 hours of "CPU Bench Utilization" time for use of Pinkerton's computer systems at a rate of $18.50 per hour.[18] Pinkerton also included a five percent "administrative overhead fee" of $459.38.[19] Thus, the total cost of restoration and search was $11,524.63.[20] In addition, UBS incurred the following costs: $4,633 in attorney time for the document review (11.3 hours at $410 per hour)[21] and $2,845.80 in paralegal time for tasks related to document production (16.74 hours at $170 per

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[15] See id. ¶ 13; see also 7/21/03 Letter from Christina J. Kang to the Court (transmitting UBS's privilege log, which reflects that approximately 4% (25 of 625) of the responsive documents were withheld on the basis of privilege).

[16] See Simon Decl. ¶ 29.

[17] See 7/18/03 Letter from Norman C. Simon to the Court ("7/18/03 Ltr.")

[18] See 7/18/03 Ltr.; see also Pinkerton Invoice Summary ("Pinkerton Invoice"), Ex. E to Simon Decl.

[19] See Pinkerton Invoice.

[20] See 7/18/03 Ltr.

[21] See Simon Decl. ¶ 17; see also Time Records for Norman C. Simon, Jennifer Brevaire, and Sandra Wong ("Time Records"), Ex. F to Simon Decl.

hour).[22] UBS also paid $432.60 in photocopying costs,[23] which, of course, will be paid by Zubulake and is not part of this cost-shifting analysis.[24] The total cost of restoration and production from the five backup tapes was $19,003.43.[25]

UBS now asks that the cost of any further production -- estimated to be $273,649.39, based on the cost incurred in restoring five tapes and producing responsive documents from those tapes -- be shifted to Zubulake. The total figure includes $165,954.67 to restore and search the tapes and $107,694.72 in attorney and paralegal review costs. These costs will be addressed separately below.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure specify that "any matter, not privileged, that is relevant to the claim or defense of any party" is discoverable,[26] except where:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or

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[22] See Simon Decl. ¶ 18; see also Time Records.

[23] See Simon Decl. ¶ 19; see also Time Records.

[24] See Fed. R. Civ. P. 34(a) (permitting the requesting party to "inspect and copy" any documents it asks for); see also In re Bristol-Myers Squibb Sec. Litig., 205 F.R.D. 437, 440 (D.N.J. 2002) (imposing cost of photocopying electronic documents on requesting party).

[25] See Simon Decl. ¶ 20.

[26] Fed. R. Civ. P. 26(b)(1).

> less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.[27]

Although "the presumption is that the responding party must bear the expense of complying with discovery requests," requests that run afoul of the Rule 26(b)(2) proportionality test may subject the requesting party to protective orders under Rule 26(c), "including orders conditioning discovery on the requesting party's payment of the costs of discovery."[28] A court will order such a cost-shifting protective order only upon motion of the responding party to a discovery request, and "for good cause shown."[29] Thus, the responding party has the burden of proof on a motion for cost-shifting.[30]

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[27] Fed. R. Civ. P. 26(b)(2).

[28] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

[29] Fed. R. Civ. P. 26(c).

[30] But see Tex. R. Civ. P. 196.4 ("To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot -- through reasonable efforts -- retrieve the data or information

III. DISCUSSION

A. Cost-Shifting Generally

In Zubulake I, I considered plaintiff's request for information contained only on backup tapes and determined that cost-shifting might be appropriate.[31] It is worth emphasizing again that cost-shifting is potentially appropriate only when inaccessible data is sought. When a discovery request seeks accessible data -- for example, active on-line or near-line data -- it is typically inappropriate to consider cost-shifting.

In order to determine whether cost-shifting is appropriate for the discovery of inaccessible data, "the

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requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information."); see also American Bar Association Civil Discovery Standards (1998) (Standard 29: "Unless the requesting party can demonstrate a substantial need for it, a party does not ordinarily have a duty to take steps to try to restore electronic information that has been deleted or discarded in the regular course of business but may not have been completely erased from computer memory. . . . The discovering party generally should bear any special expenses incurred by the responding party in producing requested electronic information. The responding party should generally not have to incur undue burden or expense in producing electronic information, including the cost of acquiring or creating software needed to retrieve responsive electronic information for production to the other side.").

[31] See Zubulake I, 2003 WL 21087884, at *12 ("A court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes.") (emphasis in original).

following factors should be considered, weighted more-or-less in the following order":

1. The extent to which the request is specifically tailored to discover relevant information;

2. The availability of such information from other sources;

3. The total cost of production, compared to the amount in controversy;

4. The total cost of production, compared to the resources available to each party;

5. The relative ability of each party to control costs and its incentive to do so;

6. The importance of the issues at stake in the litigation; and

7. The relative benefits to the parties of obtaining the information.[32]

In establishing this test, I modified the list of factors articulated in Rowe Entertainment, Inc. v. William Morris Agency, Inc.,[33] to meet the legitimate concern of those commentators who have argued that "the factors articulated in Rowe [] tend to favor the responding party, and frequently result in shifting the costs of electronic discovery to the requesting party."[34] Thus,

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[32] Id. at *13.

[33] 205 F.R.D. 421, 429 (S.D.N.Y.), aff'd, 2002 WL 975713 (S.D.N.Y. May 9, 2002).

[34] Adam I. Cohen & David J. Lender, Electronic Discovery: Law and Practice § 5.04(c) (Aspen Law & Business, publication forthcoming 2003) ("For example, in many instances, at least four factors -- the purposes of retention, benefit to the parties,

the seven-factor test articulated in Zubulake I was designed to simplify application of the Rule 26(b)(2) proportionality test in the context of electronic data and to reinforce the traditional presumptive allocation of costs.

B. Application of the Seven Factor Test

1. Factors One and Two

As I explained in Zubulake I, the first two factors together comprise the "marginal utility test" announced in McPeek v. Ashcroft:

> The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense. The less likely it is, the more unjust it would be to make the [responding party] search at its own expense. The difference is "at the margin."[35]

These two factors should be weighted the most heavily in the cost-shifting analysis.[36]

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total costs and ability to control costs -- will favor the responding party. If courts simply conduct an absolute comparison of the eight Rowe factors, the responding party will need to attain just one more factor to shift the costs to the requesting party. This is a dramatic shift from earlier cases, which were more inclined to follow the presumption in traditional document production, requiring the responding party to pay.").

[35] 202 F.R.D. 31, 34 (D.D.C. 2001)

[36] See Zubulake I, 2003 WL 21087884, at *11.

a. The Extent to Which the Request Is Specifically Tailored to Discover Relevant Information

The document request at issue asks for "[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff,"[37] and was subsequently narrowed to pertain to only five employees (Chapin, Hardisty, Tong, Datta, and Clarke) and to the period from August 1999 to December 2001.[38] This is a relatively limited and targeted request, a fact borne out by the e-mails UBS actually produced, both initially and as a result of the sample restoration.

At oral argument, Zubulake presented the court with sixty-eight e-mails (of the 600 she received) that she claims are "highly relevant to the issues in this case" and thus require, in her view, that UBS bear the cost of production.[39] And indeed, a review of these e-mails reveals that they are relevant. Taken together, they tell a compelling story of the dysfunctional atmosphere surrounding UBS's U.S. Asian Equities Sales Desk (the "Desk"). Presumably, these sixty-eight e-mails are reasonably representative of the seventy-seven backup tapes.

A number of the e-mails complain of Zubulake's

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[37] Plaintiff's First Request for Production of Documents ¶ 28, Ex. E to the 3/21/03 Declaration of Kevin B. Leblang ("Leblang Dec.").

[38] See Zubulake I, 2003 WL 21087884, at *2.

[39] See Tr. at 5 (Statement of James A. Batson).

behavior. Zubulake was described by Clarke as engaging in "bitch sessions about the horrible men on the [Desk]," and as a "conduit for a steady stream of distortions, accusations and good ole fashioned back stabbing,"[40] and Hardisty noted that Zubulake was disrespectful to Chapin and other members of the Desk.[41] And Chapin takes frequent snipes at Zubulake.[42] There are also complaints about Chapin's behavior.[43] In addition, Zubulake argues that several of the e-mails contradict testimony given by UBS employees in sworn depositions.[44]

In particular, six e-mails singled out by Zubulake as

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[40] 7/6/01 e-mail, Bates No. UBSZ 001181.

[41] 7/16/01 e-mail, Bates No. UBSZ 001131. See also 7/24/01 e-mail, Bates No. UBSZ 001792 (Michael Balbirnie complaining that Zubulake went to Asia but failed to visit Singapore or Kuala Lampur); 9/21/01 e-mail, Bates No. UBSZ 001399 (Chapin recounting Peggy Yeh's complaint that Zubulake was "mis-representing her views"); 5/3/01 e-mail, Bates No. UBSZ 001090 (Chapin recounting complaints about Zubulake from Datta and Clarke).

[42] See, e.g., 9/21/01 e-mail, Bates No. UBSZ 001399 ("In the past few days I have caught snatches of LZ's conversation in which she is complaining and being critical of how I handled the Chinese Corporation conf..everytime she senses I am in ear shot she quickly drops her voice. She has gone back to being dismissive and abrasive in her interactions w/ me. Good to see LZ is back to her old tricks [sic].").

[43] See 4/23/01 e-mail, Bates No. UBSZ 001063 (Hardisty stating, "[Y]ou are smart, i don't believe you made a mistake. What am i supposed to say to [Zubulake] when she tells me that you are telling me one thing and her another and that you want her off the desk.? As i see it, you do not appear to be upholding your end of the bargain to work with her [sic].").

[44] See Tr. at 6-18.

particularly "striking"[45] include:

- An e-mail from Hardisty, Chapin's supervisor, chastising Chapin for saying one thing and doing another with respect to Zubulake. Hardisty said, "As I see it, you do not appear to be upholding your end of the bargain to work with her." This e-mail stands in contrast to UBS's response to Zubulake's EEOC charges, which says that "Mr. Chapin was receptive to Mr. Hardisty's suggestions [for improving his relationship with Zubulake]."[46]

- An e-mail from Chapin to one of his employees on the Desk, Joy Kim, suggesting to her how to phrase a complaint against Zubulake. A few hours later, Joy Kim did in fact send an e-mail to Chapin complaining about Zubulake, using precisely the same words that Chapin had suggested. But at his deposition (taken before these e-mails were restored), Chapin claimed that he did not solicit the complaint.[47]

- An e-mail from Chapin to the human resources employee handling Zubulake's case listing the employees on the Desk and categorizing them as senior, mid-level, or junior salespeople. In its EEOC filing, however, UBS claimed in response to Zubulake's argument that she was the only senior salesperson on the desk, that it "does not categorize salespeople as 'junior' or 'senior.'" In addition, UBS claimed in its EEOC papers that there were four female salespeople on the Desk, but this e-mail shows only two.[48]

- An e-mail from Chapin to Hardisty acknowledging that Zubulake's "ability to do a good job . . . is clear,"

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[45] Tr. at 15 (Statement of James A. Batson).

[46] See 4/23/01 e-mail, Bates No. UBSZ 001063; Tr. at 6-7.

[47] See 9/25/01 e-mail, Bates No. UBSZ 001663; 9/25/01 e-mail, Bates No. UBSZ 001664; Tr. at 8-11.

[48] See 5/16/01 e-mail, Bates No. UBSZ 000974; Tr. at 11-12.

and that she is "quite capable."[49]

- An e-mail from Derek Hillan, presumably a UBS employee, to Chapin and Zubulake using vulgar language, although UBS claims that it does not tolerate such language.[50]

- An e-mail from Michael Oertli, presumably a UBS employee, to Chapin explaining that UBS's poor performance in Singapore was attributable to the fact that it only "covered" eight or nine of twenty-two accounts, and not to Zubulake's poor performance, as UBS has argued.[51]

Not surprisingly, UBS argued that these e-mails have very little, if any, relevance to the issues in the case.[52]

While all of these e-mails are likely to have some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,"[53] none of them provide any direct evidence of discrimination. To be sure, the e-mails reveal a hostile relationship between Chapin and Zubulake -- UBS does not contest this. But nowhere (in the sixty-eight e-mails produced to the Court) is there evidence that Chapin's dislike of Zubulake related to her gender.

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[49] See 6/28/01 e-mail, Bates No. UBSZ 001210; Tr. at 12-13.

[50] See 3/5/01 e-mail, Bates No. UBSZ 001553; Tr. at 13.

[51] See 7/27/01 e-mail, Bates No. UBSZ 001114; Tr. at 13-14.

[52] See Tr. at 20-27 (Statement of Kevin B. Leblang).

[53] Fed. R. Evid. 401. See also Advisory Committee Note to Fed. R. Civ. P. 26(b)(1).

b. The Availability of Such Information from Other Sources

The other half of the marginal utility test is the availability of the relevant data from other sources. Neither party seemed to know how many of the 600 e-mails produced in response to the May 13 Order had been previously produced. UBS argues that "nearly all of the restored e-mails that relate to plaintiff's allegations in this matter or to the merits of her case were already produced."[54] This statement is perhaps too careful, because UBS goes on to observe that "the vast majority of the restored e-mails that were produced do not relate at all to plaintiff's allegations in this matter or to the merits of her case."[55] But this determination is not for UBS to make; as the saying goes, "one man's trash is another man's treasure."

It is axiomatic that a requesting party may obtain "any matter, not privileged, that is relevant to the claim or defense of any party."[56] The simple fact is that UBS previously produced only 100 pages of e-mails,[57] but has now produced 853 pages (comprising the 600 responsive e-mails) from the five selected

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[54] Simon Decl. ¶ 14(b).

[55] Id. ¶ 14(c) (emphasis in original).

[56] Fed. R. Civ. P. 26(b)(1).

[57] See Zubulake I, 2003 WL 21087884, at *2.

backup tapes alone.[58] UBS itself decided that it was obliged to provide these 853 pages of e-mail pursuant to the requirements of Rule 26. Having done so, these numbers lead to the unavoidable conclusion that there are a significant number of responsive e-mails that now exist only on backup tapes.

If this were not enough, there is some evidence that Chapin was concealing and deleting especially relevant e-mails. When Zubulake first filed her EEOC charge in August 2001, all UBS employees were instructed to save documents relevant to her case.[59] In furtherance of this policy, Chapin maintained separate files on Zubulake.[60] However, certain e-mails sent after the initial EEOC charge -- and particularly relevant to Zubulake's retaliation claim -- were apparently not saved at all. For example, the e-mail from Chapin to Joy Kim instructing her on how to file a complaint against Zubulake[61] was not saved, and it bears the subject line "UBS client attorney priviledge [sic] only," although no attorney is copied on the e-mail.[62] This potentially useful e-mail was deleted and resided only on UBS's

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[58] See Tr. at 4 (Statement of James A. Batson); id. at 18 (Statement of Kevin B. Leblang).

[59] See id. at 10 (Statement of James A. Batson).

[60] See id.

[61] See supra note 47 and accompanying text.

[62] See 9/25/01 e-mail, Bates No. UBSZ 001664.

backup tapes.

In sum, hundreds of the e-mails produced from the five backup tapes were not previously produced, and so were only available from the tapes. The contents of these e-mails are also new. Although some of the substance is available from other sources (e.g., evidence of the sour relationship between Chapin and Zubulake), a good deal of it is only found on the backup tapes (e.g., inconsistencies with UBS's EEOC filing and Chapin's deposition testimony). Moreover, an e-mail contains the precise words used by the author. Because of that, it is a particularly powerful form of proof at trial when offered as an admission of a party opponent.[63]

c. Weighing Factors One and Two

The sample restoration, which resulted in the production of relevant e-mail, has demonstrated that Zubulake's discovery request was narrowly tailored to discover relevant information. And while the subject matter of some of those e-mails was addressed in other documents, these particular e-mails are only available from the backup tapes. Thus, direct evidence of discrimination may only be available through restoration. As a result, the marginal utility of this additional discovery may be quite high.

While restoration may be the only means for obtaining

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[63] See Fed. R. Evid. 801(d)(2).

direct evidence of discrimination, the existence of that evidence is still speculative. The best that can be said is that Zubulake has demonstrated that the marginal utility is potentially high. All-in-all, because UBS bears the burden of proving that cost-shifting is warranted, the marginal utility test tips slightly against cost-shifting.

2. Factors Three, Four and Five

"The second group of factors addresses cost issues: 'How expensive will this production be?' and, 'Who can handle that expense?'"[64]

a. The Total Cost of Production Compared to the Amount in Controversy

UBS spent $11,524.63, or $2,304.93 per tape, to restore the five back-up tapes. Thus, the total cost of restoring the remaining seventy-two tapes extrapolates to $165,954.67.[65]

In order to assess the amount in controversy, I posed the following question to the parties: Assuming that a jury returns a verdict in favor of plaintiff, what economic damages can the plaintiff reasonably expect to recover? Plaintiff answered that reasonable damages are between $15,271,361 and

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[64] See Zubulake I, 2003 WL 21087884, at *11.

[65] See also Tr. at 18 (Statement of James A. Batson) (reporting that UBS has "represented [that the total cost of restoration] would be about 175,000 exclusive of attorney time").

$19,227,361, depending upon how front pay is calculated.[66] UBS answered that damages could be as high as $1,265,000.[67]

Obviously, this is a significant disparity. At this early stage, I cannot assess the accuracy of either estimate. Plaintiff had every incentive to high-ball the figure and UBS had every incentive to low-ball it. It is clear, however, that this case has the potential for a multi-million dollar recovery. Whatever else might be said, this is not a nuisance value case, a small case or a frivolous case. Most people do not earn $650,000 a year. If Zubulake prevails, her damages award undoubtedly will be higher than that of the vast majority of Title VII plaintiffs.

In an ordinary case, a responding party should not be required to pay for the restoration of inaccessible data if the cost of that restoration is significantly disproportionate to the value of the case. Assuming this to be a multi-million dollar case, the cost of restoration is surely not "significantly disproportionate" to the projected value of this case. This factor weighs against cost-shifting.

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[66] See 6/20/03 Letter from James A. Batson to the Court.

[67] See 6/20/03 Letter from Kevin B. Leblang to the Court.

b. The Total Cost of Production Compared to the Resources Available to Each Party

There is no question that UBS has exponentially more resources available to it than Zubulake.[68] While Zubulake is an accomplished equities trader,[69] she has now been unemployed for close to two years. Given the difficulties in the equities market and the fact that she is suing her former employer, she may not be particularly marketable. On the other hand, she asserts that she has a $19 million claim against UBS. So while UBS's resources clearly dwarf Zubulake's, she may have the financial wherewithal to cover at least some of the cost of restoration. In addition, it is not unheard of for plaintiff's firms to front huge expenses when multi-million dollar recoveries are in sight.[70] Thus, while this factor weighs against cost shifting, it does not rule it out.

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[68] See Zubulake I, 2003 WL 21087884, at *10, n.66 ("UBS, for example, reported net profits after tax of 942 million Swiss Francs (approximately $716 million) for the third quarter of 2002 alone.").

[69] See, e.g., Laura Zubulake, The Complete Guide to Convertible Securities Worldwide (1991).

[70] See, e.g., In re San Juan Dupont Plaza Hotel Fire Litig., 111 F.3d 220 (1st Cir. 1997) (affirming award of $10.7 million in costs to plaintiffs' steering committee).

c. The Relative Ability of Each Party to Control Costs and Its Incentive to Do So

Restoration of backup tapes must generally be done by an outside vendor.[71] Here, UBS had complete control over the selection of the vendor. It is entirely possible that a less-expensive vendor could have been found.[72] However, once that vendor is selected, costs are not within the control of either party. In addition, because these backup tapes are relatively well-organized -- meaning that UBS knows what e-mails can be found on each tape -- there is nothing more that Zubulake can do to focus her discovery request or reduce its cost.[73] Zubulake has already made a targeted discovery request and the restoration of the sample tapes has not enabled her to cut back on that request. Thus, this factor is neutral.

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[71] See, e.g., Cohen & Lender, supra note 34, § 2.09 (recognizing that "third party computer technicians or experts" are often "necessary in retrieving, searching, or analyzing electronic information"), § 5.04(B) (noting that "computer experts can often recover 'deleted' files").

[72] See, e.g., McPeek, 202 F.R.D. at 32 (citing restoration costs of $93 per hour).

[73] See, e.g., Rowe, 205 F.R.D. at 432 ("The [requesting parties] will be able to calibrate their discovery based on the information obtained from initial sampling. They are in the best position to decide whether further searches would be justified.").

3. Factor Six: The Importance of the Issues at Stake in the Litigation

As noted in Zubulake I, this factor "will only rarely come into play."[74] Although this case revolves around a weighty issue -- discrimination in the workplace -- it is hardly unique. Claims of discrimination are common, and while discrimination is an important problem, this litigation does not present a particularly novel issue. If I were to consider the issues in this discrimination case sufficiently important to weigh in the cost-shifting analysis, then this factor would be virtually meaningless. Accordingly, this factor is neutral.

4. Factor Seven: The Relative Benefits to the Parties of Obtaining the Information

Although Zubulake argues that there are potential benefits to UBS in undertaking the restoration of these backup tapes -- in particular, the opportunity to obtain evidence that may be useful at summary judgment or trial -- there can be no question that Zubulake stands to gain far more than does UBS, as will typically be the case.[75] Certainly, absent an order, UBS

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[74] See Zubulake I, 2003 WL 21087884, at *11.

[75] See id. ("the last factor -- (7) the relative benefits of production as between the requesting and producing parties -- is the least important because it is fair to presume that the response to a discovery request generally benefits the requesting party. But in the unusual case where production will also provide a tangible or strategic benefit to the responding party, that fact may weigh against shifting costs.") (emphasis in original).

would not restore any of this data of its own volition. Accordingly, this factor weighs in favor of cost-shifting.

5. Summary and Conclusion

Factors one through four tip against cost-shifting (although factor two only slightly so). Factors five and six are neutral, and factor seven favors cost-shifting. As noted in my earlier opinion in this case, however, a list of factors is not merely a matter of counting and adding; it is only a guide.[76] Because some of the factors cut against cost shifting, but only slightly so -- in particular, the possibility that the continued production will produce valuable new information -- some cost-shifting is appropriate in this case, although UBS should pay the majority of the costs. There is plainly relevant evidence that is only available on UBS's backup tapes. At the same time, Zubulake has not been able to show that there is indispensable evidence on those backup tapes (although the fact that Chapin apparently deleted certain e-mails indicates that such evidence may exist).

The next question is how much of the cost should be shifted. It is beyond cavil that the precise allocation is a matter of judgment and fairness rather than a mathematical consequence of the seven factors discussed above. Nonetheless,

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[76] See Zubulake I, 2003 WL 21087884, at *11 ("we do not just add up the factors") (quoting Noble v. United States, 231 F.3d 352, 359 (7th Cir. 2000)).

the analysis of those factors does inform the exercise of discretion. Because the seven factor test requires that UBS pay the lion's share, the percentage assigned to Zubulake must be less than fifty percent. A share that is too costly may chill the rights of litigants to pursue meritorious claims.[77] However, because the success of this search is somewhat speculative, any cost that fairly can be assigned to Zubulake is appropriate and ensures that UBS's expenses will not be unduly burdensome. A twenty-five percent assignment to Zubulake meets these goals.

C. Other Costs

The final question is whether this result should apply to the entire cost of the production, or only to the cost of restoring the backup tapes. The difference is not academic -- the estimated cost of restoring and searching the remaining backup tapes is $165,954.67, while the estimated cost of producing them (restoration and searching costs plus attorney and paralegal costs) is $273,649.39 ($19,003.43 for the five sample tapes, or $3,800.69 per tape, times seventy-two unrestored

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[77] See Zubulake I, 2003 WL 21087884, at *7 ("Courts must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases. This will both undermine the 'strong public policy favor[ing] resolving disputes on their merits,' and may ultimately deter the filing of potentially meritorious claims.") (footnote omitted).

tapes), a difference of $107,694.72.

As a general rule, where cost-shifting is appropriate, only the costs of restoration and searching should be shifted. Restoration, of course, is the act of making inaccessible material accessible. That "special purpose" or "extraordinary step" should be the subject of cost-shifting.[78] Search costs should also be shifted because they are so intertwined with the restoration process; a vendor like Pinkerton will not only develop and refine the search script, but also necessarily execute the search as it conducts the restoration.[79] However, the responding party should always bear the cost of reviewing and producing electronic data once it has been converted to an

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[78] See supra note 30.

[79] See, e.g., Applied Discovery website, at http://www.applieddiscovery.com/betterWay/theADIway.asp (offering "media restoration" service that includes "retrieval of information from backup tapes or legacy systems -- from standard email and word processing programs to arcane systems and uncommon file types" and "proven, cost effective strategies for narrowing the set of potentially responsive documents."); Computer Forensics Inc. website, at http://www.forensics.com/html/-electronic_restore.html ("[An] unfettered approach [to restoration] greatly increases the cost of electronic discovery, adding thousands of dollars for processing, as well as the cost of attorney review time. Computer Forensics Inc. helps our clients avoid any unnecessary restoration of data, while ensuring that potentially relevant data, including encrypted, compressed and password-protected files, are addressed."). See also Rowe, 205 F.R.D. at 425 (describing restoration of backup tapes as potentially requiring "an information systems analyst [to] import all of the agents' e-mail into a single common format, creating a single database. The entire database could then be reviewed using one search engine."); McPeek, 202 F.R.D. at 34 (permitting shift of search costs).

accessible form. This is so for two reasons.

First, the producing party has the exclusive ability to control the cost of reviewing the documents. In this case, UBS decided -- as is its right -- to have a senior associate at a top New York City law firm conduct the privilege review at a cost of $410 per hour. But the job could just as easily have been done (while perhaps not as well) by a first-year associate or contract attorney at a far lower rate. UBS could similarly have obtained paralegal assistance for far less than $170 per hour.[80]

Moreover, the producing party unilaterally decides on the review protocol. When reviewing electronic data, that review may range from reading every word of every document to conducting a series of targeted key word searches. Indeed, many parties to document-intensive litigation enter into so-called "claw-back" agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently

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[80] Compare with S.W. ex rel. N.W. v. Board of Educ. of City of New York (Dist. Two), 257 F. Supp. 2d 600, 607-08 (S.D.N.Y. 2002) ("Paralegals typically are billed at $75 per hour, unless they have significant experience."); Marisol A. v. Giuliani, 111 F. Supp. 2d 381, 388 (S.D.N.Y. 2000) (holding that, in the absence of evidence demonstrating a high level of experience, an hourly rate of $75 per hour is reasonable for paralegal services). Cf. Williams v. New York City Hous. Auth., 975 F. Supp. 317, 323 (S.D.N.Y. 1997) (approving an hourly rate of $75 per hour for paralegals in a civil rights action); Wilder v. Bernstein, 975 F. Supp. 276, 282 (S.D.N.Y. 1997) (acknowledging that the prevailing rate for paralegals in civil rights cases in 1997 was between $60-75 per hour).

produced privileged documents.[81] The parties here can still reach such an agreement with respect to the remaining seventy-two tapes and thereby avoid any cost of reviewing these tapes for privilege.

Second, the argument that all costs related to the production of restored data should be shifted misapprehends the nature of the cost-shifting inquiry. Recalling that cost-shifting is only appropriate for inaccessible -- but otherwise discoverable -- data, it necessarily follows that once the data has been restored to an accessible format and responsive

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[81] See The Sedona Conference, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (March 2003), available at http://www.thesedonaconference.org/publications_html (Comment 10a: "Because of the large volumes of documents and data typically at issue in cases involving production of electronic data, courts should consider entering orders protecting the parties against any waiver of privileges or protections due to the inadvertent production of documents and data. . . . Such an order should provide that the inadvertent disclosure of a privileged document does not constitute a waiver of privilege, that the privileged document should be returned (or there will be a certification that it has been deleted), and that any notes or copies will be destroyed or deleted. Ideally, an agreement or order should be obtained prior to any production."). Cf. Tex. R. Civ. P. 193.3(d) ("Privilege Not Waived by Production. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if -- within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made -- the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.").

documents located, cost-shifting is no longer appropriate. Had it always been accessible, there is no question that UBS would have had to produce the data at its own cost.[82] Indeed, this is precisely what I ordered in Zubulake I with respect to certain e-mails kept on UBS's optical disk system.[83]

Documents stored on backup tapes can be likened to paper records locked inside a sophisticated safe to which no one has the key or combination. The cost of accessing those documents may be onerous, and in some cases the parties should split the cost of breaking into the safe. But once the safe is opened, the production of the documents found inside is the sole responsibility of the responding party. The point is simple: technology may increasingly permit litigants to reconstruct lost or inaccessible information,[84] but once restored to an accessible form, the usual rules of discovery apply.

IV. CONCLUSION

For the reasons set forth above, the costs of restoring any backup tapes are allocated between UBS and Zubulake seventy-five percent and twenty-five percent, respectively. All other costs are to be borne exclusively by UBS. Notwithstanding this

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[82] See Zubulake I, 2003 WL 21087884, at *6-9.

[83] See id. at *13.

[84] See, e.g., Douglas Heingartner, Back Together Again: Scanning Technology Reassembles Shredded Documents Once Thought Gone for Good, N.Y. Times, July 17, 2003, at G1.

ruling, UBS can potentially impose a shift of all of its costs, attorney's fees included, by making an offer to the plaintiff under Rule 68.[85]

SO ORDERED:

_____
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
July 24, 2003

[85] See Fed. R. Civ. P. 68 ("At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."); see also Lyte v. Sara Lee Corp., 950 F.2d 101, 103 (2d Cir. 1991) (holding that Rule 68 "costs" include attorney's fees, in the Title VII context) (citing Marek v. Chesny, 473 U.S. 1, 9 (1985)).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAURA ZUBULAKE,	:	
	:	
Plaintiff,	:	**OPINION AND ORDER**
	:	
-against-	:	**02 Civ. 1243 (SAS)**
	:	
UBS WARBURG LLC, UBS WARBURG, and UBS AG,	:	
	:	
Defendants.	:	
	:	

SHIRA A. SCHEINDLIN, U.S.D.J.:

"Documents create a paper reality we call proof."[1] The absence of such documentary proof may stymie the search for the truth. If documents are lost or destroyed when they should have been preserved because a litigation was threatened or pending, a party may be prejudiced. The questions presented here are how to determine an appropriate penalty for the party that caused the loss and -- the flip side -- how to determine an appropriate remedy for the party injured by the loss.

Finding a suitable sanction for the destruction of evidence in civil cases has never been easy. Electronic evidence only complicates matters. As documents are increasingly maintained electronically, it has become easier to delete or tamper with evidence (both intentionally and inadvertently) and

[1] Mason Cooley, City Aphorisms, Sixth Selection (1989).

more difficult for litigants to craft policies that ensure all relevant documents are preserved.[2] This opinion addresses both the scope of a litigant's duty to preserve electronic documents and the consequences of a failure to preserve documents that fall within the scope of that duty.

I. BACKGROUND

This is the fourth opinion resolving discovery disputes in this case. Familiarity with the prior opinions is presumed,[3] and only background information relevant to the instant dispute is described here. In brief, Laura Zubulake, an equities trader who earned approximately $650,000 a year with UBS,[4] is suing UBS for gender discrimination, failure to promote, and retaliation under federal, state, and city law. She has repeatedly

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[2] See Adam I. Cohen & David J. Lender, Electronic Discovery: Law and Practice § 3.01 (Aspen Law & Business, publication forthcoming 2003) ("Unlike paper documents, electronic documents can be updated or changed without leaving an easily recognizable trace. Therefore, unique questions may arise as to the scope of a party's duty to preserve evidence in electronic form.").

[3] See Zubulake v. UBS Warburg, LLC, -- F.R.D. --, No. 02 Civ. 1243, 2003 WL 21087884 (S.D.N.Y. May 13, 2003) ("Zubulake I") (addressing the legal standard for determining the cost allocation for producing e-mails contained on backup tapes); Zubulake v. UBS Warburg, LLC, No. 02 Civ. 1243, 2003 WL 21087136 (S.D.N.Y. May 13, 2003) ("Zubulake II") (addressing Zubulake's reporting obligations); Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003) ("Zubulake III") (allocating backup tape restoration costs between Zubulake and UBS).

[4] See 6/20/03 Letter from James A. Batson, Zubulake's counsel, to the Court.

maintained that the evidence she needs to prove her case exists in e-mail correspondence sent among various UBS employees and stored only on UBS's computer systems.

On July 24, 2003, I ordered the parties to share the cost of restoring certain UBS backup tapes that contained e-mails relevant to Zubulake's claims.[5] In the restoration effort, the parties discovered that certain backup tapes are missing. In particular:

Individual/Server	Missing Monthly Backup Tapes
Matthew Chapin (Zubulake's immediate supervisor)	April 2001
Jeremy Hardisty (Chapin's supervisor)	June 2001
Andrew Clarke and Vinay Datta (Zubulake's coworkers)	April 2001
Rose Tong (human resources)	Part of June 2001, July 2001, August 2001, and October 2001

(UBS has located certain weekly backup tapes to fill some of the gaps created by the lost monthly tapes).

In addition, certain isolated e-mails -- created after UBS supposedly began retaining all relevant e-mails -- were deleted from UBS's system, although they appear to have been saved on the backup tapes. As I explained in Zubulake III, "certain e-mails sent after the initial EEOC charge -- and particularly relevant to Zubulake's retaliation claim -- were

[5] Zubulake III, 216 F.R.D. 280.

apparently not saved at all. For example, [an] e-mail from Chapin to Joy Kim [another of Zubulake's coworkers] instructing her on how to file a complaint against Zubulake was not saved, and it bears the subject line 'UBS client attorney priviledge [sic] only,' although no attorney is copied on the e-mail. This potentially useful e-mail was deleted and resided only on UBS's backup tapes."[6]

Zubulake filed her EEOC charge on August 16, 2001; the instant action was filed on February 14, 2002. In August 2001, in an oral directive, UBS ordered its employees to retain all relevant documents.[7] In August 2002, after Zubulake specifically requested e-mail stored on backup tapes, UBS's outside counsel orally instructed UBS's information technology personnel to stop recycling backup tapes.[8]

Zubulake now seeks sanctions against UBS for its failure to preserve the missing backup tapes and deleted e-mails. In particular, Zubulake seeks the following relief: (a) an order

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[6] Zubulake III, 216 F.R.D. at 287.

[7] See 3/26/03 Oral Argument Transcript at 40 (Statement of Kevin Leblang, counsel to UBS) ("As of August when Ms. Zubulake filed a charge, everyone was told nothing gets deleted and we searched everyone's computer, everyone's hard files, the human resources files and the legal files.").

[8] See 9/26/03 Oral Argument Transcript ("9/26/03 Tr.") at 18 (Statement of Norman C. Simon, counsel to UBS); see also 10/14/03 Letter from Norman Simon to the Court ("10/14/03 Ltr.") at 2.

requiring UBS to pay in full the costs of restoring the remainder of the monthly backup tapes; (b) an adverse inference instruction against UBS with respect to the backup tapes that are missing; and (c) an order directing UBS to bear the costs of re-deposing certain individuals, such as Chapin, concerning the issues raised in newly produced e-mails.

II. LEGAL STANDARD

Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[9] The spoliation of evidence germane "to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction."[10] However, "[t]he determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis."[11] The authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the

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[9] West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

[10] Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998).

[11] Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001).

court's own inherent powers.[12]

III. DISCUSSION

It goes without saying that a party can only be sanctioned for destroying evidence if it had a duty to preserve it. If UBS had no such duty, then UBS cannot be faulted. I begin, then, by discussing the extent of a party's duty to preserve evidence.

A. Duty to Preserve

"The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[13] Identifying the boundaries of the duty to preserve involves two related inquiries: when does the duty to preserve attach, and what evidence must be preserved?

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[12] See Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (Francis, M.J.) (citing Fed. R. Civ. P. 37). See also Shepherd v. American Broadcasting Companies, 62 F.3d 1469, 1474 (D.C. Cir. 1995) ("When rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap."); id. at 1475 (holding that sanctions under the court's inherent power can "include . . . drawing adverse evidentiary inferences"). See generally Cohen & Lender, supra note 2, §§ 3.02[B][1]-[2].

[13] Fujitsu, 247 F.3d at 436 (citing Kronisch, 150 F.3d at 126). See also Silvestri v. General Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.") (citing Kronisch, 150 F.3d at 126).

1. The Trigger Date

In this case, the duty to preserve evidence arose, at the latest, on August 16, 2001, when Zubulake filed her EEOC charge.[14] At that time, UBS's in-house attorneys cautioned employees to retain all documents, including e-mails and backup tapes, that could potentially be relevant to the litigation.[15] In meetings with Chapin, Clarke, Kim, Hardisty, John Holland (Chapin's supervisor), and Dominic Vail (Zubulake's former supervisor) held on August 29-31, 2001, UBS's outside counsel reiterated the need to preserve documents.[16]

But the duty to preserve may have arisen even before the EEOC complaint was filed. Zubulake argues that UBS "should have known that the evidence [was] relevant to future litigation,"[17] as early as April 2001, and thus had a duty to preserve it. She offers two pieces of evidence in support of this argument. First, certain UBS employees titled e-mails pertaining to Zubulake "UBS Attorney Client Privilege" starting

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[14] See 9/26/03 Tr. at 16 (statement of Norman C. Simon agreeing that the duty to preserve attached no later than August 2001).

[15] See 10/14/03 Ltr. and attached exhibits (reflecting correspondence from UBS's in-house counsel reiterating, in writing, the August 2001 oral directive to UBS employees to preserve documents).

[16] See id. at 1 n.1.

[17] Fujitsu, 247 F.3d at 436.

in April 2001, notwithstanding the fact that no attorney was copied on the e-mail and the substance of the e-mail was not legal in nature. Second, Chapin admitted in his deposition that he feared litigation from as early as April 2001:

> Q: Did you think that Ms. Zubulake was going to sue UBS when you received these documents?
> A: What dates are we talking about?
> Q: Late April 2001.
> A: Certainly it was something that was in the back of my head.[18]

Merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve. But in this case, it appears that almost everyone associated with Zubulake recognized the possibility that she might sue. For example, an e-mail authored by Zubulake's co-worker Vinnay Datta, concerning Zubulake and labeled "UBS attorney client priviladge [sic]," was distributed to Chapin (Zubulake's supervisor), Holland and Leland Tomblick (Chapin's supervisor), Vail (Zubulake's former supervisor), and Andrew Clarke (Zubulake's co-worker) in late April 2001.[19] That e-mail, replying to one from Hardisty, essentially called for Zubulake's termination: "Our biggest strength as a firm and as a desk is our ability to share

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[18] 2/12/03 Deposition of Matthew Chapin at 247:14-247:19, Ex. B. to the 9/15/03 Letter from James Batson to the Court ("Batson Ltr.").

[19] See 4/27/01 e-mail, Ex. A to Batson Ltr.

information and relationships. Any person who threatens this in any way should be firmly dealt with. . . . [B]elieve me that a lot of other [similar] instances have occurred earlier."[20]

Thus, the relevant people at UBS anticipated litigation in April 2001. The duty to preserve attached at the time that litigation was reasonably anticipated.

2. Scope

The next question is: What is the scope of the duty to preserve? Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, "no". Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation.[21] As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.[22]

At the same time, anyone who anticipates being a party

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[20] Id.

[21] Cf. Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, 1997 WL 3335279, at *4 (E.D. Ark. Aug. 29, 1997) ("to hold that a corporation is under a duty to preserve all e-mail potentially relevant to any future litigation would be tantamount to holding that the corporation must preserve all e-mail. . . . Such a proposition is not justified.").

[22] See, e.g., The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery cmt 6.h (Sedona Conference Working Group Series 2003) ("Absent specific circumstances, preservation obligations should not extend to disaster recovery backup tapes. . . .").

or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary. "While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."[23]

i. Whose Documents Must Be Retained?

The broad contours of the duty to preserve are relatively clear. That duty should certainly extend to any documents or tangible things (as defined by Rule 34(a))[24] made by individuals "likely to have discoverable information that the disclosing party may use to support its claims or defenses."[25] The duty also includes documents prepared for those individuals, to the extent those documents can be readily identified (e.g.,

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[23] Turner, 142 F.R.D. at 72 (quoting William T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)).

[24] See Fed. R. Civ. P. 34(a) (defining the term "document" to "includ[e] writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form"); see also Zubulake I, 2003 WL 21087884, at *6 (holding that the term "document," within the meaning of Rule 34(a), includes e-mails contained on backup tapes).

[25] Fed. R. Civ. P. 26(a)(1)(A).

from the "to" field in e-mails). The duty also extends to information that is relevant to the claims or defenses of any party, or which is "relevant to the subject matter involved in the action."[26] Thus, the duty to preserve extends to those employees likely to have relevant information -- the "key players" in the case. In this case, all of the individuals whose backup tapes were lost (Chapin, Hardisty, Tong, Datta and Clarke) fall into this category.[27]

ii. What Must Be Retained?

A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter. In recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished. For example, a litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at the time the duty to preserve attaches (to

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[26] Fed. R. Civ. P. 26(b)(1).

[27] See 9/26/03 Tr. at 17 (Statement of Norman C. Simon agreeing that the duty to preserve applied to the documents of Chapin, Hardisty, Tong, Datta and Clarke).

preserve documents in the state they existed at that time), creates a complete set of relevant documents. Presumably there are a multitude of other ways to achieve the same result.

iii. Summary of Preservation Obligations

The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold.

However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of "key players" to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes.

iv. What Happened at UBS After August 2001?

By its attorney's directive in August 2002, UBS endeavored to preserve all backup tapes that existed in August 2001 (when Zubulake filed her EEOC charge) that captured data for employees identified by Zubulake in her document request, and all such monthly backup tapes generated thereafter. These backup tapes existed in August 2002, because of UBS's document retention policy, which required retention for three years.[28] In August 2001, UBS employees were instructed to maintain active electronic documents pertaining to Zubulake in separate files.[29] Had these directives been followed, UBS would have met its preservation obligations by preserving one copy of all relevant documents that existed at, or were created after, the time when the duty to preserve attached.

In fact, UBS employees did not comply with these directives. Three backup tapes containing the e-mail files of Chapin, Hardisty, Clarke and Datta created after April 2001 were lost, despite the August 2002 directive to maintain those tapes. According to the UBS document retention policy, these three monthly backup tapes from April and June 2001 should have been

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[28] See Zubulake I, 2003 WL 21087884, at *3 ("Nightly backup tapes were kept for twenty working days, weekly tapes for one year, and monthly tapes for three years.").

[29] See Zubulake III, 216 F.R.D. at 287.

retained for three years.[30]

The two remaining lost backup tapes were for the time period after Zubulake filed her EEOC complaint (Rose Tong's tapes for August and October 2001). UBS has offered no explanation for why these tapes are missing. UBS initially argued that Tong is a Hong Kong based UBS employee and thus her backup tapes "are not subject to any internal retention policy."[31] However, UBS subsequently informed the Court that there was a document retention policy in place in Hong Kong starting in June 2001, although it only required that backup tapes be retained for one month.[32] It also instructed employees "not [to] delete any emails if they are aware that . . . litigation is pending or likely, or during . . . a discovery process."[33] In any event, it appears that UBS did not directly order the preservation of Tong's backup tapes until August 2002, when Zubulake made her

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[30] See supra note 28. According to a chart prepared by UBS's attorneys and presented during oral arguments, the three backup tapes of U.S. personnel were in fact deleted between October 2001 and February 2002 -- after UBS staff were warned to retain documents, but before they were told specifically to preserve backup tapes.

[31] 9/17/03 Letter from Kevin Leblang to the Court ("Leblang Ltr.").

[32] See 10/14/03 Ltr. at 2-3; see also UBS Asia policy for "Retention of Back-up Tapes of Email Servers," ("UBS Asia Policy") Ex. F to 10/14/03 Ltr.

[33] UBS Asia Policy at 2.

discovery request.[34]

In sum, UBS had a duty to preserve the six-plus backup tapes (that is, six complete backup tapes and part of a seventh) at issue here.

B. Remedies

As noted, Zubulake has requested three remedies for UBS's spoliation of evidence. I consider each remedy in turn.

1. Reconsideration of the Cost-Shifting Order

Zubulake's request that this Court re-consider its July 24, 2003, Order in Zubulake III is inappropriate. At the time that motion was made, the Court was well aware that certain e-mails had not been retained and that certain backup tapes were missing.[35] Indeed, Zubulake urged that these missing backup tapes "be considered as a factor in why the costs should be shifted to defendants," in part because she would have chosen one of the lost tapes as part of the court-ordered sample restoration.[36] And these lost tapes and deleted e-mails did, in fact, inform my resolution of the cost-shifting motion. In Zubulake III, in my analysis of the marginal utility factors, I specifically noted that "there is some evidence that Chapin was

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[34] See 9/26/03 Tr. at 31, 35-36.

[35] See 9/26/03 Tr. at 27.

[36] 6/17/03 Oral Argument Transcript (Statement of James Batson).

concealing and deleting especially relevant e-mails."[37] There is therefore no need to reconsider that ruling in light of the instant motion; this evidence already played a role in the cost-shifting decision.

2. Adverse Inference

Zubulake next argues that UBS's spoliation warrants an adverse inference instruction. Zubulake asks that the jury in this case be instructed that it can infer from the fact that UBS destroyed certain evidence that the evidence, if available, would have been favorable to Zubulake and harmful to UBS. In practice, an adverse inference instruction often ends litigation -- it is too difficult a hurdle for the spoliator to overcome. The in terrorem effect of an adverse inference is obvious. When a jury is instructed that it may "infer that the party who destroyed potentially relevant evidence did so 'out of a realization that the [evidence was] unfavorable,'"[38] the party suffering this instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly.[39]

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[37] 216 F.R.D. at 287.

[38] Linnen v. A.H. Robins Co., No. 97-2307, 1999 WL 462015, at *11 (Mass. Super. June 16, 1999) (alteration in original) (quoting Blinzler v. Marriott International, Inc., 81 F.3d 1148, 1158 (1st Cir. 1996)).

[39] See Mary Kay Brown & Paul D. Weiner, Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron, 74 Pa.

A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind" and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.[40] In this circuit, a "culpable state of mind" for purposes of a spoliation inference includes ordinary negligence.[41] When evidence is destroyed in bad faith (i.e., intentionally or willfully), that fact alone is sufficient to demonstrate relevance.[42] By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions.[43]

B.A.Q. 1, 7 (2003) (listing "severe sanctions, such as adverse inference instructions" imposed by courts when "relevant electronic evidence was not preserved, or was intentionally destroyed"); but see Mosel Vitelic Corp. v. Micron Technology, Inc., 162 F. Supp. 2d 307, 315 (D. Del. 2003) ("adverse inference instructions are one of the least severe sanctions which the court can impose").

[40] Byrnie v. Town of Cromwell, 243 F.3d 93, 107-12 (2d Cir. 2001).

[41] See Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002).

[42] See id. at 109.

[43] See id.

a. Duty to Preserve

For the reasons already discussed, UBS had -- and breached -- a duty to preserve the backup tapes at issue. Zubulake has thus established the first element.

b. Culpable State of Mind

Zubulake argues that UBS's spoliation was "intentional -- or, at a minimum, grossly negligent."[44] Yet, of dozens of relevant backup tapes, only six and part of a seventh are missing. Indeed, UBS argues that the tapes were "inadvertently recycled well before plaintiff requested them and even before she filed her complaint [in February 2002]."[45]

But to accept UBS's argument would ignore the fact that, even though Zubulake had not yet requested the tapes or filed her complaint, UBS had a duty to preserve those tapes. Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.[46] (Of course, this would not apply

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[44] See Batson Ltr. at 2.

[45] Leblang Ltr. at 2.

[46] See Black's Law Dictionary (6th ed. 1991) (defining "negligence" as "that legal delinquency which results whenever a man fails to exhibit the care which he ought to exhibit, whether it be slight, ordinary, or great. It is characterized chiefly by inadvertence, thoughtlessness, inattention, and the like. . . ."). Cf. Kier v. UnumProvident Corp., No. 02 Civ. 8781, 2003 WL 21997747, at *13 (S.D.N.Y. Aug. 22, 2003) (criticizing defendant for loss of e-mails even though loss occurred "through the fault of no one," because "[i]f UnumProvident had been as diligent as it should have been . . . many fewer [backup] tapes would have been inadvertently

to destruction caused by events outside of the party's control, e.g., a fire in UBS's offices).

Whether a company's duty to preserve extends to backup tapes has been a grey area. As a result, it is not terribly surprising that a company would think that it did not have a duty to preserve all of its backup tapes, even when it reasonably anticipated the onset of litigation. Thus, UBS's failure to preserve all potentially relevant backup tapes was merely negligent, as opposed to grossly negligent or reckless.[47]

UBS's destruction or loss of Tong's backup tapes, however, exceeds mere negligence. UBS failed to include these backup tapes in its preservation directive in this case, notwithstanding the fact that Tong was the human resources employee directly responsible for Zubulake and who engaged in continuous correspondence regarding the case. Moreover, the lost tapes covered the time period after Zubulake filed her EEOC charge, when UBS was unquestionably on notice of its duty to preserve. Indeed, Tong herself took part in much of the correspondence over Zubulake's charge of discrimination. Thus, UBS was grossly negligent, if not reckless, in not preserving those backup tapes.

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overwritten.").

[47] Litigants are now on notice, at least in this Court, that backup tapes that can be identified as storing information created by or for "key players" must be preserved.

Because UBS was negligent -- and possibly reckless -- Zubulake has satisfied her burden with respect to the second prong of the spoliation test.

c. Relevance

Finally, because UBS's spoliation was negligent and possibly reckless, but not willful, Zubulake must demonstrate that a reasonable trier of fact could find that the missing e-mails would support her claims.[48] In order to receive an adverse inference instruction, Zubulake must demonstrate not only that UBS destroyed relevant evidence as that term is ordinarily understood,[49] but also that the destroyed evidence would have been favorable to her.[50] "This corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to

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[48] See Byrnie, 243 F.3d at 107-12.

[49] See Fed. R. Evid. 401; Fed. R. Civ. P. 26(b)(1)

[50] See Residential Funding, 306 F.3d at 108-09 ("Although we have stated that, to obtain an adverse inference instruction, a party must establish that the unavailable evidence is 'relevant' to its claims or defenses, our cases make clear that 'relevant' in this context means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that 'the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction.'") (citations, footnote, and alterations omitted).

him."[51] This is equally true in cases of gross negligence or recklessness; only in the case of willful spoliation is the spoliator's mental culpability itself evidence of the relevance of the documents destroyed.[52]

On the one hand, I found in Zubulake I and Zubulake III that the e-mails contained on UBS's backup tapes were, by-and-large, relevant in the sense that they bore on the issues in the litigation.[53] On the other hand, Zubulake III specifically held that "nowhere (in the sixty-eight e-mails produced to the Court) is there evidence that Chapin's dislike of Zubulake related to her gender."[54] And those sixty-eight e-mails, it should be emphasized, were the ones selected by Zubulake as being the most relevant among all those produced in UBS's sample restoration. There is no reason to believe that the lost e-mails would be any more likely to support her claims.

Furthermore, the likelihood of obtaining relevant information from the six-plus lost backup tapes at issue here is even lower than for the remainder of the tapes, because the majority of the six-plus tapes cover the time prior to the filing

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[51] Turner, 142 F.R.D. at 77 (citing Stanojev v. Ebasco Services, Inc., 643 F.2d 914, 924 n.7 (2d Cir. 1981)).

[52] See Residential Funding, 306 F.3d at 109.

[53] See Zubulake I, 2003 WL 21087884, at *6; Zubulake III, 216 F.R.D. at 284-87.

[54] 216 F.R.D. at 286.

of Zubulake's EEOC charge. The tape that is most likely to contain relevant e-mails is Tong's August 2001 tape -- the tape for the very month that Zubulake filed her EEOC charges. But the majority of the e-mails on that tape are preserved on the September 2001 tape. Thus, there is no reason to believe that peculiarly unfavorable evidence resides solely on that missing tape. Accordingly, Zubulake has not sufficiently demonstrated that the lost tapes contained relevant information.[55]

d. Summary

In sum, although UBS had a duty to preserve all of the backup tapes at issue, and destroyed them with the requisite culpability, Zubulake cannot demonstrate that the lost evidence would have supported her claims. Under the circumstances, it would be inappropriate to give an adverse inference instruction to the jury.

3. UBS Must Pay the Costs of Additional Depositions

Even though an adverse inference instruction is not warranted, there is no question that e-mails that UBS should have produced to Zubulake were destroyed by UBS. That being so, UBS must bear Zubulake's costs for re-deposing certain witnesses for

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[55] See generally Turner, 142 F.R.D. at 77 ("Where, as here, there is no extrinsic evidence whatever tending to show that the destroyed evidence would have been unfavorable to the spoliator, no adverse inference is appropriate."); Concord Boat Corp., 1997 WL 33352759, at *7 ("It would simply be inappropriate to give an adverse inference instruction based upon speculation that deleted e-mails would be unfavorable to Defendant's case.").

the limited purpose of inquiring into issues raised by the destruction of evidence and any newly discovered e-mails. In particular, UBS is ordered to pay the costs of re-deposing Chapin, Hardisty, Tong, and Josh Varsano (a human resources employee in charge of the Asian Equities Sales Desk and known to have been in contact with Tong during August 2001).[56]

IV. CONCLUSION

For the reasons set forth above, Zubulake's motions for an adverse inference instruction and for reconsideration of the Court's July 24, 2003, Order are denied. Her motion seeking costs for additional depositions is granted.

SO ORDERED:

_____
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
October 22, 2003

[56] See 9/26/03 Tr. at 26 (statement of James Batson, seeking to re-depose only these four employees).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

LAURA ZUBULAKE,	:	**OPINION AND ORDER**
Plaintiff,	:	02 Civ. 1243 (SAS)
- against -	:	
UBS WARBURG LLC, UBS WARBURG, and UBS AG,	:	
Defendants.	:	

- -x

SHIRA A. SCHEINDLIN, U.S.D.J.:

Commenting on the importance of speaking clearly and listening closely, Phillip Roth memorably quipped, "The English language is a form of communication! . . . Words aren't only bombs and bullets — no, they're little gifts, containing meanings!"[1] What is true in love is equally true at law: Lawyers and their clients need to communicate clearly and effectively with one another to ensure that litigation proceeds efficiently. When communication between counsel and client breaks down, conversation becomes "just crossfire,"[2] and there are usually casualties.

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[1] PHILIP ROTH, PORTNOY'S COMPLAINT (1967).

[2] *Id.*

I. INTRODUCTION

This is the fifth written opinion in this case, a relatively routine employment discrimination dispute in which discovery has now lasted over two years. Laura Zubulake is once again moving to sanction UBS for its failure to produce relevant information and for its tardy production of such material. In order to decide whether sanctions are warranted, the following question must be answered: Did UBS fail to preserve and timely produce relevant information and, if so, did it act negligently, recklessly, or willfully?

This decision addresses counsel's obligation to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information and, perhaps more importantly, a client's obligation to heed those instructions. Early on in this litigation, UBS's counsel — both in-house and outside — instructed UBS personnel to retain relevant electronic information. Notwithstanding these instructions, certain UBS employees deleted relevant e-mails. Other employees never produced relevant information to counsel. As a result, many discoverable e-mails were not produced to Zubulake until recently, even though they were responsive to a document request propounded on June 3,

2002.[3] In addition, a number of e-mails responsive to that document request were deleted and have been lost altogether.

Counsel, in turn, failed to request retained information from one key employee and to give the litigation hold instructions to another. They also failed to adequately communicate with another employee about how she maintained her computer files. Counsel also failed to safeguard backup tapes that might have contained some of the deleted e-mails, and which would have mitigated the damage done by UBS's destruction of those e-mails.

The conduct of both counsel and client thus calls to mind the now-famous words of the prison captain in *Cool Hand Luke*: "What we've got here is a failure to communicate."[4] Because of this failure by *both* UBS and its counsel, Zubulake has been prejudiced. As a result, sanctions are warranted.

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[3] *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 312 (S.D.N.Y. 2003) ("*Zubulake I*") (quoting Zubulake's document request, which called for "[a]ll documents concerning any communications by or between UBS employees concerning Plaintiff," and defining "document" to include "without limitation, electronic or computerized data compilations.").

[4] Captain, Road Prison 36, in COOL HAND LUKE (1967), found at http://ask.yahoo.com/ask/20011026.html.

II. FACTS

The allegations at the heart of this lawsuit and the history of the parties' discovery disputes have been well-documented in the Court's prior decisions,[5] familiarity with which is presumed. In short, Zubulake is an equities trader specializing in Asian securities who is suing her former employer for gender discrimination, failure to promote, and retaliation under federal, state, and city law.

A. Background

Zubulake filed an initial charge of gender discrimination with the EEOC on August 16, 2001.[6] Well before that, however — as early as April 2001 — UBS employees were on notice of Zubulake's impending court action.[7] After

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[5] *See Zubulake I*, 217 F.R.D. 309 (addressing the legal standard for determining the cost allocation for producing e-mails contained on backup tapes); *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243, 2003 WL 21087136 (S.D.N.Y. May 13, 2003) ("*Zubulake II*") (addressing Zubulake's reporting obligations); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake III*") (allocating backup tape restoration costs between Zubulake and UBS); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) ("*Zubulake IV*") (ordering sanctions against UBS for violating its duty to preserve evidence).

[6] *See Zubulake I*, 217 F.R.D. at 312.

[7] *See Zubulake IV*, 220 F.R.D. at 217 ("Thus, the relevant people at UBS anticipated litigation in April 2001. The duty to preserve attached at the time that litigation was reasonably anticipated.").

she received a right-to-sue letter from the EEOC, Zubulake filed this lawsuit on February 15, 2002.[8]

Fully aware of their common law duty to preserve relevant evidence, UBS's in-house attorneys gave oral instructions in August 2001 — immediately after Zubulake filed her EEOC charge — instructing employees not to destroy or delete material potentially relevant to Zubulake's claims, and in fact to segregate such material into separate files for the lawyers' eventual review.[9] This warning pertained to both electronic and hard-copy files, but did *not* specifically pertain to so-called "backup tapes," maintained by UBS's information technology personnel.[10] In particular, UBS's in-house counsel, Robert L. Salzberg, "advised relevant UBS employees to preserve and turn over to counsel all files, records or other written memoranda or documents concerning the allegations raised in the [EEOC] charge or any aspect of [Zubulake's] employment."[11] Subsequently — but still in August 2001 — UBS's outside counsel met with a number of the key players in the litigation and reiterated Mr. Salzberg's instructions, reminding them

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[8] *See Zubulake I*, 217 F.R.D. at 312.

[9] *See Zubulake IV*, 220 F.R.D. at 215.

[10] *See id.*

[11] *See* 10/14/03 Letter from Norman Simon, counsel to UBS, to the Court ("10/14/03 Simon Ltr.") at 1.

to preserve relevant documents, "including e-mails."[12] Salzberg reduced these instructions to writing in e-mails dated February 22, 2002[13] — immediately after Zubulake filed her complaint — and September 25, 2002.[14] Finally, in August 2002, after Zubulake propounded a document request that specifically called for e-mails stored on backup tapes, UBS's outside counsel instructed UBS information technology personnel to stop recycling backup tapes.[15] *Every* UBS employee mentioned in this Opinion (with the exception of Mike Davies) either personally spoke to UBS's outside counsel about the duty to preserve e-mails, or was a recipient of one of Salzberg's e-mails.[16]

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[12] *Id.* at 1 n.1.

[13] *See* Ex. A to 10/14/03 Simon Ltr.

[14] *See* Ex. C to 10/14/03 Simon Ltr.

[15] *See Zubulake IV*, 220 F.R.D. at 215. *See also* 10/14/03 Simon Ltr. at 2 ("In late August 2002, plaintiff first requested backup e-mails from certain UBS employees. Thereafter, I advised UBS's information technology personnel to locate and retain all existing backup tapes for employees identified by plaintiff. I re-emphasized that directive and confirmed that these tapes continued to be preserved both orally and in writing on several subsequent occasions.").

[16] Specifically, UBS's outside counsel spoke with Matthew Chapin on August 29, 2001, with Joy Kim and Andrew Clarke on August 30, 2001, and with Jeremy Hardisty, John Holland, and Dominic Vail on August 31, 2001. *See* 10/14/03 Simon Ltr. at 1 n.1. Holland, Chapin, Hardisty, Brad Orgill, James Tregear, Rose Tong, Vail, Barbara Amone, Joshua Varsano, and Rebecca White were all direct recipients of Salzberg's e-mails. *See* Ex. A to 10/14/03 Simon Ltr.

B. Procedural History

In *Zubulake I*, I addressed Zubulake's claim that relevant e-mails had been deleted from UBS's active servers and existed only on "inaccessible" archival media (*i.e.*, backup tapes).[17] Arguing that e-mail correspondence that she needed to prove her case existed only on those backup tapes, Zubulake called for their production. UBS moved for a protective order shielding it from discovery altogether or, in the alternative, shifting the cost of backup tape restoration onto Zubulake. Because the evidentiary record was sparse, I ordered UBS to bear the costs of restoring a sample of the backup tapes.[18]

After the sample tapes were restored, UBS continued to press for cost shifting with respect to any further restoration of backup tapes. In *Zubulake III*, I ordered UBS to bear the lion's share of restoring certain backup tapes because Zubulake was able to demonstrate that those tapes were likely to contain relevant information.[19] Specifically, Zubulake had demonstrated that UBS had failed to maintain all relevant information (principally e-mails) in its active files. After

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[17] *See generally Zubulake I*, 217 F.R.D. 309.

[18] *See id.* at 324.

[19] *See Zubulake III*, 216 F.R.D. at 289.

Zubulake III, Zubulake chose to restore sixteen backup tapes.[20] "In the restoration effort, the parties discovered that certain backup tapes [were] missing."[21] They also discovered a number of e-mails on the backup tapes that were missing from UBS's active files, confirming Zubulake's suspicion that relevant e-mails were being deleted or otherwise lost.[22]

Zubulake III begat *Zubulake IV*, where Zubulake moved for sanctions as a result of UBS's failure to preserve all relevant backup tapes, and UBS's deletion of relevant e-mails. Finding fault in UBS's document preservation strategy but lacking evidence that the lost tapes and deleted e-mails were particularly favorable to Zubulake, I ordered UBS to pay for the re-deposition of several key UBS employees — Varsano, Chapin, Hardisty, Kim, and Tong — so that Zubulake could inquire about the newly-restored e-mails.[23]

C. The Instant Dispute

The essence of the current dispute is that during the re-depositions required by *Zubulake IV*, Zubulake learned about more deleted e-mails and about

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[20] 4/22/04 Oral Argument Transcript ("Tr.") at 29-30.

[21] *Zubulake IV*, 220 F.R.D. at 215.

[22] *See id.*; *see also Zubulake III*, 216 F.R.D. at 287.

[23] *See Zubulake IV*, 220 F.R.D. at 222 (finding that spoliation was not willful and declining to grant an adverse inference instruction).

the existence of e-mails preserved on UBS's active servers that were, to that point, never produced. In sum, Zubulake has now presented evidence that UBS personnel deleted relevant e-mails, some of which were subsequently recovered from backup tapes (or elsewhere) and thus produced to Zubulake long after her initial document requests, and some of which were lost altogether. Zubulake has also presented evidence that some UBS personnel did not produce responsive documents to counsel until recently, depriving Zubulake of the documents for almost two years.

1. Deleted E-Mails

Notwithstanding the clear and repeated warnings of counsel, Zubulake has proffered evidence that a number of key UBS employees — Orgill, Hardisty, Holland, Chapin, Varsano, and Amone — failed to retain e-mails germane to Zubulake's claims. Some of the deleted e-mails were restored from backup tapes (or other sources) and have been produced to Zubulake, others have been altogether lost, though there is strong evidence that they once existed. Although I have long been aware that certain e-mails were deleted,[24] the re-depositions demonstrate the scope and importance of those documents.

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[24] *See Zubulake III*, 216 F.R.D. at 287.

a. At Least One E-Mail Has Never Been Produced

At least one e-mail has been irretrievably lost; the existence of that e-mail is known only because of oblique references to it in other correspondence. It has already been shown that Chapin — the alleged primary discriminator — deleted relevant e-mails.[25] In addition to those e-mails, Zubulake has evidence suggesting that Chapin deleted at least one other e-mail that has been lost *entirely*. An e-mail from Chapin sent at 10:47 AM on September 21, 2001, asks Kim to send him a "document" recounting a conversation between Zubulake and a co-worker.[26] Approximately 45 minutes later, Chapin sent an e-mail complaining about Zubulake to his boss and to the human resources employees handling Zubulake's case purporting to contain a verbatim recitation of a conversation between Zubulake and her co-worker, as overheard by Kim.[27] This conversation allegedly took place on September 18, 2001, at 10:58 AM.[28] There is reason to believe that immediately after that conversation, Kim sent Chapin an e-mail that

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[25] *See id.* (finding that Chapin "was concealing and deleting especially relevant e-mails").

[26] *See* 9/21/01 e-mail from Chapin to Kim, UBSZ 001400.

[27] 7/21/01 e-mail from Chapin to Holland, Varsano and Tong, UBSZ 001399.

[28] *See id.*

contained the verbatim quotation that appears in Chapin's September 21 e-mail — the "document" that Chapin sought from Kim just prior to sending that e-mail — and that Chapin deleted it.[29] That e-mail, however, has never been recovered and is apparently lost.

Although Zubulake has only been able to present concrete evidence that this one e-mail was irretrievably lost, there may well be others. Zubulake has presented extensive proof, detailed below, that UBS personnel were deleting relevant e-mails. Many of those e-mails were recovered from backup tapes. The UBS record retention policies called for monthly backup tapes to be retained for three years.[30] The tapes covering the relevant time period (circa August 2001) should have been available to UBS in August 2002, when counsel instructed UBS's information technology personnel that backup tapes were also subject to

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[29] Kim sent an e-mail at 11:19 AM on September 18, bearing the subject "2," which appears to contain a *different* verbatim quotation from Zubulake. *See* UBSZ 004047. The e-mail containing the quotation that Chapin used in his September 21 e-mail would have borne the subject "1" and been sent sometime between 10:58 AM and 11:19 AM. *See also* 2/6/04 Deposition of Matthew Chapin at 565 (Chapin testifying that he might have pasted the quotation from another document); *id.* at 587 (Chapin testifying that he wasn't sure whether the quotation was a paraphrase or pasted from another e-mail).

[30] *See Zubulake I*, 217 F.R.D. at 314 ("Nightly backup tapes were kept for twenty working days, weekly tapes for one year, and monthly tapes for three years. After the relevant time period elapsed, the tapes were recycled.").

the litigation hold.

Nonetheless, many backup tapes for the most relevant time periods are missing, including: Tong's tapes for June, July, August, and September of 2001; Hardisty's tapes for May, June, and August of 2001; Clarke and Vinay Datta's tapes for April and September 2001; and Chapin's tape for April 2001.[31] Zubulake did not even learn that four of these tapes were missing until after *Zubulake IV*. Thus, it is impossible to know just how many relevant e-mails have been lost in their entirety.[32]

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[31] *See* Current List of Missing Monthly Backup Tapes, Ex. E to 5/21/04 Reply Affirmation of James A. Batson, counsel to Zubulake ("Batson Reply Aff."). UBS does have some weekly backup tapes for portions of these times for everyone but Tong. *See id.* n.1.

[32] In *Zubulake IV*, I held that UBS's destruction of relevant backup tapes was negligent, rather than willful, because whether the duty to preserve extended to backup tapes was "a grey area." 220 F.R.D. at 221. I further held that "[l]itigants are now on notice, at least in this Court, that backup tapes that can be identified as storing information created by or for 'key players' must be preserved." *Id.* at 221 n.47.

Because UBS lost the backup tapes mentioned in this opinion well before *Zubulake IV* was issued, it was not on notice of the precise contours of its duty to preserve backup tapes. Accordingly, I do not discuss UBS's destruction of relevant backup tapes as proof that UBS acted willfully, but rather to show that Zubulake can no longer prove what was deleted and when, and to demonstrate that the scope of e-mails that have been irrevocably lost is broader than initially thought.

b. Many E-Mails Were Deleted and Only Later Recovered from Alternate Sources

Other e-mails were deleted in contravention of counsel's "litigation hold" instructions, but were subsequently recovered from alternative sources — such as backup tapes — and thus produced to Zubulake, albeit almost two years after she propounded her initial document requests. For example, an e-mail from Hardisty to Holland (and on which Chapin was copied) reported that Zubulake said "that all she want[ed] is to be treated like the other 'guys' on the desk."[33] That e-mail was recovered from Hardisty's August 2001 backup tape — and thus it was on his active server as late as August 31, 2001, when the backup was generated — but was not in his active files. That e-mail therefore *must have* been deleted subsequent to counsel's warnings.[34]

Another e-mail, from Varsano to Hardisty dated August 31, 2001 — the very day that Hardisty met with outside counsel — forwarded an earlier message from Hardisty dated June 29, 2001, that recounted a conversation in which Hardisty "warned" Chapin about his management of Zubulake, and in

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[33] 7/23/01 e-mail from Hardisty to Holland, UBSZ 002957.

[34] Because the e-mail was dated July 23, 2001, the same cannot be said of Chapin or Holland. Although they had a duty to preserve relevant e-mails starting in April 2001, counsel did not specifically warn them until August 2001. Chapin and Holland might have deleted the e-mail prior to counsel's warning.

which Hardisty reminded Chapin that Zubulake could "be a good broker."[35] This e-mail was absent from UBS's initial production and had to be restored from backup; apparently neither Varsano nor Hardisty had retained it.[36] This deletion is especially surprising because Varsano retained the June 29, 2001 e-mail for over two months before he forwarded it to Hardisty.[37] Indeed, Varsano testified in his deposition that he "definitely" "saved all of the e-mails that [he] received concerning Ms. Zubulake" in 2001, that they were saved in a separate "very specific folder," and that "all of those e-mails" were produced to counsel.[38]

As a final example, an e-mail from Hardisty to Varsano and Orgill, dated September 1, 2001, specifically discussed Zubulake's termination. It read: "LZ — ok once lawyers have been signed off, probably one month, but most

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[35] 8/31/01 e-mail from Varsano to Hardisty, UBSZ 002968. Because the header information from Hardisty's June 29, 2001 e-mail was cropped when Varsano forwarded it, it is not clear who — besides, presumably, Varsano — received that message.

[36] *See* Example of Relevant E-Mails, in Chronological Order, That Were Restored From April to October 2001 Backup Tapes, Ex. I to the 4/30/04 Affirmation of James A. Batson ("Batson Aff."). This chart does not clearly indicate from which backup tape the e-mail was restored.

[37] *See id.*; *see also* 6/29/01 e-mail from Hardisty to Holland, Amone and Varsano, UBSZ 004097 (the underlying e-mail, also restored from a backup tape).

[38] 1/26/04 Deposition of Joshua Varsano ("Varsano Dep.") at 289-90. If Varsano's testimony is credited, then counsel somehow failed to produce those e-mails to Zubulake.

easily done in combination with the full Asiapc [downsizing] announcement. We will need to document her performance post her warning HK. Matt [Chapin] is doing that."[39] Thus, Orgill and Hardisty had decided to terminate Zubulake as early as September 1, 2001. Indeed, two days later Orgill replied, "It's a pity we can't act on LZ earlier."[40] Neither the authors nor any of the recipients of these e-mails retained any of them, even though these e-mails were sent within days of Hardisty's meeting with outside counsel. They were not even preserved on backup tapes, but were only recovered because Kim happened to have retained copies.[41] Rather, all three people (Hardisty, Orgill and Varsano) deleted these e-mails from their computers by the end of September 2001. Apart from their direct relevance to Zubulake's claims, these e-mails may also serve to rebut Orgill and Hardisty's deposition testimony. Orgill testified that he played no role in the

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[39] 9/3/01 e-mail from Orgill to Hardisty and Varsano (replying to and attaching 9/1/01 e-mail from Hardisty to Varsano and Orgill), UBSZ 002965.

[40] *Id.*

[41] These e-mails were some of the ones fortuitously recovered from Kim's active files, as discussed below. *See* Memorandum of Law in Support of Plaintiff's Motion for Sanctions ("Pl. Mem.") at 6 n.18. And, indeed, Kim did not have all of the original e-mails, but retained only the last e-mail in the chain of correspondence, which had the earlier e-mails in the same chain embedded in it. It is not clear why or how she obtained this e-mail.

decision to terminate Zubulake.[42] And Hardisty testified that he did not recall discussing Zubulake's termination with Orgill.[43]

These are merely examples. The proof is clear: UBS personnel unquestionably deleted relevant e-mails from their computers after August 2001, even though they had received at least two directions from counsel not to. Some of those e-mails were recovered (Zubulake has pointed to at least 45),[44] but some — and no one can say how many — were not. And even those e-mails that were recovered were produced to Zubulake well after she originally asked for them.

2. Retained, But Unproduced, E-Mails

Separate and apart from the deleted material are a number of e-mails that were absent from UBS's initial production even though they were not deleted. These e-mails existed in the active, on-line files of two UBS employees — Kim and Tong — but were not produced to counsel and thus not turned over to Zubulake until she learned of their existence as a result of her counsel's questions at deposition. Indeed, these e-mails were not produced until after Zubulake had

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[42] *See* 3/4/03 Deposition of Brad Orgill at 43.

[43] *See* 2/26/03 Deposition of Jeremy Hardisty at 262.

[44] *See* The Actual Number of E-Mails not Retained by UBS Executives Post-Dating the August EEOC Filing, Ex. H to Batson Reply Aff.

conducted thirteen depositions and four re-depositions.[45]

During her February 19, 2004, deposition, Kim testified that she was *never* asked to produce her files regarding Zubulake to counsel, nor did she ever actually produce them,[46] although she was asked to retain them.[47] One week after Kim's deposition, UBS produced seven new e-mails. The obvious inference to be drawn is that, subsequent to the deposition, counsel for the first time asked Kim to produce her files. Included among the new e-mails produced from Kim's computer was one (dated September 18, 2001) that recounts a conversation between Zubulake and Kim in which Zubulake complains about the way women are treated at UBS.[48] Another e-mail recovered from Kim's computer contained the correspondence, described above, in which Hardisty and Orgill discuss Zubulake's termination, and in which Orgill laments that she could not be fired sooner than she was.

On March 29, 2004, UBS produced several new e-mails, and three

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[45] *See* Batson Reply Aff. ¶ 6.

[46] *See* 2/19/04 Deposition of Joy Kim at 44-45.

[47] *See id.* at 35.

[48] *See* UBSZ 004047.

new e-mail retention policies, from Tong's active files.[49] At her deposition two weeks earlier, Tong explained (as she had at her first deposition, a year previous) that she kept a separate "archive" file on her computer with documents pertaining to Zubulake.[50] UBS admits that until the March 2004 deposition, it misunderstood Tong's use of the word "archive" to mean backup tapes; after her March 2004 testimony, it was clear that she meant active data. Again, the inference is that UBS's counsel then, for the first time, asked her to produce her active computer files.

Among the new e-mails recovered from Tong's computer was one, dated August 21, 2001, at 11:06 AM, from Mike Davies[51] to Tong that read, "received[.] thanks[,] mike,"[52] and which was in response to an e-mail from Tong, sent eleven minutes earlier, that read, "Mike, I have just faxed over to you the 7 pages of Laura's [EEOC] charge against the bank."[53] While Davies' three-word e-

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[49] *See* Ex. M to the Batson Aff.

[50] *See* 3/10/04 Deposition of Rose Tong at 97, 140; *see also* 3/4/03 Deposition of Rose Tong at 66-67.

[51] Davies, Tong's supervisor, was — as far as the record before the Court shows — not specifically instructed about the litigation hold by UBS's counsel.

[52] 8/21/01 e-mail from Davies to Tong, UBSZ 004352.

[53] 8/21/01 e-mail from Tong to Davies, UBSZ 004351.

mail seems insignificant in isolation, it is actually quite important.

Three hours after sending that three word response, Davies sent an e-mail to Tong with the subject line "Laura Zubulake" that reads:

> I spoke to Brad [Orgill] — he's looking to exit her asap [by the end of month], and looking for guidance from us following letter? we sent her re her performance [or does he mean PMM]
>
> I said you were on call with US yesterday and that we need US legal advise etc, but be aware he's looking to finalise quickly! — said if off by end August then no bonus consideration, but if still employed after aug consideration should be given?[54]

Davies testified that he was unaware of Zubulake's EEOC charge when he spoke with Orgill.[55] The timing of his e-mails, however — the newly produced e-mail that acknowledges receiving Zubulake's EEOC charge coming three hours before the e-mail beginning "I spoke to Brad" — strongly undercuts this claim. The new e-mail, therefore, is circumstantial evidence that could support the inference that Davies knew about the EEOC charge when he spoke with Orgill, and suggests that Orgill knew about the EEOC charge when the decision was made to terminate

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[54] 8/21/01 e-mail from Davies to Tong, UBSZ 004353. The text of this e-mail was part of UBS's initial production.

[55] *See* 3/11/03 Deposition of Mike Davies at 21 ("The EEOC application was something new to me, so it did stand out in my mind, and I hadn't had a conversation with anyone about it, so I hadn't spoken to Brad about it"); *see also id.* (Davies replying "no" in response to the question "Did you ever speak to Brad about it?").

Zubulake.[56] Its relevance to Zubulake's retaliation claim is unquestionable, and yet it was not produced until April 20, 2004.[57]

* * *

Zubulake now moves for sanctions as a result of UBS's purported discovery failings. In particular, she asks — as she did in *Zubulake IV* — that an adverse inference instruction be given to the jury that eventually hears this case.

III. LEGAL STANDARD

Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[58] "The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge,

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[56] It is also plausible that Orgill and Davies spoke days earlier — before either knew about the EEOC charge — and Davies might have omitted that information from his initial e-mail to Tong. The newly discovered e-mail, however, is helpful to Zubulake in arguing her view of the evidence.

[57] Ostensible copies of these e-mails were produced on March 29, 2004 — from where is not clear — but they appear to have the incorrect time/date stamps. The copies produced on April 20, because they came directly from Tong's computer, are more reliable.

[58] *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

and is assessed on a case-by-case basis."[59] The authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's inherent powers.[60]

The spoliation of evidence germane "to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction."[61] A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind" and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could

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[59] *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).

[60] *See Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (Francis, M.J.) (citing Fed. R. Civ. P. 37); *see also Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995) ("When rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap."); *id.* at 1475 (holding that sanctions under the court's inherent power can "include . . . drawing adverse evidentiary inferences").

[61] *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

find that it would support that claim or defense.[62]

In this circuit, a "culpable state of mind" for purposes of a spoliation inference includes ordinary negligence.[63] When evidence is destroyed in bad faith (*i.e.*, intentionally or willfully), that fact alone is sufficient to demonstrate relevance.[64] By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions.[65]

In the context of a request for an adverse inference instruction, the concept of "relevance" encompasses not only the ordinary meaning of the term,[66] but also that the destroyed evidence would have been favorable to the movant.[67]

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[62] *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107-12 (2d Cir. 2001). An adverse inference instruction may also be warranted, in some circumstances, for the untimely production of evidence. *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

[63] *See Residential Funding*, 306 F.3d at 108.

[64] *See id.* at 109.

[65] *See id.*

[66] *See* Fed. R. Evid. 401; Fed. R. Civ. P. 26(b)(1).

[67] *See Residential Funding*, 306 F.3d at 108-09 ("Although we have stated that, to obtain an adverse inference instruction, a party must establish that the unavailable evidence is 'relevant' to its claims or defenses, our cases make clear that 'relevant' in this context means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that the destroyed or unavailable evidence

"This corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him."[68] This is equally true in cases of gross negligence or recklessness; only in the case of *willful* spoliation does the degree of culpability give rise to a presumption of the relevance of the documents destroyed.[69]

IV. DISCUSSION

In *Zubulake IV*, I held that UBS had a duty to preserve its employees' active files as early as April 2001, and certainly by August 2001, when Zubulake filed her EEOC charge.[70] Zubulake has thus satisfied the first element of the adverse inference test. As noted, the central question implicated by this motion is whether UBS and its counsel took all necessary steps to guarantee that relevant data was both preserved and produced. If the answer is "no," then the next question is whether UBS acted wilfully when it deleted or failed to timely produce

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would have been of the nature alleged by the party affected by its destruction.") (quotation marks, citations, footnote, and alterations omitted).

[68] *Turner*, 142 F.R.D. at 77 (citing *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 924 n.7 (2d Cir. 1981)).

[69] *See Residential Funding*, 306 F.3d at 109.

[70] *See Zubulake IV*, 220 F.R.D. at 216-17.

relevant information — resulting in either a complete loss or the production of responsive information close to two years after it was initially sought. If UBS acted wilfully, this satisfies the mental culpability prong of the adverse inference test and also demonstrates that the deleted material was relevant.[71] If UBS acted negligently or even recklessly, then Zubulake must show that the missing or late-produced information was relevant.

A. Counsel's Duty to Monitor Compliance

In *Zubulake IV*, I summarized a litigant's preservation obligations:

> Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (*e.g.*, those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (*i.e.*, actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold.[72]

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[71] *See Residential Funding*, 306 F.3d at 109 ("[O]nly in the case of *willful* spoliation is the spoliator's mental culpability itself evidence of the relevance of the documents destroyed.")

[72] *Zubulake IV*, 220 F.R.D. at 218 (emphasis in original); *see also id.* ("[I]t does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of "key players" to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to *all* backup tapes.") (emphasis in

A party's discovery obligations do not end with the implementation of a "litigation hold" — to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.

1. Counsel's Duty to Locate Relevant Information

Once a "litigation hold" is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold," to the extent required in *Zubulake IV*. To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture.[73] This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's

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original).

[73] *Cf. Zubulake I*, 217 F.R.D. at 324 ("[i]t is necessary to thoroughly understand the responding party's computer system, both with respect to active and stored data").

recycling policy. It will also involve communicating with the "key players" in the litigation,[74] in order to understand how they stored information. In this case, for example, some UBS employees created separate computer files pertaining to Zubulake, while others printed out relevant e-mails and retained them in hard copy only. Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected. A brief conversation with counsel, for example, might have revealed that Tong maintained "archive" copies of e-mails concerning Zubulake, and that "archive" meant a separate on-line computer file, not a backup tape. Had that conversation taken place, Zubulake might have had relevant e-mails from that file two years ago.

To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each "hit." Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive

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[74] *Zubulake IV*, 220 F.R.D. at 218.

documents.[75] When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as "hits" on the second, more restrictive search. The initial broad cut merely guarantees that relevant documents are not lost.

In short, it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take *some reasonable steps* to see that sources of relevant information are located.

2. Counsel's Continuing Duty to Ensure Preservation

Once a party and her counsel have identified all of the sources of potentially relevant information, they are under a duty to retain that information (as per *Zubulake IV*) and to produce information responsive to the opposing

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[75] It might be advisable to solicit a list of search terms from the opposing party for this purpose, so that it could not later complain about which terms were used.

party's requests. Rule 26 creates a "duty to supplement" those responses.[76] Although the Rule 26 duty to supplement is nominally the party's, it really falls on counsel. As the Advisory Committee explains,

> Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information.[77]

To ameliorate this burden, the Rules impose a continuing duty to supplement responses to discovery requests *only* when "a party[,] or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney."[78]

The *continuing* duty to supplement disclosures strongly suggests that parties also have a duty to make sure that discoverable information is not lost.

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[76] Fed. R. Civ. P. 26(e).

[77] 1966 Advisory Committee Note to Fed. R. Civ. P. 26(e).

[78] *Id.* The Rules also create a duty to supplement in two other instances: (a) when the Court so orders, and (b) with respect to Rule 26(a) initial disclosures, "because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention," *id. See* Fed. R. Civ. P. 26(e).

Indeed, the notion of a "duty to preserve" connotes an ongoing obligation. Obviously, if information is lost or destroyed, it has not been preserved.[79]

The tricky question is what that continuing duty entails. What must a lawyer do to make certain that relevant information — especially electronic information — is being retained? Is it sufficient if she periodically re-sends her initial "litigation hold" instructions? What if she communicates with the party's information technology personnel? Must she make occasional on-site inspections?

Above all, the requirement must be reasonable. A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve. At the same time, counsel is more conscious of the contours of the preservation obligation; a party cannot reasonably be trusted to receive the "litigation hold" instruction once and to fully comply with it without the active supervision of counsel.[80]

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[79] *See* OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining "preserve" as "[t]o keep safe from harm or injury; to keep in safety, save, take care of, guard"); *see also id.* (defining "retain" as "[t]o keep hold or possession of; to continue having or keeping, in various senses").

[80] *See Telecom International Am. Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999) ("Once on notice [that evidence is relevant], the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to

There are thus a number of steps that counsel should take to ensure compliance with the preservation obligation. While these precautions may not be enough (or may be too much) in some cases, they are designed to promote the continued preservation of potentially relevant information in the typical case.

First, counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipated.[81] The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.

Second, counsel should communicate directly with the "key players" in the litigation, *i.e.*, the people identified in a party's initial disclosure and any subsequent supplementation thereto.[82] Because these "key players" are the "employees likely to have relevant information,"[83] it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place.

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the litigation.") (citing *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 18 (D. Neb. 1983)).

[81] *See Zubulake IV*, 220 F.R.D. at 218.

[82] *See* Fed. R. Civ. P. 26(a)(1)(A).

[83] *Zubulake IV*, 220 F.R.D. at 218.

Finally, counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place. In cases involving a small number of relevant backup tapes, counsel might be advised to take physical possession of backup tapes. In other cases, it might make sense for relevant backup tapes to be segregated and placed in storage. Regardless of what particular arrangement counsel chooses to employ, the point is to separate relevant backup tapes from others. One of the primary reasons that electronic data is lost is ineffective communication with information technology personnel. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled.

Kier v. UnumProvident Corp.[84] provides a disturbing example of what can happen when counsel and client do not effectively communicate. In that ERISA class action, the court entered an order on December 27, 2002, requiring UnumProvident to preserve electronic data, specifically including e-mails sent or received on six particular days. What ensued was a comedy of errors. First, before the court order was entered (but when it was subject to the common law

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[84] No. 02 Civ. 8781, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003).

duty to preserve) UnumProvident's technical staff unilaterally decided to take a "snapshot" of its servers instead of restoring backup tapes, which would have recovered the e-mails in question. (In fact, the snapshot was useless for the purpose of preserving these e-mails because most of them had already been deleted by the time the snapshot was generated.) Once the court issued the preservation order, UnumProvident failed to take any further steps to locate the e-mails, believing that the same person who ordered the snapshot would oversee compliance with the court order. But no one told him that.

Indeed, it was not until January 13, when senior UnumProvident legal personnel inquired whether there was any way to locate the e-mails referenced in the December 27 Order, that anyone sent a copy of the Order to IBM, who provided "email, file server, and electronic data related disaster recovery services to UnumProvident."[85] By that time, UnumProvident had written over 881 of the 1,498 tapes that contained backup data for the relevant time period. All of this led to a stern rebuke from the court.[86] Had counsel in *Kier*

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[85] *Id.* at *4.

[86] *Id.* at *13 ("If UnumProvident had been as diligent as it should have been . . . many fewer [backup] tapes would have been inadvertently overwritten."). Rather than order sanctions, the court recommended that the parties determine the feasibility of retrieving the lost data and the extent of prejudice to the plaintiffs so that an appropriate remedy could be determined.

promptly taken the precautions set out above, the e-mails would not have been lost.[87]

3. What Happened at UBS After August 2001?

As more fully described above, UBS's in-house counsel issued a litigation hold in August 2001 and repeated that instruction several times from September 2001 through September 2002. Outside counsel also spoke with some (but not all) of the key players in August 2001. Nonetheless, certain employees unquestionably deleted e-mails. Although many of the deleted e-mails were recovered from backup tapes, a number of backup tapes — and the e-mails on them — are lost forever.[88] Other employees, notwithstanding counsel's request

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[87] *See also Metropolitan Opera Assoc., Inc. v. Local 100, Hotel Employees & Restaurant Employees International Union*, 212 F.R.D. 178, 222 (S.D.N.Y. 2003) (ordering default judgment against defendant as a discovery sanction because "counsel (1) never gave adequate instructions to their clients about the clients' overall discovery obligations, [including] what constitutes a 'document' . . . ; (2) knew the Union to have no document retention or filing systems and yet never implemented a systematic procedure for document production or for retention of documents, including electronic documents; (3) delegated document production to a layperson who . . . was not instructed by counsel[] that a document included a draft or other nonidentical copy, a computer file and an e-mail; . . . and (5) . . . failed to ask important witnesses for documents until the night before their depositions and, instead, made repeated, baseless representations that all documents had been produced.").

[88] *See Zubulake IV*, 220 F.R.D. at 218-19 ("By its attorney's directive in August 2002, UBS endeavored to preserve all backup tapes that existed in August 2001 (when Zubulake filed her EEOC charge) that captured data for employees

that they produce their files on Zubulake, did not do so.

a. UBS's Discovery Failings

UBS's counsel — both in-house and outside — repeatedly advised UBS of its discovery obligations. In fact, counsel came very close to taking the precautions laid out above. *First*, outside counsel issued a litigation hold in August 2001. The hold order was circulated to many of the key players in this litigation, and reiterated in e-mails in February 2002, when suit was filed, and again in September 2002. Outside counsel made clear that the hold order applied to backup tapes in August 2002, as soon as backup tapes became an issue in this case. *Second*, outside counsel communicated directly with many of the key players in August 2001 and attempted to impress upon them their preservation obligations. *Third*, and finally, counsel instructed UBS employees to produce copies of their active computer files.[89]

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identified by Zubulake in her document request, and all such monthly backup tapes generated thereafter. These backup tapes [all should have] existed in August 2002, because of UBS's document retention policy, which required retention for three years. In August 2001, UBS employees were instructed to maintain active electronic documents pertaining to Zubulake in separate files. Had these directives been followed, UBS would have met its preservation obligations by preserving one copy of all relevant documents that existed at, or were created after, the time when the duty to preserve attached. In fact, UBS employees did not comply with these directives.") (footnotes omitted).

[89] Kim testified that she was not so instructed.

To be sure, counsel did not fully comply with the standards set forth above. Nonetheless, under the standards existing at the time, counsel acted reasonably to the extent that they directed UBS to implement a litigation hold. Yet notwithstanding the clear instructions of counsel, UBS personnel failed to preserve plainly relevant e-mails.

b. Counsel's Failings

On the other hand, UBS's counsel are not entirely blameless. "While, of course, it is true that counsel need not supervise every step of the document production process and may rely on their clients in some respects,"[90] counsel is responsible for coordinating her client's discovery efforts. In this case, counsel failed to properly oversee UBS in a number of important ways, both in terms of its duty to locate relevant information and its duty to preserve and timely produce that information.

With respect to locating relevant information, counsel failed to adequately communicate with Tong about how she stored data. Although counsel determined that Tong kept her files on Zubulake in an "archive," they apparently made no effort to learn what that meant. A few simple questions — like the ones that Zubulake's counsel asked at Tong's re-deposition — would have revealed that

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[90] *Metropolitan Opera*, 212 F.R.D. at 222.

she kept those files in a separate *active* file on her computer.

With respect to making sure that relevant data was retained, counsel failed in a number of important respects. *First*, neither in-house nor outside counsel communicated the litigation hold instructions to Mike Davies, a senior human resources employee who was intimately involved in Zubulake's termination. *Second*, even though the litigation hold instructions were communicated to Kim, no one ever asked her to produce her files. And *third*, counsel failed to protect relevant backup tapes; had they done so, Zubulake might have been able to recover some of the e-mails that UBS employees deleted.

In addition, if Varsano's deposition testimony is to be credited, he turned over "all of the e-mails that [he] received concerning Ms. Zubulake."[91] If Varsano turned over these e-mails, then counsel must have failed to produce some of them.[92]

In sum, while UBS personnel deleted e-mails, copies of many of these e-mails were lost or belatedly produced as a result of counsel's failures.

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[91] Varsano Dep. at 289.

[92] I have no reason not to credit Varsano's testimony, given that he is a human resources employee who is not implicated in the alleged discrimination against Zubulake.

c. Summary

Counsel failed to communicate the litigation hold order to all key players. They also failed to ascertain each of the key players' document management habits. By the same token, UBS employees — for unknown reasons — ignored many of the instructions that counsel gave. This case represents a failure of communication, and that failure falls on counsel and client alike.

At the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril. Though more diligent action on the part of counsel would have mitigated some of the damage caused by UBS's deletion of e-mails, UBS deleted the e-mails in defiance of explicit instructions not to.

Because UBS personnel continued to delete relevant e-mails, Zubulake was denied access to e-mails to which she was entitled. Even those e-mails that were deleted but ultimately salvaged from other sources (*e.g.*, backup tapes or Tong and Kim's active files) were produced 22 months after they were initially requested. The effect of losing potentially relevant e-mails is obvious, but the effect of late production cannot be underestimated either. "[A]s a discovery deadline . . . draws near, discovery conduct that might have been considered

'merely' discourteous at an earlier point in the litigation may well breach a party's duties to its opponent and to the court."[93] Here, as UBS points out, Zubulake's instant motion "comes more than a year after the Court's previously imposed March 3, 2003 discovery cutoff."[94] Although UBS attempts to portray this fact as evidence that Zubulake is being overly litigious, it is in fact a testament to the time wasted by UBS's failure to timely produce all relevant and responsive information. With the discovery deadline long past, UBS "was under an obligation to be *as cooperative as possible*."[95] Instead, the extent of UBS's spoliation was uncovered by Zubulake during court-ordered re-depositions.

I therefore conclude that UBS acted wilfully in destroying potentially relevant information, which resulted either in the absence of such information or its tardy production (because duplicates were recovered from Kim or Tong's active files, or restored from backup tapes). Because UBS's spoliation was

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[93] *Residential Funding*, 306 F.3d at 112.

[94] Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Sanctions ("Def. Mem.") at 3.

[95] *Residential Funding*, 306 F.3d at 112 (emphasis in original); *see also id.* (suggesting that breach of that obligation might "constitute[] sanctionable misconduct in [its] own right").

willful, the lost information is presumed to be relevant.[96]

B. Remedy

Having concluded that UBS was under a duty to preserve the e-mails and that it deleted presumably relevant e-mails wilfully, I now consider the full panoply of available sanctions.[97] In doing so, I recognize that a major consideration in choosing an appropriate sanction — along with punishing UBS and deterring future misconduct — is to restore Zubulake to the position that she would have been in had UBS faithfully discharged its discovery obligations.[98]

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[96] *See Kronisch*, 150 F.3d at 126 ("It is a well-established and long-standing principle of law that a party's intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.") (cited in *Residential Funding*, 306 F.3d at 109); *see also Residential Funding*, 306 F.3d at 109 ("[A] showing of [wilfullness or] gross negligence in the destruction *or untimely production* of evidence will in some circumstances suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party.") (emphasis added); *see also id.* at 110 ("Just as the intentional or grossly negligent *destruction* of evidence in bad faith can support an inference that the destroyed evidence was harmful to the destroying party, so, too, can intentional or grossly negligent acts that hinder discovery support such an inference. . . .") (emphasis in original).

[97] *See Fujitsu*, 247 F.3d at 436 (holding that the choice of sanctions for spoliation and failure to produce evidence "is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis").

[98] *See West*, 167 F.3d at 779 (explaining that the chosen sanction should "(1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore 'the

That being so, I find that the following sanctions are warranted.

First, the jury empanelled to hear this case will be given an adverse inference instruction with respect to e-mails deleted after August 2001, and in particular, with respect to e-mails that were irretrievably lost when UBS's backup tapes were recycled. No one can ever know precisely what was on those tapes, but the content of e-mails recovered from other sources — along with the fact that UBS employees wilfully deleted e-mails — is sufficiently favorable to Zubulake that I am convinced that the contents of the lost tapes would have been similarly, if not more, favorable.[99]

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prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'") (quoting *Kronisch*, 150 F.3d at 126); *see also Pastorello v. City of New York*, No. 95 Civ. 470, 2003 WL 1740606, at *8 (S.D.N.Y. Apr. 1, 2003).

[99] *Cf. Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) ("'[e]mployers are rarely so cooperative as to include a notation in the personnel file' that their actions are motivated by factors expressly forbidden by law. Because an employer who discriminates is unlikely to leave a 'smoking gun' attesting to a discriminatory intent, a victim of discrimination is seldom able to prove his claim by direct evidence, and is usually constrained to rely on circumstantial evidence.") (quoting *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464 (2d Cir. 1989)) (citations omitted); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988) ("[In] reality . . . direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it. Employers of a mind to act contrary to law seldom note such a motive in their employee's personnel dossier.")

Note that I am *not* sanctioning UBS for the loss of the tapes (which

Second, Zubulake argues that the e-mails that *were* produced, albeit late, "are brand new and very significant to Ms. Zubulake's retaliation claim and would have affected [her] examination of every witness . . . in this case."[100] Likewise, Zubulake claims, with respect to the newly produced e-mails from Kim and Tong's active files, that UBS's "failure to produce these e-mails in a timely fashion precluded [her] from questioning any witness about them."[101] These arguments stand unrebutted and are therefore adopted in full by the Court. Accordingly, UBS is ordered to pay the costs of any depositions or re-depositions required by the late production.

Third, UBS is ordered to pay the costs of this motion.[102]

Finally, I note that UBS's belated production has resulted in a self-executing sanction. Not only was Zubulake unable to question UBS's witnesses using the newly produced e-mails, but UBS was unable to prepare those witnesses with the aid of those e-mails. Some of UBS's witnesses, not having seen these e-

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was negligent), but rather for its *willful* deletion of e-mails. Those e-mails happen to be lost forever because the tapes that might otherwise have contained them were lost.

[100] Tr. at 10.

[101] Pl. Mem. at 10.

[102] Fed. R. Civ. P. 37(b)(2).

mails, have already given deposition testimony that seems to contradict the newly discovered evidence. For example, if Zubulake's version of the evidence is credited, the e-mail from Davies acknowledging receipt of Zubulake's EEOC charge at 11:06 AM on August 21, 2001, puts the lie to Davies' testimony that he had not seen the charge when he spoke to Orgill — a conversation that was reflected in an e-mail sent at 2:02 PM. Zubulake is, of course, free to use this testimony at trial.

These sanctions are designed to compensate Zubulake for the harm done to her by the loss of or extremely delayed access to potentially relevant evidence.[103] They should also stem the need for any further litigation over the backup tapes.

C. Other Alleged Discovery Abuses

In addition to the deleted (and thus never- or belatedly produced) e-mails, Zubulake complains of two other perceived discovery abuses: the destruction of a September 2001 backup tape from Tong's server, and the belated production of a UBS document retention policy.

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[103] Another possible remedy would have been to order UBS to pay for the restoration of the remaining backup tapes. Zubulake, however, has conceded that further restoration is unlikely to be fruitful. *See* Tr. at 30-31.

1. Tong's September 2001 Backup Tape

Zubulake moves for sanctions because of the destruction of Tong's September 2001 backup tape. In *Zubulake III*, I ordered UBS to pay 75% of the cost of restoring certain backup tapes.[104] Understandably, one of the tapes that Zubulake chose to restore was Tong's tape for August 2001, the month that Zubulake filed her EEOC charge. That tape, however, had been recycled by UBS. Zubulake then chose to restore Tong's September 2001 tape, on the theory that "the majority of the e-mails on [the August 2001] tape are preserved on the September 2001 tape."[105] When that tape was actually restored, however, it turned out not to be the September 2001 tape at all, but rather Tong's October 2001 tape. This tape, according to UBS, was simply mislabeled.[106]

Zubulake has already (unintentionally) restored Tong's October 2001 tape, which should contain the majority of the data on the September 2001 tape. In addition, UBS has offered to pay to restore Varsano's backup tape for August

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[104] *See Zubulake III*, 216 F.R.D. at 291.

[105] *Zubulake IV*, 220 F.R.D. at 221.

[106] *See* Def. Mem. at 12 n.8; Tr. at 57 (attributing mislabeling of tape to "human error"); *see also* Declaration of James E. Gordon, Vice President of Pinkerton Consulting & Investigations, Inc. (detailing UBS's investigation into the missing September 2001 tape), Ex. I to the 5/14/04 Declaration of Norman C. Simon ("Simon Decl.").

2001, which it has and which has not yet been restored.[107] Varsano was Tong's HR counterpart in the United States, and was copied on many (but not all) of the e-mails that went to or from Tong.[108] These backup tapes, taken together, should recreate the lion's share of data from Tong's August 2001 tape. UBS must therefore pay for the restoration and production of relevant e-mails from Varsano's August 2001 backup tape, and pay for any re-deposition of Tong or Varsano that is necessitated by new e-mails found on that tape.

2. The July 1999 Record Management Policy

Zubulake also moves for sanctions in connection with what she refers to as "bad faith discovery tactics" on the part of UBS's counsel.[109] In particular, Zubulake complains of a late-produced record management policy.[110] The existence of this policy was revealed to Zubulake at Varsano's second deposition on January 26, 2004,[111] at which time Zubulake called for its production.[112]

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[107] *See* Tr. at 58-59.

[108] *See id.*

[109] Pl. Mem. at 8.

[110] *See* June 1999 UBS Record Management Policy for the Americas Region (the "June 1999 policy"), Ex. M to the Batson Aff.

[111] *See* Varsano Dep. at 489-94.

[112] *See id.* at 494.

Zubulake twice reiterated this request in writing, in the hopes that she would have the policy in time for Hardisty's deposition on February 5, 2004. UBS did not produce the policy, however, until February 26, 2004.[113]

The late production of the July 1999 policy does not warrant sanctions at all. *First*, UBS's production of the policy was not late. Zubulake requested it at Varsano's deposition on January 26, 2004, and UBS produced it one month later, on February 26. The Federal Rules afford litigants thirty days to respond to document requests,[114] and UBS produced the policy within that time. The fact that Zubulake wanted the document earlier is immaterial — if it was truly necessary to confront Hardisty with the policy, then his deposition should have been rescheduled or Zubulake should have requested relief from the Court.[115] Not having done so, Zubulake cannot now complain that UBS improperly delayed its production of that document.

Second, even if UBS was tardy in producing the policy, Zubulake has not demonstrated that she was prejudiced. She suggests that she would have used

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[113] *See* 4/26/04 Letter from Norman Simon, counsel to UBS, to James Batson, Ex. N to the Batson Aff.

[114] *See* Fed. R. Civ. P. 34(b).

[115] *See id.* (reserving to the court the authority to lengthen or shorten the time in which a party must respond to a document request).

the policy in the depositions of Hardisty and perhaps Chapin, but does not explain how. Nor is it at all clear how Zubulake might have used the policy. With respect to e-mail, the policy states: "Email is another priority. We will have a separate policy regarding email with appropriate reference or citation in this policy and/or retention schedules."[116] Prior to these depositions, Zubulake had a number of UBS document retention policies that post-dated the June 1999 Policy.[117]

V. CONCLUSION

In sum, counsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained, and produced. In particular, once the duty to preserve attaches, counsel must identify sources of discoverable information. This will usually entail speaking directly with the key players in the litigation, as well as the client's information technology personnel. In addition, when the duty to preserve attaches, counsel must put in place a litigation hold and make that known to all relevant employees by communicating with them directly. The litigation hold instructions must be

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[116] June 1999 Policy § 3.2.

[117] *See* Retention of Back-up Tapes of Email Servers (dated June 2001), Ex. H to Simon Decl.; Retention of Back-Up Tapes of E-mail and Interchange (dated October 2001), Ex. K to Simon Decl.; *see also* Ex. M to Batson Aff. (consisting of four UBS document retention policies, including one entitled "Use of Electronic Mail, Chat and Text Messaging," dated November 2002).

reiterated regularly and compliance must be monitored. Counsel must also call for employees to produce copies of relevant electronic evidence, and must arrange for the segregation and safeguarding of any archival media (*e.g.*, backup tapes) that the party has a duty to preserve.

Once counsel takes these steps (or once a court order is in place), a party is fully on notice of its discovery obligations. If a party acts contrary to counsel's instructions or to a court's order, it acts at its own peril.

UBS failed to preserve relevant e-mails, even after receiving adequate warnings from counsel, resulting in the production of some relevant e-mails almost two years after they were initially requested, and resulting in the complete destruction of others. For that reason, Zubulake's motion is granted and sanctions are warranted. UBS is ordered to:

1. Pay for the re-deposition of relevant UBS personnel, limited to the subject of the newly-discovered e-mails;

2. Restore and produce relevant documents from Varsano's August 2001 backup tape;

3. Pay for the re-deposition of Varsano and Tong, limited to the new material produced from Varsano's August 2001 backup tape;[118] and

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[118] Rulings numbered (1) and (3) may both result in the re-deposition of Tong and Varsano. Obviously, each should only be re-deposed once.

4. Pay all "reasonable expenses, including attorney's fees,"[119] incurred by Zubulake in connection with the making of this motion.

In addition, I will give the following instruction to the jury that hears this case:

> You have heard that UBS failed to produce some of the e-mails sent or received by UBS personnel in August and September 2001. Plaintiff has argued that this evidence was in defendants' control and would have proven facts material to the matter in controversy.
>
> If you find that UBS could have produced this evidence, and that the evidence was within its control, and that the evidence would have been material in deciding facts in dispute in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to UBS.
>
> In deciding whether to draw this inference, you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that UBS's failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case.[120]

The Clerk is directed to close this motion [number 43 on the docket sheet]. Fact discovery shall close on October 4, 2004. A final pretrial conference is scheduled

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[119] Fed. R. Civ. P. 37(b)(2).

[120] This instruction was adapted from LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS 75-7 (2004); *see also Zimmerman v. Associates First Capital Corp.*, 251 F.3d 376, 383 (2d Cir. 2001) (affirming district court's use of a similar charge); *cf.* NEW YORK PATTERN JURY INSTRUCTIONS — CIVIL 1:77 (3d ed. 2004).

for 4:30 PM on October 13, 2004, in Courtroom 15C. If either party believes that a dispositive motion is appropriate, that date will be converted to a pre-motion conference.

VI. POSTSCRIPT

The subject of the discovery of electronically stored information is rapidly evolving. When this case began more than two years ago, there was little guidance from the judiciary, bar associations or the academy as to the governing standards. Much has changed in that time. There have been a flood of recent opinions — including a number from appellate courts — and there are now several treatises on the subject.[121] In addition, professional groups such as the American Bar Association and the Sedona Conference have provided very useful guidance on thorny issues relating to the discovery of electronically stored information.[122] Many courts have adopted, or are considering adopting, local rules addressing the

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[121] *See* MICHAEL ARKFELD, ELECTRONIC DISCOVERY AND EVIDENCE (2003); ADAM I. COHEN & DAVID J. LENDER, ELECTRONIC DISCOVERY: LAW AND PRACTICE (2004).

[122] *See* Memorandum from Gregory P. Joseph & Barry F. McNeil, *Electronic Discovery Standards — Draft Amendments to ABA Civil Discovery Standards* (Nov. 17, 2003), available at http://www.abanet.org/litigation/taskforces/electronic/document.pdf; The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (January 2004), available at http://www.thesedonaconference.org/publications_html.

subject.[123] Most recently, the Standing Committee on Rules and Procedures has approved for publication and public comment a proposal for revisions to the Federal Rules of Civil Procedure designed to address many of the issues raised by the discovery of electronically stored information.[124]

Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information. The tedious and difficult fact finding encompassed in this opinion and others like it is a great burden on a court's limited resources. The time and effort spent by counsel to litigate these issues has also been time-consuming and distracting. This Court, for

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[123] *See, e.g.,* E.D. Ark. Local Rule 26.1; W.D. Ark. Local Rule 26.1; D. Wy. Local Rule 26.1; D.N.J. Local Rule 26.1(d); *see also* Memorandum from the Ninth Circuit Advisory Board, *Proposed Model Local Rule on Electronic Discovery*, available at http://www.krollontrack.com/LawLibrary/Statutes/9thCirDraft.pdf, D. Kan. *Electronic Discovery Guidelines*; D. Del. *Default Standards for Discovery of Electronic Document*. In addition, a number of states have adopted rules governing electronic discovery. *See, e.g.,* Miss. R. Civ. P. 26; Tex. R. Civ. P. 193.3, 196.4. With the exception of the proposed Ninth Circuit model rule, all of these rules are collected at http://www.kenwithers.com/rulemaking/.

[124] The proposals forwarded from the Civil Rules Advisory Committee to the Standing Committee can be found on pages 20-70 of the memorandum available at http://www.kenwithers.com/rulemaking/civilrules/report051704.pdf. Those proposals were subsequently revised by the Standing Committee; the final text of the proposed rules that will be published for comment should be available some time in August 2004.

one, is optimistic that with the guidance now provided it will not be necessary to spend this amount of time again. It is hoped that counsel will heed the guidance provided by these resources and will work to ensure that preservation, production and spoliation issues are limited, if not eliminated.

SO ORDERED:

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Shira A. Scheindlin
United States District Judge

Dated: New York, New York
July 20, 2004

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