ZUBULAKE - IV

LAURA ZUBULAKE, Plaintiff, -against- UBS WARBURG LLC, UBS WARBURG, and UBS AG, Defendants.

02 Civ. 1243 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

220 F.R.D. 212; 2003 U.S. Dist. LEXIS 18771; 92 Fair Empl. Prac. Cas. (BNA) 1539

October 22, 2003, Decided
October 22, 2003, Filed

SUBSEQUENT HISTORY: Sanctions allowed by Zubulake v. UBS Warburg LLC, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y., July 20, 2004)

PRIOR HISTORY: Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 2003 U.S. Dist. LEXIS 12643 (S.D.N.Y., 2003)

DISPOSITION: [**1] Plaintiff's motion for reconsideration of prior order denied. Plaintiff's motion for inverse inference instruction denied and motion seeking costs for additional depositions granted.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employee sued defendant employer alleging gender discrimination, failure to promote, and retaliation under federal, state, and city law. The employee sought sanctions against the employer for its failure to preserve the missing backup tapes and deleted emails. The employee sought costs for the restoration of the backup tapes, an adverse inference instruction, and costs for re-depositions.

OVERVIEW: The employee, an equities trader, maintained that the evidence needed to prove her gender discrimination, failure to promote, and retaliation claims existed in e-mail correspondence sent among various employees and was only stored on the employer's computer systems. The parties were previously ordered to share the costs of restoring backup tapes that contained relevant e-mails. During the restoration, the parties discovered that certain relevant tapes were missing. The employee sought sanctions for the failure to preserve the missing backup tapes and deleted e-mails. The court found that the duty to preserve the missing tapes arose when the relevant people at the employer anticipated litigation, four months before the employee filed her Equal Employment Opportunity Commission charge. Because the employer was negligent, and possibly reckless, the employee satisfied her burden with respect to the first two prongs of the spoliation test. However, the employee failed to show that the lost tapes contained relevant information. Under the circumstances, it was inappropriate to give an adverse inference instruction to the jury.

OUTCOME: The employee's motions for adverse inference instruction and for reconsideration of the order denying the costs for restoration of the backup tapes. The employee's motion for costs for the additional depositions was granted.

LexisNexis(TM) Headnotes

Civil Procedure > Sanctions > Discovery Misconduct

[HN1]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. 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. However, the determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of a trial judge, and is assessed on a case-by-case basis. The authority to sanction litigants for spoliation arises jointly under the Fed. R. Civ. P. 37 and a district court's own inherent powers.

Civil Procedure > Sanctions > Discovery Misconduct

[HN2]A party can only be sanctioned for destroying evidence if it had a duty to preserve it.

Civil Procedure > Sanctions > Discovery Misconduct

Civil Procedure > Disclosure & Discovery > Relevance

[HN3]The obligation to preserve evidence arises when a 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. 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?

Civil Procedure > Sanctions > Discovery Misconduct

Civil Procedure > Disclosure & Discovery > Relevance

[HN4]In the context of preserving evidence, 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 that are almost always involved in litigation. As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation.

Civil Procedure > Sanctions > Discovery Misconduct

Civil Procedure > Disclosure & Discovery > Relevance

[HN5]Anyone who anticipates being a party 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.

Civil Procedure > Sanctions > Discovery Misconduct

Civil Procedure > Disclosure & Discovery > Relevance

[HN6]The broad contours of the duty to preserve evidence are relatively clear. That duty should certainly extend to any documents or tangible things (as defined by Fed. R. Civ. P. 34(a)) made by individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses. Fed. R. Civ. P. 26(a)(1)(A). The duty also includes documents prepared for those individuals, to the extent those documents can be readily identified (e.g., 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. Fed. R. Civ. P. 26(b)(1). Thus, the duty to preserve extends to those employees likely to have relevant information, the key players in the case.

Civil Procedure > Sanctions > Discovery Misconduct

Civil Procedure > Disclosure & Discovery > Relevance

[HN7]A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve evidence 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.

Civil Procedure > Sanctions > Discovery Misconduct

Civil Procedure > Disclosure & Discovery > Relevance

[HN8]The scope of a party's evidence 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.

Civil Procedure > Sanctions > Discovery Misconduct

[HN9]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, the party suffering the 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.

Civil Procedure > Sanctions > Discovery Misconduct

Civil Procedure > Disclosure & Discovery > Relevance

[HN10]A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: (1) that a 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 can find that it would support that claim or defense. A culpable state of mind for purposes of a spoliation inference includes ordinary negligence. When evidence is destroyed in

bad faith (i.e., intentionally or willfully), that fact alone is sufficient to demonstrate relevance. By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions.

Civil Procedure > Sanctions > Discovery Misconduct

Civil Procedure > Disclosure & Discovery > Relevance

[HN11]Once the duty to preserve evidence attaches, any destruction of documents is, at a minimum, negligent.

Civil Procedure > Sanctions > Discovery Misconduct

Civil Procedure > Disclosure & Discovery > Relevance

Civil Procedure > Jury Trials > Jury Instructions

[HN12]In order to receive an adverse inference instruction, a plaintiff must demonstrate not only that a defendant destroyed relevant evidence as that term is ordinarily understood, Fed. R. Civ. P. 26(b)(1), Fed. R. Evid. 401, but also that the destroyed evidence would have been favorable to her. 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. 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.

COUNSEL: For Plaintiff: James A. Batson, Esq., Liddle & Robinson, LLP, New York, New York.

For Defendants: Kevin B. Leblang, Esq., Norman C. Simon, Esq., Kramer Levin Naftalis & Frankel LLP, New York, New York.

JUDGES: Shira A. Scheindlin, U.S.D.J.

OPINIONBY: Shira A. Scheindlin

OPINION: [*214] OPINION AND ORDER

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

"Documents create a paper reality we call proof." n1 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.

---------- Footnotes ----------

n1 Mason Cooley, City Aphorisms, Sixth Selection (1989).

---------- End Footnotes- ----------

[2]**

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 more difficult for litigants to craft policies that ensure all relevant documents are preserved. n2 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.

---------- Footnotes ----------

n2 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.").

---------- End Footnotes- ----------

I. BACKGROUND

This is the fourth opinion resolving **[**3]** discovery disputes in this case. Familiarity with **[*215]** the prior opinions is presumed, n3 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, n4 is suing UBS for gender discrimination, failure to promote, and retaliation under federal, state, and city law. She has repeatedly 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.

---------- Footnotes ----------

n3 See Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 2003 U.S. Dist. LEXIS 7939, 2003 WL 21087884 (S.D.N.Y. 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, 2003 U.S. Dist. LEXIS 7940, 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]

n4 See 6/20/03 Letter from James A. Batson, Zubulake's counsel, to the Court.

---------- End Footnotes- - - - - - - - - -

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. n5 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).

---------- Footnotes - - - - - - - - -

n5 Zubulake III, 216 F.R.D. 280.

---------- End Footnotes- - - - - - - - -

In addition, certain isolated e-mails -- created after UBS supposedly began retaining [**5] 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 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." n6

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n6 Zubulake III, 216 F.R.D. at 287.

---------- End Footnotes- - - - - - - - -

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. n7 In August 2002, after Zubulake specifically requested e-mail stored on backup tapes, UBS's outside [**6] counsel orally instructed UBS's information technology personnel to stop recycling backup tapes. n8

---------- Footnotes - - - - - - - - -

n7 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.").

n8 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.

---------- End Footnotes- ----------

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 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 **[**7]** certain individuals, such as Chapin, **[*216]** concerning the issues raised in newly produced e-mails.

II. LEGAL STANDARD

[HN1]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." n9 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." n10 However, "the 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." n11 The authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's own inherent powers. n12

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n9 West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

n10 Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998).

n11 Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001).

n12 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, 314 U.S. App. D.C. 137, 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].

---------- End Footnotes- ----------

[8]**

III. DISCUSSION

It goes without saying that [HN2]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

[HN3]"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." n13 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?

---------- Footnotes ----------

n13 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).

---------- End Footnotes- ----------

[9]**

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. n14 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. n15 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. n16

---------- Footnotes ----------

n14 See 9/26/03 Tr. at 16 (statement of Norman C. Simon agreeing that the duty to preserve attached no later than August 2001).

n15 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).

n16 See id. at 1 n.1.

---------- End Footnotes ----------

But the duty to preserve may have arisen even before the EEOC complaint was filed. Zubulake argues **[**10]** that UBS "should have known that the evidence [was] relevant to future litigation," n17 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 in April 2001, notwithstanding the fact that no attorney was copied on the e-mail and the **[*217]** 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. n18

---------- Footnotes ----------

n17 Fujitsu, 247 F.3d at 436.

n18 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.").

---------- End Footnotes ----------

Merely because one or two employees contemplate **[**11]** 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. n19 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 information and relationships. Any person who threatens this in any way should be firmly dealt with. . . . Believe me that a lot of other [similar] instances have occurred earlier." n20

---------- Footnotes ----------

n19 See 4/27/01 e-mail, Ex. A to Batson Ltr.

n20 Id.

---------- End Footnotes ----------

Thus, the relevant people at UBS anticipated **[**12]** litigation in April 2001. The duty to preserve attached at the time that litigation was reasonably anticipated.

2. Scope

The next question is: [HN4]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. n21 As a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation. n22

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n21 Cf. Concord Boat Corp. v. Brunswick Corp., 1997 U.S. Dist. LEXIS 24068, 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.").

n22 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. . . .").

---------- End Footnotes- ----------

[13]**

At the same time, [HN5]anyone who anticipates being a party 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." n23

---------- Footnotes ----------

n23 Turner, 142 F.R.D. at 72 (quoting William T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1445 (C.D. Cal. 1984)).

---------- End Footnotes- ----------

i. Whose Documents Must Be Retained?

[HN6]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)) n24 made by **[*218]** individuals "likely to have discoverable information that the disclosing party may use to support **[**14]** its claims or defenses." n25 The duty also includes documents prepared for those individuals, to the extent those documents can be readily identified (e.g., 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." n26 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. n27

---------- Footnotes ----------

n24 See Fed. R. Civ. P. 34(a) (defining the term "document" to "include 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, 217 F.R.D. 309, 2003 U.S. Dist. LEXIS 7939, 2003 WL 21087884, at *6 (holding that the term "document," within the meaning of Rule 34(a), includes e-mails contained on backup tapes).

[15]**

n25 Fed. R. Civ. P. 26(a)(1)(A).

n26 Fed. R. Civ. P. 26(b)(1).

n27 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).

---------- End Footnotes- ----------

ii. What Must Be Retained?

[HN7]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 preserve **[**16]** 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

[HN8]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 **[**17]** 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. n28 In August 2001, UBS employees were instructed to maintain active electronic documents pertaining to Zubulake in separate files. n29 Had these directives been followed, UBS would have met its preservation obligations by preserving one copy of all relevant documents **[*219]** that existed at, or were created after, the time when the duty to preserve attached.

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n28 See Zubulake I, 217 F.R.D. 309, 2003 U.S. Dist. LEXIS 7939, 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.").

[18]**

n29 See Zubulake III, 216 F.R.D. at 287.

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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 retained for three years. n30

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n30 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.

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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). **[**19]** 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." n31 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. n32 It also instructed employees "not [to] delete any emails if they are aware that . . . litigation is pending or likely, or during . . . a discovery process." n33 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 discovery request. n34

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n31 9/17/03 Letter from Kevin Leblang to the Court ("Leblang Ltr.").

n32 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.

n33 UBS Asia Policy at 2.

n34 See 9/26/03 Tr. at 31, 35-36.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

[20]**

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. n35 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. n36 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 concealing and deleting especially relevant e-mails." n37 There is therefore no need to reconsider that ruling in light of the instant **[**21]** motion; this evidence already played a role in the cost-shifting decision.

---------- Footnotes ----------

n35 See 9/26/03 Tr. at 27.

n36 6/17/03 Oral Argument Transcript (Statement of James Batson).

n37 216 F.R.D. at 287.

---------- End Footnotes----------

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, [HN9]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 **[*220]** potentially relevant evidence did so 'out of a realization that the [evidence was] unfavorable,'" n38 the party suffering this instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse **[**22]** inference instruction is an extreme sanction and should not be given lightly. n39

---------- Footnotes ----------

n38 Linnen v. A.H. Robins Co., 1999 Mass. Super. LEXIS 240, 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)).

N39 See Mary Kay Brown & Paul D. Weiner, Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron, 74 Pa. 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").

---------- End Footnotes----------

[HN10]A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: **[**23]** (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. n40 In this circuit, a "culpable state of mind" for purposes of a spoliation inference includes ordinary negligence. n41 When evidence is destroyed in bad faith (i.e., intentionally or willfully), that fact alone is sufficient to demonstrate relevance. n42 By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions. n43

---------- Footnotes ----------

n40 Byrnie v. Town of Cromwell, 243 F.3d 93, 107-12 (2d Cir. 2001).

n41 See Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002).

n42 See id. at 109.

n43 See id.

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a. Duty to Preserve

For **[**24]** 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." n44 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]." n45

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n44 See Batson Ltr. at 2.

n45 Leblang Ltr. at 2.

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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. [HN11]Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent. n46 (Of course, this would not apply to destruction caused by events outside of the party's control, e.g., a fire in UBS's offices).

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n46 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. Keir v. UnumProvident Corp., 2003 U.S. Dist. LEXIS 14522, 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 "if UnumProvident had been as diligent as it should have been . . . many fewer [backup] tapes would have been inadvertently overwritten.").

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[25]**

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. n47

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n47 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.

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[*221]

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, **[**26]** 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.

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. n48 [HN12]In order to receive an adverse inference instruction, Zubulake must demonstrate not only that UBS destroyed relevant evidence as that term is

ordinarily understood, n49 but also that the destroyed evidence would have been favorable to her. n50 "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." n51 This is equally true in cases of gross negligence or recklessness; only in the case **[**27]** of willful spoliation is the spoliator's mental culpability itself evidence of the relevance of the documents destroyed. n52

---------- Footnotes ----------

n48 See Byrnie, 243 F.3d at 107-12.

n49 See Fed. R. Evid. 401; Fed. R. Civ. P. 26(b)(1)

n50 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).

n51 Turner, 142 F.R.D. at 77 (citing Stanojev v. Ebasco Services, Inc., 643 F.2d 914, 924 n.7 (2d Cir. 1981)).

[28]**

n52 See Residential Funding, 306 F.3d at 109.

---------- End Footnotes ----------

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. n53 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." n54 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.

---------- Footnotes ----------

n53 See Zubulake I, 217 F.R.D. 309, 2003 U.S. Dist. LEXIS 7939, 2003 WL 21087884, at *6; Zubulake III, 216 F.R.D. at 284-87.

n54 216 F.R.D. at 286.

---------- End Footnotes ----------

Furthermore, the likelihood of obtaining **[**29]** 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 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. n55

---------- Footnotes ----------

n55 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 U.S. Dist. LEXIS 24068, 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.").

---------- End Footnotes ----------

[30] [*222]**

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 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). n56

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n56 See 9/26/03 Tr. at 26 (statement of James Batson, seeking to re-depose only these four employees).

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[31]**

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