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# E-Discovery Newsletter

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## District Court in Fifth Circuit Adopts *Zubulake* Framework and Evaluates Proper Scope of Litigation Hold

*Consolidated Aluminum Corp. v. Alcoa, Inc.*, No. 03-1055-C-M2, 2006 WL 2583308 (M.D. La July 19, 2006), is notable for two reasons. First, this was the first case in the Fifth Circuit to address the standards for preservation of electronic evidence and applicable sanctions where such evidence has been spoliated. Following the lead of numerous courts, the District Court applied the analytic framework from the *Zubulake* cases.

Second, the case is a useful illustration of an insufficient litigation hold.

After Consolidated issued a demand letter to Alcoa, Alcoa's counsel met with certain individuals it determined to be key players to the anticipated litigation to establish a document hold. *Id*. at *1. During discovery, Alcoa contacted additional individuals and requested that they preserve relevant documents. *Id*. Consolidated contended that Alcoa failed to include at either time a key player—the plant manager. *Id*. Then, almost two and half years after the demand letter had been issued, Alcoa suspended its "janitorial email deletion policy."

The District Court found that the plant manager was a key player and rejected the argument that preserving his emails was not required since any likely relevant information in his emails would also be contained in the emails of the individuals Alcoa had notified of the litigation hold. *Id*. at *3-4. On the second point, the Court pointed out that the plant manager could have engaged in relevant conversations with individuals not advised of the litigation hold. *Id*.

The Court found that Alcoa had failed to preserve possibly relevant emails by not suspending its

routine deletion of its document destruction policy. *Id*. at *5. The Court noted that once a company reasonably anticipates litigation, it must suspend its routine document retention policy and set up a litigation hold. *Id*. at *2.

The Court, however, held that adverse inference instructions should not be imposed against Alcoa. *Id*. at *7. It held that Alcoa lacked "fraudulent intent and a desire to suppress the truth." *Id.* at *6. In particular, the Court reasoned that (1) that the destruction of documents was part of routine procedures, (2) that Alcoa had taken some steps to preserve the documents of individuals it had determined to be key players, (3) that Alcoa expanded its litigation hold once it received Consolidated's discovery requests and had actual knowledge of the breadth of the litigation, (4) that the most relevant emails are likely to be contained in the preserved emails of the initially identified key players, who were apprised of the original litigation hold; and (5) that Consolidated failed to assert the relevance of the destroyed documents. *Id*. at *6-8. The Court did, however, find Alcoa's actions negligent and therefore imposed on Alcoa: (1) Consolidated's possible costs for re-deposing certain witnesses "for the limited purpose of inquiring into issues raised by the destruction of evidence and regarding any newly discovered emails" and (2) Consolidated's costs and attorney fees associated with the motion. *Id*. at *9.

The case serves as a reminder of the importance of clients suspending routine deletion of accessible data reasonably likely to have relevant material as soon as the client is aware of information that makes it reasonable to anticipate a litigation or investigation.

### New York Trial Court Adopts *Zubulake* Sampling Procedures

In *Delta Financial Corporation v Morrison*, 819 N.Y.S.2d 908 (N.Y. Sup. Ct. Aug. 17, 2006), defendants alleged that the plaintiffs failed to properly search for non-email electronic documents, that emails from the monthly (versus the ninety day tapes) were not captured by plaintiffs' searches, and that emails from the first half of 2000 were not captured. *Id.* at 910.

The trial court considered the Federal Rules of Civil Procedure and applied the principles of the *Zubulake I* decision. *Id*. at 911-917. For all three types of evidence, the Court applied the same procedure, as outlined by *Zubulake I*. *Id*. First, the Court required plaintiff to search and produce a small sample of restored documents from its backup tapes in the three different categories. *Id*. Second, the Court stated that defendants would bear 100% of the costs for this procedure, as defendants had not shown convincingly that responsive documents would be located. *Id*.

### Production of Data in Inaccessible Format: Court Shifts Costs for Restoring to Producing Party, but Holds Converting Data to Inaccessible Format Does Not Constitute Spoliation

In *Quinby v. WestLB AG,* No. 04 Civ. 7406, 2006 WL 2597900 (S.D.N.Y. Sept. 5, 2006), the defendant sought to shift to the plaintiff the costs of producing data maintained in inaccessible electronic form. The District Court held that the non-responding party (plaintiff) would only be responsible for a portion of the costs to restore the email of one employee that responding party (defendant) could not have reasonably foreseen would have responsive documents. *Id*. at *16.

Plaintiff alleged unlawful gender discrimination and retaliatory firing. *Id*. at *1. In discovery, Plaintiff

sought to “search nineteen current and former [defendant] employees’ e-mails for over 170 search terms for approximately a five year period.” *Id*. at *3. Prior to this decision, the Court had rejected many of the search terms (as they encompassed common words, such as “go,” “her,” “okay,” and “she”) and had limited the search to seventeen current and former employees, using specific search terms for each employee. *Id*.

In response to this request, Defendant sought to shift the cost of producing the data for six of the former employees, arguing that these emails were stored on backup tapes that are in “an inaccessible compressed format.” *Id*. at *4.

Plaintiff responded that once the defendant anticipated litigation, the defendant had a duty to maintain the emails in an accessible format. *Id*. at *9. The Court held that “[p]reservation of data, even in inaccessible form, will not result in spoliation because the responding party will be able to produce the electronic evidence by restoring it from an inaccessible format, albeit at a higher cost.” *Id*. The Court, however, added that “if a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data.” *Id*.

The Court held that it was reasonably foreseeable that certain of the former employees would have responsive documents in their email as former co-workers, human resource personnel, and supervisors, and that it was not reasonably foreseeable that a certain co-worker who left the company prior to the period for when the plaintiff had signed a release would have responsive documents. *Id*. at *10-11. The Court then applied the *Zubulake III* seven-factor test and concluded that 30% of the costs of restoring this employee’s emails should be shifted to the plaintiff. *Id*. at 11-17.

### Production of Data in Inaccessible Format: Court Does Not Require Party to Produce in Accessible Format Where the Party Does not Maintain the Data in Accessible Format

In *EEOC v. Lexus Serramonte*, 237 F.R.D. 220 (N.D. Cal. 2006), the Court rejected the claim that the defendants should be required to convert inaccessible data into accessible form where the defendant had not maintained the data in accessible form. The Court reasoned that it would seek to avoid " unduly burdening Defendants," and held therefore that "If Defendants do not maintain the requested information in the format specified by Plaintiff, then they shall produce in whatever form they do maintain it."

Taken together, *Quinby* and *Lexus* indicate that clients should not delete the available, accessible form of data once they are on notice of the data's relevance, but are not under an obligation to produce data in accessible form if the data was not maintained in an accessible form.