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New York's Appellate Division for the First Department Adopts Zubulake

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VOOM HD Holdings LLC v EchoStar Satellite L.L.C., 2012 NY Slip Op 00658 (1st Dept Jan. 31, 2012)

On February 1, 2012, the First Department became the first New York appellate court to adopt the preservation requirement set forth in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (SDNY 2003) to determine the scope of a party's duties in the electronic discovery context. The *Zubulake* standard states, "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."

The case, *Voom HD Holdings v. EchoStar Satellite LLC*, ___ N.Y.S.2d ___, 2012 NY Slip Op 00658 (1st Dept Jan. 31, 2012), surrounds a dispute between a television programming service, Voom (a subsidiary of Cablevision), and a direct broadcast digital satellite system, EchoStar. In 2005, the parties entered into a 15-year affiliation agreement wherein EchoStar agreed to distribute Voom's programs over the "DISH Network." The agreement stated that EchoStar would not "tier" the channels and charge its customers more for Voom than the standard fee charged to customers who are already paying for high-definition channels. Moreover, the agreement provided that EchoStar retained the right to audit Voom's expenses and investments, and had the right to terminate the agreement if Voom failed to spend $100 million on services in a calendar year.

Within two years of the contract, EchoStar allegedly determined that the affiliation agreement was no longer profitable, and as a result began to claim that Voom had failed to meet its contractual obligations. In June 2007 EchoStar's Senior Corporate Counsel sent a letter to Voom informing them that it planned to terminate the agreement because Voom failed to spend $100 million in 2006. In the subsequent months, letters and emails went back and forth between the parties, with EchoStar making repeated threats of litigation while ignoring Voom's financial analysis showing that the company had spent the requisite sums.

On January 30, 2008, EchoStar formally "terminate[d] the Agreement" and Voom brought suit against them the next day. EchoStar did not implement a litigation hold until after Voom filed suit. Even when EchoStar implemented the purported "hold," it did not suspend EchoStar's automatic deletion of emails, which were automatically purged after seven days. It was not until June 1, 2008 — four months after the commencement of the lawsuit, and nearly one year after EchoStar was on notice of anticipated litigation — that EchoStar suspended the automatic deletion of relevant emails. Voom learned of this during discovery and accused EchoStar of

spoliation of evidence and sought an adverse inference from the trial court. Citing the well-known e-discovery case *Zubulake*, the trial court agreed, and the First Department affirmed.

In making its decision the First Department noted,

> *[I]n the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, it is necessary for a party facing litigation to take active steps to halt that process (Convolve, Inc. v Compaq Computer Corp., 223 FRD 162, 175-76 [SD NY 2004]). Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data.*

Moreover, in regards to litigation holds under *Zubalake*,

> *Regardless of its nature, a hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee. The hold should, with as much specificity as possible, describe the ESI at issue, direct that routine destruction policies such as auto-delete functions and rewriting over e-mails cease, and describe the consequences for failure to so preserve electronically stored evidence.*

The Court went on to rule that "[u]nder any variant of the standard, EchoStar should have reasonably anticipated litigation as of June 20, 2007," which was the date it sent the letter to Voom demanding an audit and threatening termination of the contract. Relying on these facts, the Court affirmed the trial court's decision to impose sanctions against defendant for the spoliation of evidence.

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