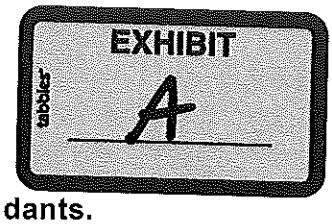


382 F.Supp.2d 536 (2005)

Laura ZUBULAKE, Plaintiff,

v.

UBS WARBURG LLC, UBS Warburg, and UBS AG, Defendants.

No. 02 Civ. 1243SAS.

United States District Court, S.D. New York.

March 16, 2005.

539 *537 *538 *539 James A. Batson, Liddle & Robinson, LLP, New York City, for Plaintiff.

Bettina B. Plevan, Proskauer Rose LLP, New York City, for Defendants.

OPINION AND ORDER

SCHEINDLIN, District Judge.

Laura **Zubulake** is suing her former employer, **UBS Warburg** LLC (hereinafter "**UBS**"), for sex discrimination, including disparate treatment and wrongful termination, and retaliation in violation of, *inter alia,* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Both parties have filed motions in limine that are addressed in this Opinion and Order.

I. PLAINTIFF'S MOTION TO PRECLUDE EVIDENCE OF HER PRIOR EMPLOYMENT

Plaintiff seeks to preclude defendants from using evidence of plaintiff's prior employment to show that she had a propensity for certain performance deficiencies. Defendants intend to proffer two categories of evidence. *First,* **UBS** seeks to introduce evidence of plaintiff's employment history, specifically the fact that she worked for ten different
540 securities firms in a period of less than twenty years. Because *540 this evidence is relevant to plaintiff's ability to find subsequent employment it is admissible.

The second category of evidence involves plaintiff's poor work performance at Credit Suisse First Boston ("CSFB") and, in particular, the performance appraisal she received shortly before negotiating a severance package. *See* May 5th 1999 Memorandum from Jay Plourde entitled "Performance Deficiencies." Plaintiff claims that this is character evidence which is inadmissible under Federal Rule of Evidence 404(b). Defendants claim that this evidence is admissible because: (1) plaintiff's character is in issue;[1] (2) the evidence is proffered to prove matters other than plaintiff's character, specifically to rebut her contention that she was not insubordinate and uncooperative; and (3) the evidence is admissible to prove habit pursuant to Rule 406. Defendants' arguments are rejected.

An almost identical issue involving previous employment was addressed in *Neuren v. Adduci, Mastriani, Meeks & Schill,* 43 F.3d 1507 (D.C.Cir.1995). In that case, plaintiff sued her employer Adduci, Mastriani, Meeks & Schill ("AMM & S"), a Washington D.C. law firm, for sex discrimination in violation of Title VII. In addition to introducing evidence of plaintiff's performance problems at AMM & S, defendants introduced evidence concerning plaintiff's prior employment with another law firm, Dow, Lohnes & Albertson ("DL & A"). *See id.* at 85 (defendants introduced written evaluations of plaintiff's work at DL & A and related testimony regarding plaintiff's difficulties in getting along with staff and meeting deadlines while an associate at DL & A).

Defendants argued that the DL & A evidence was admissible to demonstrate that plaintiff had the same difficulties at a previous law firm that she had at AMM & S or, failing that, to impeach her testimony regarding her reasons for leaving DL & A. The court rejected the argument that the DL & A evidence was admissible because it demonstrated that plaintiff

displayed similar work-related problems in her former employment. In finding that the district court abused its discretion in admitting this evidence, the court stated:

Both AMM & S and the district court misapprehend the Federal Rules' treatment of character evidence. Under Federal Rule of Evidence 404, "[e]vidence of a person's character or a trait of [her] character is not admissible for the purpose of proving that [she] acted in conformity therewith on a particular occasion," except in certain defined circumstances none of which is present here. Fed.R.Evid. 404(a). Additionally, Rule 404(a) provides specifically that evidence of prior acts cannot be introduced to prove the character of a person in order to show that she acted in conformity therewith. Fed.R.Evid. 404(b). When the district court admitted the DL & A evidence relating to Neuren's difficulties with personal relationships at that firm, it noted that the evidence was "relevant with respect to how she performed at another firm.... 541 [AMM & S is] just showing that this is the same problem that this woman had." (citation *541 omitted). Thus, the district court admitted the evidence for the purpose specifically prohibited by Rule 404 — as evidence that she acted in conformity with her behavior at DL & A while working for AMM & S.

The DL & A character evidence does not fall within any of the exceptions expressly contemplated by Rule 404(b). *See* Fed.R.Evid. 404(b) (exceptions for proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident). Moreover, appellee's argument that this evidence is admissible because character was "in issue" in the case is equally unavailing. Under the "character in issue" doctrine, character evidence is admissible where character itself is "an element of a crime, claim, or defense." Fed.R.Evid. 404(a), Notes of Advisory Committee on Proposed Rules. An example of evidence admissible where character is "in issue" is evidence of the chastity of a victim in a prosecution for the crime of seduction where chastity is an element of that crime. *Id.* In this case, AMM & S has not offered a plausible theory under which Neuren's character could be considered an element of its defense. AMM & S's business justification for Neuren's termination was that she had difficulty in interpersonal relationships with co-workers and in meeting deadlines. Strictly speaking, this defense is based on Neuren's *behavior* at the firm, not her *character.* Consequently, her character was not "in issue" in the sense contemplated by the exception to the rule.

Id. at 511. Several lower courts in the District of Columbia have reached similar conclusions. In *Zenian v. District of Columbia*, 283 F.Supp.2d 36 (D.D.C.2003), the District wanted to introduce documentary evidence pertaining to plaintiff's performance problems prior to July 1995. The district court precluded such use, stating:

If the District is offering the evidence to show that plaintiff has always been a bad employee, it is doing exactly what it cannot do: introduce evidence of a person's character to prove that his behavior on one or more occasions was consistent with that character. Fed.R.Evid. 404(a). The only purpose of proving that plaintiff was a bad employee before 1995 is to prove that he was an equally bad employee after 1995. That, of course, is exactly what a litigant cannot do.

Id. at 40. *See also* *Rauh v. Coyne*, 744 F.Supp. 1181 (D.D.C.1990) (holding inadmissible evidence concerning plaintiff's job performance before and after her employment at defendants' establishment).

The reasoning found in these cases is persuasive. Because this is an employment discrimination case, plaintiff's character is not in issue, either as an essential element of a claim or defense. *See* *EEOC v. HBE Corp.*, 135 F.3d 543, 553 (8th Cir.1998) (plaintiff's moral character was not an essential element of his retaliatory discharge claim). And no matter how defendants try to frame their intended use — whether to rebut plaintiff's contention that she was not insubordinate and uncooperative or whether to prove that she was insubordinate and uncooperative outright — they are seeking to introduce inadmissible propensity evidence. Because none of the exceptions found in Rule 404(b) apply here, such evidence is inadmissible to prove that plaintiff acted insubordinately at **UBS**.

Finally, defendants argue that the evidence at issue is admissible under Rule 406 as evidence of plaintiff's habit of behaving insubordinately in response to conflicts in the workplace. Rule 406 provides as follows: "Evidence of the habit 542 of a *542 person or of the routine practice of an organization ... is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." The Advisory Committee Note to Rule 406 of the Federal Rules of Evidence defines "habit" as follows: "'A habit ... is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The

doing of the habitual acts may become semi-automatic.'" Fed.R.Evid. 406, Advisory Committee Note (quoting *McCormick on Evidence,* § 195 at 462-63 (2d. ed.1972)).

Habit is conduct that is situation-specific, *i.e.,* specific, particularized conduct capable of almost identical repetition. Character, on the other hand, is a generalized description of a person's disposition or a general trait such as honesty, violence or peacefulness. There is a tension between Rule 404 (character) and Rule 406 (habit) which stems from the difficulty in distinguishing between admissible evidence of habit and inadmissible character evidence. *See* Simplex, Inc. v. Diversified Energy Sys., Inc., 847 F.2d 1290, 1293 (7th Cir.1988) ("We are cautious in permitting the admission of habit or pattern-of-conduct evidence under Rule 406 because it necessarily engenders the very real possibility that such evidence will be used to establish a party's propensity to act in conformity with its general character, thereby thwarting Rule 404's prohibition against the use of character evidence except for narrowly prescribed purposes.").

"[B]efore a court may admit evidence of habit, the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere `tendency' to act in a given manner, but rather, conduct that is `semi-automatic' in nature." *Id.* "Although a precise formula cannot be proposed for determining when the behavior may become so consistent as to rise to the level of habit, `adequacy of sampling and uniformity of response' are controlling considerations." Reyes v. Missouri Pac. R.R. Co., 589 F.2d 791, 795 (5th Cir.1979) (quoting Notes of Advisory Committee). "It is only when examples offered to establish such pattern of conduct or habit are numerous enough to base an inference of systematic conduct, that examples are admissible." Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519, 1524 (11th Cir.1985) (internal quotation marks and citation omitted).

These principles have been applied to exclude evidence of conduct that falls short of the definition of habit. One such case is Becker v. ARCO Chem. Co., 207 F.3d 176 (3d Cir.2000), an age discrimination case. In that case, defendant offered a legitimate non-discriminatory reason for its termination of Becker. To rebut that defense, Becker offered evidence that ARCO had previously fabricated evidence of a legitimate reason for terminating one of Becker's co-employees, Linwood Seaver. *See id.* at 183, 185. Specifically, Becker testified that two of his supervisors solicited his assistance in fabricating evidence of Seaver's poor performance on a particular project to facilitate Seaver's termination. *See id.* at 185.

"[T]he district court found Becker's testimony admissible under Rule 404(b) because it was evidence of a scheme or plan of fabricating reasons used by the decisionmaker in terminating employees." *Id.* at 189 (internal quotation marks and citation omitted). The appellate court rejected this reasoning. *See id.* at 201 ("[W]e hold that standing alone, the
543 similarities between the Seaver evidence and the allegation of fact in this case do not provide *543 a sufficient foundation from which the existence of ARCO's `scheme or plan' of fabricating reasons in terminating its employees may be inferred so as to justify admitting the Seaver evidence on that basis.").

The district court also found the Seaver evidence admissible "under the theory that it tended to show ARCO's `habit' when confronted with the task of having to terminate its employees." *Id.* at 204. The appellate court disagreed:

Clearly, Rule 406 does not support the introduction of the Seaver evidence on the basis that it was ARCO's "habit" to fabricate reasons for terminating its employees. The Seaver evidence did not show ARCO's "regular response to a specific situation," as the nature of the alleged conduct — the fabrication of reasons to justify its employees' dismissals — is not the sort of semi-automatic, situation-specific conduct admitted under the rule. Moreover, the Seaver evidence ostensibly showed only, at best, one other instance in which ARCO exhibited its alleged repetitive behavior.

Id.

Similarly, in *McCarrick v. New York City Off-Track Betting Corp.,* No. 91 Civ. 5626, 1995 WL 261516, at *5 (S.D.N.Y. May 3, 1995), the plaintiff argued that witnesses should have been allowed to testify as to OTB's policy of discriminating against its employees on the ground that OTB's conduct constituted habit evidence admissible under Rule 406. The court rejected this argument stating that "[i]n order to be admissible under this rule ... the conduct at issue must constitute a `regular response to a repeated specific situation.'" *Id.* (quoting Thompson v. Boggs, 33 F.3d 847, 854 (7th Cir.1994)). The court found that "evidence of an employer's overall policy of discrimination against several individuals under varying

circumstances is not the sort of repeated conduct covered by Rule 406." *Id.*

Here, plaintiff's alleged insubordination and lack of teamwork at CSFB was in response to the specific circumstances plaintiff confronted at that job. In other words, plaintiff's conduct at CSFB resulted from many factors, including her interaction with supervisors and other employees, within the CSFB working environment. Plaintiff's experience at **UBS** was necessarily different because **UBS** had a working environment distinct from that at CSFB. Plaintiff's alleged insubordination and lack of teamwork at **UBS** therefore cannot be seen as habit because it is not "a regular response to a repeated specific situation." In any event, insubordination at two securities firms is not of sufficient frequency to show the type of semi-automatic conduct envisioned in Rule 406. The CSFB Performance Deficiency Memorandum is therefore not admissible as habit evidence under Rule 406.

In addition to the prohibition found in Rule 404(b) and the inapplicability of Rule 406, there is another reason to preclude the admission of the CSFB Memorandum. To admit the Memorandum would, in effect, create a trial within a trial. Absent a stipulation, documents must be authenticated before they are admitted. That means that someone from CSFB would have to testify as to the Memorandum's authenticity. Then, both sides would likely call witnesses to testify regarding plaintiff's performance at CSFB. Weighing the slight probative value of this evidence against the confusion it would cause the jury and the inevitable delay in the core trial proceedings, I also find the proffered evidence inadmissible under Rule 403.

544 *544 II. DEFENDANTS' MOTIONS

A. To Preclude Alleged Acts of Discrimination Against Another **UBS** Employee

Defendants seek to preclude plaintiff from introducing evidence of alleged acts of discrimination directed at sales assistant Peggy Yeh by Matthew Chapin, the Manager of the U.S. Asia Equities Sales Desk. These acts include: (1) use of the expressions "chicks" and "yellow fever" when referring to Asian women; (2) asking whether Yeh planned to wear a one-piece or two-piece bathing suit on vacation; (3) asking whether Yeh had any "weekend exploits;" (4) stating his belief that extramarital affairs between consenting adults were acceptable; and (5) his suggestion that Yeh use her feminine charms to improve client relationships. Defendants also seek to preclude an alleged statement made by co-worker Robert Hrabchak, who responded to Yeh's comments belittling him at an employee dinner by saying "fuck me, Peggy."[2] Finally, defendants also seek to preclude any evidence concerning Yeh's exit interview at **UBS**, in which Yeh allegedly described discriminatory comments and conduct by Chapin and Hrabchak.[3]

"As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent." *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir.1990) (collecting cases). The Ninth Circuit cited *Spulak* in stating that "[i]t is clear that an employer's conduct tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility towards that group is the true reason behind firing an employee who is a member of that group." *Heyne v. Caruso*, 69 F.3d 1475, 1479 (9th Cir.1995). In addition, the Third Circuit has recognized that, as a general rule, "evidence of a defendant's prior discriminatory treatment of a plaintiff or other employees is relevant and admissible under the Federal Rules of Evidence to establish whether a defendant's employment action against an employee was motivated by invidious discrimination." *Becker*, 207 F.3d at 194 n. 8.

The type of discrimination directed at other employees must be similar in nature to that experienced by the plaintiff in order to make the "other employee" conduct admissible. In *Heyne,* for example, the plaintiff claimed she was fired for rejecting the sexual advances of her employer, Mario Caruso. *See Heyne*, 69 F.3d at 1477. The court admitted evidence of the employer's sexual harassment of other female employees, stating as follows:

Evidence of Caruso's sexual harassment of other female workers may be used, however, to prove his motive or intent in discharging Heyne. The sexual harassment of others, if shown to have occurred, is relevant and probative of Caruso's general attitude of disrespect toward his female employees, and his sexual objectification of them. That attitude is relevant to the question of Caruso's motive for discharging Heyne.

Id. at 1480 (citation omitted). The court found that the probative value of this evidence outweighed the danger of unfair prejudice.

545 *545 There is no unfair prejudice, however, if the jury were to believe that an employer's sexual harassment of other female employees made it more likely that an employer viewed his female workers as sexual objects, and that, in turn, convinced the jury that an employer was more likely to fire an employee in retaliation for her refusal of his sexual advances. There is a direct link between the issue before the jury — the employer's motive behind firing the plaintiff — and the factor on which the jury's decision is based — the employer's harassment of other female employees.

Id. at 1481.

Two types of discrimination are at play: (1) the sexual harassment experienced by Yeh because of Chapin's attraction to her; and (2) the alleged unfavorable treatment of plaintiff by Chapin because she is a woman. Facially, the two types of discrimination appear to differ, one being the kind of harassment seen in hostile work environment cases and the other being disparate treatment. But there is a common thread — both result from Chapin's non-performance based reaction to individuals based on their gender and they both degrade individuals because of their sex, albeit in different ways.

In *Becker,* the Third Circuit noted that the courts that admitted other employee evidence did so because the discriminatory nature of the conduct tended to show the employer's state of mind or attitude toward members of the protected class. *See id.,* 207 F.3d at 194 n. 8. Similarly, the Eighth Circuit reversed a jury verdict for defendant in an age and race discrimination suit where the district court excluded, on relevance grounds, "evidence which tended to show a climate of race and age bias at [defendant's company]." *Estes v. Dick Smith Ford, Inc.,* 856 F.2d 1097, 1102 (8th Cir.1988), *abrogated on other grounds by Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).[4] In *Estes,* the court noted that an employer's prior or ongoing discriminatory conduct is indeed relevant to proving a particular instance of discrimination. *See id.* at 1102. *See also Phillip v. ANR Freight Sys., Inc.,* 945 F.2d 1054 (8th Cir.1991) (stating that "'background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive'") (quoting *Estes,* 856 F.2d at 1103).

Accordingly, plaintiff may introduce evidence of Chapin's allegedly discriminatory treatment of Yeh, including use of the
546 phrase "yellow fever."[5] In addition, defendants *546 will likely offer evidence that four of the seven people Chapin hired were women, albeit all of them were Asian. Chapin's comments to Yeh, particularly his use of the phrase "yellow fever," indicate his attraction to Asian women. The fact that he hired and promoted four women, all from the group he finds sexually attractive, does not negate the possibility of discrimination against non-Asian women. Thus, plaintiff would be allowed to offer the Yeh evidence, in any event, to rebut this defense.

B. To Preclude Irrelevant Testimony

1. Court Decisions and Discovery

Defendants contend that this Court's previous decisions in this case, including the imposition of sanctions on **UBS**, are irrelevant to plaintiff's discrimination claims and would unfairly prejudice **UBS**. Defendants are right. Placing the five previous decisions in this case before the jury would serve no legitimate purpose. The jurors will be told all they need to know through the evidence admitted at trial and my charge. There is no need to reference my earlier decisions.

Defendants also argue that none of the correspondence between counsel on discovery matters is relevant to plaintiff's claims or the adverse inference instruction and seek to preclude plaintiff from introducing this evidence. In ***Zubulake v. UBS Warburg LLC,*** No. 02 Civ. 1243, 2004 WL 1620866, at *5 (S.D.N.Y. July 20, 2004) ("***Zubulake V***"), I found that "**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." I also found that "**UBS** acted wilfully in destroying potentially relevant information, which resulted either in the absence of such information or its tardy production...." *Id.* at *12. I therefore concluded that the appropriate remedy was an adverse inference instruction with respect to e-mails deleted after August 2001. *See id.* at *13. The text of the adverse inference instruction I intend to give the jury in this case is set forth at the end of ***Zubulake*** *V.* It states, in pertinent part, as follows: "You may also consider whether you are satisfied that **UBS's** failure

to produce this information was reasonable."

In light of the above, plaintiff may introduce correspondence between counsel on discovery matters if defendants open the door by introducing evidence as to whether their failure to produce was reasonable. If defendants decide not to offer proof that their failure to produce certain e-mails (or late production of other e-mails) was justified, plaintiff will not be permitted to introduce any of the correspondence between counsel in her case in chief.

2. Back-Up Tapes

Defendants seek to preclude any evidence concerning the failure by **UBS** to preserve several monthly back-up tapes. In ***Zubulake v. UBS Warburg LLC***, 220 F.R.D. 212, (S.D.N.Y.2003) ("***Zubulake IV***"), I stated the following:

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.

Id. at 220. The destruction of some of the backup tapes may be relevant to **UBS's** justification for failing to produce some of the e-mails sent or received in August and September 2001. However, for the reasons stated with regard to attorney
547 correspondence, the choice as to whether to *547 introduce such evidence is left to defendants. Plaintiff can introduce evidence of backup tape destruction if, and only if, defendants first open the door to such evidence.

3. Securities Exchange Commission Compliance

According to defendants, any testimony about **UBS's** compliance with Securities Exchange Commission ("SEC") Rule 17a-4 is irrelevant and should be excluded. Defendants correctly point out that this case does not arise out of any alleged failure by **UBS** to comply with SEC Rule 17a-4. Admitting testimony of **UBS's** noncompliance with the Rule would only serve to unfairly prejudice the jury against **UBS**. I previously noted that "[i]n the absence of a clear professional duty, the only obvious reason for **Zubulake** to disclose this material to regulators is to gain leverage against **UBS** in this action." ***Zubulake v. UBS Warburg LLC***, No. 02 Civ. 1243, 2003 WL 21087136, at *2 (S.D.N.Y. May 13, 2003) ("***Zubulake II***"). This same observation applies to plaintiff presenting evidence of alleged violations of SEC Rule 17a-4 to the jury, which could cause undue prejudice. This evidence is excluded even if defendants seek to prove the reasonableness of their non-production of certain e-mails.

4. Chapin's Arrest

Defendants also seek to prevent plaintiff from introducing testimony and documents concerning Chapin's arrest for disorderly conduct which occurred during a client outing with Leland Timblick. In her initial opposition papers, plaintiff states that she does not intend to present evidence of Chapin's arrest at trial. *See* Pl. Opp. at 3, n. 3. However, in her supplemental opposition papers, plaintiff reserves the right to testify as to Chapin's arrest should defendants raise the issue of plaintiff's perceived lack of respect for Chapin as her manager. *See* Plaintiff's Supplemental Memorandum of Law in Opposition to Defendants' Motions in Limine. Plaintiff's request is denied. The resulting prejudice from proof of this arrest would outweigh its probative value. Furthermore, the conduct resulting in the arrest does not relate in any way to the truthfulness of the witness. *See* Fed.R.Evid. 608(b).

5. Chapin's Alleged Prior Conduct

Defendants seek to preclude testimony of Chapin's alleged discriminatory conduct at other firms. Such evidence includes rumors that Chapin sexually harassed a former colleague at HSBC, allegations that he discriminated against women at his prior place or places of employment, and a former colleague's reference to him as a "misogynist." Defendants argue that such hearsay testimony is barred by Rule 602 as plaintiff has no personal knowledge of Chapin's prior conduct. In response, plaintiff has stated that although she herself will not give such testimony, she may call individuals who do have actual knowledge, including Raymond Tam and Michael Bugel, both of whom were formerly employed by HSBC. *See* Pl. Opp. at 5-6.

In a telephone conference held on March 15, 2005, plaintiff conceded that she does not intend to call either witness in her direct case. Whether she is entitled to call either witness on rebuttal is an open question, but it is highly unlikely that this Court would permit such testimony for the same reasons discussed in Part I, *supra,* with regard to character evidence.

6. Demographics of Senior Management

Defendants anticipate that plaintiff will proffer her own testimony concerning the number of women in senior positions at
548 **UBS**. Plaintiff has stated that she *548 does not intend to provide such testimony unless **UBS** opens the door. *See id.* at 6. Plaintiff is permitted to testify to her own observations.

7. September 2001 Conference

Defendants seek to preclude evidence of Chapin's decision not to cancel a conference in New York attended by visitors from China during the wake of the September 11, 2001 tragedy. Plaintiff claims that such evidence is relevant to discrediting an e-mail in which Chapin describes as false **Zubulake's** statement to another salesperson that Peggy Yeh was forced to attend the conference. This is surely a collateral issue. The e-mail, in fact, is favorable to defendants as it highlights plaintiff's alleged insubordination in saying negative things about Chapin to others. Whether or not Yeh, in fact, felt pressured to attend the conference is irrelevant. Furthermore, the probative value of this evidence, if any, is completely outweighed by the danger of unfair prejudice given the emotions associated with the attacks of September 11th. This evidence is therefore excluded.

8. Client Functions

Defendants argue that evidence that plaintiff's co-workers organized client trips to strip clubs is irrelevant to plaintiff's claims. Although plaintiff has not alleged a hostile work environment, she has alleged discriminatory treatment, including the purposeful exclusion from client outings. Having client outings at strip clubs, knowing that women would obviously not want to attend, is one such method of exclusion. Therefore, evidence of these outings is relevant and will be admitted.

C. To Preclude Certain Stray Remarks

Defendants anticipate that plaintiff will seek to admit evidence that: (1) Derek Hillen, a **UBS** employee, referred to a male contact as a "dickhead" in an e-mail to Chapin and plaintiff;[6] and (2) an e-mail from Andrew Clarke, a co-worker on the Desk, in which he stated that plaintiff and a co-worker, Lisa Marrapodi, were engaging in a "mutual bitch session."[7] Clarke, however, was not a decision-maker, nor was he accused by plaintiff of discriminating against her. Accordingly, Clarke's stray remark is not evidence of discrimination and is therefore excluded. *See* Minton v. Lenox Hill Hosp., 160 F.Supp.2d 687, 695 (S.D.N.Y.2001) (stating that it is well established that "[a]s a general matter, stray comments are not evidence of discrimination if ... they are made by individuals without decision-making authority") (internal quotation marks and citation omitted, ellipsis in original).

D. To Preclude Testimony from Defendants' Attorneys

Plaintiff has indicated that she intends to elicit testimony from defendants' counsel, including Kevin LeBlang, Norman Simon and Robert Salzberg, regarding the preservation of e-mails and back-up tapes. Defendants claim that such testimony would be cumulative as defendants have already produced documents regarding **UBS's** official retention policies and the requests made to employees to retain documents. Moreover, the risk that privileged communications could be probed during trial is arguably too great to permit plaintiff to call opposing counsel to testify. I do not see any
549 legitimate need plaintiff *549 may have for calling opposing counsel given the extensive discovery on the issue of e-mail and back-up tape preservation and retention. Plaintiff is therefore precluded from calling LeBlang, Simon and Salzberg as witnesses. *See* In re Grand Jury Subpoena Dated October 22, 2001, 282 F.3d 156, 160 (2d Cir.2002) (quashing grand jury subpoena directed to attorney and finding that work product establishes a "zone of privacy for an attorney's preparation to represent a client in anticipation of litigation"); ResQNet.com, Inc. v. Lansa, Inc., No. 01 Civ. 3578, 2004 WL 1627170, at *6 (S.D.N.Y. July 23, 2004) (holding that the risk of encountering work product and privilege issues and the amount of discovery already conducted are factors courts must consider in determining whether counsel may be

deposed).

SO ORDERED.

[1] Character may itself be an element of a crime, claim or defense. *See* Advisory Committee Note to Subdivision (a). One example is the chastity of a victim under a statute requiring chastity as an element of the crime of seduction. *See id.* These kinds of situations are commonly referred to as "character in issue" cases. *See id.* In these cases, Rule 404 does not apply and the relevant character evidence is admissible. This case is not covered by the exception. A plaintiff's character is not an essential element of any claim or defense in an employment discrimination case. The prohibitions of Rule 404 therefore apply.

[2] Plaintiff does not intend to offer any evidence of this statement. *See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motions in Limine ("Pl.Opp.") at 3, n. 2.

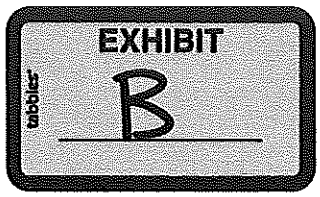
[3] Lauren Cullinane is the Human Resources employee who conducted Yeh's exit interview. Cullinane's testimony as to what Yeh told her during that interview and her contemporaneous notes of what Yeh told her are not hearsay if offered for the limited purpose of rebutting a charge of recent fabrication. *See* Fed.R.Evid. 801(d)(1)(B).

[4] In *Estes,* the district court excluded background evidence concerning defendant's workforce on materiality grounds because Estes presented an individual disparate treatment case, not a disparate impact case. *See id.* at 1103. The court stated that "it is hard to see how evidence which suggests that Ford discriminated against blacks in hiring would be irrelevant to the question of whether it fired a black employee because of his race." *Id.*

[5] Defendants' reliance on *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir.1984), is misplaced. In *Haskell,* the Second Circuit held that testimony of six former employees had been admitted in error because that testimony did not produce statistically significant evidence of a pattern and practice of discrimination. Thus, the court found that the probative value of the evidence was outweighed by the prejudicial impact of "a parade of witnesses, each recounting his contention that defendant laid him off because of his age." *Id.* at 122. *Haskell* is a decision addressing the value of statistical evidence in which the sample was held to be too small. Because the plaintiff in *Haskell* proffered the evidence to show a "pattern and practice" of discrimination, the court did not discuss whether the evidence was probative of a discriminatory attitude on the part of the employee's supervisor. *Haskell,* therefore, is not a controlling case here.

[6] Plaintiff does not intend to introduce evidence of Hillen's e-mail. *See* Pl. Opp. at 7, n. 5.

[7] Defendants also seek to exclude Chapin's use of the expression "yellow fever" when referring to Asian women. This issue has been addressed in Part II.A of this Opinion.



RICHARD GREEN (FINE PAINTINGS), Plaintiff,

v.

DOYLE MCCLENDON AND MARY ALICE MCCLENDON, Defendants.

No. 08 Civ. 8496 (JGK).

United States District Court, S.D. New York.

September 17, 2010.

AMENDED MEMORANDUM OPINION AND ORDER

JOHN G. KOELTL, District Judge.

Richard **Green** (Fine Paintings) ("**Green**" or "the plaintiff") is an art dealer who offered a painting by Pierre Bonnard ("the painting") for sale at the 2007 International Fine Art Fair in New York. **Green** alleges that it entered into an agreement to sell the painting to Doyle ("Mr. **McClendon**") and Mary Alice **McClendon** ("Ms. **McClendon**") (collectively, "the McClendons") when the McClendons visited his booth at the Fair. It is undisputed that the McClendons paid **Green** $500,000 towards the agreed upon purchase price of $4.2 million, with the balance due in a year. Jonathan **Green** agreed to deliver the painting to the McClendons' Florida home once payment was complete. The McClendons have subsequently divorced, and have not paid the remainder of the balance on the painting. **Green** retains possession of the painting at this time.

Green brought this action seeking the full price of the painting. Ms. **McClendon** filed a motion to dismiss, arguing among other things that the alleged contract was merely an oral agreement and not enforceable under the Statute of Frauds. The Court denied the motion to dismiss, finding among other things that three emails between **Green** and Ms. **McClendon**, taken together, were a writing sufficient to meet the requirements of the Statute of Frauds.

Mr. **McClendon** recently died, and **Green** decided not to pursue this action against any successor to Mr. **McClendon** and to proceed solely against Ms. **McClendon**. **Green** and Ms. **McClendon** had previously made cross-motions for summary judgment that were withdrawn upon Mr. **McClendon's** death and have now been reinitiated. **Green** now moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. Ms. **McClendon** cross move for summary judgment.

I.

The standard for granting summary judgment is well established. Summary judgment may not be granted unless "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Gallo v. Prudential Residential Servs. Ltd. P'ship, 22 F.3d 1219, 1223 (2d Cir. 1994). "[T]he trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." Gallo, 22 F.3d at 1224. The moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes Celotex, 477 U.S. at 323. The substantive law governing the case will identify those facts which are material and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Robins v. NYC Bd. of Educ., No. 07 Civ. 3599, 2010 WL 2507047, at *1 (S.D.N.Y. June 21, 2010).

In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable

inferences against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); see also Gallo, 22 F.3d at 1223. Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the non-moving party. See Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994). If the moving party meets its burden, the burden shifts to the nonmoving party to come forward with "specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). The non-moving party must produce evidence in the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible." Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993); see also Scotto v. Almenas, 143 F.3d 105, 114-15 (2d Cir. 1998) (collecting cases); Robins, 2010 WL 2507047, at *1.

II.

The following facts are undisputed unless otherwise noted.

The McClendons are sophisticated art collectors who have both served on the boards of various museums and have together purchased more than 50 works of art worth over $10 million. (Pl.'s Rule 56.1 Statement ("Pl.'s 56.1 Stmt.") ¶¶ 5-12, Oct. 23, 2009; Def. Mary Alice **McClendon's** Resp. to Pl.'s Local Civil Rule 56.1 Statement of Facts ("Def.'s 56.1 Stmt.") ¶¶ 5-12, Nov. 20, 2009.) When purchasing art, the McClendons would sometimes make an initial payment followed by a second payment of the remaining balance they owed for the work. (Pl.'s 56.1 Stmt. ¶ 13, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶ 13, Nov. 20, 2009.) Ms. **McClendon** could not recall an instance when the couple signed papers at the time of an art purchase (Pl.'s 56.1 Stmt. ¶ 14, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶ 14, Nov. 20, 2009), although she did produce a handful of invoices signed by Mr. **McClendon**. (Drab Decl. Ex. A, Nov. 20, 2009.)

Green, headquartered in London, regularly displays and sells artwork in various locations. (Pl.'s 56.1 Stmt. ¶ 15, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶ 15, Nov. 20, 2009.) The plaintiff displayed the painting at issue here, an 1892 Pierre Bonnard painting. The painting had been purchased in November 2006 by Jonathan **Green** for $3,712,000. (Pl.'s 56.1 Stmt. ¶¶ 15-16, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 15-16, Nov. 20, 2009.)

On May 12, 2007 the McClendons visited **Green's** booth at the Fine Art Fair and expressed their interest in the painting to David **Green**, who told them about the history of the work and allowed them to inspect it with an ultraviolet light. (Pl.'s 56.1 Stmt. ¶¶ 18-21, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 18-21, Nov. 20, 2009.) David **Green** introduced the McClendons to Jonathan **Green**, and they told him that they would be "delighted" to buy the painting for $4.2 million. (Pl.'s 56.1 Stmt. ¶¶ 22-24, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 22-24, Nov. 20, 2009.)

The parties agree that Mr. **McClendon** wired $500,000 to the plaintiff in July 2007 and that the balance of the purchased price, $3.7 million, was due on May 12, 2008. (Pl.'s 56.1 Stmt. ¶¶ 25-27, 34, 42, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 25-27, 34, 42, Nov. 20, 2009.) Ms. **McClendon** later testified that this was a "firm agreement" to "purchase the painting after a year." (Pl.'s 56.1 Stmt. ¶ 70, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶ 70, Nov. 20, 2009; Adelman Decl. Ex. B at 10-11, Oct. 23, 2009.) A **Green** employee then placed a red dot on the caption next to the painting, signifying that the work had been sold. (Pl.'s 56.1 Stmt. ¶ 28, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶ 28, Nov. 20, 2009.) The plaintiff argues that the $500,000 payment was the first instalment of the purchase price, but Ms. **McClendon** now argue that the payment was merely to hold the painting for a year but not a firm commitment to purchase the painting at the end of that period. (Pl.'s 56.1 Stmt. ¶¶ 25, 29, 43-44, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 25, 29, 43-44, Nov. 20, 2009.)

Green was to deliver the painting to the McClendons' Florida home after the balance was paid in full, but the painting was never shipped to Florida because the balance was never paid. (Pl.'s 56.1 Stmt. ¶¶ 31-32, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 31-32, Nov. 20, 2009.)

On May 13, 2007 **Green** delivered an envelope to the McClendons' hotel in New York containing a description of the work and a cover letter signed by David **Green** congratulating the defendants on "the purchase of the painting," "confirm[ing] the purchase price of $4,200,000," referring to the $500,000 payment as a "deposit" with the balance due on May 12, 2008, and confirming that the painting would be held in **Green's** London headquarters until the balance was

paid and would then be delivered to the McClendons' home in Florida. (Pl.'s 56.1 Stmt. ¶ 34, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶ 34, Nov. 20, 2009; Adelman Decl. Ex. L, Oct. 23, 2009.)

Green subsequently sent an invoice to the McClendons confirming the transaction and confirming receipt of the $500,000 payment. (Pl.'s 56.1 Stmt. ¶ 37, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶ 37, Nov. 20, 2009; Adelman Decl. Ex. M, Oct. 23, 2009.) The McClendons did not object to any of the statements in these documents. (Pl.'s 56.1 Stmt. ¶¶ 35-37, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 35-37, Nov. 20, 2009.)

Ms. **McClendon** and a friend had lunch with Jonathan and Matthew **Green** in London in May 2007, when Ms. **McClendon** made a statement confirming that she had told her friend that she had purchased the painting. (Pl.'s 56.1 Stmt. ¶¶ 39-41, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 39-41, Nov. 20, 2009.)

In an email dated Feb. 5, 2008, Ms. **McClendon** told Jonathan **Green** that she could not consider purchasing another painting from **Green** "when [the McClendons] have not yet met our obligation to **[Green]** after purchasing the Bonnard. In these money times I think it foolish to go into debt to **Green's** further." (Pl.'s 56.1 Stmt. ¶¶ 45-47, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 45-47, Nov. 20, 2009; Adelman Decl. Ex. Q, Oct. 23, 2009.)

In an April 18, 2008 letter, which received no response from the defendants, Jonathan **Green** reminded the McClendons of the outstanding balance on the painting and confirmed that **Green** would deliver the painting to Florida once the balance was paid in full. (Pl.'s 56.1 Stmt. ¶¶ 48-51, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 48-51, Nov. 20, 2009; Adelman Decl. Ex. R, Oct. 23, 2009.)

Ms. **McClendon** attended the 2008 Fine Art Fair on or about May 12, 2008 and discussed with Jonathan **Green** the possibility of obtaining an extension of time to pay the balance for the painting, and indicated that she may not be able to pay the balance. (Pl.'s 56.1 Stmt. ¶¶ 52-56, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 52-56, Nov. 20, 2009.) By letter dated May 16, 2008, Jonathan **Green** confirmed an extension of time until July 31, 2008, although Ms. **McClendon** disputes that she agreed to pay the balance. (Pl.'s 56.1 Stmt. ¶¶ 57-58, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 57-58, Nov. 20, 2009; Adelman Decl. Ex. S, Oct. 23, 2009.) Ms. **McClendon** replied by email on May 20, 2008 questioning the amount of the remaining balance, an error she later corrected, and telling **Green** that "[i]f you feel you must bring this matter to a close then do so without further ado." (Pl.'s 56.1 Stmt. ¶ 58, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶ 58, Nov. 20, 2009; Adelman Decl. Ex. T, Oct. 23, 2009.)

On July 30, 2008, Jonathan **Green** emailed Ms. **McClendon** requesting payment. (Pl.'s 56.1 Stmt. ¶ 59, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶ 59, Nov. 20, 2009; Adelman Decl. Ex. U, Oct. 23, 2009.) Ms. **McClendon's** response, dated August 1, 2008, informed **Green** that the McClendons were separated, indicated that Mr. **McClendon** was supposed to contact **Green** regarding a further extension of time, and stated that Ms. **McClendon** would "close our deal" if she had $4 million. (Pl.'s 56.1 Stmt. ¶¶ 60-61, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 60-61, Nov. 20, 2009; Adelman Decl. Ex. U, Oct. 23, 2009.) Ms. **McClendon** then suggested a "compromise for the $500,000[] we have paid in that **[Green]** offer [the McClendons] something small as a token of good will." (Pl.'s 56.1 Stmt. ¶ 59-61, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶ 59-61, Nov. 20, 2009; Adelman Decl. Ex. U, Oct. 23, 2009.) In a subsequent phone call, Mr. **McClendon** informed **Green** that he did not have the money owed and that **Green** would have to sue to obtain it. (Pl.'s 56.1 Stmt. ¶¶ 62-63, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 62-63, Nov. 20, 2009.)

Green attempted to sell the painting to another buyer, but by that time world financial events lowered the estimated price of the painting. (Pl.'s 56.1 Stmt. ¶¶ 64-66, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 64-66, Nov. 20, 2009.)

Ms. **McClendon** commenced divorce proceedings in June 2008, and the McClendons were divorced in early 2009. (Pl.'s 56.1 Stmt. ¶¶ 1-2, Oct. 23, 2009; Def.'s 56.1 Stmt. ¶¶ 1-2, Nov. 20, 2009.)

At a hearing on August 13, 2009, the Court denied a motion to dismiss the amended complaint. The Court found, among other things, that the February 5, 2008, May 20, 2008, and August 1, 2008 emails, taken together, "are sufficient to reflect the existence of the alleged contract and satisfy the [Uniform Commercial Code ("UCC")] Statute of Frauds." (Tr. 36:22-25.) The Court also found that the claims are not barred by the Statute of Frauds pursuant to the partial performance exception of section 2-201(3)(c) of the UCC. (Tr. 38:19-39:1.)

The plaintiff now moves for summary judgment on the breach of contract claim under the UCC pursuant to Federal Rule of Civil Procedure 56, seeking the remainder of the price of the painting. Ms. **McClendon** opposes and cross moves for summary judgment dismissing the breach of contract and promissory estoppel claims.

III.

The plaintiff is entitled to summary judgment for the price of the painting as determined by the contract. The evidence is clear that the parties entered into an agreement whereby the plaintiff would sell the painting to the McClendons for $4.2 million. The McClendons in fact paid $500,000, but never paid the remainder of the purchase price.[1]

Under New York law, the determination whether a written contract is ambiguous and the interpretation of an unambiguous contract is a question of law for the court to decide. See JA Apparel Corp. v. Abboud, 568 F.3d 390, 396-97 (2d Cir. 2009). Whether a contract is ambiguous "is determined by looking within the four corners of the document, not to outside sources." Id. at 396 (internal quotation marks omitted). Summary judgment to recover the price of the goods contracted for sale pursuant to section 2-709 of the UCC is appropriate when the plaintiff shows that "1) [it] had a contract; 2) the buyer failed to pay the purchase price; and 3) the buyer accepted the goods." Hidden Brook Air, Inc. v. Thabet Aviation Int'l Inc., 241 F. Supp. 2d 246, 272 (S.D.N.Y. 2002) (internal quotation marks omitted). There is no dispute that the McClendons failed to pay the full purchase price of the painting. Ms. **McClendon** argues that summary judgment is not appropriate because there was no unambiguous contract, and the painting was not delivered to her in Florida.

This Court has previously found that the emails exchanged between Ms. **McClendon** and Jonathan **Green** dated February 5, 2008, May 20, 2008, and August 1, 2008 are, taken together, a sufficient writing to satisfy the Statute of Frauds. To the extent that Ms. **McClendon** now raises the Statute of Frauds, there is no merit to the argument, for the reasons explained previously. The Court also previously found that even if the email exchanges were not sufficient to satisfy the Statute of Frauds, the partial performance exception under section 2-201(3)(c) of the UCC applies because the McClendons made a partial payment. Moreover, the deposition testimony of the

The essential terms of a contract for the sale of goods are "quantity, price, and time and manner of delivery." Lomaglio Assocs. Inc. v. LBK Mktg. Corp., No. 94 Civ. 3208, 1999 WL 705208, at *6 (S.D.N.Y. Sept. 10, 1999) (internal quotation marks omitted). The contract, as reflected in the email exchange between Ms. **McClendon** and Jonathan **Green**, is unambiguous with respect to each of these terms. The contract was for the sale of the painting for $4.2 million, with a $500,000 initial payment and the balance due in a year and with delivery to occur at the **McClendon's** Florida home after the payment of the balance owed.

In opposing summary judgment, Ms. **McClendon** attempts to manufacture a dispute as to whether the parties intended the $500,000 payment to be simply a "deposit." But the terminology is not dispositive here. Whether the payment is termed a "deposit" or a first instalment, Ms. **McClendon** now concedes that it is not refundable. Nothing in the contract suggests that the McClendons paid the $500,000 merely to hold the painting, with an option to buy it within a year. It is clear that there was a commitment to purchase the painting for $4.2 million and that the McClendons paid $500,000, as was their practice, because they did not keep sufficient cash in their checking account to pay for the whole payment. Thus, the defendants negotiated the full payment within a year.

Ms. **McClendon** also argues that she believed $500,000 would be a sufficient payment to cover her obligation, possibly as liquidated damages. But there is no basis for this argument in the plain language of the contract, and it does not affect the terms of the agreement to which she did agree. The parties agreed to all of the essential terms of the agreement to purchase the painting. Ms. **McClendon** also does not allege that she or Mr. **McClendon** ever communicated to the plaintiff that the $500,000 was a maximum amount of damages that the McClendons would owe, and such a term is not an essential term of the sale of the painting for $4.2 million with an initial payment of $500,000 and the balance payable within one year. See Lomaglio Assocs., 1999 WL 705208, at *6 (stating essential terms of contract for sale of goods are "quantity, price, and time and manner of delivery.")

Therefore, the parties here did have a contact, and the buyer has failed to pay the purchase price. If Ms. **McClendon**

accepted the painting, then the plaintiff is entitled to the purchase price pursuant to section 2-709 of the UCC. See Hidden Brook Air, 241 F. Supp. 2d at 272. Under section 2-606 of the UCC, "[a]cceptance of goods occurs when the buyer . . . after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity." The McClendons inspected the painting with an ultraviolet light at the plaintiff's booth at the time the agreement was negotiated. The plaintiff stands willing and able to deliver the painting to Ms. **McClendon** as agreed once full payment is made. A reasonable opportunity to inspect the goods is sufficient for acceptance under the UCC, even when the buyer does not yet possess the goods. See id. at 274-75. Therefore, Ms. **McClendon** accepted the painting and the plaintiff is entitled to summary judgment for the agreed upon price of the painting.[2]

IV.

Ms. **McClendon** moves for summary judgment on the grounds that there was never an agreement to purchase the painting. New York law requires a meeting of the minds regarding the essential terms of a binding contract. See Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 95 (2d Cir. 2007). Ms. **McClendon** argues that there was never a meeting of minds over an agreement to purchase the painting because she now alleges that she believed the $500,000 payment was merely to hold the painting for a year.

This argument is incorrect on the undisputed facts. Nothing in the contract suggests any ambiguity as to the essential terms of the contract. There is no indication that the parties agreed, at the time the agreement was made, to anything other than the purchase of the painting for $4.2 million, with a $500,000 initial payment and the balance due within a year.

V.

Ms. **McClendon** also moves for summary judgment dismissing the promissory estoppel claim. A promissory estoppel claim under New York law requires "(1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced." Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst., 404 F.3d 167, 172 (2d Cir. 2005).

Ms. **McClendon** argues that there was no oral promise as to which there was justifiable reliance. Ms. **McClendon** further argues that she never confirmed in writing any request for an extension of time. However, there are issues of fact regarding whether Ms. **McClendon** orally requested an extension of time to pay for the painting, and whether the plaintiff was harmed as a result of granting the extension and the subsequent loss in value in the painting. Therefore, Ms. **McClendon** is not entitle to summary judgment dismissing the promissory estoppel claim.

CONCLUSION

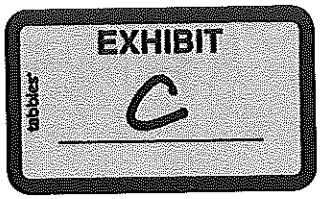
For the reasons stated above, the plaintiff's motion for summary judgment is granted and Ms. **McClendon's** motion for summary judgment is denied.

The Clerk is directed to close these motions.

SO ORDERED.

[1] Ms. **McClendon** has not sought to assert any defense to her liability under the contract based on Mr. **McClendon's** death.

[2] To the extent that Ms. **McClendon** objects that the complaint did not plead a claim for the price of the painting, the plaintiff is not required to plead the specific remedy in the complaint.



March 20, 2012

TO: Ms. Client, via email

FROM: Gordon Cruse, CFLS

SUBJECT: Marriage of Client, ESI Preservation

Dear Client,

Recent changes in the law require that you now protect from change and destruction all electronically stored information (ESI) during your case. This means that until your case is over and you are told otherwise by me, you must not delete any email, text messages or voice-mails. If you are using Quickbooks, Microsoft Money or other accounting software at home, you cannot delete those files. Frankly if in doubt, keep it.

If you suffer a hardware failure such as a hard drive that stops working, it is imperative that you let my office know so we can notify the opposing counsel. You will need to keep that broken hard drive until I tell you that you can dispose of it. This is also true for your cell phone. If you decide to replace your phone, you cannot turn in your old one, you must keep it safe until your case is over and I tell you it is now okay to get rid of your old phone.

This rule of keeping old, broken or inoperable hardware also applies to:

- iPods or any music player,
- iPads or any computer tablet,
- thumb drives and portable hard drives,
- GPS devices, handheld or built into your car,
- Security systems that record video or audio,
- Digital audio recorders,
- Media used to hold your digital photos, even the ones on your cell phone. This includes CD's, DVD's, flash drives, SD drives, Compact Flash Drives or any type of device used to hold the digital photo, video or audio.

If you have any question, before you delete anything, before you throw anything away, call the office and speak to me. The penalties the court can impose on you for what the court deems to be the destruction of evidence or potential evidence can be very severe. This includes the Court prohibiting you from presenting certain evidence yourself, deciding issues without any input from you or making you pay for the recreation of the lost or damaged ESI.

You are likely wondering why any of this is necessary. The answer is simply that now the law requires it and it is my duty to make sure you are informed of your responsibilities to protect and preserve all electronically stored information while your case is pending.

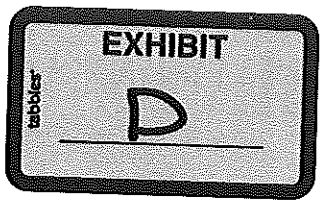
Do not take this responsibility lightly as the Court takes it very seriously. If you have any questions at all, please call me and I will be happy to answer them for you.

Very truly yours,

GORDON D. CRUSE, APLC

Gordon D. Cruse, CFLS

GDC:hd
cc: co-counsel, CFLS



DEMAND FOR PRESERVATION OF EVIDENCE, DOCUMENTS AND ELECTRONICALLY STORED INFORMATION

September 12, 2013

PERSONAL AND CONFIDENTIAL

XXXXX Z. AAAAAA
The XXXX Law Firm, LLC
XXXXXX Street
XXXXXXXXX, SC 11111

Re: X v. Y

Dear XXXX:

As you know, we in this office represent clients who are involved in family law issues. In the course of events we sometimes find ourselves called upon to represent a client which, of necessity, creates a level of discomfort. Unfortunately, I find myself in that position at this time, as this office has been called upon to represent YYYYYY PPPPPP.

In connection with that representation we have been provided with information which suggests that you are privy to materials and information pertinent to our representation of XX. PPPPPP. Accordingly, in connection with our ethical and legal obligations, we are required to send this letter to you and thereby make the requests outlined below. We certainly trust that you understand our position in this matter, and that you appreciate that we hope to proceed in a business-like fashion in all respects.

This letter relates to the potential spoliation of documents, records, memorializations, tangible things, electronically stored information, data, storage systems, computers, hard drives, storage devices, and/or other material which may be discoverable and/or relevant in connection with legal matters which may potentially involve you and/or others with whom you may have business and/or personal relations. Our representation and the associated legal and equitable matters may involve, among others, issues related to family law, accounting finances, and/or the preservation of assets and information. Accordingly, it is critically important that any and all documents, records, memorializations, tangible things, electronically stored information, data, and/or other material, regardless of form or format, which may be discoverable and/or relevant, be

preserved inviolate until a Court of competent jurisdiction permits the alteration or destruction of such. Therefore, the purpose of this letter is to request that you preserve and retain any and all documents, records, memorializations, tangible things, electronically stored information, data, storage systems, computers, hard drives, storage devices, and/or all other material, regardless of form or format, which may be discoverable and/or relevant in connection with any claims and/or potential claims which MM. XXXXXXXX may have involving these matters.

This letter is intended to reach not only those named specifically above, but also YYYYYYY, a/k/a ZZZZZ XXXXX, all businesses, enterprises, companies, partnerships, corporations, limited liability companies, and/or any and all other entities controlled or operated by the aforementioned persons and/or entities, or in which they have any interest of any nature, and any predecessors, successors, parents, subsidiaries, divisions, or affiliates, and its respective officers, directors, agents, attorneys, accountants, employees, partners, or other persons occupying similar positions or performing similar functions.

This letter is also intended to reach all documents, records, memorializations, tangible things, electronically stored information, data, storage systems, computers, hard drives, storage devices, and/or other material of any and every nature, regardless of form or format, which may be discoverable and/or relevant pursuant to Rules of Court. It is the intent of this letter that it should not be parsed or dissected in an attempt to circumvent or undermine its meaning, it is intended to be all encompassing; any doubt or question as to its reach or intent should be resolved in favor of preservation and retention. Therefore, no part or portion of such materials may be destroyed, altered, hidden, discarded, written over, mutilated, alienated, hypothecated, encumbered, sold, donated, given to others, secreted, diminished, decreased in value, deleted, erased, or otherwise rendered unproducable to any extent whatsoever.

You should anticipate that some of the information subject to disclosure or responsive to discovery in this matter may be stored on your current and former computer, computer systems, online repositories, hard drives (external and/or internal), digital or other cameras, PDAs, smart phones, other electronic devices, telephones, and/or cell/wireless phones. Such may also be stored, preserved, and/or maintained in some other form or format, e.g., paper, and such may or may not be stored, retained, and/or maintained off site in the past, currently, or in the future.

Electronically stored information (hereafter "ESI") should be afforded the broadest possible definition and includes (by way of example and not as an exclusive list) potentially relevant information electronically, magnetically, or optically stored as:

1. Digital communications (e.g. e-mail, voicemail, instant messaging, texting), including, but not limited to, any and all email messages to and/or from you and/or YYYYY ZZZZZZ, a/k/a XXXXX YYYYYYY;
2. Word processing documents, including drafts and metadata (created by and/or stored in Word or WordPerfect or other word processing programs);

3. Spreadsheets and Tables (e.g., Excel or Lotus 123 worksheets);
4. Accounting Application Data (e.g., Quickbooks, Money, Peachtree Data Files);
5. Image and Facsimile Files (e.g., .PDF, .TIFF, .JPG, .GIF images);
6. Sound Recordings (e.g.,.WAV and .MP3 files);
7. Video and Animation (e.g., .AVI, .MOV files);
8. Databases (e.g., Access, Oracle, SQL Server data, SAP);
9. Contact and Relationship management Data (e.g., Outlook and ACT!);
10. Presentations (e.g., Powerpoint, Corel Presentations);
11. Network Access and Server Activity Logs;
12. Project Management Application Data;
13. Computer Aided Design/Drawing Files; and/or,
14. Backup and Archival Files (e.g., Zip, .GHO).

ESI may be located not only in areas of electronic, magnetic, and optical storage media reasonably accessible to you, but also in areas you may deem not reasonably accessible. You are obligated to preserve potentially discoverable evidence from all sources and locations of ESI, even if you do not anticipate producing such ESI.

The request contained herein that you preserve both accessible and inaccessible ESI is reasonable and necessary. Please be aware that even ESI that you deem reasonably inaccessible must be preserved in the interim so as to avoid depriving my client of **HIS/HER** right to secure evidence or the Court of its right to adjudicate the issue.

In addition to the above, regardless of format or form or manner of storage, and without limitation, you should immediately undertake to preserve for the period commencing **January 1, 2011** and proceeding forward in time and continuing until released by Court Order, all itineraries, calendars, debit and/or credit card statements and/or bills and/or invoices, airline and/or other common carrier tickets, receipts, boarding passes, invoices, bills, charges, and the like; private transportation tickets, receipts, boarding passes, in voices, bills, charges, and the like; hotel/motel and other similar accommodation bills, invoices, charges, receipts, and the like; all banking and/or financial institution statements, records, notifications, checks, registers, stubs, data entries, drafts, draft records, communications, and the like. All social media pages, including, but not limited to, Facebook, LinkedIn, MySpace, YouTube, chatrooms, message boards, instant messaging, and the like.

Preservation Requires Immediate Intervention

This requires immediate action on your part to preserve potentially discoverable and/or relevant evidence, including, but not limited to, ESI, which in any way may relate to our client's potential claim(s). You must maintain all computers and any and all component parts, internal and/or external.

Adequate preservation of evidence, especially, but not limited to, ESI, requires more than simply refraining from efforts to destroy or dispose of such evidence. You must also intervene to prevent loss due to routine operations and employ proper techniques and protocols suited to protection of all such evidence, including, but not limited to, ESI. Please be advised that sources of ESI are altered and erased by continued use of your computers and other devices. Booting a drive, examining its contents, or running any application will irretrievably alter the evidence it contains and may constitute unlawful spoliation of evidence. Consequently, alteration and erasure may result from failing to act diligently and responsibly to prevent loss or corruption of ESI.

Nothing in this demand for preservation for ESI should be understood or construed to diminish your concurrent obligation to preserve documents, tangible things, and/or all other potentially discoverable and/or relevant evidence.

Suspension of Routine Destruction

It is advisable to initiate immediately a litigation hold for potentially relevant ESI, documents, and tangible things, and to act diligently and in good faith to secure and audit compliance with such litigation hold. It is also advisable immediately to identify and modify or suspend features of your information systems and devices that, in routine operation, operate to cause the loss of potentially discoverable and/or relevant ESI. Examples of such features and operations include:

1. Purging the contents of e-mail repositories by age, capacity, and/or other criteria;
2. Using data or media wiping, disposal, erasure, or encryption utilities, and/or devices;
3. Overwriting, erasing, destroying, and/or discarding back up media;
4. Re-assigning, re-imaging, or disposing of systems, servers, devices, and/or media;
5. Running antivirus or other programs effecting wholesale metadata alteration;
6. Releasing and/or purging online storage repositories;
7. Using metadata stripper utilities;
8. Disabling server and/or IM logging; and/or
9. Executing drive and/or file defragmentation and/or compression programs.

Guard Against Deletion

Unfortunately, employees, officers, or others may seek to hide, destroy, and/or alter ESI and/or act to prevent and/or guard against preservation, retention, and/or disclosure. Especially where company machines have been used for internet access or personal communications, users may seek to delete and/or destroy information that they regard as personal, confidential, and/or embarrassing and, in so doing, may violate the duty to retain and preserve; discoverable and/or relevant material and/or information is not necessarily rendered undiscoverable and/or irrelevant simply because it may be regarded as personal or

embarrassing. Compounding the potential problem, deleting and/or destroying such allegedly personal material and/or information may also delete or destroy potentially relevant ESI that is not personal. This concern is not one unique to you or your employees and officers. It is simply an event that occurs with such regularity in electronic discovery efforts that any custodian of ESI and counsel are obliged to anticipate and guard against its occurrence.

Servers

With respect to servers like those used to manage electronic mail (e.g., Microsoft Exchange Lotus Domino) or network storage (often called a user's "network share"), the complete contents of each user's network share and e-mail account should be preserved. There are several ways to preserve the contents of a server depending upon its RAID configuration and whether it can be shut down or must be online 24/7. If you question whether the preservation method you pursue is one that is sufficient, please understand the duty to preserve is inviolate.

Home Systems, Laptops, Online Accounts, and Other ESI Venues

Although swift action to preserve data on office workstations and servers must be taken, you should also determine if any home or portable systems may contain potentially relevant data. To the extent that officers, board members, employees, accountants, or attorneys have sent or received potentially relevant e-mail messages or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices, and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD-R disks, and the user's PDA, telephones, smart phone, iPhone, voice mailbox, and/or other form of ESI storage). Similarly, if employees, officers, accountants, attorneys, or board members used online or browser-based-e-mail accounts and services (such as AOL, Gmail, Yahoo, or the like) to send or receive potentially relevant messages and attachments, the contents of these account mailboxes (including by way of example, Sent, Deleted, and Archived Message folders) should be preserved.

Ancillary Preservation

It is important and imperative to preserve the documents and other tangible items that may be required to access, interpret, and/or search potentially relevant ESI including, but not limited to, logs control sheets, specification, indices, naming protocols, file lists, network diagrams, flow charts, instruction sheets, data entry forms, abbreviation keys, user ID, and/or password rosters, key codes, access codes, or the like.

It is also important and imperative to preserve any passwords, keys, or other authenticators required to access encrypted files or standard CD or DVD optical disk drive if needed to access the encrypted files or run applications, along with installation disks, user manuals, and license keys for applications required to access the ESI.

It is also important and imperative to preserve any cabling, drivers and hardware, floppy disk drive, and/or standard CD or DVD optical disk drive, if needed to access or interpret devices on which ESI is stored. This includes tape drives, bar code readers, Zip drives, and other legacy or proprietary devices.

Preservation Protocols

A successful and compliant ESI preservation effort requires expertise and the implementation of efficacious forensic protocols. If you do not currently have such expertise at your disposal, we urge you to engage the services of an expert in electronic evidence and computer forensics.

Do Not Delay Preservation

Please proceed promptly to implement appropriate protocols for the retention and preservation of discoverable and/or relevant evidence, regardless of form or format. Again, in order to be safe and compliant, it is best to conclude that all material is discoverable and relevant. Your implementation of such protocols will likely avoid spoliation of evidence, a result all involved should advocate and endorse.

Confirmation of Compliance

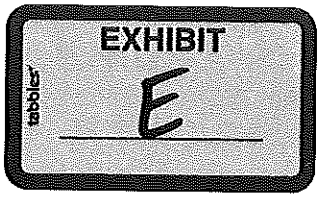
Please confirm that you have taken the steps to preserve ESI, tangible documents, and all other evidence, and materials, regardless of form or format, which is potentially discoverable and/or relevant to our client's potential claims. Thank you for your attention to this matter.

Kind regards and best wishes.

Sincerely yours,

ZZZZZ Y. XXXXXX

ZZZ/alt
cc: XXXXX YYYYYY (via email only)



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OF MATRIMONIAL LAWYERS

FELLOW, INTERNATIONAL ACADEMY OF
MATRIMONIAL LAWYERS

MATTHEW S. BLADO

January 12, 2012

Jeff , President
Systems, Inc.
9920 Prospect Avenue, Suite 109
, CA 92XXX

Re: Marriage of

Dear Mr. :

Please be advised that my client, W, is involved in a dissolution of marriage action with the managing partner, H, of your client, M, S & K, LLP, in case number D5XXXX. The issues in dispute between the parties include levels of spousal support, duration of spousal support, the division of assets, the value of assets including but not limited Mr. H' partnership interest at the law firm, M, S & K, LLP, (the law firm) and Mr. H accessing my client's e-mail and e-mail accounts, reviewing my client's hard drive on her personal computer, installing or causing to be installed key-logger or other tracking software on my client's personal computer and reading e-mail between my client and her lead counsel, Adryenn Cantor, CFLS.

DEMAND FOR PRESERVATION OF EVIDENCE

Please be advised that my client and I believe that electronically stored information (ESI) is an important and irreplaceable source of discovery and/or evidence in connection with the dispute described above. As litigation is necessary to protect Ms. W's rights, the discovery requests to be served in this matter will seek information from computer systems, removable electronic media and other locations for M, S & K, LLP, from Mr. H and from Systems, Incorporated (the company). As you can see, Ms. W is seeking information from agents and individual employees of M, S & K, LLP, who were involved in or dealt with matters relevant to Mr. H's compensation, partnership contracting, partnership benefits, employee benefits, partnership duties to the law firm, and Mr. H's access to Ms. H's personal computer and any information technology (IT) services at the law firm or with outside service providers such as Systems, Inc.. This includes, but is not limited to, e-mail, instant messaging, text messages, voice mail messages, and other electronic communications, word processing documents, spreadsheets, databases, calendars, and telephone logs.

Therefore, you are hereby given notice to immediately take all steps necessary to prevent the destruction, loss, concealment, or alteration of any paper, document, or electronically stored

information and other data or information generated by and/or stored on your company's computers and storage media (e.g., hard disks, floppy disks, backup tapes, etc.), and e-mail related to any of the issues including Mr. H's compensation, benefits, partnership obligations, scheduling, his ownership interest in the partnership, his interaction with any IT services at the law firm or provided by your company to the law firm or Mr. H and Mr. H's accessing my client's e-mail, her e-mail accounts, accessing my client's hard drive as well as installing or causing to be installed any key-logger or tracking software on my client's personal computer.

ESI should be afforded the broadest possible definition and includes, but is not limited to, all digital communications (e.g., e-mail, voice mail, instant messaging), word processed documents (e.g., Word and WordPerfect documents and drafts), spreadsheets and tables (e.g. Excel and Lotus 123 worksheets), accounting application data (such as QuickBooks, Money, or Peachtree files), image and facsimile files (including PDF, TIFF, JPG, and GIF images), sound recordings (including WAV and MP3 files), video recordings, all databases, all contact and relationship management data, calendar and diary application data, online access data (including temporary, Internet files, History, and Cookies), all presentations (including PowerPoint and Corel), all network access and server activity logs, all data created with the use of any Personal Data Assistant (PDA) such as a Palm Pilot, Blackberry, or other Windows-based or Pocket PC devices, any Droid, Apple, Microsoft or other smart phone operating system, all CAD files, and all back-up and archival files.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. You must also intervene loss due to routine operations and employ proper techniques to safeguard all such evidence.

Because hard copies do not preserve electronic searchability or metadata, they are not an adequate substitute for ESI. If information exists in both electronic and paper form, you should preserve them both.

Litigation Hold

You are requested to immediately initiate a litigation hold for potential relevant ESI, documents, and tangible things, and to act diligently and in good faith to secure and audit compliance with that litigation hold. You are also requested to preserve and not destroy all passwords, decryption procedures (including, if necessary, the software to decrypt the files), network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software, and any and all other information and things necessary to access, view, and (if necessary) reconstruct any ESI. You should not pack, compress, purge, or dispose of any file or any part thereof nor allow such to happen by any third party.

You are further requested to immediately identify and modify or suspend features of Systems. Incorporated's operations, information systems, and devices that, in routine operations, operate to cause the loss of documents, tangible items, or ESI. Examples of such features and operations include, but are not limited to, purging the contents of e-mail repositories by age, capacity, or other criteria; using data or media wiping, disposal, erasure, or encryption utilities or

devices; overwriting, erasing, destroying, or discarding backup media; reassigning, re-imaging or disposing of systems, servers, devices, or media; running antivirus or other programs that alter metadata; using metadata stripper utilities; and destroying documents or any ESI by age or other criteria.

Servers

With respect to servers like those used to manage electronic mail and network storage, the entire contents of each user's network share and e-mail account should be preserved and not modified.

Storage

With respect to on-line storage and/or direct access storage devices attached to your company's mainframe computers and /or minicomputers, in addition to the above, you or any third party are not to modify or delete any ESI, "deleted" files, and/or the file fragments existing on the date of this letter's delivery that contain potentially relevant information.

With regard to all electronic media used for offline storage, including magnetic tapes and cartridges, optical media, electronic media, and other media or combinations of media containing potentially relevant information, you are requested to stop any activity which may result in the loss of any ESI, including rotation, destruction, overwriting and erasure in whole or in part. This request is intended to cover all media used for data or information storage in connection with your computer systems, including magnetic tapes and cartridges, magneto-optical disks, floppy diskettes, and all other media, whether used with personal computers, mini computers, mainframes, or other computers, and whether containing backup and/or archival ESI.

Personal Computers

You should take immediate steps to preserve all ESI on all personal computers used by your company's support staff, the company's management team, their IT support personnel, the accounting department, the company's officers and directors and employees that in anyway relate to the subject matter of this action. As to fixed devices, (1) a true and correct copy is to be made of all such ESI, including all active files and completely restored versions of all deleted electronic files and file fragments; (2) full directory listings (including hidden files) for all directories and subdirectories (including hidden directories) on such fixed devices should be written; and (3) all such copies and listings are to be preserved until this litigation is ended. Floppy diskettes, CDs, DVDs, tapes, and other non-fixed media relating to this matter are to be collected and stored pending resolution of this litigation.

Portable Systems

In addition to your immediate preservation of ESI, documents and tangible items in the company's business, on servers and workstations, you should also determine if any home or portable systems may contain potentially relevant data or information. To the extent that officers, board members,

or employees have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the company's offices, you must preserve the contents of systems, devices, and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD-R disks, PDAs, smart phones, voice mail boxes, or other forms of ESI storage). Additionally, if any employees, officers, partners or directors of the company used online or browser-based e-mail accounts or services to send or receive potentially relevant messages and attachments, the contents of these account mailboxes should be preserved.

Evidence Created or Acquired in the Future

With regard to documents, tangible things, and ESI that are created or come into your custody, possession or control subsequent to the date of delivery of this letter, potentially relevant evidence is to be preserved. You should take all appropriate action to avoid destruction of potentially relevant evidence.

Please forward a copy of this letter to all persons and entities possessing or controlling potentially relevant evidence. Your obligation to preserve potentially relevant evidence is required by law.

Please contact me if you have any questions regarding this letter. I would be happy to meet and confer with you or your designee over the issues set forth herein.

Very truly yours,

GORDON D. CRUSE, APLC

Gordon D. Cruse, CFLS

cc: Adryenn Cantor, CFLS
Ms. W
Julia Garwood, CFLS

Qualcomm v. Broadcom: How many red flags does it take?

BY DEBRA BERNARD OF PERKINS COIE LLP

INTRODUCTION

In a January 2008 ruling that sent, or should have sent, ripples of fear through the litigation community and in-house counsel managing or supervising litigation, Magistrate Judge Barbara Major entered an Order sanctioning Qualcomm, Inc. and various individual attorneys from Qualcomm's outside legal team for misconduct in connection with the production of electronically stored information (ESI).[1] What happened in this case highlights the importance of the legal and ethical duties of both in-house and outside counsel in connection with discovery of ESI and also, how this type of situation can be avoided by adherence to the spirit, if not the letter, of the amended Federal Rules of Civil Procedure (FRCP) directed to the discovery of ESI.

TIMING IS EVERYTHING

The *Qualcomm v. Broadcom* case was a patent infringement lawsuit alleging that Broadcom infringed Qualcomm's '104 and '767 patents based on Broadcom's manufacture, sale and offers to sell H.264 compliant products. The H.264 standard is a video coding standard developed by the Joint Video Team (JVT), a joint project launched by two parent standards bodies.[2] As one of its affirmative defenses, Broadcom asserted that the '104 and '767 patents were unenforceable due to a waiver premised on Qualcomm's participation in the JVT. If Qualcomm had participated in the JVT prior to the publication of the H.264 standard, it would have been required to disclose patents that "may reasonably be essential to practice the H.264 standard" and license them royalty free or under non-discriminatory reasonable terms. *Qualcomm v. Broadcom*, 2007 WL 1031373, at *19-21 (S.D. Cal. March 21, 2007). Moreover, Qualcomm would also have been prohibited from suing companies that utilize the H.264 standard. Hence, a key issue in the case was the timing of Qualcomm's participation in the JVT—Qualcomm claimed that its participation began in late 2003—after the May 2003 publication of the H.264 standard.

DECISION TIME

While Magistrate Judge Major's ruling sanctioning the lawyers in the case that has gotten the most attention, a review of decisions in the case from at least March 2007 demonstrates that the January ruling was the culmination of a series of decisions and opinions addressing a litany of misconduct by Qualcomm at various stages in the litigation (pretrial, during trial and post-trial). The court found that Qualcomm had not only intentionally failed to disclose those patents to the JVT and filed the lawsuit against Broadcom, but also apparently intentionally withheld evidence from Broadcom (and the Court) of its participation in the JVT and the development of the H.264 standard.

With respect to the discovery issues, Qualcomm did not simply fail to produce "some" documents that "may" be relevant or responsive to "some" issues in the case. Rather, it was a wholesale failure or breakdown in the discovery process which resulted in Qualcomm failing to disclose over 46,000 clearly relevant and responsive documents (300,000 pages) and taking substantive legal positions that it could not have taken had this information been located and produced. Interestingly, at least one document had been produced which implied Qualcomm may have been involved in the JVT prior to May 2003. Broadcom's apparent failure to vigorously pursue whether there were other such documents and Qualcomm's failure to recognize the significance of this document and investigate further whether other such documents may have existed, are the key failures of both parties.

Qualcomm's repeated concealments and their effects snowballed: first Qualcomm concealed its patents from the JVT and the marketplace; then Qualcomm sued Broadcom for practicing the H.264 standard which it would have been banned from doing had it satisfied its JVT disclosure obligations; Qualcomm withheld relevant evidence before and during the trial; based on the fact that it withheld this evidence, Qualcomm provided false answers to interrogatories; Qualcomm's employees provided false testimony; and Qualcomm's lawyers made false arguments to the court. Of course, none of this misconduct paid off as Qualcomm lost on the merits at trial and its misconduct resulted in various monetary and nonmonetary sanctions.

THE MID-TRIAL "DISCOVERY"

The spark that ignited the fire resulting in the ultimate revelation of the extent of Qualcomm's discovery failures actually occurred in the middle of the trial. During the trial preparation of Ms. Viji Raveendran, a Qualcomm engineer, Qualcomm's counsel discovered 21 emails regarding a JVT "ad hoc" group on Ms. Raveendran's computer which had not previously been searched. Several lawyers on Qualcomm's trial team became aware of these emails and a decision was made that they were "not responsive" to Broadcom's requests, as unilaterally narrowed by Qualcomm, and thus were not initially produced. At a sidebar during the trial Qualcomm argued that there were no emails sent to this "ad hoc" list. (This lawyer later claimed he was unaware of what his colleagues knew about the additional emails). During cross examination, Ms. Raveendran disclosed the existence of the 21 emails and that they had been searched for and located during her trial testimony preparation. Remarkably, at another sidebar, Qualcomm's counsel argued that he did not know if the emails were responsive to any of Broadcom's requests. Nonetheless, Qualcomm produced the emails after the lunch recess that day.

This discovery during the trial led Broadcom to take the unusual step of aggressively pursuing additional discovery post-trial in an attempt to ascertain the extent of other documents on this topic that were not previously produced by Qualcomm. Qualcomm vigorously resisted such discovery until Broadcom threatened to seek court intervention. Apparently, it was not until its search for documents post-trial, in March 2007, that Qualcomm searched the email archives of five Qualcomm witnesses (including Ms. Raveendran) for the search terms "JVT," "Joint Video Team," "AVC," "Advanced Video Coding," "H.264," "MPEG-4 Part 10," MPEG4 Part 10" and "Gary Sullivan." The Court noted that it "finds it incredible that Qualcomm never conducted such an obvious search for these key terms in the email archives of these key Qualcomm witnesses during the many months of discovery that occurred before trial since Broadcom had clearly requested all of it and more." (Aug. 6 Order at 51).

This compromise of candor even continued in connection with the briefing of the sanctions motion. Qualcomm refused to waive the attorney-client privilege and hence its outside counsel essentially blamed each other or Qualcomm (not surprisingly, Qualcomm blamed its outside counsel).[3] Now that the Court has lifted the veil of the attorney-client privilege in connection with this discovery dispute, we may actually learn how and by whom the failure occurred and whether it was intentional, fraudulent, reckless or negligent. What the Qualcomm ruling teaches us is in some measure dependent on the answer to that question.

WHAT CAN WE LEARN FROM QUALCOMM?

There were numerous points in the conduct of this litigation where red flags should have alerted experienced counsel to investi-

gate further. Regardless of who is ultimately found to be at fault, as may be revealed in the ongoing proceedings, there are several lessons to be learned from this case from the perspective of both in-house counsel and outside counsel.

1. In-house Counsel should be actively involved in the discovery of ESI

Magistrate Judge Major clearly lays some of the blame for what happened in this case at the feet of Qualcomm's in-house legal team, noting that they had access to all Qualcomm employees, know or could have determined all the computers and databases that were searched and the search terms that were utilized and reviewed the pleadings filed on Qualcomm's behalf. *Qualcomm v. Broadcom*, 2008 WL 66932, at *18 (S.D. Cal. Jan. 7, 2008). Significantly, the CREDO protocol outlined by the Court provides a blueprint for the type of program that a large organization should implement in order to fulfill its discovery obligations under the amended FRCP and the evolving case law dealing with the preservation, collection, review and production of electronically stored information.

Hence, a clear message of the Qualcomm decisions is that in-house legal staff needs to be actively involved in supervising the litigation and the outside legal team. The in-house legal staff is in the best position to understand the organization, the various roles of the different business units and where to obtain information. Moreover, as the litigation develops, the in-house counsel is better equipped to recognize issues that arise in the litigation that may need further investigation.

2. Transparency is key

Consistent with the amended FRCP, the decisions in Qualcomm clearly hold outside counsel accountable for how the process of the identification, collection, review and production of ESI is conducted. Notably, what happened in the Qualcomm case demonstrates the importance of transparency in the meet and confer process for ESI that is now mandated by amended FRCP 26(f). Had Qualcomm and Broadcom agreed on the custodians whose data was to be searched and the search terms or concepts to be applied, much of what happened here could have been avoided. Typically, such agreements can be revised as the case proceeds and additional information is discovered which may lead to the identification of additional key custodians or relevant search terms.

3. Witness Preparation

While it may seem obvious, another important lesson from the Qualcomm case is that any witness presented for deposition, whether as a fact witness or a Rule 30(b)(6) corporate representative, should have his or her data searched, reviewed and produced where it contains relevant and responsive information.

4. Be Aware, Ask Questions

It is clear that both Judge Brewster and Magistrate Judge Major were struck by outside counsel's apparent failure to recognize and/or act on numerous "red flags" and "warning signs" during the course of the document production and depositions. Outside counsel must be aware, pay attention to warning signs and be assertive about getting your client to be responsive and keep you informed about all steps taken to ascertain who the relevant witnesses may be and who may have relevant documents.

5. Consult with co-counsel

One of the other significant failures in this case was the apparent lack of thorough communication between and among counsel. When multiple firms are working together on behalf of the same client in a matter, they cannot blindly rely on the work product of the other firm. Each firm has a responsibility to ensure that the other firm is complying with all appropriate rules, processes and procedures such that it is reasonable to rely on their representations and work product.

6. Associates need to be able to report concerns

Law firms should have a process or mechanism for associates to report concerns that they may have if they are privy to decisions or litigation conduct that they believe may be inappropriate or a violation of the rules. For example, if an associate points out that certain data sources should be searched (such as the email of a key witness) and is told not to do so by either a partner or a client, that associate should have somewhere to turn to voice his or her concerns. Some firms have an ombudsperson with whom an associate can consult without fear of reprisals.

7. Be aware of your ethical duties and obligations

It is not just associates who may be put in a difficult or uncomfortable position. Partners may also be faced with a situation where they believe that additional collection and searching should be performed to comply with discovery obligations and for either expense or other reasons are instructed by a client or colleagues not to proceed further. What are that lawyer's ethical obligations to his or her firm and the Court?

8. Pay attention to the documents

Broadcom had the document which identified Ms. Raveendran on the "ad hoc" list and used it in at least one of the Rule 30(b)(6) depositions of Qualcomm. This document should have put both Qualcomm and Broadcom on notice that there may have been additional documents which would have disclosed Qualcomm's earlier involvement in the JVT. Apparently, Broadcom did not aggressively pursue this until after the trial. While we know that Ms. Raveendran's email archives were not searched, it is unclear whether or not Broadcom pursued such a basic line of questioning with her that would have revealed that they could have pursued it during the course of discovery. Similarly, it is unclear why Qualcomm did not recognize that as a key witness, her data should have been searched.

CONCLUSION

What should be immediately evident for in-house and outside counsel is that what happens in the ediscovery process–what is done or is not done–can become a "litigation within a litigation" and take on a life of its own at the expense of, or in place of, the actual substantive merits of the case. Moving forward, law firms will begin to recognize the lessons outlined above and are likely develop clear and consistent ediscovery protocols to avoid these situations in the future. IPT

ENDNOTES

1. In January 2007, the jury returned a verdict in favor of Broadcom and against Qualcomm of non-infringement of both patents but uphold the validity of the patents. Thereafter, both Judge Rudi Brewster, the District Court Judge, and Magistrate Judge Barbara Major entered a number of rulings addressing a litany of alleged misconduct engaged in by Qualcomm, much of which is beyond the scope of this article, both prior to the litigation, during the litigation and post litigation. On January 7, 2008, Magistrate Judge Major entered an order again ordering Qualcomm to pay Broadcom's fees and expenses (receiving credit for the exceptional case award previously entered), referred six attorneys the State Bar of California for investigation into possible ethical violations and ordered those six attorneys plus five in house Qualcomm attorneys to participate in the development of the comprehensive Case Review and Enforcement of Discovery Obligations (CREDO) protocol). *Qualcomm v. Broadcom*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008)
2. The JVT was a joint project of two standard setting bodies: (1) the Video Coding Experts Group ("VCEG") of the International Telecommunication Union Telecommunication Standardization Sector ("ITU-T") and (2) the Moving Picture Experts Group ("MPEG") of the International Organization for Standardization ("ISO")/International Electrotechnical Commission ("IEC").
3. On September 28, 2007, the Magistrate Judge held that the self-defense exception does not apply to disclosing privileged information. *Qualcomm v. Broadcom*, 2007 WL 2900537 (S.D. Cal. Sept. 28, 2007). However, on March 5, 2008, an order was entered vacating the order denying the application of the self-defense objection noting that as a result of the various declarations filed by Qualcomm and its retained attorney "this introduction of accusatory adversity between Qualcomm and its retained counsel regarding the issue of assessing responsibility for the failure of discovery changes the factual basis which supported the court's earlier order denying the self-defense exception to Qualcomm's attorney-client privilege." *Qualcomm v. Broadcom*, 2008 WL 638108, at *3 (S.D. Cal. March 5, 2008). Obviously, until we see what outside counsel will now recount of its relevant privileged communications, we cannot know whether outside counsel actually did ignore the warning signs or whether they were obstructed by Qualcomm.