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### FEDERAL E-DISCOVERY

## Party Sanctioned for Spoliation Of Non-Party's Text Messages



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In *Ronnie Van Zant v. Pyle*, 2017 WL 3721777 (S.D.N.Y. Aug. 28, 2017), a court in the Southern District of New York recently made some notable findings relating to spoliation and control of text messages.

Members of the Southern rock band Lynyrd Skynyrd were involved in a charter plane crash in 1977. Lead singer Ronnie Van Zant and guitarist/vocalist Steven Gaines died in the crash, along with Gaines's sister, a crew member, and the two pilots. Other band members, including drummer Artimus Pyle, were injured, but survived.

During a reunion and tribute tour commemorating the 10-year anniversary of the crash, the surviving band members and Ronnie Van Zant's widow disagreed over the use of the Lynyrd Skynyrd name. The resulting lawsuit in 1988 ended with a Consent Order restricting "how the parties in the 1988 Action could use the name Lynyrd Skynyrd, the name, images and likeness of Van Zant and Gaines, or the history of Lynyrd Skynyrd." *Van Zant*, at \*2. Pyle was a defendant in the 1988 action, a signatory



**Johnny Van Zant** and **Artimus Pyle**, former drummer of Lynyrd Skynyrd.



ROCKMAN

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to the consent order, and represented by counsel throughout.

In early 2016, an independent record label's film division, Cleopatra Films, decided to make a feature film about the band and the 1977 plane crash. Cleopatra hired director and screenwriter Jared Cohn to write and direct the film. Although not an employee, Cohn was paid by and reported to Cleopatra. Soon thereafter, Cohn contacted Artimus Pyle about participating in the film, which led to a series of meetings discussing his involvement in the movie. Among other contributions, Pyle was to narrate the film, make a cameo appearance, and contribute an original song, and in

exchange receive 5 percent of the film's net receipts.

In response to press releases highlighting Pyle's participation in the upcoming movie, the plaintiffs in the instant action sent a cease and desist letter to Cleopatra, noting the restrictions of the Consent Order to which Pyle was a signatory and which the plaintiffs provided to Cleopatra. Despite this, Cleopatra continued to work on the film with the assistance of Pyle, who "regularly texted or called Cohn to relay historical information," provided feedback on issues such as casting and costumes, and had "regular and factually-focused interactions" with Cleopatra. *Id.* at \*5.

On May 5, 2017, after an article in *Variety* described the ongoing film production, this lawsuit against Cleopatra and Pyle alleging violations of the Consent Order was filed by the plaintiffs, including surviving band member Gary Rossington, current band lead singer Johnny Van Zant (brother to Ronnie Van Zant), and representatives of the estates of deceased band members. Soon thereafter, “in mid-May 2017, following the end of filming, Cohn switched cell phone providers and, consequently, acquired a new cell phone. Although certain data on Cohn’s old phone was backed-up, such as pictures, other data was not preserved, such as Cohn’s text messages, including those sent and received from Pyle.” *Id.* at \*7. The plaintiffs filed a motion for spoliation sanctions for Cohn’s actions in losing the text messages, specifically requesting that the court issue an adverse inference sanction against the defendants under Federal Rule of Civil Procedure 37(e) or the court’s inherent authority.

Quoting Rule 37(e), the court wrote that it may sanction a party “[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.” Additionally, “[w]here the party that failed to preserve the electronically stored information ... ‘acted with the intent to deprive another party of the information’s use in the litigation,’ the Court may ‘instruct the jury that it may or must presume the information was unfavorable to the party’ or ‘dismiss the action or enter a default judgment.’” In a footnote, the court observed that even with Rule 37(e) in place, a number of courts continue to recognize their inherent powers to sanction, but since Rule

37(e) applies in this matter, it saw no need to rely on such powers.

Cleopatra argued that it should not be sanctioned for the actions of Cohn, a non-party, whose phone, according to Cleopatra, was not in its legal control. The court disagreed. Citing precedent in applying the Second Circuit’s broad “practical ability” standard for legal control, the court found that “[d]ocuments are considered to be under a party’s control ‘if the party has the practical ability to obtain the documents from another, irrespective of his legal entitlement.’” The court noted that Cohn was in contract with Cleopatra to work on the film, worked closely on the film for over a year, aided in discovery in the instant action by providing documents and taking a

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‘Van Zant’ demonstrates that electronically stored information is more than just email and that parties should thoughtfully consider and manage information such as text messages as part of their preservation and e-discovery efforts.

deposition, and had a financial interest in the action “since he is entitled to a percentage of the Film’s net receipts, which would be zero should Plaintiffs prevail.” *Id.* at \*9. Thus, the court concluded that “while Cohn is a non-party, his text messages were, practically speaking, under Cleopatra’s control” and that “‘common sense’ indicates that Cohn’s texts with Pyle were within Cleopatra’s control, and in the face of pending litigation over Pyle’s role in the Film, should have been preserved.” *Id.*

In response to Cleopatra’s argument that the plaintiffs could have obtained the text messages directly from Pyle, the

court found that it was satisfied with the plaintiffs’ unsuccessful efforts in trying to obtain the texts from him, especially since he “has made minimal appearance and has not produced any documents in this litigation.” *Id.* Additionally, noting the potential value of the destroyed text messages and the resulting prejudice to the plaintiffs, the court stated that the text messages would have spoken to “the quality of interaction between Pyle, the Consent Order’s signatory, and Cohn, the principal writer and singular director of the Film, a relationship that evidence established was principally developed through text messages.” *Id.*

Finally, the court determined that Cohn’s actions with his phone after the plaintiffs filed suit, getting a new phone and backing up pictures but not text messages, “evinced the kind of deliberate behavior that sanctions are intended to prevent and weigh in favor of an adverse inference.”

The court granted the plaintiffs’ spoliation sanctions motion, imposing the sanction of an adverse inference regarding the text messages. Ultimately, the court granted the plaintiffs a permanent injunction against Cleopatra as to the film.

*Van Zant* may serve to further evolve post-Rule 37(e) sanctions law in the Second Circuit. It is a reminder to parties of the expansive notion of control in the circuit and that behavior by parties or even non-parties with information in a company’s legal control can have a potentially significant impact on the outcome of a matter. The decision also demonstrates that electronically stored information is more than just email and that parties should thoughtfully consider and manage information such as text messages as part of their preservation and e-discovery efforts.