

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.Civ.P. 7.1, the Washington Legal Foundation (WLF) states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, and no publicly-held company has a 10% or greater ownership interest.

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**WASHINGTON LEGAL FOUNDATION AND
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL'S
MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S OBJECTIONS
TO THE MAGISTRATE JUDGE'S MEMORANDUM AND ORDER,
ENTERED AND SERVED ON OCTOBER 11, 2011,
CONCERNING PRESERVATION OF COMPUTER HARD DRIVES OF
POTENTIAL MEMBERS OF THE PUTATIVE CLASS OR COLLECTIVE ACTION**

INTERESTS OF *AMICI CURIAE*

The interests of the Washington Legal Foundation (WLF) are set out more fully in the accompanying motion for leave to file this brief.¹ In brief, WLF is a public interest law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system.

Amici curiae are concerned that the decision of the Magistrate Judge, by condoning broad ESI preservation orders without regard to their cost, will skew the outcome of civil litigation by (for all practical purposes) forcing defendants to enter into settlements as a less-expensive alternative to complying with the preservation orders. Those concerns are particularly pronounced in the context of class action litigation,² where the volume of potentially relevant

¹ *Amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

² When *amici* refer herein to "class action litigation," we do so as a short-hand that encompasses both suits seeking class certification under Fed.R.Civ.P. 23 and suits seeking certification under the FLSA's collective action provision.

documents can be huge. *Amici* have no knowledge of KPMG LLP's ("KPMG") employment practices and take no position on Plaintiffs' claims that KPMG violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and New York law by classifying Plaintiffs and other Audit Associates as exempt employees.

INTRODUCTION AND STATEMENT OF THE CASE

Defendant KPMG has moved for a protective order for the purpose of limiting its obligation to preserve computer hard drives for thousands of its former employees, none of whom are at present parties to this litigation. The Magistrate Judge did not simply deny the motion; he affirmatively ordered KPMG to preserve each of the hard drives at issue. The Magistrate Judge conceded that preservation of the hard drives "is not without considerable expense," and that it was "unclear" how those costs compared with the potential value of this lawsuit and the potential usefulness (to this litigation) of the Electronically Stored Information (ESI) contained on the hard drives. Memorandum and Order ("M&O") at 14. He nonetheless ultimately concluded that "prudence" dictated entry of a broad preservation order. *Id.* at 11, 18. His determination that the hard drives might contain relevant information was not based on any meaningful evidentiary submission from Plaintiffs but on the mere fact that the laptop computers were used by former KPMG Audit Associates who are potential members of either the putative plaintiff class action under New York law or the proposed nationwide collective action under the FLSA. The Magistrate Judge held that each such former employee qualified as a "key player" whose hard drives must be preserved. *Id.* at 12. Such a broad definition of a "key player" is unprecedented; *amici* are concerned that acceptance of that definition in the class action context will lead to an exponential increase in discovery costs for class action defendants.

Plaintiffs Kyle Pippins, Jamie Schindler, and Edward Lambert are former KPMG Audit Associates. They allege that KPMG misclassified them as exempt employees under the FLSA, causing them to be deprived of overtime wages for time they worked in excess of 40 hours per week. They allege that the misclassification also violated labor laws of New York State. With respect to the claims arising under New York law, Mr. Lambert seeks certification (under Fed.R.Civ.P. 23) as a representative of a class of all New York-based former Audit Associates who worked for KPMG after March 2005; he alleges that all were similarly misclassified. All three Plaintiffs seek to represent – pursuant to the FLSA’s collective action provision, 29 U.S.C. § 216(b) – current and former Audit Associates who worked for KPMG anywhere in the United States on or after January 19, 2008. This Court has stayed discovery until after it rules on Plaintiffs’ motion for conditional certification of a proposed nationwide collective.

As KPMG has outlined in its Memorandum of Law at 4, it has undertaken substantial efforts to preserve ESI and other documents relevant to this lawsuit. In particular, it is maintaining time records and payroll records for the three named Plaintiffs as well as for all members of the putative class and proposed collective. It has also maintained ESI for the named Plaintiffs and their supervisors. At issue here are the hard drives for departing KPMG employees who fall within the definition of the putative class and proposed collective. KPMG asserts that it should not be required to preserve those hard drives; indeed, until the Magistrate Judge issued his Memorandum and Order, it had not instituted a litigation hold to preserve the hard drives of departing Audit Associates who were members of the collective.

The un rebutted evidence before the Magistrate Judge indicated that: (1) there are more than 7,500 potential opt-in plaintiffs to the FLSA collective; (2) there are more than 1,500

putative class members in New York; (3) the cost to preserve each hard drive is \$600, not including long-term preservation costs; and (4) KPMG has already expended more than \$1.5 million for litigation-related preservation of the hard drives of former Audit Associates. M&O at 5. The Magistrate Judge determined that KPMG “failed to establish that it has no duty to preserve the hard drives.” *Id.* at 18. Accordingly, it ordered KPMG “to continue its preservation of the existing hard drives that belonged to former Audit Associates who are potential members of the FLSA collective or putative class members in New York” and henceforth “to preserve the hard drives of all departing Audit Associates” who fit into those categories. *Id.*

ARGUMENT

I. DISCOVERY COSTS SHOULD NOT BE PERMITTED TO DISTORT THE SUBSTANTIVE RIGHTS OF THE PARTIES IN CLASS/COLLECTIVE ACTION LITIGATION

As the Magistrate Judge readily conceded, M&O at 14, his preservation order is causing KPMG to incur “considerable expense” – an expense that is conservatively estimated at several million dollars. By applying the preservation order to the thousands of former Audit Associates who are potential members of the FLSA collective or putative class members, the Magistrate ensured that discovery expenses will be several orders of magnitude greater than if the three Plaintiffs had not raised any class claims. Any economically rational defendant would seriously consider settling the litigation rather than incurring such large discovery expenses, even if the defendant deemed it unlikely that the class would ever be certified. *Amici* respectfully submit that Congress never intended to permit plaintiffs to leverage class/collective action devices in this manner for the purpose of achieving more favorable settlements than would otherwise have been achievable.

The Supreme Court has repeatedly admonished that federal class action rules are mere procedural rules designed to facilitate efficient resolution of multiple claims; they are neither intended nor permitted to alter substantive rights. *See, e.g., Shady Grove Orthopedic Assoc., Inc. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) (classwide adjudication enables the trial of claims of “multiple parties at once, instead of in separate suits,” but “leaves the parties’ legal duties intact and the rules of decision unchanged”). Class actions may “achieve economies of time, effort, and expense,” but only when those goals can be achieved “without sacrificing procedural fairness or bringing about other undesirable results.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997). Indeed, the Rules Enabling Act, 28 U.S.C. § 2072(b), “forbids interpreting Rule 23 to ‘abridge, enlarge, or modify any substantive rights.’” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). Yet, by invoking Rule 23 class action allegations as the basis for imposing substantial additional costs on class action/collective action defendants and thereby substantially increasing the settlement value of class claims, the Magistrate Judge has done precisely what the Supreme Court has forbidden: he has used Rule 23 to alter the substantive rights of the parties.

Numerous commentators have noted that defendants in large class actions often come “under intense pressure to settle” – due both to the high cost of litigating such claims and to the unwillingness of stockholders to chance even a slight risk of a crushingly large judgment. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, C.J.), *cert. denied*, 516 U.S. 867 (1995). Such settlements can in many instances legitimately be deemed “blackmail settlements.” Henry Friendly, *Federal Jurisdiction: A General View* 120 (1973). The costs of a certified class action become prohibitive long before a summary judgment motion can be

prepared. J. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 585-87 (Feb. 1991) (case study); D. Towns, *Merit Based Class Certification*, 78 VA. L. REV. 1001, 1031 (1992). One study concluded that, driven largely by litigation costs, “the vast majority of certified class actions settle, most soon after certification.” R. Bone & D. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L. J. 1251, 1291 (Feb. 2002).

In order to ameliorate those concerns, federal courts in recent years have become much more rigorous in their review of certification motions. *See, e.g., Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011); *Myers v. Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010). Moreover, many federal district courts defer the start of merits discovery in putative class actions and proposed collective actions until after they have ruled on the certification motion. In that manner, defendants are spared the immense discovery-related costs associated with large class/collective actions (and the associated settlement pressures) unless and until the district court determines that the case may properly proceed as a class/collective action.

But by issuing a sweeping preservation order in advance of the ruling on collective certification, the Magistrate Judge has foisted huge discovery-related costs on KPMG even though the Court has not yet determined whether the three Plaintiffs should be permitted to proceed on a nationwide basis. Moreover, he issued his order without conducting a “proportionality test” of the sort contemplated by Fed.R.Civ.P. 26(b)(2) and in the absence of an evidentiary record that would support a proportionality finding. He explicitly conceded that it was “unclear” how the “considerable expense” that he was ordering KPMG to bear compared with the potential value of this suit and the potential usefulness (to this litigation) of the ESI

contained in the hard drives he ordered to be preserved.³ M&O at 14. A preservation order that imposes massive class-wide costs on a defendant even before the plaintiffs have demonstrated their entitlement to proceed on a class-wide basis alters the substantive rights of the parties by significantly increasing the settlement value of the plaintiffs' claims. Leading commentators have noted that plaintiffs routinely assert wide-ranging ESI discovery and preservation requests that "are often intended to accomplish little more than to raise the cost of defense in an attempt to compel settlement." Michael Nelson and Mark Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 RICH. J.L. & TECH. 14, 17 (2006).

In *Zubulake I*, Judge Scheindlin warned against entry of discovery orders that impose such significant costs on a party that it can no longer afford to press its case. *Zubulake v. UBS Warburg LLC* ["*Zubulake I*"], 217 F.R.D. 309, 318 (S.D.N.Y. 2003). She stated that such orders "undermine the 'strong public policy favoring resolving disputes on their merits.'" *Id.* (quoting *Pecarsky v. Galaxiworld.com, Inc.*, 249 F.3d 167, 172 (2d Cir. 2001)). By imposing a sweeping preservation order on a class-wide basis in a case that currently is limited to three named plaintiffs, the Magistrate Judge has imposed substantial costs that KPMG can avoid only by entering into a settlement agreement – thereby undermining the public policy favoring merits-based resolution of disputes.

³ The Magistrate Judge asserted that a "proportionality test" is primarily applicable to production orders and is of limited relevance in determining the propriety of a preservation order. M&O at 14. That assertion makes little sense. The primary reason for requiring "proportionality" in discovery matters is to prevent a party from foisting undue expenses on the opposing party. From the standpoint of the opposing party, it makes no difference if undue expenses are being generated by a production order or a preservation order. Both are equally objectionable.

II. REAL LIMITATIONS MUST BE IMPOSED ON THE DEFINITION OF A “KEY PLAYER” IF THAT TERM IS TO PLAY A MEANINGFUL ROLE IN CABINING A PARTY’S DOCUMENT PRESERVATION OBLIGATIONS

It is common ground that, in light of the vast amount of ESI maintained by major corporations,⁴ there is need for cost-based limits to a party’s litigation-based duty to preserve ESI. Yet, by basing his preservation order on an overly expansive definition of what constitutes a “key player,” the Magistrate Judge effectively abolished all such limits.

Fed.R.Civ.P. 26(f)(2) requires parties to meet, in advance of a scheduling conference with a federal district judge, to “discuss any issues about preserving discoverable information.” The Advisory Committee’s Notes regarding the 2006 Amendments to Rule 26 (the amendments that added Rule 26(f)) state:

This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. . . . The parties’ discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party’s routine computer operations could paralyze the parties’ activities. *Cf. Manual for Complex Litigation* (4th) § 11.422 (“A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.”) The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored.

As Judge Scheindlin explained, in discussing the need for limits on a party’s duty to preserve evidence:

What is the scope of the duty to preserve? Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document,

⁴ For example, Exxon Mobil reported to the Federal Rules Advisory Committee in 2005 that it was storing 500 terabytes of ESI (about 250 billion typewritten pages) in the United States alone. See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 564 (2010).

and every back-up tape? The answer is clearly, “no.” Such a rule would cripple large corporations, like UBS, that are almost always involved in litigation.

Zubulake v. UBS Warburg LLC [“*Zubulake IV*”], 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

Judge Scheindlin coined the phrase “key players” as a short-hand means of describing those individuals who played a central role in events leading up to the litigation and whose computer files should for that reason be preserved. *Zubulake* involved the claims of an individual who claimed that she had been fired by the employer/defendant in violation of federal civil rights laws. *Zubulake IV* indicated that perhaps ten of the defendant’s employees fell within the “key player” category.

The Magistrate Judge borrowed Judge Scheindlin’s “key player” terminology, but then expanded it beyond recognition to encompass thousands of individuals. He held that all members of the putative class and proposed collective are “key players” and that their laptop hard drives must be preserved because they might contain relevant evidence. M&O at 12. He did so despite admitting that “it is not entirely clear what the hard drives contain,” *id.* at 11, and without regard to the preservation costs. That holding was clear legal error.

We note initially that the Magistrate Judge applied the term “key players” to thousands of former KPMG employees whom KPMG would never have identified as individuals that it might “use to support its claims or defenses.” Fed.R.Civ.P. 26(a)(1)(A)(i). If any of these former employees choose to opt in to the FLSA collective, they will be in a position to testify directly regarding the information contained on their old laptops. Accordingly, Plaintiffs’ need for access to the ESI contained on the old laptops of their fellow Audit Associates is considerably less than the litigation needs of Ms. Zubulake and similarly situated plaintiffs who have never had access to the files they seek. Indeed, Judge Scheindlin made clear that she was limiting the

definition of “key players” to individuals identified by a party as potential witnesses “in a party’s initial [Rule 26(a)(1)(A)] disclosure and subsequent supplementation thereto.” *Zubulake v. UBS Warburg LLC* [“*Zubulake V*”], 229 F.R.D. 422, 433-34 (S.D.N.Y. 2004). KPMG has not and would not identify, under Rule 26(a)(1)(A)(i), the thousands of members of the putative class and proposed collective as individuals it “may use to support its claims or defenses.”

More importantly, the Magistrate Judge failed to explain precisely what unique, relevant evidence might be obtained from the laptop hard drives of members of the putative class and proposed collective. Plaintiffs maintain that a class/collective action is appropriate because KPMG gives substantially identical job responsibilities to all of its Audit Associates, and thus the Court should be able to determine on a class-wide basis whether KPMG misclassified its Audit Associates as exempt employees under the FLSA. If so, the members of the putative class and proposed collective cannot plausibly be described as “key players” because evidence regarding the job responsibilities of the three named Plaintiffs will be sufficient to demonstrate the job responsibilities of all other Audit Associates. KPMG is maintaining massive amounts of ESI regarding all of the Audit Associates it has employed in recent years (including the hours they billed, the work they performed, and the salary they were paid), and thus it is likely that much of the ESI on the hard drives simply duplicates ESI already being preserved.⁵ But even with respect to the unique documents, there is nothing to suggest that Plaintiffs will need those documents to prove their class/collective claims. Those claims (if certified) can be adjudicated based on evidence regarding the named Plaintiffs’ job responsibilities, and KPMG is preserving

⁵ It is well accepted that a party is never required to preserve “multiple identical copies” of documents or ESI. *Zubulake IV*, 220 F.R.D. at 218.

ESI relating to the named Plaintiffs.

The Magistrate Judge also held that members of the putative class and proposed collective were “key players” because they might choose to sue on their own if the class/collective is not certified. M&O at 12. But the duty to preserve ESI and other documents does not arise until a party is on notice “that the evidence may be relevant to future litigation.” *Zubulake IV*, 220 F.R.D. at 216. KPMG is not on notice that members of the putative class and proposed collective – other than the handful of Audit Associates who have already filed suit in their own names – are contemplating filing separate lawsuits. Simply because the three named Plaintiffs have filed suit is no reason to assume that the thousands of other former Audit Associates are preparing to file separate suits.

Nor is there reason to suppose that former Audit Associates have held off on filing suit while they await the Court’s ruling on the motion to certify. If former Audit Associates are aware of this lawsuit and want to participate in the FLSA collective action, there is nothing that prevents them from doing so immediately. *See Myers v. Hertz Corp.*, 624 F.3d 537, 555 n.10 (2d Cir. 2010). Indeed, three former Audit Associates have already done so. *See* Dkt. #10 (Feb. 9, 2011); Dkt. #11 (Feb. 9, 2011); Dkt. #50 (April 25, 2011). Thus, if current or former Audit Associates who are aware of this lawsuit have neither sought to join the lawsuit nor filed a FLSA complaint of their own, there is no reason for KPMG to preserve their ESI on the grounds that those employees might yet file suit.

In sum, use of the term “key player” can be helpful in sorting out ESI preservation obligations, but only if the term is used to impose meaningful limits on preservation obligations. As used by the Magistrate Judge, however, the term is defined so broadly that it provides no

such limits. The members of the putative class and proposed collective are not “key players” as that term has been used by Judge Scheindlin and others. The Magistrate Judge erred in ruling otherwise.

CONCLUSION

Amici curiae respectfully request that the Court set aside the Magistrate Judge’s decision requiring Defendant KPMG to preserve hard drives that were used by former KPMG Audit Associates.

Dated: Mineola, New York
November 8, 2011

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