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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

KYLE PIPPINS, JAMIE SCHINDLER, and
EDWARD LAMBERT, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

KPMG LLP,

Defendant.

No. 11 Civ. 0377 (CM)(JLC)

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
OBJECTIONS TO THE MAGISTRATE JUDGE'S MEMORANDUM AND ORDER,
ENTERED AND SERVED ON OCTOBER 11, 2011, CONCERNING PRESERVATION
OF HARD DRIVES OF POTENTIAL MEMBERS OF THE PUTATIVE CLASS OR
COLLECTIVE ACTION**

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PRELIMINARY STATEMENT

After months of refusing to provide Plaintiffs with any information that would allow the parties to negotiate a compromise, on August 12, 2011, KPMG LLP (“KPMG”) filed a motion seeking permission to destroy thousands of Audit Associates’ laptop hard drives, and amnesty for having unilaterally destroyed hundreds already, without ever explaining to Plaintiffs or the Court what the hard drives contain. By Memorandum and Order entered on October 11, 2011 (“Order”), the Magistrate Judge correctly prohibited this reckless exercise until discovery begins and KPMG is forced to be more forthcoming. Now, without pointing to a single legal error or incorrect factual finding, KPMG asks the Court to overturn a time-limited, cautious, well-reasoned discovery order that temporarily maintains the status quo.

KPMG almost completely ignores the root of the problem – its own failure to cooperate with Plaintiffs. As the Magistrate Judge correctly determined, “KPMG’s ongoing burden is self-inflicted to a large extent.” Declaration of Justin M. Swartz in Opposition to Defendants’ 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 (“Swartz Decl.”) Ex. X (Order) at 16.¹ Defendant misrepresents the Magistrate Judge’s finding, claiming that the Magistrate Judge was frustrated with “*the parties*’ inability to ‘work effectively’ together,” 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, ECF No. 111 (“Def.’s Br.”) at 16 (emphasis added), when the Magistrate

¹ With the exception of new Exhibits W – AA, the exhibits annexed to the Swartz Decl. are identified with the same letters as those annexed to the Declaration of Justin Swartz in Support of Plaintiffs’ August 26, 2011 Memorandum of Law in Opposition to Defendant’s Motion for a Protective Order, ECF No. 97.

Judge's "frustration" was clearly directed at KPMG, not at Plaintiffs or "the parties." *See* Order at 16 ("However, to date, KPMG has failed to work effectively with Plaintiffs . . .").

It is important to set forth what this dispute is *not* about. It is not about production. The Order is clear that KPMG will not have to produce all of the hard drives it preserves. Order at 15. It is not about a long period of time. Plaintiffs will likely obtain the discovery necessary to craft a sampling agreement soon after the Court decides Plaintiffs' pending Motion for Conditional Certification and Court-Authorized Notice Pursuant to Section 216(b) of the FLSA, ECF No. 33 ("Plaintiffs' Notice Motion"), and lifts the discovery stay. *See* Order at 15. It is not about a large additional financial burden. Because KPMG has already preserved many (but not all) of the hard drives, its marginal costs are limited to preserving the additional hard drives of the few Audit Associates who leave KPMG between now and the Court's ruling.

This dispute is also not about finding a needle in a haystack. Plaintiffs believe that the hard drives will be useful because they will allow Plaintiffs to recreate the tasks that Audit Associates performed on their laptops and determine how long it took to perform them. This will help the factfinder understand exactly what Audit Associates did all day long and corroborate testimony that they performed mostly menial, repetitive, routine duties.

Plaintiffs do not need all of the hard drives to do this – they agree that sampling is necessary. To this day, however, KPMG has refused to permit Plaintiffs to inspect even a single hard drive and refused to provide important information about the hard drives, making it impossible to negotiate a sampling agreement. *See* Order at 11.

KPMG and its *amicus* support, the United States Chamber of Commerce ("Chamber"), blow the import of the Order out of proportion, suggesting that it is a far-reaching threat to the interests of corporate litigants. In fact, the Order is based on the very narrow set of facts present

here, where discovery is stayed and a party refuses to voluntarily provide sufficient information to allow an informed sampling negotiation.

The Court should affirm the Order because the Magistrate Judge got it right. He certainly did not commit clear error.

STATEMENT OF FACTS

I. Current Status of KPMG's Hard Drive Destruction.

For more than two years, KPMG has taken the aggressive unilateral position that it need not and will not preserve hard drives for departing Audit Associates. *See* Swartz Decl. Ex. G (Letter, dated September 16, 2010) at 2 (“We repeatedly informed Plaintiffs’ counsel . . . that KPMG LLP was not preserving ESI or hard drives for all departing employees – during at least our calls on July 15, 2009 and August 21, 2009.”);² *id.* Ex. H (Letter, dated June 6, 2011) at 4 (“KPMG will not agree to preserve computer hard drives of all of the departing employees who are potential FLSA opt-in plaintiffs throughout the country.”). KPMG refused even to maintain the status quo during the parties’ negotiations, rejecting a two-week moratorium proposed by Plaintiffs. *See id.* H (Letter, dated June 6, 2011) at 2-3.

Although KPMG has in its possession approximately 2,500 hard drives that it preserved “as a result of litigation holds in other cases and for reasons unrelated to this litigation,” Def.’s Br. at 4, KPMG has refused to tell Plaintiffs or the Court almost anything about these hard drives, including the time period during which the Audit Associates left the firm, the geographic spread of the hard drives, or anything about the “litigation holds in other cases” or “reasons

² This letter was sent in connection with the parallel lawsuit *In re KPMG Wage and Hour Litigation*, No. 07 Civ. 4396-RSWL-CW (C.D. Cal.) (the “California Case”), which was stayed on September 18, 2009 pending a decision in an appeal to the Ninth Circuit in *Campbell v. PricewaterhouseCoopers, LLP*, 602 F. Supp. 2d 1163 (E.D. Cal. 2009), *rev’d*, 642 F.3d 820 (9th Cir. 2011), which the Ninth Circuit issued on June 15, 2011.

unrelated to this litigation” that caused KPMG to preserve them.³ KPMG will not even tell Plaintiffs or the Court whether its outside preservation obligations continue to exist. Declaration of Andrew Stern 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, ECF No. 110 (“Stern Decl.”) Ex. 4 (“Keegan Decl.”) ¶ 7 (“KPMG has also preserved a number of hard drives for reasons unrelated to this litigation.”); Def.’s Reply in Further Support of Motion for Protective Order, ECF No. 100 at 6 n.4 (“[A]s other cases are resolved, those litigation holds and preservation obligations will be lifted.”); Swartz Decl. Ex. G (Letter, dated September 16, 2010) (discussing KPMG’s preservation obligations in separate litigation).

KPMG claims to have “made good faith efforts to preserve computer hard drives of departing employees who are putative class members in New York,” Def.’s Br. at 4, and that, as a result, it has preserved hard drives for approximately 500 former employees who are putative New York class members. Stern Decl. Ex. 4 (Keegan Decl.) ¶ 8. However, as Audit Associates in other states left the firm over the past few years, KPMG destroyed their hard drives without seeking a protective order until now. *See* Def.’s Br. at 4-5; Stern Decl. Ex. 4 (Keegan Decl.) ¶¶ 8-10 (KPMG has preserved hard drives for “more than 2500 of the approximately 3800 former employees.”).⁴

³ Def.’s Br. at 4; *see* Swartz Decl. Ex. J (Letter, dated May 31, 2011) at 2-3; *id.* Ex. H (Letter, dated June 6, 2011) at 4 (failing to respond to Plaintiffs’ questions); *id.* Ex. B (Letter, dated June 10, 2011) at 1 (“[I]nstead of providing the information Plaintiffs requested, KPMG’s counsel has been dismissive of Plaintiffs’ questions, calling them ‘unprofessional,’ ‘absurd,’ and not ‘in good faith,’ and providing only limited and often vague responses.”); Order at 7.

⁴ Despite Plaintiffs’ urging, KPMG has not even agreed to preserve hard drives for Audit Associates from New Jersey, who were class members in *Lambert v. KPMG LLP*, No. 11 Civ. 1622 (S.D.N.Y. Mar. 9, 2011) before the New Jersey claims in that case were dismissed and refiled in New Jersey state court, *Lambert v. KPMG LLC*, No. ESX L 5225 11 (N.J. Super. Ct.).

II. The Hard Drives Are Likely to Contain Useful Information.

Although Plaintiffs have not had an opportunity to examine any hard drives, Plaintiffs do remember at least some of what might be expected to be found on them, including computer usage information, log-in/log-out information, forms, and other documents stored and edited in the course of Plaintiffs' workdays. *See* Swartz Decl. Ex. T ("Lambert Decl.") ¶¶ 4-5, 8; Ex. U ("Pippins Decl.") ¶¶ 4-5, 8; Ex. V ("Schindler Decl.") ¶¶ 4-5, 8. This information could help prove the hours that Audit Associates worked and the substance of their work. The Magistrate Judge correctly held that "any material contained on the hard drives that tends to show either the Audit Associates' job responsibilities or the hours they worked is relevant." Order at 11.

III. KPMG Forced Plaintiffs to Negotiate in the Dark.

KPMG has used the Court's discovery stay as a shield, refusing to produce even a few sample hard drives, while aggressively seeking an order allowing it to destroy thousands of hard drives sight unseen, and granting it amnesty for the hard drives it has already destroyed. The Magistrate Judge correctly held that, "at this point it is not entirely clear what the hard drives contain, in part because of KPMG's own efforts to keep that information at bay." Order at 11.

KPMG's refusal to share even a few hard drives has prevented Plaintiffs from determining what, if anything, on the hard drives is useful. The Magistrate Judge correctly held that KPMG has been unwilling to "provide Plaintiffs with the opportunity to learn of the hard drive's contents . . . that might have enabled them to propound targeted requests for specific files contained within the hard drives at lesser cost." Order at 16 (internal citations omitted).

Critically, KPMG never describes what the hard drives contain or even indicates that it has examined any of them.

IV. KPMG Has Withheld Other Important Information.

Hiding behind the discovery stay, KPMG has consistently stonewalled Plaintiffs' informal attempts to obtain other information about the hard drives, refusing to answer even simple inquiries that might have narrowed the dispute. Early in the process, Plaintiffs asked KPMG to voluntarily provide limited discovery related to the hard drives and to furnish information supporting the alleged cost of data preservation. Swartz Decl. Ex. J (Letter, dated May 31, 2011) at 2-3 (inquiring about the costs of preservation and whether data might be available from other sources). KPMG refused to answer Plaintiffs' questions. *Id.* Ex. L (Letter, dated June 9, 2011) at 1 (“[W]e believe that the other questions you posed are neither relevant nor reasonable and, as a result, KPMG will not agree to respond to them.”); *id.* Ex. K (Letter, dated June 10, 2011) at 2 (KPMG acknowledging refusal to share information because “Plaintiffs’ counsel’s questions were directed at obtaining ‘free discovery’ related to the hard drives”); *id.* Ex. B (Letter, dated June 10, 2011) at 2 (“KPMG’s counsel has been dismissive of Plaintiffs’ questions, calling them ‘unprofessional,’ ‘absurd,’ and ‘not in good faith,’ and providing only limited and vague responses.”). As Plaintiffs told KPMG but KPMG ignored, providing information could narrow or potentially eliminate the dispute. *Id.* Ex. Q (Email, dated July 22, 2011) (“[I]f we had access to the other discovery that we will ultimately obtain [about the hard drives], we would be better informed with respect to this issue because we would have a better idea of how badly we need the hard drives and whether they are the only source of certain evidence.”).

KPMG has also refused to provide details about its claimed burden. Although KPMG claims that preserving one hard drive costs \$600.00, Def.’s Br. at 5; Stern Decl. Ex. 4 (Keegan Decl.) ¶¶ 11-12, it has not given Plaintiffs the ability to verify this. Swartz Decl. Ex. B (Letter, dated June 10, 2011) at 4-5. KPMG’s unsupported cost estimate fails to explain whether these

numbers reflect the actual costs to KPMG or merely the retail price that KPMG would charge to its own clients as a vendor.⁵ KPMG has also not explained how much of the \$600.00 is for “administrative” expenses, Stern Decl. Ex. 4 (Keegan Decl.) ¶ 12, and what this means. Swartz Decl. Ex. B (Letter, dated June 10, 2011) at 4-5 (“KPMG has refused to explain to Plaintiffs how they determined that preserving one hard drive would cost \$600 When Plaintiffs’ counsel asked for more information, whether these costs were in-house estimates or third-party vendor costs, KPMG refused to answer.”).

Likewise, when scrutinized, KPMG’s claim that it “has incurred more than \$1.5 million in costs associated with the preservation of these hard drives,” Def.’s Br. at 5, generates more questions than answers.⁶ Critically, KPMG has refused to divulge how much of this \$1.5 million is attributable to other preservation obligations KPMG admits it has. Def.’s Br. at 5, 12-13. Because of the discovery stay and KPMG’s refusal to volunteer information, Plaintiffs have not been able to inquire into any of this.

At a Court conference, KPMG candidly admitted that another “cost” it will incur if it is forced to preserve hard drives for this case is that the hard drives will be available and subject to discovery in other proceedings.⁷ See Swartz Decl. Ex. I (Transcript, dated June 16, 2011) at

⁵ KPMG promotes itself as an industry leader in assisting companies in e-discovery, yet still proclaims that turning over just five hard drives is too burdensome. See Cynthia Bateman and Kenneth C. Koch, *Taking Control of E-Discovery: Managing Internally and Consistently*, KPMG (Oct. 13, 2011), <http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Documents/taking-control-ediscovery.pdf> (last visited Nov. 30, 2011).

⁶ Similarly, KPMG’s *amicus* support decries “the well-recognized burden of preserving electronic records today,” Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Defendant’s Objections to the Magistrate Judge’s October 11, 2011 Order, ECF No. 119 (“Chamber’s Br.”) at 3, without referring to the specific burdens in this case at all.

⁷ This motion is not the first time in this case that KPMG has gone to lengths to hide information. KPMG responded to Plaintiffs’ Notice Motion by redacting volumes of documents

12:16-23. KPMG did not identify any other proceedings to which the hard drives might be relevant, why it does not have a litigation hold in place if it anticipates them, or why it would be so damaging to KPMG for the hard drives to be available.⁸

V. The Potential Damages Appear to Be Significant.

The discovery stay has also allowed KPMG to avoid providing information that would allow Plaintiffs or the Court to accurately estimate the total damages at issue. Although KPMG claims that the cost of preserving hard drives would “swallow the amount at stake,” Def.’s Mem. in Supp. of Mot. for Protective Order, ECF No. 91, at 2, it has never provided its own estimate of the value of this case. Because KPMG has not yet produced compensation records, payroll records, dates of employment, or time records, Plaintiffs can only guess at the total damages. However, using a very rough per-person damages estimate of \$10,000.00 and a 30% opt-in rate, the lost wages at issue would be \$37.5 million. With liquidated damages and interest, Plaintiffs and the class may be owed more than \$90 million.

and declarations and large portions of its opposition brief without the Court’s permission. As a result, the Court decided that, after it decides Plaintiffs’ Notice Motion, it will hold a hearing, taking testimony from an independent court-appointed expert, to determine whether “the allegedly proprietary practices”. . . “ought in fact to be subject to a confidentiality order.” Swartz Decl. Ex. W (Order, dated June 29, 2011). The Court intends to ask the AICPA and the SEC to weigh in on the issue. *Id.*

⁸ Several Members of Congress have expressed an interest in the Big Four accounting firms’ audits. Two Senators introduced a bill that would make the Public Company Accounting Oversight Board (“PCAOB”) disciplinary proceedings more transparent, Press Release, Sen. Jack Reed, Reed and Grassley Seek to Increase Transparency at Accounting Watchdog (Nov. 18, 2011), <http://reed.senate.gov/press/release/reed-and-grassley-seek-to-increase-transparency-at-accounting-watchdog> (last visited Nov. 30, 2011), and another is re-examining one of KPMG’s main competitor’s audits in light of the PCAOB’s public criticism of that firm in the last month, Letter to Joe Echevarria, CEO, Deloitte LLP, from Sen. Claire McCaskill (Nov. 7, 2011), <http://mccaskill.senate.gov/files/documents/pdf/2011-11-07DeloitteDocumentRequest.pdf> (last visited Nov. 30, 2011).

VI. KPMG Took Unreasonable Negotiating Positions, Including Rejecting the Magistrate Judge's Proposed Resolution.

KPMG has never made serious attempts to negotiate a resolution to this dispute. As the Magistrate Judge correctly observed, "KPMG's ongoing burden is self-inflicted to a large extent. It is suffering from the effects of its own reluctance to work with Plaintiffs to generate a reasonable sample that may well be less burdensome to maintain." Order at 16.

Several times, KPMG gave Plaintiffs unreasonable and arbitrary deadlines to agree to KPMG's proposals. For example, on June 10, 2011, KPMG acknowledged that it had advised Plaintiffs that unless they agreed to "preservation of only a sample of hard drives" that afternoon, KPMG would cease negotiating. Swartz Decl. Ex. K (Letter, dated June 10, 2011) at 2-3. *See also id.* Ex. L (Letter, dated June 9, 2011) at 1-2 (demanding a response to KPMG's preservation proposal by "tomorrow" or "we will advise the Magistrate Judge . . . that the parties have reached an impasse").

On July 15, 2011, KPMG proposed a limited preservation of 250 hard drives, selected randomly, and no obligation to preserve any hard drives as Audit Associates leave the firm. Swartz Decl. Ex. M (Letter, dated July 15, 2011) at 1. Again, KPMG insisted that either Plaintiffs accept this framework or it would inform the Court that the parties were not going to be able to reach an agreement. *Id.* at 1-2.

On the same day, Plaintiffs requested an additional ten days to attempt to resolve the preservation issue, which the Magistrate Judge granted. Swartz Decl. Ex. N (Order, dated July 15, 2011). KPMG immediately signaled its intention not to cooperate, "disagree[ing] with the Plaintiffs' suggestion . . . that the discussion of this issue should continue." *Id.* Subsequently, still in the dark about almost everything related to the hard drives, Plaintiffs continued to ask questions, but to no avail. *See id.* Ex. Q (Email, dated July 22, 2011) ("[T]here are a lot of other

questions we have asked that KPMG refused to answer. Please let us know whether it will reconsider on any of them.”).

At the July 25, 2011 conference, the Magistrate Judge proposed a compromise and gave “[t]he parties . . . until August 2, 2011 to continue their meet and confer” and consider it.⁹ Swartz Decl. Ex. O (Order, entered July 27, 2011). Three days later, without waiting to see whether Plaintiffs accepted the Magistrate Judge’s proposal, KPMG rejected it. *Id.* Ex. P (Letter, dated July 29, 2011) at 1.

KPMG filed its Motion for a Protective Order on August 12, 2011. A few days later, in another effort to avoid motion practice, Plaintiffs suggested that KPMG produce a sample of just *five* hard drives so that Plaintiffs could see what information they contained. *Id.* Ex. R (Letter, dated August 17, 2011). Less than twenty-four hours later, KPMG rejected this offer and proposed no alternative, describing it “unworkable.” *Id.* Ex. S (Letter, dated August 18, 2011).

VII. The Magistrate Judge’s Order Has Not Convinced KPMG to Cooperate.

By Memorandum and Order filed October 7, 2011 and entered on October 11, 2011, the Magistrate Judge denied KPMG’s Motion for a Protective Order and ordered KPMG not to destroy any hard drives until the Court decides Plaintiffs’ Notice Motion and lifts the discovery stay. Although the Order states in no uncertain terms that the parties should continue to attempt to resolve the issue, Order at 16-17 (“encourag[ing] the parties to continue to meet and confer in light of this decision to see if an agreement on sampling can be reached, sooner rather than later,

⁹ The Magistrate Judge proposed that KPMG preserve 750 of the hard drives it has and one-third of departing Audit Associates’ hard drives going forward. The Magistrate Judge also proposed that the hard drives be selected based on negotiated criteria in an effort to achieve representativeness and that the parties negotiate a stipulation on the admissibility of the hard drives.

thus alleviating the cost concerns KPMG has raised in its motion.”), KPMG’s strategy since the Order was entered has been no more cooperative than it was in the months leading up to it.

Heeding the Magistrate Judge’s admonition, Plaintiffs wrote to KPMG on November 9, 2011 seeking to engage in a dialogue. Swartz Decl. Ex. Y (Email, dated November 9, 2011). Almost two weeks later, KPMG made a proposal much like its prior offers that failed to account for any of the concerns that Plaintiffs and the Magistrate Judge had raised. *Id.* Ex. Z (Email, dated November 22, 2011). Among other things, KPMG continued to insist on using search terms, refused to attempt to ensure that any sample contains a robust cross-section of hard drives, and would not agree to preserve any hard drives from Audit Associates who leave in the future. *See id.* KPMG did not provide any additional information or answers to Plaintiffs’ questions about KPMG’s purported costs or the details about the hard drives it is currently preserving.

ARGUMENT

I. The Court Should Give the Magistrate Judge’s Order “Substantial Deference.”

KPMG almost completely ignores the “substantial deference” standard that governs district courts’ review of magistrate judges’ discovery orders. *Weiss v. La Suisse*, 161 F. Supp. 2d 305, 320-21 (S.D.N.Y. 2001) (McMahon, J.). For the most part, KPMG simply disagrees with the Order, which is insufficient. A court may set aside a magistrate judge’s legal determination concerning nondispositive matters only if the order is “clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). Factual findings by a magistrate judge are reviewed for clear error. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, No. 02 Civ. 1499, 2003 WL 21872389, at *2 (S.D.N.Y. Aug. 7, 2003).

A magistrate judge’s discovery order, therefore, should be overruled only where the district court “is left with the definite and firm conviction that a mistake has been committed.”

Weiss, 161 F. Supp. 2d at 321. Here, KPMG does not point to any legal ruling or factual finding that is clearly erroneous or is contrary to law.

Particularly where, as here, a magistrate judge has “been deeply involved in discovery matters in the case,” the district court should defer to his findings. *Grand River Enters. Six Nations, Ltd. v. King*, No. 02 Civ. 5068, 2009 WL 330213, at *2 (S.D.N.Y. Feb. 9, 2009) (quoting *Lugosch v. Congel*, 443 F. Supp. 2d 254, 276 (N.D.N.Y. 2006)). This includes a finding that a party was uncooperative. See *Bogan v. Nw. Mut. Life Ins. Co.*, 144 F.R.D. 51, 53 (S.D.N.Y. 1992) (magistrate judge can best “judge the entire atmosphere of the discovery process . . .”); *Betancourt v. E.C.C. Indus., Inc.*, No. 94 Civ. 7102, 1999 WL 587833, at *1 (S.D.N.Y. Aug. 4, 1999) (the magistrate judge “was in a far better position . . . to determine whether [defendant] violated his order and whether sanctions or other relief was appropriate”).

II. The Order Is Limited in Duration.

The Magistrate Judge was cautious to issue an order that did no more than is necessary at this transitory point in the case. The Order, which denies KPMG’s motion *without* prejudice, Order at 1, 19, is essentially a place-holder and is explicitly time-limited. By its terms, the Order is only operative until the Court issues a further order or the parties agree on a sampling methodology. *Id.* at 18-19.¹⁰ The Magistrate Judge was clear (and Plaintiffs do not disagree) that “ongoing preservation can (and will) be limited through sampling” *Id.* at 15-16. Plaintiffs simply need an opportunity to obtain information.

¹⁰ See also Order at 12 (“*until the pending [Notice Motion] is resolved . . .*”); Order at 14-15 (“*Until discovery proceeds and the parties can resolve what materials are contained on the hard drives . . . it would be premature to permit the destruction of any hard drives.*”); Order at 15-16 (“the ongoing preservation can (and *will*) be limited through sampling *once the [Notice Motion] is resolved* and discovery proceeds – it is not unreasonable that KPMG continue its preservation *at this time.*”) (emphasis added in each).

The Magistrate Judge was also clear that, once the Court rules on Plaintiffs' Notice Motion and discovery is allowed, the process should not take a long time. Plaintiffs should be able to determine "promptly" what is on the hard drives and quickly verify KPMG's ongoing costs of preservation. *See* Order at 15. The Magistrate Judge prudently held that "[w]ith so many unknowns involved at this stage in the litigation, permitting KPMG to destroy the hard drives is simply not appropriate at this time." *Id.*

III. The Magistrate Judge Correctly Found That Material on Hard Drives May Contain Relevant Information.

The Magistrate Judge correctly found that the hard drives may contain relevant information. He held that "any material . . . that tends to show either the Audit Associates' job responsibilities or the hours they worked is relevant." Order at 11. Plaintiffs' showing that the hard drives likely contained this type of information, which was based on their best recollections sometimes years after the fact, is sufficient to support the Magistrate Judge's relevance finding. Swartz Decl. Ex. T (Lambert Decl.) ¶¶ 4-5, 8, Ex. U (Pippins Decl.) ¶¶ 4-5, 8, Ex. V (Schindler Decl.) ¶¶ 4-5, 8. Because KPMG refused to produce even a few sample hard drives for Plaintiffs or the Court to examine, or even to explain what is on the hard drives, it could not rebut Plaintiffs' showing. The Magistrate Judge, therefore, correctly held that KPMG "failed to establish that the contents of the disputed hard drives are not relevant." Order at 11. It is inequitable for one party to declare peremptorily that the material it wishes to destroy is not important while not allowing the other side an opportunity to inspect it. *See, e.g., Chrysler Realty Co. v. Design Forum Architects, Inc.*, No. 06 Civ. 11785, 2008 WL 2245396, at *4 (E.D. Mich. May 30, 2008), *remanded on other grounds*, 341 Fed. Appx. 93 (6th Cir. 2009).

IV. The Magistrate Judge Properly Determined That the Potential FLSA Opt-Ins May Be Key Players.

KPMG and the Chamber blow the “key player” issue out of proportion. The Magistrate Judge did not rule, as KPMG and the Chamber erroneously claim, that all former Audit Associates are “key players.” Def.’s Br. at 9-10; Chamber’s Br. at 7. He explicitly did “*not* reach whether all potential members of the FLSA collective and all members of the putative New York class will be key players if the Motion For Conditional Certification is granted.” Order at 12 (emphasis added). Instead, the Magistrate Judge proceeded with caution, holding that, “until the pending Motion For Conditional Certification is resolved,” KPMG may not destroy hard drives because each Audit Associate “*could be found to be* a ‘key player.’” *Id.* (emphasis added).

This unremarkable ruling is consistent with applicable caselaw. A party may not destroy evidence “when [it] has notice that the evidence is relevant to litigation” or “when [it] should [] know[] that the evidence *may be relevant to future litigation.*” *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (emphasis added). The duty to preserve evidence begins when litigation is “pending or reasonably foreseeable.” *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011); *see also West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (applying the same standard). Here, Plaintiffs’ pending Notice Motion puts KPMG on clear notice that litigation with each potential opt-in plaintiff is reasonably foreseeable and that evidence of their job duties and hours worked may be relevant. *See Kronish*, 150 F.3d at 126.

If the Court grants Plaintiffs’ Notice Motion, every potential opt-in plaintiff will receive a notice inviting them to join the case. Between 15% and 30% of them are likely to do so. *See Andrew C. Brunsdon, Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkeley J. Emp. & Lab. L. 269, 310, n.125 (2008). Soon after that, the

parties can attempt to agree on, or the Court can rule on, how many of the opt-in plaintiffs' hard drives KPMG must produce. The Court can then decide whether KPMG must continue to preserve hard drives of individuals who do not join the case. Material on the hard drives of the Audit Associates who join the case may bear directly on those individuals' claims. It may also bear on the KPMG policies and practices at issue.

Even if the Court does not grant Plaintiffs' Notice Motion, material on the hard drives might be relevant. Plaintiffs will attempt to demonstrate through discovery that they are similarly situated to other Audit Associates and, at the end of discovery, move for notice to the collective again. A denial of conditional certification does not preclude reconsideration at the close of discovery. *Mendoza v. Casa De Cambio Delgado, Inc.*, No. 07 Civ. 2579, 2008 WL 3399067, at *12 (S.D.N.Y. Aug. 12, 2008) (granting plaintiffs' renewed motion for conditional certification after additional discovery).

The Chamber's *amicus* brief cites five non-class or collective action cases for the proposition that the "key player" concept covers only a "select" number of individuals. Chamber's Br. at 8-9 & n.3. None of these cases even suggests that an opt-in plaintiff cannot be a key player in his or her own case. Neither KPMG nor the Chamber cites a case holding that a plaintiff or an opt-in plaintiff cannot be a key player.

Finally, KPMG's litigation strategy seems to contradict its argument that each opt-in plaintiff is not a potential "key player." In opposing Plaintiffs' Notice Motion, KPMG deposed every current plaintiff and opt-in plaintiff for a full day and one opt-in plaintiff for almost two days. Swartz Decl. ¶ 6. This suggests that, if the Court grants Plaintiffs' Notice Motion, KPMG will seek to depose a large number of the opt-in plaintiffs, as defendants frequently do. *See* Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The*

Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards, 92 Minn. L. Rev. 1317, 1335 (2008). Although plaintiffs usually oppose such broad discovery with some success, see *Sand v. Greenberg*, No. 08 Civ. 7840, 2009 WL 6540161, at *1 (S.D.N.Y. July 23, 2009) (allowing 10 depositions and striking defendants' individualized document requests and interrogatories), courts occasionally allow it. See, e.g., *Rosen v. Reckett & Colman Inc.*, No. 91 Civ. 1675, 1994 WL 652534, at *3-4 (S.D.N.Y. Nov. 17, 1994) (allowing defendants to depose every member of a 50-member ADEA opt-in collective) (collecting cases).

V. KPMG Does Not Claim that the Information on the Hard Drives Is Duplicative of Other Discovery Material.

The Magistrate Judge also correctly determined that ongoing preservation of the hard drives would not be duplicative of other discovery materials subject to KPMG's separate preservation efforts. Order at 12 (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)). As he noted, KPMG did not make this argument in its moving brief, Order at 13, and does not raise it here.

VI. The Magistrate Judge Appropriately Applied a Proportionality Test, Especially Given KPMG's Non-Cooperation.

Having found that the hard drives may contain relevant information, the Magistrate Judge attempted to balance the equities by applying a proportionality test to the extent that he could. He was well within his discretion to find that KPMG's refusal to reveal the contents of the hard drives, details about the financial burden it claims, and other important information, see *supra* pp. 6-7, as well as its failure to work effectively with Plaintiffs' counsel to negotiate a sampling mechanism, Order at 16, weighed against it in measuring the equities.

A. KPMG and the Chamber of Commerce Are Wrong That the Magistrate Judge Did Not Engage in a Proportionality Analysis.

The Magistrate Judge properly applied a proportionality test, comparing KPMG’s rough estimates of the cost of preservation with the likely benefit of the information on the hard drives. Order at 9 (“KPMG’s motion thus requires the Court to balance the company’s interest in avoiding . . . [the] undue burden or expense that would result from its obligation to preserve the hard drives with its duty to preserve”) (internal quotation marks omitted); *id.* at 14 (“KPMG has not been able to establish conclusively that the materials contained on the hard drives are of either ‘little value’ or ‘not unique.’” (citing Def.’s Br. at 7)). He also properly considered the irreversible harm that destroying the hard drives now would cause. Order at 15. He held that “[g]iven the finality that would result from granting KPMG’s motion and what stands to be lost – especially as compared to the potential (if not likelihood) that the ongoing preservation can (and will) be limited through sampling once the Motion to Certify is resolved and discovery proceeds – it is not unreasonable that KPMG continue its preservation at this time.” *Id.* at 15-16. His conclusion that the balance tipped in favor of preservation for a limited time is entitled to deference.

Although the law is unclear as to whether a proportionality test must always be applied in a pre-discovery preservation dispute, *see Orbit One Comm’cns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010), the Court need not reach this issue here because the Magistrate Judge actually applied a proportionality test. Contrary to KPMG’s representation, the Magistrate Judge never held that “a proportionality analysis . . . is irrelevant to a party’s duty to preserve evidence.” Def.’s Br. at 7. Contrary to the Chamber’s claim, he never held that “the duty to preserve electronically stored information was not limited by any test of proportionality.” Chamber’s Br. at 2.

The Magistrate Judge was correct in acknowledging that courts should apply proportionality with caution in the preservation context. Order at 14 (“Proportionality is particularly tricky in the context of preservation.”) (citing *Orbit One*, 271 F.R.D. at 437). He also properly held that the discovery stay and KPMG’s non-cooperation made it difficult to be more precise in determining proportionality. Order at 14-15.

B. The Magistrate Judge’s Determination That KPMG Was Uncooperative Is Entitled to Great Deference.

KPMG does not contest the Magistrate Judge’s ruling that it was uncooperative or that its current predicament is its own doing. *See* Order at 16 (“KPMG’s ongoing burden is self-inflicted to a large extent. It is suffering from the effects of its own reluctance to work with Plaintiffs to generate a reasonable sample that may well be less burdensome to maintain.”). The Chamber’s brief does not even mention it. Even had KPMG not failed to rebut the point, the Court should give this determination “substantial deference” because the Magistrate Judge has “been deeply involved” in this discovery matter. *See Grand River Enters. Six Nations*, 2009 WL 330213, at *2. Magistrate judges are often in the best position to “judge the entire atmosphere of the discovery process.” *Bogan*, 144 F.R.D. at 53; *cf. Betancourt*, 1999 WL 587833, at *1 (the magistrate judge “was in a far better position . . . to determine whether [defendant] violated his order and whether sanctions or other relief was appropriate”). Here, the Magistrate Judge presided over two conferences about this issue and met with the parties separately in an attempt to mediate it. Swartz Decl. ¶ 5.

The only time KPMG even acknowledges the Magistrate Judge’s determination that KPMG brought this upon itself, KPMG attempts to mislead the Court by claiming that the Magistrate Judge was frustrated with “*the parties’* inability to ‘work effectively’ together,” Def.’s Br. at 16 (emphasis added). However, the passage in the Order that KPMG was quoting is

clear that the Magistrate Judge's "frustration" was directed at KPMG, not Plaintiffs or "the parties." Order at 16 ("KPMG's ongoing burden is self-inflicted to a large extent. It is suffering from the effects of *its own reluctance to work with Plaintiffs . . .* However, to date, *KPMG has failed to work effectively with Plaintiffs . . .*") (emphasis added). This highlights KPMG's continued failure to appreciate the consequences of its conduct.

C. KPMG's Non-Cooperation Is Relevant to the Proportionality Test.

The Magistrate Judge was right to consider KPMG's bad conduct in making its proportionality determination. "In assessing whether a particular discovery request or requirement is unduly burdensome or expensive, a court should consider the extent to which the claimed burden and expense grow[s] out of the responding party's action or inaction." *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 Sedona Conf. J. 289, 298 (2010). Courts may consider a party's own fault in creating the very burden that the party asks the court to balance. *See Escamilla v. SMS Holdings Corp.*, No. 09 Civ. 2120, 2011 WL 5025254, at *5 (D. Minn. Oct. 21, 2011) (discounting financial burden to defendant because "the burden and expense of this discovery was self-inflicted").

Here, KPMG's hands are far from clean. KPMG does not deny that it refused to show Plaintiffs or the Court even a single hard drive. Swartz Decl. Ex. S (Letter, dated August 18, 2011) at 1 (describing Plaintiffs' sampling proposal as "unworkable"). Rather than allowing Plaintiffs to take even limited discovery into the contents of the hard drives – discovery to which Plaintiffs will be entitled as soon as the discovery stay is lifted – KPMG rushed to seek a ruling from the court allowing it to destroy the hard drives without Plaintiffs or the Court ever having a look at them.

This conduct is contrary to the clear judicial preference for cooperation and information sharing in ESI matters. *See William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (“Of course, the best solution in the entire area of electronic discovery is cooperation among counsel. This Court strongly endorses The Sedona Conference Cooperation Proclamation.”) (citation omitted);¹¹ *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 415 (S.D.N.Y. 2009) (“I also draw the parties’ attention to the recently issued Sedona Conference Cooperation Proclamation, which urges parties to work in a cooperative rather than an adversarial manner to resolve discovery issues in order to stem the ‘rising monetary costs’ of discovery disputes.”).

It is also contrary to the spirit of the recent Order issued by the Judicial Improvements Committee of the Southern District of New York (“JIC”) introducing the Pilot Project Regarding Case Management Techniques For Complex Civil Cases, Standing Order M 10-468, No. 11-mc-00388-LAP (S.D.N.Y. Nov. 1, 2011), Swartz Decl. Ex. AA (“Pilot Project”). The Pilot Project’s model case management plan clearly encourages information sharing regarding preservation issues. *See id.* (Pilot Project) at 20 (requiring reporting on “identification of potentially relevant data; disclosure of the programs and manner in which the data is maintained; identification of computer system(s) utilized; and identification of the individual(s) responsible for data preservation, etc” and reporting on “the extent to which the parties have disclosed . . . contents . .

¹¹ The Sedona Conference Cooperation Proclamation (“Proclamation”), which endorses a cooperative approach between counsel in e-discovery matters, points out that an adversarial posture in the e-discovery context leads to “rising monetary costs . . . escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether[.]” Proclamation at 1, *available at* http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf. (last visited November 29, 2011).

. of ‘litigation hold’ communications.”). Had the Pilot Project been in place in this case, KPMG would have been required to self-report its own failure to cooperate.¹²

D. KPMG Has Not Sufficiently Established Its Financial Burden.

The Magistrate Judge’s finding that KPMG’s claimed costs do not outweigh the harm to Plaintiffs if the hard drives are destroyed cannot be “clearly erroneous” or “contrary to law” because KPMG has not sufficiently established its side of the equation. The Order correctly observes that, until the discovery stay is lifted, “it is . . . difficult to conclude what KPMG’s costs of preservation will be” Order at 15.

KPMG’s estimates of \$600.00 per hard drive and “more than \$1.5 million in [total] costs,” Def.’s Br. at 5, have not been verified or tested. KPMG has allowed no inquiry, formal or informal, into the details. For example, KPMG has refused to reveal whether \$600.00 is the cost that it would charge one of its clients to preserve a hard drive or whether it is an out-of-pocket amount. It has not explained how much of the \$600.00 is for “administrative” expenses and what this means. Stern Decl. Ex. 4 (Keegan Decl.) ¶ 12. It has refused to divulge how much of the \$1.5 million is attributable to other preservation obligations KPMG admits it has. *See supra* p. 8. It has not even addressed its marginal financial burden – the cost for it to preserve the few additional hard drives of Audit Associates who leave KPMG between now and when the Court decides Plaintiffs’ Notice Motion and the discovery stay is lifted. The Chamber’s brief glosses over all of this, simply citing “the well-recognized burden of preserving electronic records today.” Chamber’s Br. at 3.

KPMG cannot credibly claim that its costs will be “grossly disproportional to the information’s potential value,” Def.’s Br. at 2, when its true costs are so unclear. *See Victor*

¹² Magistrate Judge Cott is a member of the JIC, Pilot Project at ii n.1, which drafted the Pilot Project, and was a member of its Discovery Subcommittee, Pilot Project at vi.

Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 260 n.10 (D. Md. 2008) (whether discovery is too expensive is a fact-intensive inquiry).

E. The Magistrate Judge Correctly Found That He Did Not Have Enough Information About the Contents of the Hard Drives to Allow Them to Be Destroyed.

In addition to the lack of clarity about the cost of preservation, KPMG's non-cooperation deprived the Magistrate Judge of information about the hard drives themselves. The Magistrate Judge correctly ruled that, until discovery starts and more information is available, it is prudent to maintain the status quo. "With so many unknowns involved at this stage in the litigation, permitting KPMG to destroy the hard drives is simply not appropriate at this time." Order at 15. Courts routinely recognize that a party's non-cooperation can prevent a court from performing a full balancing test. If a party fails in its responsibility to share information and minimize burden and expense, "the courts' ability to objectively resolve[] . . . disputes" is "inhibit[ed]." *Collins & Aikman*, 256 F.R.D. at 415 n.69.

Because the Magistrate Judge lacked information that KPMG controls, he was right to take the safe road, "[g]iven the finality that would result from" allowing KPMG to destroy the evidence sight unseen. *See* Order at 15. As the Magistrate Judge noted, once discovery proceeds, the production of the hard drives can be limited through sampling. *See id.* For now, however, especially in light of the lack of information, the Magistrate Judge is correct that it is important to "maintain[] the integrity of the materials contained on the hard drives by preventing their destruction." *See id.*

VII. KPMG's Continued Insistence on a Key Word Search Is Unreasonable.

The information that Plaintiffs seek from the hard drives cannot be obtained using search terms. Plaintiffs will likely seek log-in/log-out information, which may demonstrate the hours Plaintiffs worked, and time stamps and draft documents saved on the hard drives, which may

demonstrate the actual work Audit Associates performed. A keyword search would not recover this information because it is not topic- or keyword-specific. Moreover, courts and commentators recognize the limitations of keyword searches, even for topic-specific inquiries. *See, e.g., Asarco, Inc. v. U.S. Envtl. Prot. Agency*, No. 08 Civ. 1332, 2009 WL 1138830, at *2 (D.D.C. Apr. 28, 2009) (“keyword searches are no longer the favored methodology”).¹³ In any event, as the Magistrate Judge correctly observed, “KPMG did not provide Plaintiffs with the opportunity to learn of the hard drive’s contents – such as by reviewing a handful of hard drives that counsel had vetted for privilege or created a log of contents – that might have enabled them to ‘propound targeted requests for specific files contained within the hard drives at lesser cost.’” Order at 16.

VIII. The Magistrate Judge Acted Within the Scope of His Authority in Affirmatively Ordering KPMG to Preserve Evidence.

The Magistrate Judge was within his authority to affirmatively order KPMG to preserve hard drives until the parties reach agreement on sampling during discovery. When a court denies a moving party’s motion for a protective order, it may order the moving party to comply with its discovery obligations. “If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.” Fed. R. Civ. P. 26(c)(2). Courts routinely order moving parties to provide the discovery that they had moved to protect. *See, e.g., Kamps v. Fried, Frank, Harris, Shriver & Jacobson L.L.P.*, No. 09 Civ.

¹³ *See also* Jason R. Baron & Edward C. Wolfe, *A Nutshell on Negotiating E-Discovery Search Protocols*, 11 Sedona Conf. J. 229, 231 (2010) (“a growing body of case law” recognizes that “the exponential growth of ESI coupled with the ambiguities of human language pose profound challenges to constructing efficacious keyword searches for the purpose of finding all or most relevant documents in a given collection”); Jay Grenig, Browning Marean & Mary Pat Poteet, *Electronic Discovery & Records Management Guide: Rules, Checklists & Forms* (2009 ed.) § 15:15 (“keyword searches do not reflect context” and “can also miss documents containing a word that has the same meaning as the term used in the query but is not specified”).

10392, 2010 WL 5158183, at *4 (S.D.N.Y. Dec. 9, 2010) (denying defendants' motion for protective order to prevent depositions and ordering defendants to sit for them).

KPMG is wrong that it was "procedurally improper" for the Magistrate Judge to order it to preserve hard drives simply because Plaintiffs did not cross-move. Def's Br. at 17. His authority to do so is clear and KPMG cites nothing to the contrary.

This dispute boils down to two options: either KPMG is permitted to destroy the hard drives or it is not. It is not clear from KPMG's papers how the Magistrate Judge could have denied KPMG's request to destroy the hard drives without also requiring it to preserve them.

IX. KPMG Has Waived Any Objection Regarding Cost-Shifting.

The Magistrate Judge was correct that cost-shifting is not appropriate. Order at 17-18. KPMG did not object to this portion of the Order. A party waives objections to portions of a magistrate's non-dispositive order to which it does not specifically object. Fed. R. Civ. P. 72(a) ("a party may not assign as error a defect in the order not timely objected to"); *see also Caidor v. Onondaga Cnty.*, 517 F.3d 601, 604 (2d Cir. 2008) ("failure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court affirm the Magistrate Judge's October 11, 2011 Order.

Dated: New York, New York
November 30, 2011

Respectfully submitted,

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