UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KYLE PIPPINS, JAMIE SCHINDLER, and EDWARD LAMBERT, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

- against -

KPMG LLP,

Defendant.

11 Civ. 0377 (CM) (JLC)

ECF CASE

BRIEF FOR *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

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November 4, 2011

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber is greatly concerned with the rising cost of litigation, particularly the cost of class action litigation, and its effect on the productivity of American businesses. It has submitted *amicus* briefs in numerous cases involving class action issues, including recently in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). Although the vast majority of the Chamber's *amicus* briefs are filed in the Supreme Court of the United States, the federal Courts of Appeals, and state supreme courts, the Chamber will file an *amicus* brief in a federal District Court when the court faces a case presenting issues of exceptional importance.

This is such a case. The Magistrate Judge's order in this case raises issues of profound significance to businesses in America. In recent years, there has been a veritable explosion of electronically stored information in American commerce. Virtually every enterprise is heavily reliant on information technology today. Virtually every employee uses a company-owned desktop, or laptop, or tablet, or smart phone, or all of the above, all creating documents and generating data, often in multiple copies, frequently replicated and backed up, over and over again. Many employees send and receive hundreds of emails a day, many with attachments, with the result that companies accumulate many millions of such messages a year. Even cell phones today have storage measuring in the gigabytes; the desktops, hundreds of gigabytes; the servers, terabytes. One gigabyte equals roughly 500,000 typewritten pages; one terabyte, 500,000,000—

half a *billion*. If 2,500 pages fit in a banker's box, a terabyte would fill *200,000* such boxes.

The Magistrate Judge's opinion reached an unprecedented conclusion here: that, faced with an uncertified class or collective action alleging that employees were not properly compensated for overtime, KPMG, at considerable expense, has to rip out and retain every single hard drive from every computer that any member of the putative class or collective may have used before leaving the company. This KPMG must do, said the Judge, even though there is a database that directly recorded the employees' hours, and even though virtually all of the data on the hard drives would be irrelevant to the case.

The Magistrate Judge made two errors of law that led to this novel conclusion. First, he held that the duty to preserve electronically stored information was not limited by any test of proportionality. Second, he held that every member of the proposed plaintiff class or collective action was a "key player" for purposes of discovery and the retention of electronic information. Both holdings are wrong, unprecedented, and—if affirmed here and followed by other courts—would be highly detrimental to the conduct of civil litigation under the Federal Rules.

ARGUMENT

THE MAGISTRATE JUDGE ERRED IN ORDERING KPMG TO PRESERVE THE HARD DRIVES OF THOUSANDS OF ITS FORMER AND DEPARTING EMPLOYEES.

A. The Magistrate Judge erred in refusing to apply a proportionality standard.

The Magistrate Judge held that the generally applicable "proportionality" test for discovery—which requires courts to "limit the frequency or extent of discovery" if "the burden or expense of the proposed discovery outweighs its likely benefit," FED. R. CIV. P. 26(b)(2)(C), does not apply to the preservation of electronically stored information. *See* Oct. 11 Order at 10, 14-15. Rejecting "the application of a proportionality test as it relates to preservation," *id.* at 14, the Judge emphasized "that this is a dispute about preservation, not production," *id.* at 15.

That distinction is wrong—and dangerous. In rejecting the proportionality test for preservation, the Judge ignored the well-recognized burden of preserving electronic records today. The *Manual for Complex Litigation (Fourth)*, for example, commends precisely the opposite of what the Judge ordered here. The *Manual* recognizes that the scope of data preservation must be carefully limited to what is proportional, as "[a] blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operation." FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.442, at 73 (2004). "Because such an order may interfere with the normal operations of the parties and impose unforeseen burdens," courts must carefully consider "the need for a preservation order and, if one is needed, the scope, duration, method of data preservation, and other terms that will best preserve relevant matter without imposing undue burden." *Id.* Efforts should be made to "minimiz[e] cost and intrusiveness and the downtime of the computers involved." *Id.* And preservation orders should "*exclude* specified categories of documents or data whose cost of preservation *outweighs* substantially their relevance in the litigation, *particularly ... if there are alternative sources for the information*." *Id.* § 11.442, at 74 (emphasis added).

As the *Manual* recognizes, there may be relevant needles buried in many electronic haystacks, but it may not be worth keeping all the haystacks to hunt for all the needles. That is because the amount of electronic information that accumulates in modern enterprises is immense:

> Computerized data have become commonplace in litigation. The sheer volume of such data, when compared with conventional paper documentation, can be staggering. … A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes … .
>
> Digital or electronic information can be stored in any of the following: mainframe computers, network servers, personal computers, hand-held devices, automobiles, or household appliances; or it can be accessible via the Internet, from private networks, or from third parties.

Id. § 11.446, at 77-78.

In explaining the scope of the problem a few years ago to the Civil Rules Advisory Committee, one corporate in-house counsel testified that his global company, half of whose employees were in the United States, "generate[d] 5.2 million emails a day," had "65,000 desktop computers … and 30,000 laptop computers," each with a typical storage capacity of "40 gigabytes, … the equivalent of 20 million typewritten pages"; the company also had "between 15,000 and 20,000 blackberries and PDAs around the world," "7,000 servers worldwide, 4,000 of them in the U.S.," "one thousand to 2,000 networks worldwide, about half of those in the U.S.," "3,000 databases, 2,000 of those in the U.S." He summarized: "Our total storage of information that we now have is 800 terabytes, 500 terabytes in the U.S. … 500 terabytes equals 250 billion pages." Proposed Amendments to the Federal Rules of Civil Procedure: Public Hearing Before the Committee on Rules of Practice & Procedure, 36-38 (2005) (statement of Chuck Beach, Exxon Mobil Corp.), *available at* http://1.usa.gov/ubzdUT.

And a very recent letter to the Committee from in-house lawyers at Microsoft Corporation detailed how "[t]he burden of over-preservation grows heavier by the day," and is becoming "a significant drag on innovation and productivity":

> Unfortunately, with almost every new and useful technological advance, conflicting and ambiguous case law on the duty to preserve creates additional burdens. This is a significant drag on innovation and productivity. …
>
> Today, for preservation purposes alone, Microsoft *collects*, on average, 17.5 GB from each custodian in litigation (which is equivalent to over 430 banker boxes of documents per custodian). … Based on a current snap-shot, the company currently monitors 14,805 separate custodian legal holds in 329 separate matters. In other words, Microsoft currently places an average of 45 custodians on hold for each matter (or a total of 787.5 GB). This corresponds to nearly 20,000 banker boxes of documents per matter. Thus, the company is effectively preserving several warehouses of documents at any one point in time.

Letter from David M. Howard et al., to Hon. David G. Campbell, at 1-3 (Aug. 31, 2011), *available at* http://1.usa.gov/vFoIeH.

As one commentator has explained, the costs of electronic discovery "threaten to drive all

but the largest cases out of the system" by "'dominat[ing] the underlying stakes in dispute'":

> [T]he volume of information, including electronically stored information, is growing at a rate of 30 percent annually. The growing cache of electronic information drives up costs, as companies are forced to cull through ever-larger stockpiles of data to identify responsive documents. … [E]xpenditures for the collection and processing of electronic documents in the United States will reach $4.7 billion in 2010, an increase of 15 percent over the prior year. Notably, this figure does not include the cost of reviewing these documents for responsiveness or privilege ….
>
> The rising costs associated with electronic discovery threaten to drive all but the largest cases out of the system. A report released in 2008 by the RAND Institute for Civil Justice warns that in low-value cases, the costs of electronic discovery "could dominate the underlying stakes in dispute." But even in large cases, the volume of electronic information is growing so fast that traditional techniques of identifying and reviewing documents are breaking under the strain.

John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 567 (2010) (footnotes and citations omitted).

Given this explosion of electronic information, if the Federal Rules of Civil Procedure are to have any chance at being "administered to secure the just, speedy, and inexpensive determination of every action and proceeding," FED. R. CIV. P. 1, then preservation of that information must be restricted to what is proportional. Indeed, the application of the proportionality principle to preservation follows from the existence of that principle under the discovery rules. For the duty to preserve turns upon what is discoverable under Rule 26: "Generally, the duty to preserve extends to documents or tangible things … by or to individuals 'likely to have discoverable information that the disclosing party may use to support its claims or defenses.'" *Rimkus Consulting Grp.* v. *Cammarata*, 688 F. Supp. 2d 598, 612-13 (S.D. Tex. 2010). "Descriptions of the scope of the common-law duty to preserve are virtually coextensive with the scope of discovery." Hon. Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 BALT. L. REV. 381, 395 & n.61 (2008) (citing authorities).

The scope of discovery, in turn, is expressly limited by the proportionality principle: Rule 26(b)(2)(C) provides that discovery "*must*" be limited to what is proportional from a cost-

benefit standpoint, viewed in light of the size of the case, the importance of the discovery, and the availability of alternative sources of information:

> On motion or on its own, the court *must* limit the frequency or extent of discovery otherwise allowed by these rules … if …
>
> > the discovery … can be obtained from some other source that is more convenient, less burdensome, or less expensive; … or …
> >
> > the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(C) (emphasis added).

As a result, "[a] corporation, upon recognizing the threat of litigation, need not preserve every shred of paper, every e-mail or electronic document, and every backup tape." *In re Nat'l Century Fin. Enters., Inc. Fin. Inv. Litig.*, No. 2:03-md-1565, 2009 WL 2169174, at *11 (S.D. Ohio July 16, 2009) (quoting *Consol. Aluminum Corp.* v. *Alcoa, Inc.*, 244 F.R.D. 335, 339 (M.D. La. 2006) (citation and internal quotation marks omitted)). Instead, "[w]hether preservation … is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards." *Rimkus*, 688 F. Supp. 2d at 613 (emphasis in original). "Electronic discovery burdens should be proportional to the amount in controversy or the nature of the case," because "[o]therwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation." THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17 cmt. 2.b. (2007), *quoted in Rimkus*, 688 F. Supp. 2d at 613 n.8.[1]

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[1] *Accord*, *e.g.*, *Victor Stanley*, *Inc.* v. *Creative Pipe*, *Inc.*, 269 F.R.D. 497, 522 (D. Md. 2010) (The duty to preserve "is neither absolute, nor intended to cripple organizations. … [T]he scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation." (internal citations and quotation marks omitted)); *Kay Beer Distrib.*,
(footnote continued)

B. The Magistrate Judge erred in holding that every potential class or collective action member is a "key player."

The Magistrate Judge's mistaken repudiation of the proportionality principle was compounded by a second, equally significant, error. The Judge held that KPMG had to retain hard drives of "*each and every Audit Associate*"—meaning thousands of former employees, with the number ever increasing as more personnel depart—because each such former employee "is a potential plaintiff and thus could be found to be a '*key player*'" as that phrase was used in Judge Scheindlin's widely cited opinion in "*Zubulake IV*," *Zubulake* v. *UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Oct. 11 Order at 9 (emphasis added).

This holding lacks foundation in precedent and logic. To begin with, it twists the "key players" concept beyond recognition. As the Magistrate Judge acknowledged, *Zubulake IV* used the phrase as shorthand for the people whom parties must identify in their mandatory initial disclosures under Fed. R. Civ. P. 26(a)(1)(A)(i): "each individual *likely* to have discoverable information … that the *disclosing party may use to support its claims or defenses*, unless the use would be solely for impeachment." FED. R. CIV. P. 26(a)(1)(A)(i) (emphasis added; quoted in part in Oct. 11 Order at 9); *see Zubulake IV*, 220 F.R.D. 218 & n.25 (citing and quoting FED. R. CIV. P. 26(a)(1)(A)(i)). The rule requires production of a *witness* list. It "requires all parties … early in the case to exchange information regarding potential *witnesses*"—"persons who … might reasonably be expected to be deposed or called as a witness." FED. R. CIV. P. 26 Advisory

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Inc. v. *Energy Brands*, *Inc.*, No. 07-1068, 2009 WL 1649592, at *4 (E.D. Wis. June 10, 2009) ("mere possibility of locating some needle in the haystack of ESI … does not warrant the expense [defendant] would incur in reviewing it"); *S. Capitol Enters.*, *Inc.* v. *Conseco Servs.*, *L.L.C.*, No. 04-705-JJB-SCR, 2008 WL 472427, at *2 (M.D. La. Oct. 24, 2008) ("the likely benefit … is outweighed by the burden and expense of requiring the defendants to renew their attempts to retrieve the electronic data."); *Mancia* v. *Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364 (D. Md. 2008) (noting "concerns that the discovery sought by the Plaintiffs might be excessive or overly burdensome, given the nature of this FLSA and wage and hour case, the few number of named Plaintiffs and the relatively modest amounts of wages claimed for each").

Committee Note to 1993 Amendments (emphasis added).[2] This provision serves to "*focus* the discovery" and to "achieve[]" "savings in time and expense" by "accelerat[ing] the exchange of *basic* information about the case and … eliminat[ing] … paper work." *Id.* (emphasis added).

"Key players" thus could not, and does not, embrace every member of a putative class of thousands. If a party—even a party to a class action—produced a Rule 26(a)(1)(A)(i) witness list bearing thousands, or even hundreds, of names, that party would almost certainly be sanctioned. For no one could in good faith say that she may call such a large group to testify at a trial, even a huge trial; and certainly a list so long would not serve Rule 26(a)(1)(A)'s purpose of focusing discovery and reducing expense. Not surprisingly, when Judge Scheindlin in *Zubulake IV* first used the words "key players," she was actually referring to a group of *five* people. *See* 220 F.R.D. at 218 ("Chapin, Hardisty, Tong, Datta and Clarke"). In fact, in a later opinion she described as "*Zubulake* Revisited: Six Years Later," Judge Scheindlin herself distinguished between "*all* those employees who had any involvement with the issues raised in the litigation" and "*just* the key players." *Pension Comm. of the Univ. of Montreal Pension Plan* v. *Banc of Am. Sec.*, *LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (emphasis added). And other cases invoking her "key players" concept have likewise used it to describe similarly select groups.[3] The

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[2] *Accord*, *e.g.*, *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756 (7th Cir. 2004) (Rule 26(a)(1)(A) requires identification of "each potential *witness*"; emphasis added); *McDermott* v. *Liberty Mar. Corp.*, No. 08 Civ. 1503 (KAM), 2011 WL 2650200, at *3 (E.D.N.Y. July 6, 2011) (noting party's obligation to "disclos[e] *witnesses*" under rule; emphasis added); *Ventra* v. *United States*, 121 F. Supp. 2d 326, 330 (S.D.N.Y. 2000) (rule "requires parties to disclose *witnesses*"; emphasis added); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.22[4][a][i] (3d ed. 2011) (rule "requir[es] the parties to disclose the identities of their prospective witnesses early in the litigation … to assist the other parties in deciding whom they wish to depose").

[3] *See, e.g.*, *E.I DuPont de Nemours and Co.* v. *Kolon Indus.*, *Inc.*, No. 3:09-cv-58, 2011 WL 2966862, at *4-18 (E.D. Va. July 21, 2011) (six employees); *E.I. DuPont de Nemours and Co.* v. *Kolon Indus.*, *Inc.*, No.3:09cv58, 2011 WL 1597528, at *13 (E.D. Va. Apr. 27, 2011) (four former employees); *Siani* v. *SUNY Farmingdale*, No. CV09-407 (JFB) (WDW), 2010 WL 3170664, at *7 (E.D.N.Y. Aug. 10, 2010) (five employees); *Crown Castle USA Inc.* v. *Fred A. Nudd Corp.*, No. 05-cv-6163T, 2010 WL 1286366, at *10 (Mar. 31, 2010), *report and recommendation adopted*, 2010 WL 4027780 (W.D.N.Y. Oct. 14, 2010) (five employees).

cases even say that "key players" ordinarily are witnesses who are so significant that counsel has a duty to personally *"interview*" each of them, *Williams* v. *New York City Transit Auth.*, No. 10 Civ. 0882 (ENV), 2011 WL 5024280, at *4 (E.D.N.Y. Oct. 19, 2011) (citation omitted), an obligation that would be entirely infeasible if those witnesses could number in the thousands.

In addition to misapprehending the case law upon which it relied, the Magistrate Judge's "key players" holding irreconcilably conflicts with the proper status of an absent class member under Rule 23, and of a member of an FSLA collective, if such a class or collective is properly certified. Put bluntly: no absent member of a properly certified class or non-party to a properly certified collective action should be a "key player." Under the FLSA, employees who sue may represent "other employees" only if they are "similarly situated." 29 U.S.C. § 216(b). Under Rule 23(a)(3), "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). Indeed, the very "premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff[s], so go the claims of the class." *Sprague* v. *General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc). And for a Rule 23(b)(3) class like the New York class proposed here, the "the questions of law or fact common to class members [must] predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3).

In short, no one should be key, because all should be alike. If there are absent class or collective action members who are key players, then there shouldn't be a class or collective action, or they shouldn't be in it. At the very least, in contrast to what the Magistrate Judge held, certainly *not every* class or collective action member can be deemed "key."

* * *

In disregarding the proportionality principle and in treating every potential class or collective action member as a "key player," the Magistrate Judge set a dangerous precedent. Although it contradicts other authority, his decision, if not overturned, would exert an inordinate influence on how practitioners perceive the law. Every decision on the subject of discovery is important, because courts so sparsely write about it, as discovery disputes tend to be fact-bound and often settled. More significantly, however, because of the threat of sanctions, a decision—like the Magistrate Judge's—that *overstates* the duty of *preservation* will effectively *become* the law. For in the absence of controlling authority, parties and their counsel have no way to know in advance what standard a court will ultimately apply, and in an overabundance of caution, they may feel obligated to follow the broadest standard of preservation adopted by any court. It is imperative that this Court overturn the Magistrate Judge's decision and correct its errors of law.

CONCLUSION

It is respectfully submitted that the Court should set aside the Magistrate Judge's October 11, 2011 Order.

Dated: New York, New York
November 4, 2011

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