UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on behalf of All Others Similarly Situated,

Plaintiff,

-against-

PFIZER INC., et al.,

Defendants

Civil Action No. 1:10-cv-03864-AKH

MEMORANDUM OF NON-PARTY KPMG LLP IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND APPLICATION FOR COSTS

SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599
Counsel for Non-party KPMG LLP

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Pursuant to Federal Rules of Civil Procedure 26(c) and 45(c)(3), non-party KPMG LLP ("KPMG") respectfully submits this memorandum in support of its motion for protective order and application for costs.

INTRODUCTION

In response to a September 2011 subpoena *duces tecum* served on KPMG, the outside auditor of Defendant Pfizer Inc., KPMG has undertaken in good faith extensive efforts to provide Plaintiffs with information pertinent to the claims and defenses at issue in the instant action. Throughout much of the process, and as reflected in the Requests for Production in the Subpoena as served, Plaintiffs demanded documents based on a complete disregard for the matters at issue. Rather than engaging in good faith negotiations up front about an appropriate scope of discovery, they pursued a strategy of demanding *everything* until forced to acknowledge that everything was neither reasonable, nor necessary. They also have insisted on treating KPMG as if it was a party, both with respect to the costs of responding to the subpoena and the scope of information demanded. It has been a long and tedious process.

Now, after eighteen months of negotiations and multiple supplemental productions by KPMG consisting of tens of thousands of pages, Plaintiffs backpedal on prior agreements and demand still more. Specifically, they demand that KPMG collect custodial documents from yet another KPMG partner, after having agreed nine months ago to a group of six different KPMG custodians for purposes of a supplemental production made last year. And Plaintiffs refuse to reimburse KPMG for the reasonable costs of responding to the subpoena.

The recitation in Plaintiffs' February 22, 2013 letter to the Court of facts and circumstances leading to this discovery dispute is neither accurate, nor productive. And the

argument that this latest demand for a supplemental production derives from a newly asserted "reliance on professionals" defense by Pfizer is a bald pretext.

Given the extensive efforts undertaken by KPMG to date, Plaintiffs should not be permitted to undo prior negotiations. Accordingly, KPMG seeks a protective order (i) prohibiting Plaintiffs from seeking the production of additional documents from KPMG, and (ii) in any event, directing Plaintiffs to reimburse KPMG for the reasonable costs and fees incurred by KPMG in responding to the subpoena.

BACKGROUND

On September 7, 2011, plaintiffs served KPMG with a subpoena ("Subpoena") seeking production of broad categories of documents. (*See* Decl. Ex. 1.)[1] As served, the Subpoena was entirely overbroad and would impose on KPMG an immense and undue burden. Remarkably, the Requests for Production made no reference to off-label marketing of Pfizer pharmaceutical products during the class period, nor to any other discrete category of documents purportedly relevant to the instant action. For example, the Subpoena sought without limitation:

> *All* audit documentation and engagement workpapers concerning *all* professional services performed by [KPMG] for Pfizer or the defendants, *including but not limited to*: (a) audit; (b) consulting; (c) reviews; (d) assurance, accounting and attestation; (e) agreed upon procedures; (f) evaluations and testing of Pfizer's internal controls, including those contemplated or required by §404 of the Sarbanes-Oxley Act of 2002; and (g) forensic services or forensic consulting.

(*See* Decl. Ex. 1, Request for Production No. 1 (emphasis added).) This request alone would call for the production potentially of hundreds of thousands, if not millions of pages of documents—from a non-party—the vast majority of which would have no bearing on the claims at issue.

[1] "Decl." refers to the March 5, 2013 Declaration of Kevin A. Burke in Support of Non-Party KPMG LLP's Motion for Protective Order and Application for Costs filed in conjunction with this memorandum. "Decl. Ex. ___" refers to the exhibits thereto.

Accordingly, after serving written responses and objections pursuant to Fed. R. Civ. P. 45(2)(B) (*see* Decl. Ex. 2), KPMG engaged in extensive meet-and-confer discussions in an effort to reach some reasonable agreement with Plaintiffs to limit the scope of information otherwise sought by the Subpoena. (*See* Decl. ¶ 5.) As mentioned, it has been a long and tedious—and expensive—process.[2]

In an effort to expedite production at the outset, KPMG promptly agreed to produce materials it had identified and produced in a prior action, *In re Pfizer Inc. Shareholder Derivative Litig.,* No. 09-cv-7822 (S.D.N.Y 2011.) (JSR) ("Derivative Action"), which involved substantially similar issues with respect to off-label marketing. Thus, on November 21, 2011, KPMG made a document production consisting of more than 16,000 pages. These materials included pertinent workpapers from KPMG's audit engagement binders as well as electronically stored information ("ESI") from the files of four key custodians who served as partners and managers on the Pfizer audits. The materials also included a copy of the transcript and exhibits of a deposition of a KPMG-engagement partner taken in the Derivative Action. (Decl. ¶ 4.)

Over the ensuing months, Plaintiffs and KPMG engaged in numerous additional meet-and-confer discussions. (*See* Decl. ¶ 5.) For example, in February 2012, Plaintiffs inquired specifically about the role of KPMG forensics professionals, which counsel for KPMG then discussed at great length in subsequent meet-and-confer calls.[3] (*See* Decl. Ex. 5.) In the spring 2012, KPMG agreed to make a supplemental search based on the application of search terms to

[2] In its written responses and objections, KPMG put Plaintiffs on notice that KPMG reserved the right to seek reimbursement for all reasonable costs of responding to the Subpoena. (Decl. Ex. 2 at 3, 8.) On several occasions thereafter, KPMG sought, but was unable to obtain, confirmation from Plaintiffs that they would reimburse KPMG for the reasonable expenses incurred in collecting, processing and reviewing additional materials requested. (*See, e.g.*, Decl. Ex. 3 at 2.)

[3] Plaintiffs' assertion in their February 22, 2013, letter to the Court regarding purported assertions of privilege by KPMG relating to the work its forensic professionals conducted with respect to the Pfizer engagement are inaccurate. At no point in any meet-and-confer with Plaintiffs did KPMG make a blanket assertion of privilege with respect to forensics work. (*See* Decl. Ex. 3 at 1.)

the ESI files of six custodians (as well as to the underlying quarterly review and audit engagement workpapers). The custodians were selected based on the roles they played as partners and managers in Pfizer audits, and they included the four selected in the Derivative Action. **Significantly, Plaintiffs were the ones who selected the custodians—and they chose not to include any forensics professionals**. (Decl. ¶ 7.)

Based on this supplemental search, KPMG identified additional responsive information within the agreed-upon scope of discovery in this action.[4] That included information derived from or prepared by KPMG forensics professionals that was incorporated into the quarterly review and audit workpapers, as well as in the selected ESI. On November 28, 2012, KPMG then made a supplemental production, consisting of more than 17,000 additional pages. (Decl. ¶ 8.)

In performing this supplemental search and production, KPMG incurred substantial additional costs. These included costs with respect to internal data collection and processing by KPMG forensic technicians, hosting and further processing of data by a third-party discovery vendor, and review by outside counsel. (*See* Decl. ¶ 17.) To date, Plaintiffs have reimbursed KPMG only for the relatively modest cost of making an electronic copy of the production itself.[5]

Immediately thereafter, on December 4, 2012, Plaintiffs sent a letter to KPMG purporting to have just learned that "defendants will be asserting the defense of reasonable reliance on the advice of professionals (including attorneys and accountants)". With that pretext, Plaintiffs indicated they would seek a second supplemental production (*i.e.*, a third document production)

[4] Based on KPMG's understanding of the parties' agreed-upon scope of discovery, and as KPMG previously informed Plaintiffs, it did not produce materials that pertained to (i) drugs other than Bextra, Geodon, Lyrica and Zyvox (*see* First Amended Complaint ¶¶ 1, 8-11, *Jones v. Pfizer Inc.*, No. 1:10-cv-3864 (S.D.N.Y. Apr. 15, 2011) (AKH), Dkt. No. 71 ("Amend. Compl.")), (ii) foreign investigations and FCPA matters, or (iii) investigations involving state attorneys general as opposed to the Department of Justice (*see id*. ¶¶ 19, 95).

[5] Notably, Plaintiffs failed to reimburse KPMG even for that modest cost until they decided to raise this discovery dispute with the Court. (*See* Decl. ¶ 8(a).)

purportedly focused on documents derived from the work of KPMG forensics professionals, which had been the subject of meet-and-confer discussions eleven months prior. (Decl. ¶ 8(b).)

On December 13, 2012, Plaintiffs and KPMG conducted a telephonic meet-and-confer. They discussed the possible existence and nature of audit workpapers and ESI containing information derived from or prepared by KPMG forensics professionals, including with respect to the assessment of potential "illegal acts" in the promotion of Pfizer's pharmaceutical products. Plaintiffs proceeded to request that ESI be collected from the files of three specific KPMG forensics professionals. (Decl. ¶ 8(c).)

On December 18, 2012, plaintiffs then sent a letter reverting to square one. (*See* Decl. Ex. 4.) The letter identified a number of broad categories of documents—*e.g.*, "[a]ll quarterly memoranda and Pfizer Compliance reports", "[a]ll Compliance Binders", "[a]ll conclusion memoranda regarding possible illegal acts", "[a]ll Forensic team memoranda"—that they demanded KPMG produce. They also demanded that KPMG produce "forensic binders #500 series". The requests did not reference off-label marketing of Pfizer pharmaceutical products during the class period, nor any other discrete category of documents purportedly relevant to the instant action. Also, the requests ignored that responsive documents within these broad categories *already had been produced*.[6]

When pressed in a subsequent telephonic meet-and-confer on January 8, 2013, Plaintiffs clarified that they sought these categories of documents only to the extent they pertained to the claims at issues in the case. Through the course of still more meet-and-confer discussions over the ensuing weeks, both oral and written, KPMG confirmed that it had conducted a reasonable diligent search of workpapers in the quarterly review and audit engagement binders and ESI files

[6] In making the broad requests, plaintiffs identified specific audit workpapers already produced that referred to the types of forensic documents plaintiffs purportedly sought. Notably, KPMG had produced back in November 2011 nine of the eleven workpapers plaintiffs identified in their December 18, 2012 letter. (Decl. ¶ 9(a).)

of the agreed-upon custodians and produced responsive materials within the scope of discovery. Further, KPMG explained, again, that workpapers derived from or prepared by KPMG forensics professionals—such as the "quarterly memoranda and Pfizer Compliance reports", "Compliance Binders", "conclusion memoranda regarding possible illegal acts", and "Forensic team memoranda" identified in plaintiffs' December 18, 2012 letter—had been included in the audit engagement binders to the extent they impacted the audit.[7] (Decl. ¶ 9(b).) And, to the extent that same information was pertinent to the claims at issue in the instant action within the agreed-upon scope of discovery, *KPMG had produced it*. Thus, notwithstanding Plaintiffs' initial assertions to the contrary, KPMG had produced numerous "Compliance Overview" memoranda and other related documents reflecting the input of forensics professionals. (*See* Decl. ¶ 11.) It had produced numerous workpapers addressing the auditors' assessment of "possible illegal acts". (*See* Decl. ¶ 12.) And, with respect to the 2006 "forensic binders #500 series", KPMG confirmed that those binders pertain to FCPA matters, which are beyond the agreed-upon scope of discovery. (*See supra* footnote 4.)

COMPLIANCE WITH FED. R. CIV. P. 37(a)(1)

Notwithstanding all of KPMG's efforts described above, Plaintiffs persisted in their demand that KPMG collect additional ESI from the files of one custodian, Timothy Hedley, a KPMG forensics partner. Given that KPMG already has made three document productions, and

[7] As explained previously to plaintiffs, KPMG forensics professionals generally do not maintain separate binders of their workpapers on audit-assist engagements. While they may retain certain related materials for a period of time, such materials are likely to be redundant of workpapers in the audit engagement binders to the extent they impacted the audit.

Plaintiffs continue to refuse to pay for the reasonable costs of those productions—including as of March 4, 2013 (*see* Decl. ¶ 18)[8]—KPMG objected.

On February 5, 2013, and in light of Your Honor's Individual Rule of Practice 2.E, Plaintiffs sent KPMG a draft joint letter regarding the as-of-then unresolved non-party discovery issues. Multiple drafts were exchanged in good faith, which itself led to the resolution of certain previously unresolved matters. Ultimately, KPMG notified Plaintiffs that it was uncertain about the applicability of Your Honor's Individual Rule of Practice 2.E to this dispute, given that KPMG was a non-party that had not appeared in this action. For example, it was not clear what rights would be afforded to submit evidence or to appeal a ruling if issued in the form of a letter endorsement. (Decl. ¶ 15.)

Nevertheless, rather than seeking clarification of the procedure with respect to discovery disputes involving non-parties, Plaintiffs insisted on filing their own letter. Accordingly, on February 21, 2013, KPMG sent Plaintiffs a letter confirming the basis of its objection to the demand for an additional search of custodial files. (See Decl. Ex. 5.) It also confirmed its belief that, if Plaintiffs ultimately decided to seek judicial relief directed at KPMG, the matter ought to be assigned to Your Honor. (*Id*.) The next day, February 22, 2013, Plaintiffs filed their own letter with the Court.

As directed by Your Honor in a telephonic conference on February 26, 2013, KPMG now brings this non-party motion for a protective order.

[8] Specifically, while Plaintiffs offered on March 4, 2013, to reimburse KPMG for the incremental costs associated with the collection, processing and review of data from Mr. Hedley's files, they did not agree to reimburse KPMG for the corresponding costs of the prior supplemental productions made to date. (Decl. ¶ 18.)

ARGUMENT

I. Plaintiffs' Demand Is Unduly Burdensome

Under the Federal Rules of Civil Procedure, non-parties subject to a subpoena who have acted in good faith may seek protection from the court from undue burden. *See Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 48 (S.D.N.Y. 1996) (citing Fed. R. Civ. P. 26(c) and 45(c)(3)). "Whether a subpoena imposes … an 'undue burden' depends upon 'such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed." *Id.* at 48-49 (quoting *U.S. v. IBM Corp.*, 83 F.R.D. 97, 104 (S.D.N.Y. 1979)); *see also In re Blackstone Partners, L.P.*, No. 04-cv-7757, 2005 WL 1560505, at *2 (S.D.N.Y. Jul. 1, 2005) ("The determination of whether a subpoena subjects a witness to 'undue burden' is 'committed to the sound discretion of the trial court' … and 'depends upon such factors as relevance ... and the burden imposed.'") (citation omitted); *In re Biovail Corp. Sec. Litig.*, 247 F.R.D. 72, 74 (S.D.N.Y. 2007) ("where, as here, [information] is sought from third parties, the Court must weigh the probative value of the information against the burden of production on said non-parties"). In addition to backpedaling on eighteen months of meet-and-confer discussions, the search now demanded by Plaintiffs is unduly burdensome.

KPMG already has been subject to undue burden in responding to the Subpoena. Since the issuance of the Subpoena, KPMG has been in regular contact with Plaintiffs, participated in good faith in numerous meet-and-confer conferences, and made multiple document productions totaling over 33,000 pages. (*See* Decl. ¶¶ 4, 5, 8.) In doing so, it has incurred substantial costs. The internal costs to collect and process ESI exceeded $35,000. (Decl. ¶ 17.) The costs to host and further process the data by a third-party vendor exceeded $65,000. (Decl. ¶ 17.) And the

costs for contract attorneys to review the collected data exceeded $22,000. (Decl. ¶ 17.) Significantly, these costs do not include the costs and expenses incurred by KPMG in retaining Sidley Austin LLP to assist in responding to the Subpoena [9]

Further, the search now demanded by Plaintiffs has questionable probative value. As explained to Plaintiffs, the significant output and definitive conclusions reached in KPMG's quarterly reviews and year-end audits are contained in the engagement workpapers themselves. That is true with respect to the work of forensics professionals assisting the audit engagement team. And that is precisely why KPMG in the first instance focused its search in response to the Subpoena on the quarterly review and audit engagement workpapers. In addition, while KPMG forensics professionals individually may retain certain audit-assist materials, such materials are likely to be redundant of workpapers in the audit engagement binders to the extent they impacted the audit. Moreover, to the extent Mr. Hedley communicated by email with the six custodians regarding off-label marketing issues pertinent to this action, those emails have been produced from those ESI files already searched. (*See* Decl. ¶ 13.)

To search through Mr. Hedley's custodial files would be time consuming and costly. Because Mr. Hedley has worked on the Pfizer engagement for a number of years and was involved with respect to matters much broader than those at issue in the instant action, his custodial files regarding Pfizer are not insubstantial. But the vast majority of those materials would likely have no bearing on the claims at issue here. Nevertheless, to collect and sort through which of them are responsive would require an extensive and costly review, just as it required with respect to the other six custodians.

[9] KPMG does not seek reimbursement of the costs and expenses incurred in retaining Sidley Austin LLP.

Separately, the arguments in Plaintiffs' February 22, 2013 letter to the Court in defense of their belated demand for Mr. Hedley's custodial files are entirely pre-textual. *First*, at no point during meet-and-confer discussions did KPMG assert privilege or work product protection with respect to all the work of its forensic professionals. Rather, KPMG asserted privilege with respect to select communications and documents involving the provision of legal advice by its own counsel, with respect to all of which KPMG appropriately has identified in a privilege log served on Plaintiffs.[10] Otherwise, KPMG produced many documents reflecting the work and involvement of forensics professionals. (*See* Decl. ¶ 11.) Any protection from disclosure that may have been asserted by Pfizer is not the subject of this dispute and, in any event, does not implicate the *new* search that Plaintiffs now demands of KPMG.

Second, Plaintiffs' suggestion that they previously were unaware of the role that forensics professionals played in the audit engagement, with respect to potential illegal acts or otherwise, is without merit. Plaintiffs inquired about the role of forensics professionals—and KPMG spent a great deal of time explaining the role of forensics professionals—back in the first quarter of 2012. These discussions took place months *after* Plaintiffs had received KPMG's initial document production, which itself contained a variety of workpapers reflecting the work of forensics professionals and audit work pertaining to potential illegal acts.[11] (*See supra* footnote 6.)

[10] Contrary to Plaintiffs' assertions in footnote 2 of their February 22, 2013, letter to the Court, KPMG has not waived any privilege or protection that it held. (*See, e.g.*, Decl. Ex. 3 at 1.)

[11] Moreover, in a May 9, 2012 joint letter by the parties to the Court regarding discovery related matters, plaintiffs represented that their stance in these negotiations were informed by their review of KPMG's initial document production. *See* Joint Letter to the Court at 5, *Jones v. Pfizer Inc.*, No. 1:10-cv-3864, (S.D.N.Y. May 9, 2012) (AKH), Dkt. No. 136 ("According to the agreement [between plaintiffs and KPMG], after plaintiffs reviewed the initial KPMG production, plaintiffs and KPMG agreed to discuss a supplemental production by KPMG. . . . Plaintiffs have reviewed KPMG's initial production and are currently attempting to come to an agreement with KPMG on a supplemental production.").

Third, as KPMG understands, Plaintiffs' assertion that Defendants *recently* informed them "they would make a 'reliance on the process' defense" based on advice from KPMG is inaccurate. (*See* Decl. Ex. 6 at 1.) Defendants have not articulated a new defense bearing on KPMG. The only development with regard to defenses is that Pfizer has executed a limited subject-matter waiver of its attorney-client privilege with regard to legal advice concerning its legal proceedings disclosures and FAS 5 reserves relating to the government investigations at issue in the action. The terms of that limited subject-matter waiver are reflected in a Rule 502(d) order, signed by Judge Hellerstein on January 22, 2013.[12] That limited subject-matter waiver has nothing to do with KPMG.

Given the substantial unreimbursed costs already incurred by KPMG to date, the questionable probative value of Mr. Hedley's custodial files, and Plaintiffs' refusal to reimburse KPMG for the reasonable costs of searching his files, the demand is unduly burdensome.

II. Plaintiffs Should Bear the Reasonable Costs of Responding to the Subpoena

Federal Rule of Civil Procedure 45 protects non-parties from significant expense. And courts have discretion to order requesting parties to bear the expense of seeking non-party discovery based on the burdens created and the equities of the particular case. *See Linder v. Calero-Portocarrero*, 180 F.R.D. 168, 177 (D.D.C. 1998) (ordering that non-party government agency be reimbursed for half of the reasonable copying and labor costs incurred in responding to subpoena).

Courts tend to consider three factors in determining how much of the production expense the requesting party should bear: (i) whether the non-party has an interest in the outcome of the case, (ii) whether the non-party can more readily bear its costs than the requesting party, and (iii)

[12] *See* Rule 502(d) Order, *Jones v. Pfizer Inc.*, No. 1:10-cv-3864 (S.D.N.Y. Jan. 22, 2013) (AKH), Dkt. No. 150.

whether the litigation is of public importance. *Linder*, 180 F.R.D. at 177; *see also In re World Trade Center Disaster Site*, No. 21 MC 100, 2010 WL 3582921, at *1-3 (S.D.N.Y. Sept. 14, 2010) (considering *Linder* factors); *Prescient Acquisition Group, Inc.*, 2006 WL 2996645, at *3 (same); *In re First Am. Corp.*, 184 F.R.D. 234, 241-43 (S.D.N.Y. 1998) (same). These factors weigh in favor of shifting the costs to Plaintiffs here.

First, KPMG has no interest in the outcome of the case. It is neither a party to this matter nor a party to any other related matter arising out of the underlying facts at issue. It serves as the outside auditor of Pfizer Inc. and, pursuant to professional standards must maintain independence in mental attitude in all matters relating to the audit. *See, e.g.*, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD RULES, Rule 3520, File No. PCAOB-2006-01 (PCAOB 2006); CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, STATEMENT ON AUDITING STANDARDS No. 1, § 220 (Am. Inst. Of Certified Pub. Accountants 1972).

Second, there is no evidence that KPMG—which must respond to dozens of subpoenas each year in a variety of proceedings—more readily is able to bear the costs. Plaintiffs purport to be a class of thousands of investors. They are represented by a prominent law firm with extensive resources and a long track record of litigating complex securities actions such as this one. And their counsel aggressively have touted the billions of dollars recouped on behalf of clients in recent years. (Decl. ¶ 19.)

Third, while this case certainly is a matter of significance to the parties, there is no indication that it is of particular public importance. There is no indication that a novel issue of law is at stake, nor that the outcome will impact anyone other than the parties themselves.

Under these circumstances, Plaintiffs should bear *all* reasonable costs incurred by KPMG in responding to the Subpoena, including internal data collection and processing, external data

hosting and further processing, and legal review . *See In re Rezulin Prods. Liability Litig.*, No. 00-cv-2843, 2002 WL 24475, at *1 (S.D.N.Y. Jan. 10, 2002) (ordering that non-party be reimbursed for copying costs and attorney and paralegal time involved in responding to subpoena); *Kahn v. General Motors Corp.*, No 88-cv-2982, 1992 WL 208286, at *2-3 (S.D.N.Y. Aug. 14, 1992) (granting application for costs, including those associated with retrieval, identification, and review of documents by attorneys); *see also Spears v. City of Indianapolis,* 74 F.3d 153, 158 (7th Cir. 1996) (affirming district court's order that requesting party pay all costs incurred in responding to subpoena); *Celanese Corp. v. E.I. duPont de Nemours & Co.,* 58 F.R.D. 606, 610, 611-12 (D. Del. 1973) (requiring requesting party to bear all reasonable expenses of response to subpoena); *In re Law Firms of McCourts and McGrigor Donald*, No. M. 19-96, 2001 WL 345233, at *3 (S.D.N.Y. Apr. 9, 2001) (ordering that respondents would be "required to produce the requested documents only after receiving in advance the reasonably estimated costs of production, including the attorney's fees to be incurred by respondents in reviewing and selecting the documents to be produced").[13] Accordingly, whether or not KPMG were ordered to search for and produce responsive information from the custodial files of Mr. Hedley, Plaintiffs should be ordered to reimburse KPMG for the reasonable costs of responding to the Subpoena.

[13] A non-party is not required to file a motion to quash or a motion for reimbursement for the costs prior to responding to the subpoena. *See In re First Am. Corp.*, 184 F.R.D. 234, 239 (S.D.N.Y. 1998); *Prescient Acquisition Group, Inc.*, 2006 WL 2996645, at *2.

CONCLUSION

For the forgoing reasons, non-party KPMG respectfully requests that the Court issue a protective order prohibiting Plaintiffs from seeking additional documents from KPMG and ordering Plaintiffs to reimburse KPMG for the reasonable costs and fees incurred by KPMG in responding to the Subpoena, together with such other and further relief that this Court deems just, fair, and appropriate.

Dated: March 5, 2013

Respectfully submitted,

/s/ Kevin A. Burke

Kevin A. Burke
kaburke@sidley.com
Neil D. Corcoran
ncorcoran@sidley.com
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599
Counsel for Non-party KPMG LLP