

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA**

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<b>In re Federal National Mortgage Association Securities, Derivative, and “ERISA” Litigation</b>	)	<b>MDL No. 1668</b>
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	)	
<b>In Re Fannie Mae Securities Litigation</b>	)	<b>Consolidated Civil Action No.: 1:04-CV-01639</b>
	)	
	)	<b>Judge Richard J. Leon</b>
	)	

**MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS’ MOTION TO COMPEL (1) KPMG TO PRODUCE DOCUMENTS REGARDING ITS PRODUCTION OF A WELLS SUBMISSION TO THE SEC, AND (2) KPMG WITNESSES TO ANSWER LEAD PLAINTIFFS’ QUESTIONS REGARDING KPMG’S RECEIPT OF A WELLS NOTICE AND ANY SUBSEQUENT WELLS SUBMISSION**

***I. Factual Background.***

In several recent depositions of KPMG employees, KPMG’s counsel repeatedly instructed the deponents not to answer any questions regarding whether KPMG had received a Wells Notice in connection with its Fannie Mae engagement. KPMG’s counsel further instructed these employees (or former employees) not to answer questions as to whether they assisted in the preparation of any Wells Submissions to the SEC in connection with KPMG’s Fannie Mae engagement. For instance, at the August 12, 2009 deposition of KPMG employee Mark Serock, KPMG’s counsel instructed Mr. Serock not to answer any questions related to whether the SEC issued KPMG or Mr. Serock a Wells Notice in connection with KPMG’s Fannie Mae engagement. Serock Depo., at 86:19-92:6 (attached as Exhibit 1) (filed under seal). That process repeated itself at the September 30, 2009 and October 8, 2009 depositions of KPMG employees Kenneth Russell and Harry Argires. See Russell Depo., at 289:15-293:7 (also inquiring as to whether Mr. Russell assisted in the preparation of a Wells Submission) (attached

as Exhibit 2) (filed under seal); Argires Depo., at 37:18-38:1; 38:9-40:9 (refusing to allow Mr. Argires to testify as to whether the SEC issued KPMG or Mr. Argires a Wells Notice in connection with the Fannie Mae engagement or whether Mr. Argires assisted in the preparation of a Wells Submission in that context) (attached as Exhibit 3) (filed under seal).

In light of KPMG's repeated instructions to KPMG employees not to answer deposition questions regarding any Wells Notice or Wells Submission it may have made to the SEC in this context, Lead Plaintiffs now have reason to believe that, contrary to KPMG's representations, KPMG has not fully responded to Lead Plaintiffs' First Request for Production of Documents.

In Document Request No. 1, Lead Plaintiffs requested, in part, all documents that KPMG (or others on its behalf) provided to the SEC in connection with the SEC's investigation into Fannie Mae and KPMG's engagement. *See* Defendant KPMG LLP's Objections and Responses to Lead Plaintiffs' First Request for Production of Documents, at 8 (filed March 9, 2007) (attached as Exhibit 4). Although KPMG objected to Lead Plaintiffs' request on both privilege (accountant-client, settlement, attorney-client, attorney work product, etc.) and relevance grounds, at no time did KPMG indicate to Lead Plaintiffs that KPMG or its employees had received a Wells Notice, nor did it identify in its privilege log that any such documents were being withheld from Lead Plaintiffs. Lead Plaintiffs only had reason to believe that KPMG had in fact received a Wells Notice and made a Wells Submission to the SEC when KPMG's counsel recently began instructing its witnesses not to respond to deposition questions regarding those matters.<sup>1</sup>

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<sup>1</sup> KPMG may argue that Lead Plaintiffs are barred from seeking these documents because the motion to compel deadline in Case Management Order No. 5 ("CMO #5") has passed (*see* Exhibit 7). However, as explained above, Lead Plaintiffs had no reason to believe that a Wells Notice had likely been issued and a Wells Submission likely made until the September and October 2009 depositions of KPMG witnesses. Further, Defendants, without Court approval, have filed motions to compel after the deadline in CMO #5. *See, e.g.* Motion to Compel Production of Documents from the Office of Federal Housing Enterprise Oversight by Franklin Raines, J. Timothy Howard and Leanne G. Spencer filed February 26, 2009 (Dkt. # 700); KPMG Notice of Joining the Individual Defendants'

In an effort to resolve this discovery dispute, Lead Plaintiffs' counsel sent two letters to KPMG's counsel, one October 21, 2009 and another on January 22, 2010 (attached as Exhibits 5 and 6). KPMG ignored the first letter, and refused in response to the second letter to try to resolve the issue (attached as Exhibit 7).

***II. KPMG Has No Legitimate Basis For Refusing To Comply With Lead Plaintiffs' Discovery Requests Or For Instructing Its Witnesses Not To Answer Lead Plaintiffs' Questions Regarding KPMG's Receipt Of A Wells Notice And/Or KPMG's Wells Submission To The SEC Regarding Its Fannie Mae Engagement.***

Lead Plaintiffs have a right to discover any non-privileged information, documents or facts that are relevant to their claims. Fed. R. Civ. Pro. 26(b)(1). *See also Anderson v. Hale*, Case No. 00C2021, 2001 WL 503045, at \*3 (N.D. Ill May 10, 2001) (explaining that the “minimal showings of relevance and admissibility hardly pose much of an obstacle for an inquiring party to overcome”).

Courts have unequivocally compelled defendants in securities fraud litigation cases to produce their Wells Submissions to the plaintiffs because such documents were relevant and because production of such documents to the SEC waived any work product or attorney/client privilege.<sup>2</sup> *See, e.g., In re Sealed Case*, 676 F.2d 793, 823-24 (D.C. Cir. 1982) (compelling disclosure of defendant corporation's “voluntary disclosure statement” – the historical predecessor to a Wells Submission – and documents underlying that statement on the ground that

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Motion to Compel the Production of Documents from the Office of Federal Housing Enterprise Oversight filed March 4, 2009 (Dkt. # 703); KPMG's Motion to Compel the Office of Federal Housing Enterprise Oversight to Produce Documents from the Court-ordered Quick Peek Review filed April 17, 2009 (Dkt. #722); KPMG Motion to Compel OFHEO to Produce Documents Withheld as Exempt filed July 24, 2009 (Dkt. #763); KPMG Motion to Compel Rust Consultation Inc. filed September 21, 2009 (Dkt. # 784). Individual Defendants and KPMG have also issued document requests and subpoenas after the deadline in CMO #5 when new issues have arisen.

<sup>2</sup> In contrast to KPMG, Mr. Raines's counsel apparently recognized that the case law required him to disclose whether the SEC issued him a Wells Notice; and he did, in fact, respond that he had not received one. *See* Defendant Franklin D. Raines's Responses and Objections to Lead Plaintiffs' Second Set of Interrogatories, at Interrogatory 13 (responding “no” to Lead Plaintiffs' interrogatory “Have you received a Wells Notice in connection with your activities at Fannie Mae?”) (attached as Exhibit 8).

defendant corporation waived any work product and/or attorney-client privilege that might otherwise attach to a by submitting the statement to the SEC); *In re: Initial Public Offering Securities Litigation*, No. 21 MC 92(SAS), 2004 WL 60290, at \*5 (S.D.N.Y. Jan. 12, 2004) (compelling defendant underwriters to produce Wells Submissions on the grounds that such Submissions were both relevant to investors' securities litigation claims and were not protected by either settlement or work product privilege); *Prymak v. Contemporary Financial Solutions, Inc.*, Case No. 07-cv-00103, 2008 WL 1699794, at \*3 (D.Colo. April 9, 2008) (compelling defendants in securities litigation matter to produce their Wells Submissions); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234-35 (2d Cir. 1993) (compelling defendant in securities litigation matter to produce Wells Submission on the ground that that defendant voluntarily produced Wells Submission to the SEC, thereby waiving any work product privilege); *In re Leslie Fay Companies, Inc. Sec. Litig.*, 152 F.R.D. 42, 46 (S.D.N.Y. 1993) (same).

The case law in this Circuit and elsewhere could not be clearer: KPMG has an obligation under Rule 26 of the Federal Rules of Civil Procedure to produce to Lead Plaintiffs its Wells Submission to the SEC in connection with its Fannie Mae engagement, as well as the non-privileged documents related to that Submission. *See, e.g., In re Sealed Case*, 676 F.2d at 824.

KPMG has refused to abide by this well-settled rule. Accordingly, Lead Plaintiffs respectfully request this Court to compel KPMG to (a) produce any Wells Submissions and any related, non-privileged documents KPMG provided to the SEC in connection with its Fannie Mae engagement; and (b) make available Mark Serock, Kenneth Russell and Harry Argires to promptly reconvene their depositions and answer the deposition questions KPMG previously instructed them not to answer regarding any Wells Notice and Wells Submission, as well as any questions arising out of KPMG's production of the Wells Submissions.

**III. Conclusion.**

For the foregoing reasons, Lead Plaintiffs respectfully requests this Court grant their motion to compel in its entirety.

Dated February 2, 2009.

Respectfully submitted,

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