United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ronald A. Guzman	Sitting Judge if Other than Assigned Judge	Nan R. Nolan
CASE NUMBER	02 C 5893	**DATE**	3/5/2007
CASE TITLE	Lawrence E Jaffe vs. Household International, Inc, et al		

DOCKET ENTRY TEXT

For the reasons stated below, Plaintiffs' Motion for Reconsideration of the Court's January 24, 2007 Order Finding Waiver of KPMG Documents, But Precluding Disclosure for Failure to Demonstrate Prejudice [Doc. 947] is denied.

■[For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

On January 24, 2007, the court issued an Order finding confidential certain opinion letters summarizing pending and threatened litigation against Household and its subsidiaries, written by Kenneth H. Robin, Household's Senior Vice President, General Counsel, to KPMG, Household's outside auditor ("KPMG Opinion Letters"). The court expressed disapproval that Defendants failed to bring the KPMG Opinion Letters to the court's attention in a timely manner, but nonetheless concluded that "[g]iven the magnitude of the document production in this case and the small number of documents at issue here, . . . fairness requires that the KPMG Opinion Letters remain confidential." (Minute Order of 1/24/07, Doc. 931 (citing *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, No. 99 C 1174, 2001 WL 1286727, at *6 (N.D. Ill. Oct. 24, 2001).) In reaching this conclusion, the court also noted that Plaintiffs would not be prejudiced by the untimely recall because they knew since July 2006 that this court would likely find the documents privileged. (*Id*.)

Seizing on this prejudice language, Plaintiffs now seek reconsideration of the court's Order on the theory that the court improperly imposed a requirement that Plaintiffs demonstrate prejudice to prevail on their motion to compel. This is an inaccurate reading of the court's opinion and is not a basis for reconsideration.

A. Standard of Review

A motion to reconsider is proper only when "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). These problems "rarely arise and the motion to reconsider should be equally rare." *Id.* Indeed, a court's orders "are not mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Ohio Farmers Ins. Co. v. Hotler*, No. 03-2138, 2006 WL 272779, at *1 (C.D. Ill. Jan. 31, 2006) (quoting *McKnight v. Dean*, No. 97 C 8939, 2000 WL 968822, at *1 (N.D. Ill. July 12, 2000)).

STATEMENT

B. Analysis

Plaintiffs first argue that the court erred in requiring that Plaintiffs demonstrate undue prejudice in order to find that Defendants waived their privilege with respect to the KPMG Opinion Letters. (Pl. Mem., at 3.) The court did not, however, impose any such requirement. The court expressly relied on *R.J. Reynolds Tobacco*, which confirms that a court should determine waiver by balancing "the reasonableness of the precautions taken to prevent the disclosure, the time taken to rectify the error, the scope of discovery, the extent of the disclosure, and the overriding issue of fairness." 2001 WL 1286727, at *6. Notably, the court also referenced its earlier July 6, 2006 opinion, which set forth this exact balancing test. *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006). The mere fact that the court additionally noted a lack of prejudice to Plaintiffs does not change the court's clear conclusion that, based on an application of *R.J. Reynolds Tobacco*, "*fairness* requires that the KPMG Opinion Letters remain confidential."[1] (Minute Order of 1/24/07, Doc. 931.) (emphasis added).

Nor have Plaintiffs demonstrated that they will in fact suffer any undue prejudice. Plaintiffs once again claim that the opinion letters are highly probative of falsity, scienter, and materiality. (Pl. Mem., at 4; Pl. Reply, at 3-5.) They raised this identical argument in connection with their briefing on the Arthur Andersen Opinion Letters. (*See, e.g.*, Class' Response to the Household Defendants' Memorandum of Law in Support of the Return of Certain Arthur Andersen Documents, Doc. 519, at 8-9.; Class' Objection to the Magistrate's Order Regarding the Application of the Work Product Doctrine to Audit Letters, Doc. 612, at 2-4.) As determined by this court, and affirmed by Judge Guzman, that is not a sufficient basis for finding waiver of the work product privilege as to Household's attorney opinion letters. *See Lawrence E. Jaffe Pension Plan*, 237 F.R.D. 176; (Minute Order of 1/17/07, Doc. 923.)

Plaintiffs disagree, noting that "the Class intends to use these entries [in the KPMG Opinion Letters] affirmatively, *i.e.* for what they show. By comparison, the Class would have used the Andersen audit letters, which comprise an earlier set, negatively, *i.e.* for what is omitted." (Pl. Reply, at 4.) The court finds this a distinction without a difference. Plaintiffs' argument merely repeats their assertion that the KPMG Opinion Letters are highly probative and relevant to this lawsuit. The court has conducted an *in camera* review of the documents, however, and affirms that fairness requires that the KPMG Opinion Letters remain confidential. *R.J. Reynolds Tobacco*, 2001 WL 1286727, at *6.

Plaintiffs finally object that the court erred by not allowing the Class to make a record of its position on this issue. (Pl. Mem., at 2.) This is simply not true. As indicated above, Plaintiffs have exhaustively briefed the issue of whether Household's attorney opinion letters are protected as work product, which culminated in two opinions from the court. *See Lawrence E. Jaffe Pension Plan*, 237 F.R.D. 176; (Minute Order of 1/17/07, Doc. 923.) In addition, Plaintiffs addressed the issue of waiver as to the KPMG Opinion Letters in their January 10, 2007 Status Report, prompting the court to conduct an *in camera* review of those documents. (Status Report, Doc. 889, at 9.) It was well within this court's discretion to decide that further briefing was unnecessary, especially given the extensive amount of briefing already before the court. *See Fairley v. Andrews*, 423 F. Supp. 2d 800, 806 (N.D. Ill. 2006) ("Discovery rulings are a matter of the Court's discretion, and the Court need not allow briefing on discovery motions."); *Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 943 (7th Cir. 1997) ("District courts enjoy extremely broad discretion in controlling discovery.")

There is no basis for Plaintiffs' motion for reconsideration and it is denied.

1. Plaintiffs' assertion that the court did not mention the term "fairness" in its Order is wholly inaccurate. (Pl. Reply, at 3 n.2.)