UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff, *- against -* HOUSEHOLD INTERNATIONAL, INC., ET AL., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

HOUSEHOLD'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S JANUARY 24, 2007 ORDER PRECLUDING DISCLOSURE OF KPMG DOCUMENTS

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This Court should not reconsider its January 24, 2007 Order (the "January 24 Order") protecting as work product attorney opinion letters produced by KPMG that are identical (in nature, and, in certain instances, in exact substance) to attorney opinion letters that the Court had already deemed privileged in its July 6, 2006 Opinion and Order, as affirmed by Judge Guzman's January 17, 2007 Minute Order. 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" ("Pl. Br.") does not begin to approach the high threshold necessary to succeed on a motion for reconsideration. In the first place, Plaintiffs' contention that the Court erroneously rested its decision on the fact that Plaintiffs made no showing of prejudice is simply not true, and their argument that they were not given the opportunity to be heard prior to the Court's determination is unfounded. In any event, the January 24 Order is plainly correct. Plaintiffs have already had three bites at the apple — they should not be allowed a fourth.

ARGUMENT

A. Plaintiffs Fail to Meet the Standard for Reconsideration.

Plaintiffs' motion for reconsideration should be summarily denied because Plaintiffs fail to meet what they have described as the "stringent standard" for seeking reconsideration. (*See* Lead Plaintiffs' Response to the Household Defendants' Motion for Reconsideration of the Court's April 18, 2005 Order ("November 3, 2006 Brief") at 3). As Plaintiffs themselves have noted, a court's opinions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." (November 3, 2006 Brief at 2, citing *Quaker Alloy Casting Co.* v. *Gulfco Industries, Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988)). *See also Caisse Nationale de Credit Agricole* v. *CBI Industries, Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996) ("Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present

newly discovered evidence.") (citations omitted). Indeed, the Seventh Circuit in *Bank of Waunakee* v. *Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990), upon which Plaintiffs rely, provides in no uncertain terms that a motion for reconsideration is properly granted only in limited situations which "rarely arise" and thus, "the motion to reconsider should be equally rare." (citations omitted).

Plaintiffs have failed to demonstrate that this instance is one of those rare cases in which the Court committed a "manifest error," defined in this district as the "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Johnson* v. *City of Prospect Heights*, 2006 U.S. Dist. LEXIS 78566, at *5 (N.D. Ill. Oct. 27, 2006) (citations omitted).

1. The Court Did Not Err in Considering Undue Prejudice on the Waiver Issue.

Plaintiffs assert without basis that "the Court erroneously imposed a requirement upon the Class that has no basis in existing law" (Pl. Br. 4)— namely, that Plaintiffs must establish undue prejudice "before finding that defendants' waiver mandates discovery." (Pl. Br. 2) This argument depends on an insupportable misreading of the January 24 Order. Rather than requiring Plaintiffs to establish undue prejudice in order to prevail, the Court merely considered the lack of undue prejudice to Plaintiffs as one of several factors contributing to the "overall fairness" of finding that privilege was not waived following the disclosure of the KPMG documents. This is perfectly consistent with *R. J. Reynolds Tobacco Co.* v. *Premium Tobacco Stores, Inc.*, 2001 U.S. Dist. LEXIS 17602 (N.D. Ill. Oct. 24, 2001), on which Plaintiffs rely. That opinion indicates that "[t]he overriding issue in the [waiver] analysis is fairness" but does not limit courts by specifying factors that they may or may not weigh in determining fairness. *Id.* at *25. The Court's decision to consider, *inter alia*, the lack of prejudice to Plaintiffs as part of its fairness calculus reflects a valid application of the governing standards to the facts at hand, and does not, by any stretch of the imagination, constitute a "manifest error of law."

In any event, Plaintiffs are grasping at straws in focusing on the lack of prejudice reference as the supposed basis of the January 24 Order. In fact the Order adopted by reference the rationale of the Court's July 6, 2006 Opinion and Order on the subject of non-waiver, by stating that the KPMG documents "fall within the scope" of that opinion. That more detailed opinion highlighted a balancing test consisting of five factors, including the enormous volume of documents produced in this action. The Court there emphasized that "[g]iven the volume of documents at issue in this case, the court does not view this delay [from production to recall of certain documents] as unreasonable," and thus, the work product protection afforded to the audit letters was not waived. *Lawrence E. Jaffe Pension Fund* v. *Household International, Inc.*, 237 F.R.D. 176, 183-84 (N.D. Ill. 2006). Moreover, in affirming the July 6, 2006 Opinion and Order in its entirety, Judge Guzman reiterated that "[t]his litigation involves millions and millions of documents" and that "the delay in rectifying the [disclosure] error was reasonable." (January 17, 2007 Minute Order at 2). The fact that the January 24 Order also mentions as another non-dispositive factor that Plaintiffs have not demonstrated that they will suffer prejudice from the non-disclosure of the privileged KPMG documents is not an error of law that entitles Plaintiffs to reconsideration.

2. The January 24 Order Had Ample Basis on the Record.

Plaintiffs' argument that the January 24 Order was made "outside the adversarial issues presented to the Court by the parties," depriving Plaintiffs of the opportunity "to address the issue of prejudice" is patently untrue. (Pl. Br. 2, 3). Not only have Plaintiffs extensively briefed the issue of whether Household's attorney opinion letters are protected as work product[1],

[1] *See generally* (i) Plaintiffs' May 26, 2006 Response to the Household Defendants' Memorandum of Law in Support of the Return of Certain Arthur Andersen Documents and Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household Defen-

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but they have also already created a record of the very arguments they now raise as aspects of alleged "prejudice".

In their current motion, Plaintiffs argue that the fact that they have been and will be "deprived of the opportunity of using these KPMG audit letters at depositions . . . . alone constitutes prejudice . . . . [as] these documents have probative value on the issue of falsity, scienter and materiality." (Pl. Br. 4). Plaintiffs raised these very issues in their earlier briefing to compel production of documents provided to Arthur Andersen and KPMG. (*See* The Class' Response to the Household Defendants' Memorandum of Law in Support of the Return of Certain Arthur Andersen Documents and Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household Defendants at 8; Reply in Support of the Class' Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household Defendants at 11-13; The Class' Objection to the Magistrate's Order Regarding the Application of the Work-Product Doctrine to Audit Letters and Related Documents at 2-4). The fact that prior to issuing its January 24 Order, the Court found it unnecessary to rehear the same arguments that the Court had already considered in an almost identical context simply does not amount to mak-

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dants; (ii) Plaintiffs' June 23, 2006 Reply in Support of the Class' Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household Defendants; (iii) Plaintiffs' July 25, 2006 Objection to the Magistrate's Order Regarding the Application of the Work-Product Doctrine to Audit Letters and Related Documents; and (iv) the December 11, 2006 Supplemental Declaration of Azra Z. Mehdi in Support of the Class' Objection to the Magistrate's Order Regarding the Application of the Work-Product Doctrine to Audit Letters and Related Documents Based Upon the December 7, 2006 Testimony of Kenneth H. Robin. It is worth noting that in their May 26 Cross-Motion to Compel, *Plaintiffs* highlighted the existence of audit material provided to KPMG (in addition to the Andersen audit letters) (*id.* at 1, 6, 11) — confirming that Plaintiffs were well aware of the KPMG material at the time of the prior briefing and actually included documents given to KPMG in their request for relief. It should have been perfectly clear to Plaintiffs (as it was to Defendants) that the Court's ruling applied to all litigation audit letters.

ing a ruling "outside the adversarial issues presented to the Court by the parties." The Court cannot be faulted for its prudent exercise of discretion in trying to avoid unnecessary expense and delay by foregoing additional briefing on issues that had already been thoroughly examined by this Court and Judge Guzman.

In sum, because the Court has already heard, considered, and rejected Plaintiffs' position as to the alleged utility of Household's audit letters, there is no need for the Court to entertain Plaintiffs' repetitive arguments here, and thus, Plaintiffs' motion for reconsideration must be denied in its entirety. *See Caisse Nationale de Credit Agricole* v. *CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) ("Reconsideration is not an appropriate forum for rehashing previously rejected arguments.").

B. The January 24 Order Was Correctly Decided.

In finding a lack of prejudice in KPMG's allegedly tardy recall of certain audit letters, the Court correctly concluded that "Plaintiffs have known since July 2006 that this court would likely find such documents privileged, and only recently attempted to use them at a deposition." (January 24 Order at 1). *See Lawrence E. Jaffe Pension Fund* v. *Household International, Inc.*, 237 F.R.D. at 181-82 (noting that "the Opinion Letters were prepared 'because of' pending litigation and are protected by the work product doctrine" and that "without the pending and threatened litigation, there would be no Opinion Letters"); *see also* January 17, 2007 Minute Order at 1-2 (upholding the July 6, 2006 Opinion and Order and stressing that "[t]he long and short of it is that [the audit letters] were prepared because of pending or threatened litigation" and thus "clearly constitute work product"). Indeed, one of the documents that Plaintiffs now claim that they were "deprived of the opportunity of using" at the deposition of Kenneth Robin, Esq. (Pl. Br. 4) is identical to the document Ms. Mehdi herself attached as Exhibit 3 to her "Declaration In Support of the Class' Response to the Household Defendants' Memorandum of Law

in Support of the Return of Certain Arthur Andersen Documents and Cross-Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household Defendants", which was filed back in May 2006. Thus, Plaintiffs have known at least since May 2006 that this document was potentially privileged. Further, the document on its face bears the legend "Confidential/Attorney Client Privilege/Attorney Work Product." For Plaintiffs to now claim that they are suffering undue prejudice by not being able to use documents at depositions that are substantially similar and, in at least one case, identical to documents that they themselves have attached to affidavits in support of since-denied motions to compel smacks of gamesmanship at best, and confirms that Plaintiffs' real goal is to compound Defendants' burden and cost of defending this action by means of their non-stop barrage of meritless motions.[2]

Plaintiffs' speculative afterthought that "defendants will no doubt" try to introduce audit opinions while depriving Plaintiffs of "the very documents that the auditors relied on" (Pl. Br. at 7) not only betrays an inherent misunderstanding of the audit process, but was implicitly rejected by this Court's July 6, 2006 Order, its affirmance by Judge Guzman, and every other ruling that has rejected demands to invade the attorney work product protection afforded to audit letters in this context. *See generally*, Household Defendants' Memorandum of Law in Support of Arthur Andersen LLP's Motion for the Return of Inadvertently Produced Privileged Documents at 8-9, and Household Defendants' Reply Memorandum of Law in Support of Arthur Andersen LLP's Motion for the Return of Inadvertently Produced Privileged Documents and Partial Response to Plaintiffs' Cross Motion to Compel Production of Certain Documents Provided to Outside Auditors by Household at 13.

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[2] The Household Defendants object to Plaintiffs' liberal use of quotations from the privileged documents in attempting to make their "prejudice" argument. Such use of the privileged documents is entirely improper.

CONCLUSION

Plaintiffs' motion should be denied as to the recalled KPMG documents as a whole and the highlighted portions thereof.

Dated: February 22, 2007

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