

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LAWRENCE E. JAFFE PENSION PLAN, On)	Lead Case No. 02-C-5893
Behalf of Itself and All Others Similarly)	(Consolidated)
Situated,)	
) <u>CLASS ACTION</u>
Plaintiff,)	
) Judge Ronald A. Guzman
vs.)	Magistrate Judge Nan R. Nolan
)
HOUSEHOLD INTERNATIONAL, INC., et)	
al.,)	
)
Defendants.)	
_____)	

**FURTHER SUPPLEMENT IN SUPPORT OF THE CLASS' MOTION TO COMPEL
PRODUCTION OF ERNST & YOUNG LLP DOCUMENTS AND FOR SANCTIONS
FOR DEFENDANTS' CONTINUING VIOLATIONS OF
JUDGE GUZMAN'S FEBRUARY 1, 2007 ORDER**

I. INTRODUCTION

The Class files this brief in further support of its motion to compel and for sanctions (Dkt. No. 974) and supplement (Dkt. No. 989) regarding the Ernst & Young LLP (“E&Y”) documents to address comments made by the Court during the February 27, 2007 hearing. As discussed below, this Court must enforce Judge Guzman’s February 1, 2007 ruling, which adopted this Court’s prior December 6, 2006 Order “in full.” February 1, 2007 Minute Order at 1. The February 1, 2007 Order is law of the case that this Court may not alter or reconsider. Accordingly, this Court should order Household to produce all of the E&Y compliance audit documents immediately as required by Judge Guzman’s Order. Further, this Court should set a briefing schedule with respect to the appropriate sanctions for the defendants’ willful disobedience of this Order and this Court’s December 15, 2006 Order requiring production of the E&Y documents within seven days of Judge Guzman’s Order.

II. ARGUMENT

It is axiomatic that a magistrate judge cannot overrule or reverse a ruling by a district court judge. Put differently, once the district court judge has opined on an issue, a magistrate judge cannot amend or alter that ruling. However, in oral comments made during the February 27, 2007 hearing the Court indicated that it was considering such a course. That would be clear error in light of Judge Guzman’s February 1, 2007 Order, which adopted this Court’s December 6, 2006 Order in full.

The Class recounts briefly the history of the E&Y rulings. On October 16, 2006, the Class filed with the Court its motion to compel production of all documents relating to the E&Y engagements, including the E&Y compliance study that “was to be completed by September 30, 2002.” Dkt. No. 708 at 2. The Class argued that under the *Garner* exception, the Class was entitled to all such documents. In opposition, defendants advanced various arguments, but did not contest the Class’ showing of the mutuality of interest between the Class and Household’s management so

as to warrant invocation of the *Garner* exception. Dkt. No. 764. Nor did defendants argue that there was any date on which this mutuality of interest ended. *Id.* On December 6, 2006, this Court granted the Class' motion to compel, finding that "Plaintiffs have presented evidence – and Defendants do not dispute – that the Class represents a substantial majority of shareholders who owned stock at the time of the communications in question" and that "the fiduciary exception applies to the communications between E&Y and Household." December 6, 2006 Order at 14. The Court did not limit production of these documents to any specific date range.

The Household defendants objected to the December 6, 2006 Order. Dkt. No. 841. In their brief to Judge Guzman, defendants argued strenuously that this Court's December 6, 2006 Order was incorrect as a matter of law because the Court did not limit defendants' production of the E&Y documents to documents prepared prior to the August 2002 filing of the initial complaint. We quote but a portion of that argument:

Here, in making the pivotal and supposedly undisputed finding that Household and the Jaffe class had a mutuality of interest throughout the period the privileged communications were created (*see* December 6 ruling at 14), the Magistrate Judge made two clear errors. *First*, contrary to the record on the motion, the Ruling implicitly assumed that all of the privileged communications at issue were created during the Class Period, which ran from July 31, 1999 to October 11, 2002. . . . Plaintiffs made no showing that they and their putative class represented a majority of Household shareholders at any time after October 11, 2002, and the fact that they filed this lawsuit in August, 2002 put them in an openly adversarial position to Household thereafter.

Second, even as to the Class Period, Plaintiffs made no showing that would justify a conclusive finding of mutuality of interest between the class and Household through October 2002. . . .

Id. at 10-11.

On February 1, 2007, Judge Guzman rejected these arguments and "[f]or the reasons provided in this Minute Order, the Court overrules the Household defendants' . . . objections to Magistrate Judge Nolan's December 6, 2006 Order and adopts the ruling in full. The Court grants the class' Motion to Compel Documents Pertaining to Household's Consultations with Ernst &

Young LLP. . . .” February 1, 2007 Minute Order at 1. In rejecting defendants’ arguments respecting mutuality of interest at the time the documents were created, Judge Guzman concluded that “the Court agrees with Magistrate Judge Nolan that Household did not contest the issue.” February 1, 2007 Minute Order at 2.

Under the Magistrate Judge/District Court Judge system, a magistrate judge must follow the orders issued by the district court judge. Here, Judge Guzman has adopted in full this Court’s prior December 6, 2006 Order. Once Judge Guzman adopted the December 6, 2006 Order and granted the Class’ motion to compel, it became this Court’s obligation to ensure defendants’ compliance with the February 1, 2007 Order. *See* 18B Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* §4478, at 637 (2d ed. 2002) (“Principles of authority . . . inhere in the ‘mandate rule’ that binds a lower court on remand to the law of the case established on appeal. The very structure of a hierarchical court system demands as much.”); *id.*, §4478.3, at 733 (“an inferior tribunal is bound to honor the mandate of a superior court within a single judicial system”).¹ More particularly, this Court has no authority to reconsider arguments that defendants made to Judge Guzman but were rejected by him.

This Court has not fulfilled its obligations with respect to the February 1, 2007 Order. First, this Court has not required defendants to produce all compliance study documents by a date certain. Instead, this Court has indicated that it may permit defendants to withhold some documents based on an argument that Judge Guzman rejected in the February 1, 2007 Order. This Court should set a date

¹ The Seventh Circuit holds that implied rejection of an argument by the superior court triggers the law of the case doctrine. *Burlington No. R.R. v. City of Superior*, 962 F.2d 619, 620 (7th Cir. 1992) (“In rejecting the narrow interpretation, we necessarily rejected all the reasons that the city gave for its interpretation, whether or not we mentioned each and every one of them.”) (internal citations omitted).

certain in the near future for complete production by defendants of all compliance study documents, including the E&Y work papers.

Second, this Court must issue sanctions against defendants. Defendants knew that Judge Guzman rejected all of their “mutuality of interest” arguments but continue to withhold documents on that basis in direct contravention of his Order. Similarly, there is no justifiable explanation for defendants’ failure to produce the E&Y work papers that they have held in their possession since October of 2004. When a party deliberately disobeys a court order, particularly one where compliance is easy and the rationale for disobedience has already been rejected by a superior court, there must be some consequences for such misconduct. However, this Court’s comments suggest that it will not impose such sanctions, but instead will reward defendants for their misconduct by authorizing further delays in the schedule, precisely the goal that defendants’ conduct was designed to achieve. While the Class recognizes that this Court has discretion to determine the appropriate punishment, this Court should exercise its discretion in accordance with the severity of defendants’ deliberate disobedience of the February 1, 2007 Order.

III. CONCLUSION

For the foregoing reasons, this Court must enforce compliance with Judge Guzman's February 1, 2007 Order by requiring production of the E&Y documents by a date certain and imposing sanctions on defendants for their deliberate violation of that Order.

DATED: February 28, 2007

Respectfully submitted,

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN (90785466)
AZRA Z. MEHDI (90785467)
D. CAMERON BAKER (154452)
MONIQUE C. WINKLER (90786006)
LUKE O. BROOKS (90785469)
JASON C. DAVIS (4165197)

s/ D. Cameron Baker

D. CAMERON BAKER

100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
WILLIAM S. LERACH
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

MILLER LAW LLC
MARVIN A. MILLER
LORI A. FANNING
101 North Wacker Drive, Suite 2010
Chicago, IL 60606
Telephone: 312/525-8320
312/525-8231 (fax)

Liaison Counsel

LAW OFFICES OF LAWRENCE G.
SOICHER
LAWRENCE G. SOICHER
110 East 59th Street, 25th Floor
New York, NY 10022
Telephone: 212/883-8000
212/355-6900 (fax)

Attorneys for Plaintiff

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DECLARATION OF SERVICE BY EMAIL AND BY U.S. MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on February 28, 2007, declarant served by electronic mail and by U.S. Mail to the parties the: **FURTHER SUPPLEMENT IN SUPPORT OF THE CLASS' MOTION TO COMPEL PRODUCTION OF ERNST & YOUNG LLP DOCUMENTS AND FOR SANCTIONS FOR DEFENDANTS' CONTINUING VIOLATIONS OF JUDGE GUZMAN'S FEBRUARY 1, 2007 ORDER.** The parties' email addresses are as follows:

TKavaler@cahill.com PSloane@cahill.com PFarren@cahill.com LBest@cahill.com DOwen@cahill.com	NEimer@EimerStahl.com ADeutsch@EimerStahl.com MMiller@MillerLawLLC.com LFanning@MillerLawLLC.com
--	--

and by U.S. Mail to:

Lawrence G. Soicher, Esq.
Law Offices of Lawrence G. Soicher
110 East 59th Street, 25th Floor
New York, NY 10022

David R. Scott, Esq.
Scott & Scott LLC
108 Norwich Avenue
Colchester, CT 06415

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of February, 2007, at San Francisco, California.

s/ Juvily P. Catig

JUVILY P. CATIG