

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

THE PRIOR ORDERS 1

ARGUMENT 4

A. A Magistrate Judge’s Disposition of a Discovery Dispute is Entitled to Substantial Deference

B. Magistrate Judge Nolan Properly Declined Further Briefing

C. Judge Nolan Properly Applied the R.J. Reynolds Balancing Test in Declining to Find a Waiver of Privilege

CONCLUSION..... 7

This Memorandum is respectfully submitted on behalf of Defendants Household International, Inc. (“Household”), Household Finance Corp., William F. Aldinger, David A. Schoenholz, Gary Gilmer and J.A. Vozar (collectively, “Defendants”) in opposition to Plaintiffs’ Objection to Magistrate Judge Nolan’s March 5, 2007 Order (the “March 5 Order”) denying Plaintiffs’ motion for reconsideration of the Magistrate Judge’s January 24, 2007 Order (the “January 24 Order”).

PRELIMINARY STATEMENT

On March 5, 2007, Magistrate Judge Nolan issued an order denying Plaintiffs’ motion for reconsideration of her January 24, 2007 Order, which had denied Plaintiffs’ renewed motion to compel production of audit letters inadvertently produced by Household’s outside auditors KPMG and Arthur Andersen. The March 5 Order was the *fourth* order issued in this case rejecting Plaintiffs’ continued efforts to compel production of documents that both Magistrate Judge Nolan and this Court have held to be protected by the attorney work product doctrine. Undeterred, Plaintiffs now seek to take a fifth bite of the same apple. As before, however, Plaintiffs present no sound basis to challenge Judge Nolan’s refusal to compel production of these documents. Plaintiffs’ contention that Judge Nolan incorrectly applied the *R.J. Reynolds* balancing test is without merit, as is their argument that they were not given the opportunity to be heard or develop a record prior to Judge Nolan’s determination. Plaintiffs have failed to show that Judge Nolan’s careful consideration of these issues (for the third time) or her application of the law was clearly erroneous and, in any event, both the March 5 Order and the January 24 Order are plainly correct.

THE PRIOR ORDERS

Judge Nolan’s July 6, 2006 Order

On July 6, 2006, Judge Nolan granted Arthur Andersen’s motion for a protective order and denied Plaintiffs’ cross motion to compel the production of audit letters inadvertently produced by Arthur Andersen. In so ruling (after an *in camera* review of the documents at issue), Judge Nolan rejected Plaintiffs’ various arguments for production and found that the audit letters were not “mere business documents” because they would not have been created “in the absence of any pending or threatened litigation” July 6, 2006 Order at 7. Judge Nolan fur-

ther noted that “only an attorney could have drafted” the audit letters, which would not have existed “without the pending and threatened litigation[.]” *Id.* at 8. Judge Nolan held that the audit letters were protected by the attorney work product doctrine and thus denied Plaintiffs’ first attempt to compel their production.

This Court’s January 17, 2007 Order

On January 17, 2007, this Court overruled Plaintiffs’ Objections to Judge Nolan’s July 6, 2006 Order. The Court adopted Judge Nolan’s ruling in its entirety, holding that

[c]ontrary to the class’ assertions otherwise, Magistrate Judge Nolan’s ruling regarding the Andersen documents and the requested discovery breaks no new ground. She applied the correct law to the instant facts. The long and short of it is that they were prepared because of pending or threatened litigation, and they evaluate Household’s exposure to liability on a case-by-case basis. They were either prepared by counsel or memorialize counsel’s opinion work product or qualified nonopinion work product. The fact that they were part of an audit or other examination does not remove the protection afforded the thought processes behind the evaluations obviously made by Household’s attorneys because of pending litigation.

See January 17, 2007 Minute Order. The Court also rejected Plaintiffs’ waiver arguments and ultimately held, in the clearest language possible, “[t]he audit letters, related documents, and requested discovery clearly constitute work product.” *Id.*

Judge Nolan’s January 24, 2007 Order

Notwithstanding Judge Nolan’s operative ruling that the audit letters are protected by the attorney work product doctrine, Plaintiffs’ counsel marked an audit letter as an exhibit to the deposition of Household’s General Counsel, Kenneth Robin, on December 7, 2006. *See* Robin Tr. at 181-200 and Exhibit 63, (Declaration of Janet A. Beer, Esq. dated April 3, 2007, Exs. 1 and 2). Defense counsel promptly objected to the use of the audit letter — which had clearly been found to be privileged by the Court and thus produced inadvertently. *Id.* Thereafter, Plaintiffs argued (yet again) at the status conference before Judge Nolan on January 10, 2007, for an order compelling production of the audit letters. *See* January 10, 2007 Status Conference Tr. at 107-18. The only “new” argument Plaintiffs presented in that regard was that Defendants had waived attorney work product protection by not mentioning this particular audit letter (and others inadvertently produced) during the course of briefing the earlier motion regard-

ing the privileged status of audit letters. *Id.* Having already fully considered all of the Plaintiffs' arguments on this subject and regarding the alleged waiver of privilege, Judge Nolan determined that further briefing of the issue was unnecessary. Rather, Judge Nolan instructed Defendants to identify the additional audit letters as to which privilege was claimed and their relationship to the specific audit letters considered in connection with the previous motion. After reviewing Defendants' resulting submission, and with the benefit of this Court's January 17, 2007 Order, Judge Nolan issued an Order on January 24, 2007, denying Plaintiffs' third attempt to compel production of Household's audit letters. *See* January 24, 2007 Minute Order. Judge Nolan stated that she had "conducted an *in camera* review of the documents and agrees that they fall within the scope of the July 2006 Opinion and Judge Guzman's January 17, 2007 Minute Order." *Id.* Judge Nolan went on to hold (citing *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*) that "[g]iven the magnitude of the document production in this case and the small number of documents at issue here, the court concludes that fairness requires that the KPMG Opinion Letters remain confidential." *Id.*

Judge Nolan's March 5, 2007 Order

On March 5, 2007, Judge Nolan issued the fourth order in this case denying Plaintiffs' attempt to compel production of audit letters. In denying Plaintiffs' motion for reconsideration of her January 24 Order, Judge Nolan once again held that the audit letters were entitled to protection under the attorney work product doctrine. *See* March 5, 2007 Minute Order. The March 5 Order made clear that the ruling in the January 24 Order was not, as Plaintiffs insist, contingent upon a finding that Plaintiffs had failed to establish undue prejudice. Rather, the January 24 Order and the March 5 Order were expressly premised upon Judge Nolan's finding that, having applied the *R.J. Reynolds* balancing test, "fairness requires that the KPMG Opinion Letters remain confidential." *Id.* (quoting January 24, 2007 Minute Order). Judge Nolan also found that Plaintiffs' prejudice arguments did not present "a sufficient basis for finding waiver of the work product privilege as to Household's attorney opinion letters." *Id.* Finally, Judge Nolan noted that the record on this issue was fully developed and entirely sufficient for her to have issued her March 5 Order without additional briefing. Judge Nolan noted that Plaintiffs' had already "exhaustively briefed the issue", that Plaintiffs had "addressed the issue of waiver . . . in

their January 10, 2007 Status Report,” and that the Court had conducted an *in camera* review of the documents at issue. *Id.*

ARGUMENT

A. A Magistrate Judge’s Disposition of a Discovery Dispute is Entitled to Substantial Deference

Fed. R. Civ. P. Rule 72(a) sets forth the exacting standard that governs a district judge’s review of a magistrate judge’s decision on a nondispositive motion such as this discovery dispute. *Ocean Atlantic Woodland Corp. v. DRH Cambridge Homes, Inc.*, No. 02 C 2523, 2004 WL 609326, at *3 (N.D. Ill. Mar. 23, 2004) (Guzman, J.) (“Routine discovery motions are considered to be ‘nondispositive’ within the meaning of Rule 72(a).”). Rule 72(a) provides that the district judge “shall consider such objections and shall modify or set aside any portion of the magistrate judge’s order found to be *clearly erroneous or contrary to law.*” (emphasis added) *See also For Your Ease Only, Inc. v. Calgon Carbon Corp.*, No. 02 C 7345, 2003 WL 21475905, at *3 (N.D. Ill. June 20, 2003); 12 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* 2d § 3069 (1997). With respect to factual determinations, the “clearly erroneous” standard “means that the district court can overturn the magistrate judge’s ruling only if the district court is left with the definite and firm conviction that a mistake has been made.” *Weeks v. Samsung Heavy Industries Co.*, 126 F.3d 926, 943 (7th Cir. 1997). The application of a legal standard to a particular set of facts is also reviewed under the “clearly erroneous” standard. *McFarlane v. Life Insurance Co. of North America*, 999 F.2d 266, 267 (7th Cir. 1993).

Determinations of a magistrate judge in the discovery context are entitled to substantial deference because “[t]he Federal Rules of Civil Procedure grant magistrate judges broad discretion in resolving discovery disputes,” *Ocean Atlantic Woodland Corp.*, 2004 WL 609326, at *3, and “[t]he magistrate judge has a much higher familiarity with the parties and the conduct of discovery” *Whittaker v. NIU Board of Trustees*, No. 00C 50447, 2004 WL 524949, at *1 (N.D. Ill. Mar. 12, 2004). Magistrate Judge Nolan’s March 5 Order reflects a careful and reasoned application of relevant law to the documents at issue on Plaintiffs’ motion. As demonstrated herein, Plaintiffs offer no valid and sufficient basis to disturb the Order.

B. Magistrate Judge Nolan Properly Declined Further Briefing

Plaintiffs' argument that they "[were] not permitted the opportunity to develop this record prior to the January 24 Order" is patently untrue. Pl. Obj. at 6. As recognized by Judge Nolan in her March 5 Order, "Plaintiffs have exhaustively briefed the issue of whether Household's attorney opinion letters are protected as work product." March 5, 2007 Minute Order. Plaintiffs also presented their "new" waiver argument in their status report and on the record at the January 10, 2007 status conference. *See* January 10 Status Conference Tr. at 107-18. Every one of the arguments advanced by Plaintiffs in their status report, at the status conference, and in their present brief, had been developed in earlier briefing.

Plaintiffs purport to offer a new argument based on the assertion that the letters at issue here "contain important evidentiary value" on the issues of falsity, scienter and materiality. Pl. Obj. at 7. However as Judge Nolan recognized in the March 5 Order, Plaintiffs "raised this identical argument in connection with their briefing on the Arthur Andersen Opinion Letters" and "Plaintiffs' argument merely repeats their assertion that the KPMG Opinion Letters are highly probative and relevant to this lawsuit." March 5, 2007 Minute Order. Plaintiffs try in vain to distinguish the falsity, scienter and materiality arguments they advance here from the identical arguments advanced earlier by focusing on the specific content of individual letters at issue. As Judge Nolan stated, however, this is a "distinction without a difference." All of the audit letters are similar in form, content and general purpose and Plaintiffs themselves assert that the evidentiary value of all of the audit letters is the same. In fact, in their original May 26, 2006 opening motion papers on this issue, Plaintiffs explicitly acknowledged that both Andersen and KPMG documents were at issue. *See* Pl. Mot. at 1 ("These documents were not created for the purpose of seeking or rendering legal advice or services; but rather, these documents were created to enable Andersen and/or KPMG LLP ("KPMG") to render accounting services . . ."); *id.* at 11 ("[The Household Defendants] cannot assert attorney-client privilege over any of the documents they shared with either Andersen or KPMG."). It is undeniable that this issue was fully briefed by the Plaintiffs in the course of the previous motion practice.

Plaintiffs also argue that they were not allowed the opportunity to develop a record regarding "the issue of waiver in the factual context here." Pl. Obj. at 6. Plaintiffs argue that Judge Nolan should have permitted them to submit a brief arguing that waiver could be in-

ferred from the timing of the Defendants' notification that the KPMG audit letters had been inadvertently produced. This argument is entirely without merit. The Magistrate Judge was well aware of the "factual context" Plaintiffs cite and required no such briefing in order to issue an informed and well-reasoned decision based upon the previous briefing submitted to her, the previous orders issued by her and this Court, and the timing of Defendants' notification that the KPMG audit letters had been inadvertently produced. Moreover, Plaintiffs had adequate opportunity to refresh Judge Nolan's recollection as to these issues, both in their status report and during extensive oral argument at the January 10, 2007 status conference. None of these factual issues warranted further briefing, and Judge Nolan was well within her discretion to decline the offer of additional briefing, with the unnecessary expense and delay it would have entailed.

C. Judge Nolan Properly Applied the *R.J. Reynolds* Balancing Test in Declining to Find a Waiver of Privilege

In reaching the conclusion that the privilege has not been waived, Judge Nolan correctly applied the balancing test outlined in *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, 2001 U.S. Dist. LEXIS 17602 (N.D. Ill. Oct. 24, 2001). In arguing without basis that Judge Nolan erred in this aspect of her analysis (Pl. Obj. at 10), Plaintiffs do not and could not assert that Judge Nolan applied the incorrect law, because Plaintiffs themselves expressly rely upon *R.J. Reynolds*. Instead, they take issue with the factors considered by Judge Nolan in reaching her ultimate conclusion that, pursuant to *R.J. Reynolds*, "fairness requires that the KPMG Opinion Letters remain confidential." March 5, 2007 Minute Order (quoting January 24, 2007 Minute Order).

Plaintiffs' arguments in this regard are unavailing. Judge Nolan's consideration of numerous factors, including lack of undue prejudice to the Plaintiffs and the magnitude of the document production, is entirely consistent with *R.J. Reynolds*, which indicates that "[t]he overriding issue in the [waiver] analysis is fairness" but does not limit or prescribe the factors that courts may weigh in determining fairness. *R.J. Reynolds*, 2001 U.S. Dist. LEXIS 17602, at *25. Plaintiffs insist that Judge Nolan should have given more weight to factors they proposed, such as the alleged lack of prejudice to the Defendants or the alleged evidentiary value of the audit letters, but such second-guessing does not come close to a showing of clear error. In any event, it was clear from the January 24 and March 5 Orders that Judge Nolan did in fact carefully con-

sider Plaintiffs' arguments, including with respect to the alleged evidentiary value of the audit letters, in reaching her conclusion.

Once again Plaintiffs have failed to demonstrate that it was clearly erroneous for Judge Nolan to deny their renewed motion to compel Household's audit letters. That she disagreed with Plaintiffs' recycled arguments on this subject is not a valid basis to overrule her carefully considered opinion.

CONCLUSION

As Plaintiffs have failed to demonstrate that Magistrate Judge Nolan's March 5, 2007 Order was clearly erroneous, Plaintiffs' Objections should be overruled in full.

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Chicago, Illinois

Respectfully submitted,

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