

**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. )	
_____ )	

**REPLY IN SUPPORT OF THE CLASS' OBJECTION TO THE MAGISTRATE  
JUDGE'S MARCH 5, 2007 ORDER REGARDING AUDIT LETTERS PRODUCED BY  
KPMG AND ARTHUR ANDERSEN**

## I. INTRODUCTION

The Court should sustain the Class' Objection<sup>1</sup> to the March 5, 2007 Order issued by the Magistrate Judge respecting a series of audit letters provided by Household International, Inc.'s ("Household" or the "Company") General Counsel, Kenneth Robin, to Household's independent auditors, KPMG LLP ("KPMG") and Arthur Andersen ("Andersen"). As shown by the Class, the March 5, 2007 Order is contrary to law under Federal Rule of Civil Procedure 72(a) with respect to the balancing test for waiver set out in *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, No. 99 C 1174, 2001 WL 1286727 (N.D. Ill. Oct. 24, 2001) and *Wunderlich-Malec Sys., Inc. v. Eisenmann Corp.*, No. 05 C 04343, 2006 U.S. Dist. LEXIS 84889 (N.D. Ill. Nov. 17, 2006), including with respect to the determination of fairness. Further, the Class' Motion for Reconsideration<sup>2</sup> was procedurally proper, specifically to provide the Class with the ability to address the new waiver issues presented by this series of audit letters. Defendants' arguments to the contrary do not challenge these essential points and, thus, the Class' Objection should be sustained.

### A. **The Magistrate Judge Misapplied the Applicable Case Law, Including *R.J. Reynolds* and *Wunderlich-Malec***

Defendants largely do not dispute the Class' showing on the issue of waiver with respect to the audit letters at issue. Instead, defendants attack the Class' Objection as being based on the contention that the Magistrate Judge should have given more weight to different factors under *R.J.*

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<sup>1</sup> "Class' Objection" refers to the Class' Objection to the Magistrate Judge's March 5, 2007 Order Regarding Audit Letters Produced by KPMG and Arthur Andersen, filed March 19, 2007 (Dkt. No. 1023).

<sup>2</sup> "Motion for Reconsideration" refers to the Class' Motion for Reconsideration of the Court's January 24, 2007 Order Finding Waiver of KPMG Documents but Precluding Disclosure for Failure to Demonstrate Prejudice, filed February 7, 2007 (Dkt. No. 941).

*Reynolds*. Defs' Opp. at 6.<sup>3</sup> This attack is based on a false characterization of the Class' position, which is that the Magistrate Judge did not properly interpret and apply the *R.J. Reynolds* balancing test, including how the Magistrate Judge determined fairness. The Class' Objection, thus, rests on a legal error by the Magistrate Judge in construing and applying the relevant case law, not a purported factual error in balancing the applicable factors.

Defendants concede that the initial January 24, 2007, Order concluded 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 remains confidential.” Defs' Opp. at 3 (citing the January 24, 2007 Order). The March 5, 2007 Order reaffirmed this conclusion. March 5, 2007 Order at 2. Defendants do not dispute (as indeed, they cannot) that the magnitude of the production and the number of documents at issue are separate factors under *R.J. Reynolds* from the fairness factor and thus, not relevant to determination of the issue of fairness.

Further, this case presents the same “fairness” situation as *Wunderlich-Malec*. In that case, which the Class cited to the Magistrate Judge as part of its Motion for Reconsideration, the Court in determining fairness placed the burden on the party seeking to avoid waiver to show “actual prejudice beyond what is naturally felt by a party who loses a privilege.” *Wunderlich-Malec*, 2006 U.S. Dist. LEXIS 84889, at \*23. Defendants (and the March 5, 2007 Order) do not distinguish *Wunderlich-Malec*. Defendants did not and do not now identify what, if any, prejudice defendants would suffer based on waiver. Under *Wunderlich-Malec*, the fairness factor favors the Class and the Magistrate Judge's contrary ruling was erroneous as a matter of law.

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<sup>3</sup> “Defs' Opp.” refers to Defendants Memorandum in Opposition to Plaintiffs' Objections to the Magistrate Judge's March 5, 2007 Order (Dkt. No. 1034).

In addition to the fairness issue, the Magistrate Judge specifically found that Household had no reasonable explanation for its failure to raise the alleged inadvertent production in a timely manner. “This factor weighs heavily in favor of a finding that [Household’s] actions constitute a waiver.” *Wunderlich-Malec*, 2006 U.S. Dist. LEXIS 84889, at \*21-22 (addressing party’s failure to timely recall “all mistakenly produced documents”). Moreover, there was complete disclosure of the audit letters at issue. Defendants offered no evidence,<sup>4</sup> even during the Motion for Reconsideration briefing, to support a finding on the other factors.

In these circumstances, the Magistrate Judge’s ruling was clearly erroneous and contrary to law. *See* Fed. R. Civ. P. 72(a). Under the applicable case law, including *Wunderlich-Malec*, the Magistrate Judge should have found waiver using the *R.J. Reynolds* factors.

**B. The Procedural History Demonstrates that the Class’ Motion for Reconsideration Should Have Been Granted**

The Class needed to brief the new waiver issues presented by these audit letters. Although the Class’ motion was entitled “Motion for Reconsideration,” it was actually the first and only motion the Class filed as to these specific audit letters and the new waiver issues presented due to defendants not seeking recall of these letters during the Andersen briefing.<sup>5</sup> It was for this reason the Magistrate Judge permitted briefing on this issue. *See* February 12 Hearing Tr. at 6-9 (including

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<sup>4</sup> Defendants filed no declarations or affidavits in support of their burden. Instead defendants provided only oral, unsworn statements of counsel made at the hearing that this was the first time defense counsel had “focused” on KPMG’s production. January 10 Hearing Tr. at 115. Such statements are not evidence and neither the January 24, 2007 Order nor the March 5, 2007 Order rely on these statements. Nor are these conclusory statements plausible. First, as the Class counsel mentioned at the January 10, 2007 status conference, counsel for Household reviewed the KPMG documents prior to its production. *Id.* at 114 (statement of Mr. Brooks). Second, two KPMG witnesses were deposed prior to Mr. Robin’s deposition on December 7, 2006 and defense counsel asked questions at both depositions.

<sup>5</sup> “Andersen briefing” refers to all briefs filed in connection with the Motion of Arthur Andersen LLP for Determination of the Court as to the Return of Privileged Documents Inadvertently Produced to Plaintiffs and the related objection, which are Dkt. Nos. 495, 508, 519, 525, 612, 161, 623, 661, 825, 879. *See also* Orders dated July 6, 2006 and January 17, 2007 (Dkt. Nos. 579, 923).

statement of Mr. Brooks: “. . . on the KPMG, we never had a chance to file a brief . . . and so we wanted to file these briefs. . .”). Defendants’ suggestion that the Class filed sequential motions on these letters is, thus, erroneous. *See* Defs’ Opp. at 3 (referencing the Class’ “third attempt to compel” production of the audit letters).

The waiver issues presented by the new audit letters were not encompassed in the prior Andersen briefing. In the January 24, 2007 Order, the Magistrate Judge acknowledged that the situation presented by these new audit letters was “unique [] in that it is the first time that Defendants are seeking to recall documents that they should have presented to the court in connection with a previous ruling.” January 24, 2007 Order at 1. This acknowledgement by the Magistrate Judge alone demonstrates that the waiver issues respecting the new audit letters had not been previously addressed or briefed. Statements made by the Magistrate Judge during the January 10, 2007 status conference further demonstrate that the waiver issues were different and could not have been addressed previously. *See, e.g.*, January 10 Hearing Tr. at 115 (“The waiver is that you did not recall them soon enough.”).

The Class did not brief the new waiver arguments to the Magistrate Judge on January 10 or as part of its Status Report.<sup>6</sup> *See* Defs’ Opp. at 5 (citing January 10 Hearing Tr. at 107-18). Indeed, the transcript passage defendants cite demonstrates the opposite – it shows that the Class sought to brief these issues below and that the Class only mentioned the waiver arguments without any analysis. January 10 Hearing Tr. at 109, 118 (statements of Mr. Baker); *see also id.* at 113 (colloquy between Class counsel and Court clerk identifying issue of waiver); *id.* at 115 (waiver by failure to timely recall the documents was one of the Class’ waiver arguments). Nowhere in the transcript is

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<sup>6</sup> “Status Report” refers to the Class’ Status Report to Magistrate Judge Nan R. Nolan in Advance of the January 10, 2007 Status Conference, filed on January 8, 2007 (Dkt. No. 889).

there a discussion by the Class of *R.J. Reynolds, Wunderlich-Malec*, the factors that the Court should consider in terms of waiver or the evidentiary importance of the new documents. The Class' Status Report contains even less substance than was discussed at the hearing. Status Report at 9.

Finally, each audit letter addresses a different time period and has different factual content, discussing different "new" litigation and providing updates on "old" litigation. The content of each is, thus, distinct and unique. The Class has cited numerous excerpts from the audit letters at issue to the Magistrate Judge and this Court that identify out the specific and distinct evidentiary value of these new audit letters as opposed to the prior letters. This evidentiary record was not before the Court in the prior Andersen briefing.<sup>7</sup>

For these reasons, the Class' "Motion for Reconsideration" was procedurally proper to allow the Class to submit a brief on the waiver issues and create an adequate record.

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<sup>7</sup> It is of no moment that the Class rests the new audit letters' evidentiary value on the same issues of falsity, scienter and materiality that supported the relevance of the earlier set of audit letters. *See* Defs' Opp. at 5. As the Class pointed out in its opening brief, in this securities case, like many others, these are the principal issues the parties are disputing and that will be decided at trial. More to the point, the Class has demonstrated that these particular audit letters have different evidentiary value than the earlier set by citing to specific passages in those letters. *See* Class' Objection at 7-9. Defendants do not contest the Class' demonstration on this point.

## II. CONCLUSION

This Court should sustain the Class' Objection to the March 5, 2007 Order. Further, it was an error of law for the Magistrate Judge not to find waiver based on *R.J. Reynolds, Wunderlich-Malec*, and the record evidence before the Magistrate Judge.

DATED: April 13, 2007

Respectfully submitted,

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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 April 13, 2007 declarant served by electronic mail and by U.S. Mail to the parties the: **REPLY IN SUPPORT OF THE CLASS' OBJECTION TO THE MAGISTRATE JUDGE'S MARCH 5, 2007 ORDER REGARDING AUDIT LETTERS PRODUCED BY KPMG AND ARTHUR ANDERSEN.** The parties' email addresses are as follows:

<a href="mailto:TKavaler@cahill.com">TKavaler@cahill.com</a> <a href="mailto:PSloane@cahill.com">PSloane@cahill.com</a> <a href="mailto:PFarren@cahill.com">PFarren@cahill.com</a> <a href="mailto:LBest@cahill.com">LBest@cahill.com</a> <a href="mailto:DOwen@cahill.com">DOwen@cahill.com</a>	<a href="mailto:NEimer@EimerStahl.com">NEimer@EimerStahl.com</a> <a href="mailto:ADeutsch@EimerStahl.com">ADeutsch@EimerStahl.com</a> <a href="mailto:MMiller@MillerLawLLC.com">MMiller@MillerLawLLC.com</a> <a href="mailto:LFanning@MillerLawLLC.com">LFanning@MillerLawLLC.com</a>
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I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of April, 2007, at San Francisco, California.

s/ Juvily P. Catig  
\_\_\_\_\_  
JUVILY P. CATIG