

**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
	Magistrate Judge Nan R. Nolan
vs.)	
HOUSEHOLD INTERNATIONAL, INC., et)	
al.,)	
Defendants.)	
_____)	

**REPLY IN SUPPORT OF 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**

(REDACTED VERSION)

I. INTRODUCTION

The Class has requested reconsideration of this Court's January 24, 2007 Order respecting the KPMG audit letters, specifically that part of the Court's Order finding that the Class failed to demonstrate any prejudice in not being able to use these audit letters at trial. Order at 1 (Dkt. No. 931). As discussed in the Class' opening brief, there is prejudice to the Class in depriving it of use of these documents at trial. These letters are a unique set of evidence establishing senior management's awareness of pending litigation and their judgments regarding what litigation was material. Class' Mot. at 4-5 (Dkt. No. 941). These points are reflected in the highlighted sections of the letters provided as exhibits to the Class' opening brief. In opposition, defendants studiously avoid any discussion of these letters' contents, including the passages quoted by the Class. *See* Defs' Opp. (Dkt. No. 972). However, these passages demonstrate the Class' need for these documents. Accordingly, the Court should grant the Class' motion for reconsideration based upon the Class' showing of prejudice and authorize the Class to use these KPMG audit letters.

II. ARGUMENT

A. Reconsideration Is Warranted Here

Defendants' opposition consists of several extremely legalistic arguments in support of their main position that the Class has not met the standard for reconsideration. The Class has in fact satisfied the applicable standards, as clearly articulated in the Class' opening brief. Class' Mot. at 1-2. Moreover, defendants' arguments all miss the point. As the Court is aware, the Class raised the KPMG audit letters issue in its January 8, 2007 status conference statement and was not given the opportunity to brief the issue before this Court entered its January 24, 2007 ruling. As a matter of fairness and jurisprudence, the Class should be entitled to brief the issue of prejudice before this Court makes a final determination as to the Class' ability to use the KPMG audit letters.

To counter this fundamental fairness issue, defendants erroneously suggest that the prejudice issues presented by the KPMG audit letters are identical to, and subsumed in, the prejudice issues presented by the Arthur Andersen (“Andersen”) audit letters. However, as recognized by the Court in its January 24, 2007 Order, there are a number of audit letters in the KPMG set that are not part of the Andersen set. Mehdi Decl., Exhs. B-I.¹ The Class principally seeks these new audit letters as well as the January 14, 2002 letter for specific selections within those letters, which selections were highlighted for the Court’s convenience. As discussed further below, these highlighted selections represent important trial evidence not otherwise available to the Class.

B. There Is Prejudice to the Class in Not Permitting It to Use the KPMG Audit Letters at Trial

In its January 24, 2007 Order, the Court concluded that there was no prejudice to the Class in preventing use of the KPMG audit letters at trial. This finding was based not on the contents of the specific letters, but on the fact that the first time the Class attempted to use the KPMG letters was in the December 7, 2006 deposition of Kenneth Robin, Household’s General Counsel. Order at 1. However, as discussed below, depriving the Class of the highlighted sections of these audit letters does work a prejudice on the Class in terms of trial. Further, there is a simple explanation respecting why the Class’ first use of the audit letters was at Mr. Robin’s deposition – an explanation that has nothing to do with the evidentiary significance of these letters. *See infra* at 4-5. In sum, the Class can show prejudice if such is required.²

¹ “Mehdi Decl.” or “Mehdi Declaration” refers to the Declaration of Azra Z. Mehdi in Support of the Class’ Motion for Reconsideration, filed on February 7, 2007 (Dkt. No. 942).

² As indicated in the Class’ opening brief, the relevant case law does not require the Class to show undue prejudice in order for the Court to find waiver. Class’ Mot. at 3-4. Defendants do not dispute that there is no requirement for a finding of undue prejudice *per se*, but contend that the Court correctly “merely considered the lack of undue prejudice to Plaintiffs as one of several factors contributing to the ‘overall fairness’ of finding that the privilege was not waived” in accordance with *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, No. 99 C 1174, 2001 U.S. Dist. LEXIS 17602 (N.D.Ill. Oct. 24, 2001). Defs’

As shown in the highlighted sections of the KPMG audit letters submitted as Exhibits A through I to the Mehdi Declaration, the particular audit letters at issue contain numerous passages that directly bear on the Class' predatory lending allegations. For example, the January 14, 2002 letter contains a reference and description of the Minnesota Department of Commerce investigation commencing in October of 2001. Mehdi Decl., Ex. A at 16. This reference is irrefutable documentary evidence that senior management, including Mr. Robin (Household's General Counsel) and individual defendant David Schoenholz (Household's Chief Financial Officer), were not only aware of this investigation, but that they considered this investigation material. Without this documentary evidence, the Class is left with the unpalatable alternative of asking Mr. Schoenholz whether he recalls being informed of the Minnesota investigation and if so, when and what details he recalls.

Similar points can be made with respect to the other highlighted selections in Exhibits A through I, which includes entries for the ACORN class action and related class actions filed in California and Illinois in early 2002, the Attorneys General settlement discussions, the *Luna* class action litigation filed in Washington, the various state regulatory agency investigations, the Markell investigation and the SEC investigation. *See, e.g.*, Mehdi Decl., Ex. B at 2-4; Ex. C at 1-2; Ex. D at 3-5, 6; Ex. E at 1-2; Ex. F at 1-2; Ex. G at 2-6; Ex. H at 6-7, 10-12; Ex. I at 1-2.

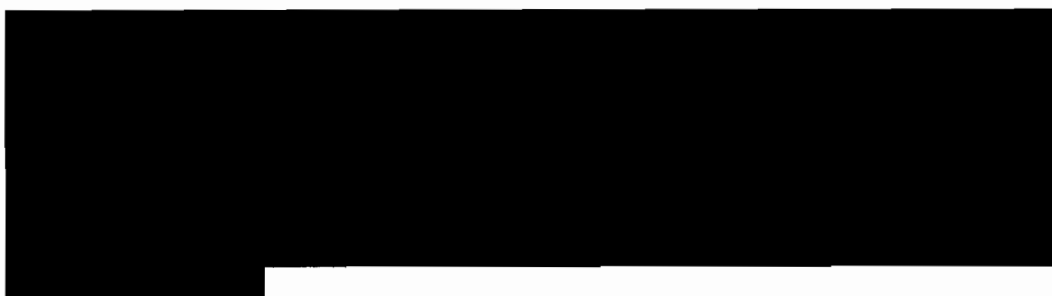
The highlighted selections contain purely factual description of the pending litigation matters, including the settlements reached. These selections do not reveal any attorney work product

Opp. at 3. However, it is clear from the Court's ruling that undue prejudice was not considered as part of any determination of "fairness," a term that is not mentioned in the Order, but that this Court considered undue prejudice to be a stand alone requirement of waiver. The Class contends this is an error requiring reconsideration.

or otherwise privileged material. For example, there are two entries relating to the New York regulatory agency investigation. The first entry is in the August 26, 2002 letter, which provides:

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Mehdi Decl., Ex. D at 4. The second entry is from the January 13, 2003 letter and provides:

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Mehdi Decl., Ex. H at 12. Significantly, this NY settlement, which was reached on October 4, 2002, is in addition to the Attorneys General settlement.

As the discussion above indicates, the Class intends to use these entries 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. Thus, the Class suffers more prejudice if it cannot use the KPMG letters at issue than if it cannot use the Andersen letters.

This showing of prejudice is not diminished by the fact that the Class did not attempt to use the KPMG audit letters until the December 7, 2006 deposition of Mr. Robin. The decision to use the KPMG audit letters at that deposition as opposed to earlier makes sense for a number of reasons,

none of which bear on the substantive import of the letters. As a starting point, with these audit letters, which “speak for themselves” more than is typical, the Class could have decided not to use these documents at any of the depositions but simply provided them to its experts. Additionally, for each Household deposition, the Class frequently has an overabundance of documents that could be used with each witness within the allotted seven hours. Not every document, no matter how “hot,” can be used at every deposition – selections must therefore be made. Further to this point, once the Class uses a document at a deposition, defense counsel is then aware of the Class’ own awareness of the document and prepares the upcoming witnesses accordingly. Since only the author of a document can answer certain key questions about the document, such as what was the intended meaning of a phrase or why was certain information included or omitted, it makes sense that the Class would first use the audit letters at Mr. Robin’s deposition since only Mr. Robin, as the author, can testify as to those types of questions. Finally, we note that the Class was prepared to use these documents at the KMPG deposition but received satisfactory answers as to the relevant questions posed such that the decision was made to defer use until Mr. Robin’s deposition.

III. CONCLUSION

For the foregoing reasons, the Court should allow the Class to use the KPMG audit letters attached to the Mehdi Declaration and to conclude its examination of Mr. Robin on those letters.

DATED: March 1, 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 March 1, 2007, declarant served by electronic mail and by U.S. Mail to the parties the: **REPLY IN SUPPORT OF 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 (REDACTED VERSION)**. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 1st day of March, 2007, at San Francisco, California.

s/ Marcy Medeiros

MARCY M. MEDEIROS