

No. 17-1345

In the Supreme Court of the United States

DARYL K. WASHINGTON, SUNDAY PLAYERS, INC.,
Petitioners,

v.

KELLWOOD COMPANY,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit*

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Despite respondent's dust-kicking, both parties concede that it was the Article III judge's chambers that initiated contact with the parties and made clear that a trial would not take place in the foreseeable future unless the parties agreed to a trial by magistrate. Thus, respondent would be hard-pressed to find a more appropriate case with which to answer the fundamental questions presented by the Petition, beginning with whether it is ever constitutional for an Article III court to effectively require that parties agree to a trial by magistrate to get a trial date. The answer should be that district courts cannot, because to do so would be unconstitutionally coercive. This question is followed closely by whether it is unconstitutional to permit magistrates to issue final judgments, unchecked by Article III district courts, that create legal precedent binding on the entire circuit, even though the alleged consent was solely between two private parties. Respondent also fails to address why it would be inappropriate to resolve the question whether Article III judges can divorce themselves from reviewing authority over a magistrate's dispositive rulings and whether parties have a constitutional right to a magistrate judge with judicial trial experience equivalent to that of the Article III judges who direct parties to agree to trials by magistrates.

Unable to credibly deny the existence of the Petition's unsettled questions, respondent ventures a series of odd arguments to distract from the inevitable conclusion that this case raises the important and unsettled issues about as cleanly as any case ever will. At stake are the rights of every litigant to an Article III

judge, without fear of being forced to consent to a non-Article III judge who may lack the necessary judicial experience. It is also disingenuous for respondent to now contend that Magistrate Netburn had suitable judicial experience when the magistrate's lack of judicial experience was highlighted in respondent's spirited objection to allowing Magistrate Netburn to try the case. *See Reply App.1-10.*

The second circuit's approval of Magistrate Netburn's decision subjectively to chuck a well-supported jury verdict, disregard undisputed industry evidence, overturn an experienced magistrate's *Daubert* ruling, ignore well-established precedent on the admissibility of expert and business owner testimony, and establish new rules for the measurement of damages, demonstrates the indispensable need for review. Also, Respondent's effort to create vehicle problems where none exists further emphasizes that a magistrate's unchecked power to create legal precedent, along with involuntary consent, is devastating to parties that otherwise present undisputed evidence and receive favorable jury verdicts. The Second Circuit's blessing of the unconstitutional and prejudicial acts of the magistrate and lower courts merit review.

I. Review is Necessary to Vindicate the Requirement That Pressure Should Not be Applied on Litigants to Waive the Right to an Article III Judge

The district court's involvement in obtaining consent was wrong. Notwithstanding its current effort to minimize how the alleged "consent" was obtained, respondent made clear in its motion to vacate

Magistrate Netburn's assignment that the alleged consent was initiated by a call from the Article III court's chambers and was necessary to proceed towards trial,

Judge Batts's courtroom deputy contacted Ken Schachter, counsel for Kellwood, in September of 2014.¹ (Schachter Decl., ¶ 5.) Judge Batts's courtroom deputy asked Schachter whether the parties would be willing to consent to have the case referred to a magistrate judge. (*Id.*) During this conversation, Schachter specifically asked the courtroom deputy who would be assigned as the magistrate judge, and he indicated that this case would be referred to Magistrate Judge Dolinger, as Judge Dolinger had already been assigned to the case. (*Id.*) **Schachter also understood from this conversation that, if Kellwood did not execute the consent, further delay on the pending *Daubert* motions would result. (*Id.*)**

Reply App.5. The realism of forced consent is reiterated in the sworn declaration of respondent's counsel, "I also understood from this conversation that, if Kellwood did not execute the consent, further delay on the pending *Daubert* motions would result." Reply App.13. The certainty of further delays was also recognized by Petitioners' counsel, "Plaintiffs' reason for the consent was to ensure that this case....could proceed to a jury trial sooner...." Op. App. 80. Petitioners agreed that [failure to consent] "**would no doubt cause a further delay in the trial of claims**

¹ The case was filed in 2005.

that have been pending for over ten years. Op. App. 77.

The existence of potential coercion to consent prompted Congress to make clear that the voluntary consent of the parties is required before a civil action may be referred to a magistrate. S.Rep. No. 96–74, at 5, U.S.Code Cong. & Admin.News 1979, pp. 1469, 1473 (“The bill clearly requires the voluntary consent of the parties as a prerequisite to a magistrate’s exercise of the new jurisdiction. **The committee firmly believes that no pressure, tacit or expressed, should be applied to the litigants** to induce them to consent to trial before the magistrates”); H.R.Rep. No. 96–287, at 2 (The Act “creates a vehicle by which litigants can consent, freely and voluntarily....”).

An Article III judge’s direct involvement also invalidates alleged consent. Section 636(c)(2) establishes the procedures for a § 636(c)(1) referral. “If a magistrate judge is designated to exercise civil jurisdiction under [§ 636(c)(1)], **the clerk of court shall**, at the time the action is filed, **notify the parties** of the availability of a magistrate judge to exercise such jurisdiction.” § 636(c)(2). Within the time required by local rule, “[t]he **decision of the parties shall be communicated to the clerk of court.**” *Id.* Federal Rule of Civil Procedure 73(b) specifies that **neither the magistrate nor the district judge “shall ... be informed of a party’s response** to the clerk’s notification, unless all parties have consented to the referral of the matter to a magistrate judge.” The procedure created by 28 U.S.C. § 636(c)(2) thus envisions advance, written consent **communicated to the clerk.** That way, the objective to preserve the

confidentiality of a party's choice is accomplished, in the interest of protecting an objecting party against any possible prejudice at the hands of the district judge or magistrate. *See also* § 636(c)(2) ("Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent").

Thus, once the district judge's chambers telephoned the parties to request consent, the parties lost any real opportunity to object to the request, lest they risked potential prejudice from additional trial delays or other prejudicial rulings, even if subconsciously by the judge initiating the consent request.

II. Respondent's Assertion of Waiver or Judicial Estoppel is Meritless.

Again, it was the district court that put into action the prerequisite to agree to a magistrate to obtain a trial date. Thus, it was futile for Petitioner to have objected to the first assignment, lest potentially finding themselves with more protracted trial delays. As far as objecting to the reassignment, Magistrate Netburn's denial of respondent's motion to vacate made clear that another objection would be pointless. *United States v. France*, 886 F.2d 223, 226 (9th Cir. 1989) (defendant's failure to contemporaneously object to the magistrate conducting jury selection did not waive her right to appellate review). Next, since one or more of the assignments were invalid, Magistrate Netburn never obtained jurisdiction to conduct the trial, and the district court judge did not issue a final judgment. Because the Article III Judge did not enter a final, appealable order the second circuit did not have jurisdiction. *See Ambrose v. Welch*, 729 F.2d 1084, 1085

(6th Cir.1984); *Jones v. Johnson*, 134 F.3d 309, 311 (5th Cir.1998).

Further, Petitioners can raise the lack of jurisdiction at any time. *See Freytag v. Comm’r*, 501 U.S. 868, 896 (1991) (Scalia, J., concurring in the judgment). Even the alleged consent does not prohibit review of Magistrate Netburn’s or the court of appeals’ lack of jurisdiction. *Id.* (“[A] litigant’s prior agreement to a judge’s expressed intention to disregard a structural limitation upon his power cannot have any legitimating effect—i.e., cannot render that disregard lawful. Even if both litigants not only agree to, but themselves propose, such a course, the judge must tell them no.”). When the Constitution’s “structural principle[s]” limiting judicial power are “implicated in a given case, ... notions of consent and waiver cannot be dispositive.” *Schor*, 478 U.S. at 850–51.

Respondent also argues that Petitioners cannot obtain review since they contested respondent’s motion to vacate. Opp. at 7, 10. However, Petitioners had no choice, since objecting to the reassigned magistrate would cause further trial delays in the then 10-year old case. Further, Petitioners’ counsel² were unaware, and never informed by the district court, of Magistrate Netburn’s trial inexperience. The extent of the magistrate’s inexperience reared its head in decisions later to vacate the jury verdict, ignore *Daubert* rulings, and deny evidence from experts, business owners and

² Respondent does not dispute that Petitioners’ two trial counsel attended University of Texas School Law and have practiced in Texas since 1975 and 1991, respectively.

sales projections, although virtually every other state and federal court allows such evidence.

But respondent clearly believed [that Magistrate Netburn did not possess the requisite experience and] and that respondent had a right to an adequately experienced magistrate,

The reassignment to Judge Dolinger specifically was a driving force in Kellwood's decision to execute the consent. **Kellwood conducted research into Judge Dolinger and his decisions**, and ultimately determined that it would be comfortable with Judge Dolinger **in light of his three decades of experience as a judge**.

Reply App.9. Relying on *New Hampshire v. Maine*, 532 U.S. 745 (2001), respondent contends that Petitioners' response to the motion to vacate creates judicial estoppel, however none of the *Maine* factors support respondent's contention. First, Petitioner "never wanted" a trial by magistrate. Second, there is no evidence Magistrate Netburn accepted any legal argument from Petitioners. Third, Petitioners derived no unfair advantage in initially contesting the motion to vacate. In fact, Petitioners were disadvantaged by their early unawareness of Magistrate Netburn's lack of experience. Nor was there an unfair detriment to respondent arising from Petitioners' response. Indeed, respondent vehemently opposed Petitioners' naïve response and would be unfairly benefitted if Magistrate Netburn's orders stand.

In any event, the Article III court made clear that consent was necessary. In her denial of the motion to

vacate, Magistrate Netburn made clear she would try the case over objection. The appeals court knew from the briefing³ that Magistrate Netburn made the decision herself [improperly] to deny respondent's Motion to Vacate. Therefore, issues surrounding the presumed jurisdiction were plainly ruled upon. This Court may properly grant review of a question "passed upon" by the court below regardless of whether it was pressed by the parties. *United States v. Williams*, 504 U.S. 36, 40-44 (1992).

The Court can also review errors and defects that are plain and affect substantial rights. *U.S. v. Olano*, 507 U.S. 725, 736 (1993). Magistrate Netburn lacked trial jurisdiction and the Article III judge did not review the findings, affecting Petitioners' substantial rights. Thus, this Court can review all rulings. Further, even when an error is not "plain," this Court has in extraordinary circumstances considered claims forfeited below. *See, e.g., Glidden Co. v. Zdanok*, 370 U.S. 530, 535–536 (1962) (opinion of Harlan, J.). Neither the Constitution nor the Magistrates Act allows assignment of trials to magistrates without voluntary consent or waives the obligation to review magistrates' findings. The multiple violations constitute extraordinary circumstances.

III. The Response Does Not Rebut That Once Magistrate Dolinger Retired, The Article III Court Should Have Conducted the Trial.

Even if the district court had not acted unwisely in requiring the initial consent, the "reassignment" to

³ See Petitioners' Br. (docketed by 2nd Cir. January 13, 2017), p. 2.

Magistrate Netburn was improper. *Mendes Junior Int'l Co. v. M/V Sokai Maru*, 978 F.2d 920, 924 (5th Cir.1992); *Hatcher v. Consol. City of Indianapolis*, 323 F.3d 513, 517 (7th Cir.2003). Where a party consents to a specific magistrate, the subsequent unavailability of that magistrate voids the initial consent. *Id.* The parties must consent again before a second magistrate can preside. Respondent made it clear it did not consent to a magistrate without a substantial trial skill level. Reply App.9. Thus, the Court is presented squarely with whether 28 U.S.C. § 636 permits reassignment, with or without objection, from a magistrate with substantial trial experience to a magistrate with little or no trial experience.

IV. The Response Does Not Challenge That it Was Unconstitutional for the Article III Court Not to Review the Magistrate's Rulings.

Under the residual authority provisions, the Article III court should have considered and ruled on the magistrate's orders. *See*, 28 U.S.C. § 636(c)(6); Rule 73(b). If the district court had considered the motion to vacate, as it was required to do, perhaps it could have assessed the unique trial issues involved and, with knowledge of Magistrate Netburn's inexperience, kept the case with an experienced Article III judge.

V. The Other Vehicle Problem Asserted by Respondent—That the Magistrate’s Errors Involve Unreviewable State Law—is Meritless.

Respondent’s second attempt to manufacture vehicle problems relies on mischaracterizations, misstatements of facts, and arguments contrary to the record. An exhaustive discussion of each erroneous assertion would consume more space than Petitioners are allowed. Nevertheless, the issue that was hotly contested at trial was not whether the suggested sales and marketing strategies would generate sales but whether respondent was required to exercise reasonable efforts to perform these proven strategies. After hearing substantial evidence from seven industry witnesses, the jury answered yes to this question. No witness testified that these strategies, if implemented, would not have been successful. And Magistrate Netburn had no independent knowledge of the compression-wear market with which to ignore the industry witnesses’ testimony. Magistrate Netburn’s repudiation of the *Daubert* process and running afoul of legal precedent is not only wrong but underscores that this case raises significant issues of judicial inexperience and overreach.

A. The Rulings Demonstrate a basic unfamiliarity with *Daubert* Principles

The purpose of any *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) inquiry is to determine whether that expert, “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant

field.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

Long before trial, respondent filed a motion to exclude SP’s damages expert, Scott Barnes. In response, SP submitted (i) Barnes’s seventy-page initial expert opinion; (ii) Barnes’s thirty-eight page affidavit of opinions; (iii) Barnes’s fourteen-page curriculum vitae; (iv) a list of fifty-eight items considered in forming opinions, including depositions, documents, financial data, and independent research; (v) Barnes’s seventy-seven page supplemental expert opinion; (vi) excerpts from the deposition of Kellwood’s expert; (vii) samples of SP’s products; (viii) excerpts from the depositions of MTV’s representative and Kellwood’s representatives; and (ix) email communications between the parties. Magistrate Dolinger had months to evaluate the testimony and methodology. Magistrate Dolinger permitted early-Under Armour (“UA”) to be used as a Yardstick for Kellwood/SP noting, “[t]he selection of comparators will seldom approach the ‘Utopian ideal’ of identifying the perfect clone.” *Washington v. Kellwood Co.*, 105 F. Supp. 3d 293, 316 (S.D.N.Y. 2015).

However, despite Magistrate Dolinger’s extensive vetting, Magistrate Netburn, in the heat of a fast-paced trial, excluded testimony, reversed the damages verdict, and excluded Barnes altogether. The decision to ignore the *Daubert* ruling and exclude Barnes was manifestly erroneous and should be vacated as a violation of rule favoring the admissibility of expert opinions and depending upon “[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof” to test

“shaky but admissible evidence.” *Daubert*, 509 U.S. at 596.

B. Respondent’s Attempt to Apply, and Limit This Case to, a New Business Rule is Meritless

Respondent refers to new businesses (Opp. at 21) and used this misguided argument to apply a higher level of scrutiny to damages proof. But Magistrate Dolinger recognized that not even respondent considered Kellwood/SP a new business:

Indeed, at his deposition, Mr. Peterson was asked whether Sunday Players “was a new venture for Performance Apparel,” to which he answered that “I don’t know that I would call it a new venture. It was a new opportunity.”

Washington v. Kellwood Co., 2015 WL 6437456, at *23 (S.D.N.Y. Oct. 14, 2015). Compression apparel was not a new product and Kellwood was not new to compression apparel, having manufactured for large retailers. Kellwood’s then-existing involvement with compression was an important reason for Petitioners to enter the Agreement. Kellwood also was not new to manufacturing or distribution—being one of the world’s largest apparel manufacturers and distributors, and a significant supplier to retailers. Kellwood was not new to licensing—it is a huge part of Kellwood’s success. And MTV, who would have provided nationwide advertising had Kellwood not refused to enter into the MTV agreement, was not new to branding or marketing. Thus, the Kellwood/SP alliance could not be considered a “new business” under any stretch.

**C. The Decisions to Ignore State and
Federal Precedent Makes This Case
Exceptional and Worthy of Review.**

Even under application of state laws, this case is reviewable due to the exceptional acts of the magistrate to (i) vacate the jury verdict; (ii) preclude testimony from an expert thoroughly vetted by the experienced Magistrate during *Daubert* proceedings; (iii) grant, then vacate the ruling on, the motion for new trial; (iv) preclude Petitioners from utilizing experts in a new trial and (v) preclude all testimony from business owners as to damages and projections.

Without review of the magistrate's utter refusal to apply the clearly established legal precedent discussed in the Petition (Pet. at 33-36) it is likely courts in the Second Circuit will not apply the previous precedent in future cases. Thus, even as to state laws, this Court should decide the damages issue on the merits since its views will be useful to each court of appeals.

CONCLUSION

Petitioners pray that the Court grant this petition.

Respectfully submitted,

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APPENDIX A

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**05 Civ. 10034 (SN)
Honorable Sarah Netburn
United States Magistrate Judge**

[Filed November 11, 2015]

DARYL K. WASHINGTON and)	)
SUNDAY PLAYERS, INC.,)	)
Plaintiffs,)	)
)	)
-against-)	)
)	)
KELLWOOD COMPANY,)	)
Defendant.)	)
)	)

**MEMORANDUM OF LAW OF DEFENDANT
KELLWOOD COMPANY IN SUPPORT OF ITS
MOTION TO VACATE NOTICE OF
REASSIGNMENT**

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PRELIMINARY STATEMENT

In September of 2014, Judge Batts's courtroom deputy contacted Defendant Kellwood Company ("Kellwood") to see if Kellwood would consent to a referral of the case to a magistrate judge. During this conversation, Kellwood was advised that, if the consent were given, the case would be referred to Magistrate Judge Dolinger, and that a consent to Judge Dolinger would avoid further delay in the determination of Kellwood's and plaintiffs' respective *Daubert* motions, which had been pending for more than three years. As Kellwood understood that it was consenting specifically to Judge Dolinger, it executed the consent.

A party's consent to a particular magistrate judge provides jurisdiction to that particular magistrate only, and does not provide a broad consent to any magistrate judge. In light of Kellwood's intent to specifically consent to Judge Dolinger, the October 14, 2015 Notice of Reassignment should be vacated.

**PROCEDURAL HISTORY AND
STATEMENT OF FACTS**

This case was assigned to Judge Batts and Magistrate Judge Dolinger when the Complaint was initially filed on November 29, 2005. (*See* Dkt. Entries, dated November 29, 2005; Declaration of Kenneth Schachter, dated November 11, 2015 ("*Schachter Decl.*"), ¶ 3.) Kellwood moved to dismiss certain counts of the First Amended Complaint in February 2006, and in March 2009, Judge Batts granted the motion while permitting plaintiffs leave to replead. (*Schachter Decl.*, ¶ 3; Dkt. Nos. 9 & 23.)

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Judge Batts entered the initial Scheduling Order in this matter on October 30, 2009, and subsequently presided over discovery until it closed on January 31, 2011. (*Schachter Decl.* ¶ 4; Dkt. Nos. 30 & 35.) The parties submitted letters to Judge Batts detailing their proposed summary judgment and *Daubert* motions, and Judge Batts set a motion schedule on the *Daubert* motions on April 21, 2011. (*Schachter Decl.* ¶ 4; Dkt. No. 36.) Consistent with Judge Batts's instructions, both parties filed their *Daubert* motions on May 20, 2011, and briefing was complete by June 24, 2011. (Dkt. Nos. 38, 41, 46 & 48.)

Over three years later, Judge Batts's courtroom deputy contacted Ken Schachter, counsel for Kellwood, in September of 2014. (*Schachter Decl.*, ¶ 5.) Judge Batts's courtroom deputy asked Schachter whether the parties would be willing to consent to have the case referred to a magistrate judge. (*Id.*) During this conversation, Schachter specifically asked the courtroom deputy who would be assigned as the magistrate judge, and he indicated that this case would be referred to Magistrate Judge Dolinger, as Judge Dolinger had already been assigned to the case. (*Id.*) Schachter also understood from this conversation that, if Kellwood did not execute the consent, further delay on the pending *Daubert* motions would result. (*Id.*)

Given Judge Batts's knowledge and familiarity with the case, Kellwood was very hesitant to consent to Judge Dolinger. (*Id.*, ¶ 6.) Accordingly, Kellwood conducted extensive research into Judge Dolinger's background and decisions, and ultimately felt comfortable with Judge Dolinger given his approximately thirty years of experience as a

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magistrate judge. (*Id.*) While Kellwood still preferred to stay with Judge Batts, it ultimately consented to Judge Dolinger in order to avoid further delay in obtaining a decision on the *Daubert* motions, which had been pending more than three years. (*Id.*)

Based on Schachter's conversation with Judge Batts's courtroom deputy, he understood that Kellwood was consenting to have the case heard by Judge Dolinger (who was already assigned to the case), and not providing a general consent to any magistrate judge. (*Id.*, ¶ 7.) The form that the parties executed to consent to Judge Dolinger listed his initials as part of the docket number. (Dkt. No. 53.) The Order of Reference to a Magistrate Judge likewise notes that the case "is referred to the designated Magistrate Judge," and lists Judge Dolinger's initials as part of the docket number. (Dkt. 54.) The presence of such initials on the consent and Order of Reference were further indicators to Kellwood that the consent was specific to Judge Dolinger. (*Schachter Decl.* ¶ 7.) When Schachter executed the consent form, he did not note that the form was more general in its referral language than his own intent and that of Kellwood, as he assumed that this was simply the standard form used for referrals. (*Id.*)

This case was reassigned to Judge Netburn on October 14, 2015. (*See* Dkt. Entries, dated October 14, 2015.) By order dated October 22, 2015, a status conference was scheduled for October 28, 2015, and during that conference, Schachter informed the Court that Kellwood intended to make the present motion. (Dkt. 93; *Schachter Decl.* ¶ 8.) No other proceedings

have taken place before Judge Netburn. (*Schachter Decl.* ¶ 8.)

ARGUMENT

**THE NOTICE OF REASSIGNMENT
SHOULD BE VACATED IN LIGHT OF
KELLWOOD'S SPECIFIC CONSENT TO
MAGISTRATE JUDGE DOLINGER**

Where parties consent to a referral to a particular magistrate judge, a case may not subsequently be transferred to a different magistrate judge. *See, e.g., Kalan v. City of St. Francis*, 274 F.3d 1150 (7th Cir. 2001) (finding that a magistrate judge lacked authority to rule over case where the parties had consented to a different, specific magistrate judge); *Mendes Junior Int'l Co. v. M/V Sokai Maru*, 978 F.2d 920, 924 (5th Cir. 1992) (“We hold that because there is no section 636(c)(1) order referring the case to (or otherwise specifically designating) Magistrate Judge Stacy, and the only written consent and the only order of reference (or special designation) are expressly for Magistrate Judge Karen Brown, Magistrate Judge Stacy lacked all authority to enter judgment in this case.”); *Paddington Partners, Inc. v. Bouchard*, 950 F. Supp. 87, 90 (S.D.N.Y. 1996) (finding good cause to vacate order of reference under Fed. R. Civ. P. 73(b) and 28 U.S.C. § 636 (c)(6) where reference to a magistrate judge was specific to a particular magistrate).

Two recent district court cases from this Circuit affirm this principle. In *Sell v. Conway*, the consent form signed by the parties did not name a specific magistrate judge, but the consent form was accompanied by a letter noting that, if the parties

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consented, the case would be assigned to Magistrate Judge Payson. No. 10-CV-6182, 2011 U.S. Dist. LEXIS 127846, at *4 (W.D.N.Y. Nov. 4, 2011). Further, the defendant's counsel "affirmed that he understood from the letter that [Judge Payson] would acquire responsibility for disposition of the case," and the defendant "timely objected to the transfer and did not implicitly consent to disposition by another magistrate judge." *Id.* Notwithstanding the fact that the consent did not name a specific judge, the Court found that the consent was specific to Judge Payson, and vacated an order transferring the case to another judge. *Id.* Likewise, in *Williams v. Conway*, the parties "consented to the jurisdiction of a magistrate judge after being informed that the matter had been assigned to" Judge Schroeder, and "timely object[ed] to the transfer of this matter to another magistrate judge." No. 07-CV-756(Sr), 2011 U.S. Dist. LEXIS 94786, at *4 (W.D.N.Y. Aug. 24, 2011). In light of these facts, the Court could not "infer consent" to the transfer, and ordered that the matter remain with the original magistrate judge. *Id.*

Here, Kellwood consented specifically to Magistrate Judge Dolinger. When Judge Batts's courtroom deputy contacted Kellwood about the consent, he advised Ken Schachter, counsel for Kellwood, that if Kellwood consented to the referral, the case would be reassigned to Magistrate Judge Dolinger. (*Schachter Decl.* ¶ 5.) The Order of Reference likewise notes that the case "is referred to the designated Magistrate Judge," and lists Judge Dolinger's initials as part of the docket number, as does the consent form. (Dkt. Nos. 53 & 54.) Based on these circumstances, Kellwood's understanding was that the consent was specific to Judge Dolinger, and

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not to any magistrate judge. (*Schachter Decl.* ¶ 7.) Although the form was more general in its referral language than Kellwood intended, Kellwood simply assumed that this was the boilerplate form used for referrals. (*Id.*)

The reassignment to Judge Dolinger specifically was a driving force in Kellwood's decision to execute the consent. Kellwood conducted research into Judge Dolinger and his decisions, and ultimately determined that it would be comfortable with Judge Dolinger in light of his three decades of experience as a judge. (*Id.*, ¶ 6.) Kellwood further understood that, if the consent were not executed, it could face even further delay in obtaining a decision on the *Daubert* motions, which had been pending for over three years at that time. (*Id.*) Thus, while Kellwood preferred to stay with Judge Batts, it ultimately executed the consent.¹ (*Id.*)

Because the consent was specific to Judge Dolinger, jurisdiction before a magistrate judge other than Judge Dolinger is not proper. As Kellwood understands that Judge Dolinger is retiring soon, the case should ultimately be transferred back to a district court judge, preferably back to Judge Batts. Having ruled on the motion to dismiss and presided over discovery, Judge Batts is already familiar with the case, and is therefore

¹ Kellwood is promptly raising its objection to the reassignment prior to any proceedings before Judge Netburn. (*Schachter Decl.* ¶ 8.) Accordingly, there can be no argument that Kellwood has implicitly consented to continuing exercise of jurisdiction by a magistrate judge. *See Astra USA, Inc. v. Bildman*, No. 09-2994-cv, 375 Fed. App'x 129, 132 (2d Cir. Apr. 30, 2010).

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in the best position of any district judge to preside over the upcoming trial.

CONCLUSION

For the foregoing reasons, Kellwood respectfully requests an order vacating the notice of reassignment.

Dated: New York, New York
November 11, 2015

Respectfully submitted,

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APPENDIX B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**05 Civ. 10034 (SN)
Honorable Sarah Netburn
United States Magistrate Judge**

[Filed November 11, 2015]

DARYL K. WASHINGTON and)	)
SUNDAY PLAYERS, INC.,)	)
Plaintiffs,)	)
)	)
-against-)	)
)	)
KELLWOOD COMPANY,)	)
Defendant.)	)
)	)

**DECLARATION OF KENNETH SCHACHTER
IN SUPPORT OF DEFENDANT'S MOTION TO
VACATE NOTICE OF REASSIGNMENT**

KENNETH SCHACHTER, being of full age,
declares and states:

1. I am a member of the firm Sills Cummis & Gross P.C., attorneys for defendant Kellwood Company ("Kellwood"). I submit this declaration in support of Kellwood's motion to vacate the notice of reassignment. Unless otherwise stated, I have personal knowledge of the facts in this declaration.

2. I personally became involved in this action in approximately May of 2007. At that time, Kellwood was represented by Silverberg Stonehill Goldsmith & Haber, P.C. (“Silverberg”), which subsequently merged into Sills Cummis & Gross P.C. Silverberg had represented Kellwood since the inception of this action.

3. Based on my reading of the docket, Judge Batts and Magistrate Judge Dolinger have been assigned to this case since the filing of the Complaint in November 2005. At the time I became involved with this matter, Kellwood’s motion to dismiss certain counts of the First Amended Complaint had been pending since February 2006, and in March 2009, Judge Batts subsequently granted the motion while permitting plaintiffs leave to replead limited claims.

4. Judge Batts entered the initial Scheduling Order in this matter on October 30, 2009, and subsequently presided over discovery until it closed on January 31, 2011. The parties submitted letters to Judge Batts detailing their proposed summary judgment and *Daubert* motions, and Judge Batts set a motion schedule on the *Daubert* motions on April 21, 2011. Consistent with Judge Batts’s instructions, both parties filed their *Daubert* motions on May 20, 2011, and briefing was complete by June 24, 2011.

5. In September 2014, I received a call from Judge Batts’s courtroom deputy. Judge Batts’s courtroom deputy asked whether the parties would be willing to consent to have the case referred to a magistrate judge. During this conversation, I specifically asked the courtroom deputy who would be assigned as the magistrate judge, and he indicated that this case would be referred to Magistrate Judge Dolinger because

Judge Dolinger was already assigned to the case. I also understood from this conversation that, if Kellwood did not execute the consent, further delay on the pending *Daubert* motions would result.

6. Given Judge Batts's knowledge and familiarity with the case, Kellwood was very hesitant to consent to Judge Dolinger. Accordingly, we undertook extensive research into Judge Dolinger's background and decisions, and ultimately felt comfortable with Judge Dolinger given his approximately thirty years of experience as a magistrate judge. While Kellwood still preferred to stay with Judge Batts, it ultimately consented to Judge Dolinger in order to avoid further delay in obtaining a decision on the *Daubert* motions, which had been pending more three years at that time.

7. Based on my conversation with Judge Batts's courtroom deputy, I understood that Kellwood was consenting to have the case heard by Judge Dolinger (who was already assigned to the case), and not providing a general consent to any magistrate judge. I also understood that the consent was specific to Judge Dolinger because both the consent and the order of reference contained Judge Dolinger's initials as part of the docket number. When I executed the consent form, I did not note that the form was more general in its referral language than our own intent and that of Kellwood, as I assumed that this was simply the standard form used for referrals.

8. I understand that Judge Dolinger will be retiring soon, and accordingly, the case was reassigned to Judge Netburn on October 14, 2015. By Order dated October 22, 2015, a status conference was scheduled for October 28, 2015, and during that conference, I

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informed the Court that Kellwood intended to make the present motion. No other proceedings have taken place before Judge Netburn.

9. I advised counsel for plaintiffs that I intended to file the present motion prior to the October 29, 2015 status conference. During this conference, counsel for plaintiffs indicated that they would oppose the relief requested herein.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: November 11, 2015
New York, New York

s/ Kenneth Schachter
KENNETH SCHACHTER