UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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

LEAD PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR A FINDING OF CONTEMPT AND APPROPRIATE SANCTIONS

Lead plaintiffs oppose Defendants' Motion for a Finding of Contempt and for Appropriate Sanctions. The gravamen of defendants' position is that plaintiffs' counsel[1] has violated the Protective Order because they provided an allegedly privileged document to their industry expert, Cathy Ghiglieri. To prevail on this motion, defendants must show via clear and convincing evidence that by this conduct, plaintiffs' counsel violated a specific unequivocal command of the Court. However, there was no specific unequivocal command from the Court directing the return of this document. Up until this motion, defendants never even asked this Court to order the return of this document. Meanwhile, commencing in December of 2006 until the present, plaintiffs used this document in prior depositions without objection by defendants. Defendants misrepresent the Court's prior orders and omit any mention of prior use of the document. The Court should deny defendants' motion.[2] If the Court is not so inclined, lead plaintiffs renew their request for an evidentiary hearing.

I. DEFENDANTS MISREPRESENT THE BASIC FACTS OF THIS DISPUTE

Defendants materially misrepresent this Court's prior orders as somehow directing plaintiffs to return this document. They omit any reference to the use of this document in depositions and by the parties' experts.

A. Defendants Mischaracterize the Court's December 6, 2006 and February 27, 2007 Orders

Principal among defendants' misrepresentations are those pertaining to this Court's prior orders. Although defendants raised with plaintiffs the issue of inadvertent production of this document in July of 2006, they have never requested that the Court order its return. To the contrary, the motions filed with the Court respecting the Ernst & Young LLP ("E&Y") engagement were

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[1] Memorandum of Law in Support of Defendants' Motion for a Finding of Contempt and for Appropriate Sanctions ("Defs' Mot.") at 8 & 9. Defendants' attack on plaintiffs' counsel is entirely inappropriate and intended only to exacerbate tensions between counsel.

[2] As discussed in lead plaintiffs' motion to strike, defendants' motion for contempt is also defective due to failure to comply with the applicable local rule, L.R. 37.1. That rule requires submission of an affidavit supporting the motion "shall set out with particularity the misconduct complained of . . . ." *Id.* Defendants filed a declaration from Janet Beer, one of their lawyers, who does not recount any facts in her declaration or state that she could be a competent witness. *See* Declaration of Janet A. Beer in Support of Defendants' Motion ("Beer Decl."). Dkt. No. 1200-2. Ms. Beer's declaration also fails to comply with this Court's requirements of a declaration establishing that the meet and confer process is complete. *Id.* During the March 13, 2008 conference call with the Court, defense counsel indicated that they would file a supplemental declaration to cure these defects. They have not done so and should be barred from doing so later.

made by plaintiffs. Plaintiffs' motions did not address previously produced documents, such as this one, but requested the Court to compel defendants to produce ***additional*** documents. To create the mirage that somehow the Court's prior orders addressed the return of this document, defendants mischaracterize the Court's prior orders and rely upon the inadvertent inclusion of this document in plaintiffs' February 22, 2007 motion seeking the production of 187 ***withheld*** documents.

Defendants assert that the Court's December 6, 2006 Order "required Defendants to produce certain documents dated during the Class Period." Defs' Mot. at 3. However, the December 6, 2006 Order does not limit defendants' production to Class Period documents. That issue did not arise until later. This is reflected in the Court's February 27, 2007 Order, which notes that the Court was unaware of the post-Class Period issue when it issued the December 6, 2006 Order. Dkt. No. 999 at 1. Further, although this document was an exhibit filed by plaintiffs with respect to the December 6, 2006 Order,[3] the Court did not direct the return of this or any other document.

The Court's February 27, 2007 Order also does not direct the return of HHS-E 0001208 or any other document. Although defendants falsely argue that plaintiffs' February 22, 2007 motion sought to "compel production of additional withheld and recalled documents relating to the E&Y engagements," Defs' Mot. at 4, plaintiffs' February 22, 2007 motion is expressly and explicitly limited to compelling the production of documents "withheld" by defendants following Judge Guzman's February 1, 2007 affirmance of the December 6, 2006 Order. Nowhere does the motion address "recalled" documents or address whether plaintiffs can retain them. Dkt. No. 974. Plaintiffs did not raise the issue of whether previously produced documents, such as HHS-E 0001208, should be returned with the Court and the Court did not address that issue in the February 27, 2007 Order. That Order addresses only "withheld" documents and not "recalled" documents. February 27, 2007 Order at 1 (discussing 187 withheld documents). Defendants did not request the return of HHS-E 0001208 following that Order.

Defendants' only basis for asserting that the February 27, 2007 Order addressed this document is the inadvertent inclusion of HHS-E 0001208 on the list of "withheld" documents submitted by plaintiffs to support their motion. *See* Beer Decl., Ex. 4 at Ex. B (correspondence

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[3] HHS-E 0001208 was submitted by plaintiffs on October 16, 2006 as Exhibit N to the Declaration of D. Cameron Baker ("Baker Decl."). Dkt. No. 709. Defendants have not requested its removal from the Court's files.

attached to plaintiffs' motion listing documents ***withheld*** from production). As defendants are well aware, that inclusion is an error since HHS-E 0001208 was produced earlier in the litigation and was not "withheld." Plaintiffs pointed this out to defendants during the meet and confer, *see* February 28, 2008 letter from C. Baker, Ex. 9 to the Beer Decl., and it is deceptive for defendants to ignore this fact and to fail to apprise the Court of it.

B. Defendants Fail to Inform the Court of the Parties' Use of This Document in This Litigation

Defendants do not mention that this document had been used previously in this litigation. It is an exhibit in the Court's files as Exhibit N to the Declaration of D. Cameron Baker in support of plaintiffs' initial motion on the E&Y issues. It was twice a deposition exhibit: once on December 7, 2006 at the deposition of Kenneth Robin (Exhibit 59)[4] and later at the March 7-8, 2007 deposition of Robin Allcock (Exhibit 141). Defendants did not prevent witnesses from responding to questions at either deposition. Significantly, the Robin Allcock deposition occurred on March 7-8, 2007 after the February 27, 2007 Order. Here is the relevant colloquy from that deposition:

MR. BAKER: Let's mark this as Exhibit 141 [Document No. HHS-E 0001208.0001 -- .0050].

* * *

MS. BEST: Can you represent what disk it came from?

MR. BAKER: Not right now. It's previously been used as an exhibit in Mr. Robin's deposition. But I reprinted it, just because it didn't copy good.

Q. And the question I'm asking you, Ms. Allcock, is: Do you recall ever reviewing this document previously?

A. No.

Q. The top of this first page references a refund team; do you see that?

MS. BEST: Object to the form of the question, but ***you can answer***.

A. Yes, I see that.

* * *

Q. Was there any team that was separately tasked with determining the amount of refunds?

MS. BEST: Object to the form of the question. ***You can answer***.

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[4] Declaration of Jason C. Davis in Support of Lead Plaintiffs' Opposition to Defendants' Motion for a Finding of Contempt and for Appropriate Sanctions ("Davis Decl., Ex. __"), Exhibit A. The Declaration of Jason C. Davis is filed herewith.

Allcock Depo Tr. at 399:16-401:14 (Davis Decl., Ex. B) (emphases added). There was no assertion of privilege.

Subsequently, plaintiffs' industry expert, Catherine Ghiglieri, reviewed and relied upon the Kenneth Robin and Robin Allcock depositions and the exhibits to those depositions, which included this document. Ghiglieri Depo Tr. at 11:23-12:7 (Davis Decl., Ex. C) (Ms. Ghiglieri had access to all depositions and exhibits and chose what to rely on). These depositions and exhibits are referenced in the documents she relied on. *See* Appendix C to the Expert Witness Report of Catherine A. Ghiglieri (Davis Decl., Ex. D). Further, this document is specifically cited in her August 15, 2007 expert report at page 128.

Between August 15, 2007 and now, defendants have raised many issues with the Court respecting plaintiffs' expert reports but none respecting Ms. Ghiglieri's use of this document. In fact, defendants said nothing about any improper use of this document despite getting extensions to respond to Ms. Ghiglieri's report and submitting in response to Ms. Ghiglieri's report two separate rebuttal reports by three proffered experts, surely vetted by numerous attorneys. It was not until Ms. Ghiglieri's February 13, 2008 deposition – ***six months*** after the August 15, 2007 report and over ***14 months*** after the document was marked at Kenneth Robin's deposition – that defendants decided it better served their interests to raise unsubstantiated (and yet still serious) allegations of contempt.

Remarkably, defendants' own expert, Robert E. Litan, relies upon the March 8, 2007 deposition of Ms. Allcock and presumably the exhibits to that deposition although that reference is not explicitly stated. *See* Appendix 4 to the Report of Robert E. Litan (Davis Decl., Ex. E). Again, defendants do not mention this salient fact in their papers.

The extensive use of this document in this litigation fatally undercuts defendants' argument that the Court ordered its return previously and demonstrates that both plaintiffs and defendants understood that this document could be used in depositions.

C. Defendants Even Misrepresent the Document at Issue

In addition to the foregoing, defendants fail to accurately describe HHS-E 0001208. To avoid an outright lie, defendants resort to quoting their own privilege log, which describes the document as a "'[r]efund forecast performed by E&Y at the request of Household counsel.'" Defs' Mot. at 2 (quoting Defendants' October 25, 2006 Thirteenth Privilege Log (Davis Decl., Ex. F)) . However, in their opposition to the initial October 16, 2006 motion, defendants conceded that this

document reflects work performed by Household International, Inc. ("Household") employees and not just E&Y.[5] Defendants do not assert a privilege as to the Household portions of this document. Needless to say, the Court has not addressed whether this document as a mixture of internal and E&Y refund estimates exchanged between two non-attorneys[6] is privileged or not under the attorney-client privilege or whether defendants may recall this document as inadvertently privileged given the specific context of its usage and history.[7]

D. Defendants Falsely Suggest that the Meet and Confer Was Completed on February 22, 2008

Defendants in a footnote state that the meet and confer process ended on February 22, 2008 when the parties held a telephonic meet and confer to discuss issues relating to the plaintiffs' subpoenas on defendants' experts. However, that meet and confer occurred prior to plaintiffs' consideration of defendants' February 21, 2008 letter, which was sent late that night. After the meet and confer, plaintiffs notified defendants that they would respond to this letter by mid-week the following week. Defendants knew that the meet and confer had not been concluded. On February 28, 2008, plaintiffs' counsel provided that letter. Defendants made no response to this letter nor did they request a telephonic meet and confer to address the issues raised in the February 21 and February 28, 2008 letters. On March 10, 2008, they filed this motion. No doubt defendants sought to avoid the meet and confer in order to avoid explaining why they did not believe the document at issue was privileged: (i) on December 7, 2006, when it was marked at the deposition of Kenneth

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[5] The Household Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel the Production of Documents Pertaining to Household Consultations with Ernest & Young LLP at 7 n.7.

[6] Defendants' privilege log indicates that this document was exchanged between two Household employees, Stephen Hicks and Terri Johnson, neither of whom is an attorney. *See* Davis Decl., Ex. F. This takes this document outside the scope of the Court's February 27, 2007 Order, which states "***any communications between E&Y and Household*** dated after that time [August 2002] are not subject to the *Garner* exception and remain privileged." February 27, 2007 Order at 2. This is a further complication to defendants' arguments. Significantly, defendants failed to provide this Court with the relevant privilege log entry.

[7] In their motion, defendants assert that this document is covered by the attorney work product doctrine. Defs' Mot. at 2. However, the Court in the February 27, 2007 Order found that plaintiffs had good cause to obtain post-Class Period communications between E&Y and Household such that the attorney work product doctrine does not protect this document from production. February 27, 2007 Order at 2.

Robin (who, as General Counsel of Household during the Class Period, was in as good a position as anyone to recognize his own "privileged" materials); (ii) on March 7, 2007, when the document was marked at Robin Allcock's deposition (which continued on March 8, 2007); and (iii) on August 15, 2007, when Ms. Ghiglieri's expert report was served and specifically referenced these two depositions ***and*** document HHS-E 0001208. They still have provided no explanation why they waited until Ms. Ghiglieri's deposition on February 13, 2008 to suggest the document should not have been used. The history of the document – hidden from the Court by defendants – exposes defendants' motion as a bad faith contrivance to make yet another *ad hominem* attack on plaintiffs' counsel.

II. LEGAL ARGUMENTS

The foregoing factual background establishes that defendants cannot prevail on this motion. First, they cannot satisfy the Seventh Circuit contempt standard, which requires an unequivocal command by the Court that this document be returned. Second, defendants' own conduct demonstrates that plaintiffs properly used this document at depositions and that Ms. Ghiglieri properly reviewed and considered this document. Third, to the extent that this motion is really a belated motion to recall this document, the motion is untimely given that this document is now part of the record in this case.

A. Defendants Cannot Satisfy the Standard for Contempt

The Seventh Circuit standard regarding civil contempt is very clear. "To hold a party or witness in civil contempt, 'the district court must be able to point to a decree from the court which "sets forth in specific detail an unequivocal command" which the party [or witness] in contempt violated.'" *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 738 (7th Cir. 1999) (alteration in original) (quoting *Ferrell v. Pierce*, 785 F.2d 1372, 1378 (7th Cir. 1986)); *see also United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 237 (1975) (a party can only be held in contempt for behavior clearly prohibited by a court order "'within its four corners'"); *Stotler and Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989). The moving party must do so via clear and convincing evidence. *Id.* Here, defendants must establish that under the terms of a specific Court order, lead plaintiffs were obligated to return or destroy the document at issue at the time they provided the Robin Allcock and Kenneth Robin depositions to Ms. Ghiglieri.

However, there is no language from any Court order directing return of this document. Defendants never even filed a motion with the Court seeking such an order. To the contrary, the

only orders from the Court regarding E&Y documents were based on plaintiffs' motions to compel the further production of previously withheld documents.

Defendants try to support their position by mischaracterizing the February 27, 2007 Order. However, as discussed above, that Order did not address "recalled" documents and did not evaluate any request by defendants for return of this document in the context of its prior use, including at the deposition of Kenneth Robin. Defendants' claim that this Order mandated the return of this document is belied by their own conduct. After this Order, defendants did not demand the return of this document. *See supra* pp. 3-4 (§I.B). Further, both parties used this document after this Order. *Id.* The extensive time delay between use of the document at two depositions and this motion strongly supports the conclusion that ***not even defendants*** thought this document must be returned.

In sum, there is no clear, unequivocal order from this Court that requires the return of this document. Defendants' motion should be denied on this reason alone.

B. The Parties' Conduct, Including the Use of This Document at Depositions and with Their Experts, Demonstrates that Plaintiffs' Continued Use Was Proper

As noted above, this document has been used extensively in this case both by plaintiffs and defendants. Plaintiffs used this document as a Court exhibit and as a deposition exhibit at Mr. Robin's deposition and Ms. Allcock's deposition. Plaintiffs provided these depositions and the related exhibits to their expert, Ms. Ghiglieri. Ghiglieri Depo Tr. at 11:23-12:7 (Davis Decl., Ex. B). Defendants likewise provided the Robin Allcock deposition to their expert, Mr. Litan. Given these uses, which defendants do not mention to this Court, defendants have no basis to assert that provision of this document to Ms. Ghiglieri violates the Protective Order. Defs' Mot. at 5, 8.

Moreover, plaintiffs' use of the document at the March 8, 2007 deposition of Robin Allcock suffices to demonstrate defendants' bad faith in bringing this motion. At that deposition, defendants made no objection to the use of this document – absolutely none – even though this deposition took place after the February 27, 2007 Order that putatively required return of this document. Significantly, Ms. Allcock was represented at the deposition by Ms. Landis Best, who argued the E&Y motions and is fully familiar with the Court's rulings on those issues. Further, Ms. Best was accompanied at that deposition by two associates, including Kim Smith, who was the author of the July 2006 letter that purported to "recall" the document at issue.

To date, defendants have not objected in any fashion to the use of this document at Ms. Allcock's deposition. No issue was raised during the time defendants were permitted to review the deposition under the Protective Order. No issue was raised during the time Ms. Allcock reviewed

the document pursuant to Fed. R. Civ. P. 30(e). Defendants do not even raise an issue now. In sum, the use of this document at Ms. Allcock's deposition was proper and without objection (even now). Thus, plaintiffs had every reason to believe based on defendants' conduct at that Ms. Ghiglieri could rely on HHS-E 0001208 to support her opinions.

The same point holds true with respect to Mr. Robin's deposition. Defendants do not and cannot contend that use of this document at that deposition was "improper" such that Ms. Ghiglieri was not entitled to consider this document as an exhibit to that deposition. Again, based on the state of the record, plaintiffs had every reason to believe that Ms. Ghiglieri could consider and rely upon HHS-E 0001208 as an exhibit at that deposition.

Separate and apart from these points is defendants' own use of this document. As noted above, defendants' expert, Mr. Litan, expressly relied upon the March 8, 2007 deposition of Ms. Allcock. Davis Decl., Ex. D. Presumably, this means that Mr. Litan also considered and relied upon the exhibits to that deposition. Defendants cannot provide Ms. Allcock's deposition to Mr. Litan, have him rely upon it, and then assert plaintiffs' own expert cannot do the same. *See Steppe v. Cleverdon*, No. 06-144-JMH, 2007 WL 3354817 (E.D. Ky. Nov. 9, 2007) (relying on the "majority rule" articulated by the Sixth Circuit that all information disclosed to testifying experts is discoverable, whether or not the material was disclosed inadvertently, and whether or not the expert actually considered the documents in forming his opinion); *see also Reg'l Airport Auth. v. LFG, LLC*, 460 F.3d 697, 716-17 (6th Cir. 2006) ("we read Rule 26(a)(2) as requiring disclosure of ***all*** information provided to testifying experts. . . . The bright-line approach is the majority rule.") (emphasis in original). Courts in this circuit concur that information "considered" by defendants' expert "trump[] any assertion of work product or privilege." *Bitler Inv. Venture II, LLC v. Marathon Ashland Petroleum LLC*, No. 1-04-CV-477, 2007 U.S. Dist. LEXIS 9231 (N.D. Ind. Feb. 7, 2007) (citations and quotations omitted).

The foregoing establishes that plaintiffs' conduct (and by implication, plaintiffs' counsel's conduct) was reasonable. Simply put, neither party understood the February 27, 2007 Order to apply to this document. Defendants certainly would not have permitted its use at Ms. Allcock's deposition if they had believed then that the document was embargoed. Defendants would not have provided this document to Mr. Litan for his review and reliance if they felt the document was embargoed. And defendants would have demanded its return earlier if they truly believed it within the scope of the February 27, 2007 Order. Defendants' current position is utterly at odds with their prior conduct.

C. Defendants Cannot Seek Return of This Document Now

As discussed above, there are fatal flaws with defendants' contempt arguments. Illustrative of the fact that there is no prior Court order on point is defendants' request that return of the document be one of the remedies. Defs' Mot. at 9. To the extent that this contempt motion represents a belated motion for recall of this document,[8] the motion should be denied as untimely and prejudicial to plaintiffs given their prior use of the document without objection from defendants.

One of the factors that Courts look at with respect to inadvertent productions is fairness.[9] In most cases, the issue of fairness favors the producing party because the obtaining party has no justifiable reason for using or relying upon the documents at issue. That is not the case here. Plaintiffs properly used the document at Mr. Robin's deposition and at Ms. Allcock's deposition. Plaintiffs properly provided these depositions and their exhibits to Ms. Ghiglieri, who in turn relied upon the document. Defendants must have known that plaintiffs would provide these depositions and their exhibits to Ms. Ghiglieri. This was confirmed when Ms. Ghiglieri did in fact rely upon those depositions and this document in her August 15, 2007 expert report. Despite this, defendants did not raise an issue as to the use of this document until Ms. Ghiglieri's deposition on February 13, 2008 – over a year after the first use at Mr. Robin's deposition on December 7, 2006. It is unfair and contrary to well-reasoned case law for defendants now at the end of this case to deprive plaintiffs of

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[8] Defendants have not made this motion and therefore, plaintiffs reserve the right to supplement their position and arguments should defendants subsequently elect to file a formal motion seeking return of this document as "privileged" and inadvertently produced.

[9] *See Baxter Travenol Lab. v. Abbott Lab.*, 117 F.R.D. 119 (N.D. Ill. 1987) ("cases discussing whether production was inadvertent consider such factors as the scope and volume of discovery, the time available for review of the documents by the party asserting the privilege, the adequacy of the party's procedures for review, the time taken to rectify the error, and the overreaching issue of fairness and protection of the privilege"). The Courts consider other factors as well. Defendants have the burden on establishing that no waiver occurred despite the inadvertent production and use of this document. *See United States ex rel Bagley v. TRW, Inc.*, 204 F.R.D. 170, 175 (C.D. Cal. 2001) (stating "the burden of persuasion rests on the party claiming the privilege" and "[t]his principle extends to all of the elements of the privilege, including an affirmative demonstration of non-waiver if the issue of waiver has been raised") (citations omitted). However, defendants have made no showing on any of these points and thus, plaintiffs do not address these additional factors at this time. Should defendants in their response papers attempt to make a showing on these issues, plaintiffs respectfully request the right to supplement this opposition due to the importance of any contempt motion, however meritless.

their ability to continue to use this document. *Baxter*, 117 F.R.D. 119 ("By failing to assert the privilege until mid-December, in the face of Abbott's repeated use of and reliance on the document, Baxter waived any privilege it had in the document."); *JSMS Rural LP v. GMG Capital Partners III, LP*, 04 Civ. 8591 (SAS) (MHD), 2006 U.S. Dist. LEXIS 35613, at *18 (S.D.N.Y. May 30, 2006) (in context of prior use at depositions, counsel provided "no explanation for their failure to seek court relief for many months").

III. PLAINTIFFS REQUEST AN EVIDENTIARY HEARING

If the Court is not convinced at this juncture that defendants' motion should be denied in its entirety, plaintiffs request that pursuant to L.R. 37.2 the Court hold an evidentiary hearing. This hearing will more fully develop the record, including defendants' prior conduct with respect to prior use of this document, their delays in raising this issue, their basis for seeking contempt sanctions against plaintiffs' counsel and all other evidence germane to this motion.

IV. CONCLUSION

For the reasons set forth above, defendants' motion should be denied in full and stricken from the record in this case. If the Court determines defendants' motion has any merit, lead plaintiffs urge the Court to grant an evidentiary hearing as set forth in lead plaintiffs' motion to strike, filed on March 13, 2008. Dkt. No. 1202.

DATED: March 25, 2008

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
AZRA Z. MEHDI (90785467)
D. CAMERON BAKER (154452)
LUKE O. BROOKS (90785469)
JASON C. DAVIS (253370)

/s/ Azra Z. Mehdi
AZRA Z. MEHDI

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

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN
SPENCER A. BURKHOLZ
JOHN J. RICE
JOHN A. LOWTHER
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
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
Telephone: 312/332-3400
312/676-2676 (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 ELECTRONIC MAIL 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 25, 2008, declarant served by electronic mail and by U.S. Mail to the parties the: **LEAD PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR A FINDING OF CONTEMPT AND FOR APPROPRIATE SANCTIONS**. 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 25th day of March, 2008, at San Francisco, California.

/s/ Marcy Medeiros
MARCY MEDEIROS