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Pursuant to Fed. R. Civ. P. 37(a), lead plaintiffs respectfully move this Court for an order compelling defendant Household International, Inc. ("Household" or the "Company") to produce documents improperly withheld on the basis of privilege.

I. INTRODUCTION

Plaintiffs seek production of documents improperly withheld by Household on privilege grounds. Household has twice revised its first privilege log. And, on at least four separate occasions, Household changed its mind regarding the status of documents previously withheld as privileged and produced them without informing plaintiff's the reasons for its reversal. Mindful of the Court's preference for resolving issues through meet and confers as well as the Court's observance of the principles in *Allendale Mut. Ins. Co. v. Bull Data Sys. Inc.*, 145 F.R.D. 84 (N.D. Ill. 1992) plaintiffs provided Household with multiple opportunities to correct deficiencies in its privilege log. Despite having three shots at justifying its refusal to produce numerous responsive documents, Household's log remains deficient for a number of reasons:

- Household has not established that it had an expectation of confidentiality for any of the documents it withheld pursuant to the attorney-client privilege (Nos. 1-2, 4-9, 11-59, and 61-112).
- Household improperly claimed that documents were protected communications, when they were not communications at all, let alone privileged (Nos. 1, 8-9, 11-12, 62, 76, and 112).
- Household failed to establish that documents withheld reflect communications relating to legal advice (Nos. 1-2, 4-9, 11-13, 15-18, 21, 25-29, 39-41, 49, 54, 57, 62, 74-76, 79, 92-94, 96, and 99-112).
- Household failed to establish that documents withheld reflect confidential client communications (Nos. 1-13, 15-18, 20, 23-24, 37, 39, 45-46, 49, 54-55, 57, 62, 66-68, 70-80, 82, 85, 91-96, and 110-112).
- Household improperly withheld documents intended for publication or disclosed to third parties Nos. 60, 61, 63-75, 78, 79, 81-82, 86, 88, and 92-97).
- Household improperly withheld documents reflecting communications exchanged in the course of searching for documents (Nos. 60, 76, 80, 92-94, and 96).

For these reasons, the Court should compel Household to produce the foregoing documents improperly withheld on grounds of privilege.¹

II. STATEMENT OF COMPLIANCE WITH LOCAL RULE 37.2

Household began its rolling production of documents on June 24, 2004. Although numerous documents were withheld and redacted on the basis of privilege, Household did not produce privilege logs concurrent with its production of documents. Exhibit 3 to the Declaration of Luke O. Brooks in Support of Lead Plaintiffs' Motion to Compel the Household Defendants to Produce Documents Improperly Withheld on the Basis of Privilege ("Brooks Decl.") filed concurrently herewith. On January 13, 2005, plaintiffs detailed a number of documents which appeared to have been improperly redacted, and requested that Household supply a privilege log for all documents produced to date. *Id.* Household agreed to produce a log by February 4, 2005, but on that date informed plaintiffs that "there [were] a couple of issues" that needed to be clarified before completing the log, and that the log would be provided by the middle of the next week. Brooks Decl., Ex. 4. Household did not produce its first installation of its privilege log until February 18, 2005 ("Log I"). Brooks Decl., Ex. 5. On February 23, 2005, after reviewing Log I, plaintiffs requested a meet and confer with Household to discuss its deficiencies. Brooks Decl., Ex. 6.

On March 4, 2005, the parties met and conferred and plaintiffs expressed concern that, for a variety of reasons, Log I did not conform to the dictates of *Allendale*, 145 F.R.D. 84, and it was impossible to determine from the face of Household's log whether many of the documents were, in fact, privileged. Brooks Decl. ¶2. That same day, plaintiffs provided Household a list of documents

¹ On April 13, 2005, Household produced a second privilege log, covering documents produced from January 19, 2005 through January 27, 2005. This log contains many of the same infirmities as Household's first log and its subsequent revisions. Although Household continues to produce documents on a rolling basis, defendants have not produced any log covering productions from February, March, April or May 2005. Brooks Decl., Ex. 1. On May 31, 2005 plaintiffs sent Household a letter identifying the defects in Household's second log. Brooks Decl., Ex. 2.

that had been partially or completely redacted but were not listed on any privilege log. Brooks Decl., Ex. 7. On March 9, 2005, plaintiffs sent Household a marked-up copy of Log I identifying the particular documents for which more information was needed to determine whether Household's assertion of privilege was proper.² Brooks Decl., Ex. 11.

On April 6, 2005, Household produced a revised version of its privilege log ("Log II"), informing plaintiffs for the first time that the log covered documents produced through January 19, 2005. *Id.* Household also produced a number of previously withheld documents, after concluding that they were not privileged. *Id.* Household did not explain why these documents were, suddenly, no longer privileged. *Id.*

On April 29, 2005, in response to Household's request for more information regarding plaintiffs' objections to Log II, plaintiffs sent Household a detailed letter listing document by document, Household's failure to justify the privileges asserted in Log II, and once again requested that Household produce the improperly withheld documents. Brooks Decl., Ex. 12. On May 5, 2005, Household again produced previously withheld documents. Brooks Decl., Ex. 13. Again, Household did not explain why the previously withheld documents had "since been deemed non-privileged" by Household. *Id.*

On May 18, 2005, Household produced a second revised privilege log ("Log III"). Brooks Decl., Ex. 14. For the fourth time, Household produced several previously withheld documents, and

² On March 9, 2005, plaintiffs also forwarded a list of documents produced prior to January 30, 2005 that were marked as privileged, but not listed on Household's privilege log. *Id.* In response, on March 18, 2005, Household produced several of the previously withheld documents, stating that Household had subsequently deemed them "responsive." Brooks Decl., Ex. 8. Household continued to withhold the remaining documents on the grounds that they were non-responsive (as opposed to privileged as they were marked in the production). *Id.*; Brooks Decl., Ex. 9. Eventually, Household explained that the skip sheets indicating the documents that had been withheld on privilege grounds had been inserted in error. Brooks Decl., Ex. 10. Household never explained why non-responsive documents were referenced in its production in the first place. *Id.*

produced redacted copies of several other documents previously withheld. *Id.* For the fourth time, Household failed to explain why the status of these documents had changed from privileged to non-privileged.

Because the deficiencies detailed in plaintiffs' April 29, 2005 letter to Household persisted in the Log III, plaintiffs requested another meet and confer regarding the privilege log, which was held on May 26, 2005. Brooks Decl., ¶3. Plaintiffs again explained their objections and Household stated that it believed Log III was adequate, but that it would further review plaintiffs' objections. Brooks Decl., ¶3. By email on June 1, 2005, Household informed plaintiffs that it would stand by Log III and that no further revisions would be made. Brooks Decl., Ex. 15. Plaintiffs now seek the Court's assistance.

III. ARGUMENT

A. Household Has Failed to Justify the Privileges Asserted in Log III

The party asserting the attorney-client privilege has the burden of establishing all of its elements on a document-by-document basis. *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983). In the Seventh Circuit, the party invoking the attorney-client privilege must establish eight elements: "(1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) (citing *Lawless*, 709 F.2d at 487).

The claim of privilege "must be made and sustained on a question-by-question or document-by-document basis." *White*, 950 F.2d at 430.³ And, the scope of the privilege is narrow, because it

³ All internal citations and internal quotations are omitted unless otherwise indicated.

is in “derogation of the search for truth.” *Id.* During numerous hearings, this Court has indicated that it follows this principle in narrowly construing privilege.

Attorney work product is material “prepared in anticipation of litigation or for trial” by or for a party or its representative. Fed. R. Civ. P. 26(b)(3). The attorney work product doctrine is a qualified privilege that “exists because it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Eagle Compressors, Inc. v. HEC Liquidating Corp.*, 206 F.R.D. 474, 478 (N.D. Ill. 2002) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S. Ct. 385, 91 L. Ed. 451 (1947)). The doctrine draws a distinction between “opinion” work product – which reflects the “mental impressions, conclusions, opinions, or legal theories of an attorney” – and ordinary “fact” work product. *Id.* (quoting Fed. R. Civ. P. 26(b)(3)). If the materials at issue constitute fact work product, the materials are discoverable, if the party seeking discovery demonstrates “a substantial need for the material and an inability to obtain the substantial equivalent of the information without undue hardship.” *Eagle Compressors*, 206 F.R.D. at 478.

The Court has informed the parties that the standards set forth in *Allendale* will govern the form of privilege logs in this action. *Allendale* requires that for each document withheld, the log should provide the following information: 1) the date of the document; 2) the author of the document; 3) all recipients of the document; 4) the author and recipients’ capacities; 5) the document’s subject matter; 6) the purpose for the document’s production; and 7) a specific explanation of why the document is privileged or immune to discovery. 145 F.R.D. at 88. *Allendale* also requires “[t]hese categories, especially [the] last category, [to] be sufficiently detailed to allow the court to determine whether the discovery opponent has discharged its burden of establishing” the privileges asserted. *Id.*

Household has failed to justify a number of the privileges asserted in Log III, and has applied the attorney-client privilege and work product doctrine to improperly withhold documents.

1. Household Has Failed to Establish that It Had an Expectation of Confidentiality for Any of the Communications Withheld Pursuant to the Attorney-Client Privilege

In the Seventh Circuit, the “expectation of confidentiality . . . [is] an essential element of the attorney-client privilege.” *United States v. BDO Seidman*, 337 F.3d 802, 812 (7th Cir. 2003), *cert. denied*, 540 U.S. 1178 (2004); *see also White*, 950 F.2d at 430. Additionally, a party withholding documents pursuant to the attorney-client privilege has the burden of establishing that the communication is “permanently protected” from disclosure at the “instance” of the client invoking the privilege. *White*, 950 F.2d at 430. Thus, a party invoking the attorney-client privilege must establish both that it expected the communication would remain confidential when made and that it has the ability to control whether the communication remains confidential. *Id.* With respect to the documents Household’s claims are protected by the attorney-client privilege Nos. 1-2, 4-9, 11-59, and 61-112, it has established neither.

Under Illinois law, in the corporate context, *only* communications between corporate counsel and the company’s control group are privileged. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 199-20 (1982). The Illinois Supreme Court has held that only “employee(s) whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority, [are] properly within the control group.” *Id.* Communications between corporate counsel and individuals on whom members of the control group “may rely for supplying information” are not protected. *Id.*; *Abbott Labs. v. Airco, Inc.*, No. 82 C 3292, 1985 U.S. Dist. LEXIS 14140, at *8 (N.D. Ill. Nov. 5, 1985) (“the only communications that are held privileged are

those made by top management who have the ability to make a final decision . . . rather than those made by employees whose positions are merely advisory”).

Household has not even attempted to demonstrate that any of its employees listed in Log III were members of its control group.⁴ Thus, Household has failed to establish communications to, from and among Household lawyers and the individuals listed in Log III are protected by the attorney-client privilege under Illinois law. *Ocean Atl. Dev. Corp. v. Willow Tree Farm*, No. 01 C 5014, 2002 U.S. Dist. LEXIS 15841 (N.D. Ill. Aug. 22, 2002).

Since communications between counsel and employees outside Household’s control group are not protected by the attorney-client privilege under Illinois law, such communications cannot be “permanently protected” at Household’s discretion – they would, for example, be discoverable in state court proceedings, even over Household’s objection. Similarly, given that such communications are discoverable in Illinois state court proceedings, Household cannot reasonably argue that it had an expectation that they would remain confidential at the time they were made, regardless of when or in which court these communications became at issue. Accordingly, Household has failed to establish necessary elements of the attorney-client privilege under the Seventh Circuit standard. *White*, 950 F.2d at 430.

The Seventh Circuit held as much in *BDO Seidman*. In that case, taxpayers sought to intervene in an IRS enforcement action and assert a statutory tax privilege over a list created and maintained by BDO Seidman pursuant to a federal statute. *BDO Seidman*, 337 F.3d 802. The statute required anyone who organizes and sells an interest in tax shelters to maintain a list identifying each person to whom such an interest was sold. *Id.* at 805. The court analyzed the scope

⁴ In fact, during meet and confers, Household flatly refused plaintiffs’ request that it identify which employees listed in both Log III and second privilege log were members of its control group. Brooks Decl., Ex. 2.

of the attorney-client privilege to determine the applicability of a statutory tax privilege, invoked by the interveners, that grants “the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney.” *Id.* at 810; *see also United States v. Sidley Austin Brown & Wood LLP*, Case No. 03 C 9355, 2004 U.S. Dist. LEXIS 6452, at **12-13 (N.D. Ill. Apr. 15, 2004) (noting that *BDO Seidman* speaks to the scope of the attorney-client privilege). The court held that the statutory “list-keeping provision precludes the Does from establishing an *expectation of confidentiality* in their communications with BDO, an essential element of the attorney-client privilege.” *Id.* at 812 (emphasis in original). Thus, “[b]ecause the Does cannot credibly argue that they expected that their participation in such transactions would not be disclosed, they cannot now establish that the documents responsive to the summonses . . . reveal a *confidential* communication,” and the privilege did not apply. *Id.*

Household is similarly precluded from establishing an expectation of confidentiality in communications which are discoverable under Illinois state law. Household, by failing to establish that the communications in document Nos. 1-2, 4-9, 11-59, and 61-112 were between Household lawyers and members of the Company’s control group, has also failed to justify its assertion of attorney-client privilege. *See id.* Household should be compelled to produce document nos. 1-2, 4-9, 11-59, 61-112.

2. Non-Communications Are Not Protected by the Attorney-Client Privilege

“[T]o establish an attorney-client privilege, there needs to be a communication with an attorney where legal advice is sought.” *Brenesen v. Motorola, Inc.*, No. 02 C 50509, 2003 U.S. Dist. LEXIS 11485, at *11 (N.D. Ill. July 3, 2003). Household has withheld as privileged the following documents where no author and/or recipient is listed on the privilege log: Nos. 1, 8-9, 11-12, 62, 76, 112. Documents which lack an author, a recipient or both do not constitute a communication, and therefore cannot be withheld pursuant to the attorney-client privilege. *Id.*;

Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., No. 95 C 0673, 1996 U.S. Dist. LEXIS 19274, at **14-15 (N.D. Ill. Dec. 9, 1996).

According to Log III, document Nos. 1, 8-9, and 11-12 contain attorney notes, comments and/or memoranda not communicated to any Household employee. Brooks Decl., Ex. 14. Document No. 76, appears to be a memo authored by a paralegal but sent to no one. *Id.* Notes and memoranda prepared by counsel but not distributed to the client are not protected by the attorney-client privilege because “the intent to confidentially communicate with the client is missing.” *Heidelberg*, 1996 U.S. Dist. LEXIS 19274, at **14-15. Because, “recorded and uncommunicated thoughts [of counsel] fall outside the province of the attorney-client privilege,” Household’s invocation of privilege over such documents is improper. *American Nat’l Bank & Trust Co. of Chicago v. Axa Client Solutions, LLC*, No. 00 C 6786, 2002 U.S. Dist. LEXIS 4805, at **8-9 (N.D. Ill. Mar. 20, 2002). These documents must be produced in unredacted form; their disclosure would not reveal any confidential communication. *Id.*

Document No. 62 is, according to Log III, a memorandum regarding Household’s restatement of earnings, accounting for stock options and the KPMG LLP audit.⁵ No date, author or recipient is identified for this document. *Id.* In other words, Household has failed to establish that information in the document was communicated at all, let alone between attorney and client. Document No. 62, an anonymous memo to no one which contains information relating to Household’s business, is not a “communication directed to anyone for the purpose of obtaining legal

⁵ That the document was stamped “Privileged and Confidential: prepared at the request of counsel” should be afforded “little if any weight.” *Ledgin v. Blue Cross and Blue Shield of Kansas City*, 166 F.R.D. 496, 499 (D. Kan. 1996). Such markings generally are viewed as nothing “more than a self-serving embellishment.” *Id.*

advice,” and must be produced. *Heidelberg*, 1996 U.S. Dist. LEXIS 19274, at **14-15. Thus, documents comprising non-communications, Nos. 1, 8-9, 11-12, 62, 76, 112, should be produced.

3. Communications Not Relating to Legal Advice Are Not Privileged

For the attorney-client privilege to apply, counsel must be involved in a legal, not business, capacity, and the confidential communications must be primarily legal in nature. *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980). Accordingly, documents or conversations created pursuant to business matters must be disclosed. *Allendale*, 152 F.R.D. at 137, or do not contain advice from a lawyer at all.

Household has withheld on attorney-client privilege grounds the following documents without establishing that the communications that either relate to legal rather than business matters: Nos. 1-2, 4-9, 11-13, 15-18, 21, 25-29, 39-41, 49, 54, 57, 62, 74-77, 79, 92-94, 96, and 99-112. The business matters addressed by these documents include the “education and training of employees” (Nos. 1-2, 4-9, 11-13, 99, and 102-112), changes to internal reports (Nos. 15, 29, 40), fees charged to customers (No. 54), and lending and accounting practices and forms (Nos. 16-18, 21, 25-28, 39, 41, 49, 54, 57, 62, and 100-101). These documents purportedly relate to “attorney comments” or “attorney review,” without any indication of legal analysis or legal matters.

Courts do not permit a corporation to merely funnel papers through the attorney in order to gain attorney-client privilege. *See Radiant Burners, Inc. v. American Gas Ass’n.*, 320 F.2d 314 (7th Cir. 1963). If these documents did in fact relate to legal advice, then surely Household would have described them as such, like they do on a number of other entries. *See, e.g.* Nos. 20 (email regarding “application of Arizona law”) and 33 (communication regarding “interpretation of California law”).

According to Log III, although document No. 77 purports to contain an “email to Household counsel,” this assertion is contradicted by the face of the log which indicates that the email is from inside counsel to a paralegal. Further, document Nos. 74-76, 79, 92-94, and 96 were emails authored

by paralegals. Paralegals are not lawyers and advice given by them is not protected by the attorney-client privilege. Household thus has not established a communication between attorney and client with respect to these documents, and they must be produced. *Byrnes v. Empire Blue Cross Blue Shield*, No. 98 Civ. 8520 (BSJ) (MHD), 1999 U.S. Dist. LEXIS 17281 (S.D.N.Y. Nov. 2, 1999) (The attorney-client privilege does not extend to communications between non-lawyers and clients, even if legal in nature).

Because Household has failed to establish that the document Nos. 1-2, 4-9, 11-13, 15-18, 21, 25-29, 39-41, 49, 54, 57, 62, 74-77, 79, 92-94, 96, and 99-112 contain legal rather than business advice, they must be produced. *Allendale*, 152 F.R.D. at 137.

4. Documents Not Reflecting Confidential Client Communications Are Not Privileged

Legal advice or communications, standing alone, do not automatically receive attorney-client protection. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 28 (N.D.Ill. 1980). Instead, the party asserting the privilege must show that such advice relates to prior confidential client communications. *Ziemack v. Centel Corp.*, No. 92 C 3551, 1995 U.S. Dist. LEXIS 6942, at *13 (N.D. Ill. May 18, 1995). This view is consistent with the Seventh Circuit's admonition to protect attorney-client communications as narrowly as possible, yet offer protection that is consistent with the privilege's purpose. *Id.* (citing *Radiant Burners*, 320 F.2d at 323).

Household has withheld on attorney-client privilege grounds the following documents without providing any details regarding why the communications contained therein relate to confidential client communications: Nos. 1-13, 15-18, 20, 23-24, 37, 39, 45-46, 49, 54-55, 57, 62, 66-68, 70-80, 82, 85, 91-96, and 110-112. In contrast, Household indicates clearly in many of its entries that advice was sought. *See, e.g.*, Nos. 14 (email "requesting and relaying attorney comments"); 21 (email "seeking and relaying legal advice"); 30 (email "containing question to attorney, and attorney answer"); 104 ("handwritten notes reflecting legal questions to be asked" of

attorney). There is no indication in Log III that the documents challenged by plaintiffs relate to any confidential client communication.

Thus, defendants have not met their burden of proving that these document Nos. 1-13, 15-18, 20, 23-24, 37, 39, 45-46, 49, 54-55, 57, 62, 66-68, 70-80, 82, 85, 91-96, and 110-112 primarily contain legal advice concerning confidential communications, which would be protected by the attorney-client privilege. *Ziemack*, 1995 U.S. Dist. LEXIS 6942, at *13; *American Nat'l*, 2002 U.S. Dist. LEXIS 4805, at *12 (Document not protected by attorney-client privilege where no evidence that any confidential communication was made for the purpose of obtaining legal advice.) These documents should, therefore, be produced.

5. Documents Intended for Publication or Disclosed to Third Parties Are Not Privileged

The attorney-client privilege is waived upon disclosure of privileged information to a third party. *Eagle Compressors, Inc. v. HEC Liquidating Corp.*, 206 F.R.D. 474, 477 (N.D. Ill. 2002). Similarly, work product protection is waived when otherwise privileged information is disclosed to an adverse third party. *Id.* at 479. Drafts of documents prepared by an attorney for transmission to third parties are only protected if the documents contain confidential information communicated by the client to the attorney that is maintained in confidence. *American Nat'l*, 2002 U.S. Dist. LEXIS 4805, at *6.

Log III indicates on its face that document Nos. 61 and 78 were disclosed to adverse third parties. Additionally, it appears from Log III that document Nos. 60, 63-75, 79, 81-82, 86, 88, and 92-97 were created with the intention of such disclosure. They too must be produced.

6. Communications Exchanged in the Course of Document Searches Are Not Privileged

The Seventh Circuit has held that “[t]here is no need for a privilege to cover information exchanged in the course of document searches, which are mostly mechanical yet which entail great

risks of dishonest claims of complete compliance.” *In re Feldberg*, 862 F.2d 622, 627 (7th Cir. 1988). Document Nos. 60, 76, 80, 92-94, and 96 clearly relate to the search for documents in response to inquiries by the Arizona Attorney General. These documents are not privileged and must be produced. *Id.*

B. Household Must Provide an Updated Privilege Log

Household’s privilege logs cover only documents produced through January 27, 2005. However, since that date, Household has produced over 700,000 pages of documents, and withheld thousands of pages of documents on the basis of privilege – all without producing a privilege log. By failing to provide a privilege log for these documents, Household has failed to satisfy its burden of establishing privilege. *Lawless*, 709 F.2d at 487. Thus, plaintiffs seek an order requiring Household to update its privilege log immediately and supply a privilege log for all documents at the time they are withheld.

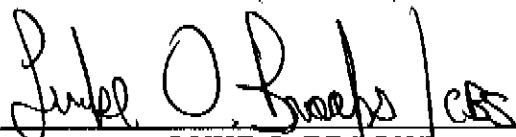
IV. CONCLUSION

For the foregoing reasons, plaintiffs' motion to compel production of documents improperly withheld on the basis of privilege should be granted, and Household should be ordered to produce document Nos. 1-2, 4-9, and 11-112. In addition, Household should be ordered to immediately produce an updated privilege log covering documents produced after January 27, 2005 and supply a privilege log for all documents at the time they are withheld.

DATED: June 6, 2005

Respectfully submitted,

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN (90785466)
AZRA Z. MEHDI (90785467)
MONIQUE C. WINKLER (90786006)
SYLVIA SUM (90785892)
LUKE O. BROOKS (90785469)



LUKE O. BROOKS

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

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
WILLIAM S. LERACH
401 B Street, Suite 1600
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

MILLER FAUCHER AND CAFFERTY LLP
MARVIN A. MILLER
30 North LaSalle Street, Suite 3200
Chicago, IL 60602
Telephone: 312/782-4880
312/782-4485 (fax)

Liaison Counsel

LAW OFFICES OF LAWRENCE G.
SOICHER
LAWRENCE G. SOICHER
305 Madison Avenue, 46th Floor
New York, NY 10165
Telephone: 212/883-8000
212/697-0877 (fax)

Attorneys for Plaintiff

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