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' REPLY IN SUPPORT OF MOTION TO COMPEL RESPONSES TO FIRST SET OF INTERROGATORIES FROM HOUSEHOLD DEFENDANTS

Lead plaintiffs respectfully submit this reply in further support of their Motion to Compel Responses to First Set of Interrogatories from Household Defendants ("Motion").[1]

I. INTRODUCTION

Affirmative defenses are pleadings, and thus must set forth a "short plain statement of the claim showing that the pleader is entitled to relief." *Weber Shandwick Worldwide v. Reid*, No. 05 C 709, 2005 U.S. Dist. LEXIS 14482, at *6 (N.D. Ill. May 12, 2005) (citing Fed. R. Civ. P. 8(a)).[2] "***An affirmative defense must include either direct or inferential allegations*** that, viewed as true, establish all material elements of the defense." *Id.* The law requires defendants to provide plaintiffs with the factual basis of their affirmative defenses. *United States EEOC v. Sedita*, No. 87 C 2790, 1988 U.S. Dist. LEXIS 2024, at **1-2 (N.D. Ill. Mar. 2, 1988); *Audiotext Commc'ns Network, Inc. v. US Telecom, Inc.*, No. 94-2395-GTV, 1995 U.S. Dist. LEXIS 15396, at **4-5 (D. Kan. Oct. 5, 1995). Contrary to defendants' inflammatory rants, there is nothing abusive about plaintiffs' interrogatories requesting such information. Defendants had to have known ***some facts*** that formed the basis of their affirmative defenses when they asserted them. *Audiotext*, 1995 U.S. Dist. LEXIS 15396, at *5; *Rusty Jones, Inc. v. Beatrice Co.*, No. 89 C 7381, 1990 U.S. Dist. LEXIS 12116, at *4 (N.D. Ill. Sept. 11, 1990); *see also* Fed. R. Civ. P. 11. Thus, defendants have "a duty to answer interrogatories with whatever information" they have. *Audiotext*, 1995 U.S. Dist. LEXIS 15396, at *5; *see also Bell* v. *Woodward Governor Co.*, No. 03 C 50190, 2005 U.S. Dist. LEXIS 4451, at *6 (N.D. Ill. Feb. 7, 2005) ("interrogatories must be answered fully and include all information within the party's control" even if "only some information is available").

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[1] To the extent that defendants advance rhetoric and argument attacking Lead Plaintiffs' September 16, 2005 Status Report, plaintiffs believe that discussion is moot in light of the September 21 status hearing. Accordingly, absent instruction from the Court, plaintiffs will not address those points.

[2] All internal quotations are omitted and emphasis is added unless otherwise indicated.

Defendants' attempts to characterize plaintiffs' interrogatories as premature are also unavailing. Defendants go so far as to push back the date merits discovery began by five months, from May to October 2004; but defendants' own document production and discovery responses belie their efforts to mask their dilatory discovery maneuvers.[3] With the fact discovery cut-off less than four months away, it is vital that plaintiffs know what factual basis, if any, defendants have for their affirmative defenses. Without relief from the Court, plaintiffs will be unable to fully explore defendants' affirmative defenses during depositions and risk losing the opportunity to develop the evidence necessary to rebut them. For plaintiffs to conduct meaningful discovery concerning defendants' affirmative defenses, fundamental fairness dictates that defendants set forth the factual bases for their affirmative defenses, identify all documents known by them that lend support to a defense and list all witnesses with knowledge concerning the defenses. *Cornell Research Found., Inc. v. Hewlett Packard Co.*, 223 F.R.D. 55, 67 (N.D.N.Y. 2003).[4]

During the course of discovery negotiations, defendants agreed to provide responses to 13 affirmative defenses, but then failed to do so despite the passage of 11 months. Despite having access to and control over the information required to provide sufficient responses to the interrogatories, defendants have chosen to be evasive and respond by directing plaintiffs to scores of

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[3] Merits discovery in this case began over 16 months ago in May 2004. Defendants' misrepresentation that merits discovery did not commence until October 2004 (Memorandum of Law in Opposition to Lead Plaintiffs' Motion to Compel Responses to First Set of Interrogatories from Household Defendants ("Defs' Opp.") at 2) is directly refuted by defendants' June 23, 2004 production of documents in response to plaintiffs' First Request for Production of Documents ("First Request"), their July 9, 2004 objections to plaintiffs' First Request, as well as their August 16, 2004 response to the interrogatories that are the subject of this Motion.

[4] Plaintiffs' Interrogatory Nos. 2 and 3 seek the identity of witnesses and documents which support defendants' affirmative defenses. These are clearly not "contention interrogatories." *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 340-42 (N.D. Cal. 1985); *Everett v. USAir Group, Inc.*, 165 F.R.D. 1, 4 (D.D.C. 1995). Indeed, the identity of witnesses and documents sought are precisely the sort of information that is to be automatically disclosed. *Everett*, 165 F.R.D. at 4. Interrogatory Nos. 2 and 3 should be answered immediately for every affirmative defense asserted.

voluminous documents from which the purported answers are difficult, if not, impossible to ascertain. *See, e.g.*, Exhibit 1 (a 699-page document comprised primarily of analyst reports was one of over two dozen documents designated for each response) to the Declaration of Luke O. Brooks in Support of Lead Plaintiffs' Reply on Motion to Compel Responses to First Set of Interrogatories from Household Defendants ("Brooks Reply Decl.").

Defendants should be compelled to answer all the interrogatories as completely as they can. If defendants are unable or unwilling to do so, their affirmative defenses should be stricken. *Household Fin. Servs., Inc. v. Northeastern Mortgage Inv. Corp.*, No. 00 C 0667, 2000 U.S. Dist. LEXIS 8975, at *5 (N. D. Ill. June 21, 2000) (striking affirmative defenses without adequate factual recitation).

II. ARGUMENT

A. The Federal Rules, Weight of Legal Authority, Fundamental Fairness and Efficiency Mandate Defendants' Immediate and Complete Responses to Plaintiffs' Interrogatories

The affirmative defenses as pled by defendants in their Answer do not provide facts sufficient to put plaintiffs on notice of the basis of the defenses. "[T]he basic concept of an affirmative defense is an ***admission*** of the facts alleged in the complaint, coupled with the assertion of some other reason defendant is not liable." *Instituto Nacional de Comercializacion Agricola (Indeca) v. Continental Illinois Nat'l Bank & Trust Co.*, 576 F. Supp. 985, 988 (N.D. Ill. 1983) (emphasis in original). Affirmative defenses that are simply "bare bones conclusory allegations" do not meet even the liberal notice pleading standard of Rule 8, and must be stricken. *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1295 (7th Cir. 1989); *Man Roland, Inc. v. Quantum Color Corp.*, 57 F. Supp. 2d 576, 578 (N.D. Ill. 1999).

Here, defendants have pled no facts upon which they base their affirmative defenses, leaving plaintiffs to guess as to their factual basis. *See* Brooks Reply Decl., Ex. 2. Without knowing the

"who, what, where and when" of these events, plaintiffs are left blind as they enter substantive depositions and attempt to develop evidence to rebut defendants' affirmative defenses. For example, defendants' second affirmative defense reads as follows:

> Plaintiffs' claims are barred in whole or in part by the applicable statute of limitations and the doctrine of waiver, estoppel, ratification, unclean hands, laches, and/or *in pari delicto.*

Id. Nothing more is alleged.[5] Plaintiffs, however, are entitled to know the factual basis upon which defendants are essentially accusing plaintiffs and the Class of participating in securities fraud violations. *See, e.g.*, *In re Olympia Brewing Co. Sec. Litig.*, No. 77 C 1206, 1985 U.S. Dist. LEXIS 13796, at *6 (N.D. Ill. Nov. 18, 1985) ("[W]ith respect to both [unclean hands and *in pari delicto*], the underlying question is the same: under what circumstances will a plaintiff's conduct bar him from bringing an action?"); *Tarasi v. Pittsburgh Nat'l Bank*, 555 F.2d 1152, 1156 (3d Cir. 1977) (the doctrine of *in pari delicto*, which literally means "of equal fault," is one of the common law doctrines created to prevent transgressors from profiting from their own wrongdoing and the equitable doctrine of unclean hands forecloses equitable relief to one who himself engaged in misconduct).

Moreover, if fraud is alleged under the doctrine of unclean hands – as it is here – Rule 9(b) requires that allegations of fraud include the particular circumstances involved, including the time, place and specific contents of the alleged false representations or omissions. Fed. R. Civ. P. 9(b). Similarly, because the affirmative defense of estoppel is "premised on a showing of intentional deception or gross negligence amounting to constructive fraud, this defense (like fraud), requires a recitation of adequate factual underpinnings for consideration of the applicability of the doctrine; mere conclusions and puffery will not suffice." *Household*, 2000 U.S. Dist. LEXIS 8975, at **5-6.

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[5] Other affirmative defenses suffer from similar infirmities. *See id.*

In other words, the party claiming fraud must place the opposing party on notice of the "who, what, where, and when of the alleged fraud." *Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999). Defendants have failed to provide this notice either through pleading or through answers to the interrogatories sought despite having the information to do so.

Defendants evade this basic threshold concept by characterizing plaintiffs' interrogatories as "contention interrogatories," which they claim are improper "until discovery is near an end." Defs' Opp. at 4. With less than four months left before fact discovery ends, ***discovery is near an end***.[6] Even if discovery were not near an end, fairness and efficiency mandate that plaintiffs are entitled to as complete a response to the interrogatories as is possible with whatever information they have. *See, e.g.*, *Cornell Research*, 223 F.R.D. at 67 ("fundamental fairness dictates, at a minimum, that [defendant] be required to flesh out the contentions associated with [their] affirmative defense in sufficient detail to allow [plaintiff] to conduct meaningful discovery concerning it"); *Bell*, 2005 U.S. Dist. LEXIS 4451, at *6 ("interrogatories must be answered fully and include all information within the party's control" even if "only some information is available"); *Audiotext*, 1995 U.S. Dist. LEXIS 15396, at *5 (defendants have "a duty to answer interrogatories with whatever information" they have).

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[6] Defendants' claim that "we have not reached the middle of discovery," is disingenuous. *Id*. at 4, 6. They base this on plaintiffs' recent proposal (not yet agreed to by defendants and not granted by the Court) for a short extension of the fact discovery cut-off from January 13, 2006 to May 12, 2006. *Id.* If plaintiffs seek additional time for discovery, it is only because of defendants' continuing delay in responding to discovery requests. For instance, to date, not a single e-mail in native format has been produced to plaintiffs. Defendants' finger-pointing at plaintiffs for unreasonably delaying discovery is plain wrong. Defendants have stalled and delayed discovery at every step, and as recently as June 30, 2005, requested a discovery stay, which Judge Guzman denied. Indeed, it was defendants' stall tactics that necessitated the filing of numerous motions to compel. Only after plaintiffs filed these motions to compel did defendants (1) provide source logs, (2) revise their privilege log (for the fourth time) and provide previously withheld documents; (3) provide electronic spreadsheets, and (4) begin review (but not production) of e-mails in native format. Permitting defendants' refusal to respond to the interrogatories would be tantamount to rewarding them for their dilatory tactics.

Defendants rely heavily upon *Convergent* for the proposition that the interrogatories are premature. 108 F.R.D. at 340-42. This reliance is misplaced. *Convergent* does not establish a bright line rule against the use of contention interrogatories until the end of discovery. *Id*. at 337 ("Because the benefits that can flow from clarifying and narrowing the issues in litigation ***early*** in the pretrial period are potentially significant, . . . it would be unwise to create a rigid rule, . . . that would always protect parties from having to answer contention interrogatories until some predetermined juncture in the pretrial period.") (emphasis in original).[7] Neither the holding nor the language of *Convergent* establishes that there are no circumstances under which ***early*** answers to contention interrogatories might significantly clarify or narrow issues. 108 F.R.D at 336. Rather, the court in *Convergent* recognized that "***requests for opinions or contentions that call for the application of law to fact . . . can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery***." *Id*. (citing 1970 Committee Notes). Indeed, Judge Wayne D. Brazil, the author of *Convergent*, subsequently opined in *McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275, 287 (N.D. Cal. 1991), that contention interrogatories may in certain cases be the most reliable and cost-effective discovery device, which would be less burdensome than depositions at which contention questions are propounded. *See Cable & Computer Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 652 (C.D. Cal. 1997).

Here, defendants' answers to plaintiffs' interrogatories will significantly clarify and narrow issues and move the case toward trial. Interrogatories are an appropriate method for obtaining an explanation of affirmative defenses. *Janes v. Chicago Bd. of Educ.*, No. 00 C 6128, 2002 U.S. Dist.

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[7] *See also* Defs' Opp. at 5 (citing *Ziemack v. Centel Corp*., No. 92 C3551, 1995 U.S. Dist. LEXIS 18192, at *5 (N.D. Ill. Dec. 6, 1995)); *Everett*, 165 F.R.D. at 3; *In re Conopco, Inc.*, No. Civil Action No. 99-101(KSH), 2000 U.S. Dist. LEXIS 1601, at **13-15 (D.N.J. Jan. 26, 2000); *Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 95-96 (E.D. Pa. 1992); *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 110-11 (D.N.J. 1990), for same proposition.

LEXIS 22239, at *41 (N.D. Ill. Nov. 15, 2002); *see, e.g.*, *Sedita*, 1988 U.S. Dist. LEXIS 2024, at **1-2. Without relief from the Court, plaintiffs face going into depositions without having an understanding of the factual background of defendants' affirmative defenses. The importance of plaintiffs' Motion is underscored by the upcoming October 6 and 7, 2005 depositions of defendants' witnesses Walt Rybak and Curt Cunningham. Defendants responded to Interrogatory No. 2 seeking the identity of all persons with knowledge of the facts of the affirmative defenses by referring plaintiffs to all 30 individuals listed in defendants' Initial Disclosures. Brooks Decl., Ex. I. This haphazard designation suggests that all 30 individuals have knowledge of the facts of all 22 affirmative defenses. Defendants' incorporation by reference of the Initial Disclosures was improper and cannot be relied upon. *Scaife v. Boenne*, 191 F.R.D. 590, 594 (N.D. Ind. 2000) (holding that an answer to an interrogatory should be complete in itself and should not refer to the pleadings, or to depositions or other interrogatories). For example, Mr. Rybak was one of the persons designated in defendants' Initial Disclosures. Plaintiffs therefore can only assume that Mr. Rybak has some information which relates to the affirmative defenses, but as to which one amongst the 22 affirmative defenses plaintiffs can only guess. Clearly, defendants' responses are incomplete and designed to make the discovery process inefficient. Such a situation should not be countenanced.

B. The Factual Basis for the Affirmative Defenses Is Information in Defendants' Possession at the Time Such Defenses Were Asserted – Plaintiffs Are Entitled to This Information

Plaintiffs are entitled to know the factual basis for the affirmative defenses asserted by defendants. *Sedita*, 1988 U.S. Dist. LEXIS 2024, at *1 (plaintiff is within its rights to request a legal and factual basis for defendants' affirmative defenses). Yet, defendants fail to address *Sedita*, a case directly on point ordering defendants to provide plaintiff with the factual basis for their affirmative defenses, precisely the same information plaintiffs seek here. Defs' Opp. at 10-11. Recognizing their inability to distinguish this on point case, defendants urge the Court to simply ignore it. *Id*.

Their claim that "*Sedita* did not require the defendants to write a lengthy memorandum, but merely to just state the facts and the legal theory," only undermines their position here. *Id*. at 11. Plaintiffs here seek only the facts upon which they base their affirmative defenses, not a "lengthy memorandum."

Ignoring *Sedita*, defendants rely instead primarily on cases where plaintiffs were the responding party and the information necessary to answer the interrogatories was in the possession of the defendants. But the court in *Convergent* noted that there was no justification for compelling early responses by plaintiffs to defendants' interrogatories because "a court is not likely to enter a judgment removing [plaintiffs] from the case until plaintiffs have had a chance to examine the most likely source of evidence on this matter: Convergent's documents." 108 F.R.D at 345. Additionally, unlike the cases cited by defendants, there was no independent Rule 11 obligation requiring defendants to have some factual basis for asserting their affirmative defenses, and hence no requirement to detail their contentions until the end of discovery. Defs' Opp. at 5, 7-11. Such blind reliance by defendants upon rulings denying responses to interrogatories prior to the end of discovery is inappropriate as generalizations about the proper timing of contention interrogatories cannot substitute for specific analysis of their propriety on a case by case basis. *In re Arlington Heights Funds Consol. Pretrial*, No. 89 C 701, 1989 U.S. Dist. LEXIS 8177, at **1-2 (N.D. Ill. July 7, 1989).

Defendants' excuse for refusing to answer plaintiffs' interrogatories that "[m]any of the affirmative defenses are directly related to affirmative elements of Plaintiffs' case-in-chief," is similarly without merit. Defs' Opp. at 8. Defendants bemoan the fact that answering the interrogatories would "require Defendants to marshal every fact that might be relevant to this element of Plaintiffs' case." *Id*. Defendants miss the point. In this Circuit, "[s]imply naming a legal theory without indicating how it is connected to the case at hand is not sufficient to withstand a

motion to strike," let alone sufficient as a response to an interrogatory. *See Yash Raj Films (USA) Inc. v. Atl. Video*, No. 03 C 7069, 2004 U.S. Dist. LEXIS 9739, at *7 (N.D. Ill. May 27, 2004). Moreover, by asserting their affirmative defenses, defendants have placed their own theory behind each affirmative defense squarely at issue. As such, defendants have a duty to respond to the interrogatories, either in whole or in part with whatever information is currently in their possession. *Audiotext*, 1995 U.S. Dist. LEXIS 15396, at *5. Furthermore, the fundamental purpose of discovery is to ascertain the truth. *National Union Fire Ins. Co. v. Continental Illinois Group*, Nos. 85 C 7080, 85 C 7081, 1988 U.S. Dist. LEXIS 7858, at **4-5 (N.D. Ill. July 21, 1998). Thus, even if the factual basis for defendants' affirmative defenses is in fact relevant to an element of plaintiffs' case, defendants must nonetheless provide an independent basis for their assertion of an affirmative defense.

C. Defendants' Reliance on Rule 33(d) Is Inappropriate

In lieu of providing responses to interrogatories requesting "all facts" upon which defendants based their affirmative defenses, defendants rely upon the business records option of Rule 33(d). Defendants' reliance on Rule 33(d) is improper here.[8] Merely designating documents from which an answer can be derived does not "state all facts." *SEC v. Elfindepan, S.A.*, 206 F.R.D. 574, 576-77 (M.D.N.C. 2002) (holding that requests for statements of facts "do not lend themselves to answer by use of Rule 33(d)" because "documents themselves rarely, if ever, reveal contentions of fact or law"); *see also In re Savitt/Adler Litig.*, 176 F.R.D. 44, 49-50 (N.D.N.Y. 1997) (documents normally reveal evidence, not a party's contentions or statement of facts).

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[8] Defendants' reliance on *Williams v. Bd. of County Comm'rs of the Unified Gov't*, No. 98-2485-JTM, 2000 U.S. Dist. LEXIS 8986 (D. Kan. June 21, 2000), is similarly misplaced. Defs' Opp. at 11. The interrogatories at issue in *Williams* were not contention interrogatories, but rather sought factual information regarding the regulations and standards for hiring and training of city employees and police officers. *Id.*

Moreover, defendants have failed to demonstrate that the designated documents will actually reveal answers to the interrogatories. 8A Charles Alan Wright, et al., *Federal Practice and Procedure* §2178 at 330-31 (2d ed. 1994). Defendants have not adequately and precisely specified for each interrogatory, the actual documents where information will be found. *Id.* at 336. Indeed, defendants' own legal authority supports plaintiffs' position. *See Derson Group, Ltd. v. Right Mgmt. Consultants, Inc.*, 119 F.R.D. 396 (N.D. Ill. 1988) (holding that a party "cannot avoid [ ] interrogatories simply by general reference to the 33,000 documents previously produced" without giving the propounding party any "clue as to where to find the requested information among the voluminous documents already submitted"); *Elfindepan*, 206 F.R.D. at 576 ("Document dumps or vague references to documents do not suffice."). For example, defendants designated 46 separate document groups comprised of 699 pages of essentially "First Call Analyst Reports" covering a four-year period as a response to each interrogatory seeking "all facts" defendants rely upon for affirmative defense Nos. 2-3, 5, and 7. Brooks Reply Decl., Ex. 1. These 699 pages of "First Call Analyst Reports" contain numerous facts relating to practically every aspect of Household's business operations and financials over the four-year period. *Id*. There is no way for plaintiffs to know what facts in each document are relevant or which facts go to which defense. Plaintiffs cannot readily ascertain the answers to the interrogatories from the documents produced in lieu of textual answers. *Natural Res. Def. Council, Inc. v. Fox*, No. 94 Civ. 8424 (PKL) (HBP), 1996 U.S. Dist. LEXIS 12810, at **10-11 (S.D.N.Y. Aug. 30, 1996). Plaintiffs are not required to jump through hoops and undertake such a burden to discover why defendants believe their defenses are valid. The burden on plaintiffs to obtain the information is infinitely greater. *Elfindepan*, 206 F.R.D. at 577.

Significantly, defendants fail to address the fact that they are improperly attempting to shift a substantial burden onto plaintiffs by designating documents from which the purported answers to the interrogatories are difficult, if not impossible, to ascertain. They fail to do so because they cannot.

The documents designated by defendants contain a multitude of different facts and give rise to a slew of possible answers. Defendants may take advantage of Rule 33(d) ***only*** where "the burden of deriving the answer is substantially the same for both parties." *Bell*, 2005 U.S. Dist. LEXIS 4451, at *7; *Elfindepan*, 206 F.R.D. at 577. That is simply not the case here as defendants are far more familiar with Household's internal policies and reports which comprise its business records, as well as the witnesses and occurrences which underlie the theories of their affirmative defenses. In addition, defendants already have culled the documents for answers to the interrogatories and have information outside the documents which are responsive to the interrogatories.

The information required to respond is in defendants' possession and plaintiffs have the right to receive it in a more convenient form. *Daiflon, Inc. v. Allied Chem. Corp.*, 534 F.2d 221, 226 (10th Cir. 1976); *ITT Life Ins. Co. v. Thomas Nastoff, Inc.*, 108 F.R.D. 664, 666 (N.D. Ind. 1985). Thus, defendants' reliance on Rule 33(a) is improper here.

III. CONCLUSION

For all the foregoing reasons as well as the reasons outlined in plaintiffs' opening memorandum of law in support of their Motion, defendants should be compelled to completely answer plaintiffs' interrogatories and provide a meaningful explanation of the factual bases for their

affirmative defenses, or in the alternative, defendants' affirmative defenses should be stricken in their entirety.

DATED: September 27, 2005

Respectfully submitted,

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DECLARATION OF SERVICE BY UPS OVERNIGHT AND BY EMAIL

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 September 27, 2005, declarant served by UPS Overnight and by email the: **LEAD PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL RESPONSES TO FIRST SET OF INTERROGATORIES FROM HOUSEHOLD DEFENDANTS** to the parties listed on the attached Service List. The parties' email addresses are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of September, 2005, at San Francisco, California.

/S/ Monina O. Gamboa
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