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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, on behalf of itself and all others similarly situated,	)	**Lead Case No. 02 C 5893 (Consolidated)**
Plaintiff,	)	
vs.	)	**Judge Ronald A. Guzman**
	)	**Magistrate Judge Nan R. Nolan**
HOUSEHOLD INTERNATIONAL, INC, et al.,	)	
Defendants.	)	

ORDER

This matter is before the court for ruling on lead plaintiffs' motion to compel responses to the first set of interrogatories. The disputed interrogatories seek information pertaining to defendants' affirmative defenses. Defendants oppose the motion to compel, arguing that the interrogatories are contention interrogatories, and that they should not be required to answer until substantial discovery has been completed. For the reasons explained below, the motion to compel is granted in part and denied in part.

BACKGROUND

Before explaining the ruling, some brief background is warranted. When defendants answered the corrected, amended consolidated class action complaint on July 2, 2004, defendants asserted 22 affirmative defenses. Shortly thereafter, on July 16, 2004, plaintiffs served the first set of interrogatories asking defendants to (1) "identify all facts" on which they base their affirmative defenses, (2) "identify all persons" with knowledge of the facts identified in response

to the first interrogatory, and (3) "identify all documents" that support each affirmative defense.[1] In their responses and objections dated August 16, 2004, defendants referred lead plaintiffs to the persons identified in their Rule 26(a) disclosures for the witnesses with knowledge of the affirmative defenses. But defendants otherwise objected to the interrogatories on grounds that the questions were premature and could not be answered until the defendants engaged in discovery. Defendants further stated that they would supplement their answers after further information was obtained. During the course of the following year, the parties met and conferred regarding the first set of interrogatories on several occasions. As a compromise, lead plaintiffs requested responses to 13 of the affirmative defenses, agreeing to defer responses to the other 9 defenses. Defendants subsequently amended their responses and objections on January 19, 2005 to respond regarding certain affirmative defenses; instead of providing narrative answers, defendants invoked Rule 33(d) of the Federal Rules of Civil Procedure and identified business records, by bates range, from which the answers could be derived. Lead plaintiffs were not satisfied with those answers, but further efforts to meet and confer did not resolve the dispute.

On September 6, 2005, lead plaintiffs filed the pending motion to compel answers to the first set of interrogatories. According to lead plaintiffs, fact discovery is nearing an end, yet they

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[1]Although plaintiffs drafted their first set of interrogatories as three interrogatories (*i.e.*, for each affirmative defense, (1) identify all facts, (2) identify all witnesses, (3) identify all documents), in the court's view, each of the 22 affirmative defenses is a discrete area of inquiry. Accordingly, the interrogatories are more fairly counted as 22 interrogatories, each containing 3 subparts—*i.e.*, one interrogatory directed at each of the 22 affirmative defenses, which seek the facts, witnesses, and documents relating to each defense. *See Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 664-665 (D. Kan. 2004) ("[A]n interrogatory containing subparts directed at eliciting details concerning a 'common theme' should generally be considered a single question. On the other hand, an interrogatory which contains subparts that inquire into discrete areas should, in most cases, be counted as more than one interrogatory.")

still do not know the factual basis underlying defendants' affirmative defenses. Moreover, lead plaintiffs maintain that defendants' reliance on Rule 33(d) was improper because the burden of deriving the answers from the documents is not substantially the same for both parties. Indeed, lead plaintiffs argue that it is not possible for them to derive the answers from the documents defendants have identified (which includes voluminous documents such as Household's 156 page SEC form 10-K and 699 pages of "First Call Analyst Reports" which contain and enormous amount of facts relating to numerous aspects of Household's business operations and financials). Defendants counter that the interrogatories are contention interrogatories, and that it is more fair and efficient to defer answers to the interrogatories until discovery is near an end. Additionally, defendants argue that their reliance on Rule 33(d) was proper.

At the time lead plaintiffs filed the motion to compel, fact discovery was scheduled to close on January 13, 2006. However, at the parties' request, the court recently extended the discovery cutoff until May 12, 2006, so six months still remain for fact discovery.

DISCUSSION

"'Contention' interrogatories are interrogatories that seek to clarify the basis for or scope of an adversary's legal claims." *Starcher v. Correctional Med. Sys., Inc.*, 144 F.3d 418, 421 n. 2 (6th Cir. 1998). "Basically, contention interrogatories require the answering party to commit to a position and give factual specifics supporting its claims." *Ziemack v. Centel Corp.*, No. 92 C 3551, 1995 WL 729295, at *2 (N.D. Ill. Dec. 7, 1995). Generally speaking, "[c]ontention interrogatories ask a party: to state what it contends; to state whether it makes a specified contention; to state all facts upon which it bases a contention; to take a position, and explain or defend that position, with respect to how the law applies to facts; or to state the legal or

theoretical basis for a contention." *B. Braun Med. Inc. v. Abbott Labs.*, 155 F.R.D. 525, 527 (E.D. Penn. 1994). Interrogatories seeking the identification of witnesses and documents, on the other hand, are not contention interrogatories. *Id.*

Contention interrogatories are a permissible form of discovery to which answers ordinarily are required. *Starcher*, 144 F.3d at 421 n.18. Here, without a doubt, lead plaintiffs are entitled to request information regarding defendants' affirmative defenses. As in most cases, the timing of the answers, rather than the subject matter of the questions, is the disputed issue. Courts recognize that answers to contention interrogatories may help narrow and clarify the issues in litigation. *In re Convergent Tech. Sec. Litig.*, 108 F.R.D. 328, 337 (N.D. Cal. 1985). But courts also recognize that requiring early responses may force a party to articulate theories of its case that have not been fully developed, *Braun*, 155 F.R.D. at 527, to prematurely commit to a position, or to submit multiple supplemental answers later in the litigation, *Ziemack*, 1995 WL 729295 at *2. Because of these concerns, and in an effort to promote fairness and efficiency, courts generally defer answers to contention interrogatories until near the end of discovery. *E.g.*, *id.*; *In re Convergent Tech. Sec. Litig.*, 108 F.R.D. at 336. This is not a rigid rule, however. *In re Convergent Tech. Sec. Litig.*, 108 F.R.D. at 337. The appropriate timing for contention interrogatories depends on the facts of the case, and, ultimately, it is within the court's discretion to determine when contention interrogatories should be answered. *Ziemack*, 1995 WL 729295 at *2; *compare Conopco, Inc. v. Warner-Lambert Co.*, No. Civ. A. 99-101(KSH), 2000 WL 342872, at *5 (D.N.J. Jan. 26, 2000) (concluding that contention interrogatories need not be answered until further discovery was completed) *and Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 96 (E.D. Penn. 1992) (denying motion to compel answers to contention interrogatories where

substantial discovery still had to be conducted) *with Ziemack*, 1995 WL 729295 at * 2 (where a significant amount of discovery had already been completed, court compelled plaintiffs to answer half of defendants' contention interrogatories before discovery neared its end) *and Rusty Jones, Inc. v. Beatrice Co.*, No. 89 C 7381, 1990 WL 139145, at *2 (N.D. Ill. Sept. 14, 1990) (granting motion to compel answers to contention interrogatories before end of discovery where plaintiffs had received significant amount of defendant's documents before filing the complaint, and where defendant had already answered plaintiff's interrogatories and document requests).[2]

Turning to the interrogatories at issue here, lead plaintiffs' first set of interrogatories asks a combination of identification interrogatories and contention interrogatories. The interrogatories that ask defendants to identify witnesses and documents are not contention interrogatories. *Braun*, 155 F.R.D. at 527. Finding no reason to postpone the answers to those interrogatories, the court orders defendants to amend their answers to identify witnesses with knowledge of the facts underlying the affirmative defenses and to identify documents supporting the affirmative defenses **by December 6, 2005**. Further, when defendants identify which witnesses have knowledge of facts relating to the affirmative defenses, defendants must specifically identify which witness has knowledge regarding which affirmative defense(s). Additionally, the court reminds defendants that Rule 26(e)(2) imposes a duty to supplement interrogatory answers. Fed. R. Civ. P. 26(e)(2). If defendants fail to properly supplement their answers, they may be barred under Rule 37(c)(1) from using evidence at trial that has not been disclosed, unless the failure is

[2]These are just a few of the many cases in which courts have addressed when contention interrogatories must be answered. Because the decision regarding timing depends on the facts of the case and is left to the court's discretion, it is unnecessary to discuss all of the cases cited by the parties.

harmless. Fed. R. Civ. P. 37(c)(1); *Portis v. City of Chicago*, No. 02 C 3139, 2005 WL 991995, at *9 (N.D. Ill. Apr. 15, 2005); *For Your Ease Only, Inc. v. Calgon Carbon Corp.*, No. 02 C 7345, 2003 WL 22682361, at *2 (N.D. Ill. Nov. 12, 2003).

Unlike the requests for identification of witnesses and documents, lead plaintiffs' interrogatories asking defendants to identify all facts on which they base their 22 affirmative defenses are contention interrogatories because they ask defendants to set forth the factual basis underlying their defenses. *See Ziemack*, 1995 WL 729295 at * 2 (contention interrogatories ask party to identify facts supporting its claims). In an effort to balance the lead plaintiffs' need for information explaining the basis for the affirmative defenses with defendants' need to sufficiently develop their defenses, the court orders defendants to answer the contention interrogatories regarding each affirmative defense **no later than January 13, 2006**. This solution gives defendants two more months to develop their defenses, but still leaves four months before the close of fact discovery for lead plaintiffs to take any additional discovery they may require. Although lead plaintiffs ask for "all facts" supporting each of the 22 affirmative defenses, several courts have held that such interrogatories should be limited to the "'principal or material' facts which support an allegation or defense." *Stoldt v. Centurion Indus., Inc.*, No. 03-2634-CM-DJW, 2005 WL 375667, at *5 (D. Kan. Feb. 3, 2005); *Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 445, 447 (D. Kan. 2000). The court agrees with the reasoning of those decisions, and thus requires defendants to identify the principal and material facts supporting each of their affirmative defenses, rather than every possible fact. Additionally, because of the complexity of this case, defendants may not rely on Rule 33(d) to avoid providing a written narrative of the principal and material facts underlying their contentions. Moreover, although

defendants are relieved from the broad request for "all facts," the court reminds them of their obligation to supplement their answers under Rule 26(e)(2) and cautions them to disclose any evidence they intend to use at trial. *See* Fed. R. Civ. P. 26(e)(2) and 37(c)(1); *Portis v. City of Chicago*, 2005 WL 991995 at *9; *For Your Ease Only, Inc.*, 2003 WL 22682361 at *2.

As a final matter, before answering the interrogatories regarding the factual basis for the affirmative defenses, defendants should re-evaluate the asserted defenses and determine which truly constitute affirmative 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 v. Cont'l Ill. Nat'l Bank & Trust Co.*, 576 F. Supp. 985, 988 (N.D. Ill. 1983) (emphasis in original). Thus, a true affirmative defense does not merely raise matters already raised by a denial of plaintiff's allegations. *Bobbitt v. Victorian House, Inc.*, 532 F. Supp. 734, 736 (N.D. Ill. 1982). Moreover, defendants bear the burden of proof on issues raised by a true affirmative defense. *Native Amer. Arts, Inc. v. Waldron Corp.*, 253 F. Supp. 2d 1041, 1045 (N.D. Ill. 2003). When a defendant raises an issue on which the plaintiff bears the burden of proof, the defendant has not raised a true affirmative defense. For example, estoppel, laches, and statute of limitations defenses are affirmative defenses. Fed. R. Civ. P. 8(c). Conversely, an asserted defense that challenges an element of the plaintiff's claim (*e.g.*, challenging whether plaintiff reasonably relied on misstatements in a fraud case) is not an affirmative defense. *See Maxcy v. WTTWS, Inc.*, No. 93 C 5088, 1993 WL 326889, at *2 (N.D. Ill. Aug. 26, 1993) (striking defenses that challenged causation in a negligence case); *In re Olympia Brewing Co. Sec. Litig.*, No. 77 C 1206, 1985 WL 3928, at *10 (N.D. Ill. Nov. 13, 1985) (defense that effectively denies reliance element of

securities fraud claim is not an affirmative defense). Likewise, attacks on the sufficiency of the pleading (*e.g.*, failure to state a claim) are not affirmative defenses. *See Instituto Nacional*, 576 F. Supp. at 991 (striking failure to state a claim from affirmative defenses).

After re-evaluating their affirmative defenses, if defendants find it necessary to amend, they should seek leave to do so from the district court.

CONCLUSION

For the reasons explained above, lead plaintiffs' motion to compel answers to the first set of interrogatories is granted in part and denied in part.

ENTERED:

Nan R. Nolan

NAN R. NOLAN
United States Magistrate Judge

Dated: November 10, 2005