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

REPLY IN SUPPORT OF THE CLASS' MOTION TO COMPEL RE RULE 30(b)(6) DEPOSITION ON HOUSEMAIL TOPICS

This motion reflects the Class' attempt to obtain information regarding Household International, Inc.'s ("Household" or the "Company") general policy of retaining Housemail files in the face of litigation (the "general policy"), a topic within the Class' Rule 30(b)(6) Housemail deposition notice. The specific questions at issue are:

1) Whether service of a summons or a complaint triggers a directive to retain documents;

2) Whether under the policy for retaining documents, as it pertained to Housemail, there was any time frame in which a directive was to be issued upon receipt of a summons or a complaint; and

3) If so, what was that time frame.

Although the Household defendants agreed to provide a knowledgeable witness on the topic of the general policy and indeed, represented to the Court that their witness, Christine Cunningham, would be prepared to testify on this topic, she could not answer the questions at issue. Further, the Household defendants have refused to provide the responsive information under oath, despite the Class' efforts and the Household defendants' prior agreement to do so.

The Household defendants' opposition is without real substance. Their argument that these questions concern "technical, legal issues" is factually and legally flawed. Indeed, under the applicable case law, the Household defendants had a duty to produce a witness knowledgeable about the requested information. Similarly, the argument that the Class should be forced to proceed via interrogatory ignores this pre-existing duty to provide the responsive information. Finally, the suggestion that the Class has improperly sought "discovery by correspondence" fails to recognize that the Class' efforts to reach a mutually acceptable compromise are precisely the steps that parties in the meet and confer process should undertake to resolve discovery disputes.

Given the foregoing and as discussed in greater detail below, the Household defendants have no reasonable grounds for opposing this motion and pursuant to Rule 37 of the Federal Rules of Civil Procedure sanctions should be awarded.

I. FACTUAL BACKGROUND

In their opposition, the Household defendants present a statement of facts rife with inaccuracies.[1] However, despite this, with one exception, the basic facts are not in dispute.

The Household defendants do not deny that they agreed to produce a witness, Ms. Cunningham, on the topic of the general policy nor that the Court ordered the Housemail deposition to include this subject. Nor do they deny that Ms. Cunningham was unable to answer the questions at issue.

Equally undisputed is that the "narrative response" approach was initially the Household defendants' suggestion and that the Class accepted its use on this issue. The Household defendants do dispute that they agreed to this approach subsequent to their agreement to produce Ms. Werner on other Housemail topics, specifically hardware and software issues, that Ms. Cunningham could not address. *See* Defs' Opp. at 3. However, by January 10, 2006, the parties had already agreed that

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[1] For example, the Household defendants erroneously state that the Class found progress in the Household defendants' reiterating an unacceptable response to the first question at issue. *See* Memorandum of Law in Opposition to Class' Motion to Compel Re Rule 30(b)(6) Deposition on Housemail Topic ("Defs' Opp.") at 6. To the contrary, the Class' expression of progress rested upon the Household defendants' provision of new information responsive to the second and third questions as well as an explanation for their rejection of the Class' proposed compromise language. *See* Declaration of D. Cameron Baker in Support of the Class' Motion to Compel Re Rule 30(b)(6) Deposition on Housemail Topic and Compliance with Local Rule 37.2 ("Baker Decl."), Ex. T at 1. Similarly, the Household defendants improperly obfuscate the history of the parties' meet and confer by leaving out relevant portions of the Class' correspondence and by interlacing comments in the parties' correspondence that address the dispute regarding Ms. Cunningham's inability to testify about the Housemail system (and Carol Werner's upcoming deposition) with comments in the correspondence pertaining to this dispute as to this general document retention policy dispute. *See* Defs' Opp. at 3 n.4 (omitting critical qualification in the Class's responsive letter); Defs' Opp. at 4. A review of the relevant letter, which was previously submitted as Exhibit G to the Baker Declaration, presents the accurate reflection of the parties' positions. The Class will not further address these issues except as they pertain to the substance of this motion.

Ms. Werner would testify on these issues in her deposition. Subsequently, by letter dated January 17, 2006, Mr. Greenblatt, counsel for the Household defendants, expressly offered to provide a narrative response to the first question under oath. *See* Baker Decl., Ex. M at 2. Accordingly, the Household defendants' current refusal to provide the narrative responses under oath does represent defendants' going back on their prior agreement. *See also* Defs' Opp. at 5 (discussing this letter and the offer to provide the response under oath).

II. THE CLASS' MOTION SHOULD BE GRANTED IN ITS ENTIRETY

A. The Questions Are Within the Topic of the General Policy For Retention of Housemails and Do Not Involve Technical or Legal Issues

The three questions at issue address basic aspects of Household's general policy of document retention regarding Housemail, *i.e.*, what triggered the general policy and whether there was a time frame in which to issue a document retention directive after receipt of a summons. Contrary to the Household defendants' arguments, these questions are not "technical, legal" questions. Moreover, pursuant to Rule 30(b)(6), the Household defendants had an obligation to fully prepare Ms. Cunningham on all knowledge within the Company regarding its general policy. Given these points, the Household defendants have no justifiable excuse for Ms. Cunningham's inability to answer these basic questions.

The questions concern basic elements of the general policy. Accordingly, it is truly incredible that the Household defendants suggest otherwise. *See* Defs' Opp. at 5. The implausibility of this suggestion is clear from the comments made by Mr. Sloane, Household's counsel at the deposition, which reflect that the questions concern the general policy:

Mr. Sloane: You're asking [as] [sic] a general policy, right?

Mr. Baker: Yes.

Baker Decl., Ex. D at 77:10-12. Mr. Sloane's comments, likewise, dispose of the Household defendants' contention that these questions concern legal issues or theories, a contention that is implausible on its face.

Further, the Household defendants had an obligation to prepare Ms. Cunningham on all the knowledge regarding the general policy that was available to the Company. This obligation is not excused due to the technical or complex nature of the topic. *Buycks-Roberson v. Citibank Fed. Sav. Bank,* 162 F.R.D. 338, 343 (N.D. Ill. 1995) (party had obligation to prepare the witness "despite the difficulty of investigating the subject matter requested by the deposing party"); *Paul Revere Life Ins. Co. v. Jafari,* 206 F.R.D. 126, 127 (D. Md. 2002) (party had obligation to prepare 30(b)(6) witness on how facts support its contentions, including the contention that ERISA was applicable, and on facts obtained by counsel). Nor is this obligation satisfied by only partially preparing the witness on the subject matter within the scope of the deposition notice. *MCI Worldcom Network Servs. v. Atlas Excavating, Inc.*, No. 02 C 4394, 2004 U.S. Dist. LEXIS 2736, at **5-6 (N.D. Ill. 2004).

As the Household defendants have a pre-existing duty to provide information responsive to these questions, they cannot now assert that the Class must propound interrogatories before they will provide responsive information. First, this was a Court-ordered deposition wherein the Court specifically ruled on this issue and they affirmatively represented that the witness would be prepared to testify on this subject. In essence, the Household defendants' position rests on the contrarian proposition that a party seeking discovery must utilize sequentially two or more of the discovery means provided by the Federal Rules of Civil Procedure before receiving information responsive to the first means. Not surprisingly, there is no support for this proposition and the Household defendants cite none in support of their position. Defs' Opp. at 9-10.

Second, during the meet and confer, they specifically agreed to provide responsive information under oath. Baker Decl., Ex. M at 2. There is no justification for the Household defendants' change in position.

Third, the Household defendants' suggestion of interrogatories presumes that the Class could only seek the responsive information via interrogatory. This is contrary to this Court's prior October 26, 2005 Order and the November 30, 2005 Order wherein it ordered the Housemail deposition and directed that it cover the topic of the general policy. *See*, *e.g.*, Declaration of Joshua M. Greenblatt in Opposition to Class' Motion to Compel Re Rule 30(b)(6) Deposition on Housemail Topic, Ex. A. Further, it is contrary to case law. Indeed, the very case cited by the Household defendants acknowledges that a party may proceed via deposition instead of interrogatories. "[N]or indeed is a 30(b)(6) requesting party limited to conducting her factual inquiry via interrogatories." *Wilson v. Lakner,* 228 F.R.D. 524, 529 (D. Md. 2005).

Finally, the Household defendants suggest that there is no good cause for granting this motion because the information sought is relevant to the spoliation issues. This suggestion ignores the fact that this Court specifically directed the parties to hold the Housemail deposition to get to the bottom of these issues.[2] The Household defendants' recalcitrance in providing this basic information regarding its general policy provides a clear indication that there are substantive spoliation issues in play.

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[2] Contrary to the Household defendants' contentions, the Housemail deposition has proven fruitful even on "non-spoliation" issues. As a result of that deposition, the Class learned that contrary to the Household defendants' representations to this Court, there were in existence live Housemail files for 47 Housemail accounts. The Household defendants are now in the process of producing these Housemail files, which would not have been otherwise produced.

B. The Household Defendants' Proposed Response Was Evasive

In their opposition, the Household defendants argue that their proposed response to the first question was not "evasive" but truthful. Defs' Opp. at 8. To the contrary, that proposed response, which distinguished between service of a summons and service of a complaint, as if the one could occur without the other (*see* Fed. R. Civ. P. 4(c)), was evasive and did not affirmatively state whether or not service of a summons triggered the general policy.

In response to the first question, the Household defendants have emphasized a distinction between a summons and a complaint and justified their evasive answer on the grounds that there was no general policy pertaining to receipt of a summons. Defs' Opp. at 8. However, when asked to identify "'whether under the policy for retaining documents as it pertained to Housemail there was any time frame in which a directive was to be issued upon a ***receipt of a summons***,'" Mr. Greenblatt responded: "The answer to this question is that the policy did not recite a specific time frame. Household's policy was/is that directives are issued within a reasonable time." Baker Decl., Ex. S at 2 (emphasis added). The Household defendants, thus, admit that the general policy is triggered by the receipt of a summons, which establishes that their rejection of the Class' proposed compromise responses was improperly based on the distinction between a summons and a complaint.

C. The Class Properly Used the Meet and Confer Process to Seek a Reasonable Compromise

Lacking any substance to their opposition, the Household defendants argue that the Class improperly pursued "discovery by correspondence" and that the Class is burdening the Court with frivolous unnecessary motions. Both of these arguments are meritless.

As to the charge of "discovery by correspondence," the Class accepts that it sought to reach a compromise by accepting the Household defendants' proposal of narrative responses under oath and by subsequently proposing various responses. This conduct is entirely consistent with this Court's oft-stated preference for resolution of discovery disputes during the meet and confer process.

As to the charge that the Class is unnecessarily burdening the Court, as discussed above and in its opening papers, the Class has made every effort to avoid this motion, accepting the Household defendants' proposed solution and proposing compromise language. Baker Decl., Exs. O & T. It was only after the Household defendants announced that they would not provide any responses under oath to these questions, absent interrogatories, that the Class brought this motion. Baker Decl., Ex. U.

Conversely, the Household defendants have been the party that has obstructed discovery so as to force this motion. As to the second and third questions, where there is no dispute as to the proposed response, all that they need to do to avert a motion was to provide these responses under oath as they had agreed to do. They would not do so. Moreover, as to the first question, the Household defendants should have accepted the Class' January 20, 2006 proposed response, which carefully tracked the defendants' own statements in their January 19, 2006 letter. Significantly, in their opposition, the Household defendants do not contest the accuracy of this proposed response, which reads in full: "During the year 2002, Household did not have a specific document retention policy with respect to the service of a summons. A directive to retain documents under Household's document retention policy at that time was triggered by the service of a complaint." *See* Defs' Opp. at 6.[3]

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[3] In their factual recitation, the Household defendants state that they rejected this response because it "improperly applied temporal qualifications to Defendants' prior answer and shifted the focus from a 'summons' to a 'complaint.'" Defs' Opp. at 6. These excuses are truly *de minimis*. First, the temporal qualification is not only accurate and relevant as the application of the general policy to this case occurred in 2002, but it also comports with the Household defendants' position during the deposition. *See* Baker Decl., Ex. D at 78:18-19 (Mr. Sloane stating that the question pertained to 2001 and 2002). Second, the objection as to "focus" makes no sense since the use of "complaint" in the proposed response is solely to explain the first sentence.

III. THE COURT SHOULD AWARD SANCTIONS

As indicated above, the Household defendants lack substantial justification for their opposition to this motion and thus, sanctions should be awarded. *See MCI Worldcom*, 2004 U.S. Dist. LEXIS 2736 (awarding sanctions in the form of attorneys' fees and the costs of the additional deposition based on the party's failure to fully prepare the Rule 30(b)(6) witness).

IV. CONCLUSION

For the reasons stated above, the Class' Motion to Compel should be granted and sanctions should be awarded against the Household defendants.

DATED: February 7, 2006

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
PATRICK J. COUGHLIN (90785466)
AZRA Z. MEHDI (90785467)
D. CAMERON BAKER (154452)
MONIQUE C. WINKLER (90786006)
SYLVIA SUM (90785892)
LUKE O. BROOKS (90785469)

/S/ Cameron D. Baker
D. CAMERON BAKER

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
655 West Broadway, Suite 1900
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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LEXSEE 2004 US DIST LEXIS 2736

MCI WORLDCOM NETWORK SERVICES, Plaintiff/Counter-Defendant, vs. ATLAS EXCAVATING, INC., Defendant/Counter-Plaintiff.

No. 02 C 4394

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

2004 U.S. Dist. LEXIS 2736

February 23, 2004, Decided
February 24, 2004, Docketed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part *MCI Worldcom Network Servs. v. Atlas Excavating, 2004 U.S. Dist. LEXIS 9582 (N.D. Ill., Apr. 8, 2004)*

PRIOR HISTORY: *MCI WorldCom Network Servs. v. Atlas Excavating, Inc., 2003 U.S. Dist. LEXIS 9197 (N.D. Ill., June 2, 2003)*

DISPOSITION: [*1] Defendant Atlas' motion for leave to file a counterclaim, a third party claim and affirmative defense, and its motion to compel, granted, and defendant MCI's motion for sanctions granted.

COUNSEL: For MCI WORLDCOM NETWORK SERVICES, INC., plaintiff: John Peirce Morrison, Robert Raymond Brown, Bell, Boyd & Lloyd, Chicago, IL. James J. Proszek, Kimberly Biedler, Hall, Estill, Hardwick, Gable, Golden & Nelson, Tulsa, OK.

For ATLAS EXCAVATING, INC., defendant: James Kenneth Borcia, Michael John Fusz, David O Yuen, Tressler, Soderstrom, Maloney & Priess, Chicago, IL.

JUDGES: JAMES B. MORAN, Senior Judge, U.S. District Judge.

OPINIONBY: JAMES B. MORAN

OPINION:

MEMORANDUM OPINION AND ORDER

Plaintiff MCI Worldcom Network Services, Inc. (MCI) brought this action against Atlas Excavating, Inc. (Atlas) alleging trespass, negligence and statutory strict liability. Defendant Atlas now seeks leave to file an amended answer containing the affirmative defense of comparative fault, along with a counterclaim against MCI and a third party complaint against AT&T Corporation (AT&T). Atlas also filed a motion to compel the deposition of Brian Tooley as MCI's *Federal Rule of Civil Procedure 30(b)(6)* [*2] witness in Chicago. MCI filed a motion seeking sanctions against Atlas for a series of discovery violations. For the following reasons, plaintiff's motions and defendant's motion are granted.

Atlas' Motion for Leave to File Counterclaim and Third party Claim, and to Amend Answer

This case arises from an incident in Bensonville, Illinois, in December 2001, in which Atlas severed an underground cable belonging to MCI while installing fiber-optic cable lines for XO Communications. Atlas also damaged utility lines belonging to AT&T Broadband (now known as Comcast). In its complaint, MCI alleges that it properly marked the location of the cable line pursuant to Illinois law and regulations. During discovery, Atlas learned that AT&T may have marked the line and seeks to amend its complaint.

Under *Rule 15(a)* we should allow pleading amendments "in the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment." *Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)*; [*3] *King v. Cooke, 26 F.3d 720, 723 (7th Cir. 1994)*. Delay alone is generally not sufficient to justify denial of leave to amend.

In its response, MCI argues that we should deny the motion because Atlas improperly delayed the amendment

resulting in prejudice and because it improperly states a claim against AT&T rather than AT&T Broadband or Comcast. We disagree. First, Atlas claims to have only learned of its potential claim through discovery, in late 2003. Moreover, delay alone is not enough to deny the motion and there is no evidence that MCI will be prejudiced in any meaningful way. It should have been clear from the commencement of this litigation that the marking of the lines is a crucial issue that will be addressed through discovery. We believe that it will be most efficient to have this issue fully litigated in this action. Finally, it seems that AT&T was the legal owner of AT&T Broadband in December 2001, and is therefore the proper third party defendant in this action.

Atlas' Motion to Compel

On October 24, 2003, Atlas attempted to set the deposition of Brian Tooley, MCI's *Rule 30(b)(6)* witness, in Chicago, where he was expected to testify as to a [*4] number of matters on behalf of the corporation. Defendant denied, instead stating that Tooley would only be made available in Texas, his home state and the corporate home of MCI.

The general rule is that plaintiff, even if a non-resident, must appear at depositions in the forum of its choosing. *Orrison v. Balcor Co., 132 F.R.D. 202, 203 (N.D. Ill. 1990).* That is, because MCI brought suit in the Northern District of Illinois, it must make party witnesses available in Chicago, even if these witnesses live elsewhere. The cases relied on by MCI do not contradict this rule; instead, they deal either with *non-party* witnesses or with corporate *defendants. See Yaskawa Elec. Corp. v. Kollmorgen Corp., 201 F.R.D. 443 (N.D. Ill. 2001); Zuckert v. Berkliff Corp., 96 F.R.D. 161 (N.D. Ill. 1982).*

MCI's Motion for Sanctions

On November 11, 2002, MCI served its interrogatories and document production requests upon Atlas. After Atlas failed to respond, MCI filed a motion to compel, which was granted on June 2, 2003. Atlas, however has still failed to comply with that order by producing the documents or answers. Also, Atlas was required [*5] to produce a *Rule 30(b)(6)* witness who was qualified to testify as to a list of 24 issues. Terry Dillon was named as Atlas' witness, but at his deposition on November 19, 2003, he was unable to testify as to past damage by Atlas to other underground utility lines, also the subject of the earlier discovery dispute.

While defendant changed counsel after we issued the June 2, 2003 order, this does not provide it with an excuse to ignore that order. Atlas admits in its response that it has not provided all of the required information, yet fails to provide an adequate justification for this failure. *Rule 37(b)(2)* allows us to impose reasonable sanctions (such as costs and fees) in the case of such failure to comply with discovery orders. *See also Melendez v. Illinois Bell Telephone Co., 79 F.3d 661, 670-71 (7th Cir. 1996).* Atlas is directed to follow the order of June 2, 2003, and to pay MCI's costs and fees incurred in the filing of this motion.

Atlas likewise offers no justification for its failure to adequately produce its *30(b)(6)* witness. It does not deny that Dillon was unqualified to testify as to the past damage, but instead claims that Dillon was partially [*6] prepared and it will make another witness available to discuss the remaining issue. This is not enough to avoid sanctions for its failure. Even though Dillon was mostly qualified and the deposition was by no means futile, defendant's failure to fully prepare him to testify violates *Rule 30(b)(6). See Buycks-Roberson v. CitiBank Federal Sav. Bank, 162 F.R.D. 338, 343 (N.D. Ill. 1995).* In addition to making available a qualified witness, defendants are ordered to pay attorney's fees and the costs of the deposition of that witness to the extent it relates to past incidents, That sanction is not so much a penalty as it is a recognition that the sequence of events has increased MCI's expense unnecessarily n1

N1 Defendant also claims that plaintiff's motion must fail because it did not fully comply with *Rule 37(d)* by providing a certification of good faith contact with defendant. *Rule 37*, however, states that such a certification, while required for certain discovery violations, is not necessary when imposing sanctions for failure to provide a *Rule 30(b)(6)* witness here regarding past incidents. We further note that the failure relates to the same subject area as the prior order compelling disclosure.

[*7]

CONCLUSION

For the foregoing reasons, defendant Atlas' motion for leave to file a counterclaim, a third party claim and affirmative defense, and its motion to compel, are granted, and defendant MCI's motion for sanctions is granted.

Feb. 23, 2004.

JAMES B. MORAN

Senior Judge, U.S. District Court

DECLARATION OF SERVICE

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 February 7, 2006, declarant served by email the: **REPLY IN SUPPORT OF THE CLASS' MOTION TO COMPEL RE RULE 30(b)(6) DEPOSITION ON HOUSEMAIL TOPICS** to the parties listed on the attached Service List. The parties' email addresses are as follows:

TKavaler@cahill.com
PSloane@cahill.com
LBest@cahill.com
NEimer@EimerStahl.com
ADeutsch@EimerStahl.com
sparzen@mayerbrownrowe.com
mmiller@millerfaucher.com
lfanning@millerfaucher.com

The above document was also served by U.S. Mail to:

Lawrence G. Soicher
Law Offices of Lawrence G. Soicher
305 Madison Avenue, 46th Floor
New York, NY 10165

David R. Scott
Scott + Scott, LLC
108 Norwich Avenue
Colchester, CT 06415

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of February 2006, at San Francisco, California.

/S/ Monina O. Gamboa
MONINA O. GAMBOA

HOUSEHOLD INTERNATIONAL (LEAD)

Service List - 2/7/2006 (02-0377)

Page 1 of 2

Counsel for Defendant(s)

Thomas J. Kavaler
Peter Sloane
Landis Best
Cahill Gordon & Reindel LLP
80 Pine Street
New York, NY 10005-1702
212/701-3000
212/269-5420 (Fax)

Nathan P. Eimer
Adam B. Deutsch
Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
312/660-7600
312/692-1718 (Fax)

Stanley J. Parzen
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, IL 60606
312/782-0600
312/701-7711 (Fax)

Counsel for Plaintiff(s)

Lawrence G. Soicher
Law Offices of Lawrence G. Soicher
305 Madison Avenue, 46th Floor
New York, NY 10165
212/883-8000
212/697-0877 (Fax)

William S. Lerach
Lerach Coughlin Stoia Geller Rudman & Robbins LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
619/231-1058
619/231-7423 (Fax)

Patrick J. Coughlin
Azra Z. Mehdi
Monique C. Winkler
Lerach Coughlin Stoia Geller Rudman & Robbins LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111-5238
415/288-4545
415/288-4534 (Fax)

Marvin A. Miller
Jennifer Winter Sprengel
Lori A. Fanning
Miller Faucher and Cafferty LLP
30 N. LaSalle Street, Suite 3200
Chicago, IL 60602
312/782-4880
312/782-4485 (Fax)

David R. Scott
Scott + Scott, LLC
108 Norwich Avenue
Colchester, CT 06415
860/537-5537
860/537-4432 (Fax)