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styled *JP Morgan Chase, et al. v. Liberty Mutual Ins. Co., et al.*, 01-CIV-15527 (JSR) (the “*Liberty Mutual Case*”). This request should be denied for two reasons. First, the *Newby* Plaintiffs’ September 23 Motion is simply an attempt to circumvent the stay of discovery relating to securities fraud claims imposed by the Private Securities Litigation Reform Act (“PSLRA”). Second, the motion is an impermissibly overbroad effort to obtain more than 200 deposition transcriptions along with their exhibits, as well as certain other materials produced by Enron in the context of the *Liberty Mutual Case*. Most of the requested material is (a) irrelevant to the issue at stake in *this* litigation, and/or (b) subject to confidential treatment by virtue of either the Protective Order entered in the *Liberty Mutual Case* by the Southern District of New York, as amended, (the “*Liberty Mutual Protective Order*,” Exhibit A) or Judge Gonzalez’s May 15, 2002 Order Modifying the Automatic Stay to Permit Certain Third-Party Discovery To Be Obtained from Debtor (the “May 15 Order,” Exhibit B).

The *Newby* Plaintiffs’ September 23 Motion should be denied pending resolution of the motions to dismiss and, to the extent that Motion is denied, should only subsequently be granted through an Order that permits the *Newby* Plaintiffs to serve subpoenas and/or document requests on the appropriate parties. Any such Order must include the conditions that (1) JPMorgan Chase be permitted to review the materials in its possession for relevance and privilege prior to production, (2) any material in question be produced under a protective order that is consistent with the terms of the *Liberty Mutual Protective Order* and the May 15 Order, and (3) all parties to the *Liberty Mutual Case* be given the opportunity to have their objections heard.

I. The Relief Sought Through The *Newby* Plaintiffs' September 23 Motion Is Barred At This Time By The PSLRA

As stated more fully in the August 1, 2002 Memorandum of the Investment Bank Defendants In Opposition To The *Tittle* Plaintiffs Motion for Production of Documents (the "August 1 Brief," Exhibit C), the PSLRA clearly bars the production of the requested material at this time:

In any private action arising under this title, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 78u-4(b)(3)(B).¹

Thus, the PSLRA does not permit discovery prior to resolution of motions to dismiss unless the plaintiff demonstrates that it seeks "particularized discovery" that is "necessary" either (1) "to preserve evidence" or (2) "to prevent undue prejudice" to the plaintiff. *Id.* Courts have noted that discovery "must" be stayed, unless the "exceptional circumstances" provided in the statute exist. *See, e.g., SG Cowen Sec. Corp. v. United States Dist. Court for the Northern Dist. Of Cal.*, 189 F.3d 909, 911-12 (9th Cir. 1999) (quoting H.R. Conf. Rep. No. 104-369, at 32 (1995), *reprinted in* 1995 U.S.C.C.A.N 731, 736). The *Newby* Plaintiffs' two-page moving brief does not even attempt to satisfy the above exceptions, nor could it.

First, the *Newby* Plaintiffs have not requested "particularized discovery," but rather copies of hundreds of depositions and their exhibits without regard to their relevance to *this* case. There is nothing particularized about this discovery.

¹ The arguments concerning the PSLRA stay presented here are discussed more fully in the August 1 Brief. These arguments are merely summarized here for the convenience of the Court.

Second, the *Newby* Plaintiffs have not even tried to demonstrate that the requested discovery is necessary to “preserve evidence.” This exception requires that plaintiffs demonstrate a “particular threat that evidence would be lost or destroyed if they are not permitted to engage in discovery now.” *In re CFS-Related Sec. Fraud Litig.*, 179 F. Supp.2d 1260, 1264-65 (N.D. Okla. 2001). The *Newby* Plaintiffs do not in any way suggest that the requested material is in danger of being destroyed.

Third, the *Newby* Plaintiffs have not attempted to argue that the requested discovery is necessary to “prevent undue prejudice.” “[U]ndue prejudice” does not exist where the plaintiffs seek to lift the stay for the sole purpose of gaining access to facts to bolster their fraud complaint. *See, SG Cowen*, 189 F.3d at 913 (“as a matter of law, failure to muster facts sufficient to meet the Act’s pleading requirements cannot constitute the requisite ‘undue prejudice’ . . . justifying a lift of the discovery stay”); *Faulkner v. Verizon Comm., Inc.*, 156 F. Supp.2d 384, 402 (S.D.N.Y. 2001). The *Newby* Plaintiffs offer no other legitimate explanation for requesting discovery now, as opposed to after the pending motions to dismiss are decided.

In opposing the motion, JPMorgan Chase is mindful of the Court’s August 16, 2002 Order (the “August 16 Order”) granting the *Newby* Plaintiffs’ request for a limited production of Enron Documents. By its terms, the August 16 Order, however, related to productions that had already been made available in their entirety to several governmental entities. This current request, by contrast, relates to material obtained or created through a private civil lawsuit, governed by its own protective orders, and concerns numerous issues of no relevance to this case. Compelling JPMorgan Chase to submit to the burdensome task of sifting through this material to respond to Plaintiffs’ request would impose precisely the same type of burdens on JPMorgan Chase that the PSLRA stay was designed to prevent.

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II. Any Grant Of The *Newby* Plaintiffs' September 23 Motion Must Preserve JPMorgan Chase's Right To Review The Requested Material For Relevance And Privilege And Must Preserve The Confidentiality Provisions Placed On These Materials By The *Liberty Mutual* Protective Order And The May 15 Order

At no point did Judge Gonzalez rule on any of the substantive discovery issues at stake. To the contrary, as Judge Gonzalez's September 13, 2002 Order states, any grant of the *Newby* Plaintiffs' request must preserve the rights of all parties to the *Liberty Mutual* case "to assert applicable privileges or objections" before either this Court or the Southern District of New York. Thus, even if the Court is inclined to grant the *Newby* Plaintiffs' September 23 Motion, it must preserve JPMorgan Chase's rights to review the materials for relevance and privilege and permit JPMorgan Chase to abide by the terms of the operative *Liberty Mutual* Protective Order and the May 15 Order.

Notwithstanding the *Newby* Plaintiffs' assertion that "[a] principal issue" in the *Liberty Mutual* case is the proper treatment of certain commodity financing transactions, that case actually involves a multitude of issues, many of which are not related to Plaintiffs' allegations in this federal securities litigation. For example, two significant issues at stake in the *Liberty Mutual* case are the contents of the surety bonds themselves, and the knowledge of the sureties, who are not even parties to this case, of certain transactions. Prior to producing the requested materials, JPMorgan Chase must, as Judge Gonzalez directed, be permitted to review the production for privilege and relevance.

Moreover, much of the requested material is covered by the *Liberty Mutual* Protective Order or the May 15 Order, which impose significant restrictions on their dissemination to the Plaintiffs and other parties in the case. *See Liberty Mutual* Protective Order, Exhibit A; May 15 Order, Exhibit B. For example, the *Liberty Mutual* Order limits dissemination of certain Confidential and Highly Confidential materials to select categories of

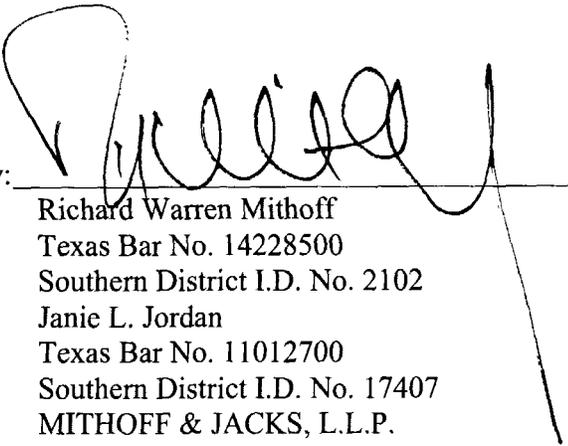
individuals. Exceptions are only made in the case of certain government entities and by judicial order. *Liberty Mutual* Protective Order, ¶ 7(h), Exhibit A. That Order further provides that “Each person who has access to Discovery Material that has been designated as Confidential or Highly Confidential shall take all due precaution to prevent the unauthorized disclosure of such material.” *Id.* ¶ 14. Similarly, the May 15 Order makes it clear that any material produced pursuant to the Order is also to be covered by the terms of the *Liberty Mutual* Protective Order. May 15 Order, ¶ E, Exhibit B. Any grant of the *Newby* Plaintiffs’ September 23 Order must permit JPMorgan Chase to adhere to the terms of the *Liberty Mutual* Protective Order and the May 15 Order and require any material produced in this litigation to be afforded the same level of confidentiality provided by those Orders.

CONCLUSION

For the foregoing reasons and for the reasons stated more fully in the August 1 Brief, this Court should deny the *Newby* Plaintiffs’ September 23 Motion unless and until this Court sustains the *Newby* Plaintiffs’ Consolidated Complaint as against JPMorgan Chase. Any subsequent grant of the *Newby* Plaintiffs’ September 23 Motion should be limited to an Order granting Plaintiffs’ permission to serve document requests or subpoenas on the appropriate parties. Any subsequent production of the requested materials must be under the conditions that (1) JPMorgan Chase be permitted to review the materials in its possession for relevance and privilege prior to production, (2) any material in question be produced under a protective order that is consistent with the terms of the *Liberty Mutual* Protective Order and the May 15 Order, and (3) all parties to the *Liberty Mutual* Case be given the opportunity to have their objections heard.

Dated: October 15, 2002

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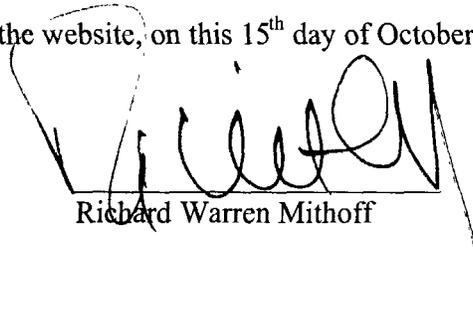
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon all counsel via electronic mail to the website, on this 15th day of October, 2002.

A handwritten signature in black ink, appearing to read "Richard Warren Mithoff", is written over a horizontal line. The signature is stylized and cursive.

Richard Warren Mithoff

The Exhibit(s) May
Be Viewed in the
Office of the Clerk