UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
OCT 15 2002
Michael N. Milby, Clerk

IN RE ENRON CORPORATION SECURITIES LITIGATION

This Document Relates To:

MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

Consolidated Civil Action
Case No.: H-01-CV-3624

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

KENNETH L. LAY, et al.,

Defendants.

**BANK DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO PRECLUDE THE FILING OR PRODUCTION OF DOCUMENTS SUBJECT TO A PROTECTIVE ORDER**

1085

## TABLE OF CONTENTS


**Page**

Preliminary Statement ..... 2

Argument ..... 4

I. The Motion Is Procedurally Improper And Premature ..... 4

II. Protective Orders Are Routinely Granted In Securities Class Actions ..... 5

III. The Entry Of A Protective Order Would Be Warranted Here ..... 7

A. There Is "Good Cause" Under Rule 26 ..... 7

B. A Protective Order Would Have No Impact On The Alleged "Strong Interests" Cited By Plaintiffs ..... 11

C. Plaintiffs Cannot Rely On A Presumption Of Public Access To Rebut The Bank Defendants' Showing Of "Good Cause" ..... 12

D. Any First Amendment Concerns Are Satisfied By A Showing of "Good Cause" ..... 14

E. The Entry Of A Protective Order In This Case Would In No Way Impair Plaintiffs' Representation of Any Putative Class Under Rule 23 ..... 16

Conclusion ..... 20

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Anderson v. Cryovac , Inc.*, 805 F.2d 1 (1st Cir. 1986) ..... 13

*Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339 (3rd Cir. 1986) ..... 13

*Barnhart v. Safeway Stores, Inc.*, Civ. No. S-92-0803WBS JFM, 1992 WL 443561 (E.D. Cal. Dec. 14, 1992) ..... 17

*Bell v. Chrysler Corp.*, No. 3:99-CV-0139-M, 2002 WL 172643 (N.D. Tex. Feb. 1, 2002) ..... 14

*Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980) ..... 15

*Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001) ..... 15

*Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3rd Cir. 1986) ..... 15

*Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999) ..... 13

*Cooper v. Sec'y of Air Force*, 132 F.R.D. 119, 122 (D.D.C. 1990) ..... 5

*Decarlo v. Archie Comic Publications, Inc.*, No. 00 Civ. 2344 (LAK), 2000 WL 781863, at *1 (S.D.N.Y. June 20, 2000) ..... 6

*Devlin v. Scardelletti*, 122 S. Ct. 2005, 2010 (2002) ..... 16

*Edwards v. Gordon & Co.*, 94 F.R.D. 584 (D.D.C. 1982) ..... 8, 9

*Gelb v. Am. Tel. & Tel. Co.*, 813 F. Supp. 1022 (S.D.N.Y. 1993) ..... 8, 9

*Glasser v. A.H. Robins Co.*, 950 F.2d 147 (4th Cir. 1991) ..... 15

*Gottstein v. Nat'l Ass'n For the Self Employed*, 186 F.R.D. 654 (D. Kan. 1999) ..... 18

*GTE Prods. Corp. v. Gee*, 112 F.R.D. 169, 170, 172 (D. Mass. 1986) ..... 9

*Gulf Oil Co.* v. *Bernard*, 452 U.S. 89 (1981) ..... 17-18

*Harris v. Amoco Prod. Co.*, 768 F.2d 669 (5th Cir. 1985) ..... 14

**Cases** **Page(s)**

*Holland v. Summit Autonomous, Inc.*, No. CIV. A. 00-2313, 2001 WL 930879 (E.D. La. Aug. 14, 2001) ..... 6

*In re Adobe Sys., Inc. Secs. Litig.*, 141 F.R.D. 155 (N.D. Cal. 1992) ..... 8, 9

*In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139 (2nd Cir. 1987) ..... 13, 17, 18-19

*In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) ..... 5-6,13

*In re City of Houston*, 745 F.2d 925 (5th Cir. 1984) ..... 16

*In re Halkin*, 598 F.2d 176 (D.D.C. 1979) ..... 13

*In re Terra Int'l,* 134 F.3d 302, 306 (5th Cir. 1998) ..... 11

*Lewis v. Am. Honda Motor Co.*, Civ. A. No. 90-4384, 1991 WL 211580 (E.D. La. Oct. 4, 1991) ..... 8

*Longman v. Food Lion, Inc.,* 186 F.R.D. 331 (M.D.N.C. 1999) ..... 17

*New York v. Microsoft Corp.*, 206 F.R.D. 19 (D.D.C. 2002) ..... 19

*Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1979) ..... 8

*Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393 (W.D. Va. 1987) ..... 13

*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) ..... 16

*Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988) ..... 15

*Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) ..... 12, 14

*SEC v. TheStreet.com*, 273 F.3d 222 (2nd Cir. 2001) ..... 19

*Transamerican Refining Corp. v. Dravo Corp.*, 139 F.R.D. 619 (S.D. Tex. 1991) ..... 16

*United States v. Brown*, 218 F.3d 415, 418 (5th Cir. 2000) ..... 16

*United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977) ..... 12

*United States v. Microsoft*, 165 F.3d 952 (D.C. Cir. 1999) ..... 15

**Cases** **Page(s)**

*United States v. $9,041,598.68 (Nine Million Forty One Thousand, Five Hundred Ninety Eight Dollars and Sixty Eights Cents)*, 976 F. Supp. 654 (S.D. Tex. 1997) ..... 14-15

*Westchester Radiologic Ass'n v. Blue Cross/Blue Shield of Greater N.Y., Inc.*, 138 F.R.D. 33 (S.D.N.Y. 1991) ..... 13

*Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc.*, No. CIV. A. 97-3012, 1998 WL 186728 (E.D. La. Apr. 17, 1998) ..... 7-9

*Wilk v. Am. Med. Ass'n*, 635 F.2d 1295 (7th Cir. 1980) ..... 14

*Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748 (7th Cir. 2000) ..... 18

*Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 143 F.R.D. 109 (W.D. Tex. 1992) ..... 12

*Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 529 F. Supp. 866 (E.D. Pa. 1981) ..... 17

**Statutes and Rules**

Fed. R. Civ. P. 5(d) ..... 19

Fed. R. Civ. P. 26(c) ..... *passim*

Local Rule 5.5 ..... 19

Local Rule 7.1 ..... 3, 5

Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(3)(B) ..... 3, 5

**Treatises**

10 FED. PROC., L.ED. (WEST 2002) ..... 8

MANUAL FOR COMPLEX LITIGATION, THIRD (1995) ..... 6

Newberg & Conte, NEWBERG ON CLASS ACTIONS (3rd Ed. 1992) ..... 16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | |
|---|---|
| IN RE ENRON CORPORATION SECURITIES LITIGATION | |
| This Document Relates To: | |
| MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants. | Consolidated Civil Action Case No.: H-01-CV-3624 |
| THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. KENNETH L. LAY, et al., Defendants. | |

**BANK DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO PRECLUDE THE FILING OR PRODUCTION OF DOCUMENTS SUBJECT TO A PROTECTIVE ORDER**

Defendants Bank of America Corporation, Credit Suisse First Boston Corp., Citigroup, Inc., Deutsche Bank AG, Barclays PLC, Merrill Lynch & Co., Inc., J.P. Morgan Chase & Company ("JPMorgan Chase"), Canadian Imperial Bank of Commerce, and Lehman Brothers Holdings, Inc. (collectively, the "Bank Defendants") respectfully submit this memorandum, along with the declaration of Richard W. Mithoff (the "Mithoff Declaration"), in

opposition to the Motion to Preclude the Filing or Production of Documents Subject to a Protective Order (the "Motion") by the Regents of the University of California, as Lead Plaintiff and on behalf of all plaintiffs consolidated thereunder (the "Plaintiffs").

## Preliminary Statement

There is no justification for the extraordinary relief Plaintiffs seek in the Motion. Plaintiffs ask the Court to rule — while the motions to dismiss are pending and before any defendant has even submitted a proposed order for the Court's review — that because this case involves Enron, the Bank Defendants have somehow forfeited all rights to protect their confidential information pursuant to Rule 26(c) of the Federal Rules of Civil Procedure (the "Federal Rules"). Such protective orders, however, are routinely entered in securities class actions. Imposing only incidental procedural burden on the parties, they protect the parties' confidential information while relieving the courts of the chore of determining, on a case-by-case basis, whether a document or testimony excerpt may be disclosed outside the litigation. The reason Plaintiffs are making this Motion is obvious; they hope to litigate their claims in the media and on the Web. The Bank Defendants respectfully submit that the proper forum for Plaintiffs' claims is this Court.

The disingenuousness of this Motion is highlighted by the fact that Plaintiffs' counsel enter into such protective orders in almost every securities fraud case they litigate. Not only do they do so, they often agree to restrictions that include provisions limiting the disclosure of confidential information to counsel's eyes only. In this case, the Bank Defendants will propose a reasonable (and standard) order that meets the legitimate confidentiality needs of all parties to this litigation, allows Plaintiffs the full use of all discovery materials in the prosecution of the case, and mirrors the confidentiality agreements and a protective order already in place in other Enron-related litigation and governmental investigations.

The Motion is procedurally deficient because Plaintiffs filed it without the pre-motion conference required under the Court's Procedures, bypassing the established mechanism for resolving discovery disputes without Court intervention. *See* Fed. R. Civ. P. 26(c); Local Rule 7.1; Procedures at § IV. Plaintiffs have also jumped the gun since the motions to dismiss the First Consolidated Amended Complaint are *sub judice* and all discovery is currently stayed pursuant to the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(3)(B). At a minimum, the Court should deny the Motion without prejudice.

The Motion also lacks any substantive merit because Plaintiffs have not shown why a standard Rule 26 protective order would be inappropriate here. Rule 26(c) of the Federal Rules allows for the entry of a protective order upon a showing of "good cause." There is ample "good cause" here because the documents that Plaintiffs seek from the Bank Defendants contain confidential and sensitive information concerning, *inter alia*, their internal operations, strategies, credit exposure and internal finances as well as documents relating to transactions with non-Enron clients that are not parties to this action. This is classic confidential information that Rule 26(c) was designed to protect.

Plaintiffs do not dispute that they seek access to such confidential information. Rather, their argument is that Enron is a special case that trumps the Federal Rules. There is, of course, no legitimate basis for such a *sui generis* exception. Plaintiffs argue that certain "strong interests" (such as the right of the public to follow the court proceedings in this action) weigh against the entry of a protective order. But such interests are embedded in every securities case. More importantly, Plaintiffs do not (and cannot) contend that a protective order here would limit in any way their access to, or use of, discovery materials in prosecuting this case. Plaintiffs focus heavily on the misdeeds of Enron and argue, in essence, that the Bank Defendants are

therefore presumed to be liable for securities fraud because they did business with Enron. According to Plaintiffs, this presumption of liability strips the Bank Defendants of their Rule 26(c) rights. Needless to say, there is no legal authority for this theory.

Nor is there any merit in Plaintiffs' argument that a protective order would interfere with the public's common-law right of access to judicial records or any First Amendment free speech rights. Many courts have held that the public does not have access rights to discovery materials that are not filed with the court. Courts have also made clear that to the extent there is any right of access to discovery materials, it must yield where, as here, there is a showing of "good cause" under Rule 26. Furthermore, courts have uniformly held that the same "good cause" showing will satisfy any First Amendment concerns. Equally unavailing is Plaintiffs' argument that a protective order would impermissibly limit their ability to communicate with absent class members. Because non-representative class members do not participate in the prosecution of an action, there is no need to disclose discovery material to them. Courts have held that protective orders restricting the disclosure of confidential information to class members are consistent with Rule 23.

## Argument

### I. The Motion Is Procedurally Improper And Premature

The Court's Procedures state that disputes concerning the mechanics of document production, including protective orders, should be "resolved by counsel without the intervention of the Court." Procedures at § IV.E. The Procedures further admonish that the Court "will *refuse to consider any and all motions for discovery* unless moving counsel advises the Court, in the motion, that counsel have conferred (in person or by telephone) in a good faith effort to resolve the matters in dispute but are unable to reach an agreement." *Id.* at § IV.D (emphasis

added).[1] The failure of counsel to cooperate on discovery matters "may result in the imposition of sanctions." Procedures at § IV.E. The Motion does not contain the certification required under the Procedures. Although the Bank Defendants have discussed with Plaintiffs the need for a protective order, no pre-motion conference among the parties has been held to attempt to resolve the issues raised in the Motion.

Moreover, all discovery in the case is stayed pursuant to the PSLRA. *See* 15 U.S.C. § 78u-4(b)(3)(B). Given that no documents are being produced, it is premature to consider the Motion. And, it would be a waste of judicial resources to decide the Motion now because, depending on the outcome of the pending motions to dismiss, the issues surrounding the protective order may become moot. Therefore, as an alternative to denying the Motion, the Court should deny the Motion without prejudice or defer any decision until after all motions to dismiss are decided and the stay is lifted. *Cf. Cooper v. Sec'y of Air Force*, 132 F.R.D. 119, 122 (D.D.C. 1990) (holding that motion for protective order was premature until the class certification question was decided).

## II. Protective Orders Are Routinely Granted In Securities Class Actions

It is commonplace for courts to issue protective orders limiting the disclosure of documents containing confidential information.

> Because parties often resist the exchange of confidential information, "parties regularly agree and courts often order that discovery information will remain private." [*United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986).] The *Manual for Complex Litigation, Second*, prepared by the Federal Judicial Center, suggests that in complicated cases where document-by-

---

[1] There is an analogous federal rule for motions seeking a protective order. Rule 26(c) states such motions must be "accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." Fed. R. Civ. P. 26(c); *see also* Local Rule 7.1 (requiring conference).

> document review of discovery materials would be unfeasible, an "umbrella" protective order, similar to the one used in this case, should be used to protect documents designated in good faith by the producing party as confidential. *Manual for Complex Litigation, Second*, § 21.431 (1985).[2]

*In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987); *Holland v. Summit Autonomous, Inc.*, No. CIV. A. 00-2313, 2001 WL 930879, at *2 (E.D. La. Aug. 14, 2001) ("protective orders are routinely agreed to by the parties and approved by the courts" because they "are essential to the functioning of civil discovery"); *Decarlo v. Archie Comic Publications, Inc.*, No. 00 Civ. 2344 (LAK), 2000 WL 781863, at *1 (S.D.N.Y. June 20, 2000) (protective orders "minimize the involvement of the Court and the parties in unproductive and time consuming disputes about the existence of good cause for protecting individual documents and avoid the litigation of such questions in the abstract").

In fact, Plaintiffs' lead counsel routinely agree to protective orders in securities class actions. The chart attached to the Mithoff Declaration as Exhibit A provides a brief description of illustrative protective orders in over 30 cases involving Plaintiffs' lead counsel. *See* Mithoff Decl. at ¶¶ 2-3, Exs. A and B. Two of those cases, *In re U.S. Liquids Securities Litigation* and *In re Landry's Seafood Restaurants, Inc. Securities Litigation*, were before this Court. *See id.* In one of those cases, Plaintiffs' lead counsel were named as defendants. *See id.* Plaintiffs' lead counsel also have been involved in cases where the protective order provides for heightened levels of protection for sensitive materials, limiting the disclosure of such material to counsel's eyes only. *See id.* Further, courts regularly approve protective orders in even the highest profile fraud cases, such as the actions involving Cendant Corporation and Sunbeam Corporation. *See* Mithoff Decl. at ¶ 4, Ex. C. Given that protective orders are so common and

---

[2] The current version of the manual still recommends the use of such protective orders. *See* MANUAL FOR COMPLEX LITIGATION, THIRD, § 21.432 (1995).

appropriate in securities class actions and that Plaintiffs' counsel routinely consent to them, this Motion should be seen for what it is: a clear attempt to misuse the Bank Defendants' confidential materials.

The Motion should also be denied because if it were granted, it would undermine the protective orders and confidentiality provisions in other Enron-related matters. JPMorgan Chase and many of the Bank Defendants are involved in other civil actions where documents were produced pursuant to confidentiality stipulations and protective orders. *See* Mithoff Decl. at ¶¶ 5-6, Exs. D and E. Exhibit E is the protective order in *The Retirement Systems of Alabama, et al. v. Merrill Lynch & Co., et al.*, CV 2002-738-H, pending in the Circuit Court for Montgomery County, Alabama (the "Alabama Action"). The Bank Defendants propose that the order in the Alabama Action serve as a template for the order in this case. In addition, several Bank Defendants have produced documents to government entities and regulators with the understanding that those documents would remain confidential. Inevitably, there will be overlap between those productions and any production of documents that may occur in this case. Granting Plaintiffs' Motion would effectively vitiate the other protective orders and confidentiality provisions.

## III. The Entry Of A Protective Order Would Be Warranted Here

### A. There Is "Good Cause" Under Rule 26

Rule 26 states that a court may limit the disclosure of "commercial information" for "good cause shown." Fed. R. Civ. P. 26(c)(7). Courts in this Circuit and in other circuits have granted protective orders where, as in this case, the documents to be produced (a) contain confidential and sensitive information the disclosure of which would put the producing party at a competitive disadvantage, and (b) contain confidential and sensitive information relating to parties that are not involved in the litigation. *See, e.g.*, *Westside-Marrero Jeep Eagle, Inc. v.*

*Chrysler Corp., Inc.*, No. CIV. A. 97-3012, 1998 WL 186728, at *1 (E.D. La. Apr. 17, 1998); *Lewis v. Am. Honda Motor Co.*, Civ. A. No. 90-4384, 1991 WL 211580, at *1 (E.D. La. Oct. 4, 1991); *Gelb v. Am. Tel. & Tel. Co.*, 813 F. Supp. 1022, 1035 (S.D.N.Y. 1993); *In re Adobe Sys., Inc. Secs. Litig.*, 141 F.R.D. 155, 158 (N.D. Cal. 1992); *Edwards v. Gordon & Co.*, 94 F.R.D. 584, 586-87 (D.D.C. 1982). *See generally Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1979) ("[C]ourts have refused to permit their files to serve . . . as sources of business information that might harm a litigant's competitive standing."); 10 FED. PROC., L. ED. § 26:227 (West 2002) (noting that the courts have issued protective orders for, *inter alia*, the protection of a party's "internal financial information," the protection of the "business and financial privacy of a party's customers," and the "avoidance of competitive disadvantage").

For example, in *Lewis* the defendant proposed a protective order that would prevent the disclosure of "competitively sensitive information." 1991 WL 211580, at *1. The proposed order defined "competitively sensitive" data as "information about Defendant's business, products, practices, or procedures which, in the ordinary course of business, is not disclosed by Defendant to the public or to third parties or entities." *Id.* The proposed order did not limit the plaintiff's use of the documents in the litigation. The court granted the order, stating:

> F.R.C.P. 26(c) clearly applies to the type of information which [the defendant] seeks to protect. Disclosure of this competitively sensitive data could certainly result in economic hardship to the Defendant. Further, since only parties outside of this litigation will be restricted by the protective order, the Plaintiff will not suffer any undue burden or inconvenience.

*Id.*

The *Westside-Marrero* court similarly granted a protective order to prevent the disclosure of a document containing "sensitive and proprietary financial information" about the

defendant's dealers, noting that the dissemination of the information "could cause commercial and competitive harm." 1998 WL 186728, at *1; *see also Adobe Sys.*, 141 F.R.D. at 158 (stating that "good cause" may be established if "the protected information includes proprietary and technical information, financial information and business strategy or marketing information which, if revealed to a competitor, would put a company at a competitive disadvantage"); *Gelb,* 813 F. Supp. at 1035 (S.D.N.Y. 1993) (granting motion to seal documents containing "potentially valuable commercial information which . . . could alter [the defendant's] competitive position" and stating, as to other documents, that "defendants' assertion that its competitors who do not now have this information could use it to do competitive injury to the defendants is . . . a sufficient basis to grant defendants' motion to seal"); *Edwards*, 94 F.R.D. at 586-87 (restricting disclosure of confidential documents relating to third parties); *cf. GTE Prods. Corp. v. Gee*, 112 F.R.D. 169, 170, 172 (D. Mass. 1986) (granting protective order prohibiting defendants from obtaining documents containing "sensitive business information" about third-party companies, including their prices, sales and identities of customers).

Here, Plaintiffs have propounded lengthy and extremely broad document requests to the Bank Defendants that, by their very breadth, call for confidential and sensitive information. For example, Plaintiffs have requested that JPMorgan Chase produce:

> (a) "all documents and all communications concerning J.P. Morgan Chase's management policies and procedures," including descriptions and explanations of, among other things, "market risk management," "credit risk management," "operational/operations risk management," "new products," "new businesses," and "risk limits" (Request No. 3);
>
> (b) "all documents and communications concerning J.P. Morgan Chase's margin agreements with Enron and others," including "all margin agreements with J.P. Morgan Chase's ten largest non-Enron volume exposures" and "all margin agreements with J.P. Morgan Chase's ten largest non-Enron credit exposures" (Request No. 5);

(c) reports of the consolidated, global market and credit risk exposure for JPMorgan Chase's "ten largest non-Enron counterparties" and "entire portfolio" (Request No. 6);

(d) "all documents concerning any business relationship" between JPMorgan Chase and any SPE (as defined in the requests) (Request No. 34);

(e) "all documents and all communications concerning J.P. Morgan Chase's policies, practices and transactions at off-market rates" (Request No. 37); and

(f) "[a]ll documents which were created or used concerning J.P. Morgan Chase's relationship management and business development process," including "the global profitability report for the 10 most profitable non-Enron clients" and "the annual credit review for each of J.P. Morgan Chase's ten most profitable non-Enron clients" (Request No. 53).

*See* Mithoff Decl. at ¶ 7, Ex. F.[3] Documents responsive to these requests (and others) would contain, *inter alia,* information relating to the banks' internal operations, strategies, credit exposure and internal finances. It cannot be doubted that unfettered public disclosure of this information would put the Bank Defendants at a competitive disadvantage because their competitors (including their co-defendants) could, for example, gain valuable insights into the banks' internal operations, their most important customer relationships and their business plans and strategies. The discovery requests also seek information about other customers who are not parties to this action. Such customers have a legitimate expectation of privacy in their dealings with the Bank Defendants and the disclosure of customer confidences would result in harm to both the customers and the banks. Therefore, under the relevant case law, it would be entirely

[3] The Bank Defendants fully reserve their rights to object to the above requests and any other requests served by Plaintiffs in this action.

appropriate for the Court to enter a protective order limiting the disclosure of the Bank Defendants' confidential and sensitive information.[4]

### B. A Protective Order Would Have No Impact On The Alleged "Strong Interests" Cited By Plaintiffs

Plaintiffs have no "strong interests" that weigh against the entry of a protective order here. *See* Pls.' Memo. of Law at 1-8. Except for their purported need to communicate with absent class members (which is addressed below in Part III.E), Plaintiffs identify only the interests of other groups, such as generic investors, policymakers, legislators and scholars. *See* Pls.' Memo. of Law at 1 and 4.

First, under Rule 26(c), the relevant interests are those of the parties involved in the action and the sole inquiry for the Court is whether there has been a showing of "good cause" by the proponents of the protective order. The purported interests of third parties are irrelevant and Plaintiffs are asking the Court in effect to re-write Rule 26. Second, Plaintiffs' reliance on other interests is a "straw man" argument because nothing in a protective order herein would prevent public access to the filings in this action and the trial. As to any subset of discovery materials subject to a protective order, Plaintiffs would be free to challenge the designations by the Bank Defendants in this Court.

---

[4] Plaintiffs also cite cases for the proposition that "good cause" must be shown through a "particular and specific demonstration of fact." Pls.' Memo. of Law at 11 (citing *In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998)). This burden does not yet fall on the Bank Defendants as no motion for a protective order is pending. Should Plaintiffs persist in their unreasonable refusal to enter into any suitable confidentiality agreement, the Bank Defendants will move at an appropriate time for a protective order and support that application with the requisite evidentiary showing.

### C. Plaintiffs Cannot Rely On A Presumption Of Public Access To Rebut The Bank Defendants' Showing Of "Good Cause"

Plaintiffs argue the Bank Defendants' interest in confidentiality "cannot overcome the presumption of the public's right to scrutinize these proceedings." Pls.' Memo. of Law at 2. As discussed above, a protective order does not prevent the public from scrutinizing the trial in this action and court filings. Moreover, the presumption cited by Plaintiffs generally applies to judicial records and proceedings, not to pre-trial discovery. The United States Supreme Court has distinguished between public access to judicial records (*i.e.*, documents filed with the court) and discovery materials that are not filed with the court. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), the Supreme Court noted that:

> Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

*See also United States v. Gurney*, 558 F.2d 1202, 1209 (5th Cir. 1977) (holding that there was no right of access because the documents sought were not part of the public record). The Supreme Court pointed out that the courts have the power to fashion protective orders under Rule 26(c) because of the liberal discovery rules and the "significant potential for abuse" of materials obtained during the discovery process. *Seattle Times*, 467 U.S. at 34.

Although *Seattle Times* involved First Amendment issues, the distinction between documents filed with the court and unfiled discovery materials has been applied to cases involving claims of a common law right of access. For example, in *Word of Faith World Outreach Ctr. Church, Inc. v. Morales*, 143 F.R.D. 109, 113 (W.D. Tex. 1992), the court cited *Seattle Times* in granting a protective order limiting the disclosure of a deposition. The Eleventh Circuit similarly cited *Seattle Times* and held that:

> [A]ppellants have no common-law right to examine the discovery materials at issue. There is no question that the press and the public jointly possess a common-law right to inspect and copy judicial records and public documents. Nevertheless, this court has observed that private documents collected during discovery are not "judicial records." Thus, while appellants may enjoy the right of access to pleadings, docket entries, orders, affidavits or depositions *duly filed*, appellants' common-law right of access does not extend to information collected through discovery which is not a matter of public record.

*Alexander*, 820 F.2d at 355 (citations omitted); *see also Anderson v. Cryovac , Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (holding that the common law presumption of access to judicial records "does not encompass discovery materials"); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343 (3rd Cir. 1986) (stating that there is no right of access to pretrial discovery, unless it is filed with the court).

Plaintiffs cite several cases for the proposition that there is a right of access to discovery materials that surpasses the Bank Defendants' interest in confidentiality. However, several of those cases expressly acknowledge that a showing of "good cause" will defeat any presumption of public access. *See Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999) (noting that a showing of "good cause" will overcome the presumption); *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 145-46 (2nd Cir. 1987) (same); *In re Halkin*, 598 F.2d 176, 188 (D.D.C. 1979) (stating that "without a protective order" discovery materials are public); *Westchester Radiological Ass'n P.C. v. Blue Cross/Blue Shield of Greater N.Y., Inc.*, 138 F.R.D. 33, 36 (S.D.N.Y. 1991) (same); *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 403-04 (W.D. Va. 1987) (noting that court may enter protective order curtailing disclosure of otherwise public discovery).

The remaining cases cited by Plaintiffs are inapposite because they each involve the modification of a protective order to allow parties in other actions to use the discovery

materials so they would not be forced to take the same discovery again. *See Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980) (stating that "access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process"); *Bell v. Chrysler Corp.*, No. 3:99-CV-0139-M, 2002 WL 172643, at *2 (N.D. Tex. Feb. 1, 2002) (same).[5]

### D. Any First Amendment Concerns Are Satisfied By A Showing of "Good Cause"

Plaintiffs argue that the First Amendment requires the Bank Defendants to show an "important or substantial" government interest, above and beyond the requirements of Rule 26(c), before the Court may issue a protective order. *See* Pls.' Memo. of Law at 14-15. In doing so, Plaintiffs utterly misconstrue the Supreme Court's controlling holding in *Seattle Times*. In *Seattle Times*, the Supreme Court held that the "good cause" standard set forth in Rule 26(c) satisfied the relevant constitutional tests:

> [W]here . . . a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

467 U.S. at 37.[6] Thus, *Seattle Times* firmly establishes that the First Amendment does not require more than Rule 26(c). *See id.*; *see also Harris v. Amoco Prod. Co.*, 768 F.2d 669, 684 (5th Cir. 1985).

---

5 Moreover, in *Wilk*, the Seventh Circuit recognized that "the raw fruits of discovery are not in the possession of the court" and, therefore, the general common-law right of public access does not attach. 635 F.2d at 1299 n.7.

6 *Seattle Times* addressed Washington Superior Court Rule 26(c), a rule virtually identical to Fed. R. Civ. P. 26(c). *See United States v. $9,041,598.68 (Nine Million Forty One Thousand, Five Hundred Ninety Eight Dollars and Sixty Eights Cents)*, 976 F. Supp. 654, 656 n.5 (S.D. Tex. 1997).

Since *Seattle Times*, federal appellate courts have uniformly rejected the argument that Plaintiffs advance here. *See, e.g., Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310 (11th Cir. 2001) (constitutional right of access to discovery materials is identical to requirements of Rule 26(c)); *United States v. Microsoft*, 165 F.3d 952, 959 (D.C. Cir. 1999) (proper application of good cause requirement sufficient safeguard for First Amendment purposes); *Glasser v. A.H. Robins Co.*, 950 F.2d 147, 149 (4th Cir. 1991) (citing *Seattle Times*); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 788 (1st Cir. 1988) (any First Amendment scrutiny of protective orders must be made within framework of Rule 26(c)'s good cause requirement); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1119-20 (3rd Cir. 1986) (clear error for district court to require defendants to demonstrate anything more than good cause for protective order); *see also United States v. $9,041,598.68 (Nine Million Forty One Thousand, Five Hundred Ninety Eight Dollars and Sixty Eights Cents)*, 976 F. Supp. 654, 656-57 (S.D. Tex. 1997) (collecting cases).

Plaintiffs cite no contrary authority. *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980) (en banc), *aff'd*, 452 U.S. 89 (1981), did not address Rule 26(c) restrictions on the disclosure of confidential material. That case concerned a total ban on all communications with any actual or potential class member concerning the action. *See* 619 F.2d at 464-465. In fact, the Fifth Circuit explicitly states that its holding — which, in any event, pre-dates *Seattle Times* — did not require it to consider whether confidentiality orders restricting the disclosure of confidential discovery materials implicate the First Amendment. *See id.* at 478 n.34. Likewise, a Rule 26(c) confidentiality order is clearly not a "gag order that prohibits attorneys, parties, or witnesses from discussing with 'any public communications media' anything about the case."

*United States v. Brown*, 218 F.3d 415, 418 (5th Cir. 2000). Thus, Plaintiffs' discussion of such gag orders is wholly inapposite. *See* Pls.' Memo. of Law at 16-18.

### E. The Entry Of A Protective Order In This Case Would In No Way Impair Plaintiffs' Representation Of Any Putative Class Under Rule 23

Plaintiffs contend that the entry of "*any* protective order" in this case "would substantially limit Plaintiffs' ability to perform their duties" as class representatives under Rule 23 of the Federal Rules. Pls.' Memo. of Law at 12, 14 (emphasis supplied). This is simply not so.

Because non-representative class members typically do not participate in the prosecution of the action, there is no need to disclose discovery material to them in order to represent or otherwise protect their interests. Non-representative class members normally are not treated as parties for purposes of discovery. *See, e.g., Transamerican Refining Corp. v. Dravo Corp.*, 139 F.R.D. 619, 621 (S.D. Tex. 1991) (the Federal Rules "do not provide for discovery against absent class members as a matter of course"); *cf. Devlin v. Scardelletti*, 122 S. Ct. 2005, 2006-07 (2002) ("nonnamed class members . . . may be parties for some purposes and not for others"); *In re City of Houston*, 745 F.2d 925, 929 n.7 (5th Cir. 1984) ("It is hardly unprecedented to treat class members differently from parties."). A Rule 23 action is a *representative* suit:

> [A] class member is ordinarily not permitted or required to file briefs or motions, to argue, or otherwise individually to participate through counsel in the trial of the action, except as the court may expressly permit.

Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 1.03 (3rd ed. 1992); *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) ("[A]n absent class-action plaintiff is not required to do anything.")

For this reason, a protective order restricting the disclosure of confidential materials to class members is fully consistent with Rule 23. *See Barnhart v. Safeway Stores, Inc.*, Civ. No. S-92-0803WBS JFM, 1992 WL 443561, at *8 (E.D. Cal. Dec. 14, 1992) (noting that plaintiffs could seek relief if there were specific instances in which it was necessary to reveal confidential information to class members)[7]; *see also Longman v. Food Lion, Inc.,* 186 F.R.D. 331, 333-34 (M.D.N.C. 1999) (plaintiffs' desire to provide discovery material to class members and public at large not "good cause" to modify protective order); *cf. In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 562 n.1, 565-67 (E.D.N.Y. 1985) (treating non-representative class members as members of the public), *aff'd* 821 F.2d 139 (2nd Cir. 1987). Indeed, courts routinely enter protective orders in class action lawsuits and, as discussed above, Plaintiffs' lead counsel regularly agree to the entry of protective orders in securities class actions. *See* Part II, *supra*; *cf. Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) ("We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court.").

Plaintiffs rely principally on *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89 (1981). *Gulf Oil*, however, has nothing to do with restrictions on the disclosure of confidential discovery material. Rather, that case, brought under Title VII, involved a "complete ban on all communications" by class counsel with class members. *Id.* at 94-95. In fact, the Supreme Court expressly limited its holding to orders "involving a broad restraint on communication with class members." *Id.* at 104 n.21. *Gulf Oil* simply held that a complete ban on communication could injure class members because (i) it interfered with class counsel's efforts to inform potential

---

[7] The court also noted that "[p]articularly at this precertification stage of the proceedings essentially unlimited revelation of sensitive information to those who *may* be class members is unwarranted." *Barnhart*, 1992 WL 443561, at *8.

class members of the *existence* of the lawsuit and thereby protect their rights to recover, when the defendant was pressing class members to sign releases and (ii) it made it more difficult for class representatives to obtain information *from* the people they sought to represent. *Id.* at 101.

Neither of these concerns is implicated by a protective order (such as the one the Bank Defendants would propose here) limiting disclosure of confidential discovery material. *See Gottstein v. Nat'l Ass'n For the Self Employed*, 186 F.R.D. 654, 658-59 (D. Kan. 1999) (allowing class counsel to contact potential class members in accordance with the holding in *Gulf Oil*, but noting that this did not mean that protected trade secrets or confidential information would be disclosed to the people contacted). Under the protective order that the Bank Defendants would propose, Plaintiffs would be free to discuss the case with class members and obtain any information that they need from them.[8] For the same reasons, Plaintiffs' reliance on *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748 (7th Cir. 2000), is misplaced.[9] That case also concerned "the right of the Plaintiffs *to contact* potential class members." 204 F.3d at 759 (emphasis added). The court did not hold, as Plaintiffs incorrectly suggest (*see* Pls.' Memo. of Law at 13-14), that restrictions on the disclosure of confidential business information violate Rule 23 or otherwise impair class representation.

Plaintiffs' reliance on *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985), *aff'd* 821 F.2d 139 (2nd Cir. 1987), is likewise misplaced. The holding in that

---

8 Plaintiffs' mere desire to satisfy "an apparent class member thirst for constant updates on the litigation," Pls.' Memo. of Law at 14, is not sufficient reason to override the Bank Defendants' legitimate interests in protecting confidential information. Even in the context of a complete ban on communications, the *Gulf Oil* Court examined whether the order "interfere[d] with the formation of a class or the prosecution of a class action in accordance with the Rules." 452 U.S. at 104. A restriction on the disclosure of confidential discovery material interferes with neither.

9 Plaintiffs also cite *Zenith Radio* for the proposition that a protective order must "comply" with Rule 23. *See* Pls.' Memo. of Law at 14. Whatever Plaintiffs intend by this assertion, *Zenith Radio* contains no such holding.

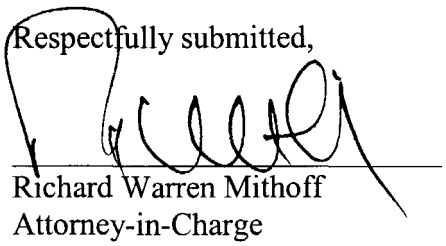
case was based on the then-applicable Rule 5(d) which "embodie[d] the . . . concern that class action litigants and the general public be afforded access to discovery materials whenever possible." *Agent Orange*, 821 F.2d at 146. Since *Agent Orange*, however, Rule 5(d) has been amended. The amended rule now states that discovery materials "*must not* be filed until they are used in the proceeding or the court orders filing." Fed. R. Civ. P. 5(d) (emphasis added); *see also* Local Rule 5.5 (discovery materials "shall not be filed with the clerk"). The 2000 Amendment to the Rule eliminates any presumption that discovery materials should be made public.

In light of the amendment to Rule 5(d), the Second Circuit recently abandoned *Agent Orange* as a precedent, stating that "to the extent that *Agent Orange* relied upon Federal Rule of Civil Procedure 5(d) to find a statutory right of access to discovery materials, we observe that the recent amendment to this rule provides no presumption of filing all discovery materials, *let alone public access to them*." *SEC v. TheStreet.com*, 273 F.3d 222, 233 n.11 (2nd Cir. 2001) (emphasis added); *see also New York v. Microsoft Corp.*, 206 F.R.D. 19, 24 (D.D.C. 2002).

## Conclusion

For the foregoing reasons, the Bank Defendants respectfully request that the Court deny the Motion. In the alternative, the Bank Defendants respectfully request that the Court deny the Motion without prejudice or that it defer any decision on the Motion until after the pending motions to dismiss the amended complaint have been decided.

Respectfully submitted,



Richard Warren Mithoff
Attorney-in-Charge
Texas Bar No. 14228500
S.D. Texas Bar No. 2102
Janie L. Jordan
Texas Bar No. 11012700
S.D. Texas Bar No. 17407
MITHOFF & JACKS, L.L.P.
One Allen Center, Penthouse
500 Dallas Street, Suite 3450
Houston, Texas 77002
Telephone: (713) 654-1122
Telecopier: (713) 739-8085

Of counsel:

Charles A. Gall
Texas Bar No. 07281500
S.D. Texas Bar No. 11017
James W. Bowen
Texas Bar No. 02723305
S.D. Texas Bar No. 16337
JENKENS & GILCHRIST, A
PROFESSIONAL CORPORATION
1455 Ross Avenue, Suite 3200
Dallas, Texas 75202
Telephone: (214) 855-4500
Telecopier: (214) 855-4300

Bruce D. Angiolillo
Thomas C. Rice
David J. Woll
Pieter H.B. Van Tol
SIMPSON THACHER & BARTLETT
425 Lexington Avenue
New York, New York 10017
Telephone: (212) 455-2000
Telecopier: (212) 455-2502

ATTORNEYS FOR J.P. MORGAN
CHASE & CO.

Barry Abrams / by permission

Barry Abrams
Attorney-in-Charge
Texas Bar No. 00822700
S.D. Texas Bar No. 2138
ABRAMS, SCOTT & BICKLEY, LLP
Chase Tower, 600 Travis, Suite 6601
Houston, Texas 77002
Telephone: (713) 228-6601
Telecopier: (713) 228-6605

Of counsel:

David H. Braff
Anthony M. Candido
Adam R. Brebner
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004-2498
Telephone: (212) 558-4000
Telecopier: (212) 558-3588

ATTORNEYS FOR BARCLAYS PLC

Hugh Whiting / by permission

Hugh R. Whiting
Attorney-in-Charge
Texas Bar No. 21373500
S.D. Texas Bar No. 30188
David E. Miller
Texas Bar No. 14067150
S.D. Texas Bar No. 27647
JONES, DAY, REAVIS & POGUE
600 Travis Street, Suite 6500
Houston, Texas 77002-3008
Telephone: (832) 239-3939
Telecopier: (832) 239-3600

Of counsel:

David L. Carden
JONES, DAY, REAVIS & POGUE
221 East 41st Street
New York, New York 10017-6702
Telephone: (212) 326-3939
Telecopier: (212) 755-7306

Robert D. Micheletto
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive, Suite 3500
Chicago, Illinois 60601-1692
Telephone: (312) 269-3939
Telecopier: (312) 782-8585

ATTORNEYS FOR LEHMAN
BROTHERS HOLDINGS, INC.

Gregory A. Markel, admitted *pro hac vice**
Attorney-in-Charge
Ronit Setton
Nancy I. Ruskin
CADWALADER WICKERSHAM & TAFT
100 Maiden Lane
New York, New York 10038
Telephone: (212) 504-6112
Telecopier: (212) 504-6666

Of counsel:

Charles G. King
Texas Bar No. 11470000
S.D. Texas Bar No. 1344
KING & PENNINGTON LLP
1100 Louisiana Street, Suite 5050
Houston, Texas 77002
Telephone: (713) 225-8404
Telecopier: (713) 224-8488

ATTORNEYS FOR BANK OF AMERICA CORP.

*Signed by Charles G. King with permission

William Knull / by permission

William H. Knull, III
Attorney-in-Charge
Texas Bar No. 11636900
S.D. Texas Bar No. 7701
MAYER, BROWN, ROWE & MAW
700 Louisiana Street, Suite 3600
Houston, Texas 77002-2730
Telephone: (713) 221-1651
Telecopier: (713) 224-6410

Of counsel:

Alan N. Salpeter
Michele Odorizzi
T. Mark McLaughlin
MAYER, BROWN, ROWE & MAW
190 South LaSalle Street
Chicago, Illinois 60603
Telephone: (312) 782-0600
Telecopier: (312) 701-7711

ATTORNEYS FOR CANADIAN
IMPERIAL BANK OF COMMERCE

Jacalyn Scott /by permission

Jacalyn D. Scott
Attorney-in-Charge
Texas Bar No. 17899900
WILSHIRE, SCOTT & DYER
3000 Houston Center, 1221 McKinney
Houston, Texas 77010
Telephone: (713) 651-1221
Telecopier: (713) 651-0020

Of counsel:

Brad S. Karp
Mark F. Pomerantz
Richard A. Rosen
Michael E. Gertzman
Claudia L. Hammerman
Jonathan H. Hurwitz
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
Telephone: (212) 373-3000
Telecopier: (212) 757-3990

ATTORNEYS FOR CITIGROUP, INC.

Lawrence Finder / by permission

Lawrence D. Finder
Attorney-in-Charge
Texas Bar No. 07007200
S.D. Texas Bar No. 602
HAYNES AND BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, Texas 77002-5012
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

Of counsel:

Richard W. Clary
Julie A. North
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019-7475
Telephone: (212) 474-1000
Telecopier: (212) 474-3700

ATTORNEYS FOR CREDIT SUISSE FIRST BOSTON CORP.

Joel Androphy / by permission

Joel M. Androphy
Attorney-in-Charge
Texas Bar No. 01254700
B. Elizabeth Klein
Texas Bar No. 24032515
BERG & ANDROPHY
3704 Travis
Houston, Texas 77002
Telephone: (713) 529-5622
Telecopier: (713) 529-3785

Of counsel:

Lawrence Byrne
Owen C. Pell
Lance Croffoot-Suede
WHITE & CASE, LLP
1155 Avenue of the Americas
New York, New York 10036-2787
Telephone: (212) 819-8200
Telecopier: (212) 354-8113

ATTORNEYS FOR DEUTSCHE BANK AG

Taylor Hicks / by permission

Taylor M. Hicks
Attorney-in-Charge
Texas Bar No. 09585000
S.D. Texas Bar No. 3079
HICKS THOMAS & LILIENSTERN, LLP
700 Louisiana, Suite 1700
Houston, Texas 77002
Telephone: (713) 547-9100
Telecopier: (713) 547-9150

Of counsel:

Herbert S. Washer
James D. Miller
Ignatius A. Grande
CLIFFORD CHANCE US LLP
200 Park Avenue
New York, New York 10166
Telephone: (212) 878-8000
Telecopier: (212) 878-8375

Robert F. Serio
Mitchell A. Karlan
Marshall R. King
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
Telephone: (212) 351-4000
Telecopier: (212) 351-4035

ATTORNEYS FOR MERRILL LYNCH & CO., INC.

## CERTIFICATE OF SERVICE

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

RICHARD WARREN MITHOFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | |
|---|---|
| IN RE ENRON CORPORATION SECURITIES LITIGATION | |
| This Document Relates To:<br><br>MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,<br><br>Plaintiffs,<br><br>vs.<br><br>ENRON CORP., et al.,<br><br>Defendants. | Consolidated Civil Action<br>Case No.: H-01-CV-3624 |
| THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated,<br><br>Plaintiffs,<br><br>v.<br><br>KENNETH L. LAY, et al.,<br><br>Defendants. | |

**DECLARATION OF RICHARD W. MITHOFF**

RICHARD W. MITHOFF, under penalty of perjury, declares:

1. I am a member of the firm of Mithoff & Jacks, L.L.P., counsel for defendant J.P. Morgan Chase & Company in the above action. I submit this declaration in opposition to Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order and for the purpose of placing certain documents before the Court.

2. Attached as Exhibit A is chart listing protective orders that were entered in actions involving Plaintiffs' lead counsel.

3. Attached as Exhibit B are true and correct copies of excerpts of the protective orders listed in Exhibit A.

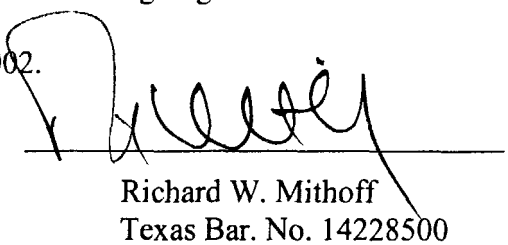
4. Attached as Exhibit C are true and correct copies of a protective order entered in *In re Sunbeam Securities Litigation*, No. 98-8258-Civ-Middlebrooks (Southern District of Florida) on September 25, 2000, and one of the protective orders entered in *In re Cendant Corporation Litigation*, Master File No. 98-1664 (WHW), *In re Cendant Corporation Prides Litigation*, No. CV-98-2819 (WHW), *In re Cendant Corporation Derivative Action Litigation*, No. CV-98-1998 (WHW) (District of New Jersey) on October 20, 1999.

5. Attached as Exhibit D is a true and correct copy of the protective order entered in *JPMorgan Chase Bank v. Liberty Mutual Insurance Company, et al.*, 01 Civ. 11523 (JSR) (Southern District of New York) on May 6, 2002, including the First Amendment to the protective order, entered on July 19, 2002.

6. Attached as Exhibit E is a true and correct copy of the protective order entered in *The Retirement Systems of Alabama, et al. v. Merrill Lynch & Co., et al.*, Civil Action No. CV 2002-738-H (Circuit Court for Montgomery County, Alabama) on September 20, 2002.

7. Attached as Exhibit F is a true and correct copy of excerpts of the First Request for the Production of Documents to J.P. Morgan Chase & Company, filed by Plaintiffs' lead counsel in this action on July 2, 2002.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Houston, Texas, on this 15th day of October, 2002.



Richard W. Mithoff
Texas Bar. No. 14228500
S.D. Texas Bar No. 2102

The Exhibit(s) May

Be Viewed in the

Office of the Clerk