United States Courts
Southern District of Texas
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES LITIGATION	MDL-1446 Consolidated Civil Action No. H-01-3624
This Document Relates To: MARK NEWBY, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. ENRON CORPORATION, et al., Defendants.	
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.	

MOTION OF J.P. MORGAN CHASE & CO., JPMORGAN CHASE BANK AND J.P. MORGAN SECURITIES INC. FOR CONFIDENTIAL TREATMENT OF CERTAIN DOCUMENTS

Defendants J.P. Morgan Chase & Co. ("JPMorgan Chase"), JPMorgan Chase Bank, and J.P. Morgan Securities Inc. (collectively, the "JPMC Defendants") respectfully submit this Memorandum of Law along with the accompanying affidavits of Melissa Vogel Brown,

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Esq., sworn to on October 31, 2003 (the "Brown Aff.") and Peter J. Dennin, Esq., sworn to on November 3, 2003 (the "Dennin Aff."), in support of their motion pursuant to Federal Rule of Civil Procedure 26(c) for confidential treatment of certain designated documents identified on the confidentiality log attached as Exhibit A to the Brown Affidavit.

PRELIMINARY STATEMENT

In response to the document requests of Lead Plaintiff, the JPMC Defendants have produced well over two million pages of responsive material. Mindful of the guidelines set forth in the Court's March 27, 2003 Order concerning confidential treatment, the JPMC Defendants are seeking confidential treatment for an extremely small fraction of their overall production. The documents for which confidential treatment is currently being sought constitute less than 1% of the JPMC Defendants' production to date and fall into two categories: (i) a proprietary policy manual relating to credit risk procedures; and (ii) materials containing information concerning transactions with customers other than Enron.

The entry of an appropriate protective order limiting the use and dissemination of the documents specified on the accompanying confidentiality log will not interfere in any way with the plaintiffs' ability to pursue their claims, nor would it be unduly burdensome to the parties or the Court. JPMorgan Chase therefore respectfully requests that this Court enter an Order that, inter alia, (1) designates the logged documents as "Confidential;" (2) prohibits disclosure of these documents to non-parties, the press, or any other member of the general public; and (3) provides that these documents may only be used for the purposes of litigating this action.

ARGUMENT

THIS COURT SHOULD ISSUE A PROTECTIVE ORDER RESTRICTING THE USE AND DISCLOSURE OF THE CONFIDENTIAL COMMERCIAL INFORMATION CONTAINED IN THE DOCUMENTS AT ISSUE

This is not the first Enron-related case in which the confidentiality of produced documents has been considered. In at least three other Enron-related proceedings in other jurisdictions, courts have determined that the documents that are the subject of this Motion (and, indeed, a much broader array of documents) merit confidential treatment. *See* Order Governing the Production and Use of Confidential Material Among the Examiner, the Official Committee of Unsecured Creditors, the Debtors and Non-Parties, entered on October 10, 2002, in *In re Enron Corp.*, Case No. 01-16034 (Bankr. S.D.N.Y.) (Dennin Aff. Exhibit A); Amended Stipulation and Protective Order, entered on October 18, 2002, in *Retirement Sys. of Alabama v. Merrill Lynch & Co. et al.*, Case No. CV-2002-73-H (Ala. Cir. Ct.) (Dennin Aff. Exhibit B); Protective Order, entered on April 24, 2002, in *JPMorgan Chase Bank v. Liberty Mut. Ins. Co. et al.*, Case No. 01 Civ. 11523 (JSR) (S.D.N.Y.) (Brown Aff. Exhibit B).

This Court has broad discretion to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," provided that "good cause" is shown. FED. R. CIV. P. Rule 26(c); *see also Seattle Times v. Rhinehart*, 467 U.S. 20, 36 (1984). The Court is specifically empowered to issue protective orders providing "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." FED. R. CIV. P. Rule 26(c)(7).

The moving party has the burden to demonstrate the need for the confidentiality order. *In re Terra Int'l, Inc.*, 134 F.3d 302, 306-07 (5th Cir. 1998) (citing *U.S. v. Garrett*, 571 F.2d 1324, 1326 n.3 (5th Cir. 1978)). The "particular and specific demonstration" must be

sufficient to support the "good cause" requirement of Rule 26(c)(7). *In re Terra Int'l, Inc.*, 134 F.3d at 306-07; *see also Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp.*, 1998 WL 186728, at *1 (E.D. La. 1998). Once a party has demonstrated good cause for a protective order, "the presumption of free use [of discovery materials] dissipates, and the district court can exercise its sound discretion to restrict what materials are obtainable, how they can be obtained, and what use can be made of them once obtained." *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 684 (5th Cir. 1985). "Determining whether good cause exists requires a balancing of the potential harm to litigants' interests against the public's right to obtain information concerning judicial proceedings." *Star Scientific, Inc. v. Carter*, 204 F.R.D. 410, 415 (S.D. Ind. 2001).

I. THE CONFIDENTIAL AND PROPRIETARY POLICY MANUAL SHOULD BE PROTECTED

In response to Lead Plaintiff's document request, the JPMC Defendants are producing various policy documents and manuals pertaining to the class period. Of these materials, the JPMC Defendants currently seek confidential treatment for one manual being produced: the Corporate Credit Manual.[1] This manual contains confidential and proprietary information concerning the JPMC Defendants' business practices.

The Corporate Credit Manual provides JPMorgan Chase personnel with a comprehensive guide for determining, tracking and reporting credit risk of customers and/or transactions. The manual was designed by JPMorgan Chase as a central repository for all of the credit policies, guidelines, and procedures used throughout all of the business units of the bank. *See* Brown Aff. ¶ 3. It includes detailed information and methodologies of a competitively sensitive nature. Indeed, the Manual states in its "Introduction, How to Use This Manual":

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[1] Counsel for the JPMC Defendants is conferring with counsel for Plaintiffs concerning requests for production of additional manuals. Accordingly, the JPMC Defendants may seek confidential treatment for certain manuals produced in the future.

> This manual is confidential and proprietary to [JPMorgan Chase]. This manual is for the internal use of [JPMorgan Chase] and its subsidiaries only. It is not for use for any other purpose or by anyone other than personnel of [JPMorgan Chase] and its subsidiaries, nor is it for distribution to anyone other than such personnel.

See Brown Aff. ¶ 4 (quoting Corporate Credit Manual at 4).

These internally created processes deserve to be shielded from unnecessary disclosure to competitors. "[C]ourts have [consistently] refused to permit their files to serve as . . . sources of business information that might harm a litigant's competitive standing." *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978) (internal citations omitted). *See, e.g., Lewis v. Am. Honda Co.*, Civ. A. No. 90-4384, 1991 WL 211580, at *1 (E.D. La. Oct. 4, 1991) (issuing protective order limiting dissemination of documents relating to the defendant's "business, products, practices, or procedures" on the ground that "[d]isclosure of this competitively sensitive data could certainly result in economic hardship to the Defendant."); *Tavoulareas v. Piro*, 93 F.R.D. 24, 29 (D.D.C. 1981) (granting protective order limiting dissemination of "confidential, internal Mobil documents dealing with strategy, negotiations, and long-range corporate planning" because "[t]he conclusion is inescapable that public disclosure of these kinds of sensitive corporate documents would cause Mobil competitive harm").

These policies were designed for the confidential and internal use of JPMorgan Chase employees in performing the bank's business. Considerable effort has been put into developing these policies. The Corporate Credit Manual covers credit policies used throughout all of the business units of the bank. *See* Brown Aff. ¶ 3. Moreover, these policies are not disseminated outside of JPMorgan Chase. *See* Brown Aff. ¶ 4. They are intended only for internal use. In these circumstances, it is appropriate to provide for confidential treatment of these policy documents in this litigation. *See The Bank of New York v. Meridien Biao Bank*

Tanzania Ltd., 171 F.R.D. 135, 144 (S.D.N.Y. 1997) (bank's internal policies, including audit procedures manual and credit policy manual, "constitute confidential and proprietary information, the unprotected disclosure of which would likely be harmful to [bank's] business"); *see also Tonnemacher v. Sasak*, 155 F.R.D. 193, 195 (D. Ariz. 1994) (accounting firm's "internal manuals are highly confidential and proprietary trade secrets"). Indeed, a "competitor, using the pricing and loan information supplied in this manual, could easily contrast its own policies to that of potential customers of the Bank." *Powell v. Howard Bank, N.A.*, No. 97-10274, 1998 WL 800110 (Bankr. D.Vt. Oct. 19, 1998) (granting protective order to maintain confidentiality of bank's policy manual).

For these reasons, the JPMC Defendants request confidential treatment for the Corporate Credit Manual.

II. INFORMATION REGARDING THE JPMC DEFENDANTS' DEALINGS WITH OTHER CUSTOMERS SHOULD BE ACCORDED CONFIDENTIAL TREATMENT

Certain of the documents requested by the Plaintiffs and being produced by the JPMC Defendants contain information concerning transactions with customers other than Enron. While information pertaining to the identity of these other customers has been redacted in some instances, a portion of the JPMC Defendants' production in this case includes materials concerning other customers' transactions that were produced unredacted in a prior litigation styled *JPMorgan Chase Bank v. Liberty Mut. Ins. Co. et al.*, Case No. 01 Civ. 11523 (JSR) (S.D.N.Y.) (the "Surety Action"). Such documents were produced in the Surety Action pursuant to a protective order. *See* Brown Aff. ¶6; Ex. B (Protective Order, entered on April 24, 2002, in *JPMorgan Chase Bank v. Liberty Mut. Ins. Co. et al.*, Case No. 01 Civ. 11523 (JSR) (S.D.N.Y.)). Pursuant to the requests in this action, the JPMC Defendants are producing certain responsive documents produced in the Surety Action, but seek confidential treatment for

materials pertaining to transactions that were done with customers other than Enron, so as to protect the legitimate confidentiality expectations of those other customers.

The public disclosure of third-party client documents could harm JPMorgan Chase's client relationships, as clients justifiably expect that information concerning their business dealings with the JPMC Defendants will not be publicly disseminated. Indeed, the Corporate Credit Manual discussed above states as one of the bank's guiding principles that JPMorgan Chase "will respect and preserve the confidentiality of information that is entrusted to us by our clients." *Corporate Credit Manual* at 6. In these circumstances, confidential treatment of the documents is appropriate. *See, e.g., Brown v. Artery Org.*, Civ. A. No. 86-3285, 1987 WL 11084, at *1 (D.D.C. May 7, 1987) (issuing protective order limiting the use and dissemination of documents "[f]or the purposes of protecting the legitimate business and privacy interests of [] parties and persons who are not parties to this proceeding"); *Edwards v. Gordon & Co.*, 94 F.R.D. 584, 586-87 (D.D.C. 1982) (issuing protective order restricting the use and dissemination of documents where "it appear[ed] that some of the compelled discovery w[ould] involve confidential information concerning account records of option and securities customers of Gordon & Co., in addition to the records pertaining to the plaintiff, and w[ould] invade their business and financial privacy.").

CONCLUSION

For the foregoing reasons, the JPMC Defendants respectfully request that the Court grant their motion for confidential treatment of certain documents.

Dated: November 3, 2003

MITHOFF & JACKS, L.L.P.

/s/ Richard Warren Mithoff

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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 known counsel of record by electronic mail to the esl3624.com website on this 3th day of November, 2003.

/s/ Richard Warren Mithoff
Richard Warren Mithoff