

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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: 05 Civ. 8626 (GEL)
In re REFCO, INC. SECURITIES LITIGATION :
: **DECLARATION OF**
: **JAMES J. SABELLA**
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JAMES J. SABELLA hereby declares under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am a director of Grant & Eisenhofer, P.A., co-counsel for Lead Plaintiffs. I make this declaration in support of Lead Plaintiffs' motion for a limited modification of the PSLRA stay of discovery.

2. At the conference on February 3, 2006, Lead Plaintiffs' counsel indicated that Lead Plaintiffs intended to move for a limited modification of the PSLRA stay of discovery in this litigation (the "Action"). See Exhibit 1 hereto at 17. The Court responded that it appeared to make sense for some document discovery to move forward, *id.* at 20, and suggested that the parties attempt to work out a reasonable program for document production. *Id.* at 21. Absent an agreement, the Court suggested that a motion to modify the stay should be filed after the filing of the Consolidated Class Action Complaint ("Complaint"), which occurred on April 3, 2006.

3. In light of the foregoing, Lead Plaintiffs' counsel contacted counsel for several defendants and also for Refco in an attempt to see if an agreement as to document production could be worked out. Unfortunately, no agreement has been reached.

4. On April 4, 2006, John P. Coffey and I, representing Lead Plaintiffs, met with Robert McCaw, representing the underwriter defendants. While Mr. McCaw indicated that his clients are willing to produce to us copies of documents that they previously had produced to

regulatory bodies and certain other documents, they are not willing to provide copies of other documents that they have produced or may produce in related investigations and proceedings, such as documents that Bankruptcy Judge Drain may order produced to the Committee of Unsecured Creditors pursuant to its subpoena in the Bankruptcy Court.

5. On April 5, 2006, I called Bruce Braun, one of the attorneys for Grant Thornton LLP, to see if Grant Thornton would be willing to provide us with copies of the documents they have produced or will be producing in all related investigations and cases. Mr. Braun indicated that someone would get back to me. On April 10, I received a call back from Mr. Braun's partner, David Mollon. Mr. Mollon stated that he was meeting with his client on April 17 and that he would then let me know their position. Thereafter, he informed me that Grant Thornton was not willing to provide us with copies of the documents that it had produced to regulatory authorities.

6. This motion seeks copies of documents produced to others by, among others, the Refco-related entities ("Refco") that have filed for bankruptcy. Given the bankruptcy stay, in late March 2006, Michael Etkin of Lowenstein Sandler PC, bankruptcy counsel for Lead Plaintiffs, contacted Sally Henry of Skadden, Arps, Slate, Meagher & Flom LLP, bankruptcy counsel for Refco, to request consent to modify the bankruptcy stay for the narrow purpose of seeking relief from the PSLRA stay (as to Refco) in the District Court. On March 31, 2006, at Ms. Henry's request, Lowenstein forwarded to Ms. Henry a copy of the order and the transcript of the January 5, 2006 oral argument in *In re Delphi Corporation*, Case No. 05-44481 (RDD) (Bankr. S.D.N.Y.), where Judge Drain (who is overseeing both the Refco and Delphi bankruptcy proceedings) granted the securities plaintiffs relief from the automatic stay in order to seek relief

from the PSLRA stay in the District Court.¹ On April 10, 2006, Ms. Henry acknowledged receipt of the transcript and requested the specific name of the Refco securities action and the specific relief requested. The information was provided to Ms. Henry and she advised that the Debtors were discussing the matter with the Committee of Unsecured Creditors (the “Committee”) and would respond. Having not heard from her, on April 12, 2006, Lowenstein once again requested Debtors’ consent to modify the automatic stay as requested.

Notwithstanding the fact that Lead Counsel have explained to Refco’s counsel that we wish simply to execute the identical procedure that their colleagues at Skadden urged this same bankruptcy judge to adopt in Delphi, Refco’s counsel has thus far not responded. Accordingly, Lead Plaintiffs are constrained to (and shortly will) file a parallel motion in the Bankruptcy Court seeking permission to include Refco within the scope of the relief sought by this motion.

7. On March 2, 2006, the Committee moved in the Bankruptcy Court for an order directing the production of documents by the underwriters of Refco’s stock and bonds (the “Underwriters”). *See* Exhibit 2. The Underwriters are also defendants in this Action. On March 23, 2006, the Bankruptcy Court granted the Committee’s motion. *See* Exhibit 3 hereto. In response to the Committee’s motion for discovery against the Underwriters, the Underwriters moved to withdraw the reference to the Bankruptcy Court, arguing that the discovery sought by the Committee should be considered “in the context of all Refco-related discovery” and that “coordination of discovery across all Refco-related actions is desirable.” *See* Memorandum of Law in Support of the Underwriter Defendants’ Motion to Withdraw the Reference, etc., dated

¹ Judge Drain adopted the procedure recommended by Delphi’s counsel, the Skadden firm, to wit, granting the Delphi lead plaintiffs permission to move in the District Court for an order lifting the PSLRA stay as to the Debtor, conditioned on a return to the Bankruptcy Court thereafter to seek a separate order lifting the bankruptcy stay for the purpose of actually producing the documents. Notably, Skadden is also counsel to the Refco debtors.

Mar. 9, 2006 (a copy of which is Exhibit 4 hereto) at 3. Upon information and belief, the Underwriters have begun to produce documents to the Committee.

8. In addition, in the fall of 2005, the Committee moved in the Bankruptcy Court for production of documents by certain current directors and former officers and employees of Refco, certain counterparties and other participants in the transactions with Refco, and Refco's attorneys and auditors. Virtually all of these persons and organizations are defendants (or prospective defendants) in this Action. By order dated December 5, 2005, the Bankruptcy Court granted the motion. *See* Exhibit 5 hereto. Upon information and belief, many if not most of these parties have produced (and continue to produce) numerous documents to the Committee.

9. In addition to the extensive document productions ongoing in the bankruptcy proceedings, we understand that many of these same parties have produced documents to the U.S. Attorney's Office and the Securities and Exchange Commission. At present, the Lead Plaintiffs in this Action are the only significant party-in-interest cut off from access to documents that others have reviewed and begun to act upon, to the prejudice of the Securities Class. The prejudice to Lead Plaintiffs is well-illustrated by recent developments in the Bankruptcy Court. As a result of the extensive discovery that the Committee has enjoyed in the Bankruptcy Court, the Committee recently filed a claim against BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft ("BAWAG"), an Austrian bank that engaged in several transactions with Refco. BAWAG is a defendant in this Action as well. Based on numerous press reports, including reports of statements by BAWAG officers and Austrian government officials, BAWAG has limited resources to satisfy all of the claims against it. Armed with the information that the Committee learned in its discovery, however, the Committee has reportedly raced ahead and sought to extract for itself a disproportionately hefty

settlement that would drastically reduce BAWAG's ability to pay any of the Class' claims -- well before Lead Plaintiffs have an opportunity for any discovery relating to BAWAG. Other news reports suggest that another party-in-interest with access to documents – the U.S. Attorney's Office – is also engaged in discussions about a settlement that would, together with the Creditors' Committee's deal, reportedly exhaust BAWAG's ability to pay. While it remains to be seen whether this reported (but as yet unseen) resolution of BAWAG's legal issues will provide meaningful relief for the Securities Class, Lead Plaintiffs' ability to represent the interests of the Class on anything approaching a "level playing field" has been hampered by their lack of access to documents that have been in the hands of the Creditors' Committee and the U.S. Attorney's Office (and others) throughout this process.

10. Upon information and belief, the members of the Class may find themselves similarly disadvantaged should the Creditors' Committee or others with access to documents again seek to exploit Lead Plaintiffs' present lack of access to strike opportunistic deals with other parties against whom the Class has asserted (or may assert) claims.

11. Also attached hereto are the following documents:

- a. Exhibit 6 is a copy of the transcript of proceedings in *United States v. Bennett*, No. 05 Cr. 1192 (NRB), on January 18, 2006.
- b. Exhibit 7 is a copy of the Order Granting the Motion of the United States trustee for the Appointment of an Examiner, dated March 17, 2006.
- c. Exhibit 8 is a copy of the Motion of Official Committee of Unsecured Creditors for Order, Under 11 U.S.C. § 1103(c) and Bankruptcy rule 2004, Directing Production of Documents by, Certain (I) current Directors and Former Officers

and Employees and (II) Investors, Attorneys, and Accountants of Refco Inc., dated November 3, 2005.

- d. Exhibit 9 is a copy of the Amended Memorandum of Law in Opposition to the Underwriters' Motion to Withdraw the Reference to the United States Bankruptcy Court of the Committee's Rule 2004 motion and Investigation, dated April 5, 2006.
- e. Exhibit 10 is a copy of a Confidentiality Stipulation and Order, dated May 4, 2006.
- f. Exhibit 11 is a copy of the Motion of the *Ad Hoc* Committee of Senior Subordinated Noteholders for an Order Directing the Debtors to Provide the Noteholders with Discovery Pursuant to Bankruptcy Rule 2004, dated February 2, 2006.
- g. Exhibit 12 is a copy of a Consensual Order directing the Debtors to Provide the *Ad Hoc* Committee of Senior subordinated Noteholders with Discovery Pursuant to Bankruptcy Rule 2004, dated May 5, 2006.
- h. Exhibit 13 is a copy of a Second Amended Order, Under 11 U.S.C. § 1103(c) and Bankruptcy Rule 2004, Directing Production of Documents by, Certain (I) Current And Former Refco Directors Officers and Employees and (II) Unrelated Third Parties, dated May 15, 2006.

Done at New York, New York this 17th day of May 2006.



James J. Sabella (JS 5454)