

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re REFCO, INC. SECURITIES LITIGATION : 05 Civ. 8626 (GEL)  
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**DECLARATION OF JOHN P. COFFEY  
IN FURTHER SUPPORT OF LEAD PLAINTIFFS' MOTION FOR A  
LIMITED MODIFICATION OF THE PSLRA STAY OF DISCOVERY**

John P. Coffey hereby declares under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am a partner at Bernstein Litowitz Berger & Grossmann LLP, co-counsel for Lead Plaintiffs and the prospective Class. I make this declaration in further support of Lead Plaintiffs’ motion for a limited modification of the PSLRA stay of discovery (the “Motion”).

**Limited Modification to the Scope of Relief Requested**

2. Shortly after Lead Plaintiffs filed their opening papers in support of the Motion, I received a telephone call from Assistant United States Attorney David Esseks, one of the prosecutors handling the criminal probe of the Refco matter. Mr. Esseks told me that he had reviewed our Motion and that the Government had one concern with the relief sought by Lead Plaintiffs. Specifically, he asked that Lead Plaintiffs narrow the requested relief to exclude, at this time, the production of any witness interview memoranda prepared by Latham & Watkins LLP, the law firm retained by Refco’s audit committee to conduct an internal investigation into certain matters at Refco. I informed Mr. Esseks that Lead Plaintiffs would accede to that request and promptly informed all counsel of record in this litigation of that agreement. *See* Exhibit A

hereto. With that agreed modification in place, I understand that the Government has no objection to the balance of the relief Lead Plaintiffs seek in the Motion.

### **The Motion Now Encompasses Refco**

3. In footnote 3 of Lead Plaintiffs' opening papers, we noted that, as to that part of the Motion seeking the production of documents from the bankrupt Refco entities, Lead Plaintiffs would be seeking certain limited relief from the bankruptcy stay. On June 9, 2006, the Bankruptcy Court granted Lead Plaintiffs' motion for relief from the automatic stay to seek relief from the PSLRA stay before this Court. Attached hereto as Exhibit B is a copy of that Order. Accordingly, Lead Plaintiffs now include in their request all documents produced by Refco as well as the other parties who have produced or will produce documents to the Creditors' Committee or the Government.

### **The Underwriter Defendants' "Offer" to Produce Documents**

4. In their memorandum in opposition to the Motion, the Underwriter Defendants repeatedly state that they offered to produce nearly one million pages of Regulatory Documents to Lead Plaintiffs. UW Mem., *passim*. Although they refer to this "offer" over a dozen times, not once do they apprise the Court of the significant string they had attached to it when we met to discuss this issue before the Motion was filed. Lead Plaintiffs had to agree in advance to forego any additional discovery from the Underwriter Defendants before motions to dismiss are decided, including the additional documents that they would soon be producing to the Creditors' Committee. Because Lead Plaintiffs would not accede to such disparate treatment, and because other Defendants informed us that they would not make their Regulatory Documents similarly available even if Lead Plaintiffs were to agree to this pre-condition, no agreement was reached and no Defendant produced any documents before the filing of this Motion.

5. I was overseas when the Underwriter Defendants' opposition to this Motion was filed. When advised that the banks' description of their willingness to produce their Regulatory Documents made no mention of any condition to that production, I asked a colleague to contact counsel for the Underwriter Defendants to arrange for prompt production of those documents. Their counsel refused to produce any documents, reiterating the point omitted from their papers, namely, that their offer was (and remains) subject to the condition that Lead Plaintiffs not seek access to any additional documents the banks may produce to others. There is no legitimate basis for that condition and Lead Plaintiffs did not agree to that waiver.

### **The “Continuous Due Diligence” Defense**

6. In their opposition papers, the Underwriter Defendants contend that the Motion should be denied because, among other things, they would unfairly be required to provide Lead Plaintiffs with copies of documents produced to the Creditors' Committee pursuant to the Rule 2004 inquiry, the scope of which is alleged to be broader than that of any reasonable discovery that may be had in this litigation. UW Mem. at 18-20. Based on recent experience with many of these same banks in other cases, however, the notion that there is a material difference in scope between the two inquiries is untenable where, as here, underwriters assert a defense that purports to rely on their “continuous” due diligence of an issuer.

7. By way of specific example, the defense of “continuous due diligence” was recently asserted in the *WorldCom* securities class action by a number of underwriters that are also defendants in this action.<sup>1</sup> In short, this defense posits that the due diligence that underwriters perform in connection with any particular public offering of securities is not limited

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<sup>1</sup> Those banks are Banc of America Securities LLC, Credit Suisse Securities (USA) LLC (known as Credit Suisse First Boston Corp. at time of the *WorldCom* litigation), Goldman Sachs & Co., Deutsche Bank Securities, Inc., J.P. Morgan Securities, Inc., and Utendahl Capital Partners, L.P.

to the discrete inquiry done in the days or weeks before an offering, but rather rests on the accumulation of all information gathered through all of the various engagements and/or contacts that the investment banks have had with the issuer over the years. Unless these same banks and their co-defendants intend to abandon that approach in this litigation, and there is no indication that they will, the scope of discovery in this case will necessarily be very broad, perhaps even broader than the Rule 2004 inquiry, because by definition it would call for virtually every document pertaining to Refco, its affiliates, and its officers.

### **The Settlement with BAWAG**

8. On pages 4-6 and 17-18 of Lead Plaintiffs' opening memorandum, we described how a party already in possession of the documents sought by Lead Plaintiffs – the Creditors' Committee – had exploited that access to race ahead of the Class in pursuit of a recovery from a financially-strapped common defendant, BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft ("BAWAG"). Our memorandum described how this situation presented a tangible, non-speculative, and significant risk that the Class would be prejudiced as those parties with access to documents sought to gain an edge over those operating without the documents.

9. As the Court is aware, since the filing of this Motion, Lead Plaintiffs were able to achieve a significant settlement with BAWAG for a guaranteed payment to the Class of at least \$108,000,000 in cash.<sup>2</sup> The Responding Parties point to this outcome and contend that this positive result undermines any claim that the Class would suffer undue prejudice if the Motion were denied. This ignores the unique circumstances that enabled Lead Plaintiffs to ameliorate

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<sup>2</sup> The terms of this proposed settlement are described more fully in my June 5, 2006 letter to the Court, which is attached hereto as Exhibit C. Lead Plaintiffs expect to make a motion for preliminary approval of this settlement in the coming weeks.

the prejudice in this particular situation. It also overlooks the non-speculative prospect (described in ¶¶ 13-16 below) that the Class will again find itself in a tail chase with the Creditors' Committee, which has made clear it intends to exploit its access to documents to move aggressively against other defendants and potential defendants in the future.

10. Although Lead Plaintiffs were eventually able to achieve what we believe to be an excellent proposed settlement with BAWAG, the settlement negotiations were severely hampered (and very nearly compromised altogether) by Lead Plaintiffs' lack of discovery from BAWAG. Fortunately, in a development that no rationale observer could expect to be replicated in the future, Lead Plaintiffs learned several critical facts that they leveraged to obtain access to BAWAG's documents: (a) the Austrian Government had agreed to step in to assist BAWAG (that country's fourth-largest bank), but was wary of doing so without resolving the claims asserted against BAWAG in Lead Plaintiffs' First Amended Consolidated Class Action Complaint; (b) BAWAG's owners were seeking to sell the bank, and the prospect of a huge potential litigation liability was certain to hamper such efforts; and (c) BAWAG's involvement in the Refco scandal would likely be a significant issue in the next Austrian elections. In our view, then, BAWAG was thus under considerable pressure to reach a global resolution of all Refco-related exposure.

11. Shortly after Lead Plaintiffs filed this Motion, I received a telephone call from BAWAG's counsel to discuss terms of a potential settlement. Without divulging the substance of those discussions, I can state that BAWAG agreed to provide Lead Plaintiffs with access to the same BAWAG documents that had been reviewed by the Government and the Creditors' Committee.

12. On the evening of Friday, May 19, 2006, Co-Lead Counsel James Sabella and I led a team of lawyers to the offices of BAWAG's counsel, Dechert LLP, to review the documents that BAWAG had made available to the Government and the Creditors' Committee months ago. Lead Plaintiffs' document review team included German speaking lawyers who were able to translate the many documents that were written in German. With hard work performed by numerous people on short notice, the document review was completed that weekend. Shortly thereafter, the co-operation of all parties involved resulted in a settlement between BAWAG and Lead Plaintiffs (as well as settlements between BAWAG and others, including the Government and the Creditors' Committee). Accordingly, once Lead Plaintiffs were provided with the same documents to which other parties had long had access, BAWAG was able to achieve its much-need global resolution of Refco-related litigation in the United States.

#### **Ongoing Undue Prejudice to Lead Plaintiffs**

13. Notwithstanding the positive outcome Lead Plaintiffs were able to achieve with regard to BAWAG, Lead Plaintiffs' lack of access to documents will undoubtedly place them at a significant disadvantage in the process of identifying and pursuing liable parties in the Securities Action as compared to the Creditors' Committee in the Bankruptcy Action, which is competing with Lead Plaintiffs to recover assets. This prejudice is particularly acute in light of the speed at which the Bankruptcy action is proceeding.

14. Attached hereto as Exhibit D is a transcription of a Bloomberg interview dated June 6, 2006, with Luc Despins, counsel to the Creditors' Committee. In that interview, Mr. Despins states that it was as a result of documents produced to the Creditors' Committee in January, February and March of 2006 that the Creditors' Committee learned of BAWAG's role

in the Refco scandal. As Mr. Despins explains, the Creditors' Committee cast "as wide a net as possible" and requested documents from "hundreds of entities" in order to assemble a universe of documents during the course of its investigation. Mr. Despins specifically states:

- "it was certainly a very important aspect of our, of the result here in the sense that we were given access to documents in January and February and March that led us to believe that BAWAG had a key role in the accounting scheme . . . .";
- ". . . clearly as a result [of having the documents] we were able to file a complaint and seek recourse against BAWAG, which ultimately led to the settlement";
- ". . . our claims were strong because we had documentary evidence that they understood why these loans were being made and, confronted with that . . . . they frankly had no choice but to settle";
- "the first thing we do is we try to cast as wide a net as we can in terms of document production, so we've asked hundreds of parties to produce documents and that ranges from entities like BAWAG, Grant Thornton, the former accountants, the lawyers, and numerous other parties";
- "the first thing we do is we gather all these documents together and try to create a database that is searchable . . . . We have the same process for other parties that will be targets of the Creditors' Committee here . . . ."; (emphasis added) and
- ". . . this case is different in the pace at which we've been proceeding in the sense that . . . its a . . . fast paced liquidation and because some of the bad actors may be leaving the jurisdiction or their assets may be leaving the jurisdiction we've been forced to act very quickly." (emphasis added.)

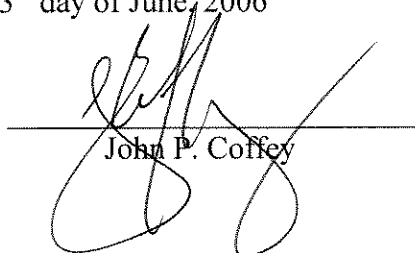
15. On May 23, 2006, the Creditors' Committee filed a supplemental motion seeking production of documents from a multiplicity of different people and entities – many of whom are named as defendants and/or discussed in the Amended Complaint filed by Lead Plaintiffs.

Attached hereto as Exhibit E is a copy of the Supplemental Motion of the Official Committee of Unsecured Creditors for Order, Under 11 U.S.C. § 1103(C) and Bankruptcy Rule 2004,

Directing Production of Documents by Certain Persons (the “Supplemental Motion”) (exhibits omitted). In the Supplemental Motion, the Creditors’ Committee actually quotes from and relies on the Consolidated Class Action Complaint filed by Lead Plaintiffs in April 2006 to justify the request of documents from Ingram Micro Inc., a non-party whose involvement in fraudulent year-end loan transactions had been illuminated in Lead Plaintiffs’ complaint. *See* Exhibit E at ¶ 21.

16. As a result, if the PSLRA stay is not lifted, Lead Plaintiffs will soon be left even further behind the Creditors’ Committee with respect to access to documents and related settlement discussions. Accordingly, unless the Motion is granted and the playing field leveled, the Creditors’ Committee will take an even further lead in what is turning into a race for recovery of losses.

Done at New York, New York this 13<sup>th</sup> day of June, 2006

  
John P. Coffey



# **EXHIBIT A**

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

ATTORNEYS AT LAW

NEW YORK • CALIFORNIA • NEW JERSEY • LOUISIANA

JOHN P. COFFEY  
sean@blbglaw.com  
212-554-1409

May 30, 2006

**Via E-mail**

TO: All Counsel of Record

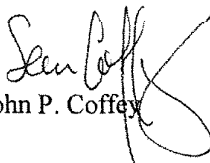
Re: *In re Refco, Inc. Securities Litigation*, 05 Civ. 8626 (GEL)

Dear Counsel:

Pursuant to a request from the United States Attorney's Office, Lead Plaintiffs have agreed to narrow the scope of relief requested in their Motion to Modify the PSLRA Stay to Permit Limited Document Discovery to exclude, at this time, the production of any interview memoranda prepared by the law firm of Latham & Watkins LLP.

If you have any questions, please do not hesitate to call me.

Sincerely,

  
John P. Coffey

cc:

Stuart M. Grant, Esq. (Co-Lead Counsel for the Class)  
AUSA David Esseks

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# **EXHIBIT B**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re : Chapter 11  
REFCO INC., et al., : Case No. 05-60006 (RDD)  
 : (Jointly Administered)  
Debtors. :  
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**AGREED ORDER MODIFYING AUTOMATIC STAY**

Upon the motion, dated May 18, 2006 (the "Motion"), of RH Capital Associates LLC and Pacific Investment Management LLC (the "Lead Plaintiffs") in the action styled *In re Refco Inc. Securities Litigation*, File No. 05-CIV-8626 (GEL) (S.D.N.Y.) (the "Securities Litigation"), for an order, pursuant to 11 U.S.C. § 362(d) and Fed. R. Bankr. P. 4001, modifying the automatic stay imposed in this chapter 11 case under 11 U.S.C. § 362(a) (the "Automatic Stay") so that the Lead Plaintiffs may seek relief in the United States District Court for the Southern District of New York (the "District Court"), where the Securities Litigation is pending, from the discovery stay under the Private Securities Litigation Reform Act of 1995 (the "PSLRA Stay"); and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. § 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and venue being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that due and adequate notice of the Motion has been given and that no further notice is required; and the Court having considered the Motion; and after due deliberation and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is hereby GRANTED and the Automatic Stay is modified under 11 U.S.C. § 362(d)(1) solely to permit Lead Plaintiffs to seek relief in the District Court from the PSLRA Stay.

2. Except for the relief granted herein, the rights of all parties hereto are preserved.

3. The requirement under Local Rule 9013-1(b) for the service and filing of a separate memorandum of law is deemed satisfied by the Motion.

Dated: New York, New York  
June 9, 2006

/s/ Robert D. Drain  
UNITED STATES BANKRUPTCY JUDGE

# **EXHIBIT C**

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

ATTORNEYS AT LAW

NEW YORK • CALIFORNIA • NEW JERSEY • LOUISIANA

JOHN P. COFFEY  
sean@blbglaw.com  
212-554-1409

June 5, 2006

**By Hand Delivery**

Honorable Gerard E. Lynch  
United States District Judge  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 910  
New York, New York 10007-1581

Re: *In re Refco, Inc. Securities Litigation, 05 Civ. 8626 (GEL)*

Dear Judge Lynch:

On behalf of Lead Plaintiffs RH Capital and PIMCO and Plaintiffs' Co-Lead Counsel Grant & Eisenhofer P.A., we are pleased to advise the Court that Lead Plaintiffs have reached a proposed settlement of the Class' claims against defendant BAWAG in the above-referenced action. The action continues as to all other Defendants.

To summarize briefly, the proposed settlement consists of financial and non-financial benefits to the Class and a release of the Class' claims against BAWAG. The total amount to be paid by BAWAG is comprised of: (a) at least \$108,000,000 in cash (the "Non-Contingent Payment"), to be paid in three installments over the next year (depending on the timing of various approvals in this Court and certain parallel actions involving BAWAG); and (b) a possible additional payment of up to \$32,000,000, if certain criteria are met in the anticipated sale of BAWAG (the "Contingent Payment").

The parties have agreed that, with the exception of the first scheduled payment (\$8,000,000 to be paid by BAWAG within ten days of preliminary approval of the settlement in this Court), Lead Plaintiffs will first apply on behalf of the Class to be paid from a BAWAG-funded restitution fund that the United States Attorney for this District will establish. Amounts received by Lead Plaintiffs and the Class out of this fund will be credited as partial payment of BAWAG's remaining obligations under the settlement agreement (up to a maximum credit of \$100,000,000). BAWAG will remain obligated for the settlement amounts should there be any shortfall in the amounts obtained from the restitution fund, and the Class will benefit from any overage paid from the fund.

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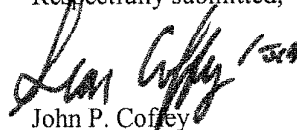


Honorable Gerard E. Lynch  
June 5, 2006  
Page 2

In addition, BAWAG has agreed to co-operate with Lead Plaintiffs in the prosecution of other Defendants and prospective defendants in this action, including providing documents and (subject to coordination with the USAO) witnesses.

The parties have turned to preparing the settlement papers and anticipate requesting an early July date for a preliminary approval hearing.

Respectfully submitted,



John P. Coffey

cc (by email):

Andrew Levander, Esq. (Counsel for Defendant BAWAG)  
Joel Levitin, Esq. (Counsel for Defendant BAWAG)  
Stuart M. Grant, Esq. (Co-Lead Counsel for the Class)  
James J. Sabella, Esq. (Co-Lead Counsel for the Class)  
Max W. Berger, Esq. (Co-Lead Counsel for the Class)  
All other counsel of record



# **EXHIBIT D**

**“Attorney Despins: BAWAG Settlement with Refco Creditors”**

*Transcript of Bloomberg Interview dated June 5, 2006 between Allan Dodds Frank (“Reporter”) and Luc Despins, Esq., counsel to the Official Committee of Unsecured Creditors of Refco Inc. (“Despins”).*

Reporter: How important was your investigation of the discovery of fraud to this settlement?

Despins: Well, it was certainly a very important aspect of our, of the result here in the sense that we were given access to documents in January and February and March that led us to believe that BAWAG had a key role in the accounting scheme that was perpetrated by Mr. Bennett and clearly as a result of that, we were able to file a complaint and seek recourse against BAWAG, which ultimately led to the settlement.

Reporter: Well, what did you find?

Despins: We found that BAWAG had loaned money to Bennett-controlled entities as part of a scheme to hide the true nature of financial condition of Refco to its creditors.

Reporter: And how central do you feel BAWAG was, knowing what you now know?

Despins: Well, BAWAG was one of the actors. There are others but clearly BAWAG was one of the actors.

Reporter: What about what BAWAG did would cause them to have to pay the creditors as much money as they’re going to get?

Despins: Well, you know, I think that they were in a difficult situation, in the sense that we were able to freeze a billion two of their assets in the United States

and it's difficult for a financial institution to operate with having all... so much capital frozen, so I think that, at the end of the day if they want to survive, they had no choice but to deal with our claims and to settle with us.

Reporter: And your claims were, tell me why your claims were so strong.

Despins: Well, our claims were strong because we had documentary evidence that they understood why these loans were being made and, confronted with that and confronted also with the fact that a billion two of their assets were frozen in the US, they frankly had no choice but to settle.

Reporter: Now, when a colleague of mine and I did a story about a half a billion dollars of the fake bonds in BAWAG accounts at Refco, that triggered a series of events in Austria, how much did that story crack this open?

Despins: It was helpful to know about that, and what happened in Austria before we filed our suit is that BAWAG was already weakened as a result of that, because they had to admit publicly that the story was true, that in fact they had been involved with these fictitious bonds, and so at the time we filed our suit, this had already paved the way to a global settlement.

Reporter: Now, do you think that the bank is getting a good deal by a no-prosecution agreement from the US attorney?

Despins: Well, I am not a criminal lawyer so I can't judge that but I think that the bank is given a shot at surviving which is a great thing for the bank and a great thing for Austria and I think that, throughout these negotiations, one of the things that the parties, including the Creditors' Committee but also the US attorney and the other parties involved looked at, is trying to avoid, avert a

liquidation for BAWAG and now they have a real shot at continuing in business and being sold and for the benefit of their depositors and shareholders and for the benefit of the Austrian government as well.

Reporter: In terms of the details of the settlement, how does it work if, I mean, is there a different amount to the settlement if BAWAG is sold at above a certain price?

Despins: Yes. The way the settlement is documented, there is a right to a contingent payment of up to \$200 million, which will be shared between us and the US government. 75% for us, 25% for the US government. That contingent payment is only triggered if BAWAG is sold for, in excess of 1.8 billion euros.

Reporter: Okay. Tell me about the creditors settlement and how that works and where the money goes.

Despins: Well, an interesting feature of this is that there is no decision at this point on how it is going to be allocated among the various creditors of Refco. Our first goal was “bring the money in, bring the settlement in” and after that people can fight over who gets it but I think that the court eventually will have to determine how this money will be allocated among the various Refco constituencies.

Reporter: Okay. But, I mean, the settlement, just describe the structure of the settlement.

Despins: So, the structure of the settlement is that there is a pot of \$675 million. That is guaranteed money in the sense that 150 million out of that 675 would be

paid once the court approves this settlement. The balance would be guaranteed through a letter of credit issued by an American bank so it's really money good; so that 675 is split between the creditors of Refco – or the Refco estates, if you will – and the US government. The US government initially gets 50% of that but then turns around and gives us 50% of what they get, so the bottom line is that out of the 675, we get 75% of that, they get 25% of that to distribute according to their own processes.

Reporter: Right. Now is it your understanding that that remaining 25% is going to be split between the class action guys and Thomas Lee?

Despins: I am not privy to exactly how it's going to be split but I do understand that there have been discussions involving the US government and these parties that you mention, where these parties may apply to be treated as victims of ... the Bennett fraud, and may be able to receive some of the funds that the government keeps – the 25% – but I am not a party to those negotiations.

Reporter: Okay. Now initially BAWAG claimed it was a victim, it was duped by Phil Bennett – what is your current assessment of that claim?

Despins: Well, it is a claim that they had to make to maintain an appearance of not being involved, but I think that the...initially the current management of BAWAG may not have understood the full consequence and the implications of what had been done. I thought that their initial reaction was: we made loans, we were repaid for those loans, there is nothing wrong about that, and on top of that, we gave you \$430 million on the eve of bankruptcy, so we don't understand why you are coming after us. I think with time and with the

advice of their US counsel, they understood that in effect they had facilitate... facilitated Bennett's fraud.

Reporter: Now, in terms of documents that have been filed with the Securities and Exchange Commission, as far as any investor knows, BAWAG only owned 10 per cent of Refco at any one time. What did your investigation show and what do you think that number actually is?

Despins: Our complaint alleged that in fact that number, that their percentage ownership was much greater than that and when I say their percentage ownership, I am using BAWAG but also its shareholders, the labor union that controls BAWAG. The exact percentage is unclear but it is vastly in excess of ten percent, but less than 50%.

Reporter: 47% is the number?

Despins: It's certainly a number around that...that may be accurate.

Reporter: Some of this is controlled through casinos, I mean, foundations in Lichtenstein?

Despins: Correct, and what happened there is that there were documents that showed that a Lichtenstein foundation controlled some of the stock but then, it was later admitted by the labor union that controls BAWAG that they were behind the Lichtenstein foundation, so in fact BAWAG plus the labor union controlled far in excess of 10%.

Reporter: Is that the kind of thing that you think should have properly been disclosed to people contemplating the initial public offering of Refco?

Despins: I can't really opine on that. That's for securities lawyers to opine on.

Reporter: Okay, you're going to get roughly \$500 million for the creditors.

Despins: About \$506 million.

Reporter: Okay. How much remains to be recovered and where do you go next?

Despins: Well, a lot more needs to be recovered and where we go next, I can't really tell you right now, but we are going to pursue other targets, some may be obvious, some may not be as obvious, and we hope that we will continue to have successes as we've had with BAWAG and other parties.

Reporter: Now, from the Creditors' Committee point of view, where does Thomas Lee stand?

Despins: That remains to be seen. We can't really comment on that at this time.

Reporter: I mean, I know that there are certain people who have been following this story, who are somewhat surprised that Thomas Lee is getting paid, when there are others who think it helped Refco go public and defraud investors.

Despins: Some may have expressed that view, but I can't really comment at this time on this.

Reporter: Okay. Now I have been bugging you, and every other lawyer in this case, for months about a mysterious number in the SEC documents filed by Refco, namely a payment of \$861,741,000 – \$861 million – on the books, payment to a shareholder, a predecessor corporation – do you now have any idea who that is, was that in fact BAWAG?

Despins: Yeah, it was BAWAG, and again in that context I am referring to BAWAG broadly as BAWAG and/or its affiliates and the labor union that controlled BAWAG.

Reporter: So that's where that mysterious money, it was real money and it went to BAWAG?

Despins: That's correct.

Reporter: Okay. Tell me how you unraveled the fake bonds and how they work, from your point of view.

Despins: That is something that I can't really comment on at this time given that it's subject to criminal investigation.

Reporter: Well, the bank escapes prosecution. Do you expect all of BAWAG's former executives to escape prosecution?

Despins: Again, I am not a criminal lawyer but I think that in the US that that may very well be the case. I am not sure that will be the case in Austria.

Reporter: Should we expect a superceding indictment in terms of the Phil Bennett case?

Despins: You would have to ask the US attorney that question. I can't answer it.

Reporter: Here's a surprise. I will probably ask him again. Well, tell me about the scope of your investigation. I am sure our viewers have no idea what really goes on when you're in a huge bankruptcy case like this and you're trying to find assets all over the world.

Despins: Well, the first thing we do is, we try to cast as wide a net as we can in terms of document production, so we've asked hundreds of parties to produce documents and that ranges from entities like BAWAG, Grant Thornton, the former accountants, the lawyers, and numerous other parties, and the first thing we do is, we gather all these documents together and try to create a



database that is searchable, that is usable, so we can start looking at bits and pieces of this, so that, for example, we are able to search the word BAWAG in hundreds of thousands of documents we know where they appear, and we can search the names of particular individuals in that database. That is the first step. Once we've reviewed that, you start getting a picture of things that are not quite right. For example, in the case of BAWAG, we saw that they received very large payments that were not commensurate with a 10% ownership, so we started digging into that and find out that in fact they owned or they controlled much more than 10%. And so on and so forth. We have the same process for other parties that will be targets of the Creditors' Committee here and that's the process generally we follow. In this case, there was something that was quite different and it's a very unique investigation in that regard, and it's the involvement of the US attorney. Typically, creditors' committees and the Department of Justice are always at war with each other over who gets the money. And, in this case, what was novel and was very productive is that in fact we worked side by side in negotiating with BAWAG, and so far the relationship with the government has been quite cooperative and they've been instrumental in obtaining the settlement we have been able to obtain from BAWAG.

Reporter: Did you find stuff that you turned over to them that they hadn't yet discovered?

Despins: We have more staffing than the government and so we have the ability to dig in and analyze things that they may not be able to accomplish on the same

timetable. We also have a lot of experts – accountants, financial advisors that they don't necessarily have access to. And, in that regard, it's not that we know more but we sometimes were able to find answers or find key documents or key issues that they may not be able to find on the same timetable.

Reporter: Where does Chris Sugrue fit in?

Despins: That's to be continued. I think that we will have to see where the investigation leads us in regards to Mr. Sugrue.

Reporter: What can you tell me about Chris Sugrue because I know this part of it, at least was subject to an action in court, what can you tell me about how Chris Sugrue got money out of Refco at the eleventh hour and what you had to do to recover it?

Despins: Well, Mr. Sugrue was the CEO and Chairman of a company called Plus Funds. That entity managed a mutual-fund type of company called Sphinx Funds and what he did when there was the Bennett announcement which was October 10<sup>th</sup> or so.

Reporter: Right.

Despins: He realized that things were going south and he being a former employee of Refco understood very well the difference between Refco Capital Markets, which was the unregulated entity and other regulated entities such as Refco LLC and what he did is he went to the company and said "I want my funds, the funds of Sphinx Funds transferred from non-segregated funds to the segregated funds at LLC," and after a day of screaming and yelling was able

to obtain that result and that's what we were able to undo through the litigation against Sphinx Funds.

Reporter: How much money did he manage to get out the door for a few minutes?

Despins: \$312 million.

Reporter: Whew. Was Phil Bennett one of his clients by any chance?

Despins: That is something that remains to be seen.

Reporter: Now, why do I suspect that...? Anyway, what about the notion that there were twin frauds going on here, BAWAG and Refco aiding and abetting one another. Can you describe your view of that?

Despins: Well I think I want to be precise to you that the way we look at the world is that there was the Bennett fraud not the Refco fraud the Bennett fraud that was inflicted on Refco and also it appears that BAWAG had its own issues that they were trying to camouflage or hide through Mr. Bennett's efforts.

Reporter: So, and where does Wolfgang Flottl fit in, as far as you know?

Despins: That remains to be seen. We are not commenting on that at this time.

Reporter: Because the bank blames all their losses on poor old Wolf?

Despins: So I understand.

Reporter: Now in terms of the whole, how, let me back up, from the Creditors' Committee point of view when you look at all the books on Refco Capital Markets, in general terms, what did you see about the flow of money for customers, money would come in and then where would it go?

Despins: That is something that, although we have a lot of information on it, that is apparent that there were huge inflows and outflows of money out of RCM

and into RCM. We know that when the music stopped there was a gap of probably a billion, in excess of a billion dollars, a billion eight or so, but I think it remains to be seen exactly where all that money went and that's something that we are actively reviewing.

Reporter: So if there's a billion eight missing and you're now going to recover about five hundred and six minus what, what are the legal fees at this point?

Despins: It depends, the legal fees on the BAWAG matter, they would be very modest compared to other legal fees but all kidding aside the legal fees in the case are fairly high, but I don't think you can do the equation you just went through. I don't think the \$506 is going to go necessarily to plug the hole at RCM. That's for the court to decide exactly which creditors of the Refco empire get that money. It may very well be used at other Refco entities where there's also a hole.

Reporter: Okay. So you have an idea what the overall hole is, that you as the head of the Creditors' Committee are facing?

Despins: Well we certainly know that it's in excess of two billion dollars but because the bar date to file claims has not passed yet and it will be sometime in July, it is too early to tell exactly what the size of the gap, of the hole is.

Reporter: What have you discovered about Refco's customer base in all this research? I mean did they, did Refco have some customers whose legitimacy was questionable?

Despins: Not that I am aware of unless you have particular...

Reporter: Oh, I mean, you know, drug dealers, arms smugglers, guerilla movements,

who knows?

Despins: That's not apparent to me. Maybe later on we will discover that, but at this point we're not...

Reporter: Funny money in the casino in Jericho?

Despins: I thought that was related to BAWAG not...

Reporter: That is related to BAWAG but they may have used Refco accounts as well.

Despins: That, we are not commenting on that at this time.

Reporter: How about customers of BAWAG, what did you find there?

Despins: We can't comment on that at this time.

Reporter: Okay. How does this case compare to other cases you've been involved in, in terms of its degree of difficulty and its international reach?

Despins: It is a complex case, but given that we've represented the Enron creditors committee before, for example, you know that we've dealt with large cases sometimes involving fraud sometimes not and this case is different in the pace at which we've been proceeding in the sense that for all sorts of reasons one, because it's a fast paced liquidation and because some of the bad actors may be leaving the jurisdiction or their assets may be leaving the jurisdiction. We've been forced to act very quickly. So that from the date we were retained on October, I forget the exact date, I think October 30 or so when the Committee retained us to now it has been a basically a non-stop effort to either try to recover assets from people, investigate claims and at the same time try to come up with a plan of re-organization to allocate all these proceeds and assets and that's why this case is different. I think we have

done in the space of six months or so what usually takes about two years and I've probably aged four years during that process.

Reporter: Now, do you see any parallels between the BAWAG situation and Enron since you've been involved in both cases?

Despins: No.

Reporter: Off-shore entities, special purpose vehicles, you don't see similarity?

Despins: Well in that sense you could say that, but I think that what happened at Refco involving BAWAG was much more primitive than that. I think that ... and they may not have understood exactly that but .... I don't know how they didn't understand it, but I think that in fact the essence of what was going on was very simple and very obvious and in Enron it certainly was not like that. I think there were complex financial structures, some of them held up, some of them didn't.

Reporter: How would you describe what the essence of what was going on was?

Despins: At Refco?

Reporter: At, yes.

Despins: Well, as far as these, the...the receivables scheme, I think that it's very clear that what was designed to achieve, which is to hide the true financial condition of Refco to its customers and creditors.

Reporter: And how about BAWAG, what was the essence there?

Despins: Well, I think that as we discussed there was a, you know, a symbiotic relationship between Mr. Bennett and BAWAG or at least certain executives at BAWAG and that's what prompted them to enter into these various

transactions.

Reporter: And help each other cover up?

Despins: Apparently.

Reporter: So the next step for you is, the Creditors' Committee, is chasing other people or what?

Despins: Chasing other people but also trying to come up with a structure to distribute these, all these assets, the cash, the securities and the proceeds from the litigation to these thousands of creditors and doing that in a cost-efficient and timely manner. That's really the challenge.

Reporter: Do you have a forecast on how much, how many cents on the dollar you finally expect to recover?

Despins: That's impossible to say at this time. I would love to be able to do that and if I were able to tell you this, I wouldn't be sitting here today.

Reporter: You have a number where you are so far?

Despins: No, the problem is that it varies by Refco entity so you can look at Refco Capital Markets and have sort of an estimate of what could be recovered there but then again that depends on how much they get in litigation proceeds, etc., but as far as all the other entities at Refco, it's, it is very hard to determine and it's, therefore it would be misleading to give a blended recovery. If you'd say, you know, if you say that it would be x cents on the dollar, it would depend on, really on the entity. I think that some entities might have a very high payout, others a lower payout. Time will tell. And also I will depend on how many people file claims against which entities...in

July.

Reporter: Now, do you have the sense that most of the, what you might characterize as questionable or illegal activity was confined in the unregulated entities such as Refco Capital Markets?

Despins: It's too early to tell that. I mean, the facts as we know them lead us to believe to the fact that a lot of that occurred at RCM but, and I think it would be premature to say that it only occurred at RCM.

Reporter: Okay. Where does this case lead next? Does it go any other exotic spot on the globe we haven't really heard of yet?

Despins: I don't think so. I think that we're going to be focused on US aspects shortly.

Reporter: And what should we look for?

Despins: More of the same. I think that the Committee's goal here is to try to recover as much as we can from parties that are either wrongdoers who took a lot of money out of Refco and I think that there'll be more of that coming.

Reporter: You mentioned that one of the reasons this case proceeded so quickly is there was concern about people involved or assets involved leaving the jurisdiction, shall we say. Has any of that happened?

Despins: No, because I think we were able to freeze the Sphinx assets but clearly we were concerned about the Sphinx assets being removed from the jurisdiction. There was a clear risk and we were also concerned about BAWAG's assets becoming outside of our reach, if you will, and that's why we proceeded as we did. If there's been some of that going on, we're not, it's not apparent to



us at this time.

Reporter: Do you know, for instance, whether Mr. Sugrue is still around?

Despins: We can't comment on that at this time.

Reporter: Where does Thomas Hackl fit in?

Despins: Again, I can't comment on Mr. Hackl's role.

Reporter: Okay.

Despins: Sorry.

Reporter: I think I've kind of exhausted the water front but let me just ask you one more time to summarize, but don't say as they've said before just .... I hear what you've said before. Blow up for me this settlement with BAWAG, how much it's worth and why it's important.

Despins: Sorry, I'm not sure....

Reporter: How much is it worth, why is it important, what have you accomplished as of today? Let's put it that way.

Despins: The settlement with BAWAG is a key settlement. One because it brings to the estate of Refco a minimum of 506 million dollars and that is a lot of money in a very short period of time and it's key in that respect and it's also key because it describes or it shows the extent of BAWAG's involvement in the Bennett scheme.

Reporter: Right. Is there anything you want to add that I haven't had the wit to ask you about?

Despins: No, I think we've already talked, the thing that's interesting is the role of the government here which was very, very...

Reporter: All right, let me ask about that. The government has been investigating this case. There was a time when there were a whole bunch of orders that were sealed, stopping you, starting you. Describe what was going on behind the scenes.

Despins: Well, the government and the AG, precise, I mean, the Department of Justice is concerned or was concerned about our investigation having an impact on their criminal prosecution. As you know, they've indicted Mr. Bennett, for all we know, they may indict other people and the last thing they want is for us to do things that might jeopardize that and so that, you saw a lot of activity in the bankruptcy court, it was all related to that. Although it was a bit choppy at the beginning, we've reached a...a sort of, an agreement with the Department of Justice which is not memorialized in any document but really an understanding with them that we would be their partners and we would work together with them and our, one of our main goals would be to avoid any negative impact on their criminal processes and I think that the BAWAG settlement really shows how we were able to accomplish that without impairing their process.

Reporter: Have you been able to talk to any of the other former Refco officers, like Santo Maggio, for instance?

Despins: No we have not talked to them at this time.

Reporter: So you haven't been able to talk to the Refco guys who rushed in to try to get a deal with the government to avoid indictment.

Despins: I can't comment on whether they did rush to get a deal on that.

Reporter: What happened when you went to London for the first meeting with the BAWAG executives about a possible settlement?

Despins: Well, we had a meeting that was attended by the CEO of BAWAG, Mr. Nowotny and their counsel. It was over a weekend, in London, and also a representative of the US Department of Justice was there, and the goal was to try to reach a consensus on a number that they could accept and that would be acceptable to us to settle this.

Reporter: What did the bank tell you at first?

Despins: They basically told us that they couldn't afford more than x because they were broke

Reporter: I think the figure that has appeared elsewhere was 300 million. Is that accurate?

Despins: It's around that amount, yes.

Reporter: So they told you they could only afford 300 million, they were broke and so you said?

Despins: We said, fine, let's understand that we have financial advisors with us, let's go through the numbers and I think they were a little bit taken aback by that and they expected us to take it at face value that they were broke, and we also had an advantage. We had hired a law firm in Austria who gave us a real sense of what was going on in Austria in terms of the political aspects of this case. There's an election that's coming in Austria, probably in the fall and how it would be unacceptable to let this bank fail, which we did not really fully understand at the beginning but it became very clear through the

advice we got from Austrian counsel that in fact it was politically unacceptable to let this bank fail and we told them basically that we were not going to buy into that story.

Reporter: So, when they, did they try to claim that the situation with the bank was worse than the Austrian public knew at that time?

Despins: Well, they brought actual newspaper articles showing depositors lined up withdrawing their money from BAWAG. They also showed us headlines of newspaper articles saying that the bank was bankrupt and we said that's fine we don't rely on the press to make decisions on settlements and, but they were very upset that we challenged their notion that they were broke.

Reporter: So what brought them back to the table?

Despins: I think they had no choice. I think that once it became clear that we were, that the Committee's resolve was very strong, that we were not going to settle for less than a certain amount, and that it was unlikely that their funds would be unfrozen in the US, they practically had no choice. Their choices were either go into bankruptcy in Austria which would have been a disaster for all and we did not wish that but if it'd come to that we had no choice, or settle with us on terms that were acceptable.

Reporter: And where was the Austrian government in all this?

Despins: Well, the Austrian government you know was clearly concerned about the stability of the financial markets in Austria and they made that known to us through the US government.

Reporter: So the Austrian government was working with the Justice Department, the

State Department to try to make something happen?

Despins: Well, I am not familiar with all the details but clearly there were some ongoing communications at that level.

- END -

# **EXHIBIT E**

**Objection Deadline: June 5, 2006 at 5:00 p.m.**  
**Hearing Date: June 8, 2006 at 10:00 a.m.**

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:

REFCO INC., et al.,

Debtors.

Chapter 11

Case No. 05-60006 (RDD)  
(Jointly Administered)

**SUPPLEMENTAL 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 PERSONS**

The Official Committee of Unsecured Creditors (the “Committee”) of Refco Inc. (together with its predecessors and affiliates, “Refco”) and its affiliated debtors and debtors in possession (collectively, the “Debtors”), by its counsel, Milbank, Tweed, Hadley & McCloy LLP, moves this Court (the “Supplemental Motion”) for entry of an order pursuant to section 1103(c) of Title 11, United States Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”) and Rule 2004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), directing the production of documents by (i) Arthur Anderson, LLP (“AA”), (ii) Delta Flyer Fund, LLC (“Delta”)/Eric M. Flanagan, (iii) Micky Dhillon and the Jasdeep Dhillon Trustee MSD Family Trust, (iv) Thomas Dittmer, (v) Ernst & Young LLP, (vi) Stephen Grady, (vii) Thomas Hackl,

(viii) Ingram Micro Inc., (ix) Mark Kavanagh, (x) Dennis Klejna, (xi) Levine Jacobs and Co. LLC, (xii) Eric Lipoff, (xiii) McDermott Will & Emery, (xiv) Joseph Murphy, (xv) Frank Mutterer, (xvi) Victor Niederhoffer/Niederhoffer Investments Inc., (xvii) Sean O’Shea and Edward McElwreath, (xviii) PricewaterhouseCoopers, LLP (“PwC”), (xix) William M. Sexton, (xx) Philip Silverman, (xxi) Chris Sugrue, and (xxii) David Weaver, ((i)-(xxii) collectively, the “Respondents”).

In further support of this Supplemental Motion, the Committee states as follows:

### **BACKGROUND**

1. On October 17, 2005 (the “Petition Date”), each of the Debtors filed a voluntary petition in this Court for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. § § 101 et seq. (as amended, the “Bankruptcy Code”). With the exception of Debtor Refco Capital Markets, Ltd. (“RCM”), for which a Trustee has been appointed, the Debtors continue to manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. The Committee is a committee duly appointed and organized under section 1102 of the Bankruptcy Code. On October 28, 2005, the United States Trustee appointed the Committee, as reconstituted on March 29, 2006.

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding under 28 U.S.C. § 157(b)(2).

4. The statutory predicates for the relief requested herein are Bankruptcy Code sections 1103(c)(2) and Bankruptcy Rule 2004.



5. On November 3, 2005, the Committee filed a motion, attached hereto as Exhibit B for entry of an order pursuant to 11 U.S.C. § 1103(C) and Bankruptcy Rule 2004 directing the production of documents by (i) certain current and former directors, officers and employees of Refco; (ii) certain third party investors, counterparties, and other participants in the events and circumstances described herein; and (iii) Refco's accountants and lawyers (the "Rule 2004 Motion"). In the Rule 2004 Motion, the Committee described the background to the Refco bankruptcy and the alleged fraud; the facts then known to the Committee, on information and belief, necessitating the discovery requested; and the legal basis for discovery pursuant to Bankruptcy Rule 2004. In the interests of judicial economy, the Committee hereby incorporates and does not repeat herein Paragraphs 5-25 and 42-45 of the Rule 2004 Motion.

6. By Order dated December 5, 2005 as subsequently amended on March 27, 2006 (the "Rule 2004 Order"), this Court granted the Rule 2004 Motion giving the Committee permission to serve subpoenas calling for the production of documents (the "Initial Rule 2004 Subpoenas") upon 16 persons and entities. The Committee served those subpoenas and has, subject to the terms of the Rule 2004 Order, been pursuing discovery from the subpoena recipients.

7. The Committee has made substantial progress in its investigation and the investigation is now at a stage where the Committee requires documents from additional parties. As the Committee explained in the Rule 2004 Motion, it "cannot state that the issues identified to date will be the only irregularities in Refco's practices." (Rule 2004 Motion, at 37.) This remains true today. As detailed below, however, from the discovery to date and from related actions the Committee is pursuing, the Committee has learned of additional persons and entities who likely have information relevant to (i) the property of the Debtors, and the location of same;

(ii) the assets, liabilities and financial condition of the Debtors; (iii) matters that may affect the administration of the Debtors' estates; and (iv) the identification and prosecution of certain potential claims against third parties by a representative of the Debtors' estates.

8. The Committee notes that as the investigation continues to proceed, it is likely that the Committee will request authority to take further discovery. Accordingly, the Committee reserves its right to (i) seek to take the depositions of the Respondents at a future date and (ii) serve supplemental and additional document requests that relate to the matters described in the Rule 2004 Motion and this Supplemental Motion.

### **RELIEF REQUESTED**

9. The Committee seeks authorization to obtain the production of documents from the Respondents concerning (i) the property of the Debtors; (ii) the assets, liabilities and financial condition of the Debtors; (iii) matters that may affect the administration of the Debtors' estates; and (iv) the identification and prosecution of certain potential claims against third parties by a representative of the Debtors' estates. The Committee seeks entry of an order substantially in the form annexed hereto as Exhibit A (the "Proposed Order").

#### **A. Persons and Entities From Whom Documents are Sought**

10. Based upon (i) the Debtors' public statements, (ii) the Criminal Complaint,<sup>1</sup> (iii) published news reports, and (iv) the Committee's preliminary investigation, including documents obtained pursuant to discovery obtained in response to the Initial Rule 2004 Subpoenas, the Respondents appear likely to have material information concerning one or more of these subjects, including but not limited to (i) the Bennett Receivables Scheme and the (ii) the Insider Payments.

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<sup>1</sup> All Capitalized terms not defined herein shall have the meaning ascribed to them in the Rule 2004 Motion.

11. The individuals and entities from whom documents are sought, and the reasons why the Committee submits such discovery is relevant and necessary, are as follows:

(1) **AA**

12. AA was Refco's auditing firm prior to 2002. The lead Refco auditor at AA, Mark Ramler, took Refco with him as a client when he left for Grant Thornton in 2002. AA will likely have documents and information relevant to the circumstances relating to the receivables between one or more of the Debtor entities and entities affiliated with Phillip Bennett ("Bennett"), as well as the manner in which such issues were handled by Refco's auditors. Thus, AA will likely have information and documents relating to the events at issue that will be indispensable to the Committee's investigation.

(2) **Delta/ Eric M. Flanagan**

13. Public reports suggest that Delta participated in the Bennett Receivables Scheme at the end of certain of Refco's financial quarters from 2001 through 2004.

14. Eric M. Flanagan is listed in the Delta LLC Registration filing as the "initial manger" of Delta. Thus, Delta and Flanagan are likely to have information and documents concerning the Bennett Receivables Scheme. Delta and Flanagan are also likely to have information and documents relating to other events at issue that will be indispensable to the Committee's investigation.

(3) **Sukhmeet "Micky" Dhillon and the Jasdeep Dhillon Trustee MSD Family Trust**

15. Sukhmeet "Micky" Dhillon was the head of Main Street Trading, a firm acquired by Refco. Dhillon, or entities affiliated with Dhillon including, the Jasdeep Dhillon Trustee MSD Family Trust, were recipients of certain Insider Payments. Upon information and belief, Dhillon, or entities affiliated with Dhillon, received substantial payments from the

Debtors and/or Refco Group Holdings, Inc. (“RGHI”), one of the entities through which Bennett held his ownership interest in Refco. Thus, Dhillon and the Jasdeep Dhillon Trustee MSD Family Trust will have information and documents relating to those payments. Dhillon and the Jasdeep Dhillon Trustee MSD Family Trust are also likely to have information and documents relating to other events at issue that will be indispensable to the Committee’s investigation.

**(4) Thomas Dittmer**

16. Thomas Dittmer co-founded Refco in 1969, retiring from his post as CEO in 1999. Upon information and belief, in connection with Refco’s initial public offering in 2005 (the “IPO”), Dittmer received substantial payments from the Debtors and/or RGHI. As the former CEO of Refco’s predecessor, Dittmer is likely to have information and documents concerning those payments. Dittmer is also likely to have information and documents relating to the events at issue that will be indispensable to the Committee’s investigation.

**(5) Ernst & Young LLP**

17. Ernst & Young LLP acted as Refco’s tax preparation firm until early 2004. At that time, about the same time that Refco and Thomas H. Lee Partners were negotiating a series of transactions (the “Leveraged Recapitalization”), Ernst & Young stopped working for Refco. Refco then chose Levine Jacobs & Co. to replace Ernst & Young. According to media reports, Ernst & Young’s decision may have been tied to a dispute with Refco. The nature and details of that dispute remain unknown. Thus, it is likely that Ernst & Young will have information and documents relating to this and other events at issue that will be indispensable to the Committee’s investigation.

**(6) Stephen Grady**

18. According to press reports, in September/October 2005, Stephen Grady, the chief operating officer (“COO”) of Refco Group’s global derivatives operations, had his

responsibilities expanded following the announcement of the former COO's, William Sexton, intent to retire. Thereafter, Grady was in charge of managing the firm's physical infrastructure and operations in Chicago, which had expanded following the acquisition of Cargill Investor Services. Grady was a recipient of certain Insider Payments. Upon information and belief, Grady received a substantial payment from the Debtors and/or RGHI. Thus, Grady will have information and documents relating to the Insider Payments. Grady is also likely to have information and documents relating to other events at issue that will be indispensable to the Committee's investigation.

**(7) Thomas Hackl**

19. Thomas Hackl is a former Executive Vice President of Refco and former member of Refco's Management Committee. Hackl was responsible for global asset management, operations and affiliations. Hackl left Refco in 2004, apparently sometime after the Leveraged Recapitalization in August 2004. Prior to joining Refco, Hackl worked as the Head of Treasury and Investment Banking at BAWAG and served as a member of BAWAG's senior management team, responsible for the bank's global treasury operations, asset management and private banking from 1991 to 2002.

20. In addition to his ties with both BAWAG and Refco during the key periods in question, upon information and belief, Hackl likely had knowledge of the Bennett Receivables Scheme. On information and belief, Hackl, Bank Frick and RGHI/Bennett were joint investors in certain entities. Thus, Hackl will likely have information and documents relating to the events at issue that will be indispensable to the Committee's investigation.

**(8) Ingram Micro Inc.**

21. The Consolidated Class Action Complaint (05 Civ. 8626) alleges that Ingram Micro Inc. ("Ingram"), an information technology distributor based in Santa Ana,

California, like Delta and Liberty Corner participated in short-term loan arrangements with RGHI and one or more of the Debtor entities. The Class Action Complaint alleges that an individual familiar with the facts of the loans confirmed that “Ingram was involved in at least one \$250 million loan transaction with Refco, which took place in February 2001.”

22. Further, according to an article in the Wall Street Journal on March 30, 2006, Ingram has confirmed that it was involved in a transaction with Refco several years ago. Thus, like Liberty Corner and Delta, Ingram is likely to have information and documents concerning the Bennett Receivables Scheme. Ingram will also likely have information and documents relating to other events at issue that will be indispensable to the Committee’s investigation.

**(9) Mark Kavanagh**

23. Mark Kavanagh is the sole member of Suffolk KAV (one of three Suffolk subsidiaries of Suffolk LLC) a company that received a “loan” of \$158 million from one or more of the Debtor entities in order to finance the buyout of the minority shareholders of PlusFunds in 2005. Thus, Kavanagh will have information and documents relating to this transfer of funds and will likely have information and documents relating to other events at issue that will be indispensable to the Committee’s investigation.

**(10) Dennis Klejna**

24. Dennis Klejna was Executive Vice President (“EVP”) and General Counsel of Refco since January 1999. Since August 2005, Klejna was also Refco’s Corporate Secretary. Klejna was also a recipient of Insider Payments. Klejna received \$6.5 million in a buyout of a profit-sharing agreement in August 2005. Thus, Klejna will have information and documents relating to the Insider Payments. As General Counsel, EVP, and Corporate Secretary,

he is also likely to have information and documents relating to other events at issue that will be indispensable to the Committee's investigation.

**(11) Levine Jacobs and Co LLC**

25. Levine Jacobs and Co LLC ("Levine Jacobs") is an accounting firm located in Livingston, New Jersey and, upon information and belief, was the firm responsible for preparing RGHI's taxes for the year ended December 31, 2004. Upon information and belief, Levine Jacobs also performed accounting work for Refco. Thus, Levine Jacobs will likely have information and documents relating to the events at issue that will be indispensable to the Committee's investigation.

**(12) Eric Lipoff**

26. Eric Lipoff was a recipient of certain Insider Payments. Upon information and belief, in 2004 Lipoff received a substantial payment from the Debtors and/or RGHI. Thus, Lipoff will have information and documents relating to the Insider Payments and is likely to have information and documents relating to other events at issue that will be indispensable to the Committee's investigation.

**(13) McDermott Will & Emery LLP**

27. McDermott Will & Emery acted as counsel for BAWAG Overseas and/or Alinea Holding GmbH in connection with the disposition of BAWAG Overseas' 10% equity stake in Refco Group Ltd., LLC ("RGL") during the Leverage Recapitalization in August 2004. In addition, upon information and belief, McDermott Will & Emery represented certain other entities in connection with their dealings with RGHI. Thus, McDermott Will & Emery will likely have information and documents relating to certain events at issue that will be indispensable to the Committee's investigation.

**(14) Joseph Murphy**

28. Joseph Murphy was the President of the Refco Group responsible for global marketing. Murphy was the EVP, President and CEO of Refco Global Futures since March 1999. Murphy was a recipient of certain Insider Payments. Murphy received between \$9.5 and \$13.7 million from the Debtors and/or RGHI in a buyout of a profit-sharing agreement in August 2005. He also received over \$8.1 million in compensation from 2003 to 2005. Thus, Murphy will have information and documents relating to the Insider Payments. Murphy is also likely to have information and documents relating to the events at issue that will be indispensable to the Committee's investigation.

**(15) Frank Mutterer**

29. Frank Mutterer was the controller of RGL. Mutterer was a recipient of certain Insider Payments. Upon information and belief, Mutterer received a substantial payment from RGHI and/or the Debtors. Thus, Mutterer will have information and documents relating to the Insider Payments. By virtue of his position, Mutterer is also likely to have information and documents relating to other events at issue that will be indispensable to the Committee's investigation.

**(16) Victor Niederhoffer/ Niederhoffer Investments Inc.**

30. Recent media reports suggest that Victor Niederhoffer's hedge fund, Niederhoffer Investments Inc., suffered heavy losses during the 1997 Asian financial crisis, received a \$50 million margin call from Refco in 1997, and contributed to Refco's large outstanding receivable balance from RGHI. Niederhoffer also invested at least \$7 million in the SPhinX Funds. Thus, Niederhoffer and Niederhoffer Investments Inc. will likely have information and documents relating to the events at issue that will be indispensable to the Committee's investigation.



**(17) Sean O'Shea / Edward McElwreath**

31. According to news reports, Sean O'Shea, a New York lawyer, represented Edward McElwreath in a NASD arbitration against Refco Securities, LLC and Refco Group, Ltd. McElwreath claimed he was owed a finder's fee for introducing Refco to Thomas H. Lee Partners. McElwreath was awarded \$3.5 million in that arbitration. In addition, according to news reports, during the course of the proceedings Robert Trosten (Refco's former CFO) admitted receiving a \$45 million severance package from Refco. Thus, O'Shea and McElwreath will have information and documents relating to the Insider Payments and will likely have information and documents relating to other events at issue that will be indispensable to the Committee's investigation.

**(18) PwC**

32. PwC advised Refco on financial reporting for more than a year prior to Refco's IPO in August of 2005. Recent news reports state that PwC advised Refco with respect to a debt offering and also subsequently on financial reporting as its status changed from a private to a public company. PwC was likely paid substantial sums for these services. Thus, PwC will likely have information and documents relating to the events at issue that will be indispensable to the Committee's investigation.

**(19) William M. Sexton**

33. William M. Sexton was the EVP and Chief Operating Officer of Refco Group from August 2004 through at least August 2005. He was responsible for information technology, operations, accounting and finance, credit, margins and risk for Refco's Futures business. Sexton was a recipient of certain Insider Payments. Sexton received between \$7 and \$9 million in a buyout of a profit-sharing agreement in August 2005. He also received over \$4.2 million in compensation from 2003 to 2005. Thus, Sexton will have information and documents

relating to the Insider Payments. Sexton is also likely to have information and documents relating to other events at issue that will be indispensable to the Committee's investigation.

**(20) Philip Silverman**

34. Philip Silverman was the corporate secretary of RGHI, the entity controlled by Phillip Bennett at the center of the Bennett Receivables Scheme. Silverman was also the corporate secretary of a Refco affiliate, Refco Alternative Investments LLC. Alleged by certain press reports to have been a confidante of Phillip Bennett, Silverman was apparently put on leave at or about the same time the Debtors terminated the employment of Bennett and Santo Maggio. Silverman is likely to have information and documents concerning the Bennett Receivables Scheme. Silverman is also likely to have information and documents relating to other events at issue that will be indispensable to the Committee's investigation.

**(21) Chris Sugrue**

35. Chris Sugrue has multiple ties to the Debtors and to Bennett. Sugrue was a Senior Vice President of RGL from January 1993 to February 1998 and was involved in the initial sale of 10% equity ownership in RGL to BAWAG Overseas. From March 2002 to the present, Sugrue served as Chairman of PlusFunds Group Inc., which used Refco's services as a clearing broker. Sugrue appeared at Refco in October 2005 and demanded that \$312 million in funds be transferred from RCM to an unregulated Refco entity, which funds were then transferred to Lehman Brothers. Sugrue was also affiliated with Suffolk LLC, which "borrowed" \$158 million from one or more of the Debtor entities, and with other entities that borrowed an additional \$50 million from one or more of the Debtor entities. Thus, Sugrue will likely have information and documents relating to the events at issue that will be indispensable to the Committee's investigation.

**(22) David Weaver**

36. David Weaver was the Chief Administrative Officer of RCM in 2002.

Upon information and belief, Weaver will likely have information and documents concerning the Bennett Receivables Scheme. Weaver is also likely to have information and documents relating to other events at issue that will be indispensable to the Committee's investigation.

**B. Areas of Requested Discovery**

37. In this Supplemental Motion, the Committee requests discovery from the Respondents with respect to, among other things, (i) the Bennett Receivables Scheme; (ii) the Debtors' accounting and regulatory policies; (iii) the financial dealings of the Respondents with the Debtors and/or with Bennett, RGHI, or any of the Recipients of the Initial Rule 2004 Subpoenas; (iv) the Insider Payments received by the Respondents, including documents relating to the current financial status of the recipients of the Insider Payments, such that the Committee can determine its ability to recover and collect such Insider Payments; and (v) any claims arising out of the IPO and the Leveraged Recapitalization, all as more fully set forth in Paragraphs 31-36 of the Rule 2004 Motion, which are incorporated herein by reference.

**C. Need and Narrow Scope**

38. The documents requested in this Supplemental Motion will provide the Committee with information it requires from those believed to have it. The Committee must obtain such information to properly discharge its duties, under section 1103(c) of the Bankruptcy Code, to the unsecured creditors that it represents. On behalf of those creditors, the Committee is entitled to seek and obtain discovery regarding these and other matters relating to the acts, conduct, property, liabilities and financial condition of the Debtors and their estates. The Committee requires the requested information to assess fully the Debtors' potential claims against third parties, including, inter alia, some or all of the Respondents.

39. The discovery sought herein is narrowly tailored to the factual matters raised or implicated by the various issues and events that precipitated the Chapter 11 Cases. These requests are, however, broad enough to permit the Committee to perform the investigation it is obligated to perform. Compliance with the annexed Rule 2004 document requests by the Respondents will not be burdensome and can be achieved without undue hardship in the time period requested.

**D. Entry of Omnibus Order**

40. To facilitate the necessary discovery, the Committee requests that the Court enter the Proposed Order granting the Motion, and requiring the Respondents to produce documents responsive to schedules to be served by the Committee substantially in the form of the schedules annexed to the Proposed Order as Exhibit “A” for Thomas Dittmer, Thomas Hackl, Mark Kavanagh, Dennis Klejna, Josephy Murphy, Victor Niederhoffer/Niederhoffer Investments Inc., William Sexton, Chris Sugrue, Phillip Silverman and David Weaver; as Exhibit “B” for Stephen Grady, Frank Mutterer, Eric Lipoff, Micky Dhillon, the Jasdeep Dhillon Trustee MSD Family Trust, Sean O’Shea, and Edward McElwreath; as Exhibit “C” for Delta/ Eric Flanagan and Ingram Micro; as Exhibit “D” for Arthur Anderson, Ernst & Young, Levine Jacobs and Co. and PricewaterhouseCoopers; and as Exhibit “E” for as and for McDermott Will & Emery. The Committee requests that the Court order that such production be made on or before the date that is thirty (30) days after the date of service of the corresponding subpoena.

**NOTICE**

41. Notice of this Motion has been given to (i) counsel for the Debtors; (ii) counsel for the Debtors’ pre-petition lenders; (iii) the United States Trustee (iv) the Examiner; (v) the Office the United States Attorney for the Southern District of New York; (vi) the RCM Trustee; and (vi) all parties that have filed notices of appearance and demanded service of papers

pursuant Bankruptcy Rule 2002(g). In addition, the Committee has given notice of this motion to each of the Respondents or their counsel as listed on the certificate of service filed herewith. The Committee is attempting to provide notice to the other Respondents described herein. Under the circumstances, the Committee submits that such notice will be adequate and sufficient and therefore, with the exception of those Respondents that have not yet been served, no other or further notice is required.

### **WAIVER OF MEMORANDUM OF LAW**

42. Because this Motion presents no novel issues of law and the authorities relied upon by the Committee are set forth in the Rule 2004 Motion<sup>2</sup>, the Committee respectfully requests that the Court waive the requirement for the filing of a separate memorandum of law in support of this Motion pursuant to Local Bankruptcy Rule 9013-1(b), but the Committee reserves the right to file a memorandum in reply to any objection to this Motion.

### **NO PRIOR REQUEST**

43. The Rule 2004 Motion sought discovery from persons and entities other than the Respondents. Accordingly, no prior application for the specific relief requested herein has been made by the Committee to this or any other court.

WHEREFORE, the Committee respectfully requests entry of the Proposed Order directing each of the Respondents to produce on or before the date set forth in the Proposed

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<sup>2</sup> See, paragraphs 42-45 of the Rule 2004 Motion.

Order the documents requested in subpoenas or document requests to be served on each of the Respondents and granting the Committee such other and further relief as is just and proper.

Dated: New York, New York  
May 23, 2006

MILBANK, TWEED, HADLEY & M<sup>c</sup>CLOY LLP

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