UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BLOOMBERG L.P.,

Plaintiff,

Case No. 08 CV 9595 (LAP)

-against-

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant.
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DECLARATION OF NORMAN R. NELSON

I am Executive Vice President and General Counsel of The Clearing House Association L.L.C. ("The Clearing House"). I submit this declaration on behalf of The Clearing House in support of the motion of the Board of Governors of the Federal Reserve System for a stay of this Court's order, dated August 24, 2009 ("Order"), in the above-captioned matter.

1. The Clearing House is an association of leading commercial banks.[1] The Clearing House banks are among the most important participants in the

[1] The members of The Clearing House are: ABN Amro Bank N.V., Bank of America, National Association; The Bank of New York Mellon; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; UBS AG; U.S. Bank National Association; and Wells Fargo Bank, National Association.

international banking and payments systems and among the world's principal intermediaries in interbank funds transfers.

2. I am familiar with the function of the New York Fed's role as a lender of last resort to depository institutions. Our member banks are entitled to borrow emergency funds from the New York Fed.

3. The Clearing House submits this declaration because the Court's Order threatens to impair the ability of our members to access emergency funds through the New York Fed's Discount Window without suffering the severe competitive harm that public disclosure of their identity will cause.

4. Our members have accessed the New York Fed's Discount Window with the understanding that the Fed will not publicly disclose information about their borrowing, especially their identity. Industry experience, including very recent and searing experience, has shown that negative rumors about a bank's financial condition—even completely unfounded rumors—have caused competitive harm, including bank runs and failures.

5. If the names of our member banks who borrow emergency funds are publicly disclosed, the likelihood that a borrowing bank's customers, counterparties and other market participants will draw a negative inference is great. Public speculation that a financial institution is experiencing liquidity shortfalls—which would be a natural inference from having tapped emergency funds—has caused bank customers to withdraw deposits, counterparties to make collateral calls and lenders to accelerate loan repayment

or refuse to make new loans. When an institution's customers flee and its credit dries up, the institution may suffer severe capital and liquidity strains leaving it in a weakened competitive condition.

6. Banks are different from other businesses. Survival can depend on the ephemeral nature of public confidence. The maintenance of public confidence has been a primary goal of bank regulation for more than a century. As far back as the banking crises of the 1930s, President Roosevelt cautioned that the most important element in our banking system is "the confidence of the people." *A Brief History of Deposit Insurance in the United States,* International Conference on Deposit Insurance (September 1998). That banking cirsis—where bank runs were common and thousands of banks closed—led to the creation of the FDIC and a host of extraordinary measures to restore public confidence in the banking system.

7. As the Court noted, "[i]n 2007, the U.S. economy encountered a serious financial crisis." Order at 5. This crisis, the worst since the Great Depression, resulted in a series of new and unprecedented Federal Reserve lending programs (the "Emergency Programs"). These Emergency Programs were designed to address market conditions in which the ability of major financial institutions to borrow under normal market conditions and terms was completely lost, or, in some cases, severely limited.

8. There are numerous examples of financially sound institutions collapsing or suffering further financial deterioration from the loss of public confidence. Experience in the banking industry has shown that when customers and market participants hear negative rumors about a bank, negative consequences inevitably flow.

For example, speculation and runs of liquidity crises arising at Bear Sterns and Lehman Brothers, Inc. caused the stocks of both companies to drop to record lows, and when the British Broadcasting Corporation reported on September 13, 2007 that Northern Rock had asked for and received emergency financial support from the Bank of England, customers lost confidence and the report triggered the first run on a U.K. bank since the 1860s. *See* Jeff Kearns & Yalman Onaran, *Bear Stearns Shoes Fall on Liquidity Speculations* (Mar. 10, 2008), available at http://www.bloomberg.com/apps/news?pid=20670001&sid=aawpC8wcg; Yalman Onaran & Lorraine Woellert, Fuld Blames Lehman's Fall on Rumors (Oct. 6, 2008), available at http://www.bloomberg.com/apps/news?pid=20670001&sid=aFhhYZ85GOeM; House of Commons Treasury Committee, *The Run on the Rock* (Jan. 26, 2008), available at http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtreasy/56/56i.pdf.

9. In its decision, the Court referred to the collapse of Bear Stearns, "one of the largest securities firms in the United States," that had "notified members of the Federal Reserve that due to deteriorating market conditions it would be unable to repay a large portion of its obligations and thus faced the prospect of filing for bankruptcy protection." Order at 6. The rapid collapse of Bear Stearns, and subsequently other major financial institutions, demonstrated the incredible rapidity which a loss of public confidence from negative publicity about its funding, can cause, including the demise of a sound institution.

10. Press reports indicate that several healthy financial institutions participated in the Troubled Asset Relief Program at the suggestion of The U.S. Dep't of the Treasury to mitigate the stigma associated with participation in the program, recognizing that rumors and speculation about the health of financial institutions can quickly spiral into market turmoil. *See* Damian Paletta, Jon Hilsenrath, and Deborah Solomon, *At Moment of Truth, US Forced Big Bankers to Blink*, Wall Street Journal (Oct. 15, 2008).

11. The Clearing House believes, based on the experiences of its members, that publicly releasing information about a financial institution's participation in the Emergency Programs can cause significant competitive harm. It is difficult to imagine information that is more competitively sensitive or harmful to a financial institution than information that it has lost the independent ability to fund itself fully in the marketplace, even momentarily or for reasons other than its own financial soundness. This harm would be specific and imminent. As experience with Bear Stearns demonstrated, an institution can lose access to funding in the marketplace, even on a secured basis, and the willingness of counterparties to continue to deal with it, both of which leave the institution in a weakened position relative to its competitors.

12. In sum, our experience differs from the factual conclusions the Court appears to have reached about the nature of competition in the banking industry:

- The competitive harm to institutions that are publicized as needing emergency funding is not "speculative," but demonstrated by the recent multiple failures and near failures of financial institutions whenever information about their funding difficulty has been disclosed.

- The disclosure does not involve mere "embarrassing publicity," but information that could result in the immediate demise of an institution.

- The disclosure would not merely "stigmatize [ ]" the institution or make it "look[] weak," but goes to its very viability.

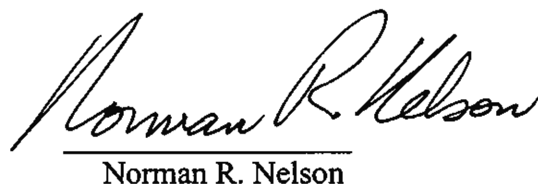
- The disclosure of accessing emergency funding is not an "inherent risk" of market participation, but an extraordinary risk in extraordinary circumstances.

- Competitors can use the disclosure to advertise or publicize that they are financially stronger because they don't need emergency funding.

- As the D.C. Circuit Court of Appeals noted in *Public Citizen Health Research Corp.* v. *Interim,* 704 F.2d 1280 (D.C. Cir. 1983), upon which the Court heavily relied, there need not be a showing of "actual competitive harm"; the "likelihood of substantial competitive injury" is the legal standard.

13. Our experience in this industry differs from the factual assumptions the Court appears to have reached about the competitive impact of disclosing a borrower's participation in the New York Fed's emergency funding programs. Our concern is not with information that "anyone throughout the entire marketplace might consider to be negative." Order at 41. We respectfully submit that this is information virtually everyone would consider potentially disastrous.

I declare under penalty of perjury that the foregoing is true and correct. Executed in New York, New York, on this 26th day of August 2009.



Norman R. Nelson