

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
BACKGROUND	2
ARGUMENT	4
A. Republic's Fear That Armstrong Will Disclose Confidential Commercial Information.....	4
B. Armstrong Will Suffer No Prejudice From The Granting Of A Protective Order	6
1. The Protective Order Will Not Infringe Armstrong's First Amendment Rights.....	6
2. The Protective Order Will Not Effect Armstrong's Ability To Prepare And Present A Complete Defense	8
CONCLUSION.....	9
<i>United States v. Ganci</i> , No. 97 Cr. 1215 (DC), 1998 WL 226196 (S.D.N.Y. May 4, 1998)	7
<i>United States v. Martin</i> , 38 F. Supp. 2d 698 (C.D. Ill. 1999)	7
<i>United States v. Rehman</i> , No. 93 Cr. 181 (MEM), 1993 WL 454198 (S.D.N.Y. Nov. 2, 1993)	7
<i>United States v. RMI Co.</i> , 599 F.2d 1183 (3d Cir. 1979).....	4
<i>United States v. Siegel</i> , No. 96 Cr. 411 (ACS), 1997 WL 12804 (S.D.N.Y. Jan. 14, 1997)	4, 8
<i>United States v. Smith</i> , 602 F. Supp. 388 (M.D. Penn.), 623 F.2d 1104 (3d Cir. 1985).....	7, 8

MEMORANDUM OF LAW IN SUPPORT OF
 HSBC USA INC., PUBLIC NEW YORK
 SECURITIES CORPORATION'S MOTION FOR AN INTERIM PROTECTIVE ORDER

TABLE OF AUTHORITIES

<u>Statutes and Rules</u>	<u>Page(s)</u>
Fed. R. Crim. P. 16(d)(1)	4
Fed. R. Civ. P. 26(c)	5
 <u>Cases</u>	
<u>Degen v. United States</u> , 517 U.S. 820 (1996).....	5
<u>Pavlovich v. City of New York</u> , No. 91 Civ. 5030 (PKL), 1992 WL 230472 (S.D.N.Y. Aug. 31, 1992).....	7
<u>Seattle Times Co. v. Rhinehart</u> , 467 U.S. 20 (1984).....	6
<u>United States v. Caparros</u> , 800 F.2d 23 (2d Cir. 1986).....	7
<u>United States v. Feeney</u> , 641 F.2d 821 (10th Cir. 1981)	4
<u>United States v. Gangi</u> , No. 97 Cr. 1215 (DC), 1998 WL 226196 (S.D.N.Y. May 4, 1998)	7
<u>United States v. Martin</u> , 38 F. Supp. 2d 698 (C.D. Ill. 1999)	7
<u>United States v. Rahman</u> , No. S3 93 Cr. 181 (MBM), 1993 WL 454198 (S.D.N.Y. Nov. 2, 1993).....	7
<u>United States v. RMI Co.</u> , 599 F.2d 1183 (3d Cir. 1979).....	4
<u>United States v. Siegel</u> , No. 96 Cr. 411 (ACS), 1997 WL 12804 (S.D.N.Y. Jan. 14, 1997)	4, 8
<u>United States v. Smith</u> 602 F. Supp. 388 (M.D. Penn.), <u>aff'd</u> , 776 F.2d 1104 (3d Cir. 1985)	7, 8

**MEMORANDUM OF LAW IN SUPPORT OF
HSBC USA INC., HSBC BANK USA, AND REPUBLIC NEW YORK
SECURITIES CORPORATION'S MOTION FOR AN INTERIM PROTECTIVE ORDER**

HSBC USA Inc., HSBC Bank USA, and Republic New York Securities Corporation (collectively, "Republic") submit this Memorandum of Law in support of their motion pursuant to Fed. R. Crim. P. 16(d)(1) for an interim protective order preventing Martin A. Armstrong ("Armstrong") from disclosing to third parties documents produced by Republic to the U.S. Attorney's Office ("U.S. Attorney's Office" or "Government").

PRELIMINARY STATEMENT

By this motion Republic seeks a narrowly tailored order: (1) preventing Armstrong, while civil litigation against Republic is stayed, from disclosing to third parties (except his defense team) all documents produced by Republic to the Government in connection with a grand jury investigation; and (2) thereafter requiring Armstrong to comply with the terms of any protective order covering Republic documents entered in the civil litigation with respect to the Republic documents Armstrong receives from the Government in criminal discovery.

Such an order will serve two functions. First, it will prevent the unfairness of one-sided discovery by ensuring that Republic's adversaries in civil litigation cannot obtain discovery of Republic documents from Armstrong while a court-ordered stay of all discovery in the civil litigation is in place. This prospect is very real in light of Armstrong's expressed intent and demonstrated practice of disclosing sensitive Republic documents to the Japanese companies suing Republic and to the media. Second, the order will prevent the release of Republic's confidential commercial information into the public domain once the civil stay is lifted because Armstrong, though a party to many of the civil cases, would otherwise be able to circumvent any civil protective order by disclosing documents he obtained in criminal discovery.

The proposed order will not hamper Armstrong's access to the documents, infringe improperly on his First Amendment rights, or hinder in any way Armstrong's ability to prepare and present his defense. Moreover, it will be limited in duration: if a protective order in the civil actions has not been entered into by October 31, 2000, Republic will apply to this Court for further relief.

BACKGROUND

On September 30, 1999, the Government announced the unsealing of a fourteen count indictment against Armstrong charging conspiracy, securities fraud, and wire fraud in connection with Armstrong's sale of approximately \$3 billion of so-called "Princeton Notes" to Japanese companies. Armstrong deposited the proceeds from the sale of the Notes at Republic New York Securities Corporation ("Republic Securities"). Forty Japanese companies have sued Republic in fourteen lawsuits pending in this District before Judge Owen (collectively, the "Civil Actions").¹ Armstrong is a defendant in all but one of the Civil Actions. Proceedings in the Civil Actions -- including all discovery -- are temporarily stayed by stipulated order, implementing a request by the U.S. Attorney's Office. See Declaration of Erik S. Groothuis ("Groothuis Decl.") Ex. A.² Armstrong is not a party to the stipulated stay because he had not

¹ See Alps Electric Co., Ltd., et al. v. Republic New York Securities Corporation, et al., No. 00 Civ. 0915 (RO), Amada Co., Ltd., et al. v. Republic New York Securities Corporation, et al., No. 99 Civ. 11602 (RO), Chudenko Corporation, et al. v. Republic New York Securities Corporation, et al., No. 00 Civ. 0435 (RO), Gun-Ei Chemical Industry Co., Ltd. v. Princeton Economics International Ltd., et al., No. 99 Civ. 12392 (RO), Starzen Co., Ltd. v. Republic New York Securities, et al., No. 00 Civ. 1362 (RO), Kita-Hyogo Shinyo-Kumiai v. Republic New York Securities Corporation, et al., No. 00 Civ. 4114 (RO), Yakult Honsha Co., Ltd. v. Republic New York Securities Corporation, et al., No. 00 Civ. 1512 (RO), Asatsu-DK Inc. v. HSBC USA, Inc., et al., No. 00 Civ. 1076 (RO), Itoki Crebio Corporation v. HSBC USA, Inc., et al., No. 00 Civ. 1075 (RO), Kissei Pharmaceutical Co., Ltd. v. HSBC USA, Inc., et al., No. 00 Civ. 1077 (RO), Maruzen Company, Limited v. HSBC USA, Inc., et al., No. 00 Civ. 1079 (RO), SMC Corporation v. HSBC USA, Inc., et al., No. 00 Civ. 1078 (RO), Nichimen Europe, PLC v. Republic New York Securities Corporation, et al., No. 00 Civ. 2756 (RO), and Kofuku Bank Ltd. And Namihaya Bank Ltd. v. Republic New York Securities Corporation, et al., No. 00 Civ. 3298 (RO).

² In the most recently filed action, Kita-Hyogo Shinyo-Kumiai v. Republic New York Securities Corporation, et al., No. 00 Civ. 4114 (RO), plaintiff's counsel has agreed to sign on to the temporary stay, but a fully executed stipulation has not yet been filed with the Court.

yet been served in any of the Civil Actions to which he is a party when the stipulations executing the stay were signed.

Republic's cooperation with the government, including the Justice Department, the SEC, and the CFTC, has been extensive. Since Republic brought this matter to the attention of the U.S. Attorney's Office last August, Republic has produced more than 250,000 pages of documents to the Government. Republic understands that the Government intends to turn over documents to Armstrong that go beyond the strict requirements of Fed. R. Crim. P. 16. Most, if not all, of these documents constitute confidential commercial information which will merit protection under Fed. R. Civ. P. 26(c)(7) when produced in the civil litigation. These documents include: (1) Republic credit and audit committee reports; (2) minutes from Republic board of directors meetings; (3) audit reports of Republic by third parties, along with the work papers; (4) revenue reports from Republic trading desks; (5) documents relating to the HSBC USA Inc.- Republic New York Corporation merger; (6) documents relating to the compensation pool for the Philadelphia office of Republic New York Securities Corporation; and (7) internal e-mails, memoranda, correspondence, and electronic recordings of telephone conversations involving Republic personnel. Republic has objected to the unrestricted production by the Government of Republic documents to Armstrong during the civil stay; Republic also desires that any protective orders which will be entered in the Civil Actions which shield its confidential commercial information be extended to include Armstrong's receipt of Republic materials in criminal discovery -- otherwise, any protection the civil protective order affords would be meaningless.

The Government and Republic have asked Armstrong to stipulate that he would not disclose Republic's documents to anyone other than persons employed by or at the direction of Armstrong's defense counsel. Groothuis Decl. ¶ 4. Armstrong's refusal to do so on the basis of the existing record evidences his intent to do precisely that which this motion is designed to

prevent. On June 9, 2000, Republic appeared at a hearing in United States v. Armstrong, 99 Cr. 997-01 (LMM) and applied orally for the relief sought herein; it was directed by the Court to submit this written motion.

ARGUMENT

THIS COURT SHOULD GRANT A PROTECTIVE ORDER

Pursuant to Rule 16(d)(1): “Upon a sufficient showing[,] the court may at any time order that the discovery or inspection [of documents requested pursuant to Rule 16] be denied, restricted, or deferred, or make such other order as is appropriate.” A nonparty to a criminal proceeding may move the court for a protective order. See United States v. Siegel, No. 96 Cr. 411 (ACS), 1997 WL 12804 (S.D.N.Y. Jan. 14, 1997) (granting, in part, third party’s motion for protective order pursuant to Fed. R. Crim. P. 16(d)(1)); United States v. RMI Co., 599 F.2d 1183 (3d Cir. 1979) (third party has standing to be heard on Rule 16 motion); see also United States v. Feeney, 641 F.2d 821, 824 (10th Cir. 1981) (third party affected by disclosure has standing to intervene in criminal proceedings and seek protective order). As set forth below, Republic has made a “sufficient showing” for the order it seeks.

A. Republic’s Fear That Armstrong Will Disclose Confidential Commercial Information

Republic’s fear that Armstrong will disclose its confidential commercial documents to third parties is well-founded. In a letter posted on the “Martin Armstrong Defense Fund” website,³ Armstrong openly acknowledges that he is “unofficially cooperating together to try to get additional discovery” for the Japanese plaintiffs, many of whom are suing Armstrong as well as Republic. Groothuis Decl. Ex. B. Armstrong also has adopted the strategy of blaming Republic in the media; to that end, he has provided the Japanese press with sensitive Republic

³ See http://www.nextion.com/adf/armstrong/gata_1-15-00.htm.

documents. In March, for example, Armstrong provided Kyodo, a Japanese news service, with a transcript of a taped conversation between two employees of Republic New York Securities Corporation. See Groothuis Decl. Ex. C.

The Supreme Court has recognized the power and propriety of “protective orders to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases.” Degen v. United States, 517 U.S. 820, 826 (1996). By this order, Republic seeks analogous relief: control of a party’s use of criminal discovery to prevent injustice in a civil case. Such relief is particularly appropriate here.

Republic and the various plaintiffs agreed to stay the proceedings in the Civil Actions at the request of the Government. It would be profoundly unfair for the plaintiffs to obtain one-way discovery during the court-ordered stay through the back door of Armstrong’s criminal discovery -- and it would be equally unfair for Armstrong to be able to circumvent any prospective civil protective order. Moreover, in the absence of this interim protective order, Republic would suffer added hardship due to the current disparity between information made public *vis-à-vis* Republic and information available *vis-à-vis* the civil plaintiffs. The civil plaintiffs have already had access to the criminal complaint against Armstrong, the civil SEC and CFTC complaints against Armstrong, the SEC and CFTC proceedings before Judge Owen, and some of the materials turned over by Republic to the Government. In contrast, Republic has received no discovery of any type from the plaintiffs. This information gap should not be permitted to grow during a stay of the Civil Actions.

Once the civil stay ends, Republic expects that a protective stipulation and order in the Civil Actions will be entered, which order will protect each party’s confidential commercial information. See Fed. R. Civ. P. 26(c). Armstrong should be bound by the terms of the protective order in the Civil Actions with respect to documents he receives in criminal

discovery once this interim protective order is lifted. Otherwise, the civil protective order will afford no real protection.

In light of Armstrong's track record of disclosure, his refusal to agree to the confidentiality agreement, and the grave harm that Republic will suffer absent the order, the Court should grant Republic's motion for an interim protective order: (1) preventing Armstrong from disclosing any Republic documents while the proceedings in the civil litigation are stayed, and (2) subjecting Armstrong to the terms of any confidentiality order governing Republic documents entered in the civil litigation.

B. Armstrong Will Suffer No Prejudice From The Granting Of A Protective Order

1. The Protective Order Will Not Infringe Armstrong's First Amendment Rights

In Seattle Times Co. v. Rhinehart, 467 U.S. 20, 22 (1984), the Supreme Court examined the scope of a party's First Amendment right to disseminate, in advance of trial, information gained through the civil pre-trial discovery process. The Court held that judges must consider whether the "practice in question furthers an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'" Id. at 32 (internal quotations omitted). The Court observed that because "[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action ... restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." Id. at 33. Ultimately, the Court affirmed the issuance of a protective order because of the substantial interest in prohibiting the discovery abuse at issue – i.e., the release of information "that not only is irrelevant but if publicly released could be damaging to reputation and privacy." Id. at 35.

The Second Circuit has since applied Seattle Times in the criminal context. See United States v. Caparros, 800 F.2d 23 (2d Cir. 1986) (discussing pretrial discovery order entered under Fed. R. Crim. P. 16(d)(1)); see also United States v. Gangi, No. 97 Cr. 1215 (DC), 1998 WL 226196 (S.D.N.Y. May 4, 1998); United States v. Rahman, No. S3 93 Cr. 181 (MBM), 1993 WL 454198 (S.D.N.Y. Nov. 2, 1993); see also United States v. Martin, 38 F. Supp. 2d 698, 706 (C.D. Ill. 1999); United States v. Smith, 602 F. Supp. 388, 396 (M.D. Penn.), aff'd, 776 F.2d 1104 (3d Cir. 1985).

The facts at bar implicate the identical interest at issue in Seattle Times. For reasons set forth above, in the absence of an interim protective order, Armstrong would be free to provide the plaintiffs in the civil actions with one-sided back door discovery that would prejudice Republic in those cases while a stay is in place. Granting the proposed order would also further an independent government interest: fostering cooperation between corporations and investigative agencies. Corporate entities in the future will be disinclined to cooperate with authorities if they cannot be sure that confidential documents will not fall into the wrong hands.

In addition, the proposed order is crafted to meet the second-half of the Seattle Times inquiry: it limits First Amendment freedoms in a manner "no greater than is necessary or essential to the protection of the particular government interest." This is so because: (1) the order restricts Armstrong's ability to abuse the civil discovery process only during such time as the civil stay is in place; and (2) for reasons which follow, it will not effect Armstrong's ability to defend himself in the criminal case. See Pavlovich v. City of New York, No. 91 Civ. 5030 (PKL), 1992 WL 230472, at *6 (S.D.N.Y. Aug. 31, 1992) (confidentiality order in civil case that prohibits dissemination of information from an investigatory file to third parties, while allowing use of the file at trial, is narrowly tailored to meet important government interest); Smith, 602 F.

Supp. at 398 (criminal enjoining order is narrowly tailored to serve government interests). As a result, the proposed order does not run afoul of the First Amendment.

2. The Protective Order Will Not Affect Armstrong's Ability To Prepare And Present A Complete Defense

Republic has no intention of preventing Armstrong's access to its documents. Therefore, the requested order would not adversely effect Armstrong's ability to prepare for and present his defense in any way. Courts have recognized that limiting the review of sensitive materials to a defendant and his counsel "solely for the purposes of preparing and presenting a defense to the pending criminal charge[s]," strikes an appropriate balance between the need to protect sensitive documents and a criminal defendant's right to prepare and present a complete defense. See, e.g., Siegel, 1997 WL 12804, at *3 (limiting disclosure of cost sheets and estimates produced by nonparty during Grand Jury investigation to defendant and defense counsel).

One Liberty Plaza
New York, New York 10006
(212) 225-2000

Attorneys for HSBC USA Inc., HSBC Bank USA,
and Republic New York Securities Corporation

Of Counsel:
Jennifer L. Kroiman
Eric S. Groothuis

CONCLUSION

For the reasons set forth above, Republic respectfully requests entry of an order, substantially in the form of the proposed order attached herewith, and granting Republic such other and further relief as is just and proper.

Dated: New York, New York
June 19, 2000

Respectfully submitted,

CLEARY, GOTTlieb, STEEN & HAMILTON

By: David E. Brodsky

David E. Brodsky (DB 1947)

A Member of the Firm

One Liberty Plaza

New York, New York 10006

(212) 225-2000

Attorneys for HSBC USA Inc., HSBC Bank USA,
and Republic New York Securities Corporation

Of Counsel:

Jennifer L. Kroiman

Erik S. Groothuis