



WASHINGTON, DC

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April 13, 2009

**CONFIDENTIALITY REQUEST PURSUANT TO 47 C.F.R. § 0.459**

**BY HAND**

Mr. Robert G. Nelson  
Chief, Satellite Division  
International Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Re: Row 44, Inc. Application for Authority to Operate Up To 1,000 Technically-Identical Aeronautical-Mobile Satellite Service (AMSS) Earth Stations In the Ku-Band and For Associated Special Temporary Authority For Mobility Testing of AMSS Earth Stations (FCC File Nos. SES-LIC-20080508-00571, as amended, and SES-STA-20080711-00928)**

Dear Mr. Nelson:

Row 44, Inc. ("Row 44"), by counsel, hereby requests that the attached "Report Concerning Ground Testing of HR6400 Aeronautical Mobile-Satellite Earth Station" ("Report"), which is being filed in response to a reporting condition contained in the Satellite Division's grant of the above-captioned special temporary authorization ("STA")<sup>1</sup>, be held in confidence and not made available for public inspection pursuant to Section 0.459 of the Commission's rules. The Report responds to the specific condition contained in the STA Order requiring Row 44 to provide a detailed report on ground-based testing conducted pursuant to the STA, including "test data pertaining to antenna mispointing and a description of test procedures" employed. As detailed herein, confidential treatment of this document is appropriate under Exemption 4 of the Freedom of Information Act ("FOIA"), which applies to information constituting "trade secrets and commercial or financial information" that "would not customarily be released to the public." See 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.457(d).

Notwithstanding the showing made herein, Row 44 is aware that ViaSat, Inc. ("ViaSat") has been an active participant in the FCC proceedings concerning Row 44's applications. It is due, in part, to ViaSat's request that Row 44 provide additional information concerning its

<sup>1</sup> See *Row 44, Inc.*, Order and Authorization, DA 09-585, slip op. at 4 (¶ 7(e)) (Sat. Div., rel. March 13, 2009) ("STA Order").

ground-based testing of its antenna system that the requirement for Row 44 to provide this information was included in the STA Order. Row 44 therefore anticipates that ViaSat, as the only other formal party to these proceedings, may request the opportunity to inspect the Report. In order to minimize the need for additional proceedings concerning ViaSat's right to review the Report, Row 44 is attaching to this submission a Proposed Protective Order that would permit ViaSat to receive a copy of the Report upon execution of an Acknowledgment of Confidentiality, a form of which is annexed to the Proposed Protective Order. The Proposed Protective Order is modeled closely upon similar orders which the Satellite Division has used in the past under similar circumstances. *See, e.g., Inmarsat Ventures*, Order Adopting Protective Order, 19 FCC Rcd 8220 (Sat. Div. 2004).<sup>2</sup> A copy of this request and the Proposed Protective Order are being served today upon counsel to ViaSat.

In support of its request for confidential treatment, Row 44 provides the following information, as required under Section 0.459(b) of the Commission's Rules –

**1. *Specific Information for Which Confidential Treatment is Sought - § 0.459(b)(1):*** Row 44 seeks confidential treatment for the Report, attached hereto, which details the results of extensive ground testing of the AeroSat HR6400 antenna. This testing and the results included in the Report are subject to existing confidentiality agreements between Row 44 and AeroSat Avionics, LLC, the manufacturer of the antenna and the party primarily responsible for conducting the tests. Given the sensitive nature of the data, as further outlined herein, Row 44 and AeroSat both seek confidential treatment for the Report in its entirety.

**2. *Circumstances Giving Rise to the Submission - § 0.459(b)(2):*** As explained above, the International Bureau on March 13, 2009 granted Row 44 an STA subject to several conditions, including the requirement that Row 44 submit within thirty days of the STA Order's release "a detailed report on ground-based testing conducted pursuant to the Special Temporary Authority," including "test data pertaining to antenna mispointing and a description of test procedures" employed.<sup>3</sup> The attached Report responds to that request.

**3. *Degree to Which the Information Is Commercial or Financial, or Contains A Trade Secret or Is Privileged - § 0.459(b)(3):*** The Report for which Row 44 is requesting confidential treatment contains commercially sensitive information "which would customarily be

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<sup>2</sup> Consistent with the instructions in the STA Order, Row 44 is providing copies of the Report contemporaneously with the submission to the FCC "to the signatories of the letter agreement filed [with the FCC] on February 6, 2009." STA Order at 4 (¶ 7(e)). This information is being provided to the signatory satellite operators pursuant to the non-disclosure provision of the referenced letter agreement filed on February 6, 2009. *See* Letter from John Guidon, CEO, Row 44, to Jose Albuquerque, Intelsat, Krish Jonnalagadda, SES Americom, and David Bair, EchoStar, dated February 6, 2009.

<sup>3</sup> STA Order at 4 (¶ 7(e)).

guarded from competitors.”<sup>4</sup> This information includes, but is not limited to, detailed information concerning the pointing performance of the AeroSat HR6400 antenna under a variety of operating scenarios, as well as description of the validation methodology employed by AeroSat. The Report therefore reveals substantial information concerning the design features of the AeroSat antenna and the means by which AeroSat evaluates antenna performance. Disclosure of this information to competitors of AeroSat or Row 44 would be competitively harmful to Row 44 and AeroSat. Accordingly, public disclosure of the confidential terms of these documents could materially impair their businesses.

**4. Degree to Which the Information Concerns a Service That Is Subject to Competition - § 0.459(b)(4):** As the Commission is aware, there is substantial competition in the satellite services industry among both communications service providers, such as Row 44, and equipment manufacturers, such as AeroSat. The commercial provision of AMSS and other mobile-satellite service applications in the Ku-band is a relatively new segment of the industry, and Row 44 believes one that will continue to attract new competitive offerings. Because these new and innovative services are just being launched, competition among equipment vendors and service providers is particularly keen, and service providers and equipment manufacturers alike have a strong interest in protecting from disclosure proprietary information concerning their products and service offerings.

**5. How Disclosure of the Information Could Result In Substantial Competitive Harm - § 0.459(b)(5):** Information about the antenna operations and performance of the HR6400 as utilized in the Row 44 AMSS system could be misused by both current and potential competitors of both companies to gain commercially exploitable knowledge of their facilities for provision of AMSS, thereby allowing them to reap unfair advantages in formulating their own plans for technical development of competing equipment and/or systems. Because additional commercial AMSS solutions are just beginning to emerge in the marketplace, now is a particularly critical time for a company that is pursuing a unique service solution to protect its plans from disclosure. Release of the details of this project to potential competitors would allow others to benefit from plans and information that both AeroSat and Row 44 have spent considerable time and money developing, and to adapt their own plans based on Row 44’s system design and AeroSat’s antenna technology.

**6. Measures Taken By Row 44 to Prevent Unauthorized Disclosure - § 0.459(b)(6):** Row 44 and AeroSat have agreed to strict limitations on the use and disclosure of the proprietary information that they have shared in developing Row 44’s AMSS system. Information included in the Report concerning antenna and system configuration and performance falls within the category of confidential information under the agreements between the two parties. In accordance with the agreements between the two companies, Row 44 and AeroSat have limited access to the information solely to those employees, contractors and agents

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<sup>4</sup> James A. Kay, Jr., 17 FCC Rcd 1834 (2002) (withholding such information from public inspection).



who require knowledge of the tests described in the Report in order to perform their duties and fulfill the companies' obligations to each other under their contracts. Any other disclosure of law requires prior written consent of the other party.

**7. The Information Submitted Is Not Available To The Public and Has Not Previously Been Disclosed To Third Parties, Except For Appropriately Limited Circumstances - § 0.459(b)(7):** No part of the attached Report has been publicly disclosed to date. Disclosure has been limited by the parties to employees, counsel, contractors and agents of Row 44 and AeroSat who have a specific need to review and analyze proprietary technical information relating to Row 44's AMSS system and the equipment components thereof.

**8. Period During Which The Submitted Material Should Not Be Available For Public Disclosure - § 0.459(b)(8):** Row 44 respectfully requests that the attached Report, which is submitted in connection with the conditions included in the March 13, 2009 STA, be kept confidential indefinitely. There is no time limitation on the non-disclosure obligations that Row 44 and AeroSat have made to each other. Accordingly, Row 44 requests that the Commission maintain confidential treatment of the agreements at least until it notifies the Commission that confidential treatment is no longer required.

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For all of the foregoing reasons, Row 44 requests that the Commission withhold the attached Report from public inspection, according it full confidential treatment. In the event that a request for examination of this document is filed, Row 44 requests an opportunity to respond and to provide a redacted version in lieu of full disclosure.

Respectfully submitted,

Row 44, Inc.

By:

  
\_\_\_\_\_  
David S. Keir

Lerman Senter PLLC  
2000 K Street, NW, Suite 600  
Washington, D.C. 20006  
(202) 429-8970

Its Attorney

cc (w/o Confidential Attachment): John Janka, Counsel to ViaSat, Inc.

# **Proposed Protective Order**

**ROW 44 PROPOSED PROTECTIVE ORDER**

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Row 44, Inc.	)	File Nos. SES-LIC-20080508-00571
	)	SES-AMD-20080619-00826
Application for Authority to Operate Up To	)	SES-AMD-20080819-01074
1,000 Technically-Identical Aeronautical-	)	SES-AMD-20080829-01117
Mobile Satellite Service (AMSS) Earth Stations	)	SES-AMD-20090115-00041
In the 14.05-14.47 GHz (Transmit) and	)	SES-STA-20080711-00928
11.7-12.2 MHz (Receive) Frequency Bands and	)	
For Associated Special Temporary Authority	)	
For Mobility Testing of AMSS Earth Stations	)	

**FORM OF  
PROTECTIVE ORDER**

**Adopted: April \_\_, 2009**

**Released: April \_\_, 2009**

By the Chief, Satellite Division, International Bureau:

1. On April 13, 2009, Row 44, Inc. (“Row 44”) filed with the Commission a “Report Concerning Pointing Accuracy Ground Testing of the HR6400 Antenna System for Aeronautical Mobile-Satellite Service” (“Report”) in response to a reporting condition attached to the above-captioned special temporary authorization (“STA”).<sup>1</sup> In the cover letter transmitting the Report, Row 44 requested confidential treatment for this Report, and included a proposed Protective Order.<sup>2</sup>

2. ViaSat, Inc. has been a party to the above-captioned proceedings (hereafter the “Relevant Proceedings”), filing several pleadings with the International Bureau with respect to certain aspects of the Relevant Proceedings.

3. Row 44 has agreed to provide to ViaSat, pursuant to the attached Commission Protective Order, a copy of the Report (hereafter the “Confidential Report”). We conclude that the voluntary disclosure proposed by Row 44 serves the public interest. Row 44’s

<sup>1</sup> See Row 44, Inc., Order and Authorization, DA 09-585, slip op. at 4 (¶ 7(e)) (Sat. Div., rel. March 13, 2009).

<sup>2</sup> Letter to Robert G. Nelson, Chief, Satellite Division, FCC, from David S. Keir, Counsel to Row 44 at 1 and Attachment (April 13, 2009).



## ROW 44 PROPOSED PROTECTIVE ORDER

disclosure to ViaSat pursuant to the terms of the attached Protective Order will provide protection of the proprietary information contained in the Confidential Report, and allow ViaSat the opportunity to evaluate the information contained therein in connection with the Relevant Proceedings. Row 44 shall provide the Confidential Report to ViaSat, provided that ViaSat executes and delivers the Acknowledgment of Confidentiality that is part of the Protective Order attached to this Order.

4. Accordingly, IT IS ORDERED that Row 44 SHALL provide to ViaSat, a copy of the Confidential Report, under the terms of the Protective Order attached to this Order, once ViaSat has executed and delivered the Acknowledgment of Confidentiality.

5. This Order is issued pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), Exception 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under Sections 0.51 and 0.261 of the Commission's rules, 47 C.F.R. §§ 0.51, 0.261, and is effective upon its release.

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# ROW 44 PROPOSED PROTECTIVE ORDER

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Row 44, Inc.	)	File Nos. SES-LIC-20080508-00571
	)	SES-AMD-20080619-00826
Application for Authority to Operate Up To	)	SES-AMD-20080819-01074
1,000 Technically-Identical Aeronautical-	)	SES-AMD-20080829-01117
Mobile Satellite Service (AMSS) Earth Stations	)	SES-AMD-20090115-00041
In the 14.05-14.47 GHz (Transmit) and	)	SES-STA-20080711-00928
11.7-12.2 MHz (Receive) Frequency Bands and	)	
For Associated Special Temporary Authority	)	
For Mobility Testing of AMSS Earth Stations	)	

## APPENDIX A: PROTECTIVE ORDER

1. *Introduction.* On April 13, 2009, Row 44, Inc. (“Row 44”) filed with the Commission a “Report Concerning Pointing Accuracy Ground Testing of the HR6400 Antenna System for Aeronautical Mobile-Satellite Service” (“Report”) in response to a reporting condition attached to the above-captioned special temporary authorization (“STA”).<sup>1</sup> Row 44 has agreed to provide to ViaSat, pursuant to a protective order, an unredacted copy of the Report (hereafter the “Confidential Report”). Consequently, the International Bureau (“Bureau”) has adopted this Protective Order to ensure that “Confidential Information,” as defined herein, provided to ViaSat (hereafter referred to as a “Reviewing Party”) is afforded protection from disclosure. The Protective Order reflects the manner in which Confidential Information is to be treated and is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under FOIA or other applicable law or regulation, including 47 C.F.R. § 0.442.

2. *Definitions.* As used herein, capitalized terms, not otherwise defined herein, shall have the following meanings:

“Confidential Information” means any information contained in the Confidential Report or derived therefrom that is not otherwise available from publicly available sources;

“Counsel” means Outside Counsel of Record;

“Outside Counsel of Record” means the firm(s) of attorneys representing a Reviewing Party;

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<sup>1</sup> See *Row 44, Inc.*, Order and Authorization, DA 09-585, slip op. at 4 (¶ 7(e)) (Sat. Div., rel. March 13, 2009).



## ROW 44 PROPOSED PROTECTIVE ORDER

“Relevant Proceedings” means the proceedings captioned above relating to the application filed by Row 44 to operate.

“Representatives” means employees of the Reviewing Party who are not involved in competitive decision-making (*i.e.*, the employee’s activities, association, and relationship with a Reviewing Party are not such as to involve such employee’s advice concerning, or participation in, any or all of the Reviewing Party’s business decisions made in light of similar or corresponding information about a competitor), but excludes in all cases the officers and directors of the Reviewing Party.

3. *Use of Confidential Information.* Persons obtaining access to Confidential Information under this Protective Order shall use the information solely for preparation and conduct of Relevant Proceedings as delineated in this paragraph and paragraphs 5, 10, and 11, and any subsequent judicial proceeding arising directly from these proceedings and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings.

4. *Non-disclosure of Confidential Information.* Except with the prior written consent of Row 44, or as hereinafter provided under this Protective Order, no Confidential Information may be disclosed by a Reviewing Party to any person other than the Commission and its staff.

5. *Permissible Disclosure.* Subject to the requirements of paragraph 8, Confidential Information may be reviewed by Counsel and Representatives as defined herein. Subject to the requirements of paragraph 8, Counsel may disclose Confidential Information to the following individuals, *provided that* they are not involved in the analysis underlying the business decisions of any competitor of Row 44, nor do they participate directly in those business decisions: (1) outside consultants or experts retained for the purpose of assisting Counsel in these proceedings; (2) paralegals or other employees of such Counsel not described in clause 3 of this paragraph 5 assisting Counsel in this proceeding; (3) employees of such Counsel involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with these proceedings, or performing other clerical or ministerial functions with regard to documents connected with these proceedings; and (4) employees of third-party contractors performing one or more of the functions set forth in clause 3 of this paragraph 5. Individuals who have obtained access to Confidential Information in accordance with the provisions of this paragraph 5 and paragraph 8 may discuss and share the contents of the Confidential Information with any other person who has also obtained access in accordance with the provisions of this paragraph 5 and paragraph 8, and with Commission and its staff.

6. *Protection of Confidential Information.* Persons described in paragraph 5 shall have the obligation to ensure that access to Confidential Information is strictly limited as prescribed in this Protective Order. Such persons shall further have the obligation to ensure that (1) Confidential Information is used only as provided in this Protective Order; and (2)

## ROW 44 PROPOSED PROTECTIVE ORDER

the documents are not duplicated except as necessary for filing at the Commission under seal as provided in paragraph 10 below.

7. *Prohibited Copying.* If, in the judgment of Row 44, the documents contain information so sensitive that it should not be copied by anyone, the relevant pages of the documents shall bear the legend "Copying Prohibited," and no copies of such pages, in any form, shall be made. Application for relief from this restriction against copying may be made to the Commission, with notice to Row 44.

8. *Procedures for Obtaining Access to Confidential Information.* In all cases where access to Confidential Information is permitted pursuant to paragraph 5, before reviewing or having access to any Confidential Information, each person seeking such access shall execute the Acknowledgment of Confidentiality ("Acknowledgment") (see Appendix B) and file it with the Bureau, on behalf of the Commission, and serve it upon Row 44 so that the Acknowledgment is received by Row 44 at least two business days prior to such person's reviewing such Confidential Information. Where the person seeking access is one described in either clause 3 or 4 of paragraph 5, the Acknowledgment shall be delivered promptly prior to the person obtaining access. Row 44 shall have an opportunity to object to the disclosure of the documents to any such persons. Any objection must be filed at the Commission and served on Counsel representing, retaining or employing such person within one business day after receiving a copy of that person's Acknowledgment (or where the person seeking access is one described in either clause 3 or 4 of paragraph 5, such objection shall be filed and served as promptly as practicable after receipt of the relevant Acknowledgment). Until any such objection is resolved by the Commission and, if appropriate, any court of competent jurisdiction prior to any disclosure, and unless such objection is resolved in favor of the person seeking access, persons subject to an objection from Row 44 shall not have access to Confidential Information. Upon receipt of an Acknowledgment and upon there being no objection by Row 44 to the person seeking access, Row 44 shall deliver a copy of the documents to such person.

9. *Requests for Additional Disclosure.* If any person requests disclosure of Confidential Information outside of the terms of this Protective Order, requests will be treated in accordance with Sections 0.442 and 0.461 of the Commission's rules.

10. *Filings with the Commission.* Persons described in paragraph 5 may, in any documents that they file in a Relevant Proceeding, reference Confidential Information, but only if they comply with the following procedure:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings;

b. The portions of pleadings containing or disclosing Confidential Information must be covered by a separate letter to the Secretary of the Commission referencing this Protective Order;

## ROW 44 PROPOSED PROTECTIVE ORDER

c. Each page of any party's filing that contains or discloses Confidential Information subject to this order must be clearly marked: "Confidential Information included pursuant to Protective Order, DA 09-\_\_\_\_;" and

d. The confidential portion(s) of the pleading shall be served on the Secretary of the Commission, the Bureau, and Row 44. Such confidential portions shall be served under seal, and shall not be placed in the Commission's public file. A party filing a pleading containing Confidential Information shall also file redacted copies of the pleading containing no Confidential Information, which copies shall be placed in the Commission's public files. Parties should not provide courtesy copies of pleadings containing Confidential Information to Commission Staff unless the Bureau so requests. Any courtesy copies shall be submitted under seal.

11. *Client Consultation.* Nothing in this order shall prevent or otherwise restrict Counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Confidential Information; *provided, however,* that in rendering such advice and otherwise communicating with such client, Counsel shall not disclose Confidential Information.

12. *No Waiver of Confidentiality.* Disclosure of Confidential Information as provided herein by any person shall not be deemed a waiver by Row 44 of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing parties, by viewing this material agree: (1) not to assert any such waiver; (2) not to use Confidential Information to seek disclosure in any other proceeding; and (3) that accidental disclosure of Confidential Information by Row 44 or any company providing technology or services to Row 44 shall not be deemed a waiver of any privilege or entitlement as long as Row 44 takes prompt remedial action.

13. *Subpoena by Courts, Departments or Agencies.* If a court, or a federal or state department or agency issues a subpoena or orders production of the documents or any Confidential Information that a party has obtained under terms of this Protective Order, such party shall promptly notify Row 44 of the pendency of such subpoena or order. Consistent with the independent authority of any court, department or agency, such notification must be accomplished such that Row 44 has a full opportunity to oppose such production prior to the production or disclosure of the documents or Confidential Information.

14. *Violations of Protective Order.* Should a person that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, that person shall immediately convey that fact to the Commission and to Row 44. Further, should such violation consist of improper disclosure of Confidential Information, the violating person shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Counsel from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in

## ROW 44 PROPOSED PROTECTIVE ORDER

this Protective Order shall limit any other rights and remedies available to Row 44 at law or in equity against any person using Confidential Information in a manner not authorized by this Protective Order.

15. *Termination of Proceeding.* The provisions of this Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of the Relevant Proceedings and any administrative or judicial review, persons described in paragraph 5 shall destroy or return to Row 44 the documents and all copies of the same. No material whatsoever derived from these materials may be retained by any person having access thereto, except Counsel (as described in paragraph 5) may retain, under the continuing strictures of this Protective Order, two copies of pleadings (one of which may be in electronic format) containing Confidential Information prepared on behalf of the party. All Counsel shall make certification of compliance herewith and shall deliver the same to Counsel for Row 44 not more than three weeks after conclusion of the Relevant Proceedings. The provisions of this paragraph 15 regarding retention of Stamped Confidential Documents and copies of same shall not be construed to apply to the Commission or its staff.

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# ROW 44 PROPOSED PROTECTIVE ORDER

## APPENDIX B

### Acknowledgment of Confidentiality

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceedings, and I understand it. I agree that I am bound by the Protective Order and that I shall not disclose or use Confidential Information except as allowed by the Protective Order. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission.

Without limiting the foregoing, to the extent that I have any employment, affiliation or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any information obtained as a result of the order is due solely to my capacity as Counsel or consultant to a party or other person described in paragraph 5 of the foregoing Protective Order and that I will not use such information in any other capacity nor will I disclose such information except as specifically provided in the Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Confidential Information is used only as provided in the Protective Order; and (2) the documents are not duplicated except as specifically permitted by the terms of paragraph 10 of the Protective Order, and I certify that I have verified that there are in place procedures, at my firm or office, to prevent unauthorized disclosure of Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

Executed at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
[Name]

[Position]

[Address]

[Telephone]