

Minutes of Proceedings

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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Date: **May 20, 2008** :
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In re: :
: Case No. 01-16034 (**AJG**)
ENRON CREDITORS RECOVERY CORP., *et al.*, :
Reorganized Debtors. :
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ENRON CORP. :
Plaintiffs, :
v. : Adv. No. 03-92677
J.P. MORGAN SECURITIES :
Defendants. :
-----X
ENRON CORP. :
Plaintiffs, :
v. : Adv. No. 03-92682
MASS MUTUAL LIFE INSURANCE CO., *et al.* :
Defendants. :
-----X

Present: Hon. Arthur J. Gonzalez
Bankruptcy Judge

Appearances:

Allen & Overy LLP
Attorneys for Securities Industry and
Financial Markets Association
New York, New York
By: Joshua Cohn, Esq.
Of Counsel

Securities Industry and Financial
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Washington, DC
By: Ira D. Hammerman, Esq.
Kevin M. Carroll, Esq.
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Venable LLP
Attorneys for the Reorganized Debtors
Baltimore, Maryland
By: Richard L. Wasserman, Esq.
Michael Schatzow, Esq..
Robert L. Wilkins, Esq.
Colleen Mallon, Esq.
Of Counsel

Togut, Segal & Segal LLP
Co-Counsel for the Reorganized Debtors
New York, New York
By: Frank A. Oswald, Esq.
Howard P. Magaliff, Esq.
Of Counsel

Proceedings: ☒ **Motion by the Securities Industry and Financial Markets Association for Leave to File Revised Brief of Amicus Curiae (the "Motion").**

Orders: ☒ **For the reasons set forth on the record of the hearing conducted on May 20, 2008, a copy of which is attached hereto as Exhibit "A," the Motion is denied.**

FOR THE COURT: Kathleen Farrell, Clerk of the Court

BY THE COURT:

s/Arthur J. Gonzalez
United States Bankruptcy Judge

05/202008
Date

Jacqueline De Pierola
Courtroom Deputy

EXHIBIT “A”

An amicus curiae serves for the benefit of the court and its purpose is to assist the court in cases of general public interest. *United States v. Gotti*, 755 F.Supp. 1157, 1158 (E.D.N.Y. 1991). It also serves “to provide supplementary assistance to [parties’] counsel and insur[e] a complete and plenary presentation of difficult issues. *Id.*

A court has broad discretion in determining whether to accept submissions from an amicus curiae. *United States v. Ahmed*, 788 F.Supp. 196, 198 n.1 (S.D.N.Y. 1992). The purpose of an amicus curiae brief is “to assist the court on matters of law.” *Banerjee v. Bd. of Trustees of Smith College*, 648 F.2d 61, 65 n.9 (1st Cir. 1981). It is not, however, to be used to assist with respect to evidentiary claims, therefore, it should not offer factual information favoring a particular party. *Id.*; see also *Strasser v. Doorley*, 432 F.2d 567 (5th Cir. 1970) (noting that “an amicus who argues facts is not welcome”). Consequently, amicus submissions may be less useful at the trial level than at the appellate level. *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993).

The information offered by the amicus must be “timely and useful” to the court in contributing to its understanding of the issues. *Lincoln Mercury*, 149 F.R.D. at 82-83. Thus, if the information offered conflates or confuses the issues before the court, the request for leave to file it will be denied. *Long Island Soundkeeper Fund, Inc. v. New York Athletic Club*, No. 94 Civ. 0436, 1995 WL 358777, at *1 (S.D.N.Y. June 14, 1995).

The usual reason for permitting amicus submissions is that they aid the court in evaluating the issues and “offer insights not available from the parties.” *United States v. El-Gabrowni*, 844 F.Supp. 955, 957 n.1 (S.D.N.Y. 1994). This will be the case where the proposed amicus has “particular expertise” not held by the parties or where it may be more willing to

advance a “far-reaching” theory than a party to the litigation. *Neonatology Assocs. v. Commissioner of Internal Revenue*. 293 F.3d 128, 132 (3d Cir. 2002). Valuable assistance to the court is also found when the amicus can explain to the court “the impact a potential holding might have on an industry or other group.” *Id.* (citation omitted).

Where, however, the perspective offered by the proposed amicus is not unique, as it is already available from the parties themselves - when adequately represented by counsel - the request from the proposed amicus for leave to file a brief will be denied. *SEC v. Bear Stearns*, Nos. 03 Civ. 2937, et al., 2003 WL 22000340, at *5 (S.D.N.Y. Aug. 25, 2003). Further, if the submission by the amicus merely repeats the parties’ arguments, its presentation is unnecessary and it cannot be found to assist the court. *Lincoln Mercury*, 149 F.R.D. at 83.

Some courts have concluded that the amicus curiae must present an “objective, dispassionate, neutral discussion of the issues.” *Lincoln Mercury*, 149 F.R.D. at 82; *Long Island Soundkeeper*, 1995 WL 358777, at *1; *Gotti*, 755 F.Supp. at 1159. These courts further conclude that the amicus must not be seeking to advance its own narrow partisan interest. *SEC v. Bear Stearns*, 2003 WL 22000340 at *5. Nevertheless, the position advanced by an amicus on legal issues will ordinarily “coincide” with that of one of the parties. *Banarjee*, 648 F.2d at 65 n.9. Thus, an amicus will presumably have an interest in the outcome of the case. *Neonatology Assocs.*, 293 F.3d at 131. *See also*, *Strasser v. Doorley*, 432 F.2d 567 (5th Cir. 1970) (noting that “by the nature of things, an amicus is not normally impartial.”). Further, its participation may assist the court where it “makes a strong but responsible presentation in support of a party.” *Neonatology Assocs.*, 293 F.3d at 131.

Here, the position advanced by SIFMA is already being presented by the parties.

Therefore, SIFMA is not adding any unique view that is not already before the Court. Rather, its presentation is cumulative. It advances a position concerning the impact of a ruling on the marketplace that has been, in one form or another, repeatedly articulated by defendants, and others that have supported their position. None of these parties, to date, has brought to the Court's attention any evidence of negative marketplace impact even though sufficient time has passed within which one would imagine such empirical data could have been presented. SIFMA's submission, therefore, is unnecessary and would not assist the Court.

The issue of marketplace impact will be addressed by experts, including economists and others in the underlying action. Further, to the extent it may be argued that the 2006 amendment to the safe harbor provisions reflect congressional intent to address the possible marketplace impact of this Court's 2005 ruling, the issue of the Court's consideration of the congressional record is already before the Court.

Therefore, SIFMA's motion is denied.