MINUTES OF PROCEEDINGS

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Date: **September 4, 2008**	:	
In re:	:	
	:	Chapter 11
Enron Creditors Recovery Corp., et. al.,	:	Case No. 01-16034 (AJG)
	:	(Jointly Administered)
Reorganized Debtors.	:	
Enron Creditors Recovery Corp., et. al.,	:	Adversary Proceeding
	:	No. 03-92677 (AJG)
Plaintiff,	:	
	:	
v.	:	
	:	
Goldman, Sachs & Co., et al.,	:	
	:	
Defendants.	:	
Enron Creditors Recovery Corp., et. al.,	:	Adversary Proceeding
	:	No. 03-92682 (AJG)
Plaintiff,	:	
	:	
v.	:	
	:	
Mass Mutual Life Insurance Co., et al.,	:	
	:	
Defendants.	:	

Present: Hon. Arthur J. Gonzalez (Bankruptcy Judge) ------- (Courtroom Deputy) ECRO (Court Reporter)

Appearances:

Name	Firm	Representing
Katherine B. Gresham, Esq.	Securities & Exchange Commission 100 F. Street NE Washington, DC 20549	Securities & Exchange Commission
Michael Schatzow, Esq.	Venalbe, LLP 750 E. Pratt Street, Suite 900 Baltimore, MD 21202	Enron Creditors Recovery Corp.
Thomas J. Moloney, Esq.	Clearly, Gottlieb, Steen Hamilton, LLP One Liberty Plaza New York, NY 10006	Goldman, Sachs, & Co.

Proceeding: Motion for leave to file brief out of time.

Order: For the reasons set forth in Exhibit "A" attached hereto, the Motion is granted.

FOR THE COURT: Kathleen Farrell, Clerk of the Court

BY THE COURT:

s/Arthur J. Gonzalez	09/04/2008	Jacqueline De Pierola
United States Bankruptcy Judge	Date	Courtroom Deputy

EXHIBIT “A”

Following a pre-motion conference call held on June 17, 2008, in which both the solicitor and counsel for the Securities and Exchange Commission ("SEC") participated, along with Enron and certain defendants in these adversary proceedings including Goldman, the SEC filed a motion for leave to file a brief out of time on July 28, 2008 in these adversary proceedings. Enron filed its opposition to the motion on August 25, 2008.

The SEC's memorandum of law submitted in support of the motion argues that under Section 1109(a) the SEC "may raise and may appear and be heard on any issue in any case under this chapter" but "may not appeal from any judgment, order, or decree entered in the case." While there is no dispute that the SEC may do so as a matter of statutory right, the issue is what procedural rules are implicated when seeking to appear and be heard under Section 1109(a) in an adversary proceeding. Of particular concern to the Court is the SEC's apparent decision to ignore the Court's directions regarding the issue.

During the pre-motion conference call on June 17, the Court informed the SEC's counsel as well as the SEC's solicitor that the SEC's intervention in these proceedings before the Court must still comply with Federal Rule of Civil Procedure 24, and advised the SEC that, if it chose to file its brief, Enron could raise Rule 24 in any objection to such filing. Further, during that conference call, the Court also called attention to the Second Circuit's decision in *Iridium*, discussing Rule 24 and Section 1109(b), and stated that in the Court’s view the reasoning applied to Section 1109(a) as well.

Certain Federal Rules of Civil Procedure are made applicable to adversary proceedings by Part VII of the Federal Rules of Bankruptcy Procedure. Specifically, Federal Rule of Civil Procedure 24 is applicable to adversary proceedings under Federal Rule of Bankruptcy Procedure 7024 and provides, among other things, for intervention as a matter of statutory right in adversary proceedings. In the Motion, the SEC does not address the requirements of Rule 24 or, if it determined that Rule 24 does not apply, why it does not apply.

The Motion and accompanying brief were filed on July 28, 2008, the date closing briefs were filed in the summary judgment motions scheduled to be heard by the Court later this month.

As referenced previously, in neither the Motion nor the memorandum of law does the SEC mention, reference, or discuss Rule 24 in any manner. Apparently, the SEC decided the Court was wrong and it would proceed without addressing the Rule 24 issue, despite the Court's statement in the June 17 conference call that failure to comply with that rule could result in the denial of the relief sought.

At the hearing on August 28, 2008 regarding this matter, the Court asked counsel for the SEC about the failure of the SEC to address Rule 24 in the Motion. Her response was that during the conference call both she and the SEC's Solicitor were surprised by the Court's reference to Rule 24 and it was only when she read the Second Circuit's *Caldor* decision the week before the hearing that she realized that the operative language of Sections 1109(a) and 1109(b) were the same. The SEC's counsel and the Solicitor intentionally ignored the Court’s directive to address Rule 24, and provided no explanation for such in the Motion, simply because it did not agree with the Court’s

position. Further it is clear that after the conference call, the SEC failed to perform any research on the Rule 24 issue. Prior to the submission of the Motion, any research of Rule 24 and Section 1109 certainly would have indicated that courts have found that Rule 24 applies to Section 1109(b) and nothing in those decisions would indicate that the same rationale would not apply to Section 1109(a). Such conduct demonstrates a total disregard of the Court's directions.

Even though such disregard provides an independent basis for denying the relief sought, the Court declines to do so. As will be discussed, the SEC's position, in spite of manner in which it proceeded, should be part of the record in this case.

Turning then to the substantive consideration of the Motion, the Court adopts the Second Circuit's reasoning in *Iridium India* and finds that Federal Rule of Civil Procedure 24, made applicable to adversary proceedings in bankruptcy cases by Federal Rule of Bankruptcy Procedure 7024 must be complied with when seeking to exercise the right to be heard in an adversary proceeding under Section 1109, including Section 1109(a). The SEC provides no convincing argument that procedural rules, specifically here Rule 24, should not apply to any relief sought under Section 1109. Certainly the Tenth Circuit in the *Templar* case, 405 F.2d 126 (10th Cir. 1969), to which the SEC was a party, held that the SEC was obligated to follow procedural rules regarding the statutory predecessor to Section 1109.

To determine whether the provisions of Rule 7024 have been satisfied, the Second Circuit in *Iridium* promulgated a four-prong test consisting of (1) timeliness; that is, the length of time the applicant knew or should have know of its interest before making the motion to intervene; (2) prejudice to existing parties resulting from the applicant's delay;

(3) prejudice to the applicant if the motion is denied; and (4) the presence of unusual circumstances militating for or against a finding of timeliness.

The threshold prong is timeliness. Here, the SEC's intervention, as its counsel stated during the pre-motion conference, is akin to a request to file an amicus brief. The SEC's articulated rationale for the delay in filing the brief is that the SEC needed to see Enron's response to the defendants' motions for summary judgment to determine if the SEC deemed it appropriate to file a brief in these proceedings. As Enron has argued, the SEC knew full well the position Enron would take and did not need to wait until it actually reviewed Enron's response to the defendants' summary judgments motions before the SEC could have filed its brief. There is merit to Enron's argument that the SEC's delay was unreasonable; but when considering the filing of a supporting brief in the context of an amicus brief, such as here, it is not unreasonable for the governmental unit to wait and actually see the issue raised before a response is filed. Although it is clear that the SEC was aware that the argument would likely be raised, and could have been prepared to seek to file a response immediately after Enron's response to the summary judgments was filed, it was not improper for the SEC to delay as it did.

This differs from the situation presented by Veritas Software Investment Corporation, which was also before the Court today. There, Veritas was a party defendant, seeking relief by way of summary judgment that did not just raise discreet legal arguments as is the case with the SEC, and allowing its joinder would have been prejudicial to Enron. In the circumstances of that motion, such prejudice outweighed any prejudice to Veritas.

The second prong is whether there is prejudice to the party opposing the intervention. In this case, the SEC brief adds little to the existing briefing on the issues by Goldman. It will not be difficult for Enron to file a response, since it has to prepare for oral arguments on the summary judgment motions in a few weeks, and has already prepared and filed written responses to the motions. Enron acknowledged that the only difference between Goldman's reply and the SEC's brief was the citation by the SEC of one additional case.

The third prong is that of prejudice to the party seeking to intervene. Unlike a party with a direct financial stake in these proceedings (like Veritas, discussed earlier), the SEC is a governmental unit charged with the enforcement of the securities laws and the supervision of financial markets. The resolution of the issues at stake in these adversary proceedings is of interest to those markets and those market participants. In spite of the manner in which the SEC proceeded here, it is important to have the SEC's views on the record. Moreover, this Court or the District Court may well find it useful to query the SEC on its positions set forth in its brief and consequences that flow from such positions.

The fourth prong is whether unusual circumstances exist that militate in favor of permitting intervention. Here, the unusual circumstances are primarily those circumstances discussed under the third prong. In that the presence of the SEC in this litigation provides, in addition to having the SEC's position on record, the Court with the ability to ask the SEC questions or concerns the Court may have regarding the positions set forth in the SEC's brief.

For the reasons set forth, the Court finds that the SEC will be permitted to intervene in this adversary under Bankruptcy Rule 7024, and that the SEC's motion to file an out-of-time brief will be allowed. Since the brief was filed in support of the Defendants motion for summary judgment, a response to such pleading will be limited to Enron. Enron may file a response by September 12, 2008. However, in light of the limited issues raised in the SEC's brief, such response shall not exceed eight double-spaced typed pages.