United States Courts
Southern District of Texas
ENTERED

AUG 1 5 2002

Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re Enron Corporation Securities, Derivative & "ERISA Litigation	§	MDL-1446
THIS DOCUMENT RELATES TO: All Cases	§	
MARK NEWBY, ET AL., Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES
ENRON CORPORATION, ET AL., Defendants	§	

ORDER

Pending before the Court are a motion of the Securities and Exchange Commission for leave, as amicus curiae, to submit briefs pertinent to certain legal issues raised by motions to dismiss (instrument #821) and a motion for leave to file amicus curiae memorandum of the State Attorneys General of Arkansas, California, Connecticut, Georgia, Illinois, Louisiana, Massachusetts, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Washington, West Virginia, and Wisconsin (#860), joined by the Attorneys General of the States of Indiana, Kentucky, Louisiana, Maryland, Michigan, Nevada, Oklahoma and the Commonwealth of Puerto Rico (#876).

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In the only response (#875) in Newby, Kirkland & Ellis states that it has no objection to the SEC's motion,[1] but does oppose that of the Attorneys General because (1) the Attorneys General fail to articulate any legitimate interest in the outcome of the pending motions to dismiss,[2] (2) their real interest is not a public interest, but their interest as investors and putative class members, in other words, as litigants, and (3) their brief merely repeats legal arguments already advanced by Plaintiffs and thus not useful to the Court. Kirkland & Ellis complains that one of the states proposing to file the brief is California, which is directly aligned to Lead Plaintiff. In re Holoholo, 512 F. Supp. 889, 895 (D. Haw. 1981)(accepting University of California's argument that "UC is the state" for Eleventh Amendment purposes): Hamilton v. Regents, 293 U.S. 245, 257 (1934)(University of California is "a constitutional department or function of the state government" whose actions are those of the state). Courts have denied such requests where the real interests of the purported amicus is "as a litigant, not as a friend of the court." American Satellite Co. v. United States, 22 Cl. Ct. 547, 549 (1991); National Organization for Women, Inc. v. Scheidler, 223 F.3d 615, 617 (7th Cir. 2000)(denying leave to file brief where

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[1] The SEC is charged with interpreting and enforcing the federal securities laws including Section 10(b) of the Exchange Act of 1934. 15 U.S.C. § 78j; SEC v. Zanford, 535 U.S. 1899 (2002). Thus the SEC not only brings its expertise to this action, but also its concern in developing legal principles in the area it oversees.

[2] Kirkland & Ellis note that the Attorneys General may be responsible for enforcing their own state securities laws, but not the federal securities laws, of which they merely offer an interpretation.

inter alia the lawyer for one putative amicus was paid by one of the appellants to prepare the brief); United States v. State of Michigan, 940 F.2d 143, 164-65 (6th Cir. 1991)(role of an amicus curiae is "that of an impartial friend of the court," not as "an adversary party in interest in the litigation."). Kirkland & Ellis emphasizes that "the Attorneys General indiscriminately advocate that all of the motions to dismiss filed by all of the 'bank, law firm, and accountant Defendants' be denied . . . without analyzing any of the facts and without recognizing, as did the SEC, that the varying factual allegations may lead to different results as among the various defendants." Response at 5.

The Attorneys General's memorandum identifies as their public interest that "[t]he anti-fraud provisions of many States' securities statutes are patterned after federal securities law" and that they look to the federal case law for guidance in construing their state statutes. Morever, even though states and state pension plans are exempt, now that the Securities Litigation Uniform Standards Act preempts many state-court suits of private plaintiffs, the states have a strong interest in remedies available to protect their citizens from securities fraud. The Court accepts this representation. Nevertheless, in reviewing the actual brief, the Court concurs with Kirk & Ellis that the Attorneys General's memorandum advocates Plaintiffs' position that Defendants are liable across the board without adding any useful information for the Court.

Granting leave to file an amicus curiae brief is within the sound discretion of the Court, which may grant such leave where the proffered material is timely or useful. Mechmet v. Four Seasons Hotel, Ltd., No. 84 C 7341, 1985 WL 766, *1 (N.D. Ill. 1985). While the Federal Rules of Civil Procedure for the district court do not directly address the issue, the Federal Rules of Appellate Procedure Rule 29 provides in relevant part as a guide,

> **(a) When Permitted.** The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia, may file an amicus-curiae brief without consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing,
> **(b) Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:
> (1) the movant's interest;
> (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

Cases cited by Kirkland & Ellis have been criticized as "a small body of judicial opinions that look with disfavor for leave to file amicus briefs." Neonatology Associates, P.A. v. C.I.R., 293 F.3d 128, 130 (3d Cir. 2002). The Third Circuit questioned whether an amicus that must have an "interest" in the case at the same time can be "impartial" or "disinterested." Id. at 131. Moreover, the Third Circuit criticized the view "that a strong advocate cannot truly be the court's friend" as "contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision

making." Id. The Third Circuit concluded that parties with pecuniary as well as policy interests can be valuable friends of the court and that proposed amicus curiae need not be unrepresented or inadequately represented to make a valuable contribution. Id. at 132. It determined that the better and more prevalent practice was a nonrestrictive policy of granting leave. Id. at 132-133, citing it as "the predominant practice in the courts of appeals," Micael E. Tigar and Jane B.Tigar, Federal Appeals--Jurisdiction and Practice 181 (3d ed. 1999)("Even when the other side refuses to consent to an amicus filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned.").

This Court agrees. Given the large volume of briefing pending before it and the Court's own research, it sees nothing injurious about reviewing this one short submission among others. Accordingly, the Court

ORDERS that both the SEC's and the Attorneys General's motions for leave to file amicus curiae briefs are GRANTED.

SIGNED at Houston, Texas, this 14th day of August, 2002.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE