



## ARGUMENT

### I. The SEC's Motion

The SEC seeks leave to submit to the Court excerpts from briefs that were filed either by the United States or the Commission in prior cases. The SEC states that these prior briefs address two legal issues that have been raised by defendants' motions to dismiss. Specifically, the brief filed by the SEC in *Klein v. Boyd*, Nos. 97-1143 & 97-1261 (3d Cir.), addresses the first issue posed by the SEC in its motion: "Can a person who creates a misrepresentation be liable as a primary violator, even though the misrepresentation is issued under the name of another person, and the identity of the creator is not publicly known, or must that person be publicly identified as the author of the misrepresentation in order to be liable as a primary violator of Rule 10b-5?" Motion of Securities and Exchange Commission for Leave, as *Amicus Curiae*, to Submit Briefs Pertinent to Certain Legal Issues Raised by Motions to Dismiss ("SEC Motion") at 3. The SEC states that the briefs from *United States v. O'Hagan*, No. 96-842 (Sup. Ct.), and *United States v. Bryan*, No. 94-5124 (4th Cir.), address a second question: "Can a person who employs a scheme to defraud or engages in a course of business that operates as a fraud that does not involve any misstatement or omission by that person be liable as a primary violator of Rule 10b-5?" SEC Motion at 3.

Kirkland & Ellis does not object to the SEC's submission of these prior briefs. The SEC is charged with interpreting and enforcing the federal securities laws, including Section 10(b) of the 1934 Act and its own Rule 10b-5. *See* 15 U.S.C. § 78j; *SEC v. Zandford*, 535 U.S. \_\_\_, 122 S. Ct. 1899, 70 U.S.L.W. 4485 (2002). As a result, the Commission has substantial expertise in the area of securities regulation, and also has an interest in the development of legal principles in that area – which are proper grounds for seeking to file an amicus brief. *See National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000); *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *Sciotto v. Marple Newtown Sch. Dist.*, 70 F. Supp. 2d 553, 554 (E.D. Pa. 1999).

Moreover, the SEC has simply asked for permission to provide the Court with pre-existing materials representing its view on two legal issues raised by the motions before the Court. It has expressly declined to state a view on how the motion of any particular defendant or defendants should be decided, even assuming its view on the two issues is accepted. Specifically, the Commission states that “[b]ecause there are a number of moving defendants and the allegations in the complaint vary for each of the defendants, the resolution of these two issues and the application of the appropriate legal principles could have different effects for different defendants.” SEC Motion at 4, n.4. *See also id.* at 2 (noting that the SEC “takes no position on whether the motions to dismiss should be granted or denied or on whether the complaint satisfies the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure or the Private Securities Litigation Reform Act”). As will be indicated in Kirkland’s reply brief in support of its motion, acceptance of the SEC’s position on both of the questions posed in its motion should lead the Court to grant Kirkland’s motion. In any event, because the SEC has expressly and properly declined to indicate how particular defendants’ motions should be decided, Kirkland has no objection to the Court granting the Commission’s motion. *See generally Sciotto*, 70 F. Supp. 2d at 554 (a proper function of an amicus curiae is to provide guidance on the proper interpretation of the law, not “to advocate a point of view so that a cause may be won by one party or another”).

## **II. Motion of State Attorneys General**

In contrast to the SEC’s motion, the motion by the state Attorneys General is objectionable on several grounds. First, the Attorneys General have not articulated any legitimate interest in the outcome of the pending motions to dismiss. As noted above, the SEC – and not the state Attorneys General – is responsible for interpreting and enforcing the federal securities laws. Although state Attorneys General may have some responsibility for enforcing their own *state* securities laws, their proposed brief amicus curiae offers only an interpretation of the *federal* securities laws. The Attorneys General accordingly do not have “a unique

perspective, or information” that could assist the court in this action. *National Organization for Women*, 223 F.3d at 617.

Second, although the Attorneys General claim to be offering their proposed brief “in the public interest,” it is evident that their real interest in this action is as investors (through pension plan funds) and thus as plaintiff class members. *See* Amicus Curiae Memorandum of the State Attorneys General Relating to Defendants’ Motions to Dismiss (“AG Mem.”) at 2, n.1. Indeed, one of the states that proposes to file the brief, the State of California, is directly aligned with the *lead plaintiff in this matter*, the University of California. *See In re Holoholo*, 512 F. Supp. 889, 895 (D. Haw. 1981) (accepting University of California’s argument that “the UC is the state” for Eleventh Amendment purposes); *see also Hamilton v. Regents*, 293 U.S. 245, 257, 55 S. Ct. 197, 201 (1934) (University of California is “a constitutional department or function of the state government” whose actions are treated as those of the state). Where, as here, it appears that the “real interests” of a proposed amicus are “as a litigant, not as a friend of the court,” courts have not hesitated to deny leave to file an amicus curiae brief. *American Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (1991). *See also National Organization for Women*, 223 F.3d at 617 (denying leave to file amicus brief where, among other reasons, the lawyer for one of the proposed amici “admit[ted] that he was paid by one of the appellants” for preparing the amicus brief). *See generally United States v. State of Mich.*, 940 F.2d 143, 164-65 (6th Cir. 1991) (the role of an amicus curiae is “that of an impartial friend of the court” not as “an adversary party in interest in the litigation”).

Third, not surprisingly in light of its true interests, the Attorneys General’s proposed brief does nothing more than repeat the legal arguments advanced by plaintiffs and thus adds nothing new to the record that could be of assistance to this Court.<sup>1</sup> Particularly in light of the extensive briefing already before this Court, including hundreds of pages of opposition papers submitted

---

<sup>1</sup> Simply by way of example, footnote 10 of the Attorney General’s proposed brief is word for word the same as the text of the first and third paragraphs of footnote 37 (pp. 72-73) of plaintiffs’ opposition to Kirkland’s motion, and footnote 20 is verbatim the text of the last full paragraph on page 71 of plaintiffs’ Kirkland opposition.

by plaintiffs' counsel, this Court will only be burdened by having to read those same arguments as repeated by the Attorneys General. *See Ryan*, 125 F.3d at 1064 (“The amicus brief does not tell us anything we don’t know already. It adds nothing to the already amply proportioned brief of the petitioner.”); *National Organization for Women*, 223 F.3d at 617 (noting that “[t]he policy of this court is ... never to grant permission to file an amicus brief that essentially merely duplicates the brief of one of the parties,” among other reasons because such briefs impose a burden on the court); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999) (rejecting government amicus brief found not “useful” to the Court).

Finally, in contrast to the SEC’s cautious approach, 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. *See* AG Mem. at 3, 22. Remarkably, the Attorneys General reach this sweeping conclusion 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. This is not a proper function of an amicus curiae purporting to act in the “public interest.” *Id.* at 2, n.1. *See Sciotto*, 70 F. Supp. 2d at 554.

### CONCLUSION

For the above reasons, Kirkland & Ellis respectfully suggests that the Court grant the SEC’s motion for leave to file excerpts from briefs filed in prior cases, and deny the motion of the state Attorneys General motion for leave to file an amicus brief regarding defendants’ motions to dismiss.

DATED: June 14, 2002

Respectfully submitted,

 by *KMK/w.p.m./jw*

John W. Spiegel  
California Bar No. 078935  
**MUNGER, TOLLES & OLSON LLP**  
355 South Grand Avenue, 35th Floor  
Los Angeles, California 90071  
Tel.: (213) 683-9100  
Email: [spiegeljw@mto.com](mailto:spiegeljw@mto.com)  
ATTORNEY IN CHARGE  
DEFENDANT KIRKLAND & ELLIS

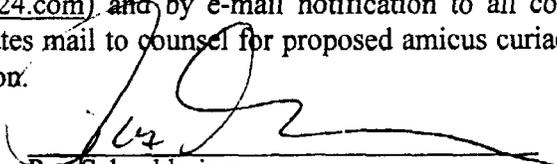
OF COUNSEL:

Kristin L. Myles  
Kelly M. Klaus  
**MUNGER, TOLLES & OLSON LLP**  
355 South Grand Avenue, 35th Floor  
Los Angeles, California 90071  
Tel.: (213) 683-9100  
Fax: (213) 683-5146

Michael Connelly  
Kent Altsuler  
**CONNELLY, BAKER, WOTRING & JACKSON, LLP**  
700 Louisiana, Suite 1850  
Houston, Texas 77002  
Tel.: (713) 980-1710  
Fax: (713) 980-1731

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument was electronically served upon all known counsel of record by posting on the internet website established for that purpose ([www.esl3624.com](http://www.esl3624.com)) and by e-mail notification to all counsel of record, as listed below, and by United States mail to counsel for proposed amicus curiae United States Securities and Exchange Commission.



Pax Schenkhuisen

Service List

Linda L. Addison  
**Fulbright & Jaworski LLP**  
1301 McKinney, Suite 5100  
Houston, TX 77010-3095  
713/651-5628 Fax: 713/651-5246  
*Attorneys for The Northern Trust Company and Northern Trust Retirement Consulting LLC*

Steve W. Berman  
**Hagens Berman, LLP**  
1301 Fifth Avenue, Ste. 2900  
Seattle, WA 98101  
206/623-7292 Fax: 206/623-0594  
*Co-Lead counsel for the Tittle plaintiffs*

Robert Hayden Burns  
**Burns Wooley & Marseglia**  
1111 Bagby, Suite 4900  
Houston, TX 77002  
713/651-0422 Fax: 713/751-0817  
*Attorneys for Defendant Kristina Mordaunt*

James E. Coleman, Jr.  
**Carrington, Coleman, Sloman & Blumenthal, LLP**  
200 Crescent Court, Ste. 1500  
Dallas, TX 75201  
214/855-3000 Fax: 214/855-1333  
*Attorneys for Kenneth Lay*

Jeremy L. Doyle  
**Gibbs & Bruns, L.L.P.**  
1100 Louisiana, Ste. 5300  
Houston, TX 77002  
713/650-8805 Fax: 713/750-0903  
*Attorneys for Robert Belfer, Norman Blake, Ronnie Chan, John Duncan, Joe Foy, Wendy Gramm, Robert Jaedicke, Charles LeMaistre, John Mendelsohn, Jerome Meyer, Paulo Ferraz Pereira, Frank Savage, Charls Walker, John Wakeham, Herbert Winokur*

Anthony C. Epstein  
**Steptoe & Johnson LLP**  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
202/429-8065 Fax: 202/261-7507  
*Attorneys for Philip J. Bazelides, Mary K. Joyce and James S. Prentice*

G. Sean Jez  
**Fleming & Associates**  
1330 Post Oak Blvd., Ste. 3030  
Houston, TX 77056  
713/621-7944 Fax: 713-621-9638  
*Attorneys for Individual Plaintiffs*

Barry G. Flynn  
**Law Offices of Barry G. Flynn, P.C.**  
1300 Post Oak Blvd., Ste. 750  
Houston, TX 77056  
713/840-7474 Fax: 713-840-0311  
*Attorneys for David Duncan*

The Service List  
Attached  
to this document  
may be viewed at  
the  
Clerk's Office