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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re **ENRON CORP., et al.,** **Debtors.**	**Chapter 11** **Case No. 01-16034 (AJG)** **Jointly Administered**
ENRON CORP. and **ENRON NORTH AMERICA CORP.,** **Plaintiffs,** **-against-** **BEAR, STEARNS INTERNATIONAL LIMITED and BEAR, STEARNS SECURITIES CORP.,** **Defendants.**	**Adv. Pro. No. 03-93388 (AJG)**

MOTION FOR LEAVE TO FILE "BRIEF OF AMICI CURIAE IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO BRING INTERLOCUTORY APPEAL"

The International Swaps and Derivatives Association, Inc. ("ISDA") and The Bond Market Association ("TBMA") (collectively, "*Amici*") respectfully move for leave of court to file the "Brief Of Amici Curiae In Support Of Defendants' Motion For Leave To Bring Interlocutory Appeal," attached hereto as Exhibit A.

This adversary action seeks to avoid and recover, as constructive fraudulent conveyances and under state law, various pre-petition payments made in connection with certain over-the-counter ("OTC") equity derivatives transactions entered into by Enron Corporation or its subsidiaries ("Enron"). Enron's claims directly contravene the safe harbor provisions set forth in Sections 546(e) and (g) of the Bankruptcy Code. Critically, the bankruptcy court's decision to deny Defendants' motion to dismiss has consequences that extend well beyond the interests of the parties to this action. Indeed, the uncertainty that eroding the safe harbor provisions would cause threatens the efficient working of the United States financial markets and places the competitive position of the United States in the global financial market at risk.

Amici respectfully seek to have the view of their members heard on this issue. ISDA is the global trade association representing leading participants in the privately negotiated derivatives industry. It was chartered in 1985, and is comprised of more than 600 member institutions from 46 countries on six continents. ISDA also publishes the ISDA Master Agreement, which serves as the contractual foundation for more than 90% of derivatives transactions globally, including the transaction at issue here. TBMA is a global trade organization that represents approximately 200 securities firms and banks that underwrite, trade, and distribute approximately $48 trillion in debt in the United States and international markets. TBMA's members deal in a wide variety of fixed-income securities. Its member firms collectively represent in excess of 95 percent of the initial distribution and secondary market

trading of municipal bonds, corporate bonds, mortgage- and other asset-backed securities and other fixed-income securities. Settlement payments with respect to these instruments are subject to some of the same safe harbor provisions at issue in this case.

Collectively, *Amici* are uniquely positioned to address the application of Sections 546(e) and (g) to the OTC equity derivatives transactions at issue in this adversary proceeding. Accordingly, *Amici* respectfully seek leave to file the attached Brief of Amici Curiae.

July 5, 2005

Respectfully submitted,

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EXHIBIT A

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BRIEF OF AMICI CURIAE IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO BRING INTERLOCUTORY APPEAL

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The International Swaps and Derivatives Association, Inc. ("ISDA") and The Bond Market Association ("TBMA") respectfully submit this amicus brief in support of Defendants' motion for leave to bring an interlocutory appeal in *Enron Corp., et ano. v. Bear, Stearns International Limited., et. ano.,* Adv. No. 03-93388 (AJG).

PRELIMINARY STATEMENT

The bankruptcy court's decision in this matter warrants an interlocutory appeal by Bear, Stearns International Limited and Bear, Stearns Securities Corporation (collectively, "Bear Stearns"). By denying Bear Stearns' motion to dismiss the adversary proceeding, the bankruptcy court has upset the carefully constructed congressional design set out in the Bankruptcy Code, which could potentially lead to the disruption of the financial markets. Because it is critical to the sound operation of the financial markets that the issues addressed in the bankruptcy court's opinion denying the motion to dismiss be resolved in a definitive and precedential manner—and because of the potentially unsettling effect on those markets of the bankruptcy court's decision—Bear Stearns' motion to bring an interlocutory appeal should be granted.

STATEMENT OF INTEREST

ISDA is the global trade association representing leading participants in the privately negotiated derivatives industry. It was chartered in 1985, and is comprised of more than 600 member institutions from 46 countries on six continents. ISDA also publishes the ISDA Master Agreement, which serves as the contractual foundation for more than 90% of derivatives transactions globally, including the transaction at issue here. TBMA is a global trade organization that represents approximately 200 securities firms and banks that underwrite, trade, and distribute approximately $48 trillion in debt in the United States and international markets. TBMA's members deal in a wide variety of fixed-income securities. Its member firms

collectively represent in excess of 95 percent of the initial distribution and secondary market trading of municipal bonds, corporate bonds, mortgage, and other asset-backed securities and other fixed-income securities. Settlement payments with respect to transactions in these instruments are subject to some of the same safe harbor provisions at issue in this case. *Amici* are thus uniquely positioned to address the application of Sections 546(e) and (g) to the OTC equity derivatives transactions at issue in this adversary proceeding.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2000, Enron Corporation and Enron North America Corporation (collectively, "Enron" or "Debtors") entered into an equity forward transaction with Bear Stearns. The parties set forth the terms of the transaction in a document titled "Equity Forward Confirmation" ("Confirmation").[1/] The Confirmation provided that on May 24, 2001, Enron would purchase 323,000 shares of its own publicly-traded common stock from Bear Stearns. The Confirmation established the per-share price at which Enron was to purchase the stock. Under the terms of the Confirmation, Enron could elect, in lieu of physically settling the contract, to settle the contract by transferring shares of Enron common stock to Bear Stearns. The Confirmation also provided that Bear Stearns had the right to terminate the transaction or demand immediate settlement of the transaction if the closing price of Enron common stock fell below a certain price per share for three consecutive days on the New York Stock Exchange.[2/] On August 22, 2001, Enron paid

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1/ The Confirmation incorporated definitions and documents published by ISDA, including the ISDA 1992 Master Agreement, the 2000 ISDA Definitions, and the 1996 ISDA Equity Derivative Definitions.

2/ The parties amended the Confirmation on June 14, 2001 ("Amended Confirmation"), which postponed the termination date of the transaction to August 24, 2001. The Amended Confirmation increased the base price per share that Enron was to pay Bear Stearns, and reduced the price per share trigger that would permit Bear Stearns to terminate or demand immediate

Bear Stearns $25,904,602.50 and Bear Stearns transferred 323,000 shares of Enron common stock to Enron.

On December 2, 2001, Enron Corporation and various of its subsidiaries filed voluntary petitions for bankruptcy protection under Chapter 11 of the Bankruptcy Code. On November 21, 2003, Enron filed an adversary action against Bear Stearns and three related adversary proceedings[3] seeking to avoid and recover payments made in connection with over-the-counter ("OTC") equity derivatives transactions. Enron sought to unwind the payment made to Bear Stearns, asserting claims arising under the Bankruptcy Code and Oregon law.

On April 27, 2005, this Court denied Bear Stearns' motion to dismiss the adversary complaint. It held that because the payments at issue were "void" under Oregon law, they could not be considered "commonly used" and therefore did not constitute "settlement payments" as that term is used in the Bankruptcy Code. 11 U.S.C. § 101(51A).

ARGUMENT

THIS COURT SHOULD GRANT BEAR STEARNS' MOTION FOR AN INTERLOCUTORY APPEAL

Preference and fraudulent conveyance actions that would unwind payments made in connection with OTC equity derivatives transactions jeopardize the efficient working of the United States financial markets and place the competitive position of the United States in the global financial market at risk. The reasoning of the bankruptcy court in this adversary proceeding thus threatens to undermine the legal certainty afforded by Congress to OTC equity

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settlement of the transaction. A later modification of the Amended Confirmation moved the termination date up to August 22, 2001, and reduced the contract per-share price.

[3] *Enron Corp. v. Credit Suisse First Boston Int'l*, Adv. Pro. No. 03-93371 (AJG); *Enron Corp. v. Lehman Bros. Fin. S.A.*, Adv. Pro. No. 03-93383 (AJG); and *Enron Corp. v. UBS AG and UBS Securities LLC*, Adv. Pro. No. 03-93373 (AJG).

derivatives market participants, including members of the *Amici* associations. Accordingly, this Court should grant Bear Stearns leave to file an interlocutory appeal in order to properly respond to the issues in this matter.

As momentous and historic as these unprecedented bankruptcy cases are, from the perspective of the global financial community the dispositions of this and the three related adversary proceedings are among the most significant decisions that will be made in the cases. Over 10% of the world's 500 largest companies rely on OTC equity derivatives to manage their equity price risk. The notional outstandings for the OTC equity derivatives market currently exceed $4.15 *trillion*. Congress has repeatedly recognized the national interest in assuring the efficient functioning of this important and necessary market, and has acted to protect this market from the fundamental upheaval that would result if the contractual relationships governing OTC equity derivatives transactions were subject to the Bankruptcy Code's avoidance provisions.[4/] For this reason, Congress repeatedly and expressly has provided that except for cases of actual fraud, OTC equity derivatives transactions are not subject to the avoidance power in bankruptcy.[5/]

Specifically, to prevent any single bankruptcy from leading to a cascade of insolvencies in the financial markets, Congress included certain protections in the Bankruptcy Code—codified at Sections 546(e), (f) and (g)—designed to exempt payments made under financial contracts from preference and fraudulent conveyance actions. Beginning with the 1982

4/ *See, e.g.,* H.R. Rep. No. 101-484, at 2 ("U.S. bankruptcy law has long accorded special treatment to transactions involving financial markets, to minimize volatility. Because financial markets can change significantly in a matter of days, or even hours, a non-bankrupt party to ongoing securities and other financial transactions could face heavy losses unless the transactions are resolved promptly and with finality.").

5/ *See* 1982 Amendments to Bankruptcy Code, Pub. L. No. 97-222, 96 Stat. 235.

amendments to the bankruptcy laws, and again in 1984, 1990, and 2005, Congress has thus safeguarded the financial markets by preventing any bankruptcy filing from interfering with the fluidity of funds or the certainty of financial contracts.[6/] Permitting this adversary proceeding to go forward would undermine precisely the objectives Congress sought to accomplish in enacting these amendments. There can be no doubt that Congress intended to create a safe harbor for OTC equity derivatives agreements, immunizing them from exactly the challenge that Debtor has brought here.[7/]

6/ *See* H.R. Rep. No. 97-420, at 1 (1982) ("[C]ertain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market."); 1982 Amendments to Bankruptcy Code, Pub. L. No. 97-222, § 4, 96 Stat. 235, 236; H.R. Rep. No. 97-420, at 1 (1982) ("several of the amendments are included to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries."); *Bevill, Bresler & Schulman Asset Mgmt. Corp. v. Spencer Savings & Loan Ass'n*, 878 F.2d 742, 748 (3d Cir. 1989) ("The certainty and fluidity needed by professionals on both sides of the transactions is of such importance that one debtor's filing of a petition should not be permitted to impair the functioning of the market as a result of the Code's automatic stay, or have the integrity of contract relationships upset by the Code's avoidance provisions."); *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849 (10th Cir. 1990) ("Congress's purpose was to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries."(internal quotation marks and citation omitted)).

7/ *See* 1990 Bankruptcy Amendments, Pub. L. No. 101-311, 104 Stat. 267; S. Rep. No. 101-285, at 1 (the purpose of the bill is "to clarify U.S. bankruptcy law with respect to treatment of swap agreements and forward contracts. The bill would provide certainty for swap transactions in the case of a default in bankruptcy . . . ."); H.R. Rep. No. 101-484, at 1 (the purpose of the bill "is to ensure that the swap and forward contract financial markets are not destabilized by uncertainties regarding the treatment of their financial instruments under the Bankruptcy Code"); *Interest Swap: Hearing on S. 396 Before the Subcomm. on Courts and Administrative Practices of the Senate Comm. on the Judiciary*, 101st Cong. 1 (1989) (statement of Sen. Heflin) ("There is concern that if one of the parties to a swap agreement files for bankruptcy under the current Bankruptcy Code, the non-defaulting party is left with a substantial risk and, depending on the size of the swap agreement, could cause a rippling effect which would undermine the stability of the financial markets."); H.R. Rep. No. 109-31, at 121 (2005) (definition of "swap agreement" in Section 101(53B) expanded to promote the congressional desire for "flexibility to avoid the need to amend the definition as the nature and uses of swap transactions matured.").

Despite Congress' clarity on the issue, the bankruptcy court's opinion completely disregards the purpose of these safe harbors of the Code and threatens to undermine the protections Congress afforded to financial transactions under the Code. The bankruptcy court's failure to heed Congress' guidance with respect to the application of Section 546 justifies permitting Bear Stearns to appeal that decision before this Court.

The bankruptcy court relied on its interpretation of Oregon statutory law to hold that the payments made as part of the OTC equity derivatives transactions may be undone in Enron's bankruptcy. But it is of no consequence in the case at bar that the underlying transactions may be void under Oregon state law. Because Enron seeks to avoid the payment under Section 550 of the Bankruptcy Code, the safe harbor defenses to that action are necessarily available to Bear Stearns. The issue of whether a transaction is void—and thus unenforceable—is irrelevant to the issue of whether a completed transaction may be undone (in or outside of bankruptcy) and the payment recovered.

Nor should it matter, contrary to the Bankruptcy Court's reasoning, whether payments that are "void" under state law are "commonly used" in the industry. *First*, as a matter of ordinary grammar, the Bankruptcy Court misconstrued the Bankruptcy Code's definition of "settlement payment." In that definition, 11 U.S.C. § 101(51A), the term "commonly used in the forward contract trade" modifies only "similar payment" — not the other parts of the definition that control here.

Second, tying the definition of the term "settlement payment," as used in the Bankruptcy Code, to the vicissitudes of state law runs contrary to the constitutional imperative that bankruptcy law be "uniform . . . throughout the United States." U.S. Const., Art. I, § 8, cl. 4. *See also Field v. Mans*, 516 U.S. 59 (1995) (looking to a consensus of state law—not the law of

the particular state where the transaction took place—to inform the meaning of a term used in the Bankruptcy Code).

The bankruptcy court's ruling effectively eviscerates the safeguards created by Sections 546(e), (f) and (g). The decision thus raises questions about the enforceability of financial contracts against insolvent debtors, the same questions that Congress sought to quell with the 1982, 1984, 1990, and 2005 amendments to the Bankruptcy Code. Market participants accordingly face the dangerous scenario of a judgment that would force the undoing of possibly thousands of settled securities transactions—precisely the result that Congress has sought to avoid.

Appellate review of the bankruptcy court's decision is therefore critical. Separate and apart from the financial consequences of the decision to the parties to the case, the issue addressed in the bankruptcy court's decision is one of tremendous public importance. Permitting immediate appellate review of that erroneous decision is necessary and appropriate. The *in terrorem* effect of the bankruptcy court's opinion, if left unreviewed, will be to chill the financial markets, exactly the outcome Congress intended to prevent in enacting the safe harbor provisions at issue.

CONCLUSION

For the foregoing reasons, Bear Stearns' motion for leave to file an interlocutory appeal should be granted.

July 5, 2005

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