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 International Swaps and Derivatives
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 Association*

**UNITED STATES BANKRUPTCY COURT
 SOUTHERN DISTRICT OF NEW YORK**

-----	X	
	:	
In re	:	Chapter 11
	:	Case No. 01-16034 (AJG)
ENRON CORP., et al.,	:	
	:	Jointly Administered
Debtors.	:	
-----	X	
ENRON CORP.,	:	
	:	Adv. Pro. No. 03-93383 (AJG)
	:	
v.	:	
	:	
LEHMAN BROTHERS FINANCE S.A., et al.,	:	
	:	
Defendants.	:	
-----	X	

**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 preferences and/or fraudulent conveyances, 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*.

September 21, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing Motion For Leave To File “Brief Of Amici Curiae In Support Of Defendants’ Motion For Leave To Bring Interlocutory Appeal” and attached Brief to be delivered by Federal Express, next business day delivery, to the following parties on this 21st day of September 2005:

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EXHIBIT A

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ENRON CORP.,	:	
	:	Adv. Pro. No. 03-93383 (AJG)
Plaintiff,	:	
	:	
v.	:	
	:	
LEHMAN BROTHERS FINANCE S.A., et al.,	:	
	:	
Defendants.	:	
-----	X	

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

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MISCELLANEOUS

U.C.C. § 4-104 (2002)6

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. v. Lehman Bros. Fin. S.A.*, Adv. Pro. No. 03-93383 (AJG).

PRELIMINARY STATEMENT

The bankruptcy court’s decision in this matter warrants an interlocutory appeal by Lehman Brothers Finance S.A., Lehman Brothers Inc., Lehman Brothers Holdings Inc., and Lehman Commercial Paper Inc. (collectively, “Lehman”). By denying Lehman’s 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—Lehman’s 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 public and 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. *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

Starting in November 2000, Enron Corporation and Enron North America Corporation (collectively, “Enron” or “Debtors”) entered into a number of over-the-counter equity derivatives transactions with Lehman related to Enron common stock. Pursuant to the terms of the confirmations (the “Confirmations”) that reflect these transactions,^{1/} Enron was required to purchase a certain number of shares of Enron common stock from Lehman at a designated future date (the “Termination Date”), at a specific price. Other transactions required one of the parties to make a comparable cash payment reflecting the change in the market price of the stock during the term of the agreement. On January 17, 2001, Enron paid Lehman \$80,319,600 for 999,000 shares of Enron common stock. The parties renegotiated the terms of certain of the transactions and entered into new agreements adjusting the Termination Date and certain other terms of the transactions. On November 5, 2001, Enron transferred \$150,022,449.20 to Lehman for 2,245,761 shares of Enron common stock. On or about November 1, 2001, the parties entered into a new transaction under which Enron would purchase the remaining 2,434,339 shares of its

^{1/} The Confirmations incorporated definitions and documents published by ISDA, including the ISDA 1992 Master Agreement.

stock still held by Lehman in exchange for a \$5,000,000 cash payment and an agreement by Enron to execute an interest-bearing note in the principal sum of \$173,538,284.14.

On December 2, 2001, Enron Corporation and various of its subsidiaries filed a voluntary petition for bankruptcy protection under Chapter 11 of the Bankruptcy Code. In November 2003, Enron filed this adversary action and three related adversary proceedings^{2/} seeking to avoid and recover payments made in connection with over-the-counter (“OTC”) equity derivatives transactions. Enron sought to unwind the payments made to Lehman, claiming that the payments were preferential transfers and fraudulent conveyances.

On July 29, 2005, this Court denied Lehman’s motion to dismiss the adversary complaint. This Court held that under Oregon law, an act in violation of the Oregon distribution statute is considered void, and because such action is a nullity the underlying transaction cannot form the basis of a securities transaction that supports a settlement payment. The Court then ruled that Section 546 of the Bankruptcy Code does not protect such payment from the trustee’s avoidance powers.

ARGUMENT

THIS COURT SHOULD GRANT LEHMAN’S 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

^{2/} *Enron Corp. v. Bear, Stearns Int’l, Ltd.*, Adv. Pro. No. 03-93388 (AJG); *Enron Corp. v. Credit Suisse First Boston Int’l*, Adv. No. 03-93371 (AJG); and *Enron Corp. v. UBS AG and UBS Securities LLC*, Adv. Pro. No. 03-93373 (AJG).

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 derivatives market participants, including *Amici* members. Accordingly, this Court should grant Lehman 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, and the notional outstandings for this 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.^{3/} 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.^{4/}

^{3/} 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.").

^{4/} See 1982 Amendments to Bankruptcy Code, Pub. L. No. 97-222, 96 Stat. 235.

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 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.^{5/} 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 Debtors have brought here.^{6/}

^{5/} 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)).

^{6/} 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

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.⁷¹ The court's failure to heed Congress' guidance with respect to the application of Section 546 justifies permitting Lehman to appeal that decision.

The bankruptcy court relies 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

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.").

⁷¹ Among other things, the bankruptcy court insists that the "circularity" of the definition of "settlement payment" in the Code necessitates an examination into whether a particular settlement payment is commonly used within the industry before the settlement payment may be afforded the protections of Section 546. This reasoning ignores the fact that Congress intended the term to reflect the meaning of "settle" under Article 4-104 of the Uniform Commercial Code (UCC). The Supreme Court has addressed the issue of interpreting terms in the Bankruptcy Code: "where Congress uses terms that have accumulated settled meaning under...the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Field v. Mans*, 516 U.S. 59, 69 (1995) (internal quotation marks omitted) (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)); see also *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992). The Official Comment of the UCC states that "[t]he term 'settle' is used as a convenient term to characterize a broad variety of conditional, provisional, tentative and also final payments of items." Official Comment, U.C.C. § 4-104 (2002). Congress incorporated the UCC's well-established definition of "settle" in the Code's broad definition of "settlement payment" that includes preliminary, partial, interim, on account, final, or any other similar payment commonly used in the securities trade. 11 U.S.C. § 741(8) (2005).

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 payments under Section 550 of the Bankruptcy Code, the safe harbor defenses to that action are necessarily available to Lehman. 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.

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, Lehman's motion for leave to file an interlocutory appeal should be granted.

September 21, 2005

Respectfully submitted,

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	:	
v.	:	
	:	
LEHMAN BROTHERS FINANCE S.A., et al.,	:	
	:	
Defendants.	:	
-----	X	

[PROPOSED] ORDER

The COURT, having considered the motion of International Swaps and Derivatives Association, Inc. (“ISDA”) and The Bond Market Association (“TBMA”) (together, “*Amici*”) for leave to file the “Brief of Amici Curiae In Support Of Defendants’ Motion For Leave To Bring Interlocutory Appeal,” and being advised of the grounds for the motion, concludes that although *Amici’s* motion is properly filed in this Court, the district court is better situated to address the motion in the context of the underlying motions for leave to bring the interlocutory appeal, and

HEREBY ORDERS that the clerk of this Court transmit *Amici’s* motion when it transmits the parties’ pleadings to the clerk of the district court as provided by Bankruptcy Rule 8003(b).

DATED this ____ of _____, 2005.

Arthur J. Gonzalez
United States Bankruptcy Judge