Ira D. Hammerman
Kevin M. Carroll
Securities Industry and Financial
Markets Association
1101 New York Avenue, NW
Washington, DC 20005
(202) 962-7382

Joshua Cohn
Allen & Overy LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 610-6300

ATTORNEYS FOR SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AS AMICUS CURIAE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	**Chapter 11**
	:	**Case No. 01-16034 (AJG)**
ENRON CREDITORS RECOVERY CORP., et al.,	:	
	:	**(Jointly Administered)**
Reorganized Debtors.	:	
ENRON CORP.,	:	**Adv. No. 03-92677 (AJG)**
Plaintiffs,	:	
v.	:	
J.P. MORGAN SECURITIES, INC., et al.,	:	
Defendants.	:	
ENRON CORP.,	:	**Adv No. 03-92682 (AJG)**
Plaintiffs,	:	
v.	:	
MASS MUTUAL LIFE INSURANCE CO., et al.,	:	
Defendants.	:	

REVISED BRIEF AND MEMORANDUM OF LAW OF AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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The Securities Industry and Financial Markets Association ("SIFMA") respectfully submits this memorandum in support of the various defendants' (the "Defendants") Motions for Summary Judgment in the adversary proceedings Enron Corp. v. J.P. Morgan, et al. (Adv. Pro. No. 03-92677) and Enron Corp. v. Mass Mutual Life Ins. Co., et al. (Adv. Pro. No. 03-92682) (collectively, the "Adversary Proceedings"), to the extent such defendants have briefed the issues treated below.

STATEMENT OF INTEREST

The Adversary Proceedings present issues that are vitally important to SIFMA. SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

Since its inception, SIFMA has worked with legislative and governmental entities as well as market regulators to foster efficient regulation of the securities and broader financial markets. Most pertinently, in working with member firms, SIFMA has developed form contracts that are widely accepted and successfully promote standardization in the commercial paper market. See, e.g., SIFMA Model Commercial Paper Dealer Agreement: 3(a)(3) Program.[1] SIFMA has also been involved in the development of certain of the Bankruptcy Code provisions discussed in this brief. See, e.g., International Swaps and Derivatives Association, Inc. and The Public Securities

[1] Available at: http://www.sifma.org/services/stdforms/pdf/guaranteed_3-a-3_cp_dealer_agreement.pdf.

Association, Financial Transactions Insolvency: Reducing Risk through Legislative Reform, 13-14 (1996).[2] The issues at stake in this proceeding bear directly on SIFMA's role as an association working to improve financial markets.

The commercial paper market is a critical component of the national economy.[3] Because the relief sought by Enron in these Adversary Proceedings threatens the liquidity of this market in which SIFMA's members participate, SIFMA respectfully submits this "Brief of Amicus Curiae in Support of Defendants' Motions for Summary Judgment."

PRELIMINARY STATEMENT

The Adversary Proceedings arise out of the attempt to avoid and recover, as preferences or fraudulent conveyances, various pre-petition payments made by Enron Corporation, now known as Enron Creditors Recovery Corporation ("Enron"). The payments in question were made in connection with the repurchase, prior to maturity, of certain of Enron's outstanding commercial paper in the period preceding Enron's voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the "Transfers").

A decision denying Defendants' motions would acutely disrupt the highly liquid commercial paper market. The market for commercial paper has grown consistently over the past decade: the amount of commercial paper outstanding in the U.S. has increased from $2.5 trillion in 2000 to more than $4 trillion at the end of 2007. SIFMA, Research Report: February 2008 at 9 (February 2008).[4] Despite recent volatility in the credit markets and increased risk sensitivity among money market investors, commercial paper continues to serve as a reliable

[2] Available at: http://www.isda.org. This white paper was prepared by PSA in conjunction with ISDA, the swaps and derivatives trade association. PSA was a predecessor of The Bond Market Association, a predecessor to SIFMA.

[3] See, e.g., Federal Reserve System (Docket No. R-1128), Department of the Treasury: Office of the Comptroller of the Currency (Docket No. 03-05), and Securities and Exchange Commission (S.E.C. Release No. 34-47638), Interagency Paper on Sound Practices to Strengthen the Resilience of the U.S. Financial System, available at: www.sec.gov/news/studies/34-37638.htm (last modified Apr. 2003) (identifying commercial paper as a "critical financial market").

[4] Available at: http://www.sifma.org/research/pdf/RRVol3-2.pdf.

funding source for both financial institutions and companies. A ruling permitting Enron to avoid payments made when, as a weakening issuer, it pursued an exit strategy from the commercial paper markets, would unsettle the markets and inhibit the ability of U.S. corporations and financial institutions to ease short-term liquidity constraints. This is especially true in view of the current stresses on our financial system.

SIFMA previously has briefed certain core issues in this case. See Brief and Memorandum of Law of The Bond Market Association, as Amicus Curiae, in Support of Defendants' Motion to Dismiss the Amended Complaint, Adv. Pro. 03-92677, Doc. No. 306 (Mar. 19, 2004).[5] SIFMA now wishes to assure the Court that the Transfers, as settlement payments, are of a kind commonly seen in the commercial paper market. The Transfers, as a matter of law and policy, should be protected under Section 546(e) of the Bankruptcy Code, as discussed below.

FACTUAL AND PROCEDURAL BACKGROUND[6]

Enron seeks to avoid and recover as avoidable preferences and constructively fraudulent conveyances the amounts it paid to repurchase and retire certain commercial paper.

Enron commenced its commercial paper program in 1993 pursuant to section 3(a)(3) of the Securities Act of 1933. In re Enron Corp., 2008 WL 649770, *1 (S.D.N.Y. Mar. 10, 2008). Enron's commercial paper program was backstopped by two revolving credit facilities totaling $3 billion. Id. In the fall of 2001, as Enron faced increased market scrutiny and potential ratings downgrades, the market for Enron's commercial paper collapsed. Id. Unable to "roll" its

[5] The Bond Market Association was a predecessor of SIFMA, see note 2 above.

[6] An extensive account of the facts underlying this adversary proceeding is set forth in the Court's 2005 opinion, *In re Enron Corp.*, 325 B.R. 671, 677-82 (Bankr. S.D.N.Y. 2005), as well as the cited decision by Judge Scheindlin, *In re Enron Corp.*, 2008 WL 649770 (S.D.N.Y. Mar. 10, 2008).

commercial paper forward and so postpone paying principal, Enron chose to utilize alternative means of financing and withdraw from the commercial paper market by buying in its commercial paper. See Def. Goldman Sach's Mot. for Summ. J. at 12-13. Enron drew upon its revolving credit facilities for the needed cash and negotiated a series of transactions from October 26 to November 6, 2001 that transferred over one billion of dollars in payments to retire certain of its unsecured, outstanding commercial paper prior to its stated date of maturity. In re Enron Corp., 2008 WL at *1. Some of these transactions were effectuated through various financial institutions that served as dealers and, on occasion, market makers. Id. Enron, however, was the primary negotiator of the terms of its purchases. See Def. Goldman Sach's Mot. for Summ. J. at 13-15. As a result of the transactions, Enron replaced short term obligations with longer term ones and replaced its commercial paper creditor group with its presumably narrower group of liquidity providers .

Enron now seeks to avoid and recover from the Defendant the Transfers as preferences or fraudulent transfers.

ARGUMENT

Section 546(e) of the Bankruptcy Code, in pertinent part, protects from avoidance settlement payments made by or to a stockbroker, financial institution or securities clearing agency.[7] A "settlement payment" is circularly defined in Section 741(8) of the Bankruptcy Code; a ". . . final settlement payment, or any other similar payment commonly used in the securities trade" being expressly within the definition. This Court is now considering whether

[7] Settlement payments made with an "actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that the transfer was made or such obligation was incurred, indebted" are not protected by the Section 546(e) safe harbor.

the Transfers are settlement payments commonly used in the securities trade.[8] At the motion to dismiss stage, this Court held that "to qualify as a settlement payment protected by section 546(e) of the Bankruptcy Code from avoidance, the payment must be common in the securities trade." See In re Enron Corp., 325 B.R. at 687. In other words, this proceeding now turns on whether payments made in connection with the purchase of debt securities constitute 'settlement payments,' and this question in turn hinges on the 'commonness' of such payments.

A. The Transfers Were Common Settlement Payments

The securities industry and its regulators possess a wide conception of the term settlement payment.[9] As the manager of the Federal Reserve's Operations and Payment Systems noted, "[s]ettlement involves the discharge of settlement obligations through the final transfer of securities from the seller to the buyer, and the final transfer of funds from the buyer to the seller." Jeff Stehm, Clearance and Settlement Systems for Securities: Critical Design Choices in Emerging Market Economies, World Bank Discussion Paper 321, 9 (April 1996).[10] Transfers of cash in exchange for debt securities like commercial paper, like the Transfers at issue, are the epitome of a commonly employed settlement payment. This is the case without regard to whether an issuer or an unaffiliated third party tenders the cash.

According to the Federal Reserve Board, the Depository Trust & Clearing Corporation ("DTCC") is "a national clearinghouse for the settlement of securities trades and a custodian for

[8] SIFMA believes that the Transfers are final settlement payments and hence are not subject to the "commonly used" clause of Section 741(8). Nonetheless, at this juncture, SIFMA hopes to serve the Court by explaining that the Transfers are commonly used settlement payments.

[9] As noted in other pleadings filed in this proceeding, the Courts have also embraced a broad conception of the term "settlement payment." See, e.g., In re Comark, 971 F.2d 322, 325-26 (9th Cir. 1992) (holding that settlement payments include "transfers which are normally regarded as part of the settlement process, whether they occur on the trade date, the scheduled settlement day, or any other date in the settlement process for the particular type of transaction at hand."); Kaiser Steel Corp v. Charles Schwab & Co., 913 F.2d 846, 848-49 (10th Cir. 1990).

[10] Available at: www.worldbank.org.

securities. DTCC performs these functions for almost all activity in the domestic CP [commercial paper] market." The Federal Reserve Board, Federal Reserve Release: About Commercial Paper.[11] In 2003, the DTCC issued a discussion paper proposing recommendations for commercial paper settlement. See Depository Trust & Clearing Corporation & The Bond Market Association, Discussion Paper: Issues and Recommendations Regarding Commercial Paper Settlement Practices.[12] The DTCC's Discussion Paper makes clear that daily commercial paper volumes are enormous, with daily issuances and maturities approximating $120 billion in 2002, and that "a significant practical burden is placed every business day on the market's ability to roll over overnight CP for another business day." DTCC Discussion Paper at 4. The tremendous volume and velocity of the commercial paper market indicate that the transfer of cash in exchange for commercial paper—that is, exactly the type of settlement at issue—is a daily occurrence among major market actors. The Transfers, of course, were made through DTCC. In re Enron Corp., 325 B.R. at 680. Furthermore, the Transfers were in standard modes, "delivery vs. payment" (a routine method of transferring securities and countervailing cash simultaneously) and/or "free delivery" (separating the securities transfer from the cash flow).[13] See Def. Goldman Sach's Mot. for Summ. J. at 18-19.[14]

We note, consistent with the Supplemental Expert Reports of Prof. Calomiris and Prof. Macey,[15] that there have been hundreds of issuer repurchases of commercial paper prior to maturity in the past 10 years. These repurchases have occurred for a variety of reasons,

[11] Available at: www.federalreserve.gov/Releases/cp/about.htm.
[12] Available at: http://www.dtcc.com/downloads/leadership/whitepapers/cppaper.pdf.
[13] "Free delivery" through DTCC is also common to the securities industry. See Tulaney Dep. Tr. at 227:8-228:10 (DTCC's 30(b)(6) witness testifying that free delivery has been an "established" DTCC settlement procedure since the 1990s).
[14] SIFMA's commercial paper model contracts, including the Model Commercial Paper Dealer Agreement: 3(a)(3) Program constitute further evidence of a common understanding that permeates the commercial paper market: the return of commercial paper to the issuer in exchange for cash constitutes a settlement. See Section 1.5 of the Model Commercial Paper Dealer Agreement: 3(a)(3) Program (describing the analogous situation of the return of unbought securities to the issuer in exchange for cash as "settlement"), available at: http://www.sifma.org/services/stdforms/pdf/guaranteed_3-a-3_cp_dealer_agreement.pdf.
[15] We note that we have only reviewed redacted versions of the Calomiris and Macey Reports.

including the desire of a weakened commercial paper issuer to maintain its reputation in the face of declining investor confidence by "buying in" its paper.[16] Issuer buy-ins of commercial paper are a common occurrence in the commercial paper markets.[17] Within the past two months, C.I.T. Group Inc., a company with more than $2 billion in outstanding commercial paper as of December 31, 2007 and only $2.5 billion in cash on hand in April of 2008, drew down a $7.3 billion credit facility in advance of its commercial paper obligations coming due.[18] Such buy-ins, furthermore, at the "accrued par" price offered by Enron are quite typical.[19]

Finally, recent amendments of Section 546(e) of the Bankruptcy Code make plain that the Transfers would be protected from attack under current law and should be treated the same way under prior law. The record describes a process of offers made by or on behalf of Enron and acceptance of those offers by some of the holders of its commercial paper. See Def. Goldman Sach's Mot. for Summ. J. at 14-15. This is a description of a group of oral securities contracts followed by transfers of money for the relevant securities. Section 546(e) of the Bankruptcy Code was expanded in 2006 to protect all "transfers . . . in connection with a securities contract."[20] The Transfers are clearly within the Bankruptcy Code Section 101(54) definition of "transfer" and are accordingly protected by revised Section 546(e). Although this case was filed before the effective date of the 2006 amendments to the Bankruptcy Code (the "2006 Revising Act"), as the Supreme Court has repeatedly noted, "[w]hen several acts of Congress are passed, touching the same subject matter, subsequent legislation may be considered to assist in the interpretation of prior legislation on the same subject." Tiger v. W. Inv. Co., 221 U.S. 286, 309

[16] Macey Rep. at ¶¶ 30-34.
[17] Id.; Calomiris Rep. at ¶¶ 61-77.
[18] See David Enrich, The Well Gets Shallower- CIT's Funding Problem Likely to Trickle Down to Needy Companies, Wall Street Journal C1, (March 21, 2008); C.I.T. Group Inc., Press Release, CIT Takes Liquidity Action (Mar. 20, 2008) ("[The Company] is drawing upon its $7.3 billion in unsecured U.S. bank credit facilities. The Company will use the proceeds to repay debt maturing in 2008, including commercial paper . . ."); C.I.T. Group Inc., Annual Report (Form -10k) at 66 (Feb. 28, 2008).
[19] Macey Rep. at ¶¶ 85-90.
[20] See The Financial Netting Improvements Act of 2006, Pub. L. No. 109-360 (2006).

(1911); see also Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 380-81 (1969) ("Subsequent legislation declaring the intent of a prior statute is entitled to great weight in statutory construction."). This is especially true in the instant case because the legislative history indicates that rather than altering or expanding the scope and purpose of the safe harbor provisions, Congress intended the 2006 Revising Act as a clarification of the existing Bankruptcy Code safe harbor provisions. H.R. Rep. 109-648(I), at 1 (2006) (noting that the 2006 Revising Act "makes technical changes to the netting and financial contract provisions . . . to update the language to *reflect current market and regulatory practices* . . ." (emphasis added)).

The safe harbor provisions were introduced over twenty years ago because Congress recognized the need to protect the financial markets from the "ripple effect" of insolvencies. See H.R. Rep. 97-420, at 1 (1982), reprinted in 1982 U.S.C.C.A.N. 583, 583. The most recent amendments to the Code demonstrate Congress' continued desire to "reduce systemic risk in the financial markets by clarifying the treatment of certain financial products in cases of bankruptcy or insolvency." See H.R. Rep. 109-648(I), at 1 (2006).

CONCLUSION

Commercial paper buybacks like the Transfers are a common method employed by "issuers-at-risk" to vary their financing strategy so as in essence to defer payment obligations and consolidate their financing with a view to continued survival. It would be inconsistent with the language and underlying policy of the Bankruptcy Code if a court were to deny the Transfers the protection of Section 546(e).

For the foregoing reasons, the Defendants' motions for summary judgment should be granted.

DATED: New York, NY
May 6, 2008

Respectfully submitted,

/s/ Joshua Cohn

Ira D. Hammerman
Kevin M. Carroll
Securities Industry and Financial Markets Association
1101 New York Avenue, NW
Washington, DC 20005
(202) 962-7382

Joshua Cohn
ALLEN & OVERY LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 610-6300
Joshua.Cohn@allenovery.com