COURT OF APPEALS
STATE OF NEW YORK

CHASKIE J. ROSENBERG,

Plaintiff-Appellant,

-*v.*-

METLIFE INC., METROPOLITAN LIFE INSURANCE COMPANY AND METLIFE SECURITIES, INC.,

Defendants-Appellees.

USCOA Docket No. 05-4363-CV

NOTICE OF MOTION
FOR LEAVE TO PARTICIPATE
AS *AMICUS CURIAE*

Motion By: The Securities Industry and Financial Markets Association

Date, Time and Place of Motion: December 18, 2006, 9:30 a.m., or as soon as counsel can be heard, at the Court of Appeals, 20 Eagle Street, Albany, New York 12207-1095

Supporting Papers: Affirmation of Michael Delikat, dated December 6, 2006; and the proposed Brief submitted therewith

Relief Requested: An order, issued pursuant to Court of Appeals Rule 500.23, permitting The Securities Industry and Financial Markets Association to participate in this matter as an *amicus curiae* and to file the proposed Brief

Dated: New York, NY
December 7, 2006

Respectfully submitted,

Michael Delikat /RW

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COURT OF APPEALS
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USCOA Docket No. 05-4363-CV

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

MICHAEL DELIKAT, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am a partner in the firm of Orrick Herrington & Sutcliffe LLP, counsel to the Securities Industry and Financial Markets Association ("SIFMA"). I submit this Affirmation in support of SIFMA's Motion for Leave to Participate as *Amicus Curiae* in the above-captioned matter.

2. SIFMA is the principal trade association of the securities industry. It is the product of the November 1, 2006 merger of the Securities Industry Association and The Bond Market Association. SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. Its mission is to promote policies and practices that 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 in the United States and globally.

3. The importance of the securities industry to New York State is long-standing and well-recognized. The industry has a profound impact on personal income, tax revenues and

overall economic growth of the State economy, and particularly the local economies in and around New York City. As of January 2006, the securities industry directly employed 194,100 individuals in New York State, representing nearly one in every four securities industry jobs nationwide. Moreover, wages paid to industry employees account for a disproportionate share of total wages and total adjusted income in the State.

4. SIFMA's broker-dealer members are required by the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a et seq., to be members of a national securities association designated by the Securities and Exchange Commission. Currently, the National Association of Securities Dealers, Inc. ("NASD") is the only association so designated. Members of the NASD are required to comply with the rules of the NASD. Those SIFMA members that also are members of the New York Stock Exchange, Inc. ("NYSE") are also required to comply with the rules of the NYSE. The NASD and the NYSE are referred to as self-regulatory organizations.

5. SIFMA and its members have a significant interest in this Court's determination of whether statements that broker-dealers are required to make on Form U5 are protected by an absolute privilege based on their content. SIFMA particularly seeks to assist the Court in its analysis of this issue by demonstrating the important role that the U5 plays in protecting the investing public from registered representatives who fail to comply with the securities laws or the rules of SEC-designated self-regulatory organizations.

6. SIFMA is familiar with the questions involved in this appeal and seeks to file its *amicus curiae* Brief in order to assist the Court in its consideration. Because of the role played by SIFMA's member firms in the preparation and submission of the U5, SIFMA believes it could identify law or arguments that might otherwise escape the Court's consideration and that

its Brief would otherwise be of assistance to the Court, as set forth in Court of Appeals Rule 500.23(a)(4).

December 7, 2006

Michael Delikat/RW

MICHAEL DELIKAT

USCOA Docket No. 05-4363-CV

IN THE
COURT OF APPEALS
OF THE
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CHASKIE J. ROSENBERG,

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v.

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On Certification from the
United States Court of Appeals for the Second Circuit

BRIEF FOR AMICUS CURIAE THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

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DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(c), the Securities Industry and Financial Markets Association states that it is a Delaware nonstock corporation with no corporate parent. It is the sole member of the Securities Industry Association Foundation for Investor Education, a Delaware non-stock corporation. It is also one of three members of The Bond Market Foundation, a Delaware non-stock corporation. It also a member of, and has representation on the board of, the Asia Securities and Financial Markets Association, a Hong Kong non-stock corporation.

INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is the principal trade association of the securities industry. It is the product of the November 1, 2006 merger of the Securities Industry Association and The Bond Market Association. SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. Its mission is to promote policies and practices that 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 in the United States and globally.

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SIFMA and its members have a significant interest in this Court's determination of whether statements that broker-dealers are required to make on Form U5 are protected by an absolute privilege based on their content. SIFMA particularly seeks to assist the Court in its analysis of this issue by demonstrating

the important role that Form U5 plays in protecting the investing public from registered representatives who fail to comply with the securities laws or the rules of SEC-designated self-regulatory organizations.

SIFMA is familiar with the questions involved in this appeal and seeks to file this *amicus curiae* brief in order to assist the Court in its consideration.

ARGUMENT

STATEMENTS ON A FORM U5 SHOULD BE ABSOLUTELY PRIVILEGED AGAINST DEFAMATION CLAIMS

SIFMA adopts the arguments advanced by MetLife Inc. in support of an absolute privilege for statements made by broker-dealers on the Form U5. SIFMA adds the following general observations to assist the Court in its consideration of this issue.

In sum, SIFMA believes an absolute privilege is appropriate for two reasons: (1) submission of the Form U5 is mandatory for broker-dealers pursuant to the quasi-governmental authority of the National Association of Securities Dealers, Inc. ("NASD"), the New York Stock Exchange, Inc. ("NYSE"), and other SEC-designated self-regulatory organizations ("SROs"), such that the form is tantamount to a compulsory statement to government regulators and therefore entitled to an absolute privilege; and (2) an absolute privilege fosters thoroughness and candor on the U5, and thereby better enables the form to achieve its purposes of exposing and deterring unlawful and otherwise inappropriate conduct by

registered representatives, and providing the investing public with information to make informed choices concerning their selection and use of investment advisors.

A. The Form U5 is Mandated by Federal Law to Protect the Interest of the General Public.

Sections 6(b)(5) and 15A(b)(6) of the Securities Exchange Act of 1934 require SROs to adopt rules "designed to prevent fraudulent acts or practices" and to discipline any member or person associated with a member for violations of the federal securities laws and regulations or the rules of those exchanges or associations. 15 U.S.C. §§ 78f(b)(5), 78o-2(b)(6).

In furtherance of that obligation, the principal SROs, including the NASD and the NYSE, require their member firms to disclose the basis for the termination of employment of any registered representative promptly upon the employee's termination. The NASD By-Laws, for example, state:

> Following the termination of the association with a member of a person who is registered with it, such member shall, not later than 30 days after such termination, give notice of the termination of such association to the NASD via electronic process or such other process as the NASD may prescribe on a form designated by the NASD, and concurrently shall provide to the person whose association has been terminated a copy of said notice as filed with the NASD.

NASD By-Laws, Article V, Section 3(a);[1] see also NYSE Rule 345.17(a).[2]

The Uniform Termination Notice for Securities Industry Registration, known as the "Form U5," is the vehicle through which member firms fulfill that obligation.[3] The form requires industry firms to provide detailed information concerning the termination of employment of a registered representative. Item 3, for example, requires the firm to provide the "reason for termination," and lists five options ("discharged," "permitted to resign," "deceased," "voluntary," or "other") with space for an explanation. Item 7 then asks a series of questions about whether the individual is, or at the time of termination was, the subject of an investigation or other proceeding concerning his or her actions as an employee. Supplemental sections seek additional detail concerning alleged criminal behavior, customer complaints, internal investigations and regulatory actions.

The Securities and Exchange Commission has specifically approved the use of the Form U5 pursuant to its oversight authority of the SROs. See 15 U.S.C. § 78s(b); see also NASD Notices to Members 05-66 and 03-42.[4] Completed U5s are submitted to the Central Registration Depository ("CRD"), an Internet-based

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[1] Exhibit 1 hereto.

[2] Exhibit 2 hereto. On November 28, 2006, the NASD and the NYSE announced that they will combine their member-regulation functions into a single entity. This combination is expected to be effective during the second quarter of 2007. That organization will be responsible, among other things, for the registration of member firm personnel, including the filing of Forms U5.

[3] A copy of the current version of the form is attached hereto as Exhibit 3.

[4] Exhibit 4 hereto.

electronic database operated by the NASD. The CRD maintains registration information for more than 6,800 registered broker-dealers and the qualification, employment, and disclosure histories of more than 660,000 active registered individuals.

The NASD and NYSE require not only that the terminating firm file the Form U5, but that any potential future employer review the form before hiring a registered employee. The NASD Rules state:

> Each member shall have the responsibility and duty to ascertain by investigation the good character, business repute, qualifications, and experience of any person prior to making such a certification in the application of such person for registration with this Association. Where an applicant for registration has previously been registered with the Association, the member shall review a copy of the [Form U5] filed with the Association by such person's most recent previous NASD member employer, together with any amendments thereto . . . .

NASD Rule 3010(e);[5] see also NYSE Rule 345.11(a).[6] Similarly, applicants are required to furnish the U5 to prospective employers upon request. See NASD Rule 3010(f);[7] NYSE Rule 345.11(b).[8]

Through this system of mandatory reporting and disclosure, the NASD uses the U5 information in part to help it "detect violations and subsequently sanction

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[5] Exhibit 5 hereto.

[6] Exhibit 2 hereto.

[7] Exhibit 5 hereto.

[8] Exhibit 2 hereto.

persons for violations of the [its] rules and other applicable federal statutes and regulations." NASD Notice to Members 88-67.[9] The NASD has explained that "a significant aspect of [its] self-regulatory activity is the investigation of members and associated persons to determine if their activities comply with the Association's rules and the federal securities laws." Thus, it "routinely investigates associated persons [i.e., registered representatives] who have been terminated for cause to determine whether the circumstances leading to the termination involved violations of the NASD's or other securities rules." NASD Notice to Members 90-61.[10] See also NASD Notice to Members 01-65 (information filed with CRD, including U5s, is used by regulators "to assist them in fulfilling their regulatory responsibilities, including making determinations about registration and licensing of firms and associated persons").[11]

B. Public Policy Requires An Absolute Immunity From Defamation Actions Based On The Content of Form U5.

In light of the mandatory nature of the U5, and the important role it plays in the federal system of securities regulation, statements made by firms in the U5 should be protected by an absolute privilege from defamation claims.

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[9] Exhibit 6 hereto.

[10] Exhibit 7 hereto.

[11] Exhibit 8 hereto.

First, as discussed above, submission of the U5 is mandatory for broker-dealers any time the employment of a registered representative is terminated, regardless of the reason. When it receives, reviews and maintains the U5, the NASD stands in the shoes of the SEC as the principal regulatory authority over the securities industry:

> [W]hile the NASD may perform some private functions, in its capacity as the recipient of the Form U-5 it stands as a regulatory surrogate for the SEC. . . . Because at least one purpose of a Form U-5 is to trigger a regulatory investigation where warranted, the NASD requires and receives them from members in its role as the primary regulatory body of the broker-dealer industry.

Fontani v. Wells Fargo Investments LLC, 129 Cal.App.4th 719, 729 (Ct. App. 1st Dist. 2005); see also Cicconi v. McGinn, Smith & Co., 27 A.D.3d 59, 62 (1st Dept. 2005) ("the process of inquiry following a termination qualifies as a quasi-judicial administrative proceeding, making the U-5 notice form material and pertinent to the inquiry into whether the plaintiff had contravened any federal statute or securities rule or regulation"); NASD v. SEC, 431 F.3d 803, 804 (D.C. Cir. 2005) (NASD acts in part "as a quasi-governmental agency, with express statutory authority to adjudicate actions against members who are accused of illegal securities practices").

Because the U5 is a critical component of this quasi-governmental function, a securities firm's statements on the form are deserving of the same absolute

immunity accorded to statements made in similar contexts under legal compulsion. See Restatement (Second) of Torts § 592A ("One who is required by law to publish defamatory matter is absolutely privileged to publish it."). In Boice v. Unisys Corp., 50 F.3d 1145 (2d Cir. 1995), for example, the Second Circuit held that statements made by a government contractor to the New York State Inspector General in response to a subpoena were protected by an absolute privilege. In reaching this conclusion, the court observed: "Vintage case law demonstrates that New York bestows an absolute privilege upon those whom the government compels to give evidence." Id. at 1149 (citing cases). The fact that the Inspector General's subpoena was issued as part of an administrative, not judicial, proceeding did not alter this result. Absolute immunity, the court said, "is conferred regardless of whether the proceeding may be described as quasi-judicial." Id.

Applying the same reasoning, the court in Slotten v. Hoffman, 999 F.2d 333, 335 (8th Cir. 1993), held that absolute immunity barred a defamation claim by the employee of a federal-government-chartered agricultural entity in response to an unfavorable employment reference provided pursuant to an oversight agreement with another federal instrumentality. Noting that the employment reference was required by federal regulations, the court explained:

> The federal government and its agents often rely on private parties for information necessary to execute

> governmental functions. When private parties are under a mandatory duty to supply such information, they are entitled to the government's official immunity.

Id. at 335, 337.

Other courts have reached the same result in comparable settings. See Becker v. Philco Corp., 372 F.2d 771, 776 (4th Cir. 1967) (barring claim based on report by government contractor to oversight agency pursuant to government regulations and holding "an action for libel will not lie in the circumstances against a private party fulfilling its governmentally imposed duty to inform"); Gulati v. Zuckerman, 723 F. Supp. 353, 356, 358 (E.D. Pa. 1989) (government contractors are "entitled to the same immunity which they would receive if they were federal officials" where they report "potentially damaging information about their employees to the appropriate federal authorities"); McManus v. McCarthy, 586 F. Supp. 302, 305 (S.D.N.Y. 1984) (cadets at Merchant Marine Academy were "performing a federal function" when reporting on actions of a colleague and were therefore entitled to official immunity from defamation suit); Blum v. Campbell, 355 F. Supp. 1220 (D. Md. 1972) (private manager of government-owned residence absolutely immune from defamation suit for statements during eviction proceedings).

This rationale is equally compelling in the context of the U5. As noted above, the SROs require broker-dealers to reveal the bases for an individual's

termination on the U5 pursuant to authority delegated to it by federal law under the auspices of the SEC. Like most of the SROs' regulatory activities, the imposition of the U5 obligation was approved by the SEC, as was the specific content of the form itself. In a very real sense, therefore, the U5 reporting obligation is imposed by the government, even though the SROs are nominally private entities.[12]

Broker-dealers complying with this legal obligation should not have to do so under the threat of defamation claims by affected individuals. In most settings outside the securities industry, where there is no comparable compulsion to disclose and no absolute privilege, employers generally refuse to provide detailed reference information for former employees, preferring instead to insulate themselves from potential defamation claims rather than explain the reasons for an employee's separation. Broker-dealers do not have the luxury to make such a choice with respect to their registered employees. Like other highly regulated entities, they should not be placed in legal jeopardy by virtue of their compliance with what is, in effect, governmentally mandated speech.

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[12] When an SRO acts in its regulatory capacity, it is entitled to the same absolute immunity afforded to government agencies. See Weissman v. NASD, No. 04-13575, 2006 WL 3077471, at *4 (11th Cir. Nov. 1, 2006) (SROs have "absolute immunity from civil damages for conduct undertaken as part of their statutorily delegated adjudicatory, regulatory, and prosecutorial authority") (citing cases); Barbara v. New York Stock Exchange, Inc., 99 F.3d 49, 58 (2d Cir. 1996) ("immunity doctrines protect private actors when they perform governmental functions"); Sparta Surgical Corp. v. NASD, 159 F.3d 1209, 1213 (9th Cir. 1998) (the same).

Second, an absolute immunity promotes candor and thoroughness on the U5. There can be little dispute that the public interest is best served by encouraging open and frank disclosure of the reason(s) a registered representative has been terminated. Securities industry employees are entrusted with the responsibility of managing and investing client assets. In keeping with their responsibility to the public, broker-dealers and their regulators are vigilant in ensuring that employees meet their legal, ethical and professional obligations.

It is thus of paramount importance that broker-dealers be honest and forthright in their disclosures on the U5. An absolute privilege fosters that goal. It encourages firms to provide the prompt and full disclosure that federal law requires, without any corresponding fear that employees will bring claims, even frivolously, alleging defamation. As the Second Department recently observed:

> By assuring brokerage firms that they will not be liable in tort for statements in their mandatory U-5 filings, we avoid the possibility that they will hesitate to clearly state the exact grounds for an employee's termination. Only be clear descriptions of questionable conduct by brokers can we best ensure that any future employers and customers have notice of any such conduct in their interactions with those brokers.

Cicconi, 27 A.D.3d at 63.

Without an absolute immunity, reasonable employers will prefer to act with an overabundance of caution and, while speaking truthfully, will nonetheless be inclined to understate the reasons for an employee's termination or water down

their explanations with vague generalities. As a result, there will be less complete information available to regulators, the public and future employers, and likely a corresponding increase in inappropriate, incompetent or reckless conduct by registered representatives.

A qualified privilege, as urged by Appellant, is not sufficient to accomplish the objectives underlying the Form U5. While such a privilege may limit firms' ultimate liability on defamation claims, it does not eliminate the prospect of extensive and costly discovery and trial (whether in litigation or, more typically, arbitration) over the purpose and meaning of the language used on the U5. It is those concerns – as much if not more so than the prospect of paying damages for successful defamation claims – that would lead industry firms to err on the side of circumspection in the U5 in order to minimize the possibility of claims.

The U.S. Supreme Court has explained the grounds for absolute immunity in the analogous context of governmental decision making as follows:

> The purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective Government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits.

Westfall v. Erwin, 484 U.S. 292, 295 (1988). Unlike a qualified privilege, an absolute privilege would allow firms to obtain dismissal of such claims as a matter

of law, with the ultimate message to potential plaintiffs and their counsel that such claims are barred and not worthy of bringing. See Boice v. Unisys Corp., 50 F.3d 1145, 1149 (2d Cir. 1995) (qualified privilege permits suit whereas absolute privilege bars suit entirely).

Appellant is also incorrect in contending that an absolute privilege would leave employees defenseless or encourage firms to be reckless or dishonest on the U5. As an initial matter, firms have an obligation to be truthful and accurate in their U5 submissions. The NASD has repeatedly advised its members of the importance of providing accurate information on the U5. See, e.g., NASD Notice to Members 88-67 (members "may be subject to administrative, civil, and even criminal penalties for failing to provide complete and accurate information on" U5);[13] NASD Notice to Members 89-57 (members are "required to exercise good faith and to disclose the circumstances of the termination in a manner reasonably designed to inform the NASD and future employers of these circumstances").[14] Similarly, failure to timely correct inaccurate submissions can subject member

[13] Exhibit 9 hereto.

[14] Exhibit 10 hereto.

firms to regulatory sanctions. See NASD Notice to Members 04-77;[15] NASD Rule 9216;[16] see also NYSE Rule 345.17(b).[17]

Moreover, in operating the CRD (where all U5s are submitted), the NASD "is guided by its mission of protecting investors and . . . has an obligation to consider compelling issues involving personal privacy and fundamental fairness." Accordingly, it "has endeavored to establish procedures reasonably designed to ensure that information submitted to and maintained on the CRD system is accurate and complete. These procedures, among other things, cover expungement of information from the CRD system in narrowly defined circumstances." NASD Notice to Members 01-65;[18] see also NASD Notice to Members 04-16.[19]

In addition, any registered representative is entitled to view his or her U5 and correct mistakes. The NASD By-Laws and NYSE Rules, as noted above, require a securities firm to provide a copy of the U5 to the terminated representative. Indeed, the NASD has explained "that the policy of providing broader access to the information on the Form U-5 requires that terminated persons be given the Form U-5 so they can verify the accuracy and completeness of the

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[15] Exhibit 11 hereto.

[16] Exhibit 12 hereto.

[17] Exhibit 2 hereto.

[18] Exhibit 13 hereto.

[19] Exhibit 14 hereto.

representations in the form. The terminated individual then can express any disagreement with the Form U-5 to his or her subsequent NASD member employer." NASD Notice to Members 89-57.[20]

In the event of an NASD or other regulatory investigation, the terminated employee also has the right to defend himself, including the right to be represented by counsel. The employee can then appeal to the SEC and within the judicial system if dissatisfied with the results of the SRO investigation. See 15 U.S.C. § 78s(d) & (e); NASD Rules §§ 9000 et seq. (Code of Procedure for disciplinary proceedings);[21] Herzfeld & Stern, Inc. v. Beck, 175 A.D.2d 689, 691 (1st Dept. 1991) (NYSE inquiry into potential employee misconduct is "a process which is adversarial in nature and affords the subject of the investigation due process protections, including the right to appeal") (citations omitted).

Consequently, far from being left with no protection against baseless statements on the U5, a terminated employee has a full and fair opportunity to clear his name. Permitting employees further recourse via the judicial or arbitration system to pursue claims of defamation will result in an insignificant benefit to a handful of individuals who are able to clear the high factual hurdles required to

[20] Exhibit 15 hereto.

[21] Exhibit 16 hereto.

sustain a defamation claim, while severely undermining the broader and more compelling public interest in full disclosure.

Nearly 40 years ago, this Court held that complaints made against attorneys to a bar grievance committee were protected by an absolute privilege. In explaining its decision, this Court stated:

> We may assume that on occasion false and malicious complaints will be made. But, whatever the hardship on a particular attorney, the necessity of maintaining the high standards of our bar – indeed, the proper administration of justice – requires that there be a forum in which clients or other persons, unlearned in the law, may state their complaints, have them examined and, if necessary, judicially determined.

Wiener v. Weintraub, 22 N.Y.2d 330, 332 (1968). The same reasoning should apply here. Even if an absolute privilege would theoretically permit unscrupulous firms to make malicious or unjustified statements on the U5, the risk of such an occurrence is small – and mitigated by SRO and SEC oversight, among other controls – and in any event pales in comparison to the much more compelling interest of providing broker-dealers and the investing public with candid and thorough information about registered representatives.

CONCLUSION

For the foregoing reasons, this Court should hold that statements on the U5 are subject to an absolute privilege.

New York, New York
December 7, 2006

Respectfully submitted,

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