UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION, : MEMORANDUM AND ORDER

Plaintiff, :

-against- : 03 Civ. 2937 (WHP)

BEAR, STEARNS & CO. INC., :

Defendant. :

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 03 Civ. 2938 (WHP)

JACK BENJAMIN GRUBMAN, :

Defendant. :

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 03 Civ. 2939 (WHP)

J.P. MORGAN SECURITIES INC., :

Defendant. :

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 03 Civ. 2940 (WHP)

LEHMAN BROTHERS INC., :

Defendant. :

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 03 Civ. 2941 (WHP)

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED :

Defendant. :

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 03 Civ. 2942 (WHP)

U.S. BANCORP PIPER JAFFRAY INC., :

Defendant. :

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 03 Civ. 2943 (WHP)

UBS WARBURG LLC, :

Defendant. :

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 03 Civ. 2944 (WHP)

GOLDMAN, SACHS & CO., :

Defendant. :

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 03 Civ. 2945 (WHP)

CITIGROUP GLOBAL MARKETS INC., :
f/k/a SALOMON SMITH BARNEY,
:
Defendant.
:

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 03 Civ. 2946 (WHP)

CREDIT SUISSE FIRST BOSTON LLC, :
f/k/a CREDIT SUISSE FIRST BOSTON
CORPORATION, :

Defendant. :

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 03 Civ. 2947 (WHP)

HENRY McELVEY BLODGET, :

Defendant. :

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

-against- : 03 Civ. 2948 (WHP)

MORGAN STANLEY & CO. INCORPORATED, :

Defendant. :

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WILLIAM H. PAULEY III, District Judge:

On July 9, 2003, individual investors Cliff Hughes and Pamela Kehn moved to intervene, or in the alternative to participate as amici curiae, in the "global research analyst settlement" actions[1] pending before this Court. The Securities and Exchange Commission ("SEC") and the defendant investment banks and individuals[2] oppose intervention on the principal grounds that: (1) intervention under Rule 24 of the Federal Rules of Civil Procedure is inappropriate and procedurally deficient;

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[1] 03 Civ. 2937 (WHP), 03 Civ. 2938 (WHP), 03 Civ. 2939 (WHP), 03 Civ. 2940 (WHP), 03 Civ. 2941 (WHP), 03 Civ. 2942 (WHP), 03 Civ. 2943 (WHP), 03 Civ. 2944 (WHP), 03 Civ. 2945 (WHP), 03 Civ. 2946 (WHP), 03 Civ. 2947 (WHP) and 03 Civ. 2948 (WHP).

[2] Bear Stearns and Co. Inc.; Citigroup Global Markets Inc., f/k/a Salomon Smith Barney Inc.; Credit Suisse First Boston LLC f/k/a Credit Suisse First Boston Corporation; Goldman, Sachs and Co.; J.P. Morgan Securities Inc.; Lehman Brothers Inc.; Merrill Lynch Pierce Fenner & Smith, Incorporated; Morgan Stanley & Co. Incorporated; UBS Warburg LLC; U.S. Bancorp Piper Jaffray, Inc.; Henry McElvey Blodget and Jack Benjamin Grubman.

and (2) conferral of formal amici status on Hughes and Kehn would cause unnecessary delay and complication in this Court's review of the proposed consent judgments. Nevertheless, the SEC does not oppose public comment on the proposed consent judgments. For the reasons set forth below, Hughes' and Kehn's motion for intervention, or in the alternative to participate as amici curiae, is denied.

BACKGROUND

On April 28, 2003, the SEC filed civil actions to redress violations of the Securities Act of 1933 and rules of the NASD, Inc. and the New York Stock Exchange, Inc. against ten separate investment banks and two former research analysts. More specifically, the SEC alleged that the investment banking groups of the defendant banks exerted inappropriate influence over their respective in-house equity research analysts, thereby spawning undisclosed conflicts of interest and compromising the objectivity of their research reports. In addition, the SEC filed civil actions against two former research analysts for issuing allegedly conflicted advice.

Months of negotiations among the SEC, the defendants and various state attorneys general culminated in the filing of twelve (12) proposed consent judgments in this District. The proposed consent judgments provide for both injunctive and

monetary relief, and contemplate the creation of Distribution Funds for most of the defendant investment banks, to be administered pursuant to plans devised by an Administrator and approved by the SEC and the Court, and an Investor Education Fund, to be administered by a separate Administrator pursuant to a plan to be approved in the same manner. Currently, this Court is considering whether to approve the proposed consent judgments in their present form.

On June 19, 2003, the law firm of Hooper & Weiss, L.L.C. ("Hooper & Weiss") requested permission to file a motion to "participate" in the underlying actions on behalf of "over 12,000" allegedly aggrieved investors. (Letter to the Court from Hooper & Weiss, dated June 19, 2003 ("Hooper & Weiss Letter") at 1.) Although the letter did not specify how such participation should be structured, it stated that the contemplated motion would "pursue [their] clients' interest in participating in the process by which the Court will determine whether to adopt, and (if so) how to administer, the consent decrees that have been proposed by the parties." (Hooper & Weiss Letter at 1.) The Court granted Hooper & Weiss' request to file a motion, and set a briefing schedule. (Scheduling Order, dated July 2, 2003.) On July 9, 2003, Hughes and Kehn filed their motion to intervene.

In that motion, the movants assert their desire to assist the Court in determining "the most appropriate procedural

mechanism . . . [to] receive useful input on the questions presented by [its] consideration of the proposed decrees." (Movants' Br. at 1-2.) In their reply, Hughes, a resident of Iowa and customer of Solomon Smith Barney (Movants' Br. at 2), and Kehn, a resident of Iowa and customer of Merrill Lynch (Movants' Br. at 2), offer a preview of some of that "useful input." The movants urge this Court to refuse to approve the proposed consent judgments unless they: (1) include payments "for the defrayment of investors' portion of arbitration and arbitrator's fees;" (2) provide for "public access to documents that were discovered during the course of the investigations that ultimately led to these cases;" and (3) prohibit the defendants from seeking evidentiary rulings excluding certain documents in individual arbitration actions brought on behalf of allegedly injured investors. (Reply Br. at 7-8.)

DISCUSSION

I. Intervention

Intervention is not an avenue for advancing the competing agendas of non-parties to a settlement, but instead "is a procedural device that attempts to accommodate two competing policies: efficiently administrating legal disputes by resolving all related issues in one lawsuit, on the one hand, and keeping a single lawsuit from becoming unnecessarily complex, unwieldy or

prolonged, on the other hand." United States v. Pitney Bowes, Inc., 25 F.3d 66, 69 (2d Cir. 1994). If this Court permitted Hughes and Kehn to intervene, such an accommodation would be elusive. The inevitable resultant delay would impair this Court's ability to review the proposed consent judgments in a timely and orderly fashion.

Rule 24 of the Federal Rules of Civil Procedure contemplates two distinct species of intervention: intervention of right, under Rule 24(a), and permissive intervention under Rule 24(b). Hughes and Kehn do not argue, nor could they, that they have a right to intervene in the underlying actions under Rule 24(a). (Movants' Br. at 5.) This Court, therefore, must analyze movants' request under the rubric of permissive intervention.

Rule 24(b), which governs permissive intervention, provides in relevant part:

> Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). Put another way, permissive intervention will not be granted, even where there is a strong commonality of fact or law, where such intervention would cause undue delay,

complexity or confusion in a case. See SEC v. Everest Mgmt. Corp., 475 F.2d 1236, 1240 (2d Cir. 1972) ("the complicating effect of the additional issues and the additional parties outweighs any advantage of a single disposition of the common issues"); accord H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc., 797 F.2d 85, 89 (2d Cir. 1986); see also Pitney Bowes, 25 F.3d at 73-74 ("given that the parties to the action had already agreed to the terms of the consent decree, and that intervention would require renegotiation, and delay the cleanup efforts, it was not an abuse of discretion for the district court to deny permissive intervention"). A district court has broad discretion in deciding whether to grant permissive intervention. New York News, Inc. v. Kheel, 972 F.2d 482, 487 (2d Cir. 1992); accord Everest Mgmt., 475 F.2d at 1240 ("Rule 24(b) necessarily vests broad discretion in the district court to determine the fairest and most efficient method of handling a case with multiple parties and claims").

Concerns about undue delay and complication resulting from permissive intervention are acute where the Government, and particularly the SEC, is a party to the underlying action. See Everest Mgmt., 475 F.2d at 1240 n.5 ("it is preferable to require private parties to commence their own actions than to have SEC actions bogged down through intervention"); accord 6 Moore's Federal Practice § 24.10[2][c], at 24-60 (Matthew Bender 3d ed. 2000) ("When one of the existing parties [in the underlying

action] is the government and that party is aggressively representing the interests of the proposed intervenor, courts exhibit unwillingness to grant permissive intervention."). The reason is that the SEC, in its role as parens patriae, is presumed to represent the interests of the investing public aggressively and adequately. Reflexive intervention by the public in SEC actions would undermine both the SEC's ability to resolve cases by consent decree and the efficient management of those cases by courts. See Everest Mgmt., 475 F.2d at 1239-40 ("The SEC can bring the large number of enforcement actions it does only because in all but a few cases consent decrees are entered. The intervention of a private plaintiff might tend to discourage or at least to complicate efforts to obtain a consent decree."); SEC v. Credit Bancorp, Ltd., 194 F.R.D. 457, 468 (S.D.N.Y. 2000) (granting permissive intervention on the unique facts of the case but noting that public "[i]ntervention has been traditionally disfavored, given courts' hesitation to allow scores of investors and other interested persons from becoming full-fledged parties to governmental enforcement actions"); SEC v. Canadian Javelin Ltd., 64 F.R.D. 648, 651 (S.D.N.Y. 1974) (in denying intervention of right, noting that "Congress has entrusted the SEC with the responsibility for protecting the public interest"); accord Natural Res. Def. Counsel, Inc. v. New York State Dep't of Envtl. Conservation, 834 F.2d 60, 62 (2d Cir. 1987) (affirming district court's denial of both permissive

intervention and intervention of right, noting that "though this is not a case where a governmental entity is suing as parens patriae, the fact that the suit is being defended by the combined legal forces of the United States and the State of New York" supports the conclusion that the "interests of [the proposed intervenors] are adequately represented") (internal citations omitted); United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968, 984-86 (2d Cir. 1984) (discussing and applying the parens patriae doctrine in affirming denial of intervention of right); CFTC v. Carter, Rogers and Whitehead & Co., Inc., 497 F. Supp. 450, 452 (E.D.N.Y. 1980) ("[t]he ability of the CFTC . . . to negotiate a settlement and obtain a consent judgment and thereby perform its congressionally entrusted duty to protect the public interest, is a relevant consideration on a motion [for permissive intervention]").

Turning to the merits, this Court notes that the motion to intervene suffers from procedural defects that alone warrant denial of permissive intervention.[3] However, it is the near-certainty of undue delay, complexity and confusion that would result were intervention permitted, as well as the adequacy of

[3] Hughes and Kehn failed to follow the strictures of Rule 24(c), which requires that a motion for intervention "state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Further, it is unclear whether Hughes and Kehn even have standing to intervene as the motion does not indicate whether Hughes and/or Kehn purchased any of the securities that are the subject of the proposed consent judgments.

the SEC's representation of the public's interest and the availability of alternative relief and commentor status for the movants, that this Court relies upon in reaching its determination to deny the motion.

Hughes and Kehn purport to offer the Court a general view into the "needs of investors." (Movants' Br. at 5.) There is no indication, however, that their opinions about the proposed consent judgments are shared by the 12,000 other investors allegedly represented by Hooper & Weiss, let alone all allegedly aggrieved investors and interested members of the public. Despite their protestations to the contrary, permitting Hughes and Kehn to intervene would open the floodgates to a multitude of potential intervenors with the same claim to intervention as Hughes and Kehn. The movants admit as much, allowing that "[i]t may be true . . . that there are also other affected people, including some investors, with different thoughts." (Reply Br. at 14.) While dismissing the potential for an avalanche of intervention applications as "massive hyperbole" (Reply Br. at 3), the movants fail to explain why any investor or self-proclaimed interested individual would not have an identical claim to permissive intervention. Were this Court to grant this motion to intervene, it would be logic-bound to allow all investors and interested members of the public with differing viewpoints to intervene in the underlying actions. This is one of the principal reasons that permissive intervention by

individual investors in SEC actions is rarely granted. See, e.g., Everest Mgmt., 475 F.2d at 1239-40; Credit Bancorp, 194 F.R.D. at 468.

Hughes and Kehn gloss over the impact that swarms of potential intervenors would have on this Court's ability to manage these actions by describing such intervention as "purely hypothetical." (Reply Br. at 3.) They ignore the numerous letters from members of the public that this Court has already received, considered and docketed in the underlying actions, as well as the common sense proposition that opening the door to intervention by some self-proclaimed interested parties with views as to the best way to structure the settlements is likely to lead to requests for intervention by other individuals with competing ideas. Rather than being "purely hypothetical," it is just these types of potential (and in this case, likely) consequences that this Court must consider on a motion for permissive intervention. Even if this Court were to employ all of the "variety of case-management tools at its disposal to streamline investor input into this process," as suggested by the movants should "the number of interested persons . . . threaten to become unwieldy" (Reply Br. at 3), such large-scale intervention would cause incalculable confusion, add unmanageable complexity, and bring this Court's review and administration of the underlying actions to a halt.

Further, the SEC is aggressively representing the interests of the investing public in the underlying actions. See Natural Res. Def. Counsel, 834 F.2d at 61-62 (adequacy of representation is a factor in deciding whether to allow permissive intervention under Rule 24(b)(2)); accord 6 Moore's Federal Practice § 24.10[2][c], at 24-59. The fact that Hughes and Kehn may not agree with the SEC's position is of no moment in deciding whether to grant them party status. See, e.g, Canadian Javelin, 64 F.R.D. at 651; Everest Mgmt., 475 F.2d at 1240. Therefore, intervention by Hughes and Kehn to represent the interests of "investors" is unnecessary and redundant.

Finally, each of the proposals advanced by movants to alter the proposed consent judgments would have the effect of subsidizing or bolstering future arbitration claims against the defendants in the underlying actions. The availability of alternative relief -- arbitration -- is another factor militating against granting permissive intervention in this case. See Metzler v. Bennett, No. 97 Civ. 0148, 1998 WL 187454, at *10 (N.D.N.Y. Apr. 15, 1998) (denying permissive intervention on the grounds that, inter alia, the proposed intervenors "have alternative relief available to them"); accord Carter, Rogers and Whitehead, 497 F. Supp. at 452-53; cf. Credit Bancorp, 194 F.R.D. at 469 (conditioning permissive intervention "upon the requirement that intervenors not simultaneously maintain parallel lawsuits in any other jurisdiction"). Indeed, recovery under the

proposed consent judgments does not preclude recovery in any other forum.

Since permissive intervention would cause undue delay, confusion and complication, and since the SEC is representing the interests of the public in the underlying actions, the motion to intervene is denied.

II. *Amici Curiae* Status

The movants argue that, in the absence of intervention, they should be granted formal amici curiae status in the underlying actions. The customary role of an amicus is "to aid the court and offer insights not available from the parties." United States v. El-Gabrowny, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994). It is axiomatic, therefore, that since the role of an amicus submission is to assist the court, "[d]istrict courts have broad discretion to permit or deny the appearance of amici curiae in a given case." United States v. Ahmed, 788 F. Supp. 196, 198 n.1 (S.D.N.Y. 1992); accord United States v. Gotti, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991).

Neither Hughes nor Kehn has a unique point of view that is not available to the Court from the parties in the underlying actions. The SEC is acting as the representative of the public. See supra Section I. This alone is a sufficient basis to deny Hughes and Kehn amici status. See El-Gabrowny, 844 F. Supp. at 957 n.1 (denying amicus status on grounds that "[n]either of

these submissions offers any argument or point of view not available from the parties themselves"); Ahmed, 788 F. Supp. at 198 n.1 (denying amicus status where "defendant's interests are adequately represented by his counsel").

Further, this Court does not believe that Hughes and Kehn are seeking to assist the Court in clarifying the issues "as an objective, neutral, dispassionate 'friend of the court'." Gotti, 755 F. Supp. at 1159. Rather, the movants seek to advance a narrow vision of what the proposed consent judgments should look like to further their potential arbitration claims. (Reply Br. at 7-8.) Conferring amicus status on such partisan interests is inappropriate. See Long Island Soundkeeper Fund, Inc. v. New York Athletic Club, No. 94 Civ. 0436 (RPP), 1995 WL 358777, at *1 (S.D.N.Y. June 14, 1995) ("Denial of leave to appear as amicus in a situation such as this, in which the applicant appears to have its own particular interests in the outcome of the litigation, is far from unprecedented."); accord Ahmed, 788 F. Supp. at 198.

The interests of the public are adequately represented by the SEC, and granting formal amici status to Hughes and Kehn would do nothing to aid this Court's evaluation of the issues in the underlying actions. See Ahmed, 788 F. Supp. at 198 n.1 ("In this case, defendant's interests are adequately represented by his counsel. Moreover, the additional memorandum of law would not aid this Court's evaluation of defendant's motion.") (internal citations omitted). Further, the Court is now aware of

movants' views concerning the proposed consent judgments, and will consider them in its continuing review. Therefore, to the extent that amici status would confer on movants the right to participate in any formal capacity before this Court in the underlying actions, the motion to appear as amici curiae is denied.

The Court, however, appreciates that customers of the defendant investment banks, investors in the implicated securities and members of the general public may have opinions concerning the proper form and implementation of the proposed consent judgments. Therefore, the Court invites any interested person to submit comments to the Court concerning the approval or implementation of the proposed consent decrees, Distribution Fund Plans, Investor Education Fund Plan, or any other subject touching upon the underlying actions. The Court will docket each such submission and consider them at the appropriate time. Further, such comments may be reviewed by the Distribution Fund Administrator in formulating the Distribution Fund Plan, and the Investor Education Fund Administrator in formulating the Investor Education Fund Plan. This will not, as the movants fear, "relegate[] [them] to the status of after-the-fact commenters from outside the process" (Movants' Br. at 5), but will instead allow the Court and the Administrators to consider the views of the broadest possible range of interested parties without compromising the Court's and the Administrators' ability to manage the underlying actions.

CONCLUSION

For the reasons set forth above, Cliff Hughes' and Pamela Kehn's motion to intervene, or in the alternative participate as amici curiae, is denied. The Clerk is directed to file copies of this Memorandum and Order in all of the related actions bearing the following docket numbers: 03 Civ. 2937, 03 Civ. 2938, 03 Civ. 2939, 03 Civ. 2940, 03 Civ. 2941, 03 Civ. 2942, 03 Civ. 2943, 03 Civ. 2944, 03 Civ. 2945, 03 Civ. 2946, 03 Civ. 2947 and 03 Civ. 2948.

Dated: August 25, 2003
New York, New York

SO ORDERED:

/S/ William H. Pauley III /S/
WILLIAM H. PAULEY III
U.S.D.J.

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