

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

CASE NO.: CV-08-B-0761-S

SECURITIES AND	:	
EXCHANGE	:	
COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
LARRY P. LANGFORD,	:	
WILLIAM B. BLOUNT,	:	
BLOUNT PARRISH & CO., INC,	:	
AND ALBERT W. LAPIERRE,	:	
	:	
Defendant.	:	

**REPLY BRIEF OF THE SECURITIES INDUSTRY
AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF ITS
MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE***

The Securities Industry and Financial Markets Association (“SIFMA”) hereby respectfully submits this reply brief in further support of its motion for leave to file a brief *amicus curiae*.

INTRODUCTION

In its moving brief, SIFMA established that it would be appropriate and helpful to the Court for SIFMA’s motion for leave to file its amicus brief to be granted. Indeed, as set forth in SIFMA’s moving brief, the SEC’s claims against the defendants with respect to the swap agreements at issue (the “County Swap

Agreements”) are based on certain assumptions concerning SIFMA’s Municipal Swap Index (the “SIFMA Swap Index”), which assumptions are not accurate. Because SIFMA is the entity that created and maintains the SIFMA Swap Index, it is plainly appropriate for SIFMA to explain the purpose, structure and application of the SIFMA Swap Index by way of its amicus brief.

Although the Securities and Exchange Commission (the “SEC”) states that it is not opposing SIFMA’s motion to file an amicus brief (SEC 8/27/08 Response to SIFMA at 3), the SEC at the same time makes a number of arguments which it asserts should lead the Court to give SIFMA’s amicus brief no weight (*id.*). The SEC’s points are without merit for the reasons stated below.

1. The SEC’s Assertions Regarding SIFMA Are Not A Basis For The Court To Disregard SIFMA’s Brief

Rather than focus on the merits of most of the points that SIFMA made, the SEC devotes much of its attention to SIFMA itself and to various assertions about SIFMA, which the SEC suggests are reasons for the Court to disregard SIFMA’s amicus brief. Respectfully, these idle assertions provide no basis to disregard SIFMA’s brief.

The SEC first suggests that the Court should discount SIFMA’s brief because SIFMA has submitted amicus briefs in a number of other cases. SEC 8/27/08 Response to SIFMA at 8. SIFMA’s submissions in other cases concerning issues unrelated to those presented in this case are plainly irrelevant here. Indeed, the SEC acknowledges that it does “not mean to suggest there is anything

unprincipled about a trade organization advocating on behalf of its members.” SEC 8/27/08 Response to SIFMA at 8. Moreover, in this case, SIFMA is not merely weighing in on a legal issue that has a bearing on its members (which, even the SEC concedes, is appropriate). Rather, in this action, it is undisputed that the claims against the defendants with respect to the County Swap Agreements are based on assumptions concerning SIFMA’s own Swap Index. Because the nature of the SIFMA Swap Index is at the very heart of the claims against the defendants with respect to the County Swap Agreements, it is implausible for the SEC to suggest that the information provided by SIFMA in its amicus brief should be given no weight. Indeed, in its response to defendants’ motions to dismiss, the SEC acknowledged that “[a] better place than the ISDA website for the Court to look for evidence of what the Municipal Swap Index really is would be statements from the organization that created and maintains it – . . . SIFMA.” SEC 7/14/08 Response to Motion to Dismiss at 47-48.

The SEC also asserts that SIFMA is a “biased advocate” on behalf of the defendants, and that “SIFMA and the defendants are working hand-in-hand.” SEC 8/27/08 Response to SIFMA at 10 n.2. These assertions are without basis or merit. It is entirely appropriate for SIFMA to explain to the Court why swap agreements based on SIFMA’s Swap Index do not satisfy the narrow definition of “security-based swap agreement” established by Congress. SIFMA is not

associated with the defendants and is not making arguments on their behalf. As SIFMA repeatedly pointed out in its motion and amicus brief, SIFMA does not take a position with respect to the merits of the allegations in the Complaint or defendants' defenses thereto. SIFMA repeatedly pointed out that it does not take a position with respect to alleged violations of the federal securities laws in connection with certain bonds issued by Jefferson County. SIFMA expressly stated that the SEC has ample statutory authority to seek redress for the alleged wrongdoing under Section 17(a) and Section 10(b) with respect to the bond offerings. Thus, contrary to the SEC's suggestion, should the Court dismiss the swap-related claims, the SEC's claims based on the bond offerings would remain.¹

SIFMA made clear that the only claims that it addresses are the claims with respect to the County Swap Agreements. In that regard, SIFMA has an interest in ensuring that the purpose, structure and application of the SIFMA Swap Index are accurately presented to the Court. Thus, SIFMA is simply explaining to the Court what the SIFMA Swap Index is, and presenting that information in the context of the history and framework of the relevant statutory provisions. The fact

¹ The SEC suggests that the discussion in SIFMA's amicus brief concerning the propriety of using judicial notice at the motion to dismiss stage indicates that SIFMA is "taking sides" in this case. SEC 8/27/08 Response to SIFMA at 9. Because SIFMA is presenting information to the Court, SIFMA believes that it is wholly appropriate for it to provide the Court with the legal authority demonstrating that such information can properly be addressed at this procedural juncture. Nothing about SIFMA's presentation of such authority could reasonably be viewed as an indication that it is arguing on behalf of the defendants or "taking sides."

that the information provided by SIFMA may lead the Court to dismiss a portion of the claims asserted against the defendants does not mean that SIFMA is working with the defendants or arguing on their behalf (which it plainly is not), and it is not a basis to disregard the helpful information that SIFMA has provided to the Court.

2. The SEC's Procedural Arguments Are Without Merit

The SEC makes two procedural arguments in support of its position that SIFMA's amicus brief should be disregarded. These procedural arguments are without merit.

First, the SEC incorrectly assumes that the defendants' pending motion to dismiss only challenges the Court's subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). SEC 8/27/08 Response to SIFMA at 13-16. However, the defendants have also made a motion to dismiss the claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. As SIFMA pointed out in its amicus brief, SIFMA Amicus Br. at 12-13, the Complaint does not state a claim for relief with respect to the swap agreements at issue, and, therefore, dismissal of those claims is appropriate pursuant to Fed. R. Civ. P. 12(b)(6). SIFMA Amicus Br. at 12-13. The SEC does not address this point. By incorrectly focusing exclusively on case law dealing with challenges to subject matter jurisdiction, the SEC thus leaves unanswered the pertinent point that, apart from the subject matter jurisdiction issue, the Complaint fails to state a claim for relief with respect to the swap

agreements. E.g., St. Matthews Baptist Church v. Wachovia Bank, 2005 WL 1199045 (D. N.J. May 18, 2005) (taking judicial notice that LIBOR is an index of rates, and granting 12(b)(6) motion to dismiss because plaintiff could not state a claim under Section 10(b) over non-security based swap agreement).

The SEC also does not address the case law cited by SIFMA which holds that even on a facial challenge to a complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the Court may consider information that is the proper subject of judicial notice. SIFMA Amicus Br. at 13. This is a separate reason why the SEC's subject matter jurisdiction argument is without merit.

Second, the SEC asserts that the Court should not use judicial notice to decide disputed factual issues. SEC 8/27/08 Response to SIFMA at 16. While this statement is true, the SEC never specifies what facts are reasonably in dispute. A careful reading of the SEC's response demonstrates that there are no facts that are reasonably in dispute concerning the nature of the SIFMA Swap Index. Rather, the only issue is how the relevant statutory language applies to those undisputed facts.² The SEC and SIFMA indeed have different views on how the statutory

² Specifically, given the undisputed facts regarding what the SIFMA Swap Index is, the question is whether swap agreements under which payments are based on the SIFMA Swap Index are based on "the price, yield, value or volatility of any security or any group or index of securities, or any interest therein." Section 206B of the Gramm-Leach-Bliley Act (as amended by the Commodity Futures Modernization Act of 2000). See SIFMA Amicus Br. at 18-25.

language applies to the facts.³ But how undisputed facts apply to statutory language is a question of law that the Court may properly resolve on a motion to dismiss.

3. The SEC’s Substantive Arguments Are Without Merit

SIFMA presented a comprehensive analysis of the nature of the SIFMA Swap Index in the context of the relevant statutory language. In that regard, by describing the manner in which the Index is calculated and utilized, SIFMA established that swap agreements under which payments are based on the SIFMA Swap Index are not security-based swap agreements and, thus, do not fall within the limited authority granted to the SEC to bring claims under Section 10(b) and 17(a). The SEC summarily counters that the definition of a “security-based swap agreement” is much broader than the “isolated terms” contained therein. SEC 8/27/08 Response to SIFMA at 19-20. The SEC then goes on to make three arguments that are without merit and do not support its conclusion that SIFMA’s amicus brief should be disregarded.

First, the SEC asserts that the interest rates used to calculate the SIFMA Swap Index are interest rates on bonds, which are securities. SEC 8/27/08

³ For example, the SEC believes that the undisputed fact that the interest rates used to calculate the SIFMA Swap Index are interest rates on bonds (which are securities) renders the Index an index of securities. As explained in SIFMA’s amicus brief and below, the SEC’s conclusion is wrong, but not because of any factual disagreement.

Response to SIFMA at 20-22. This observation is, of course, true, but irrelevant. The fact that the interest rates used to calculate the SIFMA Swap Index are interest rates on bonds does not alter the undisputed fact that the index is an index of interest rates, not an index of securities. The interest rates used in the SIFMA Swap Index are derived from securities for the sole purpose of capturing a tax exempt rate. Interest is only tax exempt if it accrues on a municipal bond. The price, yield, value and volatility of the bond are all irrelevant to the Index. Only the rate is relevant, just as with the LIBOR Index. Indeed, the SIFMA Swap Index is commonly known as the tax exempt equivalent of LIBOR. See SIFMA Amicus Br. at 8, 22. Just as with LIBOR, the terms of the obligations on which the interest rate is set are not relevant to the SIFMA Swap Index. By definition, therefore, the SIFMA Swap Index is not based upon the prices, yields, values or volatilities of the notes from which interest rates are extracted to create the Index.

For the SEC's position to be accepted, the Court would have to read Section 206B of the Gramm-Leach-Bliley Act to include "an index of interest rates that are derived from securities." But that is not what the statute says. The statute refers to an "index of securities," and the SIFMA Swap Index is indisputably an index of interest rates, not an index of securities. See SIFMA Amicus Br. at 18-25. This point is not, as the SEC asserts, a "disingenuous and irrelevant linguistic device." SEC 8/27/08 Response to SIFMA at 5. Rather, it is the same legitimate

point -- based on the text of the statute -- which led the court in St. Matthews to dismiss the Section 10(b) claims in that case because the swap agreements were based on LIBOR, which, like the SIFMA Swap Index, is an index of rates, not an index of securities. 2005 WL 1199045, at *13.

Second, the SEC asserts that the interest rate on the bonds that comprise the SIFMA Swap Index "is the equivalent of their yield." SEC 8/27/08 Response to SIFMA at 22.⁴ This assertion ignores the points that SIFMA made in its brief, including that "rate" and "yield" are two separate economic attributes of a bond. SIFMA Amicus Br. at 24. Interest rate is an express term of a bond (such as the principal amount or maturity date). Yield is not a term of a bond, but rather is derived from a mathematic calculation using components that reflect market conditions and other factors (including rate). See id. "Yield" is not synonymous with "rate." Id. The fact that the computation of yield happens to generate the same number as rate in the case of these particular bonds does not mean that "rate" and "yield" are equivalent conceptually or as a matter of statutory interpretation. Indeed, unlike "rate," the attributes of a security that are used in the statute (price, yield, value and volatility) are all means of tracking changes in the market value of

⁴ The SEC similarly confuses matters by ambiguously suggesting that the interest rates on the securities in the Index are "closely tied to the nature of the underlying securities, including their value and volatility." SEC 8/27/08 Response to SIFMA at 26. Nothing in this vague argument rebuts the clear explanation that SIFMA provided as to why the SIFMA Swap Index does not reflect or represent the composite changes in the prices, yields, market values or volatilities of the bonds whose interest rates are used in the Index. SIFMA Amicus Br. at 23-25.

that security. The undisputed fact remains that the only feature of a variable rate demand note ("VRDO") that has any significance for purposes of deriving the SIFMA Swap Index is its interest rate, and this information is obtained solely for purposes of creating a composite interest rate for use in the tax exempt market.⁵ Thus, the SIFMA Swap Index stands in stark contrast to indices that are designed to capture changes in yields. See SIFMA Amicus Brief at 24, n. 39 (contrasting indices that track changes in rates (such as the SIFMA Swap Index) with indices that track changes in yields (such as the Dow Jones Corporate Bond Index)).

Third, with regard to the SEC's assertion that two of the swap agreements were entered into "simultaneously with" bond offerings, the SEC confusingly asserts that it was not alleging an "alternative" basis for its claim, but rather an "additional" basis. SEC 8/27/08 Response to SIFMA at 27. If, as it appears, the SEC concedes that it cannot base a claim with respect to a swap agreement on the theory that the swap agreement was executed "simultaneously with" a bond offering, then it follows that no purpose was served by the SEC's assertion of its purported "additional" claim with respect to the swap agreements.

⁵ In support of its argument, the SEC quotes from a paragraph appearing on a page of a SIFMA publication that refers to the yield of VRDOs. SEC 8/27/08 Response to SIFMA at 24 (citing Ex. 12 thereto). The SEC's reliance on this paragraph is misplaced for several reasons. First, the paragraph quoted by the SEC does not discuss the SIFMA Swap Index at all, and instead simply mentions "yield" in providing an overview regarding VRDOs. Second, further down on the same page that the SEC cites, the document expressly discusses the separate economic concept of "interest rate" of the VRDOs. In that regard, as set forth in SIFMA's amicus brief, only the interest rate on the VRDOs, not their yields, are extracted to create the SIFMA Swap Index.

That is, it appears that the SEC concedes that its “additional” basis for its claim -- that the swap agreements were negotiated and executed “simultaneously with” a bond offering – is redundant of what it concedes is the requirement that the swap agreements must be security-based in order to come within the scope of the statute. Id. In any event, the SEC’s apparent concession of this point does not support its assertion that SIFMA’s amicus brief should be disregarded. To the contrary, it is respectfully submitted that SIFMA’s brief provided helpful analysis on this point.

CONCLUSION

For the foregoing reasons, as well as those set forth in its moving brief, SIFMA respectfully requests that the Court grant this motion for leave to file its brief *amicus curiae*.

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CERTIFICATE OF SERVICE

I hereby certify that on 9th day of September, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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