

UNITED DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

CIVIL ACTION FILE NO.
1:13-CV-01817-WSD

v.

DETROIT MEMORIAL PARTNERS, LLC,
and MARK MORROW,

Defendants.

BRIEF IN SUPPORT OF PETITION BY CATHEDRAL OF
ST. AUGUSTINE'S FOR LEAVE TO SERVE AS AMICUS CURIAE

Petitioner can think of no better vehicle by which to inform the Court and all interested parties – of its desire to bid on the pending private sale in a timely and intelligent manner pursuant to the mandatory 10% increased bid procedures set forth in 28 U.S.C. 2001(b) and 28 U.S.C. 2004 – than as an amicus curiae.

On November 24, 2015 the State of Michigan Strategic Fund adopted an inducement resolution for a \$26,500,000 bond issue available for petitioner to purchase the subject 28 Michigan cemeteries consistent with the attached draft form of asset purchase agreement, as indicated in the Michigan Strategic Fund Proposed Meeting Minutes. See Exhibit 1, and Exhibit 2. Petitioner's underwriter

has committed to purchase 100% of the prospective bond issue. Petitioner has also arranged to employ reputable personnel to manage the cemeteries – including former Michigan Cemetery Commissioner William R. Eldridge, Esq. See Exhibit 3.

But because cemetery ownership is a highly regulated industry in Michigan, and because the pending terms of sale have been redacted (see Dkt. 119), and remain otherwise undisclosed to date (see Dkt. 138), petitioner would require full access to all material information regarding MMG assets etc. All of which is freely available for the Receiver to obtain and share just for the asking, pursuant to Paragraph 8 of the Order Appointing Receiver (see Dkt. 51).

Law and Discussion

It is appropriate to appoint petitioner as an amicus curiae for the limited purpose requested in this petition. In Michigan an amicus curiae was appointed by the trial court “...to solicit proposals in writing from all parties for the reorganization or sale of the property in a manner that would be more beneficial to the bondholders than the one theretofore approved, **and that such offers be submitted to the court by the friend** with his recommendations.” *Detroit Trust Co. v. Mason*, 309 Mich 281 at 297 (1944). See Exhibit 4.

In *Detroit Trust Co.*, “...A peculiar situation had arisen. The Jefferson Standard plan was the result of negotiations in which plaintiff, the bondholders’

committee and Mr. Morris, employed by the Grand Park Corporation, had participated. **Plaintiff urged the acceptance of the plan. The attorney for the bondholders' committee not only urged it but insisted upon it to the exclusion of any other possible plan. From the testimony offered, it was shown that a better plan was available which would give plaintiff the \$108,000 it asked for and net more for the certificate holders.** A very unfortunate colloquy took place wherein the attorney for the bondholders' committee plainly showed that he was interested only in the Jefferson Standard plan. **The judge could not solicit other plans. He felt that, in fairness to the certificate holders, efforts should be made along this line and thereupon appointed Mr. Meyers friend of the court, not to make any decision for the Court but to obtain other plans and make recommendations, the Court reserving to itself the exclusive right to make the final determination.** Id. at 309.

While this Court also does not sua sponte solicit offers, by law it would consider a 10% increased bid on private sale, pursuant to 28 U.S.C. 2001(b) and 2004. With that in mind, how else is there for petitioner in this case to communicate its offer to the Court – but as an amicus curiae – so that the Court may take note of a 10% higher bid and then commence the procedure provided by 28 U.S.C. 200(b) and 2004?

While petitioner does not suggest that it serve to make recommendations to the Court, petitioner cites the *Detroit Trust Co.* case only to illustrate the use of an amicus curiae as a way to submit an offer to the Court exceeding 10% of the pending sale. Id. at 297, and 309.

“The literal meaning of the term ‘amicus curiae’ is a friend of the Court, and the term includes persons, whether attorneys or laymen, **who interpose in a judicial proceeding to assist the Court by giving information, or otherwise**, or who conduct investigation or other proceeding on request, or by court appointment.” *4 Am. Jur. 2d* 333, Amicus Curiae, §1.

“While Federal Rule of Appellate Procedure 29 and Supreme Court Rule 37 provide for the filing of *amicus curiae* briefs, the Federal Rules of Civil Procedure lack a parallel provision regulating *amicus* appearances at the trial level. **The district court, however, has the inherent authority to appoint *amici curiae*, or “friends of the court,” to assist it in a proceeding.** *United States v. Michigan*, 116 F.R.D. 655, 660 (W.D.Mich. 1987). “Inasmuch as an *amicus* is not a party and does not represent the parties but participates only for the benefit of the court, it is solely within the discretion of the court to determine the facts, extent, and manner of participation by the *amicus*.” *News and Sun-Sentinel Co. v. Cox*, 700 F. Supp. 30, 31 (S.D.Fla. 1988) (citations omitted).

Several courts have approved the use of such appearance in lieu of intervention. Eg., *Piedmont Paper Products, Inc, v American Financial Corp.*., 89 F.R.D. 41 (S.D.Ohio 1980); *see Athens*, 690 F.2d at 1367 (upon denying motion to intervene, court suggested that “the proper course of action may be to file a motion for leave to file an *amicus brief*”). ‘**Participation as *amicus curiae* will alert the court to the legal contentions of concerned bystanders, and because it leaves the parties free to run their own case is the strongly preferred option.’ *Bethune Plaza v. Lumpkin*, 863 F.2d 525 at 533 (1988).” *Resort Timeshare Resales, Inc. v. Stuart* 764 F. Supp. 1495 at 1500-01 (S.D.Fla.1991).**

American Jurisprudence also writes that, “**A private individual seeking to file an amicus appellate brief does not need to be impartial, and may have a pecuniary interest in the outcome of the case.**” 4 Am. Jur. 2d. 333, at 341, Amicus Curiae, §6.

Conclusion

Because the sale of MMG is ultimately underpinned by the 49% membership interest of the Defendant DMP therein, and premised on proper handling of the concomitant perpetual care trusts for the 28 cemeteries, an open sale process permitting all interested purchaser(s) open access to the books and records of the Receivership Defendant, and MMG, vis a vis the cooperation provision in Paragraph 8 of the Order Appointing Receiver (Dkt. 51) – necessary

for due diligence by St. Augustine's as an interested purchaser in this highly regulated industry to make both a competitive financial offer 10% greater than the pending bid, and a proper application to the Michigan Cemetery Commissioner – it is in the best interests of the estate to open the books to both maximize the price paid and thereby available for administrative expenses and distribution to interested parties including the Securities and Exchange Commission and the defrauded investors, and to effectively assure future care for each burial plot owner's final resting place – the heretofore forgotten *raison d'être* of each of the 28 cemeteries.

Therefore petitioner requests that it be appointed amicus curiae so that it may obtain the material information necessary for it to make a competitive and intelligent bid to the Court for the property, and make the necessary application to the Michigan Cemetery Commissioner concomitant with its offer.

Dated: December 23, 2015

Respectfully submitted,

/s/ Michael E. Norman

Michael E. Norman

GA BAR No. 545993

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