UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION This Document Applies To: *In re Lehman Brothers Equity/Debt Securities Litigation*, 08-CV-5523 (LAK)	Case No. 09-MD-2017 (LAK) ECF CASE

**LEAD PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR AUTHORIZATION TO NOTIFY THE CLASS OF
PROPOSED SETTLEMENTS AND TO SCHEDULE A SETTLEMENT HEARING**

I. PRELIMINARY STATEMENT

Lead Plaintiffs move pursuant to Fed. R. Civ. P. 23(e) and Pretrial Order No. 23 (ECF No. 502) for authorization to provide notice of proposed settlements with certain of the Underwriter Defendants and with former officers and directors of Lehman Brothers ("Lehman"), and to schedule a hearing for consideration of approval of the proposed settlements.[1] Through this motion, Lead Plaintiffs request that the Court (i) preliminarily certify the proposed classes for each proposed settlement; (ii) approve the form and manner of giving notice of the proposed settlements to the settlement classes; (iii) schedule a hearing to consider the terms of the proposed settlements and hear from any person or entity who wishes to speak on whether the Court should grant approval of the settlements and other related issues (the "Settlement Hearing"); and (iv) stay all hearings, deadlines and other proceedings in the Action to the extent they involve claims against the settling defendants, except for the Settlement Hearing.

There are two proposed settlements, one with certain of the underwriter defendants for $417 million (the "Underwriter Settlement"), and another with the Lehman directors and officers for $90 million (the "D/O Settlement").[2] Notably, Lead Plaintiffs continue to prosecute the

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[1] "Lead Plaintiffs" refers to Alameda County Employees' Retirement Association, Government of Guam Retirement Fund, Northern Ireland Local Government Officers' Superannuation Committee, City of Edinburgh Council as Administering Authority of the Lothian Pension Fund, and Operating Engineers Local 3 Trust Fund.

[2] Capitalized terms not defined herein are as stated in the stipulations of settlement filed concurrently with this motion (the "D/O Stipulation," Exhibit 2 hereto, and the "Underwriter Stipulation," Exhibit 3 hereto; collectively, the "Stipulations"). The D&O Defendants are: Richard S. Fuld, Jr., Christopher M. O'Meara, Joseph M. Gregory, Erin Callan, Ian Lowitt, Michael L. Ainslie, John F. Akers, Roger S. Berlind, Thomas H. Cruikshank, Marsha Johnson Evans, Sir Christopher Gent, Roland A. Hernandez, Henry Kaufman and John D. Macomber. The Settling Underwriter Defendants are: A.G. Edwards, ABM Amro, ANZ, BOA, BBVA, BNP Paribas, BNY, Caja Madrid, Caylon, CIBC, CGMI, Commerzbank, Daiwa, DnB NOR, DZ Financial, E.D. Jones, Fidelity Capital Markets, Fortis, Harris Nesbitt, HSBC, ING, Loop Capital, Mellon, Merrill Lynch, Mizuho, Morgan Stanley, nabCapital, NAB, Natixis, Raymond

claims against the non-settling defendants – the remaining underwriters and Ernst & Young LLP ("E&Y").[3]

The proposed settlements are the culmination of nearly three years of litigation, which included Lead Plaintiffs' extensive investigation into the claims; the filing of three detailed consolidated complaints; two rounds of motions to dismiss by multiple separate groups of defendants; and protracted settlement negotiations under the supervision of the Hon. Daniel J. Weinstein (Ret.) of JAMS, a highly-experienced mediator. Given Lehman's bankruptcy and the limitations on the financial ability of the Officer Defendants to satisfy a judgment, the additional risks in establishing Defendants' liability and proving damages, and the immediate and substantial total benefit of $507 million, Lead Plaintiffs respectfully submit that they will demonstrate in connection with seeking the Court's ultimate approval of the settlements that the settlements are not only fair, reasonable and adequate, but that they represent an outstanding recovery for the settlement classes. Accordingly, Lead Plaintiffs respectfully request that the Court authorize issuance of the Notices pursuant to Fed. R. Civ. P. 23(e), and establish the following schedule for consideration of the proposed settlements:

James, RBC Capital, RBS Greenwich, Santander, Scotia, SG Americas, Sovereign, SunTrust, TD Securities, UBS Securities, Utendahl, Wachovia Capital, Wachovia Securities, and Wells Fargo.

[3] The underwriter defendants who are not included in the Underwriter Settlement are the following: Cabrera Capital Markets, LLC, Charles Schwab & Co., Inc., HVB Capital Markets, Inc., M.R. Beal & Company, Muriel Siebert & Co., Inc., Siebert Capital Markets, UBS Financial Services, Inc., Williams Capital Group, L.P. and Incapital LLC. However, confidential term sheets have been entered into with each of the underwriter defendants, except for UBS Financial Services, Inc., and Lead Counsel expect to consolidate such settlements into the settlement process for the Underwriter Settlement.

Event	**Proposed Due Date**	**Date/Deadline**[4]
Deadline for mailing the Notices and Proof of Claim to settlement class members[5] ("Notice Date")	20 business days after entry of Preliminary Approval Order	January 4, 2012
Deadline for publishing Summary Notice[6]	10 business days after Notice Date	January 19, 2012
Deadline for filing of papers in support of approval of settlements, Plan of Allocation, and Lead Counsel's application for attorneys' fees and expenses	35 calendar days prior to Settlement Hearing	March 9, 2012
Deadline for submitting exclusion requests or objections	21 calendar days prior to Settlement Hearing	March 23, 2012
Deadline for filing reply papers	7 calendar days prior to Settlement Hearing	April 6, 2012
Settlement Hearing	At least 100 days after the motion for Preliminary Orders is filed on December 2, 2011	April 13, 2012
Deadline for submitting claim forms	120 calendar days after the Notice Date	May 3, 2012

II. THE SETTLEMENTS RESULT FROM EXTENSIVE NEGOTIATIONS AND MEDIATIONS

The settlements are the result of arms'-length discussions and negotiations that extended over more than six months and included multiple face-to-face mediation sessions. Following preliminary settlement discussions in late 2010, and while Defendants' motions to dismiss the Complaint remained *sub judice*, Lead Plaintiffs and the D/O Defendants commenced mediation.

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[4] The specific proposed dates are respectfully requested assuming that the proposed Preliminary Orders are entered on or about December 5, 2011. In the event that the Court does not enter the proposed Preliminary Orders at that time, Lead Counsel respectfully request that the same separation of dates in the schedule be provided for by the Court.

[5] *See* Exhibits A-1 and A-2 to the Preliminary Orders (Exhibit A to the Stipulations).

[6] *See* Exhibits A-3 to the Preliminary Orders (Exhibit A to the Stipulations).

The parties exchanged detailed mediation statements and additional materials setting forth their respective positions on liability and damages. Lead Counsel and counsel for the D/O Defendants participated in a two-day face-to-face mediation session in New York City. After two days, the parties remained far apart in their respective positions. Although a settlement was not reached at this mediation session, both sides remained in communication and met for another mediation session with Judge Weinstein in February 2011. A settlement was still not reached after two additional days of face-to-face negotiations and presentations, but both sides continued negotiations thereafter with the assistance of Judge Weinstein.

In August 2011, Lead Plaintiffs and the D/O Defendants reached an agreement in principle to settle for $90 million in cash, subject to the satisfaction of certain conditions including a confidential assessment of the liquid net worth of the Officer Defendants by a neutral.[7] Following the execution of the term sheet, Lead Counsel and the D/O Defendants negotiated the specific terms of the settlement, as set forth in the October 14, 2011 D/O Stipulation and related exhibits.

The negotiations leading to the Underwriter Settlement also included mediation overseen by Judge Weinstein, direct face-to-face meetings and telephonic negotiations between and among counsel. The parties ultimately entered into a term sheet on October 3, 2011, and executed the Underwriter Stipulation on or about December 2, 2011.

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[7] The D/O Settlement was also conditioned on, among other things, the consent of the Bankruptcy Court to lift the bankruptcy stay and permit the use of the proceeds from the directors and officers ("D&O") insurance policies to fund the D/O Settlement. This condition was satisfied by the Bankruptcy Court's issuance of an order dated October 19, 2011 (attached hereto as Exhibit 1), which, among other things, modified the automatic bankruptcy stay, to the extent applicable, to allow the Excess Policy Insurers to pay the D/O Settlement Amount.

III. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE

The parties have stipulated to certification of settlement classes, which are described in the Notices. The proposed D/O Settlement Class is defined as follows:

> All persons and entities who (1) purchased or acquired Lehman securities identified in Appendix A to the D/O Stipulation pursuant or traceable to the Shelf Registration Statement and who were damaged thereby, (2) purchased or acquired any Lehman Structured Notes identified in Appendix B to the D/O Stipulation[8] pursuant or traceable to the Shelf Registration Statement and who were damaged thereby, or (3) purchased or acquired Lehman common stock, call options, and/or sold put options between June 12, 2007 and September 15, 2008, through and inclusive (the "Lehman Securities"), and who were damaged thereby. Excluded from the Settlement Class are (i) Defendants, (ii) Lehman, (iii) the executive officers and directors of each Defendant or Lehman, (iv) any entity in which Defendants or Lehman have or had a controlling interest, (v) members of Defendants' immediate families, and (vi) the legal representatives, heirs, successors or assigns of any such excluded party. Also excluded from the Settlement Class are any persons or entities who exclude themselves by filing a timely request for exclusion in accordance with the requirements set forth in the D/O Notice.

The proposed UW Settlement Class, which has been stipulated and agreed to by the parties to the Underwriter Settlement solely for the purposes of the Underwriter Settlement, consists of a subset of the D/O Settlement Class as follows:

> All persons and entities who purchased or otherwise acquired Lehman securities identified in Appendix A to the UW Stipulation pursuant or traceable to the Shelf Registration Statement and Offering Materials incorporated by reference in the Shelf Registration Statement and who were damaged thereby.[9] Excluded from the UW Settlement Class are (i) Defendants, (ii) the officers and directors of each Defendant, (iii) any entity (other than a Managed Entity) in which a Defendant owns, or during the period July 19, 2007 to September 15, 2008 (the "Underwriter Settlement Class Period") owned, a majority interest; (iv) members of Defendants' immediate families and the legal representatives, heirs, successors or assigns of any such excluded party; and (v) Lehman. Also excluded from the UW Settlement Class are any persons or entities who exclude themselves by filing a timely request for exclusion in accordance with the requirements set forth in the UW Notice.

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[8] Copies of Appendix A and Appendix B are attached to the D/O Stipulation and D/O Notice.

[9] The UW Settlement Class includes registered mutual funds, managed accounts, or entities with nonproprietary assets managed by any of the Released Underwriter Parties including, but not limited to, the entities listed on Exhibit C to the UW Stipulation, who purchased or otherwise acquired Lehman Securities (each a "Managed Entity"), as defined in the UW Stipulation.

The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *In re Marsh & McLennan Cos., Inc. Sec. Litig*., 2009 WL 5178546, at *8 (S.D.N.Y. Dec. 23, 2009); *see also In re Prudential Sec. Inc. Ltd. P'ships Litig*., 163 F.R.D. 200, 205 (S.D.N.Y. 1995) (certification of a settlement class "has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants").

Here, the proposed settlement classes meet all the requirements of Rule 23(a) and Rule 23(b)(3). First, the numerosity requirement of Rule 23(a)(1) is satisfied because the number of settlement class members for each settlement class is likely to be in the thousands. Thus, the members of the settlement classes are sufficiently numerous that joinder of all members would be impracticable. *See, e.g., Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 175 (S.D.N.Y. 2008) (class of shareholders numbering in hundreds or thousands satisfied the numerosity requirement).

Second, the commonality requirement of Rule 23(a)(2) is readily satisfied. The claims alleged present many questions of law and fact which are common to all members of each settlement class, including: (i) whether the federal securities laws were violated by the defendants' acts and omissions as alleged in the Complaint; (ii) whether documents, press releases and other statements disseminated to the investing public and Lehman's shareholders during the relevant period misrepresented material facts about the business and financial condition of Lehman; (iii) whether statements made by the defendants to the investing public during the relevant period misrepresented and/or omitted material facts about the business and financial condition of Lehman; (iv) whether the market price of Lehman's securities during the

relevant period was artificially inflated due to the material misrepresentations and failures to disclose material facts complained of in the Complaint; and (v) the extent to which the members of the settlement classes have sustained damages and the proper measure of damages. *See In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 85 (S.D.N.Y. 2007) (commonality requirement satisfied where "putative class members have been injured by similar material misrepresentations and omissions"); *see also In re Oxford Health Plans, Inc.*, 191 F.R.D. 369, 374 (S.D.N.Y. 2000) ("Where the facts as alleged show that Defendants' course of conduct concealed material information from an entire putative class, the commonality requirement is met.").

Third, the typicality requirement of Rule 23(a)(3) is established because "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 85 (S.D.N.Y. 2007) (citation omitted); *see Oxford Health Plans*, 191 F.R.D. at 375. Lead Plaintiffs' claims, and the claims of absent settlement class members, are based on the same theories and would be proven by the same evidence.

Fourth, the adequacy requirement of Rule 23(a)(4) is satisfied because the claims of the Lead Plaintiffs do not conflict with those of other settlement class members, and Lead Counsel are qualified, experienced, and generally able to conduct the litigation. *See Marsh & McLennan*, 2009 WL 5178546, at *10; *Oxford Health Plans*, 191 F.R.D. at 376; *In re Drexel Burnham Lambert Group,* 960 F.2d 285, 291 (2d Cir. 1992).

And finally, the prerequisites of Rule 23(b)(3) are also satisfied. As discussed above, there are numerous common issues relating to the liability of defendants which dominate over any individualized issues. In addition, class certification is the superior method of litigating the settlement class members' claims. *See In re Blech Sec. Litig.*, 187 F.R.D. 97, 107 (S.D.N.Y.

1999); *Marsh & McLennan*, 2009 WL 5178546, at *12 (recognizing that the "class action is uniquely suited to resolving securities claims," because "the prohibitive cost of instituting individual actions" in such cases gives class members "limited interest in individually controlling the prosecution or defense of separate actions"); *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 139 (S.D.N.Y. 2008) ("as a general rule, securities fraud cases 'easily satisfy the superiority requirement [as] [m]ost violations of the federal securities laws . . . inflict economic injury on large numbers of geographically dispersed persons such that the cost of pursuing individual litigation to seek recovery is often not feasible'") (quoting *Darquea v. Jarden Corp.*, 2008 WL 622811, at *5 (S.D.N.Y. Mar. 6, 2000)) (alterations in original). Moreover, the manageability concerns of Rule 23(b)(3) are not at issue in a class certified for settlement purposes. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 593 (1997) ("Whether trial would present intractable management problems . . . is not a consideration when settlement-only certification is requested").

IV. THE FORM AND MANNER OF THE NOTICES TO THE SETTLEMENT CLASSES SHOULD BE APPROVED

As outlined in the proposed Preliminary Orders, Lead Plaintiffs will notify settlement class members of the proposed settlements by mailing two Notices (one for the D/O Settlement and one for the Underwriter Settlement; collectively "the Notices") and Proof of Claim forms to all settlement class members who can be identified with reasonable effort.[10] The Notices will advise settlement class members of, among other things: (i) the pendency of the class action; (ii) the essential terms of the applicable settlement; and (iii) information regarding Lead Counsel's

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[10] Lead Plaintiffs respectfully request that the Court appoint GCG to issue notice to the Settlement Class and administer the settlements. GCG was selected following a competitive bidding procedure conducted by Lead Counsel.

motion for attorneys' fees and reimbursement of litigation expenses.[11] In addition, the Notices will provide specifics on the date, time and place of the Settlement Hearing and set forth the procedures, as well as deadlines, for opting out of the settlement classes, objecting to any aspect of the applicable settlement, the proposed Plan of Allocation or the motion for attorneys' fees and reimbursement of Litigation Expenses and submitting a Proof of Claim. Accordingly, the Notices and Summary Notice "fairly apprise the prospective members of the class of the terms of the proposed settlement[s] and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (internal quotation marks omitted).

The proposed Preliminary Orders further require the joint Summary Notice (addressing both proposed settlements) to be published in *The Wall Street Journal* and *Investor's Business Daily*. Lead Counsel will also post copies of the Notices, in addition to other important documents, on their respective firm websites as well as the website developed for the settlements, www.LehmanSecuritiesLitigationSettlement.com. Further, Lead Plaintiffs, through the assistance of the Claims Administrator, will give notice to nominee purchasers such as brokerage firms and other persons who purchased or acquired the relevant securities as record owners but not as beneficial owners.

The form and manner of providing notice to the settlement classes represents the best notice practicable under the circumstances and satisfy the requirements of due process, Rule 23, and the Private Securities Litigation Reform Act of 1995. *See In re Warner Chilcott Ltd. Sec.*

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[11] In connection with the subsequently reached settlements with the former Non-Settling Underwriter Defendants other than UBS Financial Services, Inc., Lead Plaintiffs will provide the Court with Appendix C to the Notice for the Underwriter Settlement and Appendix D to the Notice for the D/O Settlement. These appendices will reflect the average estimated recovery per security, as well as the average estimated per security fees and expenses that may be sought.

Litig., 2008 WL 5110904, at *3 (S.D.N.Y. Nov. 20, 2008); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 448-49 (S.D.N.Y. 2004).

V. CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court enter the proposed Orders which will, preliminarily certify the settlement classes for settlement purposes only, schedule a date and time for the Settlement Hearing to consider approval of the settlements and related matters following an opportunity for settlement class members to be heard, and stay all hearings, deadlines and other proceedings in the Action to the extent they involve claims against the settling defendants, except for the Settlement Hearing.

DATED: December 2, 2011

Respectfully Submitted,

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