UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION

This document applies to: 09 MD 2017 (LAK)

In re Lehman Brothers Equity/Debt Securities Litigation, 08 Civ. 5523 (LAK)

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PRETRIAL ORDER NO. 36
(Suntrust Motion to Enjoin FINRA Arbitration)

LEWIS A. KAPLAN, *District Judge.*

Suntrust Robinson Humphrey, Inc. ("Suntrust"), a settling underwriter defendant, objects to the Report and Recommendation of Magistrate Judge Gabriel W. Gorenstein, entered June 29, 2012 ("R&R"), which recommended denial of Suntrust's motion to enjoin an arbitration pending before FINRA. The objections are overruled and the motion [DI 917] is denied.

As these objections have been handled, at the parties' request, on an expedited basis and the parties have entreated the Court to rule promptly, preferably by August 1, the Court states only that it rules as it has, substantially for the reasons given in the R&R and at pages 16-20 of the response to Suntrust's objections. It nevertheless briefly emphasizes one point.

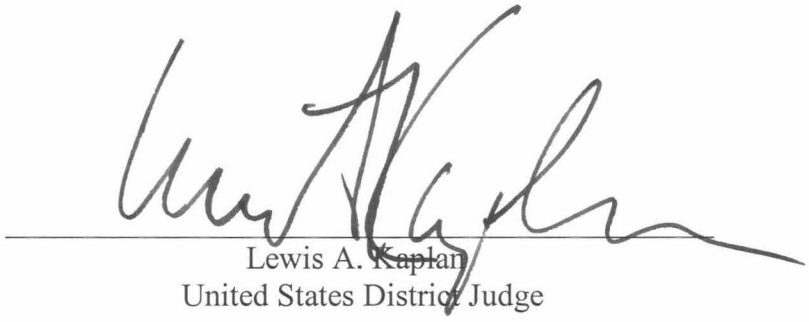
Suntrust relies heavily on rulings in the *WorldCom* case that it refers to as the *Gimbel* decisions, which it claims are inconsistent with the R&R. It characterizes them as standing for the proposition "that a claim seeking recovery of losses on investments in a particular security based on a theory that the broker's advice was improper shares the same 'factual predicate' as a claim seeking recovery of the same investment losses on a theory that the available public information regarding the security was misleading or incomplete." It suggests that this case is controlled by that proposition.

Given the limitations of time, the Court declines to expand on whether Suntrust's characterization of the *Gimbel* decisions is correct. Even if it were, however, the proposition would not be persuasive here. The claim against the underwriters in this case was based exclusively on Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, which in relevant part would have required the plaintiffs, in order to establish liability (subject to an affirmative defense of due diligence) to prove only that the registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the

statements therein not misleading." *E.g., In re Lehman Bros. Sec. and ERISA Lit.*, 684 F. Supp.2d 485, 489-90 (S.D.N.Y. 2010) (quoting 15 U.S.C. § 77k(a)). The gravamen of such a claim, therefore, is the existence of material misstatements and omissions in the registration statement. Here, on the other hand, the gravamen of the arbitration claim is not that there were material misrepresentations or omissions in the offering materials, but whether Suntrust recommended the investment despite its unsuitability for the claimant and other characteristics of the securities. In this Court's view, Magistrate Judge Gorenstein was correct in concluding that the lawsuit and the arbitration, despite some inevitable overlap, do not share the identical factual predicate. If and to the extent that the *Gimbel* decisions are inconsistent with this view, and the Court expresses no view on that point, they would not be persuasive on the facts of this case.

SO ORDERED.

Dated: July 27, 2012



Lewis A. Kaplan
United States District Judge