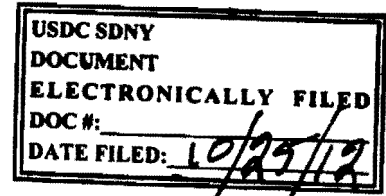


Kobhan, J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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In re:

09 MD 2017 (LAK)

LEHMAN BROTHERS SECURITIES AND
ERISA LITIGATION

This Document Applies Only to:

Vallejo Sanitation and Flood Control District v. Fuld, et al.
S.D.N.Y. Case No. 1:09-cv-06040-LAK;

*Mary A. Zeeb, Monterey County Treasurer, on Behalf of the
Monterey County Investment Pool v. Fuld, et al.*
S.D.N.Y. Case No. 1:09-cv-01944-LAK;

Contra Costa Water District v. Fuld, et al.
S.D.N.Y. Case No. 1:09-cv-06652-LAK;

City of Burbank v. Fuld, et al.
S.D.N.Y. Case No. 1:09-cv-03475-LAK;

City of San Buenaventura v. Fuld, et al.
S.D.N.Y. Case No. 1:09-cv-03476-LAK;

City of Auburn v. Fuld, et al.
S.D.N.Y. Case No. 1:09-cv-03474-LAK;

The San Mateo County Investment Pool v. Fuld, et al.
S.D.N.Y. Case No. 1:09-cv-01239-LAK; and

Zenith Insurance Company v. Fuld, et al.
S.D.N.Y. Case No. 1:09-cv-01238-LAK

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~~PROPOSED~~ PRETRIAL ORDER NO. 40
(Motions to Dismiss the Consolidated First Amended Complaint)

On October 15, 2012, the Court issued a Memorandum Opinion (the "Opinion") granting in part and denying in part the defendants' Motions to Dismiss Plaintiffs' Consolidated First Amended Complaint ("CFAC").¹ That Opinion also directed the defendants to settle an order more fully setting forth the rulings in the Opinion, preferably with agreement from all parties. Having reviewed the parties' joint proposal, and for the reasons set forth in the October 15, 2012 Opinion, it is hereby ORDERED:

Count I
Claims Under Section 11 of the Securities Act
Against the Securities Act Defendants² and EY

With Respect to the Securities Act Defendants:

- A. Timeliness
 - 1. The Motion to Dismiss is granted as to all Securities Act claims of plaintiffs City of Auburn, Contra Costa Water District, Mary A. Zeeb, Monterey County Treasurer, and Zenith, as these claims are barred by the three-year statute of repose.
 - 2. The Motion to Dismiss is granted as to the Securities Act claims of plaintiffs City of Burbank, San Mateo County, and the Vallejo Sanitation & Flood District with respect to the securities bearing CUSIP numbers 52517PG96, 52517PXU0, 52517PC58, 52517PYN5, and 52517PXT3, as these claims are barred by the three-year statute of repose.

¹ Defendant Ernst & Young LLP ("EY") joined in part the Bank Defendants' Motion to Dismiss Plaintiffs' Consolidated First Amended Complaint and the Individual Defendants' Motion to Dismiss the Consolidated First Amended Complaint. As set forth below, the Court dismissed certain claims against EY on grounds set forth in defendants' motions.

² The Securities Act Defendants are Richard S. Fuld, Jr., Christopher M. O'Meara, Erin Callan, and the Director Defendants. The Director Defendants are John F. Akers, Roger S. Berlind, Marsha Johnson Evans, Roland A. Hernandez, and Henry Kaufman.

- B. The Sufficiency of the Remaining Section 11 Claims³
- (i) Alleged Misstatements and Omissions Dismissed in *In re Lehman Brothers Equity/Debt Securities Litigation*, No. 08-cv-5523 (LAK) (“the E/D Class Action”)
 - (1) Regulation S-K Item 303
3. The Court declines to decide whether Item 303 of Regulation S-K required the disclosure of Repo 105⁴ transactions.
- (2) SFAS 140 and Repo 105 transactions
4. The Motion to Dismiss is granted as to the claims based on allegations that Lehman Brothers Holdings Inc.’s (“Lehman’s”) financial statements were materially false and misleading on the basis that Lehman accounted for the Repo 105 transactions as sales rather than financings under SFAS 140.
- (3) Valuation of Real Estate and SFAS 157
5. The Motion to Dismiss is granted as to the claims based on allegations that Lehman did not believe that the real estate valuations used in its financial and other statements were unreasonable or that its financial statements did not comply with SFAS 157.
- (4) Risk Mitigants
6. The Motion to Dismiss is granted as to the claims based on allegations that Lehman made misleading disclosures relating to its use of risk mitigants.
- (5) Liquidity Pool
7. The Motion to Dismiss is granted as to the claims based on allegations that Lehman made misleading disclosures regarding the size and strength of its reported liquidity pool.

³ Plaintiffs City of Burbank, City of San Buenaventura, San Mateo County, and Vallejo Sanitation & Flood District have Section 11 claims remaining based on their purchases of securities bearing CUSIP numbers 5252M0BZ9, 52517PK83, 52517PN98, 52517PQ46, 52517PW31, and 52517P2K6.

⁴ “Repo 105” is used to refer to Repo 105 and Repo 108 transactions collectively.

(ii) Viability in this Case of Alleged Misstatements and Omissions Upheld as Sufficient in the E/D Class Action

(1) SFAS 107 and credit risk in Alt-A holdings

8. The Motion to Dismiss is granted as to the claims based on Lehman's alleged failure, in violation of SFAS 107, to adequately disclose concentrations of credit risk in Alt-A holdings.

(2) SFAS 107 and credit risk in commercial real estate holdings

9. The Motion to Dismiss is granted as to the claims based on Lehman's alleged faulty disclosure with respect to the concentration of credit risk in commercial real estate holdings, except for the four purchases described in footnote 5, below, made during the time period between Lehman's awareness of the concentration and its disclosure of that risk in its 1Q2008 Form 10-Q on April 8, 2008, to the extent such claims are not already barred by Securities Act § 13.⁵

(3) Materiality of Repo 105 transactions

10. The Motion to Dismiss is denied as to the defendants' arguments that Lehman's misstatements and omissions relating to Repo 105 transactions were immaterial before the end of 2007.

(4) Risk limits

11. The Motion to Dismiss is granted as to any claim, to the extent made by plaintiffs, based on Lehman's alleged exceeding of its risk limits for securities purchased before July 2007, as described in footnote 6 below, to the extent such claims are not already barred by Securities Act § 13.⁶

⁵ The four relevant purchases during that period are Burbank's purchase on January 29, 2008 of CUSIP No. 525M0BZ9; Vallejo's purchase on January 30, 2008 of CUSIP No. 525M0BZ9; Ventura's purchase on February 5, 2008 of CUSIP No. 5252M0BZ9; and San Mateo's purchase on February 15, 2008 of CUSIP No. 52517PK83. Two purchases during that period, Auburn's claim with respect to its March 31, 2008 purchase of CUSIP No. 52517PSC6 and Contra Costa's claim with respect to its February 5, 2008 purchase of CUSIP No. 52517PR60, are barred by Securities Act § 13 as previously discussed.

⁶ Plaintiffs' pre-July 2007 purchases are Burbank's purchase on May 9, 2006 of CUSIP No. 52517PG96; San Mateo's purchases on October 25, 2004, October 24, 2005, August 21, 2006, November 16, 2006, December 21, 2006, March 23, 2007, and May 25, 2007 of CUSIP Nos. 52517PXU0, 52517PC58, 52517PK83, 52517PN98, 52517PQ46, 52517PW31, and 52517P2K6, respectively; and Zenith's purchases on August 18, 2005 and September 26, 2006 of CUSIP No. 52517PA35.

(5) Stress tests

12. The Motion to Dismiss is granted as to the claims based on Lehman's alleged misleading stress testing statements for securities purchased before February 13, 2007, as described in footnote 7 below, to the extent such claims are not already barred by Securities Act § 13.⁷

(6) VaR limits

13. The Motion to Dismiss is granted as to the claims based on Lehman's alleged misleading VaR statements for securities purchased before July 1, 2007, as described in footnote 8 below, to the extent such claims are not already barred by Securities Act § 13.⁸

With Respect to Callan:

14. The Motion to Dismiss is granted as to all Section 11 claims against Callan based on statements made prior to January 29, 2008, except for the claim related to plaintiff San Mateo's January 22, 2008 purchase of securities bearing CUSIP No. 5252M0BZ9.

With Respect to Ernst & Young LLP ("EY")

15. The Motion to Dismiss is granted as to all Securities Act claims of plaintiffs City of Auburn, Contra Costa Water District, Mary A. Zeeb, Monterey County Treasurer, and Zenith, as the claims are barred by the three-year statute of repose.
16. The Motion to Dismiss is granted as to the Securities Act claims of plaintiffs City of Burbank, San Mateo County, and the Vallejo Sanitation & Flood District with respect to the securities bearing CUSIP numbers 52517PG96, 52517PXU0, 52517PC58, 52517PYN5, and 52517PXT3, as the claims are barred by the three-year statute of repose.

⁷ Plaintiffs' pre-February 13, 2007 purchases are Burbank's purchase on May 9, 2006 of CUSIP No. 52517PG96; San Mateo's purchases on October 25, 2004, October 24, 2005, August 21, 2006, November 16, 2006, and December 21, 2006 of CUSIP Nos. 52517PXU0, 52517PC58, 52517PK83, 52517PN98, and 52517PQ46, respectively; and Zenith's purchases on August 18, 2005 and September 26, 2006 of CUSIP No. 52517PA35.

⁸ Plaintiffs' pre-July 1, 2007 purchases are Burbank's purchase on May 9, 2006 of CUSIP No. 52517PG96; San Mateo's purchases on October 25, 2004, October 24, 2005, August 21, 2006, November 16, 2006, December 21, 2006, March 23, 2007, and May 25, 2007 of CUSIP Nos. 52517PXU0, 52517PC58, 52517PK83, 52517PN98, 52517PQ46, 52517PW31, and 52517P2K6, respectively; and Zenith's purchases on August 18, 2005 and September 26, 2006 of CUSIP No. 52517PA35.

17. The Motion to Dismiss is denied as to the Securities Act claims of plaintiffs City of San Buenaventura, City of Burbank, San Mateo County, and the Vallejo Sanitation & Flood District with respect to the securities bearing CUSIP numbers 5252M0BZ9, 52517PK83, 52517PN98, 52517PQ46, 52517PW31, and 52517P2K6.

Count II
Claims Under Section 15 of the Securities Act
Against Defendants Fuld, O'Meara, Callan, and Lowitt

18. The Motion to Dismiss the Section 15 claims is granted to the extent plaintiffs have not asserted legally sufficient claims under Section 11 as discussed in Parts A & B above.
19. The Motion to Dismiss the Section 15 claims is denied to the extent plaintiffs have asserted legally sufficient claims under Section 11 as discussed in Parts A & B above.

Count III
Section 10(b) of The Exchange Act and Rule 10b-5
Claims Against the Officer Defendants⁹ and EY

With Respect to the Officer Defendants

- A. The Existence of Materially False and Misleading Statements or Omissions
 - (i) Alleged Misstatements and Omissions Dismissed in *In re Lehman Brothers Equity/Debt Securities Litigation*, No. 08-cv-5523 (LAK) ("the E/D Class Action")
 - (1) Regulation S-K Item 303
20. The Court declines to decide whether Item 303 of Regulation S-K required the disclosure of Repo 105 transactions.
 - (2) SFAS 140 and Repo 105 transactions
21. The Motion to Dismiss is granted as to the claims based on allegations that Lehman's financial statements were materially false and misleading on the basis that Lehman accounted for the Repo 105 transactions as sales rather than financings under SFAS 140.

⁹ The Officer Defendants are Fuld, O'Meara, Callan, Ian Lowitt, and Joseph M. Gregory.

(3) Valuation of Real Estate and SFAS 157

22. The Motion to Dismiss is granted as to the claims based on allegations that Lehman did not believe that the real estate valuations used in its financial and other statements were unreasonable or that its financial statements did not comply with SFAS 157.

(4) Risk Mitigants

23. The Motion to Dismiss is granted as to the claims based on allegations that Lehman made misleading disclosures relating to its use of risk mitigants.

(5) Liquidity Pool

24. The Motion to Dismiss is granted as to the claims based on allegations that Lehman made misleading disclosures regarding the size and strength of its reported liquidity pool.

(ii) Viability in this Case of Alleged Misstatements and Omissions Upheld as Sufficient in the E/D Class Action

(1) SFAS 107 and credit risk in Alt-A holdings

25. The Motion to Dismiss is granted as to the claims based on Lehman's alleged failure, in violation of SFAS 107, to adequately disclose concentrations of credit risk in Alt-A holdings.

(2) SFAS 107 and credit risk in commercial real estate holdings

26. The Motion to Dismiss is granted as to the claims based on Lehman's alleged faulty disclosure with respect to the concentration of credit risk in commercial real estate holdings, except for the six purchases described in footnote 10, below, made during the time period between Lehman's awareness of the concentration and its disclosure of that risk in its 1Q2008 Form 10-Q on April 8, 2008.¹⁰

¹⁰ The six relevant purchases during that period are Burbank's purchase on January 29, 2008 of CUSIP No. 525M0BZ9; Vallejo's purchase on January 30, 2008 of CUSIP No. 525M0BZ9; Contra Costa's purchase on February 5, 2008 of CUSIP No. 52517PR60; Ventura's purchase on February 5, 2008 of CUSIP No. 5252M0BZ9; San Mateo's purchase on February 15, 2008 of CUSIP No. 52517PK83; and Auburn's purchase on March 31, 2008 of CUSIP No. 52517PSC6.

(3) Materiality of Repo 105 transactions

27. The Motion to Dismiss is denied as to the defendants' arguments that Lehman's misstatements and omissions relating to Repo 105 transactions were immaterial before the end of 2007.

(4) Risk limits

28. The Motion to Dismiss is granted as to any claim, to the extent made by plaintiffs, based on Lehman's alleged exceeding of its risk limits for securities purchased before July 2007, as described in footnote 6 above.

(5) Stress tests

29. The Motion to Dismiss is granted as to the claims based on Lehman's alleged misleading stress testing statements for securities purchased before February 13, 2007, as described in footnote 7 above.

(6) VaR limits

30. The Motion to Dismiss is granted as to the claims based on Lehman's alleged misleading VaR statements for securities purchased before July 1, 2007, as described in footnote 8 above.

B. Scierter

(i) Motive and Opportunity

31. The Motion to Dismiss is granted on the ground that the CFAC fails to allege scierter on a motive-and-opportunity basis.

(ii) Circumstantial Evidence of Conscious Misbehavior or Recklessness

(a) Repo 105

32. The Motion to Dismiss is denied as to the allegations that the Officer Defendants knew, or recklessly disregarded, that the use of the Repo 105 transactions and the manner in which they were accounted for allegedly painted a misleading picture of Lehman's finances.

(b) Concentrations of credit risk

33. The Motion to Dismiss is granted on the ground that the CFAC fails to allege scierter on the part of Callan, Lowitt, and O'Meara concerning Lehman's obligation under SFAS 107 to disclose a significant concentration of credit risk with respect to commercial real estate in its 2007 10-K.

34. The Motion to Dismiss is denied on the ground that the CFAC sufficiently alleges scienter on the part of Fuld and Gregory concerning Lehman's obligation under SFAS 107 to disclose a significant concentration of commercial real estate credit risk only with respect to allegations regarding the November 6, 2007 Executive Committee meeting.

(c) Valuation of Commercial Real Estate and SFAS 157

35. The Motion to Dismiss is granted on the ground that the CFAC fails to allege scienter on the part of the Officer Defendants concerning the allegations regarding valuation of Lehman's commercial real estate assets.

(d) GAAP Violations

36. The Motion to Dismiss is granted on the ground that the CFAC fails to sufficiently allege scienter on the part of the Officer Defendants regarding GAAP violations.

(e) Stress Tests

37. The Motion to Dismiss is granted on the ground that the CFAC fails to sufficiently allege scienter on the part of the Officer Defendants with respect to the stress test-related allegations.

With Respect to Defendant EY

38. EY did not challenge the Section 10(b) claim asserted against it. Thus, the Court declines to dismiss this claim.

Count IV

**Section 20(a) of The Exchange Act Claims
Against the Officer Defendants and Director Defendants**

39. The Motion to Dismiss the Section 20(a) claims is granted to the extent the Section 20(a) claims are based on Section 10(b) claims that were dismissed.
40. The Motion to Dismiss the Section 20(a) claims is denied to the extent the Section 20(a) claims are based on Section 10(b) claims that were not dismissed.

Count V

California Corporations Code §§ 25400 and 25500 Claims Against Defendants Fuld, O’Meara, Gregory, Lowitt, Akers, Berlind, Hernandez, and Kaufman

41. The Motion to Dismiss is granted as to the California Corporations Code §§ 25400 and 25500 claims.

Count VI

California Corporations Code § 25504 Claims Against the Officer Defendants, Director Defendants, and Underwriter Defendants¹¹

42. The Motions to Dismiss are granted as to the California Corporations Code § 25504 claims.

Count VII

California Corporations Code § 25504.1 Claims Against the Officer Defendants

43. The Motion to Dismiss is granted as to the California Corporations Code § 25504.1 claims.

Count VIII

California Corporations Code §25504.2 Claims Against EY

44. The Motion to Dismiss is granted as to the California Corporations Code § 25504.2 claims.

¹¹ The Underwriter Defendants are ABN Amro Holding N.V. (n/k/a RBS Holdings N.V.); ANZ Securities, Inc.; Banc of America Securities LLC; BBVA Securities, Inc.; BNP Paribas S.A.; Calyon Securities (USA), Inc.; Citigroup Global Markets, Inc.; Commerzbank Capital Markets Corp.; Daiwa Capital Markets Europe Ltd. (f/k/a Daiwa Securities SMBC Europe Ltd.); Fortis Securities LLC; Harris Nesbitt Corp. (n/k/a BMO Capital Markets Corp.); HSBC Securities (USA), Inc.; ING Financial Markets LLC; Loop Capital Markets LLC; Mellon Financial Markets LLC (n/k/a BNY Mellon Capital Markets LLC); Natixis Bleichroeder, Inc. (n/k/a Natixis Securities Americas LLC); RBS Greenwich Capital (n/k/a RBS Securities Inc.); Santander Investment Securities, Inc.; Siebert Capital Markets; SG Americas Securities, LLC (incorrectly named as Societe Generale Corporate and Investment Banking); SunTrust Robinson Humphrey, Inc.; Wells Fargo Securities LLC; HVB Capital Markets, Inc.; M.R. Beal & Co.; and Williams Capital Group.

Count IX

Common Law Fraud and Deceit Claims Against the Officer Defendants and EY

With Respect to the Officer Defendants:

45. The Motion to Dismiss is granted as to the common law fraud and deceit claims.

With Respect to Defendant EY

46. EY did not challenge the common law fraud and deceit claim against it. Thus, the Court declines to dismiss this claim.

Count X

**Aiding and Abetting Fraud Claims
Against the Officer Defendants, Director Defendants, and EY**

With Respect to the Officer Defendants and the Director Defendants:

47. The Motion to Dismiss is granted as to the aiding and abetting common law fraud and deceit claims.

With Respect to Defendant EY

48. EY did not challenge the aiding and abetting common law fraud and deceit claim against it. Thus, the Court declines to dismiss this claim.

Count XI

**Negligent Misrepresentation Claims Against
the Officer Defendants and Director Defendants**

49. The Motion to Dismiss is granted as to the negligent misrepresentation claims.

Count XII

Fraudulent Conveyance Claim Against Richard and Kathleen Fuld

50. The Motion to Dismiss is denied as to the fraudulent conveyance claim.
51. All claims dismissed by this Order are dismissed with prejudice.

SO ORDERED



LEWIS A. KAPLAN, USDJ

10/25/12



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October 24, 2012

VIA EMAIL TO JUDGMENTS@NYS.USCOURTS.GOV

Orders & Judgments Clerk
United States District Court
Southern District of New York
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *In re: Lehman Brothers Securities and ERISA Litigation*, No. 09-md-2017;
Vallejo Sanitation and Flood Control District v. Fuld, et al., No. 09-cv-06040-LAK;
Mary A. Zeeb, Monterey County Treasurer, on Behalf of the Monterey County Investment Pool v. Fuld, et al., No. 09-cv-01944-LAK;
Contra Costa Water District v. Fuld, et al., No. 09-cv-06652-LAK;
City of Burbank v. Fuld, et al., No. 09-cv-03475-LAK;
City of San Buenaventura v. Fuld, et al., No. 09-cv-03476-LAK;
City of Auburn v. Fuld, et al., No. 09-cv-03474-LAK;
The San Mateo County Investment Pool v. Fuld, et al., No. 09-cv-01239-LAK; and
Zenith Insurance Company v. Fuld, et al., No. 09-cv-01238-LAK.

Dear Sir or Madam:

We represent defendants John F. Akers, Roger S. Berlind, Marsha Johnson Evans, Roland A. Hernandez, and Henry Kaufman (the "Director Defendants") in *In re: Lehman Brothers Securities and ERISA Litigation*, No. 09-md-2017 (the "Lehman MDL"), as well as in the eight specific actions listed above (the "Cotchett Actions"), all of which are pending before the Honorable Lewis A. Kaplan. We are writing on behalf of counsel for plaintiffs and defendants in the Cotchett Actions.¹

¹ In addition to our clients, the defendants in the Cotchett Actions are: Richard S. Fuld, Christopher M. O'Meara, Erin Callan, Joseph M. Gregory, and Ian Lowitt (the "Officer Defendants"); the Underwriter Defendants (as that term is defined in footnote 14 on page 5 of Judge Kaplan's October 15, 2012 memorandum opinion (MDL no. 1017) (the "Opinion")); Ernst & Young LLP; HVB Capital Markets; M.R. Beal & Company; and The Williams Capital Group, L.P.

Dechert
LLP

Orders & Judgments Clerk
October 24, 2012
Page 2

On October 15, 2012, Judge Kaplan issued the Opinion granting in part and denying in part the motions to dismiss filed in the Cotchett Actions. On page 66 of the Opinion, Judge Kaplan stated:

The defendants shall settle an order more fully setting forth the rulings made above. The Court would be grateful for an order agreed as to form by all parties. Absent agreement, defendants shall settle their proposed order, on seven days' notice. The agreed or proposed order shall be submitted no later than October 24, 2012.

Enclosed please find a joint proposed order that has been agreed as to form by the parties (plaintiffs and defendants) in the Cotchett Actions.

Respectfully submitted,

A handwritten signature in black ink that reads "Adam J. Wasserman" followed by a stylized flourish.

Adam J. Wasserman

Enclosures

cc: Counsel of Record in the Cotchett Actions (via email)

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