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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re: :  
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LEHMAN BROTHERS SECURITIES :  
AND ERISA LITIGATION :  
: :  
This Document Applies To: :  
: :  
Retirement Housing Foundation, et al. v. :  
Fuld, et al., No. 10 Civ. 6185 (LAK) :  
: :  
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MASTER DOCKET  
09 MD 2017 (LAK) ECF CASE

~~PROPOSED~~ PRETRIAL ORDER NO. 53  
(RHF -- Motion to Dismiss the First Amended Complaint)

On December 17, 2012, the Court issued Pretrial Order No. 49 granting in part and denying in part the Individual Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint ("Amended Complaint").<sup>1</sup> Pretrial Order No. 49 also directed the defendants to settle an order more fully setting forth the rulings made in Pretrial Order No. 49, preferably with agreement from all parties. Having reviewed the parties' joint proposal, and for the reasons set forth in Pretrial Order No. 49, it is hereby ORDERED:

**Count I**  
**Section 10(b) of The Exchange Act and Rule 10b-5**  
**Claims Against the Officer Defendants 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 Bros. Sec. and ERISA Litig.*, 799 F. Supp. 2d 258 (S.D.N.Y. 2011) (the "Class Action") or in *In re Lehman Bros. Sec. and ERISA*

<sup>1</sup> The "Individual Defendants" are Richard S. Fuld, Jr., Joseph M. Gregory, Christopher M. O'Meara, Ian Lowitt and Erin Callan (the "Officer Defendants") and 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 Macomber (the "Director Defendants"). Defendant Ernst & Young ("EY") did not move to dismiss the Amended Complaint.

*Litig.*, No. 09 MD 2017 (LAK), 2012 WL 4866504 (S.D.N.Y. Oct. 15, 2012) (the “*California Cases*”).

(1) Regulation S-K Item 303

1. The Court declines to decide whether Item 303 of Regulation S-K required the disclosure of Repo 105<sup>2</sup> transactions.

(2) SFAS 140 and Repo 105 transactions

2. 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

3. 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

4. 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

5. 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 *Class Action* and *California Cases*

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

6. 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, except for the single purchase RHF made on May 21, 2008 of CUSIP No. 52517PA35.

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<sup>2</sup> “Repo 105” is used to refer to Repo 105 and Repo 108 transactions collectively.

- (2) SFAS 107 and credit risk in commercial real estate holdings
- 7. 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.
  - (3) Materiality of Repo 105 transactions
- 8. 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, stress tests and VaR limits
- 9. The Motion to Dismiss is denied as to the allegations that Lehman exceeded its risk limits, stated that it used stress testing to evaluate risks associated with its real estate portfolio, and exceeded its stated Value-at-Risk limits.
- B. Scierer
  - (i) Motive and Opportunity
- 10. The Motion to Dismiss is granted on the ground that the Amended Complaint fails to allege scierer on a motive-and-opportunity basis.
  - (ii) Circumstantial Evidence of Conscious Misbehavior or Recklessness
    - (a) Repo 105
- 11. 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 in Alt-A holdings
- 12. The Motion to Dismiss is granted on the ground that the Amended Complaint fails to allege scierer on the part of the Officer Defendants concerning Lehman's obligation under SFAS 107 to disclose a significant concentration of Alt-A holdings at the time of plaintiffs' purchases.
  - (c) Concentrations of credit risk in commercial real estate
- 13. The Motion to Dismiss is granted on the ground that the Amended Complaint fails to allege scierer on the part of the Officer Defendants

concerning Lehman's obligation under SFAS 107 to disclose a significant concentration of credit risk with respect to commercial real estate at the time of plaintiffs' purchases.

(d) Valuation of Commercial Real Estate and SFAS 157

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

(e) GAAP Violations

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

(f) Stress Tests

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

**Count II**

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

17. 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.
18. 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 III**

**Common Law Fraud and Deceit Claims Against The Officer Defendants and EY**

19. The Motion to Dismiss is granted as to the common law fraud and deceit claims against the Officer Defendants.

**Count IV**

**Aiding and Abetting Fraud Claims Against the Individual Defendants and EY**

20. The Motion to Dismiss is granted as to the aiding and abetting fraud claims against the Individual Defendants.

**Count V**

**California Corporations Code § 1507 Claims Against the Individual Defendants**

21. The Motion to Dismiss is granted as to the California Corporations Code § 1507 claims.

**Count VI**

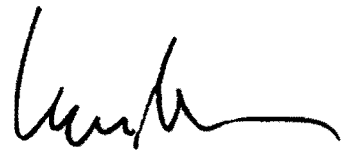
**Negligent Misrepresentation Claims Against the Officer Defendants**

22. The Motion to Dismiss is granted as to the negligent misrepresentation claims.
23. All claims dismissed by this Order are dismissed with prejudice
24. The Amended Complaint is dismissed in its entirety as to the Director Defendants.
25. The parties jointly stipulate and agree that the remaining defendants shall answer or otherwise respond to the Amended Complaint on or before January 31, 2013. However, this extension shall not prejudice plaintiffs' rights to participate in any discovery commenced prior to January 31, 2013 in these consolidated actions.

SO ORDERED.

Date: \_\_\_\_\_

*January 3, 2013*



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Lewis A. Kaplan  
United States District Judge