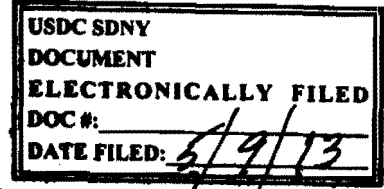


Kaplan, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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In re: :
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 : 09 MD 2017 (LAK)
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 : LEHMAN BROTHERS SECURITIES AND :
 : ERISA LITIGATION : ECF CASE
 :
 : This Document Applies Only to: :
 :
 : *State Compensation Insurance Fund v. Fuld, et al.*, No. 11 Civ. :
 : 3892 (LAK) :
 :
 : -----X

~~PROPOSED~~ PRETRIAL ORDER NO. 66
(Motions to Dismiss the Amended Complaint)

On March 26, 2013, the Court issued Pretrial Order No. 61 granting in part and denying in part the Individual Defendants' Motion to Dismiss Plaintiff's Amended Complaint ("Amended Complaint").¹ Pretrial Order No. 61 also directed the defendants to settle an order more fully setting forth the rulings made in Pretrial Order No. 61, preferably with agreement from all parties. The parties could not reach agreement. Having reviewed the parties' respective proposals, and for the reasons set forth in Pretrial Order No. 61, 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

¹ The "Individual Defendants" are Richard S. Fuld, Jr., Christopher M. O'Meara, and Erin M. 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 LLP ("EY") joined in the motion to dismiss the Amended Complaint. Where this Order references the "Motions to Dismiss," it refers to the Individual Defendants' Motion to Dismiss Plaintiffs' Amended Complaint (MDL No. 586) and EY's Motions to Dismiss and Joinders in Motions to Dismiss Certain Individual Actions (MDL No. 623).

(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 Litig.*, -- F. Supp. 2d --, 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 105² 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

² “Repo 105” is used to refer to Repo 105 and Repo 108 transactions collectively.

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.
 - (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, except for the one purchase described in footnote 1, below, made during the time period between Lehman's awareness of the concentration (November 6, 2007) and its disclosure of that risk in its 1Q2008 Form 10-Q on April 8, 2008.³
 - (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. Scierter
- (i) Motive and Opportunity
 10. The Motion to Dismiss is granted on the ground that the Amended Complaint fails to allege scierter 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.

³ The one relevant purchase during that period was State Fund's purchase on January 25, 2008 of CUSIP No. 5252M0-BZ-9.

(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 scienter 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 denied on the ground that the Amended Complaint sufficiently alleges *scienter* as to Fuld concerning Lehman's obligation under SFAS 107 to disclose a significant concentration of commercial real estate credit risk following the November 6, 2007 Executive Committee meeting. The Motion to Dismiss is granted on the ground that the Amended Complaint fails to allege *scienter* on the part of Defendants Callan and O'Meara based on that November 6, 2007 meeting concerning Lehman's obligation under SFAS 107 to disclose a significant concentration of credit risk with respect to commercial real estate.

(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.

With Respect to EY:

17. EY did not challenge the Section 10(b) claims asserted against it. Thus, the Court declines to dismiss these claims.

Count II

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

18. 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.
19. 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

Section 11 of the Securities Act Claims Against All Defendants

20. The Motions to Dismiss are denied as to all Securities Act claims without prejudice to renewal after the Court of Appeals for the Second Circuit decides *International Fund Management v. Citigroup, Inc.*, No. 12-1903.

Count IV

Section 12(a)(2) of the Securities Act Claims Against All Defendants

21. The Motions to Dismiss are denied as to all Securities Act claims without prejudice to renewal after the Court of Appeals for the Second Circuit decides *International Fund Management v. Citigroup, Inc.*, No. 12-1903.

Count V

Section 15 of the Securities Act Claims Against the Officer Defendants

22. The Motion to Dismiss is denied as to all Securities Act claims without prejudice to renewal after the Court of Appeals for the Second Circuit decides *International Fund Management v. Citigroup, Inc.*, No. 12-1903.

Count VI

California Corporations Code §§ 25400, 25500 Claims Against the Officer Defendants

23. The Motion to Dismiss is granted as to the California Corporations Code §§ 25400, 25500 claims because the claims are precluded by The Securities Litigation Uniform Standards Act ("SLUSA").

Count VII

California Corporations Code §§ 25401, 25501 Claims Against All Defendants except EY

24. The Motion to Dismiss is granted as to the California Corporations Code §§ 25401, 25501 claims because the claims are precluded by SLUSA.

Count VIII

California Corporations Code § 25504 Claims Against the Officer Defendants

25. The Motion to Dismiss is granted as to the California Corporations Code § 25504 claims because the claims are precluded by SLUSA.

Count IX

California Corporations Code § 25504.1 Claims Against the Officer Defendants

26. The Motion to Dismiss is granted as to the California Corporations Code § 25504.1 claims because the claims are precluded by SLUSA.

Count X

California Corporations Code § 25504.2 Claims Against EY

27. The Motion to Dismiss is granted as to the California Corporations Code § 25504.2 claims because the claims are precluded by SLUSA.

Count XI

Common Law Fraud Claims Against the Officer Defendants and EY

28. The Motions to Dismiss are granted as to the common law fraud claims because the claims are precluded by SLUSA.

Count XII

Aiding and Abetting Fraud Claims Against the Officer Defendants and EY

29. The Motions to Dismiss are granted as to the aiding and abetting fraud claims because the claims are precluded by SLUSA.

Count XIII


Negligent Misrepresentation Claims Against the Officer Defendants and EY

30. The Motions to Dismiss are granted as to the negligent misrepresentation claims because the claims are precluded by SLUSA.

31. All claims dismissed by this Order are dismissed with prejudice. To the extent the Motions to Dismiss the Exchange Act claims are denied, they are denied with prejudice.
32. Pursuant to Pretrial Order Nos. 33 (MDL docket no. 897) and 53 (MDL docket no. 1115), the Bank Defendants'⁴ Motion to Dismiss has been denied as moot.

SO ORDERED.

Date: May 9, 2013



Lewis A. Kaplan
United States District Judge LAK

⁴ The "Bank Defendants" are ANZ Securities, Inc., BBVA Securities Inc., BMO Capital Markets Corp, (f/k/a Harris Nesbitt Corp.), BNP Paribas S.A., Cabrera Capital Markets, LLC, Citigroup Global Markets Inc., Commerzbank Capital Markets Corp., Daiwa Capital Markets Europe Ltd, (f/k/a Daiwa Securities SMBC Europe Ltd.), DZ Financial Markets LLC, Fortis Securities LLC, ING Financial Markets LLC, M.R. Beal & Company, Mellon Financial Markets LLC (n/k/a BNY Mellon Capital Markets LLC), Mizuho Securities USA Inc., Natixis Bleichroeder Inc. (n/k/a Natixis Securities Americas LLC), Scotia Capital (USA) Inc., SG Americas Securities LLC, Sovereign Securities Corporation LLC, SunTrust Robinson Humphrey Inc., Utendahl Capital Partners L.P., and Wells Fargo Securities, LLC.