

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

OPERATIVE PLASTERERS AND CEMENT
MASONS INTERNATIONAL ASSOCIATION
LOCAL 262 ANNUITY FUND, Individually And
On Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

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; JOHN D.
MACOMBER; ABN AMRO HOLDING N.V.;
ANZ SECURITIES, INC.; BANC OF AMERICA
SECURITIES LLC; BBVA SECURITIES INC.;
BNY CAPITAL MARKETS, INC.; CABRERA
CAPITAL MARKETS, LLC; CAJA DE
AHORROS Y MONTE DE PIEDAD DE
MADRID; CIBC WORLD MARKETS CORP.;
CITIGROUP GLOBAL MARKETS INC.;
DAIWA SECURITIES SMBC EUROPE
LIMITED; DnB NOR MARKETS; DZ
FINANCIAL MARKETS LLC; RBS
GREENWICH CAPITAL; HARRIS NESBITT
CORP.; HSBC SECURITIES (USA) INC.; HVB
CAPITAL MARKETS, INC.;

(Caption continued on next page)

NO. 08-CV-5523 (LAK)

JURY TRIAL DEMANDED

ECF Case

**MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S
MOTION FOR CONSOLIDATION OF RELATED ACTIONS**

LOOP CAPITAL MARKETS, LLC; MELLON FINANCIAL MARKETS, LLC; MERRILL LYNCH, PIERCE, FENNER & SMITH INC.; MIZUHO SECURITIES USA, INC.; MORGAN STANLEY & CO. INC.; nabCAPITAL SECURITIES, LLC; NATIONAL AUSTRALIA BANK LIMITED; RBC DAIN RAUSCHER INC.; SANTANDER INVESTMENT SECURITIES INC.; SCOTIA CAPITAL (USA) INC.; SIEBERT CAPITAL MARKETS; SG CORPORATE & INVESTMENT BANKING; SOVEREIGN SECURITIES CORPORATION, LLC; SUNTRUST ROBINSON HUMPHREY, INC.; TD SECURITIES (USA) LLC; UBS SECURITIES LLC; UTENDAHL CAPITAL PARTNERS, L.P.; WACHOVIA CAPITAL MARKETS, LLC; WELLS FARGO SECURITIES, LLC; WILLIAMS CAPITAL GROUP, L.P.,

Defendants,

FOGEL CAPITAL MANAGEMENT, INC., And
On Behalf Of All Others Similarly Situated,

Plaintiff,

vs.

RICHARD S. FULD, JR.; MICHAEL L. AINSLIE; JOHN F. AKERS; ROGER S. BERLIND; THOMAS H. CRUIKSHANK; MARSHA JOHNSON EVANS; SIR CHRISTOPHER GENT; ROLAND A. HERNANDEZ; HENRY KAUFMAN; JOHN D. MACOMBER; BANC OF AMERICA SECURITIES LLC; CITIGROUP GLOBAL MARKETS INC.; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED; MORGAN STANLEY & CO. INCORPORATED; UBS SECURITIES LLC; and WACHOVIA CAPITAL MARKETS, LLC,

Defendants,

NO. 08-CV-8225 (LAK)

STANLEY TOLIN, On Behalf Of Himself And
On Behalf Of All Others Similarly Situated,

Plaintiff,

v.

RICHARD S. FULD, JR.; MICHAEL L.
AINSLIE; JOHN F. AKERS; ROGER S.
BERLIND; THOMAS H. CRUIKSHANK;
MARSHA JOHNSON EVANS; SIR
CHRISTOPHER GENT; ROLAND A.
HERNANDEZ; HENRY KAUFMAN; JOHN D.
MACOMBER; BANC OF AMERICA
SECURITIES LLC; CITIGROUP GLOBAL
MARKETS INC.; MERRILL LYNCH, PIERCE,
FENNER & SMITH INCORPORATED;
MORGAN STANLEY & CO. INCORPORATED;
UBS SECURITIES LLC and WACHOVIA
CAPITAL MARKETS, LLC,

Defendants,

No. 08-CV-10008

BROOKS FAMILY PARTNERSHIP, LLC and
KGT INC. PENSION PLAN AND TRUST, on
Behalf of Themselves and All Others Similarly
Situated,

Plaintiffs,

v.

RICHARD S. FULD, JR.; MICHAEL L.
AINSLIE; JOHN F. AKERS; ROGER S.
BERLIND; THOMAS H. CRUIKSHANK;
MARSHA JOHNSON EVANS; SIR
CHRISTOPHER GENT; ROLAND A.
HERNANDEZ; HENRY KAUFMAN; JOHN D.
MACOMBER; CITIGROUP GLOBAL
MARKETS INC.; BANC OF AMERICA
SECURITIES LLC; MERRILL LYNCH,
PIERCE, FENNER & SMITH INCORPORATED;
MORGAN STANLEY & CO. INCORPORATED;
UBS SECURITIES LLC; WACHOVIA

No. 08-CV-10206 (LAK)

(Caption continued on next page)

CAPITAL MARKETS, LLC; RBC DAIN
RAUSCHER INC.; SUNTRUST ROBINSON
HUMPHREY, INC. and WELLS FARGO
SECURITIES, LLC,

Defendants.

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I. INTRODUCTION

Lead Plaintiffs in *Operative Plasterers and Cement Masons Int'l Assoc. Local 262 Annuity Fund, et al. v. Lehman Brothers Holdings Inc., et al.*, No. 08-CV-5523 (LAK) (the "*Lehman Securities Class Action*") move the Court for an order consolidating with the *Lehman Securities Class Action* three overlapping class actions either recently filed in or removed to this District, as well as all related class actions subsequently filed in or transferred to this District.¹

Pending in this District are at least three additional class actions that are appropriate under Fed. R. Civ. P. 42 for consolidation with the *Lehman Securities Class Action*:

1. *Fogel Capital Mgmt., Inc. v. Richard S. Fund, Jr., et al.*, No. 08-CV-08225 (LAK) ("*Fogel*") (filed on September 24, 2008, and assigned to Judge Kaplan on October 7, 2008);²
2. *Brooks Family P'ship, LLC v. Richard S. Fuld, Jr., et al.*, No. 08-CV-10206 ("*Brooks*") (filed on November 24, 2008, and assigned to Judge Kaplan on November 26, 2008); and
3. *Stanley Tolin v. Richard S. Fuld, Jr., et al.*, No. 08-CV-10008 ("*Tolin*") (filed on November 18, 2008, and as of yet unassigned).

Federal Rule of Civil Procedure 42 provides that "[i]f actions before the court involve a common question of law or fact, the court may . . . consolidate the actions."

¹ "Lead Plaintiffs" or "Pension Fund Group" refers to the 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 On October 30, 2008, Lead Plaintiffs filed a motion to consolidate *Fogel* with the *Lehman Securities Class Action*. (See Dkt. Item No. 40, Case No. 08-CV-8225.) On November 7, 2008, Plaintiff *Fogel* filed a notice of non-opposition consenting to the consolidation of its action with the *Lehman Securities Class Action*. (See Dkt. Item No. 43, Case No. 08-CV-8225.) *Fogel*'s notice recognizes that its action "asserts claims with similar theories of liability" as the *Lehman Securities Class Action*, making consolidation appropriate. *Id.* On November 24, 2008, three movants filed motions seeking appointment as lead plaintiff in the *Fogel* action. Lead Plaintiff opposes such motions, and will submit opposition papers on or before December 15, 2008, in accordance with Local Rule 6.1(b).

Fed. R. Civ. P. 42(a)(1). As explained below and as summarized in the attached table at Appendix A, each of the three related class actions asserts claims on behalf of Lehman investors that are also asserted in the amended complaint (the “Complaint”) filed in the *Lehman Securities Class Action*. The theories of liability and the securities at issue in the three related actions are identical to the theories of liability and the securities at issue in the *Lehman Securities Class Action*. Accordingly, *Fogel*, *Brooks*, and *Tolin* are all perfectly-suited for consolidation. Indeed, the plaintiff in *Fogel* has consented to consolidation. (See Dkt. Item No. 43, Case No. 08-CV-8225.)

Likewise, Lead Plaintiffs respectfully submit that all subsequent related cases that are filed in, or transferred to, this Court be consolidated in order to promote efficiency and effective case management. *See, e.g.*, May 11, 2004 Order, *In re Parmalat Sec. Litig.*, 04-CV-0030 (LAK) (S.D.N.Y.) (Dkt. Item No. 103) (granting motions to consolidate actions and providing that all subsequent related actions are deemed consolidated, subject to objections by motion). Following Lehman’s bankruptcy in September 2008, numerous additional class actions have been filed in different state and federal courts alleging overlapping claims and common defendants to those asserted in the Complaint.³ In this regard, Defendants filed with the Judicial Panel on Multidistrict Litigation (“MDL Panel”) a motion to transfer numerous additional cases and any tag-along actions to this District. Thus, each of the actions identified in Defendants’ MDL motion are likely to be transferred to this Court and should be evaluated to determine if consolidation with the *Lehman Securities Class Action* is appropriate upon transfer.

³ As explained *infra*, at pages 5-6, the present motion does not seek at this time to consolidate one action already pending in this Court, *Jeffrey Stark, et al. v. Erin Callan, et al.*, No. 08-CV-09793 (LAK) (“*Stark*”), due to a recent amendment to the complaint in that action which expands the class to purchasers of securities in 800 unidentified offerings.

II. PROCEDURAL BACKGROUND

A. Related Class Actions Pending In This District

The *Lehman Securities Class Action* was filed in this District on June 18, 2008, and assigned to Judge Kaplan. (Dkt. Item No. 1, Case No. 08-CV-5523.) On July 31, 2008, the Court appointed the members of the Pension Fund Group as Lead Plaintiffs for the Class. (Dkt. Item No. 18, Case No. 08-CV-5523.) Since its appointment, the Pension Fund Group, a group of institutional investors including four public pension funds, has diligently worked to advance the interest of the class. To date, the Pension Fund Group has:

- interviewed hundreds of former Lehman employees to investigate, including at key subsidiaries, the class's claims;
- aggressively moved to secure the class's interests in Lehman's bankruptcy by retaining bankruptcy counsel, appearing in the bankruptcy court and joining in the motion for appointment of an examiner;
- retained and consulted with experts, including individuals with specialized knowledge in the areas of damages, accounting and the investment banking industry;
- proactively communicated with the class by establishing and maintaining a website (<http://www.lehmansecuritieslitigation.com/>) to inform the class about developments in this action;
- extensively evaluated each of the offerings included in the Complaint and asserted cognizable claims for each such offering;
- included additional plaintiffs in the Amended Complaint to bolster the representation for the class in accordance with Second Circuit precedent;
- filed a detailed Amended Complaint on behalf of investors who purchased or acquired publicly-traded securities of Lehman, including common stock, preferred shares, bonds and/or call or put options. The securities subject to the Amended Complaint include investors of twenty-eight Lehman offerings (including investors in 7.95% Non-cumulative Perpetual Preferred Stock, Series J ("Series J Offering") issued by Lehman in February 2008) totaling more than \$35 billion; and

- conferred repeatedly with defense counsel concerning the schedule in this case, proceedings before the panel on Multi-District Litigation and case management issues, including those relating to consolidation and coordination.

Given Lehman's filing for bankruptcy on September 15, 2008, the Court entered an order granting the Lehman Defendants' request to extend the time for filing the Complaint. (Dkt. Item No. 40, Case No. 08-CV-5523.) Pursuant to that scheduling order, the Pension Fund Group filed the Complaint on October 27, 2008, asserting claims on behalf of those who "purchased or acquired the publicly-traded securities of Lehman and its subsidiaries (including stock, preferred shares, bonds, and/or call options or who sold put options) between June 12, 2007, and September 15, 2008." (Dkt. Item No. 52, Case No. 08-CV-5523.)

Relevant to the present motion for consolidation, the Complaint specifically alleges claims for violations of Sections 11, 12 and 15 of the Securities Act of 1933 (the "Securities Act") on behalf of purchasers of 28 different Lehman Brothers Holdings Inc. ("Lehman") debt and equity holdings – including Lehman's Series J, P and Q preferred stock offerings.

On September 24, 2008, *Fogel* was filed in this District asserting claims on behalf of purchasers of Lehman Preferred Shares, Series J Offering. (See Dkt. Item No. 1, Case No. 08-CV-8225.)⁴ Counsel for the *Fogel* plaintiffs issued a press release notifying investors that they may file motions with this Court seeking appointment as lead plaintiff

⁴ The *Fogel* action was originally assigned to Judge Sidney H. Stein. On September 26, 2008, Lead Plaintiffs submitted a letter to Judge Stein (with a copy to this Court) asserting that the *Fogel* action was related to the *Lehman Securities Class Action*. Specifically, the letter stated that the *Lehman Securities Class Action* and the *Fogel* action "have overlapping claims and defendants and focus on the same subject matter." Given the relationship between the two cases, Lead Plaintiff requested that *Fogel* be transferred to Judge Kaplan. On October 7, 2008, the Clerk of the Court filed a notice indicating that *Fogel* had been reassigned to Judge Kaplan. (Dkt. Item No. 25, Case No. 08-CV-8225.)

for *Fogel* (notwithstanding the fact that the Court had previously appointed Lead Plaintiffs in the *Lehman Securities Class Action*).⁵

On October 30, 2008, Lead Plaintiff filed a motion to consolidate *Fogel* with the *Lehman Securities Class Action* and also opposed Fogel's motion for appointment as lead plaintiff. (Dkt. Item No. 40, Case No. 08-CV-8225.) Expressly noting the overlapping nature of *Fogel* and the *Lehman Securities Class Action*, on November 10, 2008, Plaintiff Fogel consented to consolidation of *Fogel* with the *Lehman Securities Class Action* and withdrew its motion for appointment as Lead Plaintiff. (Dkt. Item No. 43, Case No. 08-CV-8225). The motion to consolidate *Fogel* with the *Lehman Securities Class Action* is pending before the Court.

As a result of the press release issued by counsel for Fogel inviting investors to move the Court for appointment as a lead plaintiff in that case, three motions were filed in the *Fogel* action seeking appointment as lead plaintiffs. Lead Plaintiffs oppose all efforts to balkanize the *Lehman Securities Class Action*, and concurrently submit an opposition to these motions.

In addition to the *Lehman Securities Class Action* and *Fogel*, three additional complaints were filed asserting claims concerning Lehman's Series J Offering. *First*, on October 27, 2008, the *Stark* action, purporting to assert a class action on behalf of purchasers of Lehman's Preferred J, P, and Q Shares, was filed in the Supreme Court of the State of New York; it was removed to this District on November 12, 2008, and assigned to Judge Kaplan.

⁵ According to the September 24, 2008, press release issued in connection with the *Fogel* action, "If you purchased Lehman Preferred J during the Class Period, you may request that the Court appoint you as lead plaintiff"

On December 2, 2008, the plaintiffs in *Stark* filed an amended complaint seeking to expand the alleged class to all purchasers, between July 31, 2007 and September 14, 2008, of all Lehman debt, preferred equity or other securities (except common stock) in or traceable to any public offerings conducted by Lehman. According to the *Stark* plaintiffs, there are 800 such Lehman offerings.⁶ However, unlike the Complaint in the *Lehman Securities Class Action*, the *Stark* amended complaint fails to allege the specific offering dates, sizes of the offerings, participants in each offering (such as the identities of the underwriters), or the types of securities offered. This lack of particularity raises questions as to whether the plaintiffs in *Stark* even understand the 800 offerings. For instance, many of these additional securities are linked to the common stock of other companies or commodities; many more of these securities reached maturity within months of issuance and may not have any damages associated with them. Accordingly, Lead Plaintiffs do not seek to consolidate *Stark* at this time but will do so when appropriate based on the evaluation of the unidentified offerings asserted in the *Stark* amended complaint.

Second, on November 24, 2008, plaintiffs in *Brooks* filed a class action complaint asserting claims on behalf of the purchasers of Lehman's Preferred J Shares. On November 26, 2008, *Brooks* was assigned to Judge Kaplan.

Third, on November 18, 2008, *Tolin*, which purports to assert a class action on behalf of the purchasers of Lehman's Preferred J Shares, was filed in this District. *Tolin* has yet to be assigned. While *Tolin* is unassigned as of the date of this submission, Lead

⁶ Counsel for the plaintiffs in *Stark* also issued a press release inviting investors to move for appointment as separate lead plaintiffs in the recently-amended *Stark* action. According to the press release, the deadline for filings such motion is February 2, 2009. Lead Plaintiffs will oppose the efforts of the *Stark* plaintiffs to appoint separate lead plaintiffs for niche groups.

Plaintiffs respectfully submit that *Tolin* should be assigned to Judge Kaplan because it arises out of the same operative facts as the *Lehman Securities Class Action* with respect to the Preferred J Shares.⁷ *Tolin* includes all of the defendants already named in the Complaint, including certain officers and directors of Lehman and certain underwriters, and cases relating to Lehman's collapse originally assigned to other judges in this District have been reassigned to Judge Kaplan as well.

B. Cases Filed In Other Courts That May Be Transferred To This Court

In addition to the cases currently pending before the Court, at least nine related actions originally filed in various state courts have now been removed to federal courts and are subject to motions before the MDL Panel to be transferred to this District.⁸ The nine actions are:

- *Swiskay v. Citigroup Global Markets Inc., et al.*, (originally filed on October 7, 2008, in the Supreme Court of New York, Nassau County, and removed to the United States District Court for the Eastern District of New York, under Case No. 08-CV-4600);
- *Deathrow v. Fuld, et al.*, (originally filed on October 21, 2008, in the Circuit Court of Saline County, State of Arkansas, and removed to the Eastern District of Arkansas, Little Rock Division, under Case No. 08-CV-4149);
- *Mease and Caldwell v. Fuld, et al.*, (originally filed on October 22, 2008, in the Circuit Court of Washington County, State of Arkansas, and removed to the Western District of Arkansas, Fort Smith Division, under Case No. 08-CV-2123);
- *Mease v. Fuld, et al.*, (originally filed on October 22, 2008, in the Circuit Court of Garland County, State of Arkansas, and removed to the Western District of Arkansas, Fort Smith Division, under Case No. 08-CV-2124);

⁷ Assignment of related cases to the same judge is appropriate if “a substantial saving of judicial resources would result,” and “the just efficient and economical conduct of the litigations would be advanced,” and “the convenience of the parties and witnesses would be served.” Local Rule 15(a).

⁸ In addition, the parties in *Alaska Electrical Pension Fund v. Lehman Brothers Holdings Inc., et al.*, No. 08-CV-2816 (ADS) (E.D.N.Y.) (involving Mortgage Pass-through Certificates and Asset-Backed Notes) have stipulated to transfer the action to this District.

- *Warden v. Fuld et al.*, (originally filed on October 22, 2008, in the Circuit Court of Benton County, State of Arkansas, and removed to the Western District of Arkansas, Fort Smith Division, under Case No. 08-CV-2126);
- *Napierala v. Fuld, et al.*, (originally filed on November 4, 2008, in the Circuit Court of Benton County, State of Arkansas, and removed to the Western District of Arkansas, Fort Smith Division, under Case No. 08-CV-2127);
- *Shiple v. Fuld, et al.*, (originally filed on November 4, 2008, in the Circuit Court of Benton County, State of Arkansas, and removed to the Western District of Arkansas, Fort Smith Division, under Case No. 08-CV-2125);
- *San Mateo County Investment Pool v. Fuld, et al.*, (originally filed on November 13, 2008, in the County of San Francisco, State of California, and removed to the United States District Court for the Northern District of California under Case No. 08-CV-05353); and
- *Zenith Insurance Company v. Fuld, et al.*, (originally filed on November 19, 2008, in the County of San Francisco, State of California, and removed to the Northern District of California under Case No. 08-CV-05352).

Lead Plaintiffs anticipate that at least some of these actions, and perhaps others yet to be filed and/or removed, will be transferred to this District.

III. ARGUMENT

Lead Plaintiffs move the Court to consolidate overlapping class actions that are pending before this Court, as well as related actions that will be transferred to or later filed in this Court. Consolidation will promote judicial efficiency, manageability, prevent unnecessary costs, and avoid inconsistent rulings.

A. Consolidation Of *Fogel, Tolin, And Brooks* Is Appropriate As They Raise Questions Of Fact And Law Common With The *Lehman Securities Class Action*

Consolidation is appropriate when, as here, actions involve common questions of law or fact. Fed. R. Civ. P. 42(a); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284 (2d Cir. 1990), *cert. denied*, 498 U.S. 920 (1990). Under Rule 42, courts have broad discretion whether to consolidate, and courts consider whether judicial economy favors

consolidation. *Kaplan v. Gelfond*, 240 F.R.D. 88, 91 (S.D.N.Y. 2007). “When a court is presented with securities actions in which the complaints are based on the same ‘public statements and reports,’ consolidation is appropriate if the actions present common questions of law and fact and if the parties will not be prejudiced.” *Id.* (quoting *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F. Supp. 1196, 1211 (S.D.N.Y. 1992)). In this regard, the cases need not be identical for consolidation to be appropriate.⁹

The Complaint in the *Lehman Securities Class Action* asserts claims for violations of the Securities Act and the Securities Exchange Act of 1934 (the “Exchange Act”) on behalf of purchasers of publicly-traded Lehman securities (including stock, preferred shares, bonds, and/or call options or who sold put options) between June 12, 2007, and September 15, 2008. *See* Complaint at ¶509. The Complaint currently asserts claims pursuant to the Securities Act based on 28 of Lehman’s offerings in the Class Period. In particular, among the claims asserted in the Complaint are those for liability based on violations of Sections 11, 12, and 15 of the Securities Act on behalf of those who purchased or acquired preferred shares in the Series J Offering – the same offering singled out in *Fogel* and in the *Tolin* and *Brooks* actions. *See, e.g.*, Complaint at ¶¶270, 277, 332-54. The Complaint alleges Securities Act claims against substantially the same defendants named in the *Fogel*, *Tolin*, and *Brooks* actions. *See, e.g.*, Complaint at ¶¶32,

⁹ *See, e.g., Linn v. Allied Irish Banks, PLC*, No. 02 Civ. 1738 (DAB), 2004 U.S. Dist. LEXIS 24655, at *7 (S.D.N.Y. Dec. 7, 2004) (consolidation appropriate even if factual allegations and class periods are not identical); *Pinkowitz v. Elan Corp.*, No. 02 Civ. 865, 2002 U.S. Dist. LEXIS 14593, at *17 (S.D.N.Y. July 29, 2002) (although certain class actions name defendants not otherwise present in other class actions, consolidation was still appropriate); *In re Cendant Corp. Litig.*, 182 F.R.D. 476, 478 (D.N.J. 1998) (“Neither Rule 42 nor the PSLRA demands that actions be identical before they may be consolidated”); *Werner*, 797 F. Supp. at 1210-1212 (recognizing that consolidation is appropriate where there is at least some measure of overlap).

34, 38-46, 49, 55, 65, 67, 77, 79. The Complaint alleges that the offering documents related to the Series J Offering were materially false and misleading because, among other reasons, Lehman's financial reports failed to disclose its exposure to losses from its real estate and mortgage-related assets.

Fogel, Tolin, and Brooks arise from the same operative facts as the *Lehman Securities Class Action*. For instance, as already pleaded in the *Lehman Securities Class Action* Complaint, *Fogel, Tolin, and Brooks* assert violations of the Securities Act on behalf of purchasers in the Series J Offering. Like the *Lehman Securities Class Action*, these newly-filed actions also allege that the offering documents at issue were materially false and misleading. Additionally, the *Fogel, Tolin, and Brooks* plaintiffs bring their actions against many of the same officers, directors, and underwriters named in the Complaint. Attached as Appendix A is a chart summarizing the overlapping claims and defendants. Because all three actions allege claims based on the same or similar alleged misstatements and omissions surrounding the Series J Offering and against substantially the same defendants, consolidation of these actions is appropriate.

Additionally, Defendants will suffer no prejudice because consolidation will allow them to defend a single suit instead of several separate suits before the same Court involving the same facts and witnesses. In fact, in their November 13, 2008 letter to the Court, Defendants also urged the Court to consolidate related federal securities actions into a master action.

In sum, “[g]iven the overlapping questions of law and fact presented in the cases . . . , litigating a multitude of separate actions would only ensure the duplication of effort amongst parties and the needless expenditure of judicial resources.” *Kaplan*, 240

F.R.D. at 92. As “considerations of judicial economy favor consolidation,” *Celotex*, 899 F.3d at 1285, the *Fogel*, *Tolin*, and *Brooks* actions should be consolidated with the *Lehman Securities Class Action*.

B. Consolidation Of Later-Filed Class Actions Alleging Claims On Behalf Of Purchasers Of Publicly-Traded Lehman Securities Will Promote Efficiency And Manageability

Additional class actions have been filed in different federal courts and are subject to Defendants’ motion to transfer to this Court from the MDL Panel. *See* Def. MDL Br. at 5-10. When, as here, additional related cases may be filed in or transferred to this Court, an order that consolidates later-filed cases with the master case promotes efficiency and effective case management. *See, e.g.*, May 11, 2004 Order, *In re Parmalat Sec. Litig.*, 04 Civ. 0030 (LAK) (S.D.N.Y.).

In *Parmalat*, the Court’s consolidation order included the following provision:

All related actions subsequently filed in, or transferred to, this district shall be consolidated into this action, and shall be governed by this order, absent other order of this Court. Any party to such an action objecting to consolidation, or to any provision of this order, not later than ten days after the date a copy of this order is sent to it or its counsel, shall file a motion setting forth such objections.

Dkt. Item No. 103, ¶4.

A similar provision is appropriate here, particularly because actions filed outside this Court unquestionably are appropriate for consolidation when transferred to this District. For example, among the actions that are the subject of Defendants’ transfer motion before the MDL Panel is a class action involving the Series J preferred stock offering, *Swiskay v. Citigroup Global Market Inc.* (“*Swiskay*”). For the same reasons discussed above regarding the appropriateness of consolidating *Fogel*, *Tolin* and *Brooks* –

which involve allegations stemming from the same Series J preferred stock offering – *Swiskay*, once it is transferred to this District, should also be consolidated.

Defendants also seek to transfer various actions asserting claims under the Securities Act on behalf of investors who purchased Lehman equities or bonds in or traceable to offerings conducted pursuant to registration statements and either a prospectus supplement or pricing supplement issued in connection with each particular offering, as follows:

- *Deathrow v. Fuld, et al.*, (involving 6.5% Subordinated Notes Due June 21, 2037; 6.625% Senior Unsecured Bonds Due July 27, 2027; and 6.75% Notes Due November 22, 2027);
- *Mease and Caldwell v. Fuld, et al.*, (involving 5.5% Subordinated Notes Due April 4, 2016);
- *Mease v. Fuld, et al.*, (involving 5.5% Subordinated Notes Due April 4, 2016 and 5.75% Subordinated Notes Due 2017);
- *Warden v. Fuld, et al.*, (involving 6.5% Subordinated Notes Due 2017);
- *Napierala v. Fuld, et al.*, (involving 6.5% Senior Unsecured Notes Due October 25, 2011); and
- *Shipley v. Fuld, et al.* (involving 5% Bonds Due January 14, 2001).

The above cases involve many of the same offering documents at issue in the *Lehman Securities Class Action*. See Complaint at ¶¶270-273; see also Def. MDL Br. at 2 (noting that each of the cases subject to defendants’ MDL motion involve “one or more common questions of fact” and involve the “same or similar misrepresentations and omissions”); *id.* at 3 (noting that the *Lehman Securities Action* includes “members of each class proposed in the” MDL actions.) Absent consolidation, Lead Plaintiffs and each of the plaintiffs in the MDL actions will be simultaneously arguing that the same

defendants made the same or similar statements to the detriment of investors. Furthermore, these actions name overlapping sets of individual and underwriter defendants who are also named in the *Lehman Securities Class Action*. Consolidation with *Lehman Securities Class Action* is appropriate as it will promote manageability and efficiency.

Lead Plaintiffs recognize that certain cases arising from the collapse of Lehman may be inappropriate under Fed. R. Civ. P. 42 for **consolidation** with the *Lehman Securities Class Action*, such as individual actions or cases arising under the Employee Retirement Income Securities Act. In those circumstances, Lead Plaintiffs will propose **coordination** of those cases with the proceedings in the *Lehman Securities Class Action*. Coordination is recommended for “related cases pending before the same judge . . . to avoid conflicts and duplication.”¹⁰ Lead Plaintiffs and Defendants can fashion and propose to the Court an appropriate order governing coordination with the *Lehman Securities Class Action* that will avoid duplication and streamline the proceedings, a process that many of the counsel for the parties achieved with positive results in the *WorldCom* securities litigation. See *In re WorldCom Inc. Sec. Litig.*, No. 02 Civ. 3288, 2003 U.S. Dist. LEXIS 8525 (S.D.N.Y. May 22, 2003) (establishing pretrial discovery coordination procedures for later-filed actions). Lead Plaintiffs respectfully submit that a similar process would assist the Court and the parties here.

¹⁰ Moore’s Federal Practice, *Manual for Complex Litigation (Third)* at § 21.255. “Discovery plans in related cases pending before the same judge should be coordinated to avoid conflicts and duplication. If the cases are pending before different judges, counsel should nevertheless attempt to coordinate the depositions of common witnesses and other common discovery.” Moore’s Federal Practice, *Manual for Complex Litigation (Third)* at § 21.455. As Defendants correctly noted in their motion to transfer filed with the MDL Panel on November 14, 2008, “[c]entralization will eliminate the need for duplicative discovery, will reduce the costs of litigation and the chance of conflicting pre-trial and class certification rulings, and will conserve judicial resources while allowing the Actions to proceed most efficiently to trial.” Defs’ MDL Br., at 3.

IV. CONCLUSION

For the reasons stated above, Lead Plaintiffs respectfully submit that *Fogel, Tolin*, and *Brooks* be consolidated for all purposes with the *Lehman Securities Class Action*. Further, to the extent that subsequent related actions are transferred to this Court, or are otherwise deemed to be related to the *Lehman Securities Class Action*, they should also be consolidated subject to the rights of the parties thereto to object.

Dated: December 15, 2008

Respectfully submitted,

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Appendix A

The newly-filed actions allege claims over securities offerings already asserted in the *Lehman Securities Class Action* and involve many of the same named defendants, as detailed below:

NEWLY-FILED ACTION	OVERLAPPING OFFERING/SECURITY	CLAIMS ASSERTED	SECURITIES ACT CLAIMS ALSO ASSERTED IN CLASS ACTION?	OVERLAPPING DEFENDANTS
<i>Fogel</i>	February 5, 2008 7.95% Non-Cumulative Perpetual Preferred Stock, Series J	§§ 11 and 15	Y	<p>All Defendants in <i>Fogel</i> Are Included in the Pending <i>Lehman Securities Class Action</i></p> <p>Richard S. Fuld, Jr. Michael L. Ainslie John F. Akers Roger S. Berlind Thomas H. Cruikshank Marsha Johnson Evans Sir Christopher Gent Roland A. Hernandez Henry Kaufman John D. Macomber Banc of America Securities LLC Citigroup Global Markets Inc. Merrill Lynch, Pierce, Fenner & Smith Inc. Morgan Stanley & Co. Inc. UBS Securities LLC Wachovia Capital Markets, LLC</p>

<p><i>Tolin</i></p>	<p>February 5, 2008 7.95% Non-Cumulative Perpetual Preferred Stock, Series J</p>	<p>§§ 11 and 15</p>	<p>Y</p>	<p>All Defendants in <i>Tolin</i> Are Included in the Pending <i>Lehman Securities Class Action</i></p> <p>Banc of America Securities LLC</p> <p>Citigroup Global Markets Inc.</p> <p>Merrill Lynch, Pierce, Fenner & Smith Inc.</p> <p>Morgan Stanley & Co. Inc.</p> <p>UBS Securities LLC</p> <p>Wachovia Capital Markets, LLC</p> <p>Richard S. Fuld, Jr.</p> <p>Michael L. Ainslie</p> <p>John F. Akers</p> <p>Roger S. Berlind</p> <p>Thomas H. Cruikshank</p> <p>Marsha Johnson Evans</p> <p>Sir Christopher Gent</p> <p>Roland A. Hernandez</p> <p>Henry Kaufman</p> <p>John D. Macomber</p>
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<p><i>Brooks</i></p>	<p>February 5, 2008 7.95% Non-Cumulative Perpetual Preferred Stock, Series J</p>	<p>§§ 11, 12(a)(2), and 15</p>	<p>Y</p>	<p>All Defendants in <i>Brooks</i> Are Included in the <i>Pending Lehman Securities Class Action</i></p> <p>Richard S. Fuld, Jr. Michael L. Ainslie John F. Akers Roger S. Berlind Thomas H. Cruikshank Marsha Johnson Evans Sir Christopher Gent Roland A. Hernandez Henry Kaufman John D. Macomber Citigroup Global Markets Inc. Banc of America Securities LLC Merrill Lynch, Pierce, Fenner & Smith Inc. Morgan Stanley & Co. Inc. UBS Securities LLC Wachovia Capital Markets, LLC RBC Dain Rauscher Inc. SunTrust Robinson Humphrey, Inc. Wells Fargo Securities, LLC</p>
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