UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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. (Captions continued on next page)	08-CV-8225 (LAK) JURY TRIAL DEMANDED ECF Case

THE PENSION FUND GROUP'S MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS SEEKING APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF COUNSEL

BROOKS FAMILY PARTNERSHIP, LLC and KGT INC. PENSION PLAN AND TRUST, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, 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, CITIGROUP GLOBAL MARKETS INC., BANC OF AMERICA SECURITIES LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, MORGAN STANLEY & CO. INCORPORATED, UBS SECURITIES LLC, WACHOVIA CAPITAL MARKETS, LLC, RBC DAIN RAUSCHER INC., SUNTRUST ROBINSON HUMPHREY, INC. and WELLS FARGO SECURITIES, LLC, Defendants.	08-CV-10206 (LAK)

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I. PRELIMINARY STATEMENT

The Pension Fund Group, the Court-appointed Lead Plaintiff 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*"), respectfully submits this memorandum of law in opposition to three motions seeking appointment of separate lead plaintiffs and separate lead counsel to represent purchasers of a particular security issued by Lehman Brother's Holdings Inc. ("Lehman").[1] Concurrently, Lead Plaintiff moves to consolidate the above-captioned matters (as well as similar related actions) with the earlier-filed *Lehman Securities Class Action* asserting overlapping claims.

On July 31, 2008, this Court entered an order in the *Lehman Securities Class Action* appointing the Pension Fund Group as the lead plaintiff for a class of investors in Lehman. Since its appointment, the Pension Fund Group, a group of five 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 employees of Lehman and related entities, including at key subsidiaries, to investigate the Class's claims;
- aggressively moved to secure the Class's interests in Lehman's bankruptcy by retaining competent and experienced bankruptcy counsel, appearing in the bankruptcy court and joining in the motion for appointment of an examiner;

[1] "Lead Plaintiff" or "Pension Fund Group" refers to the Alameda County Employees' Retirement Association ("ACERA"), the Government of Guam Retirement Fund ("Guam"), the Northern Ireland Local Governmental Officers' Superannuation Committee ("NILGOSC"), The City of Edinburgh Council as Administering Authority of the Lothian Pension Fund ("Lothian"), and Operating Engineers Local 3 Trust Fund ("Operating Engineers"). Exhibits submitted herewith are attached to the Declaration Of John P. Coffey Filed In Support Of The Pension Fund Group's Memorandum Of Law In Opposition To Motions Seeking Appointment As Lead Plaintiff And Approval Of Counsel ("Coffey Decl.").

- 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 and asserted cognizable claims for each of the offerings included in the Amended Complaint; [2]

- 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") 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 Judicial Panel on Multi-District Litigation and case management issues, including those relating to consolidation and coordination.[3]

Notwithstanding the Court's July 31, 2008 order and the significant progress already made on behalf of Lehman investors, a collection of new plaintiffs has recently emerged on the scene. These plaintiffs − the "Niche Plaintiffs"[4] − seek to carve out from

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[2] "Amended Complaint" refers to the operative complaint in *Lehman Securities Class Action*, Docket Index ("D.I.") 52 (filed Oct. 27, 2008).

[3] Since the September 2008 bankruptcy of Lehman several actions have been filed in state and federal courts across the United States on behalf of investors in Lehman securities. Coffey Decl. at A. On November 14, 2008, defendants filed a motion with the Judicial Panel on Multidistrict Litigation ("MDL") to transfer each related case to this district for consolidated or coordinated proceedings. *See id.* On November 26, 2008, defendants amended their filing to include subsequently filed actions. Coffey Decl. at B.

[4] "Niche Plaintiffs" refers to the plaintiffs filing the three motions seeking separate appointment as lead plaintiff and approval of lead counsel: (1) Belmont Holdings Corp. ("Belmont"); (2) Ronald M. Mizrahi and Harry Lalwani (collectively, "Mizrahi"); and (3) Brooks Family Partnership, LLC and KGT Inc.

the pending *Lehman Securities Class Action* a new and separate lawsuit for themselves on behalf of Series J investors, ***even though claims of investors in Series J stock are already asserted in the Amended Complaint***.

The Niche Plaintiffs' motions are filed in response to an action Fogel Capital Management Inc. ("Fogel") commenced on September 24, 2008, asserting claims under the Securities Act of 1933 ("Securities Act") on behalf of Series J investors.[5] Recognizing that its action was a subset of the claims asserted in the Amended Complaint, shortly after Fogel filed its complaint, Fogel filed a notice of non-opposition to its action being consolidated with the *Lehman Securities Class Action* and withdrew its separate motion for appointment as lead plaintiff.

Despite Fogel's acknowledgement of Lead Plaintiff's ability to represent the Series J investors, the Niche Plaintiffs nonetheless seek to fracture the *Lehman Securities Class Action.* As set forth below, courts regularly reject such efforts to appoint separate lead plaintiffs for niche groups. *See, e.g, In re Delphi Corp. Sec., Deriv. & "ERISA" Litig.*, 458 F. Supp. 2d 455, 459 n.4 (E.D. Mich. 2006) (rejecting appointment of niche plaintiff and recognizing lead plaintiff's ability to assert Securities Act claims on behalf of preferred stock holders in amended complaint despite fact that none of the original complaints identified preferred securities or asserted Securities Act claims). Here, too, Lead Plaintiff should not be distracted and delayed from prosecuting claims in the *Lehman Securities Class Action* because the Niche Plaintiffs − with a substantially

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Pension Plan and Trust (collectively, "Brooks"). Citations in the form "__ Br." refer to memoranda of law filed by the respective Niche Plaintiffs on November 24, 2008.

[5] *Fogel Capital Mgmt., Inc. v. Richard S. Fuld et al.*, No. 08-CV-08225 (the "*Fogel Action*").

smaller financial interest in the *Lehman Securities Class Action* − have belatedly moved for lead plaintiff in an action that is duplicative of the *Lehman Securities Class Action* and brought on behalf of investors already represented by Lead Plaintiff in the *Lehman Securities Class Action.*

Unquestionably, the Pension Fund Group continues to have the largest financial stake in the outcome of this litigation. As set forth in its lead plaintiff motion filed on June 30, 2008, the Court-appointed Lead Plaintiff had $28 million in losses from its transactions in Lehman securities during the longest noticed class period at that time. Over the class period asserted in the Amended Complaint, the Pension Fund Group suffered losses exceeding ***$66 million***.[6] In contrast, the Niche Plaintiffs, ***collectively***, assert losses of less than $8 million.

To obscure the limited nature of their financial interest in this action and to side-step the Court's order appointing the Pension Fund Group as Lead Plaintiff, the Niche Plaintiffs rely on two notices pursuant to which the Pension Fund Group moved for appointment as the lead plaintiff in the *Lehman Securities Class Action*. The Niche Plaintiffs first attempt to limit the scope of the notices to just the Securities Exchange Act of 1934 (the "Exchange Act") claims involving Lehman's common stock, and then urge a new rule that would prohibit a court-appointed lead plaintiff from asserting additional claims arising from the course of conduct squarely within the appointee's mandate. Such efforts run afoul of the express purpose of the Private Securities Litigation Reform Act of 1995's ("PSLRA") notice provisions, which were enacted to alert investors to the

[6] Collectively, all of the plaintiffs identified in the Amended Complaint sustained more than $74 million in losses during the Class Period. Coffey Decl. at C.

pendency of an action and to encourage institutional investors with the largest financial interest in the litigation to move for appointment as lead plaintiff. Here, the plain language of the notice, widely circulated on April 30, 2008, put investors in Lehman "securities" on notice that an action involving Lehman "securities" was filed and that all investors in any Lehman security had until June 30, 2008 to move this Court to serve as a lead plaintiff in the *Lehman Securities Class Action*. The Pension Fund Group – comprised of five institutional investors, all prototypical lead plaintiffs under the PSLRA – responded to these notices and was appointed Lead Plaintiff. As Lead Plaintiff, the Pension Fund Group filed the Amended Complaint based on its investigation and analysis into cognizable claims.

In addition to its tardy appearance, Belmont is not an adequate representative of the class it seeks to represent. As explained below, the conduct of Belmont and its counsel, including convoluted procedural maneuvers calculated only to forum shop, is not in the best interest of the Class. Moreover, the assertions in Belmont's sworn certification – including that it seeks appointment as lead plaintiff for just purchasers of Series J securities – cannot be reconciled with the actions of its counsel, Grant & Eisenhofer P.A. ("G&E"). *See* Coffey Decl. at D, ¶¶1, 4. As explained below, Belmont appears unaware that its counsel recently filed an amended complaint asserting claims on behalf of purchasers of an additional (unidentified) 800 Lehman securities in separate offerings.

In sum, the Court appointed the Pension Fund Group as Lead Plaintiff, and the institutional investors comprising that group have been vigorously pursuing the interests

of the Class, including the claims of purchasers of Lehman's Series J preferred securities. Appointing a niche lead plaintiff is unwarranted here and contrary to the purposes of the PSLRA.[7]

II. PROCEDURAL BACKGROUND

A. THE PENSION FUND GROUP IS APPOINTED LEAD PLAINTIFF IN THE *LEHMAN SECURITIES CLASS ACTION*

On April 29, 2008, a securities class action against Lehman and its officers, styled *Southeastern Pennsylvania Transportation Authority v. Lehman Brothers Holdings Inc., et al*, No. 08-CV-2431, was filed in the Northern District of Illinois. That action was brought on behalf of purchasers of Lehman "securities." *See Southeastern Pennsylvania Transportation Authority*, No. 08-CV-2431, D.I. 1 at ¶1. On April 30, 2008, counsel in that action published the statutorily mandated PSLRA notice on *Prime Newswire* informing investors that a class action lawsuit on "***behalf of purchasers of the securities of Lehman Brothers Holdings Inc.***" had been filed and that the deadline to move for appointment as lead plaintiff was June 30, 2008. Coffey Decl. at E.

On June 18, 2008, the first securities class action against Lehman in this District, styled *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, was filed. That same day, counsel for the plaintiff in that action published a notice in *Marketwire* alerting investors to a class period of September 13, 2006, through June 6, 2008. *See* Coffey

[7] Unlike the institutional investors comprising the Pension Fund Group, none of Niche Plaintiffs have provided any information about the qualifications of the various members in their groups to serve as lead plaintiff. Brooks' omission is particularly deficient given that it attacks its co-Niche Plaintiffs for their failure to provide adequate information about the structure of their groups or their qualifications. *See Fogel Action*, D.I. 54 at 17-18.

Decl. at F. The June 18 notice, in a reference to the April 30 notice, explicitly stated that it "extends a prior Class Period" and refers to the lead plaintiff deadline noticed by the April 30 notice. *See id.*

Pursuant to the lead plaintiff deadlines established by the April 30 and June 18 notices, on June 30, 2008, the Pension Fund Group, along with other movants, moved for appointment as lead plaintiff in the *Lehman Securities Class Action*.

On July 31, 2008, the Court entered an order appointing the Pension Fund Group as Lead Plaintiff.[8] Upon its appointment, the Pension Fund Group continued its investigation of the Class's claims with the expectation of filing a detailed amended complaint on September 26, 2008, as set forth in the Court's order dated September 11, 2008.

Prior to the filing of the Amended Complaint, however, Lehman collapsed and filed for bankruptcy protection. The parties submitted a joint stipulation seeking an amendment of the existing scheduling order for the filing of the Amended Complaint and defendants' response thereto. The Court approved the extension, and pursuant to the revised schedule, on October 27, 2008, Lead Plaintiff filed the Amended Complaint. Based on the Lead Plaintiff's investigation, the class period is June 12, 2007 through September 15, 2008 (the "Class Period") in the *Lehman Securities Class Action*. The Amended Complaint modifies the class period pled in the initial actions to account for Lehman's bankruptcy and additional developments and corrective disclosures relating to Lehman's misrepresentations, but retains the core theory of liability set forth in the April

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[8] *See Lehman Securities Class Action,* D.I. 18.

30 and June 18 notices. Consistent with Second Circuit precedent, the Amended Complaint also names six additional plaintiffs that purchased either Lehman common stock, preferred stock and/or Lehman notes and asserts claims under Sections 10(b) and 20(a) of the Exchange Act and Sections 11, 12 and 15 of the Securities Act for twenty-eight Class Period offerings of preferred stock and bonds. The Amended Complaint expressly includes claims on behalf of purchasers of Series J stock.[9]

B. FOGEL DOES NOT OPPOSE CONSOLIDATION

On September 24, 2008, Fogel filed a class action lawsuit asserting claims under Sections 11 and 15 of the Securities Act on behalf of investors of Series J stock and subsequently moved to be appointed lead plaintiff for a class of investors in that security. *See Fogel Action*, D.I. 1, 19.[10] Concurrently with the filing of its complaint, Fogel circulated a notice announcing its action and advising the public that plaintiffs may move to be appointed lead plaintiff in its case by November 24, 2008. The Niche Plaintiffs' motions are filed in response to the notice issued by Fogel.

On October 29, 2008, two days after filing the Amended Complaint, Lead Plaintiff filed a motion seeking to consolidate the *Fogel Action* with the *Lehman Securities Class Action*. *See Fogel Action*, D.I. 40. On November 10, 2008, recognizing the factual and legal similarities between the claims in the *Lehman Securities Class*

[9] On November 18, 2008, the Court granted the defendants' request for a 45-day extension (from December 10, 2008 to January 23, 2009) to respond to the Amended Complaint. *Lehman Securities Class Action*, D.I. 64.

[10] The *Fogel Action* was originally assigned to Judge Sidney H. Stein. On September 26, 2008, the Court-appointed Lead Plaintiff wrote to Judge Stein to request a transfer of the *Fogel Action* to this Court as an action related to the *Lehman Securities Class Action*. Coffey Decl. at G. The letter also noted that an amended complaint including Series J securities would be filed in accordance with the briefing schedule entered by the Court. *Id.*

Action and the *Fogel Action,* Fogel filed a notice of non-opposition to Lead Plaintiff's motion to consolidate and withdrew its motion for appointment as lead plaintiff. *See Fogel Action*, D.I. 43. The unopposed motion is pending before the Court.

C. ADDITIONAL ACTIONS ARE FILED AND G&E BEGINS FORUM SHOPPING

Of the three Niche Plaintiffs, two movants, Belmont and Brooks, have filed their own class action complaints purporting to assert claims on behalf of purchasers of Series J stock. Belmont's amended complaint seeks to represent Series J investors along with purchasers of 799 unidentified securities, while Brooks' action asserts claims on behalf of Series J investors only. As discussed below, the filing of Belmont's amended complaint was but one of several tactics employed by its counsel, G&E, to try to cleave away a part of the *Lehman Securities Class Action* for its own benefit.

Belmont and its chosen counsel, G&E, have followed a convoluted procedural path that is not in the best interest of the class of Series J purchasers that Belmont seeks to represent. G&E's effort to carve out a niche action for itself began shortly after the *Fogel Action* was filed. Consistent with the requirements of the PSLRA, Fogel's complaint (filed on September 24, 2008) included a certification stating that it had purchased 56,300 shares of Series J stock. *See* Coffey Decl. at X. *See also Fogel Action*, D.I. 20 at 2. Almost one month later, on October 27, 2008, G&E filed an action in New York State Court with two individual plaintiffs, Jeffrey Stark ("Stark") and Kathy Rooney ("Rooney"), who purchased 2,000 and 1,200 shares of Series J in the offering at

$25.00 per share, respectively. *See* Coffey Decl. at Y, ¶¶9-10.[11] Belmont was not named as a plaintiff in the New York state court action. *Id.* By filing in state court, G&E avoided the PSLRA notice and lead plaintiff provisions and presumably believed that it could continue its action in state court despite its clients' *de minimis* financial interest.

After filing its state court action, on November 4, 2008, Belmont signed a PSLRA certification attesting to, *inter alia*: (1) reviewing the "Complaint filed relating to the Lehman Brothers Holdings Inc. Series J"; and (2) purchasing 300,000 shares of Series J stock in the offering for $25.00 per share. Coffey Decl. at H, ¶¶1, 4. Belmont's purchase of 300,000 share of Series J exceeded Fogel's financial interest. Armed with this new client, and facing the prospect of the *Fogel Action* being consolidated with the *Lehman Securities Class Action*, yet simultaneously maintaining a separate action on behalf of different (yet smaller) clients in state court, G&E wrote to the Court on November 5, 2008, asking that the Court hold Lead Plaintiff's motion to consolidate the *Fogel Action* in abeyance until after the November 24, 2008 plaintiff deadline noticed in the *Fogel Action* had expired. *See* Coffey Decl. at I. In its letter, G&E stated that it intended to move for appointment as lead plaintiff on behalf of a client but made no mention of its pending state court action. *See id*. After Fogel consented to consolidation, G&E wrote a second letter (dated November 12, 2008) again urging the Court not to consolidate the *Fogel Action*. *See* Coffey Decl. at J. The second letter also failed to inform the Court of G&E's pending state court action. *See id.* Incredibly, G&E has still not offered any

[11] G&E's state court action asserted claims for investors in three securities: (1) Series J; (2) 7.25% Non-Cumulative Perpetual Convertible Preferred Stock, Series P (the "Series P Shares"); and (3) 8.75% Non-Cumulative Mandatory Convertible Preferred Stock, Series Q (the "Series Q Shares"). Coffey Decl. at Y.

legitimate explanation for filing its state court action after the commencement of the *Fogel Action*. On November 12, 2008, G&E's state court action was removed to the Southern District of New York and transferred to this Court without opposition.

On November 24, 2008, Belmont moved for appointment as lead plaintiff and approval of G&E and the Law Office of Bernard M. Gross ("Gross") as co-lead counsel. Included with Belmont's motion is Belmont's sworn certification (dated November 4, 2008), which attested to Belmont having reviewed the "[c]omplaint filed relating to Lehman" Series J preferred securities.

Furthermore, even though Belmont is not a party to the state court action, Belmont oddly states in its lead plaintiff memorandum that removal of the state court action filed only by Stark and Rooney "will not be contested." *See* Belmont Br. at 1.

On December 2, 2008, Belmont filed an amended complaint and noticed a new lead plaintiff deadline of February 2, 2009. *See* Coffey Decl. at H. Belmont's 28-page amended complaint mirrors the complaint filed by G&E in New York State Court. The only significant difference is the addition of a few sentences that dramatically expand the class definition from purchasers of 3 Lehman-related securities to purchasers of more than 800 (unidentified) securities. Belmont clearly fails to grasp the complexity of the undertaking that its counsel, G&E, has conferred upon it by haphazardly filing a complaint covering such 800 Lehman securities. For example, some of the securities subject to Belmont's amended complaint are linked to the common stock of other companies such as NutriSystem, Inc., Apple Inc., Target Corp., Microsoft Corp., American International Group, Inc., and Yamana Gold Inc. or relate to commodities such

as crude oil. *See* Coffey Decl. at K-O. Some of these offerings have maturity dates within months of the offering and may not have sustained any damages. For example, Lehman's pricing supplement for 21.20% reverse exchangeable notes linked to the common stock of NutriSystem, Inc. states that the securities were issued in September 2007 and matured three months later in December 2007. *Id.* at K.

The certification filed with Belmont's December 2, 2008, amended complaint is dated November 4, 2008, and is identical to the sworn certification filed with Belmont's November 24, 2008, lead plaintiff motion. Consequently, it includes paragraph 1 referring only to Belmont "reviewing the Complaint filed relating to Lehman Brothers Holdings Inc. Series J" shares. *See* Coffey Decl. at H, ¶1. Thus, Belmont's own certification (dated November 4) serve as an admission that it has not reviewed and authorized the filing of the amended complaint that massively expands the scope of this case.

Accordingly, it is also reasonable to ask whether Belmont even authorized the filing of the amended complaint or even if Belmont reviewed the amended complaint prior to its filing. Moreover, Belmont's amended complaint includes Rooney and Stark as co-plaintiffs, however, neither Rooney nor Stark moved for lead plaintiff with Belmont. Regardless of whether Belmont is simply an absentee plaintiff or unable to direct its counsel, the fact remains that Belmont is unfit to serve as a lead plaintiff. *See* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007) (the PSLRA was enacted to end lawyer-driven litigation).

Separate and apart from Belmont's amended complaint, Brooks' complaint was filed on November 24, 2008, concurrently with its lead plaintiff motion. Brooks' action asserts claims on behalf of investors in Series J stock.

III. ARGUMENT

This Court has already appointed a lead plaintiff with the largest financial interest in the action. That court-appointed Lead Plaintiff continues to have the largest financial stake in the litigation and has expended considerable resources and worked diligently to advance the interest of the class. There is no basis to reopen the lead plaintiff appointment process in order to appoint niche lead plaintiffs.

A. THE COURT HAS ALREADY APPOINTED A LEAD PLAINTIFF WITH THE LARGEST FINANCIAL INTEREST IN THIS ACTION

Consideration of the Niche Plaintiffs' motions is unnecessary in light of the Court's July 31, 2008 Order, which has already appointed the movant with the largest financial interest in the action, and who otherwise meets the requirements of Rule 23, as the lead plaintiff. *Lehman Securities Class Action*, D.I. 18 (July 31, 2008 Order).

The appointment of the Pension Fund Group was not only appropriate under the lead plaintiff provisions of the PSLRA but it also advances a critical goal of Congress in enacting the PSLRA – namely, to appoint a lead plaintiff ***early*** in the litigation and to empower that lead plaintiff to direct the prosecution of the class's claims "as a whole." *See Hevesi v. Citigroup Inc*., 366 F.3d 70, 82-83 & n.13 (2d Cir. 2004) (Congress enacted the PSLRA "to empower one or several investors with a major stake in the litigation to exercise control over the litigation *as a **whole***") (emphasis added). *See also In re Telxon Corp. Sec. Litig*., 67 F. Supp. 2d 803, 818-19 (N.D. Ohio 1999) (Congress intended "to

ensure that the lead plaintiff is appointed at the earliest possible time, and to expedite the lead plaintiff process.") (internal quotations omitted). Once a lead plaintiff is appointed, it is well established that the lead plaintiff is vested with the authority to prosecute all related claims. *See Hevesi*, 366 F.3d at 82-83 & n.13; *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 281 (S.D.N.Y. 2003) ("The Underwriter Defendants contend that the claims of NYSCRF, the sole lead plaintiff, are not typical of the class since NYSCRF did not purchase any bonds from the 2000 or 2001 Offerings and therefore cannot assert the Sections 11 and 12 claims under the Securities Act . . . [the Underwriter Defendants' arguments are rejected because, *inter alia*,] NYSCRF's claims are based on misrepresentations in the Registration Statements and on the same core course of conduct at issue in the Sections 11 and 12 claims"); *see also Delphi*, 458 F. Supp. 2d at 461-62 ("It is not a requirement that a lead plaintiff under the PSLRA suffer losses on each type of security that may be at issue in the class action") (citing *In re Northwestern Corp. Sec. Litig.*, 299 F. Supp. 2d 997 (D.S.D. 2003)). As noted *supra*, since its appointment as the lead plaintiff, the Pension Fund Group has vigorously advanced the interest of the Class and has diligently executed its fiduciary obligations to the Class – including investors in Series J stock. Given that the Class is already led by a prototypical lead plaintiff − each member of the Pension Fund Group is an institutional investor with substantial assets, and its members have experience supervising counsel in complex securities litigation − there is no need to reopen the lead plaintiff process and imperil the progress that has been achieved.

In any event, even if the Court were to accept the invitation to revisit the lead plaintiff process, the Pension Fund Group's losses of $66 million[12] make it the most adequate plaintiff.[13] In this regard, it is unnecessary for the Pension Fund Group to file a separate motion in order for the Court to appoint it (again) as the lead plaintiff. The PSLRA provides that the "the court shall adopt a presumption that the most adequate plaintiff . . . is the person or group of persons that [] has ***either filed a complaint*** or made a motion in response to a notice." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa); 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I)(aa). Here, the Pension Fund Group filed its Amended Complaint and attached certifications setting forth its transactions in Lehman's securities.

Thus, while the Niche Plaintiffs attempt to make much about the scope of the April 30 and the June 18 notices (Belmont Br. at 15; Brooks Br. at 4-5), they ignore the fact that each of its movants has asserted losses that are significantly smaller than the losses asserted by the Court-appointed Lead Plaintiff. Here, the Niche Plaintiffs collectively assert losses of less than $8 million (Belmont asserts losses of $7.5 million, Mizrahi asserts losses of $275,000 and Brooks asserts losses of $106,650), a fraction of the $66 million in losses suffered by the Court-appointed Lead Plaintiff. *See Delphi*, 458 F. Supp. 2d at 461 (comparing losses between investor seeking to lead class of preferred stock purchasers with lead plaintiff's common stock losses).

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[12] *See* Coffey Decl. at C (loss chart).

[13] *See*, *e.g., In re Orion Sec. Litig.*, No. 08 Civ. 1328 (RJS), 2008 WL 2811358, at *5 (S.D.N.Y. July 8, 2008) ("This Court, like many others, shall place the most emphasis on . . . the approximate losses suffered by the movant.") (quoting *Kaplan v. Gelfond*, 240 F.R.D. 88, 93 (S.D.N.Y. 2007)) (internal quotation marks omitted); *In re Fuwei Films Sec. Litig.*, 247 F.R.D. 432, 437 (S.D.N.Y. 2008) (same); *see also Weiss v. Friedman, Billings, Ramsey Group, Inc.*, No. 05-CV-4617 (RJH), 2006 WL 197036, at *3 (S.D.N.Y. Jan. 25, 2006) ("The amount of financial loss is the most significant of [the] . . . elements.") (internal citation and quotation marks omitted).

B. THE COURT SHOULD DENY APPOINTMENT OF A "NICHE" LEAD PLAINTIFF

The Niche Plaintiffs' arguments to carve out claims relating to Series J stock (Belmont Br. at 15-19; Brooks Br. at 4-6) have been rejected by courts. *See Aronson v. McKesson HBOC, Inc*., 79 F. Supp. 2d 1146, 1151 (N.D. Cal. 1999) (rejecting "niche" plaintiffs' claim of prejudice where they argued that their theories of recovery involve different showings of scienter and proof and stating that "[t]he Reform Act requires only that the interests of the class members be adequately represented by the lead plaintiff"); *Weinberg v. Atlas Air Worldwide Holdings, Inc.*, 216 F.R.D. 248, 253 (S.D.N.Y. 2003) (refusing to appoint "niche" plaintiff who argued that "he is the only moving plaintiff with standing to assert Securities Act violations based on his purchase of securities in the September 2000 secondary public offering pursuant to the September 2000 Prospectus").

On point is the court's holding in *Delphi,* 458 F. Supp. 2d 455, which involved claims on behalf of purchasers of common stock as well as preferred stock (the preferred securities were sold through trusts described as "Delphi Trust I" and "Delphi Trust II"). In *Delphi*, the court vacated an order from the Southern District of Florida appointing a lead plaintiff asserting claims under the Securities Act on behalf of purchasers of Delphi Trust I on the basis that the ability to assert claims on behalf of Delphi Trust I purchasers was squarely within the duties of the court-appointed lead plaintiff (who purchased only common stock).

By way of background, in *Delphi*, class action lawsuits were filed in this District and, on the following day, in the Eastern District of Michigan. *Id.* at 457. The notice of the first-filed action informed investors that the action was brought on behalf of "all

securities purchasers of Delphi Corporation." *Id.* Subsequently, several other actions involving Delphi were filed. The New York action, the Michigan action and each of the subsequently filed actions asserted claims under the Exchange Act. *Id.* at 459 n.4. None of the initial actions asserted claims under the Securities Act or named Delphi Trust I or II as a defendant. *Id.*

On April 11, 2005, an action was filed in Florida asserting claims under the Securities Act on behalf of only Delphi Trust I purchasers. *Id.* at 458. The plaintiff in the Florida action was successfully appointed lead plaintiff after filing a motion stating, erroneously, "that the New York and Michigan actions were brought only 'on behalf of purchasers of the common shares of Delphi Corporation,' and that this action was 'the only action brought on behalf of purchasers of [Preferred Securities] Certificates of Delphi Trust I.'" *Id.* at 459 (brackets in original). Meanwhile, Judge Naomi Buchwald endorsed a stipulated lead plaintiff structure in the New York action. *Id.*[14] The stipulation endorsed by Judge Buchwald is substantially similar to the stipulation endorsed by this Court and refers to the appointment of the co-lead plaintiffs under the Exchange Act only. *Compare* Coffey Decl. at P (stipulation appointing co-lead plaintiffs in *Delphi*) *with id.* at Q (order dated July 31, 2008).[15] On September 30, 2005, the lead plaintiff appointed by Judge Buchwald filed an amended complaint adding claims

[14] A similar agreement was reached in the Michigan cases although no order was ever entered there because the cases were voluntarily dismissed. *Id.* at 459 n.3.

[15] Belmont's attempt to limit the authority of the Court-appointed Lead Plaintiff to assert Securities Act claims based on the language of the Court's July 31, 2008 Order (Belmont Br. at 15) is likewise undercut by the sound reasoning in *Delphi*. *See* Coffey Decl. P (stipulation appointing co-lead plaintiffs in *Delphi*).

relating to Delphi Trust I and Delphi Trust II. The amended complaint also included separate counts alleging violations of the Securities Act. *Id.* The Florida plaintiff unsuccessfully moved to strike Delphi Trust I allegations from the amended complaint. *Id.* at 456.

The *Delphi* court reasoned that, under the PSLRA, the lead plaintiff appointed by Judge Buchwald had the right to litigate claims relating to securities they did not purchase where the underlying liability relating to losses suffered by investors in common stock and preferred stock was similar, even though the co-lead plaintiffs "only suffered common stock losses." *Id.* at 461. *See also In re Cendant Corp. Litig.*, 182 F.R.D. 476, 479 (D.N.J. 1998). *Delphi*, like *Hevesi*, reasoned that the movant with the largest financial interest in an action is responsible for litigating ***all*** class members' claims whether or not that movant purchased all of the securities at issue and whether or not all the securities where expressly included in original complaints or in the notices. *See Delphi*, 458 F. Supp. 2d at 461-62 ("It is not a requirement that a lead plaintiff under the PSLRA suffer losses on each type of security that may be at issue in the class action") (quoting *Northwestern Corp. Sec. Litig.*, 299 F. Supp. 2d at 1007).

Further, the *Delphi* court was reassured that the lead plaintiff appointed by Judge Buchwald would in fact pursue preferred class members' claims because they filed an amended complaint asserting claims on behalf of Delphi Trust I and II purchasers. *Delphi*, 458 F. Supp. 2d at 462. The court stated:

> Moreover, as the institutional Lead Plaintiffs acknowledge, they are statutorily obligated to vigorously pursue the claims of all claimants. ***They have already taken action in this regard by filing a consolidated class action complaint which incorporates the claims of common stock***

> ***purchasers and the claims of both Delphi Trust I and Delphi Trust I preferred securities purchasers***.

Id. (emphasis added). The Amended Complaint here evidences the same commitment to the Class as it includes, *inter alia*, claims of Series J investors. *Delphi* is directly applicable to the matter at bar and extinguishes the Niche Plaintiffs' efforts to carve out Series J claims.[16]

Other courts have also rejected attempts to carve out niche class. For example, in *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 451 (S.D. Tex. 2002), the court denied appointing a niche lead plaintiff to represent claims of different security purchasers and explained that "[t]aken to its logical extreme . . . [an] argument that each group of notes issued pursuant to a different Registration Statement and Prospectus requires a different class or subclass and separate Lead Plaintiff would fracture this litigation into hundreds of classes or subclasses and obstruct any efficient and controlled progress." *Enron*, 206 F.R.D. at 451. This reasoning is particularly apt here.

Although not implicated in this motion, Belmont's amended complaint purports to assert claims on behalf of securities purchased in 800 separate offerings. Taking the

[16] Belmont does not explain how Judge Keenan's decision to declare *Mark v. Goldman Sachs & Co., et al.*, No. 08 Civ. 8181 (MGC) (S.D.N.Y.) (involving Freddie Mac preferred stock) as "not related" to *Kuriakose v. Federal Home Loan Mortgage Co.*, No. 08 Civ. 7281 (JFK) (S.D.N.Y.) (involving Freddie Mac common stock) is applicable to the matter at bar. Belmont Br. at 19. Here, the *Fogel Action* was transferred from Judge Stein to this Court after Lead Plaintiff wrote to Judge Stein and requested that *Fogel* be transferred to this Court. Coffey Decl. at G. Moreover, the Amended Complaint and the *Fogel Action* assert claims on behalf of an identical class of investors, on Series J stock and assert overlapping theories of liability against common defendants. In contrast, the *Kuriakose* and *Mark* actions did not involve a single overlapping defendant nor did they involve the same securities. *Compare* Coffey Decl. at R, ¶¶9-11 (*Mark* Complaint) *with id.* at S, ¶¶23-26 (*Kuriakose* Complaint). Moreover, unlike the matter at bar, as noted by Judge Keenan, "[n]o motions to consolidate [*Kuriakose* and *Mark*] . . . have been filed ***as of yet***." *Kuriakose v. Federal Home Loan Mortgage Co.*, No. 08-cv-7281, 2008 WL 4974839, at *7 (S.D.N.Y. Nov. 24, 2008) (emphasis added).

Niche Plaintiffs' arguments to their logical extreme may require the Court to appoint 800 lead plaintiffs for each of the 800 offerings subject to Belmont's amended complaint – an illogical and impractical result. The PSLRA's lead plaintiff provisions were enacted to encourage the efficient litigation of securities class actions by large institutional investors. *See id.* ("[R]equests for splintering the action or appointing multiple Lead Plaintiffs to represent specialized interests, especially in light of the common facts and legal issues here, would undermine the purpose of the PSLRA. Therefore the Court denies the motions of the 'Niche Plaintiffs. . . .'"). The relief sought by the Niche Plaintiffs undermines this goal.

The appointment of niche plaintiffs – particularly those with smaller losses – also potentially harms the representation of the Class. As noted by the court in *In re BankAmerica Corp. Sec. Litig.*, 95 F. Supp. 2d 1044, 1049 (E.D. Mo. 2000):

> Clearly, the PSLRA creates rights in plaintiffs possessing the greatest financial stake in the litigation. They have the right to be appointed lead plaintiffs, to control the course of the class action litigation, and to select class counsel of their choice. This federal right cannot be given its intended scope if competing state court plaintiffs, representing a significantly smaller number of shares, can institute premature settlement negotiations which threaten the orderly conduct of the federal case and which could result in the release of the federal claims.

Although *BankAmerica* addressed the relationship between actions in state and federal court, the rationale underlying the court's refusal to place control of a class action in the hands of plaintiffs with smaller losses is applicable to the matter at bar. There is no justification for the appointment of the Niche Plaintiffs in this case.

C. THE NOTICES, PURSUANT TO WHICH THE COURT APPOINTED THE PENSION FUND GROUP AS LEAD PLAINTIFF, DO NOT SUPPORT THE APPOINTMENT OF "NICHE" LEAD PLAINTIFFS

The April 30 and June 18 notices put all investors in Lehman's securities on notice of the claims that could be brought by the lead plaintiff. The April 30 notice notified investors that an action on "***behalf of purchasers of the securities of Lehman Brothers Holdings Inc.***" had been filed and that the deadline to move for appointment as lead plaintiff was June 30, 2008. Coffey Decl. at E. Consistent with the language in the notice, press coverage of the filing of the lawsuit reported that the action was brought on "behalf of ***all purchasers of the firm's securities***." *See* Coffey Decl. at T (Andrew Harris, "Lehman Brothers Hid Depth of Subprime-related Losses, Suit Says," Bloomberg, Apr. 30, 2008 (emphasis added).[17] On June 18, an accompanying notice was issued announcing the filing of an action on behalf of common stock holders but explicitly expanding the class period originally noticed in the April 30 notice to end on June 6, 2008. The June 18 notice, in reference to the April 30 notice, clearly stated that it "***extends a prior Class Period***" and refers to the lead plaintiff deadline from the April 30 notice. Coffey Decl. at F. The Series J offering commenced in February 2008 and is squarely within the expanded class period noticed in the June 18 notice.

Courts read PSLRA notices in a comprehensive manner to cover the largest possible class of plaintiffs. *Cf. In re Doral Financial Corp. Sec. Litig.*, 414 F. Supp. 2d 398, 402 (S.D.N.Y. 2006) ("For the purpose of determining lead plaintiff, I find that the

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[17] Several notices announcing the filing of an action on behalf of purchasers of Lehman "securities" were issued after April 30, including on May 6, June 3, June 12 and June 13. *See* Coffey Decl. at U.

use of the longer, most inclusive class period . . . is proper, as it encompasses more potential class members"); *Miller v. Dyadic Int'l, Inc.*, No. 07-80948-CIV, 2008 WL 2465286 (S.D. Fla. Apr. 18, 2008) (finding the largest, most inclusive class period to be proper for lead plaintiff selection). Here, not only does the plain language of the April 30 notice – which asserts claims on behalf of purchasers of the securities of Lehman – cover more than common stock purchasers, but Belmont's amended complaint recognizes the same. The class period in Belmont's amended complaint begins on July 31, 2007, one day after the class period noticed in the April 30 notice ends and less than two weeks ***after*** Lehman raised $5 billion in three separate subordinated note offerings.[18] By beginning Belmont's class period on July 31, 2007 and excluding Lehman's three July 2007 offerings from its action, Belmont tacitly acknowledges, as it must, that the April 30 notice covers more than common stock claims. Moreover, since the June 18 notice refers to the April 30 notice, both notices are clearly related and serve to put all investors in Lehman on notice that actions covering their securities were filed and were facing a June 30 deadline to move for appointment as lead plaintiff.

Further support for reading both notices in a comprehensive manner comes from the fact that, at their core, all of the actions filed to date – including the allegations in the Amended Complaint and each of the actions subject to the instant motions – relate to Lehman's failure to disclose its true exposure to losses from real estate and mortgage-related investments. In *Cendant*, 182 F.R.D. 476, the court refused to appoint separate counsel to litigate claims covering a class period starting the day after the class period in

[18] *See Lehman Securities Class Action*, Amended Complaint at ¶270 (referring to the July 19 6.5% Offering, the July 19 6% Offering and the July 19 6.875% Offering).

the PSLRA notices ended because the later actions related to a "continuing course of conduct." *Id.* at 479 ("These motions attempt to cloud the fact that the issues underlying this 'new' litigation are the same as those of the other consolidated actions").[19] Here, the April 30 and June 18 notices alerted investors to the fact that the claims in the class action complaint relate to Lehman's misrepresentations concerning its financial position. *See* Coffey Decl. at D & E. The Amended Complaint, as well as each of the Series J actions subject to Niche Plaintiffs' motions are based on substantially similar theories of liability as set forth in the April 30 and June 18 notices. *Compare id. with Lehman Securities Class Action*, Amended Complaint ¶¶1, 5. *See also* Belmont Br. at 5 (Lehman's prospectus was materially false and misleading because, *inter alia*, it failed to disclose that "Lehman was in desperate need of capital"); Mizrahi Br. at 4-5 (citing to Fogel notice which refers to misleading statements in Lehman's Prospectus relating to Lehman's failure to establish sufficient reserves). The April 30 and June 18 notices were more than adequate to inform Niche Plaintiffs about pending actions relating to investors' losses from disclosures relating to Lehman's precarious financial position.

The decision in *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, No. 05 Civ. 1898 (SAS), 2005 WL 1322721 (S.D.N.Y. June 1, 2005), does not require a different result. *See* Belmont Br. at 3, 16 (citing *Bombardier*); Brooks Br. at 5

[19] *In re American Int'l Group, Inc. Sec. Litig.*, No. 04 Civ. 8141 (JES), 2008 WL 2795141 (S.D.N.Y. July 18, 2008) (Belmont Br. at 18) is distinguishable from the facts of this case. *AIG* denied plaintiffs' motion to amend the complaint because the proposed amendments included claims "which took place in 2007 and 2008-more than three years after the transactions at issue in the Third Amended Complaint." 2008 WL 2795141, at *3. In *AIG* there was no relationship between the allegations in the third amended complaint and the proposed amendments in the fourth amended complaint. Unlike *AIG* which sought to assert new theories of liability, any additional claims asserted in the Amended Complaint are based on a continuing course of conduct. *See Cendant*, 182 F.R.D. at 479.

(same). In *Bombardier,* Judge Shira Scheindlin recognized that "[c]ourts have generally disfavored republication of notice when a complaint is amended, even where the amendment alters the class period." *Id.*, at *2 & n.7 (gathering cases). However, *Bombardier*, which required publication of a new notice, presented a unique fact pattern. A new notice was required there because the original complaint related to a specific, narrow type of security (Series 2000-A securities) while the amended complaint broadened the noticed class to include Series 1998-A, 1998-B, 1998-C, 1999-A, 1999-B and 2001-A Certificates along with the Series 2000-A securities and, moreover, enlarged the class period by ***five years***. *Id.*, at *1. Thus, the original notice in *Bombardier* was significantly narrower than the broader allegations in the amended complaint. Here, the opposite is true. The April 30 notice did not limit the action to common or preferred stock but rather described the claims as brought on "behalf of purchasers of the ***securities of Lehman Brothers Holdings Inc.***" *See* Coffey Decl. at E (emphasis added). The Amended Complaint includes, *inter alia*, securities within the broad scope of the April 30 notice. Accordingly, the narrow circumstances leading the *Bombardier* court to require publication of a new notice are not present here. *See e.g., Delphi*, 458 F. Supp. 2d at 459 n.4.[20]

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[20] *Ravens v. Iftikar*, 174 F.R.D. 651 (N.D. Cal. 1997), cited (Belmont Br. at 15) for the proposition that "the central purpose of the notice requirement of subparagraph (A) of section 21D(a)(3) is to enable the member of the putative class with the 'largest financial interest in the relief sought by the class' to make a rational decision whether to intervene," does not advance the Niche Plaintiffs' attempts to wrest control of this case away from Lead Plaintiff. Here, the April 30 and June 18 notices prompted the Pension Fund Group – with losses exceeding $28 million ($66 million during the Class Period) – to move to be appointed lead plaintiff. If the "central purpose" of the PSLRA's notice requirement is to encourage the movant with the largest financial interest in the litigation to seek appointment as lead plaintiff, then clearly appointing movants with significantly smaller losses – such as the Niche Plaintiffs – contravenes the central purpose of the PSLRA's notice provisions.

In re Cyberonics Inc. Sec. Litig., 468 F. Supp. 2d 936 (S.D. Tex. 2006) and *In re Leapfrog Enterprises, Inc. Sec. Litig.*, 2005 WL 5327775 (N.D. Cal. July 5, 2005) (cited at Belmont Br. at 17; Brooks Br. at 6) are also distinguishable because both of these cases involve amended complaints that sought to expand the core theories – as opposed to adding facts – pled in the initial complaints. *Cyberonics* ordered publication of a new notice where the amended complaint expanded the class period from four months to two and one-half years and newly alleged "that Cyberonics concealed the existence of improprieties related to the award of stock options grants, internal controls, and accounting for executive compensation and expenses." 468 F. Supp. 2d at 938-39 & n.2. The original complaint related to "Cyberonics' efforts to secure approval from the FDA for marketing a device for the treatment of depression." *Id.* at 938. *Leapfrog* ordered publication of a new notice because the amended complaint expanded the original theory of liability, which alleged that the company misled investors by making misstatements about its financial outlook, into a case involving Leapfrog's supply chain and distribution functions. *See Leapfrog*, 2005 WL 5327775, at *3. *See also Cyberonics*, 468 F. Supp. 2d 939 (describing expanded nature of claims in *Leapfrog*). Plaintiffs in *Leapfrog* also

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Lead Plaintiff respectfully submits that *In re Select Comfort Corp. Sec. Litig.*, No. 99 Civ. 884, 2000 WL 35529101 (D. Minn. Jan. 27, 2000) (cited at Brooks Br. at 6 because it dismissed Securities Act claims because these claims were not asserted in the original action), unreasonably restricts lead plaintiffs from fulfilling their mandate to assert all related claims in a consolidated action. Recent decisions considering a lead plaintiff's ability to allege Securities Act claims in cases where the original complaints allege only Exchange Act claims do not follow the holding of *Select Comfort*. *See, e.g., Delphi*, 458 F. Supp. 2d at 459 n.4 (allowing lead plaintiff to assert Securities Act claims but noting that "[a]s originally filed, neither the Cox action nor any of the companion cases specifically named Delphi Trust I or II as a party-defendant, nor did any of the complaints allege violation of the Securities Act of 1933 as a theory of recovery"). *See also Thomas v. Metropolitan Life Ins. Co.*, No. Civ-07-121-F, 2007 WL 2909352, at *2 (W.D. Okla. Oct. 5, 2007) ("the [PSLRA] does not expressly require any type of notice at the time of an amendment, regardless of the nature of that amendment").

expanded the original noticed class period by seven months. *Leapfrog*, 2005 WL 5327775, at **1, 3.[21]

The massive alteration of the class period(s) and theories of liability in *Cyberonics* and *Leapfrog* has not happened here. In fact, the Amended Complaint extended the end of the class period that had been set forth in the June 18 notice by just three months. In such circumstances, a lead plaintiff is not obligated to re-notice an action. *See*, *e.g.*, *In re Int'l Rectifier Corp. Sec. Litig.*, 07 Civ. 02544, 2008 WL 4555794, at *23 (C.D. Cal. May 23, 2008) (publication of new notice is not required "because Plaintiffs' Complaint extended the original 17-month class period (as represented in the notice to class members) by approximately 32 months after the appointment of the lead plaintiffs");[22] *In re Star Gas Sec. Litig.,* No. 3:04-CV-1766 (JBA), 2005 WL 818617, at *7 (D. Conn. Apr. 8, 2005) (lead plaintiffs have discretion to dictate scope of case through subsequent filing of amended complaint); *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 503 (S.D. Fla. 2003) ("additional notice is not required where the original complaint is amended to include, in part, an extension of the class period"); *In re Rite Aid Corp. Sec. Litig.*, No. 99 Civ. 1349, 1999 WL 34807713, at *1 (E.D. Pa. Dec. 21, 1999)

[21] *King v. Livent, Inc.*, 36 F. Supp. 2d 187 (S.D.N.Y. 1999) (Brooks Br. at 6) is likewise distinguishable. In *King*, plaintiffs seeking to move in an action relating only to Livent notes argued that a notice issued in another action – relating only to Livent common stock – obviated a need to issue a notice of their (the *King* plaintiffs) note-holder action. *See id.* at 189. Unlike here, the *King* plaintiffs were not moving to be appointed lead plaintiff in an already noticed action with an already appointed lead plaintiff. *See id.* at 188 ("On the same day the complaint was filed, the Kings also filed the instant motion for appointment as lead plaintiffs and the appointment [of lead counsel].").

[22] *Int'l Rectifier* distinguished *Leapfrog* by noting that "in that case, the original lead plaintiff alleged losses of only $36,000, and an institutional investor with losses over $10 million (who was the lead plaintiff in a subsequent related action) sought to be the lead plaintiff." *Int'l Rectifier*, 2008 WL 4555794, at *23 n.17. Here, the opposite is true. The Court-appointed Lead Plaintiff's financial interest in the action is considerably greater than the losses asserted by all the Niche Plaintiffs combined.

(filing of complaint similar to previously-filed complaint, but encompassing an earlier class period, did not warrant republication of notice or relitigation of lead plaintiff and counsel issues); *Greenberg v. Bear Stearns & Co., Inc.,* 80 F. Supp. 2d 65, 69 (E.D.N.Y. 2000) (new publication not required where defendant is added to complaint); *In re Synovis Life Techs., Inc. Sec. Litig.*, No. Civ. 04-3008, 2005 WL 2063870, at *1 n.3 (D. Minn. Aug. 25, 2005) (noting that "the weight of the case law" suggests no new notice is required where plaintiffs moved the start of the class period back five months).[23]

D. THE PENSION FUND GROUP SUFFERED SIGNIFICANT LOSSES ON ITS INVESTMENTS IN SERIES J SECURITIES AND HAS STANDING TO ASSERT CLAIMS

The Niche Plaintiffs attempt to make much about ACERA's inclusion of only common stock transactions in its initial lead plaintiff motion. *See, e.g.,* Brooks Br. at 9-11. *See also* Belmont Br. at 7. This effort is unavailing.

The language in the April 30 notice alerted investors in the "securities" of Lehman that an action had been commenced. As the Niche Plaintiff's own authority makes clear, the relevant inquiry for analyzing the scope of the notice is the Amended

[23] Common stock losses in this case dwarf the total size of the Series J offering. Thus, unlike *Southern Alaska Carpenters Pension Fund v. Bonlat Financing Corp., et al.*, 04-civ-30 (LAK), where bond losses constituted approximately 85% the class's losses, separate representation for preferred holders is not warranted here. *See, e.g.,* Coffey Decl. at V (*Southern Alaska Carpenters Pension Fund*, 04-civ-30, Hr. Trans. at 42 ("nobody seems to dispute that something in the neighborhood of 85 percent of losses here were suffered with respect to the bonds")).

Muzinich & Co., Inc. v. Saftey-Kleen Corp., No. 3:00-1145-17, slip op. (D.S.C. Aug. 3, 2000) (Belmont Br. at 18) is distinguishable. Coffey Decl. at W. In *Muzinich* the court ordered publication of a new notice where the notice filed by Muzinich "preceded the complaint by approximately three weeks." *Muzinich*, No. 3:00-1145-17, slip op at 2. No such delay occurred here. Here, the April 30 notice provided investors in Lehman's "securities" 60 days to consider moving for appointment as lead plaintiff.

Complaint filed by lead plaintiffs, not a lead plaintiff motion.[24] Filing a lead plaintiff motion does not, as Brooks claims without support, define the scope of the class or otherwise limit the movant's ability to represent the "whole" class for which it is ultimately appointed as a lead plaintiff. Indeed, such a reading would render the PSLRA's lead plaintiff provisions meaningless as lead plaintiff movants would need to file a complaint with their lead plaintiff motion, the only way to truly identify with certainty the scope of the complaint. Instead, the PSLRA states quite clearly that a court may appoint a movant that filed the complaint ***or*** made a motion in response to a notice. 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I)(aa).

If the Niche Plaintiffs are correct and complaints filed after a lead plaintiff has been appointed are limited to the securities in the lead plaintiff's motion, then no lead plaintiff could ever assert claims on behalf of any securities not listed in its schedule of transactions. This result turns *Hevesi* on its head. As the Second Circuit explained, Congress enacted the PSLRA "to empower one or several investors with a major stake in the litigation to exercise control over the litigation *as a* ***whole***." *See Hevesi*, 366 F.3d at 82-83 & n.13 (emphasis added). Under the new rule that would flow from the Niche Plaintiffs' argument, going forward every lead plaintiff in every securities action will be limited as to the claims they can assert by the transactions listed in their lead plaintiff papers.[25] Moreover, courts would face wasteful, successive lead plaintiff motions by

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[24] The cases cited by the Niche Plaintiffs in support of issuing a new notice (Belmont Br. at 3, 16-17; Brooks Br. at 6) analyze the relationship between a notice and a complaint filed by a lead plaintiff. None of the cases examine the list of securities submitted by a movant to interpret the scope of a notice.

[25] The Court-appointed Lead Plaintiff's lead plaintiff motion filed in the Northern District of Illinois on June 30, 2008, consistent with the language of the April 30 notice, refers to the Pension Fund Group's

niche plaintiffs seeking to carve out related actions. That cannot be, and is not, the law. In sum, Lead Plaintiff has the right to pursue claims on behalf Series J investors even if they had not purchased Series J stock. *See Hevesi*, 366 F.3d at 82-83 & n.13; *Delphi*, 458 F. Supp. 2d at 462. Here, of course, a member of the Pension Fund Group, ACERA, did in fact purchase that security.

Faced with that fact, the Niche Plaintiffs launch a number of feeble attacks. Brooks claims that ACERA has "never satisfied the PSLRA lead plaintiff requirement with respect to the Series J Shares." Brooks Br. at 10-11. Not so. The PSLRA's lead plaintiff provisions creates a rebuttable presumption that the most adequate plaintiff is the "person or group of persons that [] has either filed the complaint ***or*** made a motion in response to a notice under subparagraph (A)(i). . . ." 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I)(aa) (emphasis added). Here, the Amended Complaint includes certifications by ACERA, and each of the plaintiffs named therein, setting forth their Class Period transactions in Lehman securities -- including Series J stock. Accordingly, any perceived defect in ACERA's original application was cured by filing the Amended Complaint.[26]

Brooks also seeks to obscure the PSLRA's presumption that the movant with the largest financial interest in an action serves as lead plaintiff by arguing that any presumption of adequacy afforded to the Pension Fund Group is rebutted because the

losses in Lehman "***securities*** between September 13, 2006 and June 6, 2008. . . ." *Southeastern Pennsylvania Transportation Authority v. Lehman Brothers Holdings Inc., et al*, No. 08-CV-2431, D.I. 24 at 1 (N.D. Ill. filed June 30, 2008) (emphasis added).

[26] In addition, named plaintiffs Brockton, AEIC and Kosseff also purchased Series J stock and also have standing to represent Series J shareholders. Plaintiffs' Class Period transactions in Series J stock are filed as attachments to the Amended Complaint.

Amended Complaint "sounds in fraud." Brooks Br. at 12-13. As an initial matter, the Securities Act claims pled in the Amended Complaint most assuredly do not sound in fraud. *See, e.g.,* Amended Complaint ¶334 ("The Count does not sound in fraud."). In any case, courts have repeatedly rejected efforts to carve out niche classes based on different pleading standards. As the court in *Aronson* explained,

> "niche" plaintiffs claim prejudice because their theories of recovery involve different showings of scienter and proof. However, as all claims are based on the same financial disclosures, the existence of different pleading standards does not create the need for a separate lead plaintiff. The Reform Act requires only that the interests of the class members be adequately represented by the lead plaintiff. *See* 15 U.S.C.A. § 77z-1(a)(3)(B)(I) (West 1997). There is no bar to one plaintiff alleging multiple theories of recovery. *See* Fed. R. Civ. Proc. 8(e)(2). Although each plaintiff undoubtedly has an interest in securing an outcome most favorable to its position, "every warrior in this battle cannot be a general."

Aronson, 79 F. Supp. 2d at 1151. *See also Delphi*, 458 F. Supp. 2d at 462 (refusing to appoint separate lead plaintiffs); *Hevesi*, 366 F.3d at 82 n.13 ("any requirement that a different lead plaintiff be appointed to bring every single available claim would contravene the main purpose of having a lead plaintiff"). Here, Brooks' arguments as to what defendants ***might*** argue in response to the Amended Complaint does not serve any purpose other than to highlight the fact that Brooks will make any argument – even arguments contrary to best interest of the Class – to secure itself a position in this action.[27] Such speculative accusations are not the type of "proof" demanded by the

[27] Brooks' willingness to take positions contrary to the best interest of the Class it seeks to represent disqualifies it from serving as a lead plaintiff. *See Borenstein v. Finova Group, Inc.*, No. Civ. 00-619-PHX-SMM, 2000 WL 34524743, at *8 (D. Ariz. Aug. 30, 2000) (movants who took positions against the best interests of the entire class "cannot qualify as the presumptively most adequate plaintiff" because such an appointment "pose[s] a significant risk that the complete interests of all class members would not be fairly and adequately protected").

PSLRA to rebut a movant's status as the presumptive lead plaintiff. *See In re SemGroup Energy Partners, L.P., Sec. Litig.*, No. 08 Civ. 425, 2008 WL 4826318, at *2 (N.D. Okla. Oct. 27, 2008) ("The burden of proof of inadequacy of the presumptive lead plaintiff rests with parties contesting its appointment"). *See also Vladimir v. Bioenvision, Inc.*, No. 07 Civ. 6416, 2007 WL 4526532, at *10 (S.D.N.Y. Dec. 21, 2007); (same); *Fishbury, Ltd. v. Connetics Corp.*, No. 06 Civ. 11496, 2006 WL 3711566, at *4 (S.D.N.Y. Dec. 14, 2006) (requiring "concrete showing of a conflict of interest" to rebut presumption of adequacy). Moreover, there is no guarantee that defendants cannot or will not argue that Brooks' action sounds in fraud. Rather than provide any "proof" of Lead Plaintiff's inadequacy, Brooks offers speculation and conjecture.[28]

Last, Brooks' argument that ACERA may be subject to a unique defense because it purchased Series J stock four months after the offering (Brooks Br. at 14) is a standing argument, and a weak one at that. *See, e.g., Hevesi*, 366 F.3d at 82 n.13; *WorldCom,* 219 F.R.D. at 288 ("Those who purchase within twelve months after the registration statement becomes effective, and at any time until there is an earning statement "covering a period of at least twelve months beginning after the effective date of the registration statement" need not prove reliance in order to recover"). Even if this argument had merit, Lead Plaintiffs have named plaintiffs in the Amended Complaint who purchased in the Series J offering. *See id.* at 83 ("the PSLRA does not in any way prohibit the addition

[28] Belmont's assessment about the value of common stock/Exchange Act claims (Belmont Br. at 18) is rank speculation. Given the PSLRA's mandatory stay of discovery, 15 U.S.C. § 77z-1(b)(1), Belmont is prohibited from conducting any formal discovery of the defendants. Accordingly, Belmont has no legitimate basis for professing knowledge about the sources of recovery in this action. If anything, Belmont's statements limiting the recovery of losses to insurance coverage evidence its unwillingness to zealously pursue all of the persons responsible for causing investors' losses.

of named plaintiffs to aid the lead plaintiff in representing a class"); *In re Initial Public Offering Sec. Litig.*, 214 F.R.D. 117, 123 (S.D.N.Y. 2002) ("The purpose of the lead plaintiff section of the PSLRA was never to do away with the notion of class representatives or named plaintiffs in securities class actions."). For example, named plaintiffs American European Insurance Company and Marsha Kosseff purchased 10,000 and 400 shares, respectively, of Series J stock at $25 on February 5, 2008. In contrast, Brooks purchased 6,100 share of Series J stock on February 5, 2008.

E. NONE OF THE "NICHE" PLAINTIFFS IS AN <u>ADEQUATE REPRESENTATIVE OF THE CLASS</u>

G&E's procedural maneuvering raises serious questions about whether it and the plaintiffs it seeks to represent have acted in the best interest of Series J investors. As noted *supra*, G&E avoided publication of a PSLRA notice and skirted the PSLRA lead plaintiff provisions by filing an action in state court on behalf of two individual plaintiffs (Stark and Rooney), seeking claims on behalf of just Series J, P, and Q shareholders. It was not until after the *Stark Action* was removed to federal court that G&E moved for appointment as Lead Counsel and to have its newly-identified client, Belmont, appointed Lead Plaintiff in the *Fogel Action*. The movement between state and federal court, first to avoid the PSLRA's lead plaintiff provisions, and then to trumpet those same provisions, was examined by the court in *BankAmerica*, 95 F. Supp. 2d at 1050, and exposed for what such tactics clearly are − forum shopping. As noted by the court:

> Milberg Weiss's behavior in these cases [is] . . . precisely the sort of lawyer-driven machinations the PSLRA was designed to prevent. Hindsight now reveals that the simultaneous filing of suits in state and federal court was a blatant attempt at forum shopping. When the federal forum proved unsavory because Milberg Weiss would not be able to

> control that case [because of the limited nature of its clients' financial interest], the firm simply took its marbles and went to play in the state court.

The procedural machinations and forum shopping here are more egregious than those of Milberg Weiss in *BankAmerica.* G&E first filed an action in state court after the *Fogel Action* was filed and Fogel's financial interest had been disclosed. After being retained by Belmont, G&E wrote to the Court on November 5, 2008, and expressed its intention to file a lead plaintiff motion in federal court on behalf of Belmont, without referencing the then pending state court action on behalf of different, smaller clients – *i.e.*, Stark and Rooney. It then abandoned its original state court strategy and moved to this forum in an attempt to secure a niche lead plaintiff role.

Belmont and G&E's more recent tactic of filing an amended complaint, purportedly on behalf of purchasers of 800 (unidentified) Lehman securities raises further questions about Belmont's adequacy as a lead plaintiff on behalf of Series J purchasers. As noted above, there are several significant problems with what Belmont and its counsel have done here. First, they have cast an extraordinarily wide net, but have filed a threadbare amended complaint that is nothing more than a carbon-copy of the *Stark Action* filed in state court, leaving aside the massive expansion to include 800 (unidentified) securities covered by its action. Second, Belmont and G&E have failed to identify that many of the securities subject to Belmont's amended complaint are linked to the common stock of other companies, such as NutriSystem, Inc., Apple Inc., Target Corp., Microsoft Corp., American International Group, Inc., and Yamana Gold Inc. or relate to commodities such as crude oil, and therefore are likely subject to unique claims and defenses. *See* Coffey

Decl. at K-O. Third, some of these offerings have maturity dates within months of the offering and may not have sustained any damages. For example, Lehman's pricing supplement for 21.20% reverse exchangeable notes linked to the common stock of NutriSystem, Inc. states that the securities were issued in September 2007 and matured three months later in December 2007. *Id.* at K. Fourth, the sworn certification Belmont filed with its amended complaint (on December 2, 2008) is dated November 4, 2008. There is nothing on the record indicating that Belmont ever reviewed the amended complaint filed in its name, or that it grasps the complexity of the undertaking that its counsel, G&E, has conferred upon it by filing a complaint covering 800 unidentified securities, 799 of which lack any financial interest on the part of Belmont.

Belmont's approach to pleading an unmanageable action, and G&E's forum shopping to secure itself a role on behalf of Series J investors, is not in the best interest of the Class, particularly when viewed in light of the deliberate and transparent efforts undertaken by the Pension Fund Group to assert claims on behalf of Series J purchasers and the other additional securities identified in the Amended Complaint.

F. GRANTING THE "NICHE" PLAINTIFFS' MOTIONS WOULD CREATE INEFFICIENCIES

The *Lehman Securities Class Action* is progressing, and Defendants have requested their responses to the Amended Complaint be due on January 23, 2009. If the Niche Plaintiffs' motions are not denied, the *Lehman Securities Class Action* will be delayed to the detriment of the Class, and the Court will be faced with multiple actions asserting identical claims progressing on different tracks with several groups of lawyers each trying to establish liability against the same defendants relating to the same

misrepresentations and stemming from the same documents. None of the Niche Plaintiffs have set forth a cognizable argument as to why the *Lehman Securities Class Action* should be fractured and led by investors with significantly smaller losses than the losses asserted by the Court-appointed Lead Plaintiff. *See Cendant*, 182 F.R.D. at 480 (granting motions for a separate lead plaintiff to prosecute claims after the end of the class period in the PSLRA notice would "injure the purpose of the PSLRA by fragmenting the plaintiff class and decreasing client control").

CONCLUSION

For the foregoing reasons, the Court-appointed Lead Plaintiff respectfully requests that the Court deny Niche Plaintiffs' motions.

Dated: December 15, 2008

Respectfully submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

By: */s John P. Coffey*
JOHN P. COFFEY

JOHN P. COFFEY
AVI JOSEFSON
1285 Avenue of the Americas, 38th Floor
New York, NY 10019
Tel: (212) 554-1400
Fax: (212) 554-1444
-and-
DAVID R. STICKNEY
DAVID A. THORPE
JON F. WORM
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Tel: (858) 793-0070
Fax: (858) 793-0323

Co-Lead Counsel for Lead Plaintiffs

BARROWAY TOPAZ KESSLER MELTZER & CHECK, LLP
JOHN A. KEHOE
BENJAMIN J. HINERFELD
MICHELLE M. NEWCOMER
RICHARD RUSSO, JR.
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056

Co-Lead Counsel for Lead Plaintiffs