UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION

This Document Applies to:

ALL CASES

Civil Action 09 MD 2017 (LAK)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION BY ARKANSAS PLAINTIFFS TO MODIFY PRETRIAL ORDER NO. 1 TO PERMIT PROSECUTION OF CLAIMS ON LEHMAN BONDS ISSUED PRIOR TO FEBRUARY 13, 2007

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

BACKGROUND 3

ARGUMENT 5

I. THIS COURT ALREADY PROPERLY SELECTED LEAD PLAINTIFF AND COUNSEL PURSUANT TO THE PSLRA 5

II. ARKANSAS PLAINTIFFS HAVE NEVER SATISFIED THE STATUTORY REQUIREMENTS OF THE PSLRA 7

III. ARKANSAS PLAINTIFFS DO NOT HAVE STANDING 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Rules and Statutes

15 U.S.C. § 77z-1(a) 7, 8

Cases

Achtman v. Kirby, McInerney & Squire, LLP,
404 F. Supp. 2d 543 (S.D.N.Y. 2005)........ 7

Akerman v. Oryx Commc'ns, Inc.,
810 F.2d 336 (2d Cir. 1987)........ 9-10

Am. Home Assurance Co. v. Altman Specialty Plants, Inc.,
2009 WL 222158 (S.D.N.Y. Jan. 26, 2009) 8

Barnes v. Osofsky,
373 F.2d 269 (2d Cir. 1967)........ 9

In re Auction House Antitrust Litig.,
2001 U.S. Dist. LEXIS 1713 (S.D.N.Y. Feb. 22, 2001)........ 7

In re Donnkenny Inc. Sec. Litig.,
171 F.R.D. 156 (S.D.N.Y. 1997) 9

In re Friedman's, Inc. Sec. Litig.,
385 F. Supp. 2d 1345 (N.D. Ga. 2005) 9

In re Global Crossing, Ltd. Sec. Litig.,
313 F. Supp. 2d 189 (S.D.N.Y. 2003)........ 10

In re Initial Pub. Offering Sec. Litig.,
499 F. Supp. 2d 415 (S.D.N.Y. 2007)........ 7

In re McDermott Int'l, Inc. Sec. Litig.,
2009 WL 579502 (S.D.N.Y. Mar. 6, 2009) 6

In re Select Comfort Corp. Sec. Litig.,
2000 WL 35529101 (D. Minn. Jan. 27, 2000)........ 8

In re Star Gas Sec. Litig.,
2005 WL 818617 (D. Conn. Apr. 8, 2005)........ 5

In re Union Carbide Corp. Consumer Prods. Bus. Secs. Litig.,
718 F. Supp. 1099 (S.D.N.Y. 1989).. 7

In re Universal Serv. Fund Tel. Billing Practices Litig.,
219 F.R.D. 661 (D. Kan. 2004)... 7

King v. Livent, Inc.,
36 F. Supp. 2d 187 (S.D.N.Y. 1999).. 8

Lewis v. Casey,
518 U.S. 343, 116 S.Ct. 2174 (1996).. 10

Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.,
660 F.2d 9 (2d Cir. 1981) 7

Rabbi Jacob Joseph Sch. v. Province of Mendoza,
342 F. Supp. 2d 124 (E.D.N.Y. 2004) 8

Varghese v. China Sheghou Pharm. Holdings, Inc.,
589 F. Supp. 2d 388 (S.D.N.Y. 2008)... 9

Weinberger v. Kendrick,
698 F.2d 61 (2d Cir. 1982)... 7

Other Authorities

14 Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3738 (3rd ed. 1999)... 8

Manual for Complex Litigation, Fourth § 10.221.. 5-6

Defendants[1] submit this memorandum of law in opposition to the motion of plaintiffs Rena Caldwell, Glen Detherow, Madeline Dimodica, Barbara Kattell, Cecil Mease and Michael Shipley (collectively, the "Arkansas Plaintiffs") to modify this Court's Pretrial Order No. 1 in order to permit them to be lead plaintiffs – and their counsel lead counsel – to pursue class claims on behalf of an untold number of offerings of securities issued by Lehman Brothers Holdings Inc. ("Lehman") "prior to February 13, 2007."

PRELIMINARY STATEMENT

This motion starts from the objectively mistaken premise that, unless granted, the individual claims these six plaintiffs wish to pursue will be "abandoned." Nothing could be further from the truth. The plaintiffs have every right – and ability – to pursue the lawsuits they filed, so long as they do so on their own behalf. But, they appear to have little interest in pursuing their own claims. Rather, they – more pointedly, their lawyers – ask that they be appointed as lead plaintiff and lead counsel under the Private Securities Litigation Reform Act (the "PSLRA") to pursue class claims for every Lehman offering that was completed before the

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[1] The "Defendants" herein consist of A.G. Edwards & Sons, Inc.; ABN AMRO Holding N.V.; ANZ Securities, Inc.; Banc of America Securities LLC; BBVA Securities Inc.; M.R. Beal & Company; BNP Paribas S.A.; BNY Mellon Capital Markets, LLC; Cabrera Capital Markets LLC; Calyon Securities (USA) Inc.; Charles Schwab & Co., Inc.; CIBC World Markets Corp.; Citigroup Global Markets Inc.; Commerzbank Capital Markets Corp.; DnB NOR Markets Inc. (the trade name of which is DnB NOR Markets); DZ Financial Markets LLC; Fidelity Capital Markets Services (a division of National Financial Services LLC); Fortis Securities, LLC; RBS Greenwich Capital; BMO Capital Markets Corp. (f/k/a Harris Nesbitt Corp.); HSBC Securities (USA) Inc.; ING Financial Markets LLC; Loop Capital Markets, LLC; Mellon Financial Markets, LLC (n/k/a BNY Mellon Capital Markets, LLC); Merrill Lynch, Pierce, Fenner & Smith, Inc.; Mizuho Securities USA, Inc.; Morgan Stanley & Co. Inc.; Muriel Siebert & Co., Inc.; nabCapital Securities, LLC (f/k/a National Australia Capital Markets, LLC); National Australia Bank Limited; Natixis Bleichroeder Inc.; Raymond James & Associates, Inc.; RBC Capital Markets Corp. (f/k/a RBC Dain Rauscher Inc.); Santander Investment Securities Inc.; Scotia Capital (USA) Inc.; Siebert Capital Markets (the advertising name of Muriel Siebert & Co., Inc.); SG Americas Securities LLC; Sovereign Securities Corporation LLC; Standard Chartered Bank; SunTrust Robinson Humphrey, Inc. (f/k/a SunTrust Capital Markets, Inc.); TD Securities (USA) LLC; UBS Securities LLC; Utendahl Capital Partners, L.P.; Wachovia Capital Markets LLC; Wachovia Securities, LLC; Wells Fargo Securities, LLC; The Williams Capital Group L.P.; and Zions Direct, Inc. (collectively, the "Underwriter Defendants"); and Richard S. Fuld, Christopher M. O'Meara, 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, and John D. Macomber.

beginning of the class period in the Second Amended Consolidated Class Action Complaint (the "SAC") filed by the Lead Plaintiffs this Court appointed.

Even if this Court had not already appointed lead plaintiffs, the Arkansas Plaintiffs' motion should be denied. Since 1995, the appointment of lead plaintiffs and lead counsel in securities class actions has been governed by the PSLRA – a statute not once mentioned in the Arkansas Plaintiffs' motion. The PSLRA demands multiple prerequisites before a plaintiff can seek appointment as lead plaintiff – including the filing of a certification with statutorily required statements, publication of notice within a prescribed period ("[n]ot later than 20 days after the date on which the complaint is filed") and a timely motion.

With one exception, the Arkansas Plaintiffs have not complied with any of these requirements. The one exception underscores the absence of merit in this motion. Madeline Dimodica, an Arkansas Plaintiff, filed the required PSLRA certification (she is the only one to have done so, even though all are represented by the same counsel). And the Lehman offering in which, according to her certification, she purchased is one being pursued in the SAC by the Lead Plaintiffs the Court appointed.

Under the PSLRA, lead plaintiffs are charged with managing the litigation. That necessarily includes deciding what claims to bring, what defendants to name, and what the class period should be. The Lead Plaintiffs appointed by the Court have done that. The securities Ms. Dimodica purchased are part of the SAC; the others are not. Moreover, "the others" are not even identified in any way, apart from that they occurred "prior to February 13, 2007." At the March 2, 2009 conference before the Court, the Arkansas Plaintiffs' counsel estimated there were "about 200 different offerings in that period" – though not then nor in the instant motion is "that period" identified. What is clear, however, is that at best the identified Arkansas Plaintiffs only

purchased Lehman securities in five offerings not included in the SAC. Even if they had satisfied the PSLRA sufficient to pursue class claims, therefore, they would lack standing to do so for virtually all of the offerings whose champion they belatedly seek to be.

Accordingly, the Arkansas Plaintiffs' motion should be denied.

BACKGROUND

In accordance with the PSLRA, various plaintiffs published notices of class action complaints involving Lehman securities.[2] See, e.g., Exs. A, B (notices).[3] Several plaintiff groups and their counsel then sought appointment as lead plaintiff and lead counsel. After substantial briefing, and a hearing held on January 8, 2009, this Court entered Pretrial Order No. 1, dated Jan. 9, 2009 ("Order No. 1"), which consolidated for pretrial purposes all Lehman-related debt and equity securities actions[4] and appointed the Pension Fund Group as Lead Plaintiff and Bernstein Litowitz Berger & Grossman LLP and Schiffrin Barroway Topaz & Kessler, LLP as Lead Counsel to represent the class in those actions. Id. at ¶ 3.1.[5]

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[2] All exhibits referenced herein are exhibits to the Declaration of Roger A. Cooper, dated April 13, 2009, and annexed thereto, submitted in support of this memorandum of law.

[3] The plaintiff in Fogel Capital Management, Inc. v. Fuld, et al., (08-cv-8225, S.D.N.Y.) filed the first complaint involving Lehman debt securities and, on September 24, 2008, published nationwide notice of class action Securities Act claims against former Lehman officers and directors and underwriters in connection with certain Lehman debt securities. The notice stated that motions to be named lead plaintiff had to be filed by November 24, 2008. See Ex. A (Fogel Notice).

[4] The cases were consolidated under the caption In re Lehman Brothers Equity/Debt Securities Litigation, (08 Civ. 5523) (LAK), Order No. 1 ¶ 1.1.1, which the Court then consolidated with In re Lehman Brothers Mortgage-Backed Securities Litigation (08 Civ. 6762) (LAK) and In re Lehman Brothers ERISA Litigation (08 Civ. 5598) (LAK) for discovery purposes, id. at ¶ 1.2.

[5] By Order dated July 31, 2008, the Court had previously appointed the Pension Fund Group as Lead Plaintiff and approved the same law firms as their choice of Lead Counsel, in Operative Plasterers and Cement Masons International Association Local 262 Annuity Fund v. Lehman Brothers Holdings Inc., et al., (08-cv-5523), before Lehman Brothers filed for bankruptcy and any of the Securities Act Lehman-note claims had been filed.

After consolidating the pending debt and equity cases, the Court ordered that there shall be a single consolidated amended complaint in the consolidated debt/equity action. Order No. 1 ¶ 2.2. The Court's Order No. 1 further provided that "[t]he provisions of this Order, including pretrial consolidation, shall apply automatically to actions later instituted in or removed or transferred to this Court (including cases transferred for pretrial purposes under 28 U.S.C. § 1407) that involve claims relating to Lehman Brothers securities." Id. ¶ 2.5. At the time, the Court was aware of 11 actions pending elsewhere, including those filed by the Arkansas Plaintiffs, and that they were all the subject of a transfer motion before the Judicial Panel on Multidistrict Litigation (the "MDL"). Ex. C (Jan. 8, 2009 Hearing Tr. at 44-45). The Court's Order No. 1 thus contemplated the Arkansas cases and their potential transfer to this Court. Likewise, Lead Plaintiffs and Counsel were aware of the Arkansas cases and the claims asserted therein. See Ex. D (service list to MDL papers filed by Arkansas Plaintiffs at 3).

The Arkansas Plaintiffs do not dispute in their motion that they were aware of the proceedings that led to the Court's Order No. 1. Indeed, not only were they on general notice (through, e.g., the nationwide publication done by the Fogel plaintiffs, see supra note 3), they were also on specific notice: in each case filed by Arkansas Plaintiffs, the defendants were forced to move to stay the cases so that the MDL panel could consider pending applications under 28 U.S.C. § 1407 (ultimately granted) to transfer the Arkansas cases to this Court, which motions pointedly mentioned the proceedings being conducted here, including the lead plaintiff appointment process. Nevertheless, none of the Arkansas Plaintiffs took any steps to participate in the lead plaintiff proceedings before this Court. To the contrary, they pointedly avoided them. The Arkansas Plaintiffs in fact took considered steps to avoid involvement in the proceedings before this Court, including filing suit in Arkansas state court (each suit filed in a different

county), moving to remand, opposing MDL transfer, and opposing motions to stay the Arkansas cases until the MDL panel had time to rule. Only after each one of these efforts failed – and long after this Court had appointed lead plaintiffs – did the Arkansas Plaintiffs appear in this proceeding.

During the months the Arkansas Plaintiffs fought transfer to this Court, the Court made lead plaintiffs and lead counsel appointments. As the docket reflects, the appointment process generated numerous filings by multiple proposed lead plaintiffs and their counsel. This included a "second round" of contestants that were heard by the Court at a January 8, 2009 hearing.[6] However, at no point – until now – did the Arkansas Plaintiffs express any interest in participating in these proceedings.

ARGUMENT

I. THIS COURT ALREADY PROPERLY SELECTED LEAD PLAINTIFF AND COUNSEL PURSUANT TO THE PSLRA

Lead Plaintiffs are charged with exercising control over the prosecution of this action, which includes determining which claims to assert, against which defendants and over what class period. In re Star Gas Sec. Litig., 2005 WL 818617, at *7 (D. Conn. Apr. 8, 2005) ("The appointed lead plaintiffs can decide how to frame their amended complaint in terms of an appropriate class period in their best judgment."). As the Manual for Complex Litigation explains, the lead plaintiff is "[c]harged with formulating (in consultation with other counsel) and presenting positions on substantive and procedural issues during the litigation." Manual for

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[6] Specifically, groups sought to file separate amended complaints for the Lehman Principal Protection Notes or Series J Notes, Ex. C (Jan. 8, 2009 Tr. at 11-20, 22-27, 31-32), or to be appointed lead plaintiff in connection with one of these other complaints. Id. The Court denied all of the motions. In words that apply equally here, the Court explained to counsel for plaintiffs seeking their own amended complaint covering the Principal Protection Notes: "These claims [for the Principal Protection structured notes] are folded into a big case whether [the plaintiffs] like it or not . . . . They have absolutely no choice in the matter. They can't have their own case." Id. at 20-21.

Complex Litigation, Fourth § 10.221. In this regard, "the PSLRA was intended to ensure that parties with significant financial interests in the litigation would oversee securities class actions and control the management of such suits, including the selection of counsel." In re McDermott Int'l, Inc. Sec. Litig., 2009 WL 579502, *1 (S.D.N.Y. Mar. 6, 2009) (emphasis added) (internal citations omitted).[7]

In filing the SAC, the Lead Plaintiffs have done precisely that here. As Lead Counsel explained at the March 2, 2009 hearing, "[the Court] appointed lead plaintiff. We took a look at what was consistent with what we viewed as the evidence we had uncovered and our obligations as officers of the court, and we filed the complaint we filed." Ex. E (March 2, 2009 Tr. at 27:10-13).[8]

Clients, not lawyers, are supposed to make strategic decisions in litigation. In securities class actions under the PSLRA, that responsibility falls to the lead plaintiffs, who act as fiduciaries. They are supposed to exercise judgment, which can mean that some theories, some potential defendants, and some class periods are not pursued. The exercise of judgment cannot result – as the Arkansas Plaintiffs nevertheless demand – in some other party getting appointed lead plaintiff, so that the appointed lead plaintiffs' judgments are overruled. Quite clearly, the PSLRA was not designed to ensure that every conceivable claim against every conceivable party for the broadest conceivable class is litigated. Rather than deterring lawyer-driven meritless litigation, the approach advanced by the Arkansas Plaintiffs would encourage it.

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[7] As the Court remarked during the March 2 hearing: "Isn't it inherent in the PSLRA that whoever controls the litigation, which is ultimately decided by a court but there are various presumptions that govern it, controls what claims are asserted on behalf of classes?" Ex. E (March 2, 2009 Hearing Tr. 33:3-7).

[8] Indeed, counsel to the Arkansas Plaintiffs originally filed six separate state court actions, each focusing on a different Lehman offering, with one complaint focusing on three offerings. That they now believe four of those actions (and many others) should be part of a single case (with them at the helm) speaks volumes about why these actions were scattered throughout Arkansas. In any event, three of the offerings challenged in the six Arkansas complaints are part of the SAC.

The cases on which the Arkansas Plaintiffs rely are inapposite. None even involves the appointment of lead plaintiff under the PSLRA. All, indeed, focus on the adequacy of class settlements or class certification.[9] Those issues are irrelevant to the Arkansas Plaintiffs, only one of whom is a member of the class defined in the SAC, and all of whom have their own individual actions to pursue, no matter how the class action being pursued by the Lead Plaintiffs this Court appointed is resolved.[10]

II. ARKANSAS PLAINTIFFS HAVE NEVER SATISFIED THE STATUTORY REQUIREMENTS OF THE PSLRA

Since the adoption of the PSLRA, the lead plaintiff and lead counsel appointment process has been determined in accordance with a statutory scheme. A plaintiff seeking appointment must file a certification attesting to certain material facts. See 15 U.S.C. § 77z-1(a)(2). Notice must be broadly published so that other holders of the subject securities may

[9] See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 77 (2d Cir. 1982) (affirming approval of settlement and noting that changes to the class shortly before submission of the proposed settlement were proper "provided that proper notice and an opportunity for opting out are afforded"); Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch., 660 F.2d 9, 14, 18 (2d Cir. 1981) (reversing approval of class action settlement which would have required the release of individual claims that were never asserted in the action); In re Auction House Antitrust Litig., 2001 U.S. Dist. LEXIS 1713, at **77-78 (S.D.N.Y. Feb. 22, 2001) (approving class action settlement); In re Union Carbide Corp. Consumer Prods. Bus. Secs. Litig., 718 F. Supp. 1099, 1108-10 (S.D.N.Y. 1989) (affirming fairness of proposed settlement); In re Universal Serv. Fund Tel. Billing Practices Litig., 219 F.R.D. 661, 668-70 (D. Kan. 2004) (granting motion for class certification where objector criticized class plaintiffs' failure to prosecute fraud claims deemed by class plaintiffs not worth pursuing).

[10] The Arkansas Plaintiffs retain their individual claims, which they may continue to pursue as individual actions. See In re Initial Pub. Offering Sec. Litig., 499 F. Supp. 2d 415, 420 (S.D.N.Y. 2007) (stating that class members who sought to remove lead counsel were not prejudiced by the court's denial of the motion because "[m]ovants still have the right to pursue their individual claims with counsel of their choice"). Indeed, even if their claims were part of the class, they would be free to opt out of the class. See Achtman v. Kirby, McInerney & Squire, LLP, 404 F. Supp. 2d 543, 547 (S.D.N.Y. 2005) (observing in other context that when class action law firm decided not to name a certain defendant, "plaintiffs were free to opt out of the class action or simply to pursue their own claims against [the defendant], as others did"). Accordingly, the Arkansas Plaintiffs' rights have not been compromised or prejudiced under the circumstances.

consider seeking the lead plaintiff appointment. 15 U.S.C. § 77z-1(a)(3)(A)(i)(I). And a timely motion for lead plaintiff appointment must be made. 15 U.S.C. § 77z-1(a)(3)(A)(i)(II).[11]

Here, not one of the Arkansas Plaintiffs has complied with their statutory requirements.[12] And the time for submitting a certification, for publishing notice, and moving for appointment as lead plaintiff has long since expired: the certifications must be filed with the complaints (which were filed in October and November 2008 and removed by November 13, 2008); the notice must be published "[n]ot later than 20 days after the date on which the complaint is filed"; and the motion filed "not later than 60 days after the date on which the notice is published." 15 U.S.C. § 77z-1(a)(2)-(3).[13]

Separately, it is remarkable that there is nothing from the Arkansas Plaintiffs themselves to indicate that any of them – let alone all of them – want to take on the responsibility

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[11] All of these requirements are mandatory. See 15 U.S.C. §§ 77z-1(a)(2)(A) – 1(a)(3)(B)(i) (stating that plaintiff "shall" provide certification and "shall" publish notice and that the Court "shall" appoint a lead plaintiff within the relevant time periods); King v. Livent, Inc., 36 F. Supp. 2d 187, 189-90 (S.D.N.Y. 1999) (denying lead plaintiff motion where party "did not adhere to the requirements of the PSLRA" by failing to publish notice); In re Select Comfort Corp. Sec. Litig., 2000 WL 35529101, at *9 (D. Minn. Jan. 27, 2000) (dismissing plaintiffs' Section 11 and 12 claims where plaintiffs failed to certify complaint and publish notice because "the language of the [PSLRA] is not permissive").

[12] The one Arkansas Plaintiff who did file a certification bought in an offering that is already part of the SAC. See supra p. 2.

[13] Nor can the Arkansas Plaintiffs contend that the notices previously published by other plaintiffs in their cases suffice, because the Arkansas Plaintiffs made no motion to be appointed lead plaintiff within 60 days from when the notices were published. Similarly, that the Arkansas Plaintiffs originally filed their complaints in Arkansas state court has no impact on their obligations to meet the congressionally-mandated requirements of the PSLRA. Federal rather than state law has controlled these proceedings from the moment defendants removed the actions to federal court on November 13, 2008. See Am. Home Assurance Co. v. Altman Specialty Plants, Inc., 2009 WL 222158, at *3 (S.D.N.Y. Jan. 26, 2009) (explaining that "Rule 15(a) applies to removed actions and the parties may utilize the rule's liberal amendment policy in the same manner as if the suit had originated in a federal court") (quoting 6 Charles Allan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1477 (2d ed. 1990)); Rabbi Jacob Joseph Sch. v. Province of Mendoza, 342 F. Supp. 2d 124, 127 (E.D.N.Y. 2004) (finding that upon removal "federal law is applied as though the action was originally commenced [in federal court]"); 14 Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3738 (3rd ed. 1999) ("After the removal of an action from state court, the federal district court acquires full and exclusive subject matter jurisdiction over the litigation . . . [and] [t]he case will proceed as if it had been brought in the federal court originally.").

of serving as lead plaintiff. Nor is there anything explaining how, as a group, they will function. Indeed, there is nothing in the record to suggest they even know one another, let alone have the resources and ability to manage litigation as fiduciaries for others. See, e.g., Varghese v. China Sheghou Pharm. Holdings, Inc., 589 F. Supp. 2d 388, 393 (S.D.N.Y. 2008) (declining to appoint a group of four individual plaintiffs as lead plaintiffs because the group "fails to provide the Court with any evidence that its members have had any prior pertinent relationships or cooperative efforts, or that they will act collectively and separately from their lawyers"); In re Donnkenny Inc. Sec. Litig., 171 F.R.D. 156, 157-58 (S.D.N.Y. 1997) ("To allow an aggregation of unrelated plaintiffs to serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff. One of the principal legislative purposes of the PSLRA was to prevent lawyer-driven litigation. . . . To allow lawyers to designate unrelated plaintiffs as a 'group' and aggregate their financial stakes would allow and encourage lawyers to direct the litigation.") (internal citation omitted).

III. ARKANSAS PLAINTIFFS DO NOT HAVE STANDING

Under both Sections 11 and 12(a)(2) of the Securities Act, standing to bring such claims is limited to those persons who actually purchased the securities sold in the challenged offering. As our Circuit has explained, "an action under § 11 may be maintained only by one who comes within a narrow class of persons, i.e. those who purchase securities that are the direct subject of the prospectus and registration statement." Barnes v. Osofsky, 373 F.2d 269, 273 (2d Cir. 1967) (internal citations and quotation marks omitted) (emphasis added); see also In re Friedman's, Inc. Sec. Litig., 385 F. Supp. 2d 1345, 1371 (N.D. Ga. 2005) ("The clear import of the statute is that Plaintiffs may only sue the underwriter of the offering to which they trace their shares."). The same is true under Section 12, which "imposes liability on persons who offer or sell securities and only grants standing to 'the person purchasing such security' from them."

Akerman v. Oryx Commc'ns, Inc., 810 F.2d 336, 344 (2d Cir. 1987) (emphasis added) (internal citation omitted). The fact that the Arkansas Plaintiffs seek to bring class claims does not lift this strict requirement or help them satisfy it. See, e.g., In re Global Crossing, Ltd. Sec. Litig., 313 F. Supp. 2d 189, 207 (S.D.N.Y. 2003) ("[I]t is not enough that plaintiffs seek damages only for a class that has standing; at least one named plaintiff must . . . have purchased shares traceable to the challenged offering."); Lewis v. Casey, 518 U.S. 343, 357, 116 S.Ct. 2174, 2183 (1996) ("That a suit may be a class action . . . adds nothing to the question of standing . . . .") (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20, 96 S.Ct. 1917, 1925 n.20 (1976)).

Even if this Court had not already selected lead plaintiffs, and even if the Arkansas Plaintiffs had complied with the PSLRA in seeking lead plaintiff appointments, they still would not have standing to bring claims in connection with offerings in which they did not purchase Lehman securities. The complaints filed by the Arkansas Plaintiffs identify the five offerings in which one of them purchased securities that are not already part of the SAC. At a minimum, the Arkansas Plaintiffs have no standing to pursue claims in connection with any other Lehman offerings – let alone the "200 different offerings" mentioned at the March 2 conference.

CONCLUSION

Accordingly, the Arkansas Plaintiffs' motion should be denied.

Dated: New York, New York
April 13, 2009

Respectfully submitted,

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