

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

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

Plaintiffs,

vs.

RICHARD S. FULD, JR.; CHRISTOPHER M.
O'MEARA; JOSEPH M. GREGORY; ERIN
CALLAN; IAN LOWITT; MICHAEL L.
AINSLIE; JOHN F. AKERS; ROGER S.
BERLIND; THOMAS H. CRUIKSHANK;
MARSHA JOHNSON EVANS; SIR
CHRISTOPHER GENT; ROLAND A.
HERNANDEZ; HENRY KAUFMAN; JOHN D.
MACOMBER; ABN AMRO HOLDING N.V.;
ANZ SECURITIES, INC.; BANC OF AMERICA
SECURITIES LLC; BBVA SECURITIES INC.;
BNY CAPITAL MARKETS, INC.; CABRERA
CAPITAL MARKETS, LLC; CAJA DE
AHORROS Y MONTE DE PIEDAD DE
MADRID; CIBC WORLD MARKETS CORP.;
CITIGROUP GLOBAL MARKETS INC.;
DAIWA SECURITIES SMBC EUROPE
LIMITED; DnB NOR MARKETS; DZ
FINANCIAL MARKETS LLC; RBS
GREENWICH CAPITAL; HARRIS NESBITT
CORP.; HSBC SECURITIES (USA) INC.; HVB
CAPITAL MARKETS, INC.;

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NO. 08-CV-5523 (LAK)

JURY TRIAL DEMANDED

ECF Filed

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

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

Defendants.

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

Plaintiff,

vs.

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

Defendants.

NO. 08-CV-8225 (LAK)

The Alameda County Employees' Retirement Association, Government of Guam Retirement Fund, Northern Ireland Local Government Officers' Superannuation Committee, City of Edinburgh Council as Administering Authority of the Lothian Pension Fund, and Operating Engineers Local 3 Trust Fund (collectively, "Lead Plaintiff" or "Pension Fund Group"), together with additional plaintiffs Police and Fire Retirement System of the City of Detroit, Brockton Contributory Retirement System, Teamsters Allied Benefit Funds, American European Insurance Company, Inter-Local Pension Fund Graphics Communications Conference of the International Brotherhood of Teamsters, and Marsha Kosseff, respectfully submit this memorandum of law in support of their motion to consolidate *Fogel Capital Management, Inc. v. Richard S. Fuld, Jr., et al.*, No. 08-08225 (LAK) (the "*Fogel Action*"), with *Operative Plasterers and Cement Masons Int'l Assoc. Local 262 Annuity Fund, et al. v. Lehman Brothers Holdings Inc., et al.*, No. 08-Civ-5523 (LAK) (the "*Lehman Securities Class Action*").

INTRODUCTION AND BACKGROUND

The *Lehman Securities Class Action* was filed in this Court on June 18, 2008. (Dkt. Item No. 1, Case No. 08-Civ-5523.) On July 31, 2008, the Court entered an order appointing the Pension Fund Group as Lead Plaintiff for the Class. (Dkt. Item No. 18, Case No. 08-Civ-5523.) On October 27, 2008, the Pension Fund Group filed an Amended Class Action Complaint ("Amended Complaint") alleging claims for violations of the federal securities laws. (*See* Dkt. Item No. 52, Case No. 08-Civ-5523.)

Relevant to the present motion, the Amended Complaint alleges claims for violations of Sections 11, 12, and 15 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77k, 77l and 77o, on behalf of purchasers of 28 different Lehman Brothers

Holdings Inc. (“Lehman”) debt and equity offerings, including investors in the Preferred Series “J” stock issued by Lehman (“Series J Offering”). The Amended Complaint alleges claims against certain Lehman officers and directors, as well as underwriters of the Series J Offering, based on false and misleading statements in the offering materials, including the registration statement and prospectus for the offering.

While Lead Plaintiff was investigating and preparing to file the Amended Complaint on October 27, 2008 in accordance with the Court’s scheduling orders, on September 24, 2008, Fogel Capital Management, Inc. (“Fogel”) filed the *Fogel Action*, asserting similar claims solely on behalf of purchasers of the Series J Offering. (See Dkt. Item No. 1, Case No. 08-Civ-8225.)¹ The *Fogel Action* alleges violations of Sections 11 and 15 of the Securities Act against the same defendants named in the Amended Complaint in connection with the Series J Offering and premised on the same false and misleading statements related to the Series J Offering.² Because the *Fogel Action* and the *Lehman Securities Class Action* assert claims with identical theories of liability, and because consolidation would avoid needless duplication of judicial resources, this Court should consolidate the *Fogel Action* with the *Lehman Securities Class Action* under Rule 42(a) of the Federal Rules of Civil Procedure.

¹ The *Fogel Action* was originally assigned to the calendar of Judge Sidney H. Stein. On September 26, 2008, Lead Plaintiff submitted a letter to Judge Stein (with a copy to this Court) that the *Fogel Action* was related to the *Pending Lehman Securities Class Action*. Specifically, the letter stated that the *Pending Lehman Securities Class Action* and the *Fogel Action* “have overlapping claims and defendants and focus on the same subject matter.” Given the relationship between the two cases, Lead Plaintiff requested that the *Fogel Action* be transferred to this Court. On October 7, 2008, the Clerk of the Court filed a notice indicating that the *Fogel Action* had been reassigned to this Court’s calendar. (Dkt. Item No. 25, Case No. 08-Civ-8225.)

² On October 13, 2008, Fogel filed a motion to be appointed lead plaintiff and for the approval of lead counsel in the *Fogel Action*. (Dkt. Item No. 19, Case No. 08-Civ-8225.) Lead Plaintiff has separately today filed an opposition to that motion.

ARGUMENT

Rule 42(a) of the Federal Rules of Civil Procedure governs consolidation. Consolidation is appropriate when, as here, actions involve common questions of law or fact. *See* Fed. R. Civ. P. 42(a); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284 (2d Cir. 1990), *cert. denied*, 498 U.S. 920 (1990); *Lowinger v. Global Cash Access Holdings, Inc.*, No. 08 Cv. 3516 (SWK), 2008 WL 2566558, at *2 (S.D.N.Y. June 26, 2008) (finding a “more expansive definition of the class, allegations of additional securities law violations, and inclusion of additional defendants” did not render consolidation inappropriate); *Pinkowitz v. Elan Corp., PLC*, No. 02 CIV. 865(WK), 2002 WL 1822118, at *3-4 (S.D.N.Y. July 29, 2002) (finding consolidation of actions alleging Exchange Act claims with an action alleging Securities Act claims to be proper due to common questions of law and fact). Under Rule 42, courts have broad discretion whether to consolidate, and courts consider whether judicial economy favors consolidation. *Kaplan v. Gelfond*, 240 F.R.D. 88, 91 (S.D.N.Y. 2007). “When a court is presented with securities actions in which the complaints are based on the same ‘public statements and reports,’ consolidation is appropriate if the actions present common questions of law and fact and if the parties will not be prejudiced.” *Id.* (quoting *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F. Supp. 1196, 1211 (S.D.N.Y. 1992)).

The Amended Complaint in the *Lehman Securities Class Action* asserts claims for violations of the Securities Act and the Exchange Act on behalf of purchasers of publicly-traded Lehman securities (including stock, preferred shares and/or options) between June 12, 2007 and September 15, 2008. In particular, among the claims asserted in the Amended Complaint are those for liability based on violations of Section 11, 12, and 15

of the Securities Act on behalf of those who purchased or acquired preferred shares in the Series J Offering – the same offering singled out in the *Fogel Action*. See, e.g., Amended Complaint at ¶¶270, 277, 332-54. Further, the Amended Complaint alleges these claims against each of the defendants named in the *Fogel Action*. See, e.g., Amended Complaint at ¶¶32, 38-46, 49, 55, 65, 67, 77, 79. The Amended Complaint alleges that the offering documents related to the Series J Offering were materially false and misleading because, among other reasons, at the time of that offering, Lehman’s financial reports lacked transparency and failed to disclose its exposure to losses from its real estate and mortgage-related assets.

The *Fogel Action* arises out of the same operative facts as the *Lehman Securities Class Action* with respect to the Series J Offering. The *Fogel Action* asserts violations of Sections 11 and 15 of the Securities Act on behalf of itself and purchasers in the Series J Offering against Lehman’s officers and directors, as well as the underwriters of the offering – each of whom are named as defendants in the Amended Complaint. The *Fogel Action* also alleges that the offering documents were materially false and misleading “because at the time of the Offering, Lehman was already suffering from adverse factors that were not revealed and/or adequately addressed in the [Company’s Prospectus].” *Fogel Class Action Complaint* at ¶3. In short, both suits allege claims based on the same alleged misstatements and omissions surrounding the Series J Offering and against the same defendants, making consolidation of the two actions appropriate.

Moreover, no party will suffer prejudice from consolidation. Plaintiffs, including Fogel, will suffer no prejudice, as the claims in the *Lehman Securities Class Action* are broader than those in the *Fogel Action*. Defendants will suffer no prejudice because

consolidation will allow them to defend a single suit instead of two separate suits before the same Court involving the same facts and witnesses.

In sum, “[g]iven the overlapping questions of law and fact presented in the cases . . . , litigating a multitude of separate actions would only ensure the duplication of effort amongst parties and the needless expenditure of judicial resources.” *Kaplan*, 240 F.R.D. at 92. Accordingly, consolidation is in the interests of judicial economy and will promote the efficient resolution of this matter.

CONCLUSION

For the reasons stated above, the Pension Fund Group respectfully requests that the Court consolidate the *Fogel Action* with the *Pending Lehman Securities Class Action*.

Dated: October 29, 2008

Respectfully submitted,

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

OPERATIVE PLASTERERS AND CEMENT
MASONS INTERNATIONAL ASSOCIATION
LOCAL 262 ANNUITY FUND, Individually And
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CAPITAL MARKETS, INC.;

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NO. 08-CV-5523 (LAK)
ECF Case

JURY TRIAL DEMANDED

[PROPOSED] ORDER CONSOLIDATING RELATED ACTIONS

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

Defendants.

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

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vs.

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

Defendants.

NO. 08-CV-8225 (LAK)

LEWIS A. KAPLAN, *District Judge.*

This matter is before the Court upon the motion for consolidation of the above-captioned actions filed on October 29, 2008 by Alameda County Employees' Retirement Association, Government of Guam Retirement Fund, Northern Ireland Local Governmental Officers' Superannuation Committee, City of Edinburgh Council as Administering Authority of the Lothian Pension Fund, Operating Engineers Local 3 Trust Fund (collectively, "Lead Plaintiff"), together with additional plaintiffs Police and Fire Retirement System of the City of Detroit, Brockton Contributory Retirement System, Teamsters Allied Benefit Funds, American European Insurance Company, Inter-Local Pension Fund Graphics Communications Conference of the International Brotherhood of Teamsters, and Marsha Kosseff. Having considered the parties' papers and argument, as well as the pertinent portions of the record in both cases, and for good cause shown, Lead Plaintiff's motion for consolidation is GRANTED. Accordingly, the Court ORDERS that:

1. *Operative Plasterers and Cement Masons Int'l Assoc. Local 262 Annuity Fund et al., v. Lehman Brothers Holding Inc. et al*, No. 08-Civ-5523 (LAK), and *Fogel Capital Management, Inc. v. Fuld, et al.*, No. 08-Civ-8225 (LAK), and any actions arising out of the same operative facts now pending or hereinafter filed in or transferred to this Court, are hereby consolidated for all purposes pursuant to Rule 42(a) of the Federal Rules of Civil Procedure.

2. Every pleading hereafter filed in these cases shall bear the following caption:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

IN RE LEHMAN BROTHERS SECURITIES LITIGATION

08 Civ. 5523 (LAK)
and consolidated cases

----- x

ECF Case

3. When a case that arises out of the same operative facts as this action hereafter is filed in or transferred to this Court, it shall be consolidated with this action in accordance with paragraph 1, and the Clerk shall (a) file a copy of this order in the separate file for such action, (b) mail a copy of this order to the attorneys in the newly-filed or transferred action, and (c) docket the consolidation of these actions in the docket for both cases. Any party to a case consolidated pursuant to this order may object to the consolidation by filing an appropriate motion in this action no later than fourteen (14) days after the date the newly filed or transferred action first is docketed in this Court.

SO ORDERED

DATED: _____

The Honorable Lewis A. Kaplan
United States District Judge