

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In re:

LEHMAN BROTHERS SECURITIES AND
ERISA LITIGATION

This Document Applies To:

*In re Lehman Brothers Equity/Debt Securities
Litigation*, No. 08 Civ. 5523 (LAK)

Civil Action No. 09 MD 2017 (LAK)

ECF CASE

**REPLY MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT ERNST & YOUNG LLP'S MOTION TO DISMISS**

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In its Motion to Dismiss (“EY Br.”), Ernst & Young LLP (“EY”) explained how Plaintiffs’ Third Amended Complaint (“TAC”) fails to allege any false statement by EY with respect to Lehman’s accounting for “Repo 105” transactions—the only transactions on which Plaintiffs’ claims against EY are based. EY Br. at 5-8. EY explained how its challenged GAAP and GAAS statements were opinions, and how, as this Court has repeatedly held, opinion statements cannot be deemed “subjectively false” unless properly alleged not to have been genuinely held when made. *Id.* at 14-15, 32-33. In addition, EY explained how the TAC fails to allege that EY’s GAAP and GAAS opinions were “objectively false” (*i.e.*, that Lehman had improperly accounted for the Repo 105 transactions under GAAP, and that EY had failed to perform a GAAS audit)—also necessary elements of any false statement claim against EY. *Id.* at 16-21. Because Plaintiffs fail to allege any false statement, their claims against EY under both Section 10(b) and Section 11 must be dismissed. Furthermore, as EY demonstrated, the TAC fails adequately to allege scienter and loss causation—additional required elements for Plaintiffs’ Section 10(b) claims against EY. *Id.* at 21-29.

In response, Plaintiffs’ Opposition (“Opp.”) offers 100 pages of rhetoric, but little by way of analysis. Indeed, the Opposition is most noteworthy for what it fails to contest:

- EY’s statements of GAAP and GAAS compliance were opinions;
- EY genuinely held its GAAP and GAAS opinions when issued;
- Plaintiffs allege no GAAS violation in support of their Section 11 claims;
- Section 11 claims cannot be brought based on quarterly reports;
- EY was not responsible for Lehman’s Management Discussion and Analysis (“MD&A”), or other statements outside of Lehman’s financial statements and notes;
- Analysts and the market understood that Lehman was highly leveraged; and
- The Examiner’s Report (“Rep.”), upon which Plaintiffs’ allegations rely, did not find that Lehman’s Repo 105 accounting was wrong or caused the company’s collapse.

Instead of addressing these points—central to the case and fatal to their claims against EY—Plaintiffs offer arguments that distort the law and ignore this Court’s prior decisions.

I. PLAINTIFFS FAIL TO ALLEGE THAT EY MADE A FALSE STATEMENT.

Plaintiffs acknowledge that in order to plead a claim against EY under Section 10(b) or

Section 11, they must allege facts showing that EY made a false statement. Yet, having conceded (as they must) that the challenged statements were opinions, Plaintiffs' Opposition simply confirms what EY has shown: the TAC fails to allege facts establishing that EY did not genuinely hold those opinions (subjective falsity), and fails to allege facts establishing underlying GAAP and GAAS violations (objective falsity). Both must be demonstrated in order for the TAC to survive. *Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1094-96 (1991).

A. Plaintiffs Fail To Allege The Subjective Falsity Of EY's Opinion Statements (Opinions Genuinely Held).

Plaintiffs do not dispute that EY's allegedly false statements—its statements of GAAP and GAAS compliance—were opinions. Opp. at 22; EY Br. at 14 & n.16. Instead, Plaintiffs rely on sleight-of-hand—but no legal authority—to argue that the existence of a “due diligence” defense under Section 11 relieves them of their threshold obligation to plead the falsity of those opinion statements.¹ Plaintiffs contend that the requirement to plead subjective falsity—present in all other cases (Section 11 and otherwise) where plaintiffs allege an opinion's falsity—is suspended in Section 11 cases against auditors.² This claim cannot be reconciled with prior decisions of this Court.

This Court's jurisprudence makes clear that in order to plead opinion falsity (under both Section 11 and Section 10(b)), plaintiffs must plead facts showing that the speaker did not truly hold the opinion expressed. *See In re IndyMac Mortgage-Backed Sec. Litig.*, No. 09 Civ. 4583, 2010 WL 2473243, at *11 (S.D.N.Y. June 21, 2010) (dismissing Section 11 claims based on real estate appraisals and credit ratings, found to be “statements of opinion or belief” that are actionable “only if not truly held”); *Regions*, 2010 WL 1883487, at *3 (dismissing Section 11 claims against a bank and its auditor because allegedly false loan loss reserves were statements

¹ This is Plaintiffs' only rebuttal to EY's argument that they have failed to plead falsity, and it applies exclusively to Plaintiffs' Section 11 claims. Because there is no statutory “due diligence” defense under Section 10(b), Plaintiffs implicitly concede that they have pled no false statement in support of their Section 10(b) claims.

² Notably, as issuers do not have a due diligence defense, Plaintiffs' approach would flip Section 11 on its head. Plaintiffs would be required to allege subjective falsity as to opinions asserted by issuers (*see, e.g., Fait v. Regions Fin. Corp.*, --- F. Supp. 2d ---, 2010 WL 1883487 (S.D.N.Y. May 10, 2010)), but not as to opinions asserted by other defendants who enjoy the due diligence defense. This would perversely provide issuers with greater protection for opinion statements than non-issuers.

of opinion, and plaintiffs failed to allege that defendant “did not truly hold [its] opinion at the time it was issued”); *Tsereteli v. Residential Asset Sec. Trust 2006-A8*, 692 F. Supp. 2d 387, 393 (S.D.N.Y. 2010) (dismissing a Section 11 claim against underwriters because allegedly false appraisals were statements of opinion, and plaintiffs failed to plead facts showing that “the speaker did not truly have the opinion at the time it was made public”); *In re Lehman Bros. Sec. & ERISA Litig.*, 684 F. Supp. 2d 485, 494-95 (S.D.N.Y. 2010) (dismissing Section 11 claims based on ratings agencies’ opinions that credit enhancements were sufficient, as “the complaint must allege that the ratings agencies did not truly hold those opinions at the time they were made public”). All of these decisions follow the central holding of *Virginia Bankshares* that an opinion is false only if it is properly alleged to be both objectively and subjectively false.

Indeed, this Court and others in this Circuit have routinely dismissed Section 11 claims for failure to plead subjective falsity, *even though the “due diligence” defense was available to defendants*. See, e.g., *Tsereteli*, 692 F. Supp. 2d at 393 (dismissing claim against underwriters on subjective falsity despite availability of “due diligence” defense); *IndyMac*, 2010 WL 2473243, at *11 (same); *In re Global Crossing, Ltd. Sec. Litig.*, 313 F. Supp. 2d 189, 210-11 (S.D.N.Y. 2003) (dismissing Section 11 claim based on fairness opinion for failure to plead subjective falsity, notwithstanding availability of due diligence defense). The “due diligence” defense does not alter this threshold inquiry. Plaintiffs’ Opposition does not dispute, nor can it, that the TAC alleges no facts establishing that EY did not truly hold its GAAP and GAAS opinions, and accordingly, their claims must be dismissed.

B. Plaintiffs Fail To Allege The Objective Falsity Of EY’s Opinion Statements (No Underlying GAAP Or GAAS Violations).

The TAC also fails to allege, and the Opposition fails to identify, facts establishing the “objective falsity” of EY’s statements—*i.e.*, that Lehman’s accounting for Repo 105 transactions violated GAAP and that EY failed to perform a GAAS audit.

1. Lehman’s Repo 105 accounting complied with SFAS 140.

In their Opposition, Plaintiffs breeze over (without refuting) EY’s showing on the GAAP issue presented: the TAC fails adequately to allege that Lehman’s Repo 105 accounting violated

SFAS 140, and therefore fails to allege the “objective” falsity of EY’s statements. EY Br. at 5-8. Plaintiffs’ rebuttal simply mischaracterizes Repo 105 transactions and the applicable GAAP.

First, Plaintiffs argue that because Lehman had an obligation to repurchase Repo 105 assets, it did not relinquish “all control over the asset.” Opp. at 16. But Plaintiffs simply misstate the governing accounting standard. SFAS 140 does not require the transferor to cede “all control” over an asset in order for its transfer to be treated as a sale; rather, the standard requires the transferor to relinquish “effective control” over the asset in order for such treatment to apply. SFAS 140 at ¶ 9 (requiring isolation, a right to pledge, and that “[t]he transferor does not maintain effective control over the transferred assets”). *Second*, contrary to Plaintiffs’ assertion, the obligation to repurchase an asset does not establish “effective control” over that asset. *Id.* at ¶¶ 217-18. A party must also be *able* to repurchase the asset, *id.*, and under the guidelines established by paragraph 218 of SFAS 140, that ability was not assured in Repo 105 transactions (making sale accounting appropriate). *See* EY Br. at 5-8. Indeed, under Plaintiffs’ approach, repurchase agreements could never qualify for sale treatment under SFAS 140, in direct contravention of the standard itself. SFAS 140 at ¶¶ 98, 218.

Third, Plaintiffs repeatedly assert that Repo 105 transactions lacked any business purpose—likening them to round-trip transactions (Opp. at 15). But this claim makes no sense. The repo market is a global, multi-trillion dollar industry involving arm’s-length transactions among massive numbers of unrelated parties. The transactions provide its participants with investment returns on the one hand, and cash on the other. Rep. at 751. Plaintiffs do not dispute that repo transactions have a “business purpose,” or that SFAS 140 expressly contemplates that certain types of repos (ones where “effective control” has been transferred) will be accounted for as sales, while other types of repos (ones where “effective control” has not been transferred) will be accounted for as financings. TAC ¶¶ 61-69; SFAS 140 at ¶ 201.³ It cannot be, as a matter of

³ Indeed, the fact that many courts have treated repo transactions as sales refutes Plaintiffs’ argument that they are “sham transactions” with no business purpose, when treated as sales rather than borrowings. *See, e.g., SEC v. Drysdale*, 785 F.2d 38, 40-41 (2d Cir. 1986) (concluding that a repo transaction was a “purchase or sale of a security” for purposes of Section 10(b)); *Granite Partners, L.P. v. Bear Stearns & Co. Inc.*, 17 F. Supp. 2d 275, 302

logic and policy, that repo transactions have a “business purpose” when accounted for as financings, but “no business purpose” when accounted for as sales. Plaintiffs’ repetition of this phrase does not constitute an analysis of the issue and cannot be reconciled with SFAS 140’s language and structure, which expressly contemplate both sale and borrowing treatments.

Recognizing that the accounting literature does not support their position, Plaintiffs assert that the GAAP violations are complex and cannot be resolved at this stage.⁴ Yet securities actions against auditors are routinely dismissed for failure adequately to allege GAAP violations, and nothing here justifies Plaintiffs’ pleading failures.⁵

2. Lehman’s Repo 105 disclosures complied with SFAS 140.

Plaintiffs have not identified anything within GAAP that required disclosure of Repo 105 transactions in Lehman’s financial statements.⁶ While they seek to downplay the significance of a recent revision to GAAP—SFAS 166, which prospectively requires such disclosures (Opp. at 15 & n.5)—that revision powerfully underscores the fact that no such requirement previously existed. Nor have Plaintiffs identified anything in Lehman’s financial statements and notes requiring disclosure of Repo 105 transactions beyond what was set forth in Lehman’s 10-K. Plaintiffs argue that statements in Lehman’s 10-K must be “taken together and in context,” (Opp. at 17), but violate their own dictum by ignoring Lehman’s express disclosure that it treated certain asset transfers as sales under SFAS 140, where effective control had been relinquished. 2007 10-K at 96.

(S.D.N.Y. 1998) (deeming repo transactions “purchase and sale agreements and not secured loans subject to Article 9 of the UCC”).

⁴ Of course, by arguing that Repo 105’s are a “specialized area of financial accounting” requiring expert judgment, Plaintiffs necessarily concede that the accounting treatment used is a matter of opinion. Yet Plaintiffs have not pled subjective falsity as to Lehman’s accounting treatment for Repo 105 transactions. *See, e.g., Regions*, 2010 WL 1883487, at *4 n.46 (dismissing Section 11 claim against EY as “derivative of plaintiff’s claims for [the company’s] misstatements,” where plaintiffs failed to plead the subjective falsity of the company’s underlying statements of opinion).

⁵ *See, e.g., In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 477 (S.D.N.Y. 2006) (dismissing claims against the audited company and its auditors, as the audited company’s alleged failure “to present a true representation of [its] operations” did not violate GAAP).

⁶ Plaintiffs wrongly contend that SEC Regulation S-K required disclosure of the Repo 105 transactions in Lehman’s MD&A. Opp. at 20-21. But as Plaintiffs concede, EY is not liable for Lehman’s MD&A. EY Br. at 16 & n.18.

3. Plaintiffs' claim of a false "overall impression" cannot survive.

Recognizing that Lehman complied with SFAS 140's accounting and disclosure requirements, Plaintiffs retreat to the assertion that Lehman nevertheless violated GAAP because the "overall impression" created by its financial statements was false. Opp. at 14-16. Plaintiffs claim that Lehman's accounting ran afoul of certain Statements of Financial Accounting Concepts ("FASCON"). *Id.* at 14. This argument not only falls of its own weight, but Plaintiffs' reliance on it speaks volumes about the quality of their accounting claims.

First, it is well established that FASCON are not GAAP, and therefore citation to them cannot establish a GAAP violation.⁷ *Second*, the cases Plaintiffs cite are inapposite. This is not an instance where the accounting at issue "may or may not have been improper under particularized GAAP rules," *United States v. Ebbers*, 458 F.3d 110, 126 (2d Cir. 2006), or where the acceptability of the defendant's accounting practice at the relevant time "cannot be determined in advance of the development of the record." *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 339 (S.D.N.Y. 2004). To the contrary, Plaintiffs here effectively concede that Lehman properly applied SFAS 140, but claim that Lehman nonetheless should have ignored GAAP's dictates, even though doing so would have rendered Lehman's financial statements presumptively misleading under SEC rules. 15 U.S.C. § 78m(i). Indeed, in each of the cases Plaintiffs cite for this point, the courts found specific GAAP violations, while holding that the financial statements, taken as a whole, may be misleading even absent specifically identified GAAP violations. *Ebbers*, 458 F.3d at 126; *United States v. Sarno*, 73 F.3d 1470, 1484 (9th Cir. 1995); *Global Crossing*, 322 F. Supp. 2d at 339. Here, Plaintiffs seek to turn this point on its head, arguing that the *proper* application of GAAP somehow rendered Lehman's financial statements misleading. It simply cannot reasonably be argued that the proper application of SFAS 140 created a misimpression, while the improper application of SFAS 140 would have "cured" such misimpression.

⁷ See FASB, Concept Statements, at <http://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1176156317989> ("A Statement of Financial Accounting Concepts does not establish generally accepted accounting standards.").

Third, Plaintiffs fail, in any event, to plead *facts* showing that Lehman’s GAAP-based accounting for Repo 105’s left a false “overall impression” of its financial condition. Plaintiffs simply assert, without support, that “[d]isclosures of the Repo 105 transactions [were] unquestionably required to fairly present Lehman’s financial condition.” Opp. at 15. This bit of *ipse dixit* aside, Plaintiffs’ argument becomes entirely circular; Lehman’s accounting for Repo 105 transactions is said to have left an overall misimpression of its financial condition because these were “sham transactions without economic substance”—the proof of which, apparently, is that they left an overall misimpression concerning Lehman’s financial condition. Opp. at 15-16. Of course, in making this assertion, Plaintiffs fail to address the applicable accounting literature, Lehman’s conformity with that literature, and how such GAAP-based accounting can be reconciled with claims that these were “sham transactions” creating an overall misimpression.

4. Plaintiffs fail to allege that EY violated GAAS.

Plaintiffs have neither alleged, nor denied their failure to allege, any GAAS violations in support of their Section 11 claims. EY Br. at 33-34. This itself is fatal to Plaintiffs’ Section 11 claim based on EY’s statement of GAAS compliance. *Id.*⁸

II. PLAINTIFFS FAIL TO STATE CLAIMS UNDER SECTION 10(B).

The failure to plead a false statement by EY is fatal to Plaintiffs’ claims under both Section 11 and Section 10(b). Two additional deficiencies—their failure to plead scienter and loss causation—further compel dismissal of Plaintiffs’ Section 10(b) claims against EY.

A. Plaintiffs’ Opposition Highlights The Inadequacy Of Their Scienter Allegations.

In the TAC, Plaintiffs allege three “red flags” as the bases for EY’s scienter: (1) a Lehman “netting grid,” (2) the UK true sale opinion, and (3) an interview with Matthew Lee. As EY has shown, Plaintiffs have failed to establish that these purported “red flags” should have alerted EY to errors in Lehman’s financial statements, much less that they reflect “an actual

⁸ Nor do Plaintiffs—either in the TAC’s remainder or in their Opposition—identify facts establishing that EY violated GAAS. Only in the context of their Section 10(b) scienter allegations do Plaintiffs even reference GAAS—and there they simply recite the various GAAS standards and assert that those standards were violated, without alleging facts to support such assertions. EY Br. at 19-21.

intent to aid in” any fraud, or an audit so deficient as to constitute “no audit at all.” EY Br. at 22-25. In their Opposition, Plaintiffs reiterate the TAC’s scienter allegations without addressing their deficiencies.

First, Plaintiffs’ contention that Lehman’s “netting grid” contained information “about the suspicious volume and timing of the transactions” (Opp. at 72) is unfounded on both counts. Plaintiffs provide no basis for the assertion that period-end balances of \$25 or \$30 billion were “suspicious” for a company that had hundreds of billions of dollars of assets and conducted trillions of dollars of transactions each year. Nor did the netting grid show the timing of these transactions. It merely provided, like a balance sheet, moment-in-time data for two period ends. The period-end balance would not reveal, as Plaintiffs suggest (Opp. at 73), any *increase* at period end. On Plaintiffs’ theory, any balance sheet would be “suspicious”—by its very nature. In addition, Plaintiffs fail to address the critical fact expressly reflected in the netting grid: that Lehman’s Repo 105 accounting “practice is correct” under GAAP. Ex. 16 to Turner Decl. at 26.

Second, Lehman’s UK true sale opinion—secured in connection with its UK Repo 105 transactions—was hardly a red flag. The simple truth is that for transactions conducted in the UK under UK law, a true sale opinion from a UK firm would be expected. The UK is hardly a renegade legal jurisdiction, and the Linklaters firm hardly a source of sham opinions. Plaintiffs never allege that these UK transactions were improper under UK law, or explain why a legal opinion addressing the application of UK law to UK transactions is even noteworthy—let alone a “red flag.” EY Br. at 24.⁹

Third, EY’s June 2008 interview with Matthew Lee did not raise any red flags. Plaintiffs do not and cannot contend that anything Lee told EY—including the \$50 billion Repo 105 balance and the fact that this balance increased at the end of Q208—suggested that Lehman’s Repo 105 accounting violated GAAP; indeed, Lee is not alleged to have said that Lehman’s

⁹ Plaintiffs’ desperation to derive a “red flag” from the true sale opinion led them to blatantly misquote the Examiner’s Report. Plaintiffs misrepresent the Report to say that “[EY’s Bill] Schlich told the Examiner that E&Y never reviewed the Linklaters letter.” Opp. at 74 (citing Rep. at 950 & n.3665). The Examiner actually stated that “Schlich told the Examiner that he *did not know* if anyone *at Ernst & Young LLP* (i.e., the United States-based Ernst & Young) ever reviewed the Linklaters letter.” Rep. at 950 n.3665 (emphasis added).

Repo 105 accounting was wrong. Plaintiffs allege no facts supporting their claims that EY did not take “any steps to investigate Lee’s assertions” (Opp. at 70) and that EY was aware of any fraud or illegal act that would have caused EY to raise such concerns with Lehman’s Board.

B. Lehman’s Accounting For And Disclosures Regarding Repo 105 Transactions Did Not Cause Plaintiffs’ Loss.

As discussed in EY’s Opening Brief, not only do Plaintiffs fail to plead loss causation in connection with the Repo 105 transactions, but it is apparent from the face of the TAC that statements regarding these transactions did not cause Plaintiffs’ alleged loss. EY Br. at 25-29, 34-35. Plaintiffs do not dispute that there were no corrective disclosures concerning Lehman’s Repo 105 accounting until after its bankruptcy—and thus, that they must show how the Repo 105 transactions concealed the risk materializing in Lehman’s demise, in order to show loss causation. Opp. at 86-88. Plaintiffs’ arguments clearly lack substance on this critical issue.

First, Repo 105 transactions had no effect on, and thus could not serve to conceal, Lehman’s liquidity. As EY has explained (EY Br. at 8-11, 26-28), Repo 105 transactions exchanged certain liquid assets for other liquid assets. Plaintiffs’ novel and incorrect contention that the securities transferred in Repo 105 transactions were not “highly liquid” (Opp. at 96) is squarely contradicted not only by their own TAC allegations, but by the Examiner’s Report on which they rely. *See* TAC ¶ 190 (“Repo 105 transactions shifted highly liquid assets off Lehman’s balance sheet[.]”); Rep. at 755 n.2922 (confirming use of government securities in Repo 105 transactions). *Second*, Repo 105 transactions had no effect on, nor did they conceal, Lehman’s asset quality. Lehman’s asset classes and categories—and the amounts held in each of those categories—were set forth in the financial statements, 2007 10-K at 30, and provided the clearest picture of Lehman’s asset quality and liquidity.¹⁰ Thus, as in *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 158 (2d Cir. 2007), the auditors’ alleged misstatements cannot be

¹⁰ Plaintiffs’ assertion that the asset classes listed in Lehman’s financial statements were not a perfect proxy for their quality or liquidity (Opp. at 30) ignores the fact that these classes provided far better information about Lehman’s risk profile than the “net leverage ratio” (described by the Examiner as a “brutal, rudimentary measurement” that “did not capture the quality of the assets” (Rep. at 805)), to which Plaintiffs cling. EY Br. at 8-11. Indeed, Plaintiffs’ suggestion that investors should have looked to “net leverage” as an indicator of Lehman’s asset quality and liquidity—rather than the asset listings themselves—underscores how contrived their argument has become.

said to have caused Plaintiffs' loss; the risks allegedly "concealed" were known to the market.¹¹ *Third*, Repo 105 transactions did not allow Lehman "to avoid taking massive write-downs on assets it otherwise would have had to sell" (Opp. at 93). As Plaintiffs allege, Lehman's policy was to mark its assets at fair value. TAC ¶ 93.¹² If the assets' value decreased, the assets had to be written down, regardless of whether they were retained or sold—and regardless of whether Lehman engaged in any Repo 105 transactions.¹³ Plaintiffs' attempt to create a link between asset write-downs and Repo 105 transactions is completely fabricated.

Nor have Plaintiffs identified facts sufficient to apportion any loss caused by EY's challenged statements. While Plaintiffs deny that they must "allege the precise loss attributable to the fraud," Opp. at 97 (citing *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005)), the paragraph from which Plaintiffs cherry-pick this clause continues:

But where (as here) substantial indicia of the risk that materialized are unambiguously apparent on the face of the disclosures alleged to conceal the very same risk, a plaintiff must allege (i) facts sufficient to support an inference that it was defendant's fraud—rather than other salient factors—that proximately caused plaintiff's loss; or (ii) facts sufficient to apportion the losses between the disclosed and concealed portions of the risk that ultimately destroyed an investment.

Lentell, 396 F.3d at 177. Here too dismissal is proper, as Plaintiffs fail to plead in the TAC (or identify in their Opposition) "facts sufficient to support an inference" that EY's statements—rather than the other misrepresentations alleged in the TAC, the risk factors spelled out in Lehman's financial statements, the business decisions Lehman made, or the unprecedented credit and housing crises—proximately caused all or an apportionable part of Plaintiffs' claimed loss.

¹¹ Plaintiffs' assertion of immaterial distinctions between *Lattanzio* and this action do not distract from the opinion's principal lesson: where, as here, risks related to plaintiffs' loss are disclosed or publicly known, then an unqualified audit opinion has not concealed such risks. 476 F.3d at 157-58; *see also* EY Br. at 27-28.

¹² Plaintiffs allege that only two of Lehman's specific assets were not marked at fair value and do not address the vast majority of Lehman's assets (TAC ¶¶ 91-101), presumably because the Examiner, on whom they rely, did not conclude that Lehman's valuations were unreasonable. Rep. at 214-15 ("The Examiner finds insufficient evidence to support a finding that Lehman's valuations of its RWL, RMBS, CDO, or derivative positions were unreasonable[.]"). Of course, Plaintiffs do not allege that these specific assets were used in Repo 105 transactions.

¹³ Plaintiffs' argument assumes that Lehman needed to reduce leverage, and thus had to choose between selling toxic assets and conducting Repo 105 transactions. This is a false dilemma; Lehman could have, for example, sold outright the securities used in the Repo 105 transactions (which Lehman did not want to do, because such a transaction would be costly relative to the use of repos (Opp. at 67 n.76)). Moreover, as Lehman was not required to reduce its leverage, Lehman could have sold assets at the same time that it engaged in Repo 105 transactions, or done neither.

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Respectfully submitted,

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