UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION	:	
This Document Applies To: *In re Lehman Brothers ERISA Litigation*, 08 Civ. 5598 (LAK)	:	Civil Action 09 MD 2017 (LAK)

DIRECTOR DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' SECOND CONSOLIDATED AMENDED COMPLAINT

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INTRODUCTION

In its decision granting Defendants' motion to dismiss the Consolidated Amended Complaint in this case, this Court recognized that the Directors of Lehman Brothers Holdings Inc. had no fiduciary responsibility under the Lehman Brothers Savings Plan with respect to the selection of the Plan's investment options or for communicating with participants concerning the Plan. Plaintiffs appear finally to acknowledge this fact and now concede that they are dropping these claims as against the Director Defendants. *See* Pls.' Opp. at 28-29.

Abandoning their duty of prudence count, Plaintiffs' Opposition to the Director Defendants' Motion to Dismiss focuses entirely on their misguided claims that the Director Defendants breached a duty of loyalty as a result of supposed conflicts of interest (Count II), and breached a duty to appoint and monitor Lehman's Benefit Committee (Count III). Plaintiffs' Opposition, however, fails to provide any legitimate basis for permitting these claims – the same claims that were previously brought in the CAC and dismissed by the Court – to survive. Plaintiffs' Second Consolidated Amended Complaint and Opposition do little more than regurgitate the same facts and legal arguments concerning these counts that have already failed as a matter of law. Thus, Plaintiffs' claims against the Director Defendants are without merit and should again be dismissed.

ARGUMENT

Each of the SCAC's three counts against the Director Defendants fails as a matter of law. Specifically, Count I, which alleges that all Defendants breached their fiduciary duties of prudence and disclosure, has now been abandoned as against the Director Defendants. *See* Point I. Plaintiffs' claim for breach of ERISA's "duty to monitor" (Count III) is baseless because Plaintiffs still fail to offer any factual or legal basis for the contention that the Board failed adequately to appoint and monitor the Compensation Committee, or that the Compensation

Committee failed adequately to appoint and monitor the Benefit Committee. *See* Point II. And, Count II, which alleges a violation of the fiduciary duty to "avoid conflicts of interest," is without merit because Plaintiffs have failed to identify either any such conflicts or a causal connection to any fiduciary actions by any of the Director Defendants. *See* Point III. For these reasons, the SCAC should be dismissed as against the Director Defendants.

I. PLAINTIFFS CONCEDE THAT THE DIRECTOR DEFENDANTS WERE NOT FIDUCIARIES WITH RESPECT TO PLAINTIFFS' PRUDENCE AND DISCLOSURE CLAIMS (COUNT I)

In its February 2, 2010 Opinion, the Court correctly found that Plaintiffs' allegation that the Director Defendants were fiduciaries with respect to the management and administration of the Plan was "a legal conclusion, unsupported by factual allegations" and that the Court "need not accept it as true." Feb. 2010 Op. at 9 (published at 683 F. Supp. 2d 294 (S.D.N.Y. 2010)) (Exhibit B to the November 23, 2010 Declaration of Adam J. Wasserman). By the same token, the Court rejected Plaintiffs' argument that the Director Defendants violated ERISA by making allegedly inaccurate statements in LBHI's SEC filings. *Id.* at 10.

Despite the clear Plan language and the Court's decision, Plaintiffs' SCAC repeated a claim for breach of ERISA's duties of prudence and disclosure against *all* Defendants – including the Director Defendants. *See* SCAC ¶¶ 467-71 and Count I. However, despite the allegations of the SCAC, Plaintiffs have now abandoned both Count I's prudence and communication/candor claims against the Director Defendants. *See* Pls.' Opp. at 28-29 (stating that Plaintiffs "do not contend that the Director Defendants had a duty to remove the Lehman Stock Fund as a retirement savings option or…to communicate with Plan participants"); *see also id.* at 28, 58, 62.[1] Thus, as is discussed in the Director Defendants' moving brief (at 12-16), and

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[1] The inconsistencies between the SCAC and Plaintiffs' Opposition highlight the SCAC's failure to comply with the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. The

as Plaintiffs now concede, there is no basis to find that the Director Defendants had (let alone breached) a duty to manage the Plan's assets or communicate with Plan participants. Count I must therefore be dismissed.

II. THE SCAC FAILS TO OFFER ANY NEW ALLEGATIONS TO SUPPORT PLAINTIFFS' CLAIM FOR BREACH OF DEFENDANTS' PURPORTED DUTY TO APPOINT AND MONITOR (COUNT III)

Admitting that the Director Defendants possessed no direct responsibility for the administration of the Plan, Plaintiffs now assert that the Director Defendants "breached their fiduciary duty by (i) appointing members of the Benefit Committee who were insufficiently informed to determine whether Lehman Stock was imprudent and then (ii) failing to provide them with adequate information about Lehman's financial collapse." Pls.' Opp. at 8. This claim, which relies on factual allegations that are effectively identical to those in their rejected CAC (*compare* CAC ¶¶ 354-356 *with* SCAC ¶¶ 490-492), cannot stand as a matter of law. Plaintiffs' "duty to monitor" monitor claim is baseless because: (1) Plaintiffs fail to offer any allegations showing that the Director Defendants breached any obligation in connection with their appointment and monitoring of the members of the Compensation Committee; (2) the SCAC contains no facts supporting Plaintiffs' contention that the members of the Compensation Committee breached their fiduciary duty in appointing the members of the Benefit Committee; and (3) Plaintiffs' non-disclosure and other allegations fail as a matter of law to state a claim for breach of the duty to monitor.

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contradictions between the two documents show that not even Plaintiffs are certain as to which claims are asserted against which Defendants. For example, as discussed above, Plaintiffs' Opposition rejects any liability against the Director Defendants based on an alleged duty of prudence or duty to communicate with Plan Participants. This re-characterized theory of liability, however, directly contradicts the allegations Plaintiffs assert in the SCAC. Thus, as pled, the SCAC fails to provide adequate notice of which allegations of wrongdoing apply to which Defendants.

A. The SCAC Fails To Offer Any Support For Plaintiffs' Claims Against The Director Defendants Generally

Plaintiffs cannot conceivably state a claim against the members of the Lehman Board as a whole. As permitted by the Plan and ERISA, alleged in the SCAC, and recognized by the Court, LBHI's Board of Directors delegated the power to appoint members of the Benefit Committee to the Compensation Committee. *See* Plan, Art. X, § 10.1; SCAC ¶ 44; Feb. 2010 Op. at 8-9; *see also* 29 U.S.C. § 1105(c). Accordingly, as a matter of law, the Director Defendants who are not alleged to have been members of the Compensation Committee (*i.e.,* Defendants Ainslie, Berlind, Cruikshank, Fuld, Grundhofer, Hernandez and Kaufman) cannot be liable for the appointment or monitoring of the Benefit Committee. *See, e.g., Schultz v. Texaco Inc.,* 127 F. Supp. 2d 443, 452 (S.D.N.Y. 2001) (Where "a plan provides for the allocation of fiduciary responsibility ... [the allocator] is not liable for acts or omissions of the person to whom fiduciary responsibility is allocated... except to the extent that the allocation itself is a breach of fiduciary duty"); *see also* 29 C.F.R. § 2509.75-8, at FR-13. Moreover, the SCAC is devoid of any specific factual allegations that the Board of Directors acted improperly in appointing and monitoring the Compensation Committee. Accordingly, all of Plaintiffs' claims against the full Board should be dismissed.

B. Plaintiffs Have Failed To State A Valid Claim Based On The Compensation Committee's Appointment Of The Members Of The Benefit Committee

Plaintiffs' assertion that the Compensation Committee breached an ERISA fiduciary duty in appointing the Benefit Committee is based on a single and conclusory allegation: that they "appointed members of the Benefit Committee who were insufficiently informed to determine when, at the beginning of the Class Period, the Company stock had become imprudent for retirement savings...." SCAC ¶ 437. Nowhere, however, does the SCAC offer any specific factual allegations articulating why the Benefit Committee members were "unqualified" or

"uninformed" at the time of their appointment, as asserted in Plaintiffs' Opposition, *see* Pls.' Opp. at 23. The SCAC does not even contain such basic information as when the Benefit Committee members were appointed in the first place. *See* SCAC ¶¶ 62-68.

While Plaintiffs claim that the Court "tacitly acknowledged" that Plaintiffs can state a valid claim against the Director Defendants by merely alleging, without factual support, that the Director Defendants breached a duty of appointment (Pls.' Opp. at 22), this is simply not the case. As the February 2010 Opinion recognized, the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 155 (2007), prohibits a court from crediting "conclusory allegations" that lack "factual enhancement" in deciding a motion to dismiss. Feb. 2010 Op. at 15-16.[2] Here, the SCAC offers no factual allegations to support the assertion that the Benefit Committee members were not qualified. Rather, the SCAC asserts the opposite. According to Plaintiffs' Opposition, the SCAC "plausibly" establishes that because of their "backgrounds and experience, their senior positions at Lehman, and their job responsibilities," the members of the Benefit Committee "knew or should have known" of the alleged circumstances that allegedly rendered investment in LBHI stock imprudent. Pls.' Opp. at 3. Thus, to the extent that Plaintiffs contend that the Compensation Committee Defendants' act of appointing members of the Benefit Committee was itself a breach of fiduciary duty, that claim fails as a matter of law.

C. Plaintiffs' Duty To Monitor Claim Is Without Merit

In dismissing the CAC, the Court rejected Plaintiffs' "duty to monitor" claim because, *inter alia*, that claim is entirely dependent on the viability of their underlying prudence claim

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[2] Plaintiffs' heavy reliance on *Agway, Inc. Employees' 401(k) Thrift Investment Plan v. Magnuson*, 03-CV-1060, 2006 WL 29334391 (N.D.N.Y. Oct., 12, 2006) (affirming Report and Recommendation dated July 13, 2006), to defend their conclusory allegation in support of the appointment claim is misplaced as *Agway* was decided prior to *Twombly*.

against the Benefit Committee Defendants. *See* Feb. 2010 Op. at 16-17. Because, as discussed in the Benefit Committee Defendants' Motion to Dismiss, the SCAC's claims against the Benefit Committee Defendants are meritless, the duty to monitor claim necessarily fails again as well. *See In re SLM Corp. ERISA Litig.*, No. 08 Civ. 4334, 2010 WL 3910566, at *11 (S.D.N.Y. Sept. 24, 2010) (*citing* the February 2010 Op.); *In re Bank of America Corp. Sec., Derivative, & ERISA Litig.*, No. 09 MD 2058, 2010 WL 3448197, at *25 (S.D.N.Y. Aug. 27, 2010) (*citing* the February 2010 Op.). In addition, the duty to monitor claim should be dismissed because: (1) the Director Defendants had no legal duty to disclose non-public business information to the Benefit Committee; (2) the SCAC fails to identify material facts that the Director Defendants improperly withheld from the Benefit Committee; and (3) Plaintiffs fail to show that the Director Defendants had reason to foresee LBHI's supposed impending collapse at a time when they could have acted to prevent the alleged losses.

1. ERISA's Fiduciary Duty To Monitor Does Not Require Disclosure Of Non-Public Business Information To Appointed Fiduciaries

According to Plaintiffs, ERISA "demands" that fiduciaries with a limited duty to appoint provide their appointees with "all material information" (including material non-public information) necessary to perform their duties. *See* Pls.' Opp. at 62. However, Plaintiffs' contention concerning the scope of the duty to monitor is completely contrary to ERISA's fundamental principles concerning the apportionment of fiduciary responsibility.

Numerous courts in this district and elsewhere have concluded that ERISA does not impose an affirmative duty to disclose non-public information concerning an employer's operations and future outlook to plan participants.[3] Nonetheless, Plaintiffs allege that the limited

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[3] *See, e.g., Gearren v. The McGraw-Hill Companies, Inc.*, 690 F. Supp. 2d 254, 271 (S.D.N.Y. 2010) (a fiduciary responsible for administering a plan "ha[s] no affirmative duty under ERISA to

duty to appoint and monitor carries with it a disclosure obligation far exceeding any imposed even on the fiduciaries responsible for overseeing a plan. As noted in the Director Defendants' moving brief (at 24), the court in *In re Citigroup* rejected the very argument that Plaintiffs are making here, ruling that "[t]o hold that the Monitoring Defendants had a duty to provide material, non-public information to the Plan's fiduciaries would extend the Monitoring Defendants' fiduciary responsibilities far past their limited role as outlined by the Plan Agreement." 2009 WL 2762708, at *26. Plaintiffs make no real effort to dispute the sound reasoning of the *Citigroup* court, addressing the decision only by making the entirely inaccurate assertion that the case "concerned whether fiduciaries have a duty to communicate with plan participants, not whether appointing fiduciaries have a duty to monitor or inform their appointees." Pls.' Opp. at 63 n.68. Nor do Plaintiffs address the reasoning in *In re American Express Co. ERISA Litig.*, No. 08 Civ. 10834, 2010 WL 4371434 (Nov. 2, 2010), which rejected a duty to monitor claim because "[t]he allegation that American Express and the Monitoring Defendants are liable for failing to provide the Committee Defendants with non-public information regarding American Express's financial position extends beyond the duties of American Express and the Monitoring Defendants under the Plan." *Id.* at *14.

While Plaintiffs cite a handful of cases to try to salvage their claim (*see* Pls.' Opp. at 25, 62, 64 n.69), Plaintiffs' reliance on these decisions is misplaced.[4] These opinions, almost all of

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disclose information about the company's financial condition to plan participants"); *see also In re Citigroup ERISA Litig.*, No. 07 Civ. 9790, 2009 WL 2762708, at *22 (S.D.N.Y. Aug. 31, 2009).

4 Plaintiffs also refer to an ERISA Interpretive Bulletin issued by the Department of Labor. *See id.* at 64. Significantly, the "Question and Answer" to which Plaintiffs refer makes no reference to the provision of information to appointees, and certainly in no way suggests an ongoing obligation to provide all material non-public information concerning an employer's operations. *See* 29 C.F.R. § 2509.75-8 at FR-17. Additionally, at numerous points in their Opposition, Plaintiffs cite to arguments made by the Department of Labor in *amicus* briefs in various cases.

which pre-date *Twombly*, are inconsistent with *Twombly* and *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937 (2009), ERISA's allocation of fiduciary duties, and the well-founded principle that "it is inappropriate to infer an unlimited disclosure obligation on the basis of general provisions that say nothing about disclosure." *See In re Citigroup*, at *22 (internal quotation omitted).[5]

Plaintiffs' attempt to impose an exceedingly broad duty of disclosure on the Director Defendants is misplaced, as it is inconsistent with ERISA's basic principles concerning fiduciary duties. Thus, Plaintiffs' duty to monitor claim should be dismissed.[6]

The Department of Labor's litigation positions, however, are not entitled to any deference. *See United States v. Mead Corp.*, 533 U.S. 218, 230 121 S.Ct. 2164 (2001).

5 The two cases that Plaintiffs cite that were decided post-*Twombly*, *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345 (S.D.N.Y. 2009) and *In re Pfizer Inc. ERISA Litig.*, 04 Civ. 10071, 2009 WL 749545 (S.D.N.Y. Mar. 20, 2009), should be given little weight. In *Morgan Stanley*, the court stated that appointing fiduciaries must provide appointees with "any adverse information that the fiduciary might possess." 696 F. Supp. 2d at 366. The apparently unlimited disclosure obligation that *Morgan Stanley* envisioned is plainly inconsistent with ERISA's basic principles concerning the allocation of fiduciary duties, as well as with well-reasoned decisions such as *In re Citigroup* and *In re American Express*. Further, the only argument made by the defendants in *Morgan Stanley* concerning the plaintiffs' duty to monitor claim was that "the Complaint fails to allege a valid primary claim." *Id.* at 367. Accordingly, the court's brief discussion of the scope of the duty to monitor was dicta. *Pfizer* similarly offers little support to Plaintiffs as, unlike here, the appointing defendants in *Pfizer* allegedly made specific misrepresentations to their appointees. 2009 WL 749545, at *9. Thus, the duty at issue in *Pfizer* was not an appointing fiduciary's duty to provide information, but such fiduciary's duty to avoid affirmative misstatements. Further, like the *Morgan Stanley* court, the court in *Pfizer* failed to consider whether ERISA in fact requires an appointing fiduciary to disclose material non-public information, and instead simply assumed that such a duty exists. *Id.*

6 Plaintiffs scoff at the notion that providing inside information to the Benefit Committee with the expectation that they would act upon it would conflict with the securities laws. *See* Pls.' Opp. at 63 n.68. The Third and Ninth Circuits, however, were not so dismissive in their recent decisions. *See, e.g., Edgar v. Avaya, Inc.*, 503 F.3d 340, 350 (3d Cir. 2007) ("[H]ad defendants decided to divest [the Plans of Avaya stock], based on information that was not publicly available, they would have faced potential liability under the securities laws for insider trading"); *Quan v. Computer Sciences Corp.*, 623 F.3d 870, 882 n.8 (9th Cir. 2010) ("Fiduciaries are under no obligation to violate securities laws in order to satisfy their ERISA fiduciary duties").

2. The SCAC Fails To Identify Material Facts Demonstrating That The Director Defendants Improperly Withheld Required Information From The Benefit Committee

Even if the Director Defendants had a duty to provide material non-public information to the Benefit Committee (which they do not), the SCAC fails to identify adequately any such information that was improperly withheld from the Benefit Committee by the Director Defendants. The SCAC lists certain categories of information that Plaintiffs claim should have been disclosed: information about potential real estate/CDO losses; potential liquidity risks; supposedly fraudulent valuations; Lehman's supposed status as the most highly leveraged firm after Bear Stearns's collapse; the use of Repo 105; and a purported lack of internal controls. *See* SCAC ¶ 492. None of these conclusory non-disclosure allegations survives scrutiny.

As the SCAC itself makes clear, Lehman in fact disclosed much of the allegedly withheld information. For example, in connection with potential real estate and CDO losses, the SCAC fails to identify information on these topics that the Director Defendants knowingly withheld. Rather, the SCAC itself establishes that Lehman disclosed, among other things: the "continued strain on the capital markets, particularly the securitized products and commercial real estate components"; that Lehman owned \$6.5 billion in CDOs with a "junk rating"; that Lehman owned \$38.8 billion in Level 3 assets for which there was no reliable market; and that in June 2008 "Lehman reported a net loss of \$2.8 billion – nearly ten times the loss analysts had anticipated… – following write-downs of \$3.7 billion to the Company's mortgage-backed assets." SCAC ¶¶ 287-89, 311. With regard to liquidity, Lehman warned that it relied upon "external borrowings for the vast majority" of its funding, that "failures in our industry are typically a result of insufficient liquidity," and that its "liquidity could be impaired by an inability to access secured and/or unsecured debt markets" or by an inability to sell assets or unforeseen outflows of cash or collateral. *See* 2007 Form 10-K at 17, 38, 76 (attached as Exhibit

A to accompanying Reply Declaration of Adam J. Wasserman).[7] With regard to leverage, as Plaintiffs themselves allege, LBHI publicly reported its leverage numbers, permitting comparisons with LBHI's peer firms. *See* SCAC ¶ 176. And, as to the purported lack of internal and financial controls, not only are Plaintiffs' allegations that such controls did not exist entirely conclusory, but Lehman repeatedly disclosed that Lehman's risk management policies were established by management, dynamic, and not guaranteed to work. *See* 2007 Form 10-K at 22, 37-38, 70; Form 10-Q for Quarter Ending 8/31/07 at 73 (Exhibit B to Wasserman Reply Decl.).

Even Plaintiffs' allegations relating to valuations and Repo 105 similarly do not hold water. As to the allegedly improper real estate valuations, Plaintiffs, *inter alia*, fail to allege any facts demonstrating that the Director Defendants knew that those valuations were incorrect. And, with regard to Repo 105, Plaintiffs cite no facts demonstrating that the independent directors were aware of its use; to the contrary, the Examiner's Report on which Plaintiffs rely for these allegations says the opposite – and in any event suggested that Lehman failed because of a run on the bank, not as a result of Repo 105. *See* Examiner's Report (Ex. G to Nov. 23, 2010 Wasserman Moving Decl.) at 7-8; Examiner's Report at 16 (Ex. C to Wasserman Reply Decl.).[8]

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[7] Moreover, Plaintiffs themselves allege that Lehman's stock dropped specifically as a result of liquidity concerns. *See* SCAC ¶ 300. And, while Plaintiffs argue that Lehman overstated its liquidity pool by including certain assets, they do not allege facts demonstrating that this was known to the Director Defendants. *See id.* ¶ 367.

[8] Plaintiffs' argument that the Court cannot consider the Examiner's statement that Lehman did not disclose the use of Repo 105 to the Board of Directors is entirely misplaced. The SCAC itself cites the Examiner's Report to support Plaintiffs' allegations concerning Repo 105, *see, e.g.*, SCAC ¶¶ 167, 171, and Plaintiffs are not entitled to limit consideration of the Report solely to those conclusions that they find favorable. *See, e.g.*, *Ginx, Inc. v. Soho Alliance*, 720 F. Supp. 2d 342, 345 (S.D.N.Y. 2010) ("To the extent that the complaint refers to or relies on a particular document, it is of course proper for the Court to consider the entire text of that document in deciding any motion to dismiss"). Indeed, where the allegations in a complaint conflict with incorporated documents, courts give preference to the documents. *See Barnum v. Millbrook Care Ltd. P'ship*, 850 F. Supp. 1227, 1232-33 (S.D.N.Y. 1994).

Finally, Plaintiffs' claim that the Benefit Committee was not provided sufficient information about the risks associated with LBHI is belied by two of the Plaintiffs' main themes – first, that LBHI "was widely considered" to be the next bank in line to fail following Bear Stearns's collapse (*see* Pls.' Opp. at 11) and second, that the Benefit Committee allegedly knew of numerous facts that rendered LBHI stock imprudent and should have eliminated the LBHI investment option based on that information (*see* SCAC ¶ 472). In light of such allegations, Plaintiffs' argument that sufficient information concerning LBHI's alleged financial crisis was not disclosed to the Benefit Committee is self-defeating.

3. The SCAC Fails To Identify Facts Establishing That The Director Defendants Knew That The Benefit Committee Was Not Acting Prudently Or That LBHI Was Facing An Imminent Collapse

Regardless of the precise scope of any duty to monitor imposed by ERISA, there can be no basis for any claim against the Director Defendants unless it can be established that the Director Defendants: (1) knew that LBHI was faced with "dire circumstances"; and (2) had reason to believe that the Benefit Committee did not recognize those circumstances or were otherwise acting imprudently. Because the SCAC fails to allege facts sufficient to meet these requirements, Plaintiffs' duty to monitor claim necessarily fails for this reason as well.

a. The SCAC Fails To Identify Any "Red Flags" That Should Have Led The Director Defendants To Conclude That The Benefit Committee Was Acting Imprudently

As Plaintiffs recognize, even the Department of Labor has noted that "the duty to monitor does not require the appointing fiduciary to second-guess every decision of its appointee." Pls.' Opp. at 62 (internal quotation omitted). Thus, as the court explained in *In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861 (S.D. Tex. 2004), a valid claim based on an appointing fiduciary's alleged failure to monitor can only be maintained where there are allegations of specific "red flags" that put an appointing fiduciary on notice of an appointee's "possible misadventure". *Id.*

at 903. Here, no such red flags are alleged. Rather, Plaintiffs, like the plaintiffs in *In re Wash. Mut., Inc. Securities, Derivative & ERISA Litig.*, No. 2:08-MD-1919, 2009 WL 3246994 (W.D. Wa. Oct. 5, 2009), "merely argue that this duty must have been breached by the precipitous fall in [the Company's] stock price." *Id.* at *11. Accordingly, Plaintiffs' claim should suffer the same fate—dismissal—as the claim in *Washington Mutual.*

b. Plaintiffs Fail To Allege Facts Supporting The Conclusion That The Director Defendants Foresaw LBHI's Collapse

In their Opposition, Plaintiffs claim that they have now identified a specific date (the collapse of Bear Stearns on March 16, 2008) as of which they allege that Lehman Stock was no longer a prudent investment. *See* Pls.' Opp. at 41. According to Plaintiffs, "[b]y that date, Defendants certainly knew or should have known that Lehman was at risk of collapse itself, and indeed must be the next in line to fail...." *Id.* However, despite Plaintiffs' access to a "wealth of newly-released information" *id.* at 10, the factual allegations contained in the SCAC do not support Plaintiffs' contention.

Plaintiffs' Opposition and the SCAC are replete with references to LBHI's alleged "highly leveraged" position following Bear Stearns's demise. *See* Pls.' Opp. at 35-36. But the fact that LBHI may have adopted what Plaintiffs describe as a "risky" business model is not sufficient to establish that LBHI's collapse was imminent at that time. Indeed, Plaintiffs' assertion that the Director Defendants should have known that LBHI was "next in line to fail" as of March 2008 is belied by the fact that, as asserted in the SCAC, LBHI's stock price *rose* by more than 50% during March and April 2008 and was trading at more than $14.00 per share only one week prior to its bankruptcy filing. *See* Exhibit 11 to Affidavit of Jonathan Youngwood in Support of Benefit Comm. Defs.' Motion to Dismiss.

As the Court noted in its February 2010 Opinion, contrary to Plaintiffs' assertion that LBHI's collapse was imminent as of March 2008, the allegations of the SCAC demonstrate that LBHI's bankruptcy filing was "sparked" by events that began only days earlier. *See* Feb. 2010 Op. at 14 n.54; *see also* SCAC ¶¶ 376 (alleging failure of talks with Korean Development Bank on September 9, 2008 and resulting 45% drop in LBHI stock price), 383 (discussing renewed demands on September 11 for additional $5 billion in capital from JPMorgan Chase), 388 (pleading that on September 12 "[c]ustomers were leaving Lehman in droves, so much so that the Company 'couldn't properly process the requests'"). At most, the allegations in the SCAC suggest that LBHI's collapse was "imminent" in the few days prior to its bankruptcy filing. At that point, as the Court previously recognized, neither the Director Defendants nor the Benefit Committee could have acted to avoid loss to the Plan. *See* Feb. 2010 Op. at 16 n.65.[9] Because the SCAC does not allege facts sufficient to establish that the Director Defendants knew that LBHI was facing an impending collapse at a time when they could have provided information to the Benefit Committee to protect the Plan's participants, Plaintiffs' monitoring claim fails.

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[9] Many of the allegations in the SCAC focus on the alleged knowledge of Defendant Fuld, LBHI's former Chairman and CEO. However, Plaintiffs fail to explain how the SCAC plausibly alleges that Mr. Fuld knew of Lehman's imminent collapse by March 16, 2008. First, *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999 (9th Cir. 1990), cited by Plaintiffs, in no way stands for the proposition that a "CEO's personal knowledge of corporate activities may be presumed." *See* Pls.' Opp. at 36 n.40. Rather, the court found that it was reasonable to infer that the chairman of a union committee had personal knowledge of matters contained in the chairman's sworn affidavit based on the chairman's position and participation in the matters described in his affidavit. *Barthelemy*, 897 F. 2d at 1018. Second, as discussed above, Lehman's collapse was not in fact imminent on March 16, 2008. Third, a CEO's efforts to sell or find a merger partner for a company does not give rise to a permissible inference that the company's collapse is imminent. This "naked form of hindsight pleading" does not suffice under Rule 8. *See Charter Township of Clinton Police & Fire Retirement Sys v. KKR Fin. Holdings LLC*, No. 08 Civ. 7062 (PAC), 2010 WL 4642554, at *19 (S.D.N.Y. Nov. 17, 2010).

III. PLAINTIFFS' CONFLICT OF INTEREST CLAIM FAILS (COUNT II)

Like the SCAC, Plaintiffs' initial CAC asserted a claim against the Director Defendants for breach of their alleged duty "to avoid conflicts of interest." In the February 2010 Opinion, the Court rejected this argument, noting that "[n]either serving as a corporate officer or director nor owning or selling stock is sufficient to state a conflict of interest claim in these circumstances." Feb. 2010 Op. at 16 n.67. This conclusion is consistent with the clearly established requirement that a plaintiff asserting a claim for breach of ERISA's duty of loyalty must specifically identify how an alleged conflict of interest interfered with an alleged fiduciary's actions with respect to a plan. *See* Defs.' Moving Brief at 17-18.[10]

The SCAC's allegations concerning the Director Defendants' alleged conflicts of interest are virtually identical to those in the rejected CAC. Accordingly, Plaintiffs' only defense of their claim is to contend that they are not required to "show how the conflict harmed the Plan and how Defendants benefited from a conflict." Pls.' Opp. at 65 n.70. Because Plaintiffs' argument is simply incorrect as a matter of law, *see* Defs.' Moving Brief at 17-18, because Plaintiffs have failed to identify any actual conflicts of interest against the Director Defendants,[11] because Plaintiffs fail to allege any causal relationship between the Director Defendants' alleged personal interests and the conduct that supposedly constituted a breach of fiduciary duty, and because the SCAC fails to cure any of the deficiencies that led to the dismissal of the conflict of interest claim in the CAC, Plaintiffs' conflicts claim must be dismissed.

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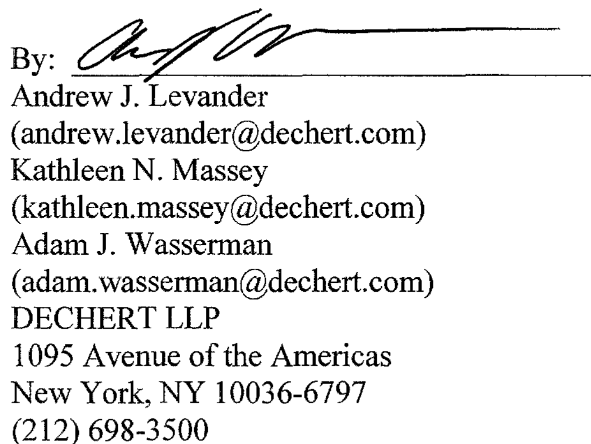
10 Citing *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 812, 835 (N.D. Cal. 2005); *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 479 (S.D.N.Y. 2005); *In re Dynegy, Inc.*, 309 F. Supp. 2d at 897–98; *In re WorldCom, Inc.*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003); *In re SLM Corp.*, 2010 WL 3910566, at *11.

11 Plaintiffs have no substantive response to the argument that there is no colorable conflict of interest claim against Mr. Fuld. *See* Pls.' Opp. at 65 n.70. Plaintiffs concede the established point that a defendant's "ownership and sales of stock alone does not necessarily violate ERISA," *id.*, and then fail to articulate any plausible facts to support their claim.

CONCLUSION

For the reasons stated above and in the Director Defendant's Memorandum of Law in Support of Their Motion to Dismiss, as well as in the submissions of the Benefit Committee Defendants in support of their Motion, Plaintiffs' Second Consolidated Amended Complaint should be dismissed, as against the Director Defendants, with prejudice.

Respectfully submitted,



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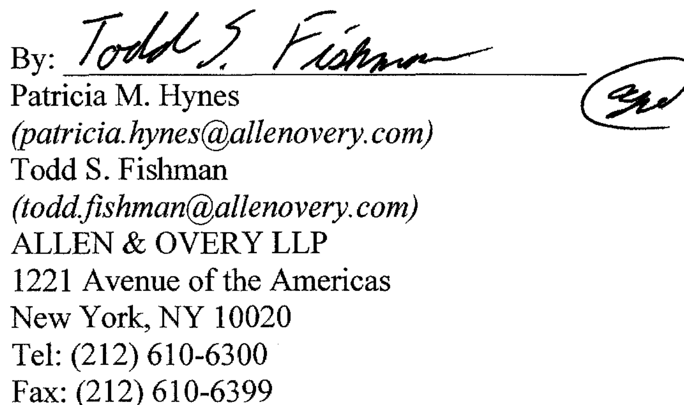

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