

**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,

v.

RICHARD S. FULD, JR., et al.,

Defendants.

No. 08-CV-5523 (LAK)

ECF CASE

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

Plaintiff,

v.

RICHARD S. FULD, JR., et al.,

Defendants.

No. 08 Civ. 8225 (LAK)

(Caption continued on next page)

**THE BROOKS GROUP'S MEMORANDUM IN
OPPOSITION TO MOTION FOR CONSOLIDATION**

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STANLEY TOLIN, On Behalf Of Himself And On
Behalf Of All Others Similarly Situated,

Plaintiff,

v.

RICHARD S. FULD, JR., et al.,

Defendants.

No. 08-CV-10008

BROOKS FAMILY PARTNERSHIP, LLC and
KGT INC. PENSION PLAN AND TRUST, on
Behalf of Themselves and All Others Similarly
Situated,

Plaintiffs,

v.

RICHARD S. FULD, JR., et al.,

Defendants.

No. 08 Civ. 10206 (LAK)

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Plaintiffs in *Brooks Family Partnership, LLC v. Fuld* (the “Brooks Group”) respectfully submit this memorandum in opposition to the motion of another plaintiff group (the “Bernstein Litowitz Group” or “BL Group”) to consolidate the *Brooks* action with the BL Group’s *Operative Plasterers* case “for all purposes.”¹ The motion should be denied because it would result in the improper expansion of the BL Group’s lead plaintiff role in violation of the Private Securities Litigation Reform Act (“PSLRA”) and prejudice the Brooks Group and other purchasers of Lehman’s Preferred J shares.

PRELIMINARY STATEMENT

The BL Group (the self-described “Pension Plan Group”) is a collection of five, unrelated investors “cobbled together by cooperating counsel” for the purposes of securing a lead plaintiff position in the *Operative Plasterers* case. See *In re Razorfish, Inc. Sec. Litig.*, 143 F. Supp. 2d 304, 308 (S.D.N.Y. 2001). It has “no independent existence and its composite members have no prior relationship.” *Id.* at 309. Presumptuously, the group calls its case the “Lehman Securities Class Action,” even though its language in a proposed order submitted in *Operative Plasterers* -- which stated (¶ 5) that “[t]his action shall be captioned ‘In re Lehman Brothers Holdings Inc. Securities Litigation’” -- was stricken from the final order. See 7/31/08 Order, Dkt. #18: 08-CV-5523.

The BL Group has been appointed as lead plaintiff in *Operative Plasterers* -- a case that did not initially assert claims arising out of Lehman’s \$1.8 billion public offering of Preferred J shares. As explained in prior briefing, the public notices issued prior to and in connection with the *Operative Plasterers* case pursuant to the PSLRA did not cover the Preferred J offering, the

¹ Reference is made herein to movant’s opening brief (“Mov. Brf.”) (Dkt. #10). Unless otherwise indicated, all references to “Dkt.” are to docket entries in *Brooks*, 08-CV-10206.

BL Group did not seek lead plaintiff status with respect to the Preferred J share claims, and the Court never appointed the BL Group as lead plaintiff with respect to the Preferred J case. *See* Dkt. #6, 13; Dkt. #54: 08-CV-8225.

A PSLRA notice was subsequently issued in connection with the first case to assert Preferred J claims -- the *Fogel* case. The Brooks Group and two other movants -- but not the BL Group -- filed motions for lead plaintiff appointment with respect to the Preferred J case. Those motions are *sub judice*.

Perhaps mindful of these facts, the BL Group has now moved to consolidate *Brooks* and other cases with *Operative Plasterers* "for all purposes," hoping that its lead plaintiff designation in that case will somehow spill over to a *de facto* lead plaintiff appointment for the Preferred J claims. The motion attempts a blatant end-run around the PSLRA's lead plaintiff provisions and should be rejected by the Court.

The Brooks Group has no objection to a coordination of certain pretrial proceedings -- including discovery -- to the extent practicable. A consolidation of *Brooks* with *Operative Plasterers*, however, is plainly inappropriate at this time, as shown below. In the event that both cases proceed beyond the pleading stage, the consolidation question can be revisited.

ARGUMENT

I. THE COURT SHOULD DENY CONSOLIDATION AT THIS TIME

A. The Standard for Consolidation

Pursuant to Rule 42(a):

If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. 42(a). As the movant, the BL Group bears the burden to show that consolidation is appropriate. *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993); *MacAlister v. Guterma*, 263 F.2d 65, 70 (2d Cir. 1958). To meet its burden, the BL Group must demonstrate that “compelling circumstances” warrant consolidation. *MacAlister*, 263 F.2d at 69.

A movant cannot meet its burden where the prejudice to a party would outweigh the benefits of consolidation. *Garber v. Randell*, 477 F.2d 711, 714 (2d Cir. 1973); *Tucker v. Arthur Andersen & Co.*, 73 F.R.D. 316, 317 (S.D.N.Y. 1976) (“Where confusion and prejudice will result, it is inappropriate for a court to order consolidation.”). While consolidation may promote efficiency, “[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial.” *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990).

Additionally, the use of procedural devices short of “consolidation for all purposes” -- including coordinated pretrial discovery -- should be evaluated before cases are consolidated. *See MacAlister*, 263 F.2d at 70 (consolidation inappropriate where there were “[m]any avenues of relief ... to forestall the possible confusion and duplication,” including coordinated discovery); *Repetitive Stress*, 11 F.3d at 374.²

As shown below, a consolidation of *Brooks* and *Operative Plasterers* would be prejudicial to the Brooks Group and the Preferred J class. Accordingly, the cases should not be consolidated, at least not at this point in the proceedings.

² Movant acknowledges that “coordination” of various related cases short of consolidation can “avoid duplication and streamline the proceedings” BL Mem. at 13. Those same goals can be achieved here, without a consolidation “for all purposes” and the consequent prejudice to the Brooks Group and the Preferred J class.

B. Fundamental Differences Between the Cases Militate Against Consolidation

Although the two cases do share certain common issues, the differences between the cases are so substantial that the proposed consolidation would inevitably prejudice the *Brooks* plaintiffs and other Preferred J purchasers. The differences include the claims themselves, the documents at issue, the parties involved, and the applicable pleading standards.³ Those differences might lessen depending on whether the *Operative Plasterers* amended complaint survives a motion to dismiss. At this juncture, however, there should be no consolidation.

According to the *Operative Plasterers* amended complaint (Dkt. #52: 08-CV-5523), ¶¶ 270, 277, although there were certain overlapping documents used in connection with the 28 different public offerings at issue in that case, various offerings incorporated offering materials that *were not part* of the Preferred J offering material, as shown below:

<u>Offering</u>	<u>Offering Documents Not Part of Preferred J Offering Material</u>
Series P Preferred Stock Offering	March 18, 2008 Form 8-K
Series Q Preferred Stock Offering	March 18, 2008 Form 8-K April 8, 2008 Form 10-Q June 9, 2008 Form 8-K
June 9, 2008 Common Stock Offering	March 18, 2008 Form 8-K April 8, 2008 Form 10-Q June 9, 2008 Form 8-K

³ Movant's principal case, *Kaplan v. Gelfond*, 240 F.R.D. 88 (S.D.N.Y. 2007) (Mov. Brf. at 9, 10), does not suggest a contrary result. In *Kaplan*, none of the parties objected to consolidation, "a consideration which weighs heavily against the potential for prejudice." *Id.* at 91 (citing *Olsen v. New York Cmty. Bancorp, Inc.*, 233 F.R.D. 101, 104-05 (E.D.N.Y. 2005)). See also *Linn v. Allied Irish Banks, PLC*, No. 02 Civ. 1738 (DAB), 2004 U.S. Dist. LEXIS 24655, at *5, 7 (S.D.N.Y. Dec. 7, 2004) (Mov. Brf. at 9 n.9) (unopposed consolidation motion); *In re Parmalat Sec. Litig.*, Order at 2, 04 Civ. 0030 (LAK) (S.D.N.Y. May 11, 2004) (Mov. Brf. at 2, 11) (same).

May 9, 2008 Subordinated Notes Offering	March 18, 2008 Form 8-K April 8, 2008 Form 10-Q
April 24, 2008 Notes Offering	March 18, 2008 Form 8-K April 8, 2008 Form 10-Q

Consequently, the BL Group will need to adequately plead, take discovery with respect to, and prove that those documents were, to use the BL Group's words, "false and misleading" when issued, even though such issues are irrelevant to the Brooks Group and the Preferred J class. That fact militates against consolidation.

Additionally, the BL Group has named as defendants 50 individuals and entities in the *Operative Plasterers* amended complaint (¶¶ 32-81), including 39 defendants that are not defendants in the *Brooks* action.⁴ The inconsistency in named defendants would create undue confusion before a jury and unnecessarily complicate the *Brooks* proceeding. This fact likewise weighs against consolidation. *See SEC v. Gerhardt*, No. 4:07CV270 JCH, 2007 WL 3144990, at *4 (E.D. Mich. Oct. 24, 2007) (consolidation improper where actions did not share numerous defendants); *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525 (GEB), 2006 WL 3095951, at *9

⁴ The 39 defendants are the following:

Individual Defendants: Erin Callan, Joseph M. Gregory, Ian Lowitt and Christopher M. O'Meara.

Underwriter Defendants: ABN Amro Holding N.V., ANZ Securities, Inc., BBVA Securities Inc., BNY Capital Markets, Inc., Cabrera Capital Markets, LLC, Caja de Ahorros y Monte de Piedad de Madrid, CIBC World Markets Corp., 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., Loop Capital Markets, LLC, Mellon Financial Markets, LLC, Mizuho Securities USA, Inc., nabCapital Securities, LLC, National Australia Bank Limited, Santander Investment Securities Inc., Scotia Capital (USA) Inc., Siebert Capital Markets, SG Corporate & Investment Banking, Sovereign Securities Corporation, LLC, TD Securities (USA) LLC, Utendahl Capital Partners, L.P. and Williams Capital Group, L.P.

(D.N.J. Oct. 3, 2006) (denying consolidation where cases did not share various defendants); *see Garber*, 477 F.2d at 717 (reversing consolidation order in securities cases where claims against one defendant were limited to a relatively short period of time during relevant period).

Moreover, although various firms acted as underwriters in multiple offerings, most of the firms were not named as defendants with respect to the Preferred J offering. *See Operative Plasterers* amended complaint, ¶¶ 47-81, 332. Nonetheless, by subsuming the Preferred J case in a complaint that likewise asserts Securities Act claims involving 27 other offerings -- involving many other underwriters who will assert fact-intensive defenses (including due diligence defenses) that are irrelevant to the Preferred J case -- a consolidation would create needless confusion and prejudice to the Brooks Group and the Preferred J class.⁵

In short, grafting the *Brooks* claims onto a litigation prosecuting Securities Act claims involving 28 different public offerings, as well as claims under the Securities Exchange Act of 1934 (“Exchange Act”) involving an untold number of other securities, represents precisely the “‘mixed bag’ type of consolidated complaint” that would create untold confusion and greatly prejudice the Brooks Group and the Preferred J class. *See Garber*, 477 F.2d at 717. For this reason alone, consolidation should be denied.

⁵ The BL Group glosses over these important distinctions among the 28 public offerings. Its complaint contains just one count under Section 11 (Count I, *see* complaint, pgs. 113-16), and one count under Section 12 (Count II, *see* complaint, pgs. 116-18), but should have contained separate counts for each offering under Section 11 and Section 12(a)(2). *See* Fed. R. Civ. P. 10(b) (“A party must state its claims or defense in numbered paragraphs, each limited as far as practicable to a single set of circumstances.... If doing so would promote clarity, each claim founded on a separate transaction or occurrence ... must be stated in a separate count”).

C. The BL Group's Complaint is Filled with Fraud Allegations That Would Subject the Claims of the Brooks Group and the Preferred J Class to Heightened Scrutiny and the Risk of Dismissal

It is well accepted that a consolidation may not properly affect the substantive rights of the parties. Thus, consolidation may not be ordered where it would effectively “merge” a party’s suit into another lawsuit or change a party’s rights. As the Supreme Court explained in *Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 53 S. Ct. 721 (1933):

[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.

289 U.S. at 496-97, 53 S. Ct. at 727-28; *see also Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 293-94, 12 S. Ct. 909, 912 (1892); *Garber*, 477 F.2d at 716 (quoting *Johnson*); *Zdanok v. Glidden Co.*, 327 F.2d 944, 950 n.6 (2d Cir. 1964) (same). Moreover, consolidation does not permit a plaintiff to “piggy back one complaint onto another ... in an attempt to insure the viability of the otherwise defective second complaint.” *Booth v. Quantum Chem. Corp.*, 942 F. Supp. 580, 588 n.6 (S.D. Ga. 1996).

In this case, a consolidation “for all purposes” would effectively merge the *Brooks* complaint with the complaint filed in *Operative Plasterers*. Such a consolidation is well more than a mere consolidation for pre-trial purposes. *See Garber*, 477 F.2d at 716 (reversing consolidation order which, “although purporting to be for ‘pretrial purposes,’ went beyond mere consolidation of the three suits for such purposes. In addition it directed the filing of the Consolidated Amended Supplemental Complaint, which superseded the complaints filed in the three separate actions. It further appears that the effect of this consolidation may be to cause serious prejudice to W & C.”); *MacAlister v. Guterma*, 263 F.2d 65, 69 (2d Cir. 1958) (district courts had no authority to order consolidated complaint, explaining: “Such an order would tend

to merge the various actions in disregard of the caveat expressed in *Johnson v. Manhattan Ry. Co.*”) (citation omitted); *Jornapak Corp. v. Bair*, 27 F.R.D. 509, 511 (S.D.N.Y. 1961) (“It is doubtful whether this Court is invested with power to order a consolidated complaint.”). Here, if the *Brooks* complaint is consolidated with the *Operative Plasterers* amended complaint, the prejudice to the Brooks Group and the Preferred J class will be immediate and indisputable. This result flows, in large part, from the “sounds in fraud” doctrine.

Although both the *Brooks* complaint and the *Operative Plasterers* amended complaint assert Securities Act claims with respect to the Preferred J offering, the *Operative Plasterers* amended complaint does so in a manner that sounds in fraud, thereby triggering the stringent pleadings requirements of Rule 9(b) and the risk of dismissal. In contrast, the *Brooks* complaint does not sound in fraud and, consequently, it is subject to the relaxed standard of Rule 8(a).⁶

To be sure, claims under Section 11 and 12(a)(2) of the Securities Act need not allege fraud. Nonetheless, the Second Circuit has held that where such claims sound in fraud, the “heightened pleading standard” of Rule 9(b) applies. *Rombach v. Chang*, 355 F.3d 164, 167 (2d Cir. 2004). This result follows even if the complaint explicitly disclaims fraud. *See OSRecovery, Inc. v. One Groupe Int’l, Inc.*, 354 F. Supp. 2d 357, 379 (S.D.N.Y. 2005) (Kaplan, J.).

In *Rombach*, the Second Circuit affirmed the dismissal of Section 11 and Section 12(a)(2) claims that “sounded in fraud,” on the ground that they failed to satisfy Rule 9(b)’s particularity requirement. In determining that the claims “sounded in fraud,” the Court found that the

⁶ Rule 9(b) requires that “a party must state with particularity the circumstances constituting fraud or mistake.” *See* Fed. R. Civ. P. 9(b). In non-fraud cases, the particularity requirement is inapplicable; the pleading needs only “a short and plain statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2).

complaint contained allegations that are “classically associated with fraud,” including allegations that the challenged disclosures were “materially *false* and *misleading*.” *Id.* at 172 (emphasis in original). *See also OSRecovery, Inc. v. One Groupe Int’l, Inc.*, 354 F. Supp. 2d at 379-80 & n.174 (applying Rule 9(b) and dismissing negligent misrepresentation claim, explaining that allegation that defendants “breached their ‘fiduciary duties to Plaintiffs by making false and/or misleading statements, and/or material omissions of fact,’ ... sounds in fraud, since the words ‘false’ and ‘misleading’ are ‘classically associated with fraud.’”) (quoting *Rombach*).

Here, fraud allegations like those in *Rombach* and *OSRecovery* permeate the *Operative Plasterers* amended complaint. For example, the BL Group repeatedly alleges that defendants made “false and misleading” statements with respect to the Preferred J offering. *See, e.g., Operative Plasterers* amended complaint (Dkt. #52: 08-CV-5523) at

¶ 1: “Defendants were able to raise billions of dollars from public investors through false and misleading offering documents,”

¶ 273: “the Offering Materials incorporated by reference documents that contain materially false and misleading statements,”

¶ 274: “the Offering Materials ... were materially false and misleading,”

¶ 277: list of allegedly “false and misleading” documents used in Preferred J offering.⁷

Indeed, paragraphs 273, 274 and 277 are explicitly part of the Securities Act claims asserted in the amended complaint, *id.* at p. 24 (§ V: **“VIOLATIONS OF THE SECURITIES**

⁷ *See also* Mov. Brf. at 10 (“The Complaint alleges that the offering documents related to the Series J Offering were materially false and misleading”).

ACT") (emphasis in original), and are organized under the heading titled "**The False And Misleading Offering Materials**," *id.* at p. 88 (§ F) (emphasis in original).⁸

The BL Group's pleading technique is prejudicial to the Brooks Group and the Preferred J class, as it will subject the Securities Act claims to the heightened pleadings requirements of Rule 9(b) and the risk of dismissal if the cases are consolidated. On the other hand, the *Brooks* complaint does not sound in fraud, and would be governed by Rule 8(a)(2)'s "short and plain statement" standard.⁹ Accordingly, a consolidation here would undermine the anti-merger rule, and effectively convert the *Brooks* action into something it is not -- a fraud action -- and thereby subject *Brooks* to heightened scrutiny under Rule 9(b) and risk of dismissal. Such prejudice, without more, warrants a denial of the motion.

Relatedly, additional prejudice to the Brooks Group and the Preferred J class could well occur if defendants have insurance policies that (like many policies) contain a so-called "fraud exclusion" permitting the insurer to deny coverage for fraudulent acts. In addition to the BL Group's Securities Act claims that sound in fraud, the BL Group alleges that various so-called "insider defendants" -- including many of the same individual defendants named in the *Brooks* action -- committed fraud in violation of Section 10(b) of the Exchange Act, 15 U.S.C. §

⁸ Except for the *Brooks* case, the other cases that movants seek to consolidate also assert claims sounding in fraud. *See Fogel* complaint (Dkt. #1: 08-CV-8225) ¶ 3 (statements were "materially false and misleading"), ¶ 32 (same); *Tolin* complaint (Dkt. #1: 08-CV-10008) ¶ 3 ("materially false and misleading"), ¶ 37 (same).

⁹ The BL Group claims that, "[l]ike" its action, *Brooks* "allege[s] that the offering documents at issue were materially false and misleading." *Mov. Brf.* at 10. This is simply not true.

78j(b).¹⁰ It also asserts a claim against defendant Richard Fuld for insider trading, in violation of Section 20A of the Exchange Act, 15 U.S.C. § 78t-1(a).¹¹

If the *Operative Plasterers* plaintiffs prove that the defendants engaged in fraud, then (depending upon the insurance policies) the defendants might find themselves without insurance coverage. *See generally Associated Elec. & Gas Ins. Servs., Ltd. v. Rigas*, 382 F. Supp. 2d 685, 694 (E.D. Pa. 2004). This result could prejudice the Brooks Group and the Preferred J class if the actions are consolidated.

D. The BL Group's Admissions Would Unduly Prejudice the Damage Claims of the Brooks Group and the Preferred J Class

The *Operative Plasterers* amended complaint posits a damage theory that, in the event of consolidation, could well gut the damages case for the Brooks Group and the Preferred J class. Even though the Brooks Group rejects the *Operative Plasterers'* damages approach, the enormous prejudice that would result from a consolidation warrants a denial of the motion.

Unlike a Section 10(b) claim, for which the plaintiff must prove damages (typically through the use of expert testimony), plaintiffs under Sections 11 and 12(a)(2) are presumptively entitled to recover losses in accordance with statutory formulae. *See, e.g.*, 15 U.S.C. § 77k(e) (Section 11 formula); 15 U.S.C. § 77l(a)(2) (Section 12(a)(2) rescissory remedy). To avoid liability for losses under the Securities Act claims, the defendant must prove “negative causation” -- *i.e.*, that the security dropped in value for reasons unrelated to the challenged disclosure violations. *See, e.g.*, 15 U.S.C. § 77k(e); 15 U.S.C. § 77l(b); *Akerman v. Oryx Commc'ns, Inc.*, 810 F.2d 336, 340 (2d Cir. 1987) (describing “negative causation” defense

¹⁰ *Operative Plasterers* amended complaint, Count IV.

¹¹ *Operative Plasterers* amended complaint, Count VI.

under Section 11); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 345 n.39 (S.D.N.Y. 2005).

But here, the BL Group, through its pleading, has made critical admissions that the *Operative Plasterers* defendants no doubt will exploit to argue that the Preferred J shares' price decline was due to market events (including statements or actions by third parties) that are unrelated to the challenged disclosures in the offering documents. For example, the BL Group states that the Lehman's securities (including the Preferred J shares) traded in "an efficient market that promptly digested current information with respect to the Company from all publicly available sources and reflected such information in the price of these securities." *Operative Plasterers* amended complaint, ¶ 484; *see id.* ¶¶ 482, 485.¹²

The BL Group even ties stock price drops in that "efficient market" to the actions of unrelated parties. For example, according to the BL Group, the stock dropped 6.67% on August 25, 2008, because "South Korea's financial regulator suggested that Korean Development Bank ... take a cautious approach to acquiring an overseas investment bank." *Id.* ¶ 482.

Indeed, the BL Group essentially gives away the store in the manner in which it has framed its damage theory, by attributing intra-class period price declines to events other than

¹² Under the title heading "The Presumption Of Reliance," the *Operative Plasterers* amended complaint contains "market efficiency" allegations (*see* ¶¶ 484-87) to support the presumption that the *Operative Plasterers* plaintiffs relied on the challenged disclosures by the defendants, thereby satisfying the "reliance" element under Section 10(b) of the Exchange Act. *See generally Basic, Inc. v. Levinson*, 485 U.S. 224, 247-48 (1988). Under the Securities Act, however, a plaintiff need not plead or prove reliance. *See Rombach*, 355 F.3d at 169 n.4 ("Neither Section 11 nor Section 12(a)(2) requires that plaintiffs allege the scienter or reliance elements of a fraud cause of action.") (citation omitted).

corrective disclosures. With respect to one of its plaintiffs, Marsha Kosseff, who purchased Preferred J shares on February 5, 2008 (the public offering date),¹³ the BL Group says she

suffered damages *when the truth about the Company's financial results was finally revealed near and at the end of the Class Period* causing the price of Lehman's securities to drop significantly.

Operative Plasterers amended complaint ¶ 29 (emphasis supplied); *see also id.* ¶ 19 (similar allegation regarding ACERA's damages). According to the amended complaint, the "truth about Lehman's financial condition and illiquid assets materialized in a series of announcements and events" beginning "[b]efore the markets opened" on June 9, 2008, when Lehman announced losses in excess of Wall Street's expectations. *See id.* ¶ 10.

Yet the amended complaint alleges that Lehman's securities declined in value well before that time. Thus, the BL Group states that on March 19, 2008 -- almost three months before the June 9 disclosure:

Bernstein Research analyst Brad Hintz reported that Lehman had \$87 billion in "troubled" assets that would probably cause Lehman more losses. On this news, Lehman's common stock fell 9.16%.

Id. ¶ 482. The amended complaint likewise alleges that "[o]n June 2, 2008, S&P downgraded Lehman's credit rating. On this news, Lehman's common stock fell 8.1%." *Id.*¹⁴ By making

¹³ *See* Kosseff Certification, Dkt. #52, at p. 224 of 224: 08-CV-5523.

¹⁴ The *Operative Plasterers* amended complaint (¶ 3) even purports to describe the market "environment," referencing "severe financial difficulties experienced by mortgage originators and other investment banks," including "firms like Citigroup, Merrill Lynch, Morgan Stanley, Bear Stearns, and UBS," and the fact that those banks booked "enormous gross losses" in 2007. Defendants no doubt will use this admission to argue that the BL Group's losses were caused by market conditions facing virtually all major investment banks, and were unrelated to the challenged disclosures. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342-43 (2005) (when investor sells shares at a price below its purchase price, "the lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price.").

these admissions,¹⁵ the BL Group has served up the “negative causation” defense on a silver platter. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 272 F. Supp. 2d 243, 255 (S.D.N.Y. 2003) (“Plaintiff here alleges that she has sustained a loss by pointing to declines in the price of her Fund’s shares which occurred *before* public disclosure of the allegedly concealed information. Such price declines may not be charged to Defendants under Section 11 or Section 12(a)(2).”) (emphasis in original) (citing *Akerman*); *see generally McMahan & Co. v. Warehouse Entm’t, Inc.*, 65 F.3d 1044, 1049 (2d Cir. 1995) (under Section 11, “as a general rule, a ‘price decline before disclosure may not be charged to defendants.’”) (quoting *Akerman*, 810 F.2d at 342).¹⁶

The problem here is far from trivial. The example of Inter-Local Pension Fund Graphic Communications Conference of the International Brotherhood of Teamsters (“GCC”), one of the plaintiffs in *Operative Plasterers*, painfully illustrates the point. GCC’s certification reveals a substantial price drop during the period beginning shortly after the February 5, 2008 Preferred J offering, and just prior to the disclosure that, according to the BL Group’s theory, first revealed the truth. Specifically, GCC purchased Lehman common stock (among other dates) on February 14, 2008 (at \$54.36 per share), and June 4, 2008 (at \$31.84 per share).¹⁷ That this \$22.52

¹⁵ *See Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528 (2d Cir. 1985) (“A party’s assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding.”)

¹⁶ One may question the judgment of the BL Group in asserting a Section 10(b) claim in the manner it did. Since ACERA (the sole member of the BL Group who purchased Preferred J shares) has a remedy under Section 11, why would it assert a Section 10(b) claim and allege market characteristics (*i.e.*, efficiency and price drops well before the end of the class period) that defendants will no doubt use in their effort to defeat the Section 11 claim? In short, the BL Group may have undermined its Securities Act claims by asserting its Section 10(b) claim. That may be just fine for ACERA and the BL Group, but it’s no good for the Preferred J class.

¹⁷ *See* GCC Certification, Dkt. #52, at p. 223 of 224: 08-CV-5523.

(41.4%) price drop occurred over a period when, according to the *Operative Plasterers* amended complaint, the truth had not yet even begun to emerge highlights the daunting loss causation problem that the BL Group has created through its own analysis, and (more importantly here) the enormous prejudice that the Brooks Group and the Preferred J class would encounter if the consolidation motion is granted.

Moreover, under the BL Group's misguided theory, class members who sold their Preferred J shares prior to the announcement on June 9, 2008 (*i.e.*, more than half-way through the Preferred J class period) would have sustained no damages.¹⁸ The prejudice here is obvious.

The *Operative Plasterers* initial complaint¹⁹ compounds the problem, stating that the full truth had emerged by June 9, 2008. Specifically, it states (¶ 10) that the “the truth about Lehman Brothers’ financial condition finally reached the market ... on June 9, 2008.”²⁰ It also states:

Because of Defendants’ wrongful course of conduct during the Class Period, *the outlook for Lehman Brothers is bleak*. The value of the firms’ assets continues to decline, and analysts are predicting that the Company could face further losses and write-downs, declining revenue, and a compressed return on equity.... *Now that the truth has been exposed, Lehman Brothers faces an uncertain future.*

¹⁸ See *Goldkrantz v. Griffin*, No. 97 Civ. 9075 (DLC), 1999 WL 191540, at *3, 7 (S.D.N.Y. Apr. 6, 1999) (granting defendants summary judgment with respect to Sections 11 and 12(a)(2) claims of class members who sold prior to corrective disclosure, explaining that their loss, if any, “is not attributable to the alleged misrepresentation”).

¹⁹ Dkt. #1: 08-CV-5523.

²⁰ See also *id.* ¶¶ 75-77. The initial complaint was filed on June 18, 2008, by the law firm of Saxena White P.A. (The plaintiff in the initial complaint is not a named plaintiff -- but is a putative class member -- in the amended complaint). Saxena White also is counsel for three plaintiffs in the *Operative Plasterers* amended complaint, including one of the members of the BL Group. See Dkt. #52 at p. 187 of 224: 08-CV-5523.

Id. ¶ 83 (emphasis supplied). Accordingly, the initial complaint suggests that persons who purchased Preferred J shares after June 9, 2008, could not have been damaged, because the “truth ha[d] been exposed,” and the marketplace then knew that Lehman “face[d] an uncertain future.”²¹

Indeed, by marrying the admissions from both the initial and the amended complaints in *Operative Plasterers*,²² defendants could argue that (i) persons who bought and sold Preferred J shares before the June 9, 2008 disclosure were not damaged, (ii) persons who bought Preferred J shares prior to June 9 and held them through June 9 can recover (at most) the amount of the J share’s price drop on June 9, and (iii) persons who purchased Preferred J shares after June 9 are entitled to nothing. A consolidation here thus would unfairly subject the Brooks Group and the Preferred J class to these admissions and the argument that flows from them. The argument, if accepted by the Court or by a jury, could prove devastating to the Preferred J class.²³

²¹ The *Operative Plasterers* admissions could potentially doom ACERA, the sole member of the BL Group who purchased Preferred J shares. ACERA first purchased Preferred J shares on June 16, 2008 -- *i.e.*, after corrective disclosures were made according to its *own* allegations and those in the initial *Operative Plasterers* complaint. See ACERA Certification, Dkt. #52 at p. 192 of 224: 08-CV-5523.

²² See *In re Initial Public Offering Sec. Litig.*, 544 F. Supp. 2d, 277, 291, n.96 (S.D.N.Y. 2008) (“statements in superseded pleadings ... are still admissions for evidentiary purposes”).

²³ Moreover, the 28 public offerings at issue in *Operative Plasterers* include the \$2 billion Preferred Q share offering on June 12, 2008 and the \$4 billion common stock offering on June 9, 2008. See *Operative Plasterers* amended complaint ¶ 270. If, as alleged in the *Operative Plasterers* amended complaint (or in the initial complaint), the truth was partially (or fully) revealed prior to the opening of trading on June 9, 2008, then, under the BL Group’s theory, the Preferred Q class and the purchasers of the common stock in the June 9 offering may have little (or no) damages. On the other hand, if the Preferred Q class and common stock purchasers were damaged, then the analysis regarding the June 9 disclosure is suspect. Either way, there are fundamental conflicts among the *Operative Plasterers* claims that, in the event of consolidation, would place the Brooks Group and the Preferred J class in the crossfire, creating even more prejudice.

Unlike the *Operative Plasterers* pleadings, the *Brooks* complaint does nothing to arm the defendants here. Nonetheless, as a result of the admissions in the *Operative Plasterers* complaints, the Brooks Group and the Preferred J class would be severely prejudiced if the *Brooks* case were consolidated with *Operative Plasterers*. That prejudice, without more, warrants denial of the motion.²⁴

E. The BL Group's Claims Concerning Securities Issued by Lehman's Subsidiaries Warrant Denial of Consolidation

The class definition in the *Operative Plasterers* case further demonstrates that the Brooks Group and the Preferred J class would be prejudiced by consolidation. In their efforts to occupy the field, the BL Group has fashioned a class definition that includes purchasers of securities issued not simply by Lehman, but by its subsidiaries as well, and that encompasses a class period that precedes by many months the Preferred J offering. *See Operative Plasterers* amended complaint ¶ 509 (defining class as persons “who purchased or acquired publicly-traded purchasers of Lehman and its subsidiaries (including stock, preferred shares, bonds, and/or call options or who sold put options) between June 12, 2007 and September 15, 2008 (the ‘Class Period’) ...”).

This one-size-fits-all approach is prejudicial to the Brooks Group and the Preferred J class members, as it will necessarily involve them in litigation involving a host of other companies (Lehman's subsidiaries), and the financial condition of (and disclosures by) those companies during a period of time that even precedes the February 2008 public offering of the Preferred J shares. This will further complicate the proceedings regarding the Preferred J claims

²⁴ Movant says that defendants support a consolidation here. Mov. Brf. at 10. For good reason too. The substantial prejudice to the Brooks Group and the Preferred J class from consolidation (including application of the heightened pleading standard and a loss theory that jeopardizes damages) is a huge gain for the defendants.

and create unnecessary confusion, all to the detriment of the Brooks Group and the Preferred class. *See Tucker v. Arthur Andersen*, 73 F.R.D. at 317 (denying consolidation of securities cases against auditing firm, where one case involved common stock issued by parent company, and second case involved debt securities issued by its wholly-owned subsidiary, noting that “the question of materiality is necessarily different in each case in relation to the allegedly misleading statements contained in the financial statements”); *see generally Tucker v. Arthur Andersen & Co.*, 67 F.R.D. 468, 472 (S.D.N.Y. 1975).

II. CONSOLIDATION CAN BE REVISITED AT A LATER DATE, IF APPROPRIATE

The Brooks Group anticipates that defendants will move to dismiss the *Operative Plasterers* amended complaint for failure to satisfy Rule 9(b) (and perhaps for other reasons as well). The outcome of any motion, of course, is uncertain.

Nonetheless, if the *Operative Plasterers* amended complaint is dismissed (or even if just its Securities Act claims regarding the Preferred J shares are dismissed), and if defendants unsuccessfully move to dismiss the *Brooks* action (or instead, answer the *Brooks* complaint), then the consolidation issue is moot. On the other hand, if *both* cases proceed beyond the pleading stage, then a renewed consideration of the consolidation issue may be appropriate. *See Journapak*, 27 F.R.D. at 511. At this critical stage of the proceeding, however, the prejudice to the Brooks Group and the Preferred J class decidedly outweighs any benefits that might be obtained by a consolidation. Accordingly, the motion should be denied.

CONCLUSION

The BL Group's motion for consolidation should be denied. Such denial, however, should be without prejudice to any party's right to seek consolidation in the event that both the *Brooks* and *Operative Plasterers* cases proceed beyond the pleading stage.

Dated: December 31, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2008, the attached THE BROOKS GROUP'S MEMORANDUM IN OPPOSITION TO MOTION FOR CONSOLIDATION was filed electronically. Notice of this filing will be electronically mailed to all parties registered with the Court's electronic filing system. Additionally, a copy of same was hand-delivered to the following recipient:

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