

UNITED STATE 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,

Plaintiff,

v.

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

Defendants.

No. 08 Civ. 05523 (LAK)

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

Plaintiff,

v.

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

Defendants.

No. 08 Civ. 08225 (LAK)

(caption continued on next page)

**BELMONT HOLDINGS CORP.'S MEMORANDUM OF LAW
IN OPPOSITION TO THE PENSION FUND GROUP'S
MOTION FOR CONSOLIDATION OF RELATED ACTIONS**

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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 Civ. 10008 (LAK)

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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INTRODUCTION

Belmont Holdings Corp. (“Belmont”) respectfully submits this memorandum of law in opposition to the December 15, 2008 motion by the so-called Pension Fund Group (“PFG”), lead plaintiff in *Operative Plasterers & Cement Masons Int’l Ass’n Local 262 Annuity Fund v. Richard S. Fuld, Jr., et al.*, No. 08 Civ. 05523 (LAK) (“*Operative Plasterers*”), to consolidate with that action *Fogel Capital Mgmt., Inc. v. Richard S. Fuld, Jr., et al.*, No. 08 Civ. 08225 (LAK) (“*Fogel*”), *Stanley Tolin v. Richard S. Fuld, Jr., et al.*, No. 08 Civ. 10008 (LAK) (“*Tolin*”), *Brooks Family P’ship, LLC v. Richard S. Fuld, Jr., et al.*, No. 08 Civ. 10206 (LAK) (“*Brooks*”), and later-filed actions.

In the usual case, consolidation is proposed to advance the goals of judicial economy and the efficient handling of litigation. At bar, however, a very different calculus is at work. Here, PFG appears to seek consolidation in order to take control of claims as to which it never filed the notice required by the PSLRA. Having gained lead plaintiff status in *Operative Plasterers* under the Securities Exchange Act of 1934 (the “Exchange Act”) only, pursuant to a notice limited to claims relating to purchases of Lehman common stock, PFG now seeks to use a motion for consolidation as a mechanism for putting PFG and its counsel in charge of Securities Act of 1933 (the “Securities Act”) claims relating to Lehman preferred stock and debt securities. The claims relate to tens of billions of dollars of publicly offered debt and preferred shares of Lehman offered in dozens of offerings pursuant to a shelf registration statement.

PFG’s strategy is particularly egregious given that the case set forth in the PSLRA notice pursuant to which it gained lead plaintiff status in *Operative Plasterers* – an Exchange Act case against Lehman’s officers and directors – is a problematic case with limited potential sources of recovery (primarily wasting insurance policies) and the burden of proving scienter, whereas the claims set forth in *Fogel* and the other cases, which were not encompassed by that notice, are

Securities Act negligence-based claims involving billions of dollars of offerings, asserted against a large group of solvent underwriters. In this light, PFG's strategy on this motion should be seen for what it is: an attempt by a plaintiff group with problematic claims to grab more desirable claims without complying with the procedures set forth in the PSLRA.

Because the notice requirements of the Private Securities Litigation Reform Act ("PSLRA") cannot be circumvented in this fashion, PFG's motion must be denied.

BACKGROUND

The PSLRA notices relating to the lead plaintiff applications in *Operative Plasterers* did not give notice that that case would purport to cover Securities Act claims relating to purchases of Lehman preferred stock or debt securities. The initial notice, for the later-withdrawn case filed in the Northern District of Illinois, was for Exchange Act claims only on behalf of persons who purchased Lehman securities in the period September 13, 2006 to July 30, 2007.¹ That notice was thereafter superseded by another notice explicitly limited to claims relating to Lehman common stock.² The *Operative Plasterers* original complaint asserted Rule 10b-5 fraud claims and did not assert any Securities Act claims. The Court's order appointing lead plaintiffs was made "pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-4(a)(3)(B), as amended by the Private Securities Litigation Reform Act of 1995"³ and did not mention the Securities Act.

Demonstrating that the investing public viewed the *Operative Plasterers* case and the appointment of lead plaintiff therein as being limited to the assertion of Exchange Act claims relating to Lehman common stock, at least eight other purported class actions have been filed

¹ Declaration of James J. Sabella, dated Nov. 24, 2008 (Docket Item No. 52 in 08 Civ. 8225) Ex. E.

² *Id.* Ex. F.

³ Docket Item No. 18 in 08 Civ. 5523.

asserting Securities Act claims on behalf of purchasers of various Lehman series of preferred stock and debt securities, including the *Fogel*, *Tolin*, and *Brooks* cases. In another case, *Stark v. Callan*, No. 08 Civ. 9793 (LAK) (“*Stark*”), the amended complaint subsumes *Fogel*, *Tolin* and *Brooks*, asserting Securities Act claims on behalf of all purchasers of Lehman debt and equity securities (other than common stock), including structured notes. PSLRA notices triggering deadlines for lead plaintiff motions relating these and other actions have been filed. Thus, the deadline for lead plaintiff motions in *Fogel* was November 24, and on that date, three such motions were filed. The deadline for lead plaintiff motions in *Stark* is February 2.

On October 27, 2008, more than a month after *Fogel* was commenced, PFG filed an amended complaint in *Operative Plasterers* that, among other things, expands the class to include all investors “who purchased or acquired publicly-traded securities of Lehman and its subsidiaries (including stock, preferred shares, bonds, and/or call options or who sold put options) between Jun 12, 2007 and September 15, 2008.”⁴

PFG’s instant consolidation motion seeks to circumvent the procedures set forth in the PSLRA, by folding all of these other cases into *Operative Plasterers*, thereby giving PFG control over claims that were not mentioned in the carefully limited notice that led to PFG’s appointment as lead plaintiff in that case. As discussed below, consolidation for the purpose of short-circuiting the procedures set forth in the PSLRA is impermissible.

ARGUMENT

Rule 42(a) of the Federal Rules of Civil Procedure governs consolidation of two or more actions. It provides:

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

⁴ See Am. Compl. ¶ 509 (Docket Item No. 52).

- (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).

In applying the Rule, trial courts have “broad discretion to determine whether consolidation is appropriate.” *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990). However, “the discretion to consolidate is not unfettered.” *Id.* Instead, when faced with a Rule 42(a) motion, the court must determine whether the cases involve sufficient common questions of law or fact such that consolidation would reduce the burden on available judicial resources, and whether the risks of prejudice to the parties or possible confusion resulting from the proposed consolidation outweigh these judicial benefits. *Almonte v. Coca-Cola Bottling Co. of New York, Inc.*, No. 3:95cv01458 (PCD), 1996 WL 768158, at *2 (D. Conn. 1996) (citing *Johnson*, 899 F.2d at 1285). In addition, the Second Circuit consolidation “should not be resorted to where other more conventional remedies will suffice.” *MacAlister v. Guterma*, 263 F.2d 65, 69-70 (2d Cir. 1958).

In moving to consolidate, PFG bears the burden of demonstrating to the court that consolidation is warranted. The Second Circuit has held that under Rule 42(a), the “party moving for consolidation must bear the burden of showing the commonality of factual and legal issues in different actions . . . and a district court must examine the special underlying facts with close attention before ordering a consolidation.” *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (internal citations omitted).

A. Consolidation of the Preferred Stock and Debt Cases With Operative Plasterers Would Effect a Circumvention of the PSLRA Notice Requirements

Consolidation is inappropriate here because it would circumvent the PSLRA's notice requirement and deprive injured investors with large losses of their right under the PSLRA to compete to control the litigation relating to Lehman preferred stock and debt securities.

The PSLRA was enacted to "cure a variety of perceived abuses in the prosecution of class actions which claim violations of the Federal Securities laws." *Chill v. Green Tree Fin. Corp.*, 181 F.R.D. 398, 404 05 (D. Minn. 1998). In particular, one purpose was to prevent "lawyer driven" litigation, and to ensure that parties with significant holdings in issuers, whose interests are strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiffs' counsel. *In re Cyberonics Inc. Sec. Litig.*, 468 F. Supp. 2d 936, 937 38 (S.D. Tex. 2006) (citing H.R. Conf. Rep. No. 104-369, 104th Cong., 1st Sess., 1996 USCCAN 730, 732).

To that end, the PSLRA requires publication notice in order to inform potential class members of their right to apply for lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(A); 15 U.S.C. § 77z-1(a)(1)(3)(I) (requiring plaintiff to publish "not later than 20 days after the date on which the complaint is filed ... a notice advising members of the purported plaintiff class ... of the pendency of the action, the claims asserted therein, and the purported class period."). Following publication of the notice, "the court shall consider any motion made by a purported class member in response to the notice, ... and shall appoint as lead plaintiff the member or members ... that the court determines to be most capable of adequately representing the interests of the class members...." 15 U.S.C. § 78u-4(a)(3)(B)(I); 15 U.S.C. § 77z-1(a)(3)(B)(i).

As the Conference Committee report stated, this procedure is designed to encourage the best possible plaintiff to step forward and lead the litigation:

These provisions are intended to encourage the most capable representatives of the plaintiff class to participate in class action litigation and to exercise supervision and control of the lawyers for the class. These provisions are intended to increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection of actions of plaintiff's counsel....

Ravens v. Iftikar, 174 F.R.D. 651, 658 (N.D. Cal. 1997) (quoting H.R. Conf. Rep. No. 104-369, 104th Cong., 1st Sess., 1996 USCCAN 730, 731).

The standards for the adequacy of the notice are straight forward. “This notice must identify the claims alleged in the lawsuit and the purported class period and inform potential class members” of their right to apply for lead plaintiff. *Ravens*, 174 F.R.D. at 657 (quoting H.R. Conf. Rep. No. 104-369, 104th Cong., 1st Sess., 1996 USCCAN 730, 732). “[T]he central purpose of the notice requirement ... is to enable the member of the putative class with the ‘largest financial interest in the relief sought by the class’ to make a rational decision whether to intervene.” *Id.* at 659. Furthermore, “[c]ourts have an independent duty to scrutinize the published notice and ensure that the notice comports with the objectives of the PSLRA.” *Teamsters Local 445 Freight Division Pension Fund v. Bombardier Inc.*, No. 05 Civ. 1898 (SAS), 2005 WL 1322721, at *2 (S.D.N.Y. June 1, 2005).

Here, no PSLRA-compliant notice was published alerting investors that Securities Act claims on behalf of holders of Lehman debt securities or preferred shares would be covered by this lawsuit. Indeed, to the contrary, the published notices simply informed investors that the lawsuit was asserting claims under the Exchange Act on behalf of purchasers of Lehman “common stock.” Conspicuously, the published notices did not mention any other securities, such as debt or preferred shares. They did not refer to the Securities Act, any securities other than “common stock,” or any potential underwriter defendants. Nor did the original complaint.

Thus, investors in Lehman debt or preferred shares who saw the notices or who even went to the trouble of reviewing the court docket and complaints were not alerted to the fact that their claims were covered by this lawsuit and that they thus had the opportunity to seek to be appointed lead plaintiff in this action. Simply put, investors in Lehman securities other than common stock had no reason to think that their rights might be adjudicated in this action.

Clear precedent establishes that a narrowly-drawn PSLRA notice cannot be used to later claim the right to assert claims over other, different classes of securities. In *Teamsters Local 445*, 2005 WL 1322721, a lead plaintiff filed an amended complaint that asserted new claims on behalf of holders of Series 1998-C securities; the original notice only mentioned Series 2000-A securities. Noting that the question “appears to be a matter of first impression,” the court required a new notice. *Id.* at *2. “In this case, the potential injustice is clear. A class member who owned only Series 1998-C securities, encountering a notice regarding only the Series 2000-A securities, would have no idea that she had the opportunity to move for appointment as lead plaintiff.” *Id.* (emphasis added). The court added that “where amendments include ‘entirely new factual and legal allegations . . . , as to separate transactions, affecting a new class of plaintiffs,’ entire classes of potential lead plaintiffs are left out of the notice procedure” and republication of notice is required. *Id.* (quoting *In re Select Comfort Corp. Sec. Litig.*, No. 99 884, 2000 U.S. Dist. LEXIS 22696 (D. Minn. May 12, 2000)). Subsequent cases addressing this issue come to the same result. *See, e.g., In re Cyberonics Inc. Sec. Litig.*, 468 F. Supp. 2d 936, 937 38 (S.D. Tex. 2006); *cf. In re American Int’l Group, Inc. Sec. Litig.*, No 04 Civ. 8141 (JES), 2008 WL 2795141, at *4 (S.D.N.Y. July 18, 2008) (denying leave to amend to expand securities case,

stating that “lead plaintiff is trying to usurp lead plaintiff status” over new claims and time periods).⁵

Consolidation under Rule 42(a) is designed to increase efficiency and reduce the burden on the courts. However, the Second Circuit has warned that “[t]he benefits of efficiency can never be purchased at the cost of fairness.” *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993). The court emphasized:

The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff’s and defendant’s cause not be lost in the shadow of a towering mass litigation.

Id. (quoting *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992)).

Consolidation of *Operative Plasterers* with these other cases is inappropriate because it would effect an end-run around the very PSLRA notice requirement that is designed to ensure fairness in the selection of lead plaintiff in large securities act cases such as this.

B. It Is Appropriate to Have Separate Cases for Exchange Act and Securities Act Claims

It is not unusual in securities cases to have one case that presents claims under the Exchange Act and another case that presents claims under the Securities Act. Indeed, just

⁵ It is anticipated that PFG will rely on *In re Delphi Corp. Sec., Deriv. & “ERISA” Litig.*, 458 F. Supp. 2d 455 (E.D. Mich. 2006), to support its view that PFG can assume lead plaintiff status over claims relating to all Lehman securities, but such reliance would be misplaced. In *Delphi*, unlike the situation at bar, the PSLRA notices that led to the appointment of lead plaintiffs and lead counsel were not narrowly drawn, as they were here. Thus, in contrast to the notices at bar, the notices in *Delphi* covered “all persons or entities who purchased the publicly traded securities of Delphi.” Declaration of James J. Sabella, dated Dec. 26, 2008 (Docket Item No. 68 in 08 Civ. 8225 (LAK)), Exh. A. Therefore, in *Delphi* it was permissible under the PSLRA for the lead plaintiffs who were appointed pursuant to those notices to bring claims on behalf of all purchasers of Delphi securities. The court’s opinion rejecting a separate lead plaintiff appointment for purchasers of two series of notes does not address the scope of the PSLRA notices or their importance, because in *Delphi* there was no issue as to the notices. The only issue was whether there should be separate lead plaintiffs for the two notes, and the court held there it was not necessary. At bar, however, the issue is not simply whether or not there is a theoretical need for separate lead plaintiffs for these different classes of securities. The issue is whether it is permissible under the PSLRA for a plaintiff to obtain appointment as lead plaintiff based on a notice explicitly limited to common stock, and then use that appointment as a springboard to preempt the field and claim entitlement to run the litigation for all purchasers of all securities. *Delphi* simply does not address, let alone answer, that question.

recently PFG's counsel proposed this exact arrangement in another case in this District. In *In re Citigroup Inc. Securities Litigation*, 07 Civ. 9901 (SHS), a plaintiff filed Rule 10b-5 fraud claims against Citigroup on behalf of purchasers of common stock. After the lead plaintiff was appointed, and after a number of cases were consolidated, Bernstein Litowitz Berger & Grossmann LLP, the counsel representing PFG at bar, filed a separate class action asserting Section 11 claims on behalf of Citigroup bond purchasers. See *Louisiana Sheriffs' Pension and Relief Fund v. Citigroup, Inc.*, 08 Civ. 9522 (SHS). Counsel then filed a second action, *Minneapolis Firefighters' Relief Association, et al. v. Rosen, et al.*, 08-cv-10353 (SHS), asserting Section 11 claims on behalf of purchasers of debt, preferred shares, and depository shares representing Citigroup preferred shares. Counsel proposed consolidating only the *Louisiana* case and the *Minneapolis* case into one large Section 11 case (now called the "Consolidated Bond Action"), proceeding in parallel with the Rule 10b-5 common stock case. Judge Stein granted this request on December 10, 2008 (Docket Item No. 10), and the cases are now proceeding separately, although coordinated.

The approach in the *Citigroup Consolidated Bond Action* is not unique in this District. For instance, earlier this year, a plaintiff filed a class action suit against Freddie Mac and its key executives, asserting fraud claims under Rule 10b-5 on behalf of purchasers of common stock. See *Kuriakose v. Federal Home Loan Mortgage Co.*, 08 Civ. 7281 (JFK). Later, a second class action was filed against Freddie Mac, this time asserting Section 11 non-fraud Securities Act claims on behalf of investors who purchased preferred shares pursuant to a public offering. See *Mark v. Goldman Sachs & Co.*, 08 Civ. 8181. Both cases allege that the defendants misled investors as to the soundness of Freddie Mac's mortgage portfolio, its underwriting standards, and the adequacy of its capital. Both cases are securities class actions and named many of the

same defendants. Therefore, after the *Mark* case was filed, it was referred to Judge Keenan as possibly related to the *Kuriakose* case. However, on September 23, 2008, the case was “declined as not related.” See Docket Entry for September 23, 2008. They are now proceeding as separate actions, similar to the *Citigroup* actions.

C. Consolidation Is Not Necessary to Achieve Efficiency, Because Appropriate Efficiency Can Be Achieved Through Coordination of the Cases

Prior to consolidation, a court should consider whether other avenues of relief, such as a coordinated discovery program providing for the common use of depositions, might achieve the sought-after efficiencies of consolidation, without the risk of prejudice or unfairness that might be occasioned by consolidation. See *State Mut. Life Assur. Co. v. Peat Marwick, Mitchell & Co.*, 49 F.R.D. 202, 208 (S.D.N.Y. 1969).

Here, the goals of judicial economy and efficient prosecution of the litigation can be achieved through coordination of the discovery process. See, e.g., *In re WorldCom, Inc. ERISA Litig.*, No. 02 Civ. 4816 (DLC), 2005 WL 3116188, at *1 (S.D.N.Y. Nov. 22, 2005); *Rahl v. Bande*, 328 B.R. 387, 406-07 (S.D.N.Y. 2005); MANUAL FOR COMPLEX LITIGATION (Third) § 21.255. As discussed above, just last month counsel for PFG, in fact, proposed in the *Citigroup* securities class actions pending in this District to keep its Section 11 bond case separate from the pre-existing Rule 10b-5 fraud case. Rather than consolidate the cases, counsel proposed coordinating them instead, and Judge Stein approved this proposal. Counsel’s idea in *Citigroup* is also appropriate here.

CONCLUSION

For the foregoing reasons, Belmont Holdings Corp. respectfully requests that this Court deny the PFG’s motion to consolidate *Operative Plasterers* with the *Fogel, Tolin, and Brooks* actions.

Dated: January 2, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2009 the attached Belmont Holdings Corp.'s Memorandum of Law in Opposition to the Pension Fund Group's Motion for Consolidation of Related Cases 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 same was delivered via UPS overnight to the following recipient:

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