

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

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**In re:** :  
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**LEHMAN BROTHERS SECURITIES** : **09 MD 2017 (LAK)**  
**AND ERISA LITIGATION** : :  
: :  
**This Document Applies to: ALL CASES** : :  
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**BONDHOLDER PLAINTIFFS’ WRITTEN SUBMISSION  
PURSUANT TO PRETRIAL ORDER NO. 2**

**I. PRELIMINARY STATEMENT**

Between October 21, 2008 and November 4, 2008, Rena Caldwell, Glen Detherow, Madeline Dimodica, Barbara Kattell, Cecil Mease, Henry Napierala, Linda Napierala, Michael Shipley, and Guy S. Warden (the “Bondholder Plaintiffs”) each served as a plaintiff in one or more of six separate lawsuits commenced in Arkansas state courts (the “Arkansas Actions”)<sup>1</sup> against certain former officers and directors of Lehman Brothers Holdings, Inc. (“Lehman” or the “Company”), along with various entities which underwrote bonds issued by Lehman within the previous three years. Significantly, every one of the Arkansas Actions seeks relief solely under Sections 11, 12(A)(2), and 15 of the Securities Act of 1933 (the “Securities Act”) for false and misleading statements contained in the Registration Statements and Prospectuses applicable to a particular offering of Lehman bonds.

On or about November 13, 2008, multiple defendants removed the Arkansas Actions to, as was required in a given case, the United States District Court for the Eastern or Western District of

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<sup>1</sup>Specifically, the Arkansas Actions consist of the following proceedings: *Deathrow v. Fuld*, Civ. No. CV2008-1022-2 (Saline County, Ark. Cir. Ct.); *Mease v. Fuld*, Civ. No. CV-2008-1316 IV DA (Garland County, Ark. Cir. Ct.); *Mease v. Fuld*, Civ. No. 2008-3964-2 (Washington County, Ark. Cir. Ct.); *Napierala v. Fuld*, Civ. No. 2008-2888-5 (Benton County, Ark. Cir. Ct.); *Shipley v. Fuld*, Civ. No. 2008-2889-2 (Benton County, Ark. Cir. Ct.); *Warden v. Fuld*, Civ. No. 2008-2731-3 (Benton County, Ark. Cir. Ct.).

Arkansas. Virtually simultaneously, some of the individual defendants petitioned the Judicial Panel for Multidistrict Litigation (the “Judicial Panel”) to transfer thirteen separate disputes – including the Arkansas Actions – to this Court and this Judge for coordination or consolidation. In short order, the Bondholder Plaintiffs filed motions to remand each of the Arkansas Actions to the appropriate state court. After full briefing of those remand motions, but before any decision had been rendered, the Judicial Panel granted the individual defendants’ request by entering its Transfer Order on February 9, 2009. In doing so, however, the Panel specifically left “the extent of coordination or consolidation of the . . . actions to the discretion of the transferee judge.” (Transfer Order of Feb. 9, 2009 at 2.)

Upon notification of the Judicial Panel’s action, this Court entered its Pretrial Order No. 2 specifying certain matters to be addressed at a hearing scheduled for March 2, 2009. Among these topics were “[a]ny issues with respect to the designations of lead plaintiffs and lead counsel” and “[c]onsolidation of actions for discovery purposes.” (Pretrial Order No. 2.) The Court further imposed a deadline of February 24, 2009 for any written submissions addressing those subjects. The present document is the Bondholder Plaintiffs’ response to this directive. To summarize, although the Bondholder Plaintiffs acknowledge that efficiencies will be served by the coordination of the discovery related to their claims with that undertaken by holders of the common stock of Lehman, they believe that the unique interests of those who – like them – acquired the Company’s bonds justify the appointment of a separate lead plaintiff and lead counsel dedicated to those distinct ends.

**II. RESPONSE TO SUBJECTS IDENTIFIED IN PRETRIAL ORDER NO. 2**

**A. The Existence Of, And Need For, Further Proceedings With Respect To Any Motions Filed In Transferor Courts But Not Yet Resolved**

At the time of transfer, the Bondholder Plaintiffs' remand motions were pending in all of the Arkansas Actions. In this regard, it bears mentioning that defendants had offered three separate grounds in support of the exercise of federal jurisdiction: (1) The Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 77p, 78bb(f) ("SLUSA") justified removal; (2) The Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453 ("CAFA"), likewise guaranteed the availability of a federal forum; and (3) Removal was appropriate because the Arkansas Actions "related to" the bankruptcy of Lehman, a nonparty to this litigation, given the Company's supposed obligation to indemnify some defendants. Naturally, the motions to remand challenged each of these points.

The Bondholder Plaintiffs are confident that both this Court and its counterparts in Arkansas would ultimately reject the efforts to remove these causes under either SLUSA or CAFA. *Cf., e.g., Nauheim v. Interpublic Group of Cos.*, No. 02-C-9211, 2003 U.S. Dist. LEXIS 6266, at \*16 (N.D. Ill. Apr. 15, 2003) ("SLUSA did not change the prohibition on removing those actions filed in state court which are based entirely on federal securities law."); *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031, 1034 (9th Cir. 2008) ("CAFA's general grant of the right of removal of high-dollar class actions does not trump [the Securities Act's] specific bar to removal of cases arising under [its scope]."). Nevertheless, the same cannot be said of the removal authorized by "related to" jurisdiction under the bankruptcy laws. *Cf.* 28 U.S.C. §§ 1334, 1452. Along these lines, in the briefing supporting the remand motions, the Bondholder Plaintiffs urged the federal district

courts in Arkansas, first, that the bankruptcy removal statutes do not override the express nonremovability of federal causes of action under the Securities Act, *see Ill. Mun. Ret. Fund v. Citigroup, Inc.*, Civil No. 03-465-GPM, 2003 U.S. Dist. LEXIS 16255, at \*6 (S.D. Ill. Sept. 9, 2003) (“[R]ules of statutory construction require [the Securities Act] to control over the more general provisions of [the bankruptcy code].”), and, second, that claimed rights of indemnification or contribution as against a nonparty in bankruptcy do not necessarily make a case “related to” the bankruptcy, *see In re: Allegheny Health, Educ., & Research Found.*, 383 F.3d 169, 175 n.7 (3d Cir. 2004) (“A defendant’s assertion of a claim for indemnity against a debtor does not always result in ‘related to’ jurisdiction over the claim against the defendant.”).

The State of Arkansas is located inside the geographic jurisdiction of the United States Court of Appeals for the Eighth Circuit, and that tribunal has not yet elaborated upon either of these arguments advocating the inapplicability of the bankruptcy removal scheme to the Arkansas Actions. The Bondholder Plaintiffs acknowledge, however, that there is no similar dearth of relevant authority within the reach of the United States Court of Appeals for the Second Circuit, where the Arkansas Actions now find themselves. *See, e.g., Cal. Pub. Employees’ Ret. Sys. v. Worldcom, Inc.*, 368 F.3d 86, 108 (2d Cir. 2004). Thus, whereas the Bondholder Plaintiffs were quite optimistic that the Arkansas federal courts would eventually reject defendants’ attempts to effect removal on the strength of the bankruptcy laws, *see Transamerica Fin. Life Ins. Co. v. Merrill Lynch & Co.*, 302 B.R. 620, 626 (N.D. Iowa 2003) (discounting notion that contribution or indemnification rights give rise to bankruptcy “related to” jurisdiction), they now see that as an unlikely outcome, *see In re Worldcom, Inc. Sec. Litig.*, 293 B.R. 308, 317-30 (S.D.N.Y. 2003). As a consequence, this Court need not consider the remand motions filed by the Bondholder Plaintiffs in the Arkansas Actions.

Stated another way, the Bondholder Plaintiffs reluctantly withdraw those motions.

**B. Scheduling**

As best as the Bondholder Plaintiffs can tell, Defendants must respond to a presumably forthcoming securities complaint no later than 45 days after the filing of that operative pleading. (See Pretrial Order No. 1.) Predictably, although this consolidated action originally contained claims only on behalf of common stockholders under the Securities Exchange Act of 1934 (the “Exchange Act”) (see Class Action Compl. ¶¶ 1, 88), the current Lead Plaintiffs in the affair have attempted in subsequent filings to sweep in causes of action rightfully belonging to bondholders by, among other things, adding grounds for relief pursuant to the Securities Act (see, e.g., Am. Class Action Compl. Viols. Fed. Sec. Laws ¶¶ 83-354). Even so, assuming this Court appoints one or more of their number to serve as lead plaintiff representing the interests of bondholders and others under the Securities Act, each of the Bondholder Plaintiffs is comfortable with allowing an equivalent 45 days for responses to a complaint properly incorporating all of those claims. Insofar as other items on the schedule are concerned, the Bondholder Plaintiffs agree to work cooperatively with the Court and other parties to coordinate the prosecution of their claims in as efficient and expeditious manner as possible.

**C. Any Issues With Respect To The Designation Of Lead Plaintiffs And Lead Counsel**

This submission has already emphasized that a purported representative of “common stock[holders]” (Class Action Compl. ¶¶ 1, 88) filed the first complaint in this consolidated action, a pleading which did not even pretend to seek redress on behalf of those who held other types of securities. And while the later appointed Lead Plaintiffs would subsequently make halfhearted

attempts to ensnare the causes of action belonging to all those who own any manner of Lehman instruments, it remains clear that the welfare of common stockholders is driving this litigation.

This much is evident from the class definition proposed by the present Lead Plaintiffs. According to the most current iteration of the complaint available to the Bondholder Plaintiffs, the Lead Plaintiffs profess to stand at the head of a class comprised of all persons and entities “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 June 12, 2007, and September 15, 2008 (the “Class Period”).” (Am. Class Action Compl. Viols. Fed. Sec. Laws ¶ 509.) What is most distressing about this Class Period is that it is defined in relation to what guiding forces have determined to be the interval during which those who purchased common stock may seek redress under the Exchange Act. With that much understood, it becomes apparent that the claims of others who happened to acquire their securities during that same time frame – which was itself devised to best accommodate a completely different kind of investor – are included as a mere afterthought. Indeed, **were the current state of affairs allowed to stand, four of the six matters which make up the Arkansas Actions, along with the classes those lawsuits encompass, would be effectively eliminated as outside the allotted Class Period.**

The underlying problem, of course, is that the Securities Act causes of action held by the bondholders do not define relevant plaintiffs in terms of actions which occur during a particular span of time; rather, the Section 11 claims at the heart of their proceedings create strict liability inuring to the benefit of all who acquired bonds or other securities in reliance upon a “registration statement . . . contain[ing] an untrue statement of a material fact or omitt[ing] to state a material fact required to be stated therein or necessary to make the statements therein not misleading.” 15 U.S.C. § 77k(a).

More to the point, and as exhibited by the Arkansas Actions,<sup>2</sup> a bondholder wishing to represent others in litigation spawned as the result of a defective offering will typically undertake to represent all those who possess bonds by virtue of the registration statement for that issuance. That the existing set of Lead Plaintiffs has acted otherwise shows that they are motivated by something other than the best interests of bondholders. At the very least, the bondholders deserve representation by a designee who will not sacrifice or abandon a significant portion of their claims.<sup>3</sup>

Unfortunately, the potentially antagonistic aims of bondholders and common stockholders do not end there. Perhaps the most compelling of the other areas likely to generate hostility is the reality that “[t]he pleading requirements for Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 are exceedingly different than for Sections 11, 12[(j)a)(2) and 15 of the Securities Act of

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<sup>2</sup>It is for this very reason that the Bondholder Plaintiffs filed six different lawsuits in Arkansas – a separate action for each distinct bond offering in which one or more of them participated. It was envisioned that this strategy, effectively devoting a single case to a particular issuance, would maximize a more efficient recovery for affected plaintiffs. Of course, in the present circumstances, the Bondholder Plaintiffs recognize that this Court will not appoint a “niche” plaintiff for each actionable Lehman offering. Rather, between the competing alternatives of the elevation of a potential multitude of parties to lead plaintiff status and the refusal to afford bondholders any independent voice, “a balance must be struck in determining the appropriate lead plaintiff.” *Miller v. Ventro Corp.*, No. C 01-01287 SBA, 2001 U.S. Dist. LEXIS 26027, at \*38 (N.D. Cal. Nov. 28, 2001). The Bondholder Plaintiffs respectfully submit that this balance would entail the appointment of a separate lead plaintiff and lead counsel specifically focused upon the interests of those with claims under the Securities Act.

<sup>3</sup>To be clear, based on the investigation of counsel and the magnitude of the treachery at Lehman, the Bondholder Plaintiffs anticipate representing a class made up of all who bought pursuant to registration statements within the period permitted by the applicable statute of repose. This would include, in other words, essentially all who acquired bonds in offerings up to three years prior to the commencement of this consolidated affair. The Bondholder Plaintiffs can only assume that the present Lead Plaintiffs were willing to cut this period short by almost two years, and thereby extinguish the claims of many thousands of bondholders, because of a perceived inability to prove that Defendants acted with *scienter* before June 12, 2007. Mindful of this, it is worthy of note that concepts of *scienter* are absolutely foreign to strict liability claims under Section 11 of the Securities Act.

1933.” *In re Nanophase Techs. Corp. Litig.*, Nos. 98 C 3450 (Consolidated), 98 C 7447, 1999 U.S. Dist. LEXIS 16171, at \*16-\*17 (N.D. Ill. 1999). Chief among these dissimilarities is the requirement that common stockholders struggling to impose liability under the Exchange Act prove that defendants perpetrated misstatements or omissions with *scienter*, *see, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42, 125 S. Ct. 1627, 1631, 161 L. Ed. 2d 577, 585 (2005), while Congress has excused claimants under the Securities Act from establishing any state of mind whatsoever,<sup>4</sup> *see, e.g., 15 U.S.C. § 77k*. Obviously, as is often the case, the common stockholders might understandably concentrate untold amounts of discovery on an endeavor to show that Defendants were at least reckless in making certain utterances, with the bondholders (and others seeking relief under the Securities Act) effectively on the sidelines during that crusade. Indeed, it seems that this incongruity has already played a major role in this litigation, as it has presumably motivated Lead Plaintiffs to craft a Class Period that excludes scores of legitimate claims. *See supra* note 3.

Moreover, it is important to remember that, unlike comparable remedies under the relevant sections of the Exchange Act, damages under Section 11 of the Securities Act are presumed and subject to a statutory formula. *See, e.g., 15 U.S.C. § 77k(e)*. Upon the likely realization of a single fund designed to compensate aggrieved investors here, then, it is readily apparent that this is yet another source of probable controversy between the two groups. *Cf., e.g., In re Waste Mgmt., Inc. Sec. Litig.*, 128 F. Supp. 2d 401, 427 (S.D. Tex. 2000) (repeating, on analogous facts, that “[c]onflicts may also arise regarding divisions of the proceeds of a settlement or judgment”). It is

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<sup>4</sup>It is, to put it mildly, particularly unsettling that Lead Plaintiffs have risked abdication of this strict liability standard by including Section 11 claims in a complaint that arguably “sounds in fraud.” *See, e.g., Rombach v. Chang*, 355 F.3d 164, 167 (2d Cir. 2004).

for reasons like these that courts confronted with similar scenarios have time and again chosen to authorize separate lead plaintiff groups, represented by different counsel.<sup>5</sup> *See In re Peregrine Sys., Inc. Sec. Litig.*, Civil No. 02cv870-J (RBB), 2002 U.S. Dist. LEXIS 27690, at \*46 (S.D. Cal. 2002) (deeming advisable the “appointment of co-lead plaintiffs, one to lead litigation with respect to the section 11 plaintiffs and another to lead litigation with respect to the section 10(b) plaintiffs”); *Miller v. Ventro Corp.*, No. C 01-01287 SBA, 2001 U.S. Dist. LEXIS 26027, at \*38 (N.D. Cal. Nov. 28, 2001) (“The Court . . . finds it appropriate to appoint a bondholder as co-lead plaintiff in addition to a stockholder.”); *In re Nanophase Techs.*, 1999 U.S. Dist LEXIS, at \*16-\*19 (creating a separate class of plaintiffs, represented by independent counsel, to pursue claims under Section 11 of the Securities Act); *cf. In re Vonage Initial Pub. Offering (IPO) Sec. Litig.*, No. 07-177 (FLW), 2007 U.S. Dist. LEXIS 66258, at \*42-\*43 (D.N.J. Sept. 6, 2007) (indicating concerns regarding the ability of one entity to represent a competing class of investors, but deferring resolution of the matter until the class certification stage); *In re: CMS Energy Sec. Litig.*, 236 F.R.D. 338, 345 (E.D. Mich. 2006) (granting defendants’ request to exclude certain noteholders from a class represented by the owner of common stock); *In re AMF Bowling Sec. Litig.*, No. 99 Civ. 3023 (DC), 2002 U.S. Dist. LEXIS 4949, at \*19-\*20 (S.D.N.Y. Mar. 25, 2002) (refusing to allow representative lacking standing under Section 12 of the Securities Act to pursue claims under that provision). To be sure, the Lead Counsel for the common stockholders is no stranger to these sorts of arrangements, as it often

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<sup>5</sup>Similarly, this very Court has in the recent past determined that plaintiffs without any alleged damages under the Securities Act have no standing to represent a class of persons who have suffered such harm. *See Caiafa v. Sea Containers Ltd.*, 525 F. Supp. 2d 398, 407-08 (S.D.N.Y. 2007) (refusing to allow named plaintiff with no cause of action under Section 12(a)(2) of the Securities Act to represent a class of investors seeking to recover under that law); *In re Global Crossing, Ltd. Sec. Litig.*, 313 F. Supp. 2d 189, 208 (S.D.N.Y. 2003) (“[A] named plaintiff must have purchased shares traceable to the challenged offering.”).

represents separate groups of bondholders. *See, e.g., In re: CitiGroup Inc. Bond Action Litig.*, No. 1:08-cv-09522-SHS (S.D.N.Y.); *In re Healthsouth Corp. Sec. Litig.*, No. CV-98-BE-2634-S (N.D. Ala.).

Against this backdrop, the Bondholder Plaintiffs respectfully propose that they, or some portion of them, be permitted to prosecute claims on behalf of Lehman bondholders (or, for that matter, all those who possess viable causes of action under the Securities Act) and to select counsel to pursue the same. Although the Lead Plaintiff for the common stockholders will surely proclaim that some within that group are also bondholders, those fitting that description – like others who are now before the Court as “additional plaintiffs” – are corrupted given that they have not previously “object[ed] to the consolidation of [their] claims as [bondholders] with the claims of stockholders, or even direct[ed] the Court to the fact that [they were] ‘different’ from the other plaintiffs.” *In re: Am. Italian Pasta Co. Sec. Litig.*, Case No. 05-0725-CV-W-ODS, 2007 U.S. Dist. LEXIS 21365, at \*26 (W.D. Mo. Mar. 26, 2007) (refusing to select proposed representative for a separate class of investors based, in part, on these considerations).

**D. Consolidation Of Actions For Discovery Purposes**

The Bondholder Plaintiffs have already expressed their reluctance at having their rather streamlined discovery – directed, as it will be, toward establishing merely that the relevant registration statements were misleading – swallowed by irrelevant, encompassing issues such as Defendants’ *scienter*. Still, the Bondholder Plaintiffs appreciate that the two cases should be coordinated for purposes of discovery. Should this occur, the Bondholder Plaintiffs agree to work cooperatively with the Court and other parties to coordinate the prosecution of their claims in as efficient and expeditious manner as possible.

**III. CONCLUSION**

For the reasons stated in this written submission, the Bondholder Plaintiffs respectfully request that one or more of them be appointed Lead Plaintiff for a group of claimants under the Securities Act, and that they be permitted to select their undersigned attorneys as Lead Counsel for that group.

DATED: February 24, 2009

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Roy L. Jacobs, hereby certify that on February 24, 2009, I served a copy of the foregoing submission on all parties appearing by the ECF system in the action by ECF filing.

/s/ Roy L. Jacobs  
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