

**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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**BOND PLAINTIFFS’ MEMORANDUM OF LAW TO MODIFY PRETRIAL
ORDER NO. 1 TO PERMIT PROSECUTION OF ABANDONED
BOND CLAIMS ON LEHMAN ISSUED BONDS PRIOR TO FEBRUARY 13, 2007**

Recent pleadings make clear that those directing this litigation have elected **not** to advance the claims brought in lawsuits filed by Rena Caldwell, Glen Detherow, Madeline Dimodica, Barbara Kattell, Cecil Mease, and Michael Shipley (the “Abandoned Bond Claim Plaintiffs”). Those causes of action have, in effect, been abandoned. Consequently, Movants respectfully request the Court to revise its Pretrial Order No. 1 to permit them and their undersigned counsel to pursue those class claims against Defendants based on bonds of Lehman Brothers Holdings, Inc. (“Lehman”) issued before February 13, 2007. Although these are the very causes of action which were at the heart of the lawsuits filed in Arkansas by the Movants,¹ Lead Plaintiffs in *In re Lehman Brothers Equity/Debt Securities Litigation*, No. 08 Civ. 5523 (S.D.N.Y.), have expressly declined to include them within the operative complaint. Should the Court grant this relief, to ensure that this consolidated matter proceeds in the most efficient manner possible, Movants also respectfully request that the Court

¹Specifically, Movants are the named Plaintiffs in *Deathrow v. Fuld*, Civ. No. CV2008-1022-2 (Saline County, Ark. Cir. Ct.) (designated in this Court as 1:09-cv-01230-LAK), *Mease v. Fuld*, Civ. No. CV-2008-1316 IV DA (Garland County, Ark. Cir. Ct.) (designated in this Court as 1:09-cv-01231-LAK); *Mease v. Fuld*, Civ. No. 2008-3964-2 (Washington County, Ark. Cir. Ct.) (designated in this Court as 1:09-cv-01232-LAK), and *Shipley v. Fuld*, Civ. No. 2008-2889-2 (Benton County, Ark. Cir. Ct.) (designated in this Court as 1:09-cv-01235-LAK). Movants have identified the instant motion as pertinent to “all cases” in this action because it seeks modification of a generally applicable pretrial order.

appoint J. Allen Carney of Carney, Williams, Bates, Bozeman & Pulliam, PLLC to serve as their representative on the Executive Committee in this proceeding.

The Motion is based upon the Motion itself, the Memorandum of Law in support, any papers filed in reply, the argument of counsel, and all papers and records in file in this matter.

I. Movants Should Be Allowed To Pursue Their Claims Abandoned By Lead Plaintiffs

Some years ago, this very Court recognized that the “strong medicine” of class action lawsuits cannot help but “subject absent class members, who typically have no role in supervising the litigation brought on their behalf, to the risk that their rights will be lost, prejudiced, or sold out too cheaply through inadequate representation.” *In re Auction Houses Antitrust Litig.*, No. 00 Civ. 0648 (LAK), 2001 U.S. Dist. LEXIS 1713, at *24 (S.D.N.Y. Feb. 22, 2001) (Kaplan, J.). To minimize the impact of this harsh reality of modern litigation, the Federal Rules of Civil Procedure mandate the court’s intervention, along with the observance of designated procedural rigors, at certain critical junctures of a representative suit. *See, e.g.*, Fed. R. Civ. P. 23; *Auction Houses*, 2001 U.S. Dist. LEXIS 1713, at *24. Moreover, while it is all too clear that the concerns articulated by this Court are inevitable features of even the most garden variety class action, they are especially conspicuous in a consolidated “supercase” such as this one against those associated with Lehman. The motion now at bar amply validates this point, for Movants and others like them face a likelihood “that their rights will be lost, prejudiced, or sold out too cheaply,” *Auction Houses*, 2001 U.S. Dist. LEXIS 1713, at *24, even though they possess effectively **no** representation in these proceedings. Some action by this Court is necessary to prevent that from happening.

To summarize, Movants are the named plaintiffs in four lawsuits challenging separate Lehman bond offerings preceding February 13, 2007. As the Court well knows, these bondholders

initially commenced their disputes in various state courts in Arkansas, but some defendants timely removed the actions to federal fora; shortly thereafter, the Judicial Panel for Multidistrict Litigation ordered these and similar Arkansas cases transferred to this district so that they might proceed in conjunction with like matters from around the country. At that point, the Arkansas litigants became subject to this Court's Pretrial Order No. 1, which resulted in the consolidation of their causes with *In re Lehman Brothers Equity/Debt Securities Litigation*, No. 08 Civ. 5523 (S.D.N.Y.). Naturally, the Court had previously designated Lead Plaintiffs and Lead Counsel to spearhead this affair, and it was not long before those entities filed their Second Amended Class Action Complaint for Violations of the Federal Securities Laws identifying the claims they would be pursuing against various parties. (*See* Second Am. Consolidated Class Action Compl. Violations Federal Sec. Laws.) Significantly, and as pertinent to present Motion, Lead Plaintiffs purport to represent a class consisting of those who acquired certain Lehman securities "between February 13, 2007 and September 15, 2008" (*Id.* at 1.) Disturbingly enough, then, Movants quickly became aware that those at the helm of the case into which they had become subsumed held absolutely no intention of seeking a recovery on their behalf. To remedy this situation, Movants presently petition this Court to modify Pretrial Order No. 1 so as to grant them authority to prosecute claims on behalf of those who acquired Lehman bonds earlier than February 13, 2007.

It has been over twenty-five years since the United States Court of Appeals for the Second Circuit (the "Second Circuit"), through Judge Friendly, emphasized that "[t]he most fundamental principles underlying class actions limit the powers of the representative parties to the claims they possess in common with *other members of the class.*" *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 16 (2d Cir. 1981) (Friendly, J.). A corollary to this foundational principle is that

the authorized proxies should not presume to act with respect to claims that may be held by some members of a defined class, but which cannot be found in the controlling pleading and would require the proof of some additional facts. *See id.* at 18 & n.7 (“[T]he named plaintiffs were authorized to represent other members of the class solely with respect to [items identified in the underlying complaint].”). Extending this concept one step further, it practically goes without saying that class representatives enjoy no ability whatsoever to speak on behalf of entities and individuals who are not even in the specified class. *Cf. id.* at 19 (rejecting settlement in which parties “attempted to release claims with respect to which none of them was authorized to represent members of the class”); *Kusner v. First Pa. Corp.*, 74 F.R.D. 606, 610 (E.D. Pa. 1977) (describing related precept as something that is “so accepted that the rule is assumed and not discussed”). Authorities’ treatment of comparable issues bears this out. *See id.* (“The explicit language of Rule 23(d)(2) limits intervention to members of the class.”); *MDL 692: In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1108 (S.D.N.Y. 1989) (refusing to allow person who was not a class member to object to proposed settlement).

Against this backdrop, it is readily apparent that this consolidated litigation – as presently configured – is set to proceed without anyone serving to safeguard the interests of certain parties whose lawsuits have been placed at this Court’s doorstep. As if this weren’t enough, Movants also face the very real threat that their grievances involving the Lehman debacle will eventually be “lost, prejudiced, or sold out too cheaply,” *Auction Houses*, 2001 U.S. Dist. LEXIS 1713, at *24, thanks to the conduct of those who – for whatever reason – are “willing to throw [the relevant causes of action] to the wind,” *Nat’l Super Spuds*, 660 F.2d at 17 n.6. Even assuming those claims are not expressly included within the scope of any eventual settlement between the adverse parties in this

affair – a reasonably likely scenario, *see Klein ex rel. SICOR Inc. v. Salvi*, No. 02 Civ. 1862 (AKH), 2004 U.S. Dist. LEXIS 4844, at *23-*24 (S.D.N.Y. Mar. 30, 2004) (Hellerstein, J.) (“[M]ost securities cases settle”); *cf. Weinberger v. Coyne*, 698 F.2d 61, 67-68, 77 (2d Cir. 1982) (Friendly, J.) (approving a release encompassing claims brought on behalf of a class that had been broadened by an amended complaint submitted simultaneously with proposed settlement) – the mere entry of a final judgment adjudicating the grounds asserted by the class as now defined could very well jeopardize Movants’ ability to subsequently seek their own redress,² *see, e.g., In re: Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 668 (D. Kan. 2004) (“Usual principles of both claim and issue preclusion apply in class actions.” (quotation omitted)). As a final alternative, should the Arkansas cases actually return to their originating districts after the completion of pretrial proceedings in this venue, *see* 28 U.S.C. § 1407 (sanctioning the transfer to a single district of multiple related lawsuits “for coordinated or consolidated *pretrial* proceedings” (emphasis added)), it will assuredly be difficult for the judges in those jurisdictions to understand why, exactly, no discovery took place with respect to the claims before them.

Clearly, Movants and others in their position deserve better options than these, and the problem is easily remedied. For that reason, they have moved this Court to modify Pretrial Order No. 1 so as to grant them authority to prosecute claims on behalf of those who acquired Lehman

² Without a doubt, Movants believe that the separate bond offerings they wish to litigate exhibit factual distinctions that would make it impermissible to include those transactions within any “expanded” settlement class or to regard them as resolved under principles of *res judicata*. *Cf. Tel. Billing Practices Litig.*, 219 F.R.D. at 668 (explaining that prohibition against “claim splitting” applies only “where all of the claims arise from the same set of operative facts”); *Weinberger*, 698 F.2d at 68 (emphasizing that new claims contained in amended complaint “were based upon factual allegations almost identical to those underlying the [preexisting causes of action]”). Still, Movants are not naive enough to think that those positions would not be hotly contested by others.

bonds earlier than February 13, 2007.

II. Conclusion

For all the foregoing reasons, Movants respectfully request that this Court modify its Pretrial Order No. 1 to permit them to litigate on behalf of a class of bondholders Securities Act claims arising from Lehman bond issuances predating February 13, 2007, to allow their undersigned counsel to pursue those claims on behalf of the class, and to appoint J. Allen Carney of Carney, Williams, Bates, Bozeman & Pulliam to serve as their representative on the Executive Committee in this proceeding.

DATED: March 30, 2009

Respectfully submitted,

ROY JACOBS & ASSOCIATES

By: /s/ Roy L. Jacobs
Roy L. Jacobs (a member of the bar of this Court)
rjacobs@jacobsclasslaw.com
60 East 42nd Street
46th Floor
New York, NY 10165
Telephone: (212) 867-1156
Fax: (212) 504-8343

Proposed Liaison Counsel For Movants

**CARNEY WILLIAMS BATES BOZEMAN &
PULLIAM, PLLC**
J. Allen Carney
Marcus Neil Bozeman
Randall K. Pulliam
11311 Arcade Drive, Suite 200
Little Rock, AR 72212
Telephone: (501) 312-8500
Fax: (501) 312-8505

Proposed Lead Counsel For Movants

Of Counsel:

PASKOWITZ & ASSOCIATES

Laurence D. Paskowitz (a member of the bar of this Court)

classattorney@aol.com

60 East 42nd Street

46th Floor

New York, NY 10165

Telephone: (212) 685-0969

Fax: (212) 685-2306

CERTIFICATE OF SERVICE

I, Roy L. Jacobs, hereby certify that on March 30, 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
Roy L. Jacobs