

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

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In re: :
 :
LEHMAN BROTHERS SECURITIES : 09 MD 2017 (LAK)
AND ERISA LITIGATION :
 :
 : ECF CASE
This document applies to: :
 :
In re Lehman Brothers Mortgage-Backed Securities :
Litigation, No. 08-CV-6762 (LAK) :
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**MEMORANDUM OF LAW IN SUPPORT OF THE PUBLIC EMPLOYEES'
RETIREMENT SYSTEM OF MISSISSIPPI'S MOTION TO INTERVENE**

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Movant Public Employees' Retirement System of Mississippi ("Miss PERS" or "Movant") submits this Memorandum of Law in support of its motion, pursuant to Fed. R. Civ. P. 24, for an order permitting Miss PERS to intervene as a named plaintiff in the above-captioned action.

I. INTRODUCTION

Miss PERS purchased mortgage pass-through certificates (the "Certificates") issued by the Lehman XS Trust, Series 2005-8; Lehman XS Trust, Series 2006-16N; and First Franklin Mortgage Loan Trust, Series 2006-FFB (collectively, the "Three Trusts"). See the accompanying Declaration of George W. Neville In Support of the Public Employees' Retirement System of Mississippi's Motion to Intervene ("Neville Decl."), Ex. A ("Miss PERS Transaction Schedule"). The Certificates were underwritten by Lehman Brothers Inc. ("LBI") and issued pursuant to two shelf Registration Statements, filed with the Securities and Exchange Commission ("SEC") by Structured Asset Securities Corporation ("SASCo") on September 16, 2005 (Reg. No. 333-127589) and August 8, 2006 (Reg. No. 333-133985), as well as the accompanying Prospectuses and Prospectus Supplements (the "Offering Documents"). The approximate aggregate value of the securities issued by the Trusts was \$3,613,240,000.

On February 23, 2009, Lead Plaintiffs and named plaintiffs in the above-captioned action (collectively, the "Plaintiffs") filed a Consolidated Securities Class Action Complaint ("Consolidated Complaint") on behalf of all persons or entities who purchased or acquired over \$90 billion of mortgage pass-through certificates issued by ninety-four (94) SASCo trusts between September 2005 and July 2007 (the "Consolidated Complaint Class"). Included among the 94 trusts named in the Consolidated Complaint were the Three Trusts. Hence, all persons or entities that

purchased or acquired securities issued by the Three Trusts, including Miss PERS, were members of the Consolidated Complaint Class.

On February 17, 2010, this Court issued a Memorandum Opinion (as amended by an Order dated February 23, 2010) sustaining certain of Plaintiffs' claims pursuant to Sections 11 and 15 of the Securities Act of 1933 (the "Securities Act") against certain individual defendants who were directors or officers of SASCo and signed the Offering Documents (the "Individual Defendants"). *See In re Lehman Brothers Mortgage-Backed Securities Litigation*, No. 08-CV-6762 (S.D.N.Y. Feb. 23, 2010), Slip Op. ("Memorandum Opinion") at 17-18. However, while this Court sustained the claims brought on behalf of the purchasers of certificates issued by the nine trusts from which the Plaintiffs had purchased (the "Nine Trusts Class"), it dismissed, for the Plaintiffs' lack of standing, the remaining claims on behalf of purchasers of securities issued by the remaining eighty-five (85) trusts (the "Eighty-Five Trusts"), including the Three Trusts. *Id.* at 6-9.

Miss PERS now seeks leave to intervene as a named-plaintiff in the above-captioned action in order to represent the former putative class members who purchased Certificates issued by the Three Trusts (the "Intervenor Class").

II. ARGUMENT

"Federal Rule of Civil Procedure 24 provides for intervention either as of right or with the permission of the Court." *Deutsche Bank Trust Co. Ams. v. Elliott Int'l, L.P.*, 2009 U.S. Dist. LEXIS 121204, at *3 (S.D.N.Y. Dec. 14, 2009). The right to intervene is unconditional when there is either: (1) a federal statute conferring such unconditional right; or (2) the party has an interest in the property or transaction subject to the action and the disposition of the action might impair or impede the party from protecting that

interest, unless the party is already adequately represented by other parties in the action. *See* Fed. R. Civ. P. 24(a). The right to intervene is permissive when there is either: (1) a federal statute conferring such conditional right; or (2) the party's claim and the action at issue have a common question of law or fact. *See* Fed. R. Civ. P. 24(b). Miss PERS seeks to bring, on behalf of the Intervenor Class, those substantive claims from the Consolidated Complaint that were sustained in the Court's Memorandum Opinion.¹

A. Intervention as a Matter of Right Under Rule 24(a) Should Be Granted

In the Second Circuit, a movant can intervene as of right under Rule 24(a) if:

(1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties.

MasterCard Int'l., Inc. v. Visa Int'l Serv. Assoc., Inc., 471 F.3d 377, 389 (2d Cir. 2006).

Movant meets all of the criteria for intervention as of right.

1. Movant has a significantly protectable interest

In order to establish a protectable interest sufficient to intervene as of right, a movant must establish that the interest asserted is "direct, substantial, and legally protectable." *Brennan v. New York City Board of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001) (citing *Donaldson v. United States*, 400 U.S. 517, 531 (1971) (requiring a "significantly protectable interest")).

Miss PERS purchased \$13,550,000 of Certificates issued pursuant to false or misleading Offering Documents and was damaged thereby. *See* Miss PERS Transaction

¹ This reliance satisfies the requirements of Fed. R. Civ. P. 24(c), which requires the filing of a pleading identifying the claims to be brought in intervention.

Schedule, Neville Decl., Ex. A. This monetary interest is legally protectable and is the same interest that had previously been represented by the Plaintiffs in the above-captioned action prior to the Court's Memorandum Opinion. As such, pursuant to Fed. R. Civ. P. 24(a), Miss PERS has a significantly protectable interest relating to the transactions that are the subject of this action.

2. The existing Plaintiffs cannot adequately represent Movant's interest

This Court has held in the Memorandum Opinion that the present Plaintiffs lack standing to bring claims on behalf of investors who purchased certificates issued by the Eighty-Five Trusts. *See* Memorandum Opinion at 6-9 (“As no named plaintiff has alleged that he or she purchased Certificates in any of the other eighty-five offerings, none can have been injured with respect to those offerings. None, therefore, has standing to bring claims with respect to these offerings.”). Thus, the Court's Memorandum Opinion made it impossible for the Plaintiffs to prosecute claims on behalf of investors who purchased certificates from the Eighty-Five Trusts.

Miss PERS, by contrast, did purchase Certificates offered by some of the Eighty-Five Trusts and can act as a plaintiff on behalf of itself and other investors who purchased certificates issued by the Three Trusts. *Id.* at 7 (“One or more plaintiffs has alleged standing adequately with respect to the nine offerings in which one or more bought Certificates.”); *see* Neville Decl. (discussing purchases of Certificates offered by the Three Trusts). Thus, Miss PERS is capable of serving as a named plaintiff on behalf of the Intervenor Class.

3. The motion to intervene is timely filed

The concept of “[t]imeliness defies precise definition, although it certainly is not confined strictly to chronology. Among the circumstances generally considered are: (1) how long the [movant] had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the [movant] if the motion is denied; and (4) any unusual circumstances mitigating for or against a finding of timeliness.” *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994).

Here, the instant motion is being submitted within five weeks of the date of the Court’s Memorandum Opinion, and within one month of the date of the Court’s Order amending the Memorandum Opinion. Prior to that time, Miss PERS believed that its interests and those of the Intervenor Class were adequately represented by the current Plaintiffs. After reviewing the Memorandum Opinion and considering its effect, Miss PERS made the decision that intervention in this action was necessary to protect its interests and those of the Intervenor Class, received the necessary approval from the Mississippi Attorney General to move forward, and filed its motion and the Declaration of George W. Neville.

There will be no prejudice to the existing parties if Miss PERS is able to represent the interests of the Intervenor Class. As to the current Plaintiffs, they sought to but were unable to represent the Intervenor Class (as well as all purchasers of certificates issued by the Eighty-Five Trusts); allowing Miss PERS to do so now would further Plaintiffs’ stated interests, not harm them. As to the current Individual Defendants, they have had notice of the claims Miss PERS seeks to prosecute since the inception of this consolidated action, which has not yet reached the discovery phase. The merits of the

claims, for purposes of the motion to dismiss, are identical to those related to the Nine Trusts Class, and which have been sustained by the Court in its Memorandum Opinion. *See* Memorandum Opinion at 12-14.

4. Without intervention Movant's interest will be impaired

Absent intervention, Miss PERS's and the Intervenor Class's interests will not continue to be represented in the above-captioned action. *See* Memorandum Opinion at 6-9 (present Plaintiffs lack standing to assert claims on behalf of the Intervenor Class). Thus, if this motion is not granted it would adversely affect and potentially prejudice both Miss PERS, which provides benefits to approximately 373,000 employees and retirees (*see* Neville Decl. ¶ 2), and those other members of the Intervenor Class whose interests would not otherwise be protected in this litigation.

B. In the Alternative, Permissive Intervention Under Rule 24(b) Should Be Granted

Rule 24(b) "permits intervention in the discretion of the court where the movant 'has a claim or defense that shares with the main action a common question of law or fact.'" *Galindo v. UBS Int'l Inc.*, 2010 U.S. Dist LEXIS 16737, at *6 (S.D.N.Y. Feb. 24, 2010) (quoting Fed. R. Civ. P. 24(b)(1)(B)). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Miss PERS's claims, and those of the Intervenor Class, are essentially identical to those of the current Plaintiffs—they *are* the claims the current Plaintiffs sought to pursue. As these claims were originally set forth in the same Consolidated Complaint under the same factual and legal theories and against the same defendants as the claims remaining in the above-captioned action, there are common questions of law and fact. Such

common questions of law and fact include: (i) whether the Individual Defendants violated the Securities Act of 1933 (the “Act”); (2) whether the offering documents issued by Individual Defendants to the investing public negligently omitted and/or misrepresented material facts about the underlying mortgage loans comprising the pools; and (3) to what extent the members of the Consolidated Complaint Class and the Intervenor Class have sustained damages and, if so, what is the proper measure thereof.

As noted above, Miss PERS seeks to re-assert claims that the Individual Defendants have been aware of since the inception of this consolidated action. There will be no undue delay in the action if Miss PERS is permitted to intervene. Miss PERS seeks to fulfill the standing requirement that the current Plaintiffs were unable to satisfy. Indeed, the effect of any minor delay that may result in granting Miss PERS’s motion will be substantially outweighed by the benefit of having all affected Intervenor Class members represented in this action once again.

III. CONCLUSION

For the foregoing reasons, Miss PERS respectfully requests that the motion to intervene be granted in all respects.

Dated: March 18, 2010
New York, New York

By: /s/ James A. Harrod
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