UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re LEHMAN BROTHERS SECURITIES AND ERISA LITIGATION This Document Applies To: *In re Lehman Brothers Equity/Debt Securities Litigation*, 08-CV-5523-LAK *Kaufman v. HSBC USA Inc.*, 09-CV-7990-LAK	Case No. 09-MD-2017 (LAK) ECF CASE

LEAD PLAINTIFFS' STATEMENT REGARDING THE KAUFMAN MOTION TO ALTER OR AMEND JUDGMENT

I. INTRODUCTION

Lead Plaintiffs respectfully submit this Statement addressing Pretrial Order No. 46 in advance of the December 18, 2012 oral argument on the motion by Irene Kaufman and Bernice Kaufman as Trustees of the Irene Kaufman Trust to amend the Class Settlement with the director and officer defendants (the "Kaufman Motion").[1] Pretrial Order No. 46 directs Lead Counsel to address the implications, if any, of granting the Kaufman Motion, including: "(1) whether granting the motion would require or counsel granting any applications by purchasers of other securities that were not purchased by any of the class plaintiffs to be included in the settlement, and (2) whether and how distribution of settlement proceeds to class members in 08 Civ. 5523 (LAK) would be affected if the motion [is] granted."

As explained below, the fundamental implication of granting the Kaufman Motion is that it would impermissibly rewrite the terms of the Settlement Agreement by changing the definition of the covered securities and the scope of the Settlement Class. *See In re Warner Commc'ns Sec. Litig.,* 798 F.2d 35, 37 (2d Cir. 1986) (explaining that a judge faced with an objection to a term of a proposed settlement "should approve or disapprove [the] proposed agreement as it is placed before him and should not take it upon himself to modify its terms"). Moreover, the Court previously rejected similar arguments when overruling objections to the Settlement by persons seeking to add additional Lehman securities into the definition of the Settlement Class.

[1] The full title of the Kaufman Motion is the Motion by Irene Kaufman and Bernice Kaufman as Trustees of the Irene Kaufman Trust To: (1) Amend Order Dismissing Movants as Members of the Class Settling with Defendant Directors and Officers of Lehman Brothers Holdings Inc.; (2) Amend Order Approving Settlement Between the Settlement Class and Settling Defendant Directors to Include Lehman Securities Held by Trustees and (3) Amend Judgment Approving the Settlement Between the Settlement Class and Settling Defendant Directors to Include Lehman Securities Held by Trustees Pursuant to Fed. R. Civ. P. 59(e) (ECF No. 1050).

As for Pretrial Order No. 46's specific questions, granting the Kaufman Motion undoubtedly would prompt additional individuals to seek further revision of the Judgment to add securities that are not included in the Settlement. The Court, however, is neither required nor counseled to grant such applications even if it grants the Kaufman Motion because, unlike the Kaufmans, no other claimants have asserted that they were omitted as a class representative as a result of a "clerical error." Opening up the Settlement to countless additional claimants would contradict the settling parties' and the Court's strong interest in achieving finality, and would delay distribution of the recovery.

Further, granting the Kaufman Motion would be prejudicial to the Settlement Class. Changing the Settlement Class definition at this advanced stage would cause extensive delay and significant additional expense in administration and distribution of the settlement fund. The Claims Administrator has already reviewed and processed over 260,000 Claim Forms under the certified Settlement Class definition and approved plan of allocation. In the event the Court were to grant the Kaufman Motion, such claims administration work that has already been completed would need to be redone with a new plan of allocation – causing additional expense and delay. In addition, the recovery by the members of the certified Settlement Class would be diluted, potentially substantially diluted, depending on the size of the claims for additional securities and the rewritten plan of allocation.

II. GRANTING THE REQUESTED RELIEF WOULD IMPERMISSIBLY REWRITE THE SETTLEMENT AGREEMENT

Lead Plaintiffs, on behalf of the Settlement Class, negotiated and reached agreement with the director and officer defendants in October 2011 as documented in the Stipulation of Settlement and Release (ECF No. 533-2, the "Stipulation" or "Settlement Agreement"). Pursuant to the Stipulation, the parties stipulated to certification of a class for settlement

purposes, which includes all persons and entities who purchased or acquired ***certain specified*** Lehman securities during the Settlement Class Period.[2] The Court approved of and certified the proposed Settlement Class (ECF Nos. 548 and 1046).

The Kaufman Motion urges the Court to rewrite the Settlement Agreement. Under controlling precedent, however, the Court should not rewrite the terms of the negotiated Settlement to change the covered securities or the definition of the Settlement Class. *See Warner Commc'ns,* 798 F.2d at 37; *see also Mba v. World Airways, Inc.*, 369 Fed. Appx. 194, 197 (2d Cir. 2010) (unpubl.) (affirming district court's refusal to restructure the terms of the settlement to alter a provision allowing potential reversion of settlement amounts); *Blatt v. Dean Witter Reynolds InterCapital, Inc.,* 732 F.2d 304, 307 (2d Cir. 1984) (affirming district court's refusal to depart from terms of settlement agreement). "[T]he court may not take it upon itself to rewrite the agreement, nor may it force the parties to accept settlement terms to which they have not agreed." *Davis v. J.P. Morgan Chase & Co.,* 827 F. Supp. 2d 172, 176-77 (W.D.N.Y. Oct. 11, 2011) (citing *Evans v. Jeff D.,* 475 U.S. 717, 726-27, 106 S. Ct. 1531 (1986)).

Courts, therefore, regularly reject objections that attempt to change the definition of the settlement class from that which was litigated, negotiated and agreed to by the parties. *See, e.g., In re Prudential Sec. Inc. Ltd. P'ships Litig.,* MDL No. 1005, M-21-67 (MP), 1995 WL 798907, at *17 (S.D.N.Y. Nov. 20, 1995) (refusing to change class definition from the definition that was litigated and negotiated as part of the settlement). Here, this Court already rejected similar (but timely) objections that, like the Kaufman Motion, sought to include additional securities in the definition of the Settlement Class. Specifically, Ms. Eisenberg (ECF No. 874-2) objected as

[2] *See* Stipulation, ¶¶1(mm) and 2. As a material part of the Stipulation, the parties expressly agreed upon the terms of the proposed Judgment, including the definition of the Settlement Class. *See* Stipulation, ¶30, Ex. B. Entry of a Judgment substantially in the form agreed to by the parties is a condition of the Effective Date of the Settlement. *Id.* ¶1(l), (r).

follows: "I would like to object that Lehman Brothers 6.375% Preferred Securities, Series K has not been included in the list of securities to be addressed by the settlement. The mis-representation of the value of Lehman Brothers by its management and by brokers/dealers was largely generic across all related securities. There is no good reason why holders of some Lehman Brothers securities should be excluded from this settlement." Another individual objector, Mr. Gao (ECF No. 874-1), did not identify the specific securities excluded, but similarly objected in part as follows: "In the proposal, only certain security classes holders are eligible/required for filing. Why is that? Is he discriminating against non-selected security holders? Are those other security class(es) holders not eligible for compensation?"

In response to the objections, Lead Plaintiffs explained that the Lehman securities included in the Settlement Class are those for which liability exists under the federal securities laws and for which Lead Plaintiffs or other named plaintiffs had standing based on the Court's prior ruling. *See* Lead Plaintiffs' Reply Memorandum in Further Support of Motion for Final Approval of Settlements with D&O Defendants and Settling Underwriter Defendants and Approval of Plans of Allocation, ECF No. 871, at p. 8. The Court overruled the objections and granted approval of the Settlement as fair and reasonable.[3]

Here, the Kaufmans concede that they received the Notice but did not object to or opt out of the Settlement. Their request is not only untimely – more than seven months after the objection deadline and after the Settlement has been approved by the Court – but it is also baseless. While the Kaufmans contend that they were inadvertently omitted as named representatives for purchasers of CUSIP 52522L202 due to a "clerical error" in the Third Amended Complaint (ECF No. 1051, at p. 6), the Kaufmans decided to pursue their individual

[3] The Court entered the Judgment and Order Approving Settlement Between Lead Plaintiffs and the Settling Officers and Directors on November 8, 2012 (ECF No. 1046).

claims against the directors and officers separate and apart from the Class Action. Contrary to the Kaufmans' contentions, consolidation of their individual action with the Class Action for pretrial purposes does not convert the Kaufmans into named plaintiffs that were inadvertently omitted from the Third Amended Complaint. There are, after all, over thirty pending individual actions arising from myriad different Lehman securities, and it would be absurd to suggest that the individual plaintiffs in such actions are class representatives that were omitted from the Third Amended Complaint due to "clerical error."

The Kaufman Motion also attempts to suggest that the Second Circuit's decision in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.,* 693 F.3d 145 (2d Cir. Sept. 6, 2012), is relevant. Kaufman Motion, at pp. 3-4. It is not. *Goldman Sachs*, which held that a plaintiff has "class standing" to assert claims on behalf of purchasers of shares in offerings in which it did not invest if the claims "implicate 'the same set of concerns as plaintiffs' claims,'" *id.* at 149, does not require that the Court amend its prior judgment. Even if *Goldman Sachs* was final (as this Court recognized in Pretrial Order No. 42, a petition for writ of certiorari is pending before the Supreme Court), the Settlement was negotiated by the parties, and approved by the Court, based on the state of the law at the time the Settlement was reached. To reexamine a negotiated and approved settlement based on subsequent changes in the case law would be contrary to the parties' and the Court's strong interest in finality. Indeed, the purpose of reaching settlements, and having deadlines in connection with proposed class action settlements, "'is to put a time limit on the claims procedure' and to achieve finality and certainty in class action settlements." *Berman v. L.A. Gear, Inc.,* No. 91 Civ. 2653 (LBS), 1993 WL 437733, at *4 (S.D.N.Y. Oct. 26, 1993) (citations omitted).

III. GRANTING THE KAUFMAN MOTION WOULD LIKELY PROMPT ADDITIONAL APPLICATIONS, BUT WOULD NOT REQUIRE OR COUNSEL GRANTING SUCH APPLICATIONS

In the event the Court grants the Kaufman Motion, additional persons or entities likely would make similar applications to include other securities that were not purchased by named plaintiffs and not negotiated for or included in the Settlement. Indeed, others previously sought to have their securities included when objecting unsuccessfully to the Settlement.

However, if the Court grants the current application, the Court is neither required nor counseled to further amend the Judgment due to any additional applications. Unlike the Kaufmans, no other claimants have asserted that they were omitted from the Third Amended Complaint as named representatives due to clerical error. Moreover, opening the Settlement up to additional securities would rewrite the Settlement Agreement, destroy the recognized interest in finality, and, as explained below, cause material delay and additional expenses to be incurred for administration and distribution of the settlement fund.

IV. GRANTING THE KAUFMAN MOTION WOULD DELAY DISTRIBUTION AND INCREASE EXPENSE

Granting the requested relief would cause substantial delay and significant additional expenses. As explained in Lead Counsel's November 5, 2012 letter to the Court (ECF No. 1045), the Claims Administrator has completed extensive work in reviewing and processing the over 260,000 claims received, and has corresponded with claimants about their claims to inform them of the status and work with them (if possible) to cure deficiencies in their claims. The Claims Administrator is making progress on the administration and expects to be prepared to complete its final recommendations and reports in the next sixty days when the deadline for responding to deficiency letters has expired.

Throughout the notice and administration process, the Claims Administrator responded to many inquiries regarding the specific securities that are eligible to be included in the Settlement, and responded based on the definition of the Settlement Class as previously certified. In addition, the Claims Administrator reviewed and determined whether each of the over 260,000 claims contained ineligible securities and sent out corresponding deficiency letters. If new securities are now added, at a minimum, additional documentation and another round of deficiency letters and response period would potentially be required. Moreover, the Claims Administrator has completed extensive work (over 135 hours) in programming, reviewing, testing and researching the plan of allocation. In the event the Court were to redefine the Settlement Class, such claims administration work that has already been completed would potentially need to be redone using a new Settlement Class definition and new plan of allocation – causing additional expense to be incurred by the Settlement Class and, ultimately, extensive delay in distribution of the newly diluted settlement fund.

V. CONCLUSION

For the foregoing reasons as well as the reasons set forth in the Structured Product Plaintiffs' Opposition to the Kaufman Motion (ECF No. 1087), Lead Plaintiffs, on behalf of the Settlement Class, respectfully request that the Court deny the Kaufman Motion.

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Respectfully submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ David R. Stickney
DAVID R. STICKNEY

MAX W. BERGER
STEVEN B. SINGER
1285 Avenue of the Americas, 38th Floor

New York, NY 10019
Telephone: (212) 554-1400
Facsimile: (212) 554-1444
-and-
DAVID R. STICKNEY
BENJAMIN GALDSTON
BRETT M. MIDDLETON
LAURENCE R. WRATHALL
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Tel: (858) 793-0070
Fax: (858) 793-0323

KESSLER TOPAZ
MELTZER & CHECK, LLP

DAVID KESSLER
JOHN A. KEHOE
JENNIFER L. ENCK
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7707
Facsimile: (610) 667-7056

Co-Lead Counsel for Lead Plaintiffs and the Settlement Classes