IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re REFCO, INC. SECURITIES LITIGATION	:	05 Civ. 8626 (GEL)

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR (I) PRELIMINARY APPROVAL OF PARTIAL SETTLEMENT WITH DEFENDANT BAWAG, (II) PRELIMINARY CERTIFICATION OF CLASS FOR PURPOSES OF SETTLEMENT, (III) PRELIMINARY APPROVAL OF FORM AND MANNER OF NOTICE, AND (IV) SCHEDULING A FINAL APPROVAL HEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Lead Plaintiffs Pacific Investment Management Company LLC and RH Capital Associates LLC (together, "Lead Plaintiffs") respectfully submit this memorandum of law in support of their motion for: (i) preliminary approval of the partial settlement of this securities class action as against defendant BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft ("BAWAG"), including the application for attorneys fees from the settlement fund on behalf of the law firms of Grant & Eisenhofer P.A. and Bernstein Litowitz Berger & Grossmann, LLP ("Co-Lead Counsel"); (ii) preliminary certification of the proposed class for purposes of the settlement with BAWAG; (iii) preliminary approval of the form and manner of notice to putative class members; and (iv) the scheduling of a hearing on final approval of the settlement and Co-Lead Counsel's application for attorneys' fees.

PRELIMINARY STATEMENT

On April 3, 2006, Lead Plaintiffs filed a Consolidated Class Action Complaint in this federal securities class action. Prior to filing that Complaint, Co-Lead Counsel had commenced settlement discussions with BAWAG, and based in part on those discussions, BAWAG was not named as a defendant in the initial Complaint. Co-Lead Counsel continued their factual and legal investigation, and on May 5, 2006, Lead Plaintiffs filed an Amended Complaint naming BAWAG as a defendant and asserting claims against it pursuant to Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Section 15 of the Securities Act of 1933. The Amended Complaint alleges that BAWAG engaged in fraudulent acts and schemes which were designed to defraud Refco's investors, including participating in sham loan transactions whose only purpose was to enable Refco to conceal uncollectible debts from the investing public.

Within a month after filing the Amended Complaint, Lead Plaintiffs and Co-Lead Counsel negotiated a proposed settlement of the action as against defendant BAWAG (the "Partial Settlement"), pursuant to which BAWAG has agreed to pay at least $108,000,000 million in cash for the benefit of the Settlement Class (defined below). In addition, in the event BAWAG is sold for a price exceeding €1.8 billion (euros) within two years after the Bankruptcy Court approves BAWAG's separate settlement with Refco's Official Committee of Unsecured Creditors, BAWAG will pay up to $32,000,000 in cash more to the Settlement Class, or up to a total of $140,000,000. Further, BAWAG has agreed to cooperate with Lead Plaintiffs in their prosecution of claims against other defendants and/or prospective defendants, including making BAWAG employees available for interviews and depositions (without the need for subpoenas), and producing documents.

Given the substantial cash settlement proceeds and non-monetary benefits to be provided by BAWAG, Lead Plaintiffs believe the Partial Settlement is fair, reasonable, and in the best interests of the Settlement Class. Moreover, by achieving an early settlement of this magnitude, Lead Plaintiffs can focus their efforts on the remaining defendants in this action, without being bogged down by the unique issues relating to BAWAG, as an Austrian entity defendant. In light of the substantial cash payment, the cost and risk of continuing the litigation against BAWAG through trial and appeals, and the arms-length negotiation and approval of the Partial Settlement by the Court-appointed institutional investor Lead Plaintiffs, the Partial Settlement warrants the Court's preliminary approval as within the range of possible approval.

It is also appropriate for this Court to preliminarily certify a class for purposes of this settlement. Like preliminary approval of a settlement, preliminary certification of settlement classes is favored in this Circuit. Here, the interested parties have consented to certification of a

settlement class after protracted negotiations between experienced counsel dealing at arms-length, and there exists no likelihood of abuse of the class device. Moreover, all of the requirements of Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure are satisfied. Accordingly, the Court should preliminarily certify the Settlement Class for purposes of the Partial Settlement.

Finally, the parties' proposed notice to potential class members regarding the Partial Settlement – attached as Exhibits 1 (Mailed Notice) and 2 (Published Notice) to Exhibit A to the Stipulation and Agreement of Settlement ("Stipulation") submitted herewith – provides notice to class members of the terms of settlement of their rights with respect thereto. Those notices are the best practicable notices under the circumstances, and their dissemination should be approved.

Accordingly, and for the reasons discussed more fully below, Lead Plaintiffs request that the Court enter an order preliminarily approving the Partial Settlement, preliminarily certifying the Settlement Class, preliminary approving the form and manner of notice to potential Settlement Class members, and establishing a date and time for a hearing regarding final approval of the Partial Settlement and Co-Lead Counsel's application for attorneys' fees.

ARGUMENT

I. THE PARTIAL SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

The proposed Partial Settlement is an excellent result for the Settlement Class. Among other things, it provides substantial monetary benefits to the Settlement Class of at least $108 million, and potentially as much as $140 million. These benefits must be compared to the risk that a protracted and contested period of litigation, including dispositive motion practice, trial and likely appeals – which could possibly extend years into the future – might lead to no recovery, or a smaller recovery, against BAWAG. Indeed, time is not on the side of the Settlement Class when it comes to claims against BAWAG. Since BAWAG's involvement in

the Refco scandal has come to light, BAWAG has been under increasing financial pressure. Like many lender and retail banks,[1] BAWAG's business depends, in part, upon the trust of its investors and customers. This relationship of trust has eroded since details regarding BAWAG's role in the Refco scandal were disclosed. According to press accounts, once BAWAG was sued by the Refco's creditors, clients began to pull their savings from BAWAG at the rate of $127 million per day, prompting the Austrian government to pledge €900 million (euros) (or $1.1 billion) in state guarantees to BAWAG to facilitate a settlement.[2] BAWAG's dramatic decline in business and its growing liquidity concerns threaten its ability to pay a substantial judgment in the future – even perhaps in the very near future. Thus, assuming Lead Plaintiffs pursued their claims against BAWAG through to a favorable verdict at trial, BAWAG may well be bankrupt, sold, or unable to pay any judgment

All other typical risks of litigation also exist. A jury might award only a fraction of the Class's losses as damages, and/or BAWAG might be allocated only a small portion of the fault for those damages. In addition, any victory on behalf of the Class at trial would likely be appealed by BAWAG, thereby creating further uncertainty and delay. Litigation against BAWAG is made even more complicated, expensive, and time-consuming because BAWAG is located in Austria, which does not abide by the Hague Convention for purposes of service of original process and other legal documents. Had Lead Plaintiffs continued to litigate their claims

[1] BAWAG is a banking and financial services corporation organized and existing under the laws of Austria. It is the fourth largest bank in Austria and is wholly owned by the Austrian Trade Union Federation.

[2] Lead Plaintiffs did not simply take BAWAG at its word regarding its deteriorating financial state. Rather, Co-Lead Counsel conducted their own investigation and, in the course of the parties' settlement negotiations, BAWAG made available for review by Co-Lead Counsel certain documents pertinent to the Class's claims and BAWAG's defenses to those claims, including documents that BAWAG had provided to the United States Attorneys Office and Refco's Official Committee of Unsecured Creditors, and Co-Lead Counsel reviewed those documents before Lead Plaintiffs agreed to the Partial Settlement. In addition, BAWAG has briefed Co-Lead Counsel and their financial consultants concerning BAWAG's financial condition and its limited ability to pay any judgment or settlement.

against BAWAG, the expenses of effecting service and otherwise complying with the necessary predicates to recovery against an Austrian entity would have created substantial hurdles to achieving a recovery -- and would likely have had a negative impact on any ultimate recovery that the Class may have achieved.

When reviewing a proposed settlement in the context of preliminary approval, courts make a preliminary determination regarding the fairness, reasonableness, and adequacy of settlement terms prior to allowing notice to be sent to the potential class. In making this preliminary determination, "[w]here the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re IPO Sec. Litig.*, 226 F.R.D. 186, 191 (S.D.N.Y. 2005) (quoting MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.41 (West 1995)); *see also In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.41 (West 1995)).

The terms of the proposed Partial Settlement are plainly "within the range of possible approval." *Id.* The substantial payment of $108 million dollars by BAWAG (and perhaps up to $140 million) when viewed in the context of the significant risks and uncertainties involved with protracted litigation against BAWAG, including its deteriorating financial condition and impending sale, make the Partial Settlement appear on its face to be extremely beneficial to the Settlement Class. Moreover, the Partial Settlement was negotiated at arm's-length, by counsel who are experienced in complex securities litigation and who were acting in an informed manner, under the direction of Lead Plaintiffs who are sophisticated institutional investors. For all of these reasons, the Court should preliminarily approve the Partial Settlement.

II. PRELIMINARY CERTIFICATION OF A SETTLEMENT CLASS UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS APPROPRIATE

The proposed class for purposes of the Partial Settlement consists of all persons and entities that purchased or otherwise acquired Refco Group Ltd., LLC/Refco Finance Inc. 9% Senior Subordinated Notes due 2012 (CUSIP Nos. 75866HAA5 and/or 75866HAC1) and/or common stock of Refco (CUSIP No. 75866G109) during the period August 5, 2004 through and including October 17, 2005 (the "Class Period") and who were damaged thereby (the "Settlement Class"). Excluded from the proposed Settlement Class are: (i) Refco; (ii) the Defendants; (iii) any person or entity who was a partner, executive officer, director, controlling person, subsidiary, or affiliate of Refco or any Defendant during the Class Period; (iv) members of the Defendants' immediate families; (v) entities in which Refco or any Defendant has a controlling interest; and (vi) the legal representatives, heirs, predecessors, successors or assigns of any of the foregoing excluded persons or entities. Also excluded from the Class is any person or entity who or which properly excludes himself, herself or itself by filing a valid and timely request for exclusion in accordance with the requirements set forth in the Notice.

The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (certifying class for purposes of preliminary settlement of securities fraud class action); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (class certification for purposes of approving or disapproving settlement in multi-district litigation is "appropriate at this time and is in the interests of Justice."). Moreover, the Second Circuit has instructed district courts to interpret Rule 23 liberally for purposes of settlement. *See, e.g.*, *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce & Smith, Inc.*, 903 F.2d 176, 179 (2d Cir. 1990) ("in light of the importance of the class action device in securities fraud suits, [Rule 23's] factors are to be

construed liberally"), *cert. denied*, 498 U.S. 1025 (1991); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995) (certifying a temporary class for purposes of partial settlement); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 279 (S.D.N.Y. 1999) (certifying for purposes of partial settlement a class period different from that certified for the continuing litigation).

In the case of partial settlements, "tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge." *In re Prudential*, 163 F.R.D. at 205 (quoting *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 174 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981)). Here, there is no likelihood of abuse of the class action device, and the settlement is fair and reasonable and is subject to approval by the Court.

A class action must meet each of the four requirements set forth in Rule 23(a), and at least one of three requirements set forth in Rule 23(b). *See* Fed. R. Civ. P. 23(b); *In re Prudential*, 163 F.R.D. at 205. Class certification is appropriate here because this action easily meets the requirements of Rule 23(a) and Rule 23(b)(3).

A. This Case Satisfies The Prerequisites Of Rule 23(a)

Certification is appropriate under Rule 23(a) if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

1. The Settlement Class Is Sufficiently Numerous

Class certification under Rule 23(a)(1) is appropriate where a class contains so many members that joinder of all would be "impracticable." *Robidoux v. Celani*, 987 F.2d 931, 935

(2d Cir. 1993). Impracticable does not mean impossible, but simply difficult or inconvenient. *Id.* Here, the Settlement Class is comprised of the purchasers of approximately 30.4 million shares of Refco common stock and $600 million par amount bonds. Thus, the Settlement Class is sufficiently numerous to satisfy Rule 23(a)(1). *See, e.g., In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 508-09 (S.D.N.Y. 1996) (holding that class members numbering at least a million made joinder impracticable); *In re Sumitomo*, 189 F.R.D. at 278 (numerosity requirement met where the potential class exceeded 20,000 members).

2. There Are Common Questions Of Law And Fact

Federal securities cases like this one easily meet the commonality requirement of Rule 23(a)(2). *See In re Oxford Health Plans, Inc.*, 191 F.R.D. 369, 374 (S.D.N.Y. 2000) ("where the facts as alleged show that Defendants' course of conduct concealed material information from an entire putative class, the commonality requirement is met."). These cases are "essentially course of conduct cases because the nub of plaintiffs' claims is that material information was withheld from the entire putative class in each action, either by written or oral communication." *Id.* (finding commonality of claims where plaintiffs alleged a scheme and common course of conduct by the defendants to misrepresent and conceal from the investing public material facts concerning the company's business and financial condition) (citation and internal quotations marks omitted); *In re Initial Public Offering Sec. Litig.*, 227 F.R.D. 65, 87 (S.D.N.Y. 2004) ("in securities fraud litigation . . . where putative class members have been injured by similar material misrepresentations and omissions, the commonality requirement is satisfied.").

Lead Plaintiffs have asserted claims against BAWAG for, among other things, violations of the Exchange Act and the Securities Act. These claims present many questions of law and fact which are common to all members of the Settlement Class, including:

- Whether BAWAG participated in and pursued the course of conduct described in the Complaint;
- Whether BAWAG acted with scienter;
- Whether BAWAG's conduct violated Section 10(b) of the Exchange Act;
- Whether BAWAG "controlled" Refco for purposes of Section 15 of the Securities Act and Section 20(a) of the Exchange Act;
- Whether BAWAG can establish its affirmative defenses to liability under Section 15 of the Securities Act or Section 20(a) of the Exchange Act; and
- To what extent the Class Members have sustained damages and the proper measure of damages.

Thus, there are questions of law and fact common to the Class, the resolution of which would advance the litigation.

3. The Class Representatives' Claims Are Typical Of Those Of The Settlement Class

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality ensures that class representatives "have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions." *See In re Oxford Health Plans*, 191 F.R.D. at 375. Typicality is established where the "claims of representative plaintiffs arise from same course of conduct that gives rise to the claims of the other class members, where the claims are based on the same legal theory, and where the class members have allegedly been injured by the same course of conduct as that which allegedly injured the proposed representatives." *Id.; see also Robidoux*, 987 F.2d at 936-37 ("when it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims.").

Here, the injuries to Lead Plaintiffs and the members of the Settlement Class are unquestionably attributable to the same course of conduct by BAWAG, and others, and liability for this conduct is predicated on the same legal theories. As such, the Rule 23(a)(3) typicality requirement is satisfied.

4. The Class Representatives Will Fairly And Adequately Protect The Interest Of The Class

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Court must measure the adequacy of representation by two standards: (1) whether the claims of the class representatives conflict with those of the class; and (2) whether the plaintiffs' counsel are qualified, experienced, and generally able to conduct the litigation. *See In re Oxford Health Plans,* 191 F.R.D. at 376; *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992).

Here, Lead Plaintiffs and the Settlement Class share the common goal of maximizing recovery, and there is no conflict between them. *See Drexel*, 960 F.2d at 291 (adequacy requirement met where "[a]ll members of subclass B similarly wish to obtain the highest possible recovery for that subclass."); *McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 428-29 (E.D. Tex. 2002) (finding no conflict between named plaintiff and class members where both groups sought maximum recovery). Moreover, Co-Lead Counsel have extensive experience and expertise in complex securities litigation and class action proceedings throughout the United States, and are qualified and able to conduct this litigation, as this Court recognized when appointing them Co-Lead Counsel. Therefore, Rule 23(a)(4) is satisfied.

B. The Class Representatives' Claims Satisfy The Prerequisites Of Rule 23(b)(3)

Rule 23(b)(3) authorizes class certification if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only

individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) is "designed to secure judgments binding all class members save those who affirmatively elect[] to be excluded," where a class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997) (citation omitted). Certification of the Settlement Class under Rule 23(b)(3) will serve these purposes.

1. Common Legal And Factual Questions Predominate

"Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *In re Livent, Inc. Noteholders Sec. Litig.*, 210 F.R.D. 512, 517 (S.D.N.Y. 2002) (common issues predominate where "each class member is alleged to have suffered the same kind of harm pursuant to the same legal theory arising out of the same alleged course of conduct [and] the only individualized question concerns the amount of damages"); *In re Blech Sec. Litig.*, 187 F.R.D. 97, 107 (S.D.N.Y. 1999) ("In determining whether common questions of fact predominate, a court's inquiry is directed primarily toward whether the issue of liability is common to members of the class."). The Rule 23(b)(3) test of predominance is "readily met" in securities fraud cases. *Amchem Prods*, 521 U.S. at 625.

Here, the same course of conduct by BAWAG forms the basis of all Settlement Class members' claims against it. There are numerous common issues relating to BAWAG's liability – including but not limited to its course of conduct, its scienter, its control of Refco, and its

ability to prove its affirmative defenses – which predominate over any individualized issues. The predominance requirement of Rule 23(b)(3) is therefore satisfied.

2. A Class Action Is Superior To Other Methods Of Adjudication

Rule 23(b)(3) sets forth the following non-exhaustive factors to be considered in making a determination of whether class certification is the superior method of litigation: "(A) the interest of members of the class in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by . . . members of the class; (C) the desirability . . . of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action." *See* Fed. R. Civ. P. 23(b)(3).

Considering these factors, this consolidated class action is clearly "superior to other available methods for the fair and efficient adjudication" of the claims of the vast number of purchasers of Refco securities. Lead Plaintiffs are unaware of any other litigation already commenced by individual Settlement Class members, which is not surprising given the tremendous costs associated with such litigation. Indeed, courts have concluded that the class action device in securities cases is usually the superior method by which to redress injuries to a large number of individual plaintiffs:

> In general, securities suits such as this easily satisfy the superiority requirement of Rule 23. Most violations of the federal securities laws, such as those alleged in the Complaint, inflict economic injury on large numbers of geographically dispersed persons such that the cost of pursing individual litigation to seek recovery is often not feasible. Multiple lawsuits would be costly and inefficient, and the exclusion of class members who cannot afford separate representation would neither be "fair" nor an adjudication of their claims. Moreover, although a large number of individuals may have been injured, no one person may have been damaged to a degree which would induce him to institute litigation solely on his own behalf.

In re Blech, 187 F.R.D. at 107; *In re Livent*, 210 F.R.D. at 518 (in the absence of class certification, "not only would separate and scattered lawsuits be needlessly repetitive and inefficient . . . many putative class members – particularly retail investors – would also be discouraged from even seeking legal relief as their potential recovery would be outweighed by the transaction costs of individual litigation").

The scope and complexity of Lead Plaintiffs' claims against BAWAG, together with the massive cost of individualized litigation, make it unlikely that the vast majority of the Settlement Class members would be able to seek relief without class certification. *See Sumitomo*, 189 F.R.D. at 279. Moreover, it is clearly desirable to concentrate the claims of all Settlement Class members in this forum, and Lead Plaintiffs do not foresee any difficulties in the management of this action as a class action. Accordingly, the requirements of Rule 23(b)(3) are satisfied.

III. THE FORM AND MANNER OF NOTICE TO THE CLASS PROPOSED BY LEAD PLAINTIFFS IS SUFFICIENT

When a court certifies a class under Rule 23(b)(3), notice must be served on all class members who can be identified through reasonable efforts. Fed. R. Civ. P. 23(c)(2)(B). Rule 23(e) also instructs courts to "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal or compromise." Fed. R. Civ. P. 23(e)(1)(B). "[D]ue process does not require actual notice, but rather a good faith effort to provide actual notice." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 231 (D.N.J. 1997) (citing *In re Cherry's Petition to Intervene*, 164 F.R.D. 630, 636 (E.D. Mich.1996)).

Lead Plaintiffs have submitted two forms of notice to the Court for approval: a Publication Notice and a Mailed Notice. Lead Plaintiffs have agreed to publish the Publication Notice in the *Wall Street Journal* national edition, and to send the Mailed Notice to the last

known mailing address of those members of the Settlement Class whose addresses can be identified through reasonable effort. This is a well-established means of providing legally sufficient notice. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. at 231 (Rule 23(c) was satisfied by providing notice of settlement to individual class members where possible and publishing notice in major newspapers); *Mangone v. First USA Bank*, 206 F.R.D. 222, 232 (S.D. Ill. 2001) (notice of settlement complied with Rule 23 when mailed to last known address of each class member and published in *USA Today*).

In terms of content, a settlement notice "need only be reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 527-28 (D.N.J. 1997) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). *See also In re Michael Milkin & Assoc. Sec. Litig.*, 150 F.R.D. 46, 60 (S.D.N.Y. 1993) (notice must be reasonably calculated to apprise the class of the pending action and to afford class members an opportunity to object); *Patrowicz v. Transamerica HomeFirst, Inc.*, 359 F. Supp. 2d 140, 150 (D. Conn. 2005) ("'the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'") (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005)). In addition, the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), provides for the disclosure of certain matters in connection with a proposed securities class action settlement, including:

(1) "The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis;"

(2) "If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged

under this chapter, a statement from each settling party concerning the issue or issues on which the parties disagree;"

(3) A statement indicating which parties or counsel intend to apply for an award of fees or costs from the settlement fund, as well as the amount to be requested (including on a per share basis) and a brief explanation supporting the fees and costs sought;

(4) The name and contact information of representatives of plaintiffs' counsel who will be reasonably available to answer class members' questions; and

(5) The reasons for the settlement.

15 U.S.C. § 78u-4(a)(7).

The Mailed Notice provides detailed descriptions of this action and the proposed Partial Settlement, as well as information about the options available to putative Settlement Class members, including the right to object or opt out. *See* Exhibit 1 to Exhibit A to Stipulation. The Publication Notice provides similar information in a summary form, and informs the reader how to obtain a copy of the more detailed Mailed Notice. *See* Exhibit 2 to Exhibit A to Stipulation. With respect to the PSLRA's settlement disclosure provisions, the Mailed Notice: (1) states the aggregate amount that is estimated to be distributed to the Settlement Class; (2) explains the settling parties' areas of disagreement with respect to the plaintiffs' recoverable damages; (3) states that Co-Lead Counsel will request attorneys' fees and states the amount sought and the basis for the request;[3] (4) identifies representatives of Co-Lead Counsel who will be available to answer class members' questions; and (5) articulates the reasons for the Partial Settlement. The only matters whose disclosure is contemplated by the PSLRA but which are not set forth in the Mailed Notice are the amount of proceeds from the Partial Settlement to be distributed to the Settlement Class on a per share basis, and the amount of the attorneys' fee application on a per

[3] Co-Lead Counsel do not intend to request reimbursement of litigation expenses at this time. Instead, Co-Lead Counsel will continue to advance those expenses on behalf of the class until future recoveries are achieved, at which time they will seek reimbursement of all expenses incurred to date, after further notice to the class.

share basis. As discussed below, although the aggregate amounts are disclosed in the Notice, due to the unique circumstances surrounding the Partial Settlement, Lead Plaintiffs are not yet in a position to estimate the "per share" amounts. Lead Plaintiffs therefore propose to defer such disclosures until a later time.

As stated in the Mailed Notice, the BAWAG settlement proceeds will be paid in installments over a period of time, and thus Lead Plaintiffs do not intend to make any distributions at this time. As a result, Lead Plaintiffs and Co-Lead Counsel have not yet attempted to determine how the BAWAG settlement proceeds will be allocated to members of the Settlement Class. It is well-established that a plan of allocation need not be prepared prior to court approval of a settlement,[4] and Lead Plaintiffs believe it would be premature for them to make the types of judgments that are necessary to preparation of a well-reasoned plan of allocation at this time. The proposed Settlement Class consists of purchasers of two different classes of securities – stock and bonds – and the claims asserted by the bond purchasers are not identical to those asserted by the stock purchasers. Additionally, even within the bond purchaser and stock purchaser categories, individual investors' recoveries may differ depending on when they purchased their securities (*e.g.*, in the initial offering or in the secondary market). As a result, unlike many cases, average "per share" recoveries in this case cannot be determined

[4] *See, e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (court can determine fairness of settlement "before a distribution scheme has been adopted so long as the distribution scheme does not affect the obligations of the defendants under the settlement agreement"); *In re Johns-Manville Corp.*, 340 B.R. 49, 70 (S.D.N.Y. 2006) (rejecting argument that settlement fund distribution procedures must be disclosed prior to fairness determination); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 480 (S.D.N.Y. 1998) ("it is appropriate, and often prudent, in massive class actions to follow a two-stage procedure, deferring the Plan of Allocation until after final settlement approval"); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 94,326 at 92,143 (W.D. Wash. July 28, 1988) (it is routine to defer allocation of a partial settlement in a complex securities case "where the appropriate allocation among class members can best be determined when further settlements have been achieved or the litigation is completely resolved"); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 959 (N.D. Ga. 1980), *aff'd*, 669 F.2d 228 (5th Cir. 1982) (court approved settlement agreement and deferred consideration of distribution plan); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.312 (West 2004) ("Often ... the details of allocation and distribution are not established until after the settlement is approved.").

simply by dividing the total recovery by the number of shares (putting aside the fact that bonds are not even denominated in "shares"). Instead, calculation of "per share" settlement distributions requires a detailed plan of allocation to divide the settlement proceeds between and among the various securities and claims in the complaint. Lead Plaintiffs and Co-Lead Counsel do not believe it is feasible or in the interests of the Settlement Class to make such determinations at this time, without the benefit of further legal and factual development.

In sum, any estimate of the "per share" distributions that Lead Plaintiffs could provide at this stage would be inherently subjective and preliminary, and would be more likely to mislead the members of the Settlement Class than to provide them with meaningful information.[5] Accordingly, in lieu of damage estimates, Lead Plaintiffs have included the following statements in the proposed Mailed Notice: "The amount of any distribution to Settlement Class members on a per share basis will depend on future Court proceedings and factual and legal analysis, and it is therefore not possible to estimate the amount of any such distribution at the present time. After further notice to the Settlement Class and an opportunity to be heard, Lead Plaintiffs will seek Court approval of a plan of allocation that will govern calculation of Class members' individual distributions." In similar circumstances, the court in *In re Enron Corporation Securities Litigation* approved settlement notices containing very similar language, despite objections to the omission of per-share recovery estimates. *See, e.g.*, Notice of Pendency and Partial Settlement of Class Action as against Bank of America, at p. 2, Part I ("the amount of any distribution to Settlement Class Members on a per share basis will depend on future Court proceedings and it is therefore not possible to estimate the amount of any such distribution at the present time"), and

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[5] The same is true with respect to any "per share" description of the attorneys' fee petition. It is anticipated that the attorneys' fees will be allocated among the Settlement Class members in the same way as the settlement proceeds, and thus "per share" fees cannot be estimated until a plan of allocation is established.

p. 6, Part XI(A) ("After further notice to the Settlement Class and an opportunity to be heard, Plaintiffs' Settlement Counsel will seek approval by the Court of a Plan of Allocation that will govern the calculation of Settlement Class Members' claims against the Gross Settlement Fund.") (attached as Exhibit A to the accompanying Declaration of Megan D. McIntyre); *In re Enron Corporation Securities Litigation*, C.A. No. H-01-3624, Order of Final Judgment and Dismissal as to Bank of America, at ¶ 3 (S.D. Tex. Oct. 19, 2005) (approving form and content of notice as "the best notice practicable under the circumstances") (attached as Exhibit B to the Declaration of Megan D. McIntyre). Lead Plaintiffs respectfully request that this Court likewise approve the form and content of the proposed Mailed Notice and Publication Notice.

CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court: (1) preliminarily approve the proposed Partial Settlement as within the range of possible fairness, reasonableness and adequacy; (2) preliminarily certify the Settlement Class; (3) preliminarily approve the form and manner of notice proposed by the Lead Plaintiffs; and (4) enter an Order setting a date and time for the hearing regarding final approval of the Settlement and Co-Lead Counsel's application for attorneys' fees. A proposed Order is attached as Exhibit A to the Stipulation, filed herewith.

DATED: September 8, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2006, the attached document was filed with the Clerk of Court using CM/ECF which will send notification of such filings to the following parties:

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