

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

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: 05 Civ. 8626 (GEL)
In re REFCO, INC. SECURITIES LITIGATION :
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**LEAD PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO MODIFY THE PSLRA DISCOVERY STAY FOR THE LIMITED
PURPOSE OF SERVICE OF A SUBPOENA ON REFCO’S
TRANSFER AGENT FOR SETTLEMENT ADMINISTRATION PURPOSES**

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 an Order modifying the stay of discovery set forth in Section 21D(b)(3)(B) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-4(b)(3)(B), for the limited purpose of permitting Lead Plaintiffs to serve a subpoena directing the production of documents, in electronic form, by the transfer agent of Refco, Inc., the Bank of New York (“BONY”), sufficient to identify the names and addresses of all natural persons or business, legal or governmental entities or associations who or which owned 9% Senior Subordinated Notes due 2012 and/or the common stock of Refco, Inc., its predecessors and affiliates (including, but not limited to, Refco Group Ltd., LLC, Refco Finance Holdings LLC and Refco Finance Inc.) (collectively “Refco”), during the period from August 5, 2004 through October 17, 2005.

STATEMENT OF FACTS

Lead Plaintiffs have moved this Court for preliminary approval of a partial settlement of this securities class action between Lead Plaintiffs and defendant BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft (“BAWAG”). Declaration of John C. Browne In Support of Lead Plaintiffs’ Motion to Modify the PSLRA Stay For the Limited Purpose of Service of Subpoena on Transfer Agent (“Browne Decl.”), ¶¶ 2,3. If

the BAWAG Settlement is given preliminary approval, Lead Plaintiffs' will, in order to satisfy the notice requirements of Rule 23 of the Federal Rules of Civil Procedure, Section 21D(a)(7) of the Securities Exchange Act of 1934, 15 U.S.C. §78u-4(a)(7), as amended, including by the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), and due process, require the names and addresses of Refco investors in order to provide them with notice of the BAWAG Settlement. To obtain this information, Lead Plaintiffs must have access to documents under the control of BONY, Refco's transfer agent. Browne Decl. ¶¶ 4, 5.

BONY has informed Lead Plaintiffs' counsel that it has the necessary information, but that it requires service of a validly issued subpoena before it will produce documents sufficient to identify the name and address of any Refco investor during the period from August 5, 2004 through October 17, 2005. Browne Decl. ¶ 5.

ARGUMENT

I. THE PSLRA STAY SHOULD BE MODIFIED FOR THE LIMITED PURPOSE OF SERVICE OF SUBPOENA ON REFCO'S TRANSFER AGENT

The PSLRA states that "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." 15U.S.C. § 78U-4(b)(3)(B). As this Court recently noted, various district courts in the Southern District of New York have stated that undue prejudice is "improper or unfair treatment amounting to something less than irreparable harm." *See In re Refco, Inc. Sec. Litig.*, No. 05 Civ. 8626 (GEL), 2006 WL 2337212, at * 1 (S.D.N.Y. Aug. 8, 2006).

A. Class Members Will Be Unduly Prejudiced if the PSLRA Stay is Not Lifted to Permit Identification of Names and Addresses

It is beyond dispute that notice of a proposed settlement must be provided to all class members who can be identified through reasonable efforts. *See Fed. R. Civ. P. 23(e)(1)(B)*. And

when notice of settlement is combined with notice of pendency of a class certified under Rule 23(b)(3) for settlement purposes only, as it is here, Rule 23(c)(1)(B) explicitly requires putative class members to receive the “best notice practicable under the circumstances, including individual notice to all class members who can be identified through reasonable efforts.” In interpreting this provision, the Supreme Court, in its seminal decision in *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173 (1974) noted that “the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.”

Lead Plaintiffs have submitted for the Court’s approval, in addition to a form of notice to be published in major publications, a form of notice to be mailed to class members (the “Mailed Notice”). The proposed Preliminary Approval Order submitted to the Court would, consistent with the requirements of the Federal Rules and due process, require Lead Plaintiffs 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, which 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. 216, 231 (D.N.J. 1997) (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*). To satisfy the notice requirement, Lead Plaintiffs require BONY, Refco’s transfer agent, to provide them with the names and last known addresses of Refco investors. Without that information, class members will be unduly prejudiced, as they will not

be provided with adequate notice, and will therefore be deprived of their ability to determine their individual positions and rights with respect to the proposed BAWAG Settlement.

B. Lead Plaintiffs' Request is Particularized

Lead Plaintiffs seek a limited set of documents for the sole purpose of identifying names and addresses of Refco investors. This request is sufficiently targeted and specified to satisfy the PSLRA's particularity requirement. *See, e.g., In re Lernout & Hauspie Sec. Litig.*, 214 F. Supp. 2d 100, 109 (D. Mass. 2002).

CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court grant an Order modifying the stay of discovery set forth in Section 21D(b)(3)(B) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-4(b)(3)(B), for the limited purpose of permitting Lead Plaintiffs to serve a subpoena directing the production of documents, in electronic form, by BONY sufficient to identify the names and addresses of all natural persons or business, legal or governmental entities or associations who owned 9% Senior Subordinated Notes due 2012 and/or the common stock of Refco during the period from August 5, 2004 through October 17, 2005.

DATED: September 27, 2006

**BERNSTEIN LITOWITZ BERGER
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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2006, copies of: (1) **Lead Plaintiffs’ Notice of Motion to Modify the PSLRA Discovery Stay for the Limited Purpose of Service of a Subpoena on Refco’s Transfer Agent for Settlement Administration Purposes**; (2) the **Declaration of John C. Browne in Support of Lead Plaintiffs’ Motion to Modify the PSLRA Discovery Stay for the Limited Purpose of Service of a Subpoena on Refco’s Transfer Agent for Settlement Administration Purposes**; and (3) **Lead Plaintiffs’ Memorandum of Law in Support of Motion to Modify the PSLRA Discovery Stay for the Limited Purpose of Service of a Subpoena on Refco’s Transfer Agent for Settlement Administration Purposes** were filed electronically with the Clerk of the Court using the CM/ECF system. Notice of these filings will be sent to all parties by operation of the Court’s electronic filing system.

I further certify that I will cause copies of the documents listed immediately above to be mailed by first class mail via the United States Postal Service to:

Alexander Shapiro
Civil Litigation Managing Counsel
The Bank of New York
101 Barclay Street
New York, NY 10286

/s/ John P. Coffey
John P. Coffey (JC-3832)