UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

LEAD PLAINTIFFS' REPLY TO GRANT THORNTON LLP'S RESPONSE TO LEAD PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT WITH BAWAG

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Lead Plaintiffs respectfully submit this reply to the response by Defendant Grant Thornton LLP to Lead Plaintiffs' motion for preliminary approval of the settlement with defendant BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft ("BAWAG").[1] Grant Thornton's sole objection to the settlement is that "the Settlement Agreement contains no clause for a reduction in judgment for non-settling defendants, thereby prejudicing Grant Thornton's legal rights." Grant Thornton Resp. at 1-2. There is no merit to this objection.

To the extent that Grant Thornton is entitled under the law to judgment reduction with respect to any of the claims asserted against it, any such judgment reduction would be in accordance with the formula set forth in the explicit provisions of the Private Securities Litigation Reform Act ("PSLRA):

> If a covered person enters into a settlement with the plaintiff prior to final verdict or judgment, the verdict or judgment shall be reduced by the greater of – (i) an amount that corresponds to the percentage of responsibility of that covered person; or (ii) the amount paid to the plaintiff by that covered person.

15 U.S.C. § 78u-4(f)(7)(B).

There is no requirement in the PSLRA that a settlement agreement or order approving a settlement incorporate a provision embodying this judgment reduction formula.[2] The law is what it is, and there is no need for any provision in a settlement agreement repeating what the law provides. *See In re Enron Corp. Sec. Litig.*, No. H-01-3624, slip op. at ¶ 11 (S.D. Tex. Oct. 18, 2005) (attached hereto as Exhibit A) (approving settlement agreement providing that the non-

[1] Grant Thornton LLP's Response to Lead Plaintiffs' 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 of Final Approval Hearing, dated September 25, 2006 ("Grant Thornton Resp.").

[2] In contrast, the PSLRA *does* mandate that the order approving a settlement contain a bar order precluding claims for contribution by or against the settling defendant. *See* 15 U.S.C. § 78u-4(f)(7)(A). Congress obviously knew how to require a provision be included in an order when it wanted to do so.

settling defendants "shall be entitled to appropriate judgment reduction in accordance with any applicable statutory or common law rule"). Grant Thornton does not cite any provision of the PSLRA or any case requiring that a settlement agreement in a case subject to the PSLRA include a judgment reduction provision.

The principal case on which Grant Thornton relies, *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), was not a PSLRA case, and the reasoning applied in *Denney* shows why that distinction is significant.[3] In *Denney*, the Second Circuit held that the order approving a settlement needed to explain what judgment reduction methodology would be applied, because there were a wide variety of approaches that might be applied to state law claims and such ambiguity should not be allowed to linger. 443 F.3d at 274-76. The only contribution bar order potentially applicable in this case is the one specified in the PSLRA. *See* Stipulation and Agreement of Settlement ¶ 35. To the extent that the PSLRA would bar contribution claims in this case, there is no ambiguity as to what judgment reduction formula will be followed; the PSLRA specifies the approach to be used in the event that a non-settling defendant is entitled to judgment reduction as to any of the claims asserted against it. The rationale that led the Second Circuit to remand the settlement approval in *Denney* does not exist in a PSLRA case.

It would be premature at this stage of the litigation to attempt to provide any greater specificity as to how the judgment reduction formula would be applied, particularly since no plan of allocation for the BAWAG settlement monies has yet been determined. In *Gerber v. MTC Electronic Technologies Co*., 329 F.3d 297 (2d Cir. 2003), on which Grant Thornton relies (Grant Thornton Resp. at 4), the parties agreed on the applicable judgment reduction approach. *Id.* at 302-03. However, the non-settling defendants complained that they did not know how the

[3] Grant Thornton also relies on *In re Initial Pub. Offering Sec. Litig*., 226 F.R.D. 186 (S.D.N.Y. 2005), which was a PSLRA case, but the issue in that case did not involve the question of judgment reduction.

settlement money would be allocated among the plaintiffs' different elements of damages and thus they did not know the exact amount of a credit that they would receive. *Id.* at 303-04. The Second Circuit rejected these objections to the settlement, stating: "We also conclude that the non-settling defendants are not entitled to any greater degree of certainty about the amount of their judgment credit than they already have." *Id.* at 304. The court explained that it was premature to provide greater specificity:

> The non-settling defendants know that they will get a credit amounting to the greater of (1) the settlement attributed to common damages, or (2) the settling defendants' proportionate share of the total damages. They therefore know that the settling defendants' wrongdoing is relevant, and can develop their trial strategy accordingly. We find no error in the district court's decision to leave the determination of the actual amount of the judgment credit for calculation at trial, because the non-settling defendants will get the full settlement amount as a credit, unless the settlement damages are not common, an issue which is obviously contingent on the outcome of the trial.

Id. at 305. Similarly, the PSLRA judgment reduction formula provides Grant Thornton all that it is reasonable or necessary to provide at this juncture.

In the event that the Court is inclined nevertheless to include in the order approving the settlement a provision embodying the judgment reduction formula, any such provision should specify that non-settling defendants receive a credit only for settlement payments relating to the claims and damages for which the non-settling defendants are being sued. *See, e.g., Gerber*, 329 F.2d at 301 ("the credit is the *greater* of the settlement amount for *common damages* or the settling defendants' share of liability") (some emphasis added).[4] Appropriate language would be as follows:

[4] *See also In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1031 (2d Cir. 1992) (non-settling defendant is entitled to judgment reduction where damages are "common"); *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1236 (10th Cir. 1988) (settlement amount is a credit as to judgment against non-settling defendant "provided both the settlement and the judgment represent common damages"); *Howard v. Gen. Cable Corp*., 674 F.2d 351, 358 (5th Cir. 1982) ("non-settling defendant may elect to subtract the amount paid by settling defendants from a judgment entered against it provided both the settlement and the judgment represent common damages").

> To the extent that a non-settling defendant has a claim for contribution barred by 15 U.S.C. § 78u-4(f)(7)(A), any final verdict or judgment that may be obtained by or on behalf of the Class or a Class Member against a Non-Settling Defendant shall be reduced by the greater of (i) an amount that corresponds to the percentage of responsibility of the Settling Defendants for the damages awarded to the Class or a Class Member on the claim on which Judgment is entered against any of the Non-Settling Defendants; or (ii) the amount paid by or on behalf of the Settling Defendants to the Class that was allocated to the claim on which Judgment is entered against any of the Non-Settling Defendants.

See In re WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288 (DLC), 2004 WL 2591402, at *13-14

(S.D.N.Y. Nov. 12, 2004).

Dated: New York, New York
October 5, 2006

Respectfully submitted,

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