UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re REFCO, INC. SECURITIES LITIGATION	:	MASTER FILE NO. 05 Civ. 8626 (GEL)

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT SILVERMAN'S MOTION FOR PARTIAL RECONSIDERATION

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Max W. Berger (MB-5010)
John P. Coffey (JC-3832)
Salvatore J. Graziano (SG-6854)
John C. Browne (JB-0391)
Jeremy P. Robinson
1285 Avenue of the Americas
New York, NY 10019
Telephone: (212) 554-1400
Facsimile: (212) 554-1444

GRANT & EISENHOFER P.A.
Stuart M. Grant (SG-8157)
James J. Sabella (JS-5454)
485 Lexington Avenue
29th Floor
New York, NY 10017
Telephone: (646) 722-8500
Facsimile: (646) 722-8501
- and -
Megan D. McIntyre
Christine M. Mackintosh
Jill Agro
Chase Manhattan Centre
1201 North Market Street
Wilmington, DE 19801
Telephone: (302) 622-7000
Facsimile: (302) 622-7100

Attorneys for Lead Plaintiffs RH Capital Associates LLC and Pacific Investment Management Company LLC and Co-Lead Counsel for the Putative Class

Defendant Philip Silverman's ("Silverman") motion for partial reconsideration of the Court's April 30, 2007 Opinion and Order (the "Order") is an exercise in futility. As explained below, reconsideration of Plaintiffs' allegations of Silverman's motive to commit fraud ***will not*** change the disposition of the claims against him, because the Court held that Plaintiffs' allegations of Silverman's recklessness are independently sufficient to plead his scienter.[1] Indeed, Silverman concedes that Plaintiffs' Section 10(b) claim against him will proceed regardless of the Court's ruling on the present motion.[2] Silverman's motion for reconsideration should therefore be denied.

"Reconsideration of a court's previous order is an 'extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.'" *SEC v. Treadway*, 354 F. Supp. 2d 311, 313 (S.D.N.Y. 2005) (citation omitted). "Motions for reconsideration are not opportunities to re-argue issues or allegations already considered, and thus the rule should be 'narrowly construed and strictly applied.'" *In re Salomon Analyst Level 3 Litig.*, 373 F. Supp. 2d 248, 250 (S.D.N.Y. 2005) (citation omitted). *See also Slue v. New York Univ. Med. Ctr.*, No. 04 Civ. 2087, 2006 WL 212294, at *1 (S.D.N.Y. Jan. 26, 2006) (citation omitted); *In re ProNetLink Sec. Litig.*, No. 03 Civ. 2298, 2006 WL 1029069, at *1 (S.D.N.Y. Apr. 19, 2006) ("A motion for reconsideration is 'not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved.'") (citation omitted).

Motions for reconsideration pursuant to Local Civil Rule 6.3 are governed by "the same standards applicable to motions pursuant to Federal Rule of Civil Procedure 59(e), and thus 'a

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[1] *See* Order at 54-55, 62-63.

[2] *See* Defendant Silverman's Memorandum of Law in Support of His Motion for Partial Reconsideration, at 1 n.1.

motion for reconsideration is appropriate only where the movant demonstrates that the Court has overlooked controlling decisions or factual matters that were put before it on the underlying motion ... and which, had they been considered, ***might have reasonably altered the result before the Court.***'" *JPMorgan Chase Bank v. Cook*, 322 F. Supp. 2d 353, 354-55 (S.D.N.Y. 2004) (emphasis added; citation omitted). *See also BMS Entm't/Heat Music LLC v. Bridges*, No. 04 Civ. 2584, 2005 WL 2675088, at *1 (S.D.N.Y. Oct. 20, 2005) ("According to the Second Circuit, '[t]he standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'") (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)).

Where reconsideration will have no effect on the resolution of the underlying motion, a motion for reconsideration should be denied. *See JPMorgan Chase Bank*, 322 F. Supp. 2d at 358-59 (denying motion for reconsideration that would lead to a "purely theoretical … exercise … [whose] outcome cannot possibly alter the result in the [prior] [o]rder"); *Treadway*, 354 F. Supp. 2d at 313-14 (denying motion to reconsider denial of motion to dismiss, where defendant claimed that court overlooked the absence of allegations of his knowledge, but where there were alternative grounds for defendant's liability that did not require his knowledge); *Johnson v. Martin*, No. 2:00-CV-75, 2006 WL 223108, at *1 (W.D. Mich. Jan. 30, 2006) (denying motion to reconsider because "even if the Court were to revisit its Ruling … the end result would remain exactly the same"); *Ramada Franchise Sys., Inc. v. Royal Vale Hospitality of Cincinnati*, No. 02 C 1941, 2004 WL 2966948, at **2, 4-5 (N.D. Ill. Nov. 24, 2004) (denying motion for reconsideration of one basis for Court's ruling, where movant made "no attempt whatsoever to address the alternative and independent bases for the Court's ruling"); *Croft v. Harder*, Civ. A.

No. 86-1692-T, 1990 WL 11608, at *1 (D. Kan. Jan. 9, 1990) (denying motion for reconsideration which was addressed to only one of two alternative grounds for the ruling).

In this case, reconsideration would not alter the Court's conclusion that Plaintiffs have stated a Section 10(b) claim against Silverman. Under Second Circuit case law, a plaintiff may allege scienter ***either*** by pleading a defendant's motive and opportunity to commit fraud ***or*** by pleading his knowledge or recklessness. *See Rothman v. Gregor*, 220 F.3d 81, 90 (2d Cir. 2000) (emphasis added). In its April 30, 2007 Order, this Court held that Plaintiffs have established a strong inference of Silverman's scienter under ***both*** of these alternative approaches.[3] Now, Silverman seeks reconsideration ***only*** as to the Court's findings regarding Plaintiffs' allegations of his motive, reasserting arguments that were set forth in both his opening and reply briefs in support of his motion to dismiss.[4] Although Silverman suggests that the Court overlooked those arguments, the Order's numerous citations and references to Silverman's arguments in support of his motion suggest that the Court understood and duly considered them.[5] However, even if Silverman were correct that the Court overlooked his arguments regarding Plaintiffs' "motive" allegations, Silverman cannot show that consideration of those arguments "might have reasonably altered the result before the Court," as Rule 59(e) and Local Rule 6.3 require. To the contrary, Silverman readily admits that Plaintiffs' Section 10(b) claim against Silverman will survive no matter how the Court rules on his motion for reconsideration, because the Court has found Plaintiffs' allegations of Silverman's recklessness sufficient to plead his scienter.

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[3] *See* Order at 54-55, 62-63.

[4] *See* Memorandum of Law in Support of Defendant Philip Silverman's Motion to Dismiss the Amended Consolidated Class Action Complaint, at 17-19; Defendant Philip Silverman's Reply Memorandum of Law in Support of His Motion to Dismiss the First Amended Consolidated Class Action Complaint, at 4.

[5] *See, e.g.*, Order at 14 n.8, 25, 28, 39, 44, 48-50, 56.

While Silverman claims that the Court should reconsider its ruling in order to create an "accurate record," doing so would serve no useful purpose. *See generally* 11 Charles Alan Wright et al., *Federal Practice and Procedure*: *Civil 2d* § 2810.1 ("amendment of the judgment [pursuant to Rule 59(e)] will be denied if it would serve no useful purpose"). The Court's ruling that the Complaint gives rise to strong inference of Silverman's scienter is an interlocutory order that does not conclusively establish any element of Plaintiffs' claims; it simply means that Plaintiffs' allegations are sufficient to allow them to proceed to discovery. Changing this ruling would not alter the course of discovery or trial because, having already satisfied the scienter pleading standard through allegations of recklessness, Plaintiffs are free to pursue discovery in support of their claims – including discovery regarding Silverman's motive – and ultimately to present evidence of his motive at trial. As the Supreme Court recognized in an opinion issued earlier this week, "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," and there is a "breadth of opportunity to prove what an adequate complaint claims." *Bell Atlantic Corp. v. Twombly*, No. 05-1126, 2007 WL 1461066, at *11 (May 21, 2007).[6] Because "as a practical matter [reconsideration] would have no effect whatever on the conclusion in the [prior] Order," *JPMorgan Chase Bank*, 322 F. Supp. 2d at 358, Silverman's motion for reconsideration should be denied.

[6] *See also Crowell v. Ionics, Inc.*, 343 F. Supp. 2d 1, 16 n.8 (D. Mass. 2004) (where plaintiff fails to allege that defendant profited from stock trading, but adequately alleges pecuniary motives for the alleged wrongful acts, "[t]his second theory of motive is sufficient to get the case to discovery, where it is entirely possible that [the plaintiff] could learn that at least one of the [defendants] did in fact profit from stock trading").

WHEREFORE, Plaintiffs respectfully request that the Court deny defendant Silverman's motion for partial reconsideration of this Court's Opinion and Order dated April 30, 2007.

Dated: May 24, 2007

Respectfully submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

By: /s/ Salvatore J. Graziano
Max W. Berger (MB-5010)
John P. Coffey (JC-3832)
Salvatore J. Graziano (SG-6854)
John C. Browne (JB-0391)
Jeremy P. Robinson
1285 Avenue of the Americas
New York, NY 10019
Telephone: (212) 554-1400
Facsimile: (212) 554-1444

GRANT & EISENHOFER P.A.

By: /s/ James J. Sabella
Stuart M. Grant (SG-8157)
James J. Sabella (JS-5454)
485 Lexington Avenue
29th Floor
New York, NY 10017
Telephone: (646) 722-8500
Facsimile: (646) 722-8501
- and -
Megan D. McIntyre
Christine M. Mackintosh
Jill Agro
Chase Manhattan Centre
1201 North Market Street
Wilmington, DE 19801
Telephone: (302) 622-7000
Facsimile: (302) 622-7100

Attorneys for Lead Plaintiffs RH Capital Associates LLC and Pacific Investment Management Company LLC and Co-Lead Counsel for the Putative Class

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2007 the attached **LEAD PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT SILVERMAN'S MOTION FOR PARTIAL RECONSIDERATION** was served via Electronic Mail and First-Class U.S. Mail to the following parties:

Bruce R. Braun (BB2505)
Bradley E. Lerman (BL1993)
Linda T. Coberly (LC8078)
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
Telephone: (312) 558-5600
Fax: (312) 558-5700

David Mollón (DM5624)
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 294-6700
Fax: (212) 294-4700

Margaret Maxwell Zagel
Tracy W. Berry
GRANT THORNTON LLP
175 W. Jackson Blvd., 20th Floor
Chicago, IL 60604
Telephone: (312) 856-0001
Fax: (312) 565-3473

Attorneys for Defendant Grant Thornton LLP

Helen B. Kim (HK-8757)
BAKER & HOSTETLER LLP
333 South Grand Avenue
Los Angeles, CA 90071-1523
Telephone: (213) 975-1611
Fax: (213) 975-1740

Marc D. Powers (MP-1528)
BAKER & HOSTETLER LLP
666 Fifth Avenue
New York, NY 10103
Telephone: (212) 589-4200
Fax: (212) 589-4201

Richard E. Nathan (RN-6487)
NATHAN LAW OFFICE
123 South June Street
Los Angeles, CA 90004
Telephone: (323) 931-8080
Fax: (323) 931-8008

Robert B. McCaw (RM-7427)
Lori A. Martin (LM-7125)
John V.H. Pierce (JP-2870)
Dawn M. Wilson (DW-3810)
WILMER CUTLER PICKERING
HALE and DORR LLP
399 Park Avenue
New York, NY 10022
Telephone: (212) 230-8800
Fax: (212) 230-8888
Attorneys for the Underwriter Defendants

Scott E. Hershman
Stephen R. Blacklocks
Richard Soto
HUNTON & WILLIAMS LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 309-1000

Attorneys for Defendant Santo C. Maggio

Jeffrey T. Golenbock (JG 2217)
Adam C. Silverstein (AS 4876)
GOLENBOCK EISEMAN ASSOR
BELL & PESKOE LLP
437 Madison Avenue, 35th Floor
New York, NY 10022-7302
Telephone: (212) 907-7300
Fax: (212) 754-0330

Attorneys for Defendants Phillip R. Bennett, Refco Group Holdings Inc., and Phillip R. Bennett Three Year Annuity Trust

Attorneys for Defendant Dennis A. Klejna

Holly K. Kulka (Bar No. 158692)
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
Telephone: (212) 832-8300
Fax: (212) 763-7600

Attorneys for Defendant Philip Silverman

Stuart L. Shapiro (SS 0894)
Matthew J. Sava (MS 9231)
Yoram J. Miller (YM 4207)
SHAPIRO FORMAN ALLEN SAVA & McPHERSON LLP
380 Madison Avenue
New York, NY 10017
Telephone: (212) 972-4900
Fax: (212) 557-1275

Attorneys for Defendants Joseph J. Murphy and Gerald M. Sherer

Greg A. Danilow (GD-1621)
Paul Dutka (PD-2568)
Seth Goodchild
Joshua S. Amsel
WEIL GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
Fax: (212) 310-8007

Attorneys for the "THL" and "Audit Committee" Defendants

Michael T. Hannafan (*pro hac vice*)
Blake T. Hannafan (*pro hac vice*)
Nicholas A. Pavich (*pro hac vice*)
HANNAFAN & HANNAFAN, LTD.
One East Wacker Drive
Suite 1208
Chicago, IL 60601
Telephone: (312) 527-0055
Fax: (312) 527-0220

Norman Eisen (*pro hac vice*)
Melinda Sarafa (MS-9943)
ZUCKERMAN SPAEDER LLP
1540 Broadway, Suite 1604
New York, NY 10036-4039
Telephone: (212) 704-9600
Fax: (212) 704-4256

Attorneys for Defendant Tone Grant

Ivan Kline (IK-9591)
Stuart I. Friedman (SF-9186)
Elizabeth D. Meacham (EM-0890)
FRIEDMAN & WITTENSTEIN
600 Lexington Avenue
New York, NY 10022
Telephone: (212) 750-8700
Fax: (212) 223-8391

Attorneys for Defendant William M. Sexton

Barbara Moses (BM-2952)
Rachel Korenblat (RK-0170)
MORVILLO, ABRAMOWITZ, GRAND IASON, ANELLO & BOHRER, P.C.
565 Fifth Avenue
New York, New York 10017
Telephone: (212) 865-9600
Fax: (212) 865-9494

Attorneys for Defendant Robert Trosten

James J. Sabella (JS-5454)
GRANT & EISENHOFER P.A.
485 Lexington Avenue
29th Floor
New York, NY 10017
Tel: (646) 722-8500
Fax: (646) 722-8501