UNITED STATES DISTRICT COURT
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 SETTLEMENT WITH DEFENDANT SANDLER O'NEILL & PARTNERS, L.P. AND (II) PRELIMINARY CERTIFICATION OF CLASS FOR PURPOSES OF SETTLEMENT

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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 settlement of this securities class action as against defendant Sandler O'Neill Partners, L.P. ("Sandler"), and (ii) preliminary certification of the proposed class for purposes of the settlement with Sandler. A copy of the Stipulation of Settlement is attached as Exhibit A to the Declaration of James J. Sabella, submitted herewith.

PRELIMINARY STATEMENT

Commencing in October 2005, multiple securities class action complaints were filed against Refco Inc. ("Refco"), certain of Refco's former officers and directors, and Refco's auditors and underwriters. By Order dated February 8, 2006, the Court consolidated the class actions, appointed RH Capital Associates LLC and Pacific Investment Management Company LLC as Lead Plaintiffs, and appointed the law firms of Grant & Eisenhofer P.A. and Bernstein Litowitz Berger & Grossmann LLP to serve as co-lead counsel ("Co-Lead Counsel") for the putative class.

On May 5, 2006, Lead Plaintiffs filed a First Amended Consolidated Class Action Complaint in this federal securities class action. In that Complaint, Lead Plaintiffs asserted claims against Sandler, one of the underwriters of Refco's August 2005 initial public offering ("IPO"), pursuant to Sections 11 and 12 of the Securities Act of 1933.

Co-Lead Counsel have engaged in extensive discovery, including the review and analysis of millions of pages of documents that have been produced by the defendants and various third parties. On December 3, 2007, Lead Plaintiffs filed a Second Amended Complaint which

incorporates some of the facts obtained through discovery. The Second Amended Complaint asserts the same claims against Sandler that were asserted in the previously filed complaint.

Counsel for Sandler and Co-Lead Counsel engaged in extensive arm's-length settlement discussions, which culminated in an agreement – subject to Court approval – to settle the action as against Sandler (the "Settlement") on terms that include the payment of $3,500,000 in cash for the benefit of the Settlement Class (defined below).

Given the substantial cash settlement proceeds to be provided by Sandler, Lead Plaintiffs believe the Settlement is fair, reasonable and adequate, and in the best interests of the Settlement Class. In light of the benefits achieved, the cost and risk of continuing the litigation against Sandler through trial and appeals, and the arm's-length negotiation and approval of the Settlement by the Court-appointed institutional investor Lead Plaintiffs, the Settlement warrants the Court's preliminary approval as within the range of possible final 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 not only favored in this Circuit, but has already been granted once in this case in connection with the prior settlement with defendant BAWAG. As was the case in that settlement, here the interested parties have consented to certification of a settlement class after protracted negotiations between experienced counsel dealing at arm's-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 Settlement.

Finally, in the interests of conserving expenses to the Settlement Class, the parties have agreed and request the Court to defer until a later date the approval of a proposed notice and

notice procedures for the Settlement, and the scheduling of a hearing for final approval of the Settlement. The Court adopted that approach in connection with preliminary approval of the settlements with defendants Klejna and Murphy.

Accordingly, and for the reasons discussed more fully below, Lead Plaintiffs request that the Court enter an order preliminarily approving the Settlement, and preliminarily certifying the Settlement Class.

ARGUMENT

I. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

The proposed Settlement represents a very favorable resolution of the Settlement Class members' claims against Sandler. Among other things, it provides meaningful monetary benefits to the Settlement Class of $3,500,000 from a defendant whom Lead Plaintiffs believe to bear responsibility for the damages suffered by the Settlement Class, but whom Lead Plaintiffs do not believe to be among the most culpable defendants in the action, especially as Sandler's share of the IPO underwriting was only 2.78%. 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 Sandler. In addition, any victory on behalf of the Settlement Class at trial would likely be appealed by Sandler, thereby creating further uncertainty and delay.

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 Initial Pub. Offering 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).

The terms of the proposed Settlement are plainly "within the range of possible approval." *Initial Pub. Offering*, 226 F.R.D. at 191. The payment of $3,500,000 to be provided by Sandler, when viewed in the context of the significant risks and uncertainties involved with continued litigation against Sandler, make the Settlement extremely beneficial to the Settlement Class. Moreover, the 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 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 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 Class Period and were damaged thereby (the "Settlement Class"). The Settlement Class excludes (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 Settlement Class is any person or entity

who or which properly excludes himself, herself or itself by filing a valid and timely request for exclusion.

This Court has already recognized that a class may be certified for purposes of settlement, having done so for purposes of Lead Plaintiffs' earlier settlements in this action with defendants BAWAG, Klejna and Murphy.[1] Indeed, the Second Circuit has long acknowledged the propriety of class certification 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 the case of 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 Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995) (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*

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[1] The proposed definition of the Settlement Class for purposes of this Settlement is identical to that certified by the Court in connection with the BAWAG settlement, with two minor exceptions. First, in light of the amendment of the Class Period in the Second Amended Complaint, the start date for the proposed Class Period is July 1, 2004 for this Settlement whereas it was August 5, 2004 for the BAWAG settlement. This change will make no practical difference to the composition of the Settlement Class, however, because the securities underlying this action were not issued until August 5, 2004, and therefore there were no purchasers of those securities between July 1 and August 4, 2004. The Class Period was amended to broaden the scope of actionable conduct by the defendants, not to expand the scope of the putative class. The second difference in the Settlement Class definition is that persons affiliated with Mayer Brown LLP are excluded from the proposed Settlement Class for this Settlement, in light of Lead Plaintiffs' assertion of claims against that firm subsequent to the BAWAG settlement.

Prudential, 163 F.R.D. at 205. Class certification is appropriate here, as it was for purposes of the BAWAG settlement, 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). 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, as the Court recognized when certifying essentially the same Settlement Class for purposes of the BAWAG settlement, joinder of all class members would be impracticable and the Settlement Class is sufficiently numerous to satisfy Rule 23(a)(1). *See also 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 Copper Litig.*, 189 F.R.D. 274, 278 (S.D.N.Y. 1999) (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 Sandler for violations of the Securities Act. These claims present many questions of law and fact which are common to all members of the Settlement Class, including:

- Whether Sandler participated in and pursued the course of conduct described in the Complaint;
- Whether Sandler's conduct violated Section 11 or 12 of the Securities Act;
- Whether Sandler can establish any of its affirmative defenses to liability under the Securities Act;
- To what extent the Settlement Class members have sustained damages and the proper measure of damages.

Thus, there are questions of law and fact common to the Settlement 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 alleged course of conduct by Sandler, 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 and when approving the settlement Co-Lead Counsel previously negotiated with BAWAG. 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 alleged course of conduct by Sandler forms the basis of all Settlement Class members' claims against it. There are numerous common issues relating to Sandler's liability – including but not limited to its course of conduct and its ability to prove any affirmative defenses – which predominate over any individualized issues. The predominance requirement of Rule 23(b)(3) is therefore satisfied for purposes of this Settlement, just as it was for purposes of the BAWAG settlement.

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 Sandler and the other defendants, 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.

CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court: (1) preliminarily approve the proposed Settlement as within the range of possible fairness, reasonableness and adequacy; and (2) preliminarily certify the Settlement Class. A proposed Order is attached as Exhibit A to the Stipulation, filed herewith.

DATED: October 27, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2008 the attached **Lead Plaintiffs' Notice of Motion for Preliminary Approval of Settlement with Defendant Sandler O'Neill Partners LP and Preliminary Certification of Class for Purposes of Settlement; Lead Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Approval of Settlement with Defendant Sandler O'Neill Partners LP and Preliminary Certification of Class for Purposes of Settlement; and Declaration of James J. Sabella in Support of Motion for Preliminary Approval of Settlement with Defendant Sandler O'Neill Partners LP and Preliminary Certification of Class for Purposes of Settlement** were filed electronically. Notice of this filing will be electronically mailed to all parties registered with the Court's electronic filing system.

/s/ James J. Sabella
James J. Sabella