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 OPPOSITION TO THE MOTION BY DEFENDANTS CREDIT SUISSE SECURITIES (USA) LLC AND GOLDMAN SACHS & CO. FOR RECONSIDERATION OR VACATUR OF THE COURT'S ORDER GRANTING PRELIMINARY APPROVAL OF THE SETTLEMENT WITH DEFENDANT SANDLER O'NEILL & PARTNERS, L.P.

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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 opposition to the motion by Defendants Credit Suisse Securities (USA) LLC and Goldman, Sachs & Co. ("Two Lead Underwriters") for reconsideration or vacatur of this Court's November 6, 2008 Order granting preliminary approval of Lead Plaintiffs' settlement with Defendant Sandler O'Neill Partners, L.P. ("Sandler").[1]

PRELIMINARY STATEMENT

"There is no question that fostering settlement is an important Article III function of the federal district courts." *United States v. Glens Falls Newspapers*, 160 F.3d 853, 856 (2d Cir. 1998). Indeed, there is a longstanding "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998); *see Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982). That policy would be frustrated, however, if courts could not enter bar orders precluding contribution claims, because the right to sue a settling defendant for contribution would "surely diminish the incentive to settle." *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1028 (2d Cir. 1992). Without the ability to limit the liability of settling defendants through bar orders, "it is likely that no settlements" could be reached. *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368-69 (2d Cir. 1991).

That, of course, is the Two Lead Underwriters' goal. They seek to narrow the scope of the Sandler bar order in order to prevent any of the Refco underwriters from breaking ranks and

[1] Interestingly, the third lead underwriter on the Refco initial public offering, Banc of America Securities LLC, has ***not*** joined the other Two Lead Underwriters in seeking reconsideration or vacatur of the preliminary approval order.

starting a flow of settlements. The Lead Underwriters' brief[2] asserts that a bar order cannot cut off contribution rights that derive from a contract; that the standard claim reduction provision based on the settling defendant's proportionate degree of fault is improper because it does not also reduce any future judgment by the shares of insolvent defendants; and that the standard Master Agreement Among Underwriters ("MAAU") obligates settling underwriters to continue to pay toward the legal defense costs of non-settling underwriters, even after they settle with plaintiffs, and that a bar order cannot extinguish such supposed liability. None of these propositions is valid, and all of them are designed to obstruct the Sandler and any future non-lead underwriter settlements. Simply put, these two underwriters would create a situation in which no Refco underwriter could settle this case with plaintiffs unless they ***all*** settled together.[3]

As discussed below, there is no need for the Court even to address any of the Two Lead Underwriters' arguments at this time. The proper time to consider the Two Lead Underwriters' objections to the settlement is at the fairness hearing in connection with a motion for final approval of the settlement. In any event, the Two Lead Underwriters' arguments are contrary to the law and policy regarding partial settlements of securities cases. Indeed, many of the arguments that the Two Lead Underwriters make were also made and specifically rejected in *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 U.S. Dist. LEXIS 3791 (S.D.N.Y. Mar. 15, 2005), a case that, although it is directly on point, somehow is not mentioned in the Two Lead Underwriters' brief.

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[2] The Lead Underwriters' Opposition to the Plaintiffs' Motion for Preliminary Approval of the Proposed Sander O'Neill Settlement, and Memorandum in Support of Their Motion in the Alternative for Reconsideration or Vacatur of Preliminary Approval Order, dated Nov. 7, 2008 ("Lead UW Br.").

[3] Under the Settlement Stipulation, Sandler has the right to terminate the settlement unless judgment is entered in all material respects in the form of the proposed judgment annexed to the Settlement Stipulation. *See* Settlement Stipulation ¶ 33. If Sandler is going to continue to be exposed to large claims for the non-settling underwriters' legal defense costs, Sandler may well exercise this right.

Therefore, it is respectfully submitted that reconsideration should be denied, or, if reconsideration is granted, on reconsideration the Court should adhere to its order granting preliminary approval of the settlement.[4]

I. THERE IS NO REASON FOR THE COURT TO DEAL WITH THE TWO LEAD UNDERWRITERS' OBJECTIONS AT THIS JUNCTURE

The Court does not need to address the Two Lead Underwriters' objections to the proposed settlement at this juncture. All of those objections are preserved and can be adjudicated in connection with the fairness hearing and motion for final approval of the settlement.

On a motion for preliminary approval, the test is merely whether the settlement amount "falls within the range of possible approval." *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 time for litigating objections is in connection with the fairness hearing and motion for final approval.

In re Parmalat Sec. Litig., No. 04 Civ. 0030 (LAK), slip op (S.D.N.Y. Mar. 6, 2007),[5] presented a situation directly comparable to that at bar. In *Parmalat*, as here, the court entered

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[4] The Two Lead Underwriters state that they informed counsel for Lead Plaintiffs that they objected to the settlement and suggest that Lead Plaintiffs' counsel should have notified the Court. *See* Lead UW Br. at 1, 6. They omit to mention that in their call to Lead Plaintiffs' counsel, James J. Sabella, which occurred on November 4, they also stated that they were having continuing negotiations with Sandler in an attempt to resolve the issues without an objection. Lead Plaintiffs' counsel later confirmed with counsel for Sandler that Sandler and the Two Lead Underwriters were, in fact, having continuing discussions concerning the Two Lead Underwriters' concerns. Only the Two Lead Underwriters, and not Lead Plaintiffs, knew whether or not an objection was a certainty. Furthermore, the Two Lead Underwriters also overlook that their counsel admitted in the November 4 call with Lead Plaintiffs' counsel that they were aware of the contents of the October 28 letter from Lead Plaintiffs' counsel to the Court. Nowhere explained in the Two Lead Underwriters' brief is why, given their knowledge of the contents of the October 28 letter, the Two Lead Underwriters did not inform the Court of their intention to file an objection, if they believed such notification was necessary.

[5] A copy of this order is attached hereto as Exhibit A.

an order granting preliminary approval of a settlement with certain defendants, prior to expiration of the time to respond to the motion for preliminary approval. Non-settling defendants moved for reconsideration, objecting to the settlement on various grounds. Declining to alter his order granting preliminary approval, Judge Kaplan stated that the non-settlors' objections were "not a good enough reason to upset this apple cart at this stage of the proceedings. There is time enough to take account of all relevant considerations when the settlement ultimately is presented for approval."[6]

This Court took essentially the same approach in connection with the proposed settlements in this case with Defendants Dennis A. Klejna and Joseph J. Murphy. Non-settling defendants objected to preliminary approval of both of those settlements. Noting the relatively low threshold for preliminary approval, the Court granted preliminary approval of the settlements.[7]

II. IT IS APPROPRIATE FOR A BAR ORDER TO CUT OFF ALL CONTRIBUTION CLAIMS, INCLUDING CLAIMS BASED ON A CONTRACT

The Two Lead Underwriters' suggestion that a bar order cannot extinguish contribution claims based in contract is simply wrong. The Two Lead Underwriters do not cite any cases holding that a bar order cannot extinguish such claims, and the reason for that omission is clear: it is settled law that a bar order can extinguish all contribution claims against the settling defendant, whether based in contract or otherwise. Otherwise, a settling defendant could not obtain the peace that it seeks by settling.

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[6] *Id.* at 1.

[7] *See* Order entered Jan. 22, 2008 (D.I. #459); Order entered Mar. 26, 2008 (D.I. #508).

Directly on point is *WorldCom,* 2005 U.S. Dist. LEXIS 3791, where, precisely as at bar, the non-settling underwriter, who was sued under Section 11 of the Securities Act of 1933, 15 U.S.C. §77k, objected to a settlement by other underwriters. The non-settling underwriter asserted, *inter alia*, that the bar order was unfair because it "would forbid it from pursuing contractual contribution claims against the settling …Defendants under the MAAUs." *Id.* at *16. In particular, the non-settling underwriter argued in *WorldCom*, as the Two Lead Underwriters do at bar, that the bar order inappropriately barred claims based on the contractual provision in the MAAU that "calls for a redistribution of a judgment against a non-settling Underwriter Defendant among other underwriters in proportion to their participation in the offering." *Id.* at *38. In a lengthy, well-reasoned opinion, Judge Cote held that it was appropriate for the bar order to extinguish all contribution claims, including those based in contract, and she overruled the objection. *Id.* at *36-40. As she noted, if contractual contribution claims cannot be barred, "settlement negotiations would become an all-or-nothing game that might effectively coerce some underwriters into proceeding to trial if one or more fellow underwriters refused to settle." *Id.* at *36.

Similarly, *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540 (D. Colo. 1989), involved the question of whether the bar order in a settlement of, *inter alia*, Section 11 claims could bar "contractual contribution … based on the provisions of the parties' underwriting agreement." *Id.* at 554. The court held that it can, and approved the settlement. *Id.*

Therefore, it is necessary and appropriate for bar orders to extinguish contribution rights based on contract in the same way that such orders may encompass contribution rights based on a statute or the common law.

III. THERE IS NO MERIT TO THE OBJECTION THAT THE SETTLEMENT PROVISIONS NEED TO BE REVISED TO TAKE INTO ACCOUNT PROVISIONS IN THE MAAU THAT WOULD REDISTRIBUTE LIABILITY IN THE EVENT THAT THERE MIGHT BE INSOLVENT DEFENDANTS

The Two Lead Underwriters also complain that the settlement cuts off their right under the MAAU to require Sandler to pay its proportionate share of "any insolvent defendant's liability, without providing any judgment reduction or other credit" for the loss of this right. Lead UW Br. at 8-9. They argue that if some defendants become insolvent, the non-settling underwriters might be held responsible for the shares of those insolvent defendants, and that the claim reduction provision in the settlement needs to reduce a future judgment not only by Sandler's proportionate degree of fault but also by the share attributable to insolvent defendants. The Two Lead Underwriters cite no authority for their argument, and the law is decidedly against it.

The Two Lead Underwriter's position runs contrary to the formulation of liability under Section 11. Except for outside directors (who are liable generally only for their proportionate share of the damages found by the jury on a Section 11 claim), all defendants found liable for a Section 11 violation are jointly and severally liable for the full amount of the damages (with a cap for underwriters up to the amount of the offering that they underwrote). Under Section 11(e), non-settling underwriters maintain a right of contribution against any other non-settling defendants – which the present settlement does not impact at all – and could seek to collect from such non-settling defendants up to their proportionate share as found by the jury. But that right of contribution does not limit the amount that Plaintiffs can recover from Two Lead Underwriters, nor should it impact the bar against claims for contribution that shields settling defendants.

In *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994), the Supreme Court explained the interplay between joint and several liability and the proportionate share approach to settlements:

> Joint and several liability applies when there has been a judgment against multiple defendants. ***It can result in one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control, such as a defendant's insolvency.*** When the limitations on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall.

Id. at 220-21 (emphasis added).

The precise argument that the Two Lead Underwriters make here was made and rejected in *WorldCom*, where the non-settling underwriter similarly argued that the judgment reduction provision was unfair because it did not take into account how the contribution provisions of the MAAU would redistribute liability if some of the defendants were insolvent. *See WorldCom*, 2005 U.S. Dist. LEXIS 3791, at *10. The judgment reduction provision in *WorldCom* was in all material respects identical to that in the Sandler settlement.[8] Rejecting the non-settling underwriter's argument that the claim reduction provision was improper because it did not take into account the possibility that some defendants could be insolvent, the *WorldCom* court noted

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[8] In *WorldCom*, the judgment reduction provision was as follows:

> The Non-Settling Entities/Individuals shall be entitled to judgment credit in an amount that is the greater of the amount allocated in the Settlement to claims for which a Non-Settling Entity/Individual may be found liable for common damages or, for each such claim, the proportionate share of the [Settling] Defendants' fault as proven at trial.

WorldCom, 2005 U.S. Dist. LEXIS 3791, at *9. The judgment reduction provision in the Sandler settlement provides:

> Any final verdict or judgment that may be obtained by or on behalf of the Settlement Class or a Settlement Class Member against a Non-Settling Defendant or Non-Settling Defendants be reduced by the greater of: (i) an amount that corresponds to the percentage of responsibility of the Sandler O'Neill for common damages; or (ii) the amount paid by or on behalf of the Sandler O'Neill to the Class for common damages.

Settlement Stipulation Exh. B ¶ 11. It should also be noted that the judgment reduction provision in the Sandler settlement is the same as the one that the Court approved in connection with the settlement herein with BAWAG.

(Cont'd)

that the non-settling underwriter was "effectively arguing that traditional principles of joint and several liability are unfair. It is undisputable, however, that joint and several liability is prescribed by Section 11 for all defendants except outside directors. *See* 15 U.S.C. § 77k(f)." *Id.* at *30. While noting that "[i]t is understandable that underwriters, particularly lead underwriters, would try to contract out of the implications of joint and several liability," *id.* at *39, the court nevertheless upheld the proposed claim reduction provision. *Id.* at *34.

The Two Lead Underwriters argue that the claim reduction provisions of the PLSRA that apply to claims under the Securities Exchange Act lend support to their argument. *See* Lead UW Br. at 9-10. In fact, those provisions cut against the Two Lead Underwriters' position. As Judge Cote explained in *WorldCom*:

> Congress codified a judgment reduction formula in the PSLRA (the "PSLRA Formula") applicable to "covered persons" – Exchange Act defendants and outside-director Section 11 defendants, 15 U.S.C. § 78u-4(f)(10)(C) – that is virtually the same as the Judgment Reduction Formula of the BOA Settlement. *See id.* § 78u-4(f)(7)(B). When the PSLRA Formula was created, the drafters certainly had insolvent defendants in mind; another provision of Section 21D(f) sets forth a detailed scheme for collection of uncollectible shares from covered persons *after* a judgment. *See id.* § 78u-4(f)(4). Nevertheless, the PSLRA Formula does not provide for an uncollectible share of a judgment to be factored into the judgment credit.

WorldCom, 2005 U.S. Dist. LEXIS 3791, at *33.

Gerber v. MTC Electronic Technologies Co., 329 F.3d 297 (2d Cir. 2003), provides further support for rejecting the Two Lead Underwriters' argument. *Gerber* involved claims under the Securities Exchange Act, which, at the time that case was filed (*i.e.*, before enactment of the PSLRA), still exposed all defendants to joint and several liability. The Second Circuit upheld a judgment reduction formula based on the settling defendants' proportionate share of

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No one, including the Two Lead Underwriters, objected that the BAWAG judgment reduction provision failed to take into account the shares of possibly insolvent defendants.

fault, without any suggestion that the possibility that a non-settling defendant might be insolvent should be reflected in the judgment reduction credit. *See id.* at 302-05.

Therefore, it is appropriate for the bar order to extinguish all contribution claims, including those based on the MAAU, and the judgment reduction provision does not need to be changed to take into account the possibility that some defendants may be insolvent.

IV. THE SETTLEMENT PROVISIONS SHOULD NOT BE REVISED TO ALLOW NON-SETTLING UNDERWRITERS TO PURSUE CLAIMS FOR ATTORNEYS' FEES UNDER THE AGREEMENT AMONG UNDERWRITERS

The Two Lead Underwriters argue that under the standard form MAAU, each underwriter is required to contribute its proportionate share of legal defense costs, that a settling underwriter (or, presumably, even underwriters who were never sued) remains obligated to contribute to the defense costs of non-settling underwriters, and that a bar order cannot terminate such obligation. The Court should reject this argument.

It would be a bizarre and unconscionable result if, where all underwriters except one settle, all of those settling underwriters were obligated to pay the defense costs of the lone non-settlor. "[S]ettlement negotiations would become an all-or-nothing game that might effectively coerce some underwriters into proceeding to trial if one or more fellow underwriters refused to settle." *WorldCom*, 2005 U.S. Dist. LEXIS 3791, at *36. It strains credulity to believe that the underwriters who entered into the MAAU viewed the agreement as leading to the result that the Two Lead Underwriters advocate.

Furthermore, the Two Lead Underwriters' position that Sandler should be exposed to continuing liability for attorneys' fees being paid to defend all of the non-settling underwriters would, if upheld, provide a major if not fatal blow to settlement efforts in any multi-underwriter case. Settlements often are negotiated to avoid the "expenses inherent in complex class action litigation." *In re Sony SXRD Rear Projection TV Class Action Litig.*, No. 06 Civ. 5173 (RPP),

2008 U.S. Dist. LEXIS 36093, at *7 (S.D.N.Y. May 1, 2008); *see Neuwirth v. Allen*, 338 F.2d 2, 3 (2d Cir. 1964) ("one of the purposes of settlement is to avoid further expense"). Inability to bar continued claims against settling defendants to contribute to defense costs would present "a scenario that would certainly significantly diminish their incentive to settle in the first place." *WorldCom*, 2005 U.S. Dist. LEXIS 3791, at *38.[9]

CONCLUSION

It is respectfully submitted that reconsideration or vacatur should be denied, or, if reconsideration is granted, on reconsideration the Court should adhere to its order granting preliminary approval of the settlement with Sandler.

[9] The Court cannot simply amend the terms of the settlement, as the Two Lead Underwriters urge. *See* Lead UW Br. at 10-11. Under the Settlement Stipulation, Sandler has the right to terminate the settlement unless judgment is entered in all material respects in the form of the proposed judgment annexed to the Settlement Stipulation. *See* Settlement Stipulation ¶ 33.

Dated: November 17, 2008

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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-- x
In re PARMALAT SECURITIES LITIGATION

MASTER DOCKET
04 MD 1653 (LAK)

This document relates to: 04 Civ. 0030
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ORDER

LEWIS A. KAPLAN, *District Judge.*

On March 1, 2007, I granted a motion by Lead Plaintiffs and others for preliminary approval of and other relief with respect to a proposed class settlement with Banco Nazionale del Lavoro S.p.A. and the Credit Suisse defendants to the extent of preliminarily certifying a class for settlement purposes with the settling defendants, directing notice to the class, and scheduling the proceedings that are usual in such cases.

A number of non-settling defendants have moved for reconsideration. They point out that I acted before the time for filing of opposition papers had expired and raise a number of objections to even a provisional certification of a class.

The moving defendants are right in pointing out that I acted on the Lead Plaintiffs' motion shortly before the expiration of the time for filing opposing papers, correctly supposing that I did so in the expectation that no opposition would be forthcoming. In consequence, I grant the motion for reconsideration for the purpose of considering their papers and arguments.

The moving defendants contend that no settlement class should be certified here because the requirements of Rule 23 have not been satisfied. They argue further that no settlement class may include foreign purchasers because the Court lacks subject matter jurisdiction over their claims. Finally, they raise certain objections to the form of notice.

The moving defendants vigorously oppose certification of a class with respect to the claims against them, and so I understand that they would rather not allow what they perceive to be a camel's nose get under the tent in the form of even a provisional certification of a settlement class against other defendants. But that is not a good enough reason to upset this apple cart at this stage of the proceedings. There is time enough to take account of all relevant considerations when the settlement ultimately is presented for approval. That seems a far more appropriate time at which to consider also whether even a settlement class should be certified – a question that would be academic if indeed the proposed settlement would not be approved for some other reason. Moreover, I have substantial doubts as to whether the moving defendants have any standing to object to certification of a settlement class or to the proposed settlement (except to whatever extent, if any,

that it might prejudice their legal rights). This too may await the fairness hearing.

Accordingly, the motion of Bank of America Corporation and others [04 MD 1653, docket item 1175; 04 Civ. 0030, docket item 794] for reconsideration is granted. On reconsideration, I decline to change the order in any respect.

SO ORDERED.

Dated: March 6, 2007

Lewis A. Kaplan
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2008 the attached **Lead Plaintiffs' Memorandum of Law in Opposition to the Motion by Defendants Credit Suisse Securities (USA) LLC and Goldman Sachs & Co. for Reconsideration or Vacatur of the Court's Order Granting Preliminary Approval of the Settlement with Defendant Sandler O'Neill & Partners, L.P.** was 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