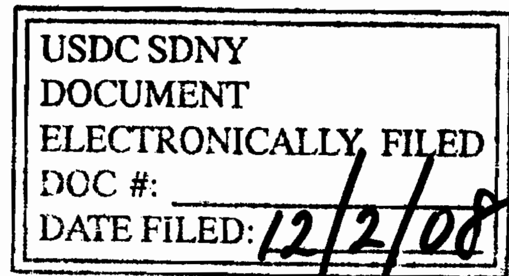


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re REFCO, INC. SECURITIES LITIGATION

05 Civ. 8626 (GEL)

ORDER

GERARD E. LYNCH, District Judge:

Credit Suisse Securities (USA) LLC and Goldman, Sachs & Co. (together the "Lead Underwriter Defendants" or the "Lead Underwriters") seek reconsideration of the Court's Order of November 6, 2008, granting preliminary approval of a partial settlement of this securities class action between Lead Plaintiffs Pacific Investment Management Company LLC and RH Capital Associates LLC and defendant Sandler O'Neill Partners, L.P. ("Sandler O'Neill"). The motion for reconsdideration will be granted, but on reconsideration the Court will adhere to its original order.

As the objecting Lead Underwriters correctly point out, the Court granted Lead Plaintiffs' motion for preliminary approval prematurely, before the time for objections had expired, based on Lead Plaintiffs' representation that no objections would be forthcoming. Despite Lead Plaintiffs' effort to explain how that representation came to be made (see Pl.'s Opp Mem at 3, n.4), the representation, and attendant de facto misleading of the Court, remain troubling. Whatever uncertainty or confusion may have attended the Lead Underwriters' position, or whatever Sandler O'Neill may have indicated to the Lead Plaintiffs about that position, a party should never represent an adversary's non-opposition to the Court absent unequivocal assurances by that party of its non-opposition, and a clear and direct authorization to report such non-opposition to the Court. Because the Court's prior Order was entered based on a misconception of the parties' positions, it must necessarily be reconsidered.

Reconsideration of an Order does not necessarily require a different result, however, and it does not do so here. Lead Underwriters object not to the settlement itself, but to the entry of a bar order that is part of the proposed settlement. That objection is properly considered at the time of the fairness hearing, before final entry of judgment based on the settlement.

While the existence of an anticipated objection that is likely to prove well-taken might under some circumstances suggest that preliminary approval, with the attendant expense of class notification, should not be granted, the present circumstances are not among them. Lead Plaintiffs do not propose immediate class notification in view of the limited size of the instant partial settlement. Rather, they seek to defer such notice until additional settlements have been negotiated – very possibly including settlements with the Lead Underwriters, which would obviate the instant objections.

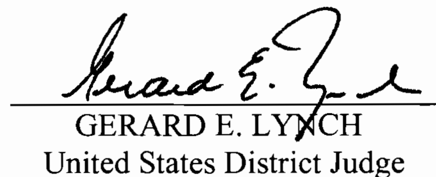
Moreover, it is by no means certain that the proffered objections will prove meritorious. A highly-respected judge of this Court has, in a thorough and carefully-reasoned opinion, rejected a position substantially similar to the one adopted by the objectors. See In re WorldCom, Inc. Sec. Litig., 2005 U.S. Dist. LEXIS 3791 (S.D.N.Y. Mar. 15, 2005). While the Lead Underwriters' attempt to distinguish the case, both on its facts and as "inopposite and legally incorrect," (Lead U. Def.'s Reply Mem. at 7), the strength of that position is not self-evident.

Under these circumstances, no purpose would be served by addressing the Lead Underwriters' objections at this point. The cases cited by the Lead Underwriters for the unremarkable proposition that all objections must be considered before a settlement is approved, arose in the context of final approvals and do not address preliminary approvals. (See Lead U. Def.'s Reply Mem. at 4-5.) Preliminary approvals serve the salutary purpose of providing guidance to the parties concerning the general range of settlement values considered by the Court to be within a range of reasonableness, and the preliminary approval process specifically contemplates the possibility that meritorious objections may eventually be filed and the settlement will fail to win ultimate approval. Given the controversial nature of the objections advanced here, it is imprudent for the Court to address issues that may ultimately be rendered moot and Lead Underwriter Defendants' efforts are almost certainly better spent in negotiating their own settlements than in attempting to undermine settlements arrived at by their co-defendants.

Accordingly, Lead Underwriter Defendants' motion to reconsider the Court's Order of November 6, 2008, granting preliminary approval of a partial settlement between Lead Plaintiffs and defendant Sandler O'Neill is granted, but upon reconsideration, the Court reaffirms and adheres to that Order.

SO ORDERED.

Dated: New York, New York
December 2, 2008



GERARD E. LYNCH
United States District Judge