

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re REFCO, INC. SECURITIES LITIGATION	:	05 Civ. 8626 (JSR)
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**LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR (I) PRELIMINARY APPROVAL OF SETTLEMENT WITH  
GRANT THORNTON LLP, (II) PRELIMINARY APPROVAL OF  
SETTLEMENT WITH JOSEPH J. MURPHY, DENNIS A. KLEJNA AND  
WILLIAM M. SEXTON, (III) PRELIMINARY CERTIFICATION OF  
CLASS AS AGAINST THESE SETTLING DEFENDANTS FOR PURPOSES  
OF SETTLEMENT, AND (IV) APPROVAL OF NOTICE TO THE CLASS**

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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 (the “Action”) as against defendant Grant Thornton LLP (“Grant Thornton”) (the “Grant Thornton Settlement”); (ii) preliminary approval of the settlement of the Action as against defendants Joseph J. Murphy, Dennis A. Klejna and William M. Sexton (the “Officers Settlement”); (iii) preliminary certification of a class for purposes of the Grant Thornton Settlement and the Officers Settlement (together, the “Settlements”); (iv) approval of the form and manner of notice to putative class members; and (v) the scheduling of a hearing on final approval of the Settlements and on Co-Lead Counsel’s motion for attorneys’ fees and reimbursement of litigation expenses.<sup>1</sup>

## **INTRODUCTION**

Lead Plaintiffs have reached an agreement to settle this securities class action as against Grant Thornton LLP, the former outside auditor of Refco Inc., for \$25,000,000 as set forth in the Stipulation and Agreement of Settlement between Lead Plaintiffs and Defendant Grant Thornton, dated October 18, 2010 (the “Grant Thornton Stipulation”).<sup>2</sup> Additionally, Lead Plaintiffs have reached an agreement to settle the Action against three former officers of Refco – Joseph Murphy (“Murphy”), Dennis Klejna (“Klejna”), and William Sexton (“Sexton”) (collectively, the “Settling Officer Defendants”) – in exchange for cash payments totaling \$300,000, as set

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<sup>1</sup> As the Court is aware, Co-Lead Counsel already have a motion pending for an award of attorneys’ fees relating to previously-achieved settlements, and for reimbursement of litigation expenses incurred through September 10, 2010. The new motion for attorneys’ fees and expenses would seek fees relating only to the newly-achieved Settlements, and reimbursement of litigation expenses that were not included in Co-Lead Counsel’s pending motion.

forth in the Stipulation and Agreement of Settlement between Lead Plaintiffs and Defendants Joseph J. Murphy, Dennis A. Klejna and William M. Sexton, dated September 30, 2010 (the “Officers Stipulation”).<sup>3</sup> This \$300,000 is in addition to the class’s recovery of approximately 30% of the sums the Settling Officer Defendants previously agreed to forfeit to the federal government.

The Settlements were reached at a time when the parties had a thorough understanding of the strengths and weaknesses of their respective positions and only after intense, arm’s-length negotiations. Lead Plaintiffs and Co-Lead Counsel believe that the proposed Settlements represent an excellent result and are in the best interests of the Settlement Class. Among other things, the Settlements provide substantial monetary benefits to the Settlement Class which compare favorably to the risks that protracted and contested litigation, including dispositive motion practice, trial and likely appeals, might lead to no recovery, or a smaller recovery, against these defendants.

At the final settlement hearing, the Court will have before it more expansive motion papers submitted in support of the proposed Settlements, and will be asked to make a determination as to whether the Settlements are fair, reasonable and adequate. At this time, Lead Plaintiffs request only that the Court grant preliminary approval of the Settlements so that notice may be provided to the Settlement Class. Specifically, Lead Plaintiffs request that this Court enter the proposed Order Preliminarily Approving Proposed Settlements With Grant Thornton, Joseph J. Murphy, Dennis A. Klejna and William M. Sexton (“Preliminary Approval Order”),

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<sup>2</sup> A copy of the Grant Thornton Stipulation and the exhibits thereto are attached as Exhibit 1 to the Declaration of Megan D. McIntyre (“McIntyre Declaration.”), submitted herewith.

<sup>3</sup> A copy of the Officers Stipulation and the exhibits thereto are attached as Exhibit 2 to the McIntyre Declaration.

attached as Exhibit A to Lead Plaintiffs' Notice of Motion (and as Exhibit A to each of the Stipulations), which, among other things, will:

- (i) preliminarily approve the Settlements on the terms set forth in the Stipulations;
- (ii) grant preliminary certification of the proposed Settlement Class as against these settling defendants, for purposes of the Settlements only, under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure.
- (iii) approve the form and content of the Notice and Publication Notice attached as Exhibits A-1 and A-3 to the Stipulation;
- (iv) find that the procedures established for distribution of the Notice and publication of the Publication Notice in the manner and form set forth in the Preliminary Approval Order constitute the best notice practicable under the circumstances, and comply with the notice requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and Section 27(a)(7) of the Securities Act of 1933, 15 U.S.C. § 77z-1(a)(7), as amended by the Private Securities Litigation Reform Act of 1995; and
- (v) set a schedule and procedures for: disseminating the Notice and publication of the Publication Notice; requesting exclusion from the Settlement Class; objecting to the Settlements or Co-Lead Counsel's application for attorneys' fees and/or reimbursement of litigation expenses; submitting papers in support of final approval of the Settlements; and the Settlement Hearing.

### **DESCRIPTION OF THE LITIGATION**

Commencing in October 2005, multiple securities class action complaints were filed against Refco, Inc. ("Refco"), certain of Refco's former officers and directors, the private equity firm that acquired a majority interest in Refco in 2004 (and certain of that firm's affiliates), and Refco's auditor and underwriters. By Order dated February 8, 2006, the Court consolidated the class actions, appointed Pacific Investment Management Company LLC and RH Capital Associates LLC as Lead Plaintiffs, and appointed the law firms of Grant & Eisenhofer P.A. and Bernstein Litowitz Berger & Grossmann LLP ("Co-Lead Counsel") to serve as co-lead counsel for the putative class.

On April 3, 2006, Lead Plaintiffs filed a Consolidated Class Action Complaint that, *inter alia*, asserted claims against Grant Thornton and the Settling Officer Defendants pursuant to Section 11 of the Securities Act of 1933 (the “Securities Act”) and Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) in connection with the offering of Refco Group Ltd., LLC/Refco Finance Holdings 9% Senior Subordinated Notes due 2012 (“Refco Notes”) and Refco common stock (“Refco Stock”). The complaint alleged that Grant Thornton failed to conduct appropriate due diligence and violated generally accepted auditing standards in its audits of Refco’s financial statements, and that its audit failures were so egregious that they amounted to extreme recklessness and caused Grant Thornton to falsely certify Refco’s financial statements as compliant with generally accepted accounting principles. Likewise, the complaint alleged that the Settling Officer Defendants failed to conduct appropriate due diligence and recklessly failed to disclose material information about Refco’s financial condition when they prepared and approved various SEC filings and other public statements on behalf of Refco during the Class Period, including false statements included in the registration statements for the Refco Notes and the Refco Stock.

On April 30, 2007, the Court issued an Opinion and Order denying, in large part, Grant Thornton’s and the Settling Officer Defendants’ motions to dismiss the Consolidated Class Action Complaint. On December 3, 2007, Lead Plaintiffs filed a Second Amended Consolidated Class Action Complaint (the “Complaint”), asserting the same claims against Grant Thornton and the Settling Officer Defendants as had been sustained in the Court’s April 30, 2007 order.

The parties participated in an extensive discovery process, coordinated with the other Refco-related actions also pending in this Court, which included, *inter alia*, the exchange of initial disclosures, interrogatories, requests for production of documents and responses thereto;



the review by Co-Lead Counsel of over 31 million pages of emails, memoranda, and other documents produced by both parties and non-parties; the taking of over 100 depositions; the exchange of expert reports; and expert depositions.

On March 26, 2010, after the conclusion of fact discovery, the Court entered a stipulation and order of partial discontinuance, dismissing the scienter-based claims asserted against the Settling Officer Defendants pursuant to Sections 10(b) and 20(a) of the Exchange Act, leaving pending against the Settling Officer Defendants only the non-scienter-based claims asserted against them pursuant to Sections 11 and 15 of the Securities Act.

On April 23, 2010, Grant Thornton moved for summary judgment on all of Lead Plaintiffs' claims against it, which was opposed by Lead Plaintiffs. That motion was fully briefed as of the time the Grant Thornton Settlement was reached.

## **DESCRIPTION OF THE SETTLEMENTS**

### **The Grant Thornton Settlement**

During the course of the litigation, Lead Plaintiffs and Grant Thornton engaged in extensive arm's-length negotiations in an effort to determine whether a consensual resolution of the Action could be achieved. These efforts included a formal mediation on July 27, 2009 with an experienced mediator and former federal judge, the Hon. Layn R. Phillips (Ret.), as well as ongoing discussions with the mediator and ongoing direct discussions between counsel for the Settling Parties. Finally, on August 22, 2010 – after the completion of both fact and expert discovery, and while Grant Thornton's summary judgment motion was *sub judice* – an agreement-in-principle was reached to settle Lead Plaintiffs' claims against Grant Thornton in exchange for the payment of \$25,000,000 in cash to the Settlement Class.

### **The Officers Settlement**

Prior to the negotiation of the Officers Settlement, each of the Settling Officer Defendants had forfeited substantial assets to the United States government pursuant to settlements entered into with the U.S. Attorney's office. Specifically, Defendant Murphy agreed to forfeit \$5,000,000, Defendant Sexton agreed to forfeit \$2,050,000, and Defendant Klejna agreed to forfeit \$1,250,000. As a result of Lead Plaintiffs' filing of a petition seeking remission of these and other forfeited funds to the class in this Action, the U.S. Attorney's office agreed to transfer 30% of the forfeited funds to an escrow account for the benefit of the class. Taking that into consideration, Lead Plaintiffs embarked upon settlement negotiations with counsel for the Settling Officer Defendants in an effort to resolve the claims against them.

On September 30, 2010, Lead Plaintiffs and the Settling Officer Defendants reached an agreement-in-principle to settle the class's claims against the Settling Officer Defendants in exchange for the following consideration: \$150,000 in cash from Defendant Murphy, \$100,000 in cash from Defendant Sexton, and \$50,000 in cash from Defendant Klejna, amounting to a total payment of \$300,000 to the Settlement Class. These recoveries on behalf of the Settlement Class members are in addition to their share of the funds the Settling Officer Defendants forfeited to the government.

\* \* \*

While Lead Plaintiffs and Co-Lead Counsel believe that the claims asserted in the Action against Grant Thornton and the Settling Officer Defendants are meritorious and that the Settlement Class ultimately would prevail at trial, they have concluded, based on their investigation and recognition of the risks they face in connection with the defenses asserted by Grant Thornton and the Settling Officer Defendants, as well as the delay and expense of further proceedings, that the terms and conditions of each of the Settlements are fair, reasonable,

adequate and in the best interests of the Settlement Class. Accordingly, Lead Plaintiffs hereby seek the Court's preliminary approval of the Settlements so that notice can be provided to the Settlement Class.

These settlements resolve the case against all remaining defendants. In October 2010, after the completion of fact and expert discovery, Lead Plaintiffs and Co-Lead Counsel decided to voluntarily dismiss the claims asserted in the Action on behalf of defendants Phillip R. Bennett ("Bennett"), Santo C. Maggio ("Maggio"), Tone N. Grant ("Grant"), Robert Trosten ("Trosten"), Gerald M. Sherer ("Sherer"), Philip Silverman ("Silverman"), Refco Group Holdings, Inc. ("RGHI"), and The Phillip R. Bennett Three Year Annuity Trust ("Bennett Trust") (collectively, the "Dismissed Defendants"). Four of the Dismissed Defendants have already forfeited substantial sums to the federal government: Bennett (over \$92.7 million); Maggio (approximately \$14.4 million); Grant (over \$7.8 million); and Trosten (over \$6 million). The government has approved the distribution of thirty percent of those forfeited assets to members of the class in this action, and Co-Lead Counsel understand that these individuals do not have additional assets from which to pay a meaningful judgment in the Action. Two of the other Dismissed Defendants (RGHI and the Bennett Trust) are mere instrumentalities of Bennett with no separate assets; Dismissed Defendant Silverman appears to have no meaningful assets; and Lead Plaintiffs have determined that the culpability of Dismissed Defendant Sherer is insufficient to warrant the expense of trial. The dismissals of the Dismissed Defendants were effected by stipulations filed on October 15, 2010 in accordance with Fed. R. Civ. P. 41(a)(1)(ii), and were without prejudice to the class.<sup>4</sup>

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<sup>4</sup> Because a class had not been certified with respect to the claims against the Dismissed Defendants, neither Court approval nor notice to the class were required for the dismissals. *See* (Cont'd)

## ARGUMENT

### I. THE PROPOSED SETTLEMENTS WARRANT PRELIMINARY APPROVAL

The settlement of complex class action litigation is favored by public policy and strongly encouraged by the courts. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) (“We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.”) (internal quotation marks and citation omitted); *In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (“It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.”).

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.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997)); *see also Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157 (E.D.N.Y. 2009).

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Fed. R. Civ. P. 23(e) (“The claims, issues, or defenses of a *certified* class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”) (emphasis added). Nonetheless, in the interests of providing full information to the class, Lead Plaintiffs’ proposed Notice of the Settlements includes a disclosure of the dismissals.

The terms of the proposed Settlements are plainly “within the range of possible approval.” *Initial Pub. Offering*, 243 F.R.D. at 87. Although Lead Plaintiffs and Co-Lead Counsel believe that the claims asserted in the Action are meritorious and that the Settlement Class would ultimately prevail at trial, continued litigation against Grant Thornton and the Settling Officer Defendants posed significant risks, including (i) the risk that Grant Thornton’s motion for summary judgment would be granted, (ii) the risk that one or more of these defendants would be able to establish due diligence or related defenses at trial, and (ii) risks related to establishing and calculating the amount of damages suffered by the Settlement Class. The substantial payment of \$25 million by Grant Thornton, and the payment of \$300,000 by the Settling Officer Defendants on top of the assets they forfeited to the government that will be remitted to the Settlement Class, when viewed in the context of these risks and the uncertainties involved with any litigation, make the Settlements extremely beneficial to the Settlement Class.

The Settlements were negotiated at arm’s-length, by counsel who are experienced in complex securities litigation and who were acting in an informed manner. The Action was actively prosecuted against Grant Thornton and the Settling Officer Defendants for more than four years. As discussed above, Co-Lead Counsel conducted substantial factual discovery during this time and, accordingly, are well-informed as to the operative facts and potential risks of the Action. Under these circumstances, a presumption of fairness attaches to the proposed settlement. *See Wal-Mart*, 396 F.3d at 116 (A “presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.”) (quoting MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.42 (1995)); *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04-cv-8144 (CM), 2009 WL 5178546, at \*4 (S.D.N.Y. Dec. 23, 2009) (same).

Moreover, the Settlements were negotiated under the direction and with the direct involvement of Lead Plaintiffs, who are sophisticated institutional investors. This fact further strengthens the presumption of fairness. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004) (participation of sophisticated institutional investor lead plaintiffs in settlement process supports approval of settlement).

For all of these reasons, the Court should preliminarily approve the Settlements.

**II. PRELIMINARY CERTIFICATION OF A SETTLEMENT CLASS AS AGAINST THESE SETTLING DEFENDANTS IS APPROPRIATE**

In granting preliminary settlement approval, the Court should also preliminarily certify a Settlement Class as against Grant Thornton and the Settling Officer Defendants for purposes of the Settlements under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. The proposed Settlement Class is identical to the Settlement Class this Court has already preliminarily certified in connection with settlements with other defendants, and consists of all persons and entities who purchased or otherwise acquired Refco Notes and/or Refco Stock during the period July 1, 2004 through and including October 17, 2005 (the “Class Period”), and who were damaged thereby (the “Settlement Class”). Excluded from the proposed Settlement Class are: (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 of any Defendant during the Class Period; (iv) immediate family members of the individual Defendants; (v) entities in which Refco or any Defendant has a majority interest; and (vi) the legal representatives, heirs, estates, administrators, predecessors, successors or assigns of any of the foregoing excluded persons and entities; provided however that any Investment Vehicle shall not be deemed an

excluded person.<sup>5</sup> Also excluded from the Settlement Class is any person or entity who or which previously properly excluded himself, herself or itself from the Settlement Class or now properly excludes himself, herself or itself by filing a valid and timely request for exclusion in accordance with the requirements set forth in the Notice.

The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *Marsh & McLennan*, 2009 WL 5178546, at \*8. Indeed, certification of a settlement class “has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants.” *Prudential*, 163 F.R.D. at 205. “[S]ettlement 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.” *Id.* (quoting *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 174 (5th Cir. 1979)). Here, there is no likelihood of abuse of the class action device, and the Settlements are fair and reasonable and are subject to approval by the Court.

As was the case with previously-approved settlement classes, certification is appropriate here because the Settlement Class meets all the requirements of Rule 23(a) and Rule 23(b)(3).

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<sup>5</sup> “Investment Vehicle” is defined as “any investment company or pooled investment fund, including but not limited to mutual fund families, exchange-traded funds, fund of funds and hedge funds, in which defendants Credit Suisse Securities (USA) LLC, Banc of America Securities LLC, Deutsche Bank Securities Inc., Goldman, Sachs & Co., Merrill Lynch, Pierce, Fenner & Smith Incorporated, J.P. Morgan Securities Inc., HSBC Securities (USA) Inc., William Blair & Company, L.L.C., BMO Capital Markets Corp. (f/k/a Harris Nesbitt Corp.), Samuel A. Ramirez & Company, Inc., Muriel Siebert & Co., Inc., or The Williams Capital Group, L.P., or any of their affiliates, has or may have a direct or indirect interest or act as an investment advisor, but in which such defendant or affiliate is not a majority owner and does not hold a majority beneficial interest. This definition does not bring into the Settlement Class any of the Underwriter Defendants.” Grant Thornton Stipulation ¶ 1(u); Officers Stipulation ¶ 1(s).

**A. The Settlement Class Satisfies the Requirements 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. *See* Fed. R. Civ. P. 23(a).

**1. The Settlement Class Members Are Too Numerous to Be Joined**

Class certification under Rule 23(a)(1) is appropriate where a class contains so many members that joinder of all would be “impracticable.” Fed. R. Civ. P. 23(a)(1). “Impracticable does not mean impossible,” *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993), but “only that the difficulty or inconvenience of joining all members of the class make the use of the class action appropriate.” *Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 244-245 (2d Cir. 2007). Numerosity is presumed when a class consists of forty members or more. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, the Settlement Class is comprised of purchasers of approximately 30.4 million shares of Refco Stock and \$600 million par amount of Refco Notes. When notice was provided to putative members of essentially the same class in connection with prior settlements in this Action, notice packets were mailed to nearly 40,000 potential class members. *See* Affidavit of Jose C. Fraga, dated April 3, 2007, at ¶ 6 (Dkt. No. 360). Although not all of these notice recipients may turn out to be Settlement Class members, it is clear that the Settlement Class is sufficiently numerous that joinder of all members would be impracticable and that Rule 23(a)(1) is satisfied. *See Consol. Rail Corp.*, 47 F.3d at 483; *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 175 (S.D.N.Y. 2008) (class of shareholders



numbering in hundreds or thousands satisfied the numerosity requirement); *In re Globalstar Sec. Litig.*, No. 01-cv-1745 (PKC), 2004 WL 2754674, at \*3 (S.D.N.Y. Dec. 1, 2004) (same).

## **2. There Are Common Questions Of Law And Fact**

Rule 23(a)(2) requires the existence of at least one question of law or fact common to the class. *See Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir. 2001); *Globalstar*, 2004 WL 2754674, at \*4. Federal securities cases like this one easily meet the commonality requirement, which is satisfied where “putative class members have been injured by similar material misrepresentations and omissions.” *Initial Pub. Offering*, 243 F.R.D. at 85; *see also 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.”).

Lead Plaintiffs have asserted claims against the Settling Officer Defendants for violations of Section 11 and 12(a)(2) of the Securities Act, and against Grant Thornton for violations of Sections 10(b) of the Exchange Act and Section 11 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 the registration statements and prospectuses for Refco Notes and Refco Stock contained material misstatements or omitted to state material information;
- Whether Grant Thornton or any of the Settling Officer Defendants can establish any statutory affirmative defenses, such as defenses of due diligence or reasonable care;
- Whether Grant Thornton acted with scienter;
- Whether, for purposes of the Exchange Act claim against Grant Thornton, reliance can be presumed on a class-wide basis pursuant the fraud-on-the-market or fraud-created-the-market doctrines;

- Whether and to what extent the market prices of Refco Notes and Refco Stock were artificially inflated during the Class Period due to the alleged misstatements or omissions in the registration statements and prospectuses;
- Whether and to what extent the Settlement Class members sustained damages as a result of the alleged misconduct and the proper measure of damages.

Because these questions of law and fact are common to all members of the Settlement Class, the commonality requirement of Rule 23(a)(2) is easily met.

### **3. The Class Representatives' Claims Are Typical Of Those Of The Settlement Class**

Rule 23(a)(3) requires that the claims of the class representatives be “typical” of the claims of the class. Fed. R. Civ. P. 23(a)(3). Typicality is established where “the claims of the named plaintiffs arise from same practice or course of conduct that gives rise to the claims of the proposed class members.” *In re Vivendi Sec. Litig.*, 242 F.R.D. 76, 85 (S.D.N.Y. 2007) (citation omitted); see *Oxford Health Plans*, 191 F.R.D. at 375. “Typical” does not mean “identical.” See *Marsh & McLennan*, 2009 WL 5178546, at \*10. Accordingly, “[f]actual differences involving the date of acquisition, type of securities purchased and manner by which the investor acquired the securities will not destroy typicality if each class member was the victim of the same material misstatements and the same fraudulent course of conduct.” *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 Grant Thornton and the Settling Officer Defendants, 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 lead plaintiffs’ conflict with those of the class; and (2) whether the lead plaintiffs’ counsel are qualified, experienced, and generally able to conduct the litigation. *See Marsh & McLennan*, 2009 WL 5178546, at \*10; *Oxford Health Plans*, 191 F.R.D. at 376; *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992).

Lead Plaintiffs and the Settlement Class share the common objective of maximizing their 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.”); *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) (“Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members”). 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 the Court recognized when appointing them co-lead counsel for the putative class and in approving the settlement they previously negotiated with BAWAG. The settlements Lead Plaintiffs and Co-Lead Counsel have recently reached with other defendants have been well-received, with no objections from class members. Therefore, Rule 23(a)(4) is satisfied.<sup>6</sup>

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<sup>6</sup> Co-Lead Counsel have and will continue to fairly and adequately represent the interests of the Settlement Class. Accordingly, Co-Lead Counsel should be appointed as counsel for the Settlement Class under Rule 23(g).

**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 class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating 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 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.” *Marsh & McLennan*, 2009 WL 5178546, at \*11 (quoting *Moore v. Paine Webber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002)). Common issues will 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 questions concern the amount of damages. *See Marsh & McLennan*, 2009 WL 5178546, at \*11; *Initial Pub. Offering*, 243 F.R.D. at 92; *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.”). As the Supreme Court has noted, predominance is a test “readily met” in cases alleging securities fraud. *Amchem Prods.*, 521 U.S. at 625.

Here, the same alleged course of conduct by Grant Thornton and by the Settling Officer Defendants forms the basis of all Settlement Class members' claims. There are numerous common issues relating to these defendants' liability which predominate over any individualized issues. The predominance requirement of Rule 23(b)(3) is therefore satisfied.

## **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 class members’ interests in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by . . . class members; (C) the desirability . . . of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing 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 fairly and efficiently adjudicating” the claims of the large 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 pursuing 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. See also *Marsh & McLennan*, 2009 WL 5178546, at \*12 (recognizing that the “class action is uniquely suited to resolving securities fraud claims,” because “the prohibitive cost of instituting individual actions” in such cases gives class members “limited interest in individually controlling the prosecution or defense of separate actions”); *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 139 (S.D.N.Y. 2008) (“as a general rule, securities fraud cases ‘easily satisfy the superiority requirement [as] [m]ost violations of the federal securities laws . . . inflict economic injury on large numbers of geographically dispersed persons such that the cost of pursuing individual litigation to seek recovery is often not feasible’”) (quoting *Darquea v. Jarden Corp.*, No. 06 Civ. 722 (CLB), 2008 WL 622811, at \*5 (S.D.N.Y. Mar. 6, 2006)) (alterations in original).

The scope and complexity of Lead Plaintiffs’ claims against Grant Thornton and the Settling Officer Defendants, together with the high cost of individualized litigation, make it unlikely that the vast majority of the Settlement Class members would be able to obtain relief without class certification. 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.

### **III. NOTICE TO THE CLASS SHOULD BE APPROVED**

As outlined in the Preliminary Approval Order, Lead Plaintiffs will notify Settlement Class Members of the Settlements by mailing the Notice to all Settlement Class Members who have been identified in connection with the provision of notice in previous settlements of this Action. The Notice will advise Settlement Class Members of (i) the essential terms of the Settlements; and (ii) information regarding Co-Lead Counsel’s application for attorneys’ fees and reimbursement of litigation expenses. The Notice also will provide specifics on the date,

time and place of the Settlement Hearing and set forth the procedures for opting out of the Settlement Class and for objecting to either of the Settlements or to the application for fees and expenses. Additionally, while not required by Rule 23 (*see supra* n.4), the Notice will inform Settlement Class Members of the voluntary dismissal of the Action as against the Dismissed Defendants. The proposed Preliminary Approval Order further requires Lead Plaintiffs to cause the Publication Notice to be published once in the national edition of *Investor's Business Daily* within ten (10) business days of the mailing of the Notice. Co-Lead Counsel will also post a copy of the Notice on the Refco securities litigation website: [www.refcosecuritieslitigation.com](http://www.refcosecuritieslitigation.com).

Together with the Notice, Co-Lead Counsel will cause a copy of the Plan of Allocation to be mailed to the Settlement Class Members who have been identified in connection with previous settlements. Lead Plaintiffs will use the same Plan of Allocation for these Settlements as the Court approves for the previous settlements.

The Notice will inform Settlement Class Members that they need not submit a new Proof of Claim form if they have already submitted one in connection with a previous settlement of this Action; the submission of a valid Proof of Claim form for a previous settlement will be deemed sufficient for purposes of these Settlements as well. To avoid the submission of duplicative claims, Lead Plaintiffs propose that the Notice *not* enclose a copy of the Proof of Claim form, but rather provide instructions as to how to retrieve one – either by downloading it from the case website or by contacting the claims administrator – if one has not previously been submitted.

The form and manner of providing notice to the Settlement Class satisfy the requirements of due process, Rule 23, and the Private Securities Litigation Reform Act (15 U.S.C. § 77z-1(a)(7)). The Notice and Publication Notice “fairly apprise the prospective members of the class of the terms of the proposed settlement[s] and of the options that are open to them in connection

with the proceedings” *Wal-Mart*, 396 F.3d at 114 (internal quotation marks omitted). The manner of providing notice, which includes individual notice by mail to all Settlement Class members who have been identified in connection with any of the previous settlements, represents the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23. See *In re Warner Chilcott Ltd. Sec. Litig.*, No. 06-cv-11515 (WHP), 2008 WL 5110904, at \*3 (S.D.N.Y. Nov. 20, 2008); *Global Crossing*, 225 F.R.D. at 448-49.



## CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court (i) preliminarily approve the proposed Grant Thornton Settlement and Officer Settlement as within the range of possible fairness, reasonableness and adequacy; (ii) preliminarily certify the proposed Settlement Class as against Grant Thornton and the Settling Officer Defendants for purposes of the Settlements; and (iii) approve the proposed form and manner of notice to putative Settlement Class members. A proposed Preliminary Approval Order is attached to Lead Plaintiffs' Notice of Motion as Exhibit A.

Dated: October 18, 2010

Respectfully submitted,

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