

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
THE AUDIT COMMITTEE DEFENDANTS AND THE THL DEFENDANTS,
(II) PRELIMINARY CERTIFICATION OF CLASS FOR PURPOSES OF
SETTLEMENT AND (III) 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 partial settlement (“Settlement”) of this securities class action as against defendants Ronald L. O’Kelley, Leo R. Breitman and Nathan Gantcher (collectively, the “Audit Committee Defendants”); Thomas H. Lee Equity Fund V, L.P., Thomas H. Lee Parallel Fund V, L.P. and Thomas H. Lee Equity (Cayman) Fund V, L.P. (collectively, the “THL Funds”); Thomas H. Lee Partners, L.P., THL Equity Advisors V, LLC, Thomas H. Lee Investors Limited Partnership and The 1997 Thomas H. Lee Nominee Trust and any predecessor or related THL Entities named in any prior version of the Complaint (collectively, with the THL Funds, the “THL Entities”) and Thomas H. Lee, David V. Harkins, Scott L. Jaeckel and Scott A. Schoen (collectively, with the THL Entities, the “THL Defendants”); (ii) preliminary certification of the proposed class for purposes of the Settlement; (iii) approval of the form and manner of notice to putative class members; and (iv) the scheduling of a hearing on final approval of the Settlement and Lead Plaintiffs’ Counsel’s motion for reimbursement of litigation expenses.

INTRODUCTION

Lead Plaintiffs have reached an agreement to settle this securities class action as against the Audit Committee Defendants and the THL Defendants (together, the “Settling Defendants”), as provided in the Stipulation and Agreement of Settlement, dated March 29, 2010 (the “Stipulation”).¹ This agreement, which provides substantial monetary benefits to the Settlement Class in the form of a cash payment of at least \$130 million and potentially up to \$140 million,

¹ A copy of the Stipulation and the exhibits thereto are attached as Exhibit 1 to the Declaration of Salvatore J. Graziano, submitted herewith. Unless otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Stipulation.

was reached at a time when the parties had a thorough understanding of the strengths and weaknesses of their respective positions and only after intense, arms'-length negotiations. Lead Plaintiffs and Lead Plaintiffs' Counsel believe that the proposed Settlement represents an excellent result and is in the best interests of the Settlement Class. Among other things, the Settlement provides substantial monetary benefits to the Settlement Class. These benefits must be compared 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 the Settling Defendants.

At the final settlement hearing, the Court will have before it more expansive motion papers submitted in support of the proposed Settlement, and will be asked to make a determination as to whether the Settlement is fair, reasonable and adequate. At this time, Lead Plaintiffs request only that the Court grant preliminary approval of the Settlement so that notice may be provided to the Settlement Class. Specifically, Lead Plaintiffs request that this Court enter the proposed Order Preliminarily Approving Partial Settlement ("Preliminary Approval Order"), attached as Exhibit A to Lead Plaintiffs' Notice of Motion (and as Exhibit A to the Stipulation), which, among other things, will:

- (i) preliminarily approve the Settlement on the terms set forth in the Stipulation;
- (ii) approve the form and content of the Notice, Proof of Claim Form and Summary Notice attached as Exhibits A-1, A-2 and A-3 to the Stipulation;
- (iii) find that the procedures established for distribution of the Notice and Proof of Claim Form and publication of the Summary 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 21D(a)(7) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-4(a)(7), as amended by the Private Securities Litigation Reform Act of 1995; and

- (iv) set a schedule and procedures for: disseminating the Notice and Proof of Claim Form and publication of the Summary Notice; requesting exclusion from the Settlement Class; objecting to the Settlement or Lead Plaintiffs' Counsel's motion for reimbursement of litigation expenses; submitting papers in support of final approval of the Settlement; and the Settlement Hearing.

Lead Plaintiffs also request preliminary certification of the proposed Settlement Class for purposes of settlement only, under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure.

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 auditors 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 to serve as co-lead counsel ("Lead Plaintiffs' Counsel") for the putative class.

On April 3, 2006, Lead Plaintiffs filed a Consolidated Amended Class Action Complaint and, on May 5, 2006, a First Amended Consolidated Class Action Complaint. On July 10, 2006, the Settling Defendants moved to dismiss the First Amended Consolidated Class Action Complaint, which Lead Plaintiffs opposed. On April 30, 2007, the Court granted in part and denied in part the Settling Defendants' motions to dismiss the First Amended Consolidated Class Action Complaint. On December 3, 2007, Lead Plaintiffs filed a Second Amended Consolidated Class Action Complaint (the "Complaint"). The Complaint alleges that the Settling Defendants variously violated the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") during the Class Period in connection with the offering of

Refco Group Ltd., LLC/Refco Finance Inc. 9% Senior Subordinated Notes due 2012 (“Refco Notes”) and Refco’s August 2005 initial public offering of common stock (“IPO”).

On February 14, 2008, the Settling Defendants filed their answers to the Complaint denying its material allegations as asserted against them and alleging affirmative and other defenses thereto. The parties subsequently participated in an extensive discovery process, coordinated with the other Refco-related actions also pending in this Court, which included the production of millions of pages of emails, memoranda, and other documents by both parties and non-parties as well as the taking of approximately 100 depositions.

Following intensive arms’-length negotiations – including a face-to-face meeting between a representative of Lead Plaintiff RH Capital Associates LLC and two individual defendants affiliated with the THL Entities, a mediation session before a retired judge (Hon. Daniel Weinstein), and extensive discussions between counsel for the Settling Parties – Lead Plaintiffs and the Settling Defendants entered into a Memorandum of Understanding on January 19, 2010 providing for the resolution of this Action as between them, subject to Court approval. Following further negotiations, Lead Plaintiffs and the Settling Defendants entered into the Stipulation on March 29, 2010.

As set out in the Stipulation, Lead Plaintiffs have agreed to settle the action as against the Settling Defendants on terms that include the payment of \$130 million in cash for the benefit of the Settlement Class, plus an additional settlement amount equal to 50% of any additional amount that the THL Entities receive as restitution from the government in connection with their claims concerning Refco after the date of the Memorandum of Understanding, up to a maximum additional amount of \$10 million.

Lead Plaintiffs' Counsel have undertaken an extensive factual investigation and legal analysis as to the claims against the Settling Defendants in the Action and the Settling Defendants' defenses to those claims, and have analyzed potential damages that could be recovered from the Settling Defendants if the Settlement Class were to prevail. In the course of their investigation, Lead Plaintiffs' Counsel have reviewed millions of pages of documents, including emails and other internal records produced by the Settling Defendants and the THL Funds' advisors in connection with the initial August 2004 investment in Refco and the work leading up to the IPO. In addition, Lead Plaintiffs' Counsel participated in the depositions of, among others, each of the individual defendants who are parties to the Stipulation. While Lead Plaintiffs' Counsel believe that the claims asserted in the Action 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 Settling Defendants' due diligence and related defenses as well as the delay and expense of further proceedings, that the terms and conditions of the Settlement are fair, reasonable, adequate and in the best interests of the Settlement Class.

In light of the substantial cash settlement payment achieved, the cost and risk of continuing the litigation against the Settling Defendants through trial and appeals, the arms'-length negotiations, and the approval of the proposed Settlement by the Court-appointed institutional investor Lead Plaintiffs, the Settlement warrants the Court's preliminary approval so that notice can be provided to the Settlement Class.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS 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).

The terms of the proposed Settlement are plainly “within the range of possible approval.” *Initial Pub. Offering*, 243 F.R.D. at 87. Although Lead Plaintiffs and Lead Plaintiffs’ Counsel believe that the claims asserted in the Action are meritorious and that the Settlement Class would ultimately prevail at trial, continued litigation against the Settling Defendants posed significant

risks, including the risks (i) that Lead Plaintiffs would not be able to establish, with respect to their claims under Section 10(b) of the Exchange Act, that the Settling Defendants acted with scienter; (ii) that Settling Defendants would be able to establish due diligence or related defenses to the claims under the Securities Act; or (iii) that a jury might conclude that the Settling Defendants' culpability was small compared to that of other actors in the collapse of Refco. The substantial payment of at least \$130 million by the Settling Defendants, when viewed in the context of these risks and the uncertainties involved with any litigation, makes the Settlement extremely beneficial to the Settlement Class.

The Settlement was negotiated at arms'-length, by counsel who are experienced in complex securities litigation and who were acting in an informed manner. The Action was actively prosecuted against the Settling Defendants for more than four years. As discussed above, Lead Plaintiffs' 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 Civ. 8144 (CM), 2009 WL 5178546, at *4 (S.D.N.Y. Dec. 23, 2009) (same).

Moreover, the Settlement was negotiated under the direction and with the direct involvement of Lead Plaintiffs, who are sophisticated institutional investors, with the assistance of an experienced mediator who is a retired judge. These facts further strengthen the presumption of fairness. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting

that a “mediator’s involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure”); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008) (“Judge Weinstein’s role in the settlement negotiations strongly supports a finding that they were conducted at arm’s-length and without collusion.”); *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 Settlement.

II. PRELIMINARY CERTIFICATION OF A SETTLEMENT CLASS IS APPROPRIATE

In granting preliminary settlement approval, the Court should also preliminarily certify a Settlement Class for purposes of settlement under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. The proposed Settlement Class consists of all persons and entities who 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 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) members of the Defendants’ immediate families; (v) entities in which Refco or any Defendant has a controlling interest; and (vi) the legal representatives, heirs, estates, administrators, predecessors, successors or assigns of any of the foregoing excluded persons and 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 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 settlement is fair and reasonable and is subject to approval by the Court.

This Court has already certified a class for purposes of Lead Plaintiffs’ earlier settlement with BAWAG, and has also preliminarily certified a class for purposes of Lead Plaintiffs’ settlement with Sandler O’Neill & Partners L.P (“Sandler O’Neill”). The Settlement Class proposed here is *identical* to the class preliminarily certified for purposes of the Sandler O’Neill settlement and is nearly the same as the class approved for purposes of the BAWAG settlement.² 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).

² There are two minor differences between the definition of the proposed Settlement Class for purposes of this Settlement and that certified by the Court in connection with the BAWAG settlement. First, because the Class Period was amended after the BAWAG settlement was reached, 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 second difference is that persons affiliated with Mayer Brown LLP are excluded from the proposed Settlement Class for this Settlement, in

(Cont’d)

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). “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 Se. & Sw. 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 common stock and \$600 million par amount bonds. When notice was provided to putative members of essentially the same class in connection with the BAWAG settlement, the notice was mailed to over 5,000 potential class members. *See* Affidavit of Jose C. Fraga, dated April 3, 2007, at ¶ 6 (Docket #360). Although not all of these notice recipients may turn out to be Settlement Class Members, it is clear that the class is sufficiently numerous that joinder of all members would be impracticable and that Rule 23(a)(1) is satisfied. *See Consol.*

light of Lead Plaintiffs’ assertion of claims against that firm subsequent to the BAWAG settlement.

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 Civ 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 Defendants for violations of Section 11 and 15 of the Securities Act and Sections 10(b) and 20(a) of the Exchange Act. These claims present many questions of law and fact which are common to all members of the Settlement Class, including:

- Whether the federal securities laws were violated by the Settling Defendants’ conduct as alleged in the Complaint;
- Whether the S.E.C. filings and other public statements disseminated to the investing public during the Class Period contained material misstatements or omitted to state material information;
- Whether and to what extent the market prices of Refco common stock and Refco Notes were artificially inflated during the Class period due to the non-disclosures and/or misrepresentations alleged in the Complaint;
- With respect to Lead Plaintiffs’ claims under Section 10(b) of the Exchange Act, whether the charged Settling Defendants acted with scienter;

- With respect to Lead Plaintiffs' claims under the Securities Act, whether the charged Settling Defendants can establish any statutory affirmative defenses; and
- 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 the Settling Defendants, and liability for this conduct is predicated on the same legal theories. Lead Plaintiffs allege that they, like the rest of the Settlement Class, paid artificially-inflated prices for Refco Notes or Refco common stock as a result of the alleged misrepresentations and omissions. Lead

Plaintiffs' claims, and the claims of absent Settlement Class Members, are based on the same theories and will be proven by the same evidence. 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, Lead Plaintiffs’ 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 Lead Plaintiffs' Counsel previously negotiated with BAWAG. Therefore, Rule 23(a)(4) is satisfied.³

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*

³ Lead Plaintiffs' Counsel have and will continue to fairly and adequately represent the interests of the Settlement Class. Accordingly, Lead Plaintiffs' Counsel should be appointed as co-lead counsel for the Settlement Class under Rule 23(g).

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 the Settling Defendants forms the basis of all Settlement Class members’ claims. There are numerous common issues relating to the liability of the Settling Defendants which predominate over any individualized issues. The predominance requirement of Rule 23(b)(3) is therefore satisfied for purposes of this Settlement, 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 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 . . . members of the class; (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 the Settling 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 Settlement by mailing the Notice and Proof of Claim Form to all Settlement Class Members who can be identified with reasonable effort. The Notice will advise Settlement Class Members of the essential terms of the Settlement and of information regarding Lead Plaintiffs' Counsel's motion for 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 the Settlement or the motion for reimbursement of litigation expenses. The proposed Preliminary Approval Order further requires Lead Plaintiffs to cause the Summary 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. Lead Plaintiffs' Counsel will also post a copy of the Notice on the Refco securities litigation website: www.refcosecuritieslitigation.com.

As stated in the Notice, no plan of allocation of the settlement proceeds has been developed at this time. When Lead Plaintiffs seek Court approval of such a plan of allocation, they will provide further notice to the Settlement Class and an opportunity to be heard. Similarly, Lead Plaintiffs' Counsel are not seeking an award of attorneys' fees from the funds recovered from the Settling Defendants at this time, but intend to do so in the future, after providing further notice to the Settlement Class and an opportunity to be heard with respect to the fee application.

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. § 78u-4(a)(7)). The Notice and Summary Notice "fairly apprise the prospective members of the class of the terms of the proposed settlement 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 can be reasonably identified, 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 Civ. 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 Settlement as within the range of possible fairness, reasonableness and adequacy; (ii) preliminarily certify the proposed Settlement Class; 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: April 5, 2010

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