UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re REFCO, INC. SECURITIES LITIGATION	:	05 Civ. 8626 (JSR)

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH GRANT THORNTON LLP AND THE SETTLING OFFICER DEFENDANTS, AUTHORIZATION OF APPLICATION OF THE PREVIOUSLY APPROVED PLAN OF ALLOCATION TO THE ADDITIONAL SETTLEMENTS AND FINAL CERTIFICATION OF A CLASS FOR SETTLEMENT PURPOSES

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs RH Capital Associates LLC ("RH Capital") and Pacific Investment Management Company LLC ("PIMCO"), respectfully submit this memorandum of law in support of their motion (i) for final approval of two additional proposed settlements in this Action: one with defendant Grant Thornton LLP ("Grant Thornton") and the other with defendants Joseph J. Murphy, Dennis A. Klejna and William M. Sexton (collectively, the "Settling Officer Defendants" and, together with Grant Thornton, the "Settling Defendants"), (ii) for authorization to apply the previously approved Plan of Allocation of these settlements and (iii) for final certification of the Settlement Class for purposes of these settlements.[1]

PRELIMINARY STATEMENT

Lead Plaintiffs are pleased to present for the Court's consideration two final settlements that have been achieved in this Action for the benefit of the Settlement Class: a settlement with Grant Thornton in return for payment of $25,000,000 in cash (the "Grant Thornton Settlement") and a settlement with the Settling Officer Defendants in return for cash payments totaling $300,000 (the "Officers Settlement" and, together with the Grant Thornton Settlement, the "Additional Settlements"). The Additional Settlements follow a series of earlier, Court-approved settlements in

[1] Lead Plaintiffs are simultaneously submitting herewith the Joint Declaration of Salvatore J. Graziano and Megan D. McIntyre in Support of (A) Lead Plaintiffs' Motion for Final Approval of Settlements with Grant Thornton LLP and the Settling Officer Defendants, Authorization of Application of the Previously Approved Plan of Allocation to the Additional Settlements and Final Certification of a Class for Settlement Purposes, and (B) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses (the "Joint Declaration" or "Joint Decl."). The Joint Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted against the Settling Defendants in the Action; the negotiations leading to the Additional Settlements; the value of the Additional Settlements to the Settlement Class, as compared to the risks and uncertainties of continued litigation; and the services Lead Counsel provided for the benefit of the Settlement Class. Unless otherwise noted, capitalized terms shall have the meanings set out in the Joint Declaration.

which Lead Plaintiffs achieved recoveries of approximately $342 million for the benefit of the Settlement Class in addition to the more than $40 million that, as a result of an agreement Lead Counsel obtained from the government, the Settlement Class will receive from victim restitution funds established by the federal government (the "Restitution Amount"). If the Additional Settlements are approved, they will bring the total settlement amount achieved in the Action to approximately $367.3 million and will result in a total recovery for the Settlement Class (including the Restitution Amount) of over $407 million. *See* Joint Decl. ¶ 5. Lead Plaintiffs believe that both the Grant Thornton Settlement and the Officers Settlement represent excellent results for the Settlement Class and should be finally approved by the Court.[2]

The settlement with Grant Thornton, Refco's former auditor, provides a substantial cash benefit for the Settlement Class of $25 million, which Lead Plaintiffs and Lead Counsel consider to be an outstanding recovery in light of the heightened challenges of establishing claims for violations of securities laws against outside auditors and the other substantial risks of establishing liability and damages in this case, discussed more fully below.

The $300,000 Officers Settlement is composed of a $150,000 payment by Joseph J. Murphy, who was an Executive Vice President of Refco responsible for global marketing; a $100,000 payment by William M. Sexton, formerly Refco's Executive Vice President and Chief Operating

[2] The terms of the Additional Settlements are set out in the Stipulation and Agreement of Settlement Between Lead Plaintiffs and Grant Thornton LLP, dated October 18, 2010 (the "Grant Thornton Stipulation") and the Stipulation and Agreement of Settlement Between Lead Plaintiffs and Defendants Joseph J. Murphy, Dennis A. Klejna And William Sexton, dated September 30, 2010 ("the "Officers Stipulation"). The Stipulations were filed with Court on October 18, 2010 (Dkt. 743-1, 743-2), and Special Master Daniel J. Capra issued a Report and Recommendation recommending preliminary approval of the Additional Settlements on November 10, 2010 (Dkt. 760). The Court granted preliminary approval on November 12, 2010. *See* Amended Order Preliminarily Approving Proposed Settlement with Defendant Grant Thornton LLP and Proposed Settlement with Defendants Joseph J. Murphy, Dennis A. Klejna and William M. Sexton, dated November 12, 2010 (Dkt. 763) (the "Preliminary Approval Order").

Officer; and a $50,000 payment by Dennis A. Klejna, formerly Refco's Executive Vice President and General Counsel. The settlement payments under the Officers Settlement are in addition to substantial amounts that the Settling Officer Defendants have forfeited to the government pursuant to settlement agreements with the U.S. Attorney's office: Defendant Murphy forfeited $5,000,000, Defendant Sexton forfeited $2,050,000, and Defendant Klejna forfeited $1,250,000. *See* Joint Decl. ¶ 5 n.5. As the result of a petition that Lead Plaintiffs submitted to the U.S. Attorney's office, the government has agreed to remit approximately 30% of the funds forfeited by the Settling Officer Defendants (as a portion of the Restitution Amount discussed above) to an escrow account for the benefit of the Settlement Class. *See id.*[3]

As detailed in the accompanying Joint Declaration and below, both Additional Settlements are the result of hard-fought, arm's-length negotiations by well-informed counsel, were approved by sophisticated lead plaintiffs, and were achieved only after extensive fact and expert discovery in the Action had been completed. The Grant Thornton Settlement was the product of intense negotiations spanning more than a year, which were assisted by an experienced mediator and former federal judge, the Honorable Layn R. Phillips (Ret.) The Officers Settlement was also achieved only after discovery and protracted arms'-length negotiations.

Lead Plaintiffs negotiated both of the Additional Settlements with a thorough understanding of the strengths and weaknesses of the claims asserted against each of the Settling Defendants. The

[3] Lead Plaintiffs had previously entered into settlement agreements with Defendants Murphy and Klejna which provided for settlement payments of $7.9 million and $7.6 million, respectively, and which were to be funded principally by Refco's Directors and Officers ("D&O") insurance policies. *See* Joint Decl. ¶¶ 55, 57. The insurance carriers denied coverage and these settlements eventually became void. *See id.* ¶¶ 56, 58. Refco's D&O insurance is not funding any portion of the currently proposed Officers Settlement, all of which will be funded personally by the Settling Officer Defendants. *See id.* ¶ 62. By requiring personal contributions by the Settling Officer Defendants, the Officers Settlement reinforces the strong public policy consideration that corporate officers be held accountable for their statements to the investing public.

Additional Settlements were agreed to only after Lead Counsel had reviewed and analyzed tens of millions of pages of documents produced in discovery; had taken or participated in over 100 depositions of fact witnesses in the Action, including depositions of eight representatives of Grant Thornton and two of the three Settling Officer Defendants; and had consulted extensively with experts in the fields of accounting, damages and market efficiency. In addition, Lead Plaintiffs' motion for class certification and Grant Thornton's motion for summary judgment were fully briefed and pending before the Court at the time the Additional Settlements were reached. In particular, Grant Thornton's opposition to the class certification motion and its briefing in support of the summary judgment motion provided Lead Counsel with a clear outline of the principal hurdles to establishing Grant Thornton's liability.

Lead Counsel, who have significant experience in securities litigation and other complex class action litigation and have negotiated numerous substantial class action settlements throughout the country, are of the opinion that the recoveries achieved in the Additional Settlements are excellent in light of the potential risks of further litigation and the expense of pursuing this Action against the Settling Defendants through a trial and the appeals that would inevitably follow. Accordingly, Lead Counsel believe that each of the Additional Settlements is fair, reasonable, and adequate and in the best interest of the Settlement Class. In addition, Lead Plaintiffs, who are sophisticated institutional investors with substantial financial stakes in the Action, have approved the Additional Settlements. *See* Joint Decl. ¶ 11.

If the Court approves the Additional Settlements, the Action will be finally resolved as against all defendants in the Action.[4]

[4] Lead Plaintiffs have a petition for certiorari pending in the United States Supreme Court seeking review of the Court's dismissal of claims against defendants Mayer Brown and Joseph Collins. If

ARGUMENT

I. THE ADDITIONAL SETTLEMENTS WARRANT FINAL APPROVAL

Under Rule 23(e) of the Federal Rules of Civil Procedure, class action settlements need Court approval. A class action settlement should be approved if the Court finds it "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2); *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546 (S.D.N.Y. Dec. 23, 2009); *In re Merrill Lynch Tyco Research Sec. Litig.* ("*ML Tyco*"), 249 F.R.D. 124, 132 (S.D.N.Y. 2008); *In re Luxottica Group S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006). The Court should also determine whether the negotiating process leading to the settlement was fair, reasonable and adequate. *See Wal-Mart Stores, Inc. v. Visa U.S.A, Inc.*,, 396 F.3d 96, 116 (2d Cir. 2005); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). Where, as here, a settlement is the product of "arm's length negotiations conducted by experienced counsel after adequate discovery," the settlement enjoys a strong presumption of fairness. *Marsh & McLennan*, 2009 WL 5178546, at *8; *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007).

The settlement of disputed claims, particularly in complex class actions, is favored by public policy and strongly encouraged by the courts in this Circuit. *See Wal-Mart*, 396 F.3d at 116 ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'") (citation omitted); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 337 (S.D.N.Y. 2005) ("public policy favors settlement, especially in the case of class actions"); *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

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that petition is granted and the dismissal of claims against these defendants is reversed, litigation will resume against those defendants. Settlements or voluntary dismissals have been entered with all other defendants. *See* Joint Decl. ¶ 2 n.2.

is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.").

A. Application Of The *Grinnell* Factors Supports Approval Of The Additional Settlements

The standards governing approval of class action settlements in this Circuit are well established. In *City of Detroit v. Grinnell Corp.*, the Second Circuit held that the following factors should be considered:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d 448, 463 (2d Cir. 1974) (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *see also Wal-Mart*, 396 F.3d at 117; *Marsh & McLennan*, 2009 WL 5178546, at *4. "In finding that a settlement is fair, not every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances." *Marsh & McLennan*, 2009 WL 5178546, at *4 (internal quotations marks and citation omitted); *see also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (same). In deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611 (LAK), 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007).

The *Grinnell* factors favor approval of the Additional Settlements, for the reasons discussed below.

1. The Complexity, Expense And Likely Duration Of The Litigation Support Approval Of The Additional Settlements

Courts have acknowledged the "overriding public interest in favor of settlement" of class actions because it is "common knowledge that class action suits have a well deserved reputation as being most complex." *Strube v. Am. Equity Inv. Life Ins. Co*., 226 F.R.D 688, 698 (M.D. Fla. 2005) (citation and internal quotations omitted). *See also In re Gilat Satellite Networks, Ltd*., No. CV-02-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007) ("Securities class actions are generally complex and expensive to prosecute."). Due to this "notorious complexity," settlement is often appropriate in securities class actions because it "circumvents the difficulty and uncertainty inherent in long, costly trials." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 02 Civ. 5575(SWK), 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006).

As set forth in the Joint Declaration, this Action has been extensively and vigorously litigated by the parties and, at the time the Additional Settlements were reached, the litigation had proceeded through the conclusion of a very extensive fact and expert discovery process. *See* Joint Decl. ¶¶ 10, 32-40. Lead Plaintiffs would have had to overcome several additional hurdles in order to achieve litigated judgments against the Settling Defendants and there is no question that this continued litigation would be very expensive and time consuming. In the absence of these settlements, a lengthy and expensive trial involving extensive expert testimony would have been necessary. Even if Lead Plaintiffs had succeeded at trial – which was far from certain, given the risks discussed below – post-trial motions and appeals from any verdict would have inevitably resulted in substantial delays in recovery for the class.

In contrast, the Additional Settlements avoid the costs and uncertainty of continued litigation and provide immediate and significant recoveries totaling $25.3 million for the benefit of the Settlement Class.

2. The Settlement Class's Reaction To The Additional Settlements

The reaction of the class to a proposed settlement is a significant factor in considering its adequacy. *See ML Tyco*, 249 F.R.D. at 134; *Strougo v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002).

Beginning on December 15, 2010, pursuant to the terms of the Preliminary Approval Order, the Court-approved Claims Administrator, The Garden City Group, Inc. ("GCG"), mailed 43,252 copies of the Notice Packet – consisting of the Notice of (I) Proposed Settlement of Class Action with Defendants Grant Thornton LLP, Joseph J. Murphy, Dennis A. Klejna and William M. Sexton, (II) Hearing on Proposed Settlement and (III) Motion for Award of Attorneys' Fees and Reimbursement of Expenses (the "Notice") and the Approved Plan of Allocation Updated to Apply to Settlements Achieved with Defendants Grant Thornton LLP, Joseph J. Murphy, Dennis A. Klejna and William M. Sexton (the "Updated Plan of Allocation") – to potential Settlement Class Members and nominees. *See* Joint Decl. ¶ 13.[5] The Notice set out the essential terms of the Additional Settlements and informed potential Settlement Class Members of their rights to opt out of the Settlement Class or object to the Additional Settlements. A Summary Notice, published in *Investor's Business Daily* on December 21, 2010, provided additional notice of the Additional Settlements to potential Settlement Class Members. *See id*.

[5] The Notice informed Settlement Class Members that if they had submitted a Proof of Claim in connection with the previous settlements in the Action, they were not required to submit another Proof of Claim to participate in the Additional Settlements. If Settlement Class Members had not previously submitted a Proof of Claim, they were able to obtain one at www.refcosecuritieslitigation.com or have one mailed to them by calling the Claims Administrator's toll-free number. *See* Joint Decl. ¶ 14.

To date, Lead Counsel have received no objections to the Additional Settlements and no requests for exclusion in response to the Notice.[6] The Court-ordered deadline for submitting objections and requesting exclusion from the Settlement Class with respect to the Additional Settlements is February 19, 2011. Should there be any objections or requests for exclusion they will be addressed by Lead Plaintiffs in a supplemental submission filed after that deadline.

3. The Stage Of The Proceedings And The Amount Of Discovery Completed Support Approval Of The Additional Settlements

The Additional Settlements were reached after years of hard-fought litigation that included extensive motion practice, review and analysis of tens of millions of pages of documents, and depositions of over 100 fact witness. Accordingly, Lead Counsel and Lead Plaintiffs possessed a thorough understanding of the strengths and weaknesses of the claims asserted against each of the Settling Defendants when negotiating and evaluating the merits of the Additional Settlements.

At the time that Lead Plaintiffs entered into agreements in principle to settle with Grant Thornton in August 2010 and with the Settling Officer Defendants in September 2010, the case had been thoroughly litigated. As set forth in the greater detail in the Joint Declaration, Lead Counsel had extensively developed the claims against the Settling Defendants to that point by, among other things:

- conducting a detailed factual investigation and analysis of Refco's SEC filings, press releases, other public statements issued by defendants, media and news reports about the Company, publicly available trading data relating to the price and volume of Refco's securities, and other information regarding the criminal proceedings against Refco's CEO Philip Bennett and other Refco insiders (Joint Decl. ¶¶ 10, 32);
- thoroughly researching the law pertinent to the claims against each Settling Defendant and the potential defenses available to these Settling Defendants (*id*. ¶ 10);

[6] There was one individual who requested exclusion in connection with the Initial Settlements. That person will also be an excluded person for purposes of the Additional Settlements.

- drafting two detailed amended complaints as a result of this detailed investigation and legal research (*id*. ¶¶ 10, 24);
- preparing extensive briefing in opposition to ten separate motions to dismiss – including motions filed by Grant Thornton and the Settling Officer Defendants (*id*. ¶¶ 10, 25-26);
- reviewing and analyzing more than 31 million pages of document discovery obtained from Refco, the Settling Defendants, other defendants in the Action, and multiple third parties (*id*. ¶ 34);
- taking or participating in depositions of one hundred and eight (108) fact witnesses taken over approximately one hundred fifty (150) days of testimony, which included eight (8) depositions of Grant Thornton representatives over twelve (12) days of testimony and depositions of two of the three Settling Officer Defendants (*id*. ¶ 35);
- interviewing former Refco CEO Philip Bennett to obtain further insight regarding the roles of various defendants in the fraud at Refco (*id*. ¶ 36);
- consulting extensively with experts in the fields of (i) accounting principles and auditing standards and (ii) market efficiency and damages, who prepared detailed expert reports and were deposed by Grant Thornton (*id*. ¶¶ 38-39);
- deposing Grant Thornton's experts proffered on the topics of (i) damages and bond market efficiency and (ii) accounting principles and auditing standards (*id*. ¶ 40);
- fully briefing a class certification motion that was vigorously contested by Grant Thornton (*id*. ¶ 43);
- opposing Grant Thornton's motion for summary judgment with a detailed counter-statement of facts and a comprehensive memorandum of law (*id*. ¶ 44); and
- beginning preparations for trial including, among other things, engaging in a detailed post-discovery analysis of Lead Plaintiffs' claims and the defenses available to the remaining defendants; preparing deposition designations; and considering possible motions *in limine*, including *Daubert* motions to exclude expert testimony (*id*. ¶ 45).

As a result of these efforts, Lead Plaintiffs and Lead Counsel were fully informed regarding the strengths and weaknesses of the claims against Grant Thornton and the Settling Officer Defendants at the time the Additional Settlements were reached. Lead Plaintiffs and Lead Counsel concluded that the Grant Thornton Settlement and the Officers Settlement each provided highly favorable resolutions of claims against those respective defendants without the substantial risk, uncertainty, and delay of continued litigation.

The "advanced stage of the litigation and extensive amount of discovery completed" at the time the Settlements were reached "weigh heavily in favor of approval" of the Additional

Settlements. *Marsh & McLennan*, 2009 WL 5178546, at *6; *see also In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 333-34 (E.D.N.Y. 2010) ("Extensive discovery ensures that the parties have had access to sufficient material to evaluate their cases and assess the adequacy of the settlement proposal in light of the strengths and weaknesses of their positions."); *Maley*, 186 F. Supp. 2d at 364 ("Plaintiffs' Counsel possessed a record sufficient to permit evaluation of the merits of Plaintiffs' claims, the strengths of defenses asserted by Defendants, and the value of Plaintiffs' causes of action for purposes of settlement.").

4. The Risks Of Establishing Liability And Damages Support Approval Of The Additional Settlements

Grinnell teaches that, in assessing the fairness, reasonableness and adequacy of a settlement, courts should consider such factors as the "risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial." 495 F.2d at 463 (citations omitted). These factors all support approval of the Additional Settlements.

Risks of Establishing Liability: The Settling Defendants vigorously contested their liability in this Action and would have continued to do so in the absence of the settlements. Lead Plaintiffs believe they had a strong case on the merits, but recovery against the Settling Defendants was by no means certain given the well-recognized hurdles to establishing liability under the federal securities laws. *See In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 256 (E.D. Va. 2009) (plaintiffs can never be confident of the outcome of securities fraud cases because "[e]lements such as scienter, materiality of misrepresentation and reliance by the class members often present significant barriers to recovery") (citation omitted); *AOL Time Warner*, 2006 WL 903236, at *9 ("the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages").

Lead Plaintiffs faced a number of substantial obstacles to establishing the Settling Defendants' liability in this Action, including the risk that they would ***not*** be able to prove (i) that Grant Thornton acted with scienter; (ii) that Grant Thornton's audits of Refco were inadequate under Generally Accepted Auditing Standards; (iii) that the Settling Officer Defendants failed to perform appropriate due diligence; (iv) that Refco's securities traded in efficient markets; or (iv) that the class's damages were caused by the allegedly false and misleading statements made by the Settling Defendants. *See* Joint Decl. ¶ 7.

All of the Settling Defendants had serious arguments available to them that other parties were responsible for the fraud – such as the Refco insiders who pled guilty or were convicted on criminal charges of securities fraud concerning Refco, including charges that they lied to certain of the Settling Defendants. *See* Joint Decl. ¶ 64. For example, in Grant Thornton's brief filed in support of its motion for summary judgment, Grant Thornton claimed that it was not a perpetrator of the fraud, but rather "was the Refco fraud's primary target." (Dkt. 686 at 1.)

With respect to Lead Plaintiffs' claim against Grant Thornton under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Lead Plaintiffs faced the substantial hurdle of establishing that Grant Thornton acted with intent to deceive or sufficient recklessness to establish scienter.[7] Establishing a defendant's scienter under Section 10(b) is generally no easy task, *see Telik*, 576 F. Supp. 2d at 579, but that burden was heightened here by Grant Thornton's role as independent auditor. To establish culpability, an auditor's recklessness must involve more than a mere failure to investigate; one court has said that auditor conduct must "approximate an actual intent to aid in the fraud being perpetrated by the audited company." *Rothman v. Gregor*, 220 F.3d

[7] Lead Plaintiffs' scienter-based claims against the Settling Officer Defendants were dismissed at the conclusion of fact discovery based on Lead Plaintiffs' review of all the available evidence.

81, 98 (2d Cir. 2000); *see also In re Ikon Office Solutions, Inc. Sec. Litig.*, 277 F.3d 658, 667-77 (3d Cir. 2002) (affirming summary judgment dismissing securities fraud claims against outside auditor on the element of scienter); *In re Doral Fin. Corp. Sec. Litig.*, 563 F. Supp. 2d 461, 464-65 (S.D.N.Y. 2008) (discussing the heightened showing of recklessness required to hold an independent auditor liable for fraud under Section 10(b) and dismissing claims against auditor); *Reiger v. PricewaterhouseCoopers LLP*, 117 F. Supp. 2d 1003, 1007-08 (S.D. Cal. 2000) ("it is almost always more difficult to establish scienter on the part of the accountant than on the part of its client"). Although Lead Plaintiffs had substantial evidence to support this claim, Grant Thornton continued to assert that it had no motive to commit fraud and that it had been lied to by Refco insiders. Lead Plaintiffs faced the risk that Grant Thornton's arguments would be accepted at summary judgment or at trial. *See* Joint Decl. ¶ 65.

With respect to Lead Plaintiffs' Securities Act claims against Grant Thornton and the Settling Officer Defendants, Lead Plaintiffs faced the risk that the Settling Defendants could successfully convince a jury that they performed adequate due diligence in connection with Refco's securities offerings. For example, as evidence of its due diligence, Grant Thornton claimed, among other things, that it had requested confirmations concerning a sufficient number of the "round-trip loan" transactions that were used to conceal the massive, uncollectible receivable on Refco's books. *See* Joint Decl. ¶ 66 The Settling Officer Defendants would also undoubtedly have claimed at trial that they had conducted "reasonable" due diligence. *See id.*

Moreover, a number of the complex issues in this case concerning, among other issues, accounting practices, market efficiency, and the calculation of damages would have required a significant amount of expert testimony from experts on both sides. The importance of expert testimony in a case such as this creates additional litigation risk because it is difficult for Lead

Plaintiffs to predict whether the jury or Court would accept their experts' view. *See, e.g.*, *Hicks v. Morgan Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("'battle of the experts' as to proper methods of valuation . . . creates a significant obstacle to plaintiffs in establishing liability"); *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("[i]n such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses").

Risks of Establishing Damages. Even if Lead Plaintiffs were successful in establishing the liability of the Settling Defendants, they faced a number of serious arguments that could have greatly reduced (or eliminated) the damages that the class could recover from the Settling Defendants. For example, Grant Thornton opposed Lead Plaintiffs' motion for class certification on the basis that Refco's securities did not trade on an efficient market. *See* Joint Decl. ¶ 67. In addition, Grant Thornton claimed that the class's damages should be limited to the drop in the price of Refco's securities that occurred immediately after the October 10, 2005 announcement that a multi-hundred million dollar related-party receivable had been discovered on Refco's books. *See id.* Acceptance of one or both of these arguments would have greatly reduced the class's maximum potential damage claims. The Settling Defendants could be expected to continue to press these arguments at trial.

In addition, all of the Settling Defendants would have been able to argue that their damages exposure was substantially reduced or even eliminated by the amounts that Lead Plaintiffs have already recovered in settlements with other defendants, because under the Private Securities Litigation Reform Act ("PSLRA"), a judgment against a non-settling defendant must be reduced by the greater of (i) the total amount recovered from any previously settling defendant; or (ii) the settling defendant's percentage of responsibility for any common damages. *See* 15 U.S.C. § 78u-

4(f)(7)(B); *see also In re Refco, Inc. Sec. Litig.*, No. 05 Civ. 8626 (GEL), 2007 WL 57872, at *3-*5 (S.D.N.Y. Jan. 9, 2007). In light of the $342 million in total settlements recovered by Lead Plaintiffs from other defendants prior to entering into the Additional Settlements, the PSLRA judgment-reduction rule posed a real risk that any judgment obtained against the Settling Defendants would be substantially lowered or – if the Settling Defendants' arguments reducing the maximum recoverable damages were accepted – possibly eliminated entirely. Accordingly, Lead Plaintiffs faced the risk that even after a lengthy and costly trial at which they successfully established the Settling Defendants' liability, they would not be able to obtain any additional payment to the class by the Settling Defendants. Joint Decl. ¶¶ 6, 69.

Risks Relating to Class Certification. At the time the Additional Settlements were achieved, Lead Plaintiffs' motion for class certification was fully briefed and pending before the Court. Grant Thornton had vigorously opposed Lead Plaintiffs' motion for class certification, and although Lead Plaintiffs believe that this Action is appropriate for class treatment and that they would have prevailed on their motion, Lead Plaintiffs faced the risk of an unfavorable decision that would have denied recovery to a large number of Refco investors. In addition, at the time the Additional Settlements were entered into, Lead Plaintiffs' motion for class certification and separate motion for final approval of the Initial Settlements were still pending. This situation gave rise to the risk that an unfavorable ruling on Grant Thornton's objections to Lead Plaintiffs' class certification motion – for example, regarding market efficiency or loss causation – might have adversely affected the Initial Settlements, as they had not been finally approved at the time.

* * *

Finally, even if Lead Plaintiffs achieved a favorable jury verdict, there is no doubt that the Settling Defendants would have appealed. Any appeal would significantly delay the distribution of

funds to the class even if the verdict were ultimately affirmed and, of course, Lead Plaintiffs would face the risk of reversal and having to relitigate the case in the trial court. Accordingly, while Lead Counsel believe that the Settlement Class's claims are meritorious, one or more arguments by the Settling Defendants might have prevailed and the Settlement Class could have ended up with little or no additional recovery from the Settling Defendants after a substantial amount of costly and time-consuming litigation. In light of these risks, Lead Counsel believe that the immediate and certain recovery of $25.3 million provided by the Additional Settlements is an excellent result for the Settlement Class.

5. The Ability Of Settling Defendants To Withstand A Greater Judgment

Under this *Grinnell* factor, the Court should consider whether the Settling Defendants had the ability to withstand a judgment greater than the amount of the proposed settlements. With respect to the Settling Officer Defendants, who had made forfeitures totaling $8,300,000 to the U.S. government and as to whom the carriers of Refco's D&O insurance had denied any coverage, Lead Counsel concluded that the cost of additional litigation far outweighed the amounts that Lead Plaintiffs could possibly collect from them after a successful trial and appeal. Joint Decl. ¶ 62.

While Grant Thornton may have possessed the ability to pay an amount greater than $25 million, this is not indicative of any flaw in this settlement. *See D'Amato*, 236 F.3d at 86 ("defendants' ability to withstand a higher judgment . . . standing alone, does not suggest that the settlement is unfair"); *Parker v. Time Warner Entm't Co.*, 631 F. Supp. 2d 242, 261 (E.D.N.Y. 2009) ("The fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate."); *McBean v. City of New York*, 233 F.R.D. 377, 388 (S.D.N.Y. 2006) ("the ability of defendants to pay more, on its own, does not render the settlement unfair, especially where the other *Grinnell* factors favor approval"). The possibility that

Grant Thornton or the other Settling Defendants may have had the ability to withstand a greater judgment is outweighed by the many other strong considerations favoring the Additional Settlements, including the risks of establishing liability and damages and the reasonableness of the settlement amounts achieved in light of those risks.[8]

6. The Range Of Reasonableness Of The Settlement Amounts In Light Of The Best Possible Recovery And All The Attendant Risks Of Litigation Supports Approval Of The Additional Settlements

The last two substantive factors that courts consider are the range of reasonableness of the settlement amount in light of: (i) the best possible recovery and (ii) litigation risks. In analyzing these factors, the issue is not whether a settlement represents the "best possible recovery," but how it relates to the strengths and weaknesses of the case. *Grinnell*, 495 F.2d at 462-63 (a court should "consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable") (citation omitted). Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Rather, "in any case there is a range of reasonableness with respect to a settlement" that "recognizes the uncertainties of law and fact . . . and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). Lead Plaintiffs submit that both of the Additional Settlements are well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation.

[8] In particular, the risk that the class might recover no damages as a result of the PSLRA judgment-reduction provision, even if Lead Plaintiffs succeeded in establishing the Settling Defendants' liability, made questions about the Settling Defendants' ability to pay of secondary importance here.

Lead Plaintiffs' damages expert has estimated that the maximum total damages in this case (assuming that Lead Plaintiffs prevailed on defendants' various challenges to damages summarized above) amount to approximately $989 million. *See* Joint Decl. ¶ 5. Together with the approximately $342 million received in the previously approved settlements and the over $40 million in restitution funds that will be distributed to the Settlement Class, the Additional Settlements bring the total recovery amount for the benefit of the Settlement Class to over $407 million. *Id.* This return of more than 41% of the class's highest possible damages claim is a truly excellent level of recovery for the Settlement Class. Moreover, if the Settling Defendants' various arguments seeking to limit the class's recoverable damages were to prevail, the total recovery for the benefit of the Settlement Class would *far exceed* the class's recoverable damages. *Id.* ¶ 6.

Courts have frequently found recoveries representing much smaller percentages of maximum damages to be fair and reasonable in light of the numerous risks presented by securities litigation. *See, e.g.*, *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (recovery of approximately 6.25% was "at the higher end of the range of reasonableness of recovery in class action[] securities litigations"); *Hicks*, 2005 WL 2757792, at *7 (settlement representing 3.8% of plaintiffs' damage calculation was "within the range of reasonableness"); *In re Blech Sec. Litig.*, No. 94 Civ. 7696 (RWS), 2000 WL 661680, at *4 (S.D.N.Y. May 19, 2000) (approving settlement representing 5% to 17% of plaintiffs' estimated damages).

Here, the $25.3 million cash recovery produced by the Additional Settlements represents an excellent result for the Settlement Class in light of the magnitude of the other settlements previously achieved (which, under the PSLRA, could have eliminated the right to any additional recovery from

these defendants, even if liability were established), the range of possible recoveries and the risks and expense of continued litigation.

B. The Fact That The Additional Settlements Were The Product Of Arm's-Length Negotiations And That They Are Recommended By Lead Plaintiffs And Experienced Counsel Also Support Their Fairness

Each of the Additional Settlements was the result of vigorously contested, arm's-length negotiations. "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.'" *Wal-Mart*, 396 F.3d at 116 (citation omitted); *Luxottica*, 233 F.R.D. at 315 ("An assumption of correctness attaches to a class settlement reached in arm's-length negotiations . . . ."); *In re Sterling Foster & Co., Inc. Sec. Litig.*, 238 F. Supp. 2d 480, 484 (E.D.N.Y. 2002) ("[a] strong presumption of fairness attaches to proposed settlements that have been negotiated at arm's-length").

The Grant Thornton Settlement was reached only following hard-fought negotiations spanning more than one year. The negotiations included a formal mediation session before Judge Phillips on July 27, 2009, which included the submission of detailed mediation statements. Despite intense negotiations conducted in connection with this mediation, no settlement was achieved that that time. Joint Decl. ¶ 49. Over the next year, while engaging in fact and expert discovery and briefing the motions for class certification and summary judgment, Lead Plaintiffs and Grant Thornton engaged in intermittent discussions concerning a possible settlement and included Judge Phillips in many of those continuing discussions. *Id*. ¶ 50. On August 22, 2010, while the motions for class certification and Grant Thornton's motion for summary judgment were pending and at a time when the previous group of settlements (with the THL and Audit Committee Defendants and the Underwriter Defendants) had been agreed to but not yet finally approved by the Court, Lead Plaintiffs and Grant Thornton reached an agreement in principle to settle for $25 million. *Id*. ¶ 51.

The involvement of an experienced mediator like Judge Phillips strengthens the conclusion that the Grant Thornton Settlement is fair and reasonable. *See D'Amato*, 236 F.3d at 85 (a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"); *In re Delphi Corp. Sec., Derivative & ERISA Litig.*, 248 F.R.D. 483, 498 (E.D. Mich. 2008) (approving settlement negotiated with the assistance of Judge Phillips and referring to him as "one of the most prominent and highly skilled mediators of complex actions"). Judge Phillips has submitted a declaration detailing his involvement in the negotiations and stating that the negotiations were complex, adversarial and fully at arm's length, that the advocacy on both sides of the case was outstanding and that, in his view, the Grant Thornton Settlement is fair and reasonable. *See* Declaration of Layn Phillips, attached to the Joint Decl. as Exhibit 1.

The Officers Settlement also resulted from lengthy negotiations conducted at arms'-length by experienced counsel. Lead Plaintiffs entered into earlier settlements with Defendants Klejna and Murphy on December 6, 2007 and February 12, 2008, respectively, following arms'-length negotiations. Joint Decl. ¶¶ 55, 57. These earlier settlements failed to become effective because the insurance carriers who were expected to pay the overwhelming majority of the settlement amounts under Refco's D&O insurance policies denied coverage, and Klejna and Murphy's efforts to require the insurance carriers to fund the settlements were unsuccessful. *Id*. ¶¶ 56, 58. Over the next two years as the parties completed fact and expert discovery (including the depositions of Defendants Murphy and Sexton), counsel for Lead Plaintiffs and the Settling Officer Defendants engaged in intermittent settlement negotiations. *Id*. ¶ 59. The lengthy and adversarial nature of the negotiations support a finding that the Officers Settlement is fair.

The recommendations of Lead Plaintiffs and Lead Counsel also support the fairness of the Additional Settlements. Lead Plaintiffs are sophisticated institutional investors who took an active role in overseeing the prosecution and resolution of the litigation against the Settling Defendants and who endorse the Additional Settlements. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *Veeco*, 2007 WL 4115809, at *5; *see also In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ.10240 (CM), 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007); *Global Crossing*, 225 F.R.D. at 462 (the participation of a sophisticated institutional investor lead plaintiff in the settlement process supported approval of the settlement). "Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *EVCI*, 2007 WL 2230177, at *4.

Moreover, Lead Counsel, who have extensive experience prosecuting complex securities class actions and were thoroughly informed about the strengths and weaknesses of the Class's claims when the agreements to settle were reached, believe that each of the Additional Settlements is fair, reasonable and adequate, and in the best interests of the Settlement Class. Joint Decl. ¶ 11. Experienced and informed counsel's endorsement of a proposed settlement is entitled to "great weight." *PaineWebber*, 171 F.R.D. at 125; *see also Veeco*, 2007 WL 4115809, at *12; *Am. Bank Note Holographics*, 127 F. Supp. 2d at 430.

In sum, an analysis of all the factors to be considered under *Grinnell* demonstrates that each of the Additional Settlements is fair, reasonable and adequate and warrants approval by the Court.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPLIED TO THE ADDITIONAL SETTLEMENTS

This Court, in connection with approval of the THL and Audit Committee Settlement and the Underwriters Settlement, approved Lead Plaintiffs' proposed Plan of Allocation for allocation of the

net settlement funds to Settlement Class Members. *See* Order Approving Plan of Allocation of Net Total Settlement Fund, dated October 28, 2010 (Dkt. 756). Lead Plaintiffs now request that the Court authorize the application of the same Plan of Allocation for purposes of distributing the net proceeds of the Additional Settlements. An Updated Plan of Allocation, which did not alter the allocation formula but simply updated the language in the introductory portions of the Plan to specify that the plan would be applied to the proceeds of the Additional Settlements, was provided to potential Settlement Class Members along with the Notice.

As the Court previously found, the Plan of Allocation provides a reasonable and rational basis for allocating the net total settlement funds among eligible claimants. Accordingly, Lead Plaintiffs now request that the Court authorize the application of the Plan of Allocation to the Additional Settlements in accordance with the Notice.

III. NOTICE TO THE SETTLEMENT CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice provided to the Settlement Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice also satisfied Rule 23(e)(1), which requires that 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 (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)).

Both the substance of the Notice and the method of its dissemination to potential Settlement Class Members satisfied these standards. The Notice Packet included all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. §§ 77z-1(a)(7), 78u-4(a)(7),

including: (a) an explanation of the nature of the Action and the Settlement Class's claims; (b) a definition of the Settlement Class; (c) the amount of the Additional Settlements; (d) a description of the Plan of Allocation; (e) an explanation of the reasons why the parties are proposing the Additional Settlements; (e) a statement indicating the attorneys' fees and costs that will be sought; (f) a description of Settlement Class Members' rights to opt-out of the Settlement Class or object to the Settlements or the requested attorneys' fees or expenses; and (g) notice of the binding effect of a judgment on Settlement Class Members.

In accordance with the Court's Preliminary Approval Order, the Claims Administrator caused 40,508 copies of the Notice Packet to be mailed by first-class mail on December 15, 2010 to Settlement Class Members and nominees who were identified in connection with the previous settlements. *See* Joint Decl. ¶ 13. The Claims Administrator mailed an additional 2,744 Notice Packets after the initial mailing, bringing the total number mailed through January 31, 2011 to 43,252. *See id*. On December 21, 2010, a Summary Notice concerning the Additional Settlements was published in *Investor's Business Daily*. *See id.* This combination of individual first-class mail to all Settlement Class Members who could be identified through reasonable effort, supplemented by notice in a widely-circulated publication, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). In addition, the Notice Packet and many other materials relevant to the Action, including Lead Plaintiffs' papers in support of preliminary approval (which contained copies of the Grant Thornton Stipulation and the Officers Stipulation), were made available on-line at www.refcosecuritieslitigation.com. Lead Plaintiffs' final approval papers (including this memorandum of law) and Lead Counsel's motion for an award of attorneys' fees and reimbursement of expenses will also be posted on that website. *See* Joint Decl. ¶ 13.

IV. THE SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED FOR SETTLEMENT PURPOSES

In the Preliminary Approval Order, the Court preliminarily certified a Settlement Class as against the Settling Defendants consisting 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, and who were damaged thereby." Preliminary Approval Order ¶ 1.[9] This is the same Settlement Class that the Court has already certified for the purposes of the THL and Audit Committee Settlement and the Underwriter Settlements. *See* Judgment and Order of Dismissal with Prejudice, dated October 28 2010, at ¶ 4 (Dkt. 755); Judgment Approving Class Action Settlement with the Settling Underwriter Defendants, dated October 28 2010, at ¶ 4 (Dkt. 754); Judgment Approving Class Action Settlement with the Sandler O'Neill & Partners, L.P., dated October 28 2010, at ¶ 3 (Dkt. 753).

For the reasons set forth in detail in Lead Plaintiffs' memorandum in support of preliminary approval of the Additional Settlements (Dkt. 742, at 10-20), certification is appropriate here because the Settlement Class meets all the requirements of Rule 23(a) and Rule 23(b)(3). Accordingly, Lead Plaintiffs request that the Court grant final certification of the Settlement Class for the purposes of the Additional Settlements.

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[9] Excluded from the Settlement Class are "(a) Refco; (b) the Defendants; (c) 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; (d) members of the Defendants' immediate families; (e) entities in which Refco or any Defendant has a controlling interest; and (f) 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 or entity by definition. Also excluded from the Settlement Class is any person and/or entity who or which properly previously excludes 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 . . ." Preliminary Approval Order ¶ 1.

CONCLUSION

For all the foregoing reasons, Lead Plaintiffs respectfully request that the Court approve the proposed Additional Settlements as fair, reasonable and adequate, approve the application of the Plan of Allocation to the Additional Settlements, and certify the Settlement Class for purposes of the Additional Settlements.

Dated: New York, New York
February 4, 2011

Respectfully submitted,

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