

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re REFCO, INC. SECURITIES : MASTER FILE NO.
LITIGATION : 05 Civ. 8626 (GEL)
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**LEAD PLAINTIFFS' OPPOSITION TO THE AUDIT COMMITTEE
DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION**

**BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP**

Max W. Berger (MB-5010)
John P. Coffey (JC-3832)
Salvatore J. Graziano (SG-6854)
John C. Browne (JB-0391)
Jeremy P. Robinson
1285 Avenue of the Americas
New York, NY 10019
Telephone: (212) 554-1400
Facsimile: (212) 554-1444

GRANT & EISENHOFER P.A.

Stuart M. Grant (SG-8157)
James J. Sabella (JS-5454)
485 Lexington Avenue
29th Floor
New York, NY 10017
Telephone: (646) 722-8500
Facsimile: (646) 722-8501
- and -

Megan D. McIntyre
Christine M. Mackintosh
Jill Agro
Chase Manhattan Centre
1201 North Market Street
Wilmington, DE 19801
Telephone: (302) 622-7000
Facsimile: (302) 622-7100

*Attorneys for Lead Plaintiffs RH Capital Associates LLC and Pacific
Investment Management Company LLC and Co-Lead Counsel for the Putative Class*

Lead Plaintiffs RH Capital LLC and Pacific Investment Management Company, LLC respectively submit this memorandum of law in opposition to the motion for reconsideration of the Court's April 30, 2007 Opinion and Order (the "Opinion") filed by defendants Ronald L. O' Kelley, Leo R. Breitman and Nathan Gantcher (collectively, the "Audit Committee Defendants").

As set forth below, the Audit Committee Defendants' motion should be denied because it fails to identify any factual matter or controlling decision overlooked by the Court and merely seeks to reargue matters already addressed by the Court expressly in its Opinion. There simply is no basis to argue that the Court's Opinion is inconsistent with Second Circuit authority or the facts alleged in the First Amended Consolidated Class Action Complaint (the "Complaint"). Rather, the Court correctly summarized the facts alleged in the Complaint as well as the controlling Second Circuit authorities in its Opinion.

ARGUMENT

DEFENDANTS' MOTION SHOULD BE DENIED BECAUSE IT FAILS TO IDENTIFY ANY FACTUAL MATTER OR CONTROLLING DECISION OVERLOOKED BY THE COURT AND MERELY SEEKS TO REARGUE MATTERS ALREADY CONSIDERED BY THE COURT

Consistent with Local Civil Rule 6.3, this Court has repeatedly held that motions for reconsideration should be limited to cases in which the Court has actually overlooked controlling decisions or factual matters, and that motions for reconsideration are not opportunities to re-argue issues or allegations already considered.

For example in *In re Salomon Analyst Level 3 Litigation*, 373 F. Supp. 2d 248, 250 (S.D.N.Y. 2005) (Lynch, J.), this Court held:

Local Civil Rule 6.3 for the Southern District of New York provides that parties may file motions for reconsideration of the Court's decisions, accompanied by memoranda that set forth "the matters or controlling decisions which counsel believes the court has overlooked." Courts in this District review motions pursuant to Local Rule 6.3 under the same standards applicable to motions pursuant to Federal Rule of Civil Procedure 59(e), and thus "a motion for reconsideration is appropriate only where the movant demonstrates that the Court has overlooked controlling decisions or factual matters that were put before it on the underlying motion . . . and which, had they been considered, might have reasonably altered the result before the Court." *McCullah v. Merrill Lynch & Co.*, 2004 U.S. Dist. LEXIS 5815, 01 Civ. 7322 (DAB), 2004 WL 744484, at *1 (S.D.N.Y. Apr. 7, 2004) (citations and internal quotations omitted). Motions for reconsideration are not opportunities to re-argue issues or allegations already considered, and thus the rule should be "narrowly construed and strictly applied." *National Congress for Puerto Rican Rights v. City of New York*, 191 F.R.D. 52, 53 (S.D.N.Y. 1999).

See also Weiss v. El Al Israel Airlines, Ltd., 471 F. Supp. 2d 356, 358 (S.D.N.Y. 2006) (Lynch, J.) (same); *Slue v. New York University Medical Center*, 2006 U.S. Dist. LEXIS 3126 at *2, 04 Civ. 2087 (GEL) (S.D.N.Y. Jan. 26, 2006) (Lynch, J.) (same).

The Audit Committee Defendants' motion for reconsideration should be denied as it fails to identify any factual matter or controlling decision overlooked by the Court and merely seeks to re-argue that which the Audit Committee Defendants already argued and the Court already considered before.

The Audit Committee Defendants' primary argument in support of reconsideration is that the Court somehow overlooked the holdings of *Acito v. IMCERA Group, Inc.*, 47 F.3d 45 (2d Cir. 1995) and *Kalnit v. Eichler*, 264 F.3d 131 (2d Cir. 2001). *See* Memorandum of Law in Support of the Audit Committee Defendants' Motion For Partial Reconsideration ("Recons. Mem.") at 1. However, not only were these cases cited extensively in the memorandum of law submitted by the Audit Committee Defendants in support of their motion to dismiss ("Audit Comm. MTD Br.") (*see id.* at 3, 25, 26, 27,

29), but *the Court* specifically cited to them in denying Defendants' motion to dismiss (see Opinion at 49, 50, 68). Accordingly, it is clear that these authorities were not "overlooked" as the Audit Committee Defendants contend.

In its Opinion, the Court accurately summarized the Second Circuit authorities cited by the Audit Committee Defendants in their motion for reconsideration, as follows:

As to motive and opportunity, "[m]otives that are generally possessed by most corporate directors and officers do not suffice; instead, plaintiffs must assert a concrete and personal benefit to individual defendants resulting from the fraud." *Kalnit v. Eichler*, 264 F. 3d 131, 139 (2d Cir. 2001).

* * *

To establish an adequate motive to commit securities fraud, plaintiffs must allege a motive that is concrete and personal to the defendant charged with making the misstatement or omission. *Kalnit*, 264 F.3d at 139. This must be more than "a generalized motive, one which could be imputed to any publicly-owned, for-profit endeavor" *Chill v. Gen. Elec. Co.*, 101 F.3d 268 (2d Cir. 1996). "Motives that are generally possessed by most corporate directors and officers do not suffice." *Kalnit*, 264 F.3d at 139. The desire for the corporation to appear profitable, the desire to keep stock prices high, and even the desire to keep stock prices high in order to increase officer compensation, are insufficient because they are "common to all corporate executives and, thus, too generalized to demonstrate scienter." *Id.* Similarly, "[t]o allege a motive sufficient to support the inference [of scienter], a plaintiff must do more than merely charge that executives aim to prolong the benefits of the positions they hold." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1130 (2d Cir. 1994).

Of course, the desire to keep stock prices high or to increase one's own compensation are often the actual motive for corporate fraud, but "[i]f scienter could be pleaded on that basis alone, virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions." *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 54 (2d Cir. 1995). "[T]he 'not commonly shared' limitation on motive inhibits some plaintiffs who have been genuinely defrauded from obtaining a remedy," *JP Morgan Chase*, 363 F. Supp. 2d at 619, but the mere desire to increase officer compensation or stock prices does not give rise to a "strong inference" of fraudulent intent because such desires are omnipresent, and can as easily be a sign of simple ambition or run-of-

the-mill greed as of fraud. *Cf. id.* at 618 n.14 (discussing whether plaintiffs must plead facts that exclude other inferences that are equally plausible to scienter).

Opinion at 49-51.

The Court went on to consider the Complaint's specific factual allegations and held that the fact that the Audit Committee Defendants each received 20,000 restricted stock units ("RSUs") in advance of the IPO (which would become worthless if the fraud were exposed) sufficiently supported the required inference of scienter. Opinion at 68.

As held by the Court:

It could be inferred from the fact that grants were made directly to the Audit Committee – and only to the Audit Committee – that the RSU grants were part of a quid pro quo in exchange for the Committee's overlooking the fraudulent transactions, or a specifically tailored incentive for them to overlook the transactions, or both. Because only these boardmembers received the RSUs, this allegation is not "common to all" boardmembers, *Kalnit*, 264 F. 3d at 139, and is sufficient to support an inference of motive.

Id. See also Complaint ¶ 592. Thus, the Court expressly considered and applied the very Second Circuit authorities the Audit Committee Defendants claim were overlooked.¹

The Court also carefully considered and rejected the Audit Committee Defendants' factual argument that their purchases of Refco shares after the IPO are sufficient at this stage to disprove scienter as a matter of law:

Several defendants point out that they purchased stock in the IPO, which, they argue, is inconsistent with the motive to commit fraud.

* * *

¹ Similarly, the Audit Committee Defendants' arguments that other *officer* defendants (Phillip Bennett and Dennis Klejna) also received RSUs and that the Audit Committee Defendants received their RSUs nine months before the IPO (Recons. Mem. at 3-4) are not new arguments, nor are they grounds to revisit the Court's findings.

In this case, however, the facts alleged in the complaint do not make clear that the defendants knew the ship was sinking. The defendants might have believed that the uncollectible receivables held by RGHI could be hidden indefinitely or at some point permanently disposed of (for example, by RGHI actually paying Refco for them), and Refco's stock would accordingly continue to rise.

* * *

Defendants are free to argue to a finder of fact that their actions were inconsistent with an intent to commit fraud. It might be possible to argue, for example, that plaintiffs' allegations are implausible because Refco would have been seen as too risky an investment by anyone who know of the scheme. However, despite the demands of Rule 9(b) and the PSLRA, this is, after all, a motion to dismiss, and arguments such as these are inappropriate at this stage.

Opinion at 53-54.

In sum, rather than identify any factual matter or controlling decision overlooked by the Court, the Audit Committee Defendants are merely disagreeing with the Court's conclusions arising from the same authorities and facts already considered by the Court. However, as numerous courts in this District have stated when confronted with motions for reconsideration that fail to demonstrate anything the court overlooked, this Court's opinion "was not an adverse party's submission to which [defendants] are entitled to respond." *Department of Economic Dev. v. Arthur Andersen & Co.*, 139 F.R.D. 594, 596 (S.D.N.Y. 1991) (quoting *Weissman v. Fruchtman*, 124 F.R.D. 559, 560 (S.D.N.Y. 1989)). The Audit Committee Defendants' motion for reconsideration should therefore be denied.

CONCLUSION

For the foregoing reasons, the Audit Committee Defendants' motion for reconsideration should be denied.

Dated: May 24, 2007

Respectfully submitted,

**BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP**

By: /s/ Salvatore J. Graziano
Max W. Berger (MB-5010)
John P. Coffey (JC-3832)
Salvatore J. Graziano (SG-6854)
John C. Browne (JB-0391)
Jeremy P. Robinson
1285 Avenue of the Americas
New York, NY 10019
Telephone: (212) 554-1400
Facsimile: (212) 554-1444

GRANT & EISENHOFER P.A.

By: /s/ James J. Sabella
Stuart M. Grant (SG-8157)
James J. Sabella (JS-5454)
485 Lexington Avenue
29th Floor
New York, NY 10017
Telephone: (646) 722-8500
Facsimile: (646) 722-8501
- and -
Megan D. McIntyre
Christine M. Mackintosh
Jill Agro
Chase Manhattan Centre
1201 North Market Street
Wilmington, DE 19801
Telephone: (302) 622-7000
Facsimile: (302) 622-7100

*Attorneys for Lead Plaintiffs RH Capital
Associates LLC and Pacific Investment
Management Company LLC and Co-Lead
Counsel for the Putative Class*

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2007 the attached **LEAD PLAINTIFFS' OPPOSITION TO THE AUDIT COMMITTEE DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION** was served via Electronic Mail and First-Class U.S. Mail to the following parties:

Bruce R. Braun (BB2505)
Bradley E. Lerman (BL1993)
Linda T. Coberly (LC8078)
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
Telephone: (312) 558-5600
Fax: (312) 558-5700

David Mollón (DM5624)
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 294-6700
Fax: (212) 294-4700

Margaret Maxwell Zagel
Tracy W. Berry
GRANT THORNTON LLP
175 W. Jackson Blvd., 20th Floor
Chicago, IL 60604
Telephone: (312) 856-0001
Fax: (312) 565-3473

*Attorneys for Defendant
Grant Thornton LLP*

Helen B. Kim (HK-8757)
BAKER & HOSTETLER LLP
333 South Grand Avenue
Los Angeles, CA 90071-1523
Telephone: (213) 975-1611
Fax: (213) 975-1740

Marc D. Powers (MP-1528)
BAKER & HOSTETLER LLP
666 Fifth Avenue
New York, NY 10103
Telephone: (212) 589-4200
Fax: (212) 589-4201

Richard E. Nathan (RN-6487)
NATHAN LAW OFFICE
123 South June Street
Los Angeles, CA 90004
Telephone: (323) 931-8080
Fax: (323) 931-8008

Robert B. McCaw (RM-7427)
Lori A. Martin (LM-7125)
John V.H. Pierce (JP-2870)
Dawn M. Wilson (DW-3810)
WILMER CUTLER PICKERING
HALE and DORR LLP
399 Park Avenue
New York, NY 10022
Telephone: (212) 230-8800
Fax: (212) 230-8888
Attorneys for the Underwriter Defendants

Scott E. Hershman
Stephen R. Blacklocks
Richard Soto
HUNTON & WILLIAMS LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 309-1000
Attorneys for Defendant Santo C. Maggio

Jeffrey T. Golenbock (JG 2217)
Adam C. Silverstein (AS 4876)
GOLENBOCK EISEMAN ASSOR
BELL & PESKOE LLP
437 Madison Avenue, 35th Floor
New York, NY 10022-7302
Telephone: (212) 907-7300
Fax: (212) 754-0330

*Attorneys for Defendants Phillip R.
Bennett, Refco Group Holdings Inc., and Phillip R.
Bennett Three Year Annuity Trust*

Attorneys for Defendant Dennis A. Klejna

Holly K. Kulka (Bar No. 158692)
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
Telephone: (212) 832-8300
Fax: (212) 763-7600

Attorneys for Defendant Philip Silverman

Stuart L. Shapiro (SS 0894)
Matthew J. Sava (MS 9231)
Yoram J. Miller (YM 4207)
SHAPIRO FORMAN ALLEN SAVA &
McPHERSON LLP
380 Madison Avenue
New York, NY 10017
Telephone: (212) 972-4900
Fax: (212) 557-1275

*Attorneys for Defendants Joseph J. Murphy and
Gerald M. Sherer*

Greg A. Danilow (GD-1621)
Paul Dutka (PD-2568)
Seth Goodchild
Joshua S. Amsel
WEIL GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
Fax: (212) 310-8007

*Attorneys for the "THL" and "Audit Committee"
Defendants*

Michael T. Hannafan (*pro hac vice*)
Blake T. Hannafan (*pro hac vice*)
Nicholas A. Pavich (*pro hac vice*)
HANNAFAN & HANNAFAN, LTD.
One East Wacker Drive
Suite 1208
Chicago, IL 60601
Telephone: (312) 527-0055
Fax: (312) 527-0220

Norman Eisen (*pro hac vice*)
Melinda Sarafa (MS-9943)
ZUCKERMAN SPAEDER LLP
1540 Broadway, Suite 1604
New York, NY 10036-4039
Telephone: (212) 704-9600
Fax: (212) 704-4256

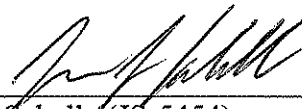
Attorneys for Defendant Tone Grant

Ivan Kline (IK-9591)
Stuart I. Friedman (SF-9186)
Elizabeth D. Meacham (EM-0890)
FRIEDMAN & WITTENSTEIN
600 Lexington Avenue
New York, NY 10022
Telephone: (212) 750-8700
Fax: (212) 223-8391

Attorneys for Defendant William M. Sexton

Barbara Moses (BM-2952)
Rachel Korenblat (RK-0170)
MORVILLO, ABRAMOWITZ, GRAND
IASON, ANELLO & BOHRER, P.C.
565 Fifth Avenue
New York, New York 10017
Telephone: (212) 865-9600
Fax: (212) 865-9494

Attorneys for Defendant Robert Trosten



James J. Sabella (JS-5454)
GRANT & EISENHOFER P.A.
485 Lexington Avenue
29th Floor
New York, NY 10017
Tel: (646) 722-8500
Fax: (646) 722-8501