

3. approval of the form and manner of notice to putative class members.

This Report and Recommendation concludes that:

1. The proposed Settlement is fair and reasonable and should be preliminarily approved.
2. The requirements for preliminarily certifying a settlement class action as against the THL Defendants have been met.
3. The proposed notice --- attached to this Report and Recommendation --- meets the standards of Rule 23, the PSLRA, and the Due Process Clause.

I. Background

Lead Plaintiffs have reached an agreement to settle this securities class action as against the THL Defendants --- certain of which purchased a controlling interest in Refco in a 2004 LBO --- as set forth in the Stipulation and Agreement of Settlement between Lead Plaintiffs and the Settling Defendants, attached hereto.

As Lead Plaintiffs recognize, the procedural posture for this proposed class action settlement is atypical. In connection with Refco's bankruptcy plan (the "Refco Chapter 11 Plan"), all of the members of the proposed class have assigned the proceeds of the claims in the RCM Class Action to a trust called the Private Actions Trust, which was created in connection with the Refco Chapter 11 Plan. All of the members of the proposed class are also beneficiaries of a second trust --- the Refco Litigation Trust. Marc Kirschner is the Trustee of both Trusts. After the fall of Refco, the Trustee brought separate actions against the THL Defendants on behalf of the Private Actions Trust and the Refco Litigation Trust, and Lead Plaintiffs brought a securities class action against the THL defendants as well.

On behalf of the Refco Litigation Trust, the Private Actions Trust and the members of the proposed Settlement Class, the Trustee has negotiated a Global Settlement of all claims held by the two trusts and the class members against the THL Defendants. As a result of the Global Settlement, the trusts will receive gross settlement proceeds of \$145,000,000. In accordance with the language of the Refco Private Actions Trust Agreement, and in accordance with the trusts' past practices, the \$145 million will be split equally between the two trusts, with \$72.5 million going to the Private Actions Trust and the other \$72.5 million going to the Refco Litigation Trust. Each member of the Settlement Class in the securities class action is a beneficiary of both trusts. Accordingly, the members of the Settlement Class will benefit from both halves of the \$145 million payment --- to the tune of about \$40 million in the aggregate for the Class.

As a condition of the Settlement, the THL Defendants are requiring the release of the claims of all members of the Settlement Class. Thus, to secure the \$145 million settlement

payment that will ultimately benefit the Settlement Class Members through their status as trust beneficiaries, Lead Plaintiffs must obtain the Court's approval of the settlement of the RCM Class Action as part of the overall global settlement.

The Special Master has weighed the benefits of the Settlement against the significant risk that continuation of this protracted and strenuously contested litigation against the THL Defendants might lead to no recovery, or a smaller recovery, from the THL Defendants. The Special Master finds that the Settlement was the result of extensive, arms'-length negotiations that took place following several years of discovery that included approximately 100 depositions and the production of millions of pages of documents.² When the Settlement was reached, the parties had a thorough understanding of the strengths and weaknesses of their respective positions. Moreover, the Trustee had to consider, among other things, that Judge Lynch granted the THL Defendants' motion to dismiss the RCM Class Action with prejudice on multiple grounds. At the time that the parties reached their global settlement, the appeal of that dismissal had been awaiting a decision from the Second Circuit for more than a year.

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 preliminary approval of the Settlement so that notice may be provided to the Settlement Class.

II. Description of the Litigation and the Settlement Process

The Trusts

Refco Capital Markets, Ltd. ("RCM"), together with several of its corporate affiliates, filed voluntary petitions for bankruptcy on October 17, 2005. During the course of negotiations for a Chapter 11 plan in connection with the bankruptcy, Marc Kirschner, who had been appointed to serve as the Chapter 11 RCM Trustee, represented the interests of RCM creditors and ultimately forged a global compromise with other Refco creditors whereby all of Refco's creditors would receive substantial distributions from the bankruptcy estates. The global compromise was memorialized in the Refco Chapter 11 Plan, filed by Refco, the RCM Trustee, and the statutory creditors' committees appointed in Refco's cases. The Refco Chapter 11 Plan was confirmed by the Bankruptcy Court on December 15, 2006 and became effective on December 26, 2006.

² The parties to the RCM Class Action participated in the coordinated discovery efforts of the Refco MDL actions and therefore conducted a significant amount of documentary and deposition discovery even though this action has not proceeded beyond the pleadings stage. Plaintiffs will conduct additional discovery of the parties other than the Settling Defendants in the event that the Second Circuit reverses the dismissal of the RCM Class Action, discussed *infra*.

The Refco Chapter 11 Plan established two litigation trusts to pursue potential claims against third parties. The first, the *Refco Litigation Trust*, was established to pursue claims belonging to Refco or its affiliates. The beneficiaries of the Refco Litigation Trust include each Settlement Class Member, as customers and creditors of Refco, as well as other general unsecured creditors of Refco entities. The second trust, the *Refco Private Actions Trust*, was established so that creditors and customers of Refco and its affiliates could contribute any claims they may have had individually against third parties (or recoveries under such claims) to a single entity to pursue.³ RCM customers holding more than 90% of the claims (by value) included in the RCM Class Action, including all the Settlement Class Members, elected to contribute their claims (or recoveries under such claims) to the Refco Private Actions Trust. The Refco Private Actions Trust was formed to ensure that the Refco bankruptcy estates (the claims of which are being pursued by the Refco Litigation Trust) would not be competing with their own creditor constituents for recoveries from the same defendants. As stated above, Marc Kirschner was appointed and approved as Trustee for both trusts.⁴ The two creditor-owned trusts share the proceeds of their collective actions in the hopes that all creditor interests would be aligned and focused on recovering maximum value from wrongdoers.⁵

When the Refco Chapter 11 Plan was originally formulated, the Refco Private Actions Trust provisions contemplated the assignment by RCM creditors to the Refco Private Actions Trust of any and all non-contract claims and causes of action (including claims for securities fraud under section 10b-5) arising from their Refco-related losses. However, because of a concern that claims in the RCM Class Action could not be assigned to the trusts, the Refco Chapter 11 Plan was renegotiated to provide that any customer opting to participate in the Refco Private Actions Trust would be compelled to contribute to the Trust its pro rata share of net (after counsel fees) recoveries from the RCM Class Action. Accordingly, the Refco Chapter 11 Plan provided that any creditor wishing to participate in the Refco Private Actions Trust was required to assign to the Refco Private Actions Trust all non-contract claims and causes of action (other than the claims being prosecuted in the RCM Class Action).⁶ With respect to the RCM Class Action, any member of the class that opted into the Refco Private Actions Trust was also required to assign its entire share of the net proceeds to the Refco Private Actions Trust.⁷

In sum, the Refco Chapter 11 Plan created the Refco Private Actions Trust as a collective action vehicle that would represent, in a fiduciary capacity, the interests of all members of the RCM Class Action that are Refco Private Actions Trust beneficiaries. The Trustee has already collected more than \$162 million, through settlements and government disgorgement funds, for

³ See Refco Chapter 11 Plan § 5.8(a).

⁴ See Refco Private Actions Trust Agreement § 1.1(b); Refco Litigation Trust Agreement § 1.1(b).

⁵ See Refco Private Actions Trust Agreement § 1.2(h).

⁶ See Refco Chapter 11 Plan, §§ 1.148 and 5.8(b).

⁷ Refco Private Actions Trust Agreement §§ 1.6, 3.12(j) & 6.2(f).

distribution to the Trusts. All money collected has been divided equally between the Refco Litigation Trust and the Refco Private Actions Trust.⁸

The RCM Actions

The RCM Class Action was commenced on January 26, 2006, when Global Management Worldwide Limited (“Global Management”), a former brokerage customer of RCM filed a putative Class Action Complaint in this Court asserting claims under the federal securities laws against the THL Defendants and other individuals and entities. The complaint alleges a scheme pursuant to which RCM, an indirect subsidiary of Refco, treated customer securities as its own, notwithstanding that those securities had been entrusted for safekeeping to RCM as a stockbroker by RCM customers, including the Settlement Class Members. The plaintiffs in the RCM Class Action allege that the deceptive scheme was perpetrated in violation of Section 10(b) of the Exchange Act by RCM and the defendants, including the THL Defendants, during a period when all defendants were control persons of RCM and Refco under Section 20(a) of the Exchange Act.

By Order dated July 7, 2006, the Court: (i) consolidated the RCM Class Action with a separate action against an unrelated defendant under the caption *In re Refco Capital Markets, Ltd. Brokerage Customer Securities Litigation*, 06 Civ. 0643 (S.D.N.Y.); (ii) appointed Global Management, Arbat Equity Arbitrage Fund Limited and Russian Investors Securities Limited as Lead Plaintiffs; and (iii) appointed Kirby McInerney LLP as Lead Counsel for the plaintiffs.

On September 5, 2006, Lead Plaintiffs filed a Consolidated Amended Class Action Complaint. On January 19, 2007, the THL Defendants moved to dismiss the Consolidated Amended Class Action Complaint, which Lead Plaintiffs opposed. On September 13, 2007, Judge Lynch dismissed the Consolidated Amended Class Action Complaint but gave leave to replead.

On December 21, 2007, Lead Plaintiffs filed a Second Amended Consolidated Class Action Complaint (the “Complaint”). The Complaint alleges violations of the Securities Exchange Act of 1934 during the Class Period and amended the definition of the class so that it includes *only* those former customers of RCM that assigned the proceeds of their claims to the Refco Private Actions Trust. Before the Complaint was filed, the amendment to the class definition was discussed with Judge Lynch at a conference held on November 20, 2007.

In addition, two individual RCM actions were brought against the THL Defendants and other individual entities. On October 9, 2007, Capital Management Select Fund Ltd., Investment & Development Finance Corp. and IDC Financial S.A. filed suit against, *inter alia*, the THL Defendants (the “Capital Management Action”).⁹ Also on October 9, 2007, VR Global Partners, L.P., Paton Holdings Ltd., VR Capital Group Ltd. and VR Argentina Recovery Fund, Ltd. filed

⁸ Refco Private Actions Trust Agreement § 1.2(h).

⁹ The Second Circuit docket number for the Capital Management Action is *Capital Management Select Fund Ltd., et al. v. Bennett, et al.*, No. 08 Civ. 6166 (2d Cir.).

suit against, *inter alia*, the THL Defendants (the “VR Action”).¹⁰ All of the plaintiffs in the individual actions are represented by Milbank, Tweed, Hadley & McCloy LLP (“Milbank”). Thereafter, by order dated May 1, 2008, the Court appointed Milbank as Co-Lead Counsel for plaintiffs and re-designated Kirby McInerney LLP as Co-Lead Counsel for plaintiffs.

On February 21, 2008, the THL Defendants moved to dismiss the Complaint, as well as the complaints in the Capital Management Action and the VR Action. On August 28, 2008, Judge Lynch granted the THL Defendants’ motion to dismiss the Complaint and the complaints in the Capital Management Action and VR Action, with prejudice. The Court held that: (1) Lead Plaintiffs failed to plead deceptive conduct on the THL Defendants’ part; (2) Lead Plaintiffs failed to allege securities fraud based on a fiduciary duty theory; and (3) Lead Plaintiffs lacked standing to bring claims under Section 10(b) of the Exchange Act. Lead Plaintiffs sought reconsideration of the Court’s denial of leave to replead. On November 20, 2008, the Court granted the reconsideration motion, but denied Lead Plaintiffs leave to replead.

On December 19, 2008, Lead Plaintiffs and the plaintiffs in the Capital Management Action and the VR Action filed a notice of appeal to the Second Circuit.. The appeal was fully briefed by the parties and oral argument was heard on October 19, 2009. No decision has yet been rendered.¹¹

Beginning in 2008, the parties participated in the extensive discovery process that was coordinated with the discovery process for all of the Refco-related actions. This included the production of millions of pages of emails, memoranda, and other documents by parties and non-parties as well as approximately 100 depositions.

The Refco-THL Estate Action

On August 8, 2007, Marc Kirschner, as Trustee of the Refco Litigation Trust, commenced the action styled *Kirschner v. Thomas H. Lee Partners, LP*, et al, No. 07 Civ. 7074 (JSR) (S.D.N.Y.) (the “Refco-THL Estate Action”). The lawsuit asserts, among other things, bankruptcy-related claims under the New York Debtor & Creditor Law and the Bankruptcy Code, as well as claims for breach of fiduciary duties and the payment of illegal dividends under Delaware law. On December 2, 2009, the Trustee filed an Amended Complaint (the “First Amended Complaint”). On December 23, 2009, the THL Defendants filed an Answer to the First Amended Complaint.

¹⁰ The Second Circuit docket number for the VR Action is *VR Global Partners LP, et al. v. Bennett, et al.*, No. 08 Civ. 6230 (2d Cir.).

¹¹ The Trustee and the Lead Plaintiffs (along with the plaintiffs in the Capital Management and VR Actions) also filed suit against, *inter alia*, the THL Defendants, in New York state court on September 15, 2008. That action was removed to federal court—*Capital Management Select Fund Ltd., et al. v. Bennett, et al.*, No. 08 Civ. 09810 (JSR) (S.D.N.Y.)—where it is stayed pending the resolution of the Second Circuit appeals (the “RCM State Claims Action”).

On June 24, 2010, the THL Defendants moved for partial summary judgment, which the Trustee opposed. Between October and December, 2010, the parties filed and briefed seven motions *in limine* to strike the testimony of various expert witnesses. On December 15, 2010, the Special Master heard a day-long oral argument regarding five of the motions *in limine*.¹²

The Trustee and the THL Defendants have engaged in extensive fact and expert discovery in the Refco-THL Estate Action, including conducting over 100 days of deposition testimony and reviewing millions of pages of documents.

In reaching the Global Settlement, the parties engaged in intensive arms'-length negotiations, including two mediation sessions (separated from one another by several months) with Eric Green of Resolutions LLC.

III. Terms of the Settlement and Payments to the Settling Class

Lead Plaintiffs and the Settling Defendants entered into a Memorandum of Understanding reflecting a settlement of the Trustee's and Lead Plaintiffs' existing and potential Refco-related claims against the THL Defendants for the sum of \$145 million. Subsequently, the parties entered into the Stipulation, signed on February 28, 2011, and the Settlement Agreement and General Release, dated as of February 28, 2011 (the "Global Settlement"), providing for a global settlement of the Trustee's and Lead Plaintiffs' existing and potential Refco-related claims against the THL Defendants. The Global Settlement provides that the Settling Defendants will make the \$145 million payment to the Refco Litigation Trust to settle the statutory avoidance claims specified in Counts I, II and III of the First Amended Complaint in the Refco-THL Estate Action.¹³ The Global Settlement also provides for dismissal with prejudice of all other claims in the Refco-THL Estate Action, as well as all claims in this Action and the following Refco-related Actions against the Settling Defendants: (i) the Capital Management Action (*Capital Management Select Fund Ltd. v. Bennett*, No. 08 Civ. 6166 (2d Cir.)); (ii) the VR Action (*VR Global Partners LP, et al. v. Bennett, et al.*, No. 08 Civ. 6230 (2d Cir.)); and (iii) the RCM State Claims Action (*Capital Management Select Fund Ltd. et al. v. Bennett et al.*, No. 08 Civ. 09810 (JSR) (S.D.N.Y.)).¹⁴ In addition, the Global Settlement releases the THL Defendants from any claims against them by the Trustee in any of the Trustee's other pending actions.¹⁵

As part of the Global Settlement, the Settling Defendants made clear that they ascribe no monetary value to the RCM Class Action.¹⁶ Lead Plaintiffs of course did not agree with the Settling Defendants' position on this point. But in the end this disagreement makes no difference to the settlement amount. Lead Plaintiffs do agree --- as does the Special Master --- that it is

¹² The Special Master was notified of the parties' settlement before issuing an R and R on the motions *in limine*.

¹³ Stipulation ¶ J.

¹⁴ *Id.*

¹⁵ *Id.* ¶ 8.2.

¹⁶ *Id.* ¶ K.

extremely difficult to arrive at a predicted monetary value for the RCM Class Action, which has been dismissed twice with an appeal pending.¹⁷ If the Second Circuit were to affirm that dismissal, the RCM Class Action would have essentially zero value.

The value of the RCM Class Action is immaterial, though, because of the formulas for allocating distributions between Settlement Class Members and the other beneficiaries of the Refco Litigation Trust and the Refco Private Actions Trust (*i.e.*, certain other unsecured creditors of Refco).¹⁸ The Global Settlement amount will be shared equally by the Trusts regardless of how much of the settlement payment is attributed to each of the actions that are being settled; so, ascribing no monetary value to the RCM Class Action will not have an effect on the recoveries for the Settlement Class Members.

The Settlement Class Members will receive (i) their pro rata share (together with other unsecured creditors of the Refco debtors) of one-half the settlement payment as beneficiaries of the Refco Litigation Trust and (ii) their pro rata share (together with those unsecured creditors of the Refco debtors that contributed their claims) of the other half of the settlement payment as beneficiaries of the Refco Private Actions Trust.¹⁹

The Settlement Class is comprised of 187 former customers of RCM. Under the formulas discussed above, the Settlement Class will receive approximately \$40 million of the \$145 million for the Global Settlement.²⁰ That distribution to the Settlement Class will push their total recovery in the Refco bankruptcy from 96% (as of December 2010) to 98%.²¹ The Special Master finds that a 98% recovery is an excellent result for the Settlement Class considering the cost and risk of continuing the litigation against the THL Defendants.

It must be noted that under the settlement proposed by Lead Plaintiffs and Settling Defendants, members of the class *will not be permitted to opt out of the settlement class*. While this non-opt-out provision of course raises concerns, the Special Master finds that it is appropriate in the unusual context of this case, *i.e.*, it is justified by the complex relationship (and overlap) among the Refco Litigation Trust, the Refco Private Actions Trust, and the Settlement Class --- as will be discussed below.

¹⁷ *Id.*

¹⁸ *Id.* ¶ L.

¹⁹ *Id.* ¶ 12.

²⁰ *Id.* ¶ 14.

²¹ *Id.* ¶ 15.

With this background, the Report and Recommendation will analyze the following questions:

1. Should the Settlement be preliminarily approved?
2. Should the settlement class be certified as against the Settling Defendants? and
3. Is the proposed notice to the class sufficient?

III. Should the Settlement Be Preliminarily Approved?

When reviewing a proposed settlement for preliminary approval, the basic questions are whether “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.” *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). “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.’” *In re IPO, supra* at 83 (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting Manual for Complex Litigation, Third § 30.42 (1995)). *See also Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003) (“A strong presumption of fairness attaches to proposed settlements that have been negotiated at arm's length.”).

A class action settlement must also be evaluated within the context of the public policy favoring settlement of actions. *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.”). In evaluating a proposed class action settlement, the court must “stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.” *In re AOL Time Warner ERISA Litig.*, 2006 WL 2789862, at *4 (S.D.N.Y.) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974).

This Settlement was clearly the result of arms'-length negotiations and there is nothing at all to indicate any collusion. Discussions were intense and included substantial discussions with an experienced mediator. The Special Master can personally attest to the fact that these cases have been actively litigated and highly contested; and fact discovery was detailed, voluminous, and comprehensive. Lead Plaintiffs' counsel are experienced and capable. *See Chatelain v. Prudential-Bache Sec., Inc.*, 805 F.Supp. 209, 212 (S.D.N.Y. 1992) (“A substantial factor in determining the fairness of the settlement is the opinion of counsel involved in the settlement.”). The result reached in the Settlement is beneficial to the Settlement Class and represents an

excellent outcome in light of the risks and expense of litigating these actions against these Defendants. These cases involve difficult and highly contested questions of law and fact. While wrongdoing clearly occurred at Refco, the claims against the THL Defendants are highly contested and complicated, and the decisions to date in this MDL have dealt many setbacks to claimants against those parties. In light of the complexities, expense and risk of pursuing these actions further, the Settlement falls comfortably within the range of reasonableness.

Recommendation on Preliminary Approval of Settlements

In light of all the factors discussed above, the Special Master recommends that the Settlement be preliminarily approved. The Settlement was the product of serious, informed, noncollusive negotiations. The distribution of approximately \$40 million to the class members is an eminently fair result for the class in light of the risks and expenses of future litigation. The Settlement does not grant preferential treatment to class representatives or segments of the class, and it falls well within the range of possible approval. The settlement negotiations were extremely hard-fought and were achieved after a full discovery process. The Special Master concludes that the amounts recovered from the Settling Defendants are based on a well-informed and intelligent assessment of the relative strength of the claims and the amount of potential recoveries against the Settling Defendants.

III. Should the Settlement Class Be Certified as Against the Settling Defendants?

The proposed Settlement Class in this action consists of all securities brokerage customers of RCM who: (i) at any time from October 17, 2000 to October 17, 2005, placed securities with or held securities at RCM and/or RSL, directly or indirectly, as custodian or broker for safe-keeping, trading or other purposes, and continued to hold positions with RCM on October 17, 2005 or thereafter;²² and (ii) elected to contribute the proceeds of their claims to the Refco Private Actions Trust.²³

Excluded from the Settlement Class are: (a) Refco; (b) the THL 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.²⁴

²² The October 17, 2000 date tracks five years back from the date on which an action was first brought, i.e., the limitations period. As stated above, the class covers those who placed securities before that date but held them at RCM and/or RSL after that date.

²³ Stipulation ¶ 1.31.

²⁴ *Id.*

This section considers whether the proposed Settlement Class meets the requirements for class certification under Rule 23.

A. General Discussion

Judge Scheindlin described the process for certifying a settlement class in *In re IPO Sec. Litig.*, 243 F.R.D. 79, 83 (S.D.N.Y. 2007):

The use of a settlement class allows the parties to concede, for purposes of settlement negotiations, the propriety of bringing the suit as a class action and allows the court to postpone formal certification of the class until after settlement negotiations have ended. A settlement-only class must meet all the requirements of Federal Rule of Civil Procedure 23, with one important exception: because the case will never go to trial, the court need not consider the manageability of the proceedings should the case or cases proceed to trial. In the settlement context, the “specifications of [Rule 23] --- those designed to protect absentees by blocking unwarranted or overbroad class definitions --- demand undiluted, even heightened, attention.”²⁵

In *In re IPO*, *supra*, Judge Scheindlin also noted that settlement class certification is more appropriate if the case is further along and the parties have therefore had a chance to assess the strengths and weaknesses of their positions. She relied on the Manual for Complex Litigation Fourth, §21.32, which states:

Extended litigation between or among adversaries might bolster confidence that the settlement negotiations were at arm's length. If, by contrast, the case is filed as a settlement class action or certified for settlement with little or no discovery, it may be more difficult to assess the strengths and weaknesses of the parties' claims or defenses, to determine the appropriate definition of the class, and to consider how class members will actually benefit from the proposed settlement.

In this case, the Rule 23 requirement should be applied from the perspective that this action has been heavily litigated, with extensive and completed fact discovery. It is also important to note that the Second Circuit has emphasized that the Rule 23 requirements are to be construed liberally for purposes of settlement. *See, e.g., Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce & Smith, Inc.*, 903 F.2d 176, 179 (2d Cir. 1990) (“in light of the importance of the class action device in securities fraud suits, [Rule 23’s] factors are to be construed liberally”).

B. Rule 23 Requirements

To be certified, a putative class must meet all four requirements of Rule 23(a) --- numerosity, commonality, typicality, and adequacy of representation --- as well as the requirements of one of the three subsections of Rule 23(b). In this case, the pertinent subsection

²⁵ Quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

of Rule 23(b) to be satisfied is subsection (1)(B), which requires the court to find that separate actions would create a risk of “inconsistent or varying adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.” These requirements will be addressed in turn.

1. Rule 23(a)

a. Numerosity

Rule 23 requires that the class be “so numerous that joinder of all members is impracticable.” Impracticable does not mean “impossible” --- the test is whether joinder of all members of the putative class would be difficult or inconvenient. *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir.1993). While there is no absolute rule on the minimum number to meet the numerosity requirement, any number over forty is generally sufficient. *See Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir.1995) (“Because numerosity is presumed at a level of 40 members (1 *Newberg On Class Actions 2d*, (1985 Ed.) § 3.05), whether viewed as 700 tax-collecting jurisdictions or 300 assessing jurisdictions, the number of defendants vastly exceeds this threshold. Numerosity is therefore satisfied.”).

Here, the Settlement Class is comprised of 187 former customers of RCM. The Settlement Class is therefore sufficiently numerous to satisfy the requirement of Rule 23(a)(1).

b. Commonality

Commonality requires a showing that common issues of fact or law affect all class members. “The critical inquiry is whether the common questions are at the core of the cause of action alleged.” *In re IPO, supra*, at 84 (quoting *D’Alauro v. GC Servs. Ltd. P’ship*, 168 F.R.D. 451, 456 (E.D.N.Y.1996)). The commonality requirement “has been applied permissively in the context of securities fraud litigation.” *In re Veeco Instruments, Inc. Sec. Litig.*, 235 F.R.D. 220, 238 (S.D.N.Y.2006). Moreover, “[i]t is not necessary that all of the questions raised by arguments are identical; it is sufficient if a single common issue is shared by the class.” *Id.* (quotation omitted). Generally speaking, where putative class members have been injured by the same course of conduct involving material misrepresentations or omissions, the commonality requirement is satisfied. *In re Baldwin-United Corp. Litig.*, 122 F.R.D. 424, 426 (S.D.N.Y.1986) (“The nub of plaintiffs’ claims is that material information was withheld from the entire putative class in each action, either by written or oral communication. Essentially, this is a course of conduct case, which as pled satisfies the commonality requirement of Rule 23....”).

The claims against the Settling Defendants raise many common questions of law and fact for the defined class, including:

- Whether the THL Defendants violated the federal securities laws;

- Whether RCM was permitted to effect transactions in the Settlement Class Members' accounts without authorizations by the Settlement Class Members;
- Whether the THL Defendants acted with scienter;
- Whether account statements provided by RCM fraudulently misrepresented that RCM was holding the Settlement Class Members' securities in safekeeping;
- Whether RCM owed a fiduciary duty to the Settlement Class Members to hold their securities in safekeeping;
- Whether the THL Defendants controlled other primary violators of federal securities laws and culpably participated in the fraud perpetrated by those primary violators; 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 with respect to the claims against the THL Defendants, the commonality requirement of Rule 23(a)(2) is easily met.

c. Typicality

Under Rule 23(a)(3), the claims or defenses of the representative parties must be typical of the claims or defenses of the class. This requirement "is not demanding." *Fogarazzo v. Lehman Bros., Inc.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005) "A named plaintiff's claims are typical where each class member's claims arise from the same course of events and each class member makes similar legal arguments to prove the defendants' liability." *In re IPO, supra*, at 84.

With respect to securities actions, "[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." *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *10 (S.D.N.Y.).

If a putative class representative's claims is subject to unique defenses, it will not satisfy the typicality requirement. *See Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59 (2d Cir. 2000). A defense is unique if it will become the focus of the litigation, thus overshadowing the primary claims and prejudicing other class members. *See Landry v. Price Waterhouse Chartered Accountants*, 123 F.R.D. 474, 476 (S.D.N.Y. 1989). Thus, the commonality and typicality requirements "tend to merge" because "[b]oth serve as guideposts for determining whether ... the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence."

Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999) (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982)).

In this case, Lead Plaintiffs' claims regarding the Settling Defendants are typical of the class. Lead Plaintiffs allege that their securities were supposed to be held in safekeeping and they were not --- and that the THL Defendants are legally responsible for that misconduct. Lead Plaintiffs' claims, and the claims of absent Settlement Class Members, are based on the same theories and would be proven by the same evidence. None of the Settling Defendants have a defense against Lead Plaintiffs that is different from any defense that could be applicable to the rest of the class. Therefore, the Rule 23(a)(3) typicality requirement is satisfied.

d. Adequacy

Under Rule 23(a)(4), Lead Plaintiffs must show that "the representative parties will fairly and adequately protect the interests of the class." "Representation is adequate if: (1) there is no conflict of interest between the plaintiffs and the other class members; and (2) plaintiffs' attorneys are qualified, experienced and capable." *In re IPO, supra*, at 85.

In this case there is no conflict between Lead Plaintiffs and members of the Settlement Class. Lead Plaintiffs and the Settlement Class share the common objective of maximizing recovery. *See, e.g., 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"). Nor is there any concern at all about adequacy of counsel. Lead Plaintiffs' Counsel have extensive experience and expertise in complex securities litigation and class action proceedings, and are qualified and able to conduct this litigation, as Judge Lynch recognized when appointing them as co- lead counsel for the putative class. Lead Plaintiffs' submissions to and arguments before the Special Master have been excellent --- without question the work of highly skilled and committed lawyers.

Judge Rakoff has also designated the proposed class representatives as Lead Plaintiffs pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which provides that the Court "shall appoint as lead plaintiff the member or members of the plaintiff class that the court determines to be most capable of adequately representing the interest of class members." 15 U.S.C. § 78u-4(a)(3)(B)(i).

For all these reasons, Rule 23(a)(4) is satisfied. *See In re Top Tankers, Inc. Sec. Litig.*, 2008 WL 2944620, at *10 (S.D.N.Y.) (adequacy requirement satisfied when the Court had previously designated a lead plaintiff and approved counsel).

2. Rule 23(b)

Assuming the Rule 23(a) requirements are met, Lead Plaintiffs must establish that the action is "maintainable" as defined by Rule 23(b). An action is maintainable as a class action if one of three alternative definitions of maintainability set forth in Rule 23(b) is met. As discussed

the Private Actions Trustee.”²⁶ All the Settlement Class Members elected to contribute their claims to the Refco Private Actions Trust, and in doing so agreed to the provision assigning any right to opt out to the Trustee. Thus, while a plaintiff’s opt-out right is generally an important due process concern, *see In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d at 292, that concern does not come into play here because the Trustee has the exclusive right to remain in the RCM Class Action or opt-out on behalf of the Settlement Class. Therefore any concern about a provision prohibiting opt-outs has been alleviated.

Recommendation on Class Certification

For all the above reasons, a settlement class should be certified for the actions against the Settling Defendants. The provision for certification is contained in the preliminary approval orders attached to this Report and Recommendation.

IV. Should the Proposed Notice Be Approved?

The parties have proposed a notice (“Notice”), which is attached to this Report and Recommendation, to inform class members of the proposed Settlement. As outlined in the Preliminary Approval Orders, also attached to this Report and Recommendation, Lead Plaintiffs will mail the notices to all Settlement Class Members. This will neither be difficult nor expensive, because the Trustee has mailing information for all 187 members of the Settlement Class, as they have received prior distributions as beneficiaries of the Trusts.

As to the manner of notice, Fed.R.Civ.P. 23(e)(1)(B) provides that, in the event of a settlement of a class action, “[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement.” To satisfy due process, the notice must be “reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *In re Prudential Secs. Inc. Ltd. P’Ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 2006). These standards are obviously met by notice mailed directly to each of the Settlement Class Members. *See Dorn v. Eddington Sec., Inc.*, 2011 WL 3282200, at *4 (S.D.N.Y.) (mailed notice alone was sufficient to satisfy notice requirement); *Lamb v. United Sec. Life Co.*, 59 F.R.D. 25, 42 (S.D. Iowa 1972) (publication notice not necessary unless there are persons missing and unknown).

As to the form of notice, The PSLRA also provides for the disclosure of certain matters in connection with a proposed securities class action settlement, including:

- (i) “The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis;”
- (ii) “If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this chapter, a

²⁶ Refco Private Actions Trust Agreement § 3.12(j).

statement from each settling party concerning the issue or issues on which the parties disagree;”

- (iii) A statement indicating which parties or counsel intend to apply for an award of fees or costs from the settlement fund, as well as the amount to be requested (including on a per share basis) and a brief explanation supporting the fees and costs sought;
- (iv) The name and contact information of representatives of plaintiffs’ counsel who will be reasonably available to answer class members’ questions; and
- (v) The reasons for the settlement.

15 U.S.C. § 78u-4(a)(7).

Here, the Notice discloses the aggregate amount of the settlement proposed to be distributed to the parties, explains the parties’ areas of disagreement with respect to the plaintiffs’ recoverable damages, identifies representatives of Co-Lead Counsel who will be available to answer class members’ questions, and clearly articulates the reason for settlement.²⁷ A statement regarding attorneys fees is not necessary as Lead Plaintiffs’ Counsel are not asking the Court to award them either attorneys’ fees or costs and expenses incurred in connection with the RCM Class Action, and do not intend to do so in the future --- that is because the proceeds of the claims have been assigned to the Trusts, and the Trustee has agreed to pay all attorneys’ fees directly out of the Trusts’ proceeds.

As Judge Scheindlin noted in *In re IPO, supra*, at 94, a description of how the proceeds will be allocated among class members is “undoubtedly an important factor in a class member’s decision of whether to opt out of a class settlement.” The notice in this matter does not contain a specific plan of allocation, but that is because it is unnecessary in the unusual context of this case. Each Settlement Class Member knows, based on its records and from prior distributions, what percentage share it has in the trusts. And the notice provides contact information in case a Settlement Class Member needs recollection refreshed about the operation of the trusts.

The Special Master finds that the form and manner of providing notice to the Settlement Class satisfy the requirements of due process, Rule 23, and the PSLRA. 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 Stores, Inc. v. Visa U.S.A .Inc.*, 396 F.3d 96, 114 (2d Cir. 2005). The language used is straightforward, not excessively legalese, and putative class members are informed about their options in clear and comprehensible language.

²⁷ See Notice, attached to this Report and Recommendation. .

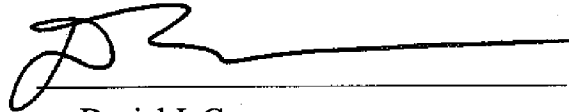
Recommendation Regarding Notice

The proposed notice satisfies the requirements of Rule 23, the PSLRA, and the Due Process Clause.

V. Conclusion

The Special Master recommends that:

1. The proposed Settlement be preliminarily approved.
2. The Settlement Class as against the Settling Defendants be approved for the purpose of effectuating the Settlement.
3. The proposed form and manner of notice be approved.



Daniel J. Capra
Special Master

Dated: April 15, 2011
New York, New York

Attachments to Report and Recommendation:

1. Stipulation and Agreement of Settlement Between Lead Plaintiffs and the THL Defendants, dated February 28, 2011 (Exhibit 1)
2. Proposed Notice (Exhibit A-1 to the Stipulation)
3. Proposed Preliminary Approval Order (Exhibit A to the Stipulation)