

**“YOU CAN’T SAY THAT!”
“WATCH ME.”
CLIENT FRAUD AND THE ETHICS RULES**

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CLIENT FRAUD AND THE ETHICS RULES

By Bill Freivogel
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The Basic Rules Dealing with Client Fraud

Model Rule 1.2(d) provides as follows:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

What is knowledge? Model Rule 1.0(f) provides that knowledge can be “inferred from the circumstances.” The vagueness of the definition should be a red flag to a lawyer who “smells a rat” in connection with what a client is telling the lawyer or other parties to a transaction.

Example: a lawyer learns that a client is not being truthful in transaction documents or in statements to other parties. The lawyer confronts the client and instructs the client to “knock it off.” The client refuses. Model Rule 1.2(d) provides the lawyer cannot continue. Model Rule 1.16(a)(1) provides that the lawyer must withdraw from the representation.

Disclosure of client fraud to others. Rules 1.6(b)(2)&(3) provide as follows:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

* * * *

2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Most states have an exception to confidentiality that is the same or nearly the same as the provisions quoted just above, see the chart with state-by-state analysis at Thomas D. Morgan & Ronald D. Rotunda, 2008 Selected Standards on Professional Responsibility 149-164 (2008).

Most states' rules do not command the lawyer to reveal client fraud to others; they permit disclosure. One must, however, be wary of Model Rule 4.1(b), which provides:

In the course of representing a client a lawyer shall not knowingly:

* * * *

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Suppose a lawyer is sitting in on a negotiation with her client and the lawyer and client on the other side. The lawyer hears the client make a misrepresentation. The lawyer drags the client out of the meeting room and privately admonishes the client to set the record straight – however that can gracefully be done. The client refuses. We know that Model Rules 1.2(d) and 1.16(a)(1) require the lawyer to withdraw. But, what about telling the other side about the misrepresentation? Model Rule 4.1(b) would seem to convert permissive disclosure under the exceptions to Model Rule 1.6 to mandatory disclosure. While we are not aware of any case citing Model Rule 4.1(b) in exactly this context, we have long been intrigued by the reach of that rule in connection with misrepresentations being made by clients leading up to the closing of transactions.

Conduct within an Organization. Where the client is an organization, Model Rule 1.13 (“Organization as Client”) is implicated. Assume that the lawyer and an officer of the client are negotiating a transaction with another party. Assume further that the officer is making claims that the lawyer knows (or strongly suspects) are not true. The lawyer should first attempt to straighten out the officer. Failing that, Rule 1.13(b) provides that the lawyer must go over the officer’s head (“climb the ladder”) even to the board of directors, if necessary. Prior to 2003 Model Rule 1.13 did not make climbing the ladder mandatory, nor did the rules of most states. Subsequent to the ABA changes in 2003 many states have amended their versions of Rule 1.13 to make climbing the ladder mandatory.

As to public companies, the SEC has adopted 17 C.F.R Part 205, which, among other things, requires, under some circumstances, the lawyer to climb the organizational ladder. To illustrate the complexity of the SEC requirements, many well-run law firms have committees of lawyers devoted to seeing that the regulation is followed and providing training to securities lawyers on the regulation.

Confidentiality vs. Attorney-Client Privilege

Confidentiality. Model Rule 1.6 provides in part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is

impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Note that the rule protects information whether or not the lawyer got it from the client or some other source. The rule also provides that a lawyer may reveal client information where the client impliedly agrees. Thus, where it is obvious that a lawyer must make certain disclosures in an opinion to the other side in order to comply with transaction documents, the lawyer may do so.

Attorney-Client Privilege. The privilege is different from the duty of confidentiality in several important respects. First, the privilege only applies to whether one side in litigation can compel a lawyer for a party to reveal the lawyer's communications with the lawyer's client. The privilege does not "seal the lawyer's lips," in this respect; Model Rule 1.6 does. *Adams v. Franklin*, 924 A.2d 993 (D.C. App. 2007). Model Rule 1.6 seals the lawyer's lips whether or not there is litigation. Thus, whether a lawyer can reveal client information in an opinion depends not upon the privilege but upon the lawyer's duties of confidentiality under the ethics rules. *Note, we have not mentioned work product immunity, which is related to, but in many cases very different from, the attorney-client privilege. For purposes of this brief discussion, they are treated the same.*

Role of privilege in Client Fraud situations. The attorney-client privilege (and work product immunity) can be lost where a party to a transaction can show that during lawyer-client communications the client was committing, or planning, a crime or fraud. The mischief to lawyers or law firms that the loss of privilege can cause is enormous. Not only will the misconduct of clients be documented, but also the complicity (or seeming complicity) of the law firm in the misconduct. Every memorandum and E-mail within the law firm will be fair game for prosecutors, regulators, and plaintiffs' class action lawyers.

The Role of Negotiations

Lawyer Conduct. The most important rule on truthfulness is Model Rule 4.1(a). It says a lawyer may not lie to a third person. The rule contains no exception for negotiations. Model Rule 8.4(c) overlaps with Rule 4.1(a) in providing that a lawyer may not engage in "dishonesty, fraud, deceit or misrepresentation." *See, too*, The Restatement (Third) of the Law Governing Lawyers § 98, cmt. C (2000), and Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 65.5 (3d ed. 2001). As to lying to non-clients in the context of a transaction governed by federal securities law, *Thompson v. Paul*, 2008 U.S. App. LEXIS 22307 (9th Cir. Oct. 27, 2008).

In April 2006 the ABA Ethics Committee issued its Formal Opinion 06-439, entitled, "Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation." It repeats the obvious that a lawyer may not lie. The opinion does recognize that lawyers may be expected to "puff" as to certain issues. For example, a lawyer may say that his witnesses are more credible than the other side's.

What the lawyer may not say is that he has five witnesses to an event when he really only has one.

Client Conduct. The situation gets trickier when, during negotiations, it is the client who is lying. As discussed above, Model Rule 1.2(d) provides that a lawyer may not assist the client in committing a crime or fraud. Moreover, Model Rule 1.16(a)(1) provides that the lawyer must withdraw from the representation where to continue would cause a violation of a rule.

Suppose a lawyer is aware that her client is lying to the other side in a negotiation. We have just seen that the lawyer cannot continue if the client persists. Under what circumstances may or must the lawyer warn others of the client's intentions? Model Rule 1.6, the confidentiality rule, plays a role. As discussed above, Rule 1.6(b)(2)&(3) now allows a lawyer to "blow the whistle" to prevent the client from committing a fraud on another or to rectify a fraud that has already occurred. Most states have comparable exceptions to their confidentiality rules. A few states provide that a lawyer *must* report client fraud.

Now return to Rule 4.1. Recall that Rule 4.1(a) says that a lawyer may not lie. Also recall our discussion above about 4.1(b) and the possibility that it may, in certain states, and under certain circumstances, mandate that the lawyer "blow the whistle" on the client.

ETHICAL CONSIDERATIONS IN OPINION GIVING

DISCUSSION OUTLINE

Donald W. Glazer
Robert H. Mundheim

A. Need for Client Consent

- i. Rule 2.3 of ABA Model Rules of Professional Conduct (“Model Rules”) permits lawyer to give opinion if lawyer “reasonably believes” that giving opinion is compatible with other aspects of lawyer’s relationship with client.
- ii. Prior to its amendment in 2002, Model Rule 2.3 required client consent after consultation before giving opinion. Opinion givers normally regarded this requirement to have been satisfied by client’s retention of lawyer to represent it in transaction and to give opinion in satisfaction of condition of closing in agreement.
- iii. Revisions adopted in 2002 to Model Rule 2.3 eliminated requirement for client consent under most circumstances. As revised, Model Rule 2.3 now permits lawyer to give opinion without consent unless the lawyer knows or reasonably should know that the opinion “is likely to affect the client’s interests materially and adversely.”

Hypothetical 1. Suppose Opco, a subsidiary of Bigco, is about to close a bank loan. The bank wants you to include in your opinion letter a statement that you know of no materially adverse litigation, pending or threatened against Opco, that is not disclosed in a schedule to the loan agreement. A litigator in your firm has been discussing with counsel for an inventor the settlement of an action the inventor has threatened to bring challenging the validity of Opco’s principal patent. The litigator is concerned about the strength of the inventor’s claim but expects it will settle for a modest amount because the inventor lacks the funds to finance a full blown legal action. He has cautioned you, however, that settlement discussions are always “iffy.” Opco has decided not to disclose the claim in the loan agreement on the grounds that the claim is likely to settle for an immaterial amount and the loan is guaranteed by Bigco, whose credit Opco management believes is what the bank is really relying on in making the loan. What should you do?

For two Massachusetts cases from which this hypothetical is drawn in part, see *Dean Foods Co. v. Pappathanasi*, No. 01-2595 BLS, 2004 WL 3019442 (Mass. Super. Ct. Dec. 3, 2004); *National Bank of Canada v. Hale & Dorr, LLP*, No. 2000-00296, 2004 WL 1049072 (Mass. Super. Ct. April 28, 2004).

B. Assisting Client’s Wrongful Conduct.

- i. Model Rule 4.1 prohibits a lawyer from knowingly (a) making a false statement of material fact or law to a third person or (b) failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a client in

committing a criminal or fraudulent act (unless disclosure is prohibited by Model Rule 1.6).

- ii. Model Rule 1.0(f) permits knowledge to be “inferred from the circumstances”.
- iii. Model Rule 1.2(d) prohibits a lawyer from assisting a client in conduct the lawyer knows is criminal or fraudulent.
- iv. Model Rule 1.13 requires that under specified circumstances a lawyer refer a matter “up” to a higher authority within the client organization if the lawyer knows that an “officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a manner related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization.”

Hypothetical 2. Suppose Techco is about to close a stock offering. At a board meeting you sat in on a few days ago, the CEO advised the board that a disgruntled ex-employee of Techco’s principal competitor, while applying for a job, disclosed to Techco that the competitor had made a technological breakthrough and was preparing a top secret launch of a new product that would render much of Techco’s product line obsolete. At the meeting, the CEO emphasized that the information was confidential and expressed relief that investors in Techco’s pending financing were unaware of it. When you later raised with the CEO the question whether the investors should be informed, he answered with an emphatic “No,” justifying his position (after calming down) on the grounds that the information was just a “rumor” and not corroborated. You are expected to deliver a straightforward opinion that Techco is duly incorporated and that the stock being sold is duly authorized, validly issued, fully paid and non-assessable. Should you deliver the opinion?

Hypothetical 3. Suppose BioCo is being acquired through a sale of all its assets. Among those assets are controlled substances, used in its research lab, that under a criminal statute in your state require a license to hold and government approval to transfer. Just before the closing you discover that the required approval to transfer has not been obtained and that the buyer does not have the requisite license. Officers of both BioCo and buyer have assured you, however, that “the way these things are done” everything will be straightened out after the closing. You are expected to give the buyer an opinion that BioCo is a Delaware corporation and that the sale of assets has been authorized by all necessary corporate action (you are not giving a no violation of law opinion). Should you give the opinion?

Hypothetical 4. Suppose Bigco is selling a small subsidiary, Smallco. The sale was conducted by auction after circulation of a disclosure document prepared by Bigco and the investment banker handling the sale. The sale is being structured as a reverse triangular merger, and, because Smallco will survive, you, as outside counsel for Bigco, are being asked for an opinion on Smallco's corporate status. A few months ago Bigco's general counsel asked you some questions that had been raised regarding payments Smallco allegedly had made to government officials in several countries where it did business. You indicated that your firm

didn't have sufficient expertise in that area and referred him to a large Washington DC law firm. You have heard nothing further about the issue. The disclosure document provided to prospective purchasers does not address it. Can you give the opinion without inquiring how the issue was resolved?

Hypothetical 5. You represent Mr. F, controlling shareholder of Finco. Mr.F has asked you to prepare the paperwork for a borrowing he will be making just before the end of each quarter from a hedge fund. The interest rate will be very high, but each time it is made the loan will be outstanding for just a few days. The loan will be secured by assets of Finco that Mr. F will be purchasing with the loan proceeds and then selling back to Finco following the end of the quarter. You aren't clear what the purpose of the transaction is, but the timing suggests to you it has something to do with Finco's quarterly financial statements. The hedge fund has asked you for an opinion that its security interest in the assets backing the loan is perfected. Should you give the opinion? Would your answer change if you also were regular counsel for Finco?

In considering all five hypotheticals, you might look at the attached materials (excerpts from Glazer & FitzGibbon on Legal Opinions – Third Edition (2008) and McCallum & Young, Ethics in Opinion Practice, 62 Bus. Law. 417 (2007)).

SUMMARY OF INVESTIGATION AND ACTIONS AGAINST ATTORNEYS RELATING TO THE FINANCIAL COLLAPSE OF REFCO, INC.

by Sue Friedberg
Associate General Counsel
Buchanan Ingersoll & Rooney PC

The following is background information and a summary of the claims asserted against attorneys in the investigation and filed actions resulting from the representation of Refco, Inc. from 1994 to 2005. The author is not aware of any decision on the merits of any proceeding described herein and does not express any opinion about the merits of these matters.

Overview: The relationship between Refco, Inc. and its outside legal counsel and a brief summary of the "round-trip" loan transactions that were a central focus of the alleged fraudulent scheme and material misrepresentations/omissions

Investigation of Examiner appointed by the Office of the United States Trustee: *In re Refco Inc. et al.* No. 05-60006 (RDD) (U.S. Bankr. Ct. S. D. N. Y. July 11, 2007) [Final Report of Examiner](#)

Private Plaintiff Action: *Thomas H. Lee Equity Fund V., L.P. et al. v. Mayer, Brown, Rowe & Maw L.L.P* 07 Civ. 6767 (GEL) (S. D. N. Y. July 26, 2007)

Trustee Action: *Kirschner v. Grant Thornton LLP et al.* No. 07 Civ. 5306 (Ill. Cir. Ct. Aug. 21, 2007)

Class Action: *In re Refco Inc. Securities Litigation* No. 05 Civ. 8626 (GEL) (S.D.N.Y. Dec. 3, 2007)

SEC Action: *United States Securities & Exchange Commission v. Joseph P. Collins* 07 Cv. 11343 (December 18, 2007)

- SEC Press Release announcing filing of charges (attached hereto)
- Litigation Release No. 20402 / December 18, 2007 (attached hereto)
- Full text of SEC complaint (attached hereto)

Criminal Action: *United States v. Joseph P. Collins* 07 Cr. (S. D. N. Y. Dec. 18, 2007)

**Overview: Relationship between Refco, Inc. and its Outside Legal Counsel
and the Round-trip Loan Transactions**

Certain defined terms used herein:

Refco	Refco, Inc., herein including its predecessor and subsidiary companies, became publicly traded in August of 2005 and filed Chapter 11 bankruptcy in October of 2005
RGHI	Refco Group Holdings, Inc. ("RGHI"), a holding company principally owned by Phillip R. Bennett, the Chief Executive Officer of Refco Inc; RGHI was not consolidated with Refco and was not publicly traded
RGL	Refco Group Ltd., LLC, the parent of the consolidated Refco companies, the RGL financial statements were relied upon by investors in the leveraged buyout by THL and initial public offering
RCM	Refco Capital Markets, Ltd. ("RCM"), a Bermuda chartered subsidiary of Refco engaged in unregulated brokerage activities
MB	Mayer, Brown, Rowe & Maw LLP, primary outside counsel to Refco and its subsidiaries
Collins	Joseph P. Collins, the MB lawyer responsible for MB's relationship with, and legal work for Refco as primary outside counsel.
WG	Weil, Gotshal & Manges LLP, primary outside counsel to THL in the leveraged buyout transaction and outside counsel to Refco after the leveraged buyout and for the IPO
Trustee	Marc S. Kirschner, the Court-approved Trustee for the Refco Litigation Trust
Round-trip Loans.	A brief description of these transactions, which are the evidentiary basis for many of the allegations against MB, is provided on page _____ hereof
Leveraged buyout (LBO)	August 5, 2004 transaction in which THL acquired a 57% interest in Refco
THL	Thomas H. Lee Partners, L.P., purchaser, together with affiliates and co-investors of a 57% equity interest in Refco on August 5, 2004 in the leveraged buyout transaction
BAWAG	An Austrian bank that was involved in a number of the Round-trip Loans, and had an equity stake in RGL prior to the 2004 leveraged buyout

Refco, a commodities and futures trading conglomerate, became a client of MB in 1994 when Joseph Collins joined MB bringing Refco as a client from his former law firm. Refco specialized in exchange-traded derivatives primarily for hedge funds, investment companies, other institutional investors, and wealthy individuals.

Collins and MB became targets of an examination by an independent examiner ("Examiner") appointed by the Office of the U. S. Trustee and named as defendants in a number of legal actions because of their role, among other matters, in documenting and sometimes negotiating a series of so-called "round-trip" loan transactions that occurred between 1998 and 2005 (the "Round-trip Loans" or "RTLs"). The Examiner found that the Round-trip Loans were undertaken to conceal significant customer defaults on completely or substantially unsecured trading loans to customers as well as other operating losses incurred by Refco subsidiaries. Instead of writing off these loans as uncollectible bad debt, Refco (directly and through subsidiaries) transferred the bad debt to RGHI, an unconsolidated holding company owned, initially, by Phillip Bennett (Refco's CEO) and another Refco investor. (Later, RGHI was wholly owned by Bennett). The effect was to create a "receivable" on Refco's books owed by RGHI to Refco ("RGHI Receivable"). But RGHI had no assets other than Refco stock and had no operational capacity. According to the Examiner, the RGHI Receivable was over \$376 million in 1998 and over \$1 billion by 2004.

The Examiner found evidence of several types of loan transactions allegedly used to avoid disclosing in Refco's financial statements that the RGHI Receivable was in the hundreds of millions, uncollectible, and a related party transaction. The Examiner's Report and legal actions against MB and Collins focus on the Round-trip Loans because these transactions were repeated many times and were documented and, in some instances negotiated, by MB attorneys. According to the Examiner it was the disclosure of the related party receivables that the Round-trip Loans were used to conceal that, when disclosed, led to Refco's bankruptcy. The following is a simplified summary description of the Round-trip Loans:

1. RCM (Refco's unregulated Bermuda subsidiary) "booked" a loan to unrelated third party customer by crediting the customer's account at RCM. Between 2000 and 2005, these loans ranged from \$50 million to \$720 million.
2. The third-party simultaneously "loaned" the same amount to RGHI by transferring the credit in the third party's RCM account to an RCM account in the name of RGHI. The effect of the credit to RGHI's account was to reduce the amount of the RGHI Receivable and make it appear that RCM was owed money from the apparently creditworthy and unrelated third party and that all or a portion of the RGHI Receivable was eliminated or reduced.
- 3.. The third party charged RGHI a slightly higher interest rate than it paid on loan from RCM (typically between 75 and 100 basis points), thereby making the transaction profitable for the third party customer. In most instances, funds were never actually transferred among the participants. The loans and repayments were book entries only.
3. Refco protected the third party customer by guaranteeing its loan to RGHI and by indemnifying the third-party against any losses it might incur.

4. One week or so after each fiscal year end (later quarterly), the third party loan transaction was reversed. The RGH Receivable was returned to the same amount as before the Round-trip Loan. The third-party received in cash the amount of the interest spread as its payment for participating.

The Examiner's Report and the various complaints filed against MB and Collins allege that the attorneys knew or should have known that the Round-trip Loans lacked a legitimate business purpose because of various "red flags", including the following:

- Refco guaranteed and also indemnified the third party participants in the Round-trip Loans for no consideration.
- Bennett (CEO/owner of RGHI) signed Round-trip Loan documents on behalf of both Refco (guarantor and indemnitor) and RGHI (borrower) in the same transactions.
- Refco made the interest payments associated with the Round-trip loans to the third-party lenders on behalf of RGHI.
- Collins and MB documented 18 Round-trip Loans from 2000 to 2005. These were essentially risk-free for the third-party lenders, and consistently unwound after a period of ten to fourteen days. In its Memorandum in Support of its Motion to Dismiss, MB and Collins argue that neither had knowledge of what RGHI did with the proceeds of the third party loans, and thus did not realize that the purpose was to manipulate Refco's financial statements.
- In 2002, after the Enron scandal, one of the third-party lenders poised to participate in an Round-trip Loan backed out because of concerns raised by the Enron publicity about financial statement manipulation. In February 2004 (during negotiations for the THL leveraged buyout transaction), Refco planned and MB and Collins drafted documents for two Round-trip Loans. One was with a third-party lender for \$500 million. The other was with a different third-party lender for \$200 million. When the \$200 million third-party lender backed out, the transaction with the \$500 million third-party lender was increased to \$720 million. The Examiner, prosecutor and various claimants have asserted that the end of fiscal year timing, and the risk-free nature of the transaction to the third party lender, taken together, should have raised doubts in the attorneys' minds about the lack of a legitimate business purpose for the loans.
- Collins participated in a \$450 million Round-trip Loan transaction in August of 2004 with knowledge (either direct or imputed from other lawyers in his firm) that Refco's bank financing associated with the leveraged buyout contained covenants expressly prohibiting Refco from incurring additional indebtedness beyond certain limits. The guarantee and indemnification of Refco breached those covenants. MB attorneys represented Refco in connection with this bank financing.
- MB and/or Collins represented Refco and RGHI (and sometimes even the third-party lender) in the Round-trip Loans. If the loans served any legitimate purpose or actually entailed financial risk, it is alleged that the obvious conflicts of interest would have been considered even if waived by the parties. The record does not indicate any evidence of conflicts letters or waiver requests issued by Collins or MB with regard to these transactions, even after the leveraged buy-out which gave THL a controlling interest in Refco.

Private Plaintiff (investor) Action:

Thomas H. Lee Equity Fund V., L.P. et al.v. Mayer, Brown, Rowe & Maw L.L.P 07 Civ. 6767 (GEL) (S. D. N. Y. July 26, 2007) 07 Civ. 6767 (GEL) (S. D. N. Y. July 26, 2007)

Summary of Claims Against Mayer, Brown, Rowe & Maw, LLP ("MB")

First Claim For Relief (Violation of Section 10(b) of the Exchange Act and Rule 10b-5) -

Thomas H. Lee Equity Fund V., L.P. ("THL") claimed that Mayer, Brown, Rowe & Maw, LLP ("MB") made false or misleading statements or omitted to state material facts in connection with the diligence process involving the 2004 leveraged buyout (private placement) purchase of Refco Inc. securities by THL. The conduct underlying this claim is MB's alleged failure to disclose the "round-trip loan" transactions (which would constitute material contracts and related-party interests disclosures that were requested as part of the legal due diligence) with knowledge that those transactions were material and essential to THL decision to purchase equity in Refco Inc.

Second Claim For Relief (Violation of Section 10(b) of the Exchange Act and Rule 10b-5) -

THL claimed that MB's failure to disclose material information and untrue statements of material fact caused Refco securities to be purchased from RGHI by THL at an artificially inflated price. The conduct underlying this claim is MB's alleged knowing or reckless failure to disclose in the course of due diligence the round-trip loan transactions, a Proceeds Participation Agreement and related agreements that gave Refco executives and other parties an equity interest in Refco Inc.. This claim also alleges that attorney Joseph Collins of MB of producing a "counterfeit" LLC Agreement for Refco Group Ltd., LLC, which hid the equity interests of the other parties in Refco Inc. The portion of the complaint regarding this LLC Agreement is heavily redacted.

Third Claim For Relief (RICO - Conspiracy to Violate 18 U.S.C. § 1962 (c), in violation of 18 U.S.C. § 1962 (d)) - THL claimed that MB conspired with certain executives of Refco Inc. in a plan to fraudulently alter its financial statements within a greater plan to enhance its financial position in order to sell the company. More specifically, MB failed to disclose information or made material false representations regarding related-party transactions, material contracts, and indemnification obligations of Refco Inc. in connection with the THL's due diligence leading to THL's 2004 leveraged buyout of Refco Inc. equity.

Fourth Claim For Relief (Fraud) - THL's claim for common law fraud specifically asserts MB's failure to disclose or material misrepresentations during due diligence for the 2004 leveraged buyout transaction regarding the round-trip loan transactions that inflated the value of Refco Inc.

Fifth Claim For Relief (Negligent Misrepresentation) - THL claimed that MB had a duty to act with due care, competence, in good faith, and fairly with regard to communications it made to THL in the diligence process for the 2004 leveraged buyout transaction. More specifically, THL alleges (1) that MB failed to accurately report or disclose information about the round-trip loans, and (2) that because of Collins' close and longstanding relationship with Refco CEO Bennett, Collins had superior information about Refco and vouched for Refco's statements in diligence although he knew or consciously avoided knowing that the statements were false or misleading.

Trustee Action:

Kirschner v. Grant Thornton LLP et al. No. 07 Civ. 5306 (Ill. Cir. Ct. Aug. 21, 2007)

Summary Of Claims Against MB

Claims asserted by Trustee on behalf of Refco Capital Markets, Ltd. ("RCM"), a Bermuda chartered subsidiary of Refco:

Malpractice (Seventh Claim for Relief) – RCM, claimed that Mayer, Brown, Rowe & Maw, LLP, ("MB") breached its duty of care to RCM in providing legal advice regarding: (a) the customer agreements utilized by RCM; (b) the applicability and impact of United States and foreign regulations and law to RCM's activities, operations, and use of customer funds; and (c) the repatriation of RCM to the United States. More specifically, MB is alleged to have failed to properly advise RCM concerning its obligations to safeguard customer funds; improperly advised RCM as to the impact of United States and foreign regulations on its operations, including the use and treatment of customer funds; simultaneously represented both Refco Inc. and Refco Group Holdings Inc. ("RGHI") despite conflicts of interest due to its knowledge and/or conscious avoidance of the misconduct at Refco Inc.; and failed to advise RCM that its funds were improperly transferred to Refco affiliates that lacked the ability to repay those funds. As a proximate result of MB's breach of its duty of care to RCM, RCM transferred over \$2 billion in RCM customer funds and assets to Refco affiliates that lacked the ability to repay those funds, thereby rendering RCM unable to satisfy its obligations to its customers.

Breach of Fiduciary Duty (Eighth Claim for Relief) – This claim addresses the alleged conflict of interest arising out of Mayer Brown's simultaneous representation of RCM and RGHI. The claim alleges that MB failed to advise RCM that it transferred funds to another client (RGHI) with knowledge that the RGHI lacked the ability to repay those funds.

Aiding and Abetting Breach of Fiduciary Duty (Ninth Claim for Relief) – By virtue of its role as outside counsel to RCM and its affiliates, MB allegedly knew and/or consciously avoided knowing that the executives of Refco Inc. were transferring assets of RCM to improve the perceived financial position of Refco Inc. thereby enabling certain Refco insiders to carry out their plan to cash out their interests through a leveraged buyout and subsequent initial public offering. RCM was a party to the roundtrip loans that were unrelated to its business of RCM did not provide an economic benefit to RCM..

Aiding and Abetting Fraud (Tenth Claim for Relief) – This claim asserts that MB knew and/or consciously avoided knowledge that certain Refco executives used the round-trip loans as customer to conceal uncollectible customer receivables and other losses from operations that should have been written off in Refco's financial statements. Also, in the leveraged buyout transaction, the RCM debt was subordinated to \$1.4 billion in debt from the leveraged buyout without the consent of RCM. The claim asserts that notwithstanding knowledge of the fraudulent scheme, MB continued to prepare documentation for fraudulent loan transactions and failed to properly advise RCM of its duty to protect customer funds.

Claims asserted by Trustee on behalf of RGL:

Malpractice (Nineteenth Claim for Relief) – RGL claimed that MB breached its duty of care to RGL by facilitating the Round-trip Loans and failing to advise the innocent RGL directors: (a) there were material related-party transactions between Refco and RGHI which moved off of the books and concealed substantial trading losses; (b) that RGL was recording fictitious accrued interest as revenue on the RGHI receivable; and (c) that RGL was using RCM's assets to finance operations and acquisitions so as to boost RGL's perceived financial condition for the leveraged buyout, which would leave RGL insolvent. More specifically, MB knew that RGL was improperly positioned for the leveraged buyout transaction, and MB should have revealed these facts to the innocent directors and disclosed these facts in RGL's financial statements.

Breach of Fiduciary Duty (Twentieth Claim for Relief) – This claim involves the alleged conflict of interest presented by MB's concurrent representation of RGL and RGHI. RGL alleged that the failure to disclose the conflict of interest was a breach of the fiduciary duty to RGL.

Aiding and Abetting Breach of Fiduciary Duty (Twenty-First Claim for Relief) – By virtue of its role as outside counsel to RGL and its affiliates, MB allegedly knew and/or consciously avoided knowing that the executives of Refco. were using the assets of RCM to improve the perceived financial position of RGL thereby enabling certain Refco insiders to carry out their plan to cash out their interests through a leveraged buyout. More specifically, MB failed to disclose its knowledge of the RGHI receivable and the Round-trip Loans, both of which were breaches of Refco's fiduciary duty to RGL.

Aiding and Abetting Fraud (Twenty-Second Claim for Relief) – This claim asserts that MB had actual knowledge or consciously avoided knowing that certain Refco insiders were using RGL in a scheme to line their pockets through the leveraged buyout transaction. More specifically, MB knew or consciously avoided knowing that the RGHI receivable was an uncollectible debt from which RGL recorded hundreds of millions of dollars of accrued interest as revenue, the Round-trip Loans were used to conceal the nature and extent of the RGHI receivable, and that RGL would not be able to meet its obligations after the leveraged buyout.

Claims asserted by Trustee on behalf of Refco:

Malpractice (Thirty-Ninth Claim for Relief) – Refco claimed that MB breached its duty of care to Refco in facilitating and providing a legal opinion in connection with the initial public offering of Refco stock without advising Refco's innocent officers and directors that: (a) substantial Refco trading losses and operating expenses were concealed as the RGHI receivable; (b) RGL was recording fictitious accrued interest on the RGHI receivable as revenue; (c) RCM funds were being used to pay for the operation of RGL in order to make Refco's perceived financial condition suitable for the initial public offering; (d) Refco's financial statements were inaccurate; and (e) as a result of the initial public offering, Refco would pay down \$231 million in debt obligations to the insolvent RGL and distribute Refco's assets to certain Refco insiders and others without first paying down other significant obligations. Refco claimed that given MB's knowledge of the RGHI receivable and the Round-trip Loans, it knew that Refco was not

in suitable financial condition for the initial public offering, and that MB had the duty to disclose that fact.

Aiding and Abetting Breach of Fiduciary Duty (Fortieth Claim for Relief) – Refco alleged that MB had knowledge that: (a) substantial Refco trading losses and operating expenses were concealed as the RGHI receivable; (b) RGL was recording fictitious accrued interest on the RGHI receivable as revenue; (c) RCM funds were being used to pay for the operation of RGL in order to make Refco's perceived financial condition suitable for the initial public offering; (d) Refco's financial statements were inaccurate; and (e) as a result of the initial public offering, Refco would pay down \$231 million in debt obligations to the insolvent RGL and distribute Refco's assets to certain Refco insiders and others without first paying down other significant obligations, all of which were part of a scheme of certain Refco executives who breached their fiduciary duties to Refco. More specifically, MB provided substantial legal assistance in facilitating the scheme of certain Refco insiders to profit from a sale of Refco, with knowledge of Refco's weak financial position.

Class Action

In re Refco Inc. Securities Litigation No. 05 Civ. 8626 (GEL) (S.D.N.Y. Dec. 3, 2007)

Summary Of Civil Claims Against MB and Collins

Count IX – For Violations of Section 10(b) of the Exchange Act ('34 Act) and Rule 10b-5(b): The complaint alleges that Collins and MB (through *respondeat superior*) were responsible for false or misleading statements that (i) deceived the investing public; (ii) inflated the market for Refco securities; and (iii) caused class to purchase the securities. Specifically, this count asserts that the Roundtrip Loans were used to manipulate Refco's financial statements and that the financial statements misleading as to related party equity in Refco (including profit sharing agreements with executives).

Count XI – Pursuant to Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c): The complaint alleges common law fraud similar to Count IX against Collins and MB. Specifically, this count alleges that the Roadtrip Loans had no legitimate business purpose and were designed solely for the purpose of furthering the fraud against investors. [The motivation for involvement was the estimated \$5 million billed to Refco by Collins and MB each year.]

Count XV – Control Person Liability Pursuant to Section 20(a) of the Exchange Act: The complaint alleges that MB is liable because it induced the fraudulent violations of Section 10(b) and Rule 10b-5 committed by its employees. This claim makes MB jointly and severally liable with Collins and other attorneys who worked for Refco.

Criminal Action

United States v. Joseph P. Collins 07 Cr. (S. D. N. Y. Dec. 18, 2007)

Summary of Criminal Indictment of Collins:

Count One (Conspiracy To Commit Securities Fraud, Wire Fraud, Bank Fraud, And Money Laundering, To Make False Filings With The SEC, And To Make Material Misstatements To Auditors) - Alleges that Joseph P. Collins ("Collins") participated with others in a scheme to hide the true financial condition of Refco, including the debt owed to Refco by RGHI and the extent of BAWAG's economic interest in Refco, from banks, counterparties, auditors, investors and potential investors. The specific underlying conduct alleged to constitute the scheme included the Roundtrip loans, material misstatements and omissions in SEC filings associated with the leveraged buyout and initial public offering, and material misstatements and omissions from information provided to Refco's auditors.

Alleged Objects of the Conspiracy:

1. Securities Fraud in violation of 17 C.F.R. § 240.10b-5 in connection with the purchase and sale of notes issued by Refco and the common stock of Refco, Inc., all in violation of 15 U.S.C. §§ 78j(b) and 78ff.
2. False Statements in documents filed with the SEC under the Exchange Act in violation of 15 U.S.C. §§ 78o(d) and 78ff.
3. False Statements in documents filed with the SEC under the Securities Act in violation of 15 U.S.C. § 77x.
4. Wire Fraud in connection to transmit false and fraudulent pretenses, representations, and promises by means of wire communications in violation of 18 U.S.C. § 1343.
5. Material Mistatements To Auditors from Phillip Bennett (co-conspirator) with assistance of Collins in connection with audits of financial statements required to be made in violation of 15 U.S.C. § 78m and 17 C.F.R. § 240.13b2-2(a).
6. Bank Fraud in connection with the scheme to obtain moneys, funds, credits, assets, securities and other property owned by a financial institution in violation of 18 U.S.C. § 1344.
7. Money Laundering in connection with monetary transactions in criminally derived property in violation of 18 U.S.C. § 1957(a).

Count Two (Securities Fraud) - Alleges Collins employed artifices to defraud, made untrue statements of material facts and omitted to state material facts, and engaged in courses of

business which operated as a fraud and deceit, in connection with the purchase and sale of 9% Senior Subordinated Notes due 2012, issued by Refco Group Ltd., LLC and Refco Finance, Inc. (15 U.S.C. § 78j(b) and 78ff; 17 C.F.R. § 240.10b-5; and 18 U.S.C. § 2.)

Count Three (Securities Fraud) - Alleges Collins employed artifices to defraud, made untrue statements of material facts and omitted to state material facts, and engaged in courses of business which operated as a fraud and deceit, in connection with the purchase and sale of common stock of Refco, Inc. (15 U.S.C. § 78j(b) and 78ff; 17 C.F.R. § 240.10b-5; and 18 U.S.C. § 2.)

Count Four (False Filing With The SEC - Exchange Act) - Alleges Collins knowingly made and caused to be made false statements in a report and document required to be filed with the SEC under the Exchange Act in connection with Refco's annual report on Form 10-K. (15 U.S.C. §§ 78o(d) and 78ff; 17 C.F.R. § 240.15d-2; and 18 U.S.C. § 2.)

Counts Five And Six (False Filing With The SEC - Securities Act) - Alleges Collins knowingly made and caused to be made false statements in a report and document required to be filed with the SEC under the Securities Act in connection with registration statements on Form S-4 (count five) and Form S-1 (count six). (15 U.S.C. § 77x; and 18 U.S.C. § 2.)

Counts Seven Through Ten (Wire Fraud) - Alleges Collins, having devised a scheme to defraud and obtain money by fraudulent statements, transmitted four emails (wire communications). The emails charged were:

- email containing a letter from Phillip R. Bennett to Thomas H. Lee Partners;
- email to representatives of Thomas H. Lee Partners regarding due diligence concerning indemnifications;
- email to representatives of Thomas H. Lee Partners regarding due diligence concerning material contracts; and
- email to representatives of Thomas H. Lee Partners and representatives of the bank syndicate and LBO Note purchasers. (18 U.S.C. §§ 1343 and 2.)

Count Eleven (Bank Fraud) - Collins knowingly executed a scheme to defraud a financial institution to obtain moneys, funds, credits, assets, securities and other property owned by a financial institution by means of false and fraudulent pretenses, representations and promises. (18 U.S.C. §§ 1344 and 2.)

SEC Action

United States Securities & Exchange Commission v. Joseph P. Collins 07 Cv. 11343 (December 18, 2007)

Summary of claims against Joseph P. Collins:

Fraud – Aiding and Abetting Violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5] – The SEC alleged that Joseph P. Collins, a partner at the law firm of MB and the longtime outside attorney for Refco Inc., substantially assisted Refco in its failure to disclose to investors that RGHI, a corporation controlled by Refco's chief executive officer, owed Refco hundreds of millions of dollars. The SEC alleged that Collins also substantially assisted Refco in its failure to disclose related party Round-trip Loan transactions that regularly occurred at the end of Refco fiscal periods and in Refco's failure to disclose hundreds of millions of dollars in potential liabilities assumed by Refco during those fiscal year-end periods. More specifically, Collins assisted Refco in carrying out the Round-trip Loans, which enabled the leveraged buyout and initial public offering to occur and allegedly perpetrating a fraud against investors.

Investigation of Examiner appointed by the Office of the United States Trustee

In re Refco Inc. et al. No. 05-60006 (RDD) (U.S. Bankr. Ct. S. D. N. Y. July 11, 2007) Final Report of Examiner, Joshua R. Hochberg

The charge of the Examiner was to investigate, make findings, and reach conclusions about potential causes of action held by Refco's bankruptcy estate. The Examiner had access to and coordinated with government agencies investigating the Refco matter. A principal focus of the report was the role and potential liability of various professionals who rendered services to Refco including its auditors, attorneys, tax accountants, and others, particularly regarding the Round-trip Loans. The Examiner also considered whether the dividend or related damages paid to Refco insiders in connection with the IPO could be recovered by the bankruptcy estate.

I. Mayer Brown -- with respect to possible violations of the New York Code of Professional Responsibility, the Examiner found:

A. Sufficient evidence to allege violations of DR7-102(a):

1. In the due diligence process with respect to the LBO and, later, the public stock and notes offering.
 - failed to provide due diligence materials and information regarding any dealings between RGHI and Refco specifically requested by THL and its counsel;
 - failed to disclose the Round-trip Loans;
 - failed, after inquiry, to disclose the existence of profits interests held by members of Refco's senior management;
2. In the negotiation and preparation of the definitive LBO agreement and later the public stock and notes offerings.
 - knew that the agreement contained false representations about Refco's liabilities and its covenant not to assume or guarantee indebtedness in excess of \$5 million;
 - continued to document Round-trip Loans that were guaranteed by Refco.

B. Possible violation of DR5-109

New York DR5-109 (b) provides:

- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the

representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

1. By continuing to represent Refco in Round-trip Loans at the time of the IBO and IPO.
2. Not bringing the Round-trip Loans to the attention of anyone independent of Refco's CEO, such as its outside directors.

C. Conflict of Interest:

The continued representation of both the guarantor/indemnitor (Refco) and the borrower (RGHI) in connection with the Round-trip Loans after the LBO constituted a conflict of interest because Refco was at risk with no consideration. Although the parties may have been able to consent to this conflict following full disclosure, the Examiner found no evidence of a request for a waiver of any conflict of interest.

D. Aiding and Abetting Breach of Fiduciary Duty/Aiding and Abetting Fraud:

The Examiner concluded that, more likely than not, Refco could make a claim for aiding and abetting a fraud and/or breach of fiduciary duty based on essentially the same evidence of participation in and nondisclosure of the Round-trip Loans in connection with the LBO and public offerings of stock and notes (assuming that a fraud and breach of fiduciary duty by Refco officers could be established).

II. Weil Gotshall -- WG represented Refco in the August 2005 public offering of notes and stock ("IPO"). The Examiner investigated whether any claims could be brought against WG by Refco's bankruptcy estate. The Examiner identified certain deficiencies in WG's due diligence process and "red flags" that could have alerted WG to examine more carefully Refco's responses to various due diligence requests and therefore question the adequacy and accuracy of disclosures in the IPO prospectus. However, the Examiner did not conclude that the debtor's estate had a claim for malpractice or breach of fiduciary duty against WG or its attorneys. The "red flags" identified by the Examiner included the following:

- WG knew that Refco failed to produce all documents requested by WG in the LBO due diligence;
- WG learned that Refco's disclosures at various times about the status of litigation and internal control deficiencies identified by Refco's auditors were misleading or false;
- WG did not review all documents in its possession relating to the Refco's executives' profit interests, including agreements and tax returns;
- WG did not press Refco for evidence of transactions and agreements between Refco and RGHI, including the transaction by which RGHI redeemed the executives' profits interests in Refco.

SEC Press Release

SEC Charges Mayer Brown Partner Joseph P. Collins with Aiding and Abetting Refco Fraud

FOR IMMEDIATE RELEASE

2007-266

Washington, D.C., Dec. 18, 2007 — The Securities and Exchange Commission today charged the longtime, primary outside attorney for Refco Group Ltd. with aiding and abetting securities fraud violations at the now-defunct New York-based financial services and commodities brokerage firm.

The SEC filed a civil injunctive action in the U.S. District Court for the Southern District of New York against Joseph P. Collins, a partner at the law firm of Mayer Brown LLP, alleging that he substantially assisted Refco and its corporate successor, Refco Inc., as they failed to disclose hundreds of millions of dollars in related party indebtedness and related party transactions.

“Financial and disclosure frauds are often possible only if an attorney, an accountant, or some other outside professional assists,” said Linda Chatman Thomsen, Director of the SEC’s Division of Enforcement. “The Commission relies on these professionals to act as gatekeepers to our markets. We will aggressively pursue individuals who ignore their professional obligations and instead assist in their clients’ violation of the federal securities laws.”

Scott W. Friestad, Associate Director of the SEC’s Division of Enforcement, said, “As a result of his longstanding relationship with his client, Collins was aware that Refco was hiding important facts from potential investors. Collins was in a perfect position to protect investors from being harmed, but chose instead to perpetuate the deception by actively assisting Refco’s fraud.”

The Commission’s complaint alleges that Collins, in the course of representing Refco, learned that Refco Group Holdings, Inc. (RGHI) owed Refco hundreds of millions of dollars. RGHI was a non-Refco entity controlled by Phillip R. Bennett, Refco’s chief executive officer. The complaint further alleges that Collins worked on, and oversaw other attorneys’ work on, short-term related party transactions that occurred regularly at the end of Refco fiscal periods from February 2000 through May 2005. In these transactions, a Refco subsidiary loaned hundreds of millions of dollars to third parties that, in turn, were obligated to loan equal amounts simultaneously to RGHI. Shortly after the ends of fiscal periods, the loans were reversed. Refco assumed hundreds of millions of dollars in potential liabilities in these transactions, in the form of guaranties and indemnification that it extended to the third parties to protect them from a default by RGHI or claims that might arise out of the loans.

In 2004, Refco placed \$600 million in senior subordinated notes with certain financial institutions pursuant to an offering circular. In 2005, Refco commenced its initial public

offering of common stock pursuant to a registration statement filed with the Commission. The SEC's complaint alleges that the offering circular failed to disclose RGHI's indebtedness, the period end transactions, and the related potential liabilities. It also is alleged that the registration statement failed to disclose the indebtedness and the potential liabilities. The complaint further alleges that Collins, while aware of the indebtedness and the transactions, reviewed and revised sections of the offering circular and the registration statement without inserting requisite disclosures regarding the indebtedness, the period-end transactions, and the potential liabilities.

The SEC's complaint seeks a permanent injunction enjoining Collins from violating the antifraud provisions of the federal securities laws. The complaint also seeks civil money penalties against Collins.

In a related action, the U.S. Attorney's Office for the Southern District of New York today announced the filing of criminal charges against Collins for his role in the Refco fraud.

The Commission's investigation is continuing.

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For more information, contact:

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**U.S. SECURITIES AND EXCHANGE COMMISSION
Litigation Release No. 20402 / December 18, 2007**

U.S. Securities and Exchange Commission v. Joseph P. Collins, 07 CV 11343 (GEL)
(S.D.N.Y. filed December 18, 2007)
SEC Charges Mayer Brown Partner Joseph P. Collins With Aiding and Abetting Refco
Disclosure Fraud

The U.S. Securities and Exchange Commission (the Commission) today filed a civil injunctive action in the United States District Court for the Southern District of New York against Joseph P. Collins, a partner at the law firm of Mayer Brown LLP. Collins was the longtime, primary outside attorney for Refco Group Ltd. The Commission's complaint alleges that Collins substantially assisted Refco Group Ltd. and its corporate successor Refco Inc. (hereinafter, together Refco) in their failure to disclose hundreds of millions of dollars in related party indebtedness and related party transactions. The complaint alleges that Collins thereby aided and abetted Refco's violations of Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Exchange Act Rule 10b 5.

The Commission's complaint alleges that Collins, in the course of representing Refco, learned that Refco Group Holdings, Inc. (RGHI), a non-Refco entity controlled by Phillip R. Bennett, Refco's chief executive officer, owed Refco hundreds of millions of dollars. In addition, the complaint alleges that Collins worked on, and oversaw other attorneys' work on, short-term transactions that occurred regularly at the end of Refco fiscal periods from February 2000 through May 2005. In these transactions, a Refco subsidiary, at the end of a fiscal period, loaned hundreds of millions of dollars to a third party that, in turn, was obligated to loan an equal amount simultaneously to RGHI. The transactions were reversed shortly after the fiscal periods ended. In these transactions, Refco assumed hundreds of millions of dollars in potential liabilities, in the form of guaranties and indemnification that it extended to the third parties to protect them from a default by RGHI or claims that might arise out of the loans.

In 2004, Refco placed \$600 million in senior subordinated notes with certain financial institutions pursuant to an offering circular. In 2005, Refco commenced its initial public offering of common stock pursuant to a registration statement filed with the Commission. The complaint alleges that the offering circular failed to disclose RGHI's indebtedness, the period end transactions, and the related potential liabilities and that the registration statement failed to disclose the indebtedness and the potential liabilities. The complaint further alleges that Collins, while aware of the indebtedness and the transactions, reviewed and revised sections of the offering circular and the registration statement, without inserting requisite disclosures regarding the indebtedness, the period-end transactions, and the potential liabilities.

The complaint seeks a permanent injunction enjoining Collins from violating Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5. The complaint also seeks civil money penalties against Collins pursuant to Section 21(d)(3) of the Exchange Act.

In a related action, the U.S. Attorney's Office for the Southern District of New York today announced the filing of criminal charges against Collins for his role in the Refco fraud.

The Commission's investigation is continuing.

The Commission acknowledges the assistance and cooperation of the Office of the United States Attorney for the Southern District of New York, the United States Postal Inspection Service, and the Commodity Futures Trading Commission.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**RECEIVED DEC 18 2007
U.S.D.C. S.D.N.Y.
CASHIERS
07 CV 11343**

**UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,**

Plaintiff,

v.

JOSEPH P. COLLINS,

Defendant.

07 CV _____ ()

ECF CASE

COMPLAINT

Plaintiff, the United States Securities and Exchange Commission ("Commission"), alleges as follows:

SUMMARY

1. The Commission brings this Complaint for violations of the federal securities laws by defendant Joseph P. Collins ("Collins"), a partner at the law firm of Mayer Brown LLP ("Mayer Brown") who was a longtime outside attorney for Refco Inc. and its predecessor entity, Refco Group Ltd. (hereinafter, together referred to as "Refco"). In that capacity, Collins substantially assisted Refco in its failure to disclose to investors that a corporation controlled by the company's chief executive officer owed Refco hundreds of millions of dollars. Collins also substantially assisted Refco in its failure to disclose related party transactions that regularly occurred at the end of Refco fiscal periods and in its failure to disclose hundreds of millions of dollars in potential liabilities regularly assumed by Refco over those period-ends.

2. In the course of representing Refco, Collins learned that an entity controlled by Phillip R. Bennett ("Bennett"), Refco's chairman and chief executive officer, owed the company hundreds of millions of dollars. In addition, Collins also worked on, and oversaw other Mayer Brown attorneys' work on, short-term transactions in which Refco, at the end of fiscal periods, loaned hundreds of millions of dollars to third parties that, in turn, were obligated to loan equal amounts simultaneously to the Bennett-controlled entity. As part of these transactions, Refco assumed potential liabilities of hundreds of millions of dollars, in the form of guaranties and indemnification that it extended to the third parties. The transactions were reversed shortly after the fiscal periods ended.

3. In August 2004, Collins represented Refco in the acquisition by Thomas H. Lee Partners, L.P. of a majority ownership interest in Refco. The transaction was financed in part by a placement of \$600 million in senior subordinated notes. The Offering Circular for the placement failed to disclose the Bennett-controlled entity's indebtedness to Refco or the period-end transactions and potential liabilities. Collins reviewed and edited the Offering Circular. He revised two sections of the document that should have made those disclosures.

4. In August 2005, Collins represented Refco in connection with its initial public offering of common stock. The Registration Statement that Refco filed with the Commission in connection with that offering also failed to disclose the indebtedness or the potential liabilities. Collins reviewed and edited the Registration Statement. He revised a section that should have made those disclosures.

5. Refco failed to disclose the indebtedness, period-end transactions, and potential liabilities in its Offering Circular and Registration Statement. The failure to disclose this information resulted in material omissions in those offering documents.

6. By engaging in this conduct, Collins aided and abetted Refco's violations of the antifraud provisions of the federal securities laws. The Commission requests, among other things, that this Court permanently restrain and enjoin Collins from further violations of the antifraud provisions of the federal securities laws as alleged in this Complaint and impose monetary penalties on him pursuant to Section 21(d)(3) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78u(d)(3)].

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), and 78aa].

8. Collins, directly or indirectly, made use of the means or instrumentalities of interstate commerce, or of the mails, or the facilities of a national securities exchange in connection with the transactions, acts, practices, and courses of business alleged in this Complaint.

9. Certain of the acts, practices, and courses of conduct constituting the violations of law alleged herein occurred within this judicial district.

10. Collins, directly and indirectly, has engaged in, and unless restrained and enjoined by this Court will continue to engage in the acts, practices, and courses of business alleged herein, or in acts, practices, and courses of business of similar purport and object.

DEFENDANT

11. Defendant Joseph P. Collins, 57, resides in Winnetka, Illinois. He joined Mayer Brown (formerly known as Mayer, Brown, Rowe & Maw LLP) in 1994 as a partner, bringing Refco with him as a client from his previous firm. From 1994 to October 2005, Collins was the billing partner for Mayer Brown's representation of Refco and had overall responsibility for the engagement. From 1994 to August 2004, Mayer Brown was Refco's primary law firm, and

Collins was Refco's primary outside lawyer. Mayer Brown and Collins continued to represent Refco in a significant capacity from August 2004 to October 2005. Collins was involved in Refco's major corporate transactions, and he interacted directly with the company's senior management, including Bennett. Collins is presently a partner at Mayer Brown and is the head of that firm's derivatives practice group. At all relevant times for this Complaint, Collins worked out of Mayer Brown's offices in Chicago, Illinois and New York, New York.

RELEVANT ENTITIES AND INDIVIDUAL

12. Refco Group Ltd. was a Delaware limited liability company with its headquarters in New York City. The company was a major provider of execution and clearing services for exchange-traded derivatives and prime brokerage services in the fixed income and foreign exchange markets. It held regulated commodities and securities brokerages. As part of a reincorporation conducted in preparation for its August 10, 2005, initial public offering of common stock, Refco Inc. became the corporate successor to Refco Group Ltd. After the offering, Refco's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act [15 U.S.C. § 781(b)] and traded on the New York Stock Exchange. On October 10, 2005, press reports appeared discussing hundreds of millions of dollars of undisclosed debt that a Bennett-controlled entity owed to Refco. On October 13, 2005, the New York Stock Exchange halted trading in Refco's common stock, and on October 17, 2005, Refco filed for protection under Chapter 11 of the U.S. Bankruptcy Code. On October 18, 2005, Refco's common stock was delisted. Refco's fiscal year ended at the end of February.

13. Phillip R. Bennett joined Refco in 1981. Beginning in September 1998, Bennett was chief executive officer and president of Refco and chairman of its board of members. After Refco's August 2005 initial public offering of common stock, Bennett continued to serve as chief executive officer and chairman of the board of directors. On October 10, 2005, Refco placed Bennett on an indefinite leave of absence. Bennett subsequently resigned from Refco in January 2006.

14. Refco Group Holdings, Inc. ("RGHI") is a closely held Delaware corporation. It is not, and was not, a subsidiary of Refco. At all relevant times for this Complaint, Bennett owned a substantial interest in RGHI. From approximately August 1999 to August 2004, Bennett owned fifty percent of RGHI. Subsequent to August 2004, Bennett completely owned RGHI. At all relevant times for this Complaint, RGHI held a substantial ownership interest in Refco.

FACTS

Collins' Knowledge of RGHI's Indebtedness to Refco

15. In 1997, Collins learned that Refco had assumed significant customer trading losses. In the aftermath of the October 1997 stock market decline caused by the Asian financial crisis, several customer accounts at Refco experienced large losses. When the customers could not meet the resulting margin calls, Refco assumed the losses. Collins drafted a series of agreements pursuant to which Refco assumed approximately \$100 million of one major

customer's trading losses. Collins learned that Refco had assigned \$71 million of those assumed losses to a subsidiary of RGHI.

16. In 1999, Collins worked on a transaction pursuant to which Bank für Arbeit and Wirtschaft ("BAWAG") acquired a ten percent ownership interest in Refco. As a result of that work, Collins learned that related parties owed Refco at least \$250 million. The BAWAG transaction was subject to review for compliance with the federal Bank Holding Company Act. In connection with that issue, on October 15, 1999, Bennett sent Collins a letter setting forth arguments supporting the transaction. Refco's financial statements for its fiscal year ended February 28, 1999, were attached to the letter. The financial statements showed that Refco held outstanding loans receivable of approximately \$252 million from related parties.

17. In 2002, Collins worked on a proposed transaction in which he learned that RGHI was indebted to Refco by hundreds of millions of dollars. Pursuant to the proposed transaction RGHI would have sold BAWAG fifty-one percent of its voting membership interest in Refco. A draft purchase agreement dated February 11, 2002, states that a portion of the consideration for the membership interest would be the purchaser's assumption of \$350 million of RGHI's liabilities.

18. Collins' hand-written notes dated April 19, 2002, specify that the purchaser's assumption of liabilities would involve assuming debt that Refco held from RGHI. The notes state, "Assumption Purchaser would become the borrower of RGL replaces loan receivable from RGHI." ("RGL" denoted Refco Group Ltd.)

19. Although the proposed transaction did not come to fruition, in July 2002, Refco entered into a Proceeds Participation Agreement with BAWAG, pursuant to which Refco conveyed to a BAWAG affiliate the right to receive a stated percentage of the proceeds from a future sale of Refco. Collins and Mayer Brown represented Refco and RGHI in connection with the Proceeds Participation Agreement.

20. In mid-2002, Collins was made aware that RGHI had at least \$350 million of "inter-company" debt owed to Refco. In June 2002, Mayer Brown prepared a draft side letter to the Proceeds Participation Agreement. Collins reviewed and edited the letter. He also forwarded the letter to BAWAG and to Bennett. A provision of the draft side letter states that Refco "agrees that \$350 million of the Purchase Price for the Participation Right shall be used or caused to be used for the retirement of inter-company debt of Refco Group Holdings, Inc." That language remained in the final version of the letter.

21. In 2004, RGHI agreed to sell Thomas H. Lee Partners, L.P. and its affiliates and co-investors ("Lee Partners") a fifty-seven percent ownership interest in Refco. RGHI kept the remaining forty-three percent. At the time, RGHI was owned jointly by Bennett and a former Refco executive. However, a condition of Lee Partners' Refco purchase was that Bennett become RGHI's sole owner.

22. As of the time of the Lee Partners transaction, Collins knew that RGHI's indebtedness to Refco was \$1 billion and that it was contemplated that RGHI's remaining indebtedness after the Lee Partners transaction would be \$300 million.

Collins' Knowledge of Refco Period-End Transactions and Potential Liabilities

23. In 2000, Collins began working on short-term transactions involving a Refco subsidiary, third parties, and RGHI that regularly occurred immediately prior to Refco fiscal period-ends and that were reversed immediately following the period-ends. From February 2000 through February 2004, the transactions were implemented at the end of each of Refco's fiscal years. Beginning in May 2004, the transactions occurred at the end of each fiscal quarter as well.

24. In the transactions, Refco Capital Markets, Ltd., an unregulated, offshore Refco subsidiary, loaned a third party (typically, a Refco customer) hundreds of millions of dollars immediately prior to the period-end, and the third party, in turn, loaned an identical amount to RGHI. As part of these transactions, Refco provided the third party with a guaranty of complete payment should RGHI default on its loan obligations. Refco also provided the third party with an indemnification for any claims arising out of the loans. The interest rate on the loan that the third party made to RGHI was slightly higher than the interest rate on the loan that Refco Capital Markets made to the third party. Accordingly, the transactions ensured a profit to the third party. Once the fiscal period ended, the transactions were reversed.

25. Mayer Brown prepared the documents for these transactions from February 2000 through May 2005. From February 2000 through February 2003, Collins was personally involved in the transactions. On multiple occasions during this time, Collins discussed the transactions with Refco executives. He obtained from Refco the loan amounts, interest rates, loan dates, and counterparty information to be utilized. Collins also discussed the transactions with other Mayer Brown attorneys.

26. For example, on February 1, 2000, Collins obtained from a Refco executive the loan amounts, interest rates, loan dates, and counterparty information for a \$150 million transaction involving Refco Capital Markets, a third party, and RGHI that occurred immediately prior to Refco's fiscal year-end of February 29, 2000.

27. Similarly, on February 12, 2002, Collins again communicated with the Refco executive and received the loan amounts, interest rates, loan dates, and counterparty information for two transactions that Refco Capital Markets and RGHI engaged in with two third parties just prior to Refco's fiscal year-end of February 28, 2002. One of these transactions involved Refco Capital Markets lending a third party \$325 million, and the third party, in turn, lending that same amount to RGHI on February 25, 2002. The structure of the other transaction was identical, except that the amount involved was \$175 million. Collins' notes of his discussion indicate that the transactions were to be reversed on March 4, 2002, just days after the end of Refco's fiscal year. His notes also referenced the guaranties that Refco provided to the third parties in these transactions.

28. Collins also communicated with some of the third parties about the period-end transactions. On February 16, 2001, a third party sent Collins a letter outlining its understanding of how the transaction would work. The letter states, in part:

It is planned that RCM will deposit the loan proceeds in [the third party's] account . . . at RCM on February 23, 2001. [The third

party] will then fax a letter to RCM instructing them to move the funds to RGHI with a 15 basis point uplift in the interest rate. RCM will then withdraw the funds from [the third party's] account and deposit the funds to RGHI's account, thereby completing the back-to-back loan transaction. The steps will be reversed on March 6, 2001. RCM will transfer the . . . spread on the transaction to [the third party's] . . . account . . . in the Cayman Islands. The account details are the same as used for the back-to-back loan done in 2000.

("RCM" denoted Refco Capital Markets.)

29. In some instances, Collins prepared, reviewed, and revised the transaction documents. For example, in 2001, Collins revised the loan agreements pursuant to which Refco Capital Markets loaned a third party \$200 million on February 26, 2001, and the third party, in turn, loaned an identical amount to RGHI. Collins also revised the guaranty and the indemnification that Refco provided the third party in this transaction.

30. As a result of Collins' familiarity with the period-end transactions, he knew that, at times, Bennett executed documents on behalf of both Refco and RGHI. On those occasions, Bennett, on behalf of RGHI, would execute the documents pursuant to which RGHI borrowed money from the third party and, on behalf of Refco, would execute documents pursuant to which Refco guaranteed RGHI's loan repayment to the third party.

31. Even though his involvement diminished over time, Collins was still aware that Mayer Brown was assisting Refco with the period-end transactions in 2004 and 2005. Collins described the transactions that occurred in 2004 and 2005 in summary fashion in the bills for legal services that he sent Refco. Although Collins by that time had delegated primary responsibility for preparing the documents and coordinating the transactions to a Mayer Brown associate, he continued to be kept abreast of the status of the transactions. On May 20, 2005, Collins was copied on an e-mail that the Mayer Brown associate sent to Refco enclosing the documents for loans of \$450 million involving Refco Capital Markets, a third party, and RGHI that occurred over the fiscal quarter-end of May 31, 2005. The e-mail also referenced the guaranty and indemnification related to those loans.

The Lee Partners Transaction

32. In 2004, RGHI agreed to sell Lee Partners a majority ownership interest in Refco. Collins coordinated Refco's responses to the due diligence that Lee Partners performed for the transaction. In its due diligence, Lee Partners requested information concerning all related party indebtedness, all transactions between Refco and RGHI, and all agreements under which Refco had incurred significant indemnification obligations. Refco failed to provide Lee Partners with information about RGHI's indebtedness or the period-end transactions, including the related indemnification obligations that were in effect over the period-ends.

33. Collins was also involved in negotiating, structuring, and drafting the Equity Purchase and Merger Agreement that Refco, RGHI, and Lee Partners executed. Several of the

representations contained in the agreement were false. The agreement contained representations that Refco did not have any undisclosed liabilities, undisclosed related party transactions, or undisclosed material contracts in which Refco guaranteed indebtedness in excess of \$1 million.

Collins' Role in Refco's False Offering Documents

34. The 2004 Lee Partners transaction was financed, in part, by the placement of \$600 million in senior subordinated notes to three financial institutions pursuant to an Offering Circular. In June 2004 and again in July 2004, Collins reviewed and edited the Offering Circular. As part of his mark-ups of the Circular, Collins reviewed and made some hand-written revisions to the Risk Factors section. The disclosed factors warned potential investors about a myriad of risks, including Refco's indebtedness, cash flow needs, regulatory and legal restrictions, market factors, competition, operational credit risks, regulatory costs and consequences, litigation risk, intellectual property issues, loss of management members, and controlling members' inherent conflicts of interest.

35. However, even after Collins' review and revisions, the Risk Factors section did not disclose that, after the Lee Partners transaction, Refco would be owed hundreds of millions of dollars by an entity controlled and owned by Refco's chief executive officer. Nor did the section disclose that Refco periodically assumed potential liabilities of hundreds of millions of dollars, in the form of guaranties and indemnification extended to third parties, with the potential liabilities contingent on the actions of Refco's chief executive officer. Although Collins was aware of the indebtedness and the potential liabilities, his edits to the Risk Factors section disclosed neither. Accordingly, as provided to the purchasers of the senior subordinated notes, the Offering Circular failed to disclose those risks.

36. As part of his June 2004 mark-up of the Offering Circular, Collins also reviewed and made hand-written revisions to the Certain Relationships and Related Transactions section. As reviewed by him, that section discussed the Equity Purchase and Merger Agreement that would effectuate the Lee Partners transaction, provisions of the limited liability company agreement that governed the issuance of two separate classes of membership units, certain provisions of the Refco securityholders agreement, a management agreement with a Lee Partners affiliate, an agreement to provide certain members of Refco management with nonvoting membership units, and an escrow agreement governing part of the consideration for Lee Partners' acquisition of its majority ownership interest.

37. However, even after Collins' review and revisions, the Certain Relationships and Related Transactions section failed to disclose that an entity controlled and owned by Refco's chief executive officer owed Refco hundreds of millions of dollars; that Refco regularly entered into transactions over its period-ends in which it loaned hundreds of millions of dollars to a third party that, in turn, was obligated to loan an equal amount simultaneously to an entity controlled by Refco's chief executive officer; or that Refco regularly guaranteed the repayment of, and indemnified third parties from any claims arising from non-payment of, hundreds of millions of dollars in loans owed by an entity controlled by Refco's chief executive officer. Although Collins was aware of these transactions, his edits to the Certain Relationships and Related Transactions section of the Offering Circular left them undisclosed.. Because the indebtedness, the transactions, and the guaranties and indemnification involved Refco's chief executive officer

(who also held a significant ownership interest in Refco), they were related party transactions. As provided to the purchasers of the senior subordinated notes, the Offering Circular failed to disclose these related party transactions.

38. In August 2005, Refco conducted its initial public offering of common stock pursuant to a Registration Statement on Form S-1 that the Commission declared effective on August 10, 2005. Collins reviewed and revised several sections of the Registration Statement. As part of an October 2004 mark-up of several sections, Collins made hand-written revisions to the Risk Factors section. Pursuant to the federal securities laws, Refco was required to provide in this section of the Registration Statement a discussion of the most significant factors that might make an investment in Refco common stock speculative or risky.

39. Although Collins revised a number of risk factors, he did not insert risk factors disclosing that Refco was owed hundreds of millions of dollars by an entity controlled and owned by Refco's chief executive officer, or that Refco periodically assumed potential liabilities of hundreds of millions of dollars, in the form of guaranties and indemnification extended to third parties, with the potential liabilities contingent on the actions of Refco's chief executive officer. As provided to potential investors in Refco's initial public offering of common stock, the Registration Statement failed to disclose the indebtedness or the potential liabilities.

40. The information regarding the indebtedness, the period-end transactions, and the potential liabilities was material. The failure of Refco, aided and abetted by Collins, to disclose the information resulted in material omissions in Refco's offering documents.

FIRST CLAIM FOR RELIEF

FRAUD

Aiding and Abetting Violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5]

41. Paragraphs 1 through 40 are realleged and incorporated herein by reference.

42. As set forth above, Refco, directly or indirectly, singly or in concert, by use of the means or instrumentalities of interstate commerce, or by the use of the mails or of the facilities of a national securities exchange, in connection with the purchase or sale of securities, knowingly or recklessly, has: (a) employed devices, schemes, or artifices to defraud; (b) made untrue statements of material fact, or omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading; and/or (c) engaged in acts, practices, or courses of business which operated as a fraud or deceit upon purchasers of Refco securities and upon other persons, in violation of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5].

43. As detailed above, Collins knowingly or recklessly provided substantial assistance to Refco in the commission of these violations.

44. By reason of the conduct described above, Collins aided and abetted Refco's violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5].

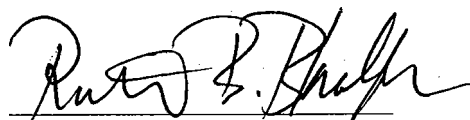
PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court enter a judgment:

- A. Permanently restraining and enjoining Collins from violating Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Exchange Act Rule 10b-5 [17 C.F.R. § 240.10b-5];
- B. Imposing civil monetary penalties on Collins pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]; and
- C. Granting such other relief as this Court may deem just and appropriate.

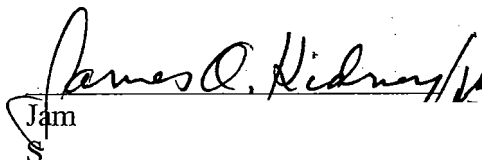
Dated: Washington, D.C. December 2007

Respectfully submitted,



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

v.

JOSEPH P. COLLINS,
Defendant.

07 CV _____ (_____)

ECF CASE

ATTACHMENT TO CIVIL COVER SHEET

Statement of Related Cases Pursuant to Local Rule 1.6(a)

Plaintiff Securities and Exchange Commission (the "SEC") submits this statement to note actions filed in this district that may be related to the case at bar:

In re Refco, Inc. Securities Litigation, No. 05-CV-8626 (GEL), filed October 11, 2005 - pending.

United States v. Phillip R. Bennett, Robert C. Trosten and Tone N. Grant, 05 Cr. 01192 (NRB), filed November 10, 2005 - pending.

SEC v. BAWAG P.S.K. Bank für Arbeit and Wirtschaft and Osterreichische Postsparkasse Aktiengesellschaft, 06 CV 04222 (DC), filed June 5, 2006 (settled concurrent with filing the complaint).

Thomas H. Lee Equity Fund V, L.P. et al v. Mayer Brown, No. 07-CV-6767 (GEL), filed July 26, 2007 - pending.