

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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: IN RE WORLDCOM, INC. SECURITIES : MASTER FILE
: LITIGATION : 02 Civ. 3288 (DLC)
: :
: This Document Relates to: :
: :
: ALL ACTIONS :
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: PUBLIC EMPLOYEES RETIREMENT SYSTEM OF :
: OHIO, et al., :
: :
: Plaintiffs, : 03 Civ. 338 (DLC)
: :
: vs. :
: :
: BERNARD J. EBBERS, et al., :
: :
: Defendants. :
: :
-----X
: RAILWAYS PENSION TRUSTEE COMPANY, LTD., :
: :
: Plaintiff, : 03 Civ. 998 (DLC)
: :
: vs. :
: :
: SALOMON SMITH BARNEY, INC., et al., :
: :
: Defendants. :
-----X
: INTERESTED PENSION FUNDS : 03 Civ. 167 (DLC)*
: :
: : MEMORANDUM OPINION
-----X : AND ORDER

* California Public Employees' Retirement System v. WorldCom, Inc. et al., No. 03 Civ. 167 (DLC), was the first of the actions brought by Milberg Weiss Bershad Hynes & Lerach, LLP on behalf of Interested Pension Funds to be assigned a docket number in the Southern District of New York. The complete list of Interested Pension Funds to which this Memorandum Opinion and Order applies is infra at 7 n.3.

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DENISE COTE, District Judge:

This Opinion addresses a renewed motion filed by Milberg Weiss Bershad Hynes & Lerach ("Milberg Weiss") on behalf of forty-one pension funds, and motions by certain Ohio pension funds and the Railways Pension Trustee Company to remand to state

court their lawsuits arising out of the collapse of WorldCom, Inc. ("WorldCom"). As explained below, the arguments made by Milberg Weiss on behalf of its clients were already fully addressed and rejected in this Court's Opinion of March 3, 2003 ("March 3 Opinion"). See In re WorldCom, Inc. Sec. Litig., Nos. 02 Civ. 3288 (DLC), 02 Civ. 8981 (DLC), 2003 WL 716243 (S.D.N.Y. March 3, 2003). Neither the Ohio funds nor Railways Pension Trustee have raised arguments that persuade the Court that the reasoning in the March 3 Opinion should not apply to their actions as well. For the reasons that follow, each of these motions to remand are denied.

In the long wake of WorldCom's collapse, numerous lawsuits have been filed around the country. Class action lawsuits filed in this district and sent to this district by the Judicial Panel on Multi-District Litigation ("MDL") were consolidated and lead plaintiff's counsel appointed in August 2002. During this same period, lawsuits were filed asserting individual rather than class claims, principally on behalf of pension funds ("Individual Actions"). Many of the Individual Actions pleaded violations of the Securities Act of 1933 ("1933 Act") and were brought in state courts. As the Individual Actions were removed to federal court on the theory that they were related to the bankruptcy of WorldCom, the MDL panel transferred to this Court those actions pending outside of the Southern District of New York.

Certain plaintiffs in the Individual Actions that had been removed from state to federal court contested the existence of federal subject matter jurisdiction. The New York City

Employees' Retirement System ("NYCERS") moved to remand its action to state court. NYCERS and eight co-plaintiffs had filed suit alleging violations of the 1933 Act and common law fraud arising out of their purchase of WorldCom stocks and bonds from 1999 through June 2002. The complaint included a claim for violation of Section 11 of the 1933 Act, 15 U.S.C. § 77k ("Section 11"). Milberg Weiss also contested removal and federal jurisdiction on behalf of forty-one plaintiffs in the numerous Individual Actions it had filed across the country ("Interested Pension Funds"). The Interested Pension Funds were permitted to intervene in NYCERS's motion so that their arguments concerning removal could be heard on an expedited basis. With the understanding that its clients would be permitted to intervene, Milberg Weiss had agreed to withdraw the objection to the MDL's November 2 Conditional Transfer Order. In re WorldCom, Inc. Sec. Litig., 2003 WL 716243, at *3 n.11. The March 3 Opinion addressed and rejected the arguments made by both NYCERS and Milberg Weiss.

An Order of March 3 ("Order") permitted any plaintiff, other than the plaintiffs in the NYCERS action, to show cause by March 21 why the March 3 Opinion did not require the denial of any timely motion to remand that they had filed. The Order gave notice that failure to make such a submission would be deemed a withdrawal of any motion to remand. The briefing in response to the Order was ordered to be completed on April 11. This Memorandum Opinion addresses the three submissions received in response to the Order.

1. Interested Pension Funds

On March 20, Milberg Weiss filed a response to the Order on behalf of the forty-one Interested Pension Funds. These are the same clients it had identified in its December 6 submission in support of intervention on NYCERS's remand motion.¹ Each of its arguments had already been fully considered and addressed in the March 3 Opinion; its March 20 response merely reargues issues it had previously presented. Accordingly on April 2, this Court issued an Order stating that "should the Court require a response to the Interested Pension Funds' submission dated March 20, 2003, it will notify the parties." Nothing in Milberg Weiss's March 20 response to the Order requires reconsideration of any of the analysis contained in the March 3 Opinion or further discussion.²

¹The State of Wisconsin Investment Board and the City of Milwaukee Employees Retirement System are among the forty-one pension funds on whose behalf Milberg Weiss filed its motion to intervene, and on whose behalf it submitted its March 20 response. See In re WorldCom, Inc. Sec. Litig., 2003 WL 716243, at *3 n.11 & n.12; infra at n.3. Although an April 25 letter to the Hon. Charles N. Clervert, Jr. for the United States District Court of the Western District of Wisconsin indicates that the March 20 submission was not on behalf of these Wisconsin entities, that is flatly contradicted by the Milberg Weiss December 6 and March 20 submissions.

² On April 25, Milberg Weiss presented an untimely supplement to its response to the Order. The basis for the submission was the WorldCom Plan of Reorganization and its purported effect on this Court's jurisdiction. Defendants have asked for an opportunity to respond within one week of receiving permission to do so. A separate scheduling order issued today grants such permission.

Its renewed motion for remand is denied as to all forty-one Interested Pension Funds.³

³ California Public Employees Retirement System, California State Teachers Retirement System, Los Angeles County Employees Retirement System, State Universities Retirement System of Illinois, Board of Trustees of the Teachers Retirement System of the State of Illinois, Illinois State Board of Investment, West Virginia Investment Management Board, Washington State Investment Board, Alameda County Employees' Retirement Association, Alameda-Contra Costa Transit Employees' Retirement Plan, City of South San Francisco, Contra Costa County Employees' Retirement Board, Imperial County Board of Retirement, Mendocino County Employees' Retirement Association, Oakland Fire and Police Retirement System, Sacramento County Employees' Retirement System, Sacramento Regional Transit District Contract Employees' Retirement Plan, Sacramento Regional Transit District Salaried Employees' Retirement Plan, San Bernardino County Employees' Retirement Association, San Diego County Employees' Retirement Association, San Diego City Employees' Retirement System, San Francisco City and County Employees' Retirement System, Sonoma County Employees' Retirement Association, Tulare County Employees' Retirement Association, Ventura County Employees' Retirement Association, Screen Actors Guild-Producers Pension and Health Plans, Directors Guild of America-Producers Pension and Health Plans, Motion Picture Industry Pension Health Plans, Motion Picture Industry Individual Account Plan, Producers-Writers' Guild of America Pension Plan, Writers' Guild-Industry Health Fund, IATSE Local #33 Pension Trust, Air Conditioning & Refrigeration Industry Retirement Trust Funds, Sheetmetal and Workers Pension Plan of Southern California, Arizona and Nevada, Montana Board of Investments, State of Wisconsin Investment Board, City of Milwaukee Employees Retirement System, United Food and Commercial Workers Union Local 880-Retail Food Employers Joint Pension Fund, United Food and Commercial Workers Union Local 880-Mercantile Employers Joint Pension Fund, United Food and Commercial Workers Union-Employer Pension Fund, and United Food and Commercial Workers Union-Employer Health and Welfare Fund.

2. Ohio Funds

On March 20, certain Ohio funds⁴ responded to the Order in light of what they believed would be the imminent transfer of their case to this Court. Since their action does not include any cause of action based on federal law, they argue that it can be distinguished from the circumstances addressed in the March 3 Opinion.

First, they argue that the Eleventh Amendment to the United States Constitution bars the removal of their lawsuit to federal court since there is no federal law claim in the lawsuit. As described in the March 3 Opinion, however, the basis for federal subject matter jurisdiction over the Individual Actions was not the existence of a federal law claim under the 1933 Act, but the existence of bankruptcy jurisdiction. See In re WorldCom, Inc. Sec. Litig., 2003 WL 716243, at * 5. Consequently, the absence of a federal law claim from the causes of action on which the Ohio funds have brought suit does not affect the analysis in the March 3 Opinion that there is federal subject matter jurisdiction over an action such as theirs and that removal to federal court was proper. Moreover, the doctrine of sovereign immunity is inapplicable to a state when it acts as a plaintiff. See, e.g., Lapidus v. Board of Regents of the Univ. Sys. of Ga., 535 U.S. 613, 619 (2002); Regents of Univ. of Cal. v. Eli Lilly & Co., 119

⁴ The Public Employees Retirement System of Ohio, State Teachers Retirement System of Ohio, School Employees Retirement System of Ohio, Ohio Bureau of Workers Compensation, Ohio Police & Fire Pension Fund, and Ohio State Highway Patrol System.

F.3d 1559, 1564-65; In re Rezulin Prods. Liab. Litig., 133 F. Supp. 2d 272, 297 (S.D.N.Y. 2001).

The Ohio funds also invoke the doctrine of mandatory abstention. The March 3 Opinion rejected the mandatory abstention argument presented there because of the absence of at least two of the six grounds necessary to entitlement to mandatory abstention. Specifically, the March 3 Opinion found that the NYCERS action could have been commenced in federal court and that the naked assertion that state court litigation of the NYCERS action would be timely was inadequate and unpersuasive. In re WorldCom, Inc. Sec. Litig., 2003 WL 716243, at *18-19. The Ohio funds argue that the Ohio courts can litigate their action expeditiously and that the action could not have been commenced in federal court since there is neither federal question nor diversity jurisdiction. The Ohio funds have not demonstrated that their action can be timely adjudicated in state court. Remanding the Ohio funds' case to state court will, in fact, slow the pace of the case dramatically since WorldCom has given notice of its intention to file a motion for a preliminary injunction in the Bankruptcy Court to enjoin the Ohio funds action if it is remanded and certain defendants before this Court have indicated an intention to seek a similar injunction in aid of this Court's jurisdiction and control over this complex litigation. In such circumstances, the rudimentary showing made by the Ohio funds is insufficient to carry the day.

3. Railways Pension Trustee

Finally, the Railways Pension Trustee has filed a motion to remand in response to the Order. Railways Pension Trustee concedes that the March 3 Opinion controls in its action, but nonetheless filed its motion to remand in order to preserve its right to voice its disagreement with the Opinion on appeal.

Conclusion

The renewed motion for remand by the forty-one Interested Pension Funds represented by Milberg Weiss, and the motions for remand by the Ohio funds and the Railways Pension Trustee Company are denied. All other motions for remand are deemed withdrawn pursuant to the terms of the March 3, 2003 Order.

SO ORDERED:

Dated: New York, New York
May 5, 2003

DENISE COTE
United States District Judge