UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLDCOM, INC. SECURITIES LITIGATION		MASTER FILE NO. 02 Civ. 3288 (DLC)
This Document Relates to		
02 Civ. 3288	02 Civ. 4973	02 Civ. 8230
02 Civ. 3416	02 Civ. 4990	02 Civ. 8234
02 Civ. 3419	02 Civ. 5057	02 Civ. 9513
02 Civ. 3508	02 Civ. 5071	02 Civ. 9514
02 Civ. 3537	02 Civ. 5087	02 Civ. 9515
02 Civ. 3647	02 Civ. 5108	02 Civ. 9516
02 Civ. 3750	02 Civ. 5224	02 Civ. 9519
02 Civ. 3771	02 Civ. 5285	02 Civ. 9521
02 Civ. 4719	02 Civ. 8226	03 Civ. 2841
02 Civ. 4945	02 Civ. 8227	03 Civ. 3592
02 Civ. 4946	02 Civ. 8228	03 Civ. 6229
02 Civ. 4958	02 Civ. 8229	

MEMORANDUM OF LAW OF LEAD PLAINTIFF ALAN G. HEVESI, COMPTROLLER OF THE STATE OF NEW YORK, AS ADMINISTRATIVE HEAD OF THE NEW YORK STATE AND LOCAL RETIREMENT SYSTEMS AND AS TRUSTEE OF THE NEW YORK STATE COMMON RETIREMENT FUND, IN OPPOSITION TO SALOMON DEFENDANTS' CROSS-MOTION FOR AN ORDER AUTHORIZING AN INTERLOCUTORY APPEAL

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TABLE OF CONTENTS

Alan G. Hevesi, Comptroller of the State of New York, as Administrative Head of the New York State and Local Retirement Systems and as Trustee of the New York State Common Retirement Fund, respectfully submits this memorandum of law in opposition to the cross-motion (the "Motion") filed by Defendants Salomon Smith Barney Inc. ("Salomon"), Citigroup Inc. ("Citigroup") and Jack Grubman ("Grubman") (collectively, the "Salomon Defendants" or "Defendants") for an order pursuant to 28 U.S.C. § 1292(b) to authorize an interlocutory appeal from the Court's order denying the Salomon Defendants' motion to dismiss.

PRELIMINARY STATEMENT

On May 19, 2003, this Court issued an opinion (the "Order") denying the Salomon Defendants' motion to dismiss Lead Plaintiff's Class Action Complaint (the "Initial Complaint"). In re WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288, 2003 WL 21219049 (S.D.N.Y. May 19, 2003). The Court's decision was based on a thorough and comprehensive analysis of the detailed allegations of Lead Plaintiff's Class Action Complaint (the "Initial Complaint"), the controlling case law of this jurisdiction, hundreds of pages of legal memoranda submitted by the parties, and lengthy oral argument. Though the success of their Motion rests in part on the Court concluding that certification of the Order for appeal "may materially advance the ultimate termination of the litigation," see 28 U.S.C. § 1292(b), the Salomon Defendants were not stirred to seek such certification for three months. It was not until the 97th page of a 98-page brief filed in opposition to Lead Plaintiff's motion for class certification that the Salomon Defendants first raised the notion of appealing the Order – and even then, only if the requested class were certified. Even if the Court were to ignore Defendants' delay in bringing this motion, however, as shown below there has been no change in the relevant law and, moreover, the pleading that Defendants would ask the Court of Appeals to

evaluate has been superseded by Lead Plaintiff's First Amended Complaint (the "Amended Complaint"), which only supplements the factual allegations previously found to be sufficient as to the Salomon Defendants. Unfortunately for those Defendants, the basis on which they seek immediate appeal of the Order — essentially because they believe the Court was wrong and now see a host of horribles should the Class be certified — is not the standard for certification.

As "clarified" in their amended notice of motion, dated September 17, 2003, the Salomon Defendants want two questions certified for immediate appellate review: (1) whether, under this Circuit's precedents concerning loss causation, Lead Plaintiff has adequately pleaded that the Salomon Defendants proximately caused the Class's losses (the "Causation Issue"); and (2) whether, pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, the relevant provisions of the Private Securities Litigation Reform Act of 1995 (the "PSLRA") and the case law of this Circuit, Lead Plaintiff has adequately pleaded facts with sufficient particularity to support its allegations that the Salomon Defendants engaged in fraud (the "Particularity Issue"). As set forth below, these are not issues on which there is "substantial ground for difference of opinion," and they are not issues whose resolution will "materially advance the termination of the litigation." See 28 U.S.C. 1292(b).

First, this Court correctly applied well-settled principles of controlling Second Circuit law to both issues identified by Defendants. With respect to the Causation Issue, contrary to what the Salomon Defendants contend, the Second Circuit's decision in Emergent Capital Investment Management v. Stonepath, 343 F.3d 189 (2d Cir. 2003) did not change the standard for causation or create some new standard; rather, as the Second Circuit made clear, its decision merely reiterated that plaintiffs must assert some causal

connection between the alleged misrepresentation or omission and the subsequent decline in the value of the investment or the ultimate failure of the venture. Id. at 198. Though the Order was issued months before Emergent was decided, the Court's holding was precisely in line with the standard reiterated by the Second Circuit in that decision: that there was a causal link between the alleged misrepresentations in Grubman's analyst reports, the decline in the price of WorldCom securities, and the failure of WorldCom itself. Order at *32-34.

Similarly, with respect to the Particularity Issue, the Court correctly applied the governing Second Circuit law in determining that the allegations regarding the Salomon Defendants established a strong inference of scienter in accordance with the pleading requirements of Rule 9(b) and the PSLRA. The Salomon Defendants do not contend that there has been an intervening change in the law, and they do not point to any facts alleged in the Initial Complaint that the Court failed to consider. To the contrary, all they contend is that the Court was wrong in rejecting their view that those allegations did not state a claim for fraud. That may be disappointing, but it is not grounds for certification for appellate review.

Moreover, resolution of these issues will not materially advance the termination of this litigation. Salomon has not moved for certification of the Court's decision denying its motion to dismiss Counts IV and V in the Initial Complaint – the counts alleging that Salomon (and the other Underwriter Defendants) violated Sections 11 and 12(a)(2) of the Securities Act of 1933. As this Court has repeatedly recognized, those Counts allege that the registration statements issued in connection with the May 2000 and May 2001 offerings of WorldCom bonds were materially false and misleading because, inter alia, they failed to disclose material conflicts of interest among Salomon, Citigroup

and WorldCom. Accordingly, regardless of how the Particularity Issue and the Causation Issue are ultimately resolved, Salomon will remain a defendant in this litigation, and the same issues relating to the same conflicts of interest will continue to be litigated.

Finally, the Motion should be denied because it is premature. First, the Salomon Defendants conditioned this Motion on this Court's certification of the Class with respect to certain claims asserted against them; that decision is pending. Second, since issuance of the Order, the pleading that the Salomon Defendants would ask the Court of Appeals to review has been superseded by the Amended Complaint, which further supplemented the allegations relating to loss causation and scienter. Third, the issues proposed for appeal here involve fact-intensive inquires, which will continually evolve as discovery proceeds. Appellate review of these highly-specific fact inquires without the benefit of a fully developed factual record would be extremely inefficient.

In sum, the Salomon Defendants' request strikes at the heart of the final judgment rule – the well-settled principle that appellate review should be limited to final judgments absent exceptional circumstances. Tellingly, the Salomon Defendants have failed to cite a single legal authority which supports their argument that certification of these issues is appropriate, and they have failed to show how the proposed appeal satisfies the stringent statutory standards of Section 1292.[1] Allowing an interlocutory appeal on the issues presented in the Motion would disturb the balance struck between the role of the trial judge and the appellate court, create judicial inefficiency and unnecessarily delay the resolution of this litigation. The Motion should be denied.

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[1] Indeed, in "support" of their Motion, the Salomon Defendants devoted only one-half page of argument in their 98-page Opposition to Plaintiff's Motion for Class Certification, and a two page cover letter to the Court accompanying their amended notice of cross-motion.

ARGUMENT

I. THE MOTION SHOULD BE DENIED BECAUSE THE CRITERIA FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL UNDER SECTION 1292 ARE NOT SATISFIED

"It is a basic tenet of federal law to delay appellate review until a final judgment has been entered." Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 865 (2d Cir. 1996). See also Cromer Fin. Ltd. v. Berger, No. Civ. 2284, 2001 WL 935475, at *1 (S.D.N.Y. Aug. 16, 2001) (same) (hereinafter "Cromer I"). Section 1292 is a "rare exception to the final judgment rule that generally prohibits piecemeal appeals." Koehler, 101 F.3d at 865. See also Flor v. BOT Fin. Corp., 79 F.3d 281, 284 (2d Cir. 1996) ("[The] use of [the] certification procedure [under Section 1292] should be strictly limited because only exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.") (citation omitted); Cromer I, 2001 WL 935475, at *1 ("Section 1292(b) is generally 'reserved for those cases where an intermediate appeal may avoid protracted litigation, and was not intended as a 'vehicle to prove early review of difficult rulings in hard cases.'") (citations omitted).

Consistent with the final judgment rule, Section 1292(b) provides that an interlocutory order may be appealed only if the Court is of the opinion that three strict statutory criteria are met: (1) the order involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation.[2] See

[2] Section 1292(b) in relevant part provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may

Nat. Asbestos Workers Med. v. Philip Morris, Inc., 71 F. Supp. 2d 139, 145 (E.D.N.Y. 1999). Even if all three statutory criteria are satisfied, the district court has independent and "unreviewable" authority to deny certification. Id. at 146 (citing Executive Software N. Am., Inc. v. United States Dist. Court, 24 F.3d 1545, 1550 (9th Cir. 1994).

Here, the statutory standards for Section 1292 are not satisfied. While the questions of law presented by the Salomon Defendants for certification may constitute "controlling questions of law" solely with respect to Counts IX, X and XI; see, e.g., Cromer I, 2001 WL 935475, at *2 ("[w]hile resolution of an issue need not necessarily terminate an action in order to be 'controlling', it is clear that a question of law is 'controlling' if reversal of the district court's order would terminate the action.") (citations omitted); the "controlling questions" do not involve "a substantial ground for difference of opinion," and their resolution by the Second Circuit will not "materially advance the termination of this litigation" as to Salomon.

A. There Is No Substantial Ground for Difference of Opinions On the Questions Presented for Certification

1. The Causation Issue

"[T]o determine whether there is a substantial ground for a difference of opinion, a court must examine 'the strength of the arguments in opposition to the challenged ruling.'" Cromer I, 2001 WL 935475, at *2. (citation omitted). Here, the Salomon

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> materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.
>
> 28 U.S.C. § 1292

Defendants argue that this Court's holding that the Initial Complaint sufficiently alleged that "the losses of putative class members were proximately caused by the Salomon Defendants' nondisclosure of conflicts of interest or unfounded opinions concerning WorldCom expressed by Salomon" is inconsistent with the recent Second Circuit decision in Emergent Capital Investment Management v. Stonepath Group, Inc., 343 F.3d 189 (2d Cir. 2003). Letter from Martin London, Esq. to the Honorable Denise L. Cote of September 18, 2003, at 2-3. The Salomon Defendants are wrong.

In Emergent, the Second Circuit held that, to allege loss causation, plaintiffs must assert a causal connection between the misrepresentations or omissions and the subsequent decline in the price of the securities or the ultimate failure of the venture. See Emergent, 343 F.3d at 198-99. As the Second Circuit made clear, this was not a novel theory. To the contrary, this had always been the standard for alleging loss causation in the Second Circuit. Id. ("We have often compared loss causation to the tort law concept of proximate cause, 'meaning that the damages suffered by plaintiff must be a foreseeable consequence of any misrepresentation or material omission"), citing Castellano v. Young & Rubicam, Inc., 257 F.3d 171, 186 (2d Cir. 2001). As recounted in Emergent, the Second Circuit's holding in Suez Equity Investors v. Toronto Dominion Bank, 250 F.3d 87 (2d Cir. 2001) was consistent with this legal principle. Emergent, 343 F.3d at 198. In Suez Equity, the defendants, in soliciting plaintiffs' investment in a company, gave plaintiffs an edited version of a background report on one of the company's principal executives; that version omitted certain important negative events in the executive's financial and business history, such as delinquent credit reports and multiple tax liens. Suez Equity, 250 F.3d at 97-99. Plaintiffs claimed that these concealed facts reflected the executive's inability to manage debt and essentially run a business, and alleged that their

investment became worthless because of a liquidity crisis that they attributed to, among other things, the executive's shortcomings. Id. The Second Circuit Court found that loss causation was adequately alleged even though the disclosure of the executive's shortcomings did not directly cause the value of the investment to decline, holding that plaintiffs had "specifically asserted a causal connection between the concealed information – i.e., the executive's history – and the ultimate failure of the venture", because they alleged that the concealed information was one of the factors that induced the failure of the venture. See id. at 98.

That type of loss causation is precisely what the Court found here. First, the Court made clear that there was a causal link between plaintiffs' allegations that Grubman deliberately misrepresented WorldCom's financial condition and omitted to disclose material information about the Company in his analyst reports, and the ultimate collapse of WorldCom. As the Court held:

> Taking the allegations in the Complaint as true, it was reasonably foreseeable that the loss the plaintiffs allege that they suffered was a natural consequence of the alleged misrepresentations and omission in the Grubman analyst reports. It was reasonably foreseeable that the unmasking of those misrepresentations and omissions would affect not only the price of WorldCom's securities, but also, given the magnitude and nature of the alleged misrepresentations and omissions and the prominence of Grubman's role as a WorldCom and telecommunications industry analyst, the economic health of WorldCom itself.

Order at *33 (emphasis added).

Second, the Court specifically rejected Defendants' contention that the sole reason for the decline in the value of WorldCom stock was the accounting fraud. Id. at *33. The Court recognized that, as in Suez Equity, there was a "synergy" between Lead Plaintiff's allegations that Grubman and Salomon concealed facts about WorldCom (and their relationship with WorldCom) which would have reflected the true state of

WorldCom's financial condition, and that the fraud occurred in large part because Grubman and Salomon were complicit and took steps to conceal it. Id. Indeed, WorldCom could never have survived but for the fact that Salomon and Grubman touted the stock and helped to underwrite billions of dollars worth of bond offerings, thereby enabling the Company to obtain badly needed capital from the investing public. Id. ("[c]onversely, given Grubman's historical role in creating demand for WorldCom securities, when the alleged illicit relationship came to light, the disclosure contributed to the decline in the price of WorldCom's securities … [t]he Complaint … adequately alleges that both prongs of their fraud theory were interdependent and responsible for the losses incurred").

2. The Particularity Issue

The Salomon Defendants also argue that this Court should now find that there is substantial ground for a difference of opinion with respect to the Particularity Question. In support of this argument, the Salomon Defendants cite only one opinion that "substantially differs" from the Court's — their own. They fail to cite any legal authority to impugn the Court's application of the legal standards here. Nor could they. In denying the Salomon Defendants' motion to dismiss Counts IX through XI for failure to plead scienter with sufficient particularity, the Court relied, to a large extent, on the legal standards enunciated by the Second Circuit in Novak v. Kasaks, 216 F.3d 300, 310 (2d Cir. 2000). Order at *16-17. The Salomon Defendants do not—and could not—argue that these legal standards have changed. Moreover, the Salomon Defendants do not point to any facts that they contend the Court failed to consider, or any other errors that the Court made. Rather, they simply disagree with the Court's decision that these facts

adequately alleged a strong inference of scienter. This is not an appropriate basis for certification for appellate review. See Cromer I, 2001 WL 935475, at *5.

B. The Appeal Will Not Materially Advance the Ultimate Termination of This Litigation

Although the Salomon Defendants have moved for certification of those parts of the Order that denied Salomon Defendants' motion to dismiss counts IX, X and XI in the Initial Complaint, they have not moved for certification of that part of the Order which denied their motion to dismiss counts IV and V. Significantly, Counts IV and V are based on the same factual underpinnings as Counts IX, X and XI. Specifically, Counts IV and V assert claims arising under Sections 11 and 12 (a) (2) of the Securities Act against Salomon in its capacity as a lead underwriter for two WorldCom bond offerings. Those counts allege that the registration statements issued in connection with those offerings were materially false and misleading because they failed to disclose the material conflicts of interest that pervaded Salomon's relationship with WorldCom — the same conflicts that rendered Grubman's research reports false and misleading.

Consequently, an appeal of Counts IX, X and XI, even if successful, will neither lead to a termination of the action as to Salomon nor materially advance the ultimate termination of this litigation. As this Court has consistently and repeatedly found, all five counts "arise from the same series of transactions or occurrences." In re WorldCom Sec. Litig., No. 02 Civ. 3288, 2003 WL 1563412, at *4 (S.D.N.Y. March 25, 2003). Thus, even if the Court were to certify the Particularity and the Causation Issues, and even if the Second Circuit were to reverse this Court on those issues, this litigation would still proceed against Salomon in its capacity as an underwriter and it would still involve many of the same issues relating to the alleged conflicts of interest. These factors weigh heavily against certification. See, e.g., Westwood Pharmaceuticals, Inc. v. National Fuel

Gas Distribution, 964 F.2d 85, 88 (2d Cir. 1992) (certification not appropriate where the same factual issues will have to be litigated before the district court regardless of the results of the appeal).

II. THE MOTION SHOULD BE DENIED BECAUSE IT IS PREMATURE AND THE LEGAL QUESTIONS PROPOSED BY THE SALOMON DEFENDANTS ARE INAPPROPRIATE FOR INTERLOCUTORY APPEAL

The Salomon Defendants' Motion is premature at this stage of the litigation for three reasons. First, the Salomon Defendants themselves ask this Court to certify the appeal only after it certifies the class with respect to certain claims asserted against them. Second, inquiries into the issues presented by the Causation Issue and the Particularity Issue are intensely fact-specific and, as such, they are inappropriate for interlocutory appeal, especially at this early stage of litigation. See, e.g., Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 235 (2d Cir. 1999) ("Proximate cause is an elusive concept, one always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent.") (internal quotations omitted); National Asbestos, 71 F. Supp. 2d at 166 ("The unique factual and legal issues raised in each of these cases counsel against certifying them for interlocutory appeal. Each case involves issues of causation under RICO which require highly fact specific inquires."); Cromer Fin. Ltd. v. Berger, 2003 WL 21436172, at *4 (S.D.N.Y. June 23, 2003) ("The fact intensive inquiries at issue here are not appropriate for certification"); Koehler, 101 F.3d 863, 866 (Section 1292(b) "was not meant to substitute an appellate court's judgment for that of the trial court").

Third, it is "[i]nherent in the requirements of section 1292(b) … that the issue certified be ripe for judicial determination." Oneida Indian Nation v. County of Oneida, 622 F.2d 624, 628 (2d Cir. 1980). Where the premise of the certified question may

change during discovery, it is axiomatic that certification is not appropriate. Id. ("[T]he purpose of Section 1292(b) is not to offer advisory opinions 'rendered on hypotheses which evaporate in the light of full factual development.'") (citations omitted). Here, neither the Causation Issue nor the Particularity Issue is ripe for appellate review. As Plaintiffs review the millions of pages of documents produced by the Salomon Defendants and other parties, they continue to discover new facts that enable them to allege more particularized facts regarding the claims they have asserted against the Salomon Defendants. Indeed, the Amended Complaint added numerous pages of particularized allegations against those Defendants, many of which relate to loss causation and scienter.

For example, in the Amended Complaint, Plaintiffs allege with even more detail that WorldCom stock dropped when disclosures of the Salomon Defendants' conflicts of interest occurred. See, e.g., Amended Complaint ¶¶ 317-18. The Amended Complaint also alleges that, when Grubman finally and belatedly cut his ratings on WorldCom on April 21, 2002 and June 21, 2002, the price of WorldCom stock dropped precipitously in response. Id., ¶¶ 313-16. Moreover, the Amended Complaint contains additional particularized allegations establishing that the Salomon Defendants knew or should have known that WorldCom's financial condition was not as it was represented to be in Grubman's analyst reports and in the Company's registration statements. See, e.g., id., ¶¶ 320-27. If Lead Plaintiff is able to prove these facts at trial — for example, if Lead Plaintiff is able to prove that Grubman knew that WorldCom did not warrant a buy rating, and that Grubman only maintained that rating because of a quid pro quo arrangement between Salomon and WorldCom — then it is indisputable that loss causation would be established based on the reaction in the stock price when Grubman finally cut his rating

(which occurred, not surprisingly, after certain facts about Grubman's relationship with WorldCom were revealed). See also Lead Plaintiff's Reply Memorandum of Law in Support of Class Certification, at 27-40. For all these reasons, certification should not be granted.

CONCLUSION

For the foregoing reasons, the Motion should be denied.

DATED: New York, New York
October 10, 2003

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CERTIFICATE OF SERVICE

I, Beata Gocyk-Farber, Esquire, hereby certify that a true and correct copy of the foregoing Memorandum of Law of Lead Plaintiff Alan G. Hevesi, Comptroller of the State of New York, as Administrative Head of the New York State and Local Retirement Systems and as Trustee of the New York State Common Retirement Fund, in Opposition to Salomon Defendants' Cross-Motion for an Order Authorizing an Interlocutory Appeal is being served on this date upon all involved parties by sending a copy of the same to all counsel listed on the attached service list by first-class mail, postage prepaid.

Dated: New York, New York
October 10, 2003

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Beata Gocyk-Farber

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