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	:	JURY TRIAL DEMANDED
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 THE UNDERWRITER-RELATED DEFENDANTS' MOTION TO STRIKE EXHIBITS 11 AND 12 TO THE DECLARATION OF MARK R. ROSEN DATED SEPTEMBER 25, 2003

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Lead Plaintiff, the New York State Common Retirement Fund, by 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 motion filed by the Underwriter-Related Defendants to strike from the record of the class motion proceedings Affidavits of Vicki Crow and Roberto L. Peña, Exhibits 11 and 12 to the Declaration of Mark R. Rosen, dated September 25, 2003.

Vicki Crow is the Auditor Controller/Treasurer-Tax Collector of the County of Fresno ("Fresno"), one of the Named Plaintiffs and proposed class representatives in this Action. Roberto L. Peña is the Retirement Administrator of the Fresno County Employees Retirement Association ("FCERA"), another of the Named Plaintiffs and proposed class representatives in this Action.

The Underwriter-Related Defendants argue that the affidavits should be stricken because they were submitted with Lead Plaintiff's reply memorandum of law, rather than with Lead Plaintiff's original motion papers, and because Gary Peterson – who served until his retirement in January 2003 as the Auditor Controller/Treasurer-Tax Collector of Fresno and as a part-time administrator and a Board member of FCERA – was the person who testified on behalf of FCERA and Fresno during class motion discovery. There are simple answers to both arguments.

First, with respect to the deposition of FCERA, Mr. Peterson was not produced in response to a Rule 30(b)(6) deposition notice. Rather, the Underwriter-Related Defendants themselves noticed Mr. Peterson's deposition *by name*. *See* Exhibit B to Kolleeny Declaration. Thus, they can hardly complain that he was the deponent who testified on behalf of FCERA.

Second, with respect to Fresno, Defendants sought a Rule 30(b)(6) deposition of the person at Fresno who was "most knowledgeable" on four topics: (1) the investments strategies employed by Fresno from January 1, 1998 through December 31, 2002; (2) WorldCom itself and Fresno's transactions involving, and holdings of, WorldCom securities; (3) Fresno's participation or attempted participation as a lead plaintiff or class representative in any other action in the last seven years; and (4) Fresno's retention of counsel for this lawsuit, decision to initiate this lawsuit and supervision of this lawsuit. *See* Exhibit A to Kolleeny Declaration. Mr. Peterson was designated as the person at Fresno most knowledgeable on each of these topics (*see* Exhibit D to Kolleeny Declaration at 3), and there is no question that he was, in fact, the person "most knowledgeable" about the topics identified in the Rule 30(b)(6) notice. Mr. Peterson's testimony was elicited on these topics during his depositions for both Fresno and FCERA, as summarized in relevant part at pages 57-61 of Lead Plaintiff's Reply Brief. Moreover, prior to Mr. Peterson's depositions, Defendants were notified that he was no longer employed by either Fresno or FCERA (*see* Exhibit C to Kolleeny Declaration at 2). They nonetheless elected to take his deposition, as their one allotted deposition, for each of the entities.

The Affidavits of Crow and Peña were submitted in response to attacks made by Defendants on the adequacy of Fresno and FCERA as class representatives based, in part, on their litigation monitoring activities, to demonstrate on the record that the supervision and understanding of the case that took place under Mr. Peterson's watch – until his retirement in January 2003 – is continuing and will continue under Ms. Crow and Mr. Peña. As stated in the Reply Brief, at 60-61 (footnotes omitted):

> Vicki Crow, Fresno's current Auditor-Comptroller/Treasurer-Tax Collector, has supervised this action since Mr. Peterson retired and will continue to do so. Crow Aff. (Pl. Ex. 11) ¶¶ 7-9. Roberto L. Peña, FCERA's new Retirement Administrator, has assumed responsibilities of that position since Peterson retired,

> and intends to continue doing so in the future. Peña Aff. (Pl. Ex. 12) ¶ 7. Thus, both Fresno and FCERA are fully capable and prepared to serve as class representatives, oversee the vigorous prosecution of the action, actively monitor and supervise the case, and provide testimony, if necessary, at trial. Crow Aff. ¶¶ 8-9; Peña Aff. ¶¶ 5-9.

While Lead Plaintiff responded to the attacks on a factual level, it is noteworthy that litigation monitoring is not one of the required elements for satisfying the adequacy prong of Rule 23(a) in this Circuit. Rather, Rule 23(a)(4)'s adequacy requirement contains two elements: "First, class counsel must be qualified, experienced and generally able to conduct the litigation. Second, the class members must not have interests that are antagonistic to one another." *In re Dreyfus Aggressive Growth Mutual Fund Litig.*, No. 98 Civ. 4318 (HB), 2000 WL 1357509, *10 (S.D.N.Y. Sept. 20, 2000). Thus, the Affidavits, while necessary to correct certain unsupported innuendoes in Defendants' papers, are not necessary for purposes of satisfying Rule 23(a). Moreover, as demonstrated in Lead Plaintiff's Reply Brief, at pages 7-8, the notion that Lead Plaintiff's motion was somehow deficient for not submitting "evidence" to support class certification is frivolous, and the decision in *Cokely v. The New York Convention Center Operating Corp.*, No. 00 Civ. 4637 (CBM), 2003 WL 1751738 (S.D.N.Y. April 2, 2003), the primary case cited by defendants in support of this argument, is inapposite for the reasons stated in the Reply Brief.[1]

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[1] The other cases cited by the Underwriter-Related Defendants (and appended to their Memorandum in support of the motion) are similarly inapposite. In *Adipar Limited v. PDL Int'l Corp.*, 2002 WL 31740622, at *16 (S.D.N.Y. Dec. 6, 2002), the court stated that *arguments* raised for the first time in a reply brief in support of a motion to dismiss need not be considered, but nonetheless held that the claims asserted had been sufficiently alleged in the pleading. *Golden West Financial v. WMA Mortgage Services*, 2003 WL 1343019 (N.D. Cal. March 13, 2003), involved a trademark infringement case in which plaintiffs sought a preliminary injunction to enjoin defendants from using the term "World" in their service marks, failed to present evidence of initial confusion in their moving papers, and thereafter sought to submit a survey that had "several substantive flaws" that made it insufficient to establish initial confusion. And this Court's decision, *In re WorldCom, Inc. Sec. Litig.*, 2003 WL 21961118 (S.D.N.Y. Aug. 14, 2003), involved a party's failure to satisfy the June 11 Rule to Show Cause why prior Opinions of the Court did not control their motion – a far different procedural posture from the present class motion – in which this Court held, citing *Adipar*, that *arguments* could not be raised for the first time in a reply brief.

Under the Federal Rules of Civil Procedure, "motions to strike are disfavored and are usually granted only for scandalous material...." *Allocco v. Dow Jones & Co., Inc.*, 2002 WL 1484400, at *1 (S.D.N.Y. July 10, 2002) (citations omitted) (involving Rule 12(f) motion to strike). Here, the statements in the Affidavits are hardly "scandalous." They simply demonstrate that the careful supervision of, and commitment to, the litigation by Mr. Peterson on behalf of Fresno and FCERA is continuing with his successors. Finally, given that Defendants were granted leave to file sur-reply briefs, there is no possible prejudice from allowing consideration of the affidavits. Thus, as a matter of law, procedure and fact, the Affidavits should not be stricken.

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the motion to strike the Crow and Peña Affidavits should be denied.

Respectfully submitted,

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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 the Underwriter-Related Defendants' Motion to Strike Exhibits 11 and 12 to the Declaration of Mark R. Rosen dated September 25, 2003 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 15, 2003

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