UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLDCOM, INC. SECURITIES LITIGATION	:	MASTER FILE 02 Civ. 3288 (DLC)
This Document Relates To: All Actions	:	

MEMORANDUM OF LAW OF LEAD PLAINTIFF H. CARL McCALL, 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 SUPPORT OF THE NYSCRF'S MOTION FOR AN ORDER PARTIALLY LIFTING THE DISCOVERY STAY

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

CASES AND ORDERS **Pages**

STATUTES AND OTHER AUTHORITIES

H. Carl McCall, Comptroller of the State of New York, as Administrative Head of New York State and Local Retirement Systems and as Trustee of the New York State Common Retirement Fund, the Court-appointed Lead Plaintiff in this action (the "NYSCRF" or "Lead Plaintiff"), respectfully submits this memorandum of law in support of Lead Plaintiff's motion for an order partially lifting the discovery stay imposed pursuant to Section 21D(b)(3)(B) of the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(3)(B) (the "PSLRA").

Specifically, the NYSCRF seeks an order that will require WorldCom, Inc. ("WorldCom" or the "Company") to produce to Lead Plaintiff, subject to certain timing and privilege considerations, copies of certain documents that WorldCom has already produced to other entities investigating the WorldCom fraud, namely: (1) all documents and materials WorldCom has produced or provided, in connection with any inquiries or investigations relating to WorldCom's accounting practices or business affairs, to any of the following: (i) any committee of the Legislative branch of the United States Government; (ii) the Executive branch of the United States Government (including, but not limited to, the United States Department of Justice) and (iii) the Securities and Exchange Commission (the "SEC"); and (2) all documents and materials WorldCom has produced to Wilmer, Cutler & Pickering ("Wilmer, Cutler") in connection with that law firm's representation of the Special Investigative Committee of WorldCom's Board of Directors. These are the same documents that the Honorable Arthur J. Gonzalez, the U.S. Bankruptcy Court Judge presiding over the WorldCom bankruptcy, has ordered WorldCom to produce to the NYSCRF, conditioned on this Court's approval of the present motion. Coffey Decl. Ex. B.[1]

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[1]References to "Coffey Decl." are to the Declaration of John P. Coffey, dated November 12, 2002, and to exhibits attached to that declaration.

PRELIMINARY STATEMENT

By this motion, the NYSCRF seeks the Court's assistance in advancing the date by which the victims of the largest corporate fraud in history may achieve redress for their astonishing losses. The relief sought by Lead Plaintiff is limited; it is supported by precedent; it is consistent with the intent of the drafters of the PSLRA; and it comports with the Court's practical approach of driving this matter to resolution as early as possible.

As a threshold matter, it is clear that the path to resolution of this massive litigation – be it through trial or settlement – will require the production of documents to Lead Plaintiff. Any argument that such discovery is by no means assured because the litigation could be terminated by motions to dismiss would be specious. The guilty pleas of four senior WorldCom executives, alone, eliminates any dispute whether actionable securities law violations took place here. Indeed, there has already been a determination by a judicial officer in this District (Magistrate Judge James C. Francis, IV) that the facts set forth in a criminal complaint dated July 31, 2002 – which contains far fewer factual allegations than those in the NYSCRF's civil complaint filed on October 11, 2002 – were sufficient to establish probable cause that a *criminal* conspiracy to commit securities fraud existed at WorldCom. Though some defendants in this action will undoubtedly argue that *they* are not liable under the securities laws, the NYSCRF respectfully submits that a civil complaint for securities fraud will be sustained against *someone*, and that discovery in this matter will eventually, inevitably occur.

The question presented by this motion is whether the law prohibits the Court from exercising its discretion to permit a narrow slice of that discovery to be had more promptly, particularly in this rare case where the materials sought are merely copies of what WorldCom has already produced to others; where the putative Class would suffer undue prejudice if it is denied the access that others have to those documents; and where a major obstacle to the Court's recent initiative on settlement talks – that is, the

absence of pertinent documents in Lead Plaintiff's hands – could be partially ameliorated by the requested access. Lead Plaintiff submits that the Court has such discretion and should grant the limited relief requested in the motion.

Notwithstanding its view that this is a case where discovery will eventually be had, the NYSCRF's motion does not seek open-ended discovery now, or a blanket exemption from the stay; it simply asks for a copy of the very same documents that WorldCom has already gathered, reviewed, and produced to other entities investigating this debacle. The NYSCRF is not engaging in the "fishing expedition" that the PSLRA stay was intended to quash; with four senior WorldCom executives having pled guilty to securities fraud, it cannot seriously be argued that the NYSCRF's lawsuit is frivolous, or that Lead Plaintiff's request is an effort to find some basis for a lawsuit because none presently exists. And the NYSCRF's request is not the type of burdensome discovery request that the PSLRA drafters feared could coerce a defendant into a non-meritorious settlement; the only entity that would have to produce documents here – WorldCom – is not a defendant and, in any event, has already had any complaints about the burden of production rejected by the Bankruptcy Judge.

Nor is the NYSCRF asking for unprecedented relief from the PSLRA stay. As explained below, courts have exercised discretion to permit plaintiffs in securities litigation to obtain discovery under circumstances less compelling than those present here. The most pertinent precedent is the Enron securities litigation, which was – until this case – the largest securities fraud case in history. There, as here, the lead plaintiff first obtained an order from the Bankruptcy Court partially lifting the bankruptcy stay, so that the debtor company could be made to produce documents that had already been produced to others investigating the fraud (including the Government). There, as here, the motion was contingent on the District Court presiding over the securities litigation also agreeing to concomitant relief from the PSLRA discovery stay. There, as here, the Bankruptcy Court granted the lead plaintiff's

motion. In considering the Enron lead plaintiff's motion in the District Court, Judge Melinda Harmon held that the PSLRA stay did not apply where the fraud was admitted, the requested discovery had essentially "already been made," and "it is merely a question of keeping it from a party because of the strictures of a statute designed to prevent discovery abuse." In re Enron Corp. Sec., Deriv. & ERISA Lit., No. H-01-3624 (S.D. Tex. 2001), Order, dated August 15, 2002 (attached at Coffey Decl. Ex. E), at 1-3. That same logic applies with as much force in WorldCom.

Indeed, there are only three notable differences between the circumstances in Enron and those present here, and each serves to further bolster the NYSCRF's motion. First, the fact that the present securities litigation is non-frivolous is even more self-evident than in Enron. At the time Judge Harmon concluded that the Enron securities litigation was not the frivolous sort at which the PSLRA discovery stay was aimed, there had yet to be any guilty plea, indictment or criminal complaint of anyone. Here, of course, there have been the four guilty pleas, an indictment, and Magistrate Judge Francis' probable cause determination.

The second difference is that the NYSCRF is seeking relief which is *narrower* than that granted in Enron. After consultation with the United States Attorney's Office for this District and with the SEC, the NYSCRF agreed to limit its request to call for less material than that granted in Enron and to set aside, for now, any request that WorldCom produce copies of interview notes of witnesses. See Coffey Decl. ¶¶ 4-5.

The third difference arises from the Court's recent initiative to send the parties to settlement negotiations at a relatively early juncture of the case. While the circumstances described above provide ample basis to order the requested relief, the NYSCRF respectfully submits that granting the motion is also warranted because it would materially advance the Court's plan for early settlement discussions. The NYSCRF is committed to good faith participation in the settlement discussions, but as noted during

the November 5, 2002 conference call, those discussions are apt to be hindered by Lead Plaintiff's utter lack of access to documents. While the NYSCRF is presently formulating its approach to the settlement discussions, including what documents it will ask the defendants to produce in order to facilitate those discussions, directing WorldCom to promptly provide Lead Plaintiff with copies of the documents that have already been produced to others investigating this fraud is indisputably going to aid the Court-ordered settlement discussions, and could mitigate, at least in part, any prejudice that might arise as Lead Plaintiff discusses potential resolutions so far in advance of merits discovery.

Accordingly, even more so than in Enron, the NYSCRF respectfully submits that the instant case presents unique facts and circumstances that make the limited lifting of the PSLRA stay appropriate. The motion should be granted.

BACKGROUND

This securities class action arises from the largest corporate fraud in history. To summarize briefly, the accounting fraud that lies at the heart of this scandal began no later than early 1999, when senior WorldCom executives began to manipulate the Company's reported earnings by improperly drawing down on reserves, and continued into 2001 and 2002, when those executives began to capitalize operating expenses.[2]

The fraud unraveled in 2002. On June 25, WorldCom announced that it had overstated its publicly-reported income during 2001 and the first quarter of 2002 by more than $3.8 billion and, as a result, the Company would be forced to restate its financial statements for those periods. On July 21, WorldCom, the second largest telecommunications company in the world, filed for bankruptcy in the Bankruptcy Court for this District. On August 8, WorldCom announced that it had improperly recorded an additional $3.3 billion in income between 1999 and the first quarter of 2002, and that the restatement would now include WorldCom's 1999 and 2000 financial statements as well. On November 5, WorldCom further disclosed that it expected an additional restatement of earnings which, when added to WorldCom's past restatements, could total in excess of *$9 billion*. In an interview published in The New York Times on November 11, WorldCom's present CEO and CFO warned that *additional*, unquantified restatements were likely.

The Investigations

Reaction to the debacle at WorldCom was swift. On June 26, 2002, the SEC filed a civil complaint against WorldCom, charging it with fraud. On June 27, the House Committee on Energy and

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[2]These allegations, and those pertaining to the illegal activities of other defendants, are set forth in detail in the NYSCRF's complaint filed on October 11, 2002 ("Complaint"). References herein to "¶_" are to paragraphs in the Complaint.

Commerce and the House Committee on Financial Services each launched an investigation of the fraud. On July 8, the House Committee on Financial Services held a public hearing relating to WorldCom. At that hearing, Bernard Ebbers, WorldCom's former Chief Executive Officer and a defendant in this action, and Scott Sullivan, WorldCom's former Chief Financial Officer and a defendant in this action, each refused to testify, invoking the Fifth Amendment. On or about July 22, the Bankruptcy Court appointed former Attorney General Richard Thornburgh as the Bankruptcy Court Examiner to investigate any allegations of fraud at WorldCom. On July 30, citing the WorldCom irregularities, the President signed into law the Sarbanes-Oxley Act of 2002, which includes the most far-reaching changes in federal securities regulation since the enactment of the Securities Exchange Act of 1934. This Court appointed the NYSCRF as Lead Plaintiff on August 12; the NYSCRF filed its Complaint on October 11. On November 4, the Examiner filed his first interim report with the Bankruptcy Court, in which he observed that WorldCom was "a company that had a number of troubling and serious issues." On November 5, 2002, the SEC filed its First Amended Complaint, alleging additional fraudulent activities by the Company.

Movement was also rapid in the criminal investigation. On or about July 10, the United States Attorney for this District initiated a criminal investigation relating to the fraud at WorldCom. As noted above, on July 31, 2002, Magistrate Judge Francis reviewed a criminal complaint against Sullivan and former WorldCom Controller David Myers and determined that there was probable cause to conclude that a criminal conspiracy to commit securities fraud had existed at WorldCom. Coffey Decl. Ex. C. Sullivan and Myers were arrested and arraigned the following day. On August 28, Sullivan and WorldCom's former Director of General Accounting, Buford Yates, Jr., were indicted on conspiracy, securities fraud and false SEC filing charges. On September 26, Myers pled guilty to a three-count criminal information charging him with conspiracy, securities fraud and making false filings with the SEC.

On October 7, Yates also a defendant in this action, pled guilty to conspiracy and securities fraud. On October 10, two other members of WorldCom's accounting department, Betty Vinson and Troy Normand, pled guilty to conspiracy and securities fraud.

WorldCom produced documents in connection with each of the foregoing investigations, except one – that being pursued on behalf of Lead Plaintiff, the NYSCRF.[3] On information and belief, WorldCom has retained copies of the documents, which may be readily provided to the NYSCRF if the relief sought by this Motion were granted.

The Bankruptcy Court's Order to Modify the Automatic Stay

On October 2, 2002, the NYSCRF filed with the Bankruptcy Court a motion for limited modification of the automatic bankruptcy stay, to permit the NYSCRF to obtain the same documents and materials that WorldCom had produced in connection with certain governmental and internal investigations, provided that the District Court later lifted the PSLRA discovery stay. Coffey Decl. ¶2. In its papers, the NYSCRF noted that the relief sought was precisely what the Bankruptcy Court had approved in Enron. WorldCom filed an objection which argued, among other things, that modifying the automatic stay would impose an undue burden on WorldCom and frustrate its efforts at reorganizing and complying with the ongoing investigations. WorldCom also argued that the NYSCRF's

[3]Despite its present inability to use civil discovery procedures on behalf of the investor class, the NYSCRF has refused simply to rely on information that other investigators have disclosed to the public. As part of an intense and ongoing investigation, for example, the NYSCRF was first to discover that the Travelers Insurance unit of Citigroup had secretly loaned several hundred million dollars to a unit controlled by Worldom's Ebbers shortly before Citigroup's investment banking arm, Salomon Smith Barney, was selected by WorldCom as lead underwriter for two of the largest bond offerings in history. Complaint ¶¶279-87. Since filing its Complaint in October, the NYSCRF has uncovered additional evidence of a nefarious relationship between elements of Citigroup and Ebbers, including the fact that Travelers had in fact become an equity business *partner* with Ebbers before those bond offerings. None of these relationships was disclosed in the bond offering materials, and the representations that were provided in those offering materials regarding those relationships were materially false and misleading.

bankruptcy motion was premature in light of the PSLRA discovery stay. The Official Committee of Unsecured Creditors of WorldCom, Inc. (the "Creditors' Committee") joined in WorldCom's objection. Id.

On October 29, 2002, after hearing oral argument from counsel for WorldCom, the Creditors' Committee and the NYSCRF, the Bankruptcy Court granted the NYSCRF's bankruptcy motion in its entirety. See Coffey Decl. as Ex. A (transcript) at 42-43. Judge Gonzalez specifically noted that he did not view the NYSCRF's request as a significant inconvenience or hardship to WorldCom. Id. at 43.

After the October 29, 2002 hearing, attorneys for the United States Attorney's Office and the SEC contacted the NYSCRF's counsel to express concern about the scope and timing of certain aspects of the relief that Lead Plaintiff had obtained from the Bankruptcy Court. Coffey Decl. ¶4. The Government requested that certain changes be made in the proposed Bankruptcy Court order, and in the NYSCRF's motion to this Court, in order to protect the ongoing criminal investigation. The NYSCRF agreed to make those changes, and the Government approved the revised language as it pertained to its concerns. Id. An order incorporating those changes was submitted to the Bankruptcy Court on consent on November 8, 2002, and signed by Judge Gonzalez that evening. Coffey Decl. Ex. B (the "Bankruptcy Order") .

Pursuant to the NYSCRF's agreement with the Government, the Bankruptcy Order provides for more narrow relief than that approved by Judge Gonzalez at the October 29, 2002 hearing. Specifically, the NYSCRF does not presently seek the production of any witness interview notes, see Proposed Order ¶4, and the NYSCRF has agreed to postpone production of any documents provided to Wilmer, Cutler until that firm provides its final report to WorldCom's full board of directors, id. ¶3; see also Coffey Decl. ¶¶ 4-5.

ARGUMENT

POINT I

THE PSLRA DISCOVERY STAY DOES NOT APPLY TO DOCUMENTS PRODUCED BY WORLDCOM IN CONNECTION WITH THE GOVERNMENTAL AND INTERNAL INVESTIGATIONS

Where, as here, there is an admitted fraud and the documents at issue have already been gathered, reviewed, and produced to others, the PSLRA discovery stay does not bar production of those documents. This precise issue was recently addressed in In re Enron Sec., Deriv. & ERISA Litig, No. H-01-3624 (S.D. Tex.), which, like this case, involved a massive admitted fraud that spurred a host of governmental and internal investigations.

In Enron, the lead plaintiff in the securities litigation to obtain copies of all documents that Enron had produced to Congress, the SEC, and an outside law firm retained by Enron to conduct an internal investigation (there, as here, Wilmer, Cutler).[4] The defendants in Enron argued that discovery should be stayed pending the District Court's ruling on their motions to dismiss. Judge Harmon rejected that argument, holding that where there was an admitted fraud and thousands of pages of documents had already been produced in connection with the investigations, the PSLRA discovery stay did not bar production of those documents to the securities litigation lead plaintiff. See Coffey Decl. Ex. E (August 16, 2002 order), at 1-3. In so holding, Judge Harmon recognized that the discovery stay was designed to "'prevent fishing expeditions in frivolous securities lawsuits,'" but not to "'keep secret from counsel in securities cases documents that have become available for review by means other than discovery in the securities case.'" Id. at 2 (quoting her order dated February 27, 2002, which is attached at Coffey Decl. Ex. D). Notably, Judge Harmon further noted that, "*[i]n a sense this discovery has already*

[4]Since Enron was in bankruptcy and subject to the automatic bankruptcy stay, the lead plaintiff had sought and obtained partial relief from the stay from Judge Gonzalez, who presides over both the Enron and WorldCom bankruptcy proceedings.

been made, and it is merely a question of keeping it from a party because of the strictures of a statute designed to prevent discovery abuse." Coffey Decl. Ex. E at 3 (emphasis added).

As the court in Enron held, and as the legislative history confirms, the PSLRA discovery stay was not intended to apply in circumstances such as these. Congress enacted the PSLRA discovery stay provision for two reasons.[5] First, Congress wanted to prevent plaintiffs from filing frivolous lawsuits initiated solely in hopes of finding sustainable claims through extensive discovery, often referred to as so-called "fishing expeditions." See S. Rep. No. 104-98, at 14 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 693; accord In re Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d 100, 106 (D. Mass. 2002). Second, Congress wanted to eliminate the threat of pressuring corporate defendants to settle frivolous securities lawsuits in an effort to avoid the high costs of discovery. See H.R. Conf. Rep. No. 104-369, at 37 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 731. Neither of these concerns is implicated in the slightest here.

A. This Case Is Not Frivolous

This case is clearly not a frivolous "fishing expedition." To the contrary, this case presents the unique circumstances of an *admitted* securities fraud of massive proportions. As noted above, WorldCom has already acknowledged that it improperly reported at least $9 billion of earnings; a number of its most senior officers have already had their guilty pleas to securities fraud accepted by

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[5] The PSLRA's discovery stay provides as follows:

> In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. §78u-4(b)(3)(B)(2000).

various District Judges sitting in this District; WorldCom's former CFO has been indicted for securities fraud by an impartial grand jury; and Magistrate Judge Francis has already concluded that a criminal complaint with a *fraction* of the facts now set forth in the NYSCRF's Complaint was sufficient to establish probable cause that a criminal conspiracy to commit securities fraud existed at WorldCom.

These facts amply distinguish this case from all other securities fraud cases governed by the PSLRA (except Enron, of course).[6] The rationale for the PSLRA discovery stay -- that discovery should not go forward until a court reviews the allegations and determines that they state a claim for fraud -- is not contravened here. There have been no fewer than six determinations – by Magistrate Judge Francis regarding the criminal complaint, by the grand jury that indicted Sullivan and Yates, and by the District Judges who accepted the factual bases of guilty pleas by Myers, Yates, Normand, and Vinson – that there was *criminal* securities fraud at WorldCom. Accordingly, this case presents truly unique and narrow circumstances to support the relief requested without running afoul of the PSLRA stay.

While Enron provides the most on-point precedent, other courts have also held that, where there was a judicial determination in a securities case that the allegations against certain defendants are meritorious, the PSLRA discovery stay does not bar discovery from these defendants and non-party discovery relevant to claims against such defendants. For example, in Lernout & Hauspie, the court denied motions to dismiss filed by certain defendants while motions brought by other defendants were still pending. After a thorough review of the legislative history and purpose of the PSLRA discovery stay, the court allowed plaintiffs to serve document requests and subpoenas seeking discovery relevant

[6]In fact, this is actually a stronger case for lifting the discovery stay than Enron, because in that case there had been no criminal convictions or guilty pleas by Enron's executive officers at the time the court lifted the PSLRA discovery stay.

to the allegations against the parties whose motions had failed. Lernout & Hauspie, 214 F. Supp. 2d at 106-09. As the court there held, "[s]ince the plaintiffs' complaint has easily survived four defendants' motions to dismiss, discovery against those defendants cannot be deemed merely a 'fishing expedition' to find a sustainable claim ... Nor can discovery against those parties be an attempt to force 'innocent parties to settle frivolous class actions.'" Id. at 106 (citations omitted). Similarly, in Carson v. Clarent Corp., the court held that the PSLRA discovery stay provision did not stay limited discovery with respect to defendants who answered the complaint, although other defendants' motions to dismiss were still pending. Carlson, No. C 01-03361 CRB (N.D. Cal. Sept. 9, 2002) (attached at Coffey Decl. Ex. F).

Further, as noted above, the NYSCRF has already filed its Complaint, which articulates in detail the bases for each defendant's liability. By this request, Lead Plaintiff is *not* casting about to find viable claims through inappropriate discovery; rather it seeks additional information on issues or claims that are already alleged in the Complaint. See Anderson v. First Security Corp., 157 F. Supp. 2d 1230, 1242 (D. Utah 2001) ("Because Plaintiffs have articulated their alleged bases for liability, [a partial lift of the PSLRA discovery stay] will not result in a fishing expedition.").

In addition, while the NYSCRF respectfully submits that its Complaint sufficiently pleads each of the claims against each of the named defendants, the requested documents could also prove pivotal to Lead Plaintiff carrying out its fiduciary obligation to evaluate the strengths and weaknesses of those claims as the NYSCRF proceeds with the Court's settlement process.

B. There Is No Threat that the NYSCRF's Limited Discovery Request Will Pressure Defendants Into Settlement

This motion does not ask a single defendant to produce a single document. It is directed at WorldCom, a non-party that cannot be "coerced" into settling anything with Lead Plaintiff or the

putative Class. The Bankruptcy Court, which is of course empowered to prohibit litigation activity that imposes an undue burden on a debtor, has already ruled that the production can be permitted. Coffey Decl. Ex. B.

Granting the NYSCRF's motion will impose no burden on any defendant in this case. Indeed, as noted by Judge Harmon in Enron, this discovery has in effect "already been made." Coffey Decl. Ex. E, at 3. Consequently, there is no threat here that this request will pressure any defendant into settlement.

POINT II

EVEN IF THIS COURT DECIDES THAT THE PSLRA DISCOVERY STAY DOES APPLY, THE DISCOVERY STAY SHOULD BE PARTIALLY LIFTED BECAUSE OTHERWISE LEAD PLAINTIFF WOULD SUFFER UNDUE PREJUDICE

Even if this Court were to hold that the PSLRA discovery stay applies – that the documents which WorldCom has already produced to other investigators should be kept from Lead Plaintiff until motions to dismiss are decided – the Court should nevertheless allow for production of such documents under the "undue prejudice" exception to the PSLRA. The Court may lift the PSLRA discovery stay if it "finds upon the motion of any party that particularized discovery is necessary . . . to prevent undue prejudice." 15 U.S.C. §78u-4(b)(3)(B)(2000); see also Lernout & Hauspie, 214 F. Supp. 2d at 107. That exception applies here.

As a threshold matters, it is clear that the request here is sufficiently "particularized" because the NYSCRF seeks a defined set of specific documents from WorldCom – namely, those documents that it has already gathered, reviewed, and produced to others. While the concept of what constitutes "particularized discovery" is a "nebulous one, and the phrase is not devoid of ambiguity," Mishkin v. Ageloff, 220 B.R. 784, 792-95 (S.D.N.Y. 1998), courts "have delineated the outer limits of what

requests do and do not qualify as sufficiently particularized." Lernout & Hauspie, 214 F. Supp. 2d at 108. For example, where the discovery request is limited to a small number of specific parties or non-parties, or concerns specific documents or specific issues, courts have found that the request is sufficiently particularized. See, e.g., Anderson, 157 F. Supp.2d at 1242 (holding that discovery from three specific non-parties was sufficiently particularized); Vacold LLC v. Cerami, 00 Civ. 4024 (AGS), 2001 WL 167704, at *6 (S.D.N.Y. Feb. 16, 2001) (allowing discovery on the limited issue of nature and timing of a disputed contract). Here, because Lead Plaintiff only seeks those documents that have already been produced in connection with the various investigations, its request is sufficiently particularized.

As for undue prejudice, there are number of ways in which the NYSCRF, and the putative investor Class, will be unduly prejudiced if the motion is not granted. Courts, including several in this District, have defined "undue prejudice" as "improper or unfair treatment" amounting to something less than irreparable harm. Vacold, 2001 WL 167704, at *6 (quoting Med. Imaging Ctrs. of Am. v. Lichtenstein, 917 F. Supp. 717, 720 (S.D.Cal. 1996); see also Lernout & Hauspie, 214 F. Supp. 2d at 107 ("Undue prejudice requires a showing of improper or unfair detriment that need not reach the level of irreparable harm"). Following this definition, numerous courts, including this Court, have lifted the PSLRA discovery stay to avoid "improper or unfair treatment" to a plaintiff bringing a securities fraud claim. See, e.g., Global Intellicom, Inc. v. Thomson Kernaghan & Co., 99 Civ. 342, 1999 WL 223158, at *2 (S.D.N.Y. Apr. 16, 1999) (Cote, J.); see also Vacold, 2001 WL 167704, at *7 (PSLRA discovery stay lifted where plaintiff made a particularized discovery request and the failure to allow discovery might have unfairly insulated defendants from liability for securities fraud).

Lead Plaintiff respectfully submits that to prevent it from obtaining the same documents and materials that have already been produced to others would be unfair and would cause undue prejudice

to the putative investor Class. At present there are any number of other parties who have agendas regarding WorldCom that *differ* from the one which this Court has appointed the NYSCRF to pursue: diligently prosecuting this historic case on behalf of defrauded investors. The NYSCRF does not criticize or seek in any way to diminish the goals of the criminal prosecutors, regulators, or other investigators – indeed, it very much supports those goals. But what is important for this discussion is that the goals of others are not co-extensive with those of the Class. To the extent that others will have had access to the documents at issue for so many more months than Lead Plaintiff, the Class would be at risk of falling far behind other litigants, of lacking the necessary knowledge base to deal with those who have had access to the documents, of "flying in the blind" while important decisions regarding the relationship between the Class and others are being made. We note, for example, that the Creditors' Committee – which opposed the NYSCRF's motion in the Bankruptcy Court – apparently has access to these and other documents at WorldCom. See Coffey Dec. Ex. A (transcript) at 23 (Creditors' Committee has access to documents for "due diligence" purposes). The goals of the Creditors' Committee and the putative investor Class are by no means the same. It would be unfair to deny the investor Class access to any documents while the Creditors' Committee – which may be competing for the same assets – has such access.

Finally, as the NYSCRF prepares to represent the putative Class' interests in settlement discussions with defendants, it would also be unduly prejudicial for the NYSCRF to have to proceed without access to *these* documents, *at a minimum*. The NYSCRF is presently identifying what documents it believes are necessary for the defendants to divulge if there are to be any meaningful settlement discussions in the coming weeks. The documents at issue here, which could better inform Lead Plaintiff as to the quality of its various claims, are crucial if the NYSCRF is to approach that process with anything approaching a level playing field.

In sum, it would be fundamentally unfair if Lead Plaintiff, which directly represents the interests of WorldCom's stock and bond purchasers, the victims most affected by this massive fraud, were the only significant party in interest without immediate access to these documents.

CONCLUSION

For the foregoing reasons, the New York State Common Retirement Fund respectfully requests that the Court grant its motion for an order partially lifting the PSLRA discovery stay as set forth above and in the accompanying Proposed Order.

DATED: New York, New York
November 12, 2002

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