UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLDCOM, INC. SECURITIES LITIGATION	:	MASTER FILE No. 02 Civ. 3288 (DLC)
This Document Applies To: All Actions	:	

MEMORANDUM OF LAW OF 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 OPPOSITION TO THE SSB GROUP'S MOTION TO SEVER COUNTS IX THROUGH XI IN THE IN RE WORLDCOM, INC. SECURITIES LITIGATION CONSOLIDATED COMPLAINT

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Max W. Berger (MB-5010)
John P. Coffey (JC-3832)
Steven B. Singer (SS-5212)
Beata Gocyk-Farber (BGF-5420)
Jennifer L. Edlind (JE-9138)
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400

BARRACK, RODOS & BACINE
Leonard Barrack
Gerald J. Rodos
Jeffrey W. Golan
Jeffrey A. Barrack
Pearlette V. Toussant
3300 Two Commerce Square
2001 Market Street
Philadelphia, Pennsylvania 19103
(215) 963-0600

Attorneys for 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

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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 "NYSCRF"), by his undersigned attorneys, hereby submits this memorandum in opposition to the motion filed by Salomon Smith Barney, Inc. ("Salomon"), Citigroup, Inc. ("Citigroup"), and Jack Grubman ("Grubman") (collectively, the "SSB Defendants" or "Defendants") to sever Counts IX through XI from the consolidated complaint filed by the NYSCRF on October 11, 2002 ("Complaint") and transfer those three claims to Judge Barbara S. Jones for consolidation with In re Salomon Analyst Cases, Master File No. 02 Civ. 3687 (BSJ) (the "Salomon Analyst Litigation").

PRELIMINARY STATEMENT

After its appointment as Lead Plaintiff on August 12, 2002, the NYSCRF did what the Court's appointment obligated it to do: undertake to investigate, evaluate, and assert all claims that should be brought on behalf of the putative Class of WorldCom stock and bond purchasers it represents. By the time it filed its Complaint sixty days later, the NYSCRF had concluded that the facts surrounding the WorldCom debacle justified bringing eleven securities law claims against a variety of defendants. By this motion, the defendants in five of those claims ask the Court to divide those claims into two pieces, keeping two of the claims here and sending three others to another courtroom, where the identical class of investors will have to prove the same facts regarding the same defendants and their relationship with the same company in order to recover damages to the same securities at issue in this courtroom. As explained below, this request makes no sense, and would also result in the unprecedented circumstance in which the truth or falsity of the very same statements would have to be litigated in two separate courtrooms. The motion should be denied.

As explained more fully below, several of the claims in the NYSCRF's Complaint pertain to the public debt offerings by WorldCom in May 2000 and May 2001. In those claims, the NYSCRF alleges that certain defendants are liable under Sections 11 and 12(a)(2) of the Securities Act of 1933 (the "Securities Act") for material misstatements in connection with the registration statements for those offerings. See Complaint Counts I through V. The Securities Act defendants include certain current and former WorldCom officers and directors (Counts I and II) and WorldCom's former auditors (Count III). But they also include eighteen underwriters for those bond offerings, including Salomon (Counts IV and V), a fact that Defendants try to tissue over by, among other things, mislabeling this action as the "WorldCom D&O Litigation," Defs. Br. seriatim, and omitting the word "underwriters" whenever they list the defendants whose conduct will be examined in this litigation, see, e.g., id. at 8, 15.

The Complaint sets forth in detail why Salomon is liable under the Securities Act for materially false statements contained in the WorldCom registration statements. In sum, the NYSCRF's investigation developed abundant evidence that Salomon and WorldCom engaged in a secret, illicit quid pro quo relationship, pursuant to which Salomon received WorldCom's lucrative investment banking business in return for agreeing to (a) issue extremely positive analyst reports about WorldCom, regardless of merit; (b) provide senior WorldCom executives with shares of valuable "hot IPO" shares; and (c) loan WorldCom CEO Bernard Ebbers several hundred million dollars. Lead Plaintiff alleges that the registration statements were rendered false and misleading in part because they failed to disclose the myriad conflicts of interest that permeated the WorldCom-Salomon relationship. Indeed, the investigation yielded evidence that these misstatements were made with scienter. With that evidence

of scienter in hand, the NYSCRF added additional claims against the SSB Defendants in connection with the registration statements, namely, Count IX and, in part, Count XI, which assert claims arising under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act").[1]

Notably, the SSB Defendants do not move to sever either Counts IV or V. They thus concede that the issue of whether Salomon has liability for the registration statements will be litigated in this courtroom. By their motion, however, the SSB Defendants would have the Court sever other claims based on those very same registration statements (Count IX and, in part, Count XI) and have those claims litigated in another courtroom -- in the so-called "analyst" litigation.

The request to transfer the claims that actually do pertain to analyst reports (Count X and, in part, Count XI) is also a guarantee of highly duplicative litigation. That is because the same evidence which demonstrates that Salomon is liable under Section 10(b) for the registration statements will also establish Salomon's liability under Section 10(b) for Grubman's analyst reports.

Faced with the challenge of explaining how splitting these claims could possibly be consistent with notions of judicial efficiency, the SSB Defendants opt to pass, and spend most of their brief urging the Court not to consider the merits of whether Counts IX through XI are more appropriately litigated in this courtroom. No such examination is warranted, they say, because there is "law of the case" that has already predetermined the desired outcome. Defs. Br. at 1-2, 5-8, 11-13.

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[1] In Count XI, the NYSCRF alleges that Salomon, as a control person of Grubman, and Citigroup, as a control person of Salomon, are each liable under Section 20(a) with respect to both the registration statements and the analyst reports.

Defendants overreach. As explained below, the prior orders on which they rely are hardly the "door closing" rejections of Lead Plaintiff's position that Defendants would prefer. Indeed, the only order that even mentions the NYSCRF's view (the MDL order) explicitly left the door open for the judges of this District to organize these cases "in an appropriate fashion on their own." Further, as set forth below, the law of the case doctrine does not apply to preliminary, nonconclusive determinations such as consolidation orders.

Moreover, it is now apparent that the MDL order -- and the other orders, to the extent they can be interpreted as speaking to this issue – relied on a key factual representation that Defendants have effectively abandoned in their present motion: the notion that the factual and legal issues in the WorldCom Securities Litigation are "largely distinct" from those in the WorldCom-related analyst cases (the "WorldCom Analyst Cases"). Defendants now assert that the Complaint has three claims with a core of common facts that requires they be litigated together: Counts IX, X, and XI. Although Defendants' papers repeatedly mischaracterize this group of claims as "analyst claims," it has now been revealed that when they say "analyst claims," the SSB Defendants really mean "analyst claims plus the WorldCom registration statements." That definition was not shared with Your Honor, Chief Judge Mukasey, Judge Martin, Judge Jones, the MDL panel, or anyone else prior to the filing of this motion late last month. Even if the Court were to ignore all of the additional facts that have come to light since the earlier orders were issued (and as explained below, it should not), the notion that the "law of the case" prohibits the Court from evaluating the merits of Lead Plaintiff's arguments should be rejected – particularly when the key premise proffered by Defendants to obtain the purportedly dispositive orders has been abandoned.

The SSB Defendants raise, but do not press, two other arguments in favor of severance. Defendants argue that the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §78u-4(a)(3)(A) (the "PSLRA") precludes the NYSCRF from prosecuting the analyst claims (and apparently at least one registration statement claim) as part of the WorldCom Securities Litigation because there has not yet been a lead plaintiff appointed in the WorldCom Analyst Cases. Defs. Br. at 13-14. As a legal argument, this is frivolous; there is nothing in the PSLRA which prohibits a duly appointed lead plaintiff from asserting all claims that the Class may assert against a particular defendant. As a practical matter, the argument is essentially moot; there is no opposition to the NYSCRF's pending motion to be appointed lead plaintiff in the WorldCom Analyst Cases.

The PSLRA argument does serve one useful purpose, in that its placement as the second argument point underscores the lack of substance to Defendants' third point -- the supposed judicial efficiency to be obtained if the motion were granted. Defs. Br. at 14-15. Contrary to what the SSB Defendants add at the very end of their brief, granting their motion would not foster judicial economy, but would instead result in duplicative, piecemeal litigation which will prejudice the Class and burden the Court. It would also prejudice the Class to split off a significant part of the litigation developing so rapidly in this courtroom -- where motions to dismiss are about to be filed, discovery is underway, and the settlement process has begun -- and send it to a litigation that, for a myriad of reasons, does not even have a date for a lead plaintiff hearing.

In sum, the five claims filed by the NYSCRF against the SSB Defendants are interrelated with each other and with those against other defendants and should be prosecuted together, in this Courtoom.

PROCEDURAL BACKGROUND

A. The Origin of the WorldCom Securities Litigation

On April 30, 2002, the first of approximately twenty class actions asserting securities law claims against WorldCom, certain of its senior officers and directors, its outside accounting firm, Arthur Andersen LLP, and certain underwriters of offerings of WorldCom securities was filed in this District. See Albert Fadem Trust v. WorldCom, Inc., 02 Civ. 3288 (DLC), slip op. at 4-5 (S.D.N.Y. July 12, 2002). The Fadem case (and cases subsequently filed in the WorldCom Securities Litigation) asserted claims pursuant to the Securities Act and the Exchange Act on behalf of purchasers of WorldCom securities over the past three years. Salomon was specifically named as a defendant in a number of these cases under Section 11 of the Securities Act, in connection with its role as lead underwriter for two WorldCom bond offerings that occurred during the Class Period.

Pursuant to the PSLRA, the plaintiff in Fadem caused a notice of the action to be published, and lead plaintiff motions in that and subsequently-filed cases against WorldCom were due on July 1, 2002. In response to that notice, nine lead plaintiff motions were filed, including one by the NYSCRF, which suffered, by far, the largest loss of any movant -- over $300 million.

By Order dated August 15, 2002, this Court appointed the NYSCRF as Lead Plaintiff for the Class of purchasers of WorldCom stock and bonds in the WorldCom Securities Litigation. See Albert Fadem Trust v. WorldCom, Inc., 02 Civ. 3288 (DLC), slip op. at 4, 6 (S.D.N.Y. Aug. 15, 2002). The Court's order also consolidated the individual WorldCom securities actions pursuant to Fed. R. Civ. P. 42(a), id. at 1; created a Master File for the consolidated cases (In re WorldCom, Inc. Securities Litigation, Master File No. 02 Civ. 3288 (DLC)), id. at 1-3; approved the NYSCRF's

choice of the two undersigned law firms as Co-Lead Counsel for the Class, id. at 6; and set October 11, 2002 as the deadline for the filing of the NYSCRF's complaint in the consolidated action, id. at 7.

B. The WorldCom Analyst Cases

Beginning on May 14, 2002, a number of cases brought on behalf of WorldCom securities holders against Salomon and Grubman were commenced in this District. These cases are among the cases that are now before Judge Jones, as part of the Salomon Analyst Litigation. The WorldCom Analyst Cases assert claims against Salomon and Grubman on behalf of purchasers of WorldCom securities under the Exchange Act based on the analyst reports regarding WorldCom issued by Salomon over the past three years. Like the WorldCom Securities Litigation, the WorldCom Analyst Cases alleged violations of the federal securities laws against Salomon in connection with public statements Salomon made regarding WorldCom during roughly the same time period, and were brought on behalf of substantially the same class. Nevertheless, these cases were not identified as related cases when filed, and were not assigned to Your Honor. Rather, these cases were wheeled out to various judges. The first case, Singleton v. Salomon Smith Barney, 02 Civ. 3687, was assigned to Judge Kaplan.

The plaintiff in Singleton caused a notice to be published advising class members that lead plaintiff motions were required to be filed by July 12, 2002. There were five motions filed in response to the notice published by the plaintiff in Singleton, including a motion by the NYSCRF. The NYSCRF's lead plaintiff motion in Singleton was filed as a precautionary measure in the event that the

WorldCom Analyst Cases were treated separately from the WorldCom Securities Litigation.[2] Consistent with its position here, the NYSCRF argued that (1) due to the substantial overlap of factual and legal issues in the WorldCom Analyst Cases and the WorldCom Securities Litigation, these two sets of actions should be consolidated, and (2) if the Court deemed it appropriate to keep the WorldCom Analyst Cases separate from the WorldCom Securities Litigation, it should appoint the NYSCRF to serve as the lead plaintiff and approve its selection of lead counsel. Of the five movants in the WorldCom Analyst Cases, the NYSCRF again had, by far, the largest financial interest in the case. Briefing on the lead plaintiff motions in the WorldCom Analyst Cases was completed with the filing of reply briefs on August 8, 2002.

By August 2002, many (but far from all) of the WorldCom Analyst Cases had been assigned to Judge Kaplan. On August 15, 2002, Judge Kaplan entered an order (attached to the Vigeland Decl. as Ex. H) consolidating twenty of those cases, one of which was a case brought on behalf of investors of Global Crossing against Salomon and Grubman (together with other such cases, the "Global Crossing Analyst Cases"). The Order noted that consolidation of the WorldCom Analyst Cases with each other was "unopposed," but did not address the NYSCRF's request to consolidate the WorldCom Analyst Cases with the WorldCom Securities Litigation. Id. at 5. Judge Kaplan's August 15 Order was entered without the filing of any motion seeking the consolidation that was ordered therein, and without any oral argument (though several letters for and against such consolidation had

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[2] A copy of this notice of motion and the memorandum of law in support thereof are attached as Exhibits C and F, respectively, to the Declaration of Peter K. Vigeland dated November 21, 2002 ("Vigeland Decl.), submitted with the SSB Defendants' motion.

been separately submitted to Chief Judge Mukasey). On August 16, 2002, again without the filing of motions or oral argument, Judge Kaplan entered a second order consolidating the WorldCom Analyst Cases with additional Global Crossing Analyst Cases and one case filed against Salomon and Grubman on behalf of purchasers of securities issued by Winstar. See Vigeland Decl., Ex. I. Judge Kaplan later established September 11, 2002 as the date for hearings on lead plaintiff motions filed in connection with these cases, but recused himself the morning of the hearing. The action was subsequently reassigned to Judge Martin.

On October 9, 2002, Judge Martin held a conference at which he indicated his preference that each of the various issuer-related sets of cases be represented by its own lead plaintiff, and ordered that parties seeking appointment as lead plaintiff in the various issuer-related Salomon Analyst Cases could submit papers by November 1, 2002. See Vigeland Decl. Ex. N. at 33-34. In a colloquy with NYSCRF's counsel at that hearing, Judge Martin noted that there were no court orders precluding the NYSCRF from asserting any claims it believed were warranted against either Salomon or Grubman, including claims arising out of Grubman's analyst reports, in its Complaint in the WorldCom Securities Litigation. Id. at 9.

On November 1, 2002, the NYSCRF submitted to Judge Martin a memorandum in support of (a) transfer of all WorldCom Analyst Cases to Your Honor, or, in the alternative (b) appointment of the NYSCRF as lead plaintiff in the WorldCom Analyst Cases. See Vigeland Decl. Ex. L. The NYSCRF argued that the claims asserted against Salomon in the WorldCom Analyst Cases were inextricably linked with the claims asserted against Salomon in the WorldCom Securities Litigation, and that forcing the Class to litigate its claims against Salomon in two different courtrooms would prejudice the Class

and waste judicial resources. On November 15, 2002, Salomon filed a memorandum in opposition to the NYSCRF's motion for transfer, to which the NYSCRF replied on November 22, 2002. That motion is now fully briefed and sub judice.

On November 14, 2002, the WorldCom Analyst Cases, as well as the other cases consolidated with the Salomon Analyst Litigation, were reassigned to Judge Jones.

C. Proceedings Before the Judicial Panel on Multidistrict Litigation

In addition to the filing of class action cases against WorldCom in this District, there were also WorldCom-related securities and ERISA cases filed in several other district courts throughout the country. Three motions were filed with the Judicial Panel on Multidistrict Litigation (the "MDL Panel") for centralization of forty-two such actions pending in federal district courts, with various participants advocating that the cases be centralized in this District, the Southern District of Mississippi, the Northern District of California, and the District of Columbia.

On October 8, 2002, the MDL Panel issued an order (the "MDL Order") holding that both the securities and ERISA cases filed on behalf of WorldCom stock and bond purchasers against WorldCom and other defendants, including Salomon and Grubman, throughout the country should be centralized in this District. See In re WorldCom, Inc. Securities & "ERISA" Litigation, MDL-1487, slip op. at 3 (J.P.M.L. Oct. 8, 2002) (attached to Vigeland Decl. as Ex. K).

The MDL Order did not direct transfer of two of the WorldCom Analyst Cases to Your Honor. See Garner v. Salomon Smith Barney, Inc., 02 Civ. 4038; Spangler v. Salomon Smith Barney, Inc., 02 Civ. 4087. Rather, the MDL Panel stated that while there may be some overlap between the two sets of cases, there were factual and legal issues in the WorldCom Securities Litigation that were

likely to be distinct from issues regarding the conduct of Grubman in the Salomon Analyst Cases. Id. at 2. The MDL Panel further noted that various analyst cases pending against Salomon had already been consolidated before a judge other than Your Honor, and that inclusion of the WorldCom Analyst Cases with the securities case "would disrupt this structure already established in the transferee district." Id. In the end, however, the MDL Panel left the handling of these cases to the discretion of Your Honor and (now) Judge Jones, stating that "to the extent any coordination between the 'analyst' actions and the MDL-1487 actions becomes desirable, the involved judges within the transferee district may address that matter in an appropriate fashion on their own." Id. (emphasis added).

D. The Pending Salomon-Related Actions In This District Are Before No Fewer than Nine Different Judges

The SSB Defendants seek to create the impression that there is some monolithic structure whereby all analyst-related cases pending against Salomon, Citigroup and Grubman are consolidated before Judge Jones. This is not the case. There are currently approximately seventy-six such cases pending against the SSB Defendants across the country, and twenty-eight of these -- 36% -- are not before Judge Jones. See Declaration of John P. Coffey, dated December 10, 2002 ("Coffey Decl."), Ex. A (listing actions).[3]

In this District alone, there are eight judges other than Judge Jones adjudicating SSB analyst cases pertaining to various issuers. For example, three cases relating to Metromedia are pending before Judge Batts, one is before Judge Buchwald, one is before Chief Judge Mukasey, and one is

[3] The SSB Defendants contend that approximately sixty-six cases are pending against them in this District and various other jurisdictions, and that thirty-five of these actions are before Judge Jones. Defs. Br. at 5. The NYSCRF's research revealed that there are at least seventy-six such actions.

before Judge Duffy. Id. Similarly, Judge Cedarbaum is presiding over four cases pertaining to Williams Communications Group, Inc. Id. There are two cases involving AT&T assigned to Judge Patterson, and one assigned to Judge Buchwald. Id. Judge Pollack is presiding over the only case pertaining to Rhythms NetConnections, Inc. Id. And Judge Koeltl is presiding over a case relating to XO Communications, Inc. Id. In addition, nine cases in this District have yet to be assigned. Accordingly, Defendants' argument that this Court should not disturb the present "structure" governing the SSB Analyst Cases fails, because it presupposes a structure which does not exist.

E. The NYSCRF's Complaint in the WorldCom Securities Litigation

As noted above, on October 11, 2002, the NYSCRF filed the Complaint in the underlying WorldCom Securities Litigation. The Complaint asserts claims on behalf of all persons and entities that purchased or acquired publicly traded securities (stocks or bonds) of WorldCom between April 29, 1999 and June 25, 2002 (the "Class Period"). The claims are brought pursuant to Sections 11 and 12(a)(2) of the Exchange Act on behalf of purchasers of WorldCom bonds, and pursuant to Section 10(b) of the Securities Exchange Act on behalf of purchasers of WorldCom stock and bonds against, among others, Salomon, Grubman and Citigroup.

Specifically, with respect to the SSB Defendants, the Complaint asserts claims against (1) Salomon for violations of Sections 11 and 12(a)(2) of the Securities Act in connection with the false and misleading registration statements (Counts IV and V, respectively); (2) Salomon and Grubman for violations of Section 10(b) of the Exchange Act in connection with those same false and misleading registration statements (Count IX); Salomon and Grubman for violations of Section 10(b) of the Exchange Act in connection with the false and misleading analyst reports issued regarding WorldCom

(Count X); and Citigroup and Salomon for violations of Section 20(a) of the Exchange Act in connection with both the registration statements and the analyst reports (Count XI). The SSB Defendants have not moved to sever Counts IV or V, thereby conceding that Salomon is properly named as a defendant in this litigation.

As demonstrated in the Complaint and discussed further below, the NYSCRF conducted an extensive investigation and discovered (and continues to discover) significant new information not previously disclosed in any WorldCom, Salomon, Grubman or Citigroup published report, in any media report, or in any indictment, complaint, or plea allocution. Indeed, the media reaction to information first aired in the Complaint demonstrates the depth of the NYSCRF's investigation and the important, previously undisclosed facts it has unearthed to date. See, e.g., J. Weil, An Ebbers Firm Got Citigroup Loans, Wall St. J., Oct. 14, 2002, at A3; Citigroup Is Sued Over WorldCom Ties, Assoc. Press, Oct. 14, 2002; Fund Sues Ebbers, Citigroup, Bloomberg News, Oct. 15, 2002; WorldCom Ex-CFO Received More IPO Profits, Suit Says, Bloomberg News, Oct. 16, 2002 (collectively attached to the Coffey Decl. as Ex. B).

The Complaint plainly identified who had been named in each Count and why. Although the SSB Defendants contend that certain Counts in the Complaint constituted an "end run" around several judicial rulings, they were not stirred to file their motion to sever until six weeks later, shortly before motions to dismiss were due.

ARGUMENT

A. The SSB Defendants Fail to Satisfy The Standard For Severing Claims

The decision whether to sever a party or a claim is within the discretion of the district court. German by German v. Federal Home Loan Mortg. Corp., 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995). In deciding whether severance is appropriate, courts generally consider (1) whether the issues sought to be tried separately are significantly different from one another, (2) whether the separable issues require the testimony of different witnesses and different documentary proof, (3) whether the party opposing the severance will be prejudiced if it is granted, and (4) whether the party requesting the severance will be prejudiced if it is not granted. Id.; accord Hal Leonard Publ. Corp. v. Future Generations, Inc., 1994 WL 163987, at *1-2 (S.D.N.Y. April 22, 1994); SEC v. Parnes, 2001 WL 1658275, at *9 (S.D.N.Y. Dec. 26, 2001).

As set forth below, severing Counts IX through XI would neither serve the interests of justice nor further the prompt and efficient resolution of this litigation. There are numerous questions of law and fact common to Lead Plaintiff's claims against the SSB Defendants and the other defendants. For example, at any trial in this matter, Counts IV and V will require the NYSCRF to prove that the registration statements issued in connection with the bond offerings were materially false and misleading, and that those filings were rendered false and misleading in part because they failed to disclose the myriad conflicts of interest that pervaded the WorldCom-Salomon relationship. Similarly, Lead Plaintiff will need to prove that Salomon had a duty to disclose these conflicts, that the conflicts were material, and that Salomon's statements about WorldCom inflated the price of WorldCom's publicly traded

securities. As explained more fully in section B below, these same facts will need to be established for Counts IX and (in part XI), regardless of whether the motion to sever is granted.

Proof of these points in all of the claims would require the testimony of the same witnesses and the presentation of the same evidence. Thus, for example, document discovery will clearly overlap, and Jack Grubman and other members of his team will still be key witnesses in the WorldCom Securities Litigation. To require plaintiffs to prove these points at separate trials involving the same defendant "would be repetitious, prolong the ultimate termination of this litigation, and place an unnecessary burden" on plaintiffs. German by German, 896 F. Supp. at 1401. In addition, severance of these claims would pose a "significant danger of inconsistent judgments" in the separate actions. Id.

In contrast to the substantial prejudice that would inure to plaintiffs if these claims were severed, the SSB Defendants do not set forth any prejudice to them that would result if the motion to sever is denied. As explained in the next section, they could not reasonably do so.

B. All of the Claims Asserted in the Complaint Against the SSB Defendants Are Inextricably Related, and their Prosecution in Two Different Courtrooms Would Prejudice the Class and Waste Judicial Resources

Contrary to the SSB Defendants' contention (see Defs. Br. at 2, 16), severing Counts IX through XI would result in duplicative, piecemeal litigation, that would waste judicial resources and prejudice the Class.

First, as demonstrated in the Complaint, the facts and evidence on which Lead Plaintiff will rely to establish Salomon's liability for the false registration statements are the same facts and evidence which will be used to establish that the analyst reports issued by Salomon and Grubman regarding WorldCom were materially false and misleading. The Complaint alleges that both the registration

statements and the analyst reports were false for the same reason: they each failed to disclose the myriad conflicts of interest that permeated the nefarious relationship between and among the SSB Defendants, WorldCom and WorldCom's top executive officers.[4] Compare, e.g., Complaint ¶¶ 202 & 240 (registration statements) with ¶¶ 273, 454 (analyst reports).

Specifically, the Complaint alleges that the SSB Defendants, WorldCom and its top executive officers entered into an illicit, multi-faceted quid pro quo arrangement to defraud investors who relied on the alleged integrity of Salomon's underwriting process and the independence of Salomon's research. The Complaint alleges that, in exchange for the promise of lucrative investment banking business from WorldCom, Salomon provided WorldCom with consistently favorable analyst reports to bolster its stock price, and provided WorldCom's top executives, like Bernard Ebbers, its former CEO, and Scott Sullivan, its former CFO, with substantial personal benefits, including generous allocations of shares in "hot" initial public offerings underwritten by Salomon and hundreds of millions of dollars of loans for Ebbers' personal use. Complaint ¶¶ 221-287. The fact that this secret, illicit relationship was never disclosed to the investing public is at the core of each allegation asserted against the SSB Defendants in the Complaint -- both as to the registration statements and the analyst reports.

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[4] Salomon's implicit contention that Grubman's analysts reports have nothing to do with WorldCom's fraudulent financial statements (see Defs. Br. at 13-14) is without merit. First, as detailed in the Complaint, Salomon, among others, ignored numerous red flags that indicated the falsity of WorldCom's financial statements. Second, during the Class Period Grubman changed his methodology for analyzing WorldCom (and WorldCom alone) in a way that concealed the growing weaknesses in WorldCom's cash flow results. Third, the Grubman reports reiterated and effectively vouched for WorldCom, its reported results and its earnings projections. Thus, Grubman's reports are inextricably intertwined with the materially false and misleading financial statements issued by WorldCom.

Consequently, if the motion is granted, the Class would be severely prejudiced, because plaintiffs would have to prove the same set of facts – i.e., this quid pro quo arrangement – twice, in two different courtrooms. This scenario would also waste judicial resources, because there would be two sets of motions to dismiss that will involve the same set of facts and substantially similar issues; parallel, duplicative discovery; duplicative summary judgment motions and perhaps even duplicate jury trials.[5]

Second, though Defendants are careful not to draw attention to it, their motion asks the Court to take the remarkable step of ensuring that the same statements are being litigated before two different judges. The SSB Defendants do not dispute that they will be required to litigate the truth or falsity of the registration statements in this courtroom, by virtue of being named in the Securities Act claims in Counts IV and V. By their request, however, these Defendants also want to litigate the truth or falsity of those identical statements a second time, before Judge Jones, in connection with Count IX and (in part) Count XI. The relief requested is unprecedented, cannot be squared with any precept of judicial economy, and triggers the risk of inconsistent results. The Class should not be required to prove its claims relating to the registration statements pursuant to Sections 11 and Section 12(a)(2) in one

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[5] The decision in Hallwood Realty Partners, L. P. v. Gotham Partners, L.P., 104 F. Supp. 2d 279 (S.D.N.Y. 2000) is particularly instructive here. In that case, plaintiffs alleged that defendants engaged in a scheme to defraud in violation of the Exchange Act, and one of the defendants moved to sever the claims asserted against it. The court denied the motion, holding that the issues involving the moving defendant and the other defendants were closely related, and that the proof against the moving defendant would overlap significantly with the proof against the other defendants. In particular, the Court emphasized the prejudice that would result if plaintiffs were forced to prove the fraudulent scheme in two separate litigations, holding that plaintiffs would be "prejudiced substantially if the case against [the moving defendant] were severed, as it would be forced to litigate the existence of the scheme in two separate fora." Id. at 288. Precisely like in Hallwood, all of the claims against Salomon are intertwined, and if the motion here is granted, the Class will be forced to litigate the existence of the scheme -- the illicit relationship between Salomon and WorldCom -- in two separate fora.

courtroom, and then prove its claims relating to the same registration statements but brought pursuant to Section 10(b) in another courtroom – particularly when so many of the key factual predicates are common to each of these legal claims.

Third, by asking this Court to sever Count IX (the Section 10(b) claims related to the registration statements) together with the claims predicated on the analyst reports, the SSB Defendants themselves implicitly recognize that, contrary to their previous assertions, the claims based on the registration statements and the analyst reports are inextricably interrelated, flow from the same nexus of events, and should be kept together. In much less compelling circumstances, that is, when the principal common elements are simply the securities at issue and a common nucleus of fact, courts have held that consolidation of related cases was appropriate. See Werner v. Satterlee, Stephens, Burke & Burke, 797 F. Supp. 1196, 1211 (S.D.N.Y. 1992) (consolidating securities fraud action against a law firm, which assisted in the preparation of a company's registration statement and prospectus, with the underlying securities action against the company and various brokerages where the cases presented "numerous common issues of law and fact"); see also Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146, 1151 (N.D. Cal. 1999) (consolidating fifty-three securities class action lawsuits predicated on the same set of false and misleading statements by various defendants); In re Olsten Corp. Sec. Litig., 3 F.Supp. 2d 286, 293 (E.D.N.Y. 1998) (consolidating four securities fraud actions where "the plaintiffs in the four complaints rely upon the same series of allegedly false and misleading public statements and omissions" against various defendants). Here, of course, there is an additional, critical element of commonality -- the claims at issue are against the same defendants.

Fourth, the present Action is at a far more advanced stage than the Salomon Analyst Litigation, and granting the motion would further prejudice the Class by delaying the final resolution of the claims that the SSB Defendants seek to sever. The Salomon Analyst Litigation has already been reassigned twice and is now before its third judge, and no lead plaintiffs have yet been appointed in that action. By contrast, in this Action, the NYSCRF filed its Complaint nearly two months ago, and defendants' responses to the Complaint are due December 13, 2002. In addition, the NYSCRF has already obtained the right to production of documents that WorldCom previously produced to governmental agencies, which should occur in the near future. Finally, at this Court's Order, the NYSCRF, on behalf of all Class members, and all defendants (including Salomon, Grubman and Citigroup) have already commenced settlement proceedings under the auspices of Magistrate Judge Dolinger. Severance of Counts IX through XI will undoubtedly prejudice the Class by substantially delaying the recovery to the Class relating to the allegations asserted in these counts.

C. The "Law of the Case" Doctrine Does Not Bar Assertion of Counts IX Through XI In This Litigation

The SSB Defendants' argument that the "law of the case" doctrine precludes Lead Plaintiff from asserting all of the claims the Class has against them overstates what has occurred -- and ignores that their own motion obviates any reliance on this doctrine.

As an initial matter, it should be noted that neither Your Honor, Judge Kaplan, Judge Martin, nor Judge Jones ever heard oral argument or addressed, at a hearing or in a written order or opinion, whether, in asserting its claims against Salomon in this litigation, the NYSCRF must exclude claims predicated on false statements in Grubman's analyst reports. As noted above, Judge Martin saw no

such obstacle when the subject arose at the October 9 conference. Further, as noted above, while the MDL Order did not consolidate the cases, the MDL Panel specifically left it up to the involved judges in this District to address coordination of the two cases "in an appropriate fashion on their own." Vigeland Decl., Ex. K at 2. Finally, no court ever considered, or was ever asked to consider, whether Section 10(b) claims related to the registration statements asserted against the SSB Defendants in the WorldCom Securities Litigation should be prosecuted separately from Sections 11 and 12(a)(2) claims asserted against Salomon on the same statements. Thus, for all of the SSB Defendants' recitation of the procedural background (Defs. Br. at 5-8), the fact is that no court has ever ruled on the question presented by this motion. Consequently, there is no "law of the case" on point to support the SSB Defendants' insistence that the Court avert its eyes from the merits.

Moreover, even if the preliminary orders on which the SSB Defendants rely could be construed as rejecting the NYSCRF's position on the merits, the "law of the case" doctrine has little, if any, application here. "Preliminary or tentative rulings do not establish law of the case." 18B Wright, Miller & Cooper, Federal Practice and Procedure, § 4478.5 (2d ed. 2002). As the circumstances of related cases change, a district court may exercise its discretion in deciding and/or re-visiting pre-trial procedural issues such as consolidation. See St. Bernard Gen. Hosp. Inc. v. Hosp. Serv. Ass'n of New Orleans, Inc., 712 F.2d 978, 989-90 (5th Cir. 1983) (directing district court to reconsider motion to consolidate in light of changes in circumstances of case); see also Republic Ins. Co. v. Masters, Mates & Pilots Pension Plan, 77 F.3d 48, 53 (2d Cir. 1996) (an order requiring an insurer to furnish defense costs was "preliminary in nature" and did not constitute law of the case); In re Evangeline Refining Co., 890 F.2d 1312, 1321-22 (5th Cir. 1989) (law of case doctrine does not apply to such

matters as interim fee awards). In any event, as the Court of Appeals stated in Virgin Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992), the law of the case doctrine is "admittedly discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment."

Finally, even if the "law of the case" doctrine did apply, Salomon itself recognizes that orders constituting the law of the case may be modified or reversed when, among other circumstances, there is new evidence of record or to prevent manifest injustice. See Defs. Br. at 12, citing Egghead.com v. Brookhaven Capital Mgmt. Co., 194 F. Supp. 2d 232, 237-38 (S.D.N.Y. 2002); see also Casey v. United States, 161 F. Supp. 2d 86, 91-93 (D. Conn. 2001) (court reconsidered statute of limitations decision based on development of more complete record and the need to prevent manifest injustice); Pineiro v. Pension Benefit Guar. Corp., 96 Civ. 7392 (LAP), 1999 WL 195131, at *2 (S.D.N.Y. Apr. 7, 1999) (court took "fresh look" at prior dismissal of claim prompted by amended complaint and new materials submitted to court); Religious Tech. Ctr. v. Scott, 869 F.2d 1306, 1309-10 (9th Cir. 1989) (court ruled that, in pre-trial settings, new allegations may play the same role as new evidence)).[6]

Here, there is a plethora of new evidence -- concealed for years by Salomon, Grubman, Citigroup, WorldCom, and senior WorldCom executives, but uncovered by the NYSCRF in its investigation as Lead Plaintiff in the WorldCom Securities Litigation -- that forms the basis of many of the allegations and claims asserted against Salomon, Citigroup and Grubman in the WorldCom Securities Litigation.

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[6] Washington Nat'l Life Ins. Co. v. Morgan Stanley & Co., 974 F. Supp. 214 (S.D.N.Y. 1997), the only other case cited by Defendants on this issue, is inapposite. That case involved the plaintiffs' motion to transfer the litigation to another district court, the District of Nebraska, after the case had already been transferred to the Southern District of New York. Here, the WorldCom Analyst Cases were filed in this District and will remain in this District.

The new evidence -- which the SSB Defendants ignore in their brief -- reveals a pernicious set of inter-relationships between and among WorldCom, its CEO Ebbers, its CFO Sullivan, one of its Directors (Kellett), Salomon, Citigroup, Grubman, other investment banking personnel at Salomon, and even Citigroup's Travelers' Insurance unit, which, as noted above, made and arranged hundreds of millions of dollars worth of loans to Ebbers for his own personal benefit.[7]

This new evidence makes clear that the factual bases to allege that the analyst reports are false are inextricably intertwined (and often identical) with the factual bases for the claims arising out of the false registration statements.

D. Assertion of the Disputed Claims Is Not Barred by the PSLRA

The SSB Defendants' remaining argument -- that assertion of the disputed claims in this Action is barred by the PSLRA -- is meritless.

Nothing in the PSLRA prohibits a duly appointed lead plaintiff from asserting any and all claims of the Class in one case. This is precisely what a lead plaintiff is obligated to do. While the PSLRA provides that consolidation motions are to be determined before motions for lead plaintiff appointment, *see* 15 U.S.C. § 78u-4(a)(3)(b)(ii), once appointed, it remains the duty and responsibility of the Lead

[7] In its continuing investigation since October 11, the NYSCRF located records showing, among other things, that Citigroup's Travelers' unit actually became an equity partner with Ebbers in a half-billion dollar timber enterprise shortly before Salomon was selected to lead WorldCom's 2000 bond offering. See G. Morgenson, New York Times, "More Clouds Over Citigroup in its Dealings With Ebbers," November 3, 2002 attached to Coffey Decl. as Ex. B. Neither the Travelers' loans nor this business relationship had been disclosed, and the various investigations by Congress, the Securities and Exchange Commission, the Department of Justice, the New York State Attorney General, the Bankruptcy Examiner or others had apparently not uncovered it.

Plaintiff to file a comprehensive complaint that protects the interests of the Class members.

Here, the NYSCRF has fulfilled its obligation by investigating and uncovering the many inter-relationships between and among WorldCom, its executives and certain Board members, Salomon, other Citigroup affiliates and various employees, including Grubman, and by asserting claims of the Class on the basis of that investigation. The notion that the NYSCRF has standing to bring some, but not all, claims on behalf of the Class it serves is specious.[8] Moreover, the argument ignores the practical realities in the WorldCom Analyst Cases. There is no opposition to the appointment of the NYSCRF as lead plaintiff in those cases. Coffey Decl. ¶ 3.

Accordingly, there can be no dispute that the NYSCRF has the right under the PSLRA to assert all claims against all defendants in all WorldCom-related litigation.

CONCLUSION

For the foregoing reasons, the motion of the SSB Defendants to sever and transfer to Judge Jones three of the five claims asserted against them in this Action should be denied.

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[8] Indeed, by asserting Counts IX through XI in the Complaint, the NYSCRF has protected the Class from any argument that it had improperly "split" its causes of actions, which might make such claims vulnerable to being barred by the "entire controversy" doctrine or notions of collateral estoppel. See, e.g., Woods v. Dunlop Tire Corp., 972 F.2d 36, 38-40 (2d Cir. 1992), and cases cited therein; Dubuc v. Green Oak Township, 2002 WL 31680799, at *6-7 (6th Cir. Dec. 2, 2002) (interpreting state law rule against splitting causes of actions); Sosebee v. State Farm Mut. Auto. Ins. Co., 164 F.3d 1215 (9th Cir. 1999) (same).

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BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ John P. Coffey
Max W. Berger (MB-5010)
John P. Coffey (JC-3832)
Steven B. Singer (SS-5212)
Beata Gocyk-Farber (BGF-5420)
Jennifer L. Edlind (JE-9138)
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400

- and -

BARRACK, RODOS & BACINE
Leonard Barrack
Gerald J. Rodos
Jeffrey W. Golan
Jeffrey A. Barrack
Pearlette V. Toussant
3300 Two Commerce Square
2001 Market Street
Philadelphia, Pennsylvania 19103
(215) 963-0600

Attorneys for 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