IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 03-8044
District Court Master File No. 02 Civ. 3288 (DLC)

IN RE WORLDCOM, INC. SECURITIES LITIGATION

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, THE FRESNO COUNTY EMPLOYEES RETIREMENT ASSOCIATION, THE COUNTY OF FRESNO, and HGK ASSET MANAGEMENT, INC., ON BEHALF OF PURCHASERS AND ACQUIRERS OF ALL WORLDCOM, INC. PUBLICLY TRADED SECURITIES,

Plaintiffs-Respondents,

v.

CITIGROUP INC., CITIGROUP GLOBAL MARKETS INC. F/K/A SALOMON SMITH BARNEY INC., and JACK GRUBMAN

Defendants-Petitioners.

BERNARD EBBERS, SCOTT SULLIVAN, DAVID MYERS, BUFORD YATES, JR., JAMES C. ALLEN, JUDITH AREEN, CARL J. AYCOCK, MAX E. BOBBITT, FRANCESCO GALESI, CLIFFORD ALEXANDER, STILES A. KELLETT, JR., GORDON S. MACKLIN, JOHN A. PORTER, BERT C. ROBERTS, JR., JOHN W. SIDGMORE, LAWRENCE C. TUCKER, ARTHUR ANDERSEN LLP, J.P. MORGAN CHASE & CO., BANC OF AMERICA SECURITIES LLC, DEUTSCHE BANK SECURITIES INC., CHASE SECURITIES INC., LEHMAN BROTHERS INC., BLAYLOCK & PARTNERS, L.P., CREDIT SUISSE FIRST BOSTON CORP., GOLDMAN, SACHS & CO., UBS WARBURG LLC, ABN/AMRO INC., UTENDAHL CAPITAL, TODYO-MITSUBISHI INTERNATIONAL PLC, WESTDEUTSCHE LANDESBANK GIROZENTRALE, BNP PARIBAS SECURITIES CORP., CABATO HOLDING SIM S.P.A., FLEET SECURITIES, INC., MIZUHO INTERNATIONAL, PLC,

Defendants.

RESPONSE OF PLAINTIFFS-RESPONDENTS TO MOTION OF DEFENDANTS-PETITIONERS, CITIGROUP INC., CITIGROUP GLOBAL MARKETS INC. F/K/A SALOMON SMITH BARNEY INC. AND JACK GRUBMAN FOR LEAVE TO FILE AN OVERSIZED PETITION FOR PERMISSION TO APPEAL

On Petition to be Filed Seeking Permission to Appeal from an Order Granting Certification of a Class Action Entered on October 28, 2003 by the United States District Court for the Southern District of New York, The Honorable Denise L. Cote

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John C. Browne (JB-0391)
Jennifer L. Edlind (JE-9138)

Attorneys for Plaintiffs-Respondents

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for Plaintiffs-Respondents states as follows:

1. The New York State Common Retirement Fund is not a corporate party.

2. The Fresno County Employees Retirement Association is not a corporate party.

3. The County of Fresno, California is not a corporate party.

4. HGK Asset Management, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Chad Johnson
Counsel for Plaintiffs-Respondents

Plaintiffs-respondents[1] submit this response in opposition to the motion of defendants-petitioners Citigroup Inc., Citigroup Global Markets Inc. f/k/a Salomon Smith Barney Inc., and Jack Grubman ("Petitioners") for leave to file up to a 50 page petition, rather than complying with the 20 page limit set by Rule 5(c), in support of their upcoming application pursuant to Fed. R. Civ. P. 23(f) for an interlocutory appeal from the Order of the Honorable Denise L. Cote of the United States District Court for the Southern District of New York certifying a class in *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2003 WL 22420467 (S.D.N.Y. Oct. 24, 2003) (the "Motion").

Introduction

Petitioners' upcoming application for interlocutory review of Judge Cote's class certification decision presents routine and uncomplicated issues that can be addressed well within the page limits established by Rule 5(c). Indeed, Petitioners' eleven-page Motion to exceed the page limits on their 23(f) application is but the latest manifestation of a concerted strategy to complicate these proceedings unnecessarily and delay the ultimate resolution

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[1] Plaintiffs-respondents are 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 (the "NYSCRF"), the Fresno County Employees

of this action. While Petitioners devote much of their lengthy Motion to a discussion of the merits of their upcoming 23(f) application, they do not identify any sound basis for extending Rule 5(c)'s page limitation by the requested 250%. Petitioners' Motion should be denied for a number of reasons, including that:

- the page limitation of Rule 5(c) recognizes that the purpose of a 23(f) application is to seek the Court's permission to fully argue the merits through subsequent briefs, and not to brief the merits as an initial matter. There is no reason to deviate from that approach here;
- securities fraud cases, such as this one, are routinely certified for class action treatment; thus the District Court's opinion does not rely on any novel theories of law requiring a lengthy explanation by Petitioners;
- Petitioners acknowledge that they are joining with other defense counsel to file a joint 23(f) application (Motion at 7, n.4). The total of 40 pages allotted to their two applications together should be more than sufficient to identify adequately the grounds for the requested appeal;
- Petitioners should not further benefit from their efforts to expand the proceedings below, thereby wasting additional judicial and litigant resources; and
- the most important document to this Court's determination of a 23(f) application is the District Court's class certification opinion, which will be before the Court pursuant to Rule 5.

Retirement Association ("FCERA"), the County Of Fresno, California ("Fresno") and HGK Asset Management, Inc. ("HGK").

In short, Petitioners' request to extend their 23(f) application to 50 pages should be denied.

Argument

Fifty pages of briefing from Petitioners is unnecessary here, especially considering Petitioners' admission that they "expect to join in a separate petition" (Motion at 7, n.4) to be filed by other defendants, represented by Skadden Arps Slate Meagher & Flom LLP, seeking the same relief that Petitioners will seek. Petitioners should not be permitted to circumvent the Appellate Rules to obtain a total of 70 pages to brief their arguments on their routine, discretionary appeal. The total of 40 pages allotted to the defendants' two Rule 23(f) petitions should be more than sufficient to highlight the issues presented by the class certification decision and to permit the Court of Appeals to decide whether to accept their appeal.[2] Of course, the most important document that this Court needs to review in order to decide whether to grant interlocutory review of the class certification order is Judge Cote's opinion itself, which discusses at length all of the

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[2] In fact, one indication of Petitioners' overreaching is that their request for up to 50 pages of briefing on their Rule 23(f) petition even exceeds the page limit for typed petitions for certiorari in the Supreme Court (40 pages), Supreme Court Rule 33, where the importance of the issues presented and the size of the record after trial and prior appeal is likely to be far greater than Petitioners' proposed appeal of a class certification ruling before trial

arguments raised by petitioners and the other defendants opposing certification. It is beyond dispute that Judge Cote's thorough and scholarly opinion will be before the Court pursuant to Rule 5.

Moreover, Petitioners should not benefit from their continued efforts to complicate and delay this litigation by, among other things, attaching nearly two feet of exhibits to their motion for an extension of page limits. See generally Motion. Despite their efforts, the fact remains that this securities fraud case is precisely the kind of case which this Court has held is uniquely suited for class action treatment.

Rather than accept this reality, defendants have tried to expand the issues to be resolved and to complicate the case generally at every stage in this proceeding. For instance, defendants attempted to convert the class certification process into a mini-trial on the merits of plaintiffs' claims and defendants' asserted defenses. In connection with the class certification process, defendants engaged in extensive discovery on every conceivable issue even tangentially relevant to class certification. Defendants took eleven depositions of ten witnesses and demanded the production of more than 74,000 pages of documents from both the proposed class representatives, as well as from non-party witnesses, in order to explore

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and judgment. The two petitions to be filed by the Petitioners and the

every theoretical ground to oppose certification. Defendants tendered two purported expert reports opposing certification, and secured detailed information from plaintiffs concerning the sole expert affidavit plaintiffs submitted in response. Petitioners should not receive an extension on a straight-forward 23(f) application due to their own efforts to expand the record below.

Notwithstanding Petitioners' efforts, certification of this case for class action treatment was not a novel event. While defendants' participation in the underlying fraud resulted in injuries of significant proportions, the legal and factual issues presented by the district court's class certification decision are not unique – and they certainly do not warrant unusually large submissions regarding this discretionary appeal.

Nor can petitioners meet the high standard established for an interlocutory review of the district court's class certification order, pursuant to the controlling precedent set forth in *In re Sumitomo Copper Litig.*, 262 F.3d 134 (2d Cir. 2001). Under *Sumitomo*:

> petitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates

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Underwriter Defendants give them 40 pages to make their case.

> a legal question about which there is a compelling need for immediate resolution.

Id. at 139. *Sumitomo* further cautioned that the "determination of whether the district court's decision is sufficiently questionable to warrant interlocutory review will be tempered by [the Court of Appeals'] longstanding view that the district court is often in the best position to assess the propriety of the class," and that that issues "whose ultimate resolution will depend on further factual development will be unlikely candidates for Rule 23(f) appeal." 262 F.3d at 139-40.

Petitioners cannot meet this test, but if they believe they can, then they should be able to present their arguments in the total of 40 pages that they and counsel to the other defendants will have in order to present their 23(f) petitions. Indeed, even a cursory review of Petitioners' Motion, which ostensibly seeks only to extend the page limit of their unfiled petition, demonstrates that Petitioners, as they did during the class certification process, are attempting to dispute the merits of plaintiffs' substantive claims, *see* Motion at 8-11, which were sustained by Judge Cote's ruling on defendants' motions to dismiss, *In re WorldCom, Inc. Sec. Litig.*, 2003 WL 21219049, and which are *not* properly subject to interlocutory review under Fed. R. Civ. P. 23(f).

Finally, Petitioners cite a decision from the Seventh Circuit, *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), to argue that an immediate appeal is warranted based upon "the unjustly coercive results of the Certification Order in this case..." Motion at 11. However, Petitioners neglect to cite a more recent decision issued by the Second Circuit, *In re VISA Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002), which is directly on point, and was cited by Judge Cote in rejecting this very argument. As Judge Cote noted in her reliance on this Court's holding in *In re VISA Check/MasterMoney*,

> "[T]he effect of certification on parties' leverage in settlement negotiations is a fact of life for class action litigants. While the sheer size of the class in this case may enhance this effect, this alone cannot defeat an otherwise proper certification." *In re Visa Check/MasterMoney*, 280 F.3d at 145.

In re WorldCom, Inc. Sec. Litig., 2003 WL 22420467, at *35. Accordingly, there is no reason to treat defendants' anticipated 23(f) petitions more favorably than others by giving Petitioners two and a half times the space generally allowed in order to present their arguments, in addition to the 20 pages of space that their fellow defendants will have in order to address the same certification issues.

Conclusion

Petitioners have not made the requisite showing to warrant deviating from Rule 5(c)'s established page limits for a Rule 23(f) motion. Accordingly, the motion to expand the page limit for the Salomon Defendants' upcoming petition should be denied.

Dated: New York, New York
November 3, 2003

Respectfully submitted,

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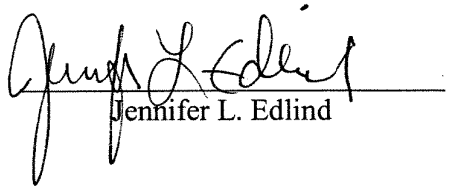
CERTIFICATE OF SERVICE

I, Jennifer L. Edlind, Esquire, hereby certify that a true and correct copy of the foregoing Response of Plaintiffs-Respondents to Motion of Defendants-Petitioners, Citigroup Inc., Citigroup Global Markets Inc. f/k/a Salomon Smith Barney Inc. and Jack Grubman for Leave to File an Oversized Petition for Permission to 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. A copy of the foregoing was also served on the Defendants-Petitioners by hand.

Dated: New York, New York
November 3, 2003



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