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December 1, 2003

By Hand

The Honorable Denise L. Cote
United States District Court
Southern District of New York
500 Pearl Street, Room 1040
New York, New York 10007

Re: In re WorldCom, Inc. Securities Litigation, Master File No. 02 Civ. 3288 (DLC)
(Issue: Further Submission on Curative Notice)

Dear Judge Cote:

On behalf of Lead Plaintiff New York State Common Retirement Fund and Co-Lead Counsel Barrack, Rodos & Bacine, we respectfully submit this letter pursuant to the Court's November 25 order asking the parties to address two issues relating to the effect, if any, of the Court's November 21 Opinion and Order (the "November 21 Order") on the contents of the Curative Notice.

A. The Impact Of A Dismissal With Prejudice

With respect to the question of what impact a dismissal with prejudice would have on the ability of an Individual Action plaintiff to participate in any Class recovery, it would appear that such a dismissal would bar that plaintiff from participating in any Class recovery.

At the outset we note that it has been and continues to be Lead Plaintiff's view that each Individual Action plaintiff remains a Class member until it receives the Court-approved class notice and formally executes a request for exclusion from the Class.[1] Where there has

[1] It is well-settled that the mere filing of an individual action by a class member does not serve as a request for exclusion from the class. See, e.g., Supermarkets General Corp. v. Grinnell Corp., 490 F.2d 1183, 1186 (2d Cir. 1974) ("The existence of [an individual] action did not automatically exclude plaintiffs as potential members of the class. The exclusion could only be effected by compliance with the provisions of Rule 23(c)(2)(B)."); In re Prudential Sec. Inc. Limited Partnerships Litig., 164 F.R.D. 362, 373 (S.D.N.Y. 1996) (it is "well-established that pendency of an individual action does not excuse a class member from filing a valid request for exclusion").

been an adjudication that extinguished with prejudice a particular class member's claim, however, *res judicata* would likely bar that class member from later seeking to participate in any recovery obtained on behalf of the Class for that same claim. See, e.g., Bray v. New York Life Insurance, 851 F.2d 60, 64 (2d Cir. 1988) (dismissal on statute of limitations grounds is final judgment on merits for *res judicata* purposes; plaintiff is precluded from relitigating claims in other proceeding); Fansher v. Kassel, 782 F. Supp. 1334, 1336 (E.D. Mo. 1992) ("The doctrine of res judicata precludes litigation involving the same subject matter ... as a previous action in which a court of competent jurisdiction rendered a final judgment on the merits .... A dismissal for failure to comply with the statute of limitations operates as an adjudication on the merits."); Powell v. Ward, 487 F. Supp. 917, 924 (S.D.N.Y. 1980) (class member who had "actually and fully litigated" claim in prior individual proceeding was "barred from relitigating" it as member of class).

Notwithstanding the foregoing, Lead Plaintiff notes that, with one modest exception, no class member has yet suffered a dismissal with prejudice of a claim asserted in the Class Action. The claims dismissed with prejudice in the November 21 Order pertain to WorldCom's August 1998 and December 2000 bond issuances, which claims Lead Plaintiff had not asserted in the Class Action. The exception relates to what the Court held was Alaska's untimely effort to name additional defendants to its Securities Act claims arising from the May 2001 Offering (claims that are essentially identical to Counts IV and V of the Class Action complaint). The exception is modest in the context of the Alaska action, since Alaska can still prosecute its claims for that offering against the Defendants who had been timely named in its original complaint. But as noted in the Underwriter Defendants' November 24, 2003 letter to the Court, the potential impact of that ruling on a host of other individual actions is significant: while none of the Individual Action claims identified in the letter's attachment have yet been dismissed with prejudice, application of the November 21 ruling in the forthcoming motion practice appears to doom those claims to dismissal with prejudice.[2]

Lead Plaintiff respectfully submits that this result – which would effectively exclude certain Class members from participating in any Class recovery – can and should be avoided. As explained below, we believe there is an alternative under Fed. R. Civ. P. 41(a)(2) which

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[2] On November 25, 2003, at the Court's request, Lead Plaintiff submitted a proposed insert to the draft Curative Notice to alert Individual Action plaintiffs to the fact that the November 21 Order dismissed with prejudice certain Securities Act claims that were filed after June 25, 2003, on the grounds that such claims are barred by the one-year "notice" statute of limitations. Lead Plaintiff anticipates that Defendants will argue that the Curative Notice should also note that the Order's logic compels the dismissal with prejudice of Securities Act claims arising from the May 2000 Offering if those claims were filed after May 12, 2003, since those claims were filed more than three years after the May 12, 2000 registration statement had been issued. See Underwriter Defendants' November 24 Letter at 2, ¶B.3. Lead Plaintiff interprets the November 21 Order the same way and would have no objection to that addition to the Curative Notice.

ensures that these victimized investors – at least some of whom were targeted with misleading and confusing solicitations – can participate in any Class recovery, and also accommodates concerns that the Court and Defendants may have about giving plaintiffs with claims that are subject to dismissal with prejudice (the "dismissible claims") a second bite at pursuing such claims in a revived Individual Action.

It was suggested during the telephonic conference on November 24 that the Court should modify its November 21 ruling so that the dismissible claims are dismissed without prejudice, in order "to preserve all their legal options for each of the clients, whatever they may be." Tr. at 12-13 (Mr. Lerach). To the extent this request asks the Court to fashion some means for investors who have dismissible claims akin to the claims being pursued in the Class Action (namely, claims pertaining to the May 2000 and May 2001 Offerings) to participate in any Class recovery, we support that request.[3] However, if the "legal options" that counsel wishes to preserve include the right to later opt out of the Class and re-file an Individual Action asserting what is now a dismissible claim, such a result would likely run afoul of the Court's ruling.

Lead Plaintiff respectfully submits that those Individual Action plaintiffs whose claims are no longer viable should still be able to recover on their claims, but solely through the Class Action. These plaintiffs may invoke Rule 41(a)(2) to obtain a voluntary dismissal of their individual actions by order of the Court. Rule 41(a)(2) provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper . . . unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." If these plaintiffs seek to dismiss their Individual Actions pursuant to Rule 41(a)(2) now, before they are dismissed with prejudice, the Court has the discretion to dismiss those cases and specify whether the dismissal is with or without prejudice. The Court has the authority to place proper "terms and conditions" upon such dismissal. D'Alto v. Dahon California, Inc., 100 F.3d 281, 283 (2d Cir.1996) ("Rule 41(a)(2) dismissals are at the district court's discretion and only will be reviewed for an abuse of that discretion"). Thus, should an individual plaintiff seek dismissal of its action under Rule 41(a)(2), the Court has the discretion to dismiss that plaintiff's case without prejudice to its participation in the Class Action, but with prejudice to its Individual Action.[4]

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[3] For the balance of this letter, the term "dismissible claim" is limited to claims arising from the May 2000 and May 2001 Offerings, which claims have been sustained in the Class Action.

[4] The option to seek voluntary dismissal without prejudice pursuant to Rule 41(a)(1) is not available to the Individual Action plaintiffs. That rule permits a plaintiff to voluntarily dismiss its action prior to the filing of an answer without a court order. However, because the Court has previously indicated that the defendants in the individual actions are presumed to have filed an answer *nunc pro tunc* as of the date the action arrives on this Court's docket, see November 5, 2003 Opinion and Order, Rule 41(a)(1) is not available to the Individual Action plaintiffs. If an

There are several reasons why this application of Rule 41(a) is appropriate here. First, allowing an Individual Action plaintiff to dismiss individual claims that are certain to be dismissed as time-barred and then simply re-file individual actions after the Class Notice is distributed would effectively render the Court's November 21 Order, in conjunction with the November 5 Order, a nullity and, as discussed above, would likely run afoul of the basic principles of *res judicata*.

Second, allowing the Individual Action plaintiffs with claims akin to those asserted in the Class Action to participate in any Class recovery would be consistent with the purposes of class actions generally and would also serve the interests of justice. These investors are victims of the WorldCom fraud with substantial alleged losses. As the Court has observed, there is no reason to believe that these plaintiffs had any intention in filing their Individual Action except to achieve the maximum recovery for the employees whose lost retirement savings and benefits they seek to recover. In re WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288 (DLC), 2003 WL 22701241, at *6 (S.D.N.Y. Nov. 17, 2003).

Third, there is a significant risk that the Individual Action plaintiffs who filed cases after June 25, 2003 (and in the case of those with May 2000 Offering-related claims, after May 12, 2003) may not have understood the risks associated with filing that action, including that such action could be time-barred. Indeed, the Court has already determined that counsel to certain Individual Action plaintiffs engaged in an active campaign to solicit plaintiffs to file individual actions by inducing confusion and misunderstanding regarding the benefits of an individual action and by derogating the class action option. In re WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288 (DLC), 2003 WL 22738546, at *16, n.28 (S.D.N.Y. November 21, 2003); see also In re WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288 (DLC), 2003 WL 22701241, at *7 (S.D.N.Y. November 17, 2003) (lack of forthright description of individual and class action options). This is further reason for fashioning an outcome which refrains from punishing these otherwise innocent investors for a decision that may have been the product of a misguided solicitation campaign.

The Court has now ordered the dissemination of a Curative Notice, which is designed to cure any misunderstanding and confusion resulting from these communications, and to fully and adequately inform investors about the advantages and disadvantages of participating in the Class Action or filing an Individual Action. The Individual Action plaintiffs whose claims and/or complaints may be subject to dismissal pursuant to the Court's November 21 Order did not have the benefit of reviewing the Curative Notice prior to deciding to file an Individual Action. Given that these plaintiffs may not have understood the risks to their rights, we respectfully submit that the Court should exercise its discretion to allow them to participate in any Class recovery before their claims are dismissed with prejudice. See generally In re Del Val Financial Corp. Securities Litigation, 162 F.R.D. 271,

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Individual Action plaintiff sought to voluntarily dismiss its action pursuant to Rule 41(a)(1), such dismissal would automatically be with prejudice. See Rule 41(a)(1).

276 (S.D.N.Y. 1995) (permitting plaintiffs who had opted-out of the class and filed individual actions effectively to "opt back in" to the class, holding that "in the interests of equity and so as not to penalize the putative class members for what seems to have been a genuine misunderstanding, we will exercise our discretion under Rule 23(c)(1) to permit them to reenter the classes, if they so choose"); Martens v. Smith Barney, Inc., 190 F.R.D. 134, 140 (S.D.N.Y. 1999) ("in order to temper the effect of any possible good faith misunderstanding by certain opt out plaintiffs, the court will now grant named plaintiffs who opted out of the settlement thirty days to rejoin the plaintiff class").

In short, Lead Plaintiff respectfully submits that the Court should first afford the affected plaintiffs an opportunity to file a motion pursuant to Rule 41(a)(2) to seek a voluntary dismissal of their Individual Action with prejudice as to re-filing any Individual Action, but without prejudice to their right to participate in any recovery in the Class Action. This approach will ensure that Individual Action plaintiffs who may have been misinformed will not be unduly penalized by losing all opportunity to recover for losses they suffered as a result of the WorldCom debacle.

Accordingly, Lead Plaintiff respectfully submits that the Curative Notice suggest to the Individual Action plaintiffs with dismissible claims that they consider filing a Rule 41(a)(2) motion seeking the aforementioned relief.

B. Conflict Of Interest

With respect to the issue of whether Milberg Weiss, or any law firm, has a conflict of interest in representing multiple clients whose cases have been affected in different ways by the November 21 Order, or in any case where a claim may be dismissed with prejudice as time barred, Lead Plaintiff respectfully submits that Milberg may have a conflict of interest.

The potential conflict may arise from the prospect that it may be in the best interests of Individual Actions plaintiffs with dismissible claims to participate in the Class Action, yet their counsel, Milberg, has repeatedly asserted that the interests of the Individual Action plaintiffs and the Class Action are opposed to one another.[5] Moreover, Milberg has repeatedly stated to WorldCom bond purchasers that they would recover more of their losses by filing an Individual Action as opposed to remaining in the Class, where their claims would

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[5] See, e.g., Petition for Mandamus re Consolidation Order dated August 7, 2003, at 31 ("one cannot ignore the legal and economic reality that the class-action case and [petitioning Individual Action plaintiffs] are in competition with each other for their recoveries, many of which are from sources subject to legal and practical limitations") (emphasis added); id. at 31 n.26 ("the economic tensions between [petitioning Individual Action plaintiffs] and the class and its counsel are clear").

purportedly be "diluted."[6] Indeed, the Court has found that Milberg solicited Class members to file Individual Actions by derogating the Class Action, and by cautioning Class members that their interests will be harmed if they remain in the Class Action. Given Milberg's stated aversion to Class participation, for example, one could question its willingness to describe an option such as the Rule 41(a)(2) motion described in Point A (and other issues as they arise) to the affected Individual Action plaintiffs. And for those plaintiffs who decide to participate in the Class, one can reasonably question whether Milberg will be able to reconcile its continued representation of those plaintiffs with the firm's stated goal of achieving a better result for those clients through Individual Actions at the expense of the Class that Milberg views as the "competition" for certain limited assets. See note 5, supra.[7]

It is well-settled that ethical rules prevent an attorney from continuing to represent a client where that representation is likely to involve the lawyer representing differing interests. See DR 5-105(B) ("A lawyer may not continue employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyers' representation of another client, or if it would be likely to involve the lawyer in representing differing interests. . . .") (emphasis added)).[8] Milberg has affirmatively stated that it considers the interests of the individual action plaintiffs and the Class Action to be divergent.

Accordingly, Lead Plaintiff respectfully submits that the Curative Notice suggest that the Individual Action plaintiffs, particularly those with dismissible claims, consult with independent counsel concerning their next steps in this litigation.

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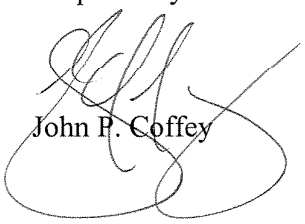
[6] See, e.g., Opposition Of The Public/Private Pension Fund Group To Proposed Changes To The Pretrial/Consolidation Order dated December 16, 2002, at 2 (Milberg takes the position that its clients "could obtain a superior recovery on their claims, above and beyond what recovery could be generated as passive class members in the class action case"); May 23, 2003 letter from William Lerach to Asbestos Workers Local 12 (Milberg "can foresee no circumstances" under which that fund's "passive reliance on the class action case would not result in a ***severe dilution*** of the recovery to which purchasers of the bonds are entitled") (emphasis in original).

[7] The Court has previously noted that the intent of the Individual Actions is to out-race the Class to those assets available to compensate victims of the WorldCom debacle. In re WorldCom Sec. Litig., No. 02 Civ. 3288 (DLC), 2003 WL 22420467, at *32 (Individual Actions "encourage a race to judgment to obtain the limited funds that are available to fund any recovery that plaintiffs may win [in Class Action]").

[8] DR 5-105 is codified at NY. Comp. Codes R. & Regs. tit. 22, § 1200.24(B) (West 2003).

Thank you for your consideration of these matters.

Respectfully submitted,



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