

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Caption (use short title)

Docket Number(s): 04-0219

California Public Employees' Retirement System

Motion for: Issuance of mandate

v.

Set forth below precise, complete statement of relief sought:
Motion for issuance of the mandate of this

Court's May 11, 2004 decision.

WorldCom, Inc., et al.

MOVING PARTY: IES: Citigroup Global Markets Inc. and Lead Plaintiff of the Class
 Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

OPPOSING PARTY: California Public Employees' Retirement System

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Court/Judge/Agency appealed from: United States District Court for the Southern District of New York
Honorable Denise L. Cote

Please check appropriate boxes:

Has consent of opposing counsel:
A. been sought? Yes No
B. been obtained? Yes No

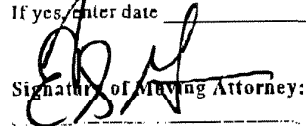
FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No

Is oral argument requested? Yes No
(requests for oral argument will not necessarily be granted)

Requested return date and explanation of emergency:

Has argument date of appeal been set? Yes No
If yes, enter date

Signature of Moving Attorney: 

Date: 5/17/04

Has service been effected? Yes No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk of Court

Date:

By:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,

Plaintiff-Appellant,

v.

WORLDCOM, INC, et al.,

Defendant-Appellees.

No. 04-0219

**JOINT MOTION FOR ISSUANCE OF THE MANDATE
OF THIS COURT'S MAY 11, 2004 DECISION**

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Request for Relief

By Order dated February 3, 2004, this Court directed the district court presiding over this action "to extend the deadline to opt out of the class action, as well as the accompanying deadline by which plaintiffs who have filed individual actions must move to dismiss their actions voluntarily, until at least thirty days after this Court's mandate issues" on the appeal brought pursuant to 28 U.S.C. § 1292(b). On May 11, 2004, this Court issued its judgment on the § 1292(b) appeal, affirming the district court's ruling that individual actions removed as "related to" a bankruptcy need not be remanded to state court under Section 22(a) of the Securities Act of 1933.

Lead Plaintiff Alan G. Hevesi, Comptroller of the State of New York, as Administrative Head of the New York State and Local Retirement Systems, and as sole Trustee of the New York State Common Retirement Fund (the "Lead Plaintiff"), and named plaintiffs the County of Fresno, California, the Fresno County Employees Retirement Association, and HGK Asset Management, Inc. (the "Named Plaintiffs") jointly with Defendants-Appellees Citigroup Inc., Citigroup Global Markets Inc. (f/k/a Salomon Smith Barney Inc.), Citigroup Global Markets Ltd. (f/k/a Salomon Brothers International Inc.) and Jack B. Grubman (the "Citigroup Defendants-Appellees") (collectively, "Movants") respectfully request that this Court direct the Clerk of Court to issue forthwith the mandate of this Court's May 11, 2004 judgment. In the alternative, Movants respectfully request that this Court return to the docket of the district court jurisdiction to set the deadline for putative class members to opt out of the certified class, as well as the accompanying deadline by which plaintiffs who have filed individual actions must move to dismiss their actions voluntarily.

Relevant Background

The appeal to which the instant motion relates arises from the consolidated class action and individual action proceedings stemming from the demise of WorldCom, Inc. ("WorldCom"), alleged to be the largest corporate fraud and accounting scandal in United States history. Indeed, as this Court has observed, "[t]his is not the run-of-the-mill class action, or even the run-of-the-mill securities class action." *Hevesi v. Citigroup Inc.*, Nos. 03-8044, 03-8045, slip op. at 15 (2d Cir. May 7, 2004) (attached hereto as App. A).¹

On January 16, 2004, this Court accepted an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) by a number of public and private pension fund plaintiffs (the "Bondholders") that had brought individual actions alleging violations of the Securities Act of 1933 (the "Securities Act") in connection with their purchases of WorldCom bonds. *Cal. Pub. Employees' Ret. Sys., v. WorldCom, Inc.*, No. 03-8052 (2d Cir. Jan. 16, 2004) (attached hereto as App. C). In their appeal, the Bondholders argued that the district court had erred in holding that their Securities Act claims were removable pursuant to 28 U.S.C. §§ 1334(b) and 1452(a) as claims "related to" a bankruptcy because such claims were not removable under Section 22(a) of the Securities Act.

Concurrent with this appeal, defendants moved the district court to dismiss certain actions filed by the Bondholders. On November 21, 2003, the district court granted a motion to dismiss an individual action based on the statute of

¹ The procedural history of the consolidated WorldCom proceedings has been set forth in several opinions of this Court, and therefore is not repeated here. (App. A; *Cal. Pub. Employees' Ret. Sys., v. WorldCom, Inc.*, No. 04-0219, slip op. (2d Cir. May 11, 2004) (attached hereto as App. B).

limitations defense (the "November 21st Order"). *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431 (S.D.N.Y. 2003). Subsequently, on January 20, 2004, the district court dismissed with prejudice thirty-one additional individual actions and denied the Bondholders' motion to extend the opt-out date by which individual plaintiffs either had to opt out of the class or join the class and withdraw their individual actions (the "January 20th Orders"). *In re WorldCom, Inc. Sec. Litig.*, 02 Civ. 3288 (DLC), 2004 WL 77694 (S.D.N.Y. Jan. 20, 2004); *In re WorldCom, Inc. Sec. Litig.*, 02 Civ. 3288 (DLC), 2004 WL 77879 (S.D.N.Y. Jan. 20, 2004).

On January 21, 2004, this Court issued an order directing the parties to show cause whether "in light of continuing proceedings in the district court...any order of this court should be issued in aid of our jurisdiction over this appeal." *Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, No. 04-0219 (2d Cir. Jan. 21, 2004) (attached hereto as App. D). In response, the Bondholders requested that (a) the individual actions be stayed pending the outcome of the interlocutory appeal, (b) the district court's November 21st Order and January 20th Orders be vacated, and (c) the opt-out date be extended until after this Court decided the appeal.

On February 3, 2004, this Court entered an Order directing the district court to "extend the deadline to opt out of the class action, as well as the accompanying deadline by which plaintiffs who have filed individual actions must move to dismiss their actions voluntarily, until at least thirty days after this Court's mandate issues." *Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, No. 04-0219 (2d Cir. Feb. 3, 2004) (the "February 3rd Order") (attached hereto as App. E). Approximately three months later, on May 11, 2004, this Court issued its judgment on

the Bondholders' appeal, affirming the district court and ruling that cases brought pursuant to the Securities Act are removable where "related to" a bankruptcy. (the "May 11th Decision") (App. B)

In the time period between the issuance of the February 3rd Order and the issuance of this Court's May 11th Decision, the Citigroup Defendants-Appellees reached a settlement agreement with Lead and Named Plaintiffs to settle all claims against them in the class action. See Citigroup Inc. Form 8-K/A dated May 7, 2004 (attached hereto as App. F); *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288, slip op. (S.D.N.Y. May 12, 2004) (attached hereto as App. G). On May 10, 2004, this Court entered an Order returning to the district court the issue of class certification to allow the district court to consider whether to approve or disapprove the settlement. *In re WorldCom, Inc. Sec. Litig.*, No. 03-9350 (2d Cir. May 10, 2004) (attached hereto as App. H).

Argument

Under Federal Rule of Appellate Procedure 41, "[t]he court's mandate must issue seven calendar days after the time to file a petition for rehearing expires, or seven calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later." In its discretion, this Court may shorten the time for issuance of the mandate. See Fed. R. App. P. 41(b) ("The court may shorten or extend the time."); *United States v. Gonzalez Claudio*, 806 F.2d 334, 344 (2d Cir. 1986) (exercising discretion to shorten the time for issuance of the mandate "in view of the acute relevance of the passage of time"); *Ostrer v. United States*, 584 F.2d 594, 598-99 (2d Cir. 1978) (directing that, in the interest of justice, the mandate issue "forthwith").

Pursuant to the February 3rd Order, until this Court's mandate issues, the district court may neither enter an order setting the opt-out date nor effectively make determinations concerning any necessary class notices. Under present circumstances, Movants respectfully submit that this Court should direct the Clerk of Court to issue the mandate of this Court's May 11th Decision forthwith. Alternatively, this Court should return to the docket of the district court jurisdiction to set the deadline for putative class members to opt out of the certified class and the accompanying deadline by which plaintiffs who have filed individual actions must move to dismiss their actions voluntarily.

In light of this Court's May 11th Decision that the Bondholders' individual actions are properly before the federal district court, it is now appropriate for the district court to be permitted to proceed with completing the class certification process by setting a new opt-out deadline and thereby enabling the parties to determine which investors will proceed as members of the class and which will elect to pursue their own individual actions. All of the parties—defendants and plaintiffs alike—have a real need for finality on this issue, especially given that it has been more than seven months since the district court certified a class, more than five months since class notice was initially sent to the absent class members, and more than three months since the original opt-out date of February 20, 2004 passed.² See generally Fed. R. Civ. P.

² Given the outcome of this Court's May 11th Decision, there is a significant risk that the implications of the February 3rd Order will be to delay class proceedings before the district court. For instance, if the Bondholders file a petition for rehearing, a mandate will not issue under Rule 41(b) until this Court rules on that petition. In this case, the opt-out date may be extended for many additional months for no apparent benefit and with the effect of allowing the Bondholders and

23(c) (instructing that the court determine whether or not to certify the class “at an early practicable time”); *Jones v. Ford Motor Credit, Co.*, 358 F.3d 205, 215 (2d Cir. 2004) (noting the importance of early class certification decisions and remanding to the district court to rule promptly on the certification issue).³

Aside from this general interest in finality, there are two principal reasons why the relief sought by Movants should be granted. The first of these reasons is the recent agreement of settlement between the Citigroup Defendants-Appellees and Lead and Named Plaintiffs. The continued extension of the opt-out date may threaten the ability of these parties to finalize their settlement by impairing their ability to certify a definitive class for settlement purposes. Such a delay in finalizing the membership of the class has negative consequences for both plaintiffs and defendants. For plaintiff class members, until the opt-out deadline is set and the class is definitively established, the settlement cannot be finalized and distributions to plaintiff class members cannot be made. As for the Citigroup Defendants-Appellees, until the Bondholders and other prospective individual plaintiffs are compelled to determine whether they will opt out, they are unable to define the universe of claims against them and make judgments concerning potential future liabilities. For these reasons, in the Memorandum of Agreement entered into in connection with their settlement, the Citigroup Defendants-Appellees and Lead and Named Plaintiffs agreed “jointly to provide notice to the Second Circuit Court of Appeals of the execution of the

other prospective individual plaintiffs to delay giving notice of their intent to proceed as members of the class or individually.

³ *Cf. Adair v. Johnston*, No. 2:03 CV 731-T, 2004 WL 938371, at *2 (M.D. Ala. Apr. 27, 2004) (noting that the class certification decision should be made early in

Agreement, and to further provide notice that, until such time as an opinion issues in *California Public Employees' Retirement System v. Bobbitt, et al.*, No. 04-0219, or a fixed opt-out date is established, the Parties will be unable to seek Final Approval of the Settlement.” (App. F ¶18)

The second reason that the relief sought by Movants should be granted is to avoid the unnecessary and wasteful continuation of discovery before the district court as against many of the Bondholders. As noted above, until the opt-out period closes, all defendants (including the Citigroup Defendants-Appellees) cannot know with certainty which individual plaintiffs will proceed apart from the class action and which will voluntarily dismiss and join the class. Accordingly, defendants continue to expend resources taking discovery of the Bondholder plaintiffs. Because many of these Bondholders may ultimately decide to “opt in” to the class, the taking of discovery from them is neither economical nor efficient—especially in light of this Court’s May 11th Decision that the Bondholders’ cases are properly before the district court.

the litigation); *Ardoin v. Stine Lumber Co.*, No. 02 CV 2502, 2004 WL 615338, at *2 (W.D. La. Mar. 17, 2004) (same).

Conclusion

Original

For the foregoing reasons, Movants respectfully request that the Court should direct the Clerk of Court to issue forthwith the mandate of the 2004 judgment or, alternatively, should return to the docket of the district court jurisdiction to set the deadline to opt out of the class action and the accompanying deadline for plaintiffs who have filed individual actions to move to dismiss their actions voluntarily.

Dated: New York, New York
May 17, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Citigroup Defendants-Appellees certifies that this motion complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure ("FRAP") 27(d) and Local Rule 27(a)(1), which provide that motions be double-spaced, reproduced on 8½ by 11 inch paper with margins of at least 1 inch, and not exceed 20 pages.



Emily S. Richman