

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

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

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
Martin London
Brad S. Karp
Eric S. Goldstein
Joyce S. Huang
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

*Attorneys for 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 Ltd.), and Jack B. Grubman*

-and-

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

BERNSTEIN LITOWITZ BERGER &
GROSSMANN LLP
Max W. Berger
John P. Coffey
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 554-1400

*Attorneys for 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 Trustee of the
New York State Common Retirement Fund*

Lead Plaintiff and Named Plaintiffs, on behalf of themselves and the class certified in *In re WorldCom, Inc. Securities Litigation*, Master File No. 02 Civ. 3288 (DLC) (S.D.N.Y.) (the “Class Action”), and the Citigroup Defendants-Appellees, respectfully submit this reply memorandum in further support of their Joint Motion for Issuance of the Mandate of this Court’s May 11, 2004 Decision, filed May 17, 2004 (the “Joint Motion”).

Preliminary Statement

In its February 3, 2004 Order, this Court extended the deadline for class members to request exclusion from the class, and the concomitant deadline for plaintiffs who have filed individual actions to move to dismiss their actions voluntarily, so that those class members potentially affected by the Court’s impending decision concerning remand would be able to consider that decision in deciding whether to opt out of or remain within the class. The members of the class now have the benefit of the Court’s decision, issued May 11, 2004, and thus the purpose of the extension has been fully satisfied. Appellants should not be permitted to use the February 3, 2004 Order to delay indefinitely the resolution of the class’s claims. This Joint Motion thus seeks either (a) issuance of the Court’s mandate with respect to its May 11, 2004 decision, or (b) an order returning 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.

Appellants’ two arguments in opposition to the Joint Motion are meritless. First, Appellants claim that because the issue presented by their appeal concerns subject-matter jurisdiction, it should be “fully and finally resolved” before

Appellants should be required to determine whether to continue to pursue their individual actions or participate as members of the class in the settlement. But both the district court and this Court, in its lengthy, careful May 11, 2004 decision, have determined that subject-matter jurisdiction exists. While Appellants have sought rehearing of the Court's decision, Appellants have presented no case or other authority which suggests that issuance of the mandate, or in the alternative an order returning jurisdiction to the district court to set an opt-out deadline, would be improper or inappropriate here, whether or not Appellants' petition for rehearing is granted.

Second, Appellants' suggestion that the district court's current inability to set a deadline for opt-outs does not delay the finalization of the settlement entered into between the class plaintiffs and the Citigroup Defendants-Appellees — and the distribution of settlement proceeds to the class — is spurious. Until the district court can establish a deadline for opt-outs, no notice of the proposed settlement can be sent to the class, for the obvious reason that any such notice must advise class members of the date by which any requests for exclusion from the class must be submitted. Moreover, the settlement cannot become effective until a release of claims against the Citigroup Defendants-Appellees by the members of the class is approved. Until the opt-out deadline is set, class notices are sent, and the members of the class participating in the settlement are determined, no hearing on the fairness of the settlement can be held, and none of the benefits of the settlement can be realized. Furthermore, despite the proposed settlement, the Citigroup Defendants-Appellants, and indeed all defendants, continue to be subjected to extensive discovery burdens imposed by plaintiffs in the individual actions consolidated for pre-trial proceedings

with the Class Action — even though those individual actions, which are brought by members of the plaintiff class, may be dismissed at the end of the opt-out period. Until the opt-out deadline has passed and the parties have certainty about which separate actions filed by putative class members will and will not go forward, defendants must continue to expend substantial resources in litigating individual actions that may well be dismissed by plaintiffs in favor of participation in the class settlement. Circumstances have changed since the oral argument held more than three months ago, on February 26, 2004: the continued extension of the opt-out period in the Class Action — which as of the date of this filing already has been open for almost six months — now substantially prejudices both the plaintiff class and defendants. We respectfully request that the Joint Motion be granted.

Further Background to the Joint Motion

On October 24, 2003, the district court issued an Opinion and Order in the Class Action granting Lead Plaintiff's motion for certification of a class. *See In re WorldCom, Inc. Securities Litigation*, 219 F.R.D. 267 (S.D.N.Y. 2003). In a detailed Notice of Class Action, dated December 11, 2003 ("Class Notice") (App. 1 hereto), sent to all members of the class reasonably identifiable, and a separate detailed Court-Ordered Notice to All Investors Who Have Filed Individual WorldCom Actions, dated December 11, 2003 ("Individual Notice") (App. 2 hereto), sent directly to all plaintiffs who had filed individual WorldCom actions, the district court informed class members of pertinent information concerning the Class Action, the individual actions, and their rights as members of the class.

Among the information provided in both Notices was that class members who did not request to be excluded from the class by February 20, 2004,

would be bound by decisions and the outcome of the Class Action and could be entitled to participate in any recoveries achieved in the Class Action. (*See* Class Notice at 1, 6-7; Individual Notice at 1.) Other information contained in the Individual Notice included: (a) descriptions of various rulings made by the district court in the individual cases, including its remand ruling of March 3, 2003 and the pendency of the motion brought by certain of the individual plaintiffs for certification of the district court's remand ruling for immediate appeal to this Court (*see* Individual Notice at 3-5); and (b) other important facts regarding the Class Action and the individual WorldCom actions (*id.* at 5-8).

On December 16, 2003, the district court certified the remand orders insofar as they held that individual Securities Act claims can be removed under the bankruptcy removal statute, 28 U.S.C. § 1452, despite the prohibition against removal contained in Section 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a). This Court accepted the interlocutory appeal on January 16, 2004, and entered the Order of February 3, 2004, in aid of its jurisdiction over the appeal of the remand ruling. (*See* App. E to Joint Motion.)

Argument

I. The Court's Purpose in Extending the Opt-Out Period Has Been Accomplished, and Appellants Fail to Provide Any Authority in Support of a Continued Extension of the Opt-Out Period

The purpose of the extension of the opt-out period directed by this Court has been served. On May 11, 2004, this Court held that the anti-removal provision in the Securities Act of 1933, 15 U.S.C. § 77v(a), does not preclude removal of individual actions under the bankruptcy removal statute, 28 U.S.C. § 1452(a). *See Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, No. 04-0219, slip op. at 4 (2d Cir.

May 11, 2004) (App. B to Joint Motion). Having affirmed in full the district court's remand ruling, and having confirmed the existence of subject-matter jurisdiction over the individual actions brought by Appellants that are consolidated for pre-trial proceedings with the Class Action, this Court should allow the district court to oversee the completion of the class certification process by setting a definitive deadline for class members either to opt out of the certified class or to remain within the class.

Appellants note that they have sought rehearing of the Court's May 11, 2004 decision, and that the remand issue involves a question of subject-matter jurisdiction. (Opp. at 4) But Appellants present no authority which would suggest that, the existence of subject matter jurisdiction having been found by the district court and affirmed by this Court, the relief sought by this Joint Motion is improper or otherwise inappropriate.¹

¹ Appellants also argue that the remand decision "should be fully and finally resolved before plaintiffs-appellants should be forced to decide whether to continue to pursue their individual actions or to 'opt in'" to the settlement. (Opp. at 4.) But a large number of individual plaintiffs — including some plaintiffs represented by Appellants' own counsel — have already decided to opt in to the class by moving for voluntary dismissal of their individual actions. Many such motions were made, and granted, before this Court's decision of May 11, 2004. (See App. 3 hereto, consisting of Opinions and Orders granting motions of the following plaintiffs to withdraw their cases: Alaska Electrical Pension Fund, Alaska Permanent Capital Management Company, Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust, Alaska Teamster-Employer Pension Trust, District No. 9, I.A. of M. & A.W. Pension Trust and District No. 9, I.A. of M. & A.W. Welfare Trust, and The National Asbestos Workers Pension Fund (January 26, 2004); Metropolitan Government of Nashville and Davidson County (January 30, 2004); SLS Investors, L.P., et al. (January 30, 2004); McMorgan & Company, IBEW Local 683 Pension Fund Pension Plan and IBEW Local 683 Profit Sharing Annuity Plan (January 30, 2004); UFCW International Union – Industry Pension Fund (February 13, 2004); Teamsters Local 408 Pension Fund (February 18, 2004); Golden Gate Transit Amalgamated Retirement Plan (April 12, 2004); Alameda-Contra Costa Transit Employees' Retirement Plan, Mendocino County Employees'

Indeed, nothing in the Joint Motion affects Appellants' pending petition for rehearing:² the Joint Motion seeks in the alternative, *either* (a) issuance of the mandate; *or* (b) an order returning 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 filed individual actions to move to dismiss their actions voluntarily. Thus, even if this Court should decide to grant further review of its May 11, 2004 decision, the Court should grant the Joint Motion and allow the district court to set a new opt out deadline.

II. Continued Extension of the Opt-Out Period Would Substantially Prejudice the Plaintiffs and Defendants in the Class Action

Rule 23 of the Federal Rules of Civil Procedure provides that district courts should address issues concerning class certification "as soon as practicable." That provision is rooted in sound concerns about efficient case management and fairness to the parties. But in addition to those general concerns, there are compelling reasons in this case why the opt-out deadline should be set now to allow the completion of the class certification process.

Retirement Association, San Diego Employees' Retirement Association, and San Francisco City and County Employees' Retirement System (April 12, 2004); Railways Pension Trustee Company Ltd. (May 4, 2004); Pacific Income Advisors, Inc. (May 10, 2004); eight plaintiffs in Maintenance Employees Teamsters Local 416 Pension Fund, et al. case (May 11, 2004).) Moreover, since the announcement of the settlement and this Court's decision of May 11, 2004, plaintiffs in two additional actions have moved to dismiss their actions in order to participate as members of the class; the district court granted those motions on May 20 and May 28, 2004. (*See* App. 4 hereto.)

² By Order dated June 2, 2004, the Court has instructed that any responses to Appellants' petition for rehearing be submitted by June 10, 2004. The Citigroup Defendants-Appellees will submit any response to Appellants' petition for rehearing at that time.

On May 7, 2004, Lead Plaintiff and the Named Plaintiffs, on behalf of themselves and the plaintiff class, entered into a Memorandum of Agreement with the Citigroup Defendants that provides for a settlement payment of \$2.65 billion, plus interest starting forty-five days after preliminary approval of the proposed settlement, for the benefit of the class. Appellants' claim that no delay of the settlement would result from a continued extension of the opt out period pending completion of any further review of the May 11, 2004 decision this Court (or the Supreme Court) might grant is demonstrably false. No notice of the proposed settlement can be sent to the class until such time as the opt-out date can be set, because the notice must advise class members of the deadline for requesting exclusion from the class. No hearing on final approval of the settlement can take place until after the class notice has been sent and the opt-out deadline has passed. Moreover, the settlement cannot become effective until the district court approves a release of claims by plaintiffs and members of the class in favor of the Citigroup Defendants-Appellees and their related entities. (*See* Memorandum of Agreement at ¶ 11 (App. 5 hereto).) Indeed, even the settlement amount cannot be determined until the opt-out period closes. (*See id.* at ¶ 2.) Thus, if determination of the opt-out deadline must await completion of any further review of the May 11, 2004 decision, the finalization of the class and the settlement, beginning with notice to the class, will be significantly delayed.

Any such further delay will cause substantial prejudice to the plaintiff class and to defendants. Though the parties to the settlement are prepared to move forward immediately, no settlement proceeds can be distributed to class members until the settlement is finally approved by the court. Moreover, until the opt-out period

closes, defendants are forced to engage in extensive discovery in actions which may not continue to exist or to be prosecuted once the opt-out period ends. In view of the proposed settlement, Lead and Named Plaintiffs have withdrawn almost all of their discovery requests to the Citigroup Defendants-Appellees. The bulk of the Citigroup Defendants-Appellees' discovery obligations in the district court now are imposed by plaintiffs in individual actions consolidated for pre-trial proceedings with the Class Action — even though those individual actions, which are brought by members of the plaintiff class, may well be dismissed in favor of participation in the class. (*See supra* note 1.) This wasteful expenditure of the parties' and the district court's resources will continue until the opt-out deadline has been established and the parties have certainty about which separate actions filed by putative class members will and will not go forward.

Conclusion

For the foregoing reasons and those set forth in our other submissions in support of the Joint Motion, Movants respectfully submit that this Court should direct the Clerk of Court to issue forthwith the mandate of this Court's May 11, 2004 judgment or, alternatively, 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.

Dated: New York, New York
June 4, 2004

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP

By:  _____

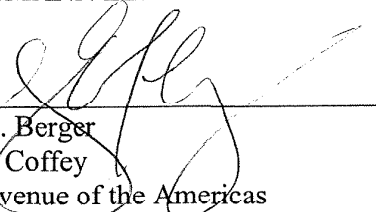
Martin London
Brad S. Karp
Eric S. Goldstein
Joyce S. Huang
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

*Attorneys for 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 Ltd.), and
Jack B. Grubman*

-and-

BERNSTEIN LITOWITZ BERGER &
GROSSMANN LLP

By: _____


Max W. Berger
John P. Coffey
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 554-1400

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

*Attorneys for 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 Trustee of the New York State
Common Retirement Fund*

-and-

BERMAN DEVALERIO PEASE
TABACCO BURT & PUCILLO LLP
Joseph J. Tabacco, Jr.
425 California Street, Suite 2100
San Francisco, California 94104
(415) 433-3200

SCHOENGOLD & SPORN, P.C.
Samuel P. Sporn
19 Fulton Street, Suite 406
New York, New York 10038
(212) 661-1100

*Attorneys for Named Plaintiffs the
County of Fresno, California and the
Fresno County Employees Retirement
Association*

*Attorneys for Named Plaintiff HGK Asset
Management, Inc.*

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 10 pages.


Emily S. Richman