UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLDCOM, INC. SECURITIES LITIGATION	:	MASTER FILE NO. 02 Civ. 3288 (DLC)
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MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF SETTLEMENT WITH THE CITIGROUP DEFENDANTS AND LEAD PLAINTIFF'S PROPOSED PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff, Alan G. Hevesi, Comptroller of the State of New York and the sole Trustee of the New York State Common Retirement Fund ("Lead Plaintiff" or "NYSCRF"), and Named Plaintiffs, County of Fresno, California ("Fresno"), Fresno County Employees Retirement Association ("FCERA"), and HGK Asset Management, Inc. ("HGK") (collectively, "Plaintiffs"), respectfully submit this memorandum of law in support of their motion for final approval of the proposed class action settlement between the Class and the Citigroup Defendants ("Settlement") and the plan of allocation ("Plan of Allocation").[1] As set forth in further detail below and in the accompanying Declaration of Jeffrey W. Golan and John P. Coffey in Support of Final Approval of Settlement with the Citigroup Defendants, Lead Plaintiff' Proposed Plan of Allocation, and An Award of Attorney's Fees and Reimbursement of Expenses (the "Joint Declaration"), through their substantial efforts over the past two years, Lead Plaintiff and the Named Plaintiffs have achieved what they respectfully submit is an extraordinary recovery for the benefit of the Class. Under the

[1] The terms and conditions of the Settlement are contained in the Stipulation and Agreement of Settlement, dated as of July 1, 2004 (the "Stipulation"), the original of which was previously filed with the Court. Unless otherwise defined herein, capitalized terms shall have the meaning ascribed to them in the Stipulation.

Under the terms of the Settlement, all claims asserted against defendants Citigroup Inc., Citigroup Global Markets Inc., formerly known as Salomon Smith Barney Inc., Citigroup Global Markets Limited, formerly known as Salomon Brothers International Limited, and Jack B. Grubman (the "Citigroup Defendants") will be dismissed with prejudice.

The prosecution of this class action ("Action") is continuing with respect to other Defendants in the case, and Plaintiffs are confident that it will lead to the recovery of substantial additional sums either through settlements or at trial for the benefit of the Class. The other Defendants include: (a) former WorldCom directors James C. Allen, Judith Areen, Carl J. Aycock, Max E. Bobbitt, Francesco Galesi, Clifford L. Alexander, Jr., Stiles A. Kellett, Jr., Gordon S. Macklin, John A. Porter, Bert C. Roberts, Jr., John W. Sidgmore, and Lawrence C. Tucker; (b) WorldCom's former outside auditor, Arthur Andersen LLP ("Andersen"); and (c) other underwriters of WorldCom's May 2000 and May 2001 debt offerings, J.P. Morgan Chase & Co., J.P. Morgan Securities, Inc., J.P. Morgan Securities Ltd., Banc of America Securities LLC, Deutsche Bank Alex. Brown Inc. (formerly known as 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 Partners, L.P., Tokyo-Mitsubishi International plc, Westdeutsche Landesbank Girozentrale, BNP Paribas Securities Corp., Caboto Holding SIM S.p.A., Fleet Securities, Inc., and Mizuho International plc. The trial of the Class Action against these Defendants will start on January 10, 2005. The prosecution of the Action against former WorldCom executives Bernard Ebbers, Scott Sullivan, David Myers and Buford Yates is presently stayed due to ongoing criminal proceedings.

standards articulated by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), the Settlement is fair, reasonable and adequate, and warrants the Court's approval. Additionally, the plan of allocation is fair, adequate and reasonable, and should be approved.

PRELIMINARY STATEMENT

The proposed Settlement provides for the payment by the Citigroup Defendants of $2.65 billion in cash to settle all claims asserted against them by the Class, with certain reductions possible based on the level of opt outs, plus interest that began to accrue for the benefit of the Class on September 3, 2004. The Settlement is the second largest settlement in securities class action history, and is by far the largest recovery ever obtained from a party that was not the issuer of the subject securities. Moreover, the Settlement will result in the Class recovering a substantial percentage of their likely recoverable damages against the Citigroup Defendants.

Significantly, the Settlement was achieved only after nearly two years of intensive, hard-fought litigation, which included extensive discovery (commencing even before motions to dismiss were decided); the review and analysis of millions of pages of documents produced by defendants, non-party WorldCom, Inc. ("WorldCom" or the "Company") and numerous third-parties; extensive proceedings relating to class certification (including class discovery, preparation of expert reports, and the briefing of the class certification motion); briefing of the Citigroup Defendants' Rule 23(f) appeal of the Court's order granting class certification; numerous depositions of fact witnesses; and protracted settlement negotiations conducted under the supervision of the Honorable Robert W. Sweet and the Honorable Michael H. Dolinger (the "Settlement Judges").

The Settlement is a particularly excellent result when considered in light of the considerable risks of litigation. Indeed, in light of the issues raised by the Citigroup Defendants' Rule 23(f) appeal of the Court's class certification order, there was a significant risk that Class members who purchased WorldCom common stock could ultimately recover an amount significantly less than the value of the Settlement (more than $1 billion) allocated to those claims. The Citigroup Defendants vigorously disputed the viability of the claims asserted under Section 10(b), arguing that Plaintiffs could not establish materiality, loss causation or scienter because, among other reasons, the Citigroup Defendants were not alleged to have knowledge of, or to participate in, the fraudulent accounting at WorldCom. The Citigroup Defendants also argued that, even if Plaintiffs could establish their liability, the damages traceable to the alleged misconduct were much smaller than Plaintiffs claims and further, under the proportionate fault provisions of the Private Securities Litigation Reform Act ("PSLRA"), the Citigroup Defendants were liable only for a small percentage of those damages. With respect to the claims asserted under Sections 11 and 12(a)(2), the Citigroup Defendants argued that they conducted a reasonable due diligence investigation, and that they were entitled to rely on the audit opinions and comfort letters provided by Andersen with respect to the financial statements included in the registration statements for the May 2000 and May 2001 bond offerings. Any of these arguments, if credited by a jury, could have materially impacted the Class's recovery against these Defendants.

The Settlement is also the product of difficult, adversarial arm's length negotiations between Lead Plaintiff and the Citigroup Defendants and, ultimately, involved the direct participation of New York State Comptroller Alan G. Hevesi and the Chief Executive Officer of Citigroup, Charles O. Prince. These discussions were conducted under the supervision of Judge

Sweet and Magistrate Judge Dolinger. Joint Decl. ¶ 73. The negotiation process itself took place over a period of more than one year, and included the exchange of detailed submissions by the parties and expert damages analyses, as well as numerous settlement conferences. Joint Decl. ¶¶ 73-74. After the Settlement was reached, the Settlement Judges expressed their opinion of the proposed Settlement and plan of allocation as follows:

Statement by the Mediators

> Pursuant to appointment by the Honorable Denise L. Cote, United States District Judge, we have presided over the extensive negotiations between the Parties that led to this Agreement. We can state based on our discussions with the Parties and the information made available to us, that this Settlement was negotiated in good faith and the Settlement and the allocation between the Securities Act and Exchange Act claims are in the public interest.
>
> Robert W. Sweet, U.S.D.J. Michael H. Dolinger, U.S.M.J.

See Joint Decl., Exhibit 3, Notice of Proposed Settlement of Class Action Against the Citigroup Defendants.

Pursuant to this Court's Order of December 12, 2003, a printed Notice of Class Action was sent to potential Class Members beginning December 13, 2003. Further, pursuant to the Court's Hearing Order of July 16, 2004, a Notice of Proposed Settlement of Class Action Against the Citigroup Defendants (the "Notice"), in the form approved by the Court, was mailed to more than four million potential Class Members beginning on August 2, 2004, and a Summary Notice of Proposed Settlement of Class Action Against the Citigroup Defendants (the "Publication Notice"), in the form approved by the Court, was published in the national editions of *The Wall Street Journal* and *The New York Times* on August 10 and 11, 2004, and was further published on the *PR Newswire* and *Bloomberg* News on August 12 and 16, 2004. *See* Joint Decl., Exhibit 5, Affidavit of Shandarese Garr, ¶ 25.[2] The Notice contained a detailed

[2] On July 16, 2004, the Court preliminarily approved the Settlement, set a hearing on November 5, 2004 to

description of the nature and procedural history of the Action, the terms of the Settlement, the average recovery per share and the claims that will be released in the Settlement. The Notice also advised Class Members of their right to exclude themselves from the Class by no later than September 1, 2004, and to object to the Settlement or plan of allocation by no later than October 8, 2004. While the October 8, 2004 deadline has not yet expired, to date not one Class Member has filed an objection to the proposed Settlement or plan of allocation.[3] Joint Decl. ¶ 102.

In sum, when considering the size of the recovery, the substantial risks relating to the continued prosecution of the claims against the Citigroup Defendants with respect to both liability and damages, the issues raised by the Rule 23(f) appeal, the ample discovery that had taken place, and the informed assessments of Lead Plaintiff, Named Plaintiffs and their counsel of the strengths and weaknesses of the claims and defenses thereto, Plaintiffs believe that the Settlement is an excellent result and respectfully request that the Court approve it as fair, reasonable and adequate.

BACKGROUND OF THE ACTION

Submitted concurrently herewith is the Joint Declaration, which provides a detailed description of the history of the litigation, the claims asserted, the investigation and discovery undertaken, the negotiation and substance of the Settlement, and the substantial risks in litigating the claims against the Citigroup Defendants. It is an integral part of this submission and is incorporated herein by reference. Since the Court is intimately familiar with the background of this litigation and the proceedings that have occurred to date, for the sake of brevity Lead

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determine the fairness, reasonableness and adequacy of the Settlement (the "Settlement Hearing") and directed that Notice of the proposed Settlement and the Settlement Hearing be given to the Class. Joint Decl. ¶¶ 97-99.

[3] Should any objections be received, they will be addressed by Lead Counsel in a further submission to the Court of October 22, 2004, per the Hearing Order.

Plaintiff will not repeat here a detailed description of the litigation, but instead respectfully refers the Court to the Joint Declaration.

ARGUMENT

A. The Proposed Settlement Is Fair, Reasonable And Adequate And Should Be Approved

1. Standards for Approval of a Class Action Settlement

"Settlement approval is within the Court's discretion, which 'should be exercised in light of the general judicial policy favoring settlement.'" *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) (citation omitted). In evaluating a proposed settlement under Fed. R. Civ. P. 23(e), the Court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995); *see also Varljen v. H.J. Meyers & Co., Inc.*, No. 97 Civ. 6472, 2000 WL 1683656, at *3 (S.D.N.Y. Nov. 8, 2000). As noted by courts generally, "[t]he arm's-length compromise of a disputed claim has long been favored by the courts." *E.g.*, *Sumitomo*, 189 F.R.D. at 280 (and cases cited therein). *See also Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). This is particularly true of class actions. *Sumitomo*, 189 F.R.D. at 280; *In re Union Carbide Corp. Consumer Prod. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989).

A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arm's-length negotiations conducted by capable counsel, well-experienced in class action litigation arising under the federal securities laws. *See, e.g.*, *Sumitomo*, 189 F.R.D. at 280; *New York & Maryland v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 680-81 (S.D.N.Y. 1991). Moreover, under the PSLRA, a settlement reached under the supervision of an appropriately selected Lead Plaintiff is entitled to an even greater presumption of reasonableness. As stated in the Senate Committee Report issued in support of

the PSLRA, as cited in *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 63-64 (D. Mass. 1996): "Institutions with large stakes in class action share much the same interests as the plaintiff class generally; thus, courts could be more confident settlements negotiated under the supervision of institutional plaintiffs were 'fair and reasonable' …" Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.

The standards governing approval of class action settlements are well-established in this Circuit. In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), the Second Circuit Court of Appeals held that the following were factors to be considered in evaluating a class action settlement:

> (1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 463(citations omitted). *See also County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323-24 (2d Cir. 1990); *Sumitomo*, 189 F.R.D. at 281.

In applying these factors, a court neither substitutes its judgment for that of the parties who negotiated the settlement nor conducts a mini-trial of the merits of the action. *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993). As the Second Circuit stated in *Newman v. Stein*:

> [T]he role of a court in passing upon the propriety of the settlement of a . . . class action is a delicate one . . . . [W]e [recognize] that since "'the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation,' the court must not turn the settlement hearing 'into a trial or a rehearsal for the trial.'"

464 F.2d 689, 691-92 (2d Cir. 1972).

In short, this Court is now asked to determine that the Settlement is within a range which reasonable and experienced attorneys, and a sophisticated institutional Lead Plaintiff, could accept, considering all relevant risks, facts and circumstances in the Action. *See Weinberger*, 698 F.2d at 74; *Grinnell*, 495 F.2d at 455. The range, as defined by Judge Friendly, "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion ...." *Newman*, 464 F.2d at 693.

Lead Plaintiff respectfully submits that the proposed Settlement is eminently fair, reasonable and adequate when measured under the foregoing criteria, represents an excellent result for the Class, and should be approved by this Court.

2. Application of the *Grinnell* Factors Supports Approval of the Settlement

As demonstrated below, the Settlement with the Citigroup Defendants satisfies the criteria for approval of class action settlements articulated by the Second Circuit in *Grinnell*.

a) The Complexity, Expense and Likely Duration of the Litigation

The "complexity, expense and likely duration of the litigation" are factors that the Court should consider in evaluating a proposed settlement for approval. *Grinnell*, 495 F.2d at 463; *In re Drexel Burnham Lambert Group Inc.*, 130 B.R. 910, 927 (S.D.N.Y. 1991). "In evaluating the settlement of a ***securities*** class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain." *Sumitomo*, 189 F.R.D. at 281 (citations omitted) (emphasis added). That statement is certainly true with respect to the claims asserted against the Citigroup Defendants.

As reflected in the Joint Declaration, this prosecution has required one of the most exhaustive and accelerated efforts in the history of securities litigation. The parties have briefed numerous motions, including multiple motions to dismiss, the motion for class certification, motions to sever the so-called "analyst" claims asserted against the Citigroup Defendants,

motions relating to the Court's scheduling and consolidation orders and the "embargoed witnesses," and many discovery motions. Reflecting the magnitude and importance of this litigation, the parties have already briefed multiple appeals to the Second Circuit on a variety of issues, including petitions for writs of mandamus regarding the Court's consolidation order and scheduling order, and the Court's class certification order. Plaintiffs reviewed and analyzed millions of pages of documents, conducted extensive deposition discovery (on many occasions conducting multiple depositions in different states on the same date), and engaged in expert discovery in connection with class certification. Joint Decl. ¶¶ 36-37, 49**.** As reflected by the more than 170,000 hours plaintiffs' attorneys and paralegals spent litigating this case, and the amount of expenses that have been incurred, the litigation effort has been enormous.

This Action has also been one of the most complex cases in securities history. It involves more than thirty-five defendants, a bankrupt issuer, and claims asserted under both the Securities Act and the Exchange Act. As the Court is aware, the so-called "analyst" claims asserted against the Citigroup Defendants involved many novel and complicated issues, including whether (and under what circumstances) the fraud-on-the-market theory of reliance applied to statements and opinions issued by a research analyst.

Further, as evidenced by the effort undertaken to date by Plaintiffs' counsel, absent the Settlement, there would have been significant additional necessary resources and costs expended to prosecute the claims against the Citigroup Defendants through trial and the inevitable appeals of any judgments. *See In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 318 (3d Cir. 1998) (settlement favored where "trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court"). Indeed, if the Citigroup Defendants' success in persuading the Court of Appeals to accept their

Rule 23(f) petition challenging the Court's class certification order had been followed by a victory on the merits of that appeal, the parties potentially faced further extensive and protracted proceedings related to class certification. In contrast, the Settlement offers the opportunity to provide definite recompense to the Class now, rather than await the uncertain outcome prompted by the effort and time devoted to summary judgment motions, trial and likely appeals.

b) The Response of the Class

While the deadline for filing objections is October 8, 2004, the reaction of the Class to date supports approval of the Settlement. As the cases report, a positive reaction of the Class to the proposed Settlement is a further factor favoring its approval by a court. *See Grinnell*, 495 F.2d at 462 (approving settlement where only twenty objectors appeared from group of 14,156 claimants); *RMED International, Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587, 2003 WL 21136726, at *1 (S.D.N.Y. May 15, 2003). Here, more than four million copies of the Notice were mailed directly to brokers and prospective members of the Class. *See* Garr Aff. (Exhibit 5 to Joint Decl.) ¶ 28.[4] In addition, the Publication Notice appeared in *The Wall Street Journal, The New York Times, PR Newswire* and *Bloomberg News* on August 10-12 and 16, 2004. *Id.* ¶ 25. Despite the extensive notice that has been provided, no objections to the proposed Settlement from any Class member have been received to date, and only a fraction of the Class

[4] Rule 23(c)(2), Fed. R. Civ. P., requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974) (class notice designed to fulfill due process requirements).

The Notice, as approved by the Court in the Hearing Order, was sent to all identifiable potential Class Members. *See* Garr Aff. ¶¶ 17-28. It described the Action, the terms of the Settlement, the estimated average recovery per share if there were a pro rata distribution of the New Settlement Fund, and Lead Counsel's fee and expense application. The Notice also explained Class Members' rights and procedures for objecting to the Settlement and/or the fee and expense application and the right of Class Members to appear at the Settlement Hearing. Thus, the Notice disseminated to Class Members contained all information required by § 21D(vi)(7) of the PSLRA, and is more than adequate to meet the due process and Rule 23(c)(2) and (e) requirements for providing notice to the Class.

has opted out.[5] Joint Decl. ¶ 102. Moreover, in recent months a number of Plaintiffs who filed individual actions decided to dismiss their individual cases with prejudice and re-join the class. In sum, Lead Plaintiff respectfully submits that the reaction of the Class to the Settlement appears to be overwhelmingly positive, and is another factor militating in favor of approval of the Settlement.

c) The Stage of the Proceedings and Amount of Discovery Completed

"[T]he stage of the proceedings and the amount of discovery completed" are other *Grinnell* factors to be considered in determining the fairness, reasonableness and adequacy of a settlement. *Grinnell*, 495 F.2d at 463. This criteria is easily met in the instant case. Prior to entering into the Settlement, Lead Counsel had extensively analyzed and investigated the events and transactions alleged in the Action, reviewed and analyzed millions of documents produced by the Citigroup Defendants and others, took depositions of witnesses affiliated with the Citigroup Defendants and others, and retained and consulted with expert witnesses and consultants in numerous fields, including damages, forensic accounting, investment banking, due diligence, and analyst reports and valuations. *See* Joint Decl. ¶¶ 73-75. Lead Plaintiff and Lead Counsel engaged in sufficient document discovery and sufficient discussions about the merits of the Action to evaluate fully the merits of the claims and the obstacles to success. *In re Medical X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *4 (E.D.N.Y. Aug. 7, 1998). *See also In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 591 (S.D.N.Y. 1992)

[5] WorldCom had approximately three billion shares of stock outstanding during the Class Period, and issued approximately $17 billion worth of publicly-traded debt securities during that same period. While plaintiffs received approximately 15,000 requests for exclusion, that appears to represent a very small percentage when measured against the number of Class members and the number of Notices mailed to potential Class members. As noted above, if the value of the claims of opt outs exceeds a certain amount, pursuant to the Stipulation the Settlement Amount would be reduced. At this time, however, no determination has been made concerning whether any reduction is required under the Stipulation.

("The compromise reached by class counsel has been neither arbitrary nor premature, but formed after careful investigation and weighing of facts …").

In this case, it can truly be said that the parties "have a clear view of the strengths and weaknesses of their cases." *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986). Likewise, Lead Plaintiff was able to make an informed decision of the merits of the Settlement, and the Court should give great weight to this consideration. *See* Joint Decl. ¶¶ 93, 96; *see also* Declaration of Alan P. Lebowitz, General Counsel to the Comptroller of the State of New York, in Support of Final Approval of Settlement with the Citigroup Defendants, Lead Plaintiff's Proposed Plan of Allocation, and An Award of Attorney's Fees and Reimbursement of Expenses ("NYSCRF Decl."), Exhibit 4 to Joint Decl., ¶¶ 10-12. And, as noted above, the Settlement Judges – who many times discussed with Lead Plaintiff and Lead Counsel the strengths and weaknesses of the claims against the Citigroup Defendants – have also concluded that the Settlement is in the best interests of the Class.

d) Risks Involved in Establishing Liability and Damages, and in Maintaining the Class Action Through Trial

Grinnell holds that, in assessing the fairness, reasonableness and adequacy of a settlement, courts should consider such factors as the "risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial." 495 F.2d at 463 (citations omitted). Here, these factors strongly support approval of the Settlement.

Because the Action is continuing against the non-settling defendants, it would not be appropriate to discuss the specific risks identified relating to the establishment of liability and damages. However, as stated in the Notice, there are certain unassailable facts and risks that had to be considered by Plaintiffs as factors in assessing the sufficiency of the Settlement. For example, with respect to the Securities Act claims, the Citigroup Defendants vigorously disputed

any liability, and in particular had asserted a "due diligence" defense with respect to those claims. With respect to the Exchange Act claims, plaintiffs would have had to establish that the Citigroup Defendants acted with scienter, or intent to defraud. The Citigroup Defendants argued that plaintiffs could not establish scienter because they had no knowledge of, or participation in, the accounting fraud at WorldCom. While plaintiffs believed that they could establish defendants' scienter, they could not dismiss the possibility that a reasonable jury could conclude that the Citigroup Defendants did not act with intent to defraud.

Lead Plaintiff also faced serious risks in connection with its Section 10(b) claims with respect to establishing materiality and loss causation. With respect to materiality, the Citigroup Defendants argued that there was no evidence that statements made in analyst reports had any impact on the price of WorldCom securities, and noted that WorldCom stock was declining for most of the Class Period, notwithstanding defendants' positive statements. Materiality is a complex and delicate area of the law, and Lead Plaintiff would bear the burden of proving that the alleged misrepresentations "assumed actual significance in the deliberations of the reasonable shareholder." *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 379 (S.D.N.Y. 1998). And, as demonstrated by the Second Circuit opinion in support of granting approval to the Citigroup Defendants' Rule 23(f) appeal, there was a substantial risk that a jury (or court) could conclude that the statements made in analyst reports were not material to the Class. *Hevesi v. Citigroup Inc.*, 366 F.3d 70 (2d Cir. 2004).

With respect to loss causation, the Citigroup Defendants contended that Lead Plaintiff would not be able to show that their conduct caused Plaintiffs' losses. The Citigroup Defendants argued that the price of WorldCom securities did not decline when certain facts regarding Grubman were disclosed, and further argued that investors had previously been on notice of

those facts. While Lead Plaintiff believes it had arguments to combat these points and would establish loss causation, this was another risk faced by the Class.

Lead Plaintiff also faced risks in proving the amount of damages. As an initial matter, with respect to the fraud claims asserted against the Citigroup Defendants, plaintiffs faced significant risks that a jury would conclude that these defendants were only liable (if at all) for a small percentage of plaintiffs' damages. Indeed, given the PSLRA's proportionate liability provisions, under which a defendant may be obligated to pay only for that portion of damages for which that defendant is held responsible, and considering the fact that a number of other defendants in this action (and certain non-parties) pled guilty to securities fraud, Lead Plaintiff believes that it was highly likely that a jury could place a high proportion of liability on persons and entities other than the Citigroup Defendants, including WorldCom itself.

Moreover, in securities cases, damages are determined by expert testimony. The inevitable "battle of the experts" would be especially pronounced in terms of determining the Exchange Act damages, given the myriad issues that exist with respect to materiality, loss causation and fraud-on-the-market. Lead Plaintiff is cognizant of the fact that, at trial, a wide divergence would exist between Lead Plaintiff's and the Citigroup Defendants' experts. Each of the Citigroup Defendants' experts would present sophisticated analyses and methodologies for calculating damages, as they related not only to the statements of WorldCom but also the research reports issued by Salomon and Grubman. It is difficult to predict which testimony or methodology might be accepted by the jury or which might simply be rejected by a jury as inherently speculative and unreliable. *See In re American Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) (stating that "[i]n such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who

could minimize or eliminate the amount of Plaintiffs' losses"); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997) ("damages are a matter for the jury, whose determinations can never be predicted with certainty"), *aff'd*, 117 F.3d 721(2d Cir. 1997).

Finally, in this case, there was a very real possibility that Plaintiffs would not have been able to maintain a Class through trial, at least with respect to the claims based on the research reports issued by Salomon and Grubman. While Plaintiffs believe that class action treatment of those claims is proper, and that the ruling of this Court was appropriate based on the record before it, the fact is that at the time the Settlement was reached the Court of Appeals had granted the Citigroup Defendants' petition under Rule 23(f) for immediate review of this Court's class certification ruling in this regard. Defendants' Rule 23(f) petition challenged the application of the fraud-on-the-market theory of reliance to research analysts generally, and the application of that theory in the context of this particular case. Had the Second Circuit ruled as a matter of law that the fraud-on-the-market theory did not extend to research analysts or should not have applied in this case, that ruling would have been devastating to plaintiffs' ability to obtain any meaningful recovery for the Class' Exchange Act claims.

The recent decision in *DeMarco v. Lehman Brothers, Inc.*, 222 F.R.D. 243 (S.D.N.Y. 2004), in which Judge Rakoff held that plaintiffs had failed to carry their burden of demonstrating that the fraud-on-the-market theory should apply to the analysts' statements, illustrates the risk that Plaintiffs faced in seeking to maintain on appeal the Class as certified by this Court on October 24, 2003. In that action, the court denied class certification, holding that plaintiffs had failed to establish that the analysts' statements had a material impact on the price of the stock – in other words, plaintiffs failed to show that the analyst had moved the market, and thus, they were not entitled to the fraud-on-the-market presumption of reliance. *DeMarco*, 222

F.R.D. at 249. While Lead Plaintiff believes that the facts and record in this Action are distinguishable from the facts and record in *DeMarco v. Lehman Brothers*, there is no doubt that this was a very significant risk for plaintiffs.

e) Collectability and the Ability of Defendants to Withstand a Greater Judgment

Plaintiffs recognize that Citigroup is a very substantial company, with enormous resources and profit-generating capabilities, so this factor was not a consideration in Lead Plaintiff's decision to enter into the Settlement.

f) The Range of Reasonableness of the Settlement Amount in Light of the Best Possible Recovery and in Light of All Risks of Litigation

In order to calculate the "best possible" recovery, the Court must assume complete victory on both liability and damages as to all class members on every claim asserted against each defendant in the Action. Courts agree that the determination of a "reasonable" settlement "is not susceptible of a single mathematical equation yielding a particularized sum." *In re PaineWebber*, 171 F.R.D. at 130 (citation omitted); *In re Union Carbide*, 718 F. Supp. at 1103. Rather, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d at 693; *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971). The Second Circuit stated that "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455. The Second Circuit further explained that, "[i]n fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at 455 n.2.

Despite the obstacles facing Lead Plaintiff on the issues of liability and damages, Lead Plaintiff believes that it would be able to prove its claims and obtain a verdict for substantial damages for the members of the Class. However, such a victory was no sure thing. When the benefits of this immediate guaranteed recovery is weighed against the risks of continued litigation against these defendants, it is clear that approval of the Settlement is warranted.

Above all, the Settlement provides for payment to Class members now, not some wholly speculative payment of a hypothetically larger amount years down the road. "[M]uch of the value of a settlement lies in the ability to make funds available promptly." *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985), *modified on other grounds*, 818 F.2d 179 (2d Cir. 1987). Given the obstacles and uncertainties attendant to this complex litigation, Lead Plaintiff submits that the Settlement is well within the range of reasonableness, and is unquestionably better than the other possibilities — which could have been little or no recovery at all.

Indeed, the Settlement yields a significant recovery for the Class both in its absolute terms and as a percentage of the amounts that Lead Plaintiff estimated to be the damages in the case. As stated in the Notice, Lead Plaintiff estimated that the damages against the Citigroup Defendants stemming from the Securities Act claims against them were approximately $3.7 billion. The $1.4575 billion allocated to Class members with Securities Act claims under the plan of allocation being proposed by Lead Plaintiff and the Named Plaintiffs is roughly 36% of the total estimated damages – a very significant percentage of plaintiffs' estimated damages, which the Citigroup Defendants would clearly have opposed vigorously as the appropriate amount of damages for these claims.

With respect to the Section 10(b) claims against the Citigroup Defendants, Lead Plaintiff recognized that these claims carried with them a higher risk that a jury would not find liability, and that plaintiffs' estimate of the potential damages, which measured in the tens of billions of dollars, would have been vigorously opposed by the Citigroup Defendants, who could have put forward at trial arguments that total damages were substantially smaller. As noted above, Lead Plaintiff also recognized that the Class faced the possibility that the class certification ruling with respect to the claims against the Citigroup Defendants based on the analyst reports might not have survived the appeal of that ruling, and that the amount of inflation in the market price of WorldCom's stock that a jury might have attributed to the Grubman reports may have been quite small.

Lead Plaintiff also recognized that, because of the proportionate fault requirements of the PSLRA, there was a significant risk that a jury would conclude that the Citigroup Defendants were liable only for a small percentage of plaintiffs' damages. Thus, for example, while plaintiffs' damages expert estimated that damages suffered by Class members who purchased WorldCom stock were in the tens of billions of dollars, given the number of additional parties and non-parties (including WorldCom itself) who are alleged to have participated in or orchestrated the fraud at WorldCom (including those senior officers who pled guilty to securities fraud), a jury could conclude that the Citigroup Defendants were responsible for more than a fraction of plaintiffs' total damages. Ultimately, of course, the percentage of fault a jury would assign to the Citigroup Defendants was uncertain, and a significant risk. In these circumstances, the percentage recovery for the amount allocated for Class members with Section 10(b) claims, the sum of $1.1925 billion, must also be seen as a significant recovery, both in its absolute term, and as a percentage of the likely recoverable damages for this claim.

Accordingly, each of the *Grinnell* factors discussed above supports approval by this Court of the Settlement.

3. The Proposed Settlement Is The Product Of Informed Arm's-Length Negotiations And Is Presumptively Fair

"In appraising the fairness of a proposed settlement, the view of experienced counsel favoring the settlement is 'entitled to great weight'. * * * There is thus a strong initial presumption that the compromise as negotiated herein under the [c]ourt's supervision is fair and reasonable." *In re Michael Milken*, 150 F.R.D. at 54 ; *see also In re Union Carbide*, 718 F. Supp. at 1103.

As the court noted in approving the settlement in *In re Sumitomo Copper Litig.*:

> So long as the integrity of the arm's-length negotiation process is preserved ... ***a strong initial presumption of fairness attaches to the proposed settlement***.' *In re PaineWebber*, 171 F.R.D. at 125. As likewise stated by the *Manual for Complex Litigation*, a ***'presumption of fairness, adequacy and reasonableness*** may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery**.'** *Manual for Complex Litigation*, Third ¶ 30.42 (1995).

189 F.R.D. at 280-81 (emphasis in original). As in *Sumitomo*, the parties here negotiated the Settlement at arm's-length. Thus, the presumption of fairness "clearly attaches here."

As discussed above, the Settlement was negotiated at arm's-length between Lead Counsel and counsel for the Citigroup Defendants and, ultimately, between the two principals on each side, Comptroller Hevesi and Mr. Prince. The negotiations were conducted under the close supervision and guidance of the Settlement Judges, who monitored them both for their progress and for the propriety of the presentations made by each side to the other. *See* Joint Decl. ¶¶ 73-74, 76-77. As cited above, the Settlement Judges have opined that the Settlement was "negotiated in good faith" and "in the public interest." Moreover, Lead Plaintiff and the Named Plaintiffs, and their counsel, who conducted the negotiations on behalf of Plaintiffs, were

thoroughly conversant with the strengths and weaknesses of the claims against the Citigroup Defendants (*e.g.*, NYSCRF Decl. ¶ 10) and, Lead Cuonsel, like other plaintiffs' counsel who assisted in the prosecution of the Action, have many years of experience in conducting complex securities class action litigation.

As Judge Sweet noted in another context, where, as here, "[t]he process by which the parties reached the Proposed Settlement[] was arm's-length and hard fought by skilled advocates," the Settlement is deserving of the Court's approval. *In re NASDAQ Market-Makers*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998). Accordingly, Lead Plaintiff and Lead Counsel recommend that the Settlement be approved by this Court.

B. The Plan Of Allocation Is Fair And Reasonable

Under Rule 23, approval of a plan for allocating settlement proceeds among class members is "governed by the same standards of review applicable to approval of the settlement as a whole: the plan must be fair, reasonable and adequate." *In re Oracle Sec. Litig.*, No. C-90-9031-VRW, 1994 WL 502054, at *1 (N.D. Cal. Jun. 18, 1994); *accord In re Computron Software, Inc. Sec. Litig.*, 6 F. Supp.2d 313, 321 (D.N.J. 1998); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284-85 (9th Cir. 1992). "A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable." *In re Oracle*, 1994 WL 502054, at *1. As numerous courts have held, a plan of allocation need not be perfect. *RMED Int'l., Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587 (PKL RLE), 2000 WL 420548, at *2 (S.D.N.Y. Apr. 18, 2000) ("aggregate damages in securities fraud cases are generally incapable of mathematical precision.") (citing *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1182 (N.D. Cal. 1993)); *see also In re Computron Software, Inc. Sec. Litig.*, 6 F. Supp.2d 313, 320 (D.N.J. 1998); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284-85 (9th Cir. 1992).

The law in this Circuit is in full accord. In *Maley v. Del Global Technologies Corp.*, 186 F. Supp.2d 358, 367 (S.D.N.Y. 2002), the court stated: "To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized – namely, it must be fair and adequate." Similarly, in *In re NASDAQ Market-Makers Antitrust Litigation*, 2000 WL 37992, *2 (S.D.N.Y. Jan. 18, 2000), Judge Sweet noted: "An allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' Class Counsel." *See also In re PaineWebber Limited P'ship Litig.,* 171 F.R.D. 104, 129 (S.D.N.Y. 1997); *In re Lloyd's American Trust Fund Litig.*, 2002 WL 31663577, *18 (S.D.N.Y. Nov. 26, 2002).

Here, the plan of allocation was prepared after careful analysis of the potential damages that plaintiffs might obtain based on the various claims against the Citigroup Defendants, and the risks of establishing both liability and damages on the claims against the Citigroup Defendants in the amounts claimed by plaintiffs. In *Maley v. Del Global*, 186 F. Supp.2d at 367, Judge McMahon wrote: "The proposed Plan of Allocation, which was devised by experienced plaintiffs' counsel who are familiar with the relative strengths and weaknesses of the potential claims of Class members, satisfied the same standards of fairness, reasonableness, and adequacy that apply to the overall settlement." The same reasoning applies here.

In addition, however, the proposed Plan of Allocation was further the subject of significant discussion, through counsel, between the Lead Plaintiff NYSCRF, which suffered its losses primarily as a result of purchases of WorldCom stock, and Named Plaintiffs Fresno, FCERA and HGK, whose losses resulted from purchases of WorldCom bonds issued in the May 2000 and May 2001 offerings. The Citigroup Defendants played no role in the allocation process. As this Court determined in the class certification ruling, the existence of diligent class

representatives with claims under the Securities Act and the Exchange Act serves as a further protection that all members of the Class would be treated fairly. *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 286-87 (S.D.N.Y. 2003). The Plan of Allocation was also an important issue discussed and considered by Lead Plaintiff and Lead Counsel, based in part on the damages calculations provided to Plaintiffs and their counsel by the expert consulting firm, Forensic Economics, which calculated damages based on the statutory measures set forth in Section 11 of the Securities Act and the out-of-pocket measure of damages required under Section 10(b) of the Exchange Act.

The resulting plan provides 55% of the total Settlement Amount to claims of persons who purchased bonds issued by WorldCom in the May 2000 and May 2001 bond offerings (roughly $335 million and $1.122 billion, respectively), and 45% to persons who purchased WorldCom stock and other publicly traded WorldCom securities over the course of the Class Period (roughly $1.1925 billion). Lead Plaintiff and the Named Plaintiffs respectfully submit that this plan reasonably and fairly compensates all members of the Class, and should also be approved.

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests this Court approve the Settlement as fair, reasonable and adequate, and the Plan of Allocation as fair and reasonable.

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Respectfully Submitted,

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