

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLDCOM, INC.	:	MASTER FILE NO.
SECURITIES LITIGATION	:	02 Civ. 3288 (DLC)
	:	
<hr/>		
This Document Relates to	:	
02 Civ. 3288	:	02 Civ. 4990
02 Civ. 3416	:	02 Civ. 5057
02 Civ. 3419	:	02 Civ. 5071
02 Civ. 3508	:	02 Civ. 5087
02 Civ. 3537	:	02 Civ. 5108
02 Civ. 3647	:	02 Civ. 5224
02 Civ. 3750	:	02 Civ. 5285
02 Civ. 3771	:	02 Civ. 8226
02 Civ. 4719	:	02 Civ. 8227
02 Civ. 4945	:	02 Civ. 8228
02 Civ. 4946	:	02 Civ. 8229
02 Civ. 4958	:	02 Civ. 8230
02 Civ. 4973	:	02 Civ. 8234
	:	
	:	

**LEAD PLAINTIFF'S RESPONSE TO MOTION OF INDIVIDUAL
ACTION LIAISON COUNSEL FOR AN ORDER AWARDING
FEES AND EXPENSES TO LIAISON COUNSEL FROM THE
CLASS SETTLEMENT FUND**

**BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP**
Max W. Berger (MB-5010)
John P. Coffey (JC-3832)
Steven B. Singer (SS-5212)
Chad Johnson (CJ-3395)
Beata Gocyk-Farber (BGF-5420)
John C. Browne (JB-0391)
Jennifer L. Edlind (JE-9138)
David R. Hassel (DH-0113)
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400

BARRACK, RODOS & BACINE
Leonard Barrack
Gerald J. Rodos
Jeffrey W. Golan
Mark R. Rosen
Jeffrey A. Barrack
Pearlette V. Toussant
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 Co-Lead Counsel for the Class*

TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT	1
II.	ARGUMENT	3
III.	CONCLUSION.....	7

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”), respectfully submits this memorandum in response to the motion of liaison counsel for the entry of (i) an order awarding fees and expenses to liaison counsel from the Class settlement fund, and (ii) a set-aside order in the individual actions.

I. PRELIMINARY STATEMENT

The law firm of Lowey Dannenberg Bemporad & Selinger, P.C., Liaison Counsel for the Individual WorldCom Action Plaintiffs (hereafter “IA Liaison Counsel”), has moved this Court for entry of two orders: (1) one seeking fees and expenses from the Settlement Fund established for the benefit of the Class through the Settlement between and among Lead Plaintiff, the Named Plaintiffs and the Citigroup Defendants, filed July 1, 2004; and (2) a second seeking a set-aside from any recoveries achieved in the Individual WorldCom Actions in order to permit IA Liaison Counsel to apply to the Court for an award of fees and expenses out of the sequestered funds. Lead Plaintiff believes that the concept that IA Liaison Counsel should be paid for its efforts as the Individual Action Plaintiffs’ Liaison Counsel has merit, but opposes having the Class subsidize the Individual Action Plaintiffs by paying any part of the fees and expenses that the Individual Action Plaintiffs should fully bear.

The appointment of IA Liaison Counsel – as a general matter, and specifically with respect to the appointment of the Lowey Dannenberg firm – came about through a suggestion of the Individual Action Plaintiffs, which was adopted by the Court. *See* Transcript of Proceedings, May 21, 2003, at 14, 19. Lead Plaintiff acknowledges the significant services that IA Liaison Counsel has rendered since being appointed as the

Individual Action Plaintiffs' Liaison Counsel. Indeed, on behalf of Lead Plaintiff, the undersigned Lead Counsel has consistently expressed its appreciation for the job that IA Liaison Counsel has done in terms of coordinating the efforts of the Individual Action counsel with the efforts of Lead Counsel, and representing the positions of the Individual Action Plaintiffs before this Court.

Based on the foregoing, the papers submitted by IA Liaison Counsel, and the precedent cited in Part B of IA Liaison Counsel's brief (pages 9-12), Lead Plaintiff notes its belief that to the extent there are recoveries achieved by the Individual Action Plaintiffs, IA Liaison Counsel should be reimbursed for its services as the Individual Action Plaintiffs' Liaison Counsel. Paragraphs 7, 10 and 11 of the Affidavit of Neil L. Selinger chronicle the many services that he and his firm provided to the Individual Action Plaintiffs. As Mr. Selinger states, he has, *inter alia*, acted as the spokesperson for IA counsel on matters of significance to the IA cases; negotiated with defendants on behalf of all IA counsel regarding discovery and scheduling matters; coordinated the preparation and filing of *amicus* briefs in connection with the first two phases of motion practice directed to complaints in the Individual Actions; and coordinated IA counsel's participation in document productions and depositions. Lead Plaintiff believes that these actions, undertaken at the behest of the Individual Action Plaintiffs, may reasonably be compensated from any recoveries obtained by any of the Individual WorldCom Action Plaintiffs.

However, Lead Plaintiff does not believe that any portion of the Citigroup Settlement Fund – which was negotiated and achieved by Lead Plaintiff and Lead Counsel for the benefit of the Class – should be paid to counsel who was not selected by

Lead Plaintiff to assist in the Class' efforts and who did not represent (or provide services for the benefit of) the Class. The fact is that IA Liaison Counsel represents entities that have opted out of the Class and are seeking an individual recovery separate and apart from the Class, and that its services as IA Liaison Counsel have been undertaken on behalf of its own clients and other entities that have also opted out of the Class, and are also seeking individual recoveries separate and apart from the Class. Such services were carried out in order to provide the Individual Action Plaintiffs with the full and fair opportunity to be heard and to participate in discovery matters envisioned by this Court at the May 21, 2003 Hearing (*e.g.*, Transcript at 15-16), but such services were not undertaken to benefit the Class. Moreover, to the extent the services of IA Liaison Counsel or the Individual Action Plaintiffs arguably assisted the Class, Lead Plaintiff respectfully submits that this was more than offset by the substantial benefits the Individual Action Plaintiffs received from Lead Counsel's efforts. As a result, Lead Plaintiff does not believe that any payment should be made from the Settlement Fund obtained for the benefit of the Class to a counsel representing, and acting on behalf of, the Individual Action Plaintiffs.

II. ARGUMENT

Attorneys who represent a class and achieve a benefit for the class members are entitled to be compensated for their services. The Supreme Court has recognized that "a lawyer who recovers a common fund for the benefit of persons other than ... his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Savoie v. Merchants Bank*, 84 F.3d 52, 56 (2d Cir. 1996). IA Liaison Counsel cites no case in which a liaison counsel for individual

plaintiffs has been awarded a fee from a recovery obtained in a parallel class action. Indeed, such an award would conflict with the principle stated in *Boeing*, since the services IA Liaison Counsel provided were undertaken to benefit the Individual Action Plaintiffs, and not the Class.

IA Liaison Counsel cites *New Jersey Dep't of Environmental Protection v. Gloucester Environmental Management*, 138 F.R.D. 421, 428 (D.N.J. 1991), for the proposition that a court “has the clear authority to arrange parties into coordinated groups and to require parties to compensate Liaison Counsel for administrative services on behalf of the group’s members.” But that case arose from the failure of certain members of the “Transporter Group” of defendants in that case to pay their per capita share of their own liaison counsel’s fees and expenses for work incurred in its liaison counsel role. As the court stated, compensation of liaison counsel “was to be paid by the respective group members.” *Id.* at 427. Thus, while the case may have relevance to the set-aside sought by IA Liaison Counsel, it is not supportive of IA Liaison Counsel’s request for a fee from the Class Settlement. Here, IA Liaison Counsel was appointed to provide services on behalf of the Individual Action Plaintiffs – not on behalf of the Class, who already had Lead Counsel directing the Litigation for the benefit of the Class since Lead Counsel’s appointment by Order of August 15, 2002.

IA Liaison Counsel further cites *In re Independent Energy Holdings PLC Securities Litigation*, 302 F. Supp.2d 180 (S.D.N.Y. 2003), in support of its motion seeking a fee from the Class Settlement. However, in that case, the services were provided by counsel who purported to act on behalf of the class, and the court found that the initial complaint filed by that counsel, who was not selected to lead the class

litigation, had provided a benefit to the class (and was therefore compensable from the recovery obtained for the class) because portions of the initial complaint were utilized in the consolidated complaint later filed by lead counsel. Notably, as well, the court held that fees for work allegedly performed by the law firm after the appointment of lead counsel were non-compensable. *Id.* at 182 (citing *In re Auction Houses Antitrust Litigation*, 2001 WL 210697, at *4 (S.D.N.Y. Feb. 26, 2001) (“Nor is there any reason for the class as a whole to compensate ... lawyers for individual class members for keeping abreast of the case on behalf of their individual clients”).¹

Here, IA Liaison Counsel’s efforts were not undertaken for the benefit of the Class. They were undertaken for the benefit of Individual Action Plaintiffs who have decided to opt out of the Class and pursue their own cases, and it is from any recoveries achieved by the Individual Action Plaintiffs that IA Liaison Counsel should look for compensation for its efforts in this regard.²

¹ Other cases cited by IA Liaison Counsel are similarly not supportive of this portion of its motion. *See Smiley v. Sincoff*, 958 F.2d 498 (2d Cir. 1992) (ruling that a district court has the discretion to apportion fees in a mass tort case to the members of a plaintiffs’ steering committee that coordinated all liability aspects of the litigation on behalf of all plaintiffs in the various actions); *In re Diet Drugs Products Liability Litigation*, 2001 WL 497313 (E.D. Pa. May 9, 2001) (citing earlier sequestration order to provide for costs and fees that a plaintiffs’ management committee incurred in coordinating discovery and other activities of all plaintiffs in the MDL and state-federal coordinated proceedings); *In re FTC Line of Business Reprot Litigation*, 626 F.2d 1022 (D.C. Cir. 1980) (noting principle that liaison counsel for similarly situated plaintiffs can be awarded fees and expenses from the group of plaintiffs for whom that counsel is serving as liaison counsel).

² Lead Plaintiff recognizes that a number of investors that filed individual cases subsequently moved to dismiss their actions without prejudice to remaining as members of the Class, and that such motions were granted. However, that is no basis for allowing IA Liaison Counsel to collect a fee from the Class Settlement. Indeed, it was Lead Counsel who first suggested – after the dismissal of various claims raised in Individual

On October 24, 2003, the Court certified this consolidated case as a Class Action on behalf of persons and entities that purchased or otherwise acquired publicly traded securities of WorldCom during the period from April 29, 1999 through June 25, 2002 (the “Class Period”), and who were injured thereby. *In re WorldCom Sec. Litig.*, 219 F.R.D. 267, 275, 302 (S.D.N.Y. 2003). At no time prior to or after the Class decision did Lead Plaintiff ask IA Liaison Counsel to provide any services for the benefit of the Class, and IA Liaison Counsel did not, in fact, provide such services for the benefit of the Class.

On May 7, 2004, solely as a result of negotiations conducted on behalf of Lead Plaintiff, the Named Plaintiffs, and other members of the Class, under the supervision of the Settlement Judges, Lead Plaintiff achieved a settlement with the Citigroup Defendants that provides for the payment of \$2.65 billion, with a potential for a reduction based on the number of opt outs, for the benefit of the Class. IA Liaison Counsel was not part of the process that led to the recovery achieved for the Class.

Clearly, IA Liaison Counsel did consult with Lead Counsel on many aspects of the litigation, and did serve as the conduit at various points for Individual Plaintiffs’ counsel to coordinate their thoughts about discovery and other matters with Lead Counsel, and vice-versa. However, IA Liaison Counsel’s actions in this regard were

Action complaints – that Individual Action Plaintiffs should be allowed to file Rule 41(a)(2) voluntary dismissal motions, rather than seeing their cases and/or claims within their cases dismissed outright. *See* Lead Counsel’s Letter to Court, dated December 1, 2003, at 3-5, attached as Tab 1 to Memorandum of Law of Lead Plaintiff in Support of the Motion by the Metropolitan Government of Nashville and Davidson County, Tennessee to Voluntarily Dismiss Its Complaint Without Prejudice Pursuant to Rule 41(a)(2), filed December 31, 2003 (“LP’s Rule 41(a)(2) Mem.”); *see also* Court-Ordered Notice to All Investors Who Have Filed Individual WorldCom Actions, dated December 11, 2003, at 4 (printed version). Lead Plaintiff thereafter supported the Rule 41(a)(2) motions filed by individual plaintiffs seeking to withdraw their cases without prejudice to remaining as members of the Class. *See* LP’s Rule 41(a)(2) Mem.

undertaken on behalf of the Individual Action Plaintiffs (including its own clients), and not on behalf of the Class.

Indeed, if there were a tally being kept, it is the Individual Action Plaintiffs who have benefited considerably from Lead Counsel's efforts – not the other way around. Among other things, Lead Counsel conducted the primary examination in all of the fact witness depositions in which Lead Counsel participated (whether noticed by Lead Plaintiff or by Defendants); Lead Counsel retained experts (which most Individual Action Plaintiffs have now adopted for their own cases); Lead Counsel established its website, to which all persons (including Individual Plaintiffs and their counsel) have access; and Lead Counsel briefed all of the motions in the Class Action, many of which established important precedents for the Individual Actions as well. While Lead Counsel is not seeking a fee from any recoveries that Individual Actions Plaintiffs might achieve, in fact there would be legal precedent for such an application, *see, e.g., In re Linerboard Antitrust Litigation*, 292 F. Supp. 2d 644, 652-56, 661-63 (E.D. Pa. 2003), but this precedent simply does not support the portion of IA Liaison Counsel's motion that seeks a fee from the Class Settlement.

III. CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully submits that this Court should not award fees and expenses to the IA Liaison Counsel from the Settlement

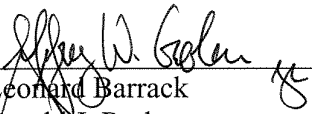
reached between and among Lead Plaintiff, Named Plaintiffs and the Citigroup Defendants.

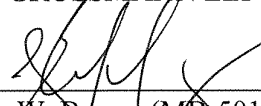
DATED: October 8, 2004

Respectfully submitted,

BARRACK, RODOS & BACINE

BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP


Leonard Barrack
Gerald J. Rodos
Jeffrey W. Golan
Mark R. Rosen
Jeffrey A. Barrack
Pearlette V. Toussant
3300 Two Commerce Square
2001 Market Street
Philadelphia, Pennsylvania 19103
(215) 963-0600


Max W. Berger (MB-5010)
John P. Coffey (JC-3832)
Steven B. Singer (SS-5212)
Chad Johnson (CJ-3395)
Beata Gocyk-Farber (BGF-5420)
John C. Browne (JB-0391)
Jennifer L. Edlind (JE-9138)
David R. Hassel (DH -0113)
1285 Avenue of the Americas
New York, New York 10019
(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, and Co-Lead Counsel for the Class

BERMAN DeVALERIO PEASE
TABACCO BURT & PUCILLO
Joseph J. Tabacco, Jr. (JT-1994)
425 California Street, Suite 2100
San Francisco, CA 94104
(415) 433-3200

-and-
Michael J. Pucillo
515 North Flagler Drive, Suite 1701
West Palm Beach, Florida 33401
(561) 835-9400

*Attorneys for Named Plaintiff
Fresno County Employees
Retirement Association*

BERMAN DeVALERIO PEASE
TABACCO BURT & PUCILLO
Joseph J. Tabacco, Jr. (JT-1994)
425 California Street, Suite 2100
San Francisco, CA 94104
(415) 433-3200

-and-

Michael J. Pucillo
515 North Flagler Drive, Suite 1701
West Palm Beach, Florida 33401
(561) 835-9400

*Attorneys for Named Plaintiff
County of Fresno, California*

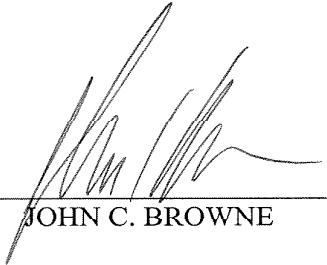
SCHOENGOLD & SPORN, P.C.
Christopher Lometti (CL-9124)
19 Fulton Street, Suite 406
New York, New York 10038
(212) 661-1100

*Attorneys for Named Plaintiff
HGK Asset Management, Inc*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Lead Plaintiff's Response to the Motion for Entry of an Order Awarding Fees and Expenses to Liaison Counsel from the Class Settlement Fund, is being served on this date upon all involved parties by sending a copy of same to all counsel listed on the attached service list by facsimile and first class mail, postage prepaid.

Dated: October 8, 2004



JOHN C. BROWNE

WORLDCOM SERVICE LIST

Peter K. Vigeland
WILMER, CUTLER & PICKERING
399 Park Avenue
New York, NY 10022
Tel: (212) 230-8807
Fax: (212) 230-8888

Jonathan J. Walsh
Gary Cutler
CURTIS, MALLET-PREVOST, COLT &
MOSLE LLP
101 Park Avenue
New York, NY 10178
Tel: (212) 696-6000
Fax: (212) 697-1559

Thomas J. Kavalier
David G. Januszewski
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005
Tel: (212) 701-3000
Fax: (212) 269-5420

Stuart F. Pierson
TROUTMAN SANDERS LLP
401 9th Street, N.W. , Suite 1000
Washington, D.C. 20004-2134
Tel: (202) 274-2897
Fax: (202) 654-5622

Jay B. Kasner
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
4 Times Square
New York, NY 10036
Tel: (212) 735-3000
Fax: (212) 735-2000

David Wertheimer
Lyndon M. Tretter
HOGAN & HARTSON LLP
875 Third Avenue
New York, NY 10022
Tel: (212) 918-3000
Fax: (212) 918-3100

Eric S. Goldstein
Martin London
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
Tel: (212) 373-3316
Fax: (212) 373-2384

Paul C. Curnin
SIMPSON, THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017-3954
Tel: (212) 455-2000
Fax: (212) 455-2502

Nathan Reilly
Pamela Rogers Chepiga
ALLEN & OVERY
1221 Avenue of the Americas
New York, NY 10020
Tel: (212) 610-6300
Fax: (212) 610-6399

George E. Ridge
COOPER, RIDGE & LANTINBERG, P.A.
1200 SunTrust Bank Building
200 West Forsyth Street
Jacksonville, Florida 32202
Tel: (904)353-6555
Fax: (904)353-7550

Irvin B. Nathan
Julie B. Rothenberg
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
Tel: (202) 942-5000
Fax: (202) 942-5999

Richard Janis
S. Robert Sutton, Esq.
JANIS SCHUELKE & WECHSLER
1728 Massachusetts Ave., NW
Washington D.C. 20036
Tel: (202) 861-0600
Fax: (202) 223-7230

Buford Yates, Jr. (Pro Se)[†]
108 Redbud Drive
Brandon, MS 39047

Byron B. Mathews, Jr., (Pro Se)[†]
410 West 24th Street, #2H
New York, NY 10011

Lynn L. Sarko
KELLER ROHRBACK LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Tel: (206) 224-7552
Fax: (206) 623-3384

Gregory A. Markel
Ronit Setton
CADWALADER, WICKERSHAM
& TAFT LLP
100 Maiden Lane
New York, NY 10038
Tel: (212) 504-6000
Fax: (212) 504-6666

Michael J. Pucillo
BERMAN DeVALERIO PEASE
TABACCO BURT & PUCILLO
515 North North Flagler Drive
Suite 1701
West Palm Beach, FL 33401
Tel: (561) 835-9400
Fax: (561) 835-0322

Joel H. Bernstein
Beth J. Hoffman
GOODKIND LABATON RUDOFF
& SUCHAROW LLP
100 Park Avenue
New York, NY 10017
Tel: (212) 907-0700
Fax: (212) 818-0477

Joseph Bartlett
FISH & RICHARDSON P.C.
153 East 53rd Street, 52nd Floor
New York, NY 10022
Tel: (212) 765-5070
Fax: (212) 258-2291

Neil L. Selinger
LOWEY DANNENBERG BEMPORAD &
SELINGER, P.C.
One North Lexington Avenue
11th Fl.
White Plains, NY 10601
Tel: (914) 997-0500
Fax: (914) 997-0035

Jill Abrams
ABBEY GARDY, LLP
212 East 39th Street
New York, NY 10016
Tel: (212) 889-3700
Fax: (212) 684-5191

Alan R. Friedman
Marjorie Sheldon
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
919 Third Avenue
New York, NY 10022
Tel: (212) 715-9100
Fax: (212) 715-8000

Samuel P. Sporn
Christopher Lometti
SCHOENGOLD & SPORN, P.C.
19 Fulton Street, Suite 406
New York, New York 10038
Tel: (212) 964-0046
Fax: (212) 267-8137

Andrew E. Miller
ALLEN MATKINS LECK GAMBLE
& MALLORY LLP
515 S. Figueroa Street
Los Angeles, CA 90071
Tel: (213) 955-5597
Fax (213) 620-8816

Geoffrey S. Harper
Beth G. Jaynes
Kelly R. Vickers
FISH & RICHARDSON P.C.
1717 Main Street, Suite 5000
Dallax, TX 75201
Tel: (214) 747-5070
Fax: (214) 747-2091

Kevin Walsh
Jennifer C. Yang
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166
Tel: (212) 294-6700
Fax: (212) 294-4700

Michael S. Sundermeyer
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Tel: (202) 434-5015
Fax: (202)-434-5029

Richard C. Schoenstein
PAUL, HASTINGS, JANOFSKY
& WALKER, LLP
75 East 55th Street
New York, NY 10022
Tel: (212) 318-6000
Fax: (212)319-4090

John M. Callagy
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178
Tel: (212) 808-7800
Fax: (212) 808-7898

† Service by First Class Mail Only