UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLDCOM, INC. SECURITIES LITIGATION			:	
This Document Relates to:			:	
02 Civ. 3288	02 Civ. 4990	02 Civ. 9514	:	MASTER FILE NO.
02 Civ. 3416	02 Civ. 5057	02 Civ. 9515	:	02 Civ. 3288 (DLC)
02 Civ. 3419	02 Civ. 5071	02 Civ. 9516	:	
02 Civ. 3508	02 Civ. 5087	02 Civ. 9519	:	
02 Civ. 3537	02 Civ. 5108	02 Civ. 9521	:	
02 Civ. 3647	02 Civ. 5224	03 Civ. 2841	:	
02 Civ. 3750	02 Civ. 5285	03 Civ. 3592	:	
02 Civ. 3771	02 Civ. 8226	03 Civ. 6229	:	
02 Civ. 4719	02 Civ. 8228	03 Civ. 7298	:	
02 Civ. 4945	02 Civ. 8229	03 Civ. 7299	:	
02 Civ. 4946	02 Civ. 8230		:	
02 Civ. 4958	02 Civ. 8234			
02 Civ. 4973	02 Civ. 9513			

LEAD PLAINTIFF'S OPPOSITION TO THE UNDERWRITER DEFENDANTS' MOTION FOR RECONSIDERATION OF OR, IN THE ALTERNATIVE, TO CLARIFY, THE COURT'S DECEMBER 15, 2004 SUMMARY JUDGMENT ORDER ON THE ISSUE OF LEAD AND NAMED PLAINTIFFS' STANDING

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Lead Plaintiff New York State Common Retirement Fund respectfully submits this brief in opposition to the Underwriter Defendants' motion for reconsideration of or, in the alternative, to clarify the Court's December 15, 2004 Summary Judgment Opinion on the Issue of Lead and Named Plaintiffs' Standing.

Preliminary Statement

For the fourth time in this litigation, the Underwriter Defendants have asked this Court to rule that the Lead and Named Plaintiffs lack standing to assert certain individual claims arising under the Securities Act. Specifically, the Underwriter Defendants contend that the Court should rule as a matter of law that (1) the Lead Plaintiff does not have standing to bring Securities Act claims because it did not buy bonds issued in connection with either the 2000 or 2001 Offering; (2) Named Plaintiff County of Fresno, California ("Fresno") does not have standing to assert claims arising out of the 2001 Offering because it only purchased bonds issued in connection with the 2000 Offering; and (3) named plaintiff Fresno County Employees' Retirement Association ("FCERA") does not have standing to assert claims arising out of the 2000 Offering, because it only purchased bonds issued in the 2001 Offering. As set forth below, the motion should be denied.

First, the standard for reconsideration has not been satisfied. Motions for reconsideration should only be granted "where the moving party demonstrates that the Court has overlooked factual matters or controlling precedent that was presented to it on the underlying motion." *In re WorldCom, Inc. Sec. Litig.*, 308 F. Supp. 2d 214, 224 (S.D.N.Y. 2004). The Court has done neither. Indeed, the Underwriter Defendants raised these exact same arguments in connection with their motion to dismiss and also at

class certification, and both times the Court rejected their arguments, holding that the Lead and Named Plaintiffs did have standing. The Underwriter Defendants have cited no new authority (or evidence) that compels a different conclusion now.

Second, the Underwriter Defendants' motion fails to acknowledge that this is a certified class action, and not an individual action. As this Court has repeatedly recognized, because this action has been brought on behalf of a class (and certified by the Court to proceed as such), the issue as to standing is not whether each (or any) particular Class Representative can individually assert every single cause of action, but whether the Class Representatives can *collectively* assert the claims on behalf of the Class. Indeed, the Court made this well-settled principle of law perfectly clear when it denied the Underwriter Defendants' argument the first time they raised it:

> Long before passage of the PSLRA, it was well established that named plaintiffs may jointly represent the class *and it is their claims that determine whether there is standing to bring the claims alleged on behalf of the class* ... While it is true that a plaintiff must have standing to bring the claims asserted in a lawsuit, there is no dispute that the Complaint has adequately alleged that at least FCERA and Fresno have standing to assert claims based on the two Offerings. They each allege a personal stake in the outcome of the controversy sufficient to establish standing.

In re WorldCom, Inc. Sec. Litig., 294 F. Supp. 2d 392, 422 (S.D.N.Y. 2003) (denying motion to dismiss) (emphasis added); *accord In re Initial Public Offering Litig.*, 214 F.R.D. 117, 122-23 (S.D.N.Y. 2002) (same).

The Underwriter Defendants do not contend that Fresno does not have standing to assert claims relating to the 2000 Offering, nor do they contend that FCERA lacks standing to assert claims relating to the 2001 Offering. Accordingly, as this Court has repeatedly held, these Class Representatives collectively have standing to assert claims

arising under the Securities Act on behalf of persons who purchased bonds issued in connection with the 2000 and 2001 Offerings. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 283 (S.D.N.Y. 2003) (granting motion for class certification) (rejecting Underwriter Defendants' argument the second time they raised it, holding that "Together, Fresno and FCERA do have such standing. Nothing more is required.").

The Underwriter Defendants also contend that the Court should rule as a matter of law that Named Plaintiff HGK Asset Management, Inc. ("HGK") does not have standing because it "acted solely as an investment advisor for others" and not on its own account in connection with the Offerings. Again, the Underwriter Defendants are wrong. As set forth below, numerous courts have held that investment managers such as HGK, who have been given discretionary authority to buy and sell securities on behalf of their clients, have standing to assert claims arising under the federal securities laws. *See, e.g., Lemanik, S.A. v. McKinley Allsopp, Inc.*, 125 F.R.D. 602, 607 (S.D.N.Y. 1989).

The Underwriter Defendants' arguments regarding standing have not improved with age. The motion should be denied.

Argument

A. Because The Court Has Repeatedly Held That Plaintiffs Have Standing, The Standard for Reconsideration Has Not Been Satisfied

As this Court has held, Local Rule 6.3 directs that a motion for reconsideration should be granted only where the moving party demonstrates that (1) "the Court has overlooked factual matters or controlling precedent that were presented to it on the underlying motion," and (2) such facts, had they been considered, would change the Court's decision. *In re WorldCom, Inc. Sec. Litig.*, 308 F. Supp.2d at 224. Local Rule

6.3 should be "narrowly construed and strictly applied" in order to discourage litigants from trying to re-litigate through repetitive arguments issues that have already been decided. *Id.*

In making this motion, the Underwriter Defendants do exactly what this Court has held they may not do – namely, repeatedly put before the Court the same arguments in connection with standing that the Court has addressed again and again. Indeed, the Court first held that the Lead and Named Plaintiffs collectively had standing to bring all claims asserted in the Complaint, including the claims arising under Sections 11 and 12(a) of the Securities Act, when it denied the Underwriter Defendants' motion to dismiss. *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d at 422. In that opinion, the Court made clear that in a class action, the issue on standing is not whether each Plaintiff can assert every claim asserted individually, but whether the Plaintiffs collectively can assert all of the claims on behalf of the Class. *Id.* ("it is well established that named plaintiffs may jointly represent the class and it is their claims that determine whether there is standing to bring the claims alleged on behalf of the class").

The Underwriter Defendants again argued that Plaintiffs lacked standing in their opposition to Plaintiffs' motion for class certification. Once again, the Court rejected this argument, holding that the Lead and Named Plaintiffs together had standing to assert all claims on behalf of the Class, including the Securities Act claims. *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. at 283. Although the Underwriter Defendants omit to mention it, they sought leave to appeal this part of the Court's class certification decision to the Second Circuit pursuant to Rule 23(f), and such petition was emphatically denied. As the Second Circuit held:

> Nothing in the PSLRA indicates that district courts must choose a lead plaintiff with standing to sue on every available cause of action. Rather, because the PSLRA mandates that courts must choose a party who has, among other things, the largest financial stake in the outcome of the case, it is inevitable that, in some cases, the lead plaintiff will *not* have standing to sue on every claim.

Hevesi v. Citigroup Inc., 366 F.3d 70, 82 (2d Cir. 2004) (emphasis in original). Thus, the Second Circuit explicitly recognized that, in a class action, it did not matter for purposes of determining standing whether each representative party could bring every claim asserted. Rather, plaintiffs had standing as long as they could collectively assert the claims on behalf of the class.

Seeking to evade the Court's prior decisions, the Underwriter Defendants now contend that in their prior motions they were seeking to dismiss "the claims of the class as a whole for lack of standing," and that what they meant in their summary judgment papers was that the Lead and Named Plaintiffs *individually* do not have standing to assert the claims. UW Mem. at 8. Yet, a review of the Underwriter Defendants' summary judgment brief reveals that this contention is not correct. Defendants devoted one page of their 100-page summary judgment brief to this argument, and in the very first line of that "section" the Underwriter Defendants conceded that they first raised this argument in connection with the motion to dismiss. See UW S.J. Mem. at 98 ("The Underwriter-Related Defendants renew their argument, first raised on their motion to dismiss ...").

While the Underwriter Defendants further contend that the Court did not rule "on the merits" on their argument that the Lead and Named Plaintiffs lacked standing to assert certain claims individually, such contention is clearly wrong and ignores the Court's decisions. The Court did consider those arguments, and correctly held that,

because the issue in a class action is whether the plaintiffs collectively have standing to assert the claims asserted on behalf of the Class, it is irrelevant whether each plaintiff individually can bring each cause of action. *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d at 422. Indeed, the Court specifically noted that the Lead and Named Plaintiffs were bringing suit in a "representative capacity", and further noted that Fresno and FCERA had standing to assert claims based on the Offerings. *Id.* Nothing more is required or needed to establish standing in a class action.

The Court's decisions that the Lead and Named Plaintiffs have standing to bring these claims are now the law of the case. The law of the case doctrine provides that a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation. *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 219 (2d Cir. 2002). It is applicable where the parties have had a full and fair opportunity to litigate the issue. *Id.* Here, the Court has ruled on the standing issue two times, and the Underwriter Defendants have had more than ample opportunity to voice their position.

B. HGK Has Standing To Assert Securities Act Claims

The Underwriter Defendants also rehash their argument that HGK does not have standing because it did not buy bonds on its own account, but rather for its customers. The Underwriter Defendants are wrong.

Courts have held that investment managers who have been given discretionary authority to buy and sell securities on behalf of their clients have standing to bring securities fraud claims. *See Lemanik, S.A. v. McKinley Allsopp, Inc.*, 125 F.R.D. 602, 607 (S.D.N.Y. 1989) (Swiss fiduciary corporation, not its clients, was "purchaser" within

meaning of § 12(2) and Rule 10b-5, and thus could bring action in its own name "whether it was acting for its own account or that of its clients"); *see also Monetary Management Group of St. Louis v. Kidder, Peabody & Co., Inc.*, 604 F. Supp. 764, 767 (E.D. Mo. 1985) (denying motion for summary judgment and rejecting argument that investment advisor is not real party in interest with respect to claims under Securities Act of 1933, court held that investment advisor who purchased bonds for client was "purchaser" within meaning of § 12(2)).[1]

Moreover, in appointing investment advisors as lead plaintiffs or class representatives in federal securities fraud cases, courts have held that investment advisors have standing to represent a class and have rejected exactly the arguments advanced here by the Underwriter Defendants. *See Weinberg v. Atlas Air Worldwide Holdings, Inc.*, No. 02 Civ. 8334 (WCC), 2003 U.S. Dist. LEXIS 9103, at *16-17 (S.D.N.Y. May 19, 2003) ("when the investment advisor is also the attorney-in-fact for its clients with unrestricted decision making authority, the investment advisor is considered the 'purchaser' under the federal securities laws with standing to sue in its own name."); *In re Unumprovident Sec. Litig.*, Lead Case No. 1:03-CV-049, MDL Case No. 1:03-md-1552, 2003 U.S. Dist. LEXIS 24633, at *27-31 (E.D. Tenn. Nov. 6, 2003) (rejecting defendants' arguments as to standing and stating that investment advisor has even more incentive to vigorously represent the class in order to maintain the trust and good will of clients who have suffered); *In re Northwestern Corp. Sec. Litig.*, 299 F. Supp. 2d 997,

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[1] *See also Congregation of the Passions v. Kidder Peabody & Co.*, 800 F.2d 177, 181 (7th Cir. 1986); *O'Brien v. Continental Illinois National Bank*, 593 F.2d 54, 60 (7th Cir. 1979); *Board of Trustees, Village of Bolingbrook Police Pension Fund v. Underwood, Neuhaus & Co., Inc.*, No. 89 C 6468, 1993 U.S. Dist. LEXIS 4972, *4 (N.D. Ill. April 14, 1993); *Medline Industries Employee Profit Sharing and Retirement Trust v. Blunt, Ellis & Loewi, Inc.*, No. 89 C 4851, 1993 U.S. Dist. LEXIS 581, at * 5-6 (N.D. Ill. Jan. 20, 1993).

1005-07 (D.N.D. 2003) ("Similar to other investment managers who have been appointed lead plaintiffs in federal securities class actions, Oppenheimer has total and complete discretion in selecting investment securities for its clients and has a significant financial and business interest in attempting to recover the money allegedly lost by its clients."); *Casden v. HPL Techs., Inc.*, No. C-02-3510, 2003 U.S. Dist. LEXIS 19606, at *31 (N.D. Cal. Sept. 29, 2003) ("Fuller & Thaler meets these qualifications to be a real party in interest for this action. As an investment advisor, it actually consummated the purchases of the HPL securities for its clients, thus bringing it within the definition of "purchaser." Additionally, . . . it had complete discretion over its clients' accounts and thus made the actual decision to purchase the HPL shares. Therefore, Fuller & Thaler is a real party in interest within the meaning of both Rule 10(b)5 and FRCP 17(a) and thus has standing to serve as lead plaintiff in this action."); *In re Rent-Way Sec. Litig.*, 218 F.R.D. 101, 108-09 (W.D. Pa. 2003) (rejecting same standing arguments and appointing investment advisor as class representative); *Newman v. Eagle Building Technologies*, 209 F.R.D. 499 (S.D. Fla. 2002); *Alfaro v. CapRock Communications Corp.*, No. 3:00-CV-1613, 2000 U.S. Dist. LEXIS 21743, at *7-8 (N.D. Tex. Dec. 8, 2000); *EZRA Charitable Trust v. Rent-Way, Inc.*, 136 F. Supp. 2d 435, 442-43 (W.D. Pa. 2001) ("investment advisors with the delegated authority to make investment decisions for clients are purchasers under the securities laws."); *see also Takeda v. Turbodyne Technologies*, 67 F. Supp. 2d 1129, 1136, n.18 (C.D. Cal. 1999); *In re Cendant Corp. Litig.*, 182 F.R.D. 144 (D.N.J. 1998).

HGK has complete discretionary authority over its clients' accounts and has been authorized to act as a legal representative in connection with the investments made by it on behalf of its clients. Most, if not all, of the Client Agreements entered into between

HGK and its clients specifically provide HGK with "fiduciary" responsibility to act on behalf of that fund's account as a "reasonable person" would on behalf of that account as follows:

> 1. **Appointment & Authority of Manager.** The Fund hereby appoints the Manager as a fixed investment manager with respect to the assets allocated to the Account. The Manager shall have full discretionary authority to manage assets in the Account. The Manager accepts responsibility as an Investment Adviser as the term is defined in the Investment Advisers Act of 1940 and acknowledges that it will act solely in the interest of the Fund as a fiduciary of the assets of the Fund. The Manager shall have full discretionary authority to manage, acquire or dispose of any or all securities, as it, without consultation or confirmation, may determine to be appropriate in accordance with the investment objectives and guidelines as communicated to Manager from time to time. To the extent applicable under federal law, the Manager accepts responsibility as an investment manager as the terms is defined in Section 3(38) of ERISA as it may be amended from time to time and the Manager shall discharge its duties solely in the interest of participants and beneficiaries of the Fund and in accordance with all applicable provisions of ERISA, including but not limited to the provision of Title I, particularly Subtitle B, Part 4 thereof.

(HGK 002120) (annexed as Exhibit 161 to the Declaration of Jennifer L. Edlind in Support of Lead Plaintiff's Opposition to the Underwriter-Related Defendants' Motion for Summary Judgment dated September 17, 2004) (emphasis added). Such language has been interpreted as including the authorization to bring actions on behalf of the client. *See Riverside Holdings, Inc. v. Arkansas Best Corporation*, No. 90-cv-5492, 1996 U.S. Dist. LEXIS 5316, at *28 (S.D.N.Y April 22, 1996) (recognizing fiduciary's standing to bring actions related to fiduciary's responsibilities as defined by those within its "discretionary authority and control"); *see also Lemanik,* 125 F.R.D. at 607.

Thus, HGK had authority to invest on behalf of its clients and to institute and prosecute this action in conformance with its fiduciary duties under ERISA and the Investment Advisors Act of 1940, as well as its common law fiduciary duties. As such, HGK has standing to bring the claims asserted in this action.[2]

CONCLUSION

For all of the foregoing reasons, the Underwriter-Related Defendants' Motion for Reconsideration or Clarification should be denied.

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[2] Defendants' citations for the proposition that an investment manager, IIGK, has no standing to serve as a class representative (Underwriter Defendants' Brief in Support of Reconsideration at 6-7), are inapposite. *See Smith v. Suprema Specialties, Inc.*, 206 F. Supp. 2d 627, 634-35 (D.N.J. 2002) (denying certification of investment advisor where plaintiff was merely authorized to invest on behalf of fund, did not demonstrate it was an "attorney-in-fact" and failed to demonstrate that advisor's clients were aware an action had been commenced); *see also In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig.*, 209 F.R.D. 353, 357-58 (S.D.N.Y. 2002) (denying certification of investment advisor where plaintiff did not demonstrate it was an "attorney-in-fact"); *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59 (2d Cir. 2000) (denying certification where father had no ability to act on behalf of son once son reached majority). Here, as set forth above, HGK was an attorney-in-fact – one is who "authorized by another to act in his place and stead, either for some particular purpose, as to do a particular act, or for the transaction of business in general ..." Black's Law Dictionary, 86 (6th Ed. West Pub. 1991).

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