

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE WORLDCOM, INC. SECURITIES
LITIGATION

MASTER FILE
02 Civ. 3288 (DLC)

This Document Relates to:

02 Civ. 3288	02 Civ. 4990	02 Civ. 9514
02 Civ. 3416	02 Civ. 5057	02 Civ. 9515
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	02 Civ. 2841
02 Civ. 3750	02 Civ. 5285	02 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	

**SUPPLEMENTAL MEMORANDUM OF LAW REGARDING LEAD
PLAINTIFF'S CALCULATION OF SECTION 11 AGGREGATE DAMAGES**

Lead Plaintiff respectfully submits this memorandum in compliance with this Court's February 17, 2005 Opinion and Order for further briefing regarding Section 11(e) aggregate damage calculations.

PRELIMINARY STATEMENT

Section 11(e) of the Securities Act of 1933 proscribes the manner in which Section 11 damages are to be calculated. In accordance with the statute, Plaintiff's expert, Dr. Blaine F. Nye, determined Section 11 aggregate damages by calculating the price paid for the bonds less the value of the bond at the time of the suit (June 26, 2002), but noted that to the extent that a Class member may have sold a bond at a higher price after June 26, 2002, that Class member would not have sustained the full measure of the

damages as calculated for the Class utilizing the price at the time the case was filed. As the Court noted in its opinion, the price of WorldCom bonds did not even begin to trade over the lawsuit price until well after the date of suit. The bankruptcy exchange did not occur until nearly two years later. Thus, while it is possible that some Class member bondholders were able to redeem their bonds at prices slightly greater than the price of the bonds at the time the suit was filed, either through a sale on the open market or through redemption of a bond at the rate determined through the bankruptcy proceedings, there is no compelling argument that this is anything other than a *de minimis* figure, particularly when compared to the billions of dollars of damages.

The fact that some Class members may ultimately have sold their bonds for a price higher than the lawsuit price, something that undoubtedly is true in many Section 11 cases, does not mean that an aggregate damages analysis that utilizes the lawsuit price is improper. Thus, Dr. Nye's aggregate damages calculation was appropriate.

Further, as more fully stated below (and as Lead Plaintiff has stated elsewhere), any such instances of post-lawsuit sales of bonds by individual Class members at higher prices can be dealt with either in a secondary proceeding or in the claims administration process. As the Court ruled in granting the portion of the Defendants' motion that individualized damages issues be dealt with in a separate proceeding, since the issue of individualized damages will be determined after the class-wide issues are determined, any inquiry into an individual Class members' post-lawsuit bond transactions is irrelevant at this phase in the litigation. Finally, Plaintiffs should not be required to submit the proof of claims forms received thus far, as it would be unduly burdensome, they are incomplete, and irrelevant to a determination of aggregate damages.

I. Section 11(e) Damages were Appropriately Calculated by Plaintiff's Expert using the Date of the Commencement of the Suit

“Section 11 ‘was designed to assure compliance with the disclosure provisions of the [Securities] Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering.’” *In re Initial Public Offering Securities Litigation*, 241 F.Supp.2d 281, 343 (S.D.N.Y. 2003) (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-382 (1983)). Section 11(e) proscribes the manner in which Section 11 damages are to be measured. It provides in relevant part that a plaintiff may recover:

such damages as shall represent the difference between the amount paid for the security...and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market *before* suit, or (3) the price at which such security shall have been disposed of after the suit but before the judgment *if such damages shall be less than the damages representing the difference between the amount paid for the security...and the value thereof as of the time such suit was brought...*

15 U.S.C. § 77k(e) (emphasis added).

“It is axiomatic that [t]he starting point in every case involving construction of a statute is the language itself.” *McMahan & Co. v. Warehouse Entertainment, Inc.*, 65 F.3d 1044, 1048 (2d Cir. 1995) (quoting *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)). The *McMahan* Court determined that “the plain language of Section 11(e) prescribes the method of calculating damages.” *Id.* Thus, with the exception of Section 11(e)(3), “post-suit market action is irrelevant in establishing plaintiffs’ damages,” and damages under Section 11 are generally “frozen” as of the date of the suit. *Beecher v. Able*, 435 F.Supp. 397, 409-10 (S.D.N.Y. 1975).

Dr. Nye’s aggregate damages formulation accurately reflects the damages sustained by the Class in that it recognizes that all bonds issued in the May 2000 (other

than those redeemed in November 2001, and not included in his calculations) and in the May 2001 offerings were still extant and actionable at the time of the filing of the lawsuit, and that any individual Class member post-lawsuit transactions could be determined separately. As a result, his aggregate damages calculation is consistent with Section 11.

II. Individualized Issues for All Class Members, Including Damages, Will be Tried Separately from Class-Wide Issues

There is no evidence that suggests that Class members who sold their bonds at a price higher than that on the time the suit was brought accounts for anything more than a *de minimus* percentage of the class members. Based on this Court's previous ruling, that "[i]ndividualized issues for all class members, including individualized reliance, knowledge, standing, and *damage issues*, will be bifurcated." *In re WorldCom, Inc. Securities Litigation*, No. 02 Civ. 3288 DLC, 2005 WL 375315, *2 (S.D.N.Y. Feb. 17, 2005) (emphasis added), Lead Plaintiff respectfully submits that an inquiry into sales of bonds after the commencement of the lawsuit is not necessary at this phase in the litigation. Indeed, had it been germane to the defendants' attempt to attack Dr. Nye's aggregate damages calculation, they well could have attempted to obtain such information from their own organizations, which account for a significant percentage of the market-maker population for WorldCom bonds.

As Lead Plaintiff has stated previously (and as we thought Defendants concurred in connection with their own motion to trifurcate the trial), any adjustments for individual Class member damages could either be handled in a separate proceeding or through the claims administration process. As this Court recognized, aggregate damages awards are "standard practice" in securities cases." *In re WorldCom, Inc. Securities Litigation*, No.

02 civ. 3288 DLC, 2005 WL 375314, * 7 (S.D.N.Y., Feb. 17, 2005) (internal citation omitted). Further, “[s]ince the award from the common fund established by any damages award will be on a claims-made basis, there is no danger that monies will be distributed to opt-outs.” *Id.* Nor is there any danger that Class members will receive more than the losses to which they are entitled. To the extent that there are any funds remaining from a Judgment after the claims are paid, they will be returned to Defendants. Therefore, for purposes of the plenary trial, aggregate damages based on the provisions of Section 11(e)(1) and (2) should be permitted at this point in the litigation, with any individualized issues stemming from sub-section (3) reserved for a separate proceeding or handled during the claims process.

III. Lead-Plaintiff Should Not be Required to Submit the Proof of Claims Gathered

Based on the foregoing, Defendants’ request for the proof of claims forms submitted in connection with Lead Plaintiff’s settlement with the Citigroup Defendants should be denied. As explained above, this request is not relevant to the issues in the plenary trial of this case. When the time is appropriate for allocation of funds, such issues could be addressed either at a secondary proceeding or, even more simply, through the claims administration process. However, that time is not now.

The current deadline for submission of proof of claim forms is not until March 4, 2005. If proof of claim forms that have been submitted to date become a part of the discovery in this case, they would potentially be an inaccurate representation of the actual amount of damages to Class members who purchased WorldCom bonds issued in the May 2000 and May 2001 offerings. In addition, on a more practical level, the approximately 300,000 claims that have been received thus far have not yet been

processed. Further, it should be noted that damages of the Class are not limited to whatever claims may have been filed with the Administrator. It could well be that a significant percentage of Class members have either not yet filed claims for any number of reasons. But that has nothing whatsoever to do with the aggregate damages that can be proven on behalf of the Class.¹

Finally, Lead Plaintiff submits that allowing an issue of proof of claim forms to be submitted to the Jury, or even a subset of claim forms that may show post-lawsuit bond transactions, would be confusing and potentially misleading when presented to the Jury. If the Court were to allow Defendants to equate claim filings with aggregate damages, that would go very far in negating the impact of the Court's ruling that Plaintiffs are entitled to prove aggregate damages. Indeed, the only arguably relevant information contained in the proof of claim forms is the information provided by Class members who may have sold their bonds at a price higher than the price of the bond as of the commencement of the suit. But, as shown previously, that circumstance can be adequately addressed either at a secondary proceeding or through the claims administration process.

¹ If Lead Plaintiff achieves a Judgment at trial, Lead Plaintiff would seek to send a new notice to the Class, and allow new claim forms to be submitted. Lead Plaintiff would further seek to have the Claims Administrator attempt to determine which, if any, Class members with potential claims did not file for a distribution from the Class' recovery, so that all Class members may recover from this proceeding. For this reason, as well, allowing Defendants at this point to equate the claim forms filed with a damages calculation would be entirely misleading and inappropriate.


CONCLUSION

For the reasons stated above, Lead Plaintiff respectfully submits that no discovery of claim forms should be required, and that no mention of post-lawsuit transactions of Class member bond purchasers should be allowed at the plenary trial of this case.

Dated: February 25, 2005

Respectfully submitted,

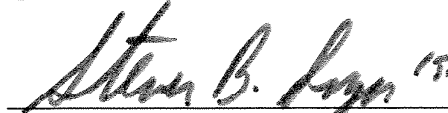
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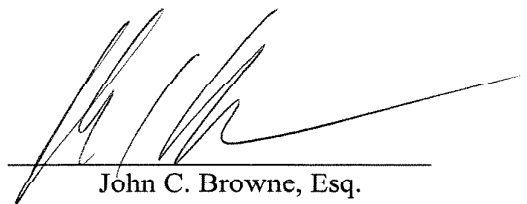
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CERTIFICATE OF SERVICE

I, John C. Browne, Esq. hereby certify that a true and correct copy of Supplemental Memorandum Of Law Regarding Lead Plaintiff's Calculation Of Section 11 Aggregate Damages 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 e-mail.

Dated: New York, New York
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