



## PRELIMINARY STATEMENT

On April 27, 2004, this Court ordered a stay of all civil proceedings against Ebbers pending the resolution of the criminal charges brought against him. *In re WorldCom, Inc. Sec. Litig.*, 02 Civ. 3288 (DLC), 2004 WL 884947, at \*1 (S.D.N.Y. April 27, 2004). Similar requests for stays were granted earlier in favor of defendants Scott D. Sullivan (“Sullivan”), David F. Myers (“Myers”), and Buford Yates, Jr. (“Yates”) (collectively, the “Stayed Defendants”).<sup>1</sup>

In his Motion, Ebbers requests that this Court sever the claims brought against him in the Class Actions into an entirely separate action pursuant to Rule 21 of the Federal Rules of Civil Procedure.<sup>2</sup> As Ebbers acknowledges, the Private Securities Litigation Reform Act of 1995 (the “PSLRA”) will require the jury in the Class Action, through special interrogatories, to determine the percentage fault of each Covered Person, as defined therein, and “each of the other persons claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff.” 15 U.S.C. § 78u-4(f)(3)(A). This determination shall be made as to all defendants, including defendants remaining at trial (“Non-Settling Defendants”), those defendants who have entered into settlements with the Lead Plaintiff (the “Settling Defendants”), Ebbers and the other Stayed Defendants, as well as any other persons deemed to have “caused or contributed” to the Lead Plaintiff’s losses pursuant to 15 U.S.C. § 78u-4(f)(3)(A).

Ebbers argues that if a separate trial were conducted for him pursuant to Rule 42(b),<sup>3</sup> as

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<sup>1</sup> See, e.g., *In re WorldCom, Inc. Sec. Litig.*, 02 Civ. 3288 (DLC), 2002 WL 31729501, at \*4 (S.D.N.Y. Dec. 5, 2002) (granting stay requests of Sullivan and Myers).

<sup>2</sup> Rule 21 of the Federal Rules of Civil Procedure provides, in pertinent part, “[a]ny claim against a party may be severed and proceeded with separately.” Fed.R.Civ.P. 21.

<sup>3</sup> Rule 42(b) of the Federal Rules of Civil Procedure provides that “the court, in furtherance of convenience or to avoid prejudice, or when separate trials may be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.” Fed.R.Civ.P. 42(b).

opposed to Rule 21, the Seventh Amendment would prohibit the second jury from reconsidering the first jury's determination of proportionate responsibility.<sup>4</sup> Consequently, Ebbers is now seeking to sever all claims asserted against him in the Class Actions pursuant to Rule 21 and proceed with the claims against him in a separate proceeding under Rule 21.

Lead Plaintiff does not oppose Ebbers' request that the Court order a separate trial under Rule 21 for Ebbers and other similarly situated Stayed Defendants. In doing so, however, Lead Plaintiff respectfully reserves its right to prosecute the severed claims against Ebbers and the other Stayed Defendants in a separate civil action in this Court, pending the final resolution of the criminal proceedings against such parties.

#### ARGUMENT

**A. Lead Plaintiff Does Not Oppose the Severance of the Claims Asserted Against Ebbers Pursuant to Rule 21 of the Federal Rules of Civil Procedure Provided that It Maintains the Right to Bring Claims Against These Defendants in a Separate Action**

Lead Plaintiff does not object to Ebbers' request to sever the civil proceedings currently pending against him pursuant to Rule 21. Ebbers' request for severance is not objectionable given the Court's determination to stay all civil proceedings against him pending the final resolution of his criminal proceedings. Moreover, this Court "is afforded broad discretion when determining whether to sever a case under Federal Rules of Civil Procedure 21 and 42(b)."

*Bancmortgage Financial Corp. v. Guarantee Title & Trust Co.*, 2000 WL 1521600, \*1 (E.D. Pa. Oct. 6, 2000), and the severance of his trial from the trial of the other claims asserted in this action pursuant to Rule 21 should not result in substantial legal prejudice to any of the parties in this case and will eliminate any theoretical risk of a Seventh Amendment violation.

Because similar stays are also pending against the other Stayed Defendants, if this Court

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<sup>4</sup> The Seventh Amendment to the United States Constitution provides, in pertinent part, that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, other than according to the rules of the common law." U.S. CONST. amend. VII.

were to decide to sever the case against Ebbers pursuant to Rule 21, Lead Plaintiff respectfully submits that the Court should frame any relief so that it applies to the claims asserted against all of the Stayed Defendants. Such severance would result in Lead Plaintiff maintaining the right to seek a trial against the Stayed Defendants following the primary trial of this case. If the trial proceeds in this manner, then the risk of any hypothetical Seventh Amendment violations will be eliminated.

**B. Pursuant to the PSLRA, the Jury in the Class Action Trial Will Determine the Percentage Fault of Each Covered Person and Other Persons Claimed to Have Caused or Otherwise Contributed to the Lead Plaintiff's Loss**

The PSLRA requires a jury, through special interrogatories, to determine the percentage responsibility of any Covered Person and any other person or persons claimed by the parties to have caused or contributed to the Lead Plaintiff's losses. The statute provides in pertinent part:

In any private action, the court shall instruct the jury to answer special interrogatories ... with respect to each covered person and each of the other persons claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff, including persons who have entered into settlements with plaintiff or plaintiffs, (i) whether such persons violated the securities laws; (ii) the percentage of responsibility of such person, measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff; and (iii) whether such person knowingly committed a violation of the securities laws.

15 U.S.C. § 78u-4(f)(3)(A).

As Ebbers states in his brief, he is a "covered person" under the provisions of the PSLRA. Therefore, pursuant to 15 U.S.C. § 78u-4(f)(3)(A), the jury in the Class Action trial must be charged with apportioning his percentage responsibility, in addition to the percentage responsibilities of any other "covered" persons, including the Non-Settling Defendants, the Settling Defendants, the other Stayed Defendants, and any other persons that any party claims may have caused or contributed to the Lead Plaintiff's losses. Thus, in accordance with the PSLRA, Ebbers and the other Stayed Defendants should be included on the special jury

interrogatories so that the percentage fault of all persons who may have potential liability under 15 U.S.C. § 78u-4(f)(3)(A) is appropriately apportioned among the relevant parties.

In addition, to further the purposes of the PSLRA, the Non-Settling Defendants must be bound by the jury's responses to the special interrogatories at the Class trial with respect to their proportionate responsibilities. The PSLRA states that these responses shall "specify the total amount of damages that the plaintiff(s) are entitled to recover and the percentage of responsibility of each covered person found to have caused or contributed to the loss incurred by the plaintiff(s)." 15 U.S.C. § 78u-4(f)(3)(B) As the Non-Settling Defendants will be parties to the Class trial, and present their defenses at the trial beginning March 17, 2005, any proportionate responsibility assigned to them by the jury must be conclusive.

**C. The Defendants Found Liable at the Class Action Trial Will Not Be Prejudiced Because They Maintain Their Right to Bring Contribution Claims Against Ebbers and the Other Stayed Defendants in a Separate Proceeding**

If this Court grants Ebbers' motion to sever, and if the Lead Plaintiff thereafter obtain a judgment against any of the Non-Settling Defendants at the Class trial, the Non-Settling Defendants would still be entitled to bring contribution claims against Ebbers and the other Stayed Defendants in a separate proceeding. The Non-Settling Defendants retain this right regardless of whether Ebbers and the others appear at the primary trial as defendants, or whether the case against Ebbers and the Stayed Defendants is severed from the Class trial, as Ebbers seeks in his motion. *See In re Del-Val Financial Corp. Sec. Litig.*, 868 F.Supp. 547, 554 (S.D.N.Y. 1994) (holding that a party may be liable for contribution even if it was not sued by the plaintiff in the underlying action). A liable party has the right to seek contribution from any person or entity "who is alleged to have violated existing securities laws and who shares joint liability for that wrong." *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 292 (1993) (finding implied right to contribution to exist under § 10(b) of the Exchange Act).

Any Non-Settling Defendant found liable to Lead Plaintiff, as well as Ebbers and other Stayed Defendants, would appropriately be characterized as “joint tortfeasors” or “joint participants” in this action, and thus subject to contribution between and among themselves. *See Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 1998 WL 647167, at \*3 (S.D.N.Y. Sep 22, 1998) (“The term ‘joint tortfeasors’ means that two or more persons are the joint participants or joint actors in the wrongful production of an injury to a third person.”) (quoting *In re Crazy Eddie Sec. Litig.*, 740 F.Supp. 149, 152 (E.D.N.Y. 1990)). No claims will be lost against them. If the Motion is granted, these defendants will only be severed from the Class trial (at their request), and other Defendants would maintain their contributions claims against them.

Therefore, if the trial were to proceed in this manner and the claims of Ebbers and the other Stayed Defendants were severed pursuant to Rule 21, the Defendants’ rights of contribution would also be preserved. They will be able to seek any amounts owed to them by Ebbers and the other Stayed Defendants in a separate contribution action at which Ebbers and the other Stayed Defendants’ percentage responsibilities will be determined by another jury. Moreover, by proceeding in this manner, Ebbers’ Seventh Amendment rights will not be compromised as a jury at a proceeding to which he is a defendant will be charged with determining his relative culpability in relation to the other defendants in this action.

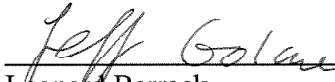
**CONCLUSION**

For the foregoing reasons, Lead Plaintiff respectfully submits that it does not oppose Ebbers' motion, and should be afforded the right to prosecute the claims it has asserted against Ebbers and the other Stayed Defendants pending the final resolution of the criminal proceedings against them.

Dated: March 10, 2005

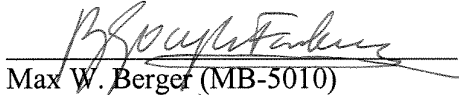
Respectfully submitted,

**BARRACK, RODOS & BACINE**

  
\_\_\_\_\_  
Leonard Barrack  
Gerald J. Rodos  
Jeffrey W. Golan  
Mark R. Rosen  
Jeffrey A. Barrack  
Regina M. Calcaterra (RC-3858)  
Pearlette V. Toussant  
Lisa M. Lamb  
3300 Two Commerce Square  
2001 Market Street  
Philadelphia, PA 19103  
Tel: (215) 963-0600

-and-

**BERNSTEIN LITOWITZ BERGER &  
GROSSMANN LLP**



Max W. Berger (MB-5010)

John P. Coffey (JC-3832)

Steven B. Singer (SS-5212)

J. Erik Sandstedt (JS-9148)

Beata Gocyk-Farber (BGF-5420)

John C. Browne (JB-0391)

David R. Hassel (DH-0113)

1285 Avenue of the Americas

New York, NY 10019-6028

Tel: (212) 554-1400


*Attorneys for Lead Plaintiff Alan G. Hevesi, Comptroller of the State of New York, as  
Administrative Head of 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*



**CERTIFICATE OF SERVICE**

I, Mark D. Debrowski, Esq. hereby certify that a true and correct copy of Lead Plaintiff's Memorandum In Response To The Motion Of Defendant Bernard J. Ebbers To Sever Claims Against Him Pursuant to F.R.C.P. 21 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  
March 10, 2005

  
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Mark D. Debrowski, Esq.

## WORLD.COM SERVICE LIST

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

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

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

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

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

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

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

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

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

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

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

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)<sup>†</sup>  
108 Redbud Drive  
Brandon, MS 39047

Byron B. Mathews, Jr., (Pro Se)<sup>†</sup>  
410 West 24<sup>th</sup> 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  
One World Financial Center  
New York, NY 10281  
Tel: (212) 504-6000  
Fax: (212) 504-6666

Michael J. Pucillo  
BERMAN DeVALERIO PEASE  
TABACCO BURT & PUCILLO  
515 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

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  
Michael J. Sternhell  
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, LAITMAN  
& LOMETTI, 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

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

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

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

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

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

Sharon L. Schneier  
DAVIS WRIGHT TREMAINE LLP  
1633 Broadway  
New York, NY 10019  
Tel: (212) 489-8230  
Fax: (212) 489-8340

William F. Boyer, Esq.  
SHARP & ASSOCIATES  
1215 19th Street, N.W.  
Washington, DC 20036  
Tel: 202-467-4114  
Fax: 202-467-1625

† Service by First Class Mail Only