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	

LEAD PLAINTIFF'S MEMORANDUM OF LAW IN RESPONSE TO OBJECTION OF J.P. MORGAN CHASE & CO., ET AL., TO PRELIMINARY APPROVAL OF THE SETTLEMENTS BETWEEN LEAD PLAINTIFF AND OTHER UNDERWRITER DEFENDANTS

Lead Plaintiff, on behalf of itself, Named Plaintiffs Fresno County Employees Retirement Association, County of Fresno, California, and HGK Asset Management, Inc., the Class certified in this Action on October 24, 2003, and members of the Class who purchased or otherwise acquired debt securities of WorldCom, Inc. ("WorldCom") in the bond offerings of May 2000 and May 2001 ("May 2000 and May 2001 Subclasses"), respectfully submits this memorandum of law in opposition to the objections raised by JP Morgan Chase & Co., J.P. Morgan Securities Inc., J.P. Morgan Securities Ltd., and Chase Securities ("JPM") to preliminary approval of the settlements

reached by Lead Plaintiff with nearly all members of the underwriter syndicates with the exception of JPM.

The settlements that JPM seeks to derail – which total approximately $1,426,000,000 – are with: Banc of America Securities LLC and Fleet Securities Inc. ("BOA Defendants"); Lehman Brothers Inc., Credit Suisse First Boston, LP, Goldman, Sachs & Co. and UBS Warburg LLC (collectively "May 2000 Junior Underwriters"); ABN AMRO Incorporated ("ABN"), Deutsche Bank Securities Inc. ("Deutsche Bank"); and Mitsubishi Securities Corp. plc, WestLB AG, BNP Paribas Securities Corp., Cabato Holding SIM S.p.A, and Mizuho International plc (collectively "May 2001 Junior Underwriters").

JPM bases its objection on two grounds: first, that the bar provision in the present settlement is overbroad, because it seeks to bar contractual claims for indemnification and contribution; and second, that because other non-settling defendants may not be able to satisfy potential contribution claims that JPM may have against those entities after JPM is found liable to plaintiffs, the master agreements between and among all underwriters should remain in place, so that JPM can seek, from the settling underwriters, their proportionate share of whatever "excess" amount of a judgment that JPM might have to pay on account of insolvent non-settling defendants. As we show below, JPM's objections to the settlements are without merit.

ARGUMENT

I. The Bar Provision of the Settlement Is Appropriate

JPM's attack on the bar provision within the present settlements ignores the overwhelming case law that shows its propriety. Case after case provides that in the

situation of a settlement with less than all defendants, a court may and should approve bars against contribution and indemnification claims against the settling defendant by non-settling defendants. *Gerber v. MTC Elec. Techs. Co., Ltd.*, 329 F.3d 297, 307 (2d Cir. 2003) (holding that bar order against non-settling defendants could be written broadly enough to include more than just contribution and indemnification claims within scope of non-settling defendants' liability to plaintiffs); *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1031-32 (2d Cir. 1992) (approving settlement bars of claims for indemnity and contribution). As the Court stated in *Gerber*: "The non-settling defendants do not dispute that the district court properly barred their contribution and indemnification claims." 329 F.3d at 305 (*citing Masters,* 957 F.2d at 1031-32).[1]

Indeed, in the context of the Citigroup Settlement, JPM conceded that the bar provision for any claim for contribution or indemnification was appropriate in light of the

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[1] *See also Eichenholtz v. Brennan*, 52 F.3d 478, 483-84 (3d Cir. 1995) (barring all claims for contribution and indemnification); *In re WorldCom Sec. Litig.*, No. 02 Civ 3288 (DLC), 2004 WL 2591402, at *14 (S.D.N.Y., Nov. 12, 2004) (approving bar order that extinguishes independent contractual claims in addition to contribution and indemnification claims); *In re WorldCom Sec. Litig.*, 339 F.Supp. 2d 561, (S.D.N.Y. 2004) (approving bar order); *In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp. 2d 706, 726-27 (E.D. Pa. 2001) (holding that PSLRA does not limit ability to enter bar orders precluding indemnification and does not include language stating that contribution bar is only bar order that may be entertained); *Lucas v. Hackett Associates, Inc.*, 18 F.Supp.2d 531, 535 (E.D. Pa., 1998) (allowing court to issue order barring indemnification and contribution claims by non-settling defendants and finding indemnification to run counter to policies underlying federal securities laws); *Neuberger v. Shapiro*, 110 F.Supp.2d 373, 383 (E.D. Pa., 2000) (approving partial settlement and bar order barring contribution and indemnification claims by non-settling defendants); *Harden v. Raffensperger*, 933 F. Supp. 763 (S.D. Ind. 1996) (approving order barring non-settling defendants from having contribution rights against settling defendants); *Seidman v. American Mobile Systems*, 965 F. Supp. 612, 628 n.1 (E.D. Pa. 1997) (approving settlement which included permanent bar orders enjoining contribution and indemnity claims "arising directly or indirectly out of the released claims or the facts, transactions, events, acts, or omissions underlying the subject matter of the action" and all other legally permissible claims which were or could be asserted); *TBK Partners, Ltd. V. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) (stating that "in order to achieve a comprehensive settlement that would prevent litigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action").

judgment credit provision included in the Judgment Approving Settlement and Dismissing Action Against the Citigroup Defendants, entered November 12, 2004 ("Citigroup Defendants, entered November 12, 2004 ("Citigroup Judgment"). The Citigroup Judgment expressly provided that "other defendants in the defendants in the Action [including JPM] ... are hereby permanently BARRED, ENJOINED and RESTRAINED from commencing, prosecuting, or asserting any claim for indemnification or contribution against the Citigroup Releasees (or any other claim against the Citigroup Releasees where the injury to the Non-Settling Entity/Individual is the Non-Settling Entity's/Individual's liability to the Lead Plaintiff, Named Plaintiff and other Class Members) ...." *See* Citigroup Judgment, ¶ 13 (emphasis added). The paragraph further provided: "The Non-Settling Entities/Individuals will be entitled to judgment credit in an amount that is the greater of the amount allocated in the Settlement to claims for which a Non-Settling Entity/Individual may be found liable for common damages or, for each such claim, the proportionate share of the Citigroup Defendants' fault as proven at trial."

JPM now seeks to argue that because the bar provisions in the present settlements state that "any contractual or other claim for indemnification or contribution" will be barred, enjoined and restrained, the new settlements should not be granted preliminary approval. However, the phrase "contractual or other" used to modify "any ... claim for indemnification or contribution" in the present settlements is mere surplusage. Under the Citigroup Judgment, any claims for indemnification and contribution are barred, and that remains the case for the new settlements. Thus, JPM's citation to the additional,

modifying words in the bar order provision of the present settlements provides no reason to withhold approval of the present settlements.

In the context of the Citigroup settlement, JPM further conceded (a) that all claims that JPM might have had against the Citigroup Defendants based on JPM's potential liability to the Class are properly barred, and (b) any claims for indemnity and contribution are appropriately barred as long as a bar order also provides judgment credit language as stated in the Citigroup Judgment. *See* JPM Memorandum of Law, filed October 8, 2004, at 10-11. This is the same language utilized at the end of the present Bar Order. Thus, JPM's present claim that the Bar Order is improper because of the words "contractual or other" is wrong – JPM earlier admitted that such claims are properly barred. Moreover, the Bar Order in the form of Judgment for the present settlements complies precisely with the law of this case, set in the Citigroup Judgment, and the law in this Circuit concerning what constitutes a non-objectionable bar order. It is mutual, as the PSLRA provides it should be, 15 U.S.C. § 78u-4(f)(7), and it is limited to a bar against claims for indemnification and contribution. The governing cases in this Circuit – *Gerber* and *Masters* – explicitly provide for such bar orders, and the present Bar Order does not go beyond what is approved in those cases.

Moreover, it s clear that a contractual claim of indemnification or contribution may be barred as a matter of federal common law. In *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540 (D Colo. 1989), applying federal common law to the issue of bar orders in federal securities litigation (*id.* at 552), the court held that all statutory, state law and contractual claims for contribution could be barred as long as the settling parties provided

for a judgment credit provision based on the proportionate share of liability as determined at trial. The court stated:

> *Non-settling defendants also seek contractual contribution under Colorado law based on the provisions of the parties' underwriting agreement.* ... Colorado affords a statutory right to contribution. ... Also, there is a Colorado settlement contribution bar statute which determines the amount of setoff by proportionate fault. ... The Colorado state statute and the uniform federal rule allowing a contribution bar are consistent. *Consequently, to the extent there are state claims seeking contribution, these claims may be extinguished through the settlement contribution bar."*

Id. at 554 (emphasis added). Similarly, in *Eichenholtz v. Brennan*, 52 F.3d 478 (3d Cir. 1995), the Court wrote definitively concerning the propriety of the bar order approved by the district court and the strong trend towards acceptance of the proportionate liability method as a federal rule in federal securities law cases.

> In general, the settlement of complex litigation before trial is favored by the federal courts. However, in multi-party litigation, settlement may be difficult. Defendants, who are willing to settle, "buy little peace through settlement unless they are assured that they will be protected against co-defendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation." *In re U.S. Oil and Gas Litigation*, 967 F.2d at 494; *see In re Jiffy Lube Securities Litigation*, 927 F.2d at 160. In cases involving multiple defendants, a right to contribution inhibits partial settlement.
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> Therefore, in order to encourage settlement in these cases, modern settlements increasingly incorporate settlement bar orders into partial settlements. "In essence, a bar order constitutes a final discharge of all obligations of the settling defendants and bars any further litigation of claims made by non-settling defendants." *Franklin [v. Kaypro Corp.]*, 884 F.2d [963] at 1225.

52 F.3d at 486. *Accord In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1369 (2d Cir. 1991). In keeping with this rationale, the Court in *Eichenholtz* affirmed a bar order extinguishing all potential contribution and indemnification claims of a non-settling underwriter against the settling defendants, including a contractual indemnification claim,

based upon a judgment credit provision keyed to the relative culpability of the settling versus the non-settling defendants.

Thus, the bar order provisions in the present settlements are appropriate, the forms of Judgment for the settlements are appropriate, and the settlements should be granted preliminary approval.

II. Neither the Possibility of Other Defendants Being Insolvent Nor the Agreements Among Underwriters Requires Any Modification of the Proposed Settlements or Forms of Judgments

JPM posits that the chance that some remaining defendants will not be able to pay their "share" of a judgment against JPM requires a modification of the proposed judgment credit and bar order provisions of the present Settlements. JPM's arguments on these points are similarly unavailing.

First, JPM's argument is contrary to the formulation of liability under Section 11 of the Securities Act. Except for outside directors (who are liable generally only for their proportionate share of the damages found by the jury for a Section 11 claim), all defendants found liable for a Section 11 violation are jointly and severally liable for the full amount of damages, with a cap for underwriters up to the amount of offerings that they underwrote. Under Section 11(e), JPM would maintain a right of contribution against any other non-settling defendants – which the present Settlements do not impact at all – and could seek to collect from such non-settling defendants up to their proportionate share as found by the jury. But that right of contribution does not thereby limit the amount that plaintiffs can recover from JPM, nor should it impact the bar against claims for contribution that shields settling defendants, as a matter of law and for the

purpose of furthering the public interest in seeking to encourage settlements of complex class actions.

Second, JPM's argument is contrary to the fundamental principles governing settlements and bar orders. As this Court stated in *In re WorldCom, Inc. ERISA Litigation*, 339 F. Supp.2d 561, 570-71 (S.D.N.Y. 2004) ("*ERISA Settlement Opinion*"), and as the Supreme Court held in *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 218-21 (1994), if a plaintiff settles with a defendant for a sum that ends up to be less than that settling defendant's proportionate share of the liability for a claim, that is a risk that the plaintiff bears in terms of being able to collect relatively less from the non-settling defendants. However, as *McDermott* also makes clear, "there is no tension between joint and several liability and a proportionate share approach to settlements." *Id.* at 220. The Supreme Court continued:

> Joint and several liability applies when there has been a judgment against multiple defendants. *It can result in one defendant's paying more than its apportioned share of liability* when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control, such as a defendant's insolvency. When the limitations on the plaintiff's recovery arise from outside forces, *joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall.*

Id. at 220-21 (emphasis added); *see also ERISA Settlement Opinion*, 339 F. Supp.2d at 571 ("If the plaintiffs have settled with defendants for less than they are financially able or required to pay, then the plaintiffs will bear the burden of that difference. If, however, the settling defendants have paid all that they can or should, then *the doctrine of joint and several liability makes the remaining defendants liable for the difference.*") (emphasis added).

Third, JPM's objection on this ground is premature. It assumes that defendants other than JPM may be found liable for plaintiffs' Securities Act claims, that the jury will attribute to them some proportionate share of the liability, and that they will be insolvent and unable to pay a contribution claim brought against them by JPM. It further seeks to clarify, at this pre-trial stage, how the judgment reduction provision that JPM approved (and even suggested in place of the original provision that Lead Plaintiff and the Citigroup Defendants had proposed) – that is, that a judgment credit would be entered to the maximum extent allowed by law in connection with the Citigroup settlement – will later be applied. But *Gerber* makes clear that "the non-settling defendants are not entitled to any greater degree of certainty about the amount of their judgment credit than they already have." *See* 329 F.3d at 304-05.

Fourth, while plaintiffs dispute that an agreement among underwriters could impact the right of plaintiffs in recovering on a verdict against JPM, the Master Agreement conditions were satisfied months ago. Pursuant to the Citigroup Settlement, all underwriters had the opportunity, for a forty-five day period, to settle at the same rate as paid by Citigroup. None of the other underwriters accepted the terms of those offers within the time period specified, but many of the underwriters have now reached agreements at or above the Citigroup rate. While JPM certainly maintains the right to choose to go to trial, its exercise of that right cannot and should not put all other underwriters at any further risk, when they have already reached agreements of settlement, in accordance with the public policy encouraging such settlements.[2] Indeed,

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[2] It is in this sense that JPM's objection is noteworthy. It makes clear that JPM – the entity that was responsible for issuing 37.5% of the May 2000 offering, and 32.11% of the May 2001 offering (and also served a Co-Lead Manager of that offering) – is now opposing settlements that other members of the May 2000 and May 2001 underwriter syndicates signed to settle the claims asserted against them in this case,

to do so would be contrary to the Citigroup Judgment, which left no possibility of any further claims for contribution being asserted against the Citigroup Defendants, and the policies enunciated in *Gerber* and *Eichenholtz.*[3]

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that this Court enter the preliminary approval orders proposed by Lead Plaintiff and the following settling underwriter defendants: Banc of America Securities LLC and Fleet Securites Inc. ("BOA Defendants"); Lehman Brothers Inc., Credit Suisse First Boston Corp., Goldman Sachs & Co., UBS Warburg LLC (collectively "May 2000 Junior Underwriters"); ABN AMRO Incorporated ("ABN"), Deutsche Bank Securities Inc. ("Deutsche Bank"); and Mistubishi Securities Corp., WestLB AG, BNP Paribas Securities Corp., Cabato Holding SIM S.p.A, and Mizuho International plc (collectively "May 2001 Junior Underwriters").

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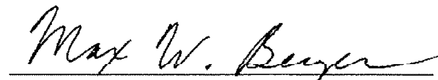
notwithstanding that many of these settling underwriters relied upon JPM to conduct adequate due diligence.

[3] The cases cited by JPM are inapposite, and do not serve to avoid the standards set in *McDermott, ERISA Settlement Opinion, Eichenholtz* and *Gerber. In re Forty-Eight Insulations, Inc.*, 149 B.R. 860 (N.D. Ill. 1992) , was not a securities case, and involved the determination of rights under insurance policies in a bankruptcy setting. Both *United States v. Davis*, 31 F.Supp.2d 45 (D. R.I. 1998), and *United States v. Hardy*, Nos. C90-0695-L(J), C90-0792-L(J), 1992 WL 439759, at *2 (W.D. Ky. 1992) , were cases arising under the Comprehensive Environmental Response, Compensation and liability Act ("CERCLA"). As the court in *U.S. v. Hardy* made clear, the statutory scheme regarding contribution claims under CERCLA sets the limits of what may and may not be discharged through settlements. Thus, the cases are inapposite.

Dated: March 14, 2005

Respectfully submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP



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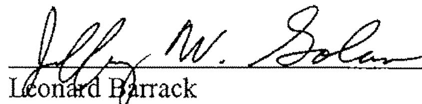

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CERTIFICATE OF SERVICE

I, John C. Browne, Esq. hereby certify that a true and correct copy of Lead Plaintiffs Memorandum Of Law In Response To Objection Of J.P. Morgan Chase & Co., Et. Al., To Preliminary Approval Of The Settlements Between Lead Plaintiff And Other Underwriter Defendants 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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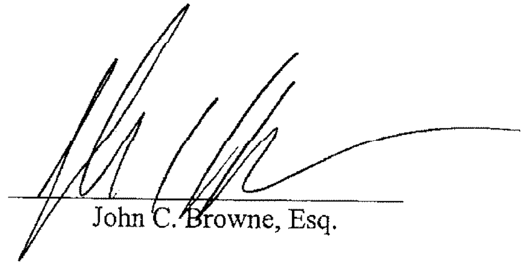

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