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 OBJECTIONS TO PRELIMINARY APPROVAL OF THE SETTLEMENT BETWEEN LEAD PLAINTIFF AND CERTAIN OF THE DIRECTOR DEFENDANTS

Lead Plaintiff respectfully submits this memorandum in response to the objections raised to the March 18, 2005 Stipulation of Settlement ("Stipulation") reached between and among Lead Plaintiff and Named Plaintiffs, on behalf of the Class, eleven Director Defendants ("Settling Director Defendants"), and seven insurance companies that issued directors and officers ("D&O") insurance liability policies to WorldCom, Inc. ("WorldCom") for the period from December 31, 2001 through December 31, 2002 (the "Insurers"). Specifically, Lead Plaintiff responds to the objections of the Individual Action Plaintiffs ("IA Plaintiffs"), and incorporates the responses of the Settling Director

Defendants and the Insurers to the objections of Non-Settling Defendants Bert C. Roberts, Jr. and Bernard J. Ebbers.

The settlement with the Settling Director Defendants is an historic one, and should be approved. It was the product of more than one year of good faith negotiations conducted by the parties to the settlement under the auspices of Magistrate Judge Michael H. Dolinger. It requires, for one of the only times in history, individual directors of a public company to pay money from their own pockets in settlement of securities law claims against them. It further provides for a substantial recovery of the available D& O insurance proceeds for the benefit of the Class, notwithstanding the fact that a jury has now rendered a verdict that WorldCom's former chief executive officer, Mr. Ebbers, filed numerous false financial statements with the SEC, including the same financial statements upon which the Insurers relied in issuing their policies. Moreover, the settlement provides sufficient funds for the lone director hold-out, Mr. Roberts, to carry on his opposition to this and other WorldCom related proceedings against him, as is his right. But that right simply cannot be turned as a sword to hold hostage approval of this historic settlement that the Lead Plaintiff, on behalf of the Class, and the Settling Director Defendants, have agreed upon and desire. Because the settlement is fair to the Class, and to non-parties who argue that they are affected by it, it should be approved.

ARGUMENT

I. The Stipulation is Appropriate Because It Does Not Bar the Claims of the IA Plaintiffs Against the Settling Director Defendants

The IA Plaintiffs' sole objection to the Stipulation, as stated in their March 20, 2005 letter to the Court ("IA Objection"), is to the provisions of the Stipulation and its exhibits that would bar potential claims of the IA Plaintiffs to recover from the Insurers

the remaining proceeds of the Insurance Policies. The IA Plaintiffs object to: (a) the definition of "Barred Person" at paragraph 1(b)(iv) of the Stipulation to the extent it includes the IA Plaintiffs; (b) paragraph 4(d) of the Stipulation, which provides that the Preliminary Approval Order shall permanently enjoin any Barred Person from instituting any action or claim "against the Insurers arising out of or related to any Insurance Policies"; and (c) paragraph 5(f) of the Stipulation because it similarly provides that the Judgment shall permanently bar and enjoin any Barred Person from instituting or prosecuting any action or claim "against the Insurers arising out of or related to any of the Insurance Policies or the obligations of any Insurer under any of the Insurance Policies."

The IA Plaintiffs' objection is misplaced. The Stipulation does not release any potential claims that the IA Plaintiffs assert against the Settling Director Defendants. Furthermore, the cases on which the IA Plaintiffs do not apply to the present situation. Those cases merely stand for the proposition that a settlement may not bar class members from asserting claims that are not based on the same factual predicate as the released claims, and for which they are not being compensated through the settlement.

A. The Stipulation of Settlement Has Been Revised to Include Language That Expressly Preserves the IA Plaintiffs' Claims Against the Settling Director Defendants

There is nothing in the Stipulation that bars any claim of the IA Plaintiffs against the Settling Director Defendants. Indeed, to make this point even clearer than it was in the original stipulation, paragraph 20 of the Stipulation and paragraph 11 of the Judgment provide expressly that nothing in the Judgment shall "release the Released Claims of any Persons against the Settling Director Defendants who submitted a timely, signed request

for exclusion and did not submit a timely, signed request to revoke the prior request for exclusion."[1]

Thus, the IA Plaintiffs' objection to the original settlement on this basis has been cured.

B. The Cases on Which the IA Plaintiffs Rely for their Present Objection Are Inapposite

The IA Objection incorporates their objections to the original director settlement, which were first stated in the IA Plaintiffs' Memorandum of January 20, 2005. In that memorandum, the IA Plaintiffs relied on *National Super Spuds, Inc. v. New York Mercantile Exchange,* 660 F.2d 9 (2d Cir. 1981) and *In re Auction Houses Antitrust Litigation,* 42 Fed. Appx. 511 (2d Cir. 2002), for the proposition that a class settlement may not release claims of members of a defined class without providing them with adequate consideration. However, these cases are inapplicable here because the IA Plaintiffs are not Class Members. Moreover, as noted above, the Stipulation and Judgment explicitly provide that it is only the claims of Class Members who are being released against the Settling Director Defendants, and that the IA Plaintiffs' claims against the Settling Director Defendants are not foreclosed by the Stipulation.

The only argument left for the IA Plaintiffs to assert is that their claims against the Insurers should not be barred through the Stipulation. However, neither *Super Spuds* nor *In re Auction Houses* supports the IA Plaintiffs' position on this issue.

Super Spuds and *In re Auction Houses* both involved settlements that purported to release claims that were not based on the same factual predicate as those asserted by the class. However, "'class action releases may include claims not presented and even those

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[1] Paragraphs 4(d) and 5(f) of the Stipulation include similar provisions.

which could not have been presented as long as the released conduct arises out of the identical factual predicate as the settled conduct.'" *Denney v. Gilchrist*, 2005 WL 388561, at *18 (Feb. 18, 2005) (quoting *Wal-Mart Stores, Inc. v. VISA U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005)). Therefore, to the extent that the IA Plaintiffs oppose the Stipulation as it purports to bar their claims against the Insurers, this argument is misplaced because the Court has the ability to bar their claims that rest on the same factual predicate as the class action claim involved in the settlement. *See, e.g., TBK Partners, Ltd. V. Western Union Corp.*, 675 F.2d 456, 462 (2d Cir. 1982); *In re VISA Antitrust Litigation*, 297 F.Supp.2d 503, 512 (E.D.N.Y. 2003); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 266 (S.D.N.Y. 1998) (stating that "[t]here is no general rule against settlements that limit additional claims ... and many settlements featuring such limitations earn Second Circuit approval").

II. The Bar Order Precluding the IA Plaintiffs From Asserting Claims Against the Insurers Is Appropriate

To the extent that the IA Plaintiffs oppose the Stipulation because it bars what they claim to be their independent potential claims against the Insurers, this argument is without merit for a number of reasons.

As stated in the Settling Director Defendants' response to the objections to the Settlement, such a bar is appropriate in the circumstances of this case. It is simply not the case that a settlement must completely eviscerate available insurance proceeds before a court may issue a bar against further claims against the insurers who provided such coverage. If that were the case, there would be little, if any, incentive for insurers to settle claims against their insured. The objection of the IA Plaintiffs, like those of Ebbers

and Roberts to this provision in the Stipulation, is thus without merit and should be rejected for this reason alone.

The IA Plaintiffs' objection on this point is also deficient because the IA Plaintiffs, as injured parties, simply do not have standing to assert claims against the Insurers. *See, e.g., Adams v. General Accident Assurance Co. of Canada*, 133 F.3d 932 (10th Cir. 1997) (injured parties are not intended beneficiaries of insurance policies and may not sue thereon). Indeed, in the IA Objection, the IA Plaintiffs appear to concede that they may not have such claims at all, stating: "It may ultimately be the case that the IA Plaintiffs have no recourse against the Insurers." *See* IA Objection, at 2.

Courts have repeatedly recognized that bars of claims are often essential ingredients to settlement agreements. Indeed, in a similar vein, in approving a settlement bar order, the Court in *Eichenholtz v. Brennan*, 52 F.3d 478 (3d Cir. 1995), ruled that indemnification was prohibited to party defendants in a federal securities law action and, therefore, a bar of such indemnification claims was appropriate. The same rationale applies here: where the IA Plaintiffs have no cognizable claim against the Insurers, there is no reason not to bar such claims, especially when the bar against claims against the Insurers is a necessary condition to encourage and facilitate the historic settlement of this complex class action against the Settling Director Defendants.

CONCLUSION

For the foregoing reasons, and those set forth in the submissions of the Settling Director Defendants and the Insurers, Lead Plaintiff and the Named Plaintiffs respectfully request that the Court: (a) reject the objections to the proposed settlement; and (b)

preliminarily approve the Settlement and sever the claims against the Settling Director Defendants from those going to trial on March 24, 2005.

Dated: March 21, 2005

Respectfully submitted,

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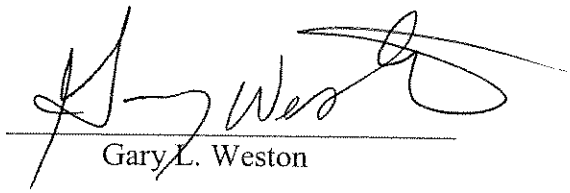
CERTIFICATE OF SERVICE

I, Gary L. Weston hereby certify that a true and correct copy of Lead Plaintiff's Memorandum of Law in Response to Objections to Preliminary Approval of the Settlement Between Lead Plaintiff and Certain of the Director 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
March 21, 2005



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