To be argued by Jeffrey W. Golan

04-6566 (L)

04-6576-cv(CON); 04-6608-cv(CON); 04-6637-cv(CON); 05-0296-cv(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE WORLDCOM, INC. SECURITIES LITIGATION

RICHARD ENTENMANN, SHARIE GALITZER, STEVEN F. HELFAND, W. CAFFEY NORMAN III, JOHN MARSHAL LUSK JR. and JAMES SAVAGE,
Objector-Appellants,

v.

ALAN G. HEVESI, COMPTROLLER OF THE STATE OF NEW YORK,
Plaintiff-Appellee.

(See Inside Cover for Continuation of Caption)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF LEAD PLAINTIFF-APPELLEE ALAN G. HEVESI

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP Max W. Berger John P. Coffey Steven B. Singer 1285 Avenue of the Americas New York, New York 10019 (212) 554-1400	BARRACK, RODOS & BACINE Leonard Barrack Gerald J. Rodos Jeffrey W. Golan 3300 Two Commerce Square 2001 Market Street Philadelphia, Pennsylvania 19103 (215) 963-0600

(Continuation of Caption)

AS ADMINISTRATIVE HEAD OF THE NEW YORK STATE AND LOCAL RETIREMENT SYSTEMS AND AS TRUSTEE OF THE NEW YORK STATE COMMON RETIREMENT FUND, THE FRESNO COUNTY EMPLOYEES RETIREMENT ASSOCIATION, THE COUNTY OF FRESNO, CALIFORNIA, AND HGK ASSET MANAGEMENT, INC., ON BEHALF OF PURCHASERS AND ACQUIRERS OF ALL PUBLICLY TRADED SECURITIES OF WORLDCOM, INC., DURING THE PERIOD BEGINNING APRIL 29, 1999, THROUGH AND INCLUDING JUNE 25, 2002,

Plaintiffs-Appellees

v.

CITIGROUP INC., CITIGROUP GLOBAL MARKETS INC. F/K/A SALOMON SMITH BARNEY INC. AND JACK GRUBMAN,

Defendants-Appellees,

BERNARD EBBERS, SCOTT SULLIVAN, DAVID MYERS, BUFORD YATES, JR., JAMCES C. ALLEN, JUDITH AREEN, CARL J. AYCOCK, MAX E. BOBBITT, FRANCESCO GALESI, CLIFFORD L. ALEXANDER, JR., STILES A. KELLETT, JR., GORDON S. MACKLIN, JOHN A. PORTER, BERT C. ROBERTS, JR., JOHN W. SIDGMORE, LAWRENCE C. TUCKER, ARTHUR ANDERSEN LLP, J.P. MORGAN CHASE & CO., BANC OF AMERICA SECURITIES LLC, DEUTSCHE BANK SECURITIES INC., CHASE SECURITIES INC., LEHMAN BROTHERS INC., BLAYLOCK & PARTNERS, L.P., CREDIT SUISSE FIRST BOSTON CORP., GOLDMAN SACHS & CO., UBS WARBURG LLC, ABN/AMRO INC., UTENDAHL CAPITAL, TOKYO-MITSUBISHI INTERNATIONAL LPC, WESTDEUTSCHE LANDESBANK GIROZENTRALE, BNP PARIBAS SECURITIES CORP., CABOTO HOLDING SIM S.P.A., FLEET SECURITIES, INC., AND MIZUHO INTERNATIONAL PLC,

Defendants.

STATEMENT PURSUANT TO RULE 26.1

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for Plaintiffs-Appellees states as follows:

1. The New York State Common Retirement Fund is not a corporate party.

2. The Fresno County Employees Retirement Association is not a corporate party.

3. The County of Fresno, California is not a corporate party.

4. HGK Asset Management, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE ISSUES PRESENTED 1

COUNTER-STATEMENT OF THE FACTS 3

I. Background of this Action 5

II. The Order Denying the Citigroup Defendants' Motion to Sever Claims 9

III. The Orders Denying in Large Part the Motions to Dismiss the Complaint 10

IV. Class Certification 11

V. Discovery 12

VI. Opt-Out Period 15

VII. Settlement Negotiations 17

VIII. Settlement Terms 18

IX. Plan of Allocation 19

X. The Notice 20

XI. Close of Opt-Out Period: Reduction of Settlement Fund 21

XII. The Reaction of the Class to the Settlement Notice 22

XIII. November 5, 2004 Settlement Hearing 24

XIV. The District Court Judgment, Opinion and Orders of November 12, 2004, Approving the Settlement, Plan of Allocation and Fee and Expense Request 24

XV. Notices of Appeal 25

SUMMARY OF ARGUMENT 25

ARGUMENT 29

I. Standard of Review 29

II. The Release in the Judgment Is Appropriate and Valid 31

A. Background 31

B. All Requirements For A Valid Release Are Satisfied 35

1. Appellants Norman's Objection to the Release Is Without Merit, as Shown Recently by an Identical Objection by Norman Being Rejected in Another Case by the District Judge Presiding Over Norman's Putative Class Action 38

2. The Rejection of Appellant Entenmann/Galitzer's Objection to the Release Should Be Affirmed on Numerous Grounds 43

3. The Released Claims Were Adequately Represented 50

III. The Notice of the Citigroup Settlement and its Dissemination Were Proper 54

IV. Entenmann/Galitzer's Appeal from Denial of Their Motion to Opt Out of the Class Late Should Be Denied 62

V. Entenmann/Galitzer's Appeal from the Injunction Issued February 18, 2005 Raises Issues That Were Not Raised at the Time of their Objection to the Settlement, and May Not Be Considered in Connection with their Appeal from the Judgment Approving the Citigroup Settlement 64

VI. The Fee Awarded by the District Court Was Fair and Reasonable, Complied With All Standards in this Circuit, and Did Not Constitute an Abuse of Discretion 67

A. Helfand's Objections to the Fee Award Are Without Merit 70

B. The District Court Thoroughly Scrutinized the Merits of the Fee Request Before Concluding It Was Fair and Reasonable 72

1. The Time and Labor Expended by Counsel 73

2. The Magnitude and Complexities of the Litigation 75

3. The Risks of the Litigation 78

a. Risks Inherent in the Litigation 79

b. Risks Associated with Non-Payment of Attorneys' Fees 81

4. Quality of Representation 85

5. The Results Achieved Justified the Requested Fee 87

6. Public Policy Considerations Support the Requested Fee 89

C. The District Court Properly Cross-Checked the Percentage Fee Award Against the Lodestar and Scrutinized Lead Counsel's Lodestar Calculations 96

1. The Time of Contract Attorneys and Paralegals Was Properly Calculated at Present Market Rates and Included in the Lodestar Computations 97

2. The Use of Current Billing Rates in the Lodestar Calculation Was Appropriate 102

3. The District Court's Examination of Class Counsel's Lodestar Was Appropriate 103

VII. The District Court Properly Ordered That Fees and Expenses Should Be Awarded from the Overall Settlement Fund, Which Would Then Be Allocated to the Class Sub-Groups According to the Plan of Allocation 106

CONCLUSION 109

TABLE OF AUTHORITIES

Page(s)

Cases

Abrahamson v. The Board of Education of the Wappingers Falls Central School Dist.,
374 F.3d 66 (2d Cir. 2004) 29

ACEquip Ltd. v. American Engineering Corp.,
315 F.3d 151 (2d Cir. 2003) 45

Alpine Pharmacy v. Chas. Pfizer & Co., Inc.,
481 F.2d 1045 (2d Cir. 1973) 94

Assoc. for Disabled Americans, Inc. v. Amoco Oil Co.,
211 F.R.D. 457 (S.D. Fla. 2002)....................45

AUSA Life Ins. Co. v. Ernst and Young,
206 F.3d 202 (2d Cir. 2000) 30

Berman v. L.A. Gear, Inc.,
1993 WL 437733 (S.D.N.Y. Oct. 26, 1993),
aff'd, 29 F.3d 621 (2d Cir. 1994)....................58

Blakey v. Continental Airlines,
2 F. Supp.2d 598 (D.N.J. 1998)....................98

Brown v. Philips Petroleum Co.,
838 F.2d 451 (10th Cir. 1988) 72

Burks v. City of Philadelphia,
974 F. Supp. 475 (E.D. Pa. 1997)....................98

California Public Employees' Retirement System v. WorldCom, Inc.,
368 F.3d 86 (2d Cir. 2004),
cert. denied, __ U.S. __, 125 S. Ct. 862 (2005) 16

Chambless v. Masters, Mates & Pilots Pension Plan,
885 F.2d 1053 (2d Cir. 1989) 101

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2d Cir. 1974) 29, 72

D'Amato v. Deutsche Bank,
236 F.3d 78 (2d Cir. 2001) 29

Dandridge v. Williams,
397 U.S. 471 (1970)...44

DeMarco v. Lehman Brothers Inc.,
222 F.R.D. 243 (S.D.N.Y. July 7, 2004) 79

Eltman v. Grandma Lee's, Inc.,
No. 82 Civ 1912, 1986 WL 53400 (E.D.N.Y. May 28, 1986).......................95

Goldberger v. Integrated Resources, Inc.,
209 F.3d 43 (2d Cir. 2000) 2, 28, 30, 68, 71, 72, 75, 96, 103

Greene v. United States,
13 F.3d 577 (2d Cir.1994) 46

Gurary v. Winehouse,
190 F.3d 37 (2d Cir.1999) 46, 101

Herman v. Davis Acoustical Corp.,
196 F.3d 354 (2d Cir. 1999) 72

Hevesi v. Citigroup Inc.,
366 F.3d 70 (2d Cir. 2004) 11, 79

In re AnnTaylor Stores Sec. Litig.,
1993 WL 183732 (S.D.N.Y. 1993) 34

In re Auction Houses Antitrust Litig.,
2001 U.S. Dist. LEXIS 1713 (S.D.N.Y. Feb. 22, 2001)..50

In re Baldwin-United Corp.,
770 F.2d 328 (2d Cir. 1985) 35, 52, 53

In re DaimlerChrysler AG Sec. Litig.,
No. 00-0993 (KAJ) (D. Del. Feb. 5, 2004).. 106

In re Franklin National Bank Sec. Litig.,
574 F.2d 662 (2d Cir. 1978) 58

In re Global Crossing Sec. Litig.,
No. 02 Civ. 910 (GEL), 2005 U.S. Dist. LEXIS 14245
(S.D.N.Y. July 12, 2005) 27, 35, 41, 42, 43, 52, 67

In re Initial Pub. Offering Sec. Litig.,
226 F.R.D. 186 (S.D.N.Y. 2005)...35

In re Lucent Technologies Sec. Litig.,
327 F. Supp.2d 426 (D.N.J. 2004)... 92, 105

In re NASDAQ Market-Makers Antitrust Litig.,
187 F.R.D. 465 (S.D.N.Y. 1998).. 69, 105

In re Oxford Health Plans, Inc. Sec. Litig.,
MDL 1222 (S.D.N.Y. June 2003) 106

In re PaineWebber Ltd. P'ships Litig.,
147 F.3d 132 (2d Cir. 1998) 35, 58, 64

In re Prudential Sec. Inc. Ltd. P'ships Litig.,
164 F.R.D. 362 (S.D.N.Y. 1996),
aff'd, 107 F.3d 3 (2d Cir. 1996)..59

In re Rite Aid Sec. Litig.,
396 F.3d 294 (3d Cir. 2005) 68, 70, 103

In re Union Carbide,
724 F.Supp. 160 (S.D.N.Y. 1989) 95, 100

In re Visa Check/Mastermoney Antitrust Litig.,
297 F. Supp. 2d 503 (E.D.N.Y. 2003),
aff'd, 396 F.3d 96 (2d Cir. 2005)... 68, 91

In re WorldCom, Inc. Sec. Litig.,
2003 U.S. Dist. LEXIS 10863 (S.D.N.Y. June 24, 2003)............................10

In re WorldCom, Inc. Sec. Litig.,
2003 U.S. Dist. LEXIS 22732 (S.D.N.Y. Dec. 16, 2003)..................... 15, 16

In re WorldCom, Inc. Sec. Litig.,
2003 U.S. Dist. LEXIS 4462 (S.D.N.Y. March 24, 2003) 9

In re WorldCom, Inc. Sec. Litig.,
2004 U.S. Dist. LEXIS 6376 (S.D.N.Y. April 15, 2004) 15

In re WorldCom, Inc. Sec. Litig.,
219 F.R.D. 267 (S.D.N.Y. 2003) 11

In re WorldCom, Inc. Sec. Litig.,
294 F.Supp.2d 392 (S.D.N.Y. May 19, 2003) 10

Joel A. v. Giuliani,
218 F.3d 132 (2d. Cir. 2000) 29, 45, 64

Konikoff v. Prudential Ins. Co. of America,
234 F.3d 92 (2d Cir. 2000) 45

Laselle v. Public Service Co. of Colorado,
988 F. Supp. 1348 (D. Col. 1997) 98, 100

LeBlanc-Sternberg v. Fletcher,
143 F.3d 748 (2d Cir. 1998) 88

Maley v. Del Global Technologies Corp.,
186 F. Supp. 2d 358 (S.D.N.Y. 2002) 95

Manners v. American Gen. Life Ins. Co.,
No. Civ. A. 3-98-0266, 1999 WL 33581944 (M.D. Tenn. 1999) 45

Matsushita Elec. Indus. Co., Ltd. v. Epstein,
516 U.S. 367 (1996) 53

Missouri v. Jenkins,
491 U.S. 274 (1989) 100, 101, 102, 103

National Super Spuds, Inc. v. New York Mercantile Exchange,
660 F.2d 9 (2d Cir. 1981) 50, 53

New York State Ass'n for Retarded Children, Inc. v. Carey,
711 F.2d 1136 (2d Cir. 1983) 102

Patrowicz v. Transamerica HomeFirst, Inc.,
359 F. Supp.2d 140 (D. Conn. 2005) 53

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985)...61

Savoie v. Merchant's Bank,
166 F.3d 456 (2d Cir. 1999) 89, 104

Shaw v. Toshiba America Information Systems, Inc.,
91 F. Supp.2d 942 (E.D. Tex. 2000) 105

Shumway v. *UPS, Inc.*,
118 F.3d 60 (2d Cir. 1997) 45

Silivanch v. Celebrity Cuises, Inc.,
333 F.3d 355 (2d Cir. 2003),
cert. denied, 540 U.S. 1105 (2004) 64

Specht v. Netscape Communications Corp.,
306 F.3d 17 (2d Cir. 2002) 46, 101

Supermarkets Gen. Corp. v. *Grinnell Corp.*,
490 F.2d 1183 (2d Cir. 1974) 59, 60

Supermarkets Gen. Corp. v. *Grinnell Corp.*,
59 F.R.D. 512 (S.D.N.Y. 1973)..60

TBK Partners, Ltd. v. Western Union Corp.,
675 F.2d 456 (2d Cir. 1982) 37, 41, 53, 66

United States Football League v. National Football League,
887 F.2d 408 (2d Cir. 1989) 100, 102

United States v. Braunig,
553 F.2d 777 (2d Cir.1977) 46, 101

Wal-Mart Stores Inc. v. Visa U.S.A.,
396 F.3d 96 (2d Cir.),
cert. denied sub nom, Leonardo's Pizza by the Slice Inc. v. Wal-Mart Stores Inc., ___ U.S. ___, 125 S. Ct. 2277
(May 16, 2005) .... passim

Weinberger v. Kendrick,
698 F.2d 61 (2d Cir. 1982) 53, 61, 66

Weinstein v. Ebbers,
336 F.Supp.2d 310 (S.D.N.Y. 2004) 34

Young v. County of Fulton,
160 F.3d 899 (2d Cir. 1998) 44

Other Authorities

"Private Securities Reform Act of 1995,"
H.R. Conf. Report No. 104-369, 104th Cong.,
1st Sess. (1995), 1995 WL 709276 90

15 U.S.C. § 78u-1(a)(3)(B)(v) 90

Adam C. Pritchard & Hillary A. Sale,
"What Counts as Fraud? An Empirical Study of Motions to Dismiss
Under the Private Securities Litigation Reform Act 21"
(John M. Olin Center for Law and Economics Working Paper Series,
Working Paper No. #03-011, 2003) 81

Rule 23(c)(2)(B) 57

Rule 23(e)(1)(B) 57

COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. Did the district court commit legal error when it approved a $2.575 billion settlement that included a release of claims relating to investments in securities issued by WorldCom, Inc., including claims based on statements made and/or omitted by the settling defendants, when Class Members (including Appellants) were notified that such claims would be released and had the opportunity to opt out of the Class, Class Members (including Appellants) are being compensated for the release of such claims, and the released claims are based on facts alleged in the case? [Lead Plaintiff responds "no"].

2. Did the district court abuse its discretion in finding that the claims of Appellants Norman and Entenmann/Galitzer were based on identical factual predicates as the claims asserted by the Class, and that they were adequately represented by the Class Plaintiffs? [Lead Plaintiff responds "no"].

3. Should this Court deny the Entenmann/Galitzer challenges to the release as set forth in their appeal where these Appellants: (a) filed their objection to the settlement after the court-ordered deadline and thereby waived any objections to the settlement; (b) never presented to the district court either in their belatedly-filed written objection or at the settlement hearing the grounds upon which they presently seek to have the settlement release overturned; and (c) only belatedly, more than two months after the Judgment approving the settlement was

entered, amended their statement of claim in their arbitration proceeding and raised for the first time with the district court the issues upon which their present appeal is based? [Lead plaintiff responds "yes"].

4. Did the district court abuse its discretion in denying the Entenmann/Galitzer motion for leave to exclude themselves from the Class nearly two months after the opt out deadline, where on a timely basis they had been sent and received the notices to Class Members, which clearly informed Class Members that if they wished to pursue an individual claim, including an arbitration claim, they were required to exclude themselves from the Class by the Court-ordered deadline, and where the settling parties had negotiated the final amount of the settlement based on the exclusion requests that had been submitted on a timely basis pursuant to the Notices? [Lead Plaintiff responds "no"].

5. Did the district court abuse the wide discretion provided to district courts in awarding fees when, after examining each of the factors identified in *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43 (2d Cir. 2000), and each issue raised in objections to the fee and expense request submitted by Lead Counsel with the prior approval of the Lead Plaintiff, the district court determined that a 5.45% fee award was fair and reasonable under all applicable criteria? [Lead Plaintiff responds "no"].

6. Did the district court abuse its discretion in ruling that the fee and expense award should be deducted from the overall Settlement Fund, and that the Net Settlement Fund should thereafter be allocated to the sub-groups within the Class based on the plan of allocation approved by the Court? [Lead Plaintiff responds "no"].

COUNTER-STATEMENT OF THE FACTS

This litigation arises from the largest corporate scandal in history, a fraud that inflicted billions of dollars of damage across a broad swath of the investing public and triggered the largest bankruptcy in American history. These consolidated appeals stem from the approval by the district court (Cote, J.) of a partial settlement of the *In re WorldCom, Inc. Securities Litigation*, which was at the time, and remains, the largest settlement ever achieved from a non-issuer of securities in a securities law class action. Notably, not one of the Appellants in these consolidated appeals asserts that the $2.575 billion settlement with the Citigroup Defendants was not fair, reasonable or adequate to the Class, <u>or</u> that Lead Plaintiff's proposed plan of allocation for the net proceeds of the settlement, which the district court approved, was not fair and reasonable to Class Members, <u>or</u> that the expenses for which the district court allowed reimbursement from the Settlement Fund were not appropriate. Rather, these appeals question only: the scope of the release included in the Judgment approving the Citigroup Settlement;

the 5.45% fee awarded by the district court upon an application that had the prior approval of the Lead Plaintiff appointed at the outset of the case pursuant to the Private Securities Litigation Reform Act of 1995; and, with respect to one group of appellants (Appellants Entenmann and Galitzer, husband and wife) ("Entenmann/ Galitzer"), the district court's decisions denying their motion to opt out of the Class late and, after approval of the Citigroup Settlement, barring them from proceeding on an individual arbitration claim for losses incurred from their investments in WorldCom securities against certain of the Citigroup Defendants and their affiliates.

As shown below, the district court applied well-settled principles of Fed. R. Civ. P. 23 and securities law jurisprudence to conclude that: (a) the release of claims was appropriate based on factual assertions made in the class action and the claims that were or could have been asserted in the underlying case against the Citigroup Defendants; (b) the fee requested by Lead Counsel with the prior approval of the Court-appointed Lead Plaintiff was fair and reasonable to the Class; (c) Entenmann/Galitzer's motion to exclude themselves late from the Class did not meet the high standard for showing "excusable neglect" in this Circuit; and (d) Entenmann/Galitzer, as members of the Class, were not entitled to pursue claims in a separate arbitration in view of the Judgment approving the Citigroup

Settlement. None of the arguments raised on appeal demonstrates that the district court erred in the slightest – let alone abused its discretion in making these rulings.

Lead Plaintiff offers the following Counter-Statement of the Facts to place into the proper context the $2.575 billion settlement reached with the Citigroup Defendants, the release of claims negotiated as part of the Settlement, the deadline set for Class members to exclude themselves from the Class, and, in light of the challenge to the fee awarded by the district court, the extensive work performed by Lead Counsel and the benefit to the Class from those services.

I. Background of this Action

On June 25, 2002, WorldCom, Inc. ("WorldCom" or the "Company") announced that its financial statements for 2001 and the first quarter of 2002 had been materially overstated, and would need to be restated. SA-3 ¶4.[1] By late July 2002, WorldCom had filed the largest bankruptcy in United States history. In March 2004, WorldCom admitted in its 2002 Form 10-K that WorldCom's reported earnings were overstated by approximately $68 billion, consisting of approximately $58 billion based on faulty accounting for acquisitions, goodwill and other assets, and approximately $10 billion from overstatements of revenues and understatements of expenses. *Id.*

---

[1] There are three sets of appendices filed with the Court. They are: Special Appendix (referred to as "SPA-__"); Joint Appendix ("A-__"); and Supplemental Joint Appendix ("SA-__").

The first of the myriad class action lawsuits stemming from WorldCom's alleged manipulation of its financial reports was filed on April 30, 2002, approximately two months before the June 25th announcement. SPA-4 to SPA-5. On August 15, 2002, the class actions were consolidated and the New York State Common Retirement Fund ("NYSCRF"), which lost over $300 million from its WorldCom investments, was selected as Lead Plaintiff. SPA-5. Three named plaintiffs ("Additional Named Plaintiffs") joined NYSCRF in alleging claims on behalf of the Class: (1) Fresno County Employees Retirement Association, which lost over $11 million; (2) the County of Fresno, California, which lost over $5.5 million; and (3) HGK Asset Management, Inc., whose clients lost over $29 million. SPA-6.

On October 11, 2002, Lead Plaintiff and the Additional Named Plaintiffs filed a consolidated class action complaint (the "Complaint") asserting claims against: (1) former WorldCom officers and directors (collectively, the "Individual Defendants"); (2) WorldCom's former outside auditor, Arthur Andersen LLP ("Andersen"); (3) underwriters of the 2000 and 2001 Offerings, including Salomon Smith Barney, one of the Citigroup Defendants;[2] and (4) Salomon, Jack Grubman, Salomon's telecommunications analyst, and Citigroup. SA-5 ¶8. Because of the

[2] The underwriters other than Salomon and its European affiliate, Salomon Ltd., which was named later as a defendant in the First Amended Complaint filed August 1, 2003, are collectively referred to herein and in the complaints as the "Underwriter Defendants."

filing of a bankruptcy petition by WorldCom, Plaintiffs were barred from asserting claims against WorldCom. *See* SPA-5; SA-5 ¶8.

Plaintiffs asserted claims under Sections 11, 12(a)(2) and 15 of the Securities Act on behalf of purchasers of WorldCom bonds in or traceable to the 2000 and 2001 Offerings against: the Individual Defendants who signed the registration statements for the Offerings (Counts I-II)); Andersen (Count III); and Salomon and the Underwriter Defendants (Counts IV-V) (collectively the "Securities Act Claim Defendants"). SA-6 ¶9. The Securities Act claims were based on (a) material misstatements of facts and omissions in the registration statements, including WorldCom's false financial statements for 1999, 2000 and the first quarter of 2001, and (b) failures to disclose numerous conflicts between the Citigroup Defendants and WorldCom, former WorldCom CEO Bernard Ebbers and former WorldCom CFO Scott Sullivan. SA-6 ¶10.

Plaintiffs further asserted claims under Sections 10(b) and 20(a) of the Exchange Act on behalf of purchasers of WorldCom's publicly traded securities during the Class Period (April 29, 1999 through June 25, 2002), against certain of the Individual Defendants (Counts VI-VII); Andersen (Count VIII); and the Citigroup Defendants (Counts IX-XI) (collectively the "Exchange Act Claim Defendants"). SA-6 ¶9. Plaintiffs alleged that: (1) statements made by the Company and these Defendants, including financial statements for 1999, 2000,

2001 and the first quarter of 2002, were materially false and misleading; (2) statements made by the Company and these Defendants failed to disclose numerous, conflicting positions of the Citigroup Defendants with respect to WorldCom, Ebbers and Sullivan; and (3) these actions and failures to disclose artificially inflated the market prices of WorldCom securities, and caused Class members to purchase such securities at inflated prices. SA-7 ¶11.

Lead Counsel undertook an extensive investigation of the WorldCom collapse. SA-9 to SA-10 ¶16. On the basis of that investigation, Plaintiffs alleged that the Citigroup Defendants failed to disclose material conflicts of interest that existed in their relationships with WorldCom, Ebbers and Sullivan; that based on this unlawful *quid pro quo* relationship, Salomon was selected to be lead underwriter for the 2000 and 2001 Offerings; and that Grubman, who was held out by Salomon as their star independent telecommunications analyst, knew or recklessly disregarded the substantial financial problems at WorldCom. SA-8 ¶¶13-14. The Complaint included a number of allegations that, notwithstanding the media interest in the WorldCom debacle, Congressional hearings, and publicly-filed criminal charges, had been uncovered through Lead Counsel's investigation. SA-10 ¶17. These included that Salomon's corporate affiliate, The Travelers Insurance Company, had loaned several hundred million dollars to an Ebbers-controlled entity; certain of Ebbers' loans from Citigroup were secured by Ebbers'

holdings in WorldCom shares; and Grubman had modified his analysis of WorldCom in order to mask the Company's deteriorating financial condition. *See* A-540 to A-557 ¶¶328-371. Upon the filing of the Complaint, several newspaper articles noted the new information pled in the Complaint. *See, e.g.,* Jonathan Weil, "Ebbers Allegedly Got Big Loans From Citigroup," *The Wall Street Journal*, October 14, 2002, at A3; Andrew Backover, "Suit Links Loans, WorldCom Stock," *USA Today*, at B3. SA-10 ¶17.[3]

II. The Order Denying the Citigroup Defendants' Motion to Sever Claims

On November 21, 2002, the Citigroup Defendants moved to sever what they characterized as the "analyst" claims in the Complaint (Counts IX–XI), and to transfer those claims to actions being consolidated before another Judge in what ultimately came to be known as the *Salomon Analyst Litigation* (No. 02 Civ. 3687 (GEL) (S.D.N.Y.)). SA-14 to SA-16 ¶¶27-30. Lead Plaintiff opposed the motion and, on March 24, 2003, the district court denied the motion. SA-15 ¶28; *In re WorldCom, Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 4462 (S.D.N.Y. March 24, 2003).[4]

---

[3] As described in Section II.B, below, the facts alleged in the Class Complaint against the Citigroup Defendants also formed the basis of claims asserted by Appellants Norman and Entenmann/Galitzer in their proceedings.

[4] NYSCRF also moved for appointment as lead plaintiff in the cases encompassed within the *Salomon WorldCom Analyst Litigation*. By Orders of March 28 and April 3, 2003, District Judge Lynch appointed NYSCRF as lead

III. The Orders Denying in Large Part the Motions to Dismiss the Complaint

On December 13, 2002, the Defendants against whom the lawsuit was not stayed – Ebbers, former WorldCom directors ("Director Defendants"), Andersen, the Citigroup Defendants, and the Underwriter Defendants – filed motions to dismiss certain of the claims asserted against them. SA-13 ¶23.[5] Lead Plaintiff submitted its opposition to the motions, and presented argument to the court. *Id.*

The district court denied, in major part, the motions. SA-13 to SA-14 ¶24; *see also In re WorldCom, Inc. Sec. Litig.*, 294 F.Supp.2d 392 (S.D.N.Y. May 19, 2003); *In re WorldCom, Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 10863 (S.D.N.Y. June 24, 2003). The court upheld all claims against the Citigroup Defendants. SA-13 to SA-14 ¶24. The Citigroup Defendants sought permission to appeal to this Court the district court's denial of their motion to dismiss the Complaint. Lead Plaintiff prepared and filed its brief in opposition to the motion, and the court denied the motion. SA-14 ¶26.

---

plaintiff, approved its selection of the two Lead Counsel firms in the *WorldCom Securities Litigation* as lead counsel for the *Salomon WorldCom Analyst Litigation*, and granted Lead Plaintiff's request that, in the event Judge Cote denied the Citigroup Defendants' motion to sever, the *Salomon WorldCom Analyst Litigation* would be stayed pending the outcome of this Action. SA-15 ¶29.

[5] By Orders of December 5, 2002 and May 6, 2003, the Action was stayed with respect to Individual Defendants Sullivan, Myers and Yates, stemming from the indictments against them. The class case was later stayed against Ebbers after his indictment.

IV. Class Certification

Beginning in early June 2003, there were extensive proceedings on Plaintiffs' motion for class certification, including: large document productions; multiple depositions taken by defendants of representatives of each of the Plaintiffs and their investment advisors; and submission of extensive briefs and expert affidavits. *See generally* SA-17 to SA-18 ¶¶36-37.

On October 24, 2003, a class consisting of persons and entities (excluding defendants and certain of their affiliates) who purchased or otherwise acquired publicly traded securities of WorldCom during the period April 29, 1999 through June 25, 2002, and who were injured thereby, was certified under Rule 23(b)(3), Fed.R.Civ.P. *In re WorldCom, Inc. Sec. Litig.,* 219 F.R.D. 267 (S.D.N.Y. 2003). On December 31, 2003, this Court permitted the Citigroup Defendants to bring an interlocutory appeal of the class order to address the applicability of the fraud-on-the-market doctrine to analysts' opinions, while rejecting the Underwriter Defendants' request for interlocutory review of other portions of the order. *Hevesi v. Citigroup Inc.,* 366 F.3d 70, 79 (2d Cir. 2004).[6] Argument had been set to take place on the Citigroup Defendants' appeal on May 10, 2004, but was adjourned

---

[6] Lead Plaintiff and Lead Counsel viewed the granting of the Rule 23(f) petition as a significant risk to the Section 10(b) portion of the case against the Citigroup Defendants, and to Plaintiffs being able to obtain, on a class-wide basis, any recovery on behalf of WorldCom stock purchasers from the Citigroup Defendants. SA-42 and SA 43, ¶92**.**

when, on the last business day before argument, Lead Plaintiff and the Citigroup Defendants signed a Memorandum of Agreement for the Citigroup Settlement.

V. Discovery

Upon the denial of the motions to dismiss the Complaint in May 2003, the court lifted the stay of discovery imposed by the PSLRA. SA-23 ¶47. Lead Counsel immediately served document requests and interrogatories upon Defendants, and subpoenas seeking documents from more than forty non-parties. *Id.* Lead Plaintiff, Lead Counsel, the Named Plaintiffs and their counsel prepared and served the Initial Disclosures of Plaintiffs, and submitted Supplements as new information came to Lead Counsel's attention. *Id.*

Lead Counsel participated in extensive meet and confer sessions with Defendants' counsel, beginning in June 2003 concerning class discovery, and continuing into the summer of 2004 concerning merits discovery. SA-23 ¶48. Lead Counsel wrote and responded to hundreds of letters to and from defense counsel, and scores of letters to the district court with respect to disputed discovery issues. *Id*. Lead Counsel obtained over four million pages of documents, and undertook a diligent process of reviewing and analyzing the documents . SA-23 ¶49.

In August 2003, Lead Plaintiff and Lead Counsel conferred about their strategy of getting to trial as expeditiously as possible, notwithstanding the

enormous number of documents that would have to be reviewed in anticipation of deposition discovery (and in connection with settlement discussions). SA-24 ¶50. At an *in camera* conference with the court on September 22, 2003, Lead Counsel – accompanied by Comptroller Hevesi's General Counsel, Alan Lebowitz – requested permission to have counsel for the Named Plaintiffs and six other plaintiffs' firms in the consolidated case assist in the review of the millions of documents that Lead Counsel expected to review in the case.[7] *Id*. Based on the representations made by Lead Plaintiff and Lead Counsel, the court authorized Lead Counsel to utilize a limited number of firms to assist in the discovery process, but directed that all such efforts be made under the strict control of Lead Counsel. *Id*. Lead Counsel heeded that admonition and thereafter maintained a strict system of controls over the services rendered by the Assisting Firms, as well as the many attorneys and paralegals who worked on the case in Lead Counsel's offices. *Id*.

Discovery in the case was fast-paced. Defendants were required to substantially complete their document productions by October 10, 2003. SA-24 to SA-25 ¶51. Plaintiffs' counsel immediately began to review and analyze all produced documents, and conducted numerous conferences with Defendants' counsel concerning other documents not yet produced. *Id.* With the approval of Lead Plaintiff, Lead Counsel retained an expert in electronic discovery to ensure

[7] Together with Mississippi local counsel and bankruptcy counsel, these firms are called the "Assisting Firms."

that Lead Counsel requested, and Defendants produced, all relevant documents maintained either on Defendants' active databases or from so-called "inaccessible" computer files. *Id.*

To move the case along, Lead Counsel suggested a novel deposition program that would allow each side to take 60 days of deposition testimony, which could be split into half days (4 hours of questioning of a witnesses). SA-25 ¶52. Defendants conversely suggested that many more depositions (on the order of hundreds) should be permitted. On November 14, 2003, the court adopted in large part Lead Counsel's suggestion, and entered an Order which set the parameters of the deposition protocol for the case. *Id.*

Plaintiffs' counsel undertook enormous efforts to gain a complete understanding of the facts underlying the claims asserted, and to obtain the deposition testimony necessary to fully prepare the case for trial. SA-25 to SA-26 ¶53. Lead Counsel served as the lead examiner in each of the seventy fact witness depositions taken by July 9, 2004, the discovery deadline. SA-26 ¶54.[8]

---

[8] The district court noted Lead Counsel's establishment of a website for the case as a further service to the Class. SPA-24, 45 n.42, and 51; *see also* SA-28 ¶58. The website at www.worldcomlitigation.com, was created in April 2003 and provides a place for Class members, the parties, and interested non-parties to view, *inter alia,* the case pleadings, rulings and court-approved Notices. SA-28 ¶58. Lead Counsel further placed on the website announcements of developments in the case, the Retainer Agreement entered into between Lead Plaintiff and Lead Counsel, the status of the opt out deadline, the eventual setting of the September 1, 2004 deadline, and the proof of claim form. *Id.*

The trial in the case was set for January 10, 2005, but was postponed in late 2004 to February 28, 2005, as a result of a postponement of the criminal trial against Ebbers. As a result of certain other settlements reached on the eve of trial, Lead Counsel commenced trial against the sole non-settling defendant, Andersen, on March 23, 2005. During the time period after the Ebbers trial and before the trial of the Class case, the parties took depositions of previously "embargoed" witnesses. *See In re WorldCom, Inc. Sec. Litig.*, 2004 U.S. Dist. LEXIS 6376 (S.D.N.Y. April 15, 2004); A-188, Entry 1750 (October 25, 2004 Order); A-240, Entry 2359 (February 23, 2005 Order); SPA-15.[9]

VI. Opt-Out Period

After certification of the class, the court established February 20, 2004, as the deadline for class members to request exclusion from the Class. *See* December

[9] The concept of "embargoed witnesses" resulted from the criminal prosecutions of former WorldCom executives begun in the fall of 2003 by the United States Attorney's Office. The USAO objected to discovery being taken in this Action of certain witnesses the USAO intended to call at the then-scheduled criminal trial of Sullivan. SPA-13. As a result, the parties were permitted to take these witnesses' depositions following the conclusion of the Sullivan trial. *In re WorldCom, Inc. Sec. Litig*., 2003 U.S. Dist. LEXIS 22732, at *9 (S.D.N.Y. Dec. 16, 2003). On March 2, 2004, as Sullivan pled guilty, Ebbers was indicted. The USAO sought to "embargo" the depositions of witnesses it believed would be critical at Ebbers' trial, which was then scheduled to begin on November 9, 2004. SPA-13. The court granted the request to embargo thirteen witnesses, s*ee* A-137, Entry 1188 and A-143, Entry 1280, but provided for possible depositions of the witnesses in the interval between the Ebbers trial and the commencement of the Class Action trial. By later orders, the depositions were allowed to be taken three days after each witness was excused from the Ebbers' trial.

11, 2003 Order (A-759). That deadline was communicated to Class members in the Notice of Class Action (mailed beginning on December 11, 2003 (A-791)), in the related Summary Notice of Class Action (SA-116 ¶9), and via the website.

On December 16, 2003, the district court certified an interlocutory appeal from a denial of remand motions made in certain of the individual cases in the coordinated litigation. *In re WorldCom, Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 22718 (S.D.N.Y. Dec. 16, 2003). This Court accepted the appeal and issued an Order of February 3, 2004, extending the period for Class members to exclude themselves from the Class to no earlier than thirty days after its mandate issued. A-809.

On May 11, 2004, this Court affirmed the district court's remand decision, concluding that individual state court lawsuits brought against WorldCom's officers and directors were properly removed to federal court. *California Public Employees' Retirement System v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir. 2004), *cert. denied,* __ U.S. __, 125 S. Ct. 862 (2005). By that time, Lead Plaintiff and the Citigroup Defendants had agreed to a settlement, with the signing of a Memorandum of Agreement on May 7, 2004. The Settling Parties thereafter entered into a formal Stipulation and Agreement of Settlement, dated July 1, 2004, and requested that the district court enter a Hearing Order granting preliminary approval of the Settlement. By Order of June 15, 2004, this Court vacated its

February 3 Order, and by the Hearing Order entered July 16, 2004, the district court extended the deadline for class members to request exclusion from the Class to September 1, 2004. A-1071. The new exclusion deadline was communicated to Class members via the case website, in the Notice of Proposed Settlement (A-1093), and in the related Summary Notice of Proposed Settlement published in *The Wall Street Journal* and *The New York Times,* and over the national wire services, PR Newswire and Bloomberg News. SA-120 and SA-121, ¶25.

VII. Settlement Negotiations

On November 7, 2002, the district court ordered the parties in this Action to participate in settlement negotiations under the supervision of the Honorable Michael H. Dolinger, United States Magistrate Judge. SPA-17. The initial discussions between the parties were not fruitful. *Id.* On September 22, 2003, the court ordered the parties to engage in additional settlement negotiations under the joint supervision of the Honorable Robert W. Sweet, United States District Judge, and Magistrate Judge Dolinger. SPA-17. In May 2004, on the eve of the argument before this Court on the Citigroup Defendants' challenge to class certification, Lead Plaintiff and the Citigroup Defendants reached a settlement. *Id.* The Settlement Judges each signed a statement released on May 10, 2004, as follows:

Statement by the Mediators

> Pursuant to appointment by the Honorable Denise L. Cote, United States District Judge, we have presided over the extensive

> negotiations between the Parties that led to this Agreement. We can state based on our discussions with the Parties and the information made available to us, that this Settlement was negotiated in good faith and the Settlement and the allocation between the Securities Act and Exchange Act claims are in the public interest.

SPA-18; SA-86 to SA-87. Upon a joint application of the settling parties, this Court dismissed the Citigroup Defendants' appeal of the class certification order.

VIII. Settlement Terms

On July 1, 2004, Lead Plaintiff and the Additional Named Plaintiffs entered into a stipulation of settlement (the "Agreement") with the Citigroup Defendants. SPA-18; *see also* A-853 (Stipulation). The Agreement created a maximum settlement fund of $2,650,000,000 in cash, plus interest. SPA-18. Under the Agreement, the Settlement Fund would be reduced in the event that more than 1.5% of Class Members – other than those who had previously filed individual cases identified in the Agreement's Schedule A – opted out of the Class. A-875 to A-876 ¶15; SA-37 to SA-39 ¶84. Notably, while there could be a reduction in the Settlement Amount based on the level of timely opt outs, which was subject to the parties' negotiation and review by the Settlement Judges and the district court, there was no provision that would allow the Citigroup Defendants to terminate the Settlement if more than a certain percentage of Class Members excluded themselves from the Class. SA-39 ¶85.

The Settlement was conditioned on the court entering a Judgment releasing the following claims of Class Members against the Citigroup Releasees, which included Salomon, its affiliates and employees:

> all claims of every nature and description, known and unknown, arising out of or relating to investments (including, but not limited to, purchases, sales, exercises, and decisions to hold) in securities issued by WorldCom, and/or in options or derivative instruments based in whole or in part on the value of securities issued by WorldCom …, including without limitation all claims arising out of or relating to any analyst research reports or other statements made or issued by the Citigroup Defendants concerning WorldCom, any disclosures, registration statements or other statements by WorldCom, as well as all claims asserted by or that could have been asserted by Plaintiffs or any member of the Class in the Action against the Citigroup Releasees ….

A-974 to A-975 ¶6(a).

IX. Plan of Allocation

The Stipulation also provided for a proposed allocation of the Settlement Fund ("Plan of Allocation") among the members of the Class, according to a two-step process: (1) to the extent allowed by the court, funds would be taken from the Settlement Fund to pay the costs of providing notice, administering the settlement, reimbursement of litigation expenses, attorneys' fees, and taxes that might be incurred on the Fund; and (2) the Net Settlement Fund remaining would be divided with approximately 55% distributed among Class Members who had claims brought under the Securities Act on behalf of purchasers of 2000 and 2001 bonds,

and approximately 45% to Class Members with claims asserted under the Exchange Act. A-874 to A-875, ¶12.

X. The Notice

The court granted preliminary approval of the Settlement by Hearing Order of July 16, 2004, and approved the Notice of Proposed Settlement ("Settlement Notice"). A-1060; SA-46 ¶97. In accordance with the Hearing Order, beginning on August 2, 2004, the Settlement Notice was sent to inform all potential Class members of the Settlement. SA-46 ¶97; SA-92 to SA-103; SA-114 to SA-123. The Settlement Notice explained that if approved, the Settlement would resolve all of the claims of Class Members against the Citigroup Defendants completely and with prejudice, and that all claims Class Members filed or could have filed against the Citigroup Defendants would be released against the Citigroup Defendants, and others, as identified in the section entitled "Release." SA-98.

The Settlement Notice stated that if a member of the Class wished to pursue an arbitration or individual lawsuit against Citigroup Defendants or any of the Citigroup Releasees, he or she must have opted out of the Class, and that the mere filing of an arbitration or an individual lawsuit did not operate as an exclusion from the Class. SA-95. It further described that the deadline for persons to exclude themselves from the Class was September 1, 2004, which had been extended from the original date of February 20, 2004. SA-95.

The Notice advised Class Members of the place, date and time of the Hearing at which the court would consider the Settlement, Plan of Allocation and Lead Counsel's application for attorney's fees and reimbursement of expenses. SA-101. It further stated that any Class Member could appear at the Settlement Hearing and be heard on any of the foregoing matters, provided that no such person would be heard, unless his, her or its objection or opposition was made in writing and filed with the Court and served for receipt by Lead Counsel by October 8, 2004. SA-101.

The Claims Administrator mailed over 4,100,000 packets containing the Notice and proof of claim form to potential Class Members. SA-121 ¶28. The Summary Notice was published on August 10 in *The Wall Street Journal*, on August 11 in *The New York Times*, and distributed over PR Newswire on August 12 and the Bloomberg News Service on August 16. SA-116 ¶ 9. The Notice and proof of claim were also placed on the websites maintained by Lead Counsel and the Administrator. SA-28 ¶ 59; SA-115.

XI. Close of Opt-Out Period: Reduction of Settlement Fund

The opt-out period for the Class closed on September 1, 2004, SPA-24, and the Administrator thereafter reported that it had received 14,978 timely requests for exclusion. *Id.*

Based on the report of timely exclusions from the Class, Lead Plaintiff and the Citigroup Defendants entered into a series of discussions, and exchanges of information and analyses, that resulted in an agreement – pursuant to the settlement reduction formula in the Agreement – that the Settlement Fund should be reduced by $75 million to $2.575 billion. SPA-25. The Settlement Judges reviewed the analysis of Lead Plaintiff and the Citigroup Defendants in reaching the reduction agreement, and issued a statement approving the reduction, as follows: "the Parties have negotiated this reduction to the Settlement Amount in good faith and ... this reduction in the Settlement Amount is reasonable and consistent with the terms" of the Agreement. SPA-25; SA-86 to SA-87. A description of the method by which the Settling Parties negotiated the reduction and the Statement of the Mediators were included in the Supplemental Joint Declaration that Lead Counsel submitted to the court on October 22, 2004. A-1376 to A-1377 ¶¶ 5-6; A-1383.

XII. The Reaction of the Class to the Settlement Notice

Only seven members of the Class objected to any portion of the Settlement, Plan of Allocation or fee and expense request by the October 8, 2004 deadline. A-1375 ¶1. This number of objectors was exceptionally limited compared to the number of notices sent to potential Class Members (over 4.1 million), and the 135,000 Class Members who had filed proof of claim forms by October 15, 2004 –

when there was still more than four months to go until the claim form submission deadline. *Id.*

Lead Plaintiff responded to each of the objections that had been timely submitted – including the objections of Appellants Norman, Savage, Lusk and Helfand – in a Reply Memorandum filed October 22, 2004. A-1335.

Untimely objections were thereafter submitted by Babson Capital Management LLC, and by Appellants Entenmann/Galitzer, who are husband and wife, whose objection, filed November 1, 2004, raised only two arguments: (i) that the proposed release was overly broad because it would release the claims asserted in a separate arbitration proceeding Entenmann/Galitzer had initiated against Salomon and certain of Salomon's employees, for broker misconduct and failure to supervise, and (ii) that they were not provided with adequate notice because neither the Notice of Class Action nor the Settlement Notice had been mailed to their counsel in the separate arbitration proceeding. A-1624.[10] Lead Plaintiff responded to both of the late-filed objections in a Memorandum of Law filed November 4, 2004. A-1536.

---

[10] As described in Section IV, below, Entenmann/Galitzer moved – unsuccessfully – for exclusion from the Class almost two months after the exclusion deadline. They then objected to the Settlement, but did not raise in their belatedly-filed objection or at the Settlement Hearing their present challenges to the scope of the release.

XIII. November 5, 2004 Settlement Hearing

On November 5, 2004, the district court held a hearing on the motions seeking approval of the Citigroup Settlement, Plan of Allocation, and the fee and expense request. SPA-27; A-1584 (Transcript of Hearing). With Lead Plaintiff, Comptroller Hevesi in attendance, Lead Counsel presented the Settlement, Plan of Allocation and fee and expense application for approval. SPA-27. The court allowed all persons who had filed objections to address the court. *Id.*; *see* A-1593 to A-1605. Appellant Entenmann appeared in person, and stated that he and his wife were relying on the written objection filed by their counsel. A-1605. Other Appellants addressed the court on the substance of their objections, counsel for the Citigroup Defendants responded to certain of the objections, the district court asked specific questions and responded to points made during the Hearing, and the court stated certain of its reasons for approving the motions, with a written opinion to follow.

XIV. The District Court Judgment, Opinion and Orders of November 12, 2004, Approving the Settlement, Plan of Allocation and Fee and Expense Request

On November 12, 2004, the court issued a comprehensive Opinion and Order approving the Citigroup Settlement, Plan of Allocation and fee and expense request. SPA-1. The Opinion and Order set forth the facts and legal precedents upon which the court analyzed the issues raised by objectors, and the court's

determinations. The court further entered the Judgment Approving Citigroup Settlement (SPA-60), which bound all Class Members who had not excluded themselves from the Class on a timely basis (SPA-69 to SPA-70 ¶18); an Order Approving Lead Plaintiff's Plan of Allocation (SPA-78); an Order Awarding Attorneys' Fees (SPA-72); and an Order allowing reimbursement of expenses (SPA-87).

XV. Notices of Appeal

Between December 8 and 10, 2004, Appellants Norman and Entenmann/ Galitzer served notices of appeal from the Judgment entered November 16, 2004 and the Opinion and Order dated November 12, 2004. A-1883; A-1884. Appellants Helfand and Lusk/Savage served notices of appeal from the Order awarding attorneys' fees and the Opinion and Order of November 12, 2004. A-1878; A-1886.

On March 15, 2005, Appellants Entenmann/Galitzer filed a second notice of appeal, this time from the district court's February 18, 2005 Order, which barred and enjoined them from prosecuting claims in their separate arbitration proceeding against certain of the Citigroup Defendants and their affiliates. A-1888.

SUMMARY OF ARGUMENT

There are two primary issues presented with respect to the Opinion and Order of November 12, 2004, and the Judgment and Orders entered thereon, in

these consolidated appeals: (a) whether the release of claims in the Settlement and Judgment was appropriate under the law in this Circuit; and (b) whether the district court abused its discretion in approving a fee request that was submitted with the prior approval of the Lead Plaintiff, appointed pursuant to the selection provisions of the PSLRA, and constituted 5.45% of the amount recovered for the Class.

Appellants Entenmann/Galitzer seek review of two further orders: (1) the denial of their motion to exclude themselves from the Class nearly two months after the opt out deadline; and (2) the injunction order barring them from proceeding with their separate arbitration against certain of the Citigroup Releasees.

None of these appeals has merit. Indeed, in bringing their appeals, Appellants seek to side-step many factual underpinnings of the court's rulings.

The Norman and Entenmann/Galitzer Appellants ignore, for instance, that the claims they object to being released in the Judgment relate specifically to purchases of WorldCom stock, which are at the heart of the Class Action and are being compensated through the Settlement. They further ignore that: (a) the release was described precisely in the Settlement Notice, which advised them and all potential Class Members of their opportunity to opt out of the Class by submitting an exclusion request by September 1, 2004; and (b) the claims being released are inextricably intertwined with the factual assertions on which the Class

claims are based, most notably the analyst reports issued during the Class Period by Salomon and its former telecom analyst, Jack Grubman, and the many other undisclosed conflicts the Class asserted against the Citigroup Defendants. These Appellants further seek to side-step the impact of the decision issued by this Court less than two months after Judge Cote rejected their objections to the Settlement, *Wal-Mart Stores Inc. v. Visa U.S.A.,* 396 F.3d 96 (2d Cir.), *cert. denied sub nom, Leonardo's Pizza by the Slice Inc. v. Wal-Mart Stores Inc.,* ___ U.S. ___, 125 S. Ct. 2277 (May 16, 2005) (hereafter "*Visa*"), in which a comprehensive release was approved and affirmed on appeal on facts that are, as shown below, far less compelling than the facts relating to the release in this case. Norman's appeal is further decimated by a recent decision of Judge Lynch rejecting a virtually identical objection raised by Norman to a virtually identical release of claims in another case against certain of the Citigroup Defendants, *In re Global Crossing Sec. Litig.*, No. 02 Civ. 910 (GEL), 2005 U.S. Dist. LEXIS 14245 (S.D.N.Y. July 12, 2005), and there are numerous independent reasons for affirming the district court's rejection of the Entenmann/Galitzer objection.

Appellants Lusk and Savage ignore that the mechanism provided in the Citigroup Stipulation and Order awarding attorney's fees does precisely what Lusk and Savage say should have been done – it provides that each group within the Class effectively pays only the portion of the fee that equates to that group's

allocation from the Settlement. Thus, their appeal – which does not even question the overall fee awarded by the court – can be rejected on its face.

Finally, Appellant Helfand ignores vast portions of the Opinion and Order of November 12, 2004, in which Judge Cote discussed each of the factors in *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43 (2d Cir. 2000), before determining that the fee award was justified on the basis of every one of the criteria set forth by this Court. Helfand further ignores the district court's findings relating to the significant risks that Lead Counsel and the Class faced, and the court's further detailed explanations of how the reasonableness of the percentage-based fee request was confirmed through a lodestar cross-check.

Thus, the district court's ruling on the validity of the release was correct as a matter of law; its findings with respect to the identical factual predicate of the claims of Appellants Norman and Entenmann/Galitzer and the Class were well supported by record evidence and not an abuse of discretion; its fee award was proper and certainly did not constitute an abuse of discretion; and its decisions specific to Entenmann/Galitzer were also well-supported by the record and did not constitute an abuse of discretion.

ARGUMENT

I. Standard of Review

A district court's approval of a settlement is subject to appellate review under an abuse of discretion standard. *See, e.g., Visa,* 396 F.3d at 106 n.12. In *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85 (2d Cir. 2001) (citing *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 445 (2d Cir. 1974)), this Court stated that it "will disturb a judicially-approved settlement only when an objector has made a 'clear showing that the District Court has abused its discretion.'" The reason for such deference to a district court's settlement decision is clear:

> [t]he trial judge's views are accorded great weight … because he is exposed to the litigants, and their strategies, positions and proofs…. Simply stated, he is on the firing line and can evaluate the action accordingly. The considerable deference accorded to the judgment of the district court is heightened where the trial judge's experience has imparted to the judge a particularly high degree of knowledge.

Joel A. v. Giuliani, 218 F.3d 132, 139 (2d. Cir. 2000) (internal citations and quotations omitted). However, while appeals regarding approvals of settlements are reviewed under an abuse of discretion standard, issues of law relating to such settlement approvals are reviewed *de novo. Visa,* 396 F.3d at 106 n.12; *see also Abrahamson v. The Board of Education of the Wappingers Falls Central School Dist.*, 374 F.3d 66, 71 (2d Cir. 2004).[11]

---

[11] This distinction between a *de novo* review of issues of law and an abuse of discretion for a review of findings of fact pertaining to settlement approvals is

A district court's fee award is also subject to review under the abuse of discretion standard. *Visa,* 396 F.3d at 106 n.12*; accord Goldberger,* 209 F.3d at 47 ("What constitutes a reasonable fee is properly committed to the sound discretion of the district court, and will not be overturned absent an abuse of discretion.") (internal citations omitted). Inherent in the abuse of discretion standard in this context is the broad deference to a district judge's decision regarding fee awards:

> abuse of discretion – already one of the most deferential standards of review – takes on special significance when reviewing fee decisions. [T]he district court, which is intimately familiar with the nuances of the case, is in a far better position to make [such] decisions than is an appellate court, which must work from a cold record.

Goldberger, 209 F.3d at 47-48 (internal quotations and citations omitted).

---

relevant to Appellants' challenge to the scope of the settlement release in this case. While the permissible scope of the release appears to be an issue of law entitled to a *de novo* review, the district court's findings – based on its review of all materials before the court, the presentations made to the court at various hearings, and its knowledge of the full parameters of the claims that were or could have been brought in the Class Action – as to the identity of the factual predicates underlying the Class Action and the Objector/Appellants' claims are reviewed under an abuse of discretion standard. *See Visa,* 396 F.3d at 108-09 (a district court's factual findings used to support approval of release are reviewed under the abuse of discretion standard); *AUSA Life Ins. Co. v. Ernst and Young,* 206 F.3d 202, 229 (2d Cir. 2000) (Jacobs, J., concurring) (when there "is an issue of mixed fact and law, the factual components … are reviewed only for clear error, while the legal conclusions drawn therefrom are reviewed *de novo*").

II. The Release in the Judgment Is Appropriate and Valid

A. Background

Appellant Norman is the plaintiff in another case filed as a putative class action on behalf of customers of Salomon Smith Barney ("Salomon") who had provided Salomon with discretion to invest on their behalf in companies that Salomon was recommending in its research reports, through "global portfolio management" ("GPM") accounts. Appellants Entenmann/Galitzer, husband and wife, commenced an arbitration proceeding against Salomon and certain Salomon affiliates to recover for their claimed losses arising from WorldCom transactions in their Salomon account. Neither sought exclusion from the Class on a timely basis, and Entenmann/Galitzer's motion for permission to opt out of the Class late was denied by the district court. These Appellants assert that the release of claims in the Judgment approving the Citigroup Settlement is overly broad. Both are wrong.

The release provides that Plaintiffs and other Class Members are releasing the Citigroup Releasees, which includes Salomon, its affiliates and employees, from:

> all claims of every nature and description, known and unknown, arising out of or relating to investments (including, but not limited to, purchases, sales, exercises, and decisions to hold) in securities issued by WorldCom, and/or in options or derivative instruments based in whole or in part on the value of securities issued by WorldCom …, including without limitation all claims arising out of or relating to any analyst research reports or other statements made or issued by the Citigroup Defendants concerning WorldCom, any disclosures,

> registration statements or other statements by WorldCom, as well as all claims asserted by or that could have been asserted by Plaintiffs or any member of the Class in the Action against the Citigroup Releasees, defined below.

A-974 to A-975 (para. 6(a)).[12]

Plaintiffs asserted two sets of claims against the Citigroup Defendants: (1) Securities Act claims that Salomon (and other Securities Act Claim Defendants) were liable to purchasers of the WorldCom bonds issued in the 2000 and 2001 offerings because of material misstatements in the registration statements for the offerings, including false financial statements for WorldCom for the years 1999, 2000 and the first quarter of 2001, and because the registration statements failed to disclose numerous conflicts between and among the Citigroup Defendants, WorldCom, Ebbers and Sullivan; and (2) Exchange Act claims that Salomon, Grubman and Citigroup (and other Exchange Act Claim Defendants) were liable to purchasers of WorldCom stock and other publicly traded securities for false

---

[12] The "Citigroup Defendants" include: Citigroup Inc., Citigroup Global Markets Inc., formerly known as Salomon Smith Barney Inc., Citigroup Global Markets Limited, formerly known as Salomon Brothers International Limited, and Jack B. Grubman. A-974. The "Citigroup Releasees" are defined to include: the Citigroup Defendants, their respective present and former parents, subsidiaries, divisions and affiliates, the present and former employees, officers and directors of each of them, and the predecessors, heirs, successors and assigns of each. A-975. The "Released Claims" described in paragraph 6(a) of the Judgment, do not operate "to preclude any Class Member or Authorized Claimant from making any claim with respect to any funds made available as a result of the WorldCom bankruptcy, WorldCom's settlement with the Securities and Exchange Commission, or any other regulatory agency fund." A-975.

statements made during the Class Period concerning WorldCom's condition, including its financial statements, and for failures to disclose material conflicts of interest that existed in the relationships between and among the Citigroup Defendants, WorldCom, Ebbers and Sullivan. *See* pp. 7-8, above. The undisclosed conflicts arose from: (a) the granting of hot IPO shares by Salomon to Ebbers while seeking investment banking business from WorldCom (A-558 to A-559, ¶¶375-378); (b) the granting of loans totaling several hundred millions of dollars by Salomon's corporate affiliate, Travelers, to an Ebbers-controlled entity (A-548 to A-557, ¶¶349-371); (c) the fact that certain of Ebbers' loans from Citigroup were secured by Ebbers' holdings in WorldCom shares (A-540 to A-559, ¶¶349-378); and (d) the positive reports issued by Salomon's analyst, Jack Grubman, who was alleged to have modified his analysis of WorldCom in order to mask its deteriorating financial condition (A-519 to A-524, ¶¶275-287).

Plaintiffs in the Class Action alleged that, based on these and other unlawful *quid pro quo* relationships, Salomon was selected to be lead underwriter for the 2000 and 2001 Offerings, SA-8 ¶13, and that these facts were not disclosed adequately in the 2000 and 2001 Registration Statements *or* in the research reports issued by Salomon and Grubman. Plaintiffs further alleged that Grubman, who was held out by Salomon as an independent telecom analyst, was a *de facto*

WorldCom insider and knew or recklessly disregarded the substantial financial problems at WorldCom. A-516 to A-525, ¶¶269-292.

The release was precisely contoured to the nature of the allegations that Plaintiffs asserted or could have asserted against the Citigroup Defendants. It releases: (1) claims based on the numerous undisclosed conflicts of interest between WorldCom, Ebbers and Sullivan, on the one hand, and Citigroup, Salomon, Travelers and Grubman, on the other hand; (2) claims based on the alleged falsity of the registration statements for the bond offerings, and other statements made by WorldCom or its management pertaining to WorldCom's financial results and operating prospects during the Class Period; and (3) claims that might have been brought in the Complaint.[13]

Courts have regularly approved releases similar to the one entered here. *See, e.g., In re AnnTaylor Stores Sec. Litig.,* 1993 WL 183732 (S.D.N.Y. 1993) (approving release of "all claims and causes of action asserted in the Action, and all claims and causes of action [class members] may have in connection with their purchases, sales or ownership of AnnTaylor common stock during the Class

---

[13] Lead Plaintiff not only bought WorldCom securities during the Class Period, but also retained securities that had been purchased before the start of the Class Period. Plaintiffs thus could have asserted common law claims based on the retention of WorldCom stock and other securities during the Class Period. Notably, such claims were brought in a separate action – the so-called "holder" action – that was dismissed on defendants' motion to dismiss the complaint. *See Weinstein v. Ebbers*, 336 F.Supp.2d 310 (S.D.N.Y. 2004).

Period"); *In re Global Crossing,* 2005 U.S. Dist. LEXIS 14245, at *24-*25. As this Court and others have recognized, settling defendants require broad releases of claims, asserted and unasserted, in order to "buy peace" and, thus, approval of such releases comports with the public policy of encouraging settlements of complex class action cases. *See Visa*, 396 F.3d 96 at 106; *In re Baldwin-United Corp.,* 770 F.2d 328, 337 (2d Cir. 1985) ("The success of any [class action] settlement was dependent on the parties' ability to agree to the release of any and all related civil claims the plaintiffs had against the settling defendants based on the same facts."); *accord In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998); *In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186, 194 (S.D.N.Y. 2005).

The same rationale applies to the release in this Settlement, whose terms fit comfortably within the types of releases approved by courts in this Circuit and is entirely appropriate here.

B. All Requirements For A Valid Release Are Satisfied

Notwithstanding the validity of the release in light of the facts alleged in the Complaints and the claims that were or could have been asserted against the Citigroup Defendants in this case, Appellants dispute the scope of the release. But this Court's decision in *Visa*, 396 F.3d 96, which followed by just two months the district court's Opinion and Order of November 12, 2004, firmly establishes that

Judge Cote correctly analyzed the issues, and properly applied the law to the facts of this case in concluding that the release is appropriate.

In *Visa*, this Court set forth the analysis for determining whether a class action settlement release is valid. Merchants alleged that both Visa U.S.A. Inc. and MasterCard International Inc. violated the Sherman Act by charging exorbitant transaction fees when merchants accepted debit cards payments from consumers using a debit card operated by Visa or MasterCard, and that defendants also engaged in anti-competitive conduct to exclude competitors from the debit card market. *Id*. at 100.

Two merchants who appealed from the district court's approval of the settlement, Reyn's Pasta Bella, LLC ("Pasta Bella") and NuCity Publications, Inc. ("NuCity"), argued that the release in the settlement was too broad. Pasta Bella had a case pending in the Northern District of California which was dismissed with prejudice after that court determined that the release in *Visa* barred Pasta Bella's remaining claim against Visa, MasterCard, and three member banks. *Id*. at 104. NuCity had filed a different class action suit in the Southern District of New York following the government's establishment of an illegal boycott and unreasonable restraint of trade in its related litigation. *Id*. at 104-05. The outcome of NuCity's claims also hinged on the *Visa* determination as it related to the scope of the release. *Id*. at 105.

This Court began its analysis in *Visa* by stating the broad proposition that "[b]road class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country." *Id.* at 106. The Court noted that a plaintiff's authority to release claims is limited by the "identical factual predicate" doctrine and the "adequacy of representation" doctrine. *Id*. at 106.

Concerning the identical factual predicate doctrine, "[t]he law is well established in this circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." *Id.* at 107 (emphasis added) (citing *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982)). Holding that the identical factual predicate doctrine permitted a release of NuCity's claims, this Court found that the district court did not abuse its discretion in determining that the exclusionary rules were a common issue between both NuCity's allegations and those in *Visa*. *Visa*, 396 F.3d at 108.

This Court also noted that a class plaintiff must also have adequately represented the interests of class members to satisfy due process concerns. *Id.* at 109. Thus, "the essential question in determining whether the Settlement complies with the adequate representation doctrine is whether the interests that were served

by the Settlement were compatible with those of [the objectors] when plaintiffs negotiated a release of [the objectors'] claims." *Id*. at 110. This Court ultimately reasoned that the district court did not err in holding that the settlement complied with due process, when Pasta Bella's and NuCity's claims were subsumed in the more generalized *Visa* claims and every member of the Pasta Bella and NuCity classes would receive some compensation as a result of the *Visa* settlement. The same is true here and, thus, the two prongs of the standard established in *Visa* are met.

1. Appellant Norman's Objection to the Release Is Without Merit, as Shown Recently by an Identical Objection by Norman Being Rejected in Another Case by the District Judge Presiding Over Norman's Putative Class Action

The claims brought by Appellant Norman with respect to the WorldCom securities purchased in GPM accounts are clearly based on the identical factual predicate as the claims that the Class asserted against the Citigroup Defendants so that the release is not overbroad with respect to them. By means of example only, in his complaint, Norman alleges that: "Throughout the class period, Salomon's analysts provided biased and tainted favorable research reports and gave favorable ratings to the stock of companies in which managed account assets were invested … as part of an effort to obtain huge investment banking fees"; "Although presented to the public as an objective and independent research analyst for these covered companies, Grubman was, in reality, an investment banker, and

Grubman's contribution to investment banking revenues was part of the basis for determining his compensation, which averaged $20 million per year from 1998 to 2001"; "The ratings Grubman issued were not independent, objective or on the merits, but rather were designed to maximize his compensation though his participation in investment banking"; "Salomon did not disclose to its clients that its account management decisions were being made based on self-serving and inaccurate research designed to benefit Salomon's investment banking business…."; "Corporate executives who had 'private wealth management' accounts at Salomon were routinely rewarded with allocations in each of Salomon's hot IPO offerings"; and "Only recently … have some of the details of Salomon's conflicts of interest and lack of independence in its ratings of securities and research reports now come to light. Serious allegations of Salomon's conflicts of interest have been made in connection with telecommunications stocks, including WorldCom…." A-1261, A-1270, A-1272, A-1273.

These allegations are strikingly similar to those in the Class Action Complaints. *See, e.g.*, A-526 to A-540, ¶¶293-327 (discussion of Grubman's false and misleading analyst reports); A-509 to A-513 & A-558 to A-559, ¶¶256-262 & 375-378 (discussion of Salomon's allocations of hot IPO shares); A-513 to A-516, ¶¶263-268 (discussion of Salomon's lack of an independent research department,

and that the "tight connection between analysts and investment banking was the driving force behind the content of Salomon's reports.").

Based on its careful review of the claims and facts asserted by Norman in his action, and by the Class in this Action, the district court found:

> Norman relies upon the same underlying factual allegations against SSB that are the heart of [Lead Plaintiff's] Amended Complaint, Norman has had adequate notice of this litigation and the effect of the release, and those GPM account holders who suffered losses from trading in WorldCom securities will be compensated for those losses from this settlement. As Norman admits, the alleged bias and bad faith in SSB's research reports form the "core" of his pleading.

SPA-35. As the court found further, the release is fair because it does not release claims relating to securities of other companies that GPM clients may have purchased or held in their accounts, and does not release any claim related to the restitution of fees or punitive damages based on the purchase or retention of non-WorldCom securities being pursued in the *Norman* case. The *Norman* class retains all such claims. Further, because the settlement with the Citigroup Defendants here compensates all WorldCom Class Members, including Norman and any members of his putative class who had purchases of WorldCom securities in their GPM accounts, for losses incurred in connection with their transactions in WorldCom securities in exactly the same manner, "[it] would be patently unfair to permit Norman and the putative *Norman* class to receive compensation for the same losses arising from the same underlying conduct twice – once in the class

action and again in the *Norman* action." SPA-36. Of course, had Norman wanted to pursue all WorldCom-related claims in his case, he had notice of the release language and the opt out deadline, and could have chosen to opt out of the present Class and thereby preserved such claims to pursue them elsewhere.

Just two weeks ago, an identical objection filed by Norman to another class settlement was rejected by District Judge Lynch – who is also the presiding Judge in the *Norman* case. *In re Global Crossing,* 2005 U.S. Dist. LEXIS 14245. In *Global Crossing*, the settlement agreement between plaintiffs and Salomon Smith Barney included the same type of release of claims as in the present case. Norman objected to the release, arguing that by releasing "all claims of every nature and description, known and unknown, arising out of or relating to any Investment Decision in Global Crossing Securities," plaintiffs had agreed to release claims "that Norman and other GMP accountholders – but not the class representatives in [the *Global Crossing*] case – have against [SSB]." *Id.* at *15-16.

Judge Lynch found this objection "unpersuasive." *Id.* at *16. Citing this Court's decisions in *Visa*, 396 F.3d at 111-12, and *TBK Partners*, 675 F.2d at 462, Judge Lynch found that the claims in the *Norman* putative class action relating to losses from Global Crossing securities arose from the same factual predicate as the claims asserted in the class case and, therefore, were properly released. After noting with approval Judge Cote's decision of November 12, 2004, rejecting

Norman’s objection in this case, Judge Lynch explained the rationale for rejecting Norman’s objection *Global Crossing*, as follows (*id.* at *17-19) (emphasis added):

> By the settlement at issue here, plaintiffs in this case purport to release only claims that arise out of or relate to a participating class members' decisions to invest in Global Crossing securities. … [T]he objectors here have precisely the same claims that Lead Plaintiffs have in common with all class members, defined by virtue of their decision to purchase securities in Global Crossing, as a consequence of allegedly false research reports issued by those defendants.
>
> If Norman seeks, in the separate action, damages attributable to trading losses in Global Crossing securities, such damages result directly from the same alleged misconduct at issue in this case. It makes no difference whether such losses were incurred as a result of his own reliance on defendants' bogus reports (or on the integrity of the market price to which those reports presumably contributed), or were incurred by the investment decisions of an investment manager (at SSB or elsewhere) who relied on such reports in purchasing the securities on the investor's behalf. The losses were incurred as a result of the same investment decision, as a result of the same alleged misconduct, resulting in the same loss to the same plaintiff. <u>If Norman and other GPM account holders have a different legal theory of liability based on these facts, which they believe is stronger, and therefore more likely to yield a larger recovery or a better settlement, than the theories being advanced by Lead Plaintiffs, they were free to opt out of the present class and pursue recovery based on that theory. He and they are not free, however, to remain a part of the instant class, partake of an award of damages under the present settlement, and then pursue further damages in a separate action based on the same losses arising from the same investment decision as a result of the same misconduct. Any such result would be substantively unfair, as well as frustrating to class action settlements</u>. A defendant can hardly be expected to settle an action based on claims of a particular wrong, pay damages to plaintiffs under that settlement, and then have to continue to defend claims by some of the same plaintiffs for further compensation based on the same harm.

Norman's objection to the release in the present case is similarly unavailing. A class member simply may not seek to recover twice for losses arising from investment decisions based on the same underlying facts by citing to a different legal theory. Thus, the Norman appeal has no merit and should be rejected.[14]

2. The Rejection of Appellant Entenmann/Galitzer's Objection to the Release Should Be Affirmed on Numerous Grounds

Appellants Entenmann/Galitzer's objection to the scope of the release (A-1624) was deficient in numerous ways, all of which are proper grounds for this Court to reject their appeal and affirm the district court's approval of the settlement.

First, Entenmann/Galitzer filed their objection to the settlement release on November 1, 2004 – more than three weeks after objections were required to be filed, and just days before the Settlement Hearing. Under the terms of the Hearing

---

[14] Judge Lynch recognized that Norman's claims for rescission of fees paid by GPM customers of Salomon potentially stand on a different footing, and ruled that whether such claims are released pursuant to the *Global Crossing* settlement will depend on the facts as they are developed in the *Norman* case. *Id.* at *19-24. However, that did not require a rejection of the release in *Global Crossing*, or any modification to it. To the contrary, as Judge Lynch wrote: "What is known now is that the release, as worded, applies only to claims against the Citigroup defendants arising out of or relating to a decision to invest in Global Crossing securities. Those are precisely the claims being advanced in this litigation by Lead Plaintiffs on behalf of all class members, and a full release as to any such claims is entirely appropriate in exchange for a substantial payment to the class by those defendants." *Id.* at *23-24 (emphasis added). Here, of course, the amount paid for a release of the enumerated claims was $2.575 billion, which certainly qualifies as a "substantial payment."

Order entered on July 16, 2004, any objection of Entenmann/Galitzer had been waived. A-1067. Paragraph 14 of the Hearing Order required objections to the Settlement to be filed with the Court (and sent for receipt by Lead Counsel) no later than October 8, 2004. A-1066 to A-1067. Paragraph 15 states that any Class Member "who does not object in the manner prescribed above shall be deemed to have waived such objection and shall be forever foreclosed from making any objection to the … Judgments and Orders to be entered approving the Settlement …." A-1067. The Settlement Notice – which Entenmann concedes he and his wife received (A-1515.52) – expressly stated these conditions for the filing of any objection. A-1099 ¶¶31-32. Thus, there is no question that the Entenmann/ Galitzer objection was not filed or served in a timely manner, and that their objections were thereby waived and foreclosed.

Although the district court rejected the objection based on its lack of merit, the lateness of the objection constitutes an independent basis upon which this Court should deny the appeal. *See e.g., Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court"); *Young v. County of Fulton*, 160 F.3d 899, 904 (2d Cir. 1998) (Court of Appeals can affirm district court ruling on an independent

ground).[15] Indeed, the law is clear that the failure to comply with an objection deadline is a valid ground for rejection of a late-filed objection. *See*, *e.g.*, *In re Cendant Corp. Litig.*, 264 F.3d 201, 252 (3d Cir. 2001), *cert. denied,* 535 U.S. 929 (2002) (holding that plaintiff class members who objected to the settlement on Rule 23 grounds waived their objections by failing to assert them prior to the settlement approval stage).[16] Thus, even though the district court elected to reach the merits of the Entenmann/Galitzer objection, this Court should reject their appeal on this independent ground that is firmly established by the undisputed facts of record.

Second, even when Entenmann/Galitzer submitted their belated objection, they did not raise the issues on which they currently seek a reversal of the district

---

[15] *See also ACEquip Ltd. v. American Engineering Corp.*, 315 F.3d 151, 155 (2d Cir. 2003) ("Our court may, of course, affirm the district court's judgment on any ground appearing in the record, even if the ground is different from the one relied on by the district court."); *Konikoff v. Prudential Ins. Co. of America*, 234 F.3d 92, 97-98 (2d Cir. 2000) ("While we may, of course, affirm on the same grounds relied on by the district court if the record permits, '[i]t is beyond cavil that an appellate court may affirm the judgment of the district court on any ground appearing in the record.'") (quoting *Shumwa*y v. *UPS, Inc.*, 118 F.3d 60, 63 (2d Cir. 1997)).

[16] *See also Joel A. v. Giuliani*, 218 F.3d 132, 140 (2d Cir. 2000) (objectors to a class settlement who failed to object until the fairness hearing waived their objections because they were untimely); *Assoc. for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 477–78 (S.D. Fla. 2002) (denying motion for reconsideration because of lateness of objection); *Manners v. American Gen. Life Ins. Co.*, No. Civ. A. 3-98-0266, 1999 WL 33581944, at *24 (M.D. Tenn. 1999) (rejecting objection to class settlement as untimely).

court's ruling. In the objection submitted on November 1, 2004, these Appellants objected that the release was "too broad" because it covered "their principal claim … concerning the manner in which they were treated and advised by the brokers, and the lack of supervision of these brokers by Salomon's managers." A-1624. Entenmann confirmed at the Settlement Hearing that they were relying on their written objection. A-1604. But nowhere in that objection did Entenmann/Galitzer raise the issue that they now press to this Court, that is, that the release should not bar claims relating to their decisions to hold WorldCom securities acquired before the Class Period. Having failed to raise this issue with the district court before consideration of the settlement release, that objection has also been waived, and may not be considered on appeal of the Judgment entered on November 12, 2004 approving the Settlement. *See Visa*, 396 F.3d at 124 n.29; *Specht v. Netscape Communications Corp*., 306 F.3d 17, 28 (2d Cir. 2002) ("'[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.'") (quoting *Greene v. United States*, 13 F.3d 577, 586 (2d Cir.1994)); *Gurary v. Winehouse*, 190 F.3d 37, 44 (2d Cir.1999) ("Having failed to make the present argument to the district court, plaintiff will not be heard to advance it here."); *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.1977) ("The law in this Circuit is clear that where a party … advances arguments available but not pressed below, and where the party had ample opportunity to

make the point in the trial court in a timely manner, waiver will bar raising the issue on appeal.”).

Third, the objection was properly rejected on its merits. Entenmann/Galitzer seek in their arbitration proceeding compensation for losses they suffered on their WorldCom investments as a result of Salomon’s alleged misconduct. As noted by the district court, the Complaints in this Action focus on allegations of alleged conflicts of interest between and among Salomon and its affiliates, and WorldCom and its affiliates. So, too, did Entenmann/Galitzer’s Statement of Claim in their arbitration proceeding (A-1515.17).

In their Statement of Claim, Entenmann/Galitzer complained, among other things, that: “Respondents [Salomon and individual Salomon employees] were in a conflict of interest with claimants in that WorldCom was a huge client of respondents….”; “Respondents failed to tell the claimants that they owed financial allegiance to WorldCom as a result of being chosen by WorldCom to handle … WorldCom financial affairs”; “[t]he fact that Respondents owed financial allegiance to WorldCom caused respondents to urge claimants to hold on to as much WorldCom stock as possible when their advice should have been the opposite”; and “[t]he fact that Respondents owed financial allegiance to WorldCom caused [Salomon] institutionally to recommend the buying and holding of WorldCom stock in the face of information which dictated the opposite

conclusion." A-1515.17-.18. Entenmann/Galitzer further asserted that they "were never made aware of the extent and nature of respondents' continuing conflict of interest in connection with WorldCom and were never made aware that this conflict caused respondents to advise claimants to take actions with respect to their WorldCom stock that they should not, as reasonable and prudent investors, have taken." A-1515.18.

That the factual basis for Appellants Entenmann/Galitzer's claims and the Class Action Complaint is substantially congruent cannot seriously be disputed. Indeed, in an effort to demonstrate how documents sought by Entenmann/Galitzer relating to the "facts surrounding Salomon's and Grubman's wrongdoing in connection with WorldCom" were relevant to their Statement of Claim, their arbitration counsel submitted to the NASD Dispute Resolution panel <u>excerpts from Lead Plaintiff's First Amended Class Action Complaint</u>. *See* A-1558. Further, in seeking discovery from Salomon in connection with their arbitration, Entenmann/Galitzer stated in their Statement of Claim that they "were encouraged to, and did, rely on the research of Salomon's Research Analyst, Jack Grubman and that this research was tainted because Grubman was more concerned about writing upbeat research to keep his firm's investment banking clients happy than fairly evaluating these companies for retail clients such as Claimants." A-1564 to A-1565. They further alleged that they had been "victimized by the corrupt

research of Grubman," and harmed because Salomon had not adequately supervised Grubman and the brokers who passed along to them Grubman's advice concerning WorldCom. A-1565 to A-1566. Thus, the Statement of Claim makes it clear that Entenmann/Galitzer are complaining that the advice they received was unsuitable <u>because it was tainted by the same alleged conflicts</u> that Plaintiffs assert as a basis for the Citigroup Defendants' liability in this Action.

Entenmann/Galitzer attempt to circumvent the clear nexus between their claims and the claims of the Class by arguing that their arbitration claim is based, in part, on different legal theories, namely (1) they received unsuitable investment advice, and (2) Salomon failed to adequately supervise its brokers who gave that advice. However, these *legal theories* are premised on the same *factual allegations* made by Plaintiffs here, as the district court expressly found after it had (i) reviewed the various submissions of the parties and heard argument on the Entenmann/Galitzer motion to exclude themselves belatedly from the Class (*see* Section IV, below), (ii) reviewed Entenmann/Galitzer's objection and the responding submissions made by Lead Plaintiff and the Citigroup Defendants, and (iii) heard argument at the Settlement Hearing. SPA-35 to SPA-37, SPA-44. This factual finding is reviewed on appeal under a deferential abuse of discretion standard. *Visa,* 396 F.3d at 108-09 (a district court's underlying factual findings used to support its approval of the release are reviewed under the abuse of

discretion standard). Clearly, the district court had sufficient record evidence to support its findings of fact, and did not abuse its discretion in making these findings.

Based on this, it was entirely proper for the court to enter the Judgment, and to bar Class Members from pursuing claims in separate proceedings that are premised upon a Class Member's transactions in WorldCom securities and alleged conflicts relating to the Citigroup Defendants.

3. The Released Claims Were Adequately Represented

Norman and Entenmann/Galitzer each incorrectly rely on *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), and *In re Auction Houses Antitrust Litig.*, 2001 U.S. Dist. LEXIS 1713 (S.D.N.Y. Feb. 22, 2001), in arguing that their claims are not adequately represented by this Settlement.

As this Court recognized in the *Visa* decision, *Super Spuds* "hinged on the fact that the class representatives did not possess the unliquidated futures." *Visa*, 396 F.3d at 111. Therefore, the class representatives were sacrificing claims related to unliquidated futures which they did not have without giving compensation to the class of people that suffered losses on those unliquidated futures. Similarly, in *Auction Houses*, the settlement release purported to bar access to United States courts to adjudicate claims related to foreign auctions.

Therefore, as in *Super Spuds*, a class of potential claimants was being forced to release their claims and received no consideration in return for this release. Here, in contrast, Lead Plaintiff purchased and held the same types of WorldCom securities during the Class Period as did Appellants, and were entitled to release claims relating to the purchase and retention of those securities.

Another issue concerning the release in *Super Spuds* was that it was not adequately described in the notice sent to class members. But, here, the release was fully described in the Settlement Notice, and Class Members wishing to pursue their own claims in another action could have opted out of the Class by submitting a timely exclusion request.

In this case, Norman (and every member of his purported class) and Entenmann/Galitzer will be compensated for losses incurred on their purchases of WorldCom securities during the Class Period. As this Court stated in *Visa*, "where different claims within a class involve the identical factual predicate, adequate representation of a particular claim is determined by the alignment of interests of class members…." *Visa*, 396 F.3d at 113. Here, because Norman and Entenmann/Galitzer will be compensated in the exact same manner as all members of the instant Class for their losses on these transactions, it is axiomatic that the interests of all these Class members are aligned. Moreover, to the extent that Entenmann/Galitzer argues that all their WorldCom stock is not represented in the

present Action, such an argument is unavailing, since they themselves contend that the Citigroup Defendants' alleged misconduct *during the Class Period* is what caused them to both purchase and continue to hold WorldCom securities. Indeed, if objections to a release such as those being made by Norman and Entenmann/Galitzer were credited – meaning that they would be entitled to compensation from the Citigroup Settlement Fund, and further continue to seek damages based on other legal remedies for the same transactions in WorldCom securities – no defendant would ever be able to obtain global peace in a class settlement since class members would seek to recover under a class settlement with the defendants, and then assert that some "independent" claim entitles them to "extra" compensation from the settling defendant in another proceeding. *See, e.g., In re Global Crossing,* 2005 U.S. Dist. Lexis 14245, at *19.

The district court committed no error when it ruled that the present release is proper, based on the facts alleged in this case, and certainly did not abuse its discretion when it found that the claims of Appellants Norman and Entenmann/Galitzer were based on an identical factual predicate as the claims asserted in the Class Complaints. The ability to achieve a class settlement is dependent upon the parties' ability to agree to release related claims. *In re Baldwin-United*, 770 F.2d at 334. As the district court wrote here:

> "[I]n order to achieve a comprehensive settlement that would prevent relitigation 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 even though the claim was not presented and might not have been presentable in the class action." *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir.1982) (emphasis supplied); *see also In re Baldwin United Corp.*, 770 F.2d 328, 336-37 (2d Cir.1985); *Weinberger*, 698 F.2d at 77 [*Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982)]. Thus, a settlement may "prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint but depending upon the very same set of facts." *Nat'l Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 18 n.7 (2d Cir.1981); *see also Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 382 (1996).[17]

SPA-34 to SPA-35.

For the foregoing reasons, the Judgment release in this case is valid and this Court should reject these Appellants' arguments seeking to overturn it.

---

[17] The Supreme Court's decision in *Matsushita* makes clear that a court may release claims that could not have been brought in the underlying action. In that case, a Delaware state court approved a settlement and release of claims based on facts alleged in the state court case. The claims that were released included federal securities act claims that could be brought only in a federal court. The Supreme Court nonetheless held, in affirming the judgment and release, that a judgment approving a class action settlement could release claims that could not even have been brought in the action being settled. This Court's decision in *TBK Partners, Ltd. v. Western Union* similarly holds that a court may permit the release of a claim "even though the claim was not presented and might not have been presentable in the class action." 675 F.2d at 460; *accord Patrowicz v. Transamerica HomeFirst, Inc.*, 359 F. Supp.2d 140, 154 (D. Conn. 2005) ("it is well-settled that a class action settlement can bar future claims by class members arising from the same transaction … even if the claim could not have been raised in the underlying litigation) (citing *TBK Partners,* 675 F.2d at 460, and noting that language of Second Circuit was quoted with approval in *Matsushita,* 516 U.S. at 377).

III. The Notice of the Citigroup Settlement and its Dissemination Were Proper

Appellants Entenmann/Galitzer contend that dissemination of the Notices to them – which they received – was improper because the Notices should have been sent instead to their attorneys in their separate arbitration proceeding. They are wrong as a matter of law. They also gloss over and ignore several critical facts, including the following:

First, Entenmann/Galitzer were sent and received copies of the Notice of Class Action (A-791) and the Settlement Notice (A-909). *See* A-1515.2, A1515.15, A-1519. Entenmann, a former attorney with the Securities and Exchange Commission (A-1525, 1528-29), admits receiving both notices in a timely fashion, but claims: (a) he and his wife did not appreciate the significance of the Notice of Class Action; (b) they did not alert his arbitration counsel to the Notices; and (c) "he did not look at" the Settlement Notice. A-1519. The Notices stated explicitly that persons who purchased or acquired WorldCom securities during the Class Period were *required* to exclude themselves from the Class if they did not wish to remain as members of the Class and be bound by any Judgments entered in the Action. They further provided the date by which such exclusion requests had to be submitted.

The Notice of Class Action provided:

> If you want to attempt to pursue a claim on your own outside of the Class Action, and that claim arises from the facts alleged in the Complaint or the Amended Complaint, then you must complete and submit a written request for exclusion from the Class, as described below.

A-796 (underscoring in original). The Settlement Notice provided with even greater clarity that Class members who wished to pursue either individual lawsuits or arbitrations were required to exclude themselves from the Class, as follows:

> 4. If you are a member of the Class and you wish to pursue an arbitration or an individual lawsuit against Citigroup Defendants or any of the parties identified in paragraph 17 as the Citigroup Releasees, you must opt out of the Class. The mere filing of an arbitration or an individual lawsuit does not operate as an exclusion from the Class and a Class member's failure to opt out will result in the release of the Released Claims (defined in paragraph 16 below) by that Class member, as described more fully in paragraph 15 of this Notice.

A-915. Because the final date for exclusions to be submitted was extended by Orders of this Court and the district court to September 1, 2004, Entenmann/Galitzer had *more than eight months* from their receipt of the Notice of Class Action to submit an exclusion request, but failed to do so.

Second, Entenmann/Galitzer ignore the summary notice published in December 2003, A-759, and the summary notice published in August 2004, A-928. Those summary notices – which were published in *The Wall Street Journal* and *The New York Times,* and disseminated over PR Newswire and Bloomberg News – further placed potential Class members, and the public at large, on notice of the

Class Action, the proposed settlement and the deadline for opting out of the Class. The Summary Settlement Notice also stated expressly that Class members who wished to pursue either individual lawsuits *or arbitrations* were required to exclude themselves from the Class. A-931.

Third, Entenmann/Galitzer's claim that their counsel was not aware of the *WorldCom Securities Litigation* is not supported by the record. Even if one were to disregard the two summary notices and the enormous press coverage that the Action received, including articles in nearly every newspaper in the country when the Citigroup Settlement was announced on May 10, 2004, counsel for Entenmann/Galitzer sought discovery from Salomon in their arbitration proceeding on May 15, 2004, by citing to the Complaint filed in this Action. A-1543, 1558-59. Thus, their arbitration counsel clearly knew about this Action, and had ready access to the notices of the class action and the Citigroup Settlement.

Fourth, Entenmann/Galitzer claim that neither the Settlement Notice nor the Proof of Claim form mention anything about purchases or acquisitions made outside of the Class Period. Entenmann Mem. at 13.[18] In fact, however, the release of claims described in the Notice states expressly that claims of Class members "arising out of or relating to investments (including, but not limited to,

---

[18] This point was raised by Entenmann/Galitzer two months after the court had entered the Judgment approving the Citigroup Settlement. For the reasons described in Section II.B.2., above, it cannot be the basis for attacking either the sufficiency of the Notice or the Judgment.

purchases, sales, exercises, and decisions to hold) in securities issued by WorldCom" will be released. A-975. Moreover, contrary to Appellants' assertion, the Proof of Claim form *required* Class members to identify and provide documentation for the WorldCom shares they held *on the day before* the start of the Class Period, as well as all Class Period transactions. *E.g.,* A-954, A-960.

In addition to the factual inaccuracies in the Entenmann/Galitzer challenge to the sufficiency of the notice, the present appeal is also without merit as a matter of law. Rule 23 does not require notice to be sent to a class member's counsel. *See* Rule 23(c)(2)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified by reasonable effort."); Rule 23(e)(1)(B) ("The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise."); *accord* SPA-43. Rather, by its terms, Rule 23 requires notices to be sent <u>to class members</u> rather than to their agents.[19]

[19] Entenmann/Galitzer complain that sending notice to them, rather than their arbitration counsel, "goes against the fundamental precept that 'a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.'" Entenmann Mem. at 19 (citing ABA Model Rules of Prof. Conduct 4.2). Entenmann/Galitzer ignore, however, that these were Notices *of the Court* sent to potential Class Members. They further ignore that their arbitration counsel *did not represent them* in the *WorldCom Securities Litigation*, having never entered an appearance on their behalf in this Action, even though that was an option described in the Notice of

In *In re Franklin National Bank Sec. Litig.*, 574 F.2d 662, 672 (2d Cir. 1978), this Court made clear that "Rule 23 does not contemplate giving notice to alleged agents or to any persons other than the members of the class." In *In re PaineWebber,* 147 F.3d at 136, this Court affirmed the denial of a motion for enlargement of the deadline to opt out, finding, *inter alia*, that the notice was clear, its meaning was plain, and it "did not require the services of a lawyer to permit a lay person to comprehend it."[20] The Court explained further in *PaineWebber*: "Opt-out deadlines ensure that parties to a class action can rely on the membership of a class becoming fixed by a specified date and that such members will be bound by the resulting outcome of the legal proceedings." *Id.* at 138.

Class Action (A-796). The failure to file such an appearance notice dooms their claim that sending a notice to a class member should be like sending a notice of deposition to a party's counsel. Entenmann Mem. at 23-24. In the latter instance, it is precisely because a party is represented by counsel in an action that notices of proceedings in a case are sent to counsel – but Entenmann/Galitzer's counsel *had not entered* such an appearance in the court below. Finally, Rule 5, F.R.Civ.P., provides that a court may direct service of a pleading to a party, rather than to counsel. Thus, even if Entenmann/Galitzer's arbitration counsel had entered an appearance, and even if the notices were considered to be pleadings of Lead Plaintiff, the court acted within its discretion in directing that they be sent directly to Class Members.

[20] In *Berman v. L.A. Gear, Inc.*, 1993 WL 437733 (S.D.N.Y. Oct. 26, 1993), *aff'd,* 29 F.3d 621 (2d Cir. 1994), the plaintiff argued that although he received actual notice informing him of his right to opt out, the notice was insufficient because it did not give him reasonable time to exercise his right. The court rejected this argument, finding, among other things, that dissemination of the notice was sufficient under Rule 23 because it was mailed directly to class members. *Id*. at *3, 5.

Here, the district court found that the Notices did not require the services of lawyer to permit a lay person to comprehend them, and that there was a vital purpose served by requiring adherence to the opt out deadline because of the provision in the Settlement Agreement pursuant to which Lead Plaintiff and the Citigroup Defendants negotiated a reduction in the Settlement Amount based on the number and estimated value of the timely opt out requests. SPA-43. Those findings were well supported by the record, and clearly did not constitute an abuse of discretion.

Courts have also ruled specifically that the filing of an individual action does not entitle a class member to any greater notice than is sent to members of the class as a whole. In *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 370 (S.D.N.Y.), *aff'd,* 107 F.3d 3 (2d Cir. 1996), the court held:

> A second group of movants who had individual actions pending against [defendant] at the time of the opt-out period seek exclusion on the ground that they or their litigation counsel were not given individual supplemental notice of the Class Settlement within the confines of their individual proceedings. … Since initiation of separate litigation did not confer upon these Class Members a right to notice above and beyond that due other Class Members, the motions brought on this ground must fail.

Entenmann/Galitzer base their entire argument that the Notices were required to be sent to their counsel in the arbitration proceeding on what this Court wrote more than thirty years ago, in dicta, in *Supermarkets Gen. Corp.* v. *Grinnell Corp.*, 490 F.2d 1183 (2d Cir. 1974), that it might be desirable "for the future" to

include in Rule 23 orders that notice should be sent to attorneys for all members of the class who, to a defendant's knowledge, have instituted individual actions, and for all members who have appeared by an attorney in the class action itself. Entenmann Mem. at 20. What Appellants ignore, however, is that the holding in *Supermarkets Gen.* v. *Grinnell* was that the notice provided by the district court was adequate, notwithstanding that it was not sent to counsel for persons who had instituted individual actions. 490 F.2d at 1185. They further ignore that this Court did not take issue with the general statement of the district court in *Supermarkets Gen. Corp.* v. *Grinnell Corp.*, 59 F.R.D. 512, 514 (S.D.N.Y. 1973), that "movants were entitled only to such notice as the members of the class were entitled to and movants did not gain additional rights because they had instituted an independent action." Indeed, neither the decision of this Court in *Supermarkets Gen.* v. *Grinnell* nor any subsequent decision has held that a district court must require notice of a class action to be sent to counsel for class members who have initiated separate proceedings against any of the defendants in the class case, in addition to the class members themselves.[21] As this Court stated just recently:

[21] Entenmann/Galitzer note that the district court required special notices, along with the regular notices, to be sent to counsel for individuals who had appeared in individual actions in the consolidated WorldCom proceeding. They argue that such a notice should have also been sent to their counsel, but ignore that they were not represented by counsel in the WorldCom Class Action – which the December 2003 Notice of Class Action informed them that they had a right to

> There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or *Rule 23(e)* requirements; the settlement notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings."

Visa, 396 F.3d at 114 (citing *Weinberger v. Kendrick*, 698 F.2d at 70). The Notices in the present Action clearly did "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that [were] open to them in connection with the proceedings." *See also Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985) (notice "sent first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process"). Nothing more was required – either in terms of the content of the Notices or the persons to whom it was sent.

In sum, Entenmann/Galitzer were sent both the Notice of Class Action and the Settlement Notice, admit receiving both, but did nothing in response. They failed to exclude themselves; to inform their arbitration counsel of the Notices; or to contact Lead Counsel. As a result, their only valid complaint is with themselves, and not with the district court or Lead Plaintiff.

---

have. Thus, there was no basis to send to their counsel the special notice that was sent to counsel who had entered an appearance on behalf of an individual plaintiff.

IV. Entenmann/Galitzer's Appeal from Denial of Their Motion to Opt Out of the Class Late Should Be Denied

On October 25, 2004, Entenmann/Galitzer sought leave from the district court to opt out of the Class almost two months after the September 1, 2004 deadline. In their papers seeking permission to exclude themselves belatedly from the Class, and at the hearing held on October 28, 2004, Entenmann/Galitzer admitted that they had timely received both the Notice of Class Action (A-791), which had initially set the opt out deadline as February 20, 2004, and the Settlement Notice (A-1090), which informed Class members of the final September 1, 2004 deadline. *See* A-1515.2, A-1515.15, A-1519.

In seeking to opt out belatedly, Entenmann/Galitzer asserted (1) they thought the Notice of Class Action did not apply to them, and (2) they disregarded the Settlement Notice. A-1515.1. The court denied the motion at the conclusion of the October 28, 2004 Hearing,[22] and entered a confirmatory Order on November 1, 2004. The district court found that Appellants had not established any grounds for a finding of "excusable neglect" and, further, that given the negotiation and conclusion of the Citigroup Settlement based on the exclusions submitted to the Administrator on a timely basis and the need for finality in setting the Class, there

---

[22] It was only thereafter, on November 1, 2004, that Entenmann/Galitzer submitted an objection to the Citigroup Settlement. However, for the reasons stated at pp. 43-44, above, that submission was late and, under the terms of the Hearing Order, as described for Class Members in the Settlement Notice, whatever objections they had to the settlement had been waived.

would be prejudice to the settling parties if Entenmann and Galitzer were allowed to opt out late. A-1719. Contrary to Entenmann/Galitzer's present "statement of facts," Lead Plaintiff and the Citigroup Defendants, pursuant to the terms of the Settlement Agreement, negotiated a reduction of the Citigroup Settlement Amount based on the persons who had submitted exclusion requests by the September 1, 2004 deadline set by the district court, and *concluded those negotiations* by the time of Lead Plaintiff's October 22, 2004 submissions. A-1346 to A-1348 (reference in reply brief to final Settlement Amount of $2.575 billion, after taking into account the $75 million reduction negotiated by the parties based on the timely opt outs); A-1376 ¶5 (description in Supplemental Joint Declaration to the negotiation process and its result).

Thus, while Entenmann/Galitzer argue that the denial of their motion for exclusion from the Class constituted an abuse of discretion, in fact, the district court had good grounds in the record for finding that: (a) the reasons for their failure to opt out of the Class in a timely manner (including Entenmann's admission that he did not even bother to read the Settlement Notice) did not meet the standard for demonstrating "excusable neglect"; and (b) allowing such late exclusion motions would prejudice Lead Plaintiff, the Class and the Citigroup Defendants, who relied upon the exclusion deadline as the basis for negotiating the appropriate reduction in the Settlement Amount. A-1719. The court's findings

and conclusions are entitled to deference (*see, e.g., Joel A. v. Guiliani*, 218 F.3d at 139) and are reviewed utilizing an abuse of discretion standard. *Visa*, 396 F.3d at 106 n.12. Here, not only was the district court correct in concluding that Entenmann/Galitzer did not satisfy the strict test in this Circuit for showing excusable neglect, as set forth in *In re PaineWebber*, 147 F.3d 132, and *Silivanch v. Celebrity Cuises, Inc.*, 333 F.3d 355, 368 (2d Cir. 2003), *cert. denied,* 540 U.S. 1105 (2004) (noting that courts in this Circuit must take a "hard line" when addressing claims of excusable neglect because of burden that would be imposed on the legal system if time limits were not enforced), but given all of the circumstances and the court's analysis, the rejection of the late opt out request certainly does not constitute an abuse of discretion.

V. Entenmann/Galitzer's Appeal from the Injunction Issued February 18, 2005 Raises Issues That Were Not Raised at the Time of their Objection to the Settlement, and May Not Be Considered in Connection with their Appeal from the Judgment Approving the Citigroup Settlement

Entenmann/Galitzer have brought a separate appeal, No. 05-0296-cv, from the injunction issued by the district court on February 18, 2005, barring them from proceeding with their arbitration against Salomon and certain persons associated with Salomon. A-1888. Lead Plaintiff took no position on the injunction motion below, and takes no position on the appeal from the district court's injunction order. However, Lead Plaintiff responds to this portion of the Entenmann/Galitzer appeal to the extent that they seek to advance their appeal from the Judgment

entered on the Citigroup Settlement by making additional arguments that were not raised below in connection with Plaintiffs' motion for approval of the Settlement.

First, Entenmann/Galitzer raise in this appeal – based on arguments made to the district court for the first time on January 19, 2005 in connection with the injunction motion – that the release entered on November 12, 2004, was overbroad because it bars claims relating to a Class member's retention of WorldCom securities. That argument was *never raised* either in the late Objection submitted by Entenmann/Galitzer on November 1, 2004 (A-1624), or at the Settlement Hearing on November 5, 2004 (A-1605). Given the failure to raise this matter in connection with the Settlement, they are estopped from raising it as a basis for overturning the district court's ruling with respect to the release. *See* cases cited at pp. 46-47, above.

Second, to the extent Entenmann/Galitzer "reformulated" their Statement of Claim to try to circumvent the Settlement release, such a "reformulation" similarly cannot provide any ground to retroactively seek to have the release overturned. Entenmann/Galitzer filed their original arbitration Claim in April 2002. In that Statement of Claim, they alleged that Salomon and certain Salomon-related individual respondents breached their duties toward them and that respondents had a conflict of interest in connection with WorldCom. A-1515.17 to A-1515.18. On December 29, 2004, six weeks after the Judgment was entered, Entenmann/

Galitzer sought to amend their claim because "Claimants are currently barred from proceeding against Salomon Smith Barney…" and they attempt to "specify with particularity the claims not covered by this bar order." A-1644. Their amendment, however, states that "As a result of their reliance on Jack Grubman's research … Claimants were induced to transfer their pre-April 29, 1999 WorldCom holdings from the brokerage house where it was originally purchased to Salomon Smith Barney, and thereafter to hold the stock, instead of selling it." A-1644 to A-1645 (emphasis added). Not only does this amendment show again that their claims are based on the same research reports that form a key basis of the Class claims against the Citigroup Defendants, but it also confirms that the argument of "held" shares was never raised with the district court at the time of its consideration of the Citigroup Settlement.[23]

---

[23] Entenmann/Galitzer's reliance on *Weinberger v. Kendrick*, 698 F.2d at 77, as a basis for challenging the injunction order (Entenmann/Galitzer Mem. at 46), appears to be misplaced. There, plaintiffs had amended their complaint to add "a broader class of plaintiffs" that included persons who merely held, rather than purchased, the subject securities. *Id.* at 68. Appellants, who were added class members, objected to their inclusion in the case and to the allocation provided for their claims. The Court affirmed their inclusion in the case, the settlement and the allocation. Here, in contrast, persons who merely held WorldCom securities, but did not purchase WorldCom securities, are not a part of this case, and the settlement does not release any claims they may have – it only releases claims of Class Members based on the "well established [law] in this circuit and others that class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." *Visa,* 396 F.3d at 107 (emphasis added) (citing *TBK Partners*, 675 F.2d at 460).

Finally, even if the injunction order were inappropriate or overbroad, that still would not be grounds to overturn the Judgment. *See, e.g., In re Global Crossing,* 2005 U.S. Dist. LEXIS 14245, at *19-24 (allowing proceedings in *Norman* to determine whether certain claims could be pursued, while finding release of claims in settlement was appropriate).

For all of these reasons, the district court's approval of the Settlement and entry of the Judgment should be affirmed.

VI. The Fee Awarded by the District Court Was Fair and Reasonable, Complied With All Standards in this Circuit, and Did Not Constitute an Abuse of Discretion

The fee sought by Class Counsel below was approved, along with the Settlement and Plan of Allocation, by the district court in its November 12, 2004 Opinion and Order. *See* SPA-1. The court, which was actively involved in the litigation from the outset, undertook a thorough analysis of the circumstances surrounding the fee request and considered Class Counsel's role in the litigation and Settlement before concluding that the fee was reasonable. The court found that the fee structure in the Retainer Agreement entered into between Lead Plaintiff and Lead Counsel, upon which the fee application was based, was "conservative" (A-1614), and that the fee "is entirely appropriate in the context of the settlement and under any of the standards by which fee requests are customarily measured." SPA-53.

The fee request was in strict accordance with the Retainer Agreement entered into between Lead Plaintiff and Lead Counsel on July 30, 2003, after the contours of the case had been established through the court's rulings on motions to dismiss the Complaint and the Citigroup Defendants' earlier motion to sever claims from the Action. The Retainer Agreement provided that a fee request by Lead Counsel could be submitted only with the prior approval of Lead Plaintiff, and was to be based on a percentage-of-the-recovery fee grid (with percentages that decrease as the amount of the recovery increases, and increase at later stages of the litigation), and limited by a lodestar cross-check to ensure the reasonableness of the request. *See* A-1504 to A-1506; SA-108 to SA-109 ¶¶7-8.[24] With the approval of Lead Plaintiff, Lead Counsel submitted its request for attorneys' fees in the amount of $141.5 million, which constituted 5.45% of the final Settlement Amount of $2.575 billion. *See* A-1377 ¶9.[25] Based on an extensive analysis of the fee request, the district court approved it. SPA-53.

---

[24] The trend in this Circuit and elsewhere has been to award attorneys' fees based on the percentage-of-the-recovery method, followed by a lodestar cross-check for reasonableness. *See, e.g., Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 520 (E.D.N.Y. 2003), *aff'd,* 396 F.3d 96, 121 (2d Cir. 2005); s*ee also In re Rite Aid Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005).

[25] The fee request was based on the amount and the percentages in the fee grid under the column "Commencement of discovery through the completion of fact discovery." SA-63. It was well below the range of acceptable lodestar multiples (4-5 times lodestar) provided in the Retainer Agreement. SA-63 to SA-64. As of

Only one of the Appellants, Helfand, has appealed the amount of the fee award.[26] Indeed, there were only two other persons – neither of whom actually demonstrated membership in the Class – who raised any objection to the fee request in the court below. *See* A-1335. This minimal level of objections stands in stark contrast to the more than four million potential Class members who were sent the Notice of the Citigroup Settlement and fee request; the 170,000 Class members who had filed proof of claim forms by the time the court approved the Settlement and fee request, when there were still four months remaining for submission of claim forms (SPA-33); and the fact that whereas nearly every institutional investor in this country had invested in WorldCom stock or bonds and suffered truly substantial losses, not one of those sophisticated investors objected to the fee request. As noted elsewhere, "such a low level of objection is a 'rare phenomenon' … [as] a significant number of investors in the class were

---

August 31, 2004, the last month before the fee submission, Class Counsel had expended more than 195,000 hours in the litigation, and incurred a lodestar of more than $57 million. *See* A-1374 ¶10; A-1384; A-1385. Thus, the fee award equated to a 2.46 multiple of counsel's lodestar, which is well within the range of multiples found reasonable in this Circuit. *See, e.g., Visa*, 396 F.3d 96 at 123 (finding multiple of 3.5 common in "mega-fund" cases); *In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 489 (S.D.N.Y. 1998) ("multipliers of between 3 and 4.5 have become common") (internal quotation marks omitted).

[26] Helfand sustained a very limited loss from his WorldCom investment. Helfand's brokerage statement shows that in two separate transactions, he purchased a total of 550 shares for $13,327.13 and realized a cumulative loss of only $1,864.02 from the sales of such stock. *See* attachment to A-1205.

'sophisticated' institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive." *In re Rite Aid*, 396 F.3d at 305 (district court did not abuse its discretion in finding two objectors out of over 300,000 class members weighed in favor of approving fee request) (citation omitted).

In approving the Citigroup Settlement, the district court noted the small number of objections, stating: "The dearth of objections, given the size of the class, is *de minimis*." SPA-29. The court thoroughly scrutinized the fee request, and the propriety of the methodology used in calculating the request, before concluding that the request was fair, reasonable and adequate. SPA-44 to SPA-55. Indeed, Appellant Helfand, himself, acknowledged that Class Counsel "did a great job with the Settlement," A-1612, and that the requested 5.45% fee is not excessive in relation to the recovery achieved. A-1210. Whereas Helfand is correct on these points, he has no valid grounds for his appeal.

A. Helfand's Objections to the Fee Award Are Without Merit

Appellant Helfand argues primarily that in its consideration of the reasonableness of the fee award, the district court erred by: (1) affording the Retainer Agreement and fee request a presumption of reasonableness based on Lead Plaintiff's consent and approval; (2) failing to properly cross-check the percentage-based award against Class Counsel's lodestar; (3) failing to scrutinize

Lead Counsel's lodestar calculations; and (4) failing to sufficiently consider what Helfand asserts was an absence of risk of non-recovery by Class Counsel of attorneys' fees. *See* Helfand Mem. at 19-33.

Each of these arguments is without merit, is factually incorrect, and should be rejected. In fact, Helfand seeks to mislead this Court by stating that the district court essentially sought to overturn "established law" by "rubber-stamp[ing] the lead plaintiff's decision by application of a presumption of reasonableness with regard to a retainer agreement between the lead plaintiff and lead counsel." *Id.* at 20. As the district court opinion demonstrates, the court thoroughly analyzed the merits of the fee request by (a) considering initially the first five *Goldberger* factors, and finding that the fee request was fair, reasonable and adequate under each of those criteria, and (b) thereafter addressing the sixth and final criteria, other public policy considerations, and finding that these public policy considerations, including the prior approval of the fee request by a diligent Lead Plaintiff, also strongly favored approval of the request. Each of the court's findings was based on a strong factual record, and in strict accord with the governing law in this Circuit.

As noted above, a district court's fee decision is reviewed based on an abuse of discretion standard. *Visa*, 396 F.3d 96 at 106 n.12; *Goldberger*, 209 F.3d at 47. It is within the sound discretion of the district court to determine if the fee award is

"'reasonable' under the circumstances" of the case. *Goldberger*, 209 F.3d at 47 (quoting *Brown v. Philips Petroleum Co.*, 838 F.2d 451, 455 (10th Cir. 1988)). Thus, the district court's conclusions as to the reasonableness of the award may be overturned only in instances where this Court determines that the district court abused its discretion, which could occur only if the court had failed to apply the proper legal standard or based the award upon findings of fact that are clearly erroneous. *Id*. at 47; *Herman v. Davis Acoustical Corp.*, 196 F.3d 354, 356 (2d Cir. 1999). The highly deferential abuse of discretion standard of review "takes on special significance when reviewing fee decisions." *Goldberger*, 209 F.3d at 47. In this case, the record makes clear that no such abuse of discretion occurred.

B. The District Court Thoroughly Scrutinized the Merits of the Fee Request Before Concluding It Was Fair and Reasonable

In determining the reasonableness of a fee request, a reviewing court should be guided by the traditional factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), as further restated in *Goldberger*. 209 F.3d at 50. As summarized in *Goldberger*, those factors include (*id.*):

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation …; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Contrary to Helfand's assertions, the district court did not merely apply a presumption of reasonableness to the Retainer Agreement and fee request in

approving the award. Indeed, before any discussion of Lead Plaintiff's role in approving the fee request, the district court found that the fee request was fair and reasonable based on every one of the first five *Goldberger* criteria. SPA-45. The court fulfilled its duties under *Goldberger* by thoroughly considering each of the factors, recognizing that whether attorney's fees in a class action are calculated under the percentage or lodestar method, a court must analyze the factual context of the settlement amount and fee request in light of the *Goldberger* factors. *Id*.

1. The Time and Labor Expended by Counsel

The district court recognized, in its approval of the fee request, that the time and labor expended by Lead Counsel and the Assisting Firms in the prosecution of this case was extensive. At the November 5, 2004 hearing, the court stated in response to Helfand's presentation:

> I have observed lead counsel from day one on this case …there is no way that this settlement would have been achieved without the work done by lead counsel. There has been no opportunity for what you deem soft time or duplicative work. We have all worked at an appropriate pace but, nonetheless, an expeditious pace, in order to bring finality for the defendants and resolution for the class. There has been no opportunity for any lawyer in this litigation at least that's a party before me, to be billing for time not spent actively working on this case … <u>I found that the retainer agreement that was negotiated here and the fee award that's coming to me as a result of that, is conservative</u>. I have scrutinized carefully, in many of the class action settlements that have come before me, the lodestar figures -- poured over time records, looked carefully, cut back fee requests. I am not shy about doing so when I think it's appropriate. <u>I see myself as a fiduciary to the class just as Mr. Hevesi is, and I will not pay attorneys sums of money that I do not believe they're entitled to. I looked at the</u>

> submissions here. If I thought it was necessary for me to get detailed time records, I would. I don't believe it is. I looked at the kinds and levels of the attorneys that were doing the work. Many of the partners have appeared before me on various issues, sometimes associates on some discovery disputes. I know these folks and I know how they're spending their time.

A-1613 to A-1614 (emphasis added). The court further found in its November 12, 2004 Opinion and Order that:

> Lead Counsel has performed its work at every juncture with integrity and competence. It has worked as hard as a litigation of this importance demands, which for some of the attorneys, including the senior attorneys from Lead Counsel on whose shoulders the principal responsibility for this litigation rests, has meant an onerous work schedule for over two years.

SPA-48.

In arriving at these determinations, the court considered the numerous tasks that Lead Counsel undertook to prosecute this case. *Id.*[27] The court further

---

[27] The Joint Declaration submitted by Lead Counsel set forth numerous examples of the tasks undertaken by Class Counsel, such as (a) defeating Defendants' motions to dismiss the Complaint; (b) conducting substantial discovery of Defendants and third parties; (c) filing numerous motions to compel additional documents from Defendants; (d) spending considerable time and effort working with Plaintiffs' accounting experts, telecommunications experts, investment banking experts, valuation experts, and damages experts; (e) responding to extensive discovery demands, undertaking enormous efforts and creating an extensive record to support arguments in favor of this case proceeding as a class action against all Defendants; (f) preparing, for the court's consideration, the Notices to be sent to Class members, and later the proof of claim form and other materials that the court directed be sent to Class Members; and (g) preparing for and taking over seventy depositions, even as documents were still being produced. SA-23 ¶47; SA-26 ¶54. The negotiation of the Settlement, which spanned more than eighteen months, also required extensive efforts on the part of

considered the time expended by Lead Counsel and the Assisting Firms, which attests to the extensive effort by all concerned. Lead Counsel alone spent more than 145,000 hours in the prosecution of the Action through August 31, 2004. Including the Assisting Firms, Class Counsel expended over 195,000 hours for a cumulative lodestar of $57.5 million. A-1377; A-1384; A-1385; SA-124. Accordingly, the time and labor expended by counsel in reaching the Settlement was carefully considered by the district court, and clearly supports the fee awarded.

2. The Magnitude and Complexities of the Litigation

As required by *Goldberger*, the district court also thoroughly considered the magnitude and complexity of the litigation in determining the reasonableness of the fee request. The court found:

> [T]here is no doubt that [this case] is complex and challenging, and that it has required an enormous commitment from the attorneys for the parties in the class action. At virtually every turn there were unusual or even novel issues of law or procedure that had to be analyzed and briefed.

Lead Counsel. Under the guidance and supervision of the Lead Plaintiff and the Settlement Judges, Lead Counsel expended enormous efforts in providing analyses of claims and damages for purposes of the settlement negotiations; meeting with Lead Plaintiff and the Named Plaintiffs' counsel; analyzing defenses asserted by the Citigroup Defendants; and participating in arduous negotiating sessions, culminating in a face-to-face meeting between Comptroller Hevesi and Citigroup's Chief Executive Officer Prince that resulted in an agreement in principle on May 6, 2004. SA-23 ¶47.

SPA-48. The court provided an array of examples that it considered in making this determination: Lead Counsel's successful efforts in lifting the bankruptcy and PSLRA stays so that it could obtain documents from WorldCom before discovery would otherwise have been available under the PSLRA; Lead Counsel's development of a system that allowed each party to take 60 days of depositions divided into four-hour blocks; Lead Counsel's handling, in connection with class certification, of the applicability of the fraud-on-the-market presumption in the district court, and in this Court, with respect to the more than seventy research reports issued by Salomon and its analyst, Jack Grubman, during the Class Period; and Lead Counsel's efforts to maintain the established trial date, while also reserving counsel's right to depose the embargoed witnesses after they testified at the Ebbers trial. *Id.*

The court further considered, and concluded, that the claims against the Citigroup Defendants were especially complex and subject to significant risk – a factor that clearly supported both approval of the Citigroup Settlement and the fee application. None of the various persons and entities that investigated the relationship between the Citigroup Defendants and WorldCom, including the Examiner appointed in WorldCom's bankruptcy proceedings, had found evidence that Grubman committed fraud in his reports about WorldCom. Yet that is precisely the claim that Plaintiffs asserted and developed through discovery in this

case. Moreover, to assert viable claims of the Class against the Citigroup Defendants based on analyst reports required Lead Plaintiff to successfully oppose the Citigroup Defendants' motion to dismiss the Complaint, their motion to sever and transfer certain claims to be prosecuted in tandem with the overall *SSB Analyst Litigation*, and their opposition to the class motion. *Id.* And, among other things, it involved the discovery and analysis of what Plaintiffs asserted were the conflicting roles of the Citigroup Defendants as a financial advisor to WorldCom, a lead underwriter in the two massive bond offerings at issue in this case, the provider of hot IPO shares to WorldCom's CEO Ebbers, the provider of loans and other financial assistance to Ebbers and various Ebbers-controlled entities, and an allegedly "independent" research analyst covering WorldCom during the Class Period. *Id.*

Thus, it is clear that the court diligently considered the complexity and magnitude of this case, which, from the examples provided above in addition to many other factors present in this litigation, the district court appropriately determined was a factor further supporting approval of the fee request.[28]

---

[28] Overall, the magnitude and complexities of this case, which involved analysis of the reasons for the downfall of the second largest long distance carrier in the country and the interrelationship of complex accounting and other non-disclosure issues, went far beyond the "normal" complexities of a federal securities class action. The WorldCom class action was prosecuted against more than thirty-five different defendants, including WorldCom executives and directors, Andersen, the Citigroup Defendants, and sixteen other underwriters of WorldCom's public

3. The Risks of the Litigation

Helfand asserts that a major defect in the district court's analysis of the fee request was its "failure" to sufficiently address the risk of recovery factor in forming its opinion. Helfand argues that the court applied only a "cursory analysis" of the risks associated with the case. Helfand Mem. at 31.

Helfand's charge is belied by the court's opinion, which demonstrates that Judge Cote – who was diligent in every aspect of this litigation – made an extensive review of the risks inherent in the case, on the basis of which she

---

bond offerings. The class proceedings involved the production of hundreds of thousands of documents, extensive depositions, and the submission of detailed briefs and expert reports by each of the parties. Settlement negotiations started and stopped several times, with major issues litigated in the interim, before the Citigroup Settlement was reached.

The issues involved in the case were also complex. There were depositions of witnesses from WorldCom, KPMG, Dovebid, American Appraisal and Andersen concerning various GAAP issues and, as shown by the expert reports and rebuttal reports produced in the litigation, nearly all of the accounting and due diligence issues were hotly contested. The case against Andersen also involved complex issues concerning whether their audits of WorldCom's financial statements complied with generally accepted auditing standards (GAAS). The case against the Director Defendants involved the actions they took in overseeing WorldCom's management, and whether, *inter alia*, they complied with their due diligence obligations for the bond offerings and, more generally, their control person obligations concerning the Company's statements during the Class Period. And the case against the Underwriter Defendants required plaintiffs to analyze their conduct with respect to the offerings as well as their other dealings with WorldCom and its senior officers, and the due diligence and other defenses that they raised. A-1113, A-1167 to A-1169. Prosecuting the case against any one defendant required litigation and understanding of the case against all defendants.

concluded that "there were significant risks associated with the claims brought against the Citigroup Defendants." SPA-49.

a. Risks Inherent in the Litigation

The district court identified and considered a host of risks with respect to both liability and damages incident to securing a recovery against the Citigroup Defendants. These included:

(a) this Court's granting of the Citigroup Defendants' Rule 23(f) petition for an immediate review of the district court's class ruling with respect to the Grubman analyst reports;[29]

(b) whether the statements made or facts allegedly omitted by the Citigroup Defendants were materially false or misleading, and actionable under the federal securities laws;

(c) whether the Citigroup Defendants acted with scienter with respect to the Exchange Act claims;

(d) whether the Citigroup Defendants conducted reasonable due diligence in connection with the 2000 and 2001 Offerings;

---

[29] The granting of the Citigroup Defendants' petition for an immediate review of the District Court's class certification order presented a significant risk to Plaintiffs. If this Court had reversed the district court's order certifying a Section 10(b) class against the Citigroup Defendants based on the analyst reports issued by Salomon and Grubman, it would have effectively ended Plaintiffs' ability to achieve <u>any</u> recovery on the basis of those claims on a class-wide basis. *See Hevesi v. Citigroup, Inc.,* 366 F.3d 70, 77-79 (2d Cir. May 7, 2004); *see also DeMarco v. Lehman Brothers Inc.*, 222 F.R.D. 243, 247-49 & n.4 (S.D.N.Y. July 7, 2004) (finding plaintiffs had not made a sufficient showing of material impact of an analyst's reports to support class certification of plaintiffs' claim). The Settlement with the Citigroup Defendants in this case, which provides $1.2 billion for the Section 10(b) portion of the Class, was reached just one day before argument on the Rule 23(f) appeal was to be heard by this Court. Thus, this was an important factor supporting both the Citigroup Settlement and the fee application.

(e) the dispute over the appropriate economic models for determining the amounts by which WorldCom common stock and bonds were allegedly artificially inflated (if at all) during the Class Period;

(f) the extent to which various market forces and other external factors, such as general market and industry conditions, influenced the trading prices of WorldCom common stock and bonds;

(g) the extent to which the various statements alleged to be false, and facts that Plaintiffs alleged were omitted, influenced (if at all) the trading prices of WorldCom common stock and bonds; and

(h) the Citigroup Defendants' anticipated right at trial to present evidence to show that the other defendants were more responsible for the Exchange Act violations and, thus, responsible for a larger amount of damages pursuant to the proportionate fault doctrine.

SPA-30 to SPA-31; A-1170 to A-1172. The court further considered the defense asserted by all Defendants that WorldCom (which could not be sued in the Action because of its bankruptcy status) and its senior officers (against whom the case was stayed because of their criminal exposure and guilty pleas) had been the ones who had perpetrated and actively concealed their fraud from Andersen, the Underwriters, the Citigroup Defendants, and WorldCom's outside directors. *Id.*

In light of these and other risks, the prospect of any recovery, let alone a large recovery, was hardly assured. The district court was aware of these risks, found that despite the risks Lead Counsel achieved a settlement of historic proportions in favor of the Class, and considered each of the risks in approving the fee request.

b. Risks Associated with Non-Payment of Attorneys' Fees

Helfand further argues that the risk of non-payment was relatively low for Lead Counsel because in securities class actions "virtually all cases are settled." Helfand Mem. at 32 (citation omitted). This statement, however, is itself misleading. First, such a statement could only pertain to cases that survive motions to dismiss the complaint which, according to recent figures from the University of Michigan John M. Olin Center for Law & Economics, were successful in 80 out of 155 (approximately 52%) securities class actions filed in the Second and Ninth Circuits from 1996 to 2002.[30] Second, the statement that "virtually all cases are settled" may apply to non-dismissed cases in which a plaintiff has the ability to sue *the company that issued the securities upon which the case is brought and the issuer's senior executives*. In this case, however, because of WorldCom's bankruptcy filing, and the stay of proceedings against WorldCom executives, the only parties against whom Lead Plaintiff could bring this Action were persons and entities who also claimed – like Plaintiffs – to have been defrauded by WorldCom and its senior executives. And, of course, as explained above, there were numerous risks inherent in *this particular case*.

---

[30] *See* Adam C. Pritchard & Hillary A. Sale, "What Counts as Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act 21" (John M. Olin Center for Law and Economics Working Paper Series, Working Paper No. #03-011, 2003), at www.law.umich.edu/centersandprograms/ olin/papers.htm.

In the face of all of the risks inherent in this case, Class Counsel nonetheless devoted an enormous amount of time and money to this case. By August 31, 2004 – just over two years from the time of the district court's appointment of Lead Plaintiff – Class Counsel had expended over 195,000 hours on this case, for a combined lodestar of more than $57 million, and incurred expenses of more than $7 million. A-1377; A-1384; A-1385. The two firms who served as Lead Counsel alone expended approximately 90,000 attorney hours and 55,000 paralegal hours on this case, incurring a lodestar of nearly $43 million. *Id.* Based on the Retainer Agreement entered into between Lead Plaintiff and Lead Counsel, only a truly significant recovery would have entitled Class Counsel to apply for a fee that even covered the time they had devoted to this case. *See* SA-63 to SA-65.[31]

Helfand also asserts that the risk of non-recovery was "dubious" because of the existence of concurrent governmental investigations of both a civil and criminal context. Helfand Mem. at 32. This assertion, too, is inaccurate and misleading. If anything, the existence of the SEC and other governmental actions

---

[31] Under the Retainer Agreement, Lead Counsel could have applied for a fee of $57 million (which would have just matched the collective lodestar of Class Counsel) only if a recovery of $610 million had been achieved at the stage of proceedings at which the Citigroup Settlement was reached. Such a $610 million recovery would have been the fourth largest in the history of securities class actions at that time, and by far the largest to that time by a non-issuer of securities. And, of course, if no such settlement had been achieved, Class Counsel would have continued to put at risk all of its time and expenses incurred in the prosecution of the case through trial and a likely appeals process.

presented substantial hurdles to the prosecution of the Class Action. First, the SEC and other governmental actions were brought only against WorldCom and certain of its senior executives, who could not be prosecuted by Lead Plaintiff in the Class Action because of the Company's bankruptcy filing and the stays imposed by the district court with respect to the insider executives. Second, the pendency of the criminal actions against WorldCom insiders imposed severe limitations on the discovery that Lead Plaintiff could seek from these individuals as well as from other witnesses prior to the Citigroup Settlement.[32] Third, the defendants that Lead Plaintiff could prosecute were not defendants or subjects in any other governmental prosecution, and they claimed to have been "cleared" of wrongdoing by the USAO and the SEC with respect to their WorldCom-related activities. Indeed, a parallel set of actions involving research analysts brought by New York Attorney General Eliot Spitzer and others did not include any finding of falsity with respect to the Salomon and Grubman research reports on WorldCom. *See, e.g.,* News Release of NASD, NYSE, SEC and NYAG, dated April 28, 2004 (available at www.nasd.com). The district court recognized the challenges that Lead Counsel faced in this regard, finding that Lead Counsel was able to keep the

[32] The district court expressly noted this challenge and praised Lead Counsel for its efforts in working in tandem with the USAO to obtain documents in the case while discovery was stayed against the "embargoed witnesses." SPA-49.

Class Action "on track *despite* the parallel criminal proceedings." SPA-50 (emphasis added).

Helfand similarly asserts – with no basis whatsoever – that the court ignored that the contract attorneys and paralegals employed by Class Counsel had "no risk" of non-payment and, thus, their hours were not eligible for a multiplier. He argues that the hours expended by these individuals, notwithstanding that these were licensed attorneys, many of whom had extensive experience in class action and complex litigation, should have been accounted for as costs, and not attorneys' fees subject to a multiplier. However, Helfand overlooks the facts that Lead Counsel: (a) employed these people as attorneys for the purpose of providing legal services that only trained attorneys could provide, or as paralegals to undertake in a more efficient and cost-effective manner other tasks also necessary for prosecution of the case; and (b) bore the full risk of non-payment for the time and efforts of these contract attorneys and paralegals – just as the firms bore the full risk of non-payment for the time and efforts of their partners, associates and paralegals. Thus, Class Counsel faced a significant risk that they would not be compensated for this time.[33]

---

[33] *See also* Section VI.C.1., below, for a further discussion of the inclusion of the time expended by contract attorneys and paralegals in the lodestar calculations, which was reviewed and approved by Lead Plaintiff for inclusion in the fee request.

The fact is that the risks of non-payment to Class Counsel, who prosecuted this Action on a contingency basis, were significant from the outset and throughout the duration of the case. And, as is evident from the district court's opinion, the court diligently considered this factor before approving the fee request. SPA-30 to SPA-31.

4. Quality of Representation

The fourth criterion for evaluating the fee request is the quality of the representation of the Class. Judge Cote oversaw the work of Lead Counsel throughout the course of the litigation and, in the Opinion and Order, attested to the quality of Lead Counsel's representation:

> The quality of representation given by Lead Counsel is unsurpassed in this Court's experience with plaintiffs' counsel in securities litigation. Lead Counsel has been energetic and creative. Its skill has matched that of able and well-funded defense counsel. It has behaved professionally and has taken care not to burden the Court or other parties with needless disputes. Its negotiations with the Citigroup defendants have resulted in a settlement of historic proportions. It has cooperated with other counsel in ways that redound to the benefit of the class and those investors who have opted out of the class. The submissions of Lead Counsel to the Court have been written with care and have repeatedly been of great assistance.

SPA-49 to SPA-50.

The court provided many examples that it considered in judging the quality of Lead Counsel's work. The court noted as particularly exceptional:

(a) Lead Counsel's discovery of loans by a Salomon affiliate to an entity controlled by Ebbers, and by Citigroup to Ebbers that were backed by his WorldCom stock;

(b) Lead Counsel's analysis of Grubman's research reports which led it to allege that Grubman had modified his model for evaluating WorldCom in order to mask its financial condition;

(c) Lead Counsel's negotiation of an agreement with the government and the SEC through which it was able to access various WorldCom documents by first seeking them from the Bankruptcy Court, notwithstanding the usual stay of proceedings involving debtors, and then from the district court notwithstanding the usual stay of discovery before determinations of motions to dismiss under the PSLRA;

(d) Lead Counsel's solicitation of an amicus brief from the SEC in support of class certification of the claims arising out of the analyst reports;

(e) the existence of the individual plaintiff actions which presented Lead Counsel with various challenges that required collaboration with over twenty-two other law firms handling those claims;

(f) Lead Counsel's role in overseeing the discovery process and the development of a litigation website that assisted Class Members as well as individual action plaintiffs; and

(g) Lead Counsel's development of a deposition plan and schedule of strategy conferences and weekly telephone calls with counsel to the individual action plaintiffs, which strategies facilitated communication and decision-making between all plaintiffs' counsel.

SPA-49 to SPA-53.

The court paid further consideration to the "leadership shown by Lead Counsel and the structures it established," and, as more fully described in the

opinion, Lead Counsel's ability to "resurrect an opportunity for certain pension funds to join the class and share in any recovery obtained." SPA-52.

The district court gave serious consideration to all of these accomplishments, and determined "the quality of representation that Lead Counsel has provided to the Class has been superb." SPA-53. Indeed, Helfand himself acknowledged at the Settlement Hearing: "I think these lawyers did a great job with the settlement." A-1612.

5. The Results Achieved Justified the Requested Fee

The district court also concluded that, pursuant to any of the methods by which fee requests are customarily calculated, the requested fee was entirely appropriate in light of the recovery achieved. SPA-53. This partial Settlement provides the Class with an all-cash recovery that has been surpassed only once in the history of federal securities class action litigation. It was by far the largest amount ever recovered from defendants that were not the issuer of the securities upon which a federal securities class action was brought.[34] Moreover, as noted above and in the district court's opinion, this recovery was achieved in the face of the many complexities and significant risks. Notwithstanding those risks and

---

[34] In *In re Cendant Corp. Litig.*, 264 F.3d 201 (3d Cir. 2001), *cert. denied,* 535 U.S. 929 (2002), $2.85 billion of the $3.18 billion settlement was paid by a viable corporate defendant that had issued the securities, and the remaining $335 million was paid by a viable outside auditing firm. Furthermore, as opposed to the Citigroup Settlement, which represented only a partial settlement of the case, the settlement in *Cendant* settled all class claims in that case.

complexities, the recovery for purchasers of May 2000 and May 2001 bonds is approximately 36% of damages that Plaintiffs estimated could have been recovered from the Citigroup Defendants on the Section 11 claims, and a significant percentage of the damages that Plaintiffs estimated could have been recovered from the Citigroup Defendants given the proportionate liability provisions for Section 10(b) claims. A-1134 to A-1135. This assumes, of course, that (a) plaintiffs would have prevailed on liability, (b) would have been able to convince a jury that plaintiffs' estimates of damages were correct, and (c) as noted above, would have been able to maintain the Class for purposes of the Class' Section 10(b) claims based on Grubman's analyst reports. A-1167.

This Court has stated that the degree of success achieved is a key factor in the reasonableness of a fee award. *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 760 (2d Cir. 1998). Here, the court appropriately found that based on the magnitude of the recovery, along with the Class' favorable reaction to the Settlement (*see* page 23, above), the fee award was justified by this fifth *Goldberger* factor. SPA-53.

The court also found – before turning to the sixth *Goldberger* factor, other public policy considerations – that the fee request was amply justified based on each of the first five factors: "The fee is entirely appropriate in the context of the settlement <u>and under any of the standards by which fee requests are customarily</u>

measured." *Id.* (emphasis added). Given the careful analysis by the district court, which undisputely applied the appropriate legal standards, such a finding can hardly be said to constitute an abuse of discretion.

6. Public Policy Considerations Support the Requested Fee

Notwithstanding the district court's extensive analysis of the fee request, Helfand argues that the court applied a presumption of reasonableness to the fee request without undertaking a substantive analysis of the merits of the request. Helfand Mem. at 17. He further alleges that the court cavalierly cited *Savoie v. Merchant's Bank*, 166 F.3d 456, 461 (2d Cir. 1999), for the proposition that it could rely on the methodology used by counsel to calculate the award, and thereby implicitly adopted the Third Circuit's presumption of reasonableness approach to fee awards cited in *Cendant*, 264 F.3d at 282.

Helfand's charges are not accurate. As described above, the district court thoroughly scrutinized the fee request based on the first five *Goldberger* factors before considering the "substantial public policy reasons," including Lead Plaintiff's role in the negotiation and endorsement of the fee request, which also supported the fee award. SPA-53.

Under the PSLRA, a lead plaintiff's role is to "adequately represent the interests of class members," which includes the selection and oversight of the counsel that it has chosen, and the court has approved, to represent the plaintiff

class. 15 U.S.C. § 78u-1(a)(3)(B)(v). The fee and expense request was carefully scrutinized, and approved, by Lead Plaintiff, the New York State Common Retirement Fund, as represented by New York State Comptroller Hevesi and his general counsel. The NYSCRF is the paradigm fiduciary that Congress envisioned in enacting the PSLRA.[35] A-1377 to A-1378. As the court noted, the NYSCRF, the nation's second largest pension fund, is a sophisticated institutional investor experienced in complex securities class actions with a significant financial stake in the outcome of the litigation. SPA-53. The Comptroller and his staff "diligently supervised the work of Lead Counsel" before authorizing the fee request, which adhered to the Retainer Agreement negotiated by the Lead Plaintiff and Lead Counsel. SPA-45.

Helfand argues that, pursuant to this Court's holding in *Visa*, 396 F.3d 96, this Circuit does not attach a presumption of reasonableness to retainer agreements, and that such agreements do not in any way bind the court. Helfand Mem. at 23. There are two key fallacies to Helfand's argument. First, this case was brought pursuant to the federal securities laws, and the appointment of Lead Plaintiff and

[35] Congress enacted the PSLRA in large part to encourage sophisticated institutional investors to assume control of securities class actions and "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." *See* "Private Securities Reform Act of 1995," H.R. Conf. Report No. 104-369, 104th Cong., 1st Sess. (1995), 1995 WL 709276, at *32.

Lead Counsel was governed by the PSLRA. It was in the context of such a case, also brought pursuant to the federal securities laws and the PSLRA, that the "presumption of reasonableness" concept was developed. *Cendant*, 264 F.3d at 220 ("courts should afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel"). In contrast, *Visa* was an antitrust case not brought pursuant to any statutory scheme that governed the appointment of a lead plaintiff.

Second, Helfand entirely misreads this Court's decision in *Visa*. The essence of that decision is that a district court should exercise its discretion in awarding what the court believes to be a fair, reasonable and adequate fee, and that if it exercises its discretion appropriately, this Court will not disturb that fee award. *Visa,* 396 F.3d at 123. Indeed, it was on that basis that this Court *affirmed* the district court's 6.5% fee award in *Visa*, which equated to a 3.5 multiple, finding the fee to be reasonable in light of the large recovery obtained. *Id.* at 121; *see In re Visa Check/Mastermoney*, 297 F.Supp.2d at 524. Similarly, the fee award here – which constitutes 5.45% of the recovery achieved by Lead Counsel (compared to the 6.5% affirmed in *Visa*), and equates to a 2.46 lodestar multiplier (compared to the 3.5 multiple in *Visa*) – should be affirmed. As this Court noted in *Visa,* as did the district court in the present case, Class Counsel devoted a tremendous amount

of time and effort to the case and the extraordinary results achieved for the class were without any assurance of a recovery. *Compare Visa,* 396 F.3d at 122, *with* SPA-53 ("Lead Counsel … undertook this service on a fully contingent basis. Its risk and effort deserve to be awarded appropriately").

The district court did not, as Helfand argues, implicitly adopt the Third Circuit's holding in *Cendant* through application of a presumption of reasonableness, and this Court likewise need not adopt the presumption in order to affirm the award. In *Cendant*, the Third Circuit held that a district court had abused its discretion by invalidating a fee agreement negotiated between counsel and three sophisticated institutional investors in favor of a sealed-bid auction for legal services. In so holding, the Court recognized that, in enacting the PSLRA, Congress expressed its strong belief that an institutional lead plaintiff would be in a better position than the court to protect the interests of the class by monitoring lead counsel throughout the litigation and by negotiating a reasonable fee for counsel's representation. 264 F.3d at 276. Accordingly, the Third Circuit held that, consistent with the PSLRA, a fee agreement negotiated between a properly selected lead plaintiff and its counsel should be accorded a "presumption of reasonableness." *Id*; *accord In re Lucent Technologies Sec. Litig.,* 327 F. Supp.2d 426, 433-34 (D.N.J. 2004).

The Retainer Agreement in this case was entered into by Lead Plaintiff and Lead Counsel following lengthy negotiations and at a stage of the litigation where Lead Plaintiff and Lead Counsel had sufficient information to make an informed judgment regarding the potential magnitude of the case and the risks of achieving a recovery. A-1115.[36] Thus, while Lead Counsel had agreed from the outset of the case that it would undertake the prosecution of this Action on an entirely contingent basis, and not recover any monies unless and until there was a recovery achieved for the Class, it was not until July 30, 2003, that the parameters of the fee agreement were established between Lead Plaintiff and Lead Counsel.[37]

The court found: "Lead Plaintiff has conscientiously supervised the work of Lead Counsel and gives its endorsement to the fee request, which adheres in all

---

[36] For instance, by the time the Retainer Agreement was negotiated, (i) Lead Counsel, on behalf of Lead Plaintiff, had conducted an extensive investigation prior to the filing of the Complaint; (ii) Lead Counsel had successfully moved to lift the automatic stay in the Bankruptcy Court and the normal PSLRA stay of discovery, and thereby obtained significant discovery of WorldCom documents that had been provided to various government entities; (iii) initial settlement discussions had been undertaken and suspended; (iv) Lead Counsel had successfully opposed the Citigroup Defendants' motion to sever the so-called "analyst" claims; (v) Lead Counsel had, with limited exception, defeated all motions to dismiss filed by Defendants; and (vi) Lead Plaintiff had filed its motion for class certification, and was producing documents and witnesses as part of the class certification discovery proceedings.

[37] The Retainer Agreement was also made available for all Class members to review. It was posted on the website maintained by Lead Counsel for the case, at www.worldcomlitigation.com, and it was further referenced in the December 11, 2003 Notice of Class Action, and in the August 2, 2004 Settlement Notice.

particulars to the retainer agreement. *In these circumstances*, the requested fee is entitled to a presumption of reasonableness." SPA-53 (emphasis added). Thus, the district court did not, as Helfand asserts, merely "rubber-stamp" the Lead Plaintiff's decision by applying a presumption of reasonableness to the fee request. On the contrary, it considered all of the circumstances surrounding the Settlement and Lead Counsel's role in the litigation and decided, based on all of the circumstances, that the requested fee was fair, reasonable and adequate. In fact, at the hearing, the district court characterized the Retainer Agreement's fee grid as "conservative." A-1614 ("[I]f anything, I found that the retainer agreement that was negotiated here and the fee award that's coming to me as a result of that, is conservative.").

In addition to the public policy considerations that support affording a properly selected lead plaintiff the authority to negotiate a fee arrangement on behalf of the Class, the court noted *other* public policy reasons supporting the award. Judge Cote found: "Lead Counsel has performed a valuable public service in prosecuting this action with vigor and skill." SPA-53. This Court similarly has taken into account the social and economic value of class actions and the need to encourage counsel to undertake such litigation. *See, e.g., Alpine Pharmacy v. Chas. Pfizer & Co., Inc.,* 481 F.2d 1045, 1050 (2d Cir. 1973). And, as former

Chief Judge Brieant stated in *In re Union Carbide*, 724 F.Supp. 160, 169 (S.D.N.Y. 1989):

> [a] large segment of the public might be denied a remedy for violations of the securities laws if contingent fees awarded by the courts did not fairly compensate counsel for the services provided and the risks undertaken.

See also Eltman v. Grandma Lee's, Inc., No. 82 Civ 1912, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986).

For the vast majority of Class members in the present case, this class action was their only hope of obtaining compensation for the losses they suffered as a result of the WorldCom fraud, and it was the most efficient manner in which to prosecute their claims. In this circumstance, "[p]rivate attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from socially undesirable activities like securities fraud." *Maley v. Del Global Technologies Corp.,* 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002).

In sum, contrary to Helfand's assertions, it was only after careful attention was paid to the circumstances surrounding the litigation, the Settlement and fee request in light of the first five of the *Goldberger* factors, which strongly favored approval of the fee request, that the district court proceeded to consider the "substantial public policy reasons [including but not limited to the Lead Plaintiff's role in setting the fee request] supporting approval of this award." SPA-53. Thus, the court did not begin its analysis with a presumption of reasonableness in favor

of the award as Helfand asserts. Rather, it thoroughly scrutinized the fee request before determining that Lead Plaintiff's endorsement of the request constituted an additional factor favoring approval of the request.

C. The District Court Properly Cross-Checked the Percentage Fee Award Against the Lodestar and Scrutinized Lead Counsel's Lodestar Calculations

Helfand recognizes that the trend in the Second Circuit is to utilize the percentage-of-the-recovery method when setting attorneys' fees in class actions, and thereafter perform a confirmatory lodestar cross-check. Helfand Mem. at 25. *See also Visa*, 396 F.3d at 121; *Goldberger*, 209 F.3d at 50. Helfand complains, however, that the district court failed to appropriately conduct its lodestar-based analysis. Helfand asserts that the court's lodestar scrutiny was "rudimentary and unsound" because it failed to scrutinize counsel's daily time records to ensure that Class Counsel did not receive an impermissible windfall. Helfand Mem. at 28.

In particular, Helfand asserts that the lodestar was inflated because it impermissibly included time devoted to the WorldCom case prosecution by contract attorneys and paralegals who were employed by Lead Counsel specifically to work on this litigation. Such contract lawyers and paralegals were employed so that the millions of documents produced in this case could be efficiently reviewed and analyzed, depositions could be taken, and Lead Counsel could be thoroughly prepared to complete all of their discovery efforts within nine months of when

Defendants produced their documents. Nonetheless, Helfand posits that such time should have been accounted for either as reimbursable expense (which he says would have resulted in a lodestar multiple of nearly 4.0), or included in lodestar but at payroll costs and not market rates. Helfand Mem. at 29. As explained below, however, it was entirely appropriate to include the reasonable hourly market rates of these attorneys and paralegals in the lodestar calculation and, in any event, it can hardly be said that the court abused its discretion in finding that the lodestar cross-check confirmed the reasonableness of the fee award.

1. The Time of Contract Attorneys and Paralegals Was Properly Calculated at Present Market Rates and Included in the Lodestar Computations

The district court considered and rejected Helfand's arguments, which he raised orally at the Settlement Hearing, regarding the impropriety of including the time of contract attorneys and contract paralegals within Class Counsel's lodestar. In its Opinion and Order of November 12, 2004, the court stated:

> The Court has reviewed the summary information from the time records, including the hours worked by each attorney and their hourly rate. <u>The extensive use of contract attorneys was justified by the need to review over ten million pages of documents</u> and was a far more efficient way of proceeding than giving the task to more highly compensated counsel. There is little danger of padded hours in this case given the volume of work that has been done and the pace of the litigation.

SPA-55 n.48 (emphasis added).

Contrary to Helfand's assertions, the time attributed to contract attorneys and paralegals was appropriately accounted for as lodestar and not as reimbursable costs. In this case, the district court made clear that it required all legal services provided for the benefit of the Class to be done either by Lead Counsel or by a few other firms, acting under the strict supervision of Lead Counsel. *See* A-1478, and page 13, above. As a result, as in other class actions and complex litigation, Lead Counsel employed a number of attorneys and paralegals to assist in the prosecution of the case, and carefully supervised the work being done by these trained professionals. In accordance with the practice approved in many other class actions, *see, e.g., Blakey v. Continental Airlines*, 2 F. Supp.2d 598 (D.N.J. 1998); *Burks v. City of Philadelphia*, 974 F. Supp. 475 (E.D. Pa. 1997); *Laselle v. Public Service Co. of Colorado*, 988 F. Supp. 1348 (D. Col. 1997), Class Counsel billed the time of the contract attorneys and paralegals in the same manner as they billed the time devoted to the case by their permanent associates and paralegals, and included the time expended, multiplied by reasonable hourly rates based on the levels of experience of the contract attorneys, in Class Counsel's lodestar calculations. As the district court held in *Laselle*, the reasonable hourly rate for the contract attorneys' services in that case was includable in the lodestar amount even though the attorney was paid "substantially less" than the rate charged for his services. 988 F. Supp. at 1352.

In the present case, it was similarly appropriate to include in the lodestar calculation the reasonable hourly market rates for the time devoted by the attorneys and paralegals hired on a contract basis. The attorneys employed for this case were trained, licensed attorneys, who performed valuable legal services for the benefit of the Class, and Lead Counsel and other Class Counsel incurred significant expenses in employing these professionals to work on the case – all based on the contingency fee agreement that meant that Class Counsel would not be compensated for the time and expenses for these contract professionals unless and until Class Counsel produced a recovery for the Class. The contract attorneys and paralegals were provided with office space at Lead Counsel's offices. They were supplied with computers, printers, and all other office supplies and materials that were available to the firms' full-time attorneys and paralegals. Lead Counsel also reimbursed these individuals, just as the firms' associates and paralegals were reimbursed, for all expenses they incurred for the case. Thus, the fact that the duration of their professional association with Class Counsel was based upon the length of their work on the case, rather than some other measure of time, provides no basis for compensating Class Counsel for their services on any different basis than for the services provided by the firms' full-time attorneys and paralegals.

Helfand's alternative argument, that contract attorneys' and paralegals' time, if included in the lodestar, should have been billed at payroll costs instead of

market rates, is similarly without merit. This time was properly billed at hourly market rates and included within the lodestar amount, and thus should be subject to the same lodestar-based cross-check designed to confirm the reasonableness of a percentage-based fee award. *See In re Union Carbide*, 724 F. Supp. at 164, *accord Missouri v. Jenkins,* 491 U.S. 274, 289 (1989); *see also Laselle*, 988 F. Supp. at 1352 (attorneys' fees should be calculated at market rates based on "logic and economics" since law firms must cover their overhead, and other expenses from fees charged by their professionals).

In a closely analogous context, this Court reasoned in *United States Football League v. National Football League*, 887 F.2d 408 (2d Cir. 1989), that including the hourly market rate in the relevant market for paralegal services in an attorneys' fee award "makes economic sense and encourages cost-effective delivery of legal services." *Id.* at 415-16 (internal quotations omitted). This statement echoes the district court's reasoning that the use of contract attorneys improved the efficiency and cost-effectiveness of prosecuting this case, particularly because of the document-intensive nature of the discovery and the enormous volume of documents that were required to be reviewed and analyzed by Class Counsel in a relatively short period of time.[38]

[38] In an argument proffered for the first time on this appeal, Helfand complains that some of the contract attorneys were billed at higher rates than some of Lead Counsel's full-time attorneys. *See* Helfand Mem. at 30. Having failed to raise this

Helfand cites *Chambless v. Masters, Mates & Pilots Pension Plan,* 885 F.2d 1053, 1059 (2d Cir. 1989), for the proposition that the district court failed to consider whether the customary practice of the local New York legal community is to bill paralegals at hourly rates. In *Chambless*, the district court originally awarded fees for paralegals and law clerks based on payroll cost, rather than the customary billing rates. *Id.* However, based on the law established by the United States Supreme Court in *Missouri v. Jenkins,* 491 U.S. at 275, this Court vacated and remanded the lower court's award for consideration in accordance with the rule set by the Supreme Court. Thus, the decision in *Chambless* supports the district court's determination here that the time of paralegals, and lawyers, was properly included within Class Counsel's lodestar. Indeed, in *Missouri v. Jenkins*, the Supreme Court stated that it "appears to be the practice in most communities

---

issue before the district court, Helfand is estopped from raising it for the first time in his appeal. *See Visa*, 396 F.3d at 124 n.29; *Specht v. Netscape Communications*, *supra,* 306 F.3d at 28; *Gurary v. Winehouse, supra*, 190 F.3d at 44; *United States v. Braunig, supra*, 553 F.2d at 780 (cited at p. 46).

Moreover, even if the Court of Appeals were to entertain this new-found objection, it should be rejected. Helfand fails to recognize that many of the contract attorneys were highly experienced lawyers, including some who had worked extensively in securities law and class action cases at other firms before being employed by Lead Counsel to work on this case. These attorneys were the ones who often were involved with the review and analysis of particularly difficult sets of documents, compiling information and documents for depositions, and even taking some depositions. As a result of their proven performance, some of them are now permanent attorneys at Lead Counsel's firms. Thus, this new criticism is without merit as well.

today" to calculate reasonable attorney's fees for paralegals at market rates rather than at cost. *See* 491 U.S. at 289. In *United States Football League*, this Court similarly accepted that the practice of New York law firms is to bill paralegal time at hourly or market rates, and not at payroll cost. 887 F.2d at 416.

2. The Use of Current Billing Rates in the Lodestar Calculation Was Appropriate

Helfand also asserts that the district court improperly approved Lead Counsel's use of present billing rates no matter when the time was recorded, which led – according to Helfand – to an "impermissible double counting." Helfand Mem. at 30-31. The law has long been established, both by the Supreme Court and in this Circuit, however, that it is appropriate to use current market rates for attorneys and paralegals in lodestar calculations because such rates are "fully compensatory" and adequately compensate for inflation and loss of use of funds. *Missouri v. Jenkins*, 491 U.S. at 275, 283-84; *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1153 (2d Cir. 1983).

In *Missouri v. Jenkins*, the Supreme Court explained that in contingency based litigation, lawyers are not paid unless and until a favorable decision is achieved, which may be years later, although their expenses continue and must be met. *See* 491 U.S. at 282. As the Supreme Court stated:

> Clearly, compensation received several years after the services were rendered … is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would

> normally be the case with private billings. We agree, therefore, that an appropriate adjustment for delay in payment – whether by the application of current rather than historic hourly rates or otherwise – is within the contemplation of the statute.

Id. at 283-84 (considering attorneys' fees under Civil Rights Attorney's Fees Awards Act). Accordingly, the use of current rates was appropriate in assessing the reasonableness of the fee award, and certainly was not an abuse of discretion.

3. The District Court's Examination of Class Counsel's Lodestar Was Appropriate

As the district court made clear in its Opinion, it reviewed, *inter alia,* "the summary information from the time records, <u>including the hours worked by each attorney and their hourly rates</u>." *See* SPA-55 n.48 (emphasis added). It was apparent to the district court, after such a review, that the percentage-of-the-recovery method for establishing fees, supplemented by a lodestar cross-check, confirmed the fairness and reasonableness of the fee award in light of the work performed and the recovery achieved. Contrary to Helfand's contention, the court was not required to undertake a more detailed and comprehensive analysis of Class Counsel's daily time records. *See*, *e.g.*, *Goldberger*, 209 F.3d at 50 (when the lodestar method is used as a cross-check, "the hours documented by counsel need not be exhaustively scrutinized by the district court"); *In re Rite Aid*, 396 F.3d at 306-07 ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted

by the attorneys and need not review actual billing records"). Indeed, in *Goldberger*, this Court held that a district court is not required to undertake a thorough analysis of detailed time records, particularly if it is familiar with the specifics of the case. As long as the goal of avoiding impermissible windfalls to attorneys is achieved, it is not necessary to "compel district courts to undertake the 'cumbersome, enervating, and often surrealistic process' of lodestar computation." *Id.* (quoting *Savoie v. Merchants Bank*, 166 F.3d at 461 n.4).

As disclosed in Lead Counsel's Initial Memorandum (which was posted on the litigation website on September 24, 2004) and the Retainer Agreement (which was referred to in paragraph 34 of the Settlement Notice and had been posted on the website since the fall of 2003), the Retainer Agreement included a lodestar cross-check pursuant to which, in the event of a total recovery in excess of $500 million, the fee would not exceed the lesser of the amount calculated pursuant to the fee grid or 5 times the collective lodestar. A-1506 ¶115. In advance of submission of the fee request, Lead Counsel and the Assisting Firms provided Lead Plaintiff thousands of pages of daily time records, which Lead Plaintiff reviewed. Lead Plaintiff, which was diligent in its analysis of counsel's daily time records (including, in certain instances, requiring Class Counsel to delete certain entries Lead Plaintiff viewed as either duplicative or inappropriate), the hourly rates, and counsel's expenses (which Lead Plaintiff reviewed and reduced by

several hundred thousands of dollars), then approved the filing of the fee and expense request. SA-110 ¶52; SA-51, ¶112. At the conclusion of Lead Plaintiff's review, the resulting lodestar multiple was well below the 4 to 5 multiple authorized in the Retainer Agreement.

Even if the time devoted to this case by contract attorneys and paralegals were not included in the lodestar calculations, according to Helfand himself, the fee request would still have only been approximately a 4 times multiple of counsel's lodestar. Such multiples have often been approved by courts, and would not constitute a basis to reverse the fee award here. *See, e.g., Visa*, 396 F.3d at 123 (finding multiple of 3.5 common in "mega-fund" cases); *In re NASDAQ,* 187 F.R.D. at 489 (finding multipliers between 3 and 4.5 "have become common"). Indeed, Helfand himself acknowledged, in his written Objection, that the 5.45% fee request was not excessive in relation to the recovery achieved. A-1210. And the cases Helfand cited in his Objection as comparable "mega-fund" cases demonstrate that a 5.45% fee is at the low end of fees awarded in other cases. Especially significant, in this regard, are: *In re NASDAQ,* 187 F.R.D. at 485-88 (awarding a fee of $143 million, constituting 14% of the $1.027 billion recovery); *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp.2d 942, 981 (E.D. Tex. 2000) (awarding a fee of $147.5 million, constituting over 14% of the $1 billion value of the settlement); *In re Lucent*, 327 F. Supp.2d 426 (17% award with

$517 million recovery); *In re DaimlerChrysler AG Sec. Litig.*, No. 00-0993 (KAJ) (D. Del. Feb. 5, 2004) (22.5% award with $300 million recovery); and *In re Oxford Health Plans, Inc. Sec. Litig.*, MDL 1222 (S.D.N.Y. June 2003) (28% award with $300 million recovery). A-1508 to A-1509. Notably, the fee award of $141.5 million here was below the fees awarded in *NASDAQ* and *Shaw v. Toshiba*, although the recovery from the Citigroup Settlement was two and one-half times more than the recoveries in those cases, and the lodestar multiple was less than the multiples in both of those cases.

VII. The District Court Properly Ordered That Fees and Expenses Should Be Awarded from the Overall Settlement Fund, Which Would Then Be Allocated to the Class Sub-Groups According to the Plan of Allocation

Appellants Lusk and Savage raise a single issue in their appeal. They contend that the fees awarded by the court should have been apportioned "equitably" between those Class members with claims based on bond purchases, and other Class members with claims based on stock purchases. *See* Lusk Mem. at 15. However, the Settlement Notice, which the district court approved and issued, describes how the Settlement Fund, once funded (which has not yet occurred due to the pendency of these appeals), will be disbursed. A-1097. That mechanism described in the Settlement Notice does precisely what Lusk and Savage argue should occur.

A simple mathematical example demonstrates this. The plan of allocation provides for (a) approximately 55% of the Citigroup Settlement Amount to be paid to Class members with Section 11 claims relating to the bonds issued in WorldCom's May 2000 and May 2001 Offerings (with a further division between claimants with May 2000 bond purchases, and claimants with May 2001 bond purchases), and (b) approximately 45% to be paid to Class members with Section 10(b) claims relating to purchases of WorldCom stock and other pre-existing debt securities during the Class Period. A- 1358.

If the total Settlement Fund were $200 million and the fee award were 5 percent ($10 million), the Lusk/Savage argument would mean that 55% of the fee award should be paid by the Section 11 claimants, and 45% of the award should be paid by the Section 10(b) claimants. This means that $5.5 million of the $10 million award should be paid by the Section 11 claimants, and $4.5 million by the Section 10(b) claimants. If that were done, that would leave $104.5 million for the Section 11 claimants ($110 million, which is 55% of the total $200 million in this example, minus the $5.5 million equitably borne by those claimants), and $85.5 million for the Section 10(b) claimants ($90 million, which is 45% of the total $200 million in this example, minus the $4.5 million equitably borne by those claimants).

What Lusk/Savage fail to realize is that this is the same result achieved by deducting the entire fee award from the overall Settlement Fund, and thereafter dividing the Net Settlement Fund between the Section 11 claimants and the Section 10(b) claimants on a 55% - 45% basis. Using the same example above, the $10 million fee award is subtracted from the $200 million Settlement Fund, leaving a Net Settlement Fund of $190 million. When that is divided on a 55% - 45% basis, it results in the Section 11 claimants receiving $104.5 million, and the Section 10(b) claimants receiving $85.5 million. Thus, the manner in which the court directed the fee to be paid from the overall Settlement Fund does indeed "equitably" apportion the fee award between the Class members with claims based on bond purchases, and Class members with claims based on stock purchases.

Thus, there is no basis for the argument raised by Lusk/Savage in their appeal, and certainly no basis for concluding that the district court abused its discretion in providing for the payment of fees in the manner it did.

CONCLUSION

For the foregoing reasons, and based on the considerable record supporting the rulings made by the district court, Lead Plaintiff respectfully submits, on behalf of all Class Members, that the Judgment approving the Citigroup Settlement and the Order awarding attorneys' fees should be affirmed in all respects.

Dated: July 27, 2005

Respectfully Submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

____

Max W. Berger
John P. Coffey
Steven B. Singer
Chad Johnson
Beata Gocyk-Farber
Jennifer L. Edlind
John C. Browne
David R. Hassel
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400

BARRACK, RODOS & BACINE

____

Leonard Barrack
Gerald J. Rodos
Jeffrey W. Golan
Mark R. Rosen
Jeffrey A. Barrack
Pearlette V. Toussant
Regina M. Calcaterra
Chad A. Carder
3300 Two Commerce Square
2001 Market Street
Philadelphia, Pennsylvania 19103
(215) 963-0600

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

Named Plaintiffs' Counsel:

BERMAN DeVALERIO PEASE
TABACCO BURT & PUCILLO,
LLP
Joseph J. Tabacco, Jr. (JT-1994)
425 California Street, Suite 2025
(415) 433-3200

- and -

Michael J. Pucillo
515 North Flagler Drive, Suite 1701
West Palm Beach, Florida 33401
(561) 835-9400

Attorneys for Additional Named Plaintiffs, The Fresno County Employees Retirement Association and the County of Fresno, California

SCHOENGOLD & SPORN, P.C.
Samuel P. Sporn (SS-4444)
Christopher Lometti (CL-9124)
Ashley Kim (AK-0105)
19 Fulton Street, Suite 406
New York, New York 10038
(212) 661-1100

Attorneys for Additional Named Plaintiff, HGK Asset Management, Inc.

CERTIFICATE OF COMPLIANCE

I, Jeffrey W. Golan, hereby certify that the foregoing brief contains 27,781 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), F.R.App.P., based on the Microsoft "word count" feature on our computers, and therefore, complies with the limit allowed by Rule 32(a)(7), as modified by the Order of July 20, 2005, granting the motion of Appellee, Alan G. Hevesi, to file a brief of not more than 28,000 words.

I further that the brief complies with the typeface and type style requirements of Rules 32(a)(5) and 32(a)(6).

Dated this 27th day of July, 2005.

____

Jeffrey W. Golan