UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLDCOM, INC. SECURITIES LITIGATION	MASTER FILE NO. 02 Civ. 3288 (DLC)

This Document Relates to:

02 Civ. 3288	02 Civ. 4973	02 Civ. 8230
02 Civ. 3416	02 Civ. 4990	02 Civ. 8234
02 Civ. 3419	02 Civ. 5057	02 Civ. 9513
02 Civ. 3508	02 Civ. 5071	02 Civ. 9514
02 Civ. 3537	02 Civ. 5087	02 Civ. 9515
02 Civ. 3647	02 Civ. 5108	02 Civ. 9516
02 Civ. 3750	02 Civ. 5224	02 Civ. 9519
02 Civ. 3771	02 Civ. 5285	02 Civ. 9521
02 Civ. 4719	02 Civ. 8226	03 Civ. 2841
02 Civ. 4945	02 Civ. 8227	03 Civ. 3592
02 Civ. 4946	02 Civ. 8228	03 Civ. 6229
02 Civ. 4958	02 Civ. 8229	

MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF SETTLEMENTS WITH THE SETTLING DEFENDANTS, AND LEAD PLAINTIFF'S PROPOSED PLANS OF ALLOCATION AND SUPPLEMENTAL PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff, Alan G. Hevesi, Comptroller of the State of New York and the sole Trustee of the New York State Common Retirement Fund ("Lead Plaintiff" or "NYSCRF"), and Named Plaintiffs, County of Fresno, California ("Fresno"), Fresno County Employees Retirement Association ("FCERA"), and HGK Asset Management, Inc. ("HGK") (collectively, "Plaintiffs"), respectfully submit this memorandum of law in support of their motions for: (a) final approval of the proposed class action settlements between the Class and the Settling Defendants (the "Settlements"); (b) final approval of Lead Plaintiff's proposed plans of allocation with respect to each of the Settlements ("Plans of Allocation"); and (c) final approval of Lead Plaintiff's proposed supplemental plan of allocation ("Supplemental Plan").

On November 12, 2004, the Court granted final approval to a $2,575,000,000 settlement (the "Citigroup Settlement") between Lead Plaintiff and Named Plaintiffs, on behalf of the Class, and Defendants Citigroup, Inc., Salomon Smith Barney, Inc. now d/b/a Citigroup Global Markets Inc., Salomon Brothers International Ltd. now d/b/a/ Citigroup Global Markets Ltd, and Jack B. Grubman ("Citigroup Defendants").

In addition to the Citigroup Settlement, Plaintiffs have now achieved settlements in the WorldCom securities class action ("Litigation") with all remaining defendants ("Settling Defendants"). The settlements with the remaining investment bank defendants ("Underwriter Defendants") and former director defendants ("Director Defendants") occurred between March 3, 2005 and March 21, 2005, within weeks and days prior to the start of the class action trial on March 23, 2005; the settlement with Arthur Andersen LLP ("Andersen") occurred on April 22, 2005, after nearly five weeks of trial, and just days before closing arguments in the trial were to take place; and the settlements with former WorldCom executives Bernard Ebbers, Scott

Sullivan, David Myers and Buford Yates ("Executive Defendants") occurred between June 30, 2005 and July 26, 2005.

The combined amount of the recent settlements is at least $3.558 million.[1] The total amount recovered for the benefit of the Class, including the Citigroup Settlement, thus, is in excess of $6.133 billion, plus interest. The Settlements reached with the Settling Defendants are as follows:

Bank of America Securities LLC and Fleet Securities, Inc. – March 3, 2005, for a total of $460.5 million in cash.

Lehman Brothers Inc., Credit Suisse First Boston LLC, Goldman, Sachs & Co. and UBS Warburg LLC - March 4, 2005, for a total of $100,341,730 in cash, as follows: Lehman Brothers Inc. (paying $62,713,582); Credit Suisse First Boston LLC (paying $12,542,716); Goldman, Sachs & Co. (paying $12,542,716); and UBS Warburg LLC (paying $12,542,716).

ABN AMRO Inc., Mitsubishi Securities International plc, BNP Paribas Securities Corp. and Mizuho International - March 9, 2005, for a total of $428,365,600 in cash, as follows: ABN AMRO Inc. (paying $278,365,600); Mitsubishi Securities International plc (paying $75 million); BNP Paribas Securities Corp. (paying $37.5 million); and Mizuho International (paying $37.5 million).

Deutsche Bank, WestLB AG and Caboto Holding SIM S.p.A. - March 10, 2005, for a total of $437.5 million in cash, as follows: Deutsche Bank (paying $325 million); WestLB (paying $75 million); and Caboto (paying $37.5 million).

J.P. Morgan Chase, Utendahl Capital and Blaylock Partners - March 16, 2005, for a total of $2,000,806,840**,** as follows: JP Morgan (paying $2.0 billion); Utendahl (paying $234,000); and Blaylock (paying $572,840).

Former WorldCom Director Defendants - March 21, 2005, for a total of $60.75 million, with former directors James C. Allen, Judith Areen, Carl J. Aycock, Max E. Bobbitt, Clifford L. Alexander, Jr., Francesco Galesi, Stiles A. Kellett, Jr., Gordon S. Macklin, John A. Porter, Bert Roberts, the Estate of John W. Sidgmore

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[1] The settlements with the Underwriter Defendants, Director Defendants and Andersen total $3,553,056,840. The settlements with Ebbers and Sullivan provide approximately $5.825 million in cash, and proceeds that the Class will receive from the prospective liquidation of certain assets obtained in those settlements. As noted below, Myers and Yates are impecunious, and the Class is dismissing its claims against them for no monetary consideration.

and Lawrence C. Tucker paying $24.75 million directly, and $36 million being paid by insurers on the Directors' behalf.

Arthur Andersen LLP – April 22, 2005, for $65 million in cash, plus contingent payments of an amount equivalent to 20% of the amounts, if any, actually paid by Andersen to its present or former partners, participating principals, national partners and national directors in repayment of any and all subordinated notes issued in respect of paid in capital and/or subordinated loans, and an additional amount if Andersen pays from its own funds more than $65 million in any other settlement. Further confidential protections for the Class were put in place in the event of a bankruptcy proceeding by Andersen.

Bernard Ebbers – June 30, 2005, for $5,556,543.69 in cash (paid to the Class on July 14, 2005), plus approximately 75% of the net proceeds from the sales of certain of Ebbers' assets and approximately 66.7% of the net proceeds from sales relating to another Ebbers' asset, the Joshua Timberlands. The conservative estimated consideration to be paid to the Class pursuant to the prospective liquidation of these assets is between $18 million and $28 million. Further confidential protections for the Class were put in place in the event of a bankruptcy proceeding by Ebbers.

Scott Sullivan - July 26, 2005, for approximately $200,000 (depending on the proceeds from the liquidation of his 401(k) account, which are to be paid to the Class before Sullivan is sentenced in his criminal case on August 11, 2005), plus approximately 90% of the net proceeds from the sale of the house presently under construction in the Le Lac Estate section of Boca Raton, Florida. The estimated consideration to be paid to the Class pursuant to the prospective sale of this property is $4 million to $5 million. Further confidential protections for the Class were put in place in the event of a bankruptcy proceeding by Sullivan.

David Myers and Buford Yates - July 26, 2005, for no monetary consideration, after Plaintiffs' extensive examination of the sworn financial statements of these Defendants confirmed their impecunious state.

As set forth in further detail below and in the accompanying Declaration of Jeffrey W. Golan and John P. Coffey in Support of Lead Plaintiff's Motion for Final Approval of Settlements with Settling Defendants, Lead Plaintiff's Proposed Plans of Allocation, Lead Plaintiff's Proposed Supplemental Plan of Allocation, and Lead Counsel's Requests for Awards of Attorneys' Fees and Reimbursement of Expenses ("Joint Decl. of 7/29/05"), and Declaration of Alan P. Lebowitz in Support of Lead Plaintiff's Motion for Final Approval of Settlements

with Settling Defendants, Lead Plaintiff's Proposed Plans of Allocation, Lead Plaintiff's Proposed Supplemental Plan of Allocation, and Lead Counsel's Requests for Awards of Attorneys' Fees and Reimbursement of Expenses ("Lead Plaintiff Decl."), through their substantial efforts over the past three years, Lead Plaintiff and Named Plaintiffs have achieved what they respectfully submit are extraordinary recoveries for the benefit of the Class. With the exception of the settlements with the Executive Defendants, which occurred after June 28, 2005, the background of the Settlements, the Settlements themselves, and the reasons that Plaintiffs entered into them, were described in detail in paragraphs 6 through 26 of the Notice of Proposed Settlements of Class Action with Settling Defendants and Bar Order Notice (the "Notice"), which was mailed to Class Members beginning on June 28, 2005.[2] Under the standards articulated by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), and in this Court's Opinion and Order of November 12, 2004, *In re WorldCom, Inc Securities Litigation,* No. 02 Civ. 3288 (DLC), 2004 WL 2591402 (S.D.N.Y. Nov. 12, 2004) (hereafter "Citigroup Settlement Opinion"), the Settlements are fair, reasonable and adequate, and warrant the Court's approval.

The Plans of Allocation and Supplemental Plan proposed by Lead Plaintiff are similarly fair, reasonable and adequate, and should also be approved. The Plans of Allocation and Supplemental Plan are described in paragraphs 27 through 34 of the Notice and in the Supplemental Plan itself. The Plans of Allocation rationally and reasonably allocate proceeds

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[2] The Notice alerted Class Members to the possibility that settlements might be reached with the Executive Defendants in the coming weeks and that, given the relative size of those prospective recoveries compared to those already obtained and the expense of mailing a new notice to all Class Members, notice of any further settlements would be accomplished only through publication of a notice in certain newspapers, over several news wire services, by posting the notice on the Class case website, www.worldcomlitigation.com, and by mailing it to any Class Member who requested by August 12, 2005, that she be sent the notice.

from the Settlements to Class Members according to the claims that were asserted against the various Settling Defendants, Plaintiffs' estimate of recoverable damages for each claim, the amounts previously allocated for the claims through the Court's Citigroup Settlement Decision and, where applicable, Plaintiffs' perceptions of the strengths and risks of proving the claims. The Supplemental Plan reimburses Class Members based on the extent of their injuries, and explains how a Class Member's Claim Amount may be affected by (a) the type of publicly traded securities of WorldCom, Inc. ("WorldCom" or the "Company") purchased or acquired by a Class Member; (b) when, and the price at which, each such WorldCom Security was purchased or acquired; (c) whether each such WorldCom Security was held until the conclusion of the Class Period, or whether it was sold or redeemed, as applicable to the various claims, during or after the Class Period; (d) the law governing the ability of a Class Member to show her loss was caused by the Settling Defendants' alleged misrepresentations or material omissions; and (e) calculations performed by Plaintiffs' expert consultant considering the relationship that each fiscal period's earnings overstatement bore to the total amount of the earnings overstatements in WorldCom's SEC filings during the Class Period, and the knowledge in the market by the end of the Class Period about the extent and nature of fraudulent activity at WorldCom. Like the Settlements, the Plans of Allocation and Supplemental Plan should also be approved consistent with the standards in this Circuit and elsewhere. *See Maley v. Del Global Technologies Corp.*, 186 F. Supp.2d 358, 367 (S.D.N.Y. 2002); *In re NASDAQ Market-Makers Antitrust Litigation,* 2000 WL 37992, *2 (S.D.N.Y. Jan. 18, 2000); *see also In re Oracle Sec. Litig.*, No. C-90-9031-VRW, 1994 WL 502054, *1 (N.D. Cal. Jun. 18, 1994); *In re Computron Software, Inc. Sec. Litig.*, 6 F. Supp.2d 313, 321 (D.N.J. 1998); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284-85 (9th Cir. 1992).

PRELIMINARY STATEMENT

The proposed Settlements provide for the payments by the Settling Defendants of over $3.558 billion in cash to settle all claims asserted against them by the Class, with estimated additional payments of $22 million or more expected from assets liquidated pursuant to the Ebbers and Sullivan settlements, and with certain potential enhancements in the Andersen Settlement. Joint Decl. at ¶¶1, 51. When considered in conjunction with the previously approved Citigroup Settlement, the total recovery achieved through the Settlements is by far the largest recovery in securities class action history, which notably has been obtained from parties that were not the issuer of the subject securities and, in certain instances, from parties that had limited financial capabilities. *Id.* at ¶1.

The Settlements were achieved after nearly three years of intensive, hard-fought litigation, which included (a) extensive discovery (commencing even before motions to dismiss were decided) (Joint Decl. 9/24/04 at ¶¶16,17, 47-55); (b) the review and analysis of millions of pages of documents produced by defendants, non-party WorldCom and numerous third-parties; (c) extensive proceedings relating to class certification (including class discovery, preparation of expert reports, and the briefing of the class certification motion) (*id.* at ¶49); (d) over seventy depositions of fact witnesses (*id.* at ¶¶54, 55); (e) the defense of depositions taken of Plaintiffs and their representatives; (f) the issuance and review of numerous expert reports by Plaintiffs' and the Settling Defendants' experts in the fields of auditing and accounting, telecommunications, investment banking and due diligence, corporate governance, WorldCom's accounting system computer programs and estimating damages in securities class actions (Joint Decl. at ¶12); (g) taking and defending expert witness depositions (*id.*); (h) extensive briefing in support of Plaintiffs' motion for partial summary judgment and in opposition to motions for

summary judgment filed by the Underwriter Defendants, Andersen and one of the Director Defendants (*id*. at ¶14); (i) extensive briefing in support of Plaintiffs' motions *in limine* and in response to the Settling Defendants' motions *in limine* and other pre-trial procedural motions (*id*. at ¶15); (j) preparation of the pre-trial order, including Lead Plaintiff's designations of witnesses, exhibits and deposition designations, and responses to the Settling Defendants' designations of witnesses, exhibits and deposition designations (a process that continued throughout the trial against Andersen) (*id.*); (k) preparation of Lead Plaintiff's pre-trial memorandum and proposed jury instructions, *voir dire* and jury questionnaire, and responses to the Settling Defendants' proposed instructions, *voir dire*, and jury questionnaire (*id.*); and (l) protracted settlement negotiations conducted by Lead Counsel with counsel for the Settling Defendants on the eve of the start of trial in this case and, in the case of Andersen, after nearly five weeks of trial and just days before closing arguments would take place, including negotiations that were conducted under the supervision of the Honorable Robert W. Sweet and the Honorable Michael H. Dolinger (the "Settlement Judges") (*id*. at ¶¶22-25).[3]

The Settlements are particularly excellent results when considered in light of the considerable risks of litigation. With respect to claims asserted under the Securities Act of 1933, which were asserted against all defendants, the Settling Defendants argued that they conducted reasonable due diligence investigations and, in the case of all Settling Defendants other than Andersen, that they were entitled to rely on the audit opinions and comfort letters provided by Andersen with respect to the financial statements included in the registration statements for the May 2000 and May 2001 bond offerings. Joint Decl. at ¶29. Certain of the Settling Defendants,

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[3] Summaries of Lead Counsel's efforts are included in the Notice, ¶¶ 6-14, and in the Joint Declaration, ¶¶ 1-17. Such efforts are well known to the Court and will not be repeated at length herein.

including Andersen and the Underwriter Defendants, further argued that there were no material misstatements whatsoever in the registration statement for the May 2000 bond offering. *Id*.

The Director Defendants and Andersen, against whom claims were also asserted under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, vigorously disputed the viability of these claims, arguing that Plaintiffs could not establish the falsity of certain alleged misstatements, loss causation or scienter because, among other reasons, the Director Defendants and Andersen were not alleged to have knowledge of, or to have participated in, the fraudulent accounting at WorldCom. Joint Decl. at ¶30. These Defendants also argued that, even if Plaintiffs could establish their liability, the damages traceable to their alleged misconduct were much smaller than Plaintiffs claimed and further, under the proportionate fault provisions of the Private Securities Litigation Reform Act ("PSLRA"), these Defendants were liable only for a small percentage of those damages. *Id.*

Any of these arguments, if credited by a jury, could have materially impacted the Class's recovery against these Defendants, and the financial condition of the Director Defendants and Andersen could further have materially impacted the Class's ability to collect on a judgment against them.[4] Joint Decl. at ¶31.

The Settlements are the product of difficult, adversarial arm's length negotiations between Plaintiffs and the Settling Defendants. *See generally* Joint Decl. ¶32. Settlement discussions were arduous and protracted. *Id.* The initial discussions with the Settling

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[4] The Director Defendants and Andersen had limited financial capabilities, and the Settlements were reached with them only after Lead Plaintiff carefully scrutinized financial statements and other information they provided, and further took into consideration the limits of the Director Defendants' insurance coverage and the possibility that the insurance policies might be declared null and void. While the risk of litigation in terms of liability against the Executive Defendants was virtually nil, given their criminal convictions, Lead Plaintiff also carefully scrutinized their financial statements and their available assets before reaching settlements with them.

Defendants were not fruitful. *Id*. at ¶20. In the fall of 2003, the parties undertook further negotiations under the supervision of the Settlement Judges. Over the course of the seven months from November 2003 to May 2004, Lead Counsel and counsel for certain of the Director Defendants held many negotiating sessions, both in person and via telephone conference. *Id*. at ¶21. A number of the sessions took place under the direct supervision of the Settlement Judges, including sessions that included counsel for the Insurers. *Id.* At the same time, Lead Counsel vigorously pursued the Class's claims, both in Court and through the discovery process. *Id*.

Lead Plaintiff and the Named Plaintiffs reached an agreement in principle with ten of the Director Defendants by May 2004, but given on-going negotiations about the precise terms of the agreement and other developments in the case, did not enter into a formal Stipulation of Settlement with them until January 7, 2005. Joint Decl. at ¶22. The Court denied preliminary approval of that proposed settlement, however, because a provision in the Stipulation limited the amount by which other defendants could have sought to reduce their potential liability to the Class by taking into account the Director Defendants' ability to pay a judgment. *In re WorldCom Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2005 WL 335201 (S.D.N.Y. Feb. 14, 2005). Because proceeding with that settlement without the ability-to-pay limitation could have resulted in a multi-billion dollar reduction in any jury verdict against the Underwriter Defendants, Lead Plaintiff exercised its right to terminate the settlement. Joint Decl. at ¶23.

In or about February 2005, Lead Plaintiff commenced settlement negotiations with counsel for Bank of America, and revised separately negotiations with counsel for a group of underwriters that had participated as junior underwriters only in WorldCom's May 2000 bond offering. Joint Decl. at ¶33. Upon reaching agreements with Bank of America and its affiliate, Fleet Securities (after numerous face-to-face meetings and telephone conference calls), and then

with Lehman Brothers, Goldman Sachs, UBS Warburg and Credit Suisse First Boston, Lead Plaintiff thereafter undertook settlement negotiations with the remaining Underwriter Defendants. *Id*. These settlement negotiations, which were concluded with the settlement with the J.P. Morgan Chase entities on March 16, 2005, resulted in settlements that achieved larger and larger proportionate payments by the remaining major Underwriter Defendants compared with the level of bonds attributed to them in the May 2000 and May 2001 registration statements. *Id*.

With the conclusion of the Underwriter Defendant settlements, Lead Plaintiff immediately revived the prior settlement with certain of the Director Defendants, eventually completing a settlement with all twelve Director Defendants by March 21, 2005. Lead Plaintiff obtained preliminary approval by the Court of all settlements reached between March 3, 2005 and March 21, 2005. Joint Decl. at ¶34.

The settlement with Defendant Andersen was reached on April 22, 2005, after nearly five weeks of trial and within a few days before closing arguments, and only after Lead Plaintiff had reviewed substantial documentation concerning the financial condition of Andersen and received sworn oral and written representations about its financial condition. Joint Decl. at ¶37. Upon preliminary approval of that settlement on April 26, 2005, and the wiring of the amount required to be paid in that settlement to an escrow account held by Lead Counsel and under the control of the Court, Lead Plaintiff agreed to a dismissal of the jury by the Court. *Id*. After the Andersen Settlement was reached, the Settlement Judges expressed their opinion of the proposed Settlement and the Plan of Allocation for that Settlement, in relevant part, as follows:

<u>Mediators' Statement</u>

> Pursuant to appointment by the Honorable Denise Cote, United States District Judge, we have presided over the extensive negotiations between the Parties that

> led to this Agreement. We hereby state, based on our discussions with the Parties and the information made available to us, that this Settlement was negotiated in good faith, and that the Settlement and the allocation between the Securities Act and Exchange Act claims are in the public interest.
>
> Robert W. Sweet, U.S.D.J. Michael H. Dolinger, U.S.M.J.

See Joint Decl. at ¶56, Exhibit 3.

Pursuant to this Court's Order of December 12, 2003, a printed Notice of Class Action was sent to potential Class Members beginning December 13, 2003. Further, pursuant to the Court's Hearing Order of July 16, 2004, a Notice of Proposed Settlement of Class Action Against the Citigroup Defendants (the "Citigroup Notice"), in the form approved by the Court, was mailed to more than four million potential Class Members beginning on August 2, 2004, and a Summary Notice of Proposed Settlement of Class Action Against the Citigroup Defendants (the "Citigroup Publication Notice"), in the form approved by the Court, was published in the national editions of *The Wall Street Journal* and *The New York Times* on August 10 and 11, 2004, and on the *PR Newswire* and *Bloomberg* News on August 12 and 16, 2004. *See* Joint Decl. of September 24, 2004, Exhibit 5, Affidavit of Shandarese Garr, ¶ 25.[5]

Pursuant to this Court's Order of June 16, 2005, the Notice of the second wave of Settlements (entitled "Notice of Proposed Settlements of Class Action with Settling Defendants and Bar Order Notice," attached as Exhibit 4 to the Joint Decl.) was mailed to more than four million potential Class Members beginning on June 28, 2005, and a Summary Notice of Proposed Settlements of Class Action with Settling Defendants and Bar Order Notice (the

[5] On July 16, 2004, the Court preliminarily approved the Citigroup Settlement, set a hearing on November 5, 2004 to determine the fairness, reasonableness and adequacy of the Settlement (the "Settlement Hearing") and directed that Notice of the proposed Settlement and the Settlement Hearing be given to the Class. Joint Decl. of September 24, 2004, ¶¶ 97-99. The Citigroup Settlement and Plan of Allocation were approved by Opinion and Order of November 12, 2004.

"Publication Notice"), in the form approved by the Court, was published in the national editions of *The Wall Street Journal* and *The New York Times* on July 6 and 7, 2005, and on the *PR Newswire* and *Bloomberg* News on July 8, 2005. *See* Joint Decl., Exhibit 2, Affidavit of Shandarese Garr, ¶¶ 3-9. Pursuant to the Order of June 16, 2005, the Supplemental Plan was mailed along with the Notice to each Class Member who previously submitted a proof of claim form, and a Summary of the Supplemental Plan of Allocation was mailed along with the Notice to the other approximately 3.5 million identified potential Class Members. *Id.* The Notice contains a detailed description of the nature and procedural history of the Action, the terms of the Settlements and the proposed Plans of Allocation, and the claims that will be released in the Settlements. The Supplemental Plan describes how Plaintiffs propose to allocate the Net Settlement Funds. The Notice also advises Class Members of the extension of the deadline for the submission of proof of claim forms until August 26, 2005, and of their right to object to the Settlements, Plans of Allocation and/or Supplemental Plan by no later than August 12, 2005. Joint Decl. at ¶¶72-77.[6] While the August 12, 2005 deadline has not yet expired, to date not one Class Member has filed an objection to the proposed Settlements, Plans of Allocation or Supplemental Plan.[7] Joint Decl. at ¶62.

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[6] Under the bolded heading, "No Further Mailing Regarding Additional Potential Settlements," the Notice further advised that in the event settlements were reached with the Executive Defendants, and notice of them could not be placed in the Notice, Lead Plaintiff had asked the Court to excuse it from the obligation to mail another notice to each Class Member (which would be the fourth in this case), given the cost of each mailing and the expectation that any settlement reached with the Executive Defendants would not materially increase the Settlement Fund. As a result, Class Members were informed that such settlements would be described in a notice posted on the case website, and published in *The Wall Street Journal* and *The New York Times*, and over the PR Newswire, and that any Class Member could request a hard copy of such a notice from the Administrator. Notice ¶¶ 38-40.

[7] Should any objections be received, they will be addressed by Lead Counsel in a further submission to the Court of September 2, 2005, per the Hearing Order.

When considering the size of the recoveries, the substantial risks relating to the continued prosecution of the claims against the non-Executive Defendants with respect to both liability and damages, the ample discovery that had taken place, and the informed assessments of Lead Plaintiff, Named Plaintiffs and their counsel of the strengths and weaknesses of the claims and defenses thereto, Plaintiffs believe that the Settlements are excellent results and respectfully request that the Court approve them as fair, reasonable and adequate. Plaintiffs further believe that the Plans of Allocation and Supplemental Plan are fair and reasonable to all Class Members, and respectfully request that the Court approve them.

BACKGROUND OF THE ACTION

Reference is made to this Court's November 12, 2004 decision and order regarding the Citigroup Settlement, *In re WorldCom Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2004 WL 2591402 (S.D.N.Y. Nov. 12, 2004), which provides history of this litigation up to the time of the Citigroup Settlement. We also refer the Court to the Joint Declaration of Jeffrey W. Golan and John P. Coffey In Support of Final Approval of Settlement With the Citigroup Defendants, Lead Plaintiff's Proposed Plan of Allocation, and an Award of Attorney's Fees and Reimbursement of Expenses dated September 24, 2004 (the "9/24/04 Joint Decl."), which provides a detailed history of the litigation up through the time of the Citigroup Settlement. Submitted concurrently herewith is the Joint Declaration, which provides a detailed description of the history of the litigation, the claims asserted, the investigation and discovery undertaken, the negotiation and substance of the Settlements, and the substantial risks in litigating the claims against the non-Executive Defendants. It is an integral part of this submission and is incorporated herein by reference, and is being submitted to provide a description of the proceedings in this case since the Citigroup Settlement and to present the facts and reasons concerning the present settlements

and plans. Since the Court is intimately familiar with the background of this litigation and the proceedings that occurred, including the many rulings made by the Court, the issues raised before what was scheduled to be a mammoth trial against the Underwriter Defendants, Director Defendants and Andersen, the issues raised during the trial against Andersen, and the evidence submitted by the Parties in conjunction with the various summary judgment motions and during the trial against Andersen, for the sake of brevity Lead Plaintiff will not repeat here a detailed description of the litigation, but instead respectfully refers the Court to the Joint Declaration.

ARGUMENT

A. The Proposed Settlements Are Fair, Reasonable And Adequate And Should Be Approved

1. Standards for Approval of a Class Action Settlement

"Settlement approval is within the Court's discretion, which 'should be exercised in light of the general judicial policy favoring settlement.'" *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) (citation omitted). In evaluating a proposed settlement under Fed. R. Civ. P. 23(e), the Court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995); *see also Varljen v. H.J. Meyers & Co., Inc.*, No. 97 Civ. 6472, 2000 WL 1683656, at *3 (S.D.N.Y. Nov. 8, 2000). As noted by courts generally, "[t]he arm's-length compromise of a disputed claim has long been favored by the courts." *E.g., Sumitomo*, 189 F.R.D. at 280 (and cases cited therein). *See also Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). This is particularly true of class actions. *Sumitomo*, 189 F.R.D. at 280; *In re Union Carbide Corp. Consumer Prod. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989).

As this Court summarized in the Citigroup Settlement Opinion:

> In brief, the district court must carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not the product of

> collusion. A district court determines a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms.

In re WorldCom Sec. Litig., No. 02 Civ. 3288 (DLC), 2004 WL 2591402 (S.D.N.Y. Nov. 12, 2004), *10 (quotations and citations omitted). *See also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (3d Cir.), *cert. denied sub nom*, *Leonardo's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 125 S.Ct. 2277 (U.S. May 16, 2005).

A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arm's-length negotiations conducted by capable counsel, well-experienced in class action litigation arising under the federal securities laws. *See, e.g.*, *Sumitomo*, 189 F.R.D. at 280; *New York & Maryland v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 680-81 (S.D.N.Y. 1991). Moreover, under the PSLRA, a settlement reached under the supervision of an appropriately selected Lead Plaintiff is entitled to an even greater presumption of reasonableness. As stated in the Senate Committee Report issued in support of the PSLRA, as cited in *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 63-64 (D. Mass. 1996): "Institutions with large stakes in class action share much the same interests as the plaintiff class generally; thus, courts could be more confident settlements negotiated under the supervision of institutional plaintiffs were 'fair and reasonable' …" Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.

The standards governing approval of class action settlements are well-established in this Circuit. In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), the Second Circuit Court of Appeals held that the following were factors to be considered in evaluating a class action settlement:

> (1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the

> amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 463(citations omitted). *See also County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323-24 (2d Cir. 1990); *Sumitomo*, 189 F.R.D. at 281; Citigroup Settlement Opinion, 2004 WL 2591402 at *10.

In applying these factors, a court neither substitutes its judgment for that of the parties who negotiated the settlement nor conducts a mini-trial of the merits of the action. *Weinberger v. Kendrick,* 698 F.2d 61, 74 (2d Cir. 1982); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993). As the Second Circuit stated in *Newman v. Stein*:

> [T]he role of a court in passing upon the propriety of the settlement of a . . . class action is a delicate one . . . . [W]e [recognize] that since "'the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation,' the court must not turn the settlement hearing 'into a trial or a rehearsal for the trial.'"

464 F.2d 689, 691-92 (2d Cir. 1972).

In short, this Court is now asked to determine that the Settlements are within a range which reasonable and experienced attorneys, and a sophisticated institutional Lead Plaintiff, could accept, considering all relevant risks, facts and circumstances in the Action. *See Weinberger*, 698 F.2d at 74; *Grinnell*, 495 F.2d at 455. The range, as defined by Judge Friendly, "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion ...." *Newman*, 464 F.2d at 693.

Lead Plaintiff respectfully submits that the proposed Settlements are eminently fair, reasonable and adequate when measured under the foregoing criteria, represent an excellent result for the Class, and should be approved by this Court.

2. Application of the *Grinnell* Factors Supports Approval of the Settlement

As demonstrated below, the Settlements satisfy the criteria for approval of class action settlements articulated by the Second Circuit in *Grinnell*.

a) The Complexity, Expense and Likely Duration of the Litigation

The "complexity, expense and likely duration of the litigation" are factors that the Court should consider in evaluating a proposed settlement for approval. *Grinnell*, 495 F.2d at 463; *In re Drexel Burnham Lambert Group Inc.*, 130 B.R. 910, 927 (S.D.N.Y. 1991). "In evaluating the settlement of a ***securities*** class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain." *Sumitomo*, 189 F.R.D. at 281 (citations omitted) (emphasis added). That statement is certainly true with respect to the claims asserted against the Settling Defendants.

As reflected in the Joint Declarations, this prosecution has required one of the most exhaustive and accelerated efforts in the history of securities litigation. 9/24/04 Joint Decl. at ¶¶1-72 ; Joint Decl. at ¶¶1-17 . The parties have briefed numerous motions, including multiple motions to dismiss, the motion for class certification, motions relating to the Court's scheduling and consolidation orders and the "embargoed witnesses," and many discovery motions. 9/24/04 Joint Decl. at ¶¶ 3-72; Joint Decl. at ¶¶5-17. The parties retained experts in the fields of accounting and auditing, telecommunications, investment banking and due diligence, corporate governance, and the complicated field of estimating damages. 9/24/04 Joint Decl. at ¶¶62-65; Joint Decl. at ¶¶8, 9, 12, 13. The experts issued numerous reports, and one or two day depositions were taken concerning their expected testimony at trial. *Id.*

Reflecting the magnitude and importance of this litigation, the parties fully briefed summary judgment motions, and further briefed and argued numerous other types of pre-trial and trial motions. Joint Decl. at ¶¶14-17. Plaintiffs reviewed and analyzed millions of pages of

documents, conducted extensive deposition discovery (on many occasions conducting multiple depositions in different states on the same date), and even engaged in expert discovery in connection with class certification. Joint Decl. of 9/24/04 ¶¶ 36-37, 49. Lead Plaintiff and Lead Counsel further proved their devotion to the Class by taking the case against Andersen to trial, and refusing to settle the claims against Andersen until Lead Plaintiff had been provided sufficient financial information and other protections in the event Andersen becomes involved in bankruptcy proceedings. As reflected by the more than 264,000 hours plaintiffs' attorneys and paralegals spent litigating this case, and the amount of expenses that have been incurred, the litigation effort has been enormous.[8]

This Action is certainly among the most complex cases in securities history. It involves more than thirty-five defendants, a bankrupt issuer, and claims asserted under both the Securities Act and the Exchange Act. As the Court is aware, the "due diligence" defense asserted by defendants involved some novel and complicated issues, including whether (and under what circumstances) underwriters and outside directors are entitled to rely on an auditor's clean audit opinion and comfort letters.

Further, as evidenced by the effort undertaken by Plaintiffs' counsel in taking the case to trial against Andersen, absent the Settlements, there would have been significant additional necessary resources and costs expended to prosecute the claims against all of the Settling

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[8] One of the objectors to the fee request in connection with the Citigroup Settlement questioned Lead Counsel's use of contract attorneys and paralegals for this Litigation. Employing trained attorneys and paralegals who would devote themselves to this one case was essential, however, in view of the massive amount of work necessary to prepare this case for trial, and the relatively brisk discovery schedule that Lead Counsel proposed and the Court ordered. Joint Decl. at ¶¶88-90. And such diligence clearly served the best interests of the Class, as it was only when the case was trial ready, and after summary judgment motions had been decided, that the defendants other than Citigroup Defendants agreed to settlements at levels acceptable to Lead Plaintiff and the Named Plaintiffs.

Defendants through trial and the inevitable appeals of any judgments. *See In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 318 (3d Cir. 1998) (settlement favored where "trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court"). Indeed, this was a challenging case to present to a jury, and even if liability of the non-Executive Defendants had been established, there were significant issues relating to the damages that a jury might have awarded in this case, and the ability of the Director Defendants and/or Andersen to pay a judgment. In contrast, the Settlements offer the opportunity to provide definite recompense to the Class now, rather than await the uncertain outcome prompted by the effort and time devoted to trial and likely appeals.

As for the Executive Defendants, while the risk of proving liability was virtually nil, the settlements reflect an outstanding (and widely hailed) recovery from Ebbers and Sullivan, and the practical reality that expending further Class resources in prosecuting the claim against the Class claims against Myers and Yates would be inefficient and counter-productive.

b) <u>The Response of the Class</u>

While the deadline for filing objections to the non-Executive Defendant settlements is August 12, 2005, the reaction of the Class to date supports approval of the Settlements.[9] Joint Decl. ¶62. As the cases report, a positive reaction of the Class to the proposed Settlement is a further factor favoring its approval by a court. *See Grinnell*, 495 F.2d at 462 (approving settlement where only twenty objectors appeared from group of 14,156 claimants); *RMED International, Inc. v. Sloan's Supermarkets, Inc.,* No. 94 Civ. 5587, 2003 WL 21136726, at *1 (S.D.N.Y. May 15, 2003). Here, the positive reaction of the Class to the Citigroup Settlement earlier approved by this Court and the Settlements that are the subject of the present motion has

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[9] Should any objections be received, they will be addressed by Lead Counsel in a further submission to the Court of September 5, 2005, per the Hearing Order.

been overwhelming. As of this time, there have been more than 800,000 Class Members who have submitted proof of claim forms seeking a distribution from the settlements. *See* Garr Aff. (Exhibit 2 to Joint Decl.) ¶ 12.[10] In sharp contrast, there were only four Class Members who objected to the Citigroup Settlement (of which only two are pursuing appeals of the Judgment entered approving that settlement, and both of whom are raising issues with respect to the release rather than the sufficiency of the settlement). Moreover, despite the extensive notice of the non-Executive Defendant Settlements that has been provided, and widespread media coverage of the June 30, 2005 settlement with Ebbers, no objections to the proposed Settlements from any Class member have been received to date. Joint Decl. ¶62. The reaction of the Class to the Settlements appears to be overwhelmingly positive, and is another factor militating in favor of approval of the Settlements.

c) The Stage of the Proceedings and Amount of Discovery Completed

"[T]he stage of the proceedings and the amount of discovery completed" are other *Grinnell* factors to be considered in determining the fairness, reasonableness and adequacy of a settlement. *Grinnell*, 495 F.2d at 463. These criteria are easily met in the instant case. This case

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[10] Rule 23(c)(2), Fed. R. Civ. P., requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974) (class notice designed to fulfill due process requirements).

The Notice, as approved by the Court in the Hearing Order, was sent to all identifiable potential Class Members. *See* Garr Aff. ¶¶ 3-8, 10-11. It described the Action, the terms of the non-Executive Defendant Settlements, the estimated average recovery per share if there were a pro rata distribution of the New Settlement Fund, and Lead Counsel's fee and expense application. The Notice also explained Class Members' rights and procedures for objecting to the Settlement and/or the fee and expense application and the right of Class Members to appear at the Settlement Hearing. In addition, the Publication Notice appeared in *The Wall Street Journal, The New York Times, PR Newswire* and *Bloomberg News* on July 6-8, 2005. *Id.* ¶ 9. Thus, the Notice disseminated to Class Members contained all information required by § 21D(vi)(7) of the PSLRA, and is more than adequate to meet the due process and Rule 23(c)(2) and (e) requirements for providing notice to the Class.

was ready for trial when the Settlements with the Underwriter Defendants and Director Defendants were reached, and Lead Counsel had completed its case-in-chief and was but days before closing arguments were to be made in the trial against Andersen when the Settlement with Andersen was reached. After the Andersen trial, when the Court indicated it would soon lift the stay of litigation against the Executive Defendants, Lead Plaintiff undertook a series of negotiations with counsel for the Executive Defendants and, with the extensive involvement of the United States Attorney's Office, achieved settlements with each of them just prior to their sentencing in their criminal cases.

Of course, well before the Settlements were reached, Lead Counsel had extensively analyzed and investigated the events and transactions alleged in the Litigation, reviewed and analyzed millions of documents produced by the non-Executive Defendants and others, took over seventy fact witness depositions, and retained and consulted with expert witnesses and consultants in numerous fields, including damages, forensic accounting, investment banking, due diligence, analyst reports and valuations, and WorldCom's accounting system programs. *See* Joint Decl. ¶8. Lead Plaintiff and Lead Counsel culled out the documents that they intended to introduce at what was to be a complex, multi-faceted trial against all of the non-Executive Defendants, and further presented testimony and numerous exhibits and demonstrative exhibits at the Andersen trial, including cross-examination of three Andersen engagement and audit partners, one witness via a trial deposition, eight witnesses via deposition designations, and four expert witnesses in the fields of auditing and accounting, damages, WorldCom's accounting system computer programs, and investment banking and due diligence. *Id.* Clearly, Lead Plaintiff and Lead Counsel engaged in sufficient document discovery and sufficient discussions about the merits of the Action to evaluate fully the merits of the claims and the obstacles to

success. *In re Medical X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *4 (E.D.N.Y. Aug. 7, 1998). *See also In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 591 (S.D.N.Y. 1992) ("The compromise reached by class counsel has been neither arbitrary nor premature, but formed after careful investigation and weighing of facts . . . .").

In this case, it can truly be said that the parties "have a clear view of the strengths and weaknesses of their cases." *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986). Likewise, Lead Plaintiff was able to make an informed decision of the merits of the Settlements, and the Court should give great weight to this consideration. *See* Joint Decl. ¶38; *see also* Lead Plaintiff Declaration, Exhibit 1 to Joint Decl. And, as noted above, at least with respect to the Andersen Settlement, the Settlement Judges – who many times discussed with Lead Plaintiff and Lead Counsel the strengths and weaknesses of the claims in the case – also concluded that the Andersen Settlement is in the best interests of the Class. Joint Decl. ¶56.

d) Risks Involved in Establishing Liability and Damages, and in Maintaining the Class Action Through Trial

Grinnell holds that, in assessing the fairness, reasonableness and adequacy of a settlement, courts should consider such factors as the "risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial." 495 F.2d at 463 (citations omitted). Here, these factors also support approval of the Settlements.[11]

There are certain unassailable facts and risks that had to be considered by Plaintiffs as factors in assessing the sufficiency of the Settlements. For example, with respect to the

[11] While the risk of maintaining the class action through trial was significant with respect to the Citigroup Settlement, *see, e.g., Hevesi v. Citigroup Inc.,* 366 F.3d 70 (2d Cir. 2004), Lead Plaintiff does not contend that there was any significant risk in this regard with respect to the claims against the other Defendants in the case.

Securities Act claims (which were the only claims asserted against the Underwriter Defendants), the non-Executive Defendants vigorously disputed any liability, and in particular had asserted a "due diligence" defense with respect to those claims. Joint Decl. at ¶46. While the Court had found, as a matter of law, that the first quarter 2001 financial statements that were incorporated in the registration statement for the May 2001 offering were materially false and misleading, the non-Executive Defendants continued to maintain that they could not be found liable for such misrepresentations, which were concealed by WorldCom's senior executives from each of the other defendants in the case. *Id.* Andersen further maintained that it could be found liable only for material misstatements in its audit opinions on the financial statements for the years ended December 31, 1999 and 2000, and not with respect to the first quarter 2001 financial statements. *Id.*

With respect to the Exchange Act claims, Plaintiffs would have had to establish that the Director Defendants and Andersen acted with scienter, or intent to defraud. These Defendants argued that plaintiffs could not establish scienter because (a) they had no knowledge of, and did not participate in, the accounting fraud at WorldCom, and (b) the accounting fraud was actively concealed by WorldCom's senior executives. While Plaintiffs believe that they could establish these Defendants' scienter (or, with respect to the Director Defendants against whom only Section 20(a) claims were asserted, that they did not satisfy their good faith defense to control person liability), Plaintiffs could not dismiss the possibility that a reasonable jury could conclude that the Director Defendants and Andersen did not act with intent to defraud. Joint Decl. at ¶¶47-48.

Lead Plaintiff also faced serious risks in connection with its Section 10(b) claims with respect to establishing loss causation. The price of WorldCom stock and other publicly traded

securities fell continuously throughout the Class Period, reaching less than $1 per share before the June 25, 2002 disclosure that WorldCom had committed a fraud. Thus, the Director Defendants and Andersen contended (and even the Executive Defendants would likely have contended had they not settled) that Lead Plaintiff would not be able to show that their conduct caused Plaintiffs' losses. Joint Decl. at ¶47.[12] While Lead Plaintiff believes it had arguments to combat these points and would establish loss causation, this was another risk faced by the Class.

Lead Plaintiff also faced risks in proving the amount of damages. As an initial matter, with respect to the fraud claims asserted against the Director Defendants and Andersen, plaintiffs faced significant risks that a jury would conclude that these defendants were only liable (if at all) for a small percentage of the Class' damages. Indeed, given the PSLRA's proportionate liability provisions, under which a defendant may be obligated to pay only for that portion of damages for which that defendant is held responsible, and considering the fact that a number of other defendants in this action (and certain non-parties) pled guilty to securities fraud, Lead Plaintiff believes that it was highly likely that a jury could place a high proportion of liability on persons and entities other than the Director Defendants and Andersen, including the Executive Defendants and WorldCom itself. Joint Decl. at ¶47.

Moreover, as demonstrated at trial, proving damages under the Securities Act claims was no easy matter. At trial, Andersen raised issues with respect to the declines in the prices of the WorldCom bonds issued in May 2000 and May 2001 prior to June 25, 2002, when WorldCom admitted that it had overstated its earnings during the year 2001 and the first quarter of 2002 by $3.8 billion, and further that the decline at that time related only to the 2001 and 2002 financials,

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[12] Indeed, in connection with Ebbers' sentencing on July 13, 2005, his counsel argued vigorously that the losses attributable to the jury's findings of securities law violations against Ebbers were substantially less than the Government contended.

which were <u>not</u> year-end financial statements included in the registration statements at issue in this case. Defendants would have countered, in the "battle of the experts," that the bond price declines related to the market's perception of WorldCom's ability to meet its interest and re-payment requirements, and not the eventual disclosures of fraud of June 25, 2002 and continuing thereafter.

Lead Plaintiff had to be cognizant of the fact that, at trial, a wide divergence would exist between Lead Plaintiff's and the non-Executive Defendants' experts. Based on their expert reports and deposition testimony, these Defendants' experts would have presented analyses and methodologies for calculating damages, and it was difficult to predict which testimony or methodology might be accepted by the jury or which might simply be rejected by a jury as inherently speculative and unreliable. *See In re American Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("[i]n such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses"); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997) ("damages are a matter for the jury, whose determinations can never be predicted with certainty"), *aff'd*, 117 F.3d 721(2d Cir. 1997).

e) Collectability and the Ability of <u>Defendants to Withstand a Greater Judgment</u>

Plaintiffs recognize that the Underwriter Defendants are very substantial companies, with enormous resources and profit-generating capabilities, and had the ability to pay – at least on a collective basis – the damages that Plaintiffs would have sought to prove against them at trial. Thus, this was not a factor with respect to the settlements with them.

However, as stated in the Joint Declaration, the Director Defendants had limited financial capabilities and a relatively low level of insurance available to cover the claims in the case. Joint

Decl. at ¶¶22-23, 31. Moreover, the insurers had filed motions for rescission of the insurance coverage, so there was no assurance that any proceeds of the policies would have been available to plaintiffs. *Id*. at ¶23. As further stated in the Joint Declaration, Andersen is no longer an operating company and it also has limited financial capabilities. *Id*. at ¶9. Based on the detailed reviews conducted by Lead Plaintiff and Lead Counsel, it was determined that the settlement with Andersen were far more beneficial to the Class than obtaining a potentially multi-billion judgment that likely would have forced Andersen into bankruptcy proceedings.

The settlements with the Executive Defendants were also based, in large measure, on the realization that even if Plaintiffs had been successful at trial in proving liability and damages against Ebbers, Sullivan, Myers and Yates, the Class would have faced significant limitations on what was collectible from these Defendants. As a result, Lead Plaintiff undertook a careful review and analysis of the financial statements and other information provided by these Defendants, and determined that the present Settlements provide a much better return for the Class compared to what it might the Class might have recovered through trial. Moreover, as noted, the settlements with Ebbers and Sullivan – like the Andersen settlement – contain confidential protections for the Class in the event of a bankruptcy proceeding. *Id*. at ¶26.

Thus, while this factor is largely irrelevant to the Underwriter Defendant settlements, it strongly supports the Settlements with the Director Defendants, Andersen and the Executive Defendants.

f) The Range of Reasonableness of the Settlement Amount in Light of the Best Possible Recovery and in Light of All Risks of Litigation

In order to calculate the "best possible" recovery, the Court must assume complete victory on both liability and damages as to all class members on every claim asserted against each defendant in the Action. Courts agree that the determination of a "reasonable" settlement

"is not susceptible of a single mathematical equation yielding a particularized sum." *In re PaineWebber*, 171 F.R.D. at 130 (citation omitted); *In re Union Carbide*, 718 F. Supp. at 1103. Rather, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d at 693; *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971). The Second Circuit stated that "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455. The Second Circuit further explained that, "[i]n fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at 455 n.2.

Despite the obstacles facing Lead Plaintiff on the issues of liability and damages, Lead Plaintiff believes that it would be able to prove its claims and obtain a verdict for substantial damages for the members of the Class. However, such a victory was no sure thing. When the benefits of the guaranteed recoveries from each of the Settling Defendants were weighed against the risks of continued litigation against these defendants, it is clear that approval of the Settlements is warranted. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985) ("much of the value of a settlement lies in the ability to make funds available promptly"), *modified on other grounds*, 818 F.2d 179 (2d Cir. 1987).

Given the obstacles and uncertainties attendant to this complex litigation, Lead Plaintiff submits that the record-breaking Settlements achieved in this Action are well within the range of reasonableness, and better for the Class than the other possibilities — which could have been little or no recovery at all.[13]

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[13] Of course, any discussion about achieving a recovery from the Director Defendants,

Indeed, the Settlements yield a significant recovery for the Class both in its absolute terms and as a percentage of the amounts that Lead Plaintiff estimated to be the damages in the case. As stated in the Notice, Lead Plaintiff estimated that the total damages against all Defendants stemming from the Securities Act claims were approximately $10.6 billion, which would have been reduced at least by the $1.4 billion allocated to Class Members with Securities Act claims through the earlier Citigroup Settlement, and possibly more. Thus, the recovery from the present Settlements for Securities Act claimants (approximately $3.452 billion, inclusive of the 20% allocations from the Director Defendant, Andersen, Ebbers and Sullivan Settlements) represents 37.5% of the maximum damages that Plaintiffs could have recovered from these Defendants, which would have been vigorously disputed at trial. Indeed, apart from estimations of damages, the estimated average recovery per $1,000 face amount of the bonds issued in May 2000 and May 2001 from the present Settlements and the Citigroup Settlement is $426.66 – more than 40% of the face amount of the bonds under the Plans of Allocation being proposed by Lead Plaintiff and the Named Plaintiffs (and more than 50% of the Plaintiffs' estimated damages).

With respect to the Section 10(b) claims against the Director Defendants and Andersen, Lead Plaintiff recognized that these claims carried with them a higher risk that a jury would not find liability, and that Plaintiffs' estimate of the potential damages, which measured in the tens of billions of dollars, would have been vigorously opposed by these Defendants, who could have put forward at trial arguments that total damages were substantially smaller. As noted above, Lead Plaintiff also recognized that, because of the proportionate fault requirements of the PSLRA, there was a significant risk that a jury would conclude that these Defendants were liable

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Andersen and the Executive Defendants must be further tempered by the realization that these defendants had limited financial means, and that there were definite limits on the extent of insurance coverage (and risks in terms of maintaining the viability of the policies) for the Director Defendants.

only for a small percentage of plaintiffs' damages. Thus, for example, while Plaintiffs' damages expert estimated that damages suffered by Class members who purchased WorldCom stock were in the tens of billions of dollars, given the number of additional parties and non-parties (including WorldCom itself) who are alleged to have participated in or orchestrated the fraud at WorldCom (including Sullivan and Myers who pled guilty to securities fraud, and whose testimony was read to the jury in the Andersen trial, and Ebbers who was convicted of securities fraud), a jury could conclude that the Director Defendants and/or Andersen were responsible for no more than a fraction of Plaintiffs' total damages. In these circumstances, including the financial limitations of these Defendants, the $100 million amount allocated to Class Members with Section 10(b) claims from the Director Defendant and Andersen Settlements must be seen as a significant recovery, in absolute terms and as a percentage of the likely recoverable damages from these Defendants for these claims.

Finally, as shown above, the settlements with the Executive Defendants were set based on their financial capabilities, based on the financial statements and other information, including sworn statements, that were carefully scrutinized by Lead Plaintiff and Lead Counsel. The settlements left Defendants Ebbers and Sullivan, their spouses and families, with only modest levels of property, and requiring the bulk of their assets to be paid to the Class in settlement of the claims in this case. The settlements with Myers and Yates reflect their impecunious conditions.

Accordingly, each of the *Grinnell* factors discussed above supports approval of the Settlements by this Court.

3. **The Proposed Settlements Are The Product Of Informed Arm's-Length Negotiations And Are Presumptively Fair**

"In appraising the fairness of a proposed settlement, the view of experienced counsel favoring the settlement is 'entitled to great weight'. * * * There is thus a strong initial presumption that the compromise as negotiated herein under the [c]ourt's supervision is fair and reasonable." *In re Michael Milken*, 150 F.R.D. at 54 ; *see also In re Union Carbide*, 718 F. Supp. at 1103.

As the court noted in approving the settlement in *In re Sumitomo Copper Litig.*:

> So long as the integrity of the arm's-length negotiation process is preserved ... a strong initial presumption of fairness attaches to the proposed settlement.' *In re PaineWebber*, 171 F.R.D. at 125. As likewise stated by the *Manual for Complex Litigation*, a **'**presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery**.'** *Manual for Complex Litigation,* Third ¶ 30.42 (1995).

189 F.R.D. at 280-81 (emphasis in original). As in *Sumitomo*, the parties here negotiated the Settlements at arm's length. Thus, the presumption of fairness "clearly attaches here."

As discussed above, the Settlements were negotiated at arm's length between Lead Counsel and counsel for the Settling Defendants. With respect to the Underwriter Defendants, Lead Plaintiff and Lead Counsel "stuck to their guns" and, with the exception of two, financially-strapped banks, refused to settle at rates lower than the rate established in the Citigroup Settlement for the Citigroup Defendants' participation in the May 2000 and May 2001 bond offerings. Indeed, given Salomon's position as a lead underwriter in each of the bond offerings, and the various conflicts of interest alleged specifically with respect to the Citigroup Defendants, Ebbers and WorldCom, that Lead Plaintiff and the Named Plaintiffs would not settle with other Underwriter Defendants at lower rates is a testament to the tenacity with which Lead Plaintiff and Lead Counsel carried on the negotiations with defendants' counsel. Thus, for

instance, as various press reports noted, the Bank of America and the group of four junior underwriters in the May 2000 offering settled at rates that were on a par with the rate established for Citigroup's payment for the May 2000 and May 2001 bond claims; the settlements of the next batch of Underwriter Defendants ranged from 5% to 17% "premiums" over the rate established for Citigroup's payment; and the final settlement with J.P. Morgan Chase was at a figure that was at least $630 million, or nearly 45% more than the rate established for Citigroup's payment.

The negotiations with the Director Defendants and Andersen were conducted under the close supervision and guidance of the Settlement Judges, who monitored them both for their progress and for the propriety of the presentations made by each side to the other. *See* Joint Decl. ¶¶18-21, 53, 56. As cited above, the negotiations with counsel for the Director Defendants took place over a period of twenty months. Lead Plaintiff required each of the Director Defendants who wished to settle the claims against him or her to provide a detailed financial statement, and sign a sworn statement attesting to the truthfulness of the financial information provided to Lead Plaintiff. *Id.* ¶35. The negotiations culminated in this Court granting preliminary approval of the Stipulation of Settlement between Lead Plaintiff and the twelve Director Defendants on March 21, 2005, but only after: (1) Lead Plaintiff had signed a Memorandum of Agreement on May 21, 2004 with ten of the Director Defendants (which required those defendants to personally pay in excess of 20% of their cumulative net worth, excluding their primary residence, retirement accounts and certain protected joint marital assets); (2) Lead Plaintiff had signed a Stipulation of Settlement of January 7, 2005, based generally on the Memorandum of Agreement but which was denied preliminary approval because of a provision required by Lead Plaintiff in the Stipulation that would limit the judgment reduction

available to non-settling defendants based on the Director Defendants' ability to pay; (3) Lead Plaintiff promptly revived the Stipulation of Settlement on March 18, 2005, after the last of the Underwriter Defendant settlements had been granted preliminary approval, which included the original ten Director Defendants plus Francesco Galesi; and (4) Lead Plaintiff came to an agreement with the sole hold-out director, Bert Roberts, Jr., requiring him to pay $4.5 million from his own pocket to join in a further revised Stipulation of Settlement of March 21, 2005. The Settlement requires the Director Defendants to pay $24.75 million from their own pockets – the first time in securities class action history that an entire group of outside directors has paid monies to settle claims against them – notwithstanding that the Director Defendants collectively lost over $300 million in the value of their own WorldCom stock holdings, and achieves a recovery of $36 million from the entities that issued WorldCom's directors and officers insurance policies, which policies were the subject of rescission actions brought by some of the carriers.

The negotiations with Andersen are also an exemplar of arm's length negotiations. Lead Plaintiff refused to enter into negotiations until Andersen agreed to provide detailed explanations and documents showing its financial condition. Joint Decl. at ¶36. The negotiations took place with starts and stops, and did not even begin to progress until after the second week of the trial, when the parties could ascertain with even greater clarity the evidence and arguments that each side was presenting to the jury. *Id.* Finally, after several all-day sessions reviewing Andersen financial documents, and extensive discussions about the progress of the trial and potential scenarios, Lead Plaintiff agreed to a settlement that provides for a very significant cash payment by Andersen of $65 million – a significant percentage of Andersen's remaining net worth – plus the potential for additional payments (20% of any future payments made by Andersen to its

former partners, and a matching provision for any other payment made by Andersen for any other claim), and certain confidential protections should Andersen enter bankruptcy proceedings. *Id*. When presented with the terms of the Andersen Settlement and the background information, the Settlement Judges opined that the Settlement was "negotiated in good faith" and is "in the public interest." *Id.* at ¶56.

Finally, as noted above, the negotiations with the Executive Defendants were arduous, involved numerous demands for information and a careful review of that information, and also involved – in the case of Ebbers – significant involvement of the USAO. All of these facts demonstrate the hard-fought, arms' length process of reaching settlements with the Executive Defendants.

Lead Plaintiff and the Named Plaintiffs, and their counsel, who conducted the negotiations on behalf of Plaintiffs, were thoroughly conversant with the strengths and weaknesses of the claims against the Settling Defendants and, Lead Counsel, like other plaintiffs' counsel who assisted in the prosecution of the Action, have many years of experience in conducting complex securities class action litigation. Joint Decl. at ¶38.

As Judge Sweet noted in another context, where, as here, "[t]he process by which the parties reached the Proposed Settlement[] was arm's-length and hard fought by skilled advocates," the Settlement is deserving of the Court's approval. *In re NASDAQ Market-Makers*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998). Accordingly, Lead Plaintiff and Lead Counsel recommend that the Settlements be approved by this Court.

B. The Plans Of Allocation and Supplemental Plan of Allocation Are Fair And Reasonable

Under Rule 23, approval of a plan for allocating settlement proceeds among class members is "governed by the same standards of review applicable to approval of the settlement

as a whole: the plan must be fair, reasonable and adequate." *In re Oracle Sec. Litig.*, No. C-90-9031-VRW, 1994 WL 502054, at *1 (N.D. Cal. Jun. 18, 1994); *accord In re Computron Software, Inc. Sec. Litig.*, 6 F. Supp.2d 313, 321 (D.N.J. 1998); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284-85 (9th Cir. 1992). As numerous courts have held, a plan of allocation need not be perfect. *RMED Int'l., Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587 (PKL RLE), 2000 WL 420548, at *2 (S.D.N.Y. Apr. 18, 2000) ("aggregate damages in securities fraud cases are generally incapable of mathematical precision") (citing *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1182 (N.D. Cal. 1993)); *see also In re Computron Software, Inc. Sec. Litig.*, 6 F. Supp.2d 313, 320 (D.N.J. 1998); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284-85 (9th Cir. 1992).

The law in this Circuit is in full accord. In *Maley v. Del Global Technologies Corp.*, 186 F. Supp.2d 358, 367 (S.D.N.Y. 2002), the court stated: "To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized – namely, it must be fair and adequate." Similarly, in *In re NASDAQ Market-Makers Antitrust Litigation,* 2000 WL 37992, *2 (S.D.N.Y. Jan. 18, 2000), Judge Sweet noted: "An allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' Class Counsel." *See also In re PaineWebber Limited P'ship Litig.,* 171 F.R.D. 104, 129 (S.D.N.Y. 1997); *In re Lloyd's American Trust Fund Litig.,* 2002 WL 31663577, *18 (S.D.N.Y. Nov. 26, 2002). Here, the Plans of Allocation and Supplemental Plan of Allocation comply fully with these standards.

1. <u>The Plans of Allocation Are Fair and Reasonable</u>

The Plans of Allocation for the Settlements are reasonably based on the claims asserted against the Settling Defendants, the potential damages that plaintiffs might have obtained based

on the various claims, the amounts previously allocated to Class Members through the Court's Citigroup Settlement Opinion (which reduced potential damages that could have been recovered on the various claims against the Settling Defendants),[14] and, where appropriate, the risks of establishing both liability and damages on the claims against the Settling Defendants in the amounts claimed by plaintiffs.

As explained to Class Members in the Notice, the Stipulations of Settlement with the Settling Defendants each provide for an allocation of any Settlement Fund attributed to the Settlements. *See generally* Notice ¶¶ 27-33; Joint Decl. at ¶61. The Stipulations with the Underwriter Defendants provide for the funds from each of those settlements to be allocated among only purchasers of the bonds issued by WorldCom in the May 2000 and May 2001 bond

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[14] The first recovery that Lead Plaintiff achieved provided for the payment of $2.575 billion from the Citigroup Defendants in a settlement that was granted final approval by this Court on November 12, 2004. Because plaintiffs had asserted claims against the Citigroup Defendants on behalf of purchasers of bonds issued by WorldCom in the May 2000 and May 2001 bond offerings under the Securities Act, and on behalf of purchasers of WorldCom stock and different pre-existing bonds under the Exchange Act, Plaintiffs proposed to the Court – and the Court approved – an allocation of the Citigroup Settlement Amount that provided for approximately 55% of the total proceeds to be paid to purchasers of bonds issued by WorldCom during the Class Period, and 45% of the proceeds to be paid to purchasers of stock and other pre-existing bonds. That allocation was based on many factors, including but not limited to the fact that Citigroup had been a lead underwriter of the two bond offerings, that claims brought under the Securities Act do not require proof of a defendant's intentional or reckless misconduct (in contrast to claims brought under the Exchange Act), issues concerning what Citigroup's proportionate liability might have been with respect to the Exchange Act claims (issues which do not impact claims brought against an underwriter, like Citigroup, under the Securities Act), Citigroup's challenge to the class motion ruling made by the Court with respect to analyst reports issued by certain Citigroup Defendants during the Class Period, and the relative estimated damages for both sets of claims. Thus, approximately $1.4 billion of the Citigroup Settlement (55%) was allocated to purchasers of WorldCom bonds in the May 2000 and May 2001 bond offerings, and approximately $1.175 billion (45%) was allocated to purchasers of WorldCom stock and other pre-existing bonds on the open market throughout the Class Period. Notice ¶ 28. These sums were utilized by Lead Plaintiff in proposing the present Plans of Allocation because they reduced the damages recoverable from the Settling Defendants on the various claims asserted against them, and because Class Members with those claims are already receiving compensation in these amounts, net of fees, costs and expenses allowed by the Court, on account of the Citigroup Settlement.

offerings and, in certain cases, to only purchasers of bonds issued in one or the other bond offering if the settling Underwriter Defendant participated as an underwriter in only one or the other of the bond offerings. On the other hand, the Stipulations with the Director Defendants, Andersen, Ebbers and Sullivan provide for the funds from those settlements to be allocated among purchasers of WorldCom stock and other pre-existing bonds on the open market, as well as purchasers of the bonds issued by WorldCom in the May 2000 and May 2001 bond offerings. The reasons for the differences in the manner in which the various settlements are allocated are described below and in the Notice ¶¶ 30-33. *See also* Joint Decl ¶60 (affirming statements of fact in Notice).

The only claims asserted in the case against the Underwriter Defendants were claims brought pursuant to the Securities Act based on the issuance of WorldCom bonds in the May 2000 and May 2001 bond offerings. As a result, when settlements were reached with those defendants, only Class Members who had actually purchased the bonds issued in those Offerings were and could be beneficiaries of those settlements. *See* 15 U.S.C. § 77k(a) (only a person "acquiring such [a] security" may bring a claim based on an allegedly false or misleading registration statement). That is why no monies from those settlements could or should be allocated to purchasers of WorldCom Securities other than the May 2000 and May 2001 bonds. *See* Notice ¶ 30.

The Plans of Allocation proposed by Plaintiffs for the Underwriter Defendant Settlements are based on (a) the relative damages asserted by Plaintiffs for the May 2000 and May 2001 bond offerings, and (b) the amounts underwritten, as represented in the registration statements, by each individual Underwriter Defendant in one or both of those offerings. The Plans of Allocation for the Underwriter Defendant settlements thus are as follows:

Underwriter Defendant	May 2000 purchasers	May 2001 purchasers
Bank of America Securities (and Fleet Securities)	13.61%	86.39%
Lehman Brothers Inc. Credit Suisse First Boston Goldman, Sachs & Co. UBS Warburg LLC	100.0%	--
ABN AMRO Inc. Mitsubishi Securities Int'l BNP Paribas Securities Corp. Mizuho International WestLB AG Caboto Holding SIM S.p.A.	--	100%
Deutsche Bank	4.15%	95.85%
J.P. Morgan Chase	22.75%	77.25%
Utendahl Capital	--	100%
Blaylock Partners	43.02%	56.98%

Notice ¶ 33.

In contrast, when Lead Plaintiff reached settlements with the Director Defendants, Andersen, Ebbers and Sullivan – all of whom had Securities Act and Exchange Act claims asserted against them – Plaintiffs proposed that 80% of all of those settlement funds be allocated to purchasers of WorldCom stock and other pre-existing bonds (the Exchange Act claimants), and 20% of those funds be allocated to purchasers of WorldCom bonds issued in the May 2000 and May 2001 bond offerings (the Securities Act claimants). *See generally* Notice ¶ 29; *see also* Supplemental Plan ¶ 31 n.3. These allocations take into account many of the factors discussed in note 14, above, with respect to the Citigroup allocation, as well as the amounts recovered from the earlier settlements with the Underwriter Defendants and Citigroup Defendants, which served to decrease by approximately $4 billion the potential damages that could be recovered on the

Securities Act claims against the Director Defendants, Andersen, Ebbers and Sullivan, and by approximately $1.2 billion the potential damages that could be recovered on the Exchange Act claims against them. *Id.*[15]

Based on the foregoing, Plaintiffs have clearly shown that the Plans of Allocation were reasonably and rationally devised, and that they are fair and reasonable to Class Members. In a similar circumstance, Judge McMahon wrote: "The proposed Plan of Allocation, which was devised by experienced plaintiffs' counsel who are familiar with the relative strengths and weaknesses of the potential claims of Class members, satisfied the same standards of fairness, reasonableness, and adequacy that apply to the overall settlement." *Maley v. Del Global* 186 F. Supp.2d at 367.

2. <u>The Supplemental Plan of Allocation Is Fair and Reasonable</u>

The Supplemental Plan of Allocation is also fair and reasonable to Class Members. Development of the Supplemental Plan involved complex and important issues that were discussed and considered extensively by Lead Plaintiff, Lead Counsel, and the expert consultant retained by Plaintiffs to opine on the Class' damages and to assist in the development of a reasonable and comprehensive plan for distributing the settlement funds to Class Members. *See*

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[15] The Plans of Allocation for the Director Defendants, Andersen, Ebbers and Sullivan settlements provide specifically that the amounts paid for the benefit of the Class in those settlements shall be allocated to members of the Class as follows: (i) 4.774% of the Net Settlement Fund to claims asserted under the Securities Act by purchasers of debt securities offered by WorldCom in May 2000; (ii) 15.226% of the Net Settlement Fund to claims asserted under the Securities Act by purchasers of debt securities offered by WorldCom in May 2001; and (iii) 80% of the Net Settlement Fund to claims asserted under the Exchange Act by Class Members who, during the Class Period, purchased (a) WorldCom stock and/or (b) other publicly-traded debt securities issued by WorldCom prior to the beginning of the Class Period. Notice ¶ 32; *accord* Supplemental Plan ¶ 31 n.3. However, because the first statement made by Andersen that Plaintiffs claim was false and misleading was made on March 30, 2000, the portion of the allocation made to Class Members in the settlement with Andersen with claims asserted under the Exchange Act would be allocated only to Class Members with purchases on or after that date. Notice ¶ 32.

Joint Decl. ¶72; Lead Plaintiff Decl. ¶13. The extensive consideration of the many issues relating to the Supplemental Plan is demonstrated in the Supplemental Plan itself, and the care with which Lead Plaintiff (and the Court) explained the Supplemental Plan to Class Members. *See generally* Supplemental Plan ¶¶ 7 (identifying Stanford Consulting Group, Inc. as Lead Plaintiff's expert consultant); 8-9, 18-19 & 28-30 (providing methodology for calculation of claims for May 2000 and May 2001 bond purchasers, and for conversion of payment for claims based on purchases of May 2001 bonds issued in foreign denominations); 10-16 & 20-25 (providing methodology for calculation of claims for purchasers of WorldCom Securities other than May 2000 and May 2001 bonds); and 26-27 (providing methodology for aggregating claims).

The Recognized Amounts for purchases of the May 2000 and May 2001 Notes are calculated based on the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (i) if the security was disposed of before the date upon which suit was commenced, the price at which the security was disposed of; or (ii) if the security was disposed of on or after the date upon which suit was commenced, the greater of the price at which the security was disposed of or the price on the date suit was commenced. Supplemental Plan ¶¶ 8-9. As applied to the circumstances of this case (in which all bonds purchased in the May 2000 and May 2001 offerings were disposed of either by sale or through WorldCom's bankruptcy reorganization), this methodology complies fully with the statutory method of presenting *prima facie* damages under Section 11 of the Securities Act. *See* 15 U.S.C. § 77k(e); *In re WorldCom, Inc. Securities Litigation,* No. 02 Civ. 3288 (DLC), 2005 WL 375313, *2-*4 (S.D.N.Y. Feb. 17, 2005).

In contrast, for the WorldCom Securities concerning which Exchange Act claims were asserted, the Recognized Amounts for purchases of these WorldCom Securities are calculated based on the Plaintiffs' expert's calculation of the amount by which the prices of such securities were inflated during the Class Period, and other factors that may be relevant to certain Class Members. *See generally* Supplemental Plan ¶¶ 11-14. Plaintiffs asserted that the cumulative overstatements in WorldCom's financial statements grew with each succeeding quarter, so that the percentage of the total artificial inflation attributable to a quarter also increased with each succeeding quarter. Accordingly, the Supplemental Plan starts with relatively smaller inflation percentages during the first quarters of the Class Period and provides for gradually increasing inflation percentages over time until the percentage inflation in the market prices of the WorldCom Securities reaches almost 100% in the fourth quarter of 2001, and includes charts showing, on a day-by-day basis, the amounts used to determine the Recognized Amounts for purchases of these WorldCom Securities. *Id.* ¶¶ 11-14, 20-25 & Tables A-G. Thus, the Supplemental Plan comports with the governing principle that a plan of allocation "that reimburses class members based on the extent of their injuries is generally reasonable." *In re Oracle,* 1994 WL 502054, at *1. In keeping with this principle, it also specifically takes into account the actual prices at which Class Members may have purchased or sold WorldCom Securities, to the extent those prices may have been outside the reported trading prices. *See* Supplemental Plan ¶ 16.[16]

The Supplemental Plan clearly also reflects the law governing claims brought under the federal securities laws. In addition to the references to law cited above, the Supplemental Plan

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[16] The Supplemental Plan further provides a mechanism of how the Net Settlement Funds are to be divided into component parts, and the composition of settlement proceeds into each such Component Net Settlement Fund. Supplemental Plan ¶¶ 31-32.

also explicitly takes into account: (a) the 90-day lookback period of the PSLRA, 15 U.S.C. § 78u-4(e)(1), *see* Supplemental Plan ¶ 15; and (b) the law governing loss causation, as reflected in the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627, 1631-32 (April 19, 2005), and the Second Circuit's decision in *Emergent Capital Investment Managements, LLC v. Stonepath Group, Inc.,* 343 F.3d 189, 198 (2d Cir. 2003). Consistent with the latter decisions, the Supplemental Plan ¶ 17 provides:

> **No Recovery for WorldCom Securities Sold or Redeemed On or Before January 28, 2002.** For any WorldCom Security that was sold or redeemed on or before January 28, 2002, the Recognized Amount is $0. Only investors who can show their loss was caused by the defendants' alleged misrepresentations or material omissions are entitled to recover in a federal securities law case. Here, the first alleged partial disclosure of the prior misrepresentations in WorldCom's financial statements occurred on January 29, 2002. Therefore, the first decline in the price of WorldCom Securities that could be said to be caused by public disclosure of the misrepresentations was a decline on and after January 29, 2002. As a result, investors who purchased WorldCom Securities during the Class Period but sold those securities before January 29, 2002, are not entitled as a matter of law to collect damages. It is for this reason that this Supplemental Plan of Allocation provides that investors who sold their WorldCom Securities before January 29, 2002 do not have a claim compensable from the Settlement Funds.[17]

Accordingly, Lead Plaintiff and the Named Plaintiffs respectfully submit that the Supplemental Plan – like the underlying Plans of Allocation – reasonably and fairly compensates all members of the Class, and should also be approved.

[17] Lead Counsel has received numerous inquiries from Class Members about this provision, and has sought to explain it by reference to the paragraph 17 of the Supplemental Plan and the governing law.

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests this Court approve the Settlements, the Plans of Allocation and the Supplemental Plan of Allocation as fair, reasonable and adequate to all Class Members.

Dated: New York, New York
July 29, 2005

Respectfully Submitted,

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