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 AWARDS TO LEAD COUNSEL OF ATTORNEY'S FEES AND REIMBURSEMENT OF EXPENSES

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Max W. Berger (MB-5010)
John P. Coffey (JC-3832)
Steven B. Singer (SS-5212)
Chad Johnson (CJ-3395)
Beata Gocyk-Farber (BGF-5420)
Jennifer L. Edlind (JE-9138)
John C. Browne (JB-0391)
David R. Hassell (DH-0113)
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 (RC-3858)
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

Table of Contents

Page

Table of Authorities

Page(s)

Cases

Other Authorities

This memorandum is submitted in support of Lead Counsel's applications for awards of attorneys' fees and reimbursement of expenses (the "Fee and Expense Application") on behalf of itself and other plaintiffs' counsel (collectively "Plaintiffs' Counsel") who assisted in the prosecution of this Action with the prior approval of Lead Plaintiff and the Court, as detailed below. For the reasons set forth herein, Lead Counsel respectfully suggests that the Fee and Expense Application should be approved.

I. PRELIMINARY STATEMENT

Lead Plaintiff, the New York State Common Retirement Fund ("NYSCRF"), by its sole Trustee, Alan G. Hevesi, the Comptroller of the State of New York, and Lead Counsel, the law firms of Barrack Rodos & Bacine and Bernstein Litowitz Berger & Grossmann LLP, succeeded in achieving settlements with the non-Executive Settling Defendants (the "Settlements"), during the period from March 3, 2005 through April 2, 2005, that provided an extraordinary recovery for the Class – the payment of $3,553,056,840 in cash plus interest that began to accrue for the benefit of the Class on May 2, 2005.[1] In conjunction with the Citigroup Settlement, which was approved in *In re WorldCom, Inc Securities Litigation*, No. 02 Civ 3288 (DLC), 2004 WL 2591402 (S.D.N.Y. Nov. 12, 2004) (the "Citigroup Settlement Opinion"), the total amount recovered for the benefit of the Class from the non-Executive Defendant Settlements is $6,128,056,840. The Settlements

[1] From June 30, 2005 through July 26, 2005, Lead Plaintiff entered into settlements with four former WorldCom executives against whom the case had been stayed, former CEO Barnard Ebbers, CFO Scott Sullivan, Controller David Myers, and General Accounting head Buford Yates (collectively, the "Executive Defendants"). As the Court noted at the preliminary approval hearing for the Ebbers settlement, Lead Counsel has disclaimed any fee from these settlements – which is why this Memorandum in support of the fee requests cites primarily to the settlements reached with the non-Executive Defendants. The Executive Defendant settlements provide for payments to the Class of approximately $5.75 million in cash and further payments from the liquidation of certain assets of Ebbers and Sullivan. Lead Plaintiff estimates that the Class will be receiving approximately $40 million as a result of these settlements.

constitute the largest recovery ever achieved in a securities law class action suit, and were obtained from entities and persons that did not issue the securities involved in the case.

The prosecution of this Action was undertaken by Lead Counsel on an entirely contingent basis.[2] As more fully described below, in fulfilling our duties and obligations as Lead Counsel over the past three years, we have incurred millions of dollars of expenses and, with other assisting counsel, spent 277,862.10 hours (through June 30, 2005) prosecuting this case – time and expenses that would not be compensated or reimbursed unless and until we achieved a recovery for the benefit of the Class.[3]

On the basis of the $3,553,056,840 recovered in the non-Executive Defendant settlements from March 3, 2005 to April 22, 2005, Lead Counsel is applying for fees in the amount of $194,600,000 (just below 5.5% of the amount recovered) and for reimbursement of expenses in the amount of $7,752,355.63, together with interest at the same rate as earned by the Settlement Fund attributable to the Settlements. The Fee and Expense Application has been approved by

---

[2] In late June 2002, the former Comptroller of the State of New York approached Lead Counsel to represent NYSCRF and requested that they move on behalf of NYSCRF for appointment as lead plaintiff in this Action. *See* Joint Decl. (9/24/04) ¶ 5. On July 1, 2002, Lead Counsel moved to consolidate the class action cases then pending before the Court into one consolidated action; for appointment of NYSCRF as lead plaintiff; and for approval of NYSCRF's choice of counsel as lead counsel for the Class. The Court thereafter, by order of August 15, 2002, appointed NYSCRF as Lead Plaintiff and approved its selection of counsel as Lead Counsel. *Id*. ¶¶ 5-6. [The documents referred to herein include the Joint Declaration of Jeffrey W. Golan and John P. Coffey ("Joint Decl."); Declaration of Alan P. Lebowitz ("Lead Plaintiff Decl."); and the Joint Declaration of Jeffrey W. Golan and John P. Coffey that was submitted in connection with the Citigroup Settlement ("Joint Decl. 9/24/05")].

[3] Negotiating the settlements with the Executive Defendants required a significant expenditure of time and effort by Lead Counsel. The time expended by Lead Counsel in pursuit of those settlements through June 30, 2005 (approximately 240 hours) is included in the total hours and lodestar cited herein. But even excluding the hours expended for those settlements, Lead Counsel and the Assisting Firms still expended more than 277,600 hours prosecuting this Litigation through June 30, 2005, and Lead Counsel is continuing to expend many more hours on this case.

Lead Plaintiff, and is being submitted in strict accord with the Retainer Agreement entered into between Lead Plaintiff and Lead Counsel for this case. Joint Decl. ¶¶ 2, 96; Lead Plaintiff Decl.¶¶ 14, 15. The Fee and Expense Application is being submitted in three parts, with separate proposed Orders, as follows:

1. Based on the settlements reached with the Underwriter Defendants – which total $3,427,306,840 – Lead Counsel request fees of $187,720,000 (just under 5.5% of the Settlement Fund attributable to these settlements), plus interest at the same rate earned by the Fund.

2. Based on the settlements with the Director Defendants and Arthur Andersen LLP ("Andersen"), Lead Counsel request fees of $6,880,000 (just under 5.5% of these settlements, which total $125,750,000), plus interest.[4]

3. Lead Counsel request reimbursement of expenses (including expenses incurred by Lead Plaintiff, Lead Counsel and the Assisting Firms) in the amount of $7,752,355.63, plus interest.

[4] The Fee and Expense Application is being applied for separately to make clear to Class Members that only monies from the settlements with the Underwriter Defendants will be utilized to pay the fee being requested based on those settlements, and only monies from the Director Defendant and Andersen settlements will be utilized to pay the fee being requested based on those settlements. Thus, for instance, no Class Member with claims arising solely from purchases of WorldCom stock will bear any part of the fee awarded on the basis of the Underwriter Defendant settlements. An argument raised on appeal by two of the Objectors to the Citigroup Settlement (Lusk and Savage) was that Class Members with only Exchange Act claims should not have to bear a disproportionate amount of the Citigroup Settlement fee award because such Class Members were allocated 45% of that Citigroup Settlement Fund. While the argument has no merit whatsoever, since a fair allocation resulted from taking the fees and expenses from the overall settlement amount, and thereafter allocating the net settlement fund on a 55% - 45% basis, Lead Counsel believe that separation of the fee request here between fees attributable to the Underwriter Defendant settlements, on the one hand, and the Director Defendant and Andersen settlements, on the other hand, should ensure that no similarly ill-conceived argument could be raised to the present Fee and Expense Application, or fees awarded by this Court.

A. Summary of Case Prosecution and Risks

No one knows better than the Court the efforts of Lead Counsel in the prosecution of this case. Indeed, over the course of the past three years, this Court has often recognized the massive nature of this litigation, and the amount of work done by counsel (and the Court) to prepare this case for trial and throughout the nearly five weeks of trial against Andersen. Because of the public nature of this case, Lead Counsel has attempted to chronicle those efforts in the accompanying Joint Declaration (without repetition of the descriptions included in the Joint Declaration prepared in connection with the earlier Citigroup Settlement), and we offer them herein in support of the present motions.

Lead Counsel's Services to the Class

By the time the Citigroup Settlement was being submitted for approval, among numerous other tasks, Lead Counsel had: (a) filed Lead Plaintiff's Consolidated Complaint on October 11, 2002, which revealed for the first time certain material facts regarding the relationship between WorldCom, Inc. ("WorldCom") and the Citigroup Defendants; (b) sought and obtained key documents relating to the fraud at WorldCom in the Fall of 2002 by successfully moving to partially lift the discovery stay imposed by the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the automatic stay imposed by the Bankruptcy Code; (c) engaged in extensive motion practice, including briefing four sets of motions to dismiss the Complaint and the motion to sever the so-called "analyst" claims asserted against the Citigroup Defendants from this Action, and numerous motions to stay the Action and/or delay the trial date; (d) coordinated the efforts of Lead Counsel with counsel for various other plaintiffs in order to ensure an efficient prosecution of the case; attended scores of Court hearings and conferences; (e) reviewed and analyzed more than four million pages of documents produced by WorldCom, defendants, and more than thirty

non-parties; (f) engaged in numerous meet and confer conferences with defense counsel; (g) engaged in extensive discovery relating to class certification; (h) filed comprehensive briefs and expert reports in support of the class motion; (i) prepared for and took more than seventy depositions of fact witnesses; (j) briefed petitions for writs of mandamus to the Second Circuit in connection with the Court's Orders pertaining to consolidation of the Individual WorldCom Actions and the discovery schedule; (k) briefed the Citigroup Defendants' and the Underwriter Defendants' Rule 23(f) appeals of the Court's class certification order; and (l) engaged in protracted, arm's length settlement negotiations that ultimately resulted in the Settlement with the Citigroup Defendants. *See generally* Joint Declaration (9/24/04) ¶¶ 8-57, 77.

Since then, Lead Counsel undertook myriad additional tasks in order to prepare the case for trial against all of the remaining Underwriter Defendants, the Director Defendants and Andersen. As set forth in more detail in the accompanying Joint Declaration, these included:

> Continuing to prepare for and attend numerous Court hearings and conferences, including but not limited to the hearing and conferences of October 19 and 24, 2004, November 5 and 11, 2004, January 11 and 27, 2005, February 3, 8, 17, 18, 24 and 25, 2005, and March 10, 16, 17, 18 and 21, 2005.
>
> Completing all fact discovery, including the taking of forty-one fact witness depositions in the months of June and July 2004 prior to the fact witness discovery deadline of July 9, 2004, reviewing testimony from the Ebbers trial, and conducting depositions of the so-called "Embargoed Witnesses."
>
> Undertaking and completing all discovery relating to experts designated by Lead Plaintiff and by the Settling Defendants to testify at trial, which included: (a) reviewing and helping to finalize reports of the Plaintiffs' five expert witnesses in the fields of auditing and accounting, the telecommunications industry, due diligence of underwriters and bringing a security to market, damages, and the computer software accounting system utilized by WorldCom; (b) reviewing the expert reports submitted by the experts designated by the Settling Defendants; (c) preparing for and attending depositions of Lead Plaintiff's experts; and (d) taking depositions of experts designated by Settling Defendants.
>
> Preparing a motion for partial summary judgment, and responding to the summary judgment motions filed by the Underwriter Defendants, Andersen, and one of the

> Director Defendants. These motions entailed significant legal issues, and resulted in the landmark decisions issued by the Court on December 15, 2004 (granting in part and denying in part Lead Plaintiff's motion for partial summary judgment, and granting in part and denying in part the Underwriter Defendants' motion for summary judgment); January 18, 2005 (denying Andersen's motion for summary judgment); and March 21, 2005 (denying Director Defendant Roberts' motion for summary judgment).
>
> Preparing numerous pre-trial and trial submissions to the Court, including but not limited to briefing and presenting oral argument, when requested by the Court, on approximately twenty-five motions *in limine* filed by Lead Plaintiff and the Settling Defendants; submitting a comprehensive Pre-Trial Order, including a statement of the Lead Plaintiff's claims, potential trial witnesses, potential trial exhibits, and designations of deposition testimony taken during discovery for presentation to the jury; presenting Lead Plaintiff's positions concerning proposed jury instructions, jury questionnaire and jury voir dire; and presenting Lead Plaintiff's positions on various other matters and issues raised by the Parties and/or the Court before and during the trial against Defendant Andersen.

Joint Decl. ¶¶ 7-17.

Preparing the case against the Underwriter Defendants required a massive undertaking. Joint Decl. ¶ 10. There were millions of documents produced that implicated the due diligence defenses raised by these defendants. *Id.* Preparing the case required a complete analysis of their conduct with respect to the offerings as well as their other dealings with WorldCom and its senior officers. *Id.* It further required obtaining depositions testimony and/or other discovery from representatives of each of the Underwriter Defendants – including, in certain cases, testimony from members of various divisions (investment banking, private banking, and credit departments) – so that Lead Counsel was able to present evidence of their alleged misconduct with respect to credit downgrades, lending to Ebbers and Ebbers-affiliated entities, underwritings of the May 2000 and May 2001 bond deals (as well as J.P. Morgan's work with respect to the December 2000 private placement), and other financial services that some of them provided to WorldCom. *Id.*

Preparing the case against the Director Defendants involved a detailed review of the actions they took in overseeing WorldCom's management, and whether, *inter alia*, they complied

with their due diligence obligations for the bond offerings. *Id.* Among other things, Lead Counsel took the depositions of a number of the directors, and further obtained evidence of their involvement with the Company – or lack thereof – from the depositions of Andersen personnel and various WorldCom employees.

And preparing the case for trial against Andersen (which is no longer an operating company) and all other Defendants implicated a review and gaining a complete understanding of the vast number of depositions of witnesses from WorldCom, KPMG, Dovebid, American Appraisal and Andersen concerning various generally accepted accounting principals ("GAAP ") issues. *Id.* ¶ 9. As shown by the expert reports and rebuttal reports served by the parties, nearly all of the accounting and due diligence issues (which had been part of the case until the very end, when settlements were reached with all remaining non-stayed defendants, other than Andesen) were hotly contested. *Id.* The case against Andersen also involved complex issues concerning whether its audits of WorldCom's financial statements complied with generally accepted auditing standards (GAAS); whether the impairment charges taken in WorldCom's restatement were appropriate; and whether the numerous accounting devices utilized by WorldCom – as Plaintiffs' expert testified at trial – were appropriately considered as elements of the WorldCom fraud. *Id.*

Concurrent with preparing the case for trial against all remaining defendants, Lead Counsel developed a strategy – in conjunction with Lead Plaintiff, the Named Plaintiffs and their counsel – and conducted extensive one-on-one negotiations with the Underwriter Defendants, given the apparent intransigence on the part of the Underwriter Defendants to negotiate a global settlement of the case against them. The negotiations were undertaken with the goal of achieving settlements with the Underwriter Defendants that maximized the recoveries for the Class, and achieving for the Class (in all but the first two Underwriter Defendant settlements) a "premium"

over the settlement rate for the Securities Act claims when compared to the Citigroup Settlement. Joint Decl. ¶ 24. Without divulging the back-and forth of the various negotiations, the result was the achievement of recoveries from the Underwriter Defendants that were equal to, and better than, the settlement offers that Lead Plaintiff had made to the Underwriter Defendants at the time of the Citigroup Settlement, consistent with one of the provisions of that Settlement. *Id*.

Lead Counsel carefully and conscientiously negotiated a settlement with the Director Defendants that provided a first-of-its-kind payment by each of the Board members (all of whom were outside directors, other than possibly Bert Roberts, Jr.) that represented a significant percentage of their cumulative net worth, and at least the amount that they had received as compensation for their services as WorldCom Board members. Joint Decl. ¶ 22. The settlement – which was expeditiously yet extensively briefed, and initially rejected because it included a provision that would have limited the judgment reduction permitted to other defendants under the PSLRA by the Director Defendants' ability to pay – thus included payments from the pockets of the Director Defendants of $24.75 million (from a Board that had cumulatively lost approximately $300 million in value of WorldCom stock they continued to hold) and $36 million from the entities that issued directors and officers liability policies that were subject to motions for rescission of those policies based on the fraudulent applications submitted by WorldCom's executives. Joint Decl. ¶¶ 23-24.

Shortly before trial was to commence, Lead Counsel presented each of the Stipulations of Settlement that Lead Plaintiff entered into with the Underwriter Defendants and the Director Defendants, along with proposed Preliminary Approval Orders and forms of proposed Judgments to the Court, and successfully obtained preliminary approval of those settlements. This included briefing and the presentation of argument to the Court on the objections raised by J.P. Morgan

Chase to the initial Underwriter Defendant settlements. Joint Decl. ¶ 24. Lead Counsel further undertook considerable efforts to reach agreements with all of the Director Defendants and to conform the Director Defendant settlement papers to account for: (a) the Court's denial of preliminary approval for the initial settlement based on the judgment reduction limitation that Lead Plaintiff required in the Stipulation before the Underwriter Defendants had settled; (b) the inclusion of Defendant Galesi in the settlement proposed March 18, 2005; and (c) the inclusion of Defendant Roberts and the Court's stated concerns regarding the settlement proposed March 21, 2005. Joint Decl. ¶ 23.

All along, Lead Counsel was preparing the case for trial against each of the Defendants against whom the case had not been stayed, and thereafter had to continuously "re-tool" the evidence for presentation of the case only against the Defendants that had not, to that point in time, settled the claims against them. Eventually, within the last week before trial was to commence, Lead Counsel had to prepare the case fully to seek to establish the liability of Andersen at trial, and to convince the jury to find Andersen liable for the full measure of Plaintiffs' estimated damages at trial. In this connection, Lead Counsel:

> Made nearly daily submissions to the Court (and many times more than one submission per day) on the myriad issues and controversies that arose before and during the Andersen trial. These included submissions concerning Plaintiffs' damages; the significance, if any, of WorldCom's correspondence with the SEC at the time of the MCI acquisition; the admissibility of proposed exhibits; the admissibility of testimony and/or exhibits from depositions taken in the case; Andersen's motions for directed verdict at the close of Lead Plaintiffs' case; Plaintiffs' motion for judicial admission of certain auditing and accounting standards, guidance and other sources; and numerous other topics.
>
> Presented Lead Plaintiff's case against Andersen through the conclusion of Lead Plaintiff's case-in-chief, presenting an opening statement, testimony from three fact witnesses who appeared live at trial (including two former Andersen audit engagement partners), eight fact witnesses who appeared at trial through videotaped deposition testimony or other prior testimony presented under oath, and

four expert witnesses, and further cross-examining at trial the various fact witnesses and one of Andersen's experts presented by Andersen in its case.

Prepared for cross-examination of Andersen's two other identified expert witnesses, and for closing arguments in the case.

Joint Decl. ¶¶ 8, 9, 13 and 17. And, of course, Lead Counsel – again in conjunction with Lead Plaintiff, whose staff rigorously examined the financial and other information provided by Andersen as a precondition to entering into any settlement talks, and held a number of face-to-face meetings with Andersen's principal executives and general counsel – negotiated the settlement with Andersen, including the many additional features of that settlement over and above the $65 million cash payment. Joint Decl. ¶ 25.

The Significant Risks to Achieving Recoveries from the Settling Defendants

The case against the non-Executive Settling Defendants involved numerous, significant risks. Many of these are set forth in the Joint Declaration and Lead Plaintiff's memorandum of law in support of final approval of the Settlements, Plans of Allocation and Supplemental Plan of Allocation. Among the defenses asserted by the Settling Defendants were:

- With respect to the Securities Act claims, the Underwriter Defendants and Andersen asserted that there were no false or misleading statements in the registration statements for the offerings with respect to the year-end financial statements included in the May 2000 and May 2001 registration statements, and Andersen further asserted that it could not be held liable for any misstatement in the first quarter 2001 statements;

- With respect to the Securities Act claims, all of the Settling Defendants asserted that they had conducted reasonable due diligence investigations, were entitled to rely on WorldCom's management, and (except for Andersen) were entitled to rely on the audit opinions and comfort letters presented by Andersen for each bond offering;

- With respect to the Securities Act claims, all of the Settling Defendants asserted that only a small part, if any, of the decline in the price of the bonds was attributable to disclosure of a material misstatement in either of the registration statements and, thus, that Plaintiffs could not establish damages on the Securities Act claims;

- With respect to the Exchange Act claims asserted against the Director Defendants and Andersen, these defendants asserted that Plaintiffs could not establish scienter, or intent to defraud, as there was no allegation that these Defendants participated in, or had knowledge of, the fraud at WorldCom;

- With respect to the Exchange Act claims, these defendants further asserted that only a small part, if any, of the declines in the prices of WorldCom Securities generally were attributable to disclosure of the fraud at WorldCom (citing specifically that the price of WorldCom stock had fallen to less than $1 per share before WorldCom admitted on June 25, 2002, that a fraud had taken place) and, thus, that Plaintiffs could not establish damages on the Exchange Act claims; and

- With respect to the Exchange Act claims, that these defendants could be held liable, if at all, for only a small percentage of the damages that a jury might find, while most of the cause of the fraud would be attributed to WorldCom and its executives, thereby allowing the Director Defendants and Andersen to be liable for only a small proportionate share of the overall liability under the PSLRA.

Joint Decl. ¶¶ 46-48.

It was in the face of these significant risks (and others) that Lead Counsel achieved, for the benefit of the Class, the $3.553 billion recovery in the settlements reached with the Underwriter Defendants, Director Defendants and Andersen. Of course, Lead Counsel faced further risks stemming from the relative lack of financial resources of the Director Defendants, Andersen and the Executive Defendants (with whom settlements were reached from June 30, 2005 through July 26, 2005), and the defenses raised by the entities that provided WorldCom's D&O insurance coverage that threatened to nullify those policies in their entirety. Thus, in addition to risks pertaining to liability and damages, there were significant risks with respect to the whether the Class would be able to either negotiate an adequate settlement with the the Director Defendants, Andersen and the Executive Defendants or collect on any judgment that might be obtained through trial against them.

B. The Basis for the Fee and Expense Applications

Lead Plaintiff is applying for a fee that constitutes just under 5.5% of the Settlement Amounts, and for reimbursement of the expenses incurred in the prosecution of the Action. As more fully discussed in the Joint Declaration ¶¶ 79, 96 and the Lead Plaintiff Declaration ¶ 14, submitted herewith, the fee request is in strict accordance with the Retainer Agreement, dated July 30, 2003, between Lead Plaintiff and Lead Counsel. The Retainer Agreement was entered into following lengthy negotiations between Lead Plaintiff and Lead Counsel, and at a stage of the litigation where Lead Plaintiff and Lead Counsel had sufficient information to make an informed judgment regarding the risks inherent in the case and the potential magnitude of the Action. Joint Decl. ¶ 79.

The fee and expense request has been reviewed and approved by the Lead Plaintiff – an institutional investor with a significant financial stake in the outcome of the litigation, and the paradigm fiduciary for the Class that Congress envisioned in enacting the PSLRA.[5] As the accompanying Declarations further make clear, Lead Plaintiff carefully reviewed and analyzed: (a) the time and expense summaries of Lead Counsel and the Assisting Firms; (b) the detailed time records of the firms, which include the daily time record of the work that each attorney and paraprofessional at the firms performed in the WorldCom case; (c) the hourly rates for each attorney and paraprofessional who devoted time to the case; and (d) the back-up documentation

[5] As the Court is aware, 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* The "Private Securities Reform Act of 1995," H.R. Conf. Report No. 104-369, 104th Cong., 1st Sess. (1995), 1995 WL 709276, at *32. Congress believed that institutions would be in the best position to monitor the ongoing prosecution of the litigation and to assess the reasonableness of counsel's fee request. *See also In re WorldCom, Inc. Securities Litigation,* No. 02 Civ. 3288 (DLC), 2004 WL 2591402, *20 (S.D.N.Y. Nov. 12, 2004) (the "Citigroup Settlement Opinion").

for the expenses incurred by Lead Counsel and the Assisting Firms, ensuring, among other things, that the expenses for which reimbursement is being sought do not exceed the limits in the Retainer Agreement. Joint Decl. ¶ 80; Lead Plaintiff Decl. ¶ 15. Moreover, the hourly rates that were utilized to calculate the "lodestar" for the attorneys and paraprofessional identified in the charts attached in Exhibit 5 of the Joint Declaration, are consistent with hourly rates utilized by other firms in the same locations of Class Counsel and the field of class action litigation generally, and were limited by Class Counsel – pursuant to an agreement with Lead Plaintiff – to the same rates that the firms utilized in 2004, notwithstanding that Lead Plaintiff and Lead Counsel recognized that there would still likely be very significant litigation of this case into 2005, and possibly beyond this year. Joint Decl. ¶ 81. In fact, Class Counsel collectively have expended more than 43,300 hours on the case in 2005, and Lead Counsel alone has expended more than 37,900 of those hours prosecuting this case, including, of course, during the five-week trial against Andersen. Joint Decl. ¶¶ 81, 87.

Evaluating counsel's work now, at the end of the case, Lead Plaintiff is in a position to determine that the fee request is fair and reasonable and should be awarded. As the Third Circuit held in *In re Cendant Corp. Litigation*, 264 F.3d 201 (3d Cir. 2001), *cert. denied*, 535 U.S. 929 (2002), a fee approved by a Lead Plaintiff is presumptively reasonable: "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." *Id*. at 220.

At the time the Retainer Agreement was negotiated, Lead Plaintiff was familiar with the strengths and weaknesses of this case, including the risks of litigation and achieving a recovery, and was actively involved in the prosecution of the Action and the settlement negotiations to that point (which had not been fruitful in any respect). Joint Decl. ¶ 79. Indeed, the Retainer

Agreement was the product of lengthy negotiations between Lead Plaintiff and Lead Counsel at a time when the contours of this case had been clarified, at least in part, by the many Court rulings to that point and the discovery and investigations undertaken by then. For instance, at the time the Retainer Agreement was negotiated:

- Lead Counsel, on behalf of Lead Plaintiff, had conducted an extensive investigation prior to the filing of the Complaint;
- Lead Plaintiff had filed motions to lift the automatic stay in the Bankruptcy Court and the stay of discovery with this Court, and thereby obtained significant discovery of WorldCom documents that head been provided to various government entities before the time normally allowed by the PSLRA;
- Initial settlement discussions had been undertaken and suspended;
- Lead Counsel had successfully opposed the Citigroup Defendants' motion to sever the so-called "analyst" claims from this Action;
- Lead Counsel had, with limited exception, defeated all motions to dismiss filed by Defendants; and
- Lead Plaintiff had filed its motion for class certification, and was producing documents and witnesses as part of the class certification discovery proceedings.

Joint Declaration 9/24/04 ¶¶ 16, 18-30, 36-40, 73, 114.

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 was established between Lead Plaintiff and Lead Counsel. Joint Decl. 9/24/04 ¶¶ 2, 110-111. The Retainer Agreement was thereafter made available for all Class members to review. It was posted on the website maintained by Lead Counsel for the purpose of this case, at www.worldcomlitigation.com, and it was further referenced in the Notice of Class Action, mailed to Class members beginning on December 11, 2003, and in the Notice of the

proposed Citigroup Settlement mailed to Class Members beginning on August 2, 2004. *Id.* As more fully set forth below, the fact that Lead Plaintiff has approved and recommended the fee request should be given considerable weight. *Cendant*, 264 F.3d at 282; *accord In re Lucent Technologies, Inc. Sec. Litig.*, 327 F. Supp.2d 426, 433-34 (D.N.J. 2004).

The fee application follows the terms and conditions of the Retainer Agreement, and has been approved by Lead Plaintiff. The fee requests constitute just under 5.5% of the Settlement Amounts, or $194.6 million, of the $3.553 billion that the Underwriter Defendants, Director Defendants and Andersen agreed to pay to settle the claims of the Class.[6] The percentage sought by Lead Counsel is well below the norm in securities law cases of this type, even in so-called "mega-fund" cases. Moreover, the fee is fair and reasonable when viewed in light of the considerable lodestar plaintiffs' counsel has amassed. Indeed, the collective lodestar of Lead Counsel and the firms that provided assistance to Lead Counsel with Lead Plaintiff's and the Court's prior approval totaled $83,183,238.70 through June 30, 2005, which results, when the present fee request is added to the amount awarded in conjunction with the Citigroup Settlement on November 12, 2004, in a multiple of 4.0. This lodestar multiple is at the low point of the 4 to 5 cap on lodestar multiples approved in the Retainer Agreement,[7] and well within the range of

---

[6] For the reasons set forth in the Preliminary Statement, Lead Counsel is submitting separate requests for fees that would be paid from the Underwriter Defendant settlements and from the Director Defendant and Andersen settlements, respectively, and has disclaimed any fee from settlements with Ebbers and Sullivan. Joint Decl. ¶ 91.

[7] Of course, as set forth above, the multiple is 4.0 only because Lead Counsel agreed to utilize the firms' 2004 rates, rather than current rates, even though much of the litigation was certainly going to continue into 2005. Assuming a 5% increase in rates for 2005 had been utilized, the lodestar multiple would be approximately 3.8. In addition, it is virtually certain that with the amount of time required to be expended by Lead Counsel in July, August and September 2005, in connection with (a) the filing of papers in support of these settlements, plans of allocation and supplemental plan, responses to any objections that may be submitted to the settlements and plans, preparing for and attending the hearing on September 9, 2005, (b) briefing the appeals from this Court's Opinion and Orders of November 12, 2004, relating to the Citigroup Settlement, and

multipliers commonly awarded in contingent fee litigation. *See, e.g., In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (Sweet, J.) (a multiplier of 3.97 "is not unreasonable in this type of case" and noting that multiples between 3 and 4.5 "have become common") (citation omitted); *Cromer Finance Ltd. v. Berger*, 2003 WL 203197 (S.D.N.Y. Jan 29, 2003) (awarding fee constituting 3.56 multiple to one of two lead counsel). Indeed, in a case with significant similarities to the present case, *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), the Court of Appeals for this Circuit affirmed a percentage-based fee award of $220 million, which constituted 6.5% of the overall $3.4 billion achieved in two settlements (one reached just before trial, and the other reached during trial), and equated to a 3.5 multiple of class counsel's lodestar. In affirming the award, the Court of Appeals noted that the district court had applied each of the factors cited in the governing Second Circuit cases, and certainly had not abused its discretion in awarding such an overall fee.

Through this application, Lead Counsel further seeks reimbursement of some, but not all, of the out-of-pocket expenses incurred in connection with the prosecution of the Action.[8] Lead

---

preparing for and arguing those appeals, and (c) continuing to respond to Class Member inquiries and overseeing the work of the Administrator, the fees being requested will be below the 4 multiple provided in the Retainer Agreement.

[8] The Retainer Agreement requires Lead Counsel to submit reports on a quarterly basis to Lead Plaintiff with the time, lodestar and expenses incurred by Plaintiffs' Counsel. Lead Plaintiff's staff reviews the reports, and seeks whatever additional information or documentation it believes necessary to evaluate the reports. Lead Plaintiff has been especially diligent over the past few months in reviewing, and requiring back-up documentation for, Class Counsel's time and expenses because of the deadline for submission of the present Fee and Expense Application. *See* Joint Decl. ¶80; Lead Plaintiff Decl. ¶¶6, 15. For purposes of this application, we are utilizing data for the quarter ended June 30, 2005, because that is the last report supplied to Lead Plaintiff. However, as Lead Counsel noted previously in connection with the fee and expense reimbursement sought in connection with the Citigroup Settlement, the Retainer Agreement provides for certain caps on expenses (*e.g.*, caps on hotel and per diem allowances for out-of-town travel, and a cap on in-house copying rates). The cap on hotel charges for New York City is $177

Plaintiff and Lead Counsel have made extensive efforts to ensure that the present Fee and Expense Application does not duplicate any expenses for which Lead Counsel sought reimbursement in connection with the Citigroup Settlement. *See* Joint Decl. ¶ 98; Lead Plaintiff Decl. ¶¶ 6, 15, 16. Accordingly Lead Counsel seeks $7,741,292.09 as expenses incurred by Class Counsel since September 1, 2004, and $11,063.54 of expenses incurred by Lead Plaintiff during the prosecution of this Action (other than those compensated in the Citigroup Settlement Opinion).[9]

---

to $208 per night depending on the season. Thus, for instance, counsel were limited to apply for reimbursement of only $177 per night for hotel rooms and short-term apartment rentals used during the trial, notwithstanding that even moderately priced New York hotels and short-term rentals cost significantly more than $177 per night. Based on such caps on allowable expenses, and Lead Plaintiff's disallowance of other expenses incurred by counsel, Lead Counsel estimate that the actual expenses incurred since the Citigroup fee and expense application, including expenses incurred by Lead Counsel in taking the case to trial against Andersen, exceed the expenses for which reimbursement is being sought by approximately $300,000. Joint Decl. ¶ 102.

[9] As discussed in greater detail below, Lead Plaintiff and Lead Counsel further respectfully request that they be able to modify the present expense request for any further expenses that may be incurred by Class Counsel after June 30, 2005 and/or approved by Lead Plaintiff, and to seek reimbursement for the Notice and Claims Administrator.

Lead Counsel notes that no part of the $5 million litigation fund that was awarded in the Citigroup Settlement Opinion was ever funded, because of the appeals taken by Objectors Norman and Entenmann and Galitzer to this Court's approval of the Citigroup Settlement, which delayed the time when the Citigroup Defendants were required to fund the Settlement. Thus, while the Citigroup Settlement Amount has been earning interest for the benefit of the Class, Lead Counsel could not utilize any of the Court-awarded litigation fund to pay any of the expenses of continuing to prosecute the Action against the remaining defendants, including the expenses incurred in trying the case against Andersen. *See* Joint Decl. ¶ 95.

C. Notice of the Fee and Expense Applications

Pursuant to this Court's Order,[10] a printed Notice of Proposed Settlements of Class Action with Settling Defendants and Bar Order Notice (the "Notice"), in the form approved by the Court, was mailed to more than four million potential Class Members beginning on June 29, 2005 and a Summary Notice of Proposed Settlements of Class Action with Settling Defendants and Bar Order Notice (the "Publication Notice"), in the form approved by the Court, was published in the national editions of *The Wall Street Journal, The New York Times, PR Newswire* and *Bloomberg News* between July 6 and July 8, 2005. Garr Aff. ¶¶ 3-9. The Notice contained a detailed description of the Action, the terms of the Settlements, the average recovery per share and bond, the amount of the fees that Lead Counsel might seek, and the amounts and types of expenses for which Lead Counsel may seek reimbursement in their Fee and Expense Application. It also advised Class Members of their right to object to the Fee and Expense Application. While the time to object does not expire until August 12, 2005, to date not one Class Member has filed an objection to the Fee and Expense Application.[11] Joint Decl. ¶ 62.

Lead Counsel respectfully submits that, given the risks faced by counsel in this Action and the enormous benefit conferred on the Class by the proposed Settlements, the Fee and Expense Application is fair and reasonable, comports with applicable precedent, and should be approved.

---

[10] The Settlements were granted preliminary approval in Orders dated March 16, March 18, March 21 and April 26, 2005. On June 16, 2005, the Court entered a Hearing Order setting a hearing on September 9, 2005 to determine the fairness, reasonableness and adequacy of the Settlements, the proposed Plans of Allocation, the Proposed Supplemental Plan of Allocation, and Lead Counsel's fee and expense applications (the "Fairness Hearing") and directed that Notice of the Fairness Hearing be given to the Class. *See* Joint Decl. ¶ 63; *see also* Affidavit of Shandarese Garr, submitted September 2, 2005 ("Garr Aff.") ¶¶ 3-9, attached to the Joint Declaration (without exhibits) as Exhibit 2.

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

II. ARGUMENT

A. Plaintiffs' Counsel Are Entitled To The Reasonable Fees Requested By The Applications

1. The Percentage-Based Fee Applications Comport with the Legal Standards Governing Awards of Attorneys' Fees in this Circuit

It is well-settled that attorneys who represent a class and achieve a benefit for the class members are entitled to be compensated for their services. The Supreme Court has recognized that "a lawyer who recovers a common fund for the benefit of persons other than ... his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Savoie v. Merchants Bank*, 84 F.3d 52, 56 (2d Cir. 1996). The Supreme Court has further emphasized that private securities actions, such as the instant action, provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).[12]

The Second Circuit Court of Appeals has further recently confirmed that counsel who creates a substantial benefit for a class is entitled to a commensurate award of fees. In *Visa*, the Second Circuit performed an analysis for determining whether an award of fees is reasonable. In *Visa*, 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. *See*

[12] Awards of attorneys' fees from a common fund serve a dual purpose by encouraging representatives to seek redress for damages caused to an entire class of persons and discouraging future misconduct of a similar nature. *Dolgow v. Anderson*, 43 F.R.D. 472, 484-85 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970). In the long run, fees that fully reward excellent results encourage the successful prosecution of meritorious cases.

Visa, 396 F.3d at 100. Defendants ultimately agreed to pay $3.4 billion to settle the claims against them. *Id*.

Counsel in *Visa* initially sought a fee award of $609,012,000, which was 9.68 times the lodestar figure in the case. *Id*. at 121. The district court in *Visa* used the percentage of the fund method of calculating fees and, after assessing the fee petition "with a careful eye for the interests of all class members," awarded fees in the amount of $220,290,160.44, or 6.5% of the amount recovered, which yielded a lodestar multiplier of 3.5. *Id*.

The Second Circuit first noted that while fees may be awarded under either the lodestar or percentage of the fund methods, "the trend in this Circuit is toward the percentage method." *Id*. The *Visa* Court then analyzed the factors identified in *Goldberger v. Integrated Resources, Inc*., 209 F.3d 43 (2d Cir. 2000), to determine the reasonableness of the common fund fee, including (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. *Id*. at 122-23. The Second Circuit agreed with the district court that counsel in *Visa* was entitled to an extraordinary fee based, in part, on the fact that lead counsel had devoted tremendous time and effort to the case for a period of years, the case was very large and complicated, the risk of litigation was high, counsel had achieved extraordinary results, and even a large fee award would be a small percentage of the settlement fund. *Visa* at 122. The Second Circuit also found that the "cross-check" lodestar multiplier of 3.5 in that case was reasonable. *Id*. at 123.

The Second Circuit's analysis of the reasonableness of the fee award in *Visa* is strikingly similar to this Court's analysis of the fee award associated with the Citigroup Settlement in this case. In this Court's November 12, 2004, Opinion and Order giving final approval to the

Citigroup settlement ("Citigroup Settlement Opinion"), No. 02 Civ. 3288 (DLC), 2004 WL 2591402 (S.D.N.Y. Nov. 12, 2004), the Court noted that the *Goldberger* factors were to be considered in awarding fees under the lodestar or percentage of the fund methods. Citigroup Settlement Opinion, 2004 WL 2591402, at *16. This Court then found, as the district court similarly found and the Second Circuit affirmed in *Visa*, that Lead Counsel was entitled to a "substantial fee" for the work it had performed in this litigation based, in part, on the fact that counsel had worked arduously for a number of years, the litigation itself was complex and challenging, there were significant risks associated with the claims, and the "quality of representation Lead Counsel ha[d] provided to the class ha[d] been superb." *Id*. at *16-18. This Court also found that public policy considerations supported the award, as Lead Plaintiff, the nation's second largest pension fund, had "conscientiously" supervised the work of Lead Counsel and had given its endorsement to the fee request, which adhered to the fee agreement. *Id*. at *20.

The decision of the Second Circuit in *Visa* and this Court in the Citigroup Settlement Opinion were consistent with Supreme Court decisions in which the Supreme Court held that in the case of a common fund, the fee awarded should be determined on a percentage-of-recovery basis. *See Trustees v. Greenough*, 105 U.S. 527, 532 (1882); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-70 (1939). In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court stated that "under the 'common fund doctrine,' ... a reasonable fee is based on a percentage of the fund bestowed on the class …." The decisions were similarly consistent with the clear trend of district courts within this Circuit to utilize the percentage of recovery approach when calculating attorneys' fees in common fund cases. *See, e.g., Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) ("the trend within this Circuit is to use the percentage of recovery method to calculate fee

awards to class counsel" in common fund cases); *In re American Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 431 (S.D.N.Y. 2001) (same). In his opinion in *In re Lloyd's American Trust Fund Litig.*, 96 Civ. 1262, 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002), Judge Sweet, who awarded class counsel 28% of the settlement fund using the percentage method, noted:

> The percentage method directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system. The percentage approach is also the most efficient means of rewarding the work of class action attorneys, and avoids the wasteful and burdensome process – to both counsel and the courts – of preparing and evaluating fee petitions, which the Third Circuit Task Force described as "cumbersome, enervating, and often surrealistic."

Id. at *25 (quoting "Court Awarded Attorney Fees," Report of the Third Circuit Task Force (Arthur F. Miller, Reporter) *reprinted in* 108 F.R.D. 237, 258 (3d Cir. 1985)).[13] In addition, the PSLRA implicitly supports the use of the percentage of the fund method. *See* 15 U.S.C. § 78u-

[13] For many years, courts within this Circuit recognized that "[s]upport for the lodestar/multiplier approach in common fund cases has eroded, and there has been a 'groundswell of support for mandating a percentage-of-the-fund approach' in the common fund cases." *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999) (citation omitted, emphasis in original); *accord In re NASDAQ*, 187 F.R.D. at 483-85 (chronicling and discussing strong support for percentage of recovery method). And the overwhelming trend among circuit courts is to utilize the percentage of recovery method, which has been expressly adopted in the vast majority of circuits (the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh and District of Columbia Circuits) as an appropriate method for determining an award of attorneys' fees. *See In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995) (permitting use of percentage method; "Contrary to popular belief, it is the lodestar method, not the [percentage] method, that breaks from precedent*."); In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994) (authorizing percentage and holding that use of lodestar/multiplier method was abuse of discretion); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 564-65 (7th Cir. 1994) (percentage approach is appropriate in common fund case); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376-77 (9th Cir. 1993) (percentage approach appropriate); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Swedish Hosp. Corp., v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases"); *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) (percentage approach applicable).

4(a)(6) ("[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class").

From a public policy perspective, the percentage-of-the-fund approach is the most efficient means of compensating the work of class action attorneys. It does not waste judicial resources analyzing thousands of hours of work, where counsel obtained a superior result. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1306 (E.D.N.Y. 1985) (criticizing lodestar approach as one that "tends to encourage excess discovery, delays and late settlements, while it discourages rapid, efficient and cheaper resolution of litigation"), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987). In addition, a percentage-of-the-fund approach is consistent with and, indeed, is intended to mirror, practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients. *See American Bank Note*, 127 F. Supp. 2d at 432 (citing *In re Sumitomo*, 74 F. Supp. 2d at 397).

Finally, the fee requests here are based appropriately on the percentage method because that is the method that Lead Plaintiff and Lead Counsel agreed to utilize in the Retainer Agreement as the primary method for determining the fees that Lead Counsel could seek in this Action. As noted above, the Retainer Agreement provides for the submission of fee requests by Lead Counsel based on the percentage-based fee grid (with percentages that decrease as the amount of the recovery increases, and increase at later stages of the litigation), with a cross-check on the reasonableness of the fee request to be submitted based on allowable lodestar multiples. Since passage of the PSLRA, courts have found such an agreement between fully informed lead plaintiffs and their counsel to be presumptively reasonable. *In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001), *cert. denied*, 535 U.S. 929 (2002); *accord In re Lucent Technologies Sec.*

Litig., 327 F. Supp.2d 426, 433-34 (D.N.J. 2004). The Third Circuit stated in *Cendant* that passage of the PSLRA "shift[ed] the underpinnings of our class action attorneys' fees jurisprudence in the securities area." *Cendant*, 264 F.3d at 276, 282.[14] As this Court wrote in its decision of November 12, 2004, when there is a sophisticated, institutional lead plaintiff appointed pursuant to the selection provisions of the PSLRA, that has faithfully and diligently carried out its responsibilities as a true guardian of the class, a presumption of reliance may attach to the lead plaintiff's approval of a fee request, especially when all other *Goldberger* factors support the reasonableness of the request.

Here, in recognition of their fiduciary duties to the Class, Lead Plaintiff negotiated and entered into the Retainer Agreement with Lead Counsel after the contours of this Action had become clearer than they were at the outset of the Litigation. Consistent with the law in this Circuit, the Retainer Agreement's fee structure was based on percentages of potential recoveries and the stage of litigation at which such recoveries might be obtained, and further cross-checked against the cumulative lodestar of Lead Counsel and other assisting counsel. Accordingly, here, there is a strong record on "what fees common fund plaintiffs in an efficient market for legal services would agree to, given an understanding of the particular case and the ability to engage in collective arm's-length negotiation with counsel." *Goldberger*, 209 F.3d at 52.

---

[14] *See also id.* at 276 (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; as a result, the Circuit Court held that a fee agreement negotiated between a properly selected lead plaintiff and its counsel should be accorded a "presumption of reasonableness."). As the Court in *Cendant* stated: "[U]nder the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel . . . This presumption will ensure that the lead plaintiff, not the court, functions as the class's primary agent vis-a-vis its lawyers." *Id.* at 282.

The Retainer Agreement that Lead Plaintiff and Lead Counsel negotiated results in these fee applications constituting just 5.5% of the Settlement Amounts. This was the negotiated fee for any recoveries (given the earlier Citigroup Settlement amount) obtained within 15 days of trial. Here, of course, not only were the Underwriter Defendant and Director Defendant settlements completed within days and a few weeks of trial, but Lead Counsel further pursued Andersen through nearly five weeks of trial before the Andersen settlement was completed. Moreover, if the full fee request and all reimbursement expenses sought by Lead Counsel are granted by the Court, the Class will still recover approximately 94% of the Settlement Amount. In this circumstance, Lead Counsel respectfully submits that the fee requests are well within the range of reasonableness.[15]

Significantly, the percentage-based fees requested here are also fair and reasonable when measured against fees awarded in other "mega-fund" cases. In *Visa*, the Court of Appeals for this Circuit affirmed a fee of 6.5% on settlements of $3.4 billion which, like the present Settlements, were also reached just prior to and during the trial in that case. In its decision of November 12, 2004, this Court found the 5.45% fee requested in conjunction with the Citigroup Settlement to be fair and reasonable. Courts in two cases with recoveries in the range of $1 billion awarded fees of approximately 14%. *See In re NASDAQ*, 187 F.R.D. at 485-88 (Judge Sweet awarding a fee of $143 million, constituting 14% of the $1.027 billion recovery obtained in that case); *Shaw v. Toshiba America Information Systems, Inc.*, 91 F. Supp.2d 942, 981 (E.D. Tex. 2000) (court approved a fee of $147.5 million, constituting over 14% of the value of that settlement, which

[15] Many courts in this Circuit and elsewhere have awarded fees in class actions with far greater percentages than Lead Counsel seeks here pursuant to the terms of the Retainer Agreement. *See In re Oxford Health Plans, Inc. Sec. Litig.*, MDL No. 1222 (CLB) (S.D.N.Y. June 12, 2003) (Brieant, J.) (awarding 28% of gross settlement amounts valued at approximately $300 million); *Lloyd's American*, 2002 WL 31663577, at *28 (Sweet, J.) (awarding 28% of the total settlement consideration valued at approximately $20 million).

consisted of $597.5 million in cash and other benefits for a total settlement conservatively valued at $1 billion). The following chart further shows that, in cases which have resulted in settlements of at least $100 million, courts have often awarded fees in the range of 25% of the recovery:

Case	Recovery	Percentage Awarded
In re Lucent Technologies, Inc Sec. Litig,, 327 F. Supp.2d 426 (D.N.J. July 19, 2004)	$517 million	17%
In re DaimlerChrysler AG Sec. Litig., No. 00-0993 (KAJ) (D. Del. Feb. 5, 2004)	$300 million	22.5%
In re Oxford Health Plans, Inc. Sec. Litig., MDL 1222 (S.D.N.Y. June 2003)	$300 million	28%
In re Rite Aid Corp. Sec. Litig.,(Rite Aid II) 269 F. Supp. 2d 603 (E.D. Pa. 2003), *vacated and remanded*, 396 F.3d 294 (3rd Cir. 2005), fees approved on remand, 362 F.Supp.2d 587 (E.D. Pa. 2005)	$126 million	25%
In re Rite Aid Corp. Sec. Litig., 146 F .Supp. 2d 706 (E.D. Pa. 2001)	$193 million	25%
Informix Corp. Sec. Litig., Master File No. C-97-1289-CRB (N.D. Cal. Nov. 2, 1999)	$132 million	30%
In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166 (E.D. Pa. 2000)	$111 million	30%
In re Prison Realty Sec. Litig., Civil Action No. 3:99-0458, 2001 U.S. Dist. LEXIS 21942 (M.D. Tenn. Feb. 9, 2001)	$104 million	30%
In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999)	$190 Million	25%
Kurzweil v. Philip Morris Co., Inc., Nos. 94 Civ. 2373 (MBM), 94 Civ. 2546 (BMB), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)	$123 million	30%
In re Combustion, Inc., 968 F. Supp. 1116 (W.D. La. 1997)	$127 million	36%
In re Sumitomo Copper Litig., 74 F. Supp. 2d 393 (S.D.N.Y. 1999)	$116 million	27.5%
In re Home-Stake Prod. Co. Sec. Litig., MDL No. 153 (N.D. Okla. Jan. 2, 1990)	$185 million	30%
In re Prudential Sec. Inc. Ltd. P'ships Litig., 912 F. Supp. 97 (S.D.N.Y. 1996)	$110 million	27%

See also Lucent, 327 F. Supp.2d at 439-41 (compiling cases).

Clearly, when judged against these awards, the Retainer Agreement – which set the rate for these recoveries of $3.553 billion during the final pre-trial and trial phases of the case at 5.5%

-- should be deemed as presumptively reasonable. For these reasons, Lead Counsel respectfully submits that the Court should utilize the percentage method to determine the reasonableness of the fee, and approve the present applications as fair and reasonable.

2. The Requested Fees Are Reasonable As Measured by the *Grinnell* Factors

In determining a reasonable fee, the Second Circuit has advised courts to be guided by the traditional factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). As summarized by the court in *Goldberger*, those factors include:

> (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.

209 F.3d at 50; *see also* Citigroup Settlement Opinion, 2004 WL 2591402, *10. Here, as shown below, each of these factors supports the fee requests.

(a) The Time and Labor Expended by Counsel

The efforts expended by Plaintiffs' Counsel in the prosecution of the action have been extensive and they are well known to the Court. The Joint Declarations of September 24, 2004 and July 29, 2005 set forth the myriad tasks undertaken by Plaintiffs' Counsel, the time and labor expended, and the creativity of these efforts. The Court noted many of the efforts taken prior to the Citigroup Settlement, and their impact, in the Citigroup Settlement Opinion, 2004 WL 2591402, *16-*20, and such efforts will not be repeated here. Notably, however, those efforts were not limited to advancing the prosecution of the case against the Citigroup Defendants; rather, they materially developed the case against all defendants, including the Settling Defendants here. *See, e.g.,* Joint Decl. 9/24/04 ¶¶ 8-14 (filing of Consolidated Complaint and pre-Complaint investigation); ¶¶ 18-20 (obtaining WorldCom documents through motions to lift the automatic stay in the Bankruptcy Court and to lift the stay of discovery generally applicable in PSLRA

cases); ¶¶ 23-30, 47-55 (defeating the Settling Defendants' motions to dismiss the Complaint, and thereafter conducting extensive discovery of Defendants and third parties, with numerous motions to compel additional documents from Defendants); ¶¶ 36-40 (obtaining class certification); ¶¶ 97-103 (preparing, for the consideration by the Court, the Notices to be sent to Class members, and later the proof of claim form and other materials that the Court directed to be sent to Class members).

In all, Lead Counsel prepared for and took over seventy depositions of defendants, representatives of WorldCom, Andersen, KPMG, other WorldCom and KPMG advisors, even as documents were still being produced in this case. Joint Decl. ¶ 8. In addition, as summarized in the Notice and affirmed in the present Joint Declaration, Lead Counsel undertook numerous other essential tasks in preparing this case for trial, and obtaining the extraordinary settlements being presented to the Court, as follows:

> Lead Counsel undertook and completed all discovery relating to experts designated by Lead Plaintiff and by the non-Executive Settling Defendants to testify at trial. In this regard, Lead Counsel: (a) served expert reports of five expert witnesses, including experts in the fields of auditing and accounting, the telecommunications industry, due diligence of underwriters and bringing a security to market, damages, and the computer software accounting system utilized by WorldCom; (b) reviewed the expert reports submitted by the experts designated by the non-Executive Settling Defendants; (c) attended depositions of Lead Plaintiff's experts; and (d) took depositions of experts designated by non-Executive Settling Defendants.
>
> Lead Counsel further prepared a motion for partial summary judgment, and responded to summary judgment motions filed by the Underwriter Defendants, Andersen, and one of the Director Defendants. In response to such motions, the Court issued opinions of December 15, 2004 (granting in part and denying in part Lead Plaintiff's motion for partial summary judgment, and granting in part and denying in part the Underwriter Defendants' motion for summary judgment); of January 18, 2005 (denying Andersen's motion for summary judgment); and of March 21, 2005 (denying Director Defendant Roberts' motion for summary judgment).
>
> Lead Counsel made numerous pre-trial and trial submissions to the Court, including but not limited to briefing and presenting oral argument, when requested

> by the Court, on approximately twenty-five motions *in limine* filed by Lead Plaintiff and the non-Executive Settling Defendants; submitting a comprehensive Pre-Trial Order, including a statement of the Lead Plaintiff's claims, potential trial witnesses, potential trial exhibits, and designations of deposition testimony taken during discovery for presentation to the jury; presenting Lead Plaintiff's positions concerning proposed jury instructions, jury questionnaire and jury voir dire; and presenting Lead Plaintiff's positions on various other matters and issues raised by the Parties and/or the Court before and during the trial against Defendant Andersen.
>
> Further, Lead Counsel presented Lead Plaintiff's case against Defendant Andersen through the conclusion of Lead Plaintiff's case-in-chief, presenting an opening statement, testimony from three fact witnesses who appeared live at trial (including two former Andersen audit engagement partners), eight fact witnesses who appeared at trial through videotaped deposition testimony or other prior testimony presented under oath, and four expert witnesses, and further cross-examining at trial the fact witnesses presented by Andersen in its case.

Joint Decl. ¶¶ 8, 9, 12-15.

The negotiation of the Settlements also required extensive efforts on the part of Lead Counsel and counsel for the Named Plaintiffs. Joint Decl. ¶ 22. Settlement discussions with the Director Defendants spanned more than twenty months, moving in starts and stops, before the signing of a Memorandum of Agreement with ten of the twelve directors in May 2004. *Id.* Seeking to protect the Class against a potentially enormous judgment reduction, Lead Counsel initially sought approval of a settlement agreement that would have capped the non-settling defendants' judgment credit by the Director Defendants' ability to pay. After the Court's rejection of the settlement as submitted, Lead Counsel waited until after settlements had been reached with all the Underwriter Defendants before reviving the Director Defendant settlement. Joint Decl. ¶ 23. The first revived settlement of March 18, 2005, was with the ten original settling Director Defendants and Director Galesi; the second (and final) further revised settlement of March 21, 2005, was with those eleven directors and Director Roberts. During this entire period of time, of course, Lead Counsel continued to prepare the case for trial against the Director

Defendants. And, during the course of the settlement proceedings, Lead Counsel submitted numerous briefs to the Court; entered into scores of settlement discussions with the Director Defendants jointly and, in the cases of Directors Galesi and Roberts, individually; and was able to reach an overall agreement only after the Court had ruled in Lead Plaintiff's favor on Defendant Roberts' motion for summary judgment. *Id*.

The negotiations with the Underwriter Defendants were similarly complicated and creative. Joint Decl. ¶ 24. In the face of a clear reluctance on the part of the Underwriter Defendants to enter into meaningful settlement discussions as a group, Lead Counsel, in conjunction with Lead Plaintiff and the Named Plaintiffs, undertook individual negotiations to "pick off" the Underwriter Defendants one-by-one, with the goal of achieving from each of the Underwriter Defendants a payment at or about the rate established for the settlement of the Securities Act claims in the Citigroup Settlement. *Id*. Lead Counsel was further forced to respond to an opposition filed by J.P. Morgan Chase to preliminary approval of the settlements with Bank of America and the four junior 2000 underwriters (Lehman, UBS, Goldman and First Boston), before such settlements were granted preliminary approval by the Court. *Id*.

Finally, as the Court is well aware, the settlement with Andersen was reached only after nearly five weeks of trial, and extensive negotiations conducted by Lead Counsel and Lead Plaintiff based on, *inter alia*, the claims in the case; the evidence adduced at trial; the risks of proceeding with the case against Andersen; and a careful analysis of Andersen's financial condition. Joint Decl. ¶ 25. The result was an extraordinary recovery of $65 million in cash (which Lead Plaintiff insisted be wired into its escrow account before Plaintiffs agreed to a dismissal of the jury), plus – among other things – 20% of any payment made to present or former Andersen partners on account of their paid in capital and/or notes and other confidential

protections for the benefit of the Class in the event of bankruptcy proceedings involving Andersen. *Id*.

The number of hours expended by Lead Counsel, and by the other Plaintiffs' Counsel attests to the extensive effort by all concerned. Joint Decl. ¶ 87. Lead Counsel alone spent a total of more than 214,500 hours through June 30, 2005 in the prosecution of the Action; together with the Assisting Firms, we spent more than 277,800 hours on the case through June 30, 2005. *See* Joint Decl. ¶ 87, and Exhibit 5. The cumulative lodestar of Lead Counsel and the Assisting Firms is $83,183,238.70 through June 30, 2005. Joint Decl. ¶ 81. As stated in the Joint Declaration, the hourly rates utilized in the lodestar calculations are based on an agreement between Lead Counsel and Lead Plaintiff that Plaintiffs' Counsel would limit their rates to our 2004 rates, which are rates in line with those that were generally utilized by firms involved in federal securities law class actions during 2004. *Id.* As the Joint Declaration further makes clear, Lead Counsel supervised every aspect of the prosecution of the Action to avoid duplication and ensure its efficient prosecution, and also employed lawyers and paralegals specifically for this case in order to efficiently undertake all of the work required to professionally and responsibly prosecute this case within the deadlines set in the Court's scheduling orders. Joint Decl. ¶ 88. The hourly rates utilized in the lodestar calculations for such contract attorneys and paralegals are based on their experience levels, and are also in accord with the rates generally utilized by firms in the federal securities law class action field. Joint Decl. ¶ 81[16].

[16] In fact, as set forth in the Joint Declaration, a number of the contract lawyers are highly experienced attorneys. William Ban joined Barrack, Rodos & Bacine as a contract attorney for the WorldCom case in early 2004. Joint Decl. ¶ 89. Mr. Ban had been a partner at Lowey, Dannenberg Bemporad & Selinger, and undertook a number of significant tasks in addition to document review work, such as assisting in the preparation for depositions, taking depositions, designating deposition testimony, conducting meet and confers with defense counsel on deposition designations, participating in plaintiffs' mock jury sessions, and drafting letters to the

Plaintiffs' Counsel compiled the hours reported from contemporaneous time records maintained by each attorney and paralegal affiliated with the firms that participated in the Action. Joint Decl. ¶88; *see also* Exhibit 5. Accordingly, the time and labor expended by counsel here amply supports the requested fees.

(b) The Magnitude and Complexities of the Litigation

As this Court recently held, this case is certainly among the largest and most complex securities litigation in history. *See* Citigroup Settlement Opinion, 2004 WL 2591402, *11, *18. Indeed, even with the removal of the Citigroup Defendants from the case through the landmark settlement achieved in 2004, the case continued to be enormously complex. The Action was prosecuted on behalf of investors of one of the (formerly) pre-eminent telecommunications companies in the world. It was brought against more than thirty-five different defendants, including Company executives and directors, WorldCom's outside auditor, the Citigroup Defendants, and sixteen other underwriters of two massive bond offerings by WorldCom in May 2000 and May 2001. Each development in the case was watched, and reported upon, by many news agencies, and there were numerous complex issues involved in preparing the case for trial against the Settling Defendants.

Court on disputes involving deposition designations. Indeed, Mr. Ban joined Barrack, Rodos & Bacine as a partner in 2005, prior to the trial against Andersen, and continued to work full-time on the WorldCom case. Attorneys Chad Carder, at Barrack, Rodos & Bacine, and David Hassel, at Bernstein Litowitz Grossmann & Berger, became permanent associates during the course of the case. *Id*. Moreover, attorneys Robert Schupler, Ahmed Khan and Alison Munoz, among others at BR&B, and Cathy Tierney and Stacey Sabo, among others at BLBG, are attorneys who also had significant experience in document reviews, creating case databases, analyzing accounting documents, and responding to discovery motions. *Id*. ¶ 90. These are but a few examples of the manner in which a contract attorney's experience and skill level were considered in setting the appropriate hourly rate for the services they provided to the Class, and to ensure that their rates were consistent with prevailing rates in the securities class action field. *Id*. ¶¶ 81, 88, 89.

We have previously summarized the tasks performed through the submission of expert reports, expert depositions, the pre-trial order and summary judgment motions. See pages 4-5 above; Joint Decl. ¶¶ 7-17. While nobody is more familiar with the myriad issues than this Court, Lead Counsel has summarized many of the issues later raised in the case as follows:

- Underwriter Defendants' motion to trifurcate the trial of the case, and Lead Plaintiffs' responding motion to sever evidence unique to Lead Plaintiff and the Named Plaintiffs from the plenary trial of the case;

- Andersen's motion to exclude Lead Plaintiff's accounting expert, Harris L. Devor, from testifying to any opinions formulated in reliance upon documents created in course of investigations done in the wake of the discovery of the accounting fraud at WorldCom;

- Andersen's motion to exclude WorldCom's Board of Directors' Investigation Report;

- Andersen's motion to exclude evidence of compensation;

- Andersen's motion to exclude certain testimony of Eugene Morse;

- Andersen's motion to exclude reports and memoranda regarding WorldCom investigations;

- Andersen's motion to exclude the Restatement;

- Andersen's motion to exclude the KPMG material weakness binder;

- Andersen's motion to exclude testimony regarding aggregate damages;

- Director Defendants' motion to exclude evidence regarding reports or public statements by the SEC, the U.S. Attorney for the Southern District of New York, and two congressional committees that were issued pursuant to investigations of WorldCom.

- Underwriter Defendants' motion to exclude reference to other WorldCom-related proceedings;

- Underwriter Defendants' motion to exclude evidence of any settlement reached in the WorldCom litigation;

- Underwriter Defendants' motion to exclude evidence of compensation of any present or former employee of the Underwriter Defendants;

- Underwriter Defendants' motion to exclude evidence of fees earned by the Underwriter Defendants;

- Underwriter Defendants' motion to exclude references to counsel's background or other characteristics;

- Underwriter Defendants' motion to exclude evidence of corporate wrongdoing generally;

- Underwriter Defendants' motion to exclude evidence regarding Intermedia Communications, Inc. and Digex Inc.;

- Underwriter Defendants' motion to exclude certain damages-related opinion testimony of Lead Plaintiff damages expert, Dr. Blaine F. Nye;

- Underwriter Defendants' motion to exclude evidence regarding Jack Grubman and Citigroup;

- Lead Plaintiff's motion to exclude evidence of Lead Plaintiff's actions and other evidence unique to plaintiffs;

- Numerous issues raised before and during trial concerning designations of depositions testimony and exhibits for trial, and the admissibility of trial exhibits;

- Continuing motions and arguments, even as the trial proceeded, concerning Andersen's involvement with Enron;

- Whether Lead Plaintiff could pose leading questions to Andersen's former partners on direct examination at trial, and whether such witnesses could consult with counsel for Andersen during Lead Plaintiff's direct examination at trial;

- Whether Andersen would be precluded from arguing that testimony that the SEC's review and comment on WorldCom's proposed accounting treatment of certain items in connection with the MCI acquisition constituted any type of approval of the accounting treatment – an issue that was briefed extensively during the course of the trial;

- Lead Plaintiff's request for judicial notice that the New York State Common Retirement Fund purchased common stock and bonds of WorldCom on the secondary market during the Class Period;

- Andersen's attempt to use excerpts from pleadings and briefs filed by Lead Plaintiff as judicial admissions;

- Responding to Andersen's motion, and the Court's request, during trial to provide record evidence confirming that there was a public market for the MCI tracker stock and the so-called "pre-existing" WorldCom bonds;

- Lead Plaintiff's motion for judicial admission of certain identified auditing and accounting literature, and Andersen's cross-motion to exclude admission or reference to certain of the literature;

- Andersen's request to introduce evidence regarding the lack of independence of KPMG;

- Andersen's attempt to serve a supplemental expert report by its damages expert Dr. Christopher James during trial; and

- Andersen's motion for judgment on Lead Plaintiff's Exchange Act claim with respect to the 1999 audit opinion.

Joint Decl. ¶ 17.

In short, the magnitude and complexity of this litigation also fully supports approval of the request for attorneys' fees.

(c) The Risks of the Litigation

As the Second Circuit recognized in *Grinnell*, "despite the most vigorous and competent of efforts, success is never guaranteed." 495 F.2d at 471. Federal courts have long recognized that securities class action litigation "is notably difficult and notoriously uncertain." *Sumitomo*, 189 F.R.D. at 281 (citation omitted). The high caliber of plaintiffs' counsel and their aggressive pursuit of a case provide no assurance that they will prevail on summary judgment, at trial, or achieve a satisfactory settlement or any settlement at all. This is confirmed by the risks that counsel assumed in commencing and prosecuting this Action.

The risks to establishing the Citigroup Defendants' liability were manifold, and were previously the subject of this Court's Citigroup Settlement Opinion. *See* Citigroup Settlement Opinion, 2004 WL 2591402, *11, *18. The risks to establishing the liability of the non-Executive

Settling Defendants herein were similarly manifold, especially with respect to the outside directors and most of the underwriters that did not have the same types of conflicts that Plaintiffs had been able to develop with respect to the Citigroup Defendants. As identified in the Notice, the parties disagreed on both liability and damages. Specific issues on which they disagreed included the following:

> (a) whether the statements made or facts allegedly omitted were materially false or misleading, or otherwise actionable under the federal securities laws;
>
> (b) the appropriate economic models for determining the amounts by which WorldCom common stock and bonds were artificially inflated (if at all) during the Class Period;
>
> (c) the amounts by which WorldCom common stock and bonds were artificially inflated (if at all) during the Class Period;
>
> (d) the extent to which external factors, such as general market and industry conditions, influenced the trading prices of WorldCom common stock and bonds at various times during the Class Period;
>
> (e) the extent to which each of the various matters that Plaintiffs alleged were materially false or misleading influenced (if at all) the trading prices of WorldCom common stock and bonds at various times during the Class Period;
>
> (f) whether the Settling Defendants conducted appropriate due diligence in connection with the May 2000 and May 2001 bond offerings;
>
> (g) the extent to which the various allegedly adverse material facts that Plaintiffs alleged were omitted influenced (if at all) the trading prices of WorldCom common stock and bonds during the Class Period; and
>
> (h) whether the Director Defendants, as outside directors of WorldCom, are properly considered "control persons" for actions taken by WorldCom executives.

Joint Decl. ¶¶ 46-49.

Lead Counsel respectfully refers the Court to Lead Plaintiff's Memorandum of Law in Support of the Settlements, in which Lead Plaintiff explains the significant risks that faced Plaintiffs with respect to establishing each of the Settling Defendants' liability; establishing

damages against the Settling Defendants; and establishing the element of loss causation with respect to Plaintiffs' claims. *See* Memorandum in Support of Settlements at 20-23. Each of these potential risks was carefully weighed by Lead Plaintiff and Lead Counsel as the litigation proceeded, and in conjunction with the negotiations with the Settling Defendants.

In light of the risks present in this litigation, the prospects of any recovery, let alone a large recovery, were hardly assured. Critical issues included whether Plaintiffs could demonstrate loss causation for the Class' bond and stock claims; whether and to what extend the decline in the price of WorldCom stock and bonds could be attributed to misconduct of Defendants (who were not the issuer of the securities purchased by Class members); and all of the proportionate fault determinations that a jury would have to make with respect to the Section 10(b) claims in the case. Moreover, Plaintiffs needed to be cognizant of the judgment reductions that might have arisen from proportionate liability findings that a jury might have found with respect to the earlier settling Citigroup Defendants.

As a result, the risks of non-payment for Plaintiffs' Counsel, who agreed to prosecute this Action solely on a contingency basis, were significant from the outset of the Action and throughout the case.

(d) Quality of Representation

The fourth criterion for evaluating the fee request is the quality of the representation of the Class. Here, through the many letters, filings and conferences with this Court, the numerous briefings and arguments on pre-trial and discovery motions, and Lead Counsel's presentation of the case at trial against Andersen, the Court has witnessed first-hand the caliber of services rendered by Lead Counsel in prosecuting this Action. The Court has also seen the recoveries achieved in the settlement with the Citigroup Defendants in mid-2004, and this year, within days and weeks of the trial of the Action, with each of the Underwriter Defendants, and then by

reviving the Director Defendant settlement (including Roberts, who was required to pay $4.5 million from his own pocket), and finally with Andersen after five weeks of trial.

The standing and prior experience of plaintiffs' counsel, as well as opposing counsel, are also relevant in determining fair compensation. *In re Union Carbide Corp. Consumer Products Bus. Sec. Litig.*, 724 F. Supp. 160, 165 (S.D.N.Y. 1989). Here, the firm resumes of Lead Counsel have previously been submitted to the Court, which demonstrate the background and experience of the Lead Counsel firms, and the numerous firms representing defendants were all well-qualified and resourceful in their defense of the case.

(e) The Results Achieved Justify the Requested Fee

The second wave of settlements reached in this case provides the Class with an all-cash recovery of $3.553 billion – on top of the earlier $2.575 billion recovered from the Citigroup Defendants.[17] The total recovery achieved is the highest in the history of federal securities class action litigation. The results were achieved in the face of the many complexities and risks discussed above and in the Joint Declaration. Notwithstanding those risks and complexities, as stated in the Memorandum in Support of the Settlements, the recovery for purchasers of May 2000 and May 2001 bonds is over one-half the damages that Plaintiffs estimate could have been recovered in the case on the Section 11 claims, and a significant percentage of the likely recoverable damages on the Section 10(b) claims against the Director Defendants and Andersen, assuming plaintiffs prevailed on liability.

[17] The ultimate amount obtained for the Class also now includes proceeds from the recent settlements with Ebbers and Sullivan, which were painstakingly negotiated by Lead Counsel, through which the Class will be getting the vast majority of Ebbers' assets and all of the net proceeds from the sale of Sullivan's mansion, from which Lead Counsel has agreed not to seek any fee. *See* Joint Decl. ¶ 94. These bring the total amount recovered to more than $3.558 billion and an estimated $30 million or more from the sale of the Ebbers and Sullivan assets.

Moreover, the financial ability of the Director Defendants and Andersen (as well as the Executive Defendants) made obtaining any greater recovery from them highly unlikely. Lead Plaintiff and Lead Counsel reviewed the financial information they required from the Director Defendants and Andersen, and the limit of insurance available from the Director Defendants. Joint Decl. ¶¶ 22, 23, 25. Lead Plaintiff and Lead Counsel required that the agreement with the Director Defendants provide for 20% of net worth to be paid collectively from the pockets of the Director Defendants – who had cumulatively lost more than $300 million in the value of their own WorldCom stock. Joint Decl. ¶ 35. Based on their review and analysis of the Andersen financial information, Lead Plaintiff and Lead Counsel determined that $65 million in cash was a significant percentage of Andersen's remaining net worth, and further included other conditions to protect the Class in the event that Andersen either can make payments to its former partners, or becomes involved in a bankruptcy proceeding. Joint Decl. ¶ 36. And, of course, the settlements reached with the Executive Directors resulted in the Class obtaining the recovery of most of the assets of Ebbers and Sullivan, while Myers and Yates are impecunious.

Given these factors, the Settlements represent truly excellent results.

(f) Public Policy Considerations Support the Requested Fee

As this Court noted, the PSLRA favors the appointment of institutional plaintiffs, like Lead Plaintiff here, as lead plaintiffs. Citigroup Settlement Opinion at *19. This Court highlighted Lead Plaintiff's experience as lead plaintiff in complex securities actions and its negotiation of the detailed Retainer Agreement that benefited the Class. *Id.* Further, the Court stated that where "Lead Plaintiff has conscientiously supervised the work of Lead Counsel and gives its endorsement to the fee request, which adheres in all particulars to the retainer agreement, … the requested fee is entitled to a presumption of reasonableness." *Id.* All of these factors were "substantial public policy reasons supporting approval of this award." *Id.*

The same public policy considerations are present concerning the instant Fee and Expense Application. Lead Plaintiff has been diligent in its supervision of the prosecution of this case by Lead Counsel, which included direct observations of Lead Counsel's negotiations with the Settling Defendants, the mock jury exercises conducted by Lead Counsel, and Lead Counsel's presentation of the case against Andersen at trial. *See* Lead Plaintiff Decl ¶¶ 2, 3, 6, 8; Joint Decl. ¶¶ 16, 101. Lead Plaintiff has similarly been diligent in reviewing the time and expense records of Lead Counsel, and has given its endorsement of the Fee and Expense Application. Lead Plaintiff Decl. ¶¶ 6, 14, 15; Joint Decl. ¶¶ 79, 96.

Moreover, private lawsuits, such as this, serve to further the objective of the federal securities laws to protect investors and consumers against fraud and other deceptive practices. *Eltman v. Grandma Lee's, Inc.,* No. 82 Civ 1912, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986). The Second Circuit 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). As a practical matter, those lawsuits can be maintained only if competent counsel can be obtained to prosecute them. This will occur if courts award reasonable and adequate compensation for their services where successful results are achieved. As former Chief Judge Brieant stated in *In re Union Carbide*,

> [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.

724 F. Supp. at 169.

For the vast majority of Class members, this class action was their only hope of obtaining compensation for the losses they suffered as a result of the WorldCom fraud. A class action was the most efficient manner in which to prosecute the claims of Class members. 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." *Del Global,* 186 F. Supp. 2d at 374.

3. The Lodestar Cross-Check

The Second Circuit has encouraged the practice of performing a lodestar "cross-check" on the reasonableness of a fee award based on the percentage approach. The lodestar is calculated by multiplying the number of hours expended on the entire litigation by a particular attorney by his or her current hourly rate. The hourly billing rate to be applied is the hourly rate that is normally charged in the community where the counsel practices, *i.e.*, the "market rate." *See Blum*, 465 U.S. at 895; *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983) (Brennan, J., concurring in part, dissenting in part) ("market standards should prevail"); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) ("[t]he 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation'" (citing *Blum*, 465 U.S. at 896 n.11)). In addition, the Supreme Court and other courts have held that the use of *current* rates is proper since such rates more adequately compensate for inflation and loss of use of funds. *Missouri v. Jenkins*, 491 U.S. 274, 283-284 (1989); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1153 (2d Cir. 1983) (use of current rates appropriate where services were provided within two to three years of fee application).

Here, as noted above, Lead Counsel and the Assisting Firms are not actually using their current rates but, rather, have limited their rates to their 2004 levels, pursuant to an agreement with Lead Plaintiff. Thus, notwithstanding that Lead Counsel and the Assisting Firms have expended over 43,000 hours prosecuting this case in 2005, including thousands of hours expended during the trial of the case against Andersen, and further undertaking the critical tasks of

overseeing and briefing of the appeals from the Citigroup Settlement to the Second Circuit Court of Appeals (for which Lead Plaintiff-Appellee's brief was filed July 27, 2005), Lead Counsel has continued to utilize the 2004 rates of Class Counsel in calculating the "lodestar" for the services provided to the Class in this case.

The lodestar here, through June 30, 2005, was $83.2 million.[18] This represents over 277,800 hours expended by attorneys and paralegals – a prodigious effort – during the three years of nearly non-stop litigation in this case. Plaintiffs' Counsel compiled the hours reported from contemporaneous time records maintained by each attorney and paraprofessional affiliated with the firms that participated in the Action. *See* Joint Decl. ¶ 88.

In negotiating the Retainer Agreement for this Action, Lead Plaintiff recognized and, to an extent, quantified the well-established principle in this Circuit that, when considering the lodestar check, a court may apply a multiplier to compensate counsel for contingency risk and quality of representation. *See In re "Agent Orange" Product Liab. Litig.*, 818 F.2d at 234-36. In the Retainer Agreement, the parties determined that the fee would be based primarily on the percentage method, but "cross-checked" against counsel's collective lodestar such that Lead Counsel could not seek any fee in excess of a five times multiple of the collective lodestar, and that Lead Plaintiff retained the discretion to limit any fee request to a four times multiple of the

[18] *See* Joint Decl. ¶ 87 & Exhibit 5. This is the time expended by Plaintiffs' Counsel through June 30, 2005, as contained within the reports that Lead Counsel sent to Lead Plaintiff. As the Joint Declaration further makes clear, the hourly rates utilized to calculate the lodestar for permanent attorneys and paraprofessional at the firms, as well as the contract attorneys and professionals who were employed specifically for this case, are consistent with rates utilized in the plaintiffs' securities law class action bar in 2004. Joint Decl. ¶ 79. Such rates necessarily reflect the reputation, experience and success records of Plaintiffs' Counsel. Indeed, if one assumes that Class Counsel raised their rates by just 5% in 2005 (which, under *Missouri v. Jenkins*, would apply to all of the time expended on the case, not just the time expended in 2005), the lodestar would be 5% more than shown in Exhibit 5 to the Joint Declaration, and the resulting lodestar multiple would be approximately 3.8, rather than the 4.0 multiple based on the firms' 2004 rates.

collective lodestar. This level of negotiation was undertaken in contemplation of the significant contingency risk present in this Action from inception, but also mindful that Lead Plaintiff (and this Court) would not countenance a fee that could be seen as a "windfall" to Lead Counsel and the other approved assisting counsel.

Courts in this Circuit have often approved fee awards representing multipliers of 3 or greater.[19] In *Visa*, 396 F.3d at 122-24, the Court of Appeals for this Circuit recently affirmed a 6.5% percentage-based fee awarded on the $3.4 billion in settlements achieved by counsel, which constituted a 3.5 lodestar multiple. Here, based on the collective lodestar of Plaintiffs' Counsel through June 30, 2005 (calculated at 2004 rates), the lodestar multiple that equates to the fee determined by the Retainer Agreement's fee grid is 4.0, which is at the low point of the four to five times multiple that served as a cap for any fee request under the terms of the Retainer Agreement, and is well within the range of multiples allowed by courts generally in this Circuit. Thus, the "cross-check" confirms the reasonableness of the percentage sought here.

B. Plaintiffs' Counsel Should Be Reimbursed For Expenses Reasonably Incurred In Connection With This Action

Reimbursement of expenses to counsel to create a common fund is appropriate. *See In re Arakis Energy Corp., Sec. Litig.*, No. 95 CV 3431, 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001) ("Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course"); *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 842 F. Supp. 733, 746 (S.D.N.Y. 1994); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily

[19] *See In re NASDAQ*, 187 F.R.D. at 489 (Judge Sweet approving fee representing 14% of $1.027 billion settlement representing a multiplier of 3.97, and noting that lodestar multiples of between 3 and 4.5 are common); *Del Global*, 186 F.Supp.2d at 371 (approving 33% of the recovery representing a multiplier of 4.65).

charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients") (citation omitted).

The Joint Declaration ¶¶ 98, 100 and Exhibit 5 thereto summarizes that Lead Counsel and the law firms that assisted in this Action incurred $7,741,292.09 in "reimbursable" expenses on behalf of the Class in the prosecution of the Action.[20] These consist of the amounts paid by the firms ($5,389,994.17) as shown on Exhibit 5, plus the amount still owing from invoices to be paid from the Litigation Fund ($2,351,297.92).

Such expenses were essential to the successful prosecution and resolution of this Action. Moreover, the NYSCRF's staff reviewed the many reports submitted by Lead Counsel, and significant additional information or documentation it believed necessary to evaluate the reports.[21]

Some of the expenses for which counsel seek reimbursement were paid out of a Litigation Fund contributed to by Lead Counsel and certain of the assisting firms, and maintained by Barrack Rodos & Bacine. A full accounting of the payments to and expenditures by the Litigation Fund is set forth in the Exhibit 6 to the Joint Declaration, and Lead Counsel is prepared to provide any additional documentation requested by the Court.

---

[20] Pursuant to the Retainer Agreement, certain expenses that counsel incurred in prosecution of the case are either capped or not reimbursable. Joint Decl. ¶ 102. Lead Plaintiff and Lead Counsel have carefully reviewed the expenses for which reimbursement is being requested to ensure that the expenses are allowed under the terms of the Retainer Agreement, and that they are not duplicative of the expenses for which Lead Counsel sought reimbursement in connection with the Citigroup Settlement. Joint Decl. ¶ 80. Lead Counsel further notes that because of appeals from approval of the Citigroup Settlement, no part of the $5 million Litigation Fund allowed by the Court's orders of November 12, 2004 was ever funded and, therefore, Lead Counsel did not have the benefit of such a Litigation Fund for prosecution of the remainder of the case. Joint Decl. ¶ 95.

[21] As noted earlier, the Retainer Agreement provides for certain caps on expenses (*e.g.*, caps on hotel charges – which are $177 to $208 per night for a Manhattan hotel room, depending on the season; per diem allowances for out-of-town travel, and a $0.10 per page cap on in-house copying rates). Such caps were enforced strictly with respect to the expense reimbursement application.

As noted in the Lead Plaintiff Declaration (¶¶ 4, 6) and Joint Declaration of Lead Counsel (¶ 100), Plaintiffs have incurred considerable expenses for experts and consultants retained by Lead Counsel. Under the Retainer Agreement, Lead Counsel was required to obtain Lead Plaintiff's approval before retaining any expert or consultant, and did so. Moreover, when retaining such experts and consultants, Lead Counsel typically considered several potential candidates, and reviewed proposals from each of them. Lead Counsel thereafter made a recommendation to the Lead Plaintiff, which considered the recommendation and determined whether to approve the retention of the expert or consultant.

Plaintiffs' identified trial experts were: Harris Devor (auditing and accounting issues); James Miller (investment banking and due diligence); John Bise (telecommunications); David Stark (WorldCom's accounting computer programs); and Blaine Nye (damages). Joint Decl. ¶ 101. All except Bise testified at the trial. *Id*. Other consultants were retained by Lead Counsel, with Lead Plaintiff's consent, to assist in other aspects of the litigation but were not retained to provide expert testimony. Such consultants substantially assisted in matters pertaining, *inter alia*, to Lead Counsel's discovery of electronic documents, certain due diligence issues, the mock jury presentations, providing trial exhibits and demonstratives, and the like. Their invoices, as paid through June 30, 2005, are contained within the summary of the Litigation Fund payments, attached (in redacted form with respect to experts and consultants) as Exhibit 6 to the Joint Declaration.

As noted above, there are still expenses to be paid to various vendors, experts and consultants from the Litigation Fund. After a review of the outstanding invoices (compared to the balance remaining in the Fund from the assessment payments made by Lead Counsel and the

Assisting Firms), Lead Plaintiff has authorized Lead Counsel to request reimbursement in the amount of $2,351,297.92 for such expenses still to be paid by Class Counsel.[22]

There is one other category of expenses for which Lead Counsel seeks payment in the present application.[23] Pursuant to the PSLRA, Lead Plaintiff NYSCRF is entitled to reimbursement of its reasonable expenses incurred in connection with this case. *See* 15 U.S.C. § 78u-4(a)(4). As stated in the Lead Plaintiff Decl. (¶ 16), NYSCRF calculated the expenses that it incurred in connection with the litigation (not including any charge for the time of members of the Comptroller's staff) since the time of Lead Counsel's initial request for reimbursement in connection with the Citigroup Settlement. Such expenses, which total $11,063.54, include travel and meals (as allowed under the New York State Management Employees Guidelines), and other costs NYSCRF incurred as set forth in Exhibit A to the Lead Plaintiff Declaration.

Lead Counsel respectfully submits that all of the foregoing reimbursement requests are appropriate, fair and reasonable, and should be approved, either in the amounts submitted herein or as modified by Lead Counsel, with the approval of Lead Plaintiff, prior to the final hearing on the request.

---

[22] Lead Plaintiff and Lead Counsel have agreed that, with the Court's permission, this request for reimbursement may be modified for additional payments for expenses made or verified by plaintiffs' counsel after June 30, 2005, assuming that such expenses are reviewed and approved by Lead Plaintiff for inclusion in the application. Joint Decl. ¶ 104. Whatever modifications may be sought, however, it is clear that the application for reimbursement of expenses is, and will remain, well within the upper limit of $12,500,000 contained in the Notice (Exhibit 4 at p.4). *Id.* ¶ 106.

[23] Lead Counsel anticipates seeking a payment of Administrative Expenses for services provided, and expenses incurred, by The Garden City Group for its notice and claims administration work since the fee and expense application submitted on behalf of GCG at the time of the Citigroup Settlement. Joint Decl. ¶ 107. However, neither Lead Plaintiff, Lead Counsel nor GCG are prepared, at this time, to make and/or approve such a request, and Lead Counsel respectfully requests permission to submit the GCG portion of the expense application with or before Lead Counsel's reply submissions on September 2, 2005. *Id.*

III. CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests this Court: (i) approve Lead Counsel's applications for attorneys' fees; and (ii) approve Lead Counsel's application for reimbursement of expenses, as may be modified prior to the Hearing on September 9, 2005.

Dated: New York, New York
July 29, 2005

Respectfully Submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

Max W. Berger (MB-5010)
John P. Coffey (JC-3832)
Steven B. Singer (SS-5212)
Chad Johnson (CJ-3395)
Beata Gocyk-Farber (BGF-5420)
Jennifer L. Edlind (JE-9138)
John C. Browne (JB-0391)
David R. Hassel (DH-0113)
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 (RC-3858)
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.