UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLDCOM, INC. ERISA LITIGATION	:	MASTER FILE 02 Civ. 4816(DLC)
This Document Relates to:	:	
ALL ACTIONS	:	<u>OPINION & ORDER</u>

Appearances:

For Lead Plaintiffs:
Lynn Lincoln Sarko
Gary A. Gotto
Keller, Rohrback, LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101

Jeffrey Lewis
Lewis & Feinberg, P.C.
436 14th Street, Suite 1505
Oakland, California 94612

Edwin J. Mills
Stull, Stull & Brody
6 East 45th Street
New York, New York 10017

For Emanuele Plaintiffs:
A.J. De Bartolomeo
Girard Gibbs & De Bartolomeo LLP
601 California Street
San Francisco, California 94108

Patrick J. Stueve
Stueve Siegel Hanson Woody LLP
330 West 47th Street, Suite 250
Kansas City, Missouri 64112

For Lead Plaintiff Steven Vivien
and Plaintiff Edward Prince:
Jeffrey Lewis
Lewis & Feinberg, P.C.
436 14th Street, Suite 1505
Oakland, California 94612

Robert Izard
Schatz & Nobel, P.C.
330 Main Street
Hartford, CT 06106

James M. Finberg
Lieff Cabraser Heimann & Bernstein LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111

Mary Ellen Signorille
AARP Foundation Litigation
601 E Street, N.W.
Washington, D.C. 20049

For Defendant WorldCom, Inc. and MCI, Inc.:
Joseph Allerhand
Mark Jacoby
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153

For Defendant Bernard J. Ebbers:
David F. Wertheimer
Hogan & Hartson L.L.P.
875 Third Avenue
New York, New York 10022

For Defendant Scott D. Sullivan:
Irvin B. Nathan
Julie B. Rottenberg
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004

For Defendant Stiles A. Kellett, Jr.:
Stuart F. Pierson
Troutman Sanders LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004

For Defendant Bert C. Roberts, Jr.:
George Ridge
Cooper Ridge & Latinberg
200 West Forsyth Street
Jacksonville, Florida 32202

For Defendant Sandra Faircloth:
William A. Maher
William F. Dahill
Wollmuth Maher & Deutsch LLP
500 Fifth Avenue, 12th Floor
New York, New York 10110

For Defendants John Porter and

Carl J. Aycock:
Pamela Rogers Chepiga
Allen & Overy
1221 Avenue of the Americas
New York, New York 10020

For Defendant Pamela Titus:
Ron Safer
Brenna Binns
Schiff Hardin L.L.P.
6600 Sears Tower
Chicago, Illinois 60606

For Defendant Dona Miller:
Frank E. Pasquesi
Robert H. Griffith
Ungaretti & Harris LLP
3500 Three First National Plaza
Chicago, Illinois 60602

For Defendant Judith Areen:
Brendan V. Sullivan
Michael S. Sundermeyer
Christopher N. Manning
Karyn A. Temple
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005

For Defendants Gordon Macklin and
Lawrence Tucker:
Thomas J. Kavaler
David Janusweski
Jessica B. Liberman
Cahill Gordon & Reindel LLP
80 Pine Street
New York, New York 10005

For Defendant James C. Allen:
Richard C. Schoenstein
Paul, Hastings, Janofsky & Walker LLP
75 East 55th Street
New York, New York 10022

For Defendant Dennis W. Sickle:
Robert M. Goldich
Jonathan Wetchler
Wolf, Block, Schorr and Solis-Cohen
1650 Arch Street, 22nd Floor
Philadelphia, PA 19103

For Defendant Ray Helms:
Brian Cogan
Stroock & Stroock & Lavan LLP

180 Maiden Lane
New York, New York 10038

For Defendant Clifford L. Alexander, Jr.:
Lawrence Levinson
Piper Rudnick LLP
1200 19th Street, N.W.
Washington, D.C. 20036

For Defendant Max Bobbitt:
William F. Boyer
Sharp & Associates
2020 K Street, N.W.
Washington, D.C. 20006

For Defendant Francesco Galesi:
Geoffrey Harper
Fish & Richardson P.C.
1717 Main Street
Dallas, Texas 75201

For Defendant the Estate of John W. Sidgmore:
Alan Friedman
Marjorie Sheldon
Deborah Grubman
Kramer Levin Naftalis & Franklin
919 Third Avenue
New York, New York 10022

For Defendant Stephanie Scott:
Frank W. Trapp
Phelps Dunbar LLP
111 East Capital Street
Suite 600
Jackson, MS 23066

For Defendant Merrill Lynch Trust
Company FSB:
William J. Kilberg
Miguel A. Estrada
Paul Blankenstein
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

For Underwriter National Union Insurance Company:
Ronald H. Alenstein
D'Amato & Lynch
70 Pine Street
New York, New York 10270

For Underwriter Gulf Insurance Company:
Ivan J. Dolowich
One State Street Plaza

9th Floor
New York, New York 10004

For Underwriter Continental Casualty Company:
John W. Duchelle
Ross, Dixon & Bell, L.L.P.
2001 K Street, N.W.
Washington, D.C. 20005

For Underwriter Twin City Fire Insurance Company:
Wayne Borgeest
Kaufman Borgeest & Ryan LLP
99 Park Avenue
New York, New York 10016

DENISE COTE, District Judge:

Plaintiffs petition for court approval of a partial settlement and bar order, as well as an award of attorneys' fees and expenses in this class action brought on behalf of employees of WorldCom, Inc. ("WorldCom") who had invested retirement funds in WorldCom stock through a WorldCom 401(k) plan ("Plan").[1] For the reasons discussed below, the settlement and bar order are approved, and partial attorneys' fees and costs are awarded.

Background

On June 25, 2002, WorldCom announced a massive restatement of its financials. Approximately one month later, on July 21, it entered bankruptcy. Lawsuits alleging, inter alia, violations of the federal securities laws and of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 et seq., preceded and followed these events. The first ERISA class action was filed in this district on June 21, 2002. The Judicial

[1] The plaintiffs will also be asking for approval of a plan of distribution of the settlement amount based on supplemental submissions.

Panel on Multi-District Litigation ("MDL Panel") has transferred the civil litigation concerning WorldCom pending in federal courts to this Court, where it has been consolidated into the Securities Litigation[2] and, on September 18, 2002, the ERISA Litigation.

The ERISA Litigation is brought on behalf of participants in the Plan and certain predecessor plans of companies that merged with WorldCom for whose accounts the plans held shares of WorldCom stock at any time from "no later than" September 14, 1998 to the present.[3] The ERISA Litgation plaintiffs chose this class period because they allege that certain defendants knew or should have known by at least September 1998 that investment in WorldCom stock under the Plan was "inappropriate or imprudent."

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[2] The Securities Litigation has been described in many prior Opinions, including In re WorldCom, Inc. Sec. Litig., 294 F. Supp. 2d 392 (S.D.N.Y. 2003) (deciding motions to dismiss the consolidated class action complaint based on federal law claims); In re WorldCom, Inc. Sec. Litig., 219 F.R.D. 267 (S.D.N.Y. 2003) (certifying that consolidated class action); In re WorldCom, Inc. Sec. Litig., 294 F. Supp. 2d 431 (S.D.N.Y. 2003)(deciding a motion to dismiss claims in an individual action which had been consolidated for pre-trial purposes with the consolidated class action).

[3] The Plan provided a number of different funds in which participants could choose to invest their account balances, including a money market fund, a bond fund, various equity funds, and one or more funds invested in WorldCom stock. As described in the Summary Plan Descriptions, "[t]he purpose of the Plan is to encourage eligible employees to save on a regular basis, by salary deferral, and to provide [employees] an opportunity to become shareholders of the Company and thereby to furnish the incentives inherent in employee stock ownership." Under the Plan, participants had discretion to allocate their investments among the alternatives offered, and to reduce or eliminate their investments in WorldCom stock at any time.

An Order of November 18, 2002 appointed Steven Vivien, Gail M. Grenier, and John T. Alexander as Lead Plaintiffs. The November 18 Order named Keller Rohrback L.L.P. as Lead Counsel; Elizabeth J. Cabraser of Lieff Cabraser and Jeffrey Lewis of Lewis & Feinberg, P.C. as Steering Committee Counsel; and Stull Stull & Brody as Local Counsel (collectively "Appointed Counsel"). The parties were required to commence settlement discussions under the supervision of the Honorable Michael Dolinger, United States Magistrate Judge, and those meetings began in July 2003.

The first consolidated class action complaint in the ERISA Litigation was filed on December 20, 2002. On January 29, 2003, plaintiffs' request for permission to file an amended consolidated complaint (the "Complaint") was granted. The motions to dismiss addressed to this pleading were granted in part on June 17, 2003. See In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d 745 (S.D.N.Y. 2003). The surviving claims were brought against WorldCom, which served as the Plan sponsor and administrator, Merrill Lynch which served as the Plan Trustee, Bernard J. Ebbers ("Ebbers"), WorldCom's President and Chief Executive Officer, Scott Sullivan ("Sullivan"), WorldCom's Chief Financial Officer, and Dona Miller ("Miller"), WorldCom's Employee Benefits Director, for breaches of fiduciary duty, including the duty of prudence, duty to provide complete and accurate information, and the duty to monitor.[4]

[4] The motions to dismiss filed by Arthur Andersen LLP ("Andersen") as well as by the "Director Defendants," namely,

On July 25 and September 12, plaintiffs filed a second and then a third amended consolidated class action complaint ("Amended Complaint") which added additional defendants and reasserted claims against certain previously dismissed defendants. The Amended Complaint seeks recovery for WorldCom employees who invested in WorldCom stock through the Plan and the several predecessor plans that the Plan had absorbed and alleges three claims pursuant to ERISA § 502(a)(2) for alleged breaches of fiduciary duty. The Amended Complaint asserts that Merrill Lynch as well as Ebbers, Sullivan, Sickle (collectively, the "Officer Defendants"), and Miller, Pamela Titus, Ray Helms, Stephanie Scott, Sandra Faircloth (the "Employee Defendants"), Roberts, and Macklin breached the duty of prudence as required by ERISA § 404(a) by continuing to offer WorldCom stock as an investment alternative within the WorldCom ERISA plan when they knew or should have known that such an investment was imprudent. The Amended Complaint asserts that Ebbers, Sullivan, and the Directors Defendants failed to monitor as required by ERISA § 404(a) the fiduciary performance by ERISA plan fiduciaries appointed by those directors. Finally, the Amended Complaint claims that WorldCom, Merill Lynch, the Officer Defendants, and

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Clifford L. Alexander, James C. Allen, Judith Areen, Carl J. Aycock, Max E. Bobbitt, Francesco Galesi, Stiles A. Kellett, Jr., Gordon S. Macklin ("Macklin"), John A. Porter, Bert C. Roberts ("Roberts"), John W. Sidgmore, and Lawrence C. Tucker, were granted. The June 17 Opinion also granted the motions to dismiss by WorldCom employees Dennis W. Sickle ("Sickle"), Senior Vice-President Human Resources; Tracy McAden, Employee Benefits Manager; Ron Levitt, Director, Taxation and Cash Management; and Margaret Barry, Manager, Taxation and Cash Management.

the Employee Defendants failed to provide ERISA plan participants with complete and accurate information regarding WorldCom stock.

On October 14, 2003, the Employee Defendants, the Director Defendants, and Sickle moved to dismiss the Amended Complaint against them in its entirety. This motion has been sub judice since November 14, 2003, but at the request of the parties has been unaddressed because of their settlement discussions.

Fact discovery in the Securities Litigation and the ERISA Litigation were coordinated. Document discovery was substantially completed in the Fall of 2003. Fact discovery in the ERISA Litigation closed on July 23, 2004. Meanwhile, on April 20, 2004, WorldCom emerged from bankruptcy as MCI, Inc. ("MCI").

Recently, an ERISA class was certified under Rule 23(b)(1)(B), Fed. R. Civ. P. In re WorldCom, Inc. ERISA Litigation, No. 02 Civ. 4816 (DLC), 2004 WL 2211664 (S.D.N.Y. Oct. 4, 2004). The Opinion certifying the class resolved the sole challenge to certification, rejecting Merrill Lynch's attack on the definition of the class. Id. at *3.

Summary judgment practice in the ERISA Litigation will conclude on October 29. The ERISA Litigation trial against a non-settling defendant -- Merrill Lynch -- is scheduled to begin on March 14, 2005.[5]

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[5] A second defendant, Sullivan, has not joined this settlement. Civil litigation against Sullivan has been stayed due to criminal proceedings against him.

Settlement Terms

On June 30, 2004, the named plaintiffs in the ERISA Litigation and all of the defendants except Merrill Lynch and Sullivan (the "Settling Defendants" and "Non-Settling Defendants" respectively) as well as the issuers of certain WorldCom insurance policies[6] executed a settlement agreement (the "Agreement"). The Agreement establishes a fund of $47.15 million in cash to be distributed to the Class Members (the "Settlement Fund"). The money in the Settlement Fund consists of (a) $46,750,000 from fiduciary liability insurance policies and WorldCom/MCI; and (b) $400,000 from Ebbers. The Agreement also provides for Ebbers to execute a promissory note that requires him to make additional payments to the Settlement Fund of at least $450,000 and up to $4 million.[7] Of the $46,750,000 from the insurers and WorldCom/MCI, National Union will contribute $10,000,000 less those defense costs that it disbursed under its policy through the date of the establishment of the Settlement

[6] The insurance companies are National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), Twin City Fire Insurance Company ("Twin City"), Gulf Insurance Company ("Gulf"), and Continental Casualty Company ("Continental"). The excess carriers Gulf, Continental, and Twin City contend that they properly rescinded their WorldCom insurance policies and that those policies are not in force and effect. The primary carrier, National Union, initially agreed to cover only "non-culpable" parties.

[7] The amount of money Ebbers will ultimately provide under the $4 million promissory note depends on the degree to which Ebbers repays a $408 million loan from WorldCom dating from April 2002. Under the terms of the promissory note, Ebbers is to pay to the Settlement Fund an amount equal to 1% of the amounts he pays in the future on indebtedness he owes to WorldCom. The aggregate minimum of all payments to the Settlement Fund under the promissory note is $450,000.

Fund. Continental and Gulf will each pay $7,000,000, and Twin City will contribute $4,000,000.[8] WorldCom/MCI's portion of the Settlement Fund is $46,750,000 less the sum of the amounts contributed by the aforementioned insurers, which amounts to a minimum contribution of $18,750,000. The Agreement states that the $47.15 million Settlement Fund will be reduced by, among other things, attorney fees. Lead Counsel represented in the notice to the class that it would seek no more than 20% of the Settlement Fund in attorney's fees plus certain other litigation expenses.

The net Settlement Fund will be allocated to the ERISA class members based on their proportionate share of losses in the Plan. The Agreement also enjoins Ebbers and Sickle from acting as named fiduciaries of any ERISA plan, or exercising discretionary authority with respect to any ERISA plan, for a period of five years. In addition, Titus has agreed to attend certain employee benefits education programs, and Miller has agreed also to attend such programs if within the next five years she takes employment in which she has duties with regard to any employee benefit plan. The Agreement also resolves certain claims filed against WorldCom in its bankruptcy proceeding as well as a dispute that exists with respect to the existence and/or extent of coverage for the claims asserted in the ERISA Litigation under certain insurance policies.

[8] National Union's policy provides primary coverage of up to $10 million. The Continental and Gulf policies each provide $15 million of excess coverage. Twin City provides $10 million of excess coverage.

Furthermore, the Agreement contains a bar order which prevents the Non-Settling Defendants from bringing claims for contribution and indemnity against the Settling Defendants while at the same time it provides the Non-Settling Defendants a right to a reduction in the amount of any judgment entered against them. The bar order also prevents anyone with notice of the Agreement from bringing any of the settled claims in any form against any settling party and insurers providing funds for the settlement.

Notice to the Class

On July 21, the Court issued Findings and an Order certifying a class for partial settlement purposes and preliminarily approving the proposed settlement. The July 21 Order found that the proposed Agreement resulted from extensive arm's-length negotiations under the auspices and with the active participation of the Judge Dolinger; the Agreement was executed only after Lead Counsel conducted pre-settlement discovery; Lead Counsel has concluded that the Agreement is fair, reasonable, and adequate; and the Agreement is sufficiently fair, reasonable, and adequate to warrant sending notice of the ERISA Litigation and the Agreement to the Settlement Class. The July 21 Order found that the Class Notice fairly and adequately (a) describes the terms and effect of this Agreement, (b) gives notice to the settlement class of the time and place of the Fairness Hearing on October 15, and (c) describes how the recipients of the Class Notice may object to the approval of the Agreement. The July 21

Order found that the Bar Order Notice fairly and adequately (a) describes the terms and effect of the Agreement and of the bar order; (b) gives notice of the time and place of the hearing of the motion for approval of the Agreement and of the bar order; and (c) describes how the recipients of the Bar Order Notice may object to approval of the Agreement and to entry of the bar order.

Pursuant to the July 21 Order, Lead Counsel distributed over 89,000 Class Notices via first-class mail to each person within the definition of the settlement class as well as to all counsel known by Lead Counsel to represent a member of the settlement class. In addition, the Class Notice was published on a website, and in the Wall Street Journal on August 6.

Objections to the Agreement were due September 15. On September 30, Lead Counsel submitted a memorandum summarizing and responding to all objections. In addition, motion practice on Merrill Lynch's and Sullivan's objections to the bar order and Agreement was fully submitted on September 15.

Merrill Lynch's Objection to the Bar Order

Merrill Lynch objected to the proposed bar order contained in the Agreement. It argued that the bar order may not allow the amount of any judgment entered against Merrill Lynch in this litigation to be reduced by the full amount of its right to contribution from defendants who have settled the litigation. Merrill Lynch's objection was rejected in an Opinion of October

13, 2004. See In re WorldCom, Inc. ERISA Litig., 02 Civ. 4816 (DLC), 2004 WL 2292362 (S.D.N.Y. Oct. 13, 2004).

The Reaction of the Class to the Notice of Settlement

Objections to the ERISA partial settlement have been made by fifteen class members: David Ryan Blackman, Dennis Sanchez, Juan Soto, Donald P. Theriot, Ralph A. Johnson ("Johnson"), George and Freya Auger, Bruce A. Custer, William Dickson, Byron Glenn Huff, Felix LaFontaine, Magdalene Schwing, Deana L. Bond,[9] Barbara McGuire, and Susan Mehl.[10] Their objections can be summarized as follows:

They object to the amount of the Agreement as too small; they claim that the settlement caps the recovery of some class members in a way that unfairly disadvantages those with larger losses; they object that WorldCom/MCI has paid too little, shifting the payments to its insurance companies and minimizing any impact on the company itself; they object to the size of the proposed award of attorney's fees and expenses and argue that counsel has not had an adequate incentive to press WorldCom/MCI for more money. They predict that Ebbers will not contribute the

[9] Ms. Bond does not object to the Agreement itself; rather, she states that she did not receive notice or documentation of the settlement even though she was a MCI/WorldCom employee from May 4, 1987 through June 28, 2002.

[10] The Department of Labor has not objected to the Agreement. According to the Agreement § 2.10, if there had remained an unresolved issue between the Department of Labor and any Settling Defendant, that Settling Defendant retained the right to "terminate [the Agreement] by written notice . . . ." No Settling Defendant has moved to terminate the Agreement.

$400,000 required by the Agreement or satisfy the promissory note of up to $4 million. They ask that WorldCom employees, specifically Miller and Titus, be prosecuted and required to contribute to the settlement from their own money. They ask that each of the WorldCom directors be required to liquidate all of their assets and contribute to the settlement. They complain of the current management of MCI, including the salaries of its current management team and its dividend practices. More than one objector has filed a proof of claim with the Bankruptcy Court and wants to opt out of the settlement to pursue that claim. They argue that those class members who went to the trouble of filing proofs of claim should receive more from the settlement.

The objectors speak with understandable passion. One particularly moving cri de coeur is the following:

> The settlement amount of 51 million dollars is ridiculous. . . . [T]here is nothing in this settlement that would come close to anything lost by employees and retirees. I do not understand why a settlement was even considered. WorldCom and its officers have robbed me of my 401k assets. . . . Please do not let MCI/WorldCom rob me again. WorldCom should have been dismantled and its assets used to settle claims. . . . My family and I have lost everything we had invested. This leaves a very dark future for us. At 65 years of age employment is impossible as is building another nest egg.

Another objector writes:

> I am not happy with, nor would I vote in favor of, the $47.15M recommended settlement. I do not feel that this will equitably resolve the losses in employee 401(k) accounts that have suffered due to the past administrators' ineffectiveness and inappropriate behaviors. Furthermore, I believe that the lack of consequences for some who are directly to blame for this blatant lack of fiduciary responsibility (Dona Miller and Pam Titus, specifically) is appalling. . . .

The Fairness Hearing

A fairness hearing was held on October 15. Lead Counsel, Local Counsel, counsel for plaintiffs in Emanuele v. WorldCom, No. 02 Civ. 8221 (DLC) ("Emanuele Counsel"), and counsel for Lead Plaintiff Steven Vivien and plaintiff Edward Prince in Vivien v. WorldCom, No. 02 Civ. 8220 (DLC) ("Vivien Counsel" and "Viven Action") addressed the Court. In addition, counsel for MCI, Merrill Lynch, the Director Defendants, Ebbers, Titus, Sickle, Ray Helms, and National Union made appearances and were given the opportunity to be heard. Two of the named plaintiffs, Stephen Vivien and Gail Grenier, attended the fairness hearing in support of the Agreement. One of the objectors, Johnson, attended part of the hearing and voiced his concerns.[11]

At the fairness hearing, Lead Counsel represented that the Bankruptcy Court authorized WorldCom to enter into the Agreement,[12] and that the Department of Labor had been given an opportunity to review the Agreement and object to it. The Department of Labor has made no objection.

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[11] Among Johnson's objections is a concern that the Agreement would extinguish his right to pursue claims against WorldCom in the Bankruptcy Court that were not connected to claims arising out of losses by the Plan -- such as claims for unpaid wages.

[12] An August 24, 2004 Order of the Bankruptcy Court approved the Agreement pursuant to Bankruptcy Rule 9019. The August 24 Order stated that "[t]he Settlement Agreement was entered into after good faith, arm's-length negotiations between and among the Settling Parties. The Settlement Agreement is for fair and reasonable consideration (including the consideration payable by [WorldCom/MCI]) and is within the range of reasonableness."

Judicial Approval of Class Action Settlements Under Rule 23(e)

Rule 23(e), Fed. R. Civ. P., mandates court approval of any settlement or dismissal of a class action. The standard to be applied in determining whether to approve a class action settlement is well established: the district court must "carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not a product of collusion." D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001) (citation omitted); see also Joel A. v. Giuliani, 218 F.3d 132, 138 (2d Cir. 2000). In so doing, the court must "eschew any rubber stamp approval" yet simultaneously "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d Cir. 1974). A proffered settlement that is "in large part negotiated prior to certification of the class" -- as occurred herein -- "is subject to a higher degree of scrutiny than is usual in assessing a settlement's fairness." County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1323 (2d Cir. 1990).

A district court determines a settlement's fairness "by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms." D'Amato, 236 F.3d at 85. The court should analyze the negotiating process in light of "the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves." Malchman v. Davis, 706 F.2d 426, 433 (2d Cir. 1983) (citation omitted). A court must ensure that the settlement resulted from "arm's-length negotiations" and that plaintiffs' counsel engaged in the discovery "necessary to effective representation of the class's interests." D'Amato, 236 F.3d at 85.

In evaluating the substantive fairness of a settlement, a district court must consider factors enumerated initially in Grinnell:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

D'Amato, 236 F.3d at 86 (citation omitted).

Finally, public policy favors settlement, especially in the case of class actions. "There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation." Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982).

There is no basis to find that this settlement is tainted by collusion. A respected and dedicated judicial officer presided over the lengthy discussions from which this settlement emerged. The parties ultimately agreed to accept his suggested amount for a cash settlement of $46,750,000 for all the parties before him except Ebbers. The settlement discussions began to bear fruit in the midst of intensive fact discovery. It was indisputably the result of arm's-length, protracted negotiations. Counsel on both sides are experienced in ERISA actions. The motion practice in this case shows that virtually every issue in this litigation has been and would continue to be seriously contested.

The settlement was reached despite significant hurdles and persistent denials of liability by certain of the defendants. Chief among the obstacles to settlement and a larger recovery for the class are complex questions about the extent to which the settling class could recover any money in the event of a favorable judgment due to WorldCom's bankruptcy, disputes over insurance coverage, and the relatively modest means of the Employee Defendants who were the hands-on fiduciaries.

Damages to the class are estimated to be between $150 to $600 million. These figures are derived from an assessment of several variables, including the date on which it is determined that WorldCom first breached its fiduciary duties, the nature of those fiduciary duties, and the losses suffered by the Plan as a result. There is, in addition, the general risk inherent in litigating complex claims such as these to their conclusion.

Of particular importance to any evaluation of a likelihood of recovery here is the fact that under WorldCom's Plan of Reorganization, the plaintiffs are entitled to either no recovery at all from WorldCom if their claim is subordinated to the claims of all other creditors, or a recovery of a cash payment of only 17.85% of the amount of the claim, plus 7.14 shares of MCI, Inc. stock for every $1,000 in claims. With MCI stock trading at approximately $14 per share at the time the Agreement was executed,[13] and not accounting for other risk factors, this cash payment translates to a recovery of between 17.85 and 28.35 cents on the dollar, or between $26.78 and $42.53 million of $150 million and between $107.1 and $170.1 million of $600 million. When various risk factors are added to this analysis, Lead Counsel estimates that its likelihood of recovery from WorldCom is properly valued at between $17 million and $67 million, with a midpoint of $42 million.

There is also substantial uncertainty surrounding the fiduciary liability insurance polices that WorldCom purchased to cover the Plan's fiduciaries. The face amounts of these policies provide $50 million in aggregate coverage, but are subject to reduction for costs of defense paid by the insurers. In this complex litigation in which many of the defendants have retained their own counsel, defense costs have already been and will continue to be substantial. Thus, while the $47.15 million Settlement Fund is nearly equivalent to the entirety of the face value of the insurance policies, even if a larger award were obtained at trial, it would not result in a larger recovery from the insurers because the proceeds of the insurance policies themselves would have been further depleted in the course of defending this action. Furthermore, certain of the issuers of these policies claim that they are not obligated to pay anything under the policies because they issued their policies based on fraudulent financial representations by WorldCom. If this

[13] As of the close of business on October 15, 2004, MCI stock was trading on the NASDAQ at $16.18 per share.

position prevailed, then those insurers would not have had to pay anything. As it is, the primary insurer has contributed its entire policy amount to the settlement, and the three other insurers (excess carriers) have contributed roughly half of their policies. WorldCom, with some help from Ebbers, has contributed the difference to create the $47.15 million Settlement Fund.

Those who have objected to the amount of the Settlement Fund are understandably upset that they will not be made whole. The Plan represented retirement savings for WorldCom employees who were entitled to the highest duty of care by Plan fiduciaries. They are innocent victims of a massive financial fraud conducted by the company's top management. It is fair to assume that most of these Plan participants could ill afford these losses and some sizeable number have lost through no fault of their own the financial security they worked hard to achieve. The amount of the Settlement Fund, even before it is reduced by attorney's fees, is at best about one-third or at worst less than 10% of the damages estimated by the plaintiffs. It must be remembered, however, that there are also other ongoing civil and criminal proceedings that address the activities leading to the demise of WorldCom which have already resulted and may result in additional damage awards to class members. For example, a $2.65 billion partial settlement was reached in the Securities Litigation last Spring and a fairness hearing is scheduled in that matter for November 5. Anyone who bought WorldCom securities during the class period encompassed by the consolidated class action in the Securities Litigation is entitled to share in that recovery.

Lead Counsel made clear at the fairness hearing that the Agreement does not affect the claims being pursued in the Securities Litigation and that the Plan will be filing a claim in the Securities Litigation partial settlement. Given the risk factors discussed above and the extensive arms length negotiations between the parties, I find the amount of the Settlement Fund fair, adequate, and reasonable.

Objections to the Agreement on the ground that it caps awards to class members reflect a misunderstanding of the allocation formula. The plan of allocation is based on the proportional share of the loss of each participant. The more a class member lost, the more that person will receive. Objections that individual defendants are not sufficiently punished by the Agreement are also somewhat addressed by the fact that Ebbers is obligated to contribute a substantial amount of his own money into the Settlement Fund. Ebbers has already paid his $400,000 contribution to the Settlement Fund, and the promissory note requiring him to provide from $450,000 up to $4 million of additional payments is a legally enforceable obligation to the ERISA class. Ebbers is also scheduled to stand trial shortly in this district on criminal charges that have been filed against him for his role in the WorldCom financial manipulations. As far as the Director Defendants are concerned, all claims against them were dismissed from the Complaint for the plaintiffs' failure to state a claim that they were in fact ERISA fiduciaries. See In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d at 760-61. Whether the plaintiffs' Amended Complaint would have succeeded in stating a claim against the Director Defendants or whether the plaintiffs can succeed in proving their liability is unknown.

The remaining objections do not raise impediments to approval of the Agreement. The current conduct of MCI management is beyond the purview of this Fairness Hearing. There is no opportunity under any Rule 23(b)(1)(B) class action to opt out and this ERISA action is properly certified under Rule 23(b)(1)(B). It is important to note that those Plan participants who have asked to opt out and to press forward with a claim in Bankruptcy Court would, even if that were possible, be faced with the same conundrum that faces the class: their claim may be worthless and would receive at best 17.78 cents on the dollar and 7.14 shares of MCI stock.[14] In sum, the objections by class members, which in the context of the size of the class and the notoriety of this litigation have been relatively few in number, do not alter the conclusion that the amount of the settlement and its terms are entitled to approval.

Attorney's Fees and Reimbursements

There have been four motions for awards of attorney's fees and expenses relating to various counsels' efforts in the ERISA Litigation. Apart from the general objections outlined above to the requested percentage of attorney's fees and expenses, there

[14] As for Johnson's concern expressed at the fairness hearing that the Agreement will prevent him from seeking redress for any non-Plan related claims he may have against WorldCom, the Agreement does not bar such claims.

has been no formal or more detailed opposition filed to these applications.

Lead Counsel, along with the rest of the Appointed Counsel in the ERISA Litigation, seek an aggregate fee of 18% of the cash component of the Settlement Fund or $8,487,000, for post-appointment services only, pursuant to Rule 23(h)(1), Fed. R. Civ. P. They also request a set aside of an additional 2% of the cash component of the Settlement Fund or $943,000, as a reserve for ongoing expenses and as a source for any fees awarded to counsel for pre-appointed services. Lead Counsel states that it alone has devoted nearly 17,000 hours of work to this matter since its appointment. Five attorneys at Keller Rohrback have each spent in excess of 1,000 hours on the ERISA Litigation during that period. Using the hours-times-rates calculation, the lodestar method, Lead Counsel's fee is approximately $5.89 million of the roughly $5.99 million requested by Appointed Counsel. The lodestar calculation includes work Appointed Counsel anticipate for implementing the Agreement and Plan of Allocation. A comparison of the percentage-based fee that they request with the total lodestar yields a multiplier of approximately 1.4.

Lead Counsel does not apply for pre-appointment fees. Lead Counsel and the other Appointed Counsel do, however, request reimbursement of all litigation expenses incurred to date in the amount of $1,013,287.04, of which $933,074.48 are costs incurred by Lead Counsel.[15] Appointed Counsel also request a set aside of $80,327.47 for the costs incurred by the notice administrator for the publication, printing, and mailing of the Agreement and Bar Order notices. In addition, Appointed Counsel request an additional $50,000 for estimated future costs associated with the notice. Lastly, Appointed Counsel request that the three named plaintiffs in the ERISA Litigation each receive a fee of $5,000.00.

Emanuele Counsel, which include Girard Gibbs & De Bartolomeo LLP and Stueve Siegel Hanson Woody LLP, have requested fees for their efforts in Emanuele v. WorldCom, No. 02 Civ. 8221 (DLC) ("Emanuele Action") prior to the appointment of Lead Counsel. The Emanuele Action was transferred from the District Court for the District of Columbia to this Court on October 8, 2002. In their moving papers and at the fairness hearing, Emanuele Counsel cited their successful efforts at securing an order requiring WorldCom to provide notice to all laid-off employees who received a severance offer package including a "General Release Agreement." The notice informed these employees that lawsuits were pending against WorldCom, including ERISA cases challenging the validity of the General Release.[16] In addition, the Emanule plaintiffs were the first parties to petition the MDL Panel to transfer all WorldCom ERISA litigation to a single federal

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[15] This request for litigation expenses includes expenses incurred by Local Counsel and Steering Committee Counsel prior to the appointment of Lead Counsel.

[16] Because Emanuele Counsel were named in that notice, they have received many inquiries from class members.

district.[17] Emanuele Counsel seek an award of $500,000 calculated under the lodestar method with a multiplier of 1.26, based only on time spent litigating substantive issues prior to the appointment of Lead Counsel, plus reimbursement of their related expenses in the amount of $26,529.00. This request does not include any time or expenses related to the pursuit of lead counsel status.

Vivien Counsel also seek an award of attorney's fees for their work prior to the transfer of their action to this Court. Vivien Counsel are a consortium of three law firms and AARP Foundation Litigation.[18] Vivien Counsel request a reimbursement of $5,533.48 in litigation expenses.[19] They ask for lodestar attorney's fees out of the Settlement Fund in the amount of $508,185.25. The Vivien Action was the first WorldCom ERISA action to be filed. It was filed in the Northern District of California on March 18, 2002, against WorldCom, Ebbers, and Sullivan. Vivien Counsel successfully resisted a motion to dismiss. See Vivien v. WorldCom, Inc., No. 02-01329 WHA, 2002 WL 31640557 (N.D. Cal. July 26, 2002).[20] Vivien Counsel assert that

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[17] Emanuele Counsel unsuccessfully petitioned the MDL Panel to transfer all ERISA actions to the District of Columbia.

[18] The three firms are Lewis, Feinberg, Renaker & Jackson, P.C., Schatz & Nobel, P.C., and Lieff Cabraser Heimann & Bernstein LLP.

[19] This request does not include the expenses incurred by Jeff Lewis and Elizabeth J. Cabraser, who seek payment of all of their expenses as Appointed Counsel.

[20] The Vivien Opinion found that there was personal jurisdiction over Ebbers and Sullivan and denied, in part, the motions to dismiss the ERISA claims pleaded against them.

they provided valuable services to the ERISA class by investigating the facts regarding WorldCom's finances and accounting, communicating with members of the class, obtaining the WorldCom insurance policies, providing the insurance carriers with notice of the pending claims, and moving, albeit unsuccessfully, for a lifting of the stay in Bankruptcy Court. Lead Counsel confirms that the information that Vivien Counsel collected and its legal research and work product were made available to Lead Counsel and utilized by Lead Counsel where helpful. Indeed, two of the legal theories in the Complaint mirror claims first filed in the Vivien Action. Since the Complaint filed in this Court named many more parties than were named in the Vivien Action, the legal issues presented to this Court extended significantly beyond those presented by the Vivien Action or addressed in the July 26, 2002 Opinion in the Vivien Action.

Local Counsel in the ERISA Litigation, Stull, Stull & Brody, has petitioned for attorney's fees under Rule 23(h)(1), Fed. R. Civ. P., for its services prior to the appointment of Lead Counsel on November 18, 2002, principally for work during the period of July 8 to September 27, 2002. Local Counsel filed an ERISA action in Mississippi, WorldCom's state of incorporation, and argued unsuccessfully before the MDL Panel that all ERISA cases be transferred to Mississippi. Local Counsel seeks $199,288.75 under the lodestar method for 457.5 hours of work before November 18, 2002.

It is well established that where an attorney creates a common fund from which members of a class are compensated for a common injury, the attorneys who created the fund are entitled to "a reasonable fee -- set by the court -- to be taken from the fund." Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 47 (2d Cir. 2000) (citing Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)). Determination of "reasonableness" is within the discretion of the district court. Goldberger, 209 F.3d at 47. There are two methods by which the district court may calculate reasonable attorney's fees in a class action, the lodestar or percentage method. Under either method, attention should be paid to the following factors: "(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 50 (citation omitted).

Using the lodestar method, the court "scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate." Id. at 47. The final step is to consider whether an enhancement of the lodestar is warranted. Id. See also Savoie v. Merchants Bank, 166 F.3d 456, 460 (2d Cir. 1999)(applying the lodestar steps).

The second method is the much simpler percentage method, by which the fee award is simply "some percentage of the fund created for the benefit of the class." Savoie, 166 F.3d at 460.

This method has been found to be a solution to some problems raised by the lodestar method. First, it "relieves the court of the cumbersome, enervating, and often surrealistic process of evaluating fee petitions." Id. at 461 n.4 (citation omitted). Second, it decreases plaintiff lawyers' incentive to "run up the number of billable hours" for which they would be compensated by the lodestar method. Id. at 460-61. And finally, it decreases the incentive to delay settlement because the fee for the plaintiffs' attorneys does not increase with delay. Id. at 461.

Lead Counsel is clearly entitled to a substantial legal fee for the work it has performed up to this point in the ERISA Litigation. Lead Counsel has performed an important public service in this action and has done so efficiently and with integrity. It has cooperated completely and in novel ways with Lead Counsel for the Securities Litigation, and in doing so all of them have worked to reduce legal expenses and maximize recovery for class members. Lead Counsel in the ERISA Litigation has also worked creatively and diligently to obtain a settlement from WorldCom in the context of complex and difficult legal questions. It still faces significant challenges in pressing forward with its litigation against Merrill Lynch. Lead Counsel should be appropriately rewarded as an incentive for the further protection of employees and their pension plans not only in this litigation but in all ERISA actions.

There is no need, however, to analyze now in great detail the final amount of attorney's fees to which Lead Counsel is entitled. Twenty percent of the cash component of the Settlement

Fund shall be set aside for potential distribution to counsel. Appointed Counsel are presently awarded $5,000,000.00 in attorney's fees and all of their litigation expenses and costs incurred for post-appointment work. In addition, $80,327.47 is awarded for notice costs, and Appointed Counsel are authorized to draw an additional $50,000 for future notice expenses. Appointed Counsel are invited to move again for additional attorney's fees and expenses at the conclusion of the proceedings against Merrill Lynch.

Vivien Counsel and Emanuele Counsel have provided valuable pre-appointment legal services to the class, and are entitled to some compensation for those services. See In re Independent Energy Holdings PLS Sec. Litig., 302 F. Supp. 2d 180, 182 (S.D.N.Y. 2003). Their requests for reimbursement of pre-appointment expenses are granted. A decision on the extent to which they should be awarded attorney's fees will await receipt of their contemporaneous billing records. Those records will assist in forming a judgment about the value to the class of the work done by these firms. See Cruz v. Local Union No. 3 of Intern. Broth. of Elec. Workers, 34 F.3d 1148, 1160 (2d Cir. 1994); New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983). On the other hand, Local Counsel has failed to show that it provided valuable legal services to the class prior to its appointment. Its request for pre-appointment attorney's fees and expenses is denied.

Lastly, the three named plaintiffs in the ERISA Litigation are awarded $5,000.00 each. See Dornberger v. Metropolitan Life

Ins. Co., 203 F.R.D. 118, 124 (S.D.N.Y. 2001) (collecting cases). They have been deposed and have given their opinion on the settlement terms. According to Lead Counsel, the three named plaintiffs have been intimately involved in every step of the litigation. The named plaintiffs have performed an important service to the class and the burden of this commitment deserves to be recognized through an award from the common fund.

Conclusion

The settlement between plaintiffs and all defendants except Merrill Lynch and Sullivan, and the bar order contained in the settlement agreement are approved.

Twenty percent of the cash settlement fund shall be reserved for potential distribution to counsel. From that reserved amount, the following sums are awarded now: attorneys' fees in the amount of $5,000,000 are awarded to Appointed Counsel for post-appointment work. Costs and expenses for post-appointment work are also awarded to Appointed Counsel. Appointed Counsel may renew their application for a further award of attorney's fees from the reserved amount at the conclusion of the litigation against Merrill Lynch. The requests by Vivien Counsel and Emanuele Counsel for reimbursement of expenses for pre-appointment work is granted. Vivien Counsel and Emanuele Counsel may submit their time records in further support of an award of attorney's fees to them from the reserved amount for their pre-appointment work. Local Counsel's request for pre-appointment attorney's fees and expenses is denied.

An award is also made from the cash settlement fund of $80,327.47 for past notice costs. Lead Counsel is permitted to maintain a fund of an additional $50,000 to pay future notice costs.

SO ORDERED:

Dated: New York, New York
October 18, 2004

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DENISE COTE
United States District Judge