

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE WORLDCOM, INC. ERISA LITIGATION :

This Document Relates to: :

ALL ACTIONS :

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Appearances:

For Lead Plaintiffs:

Lynn Lincoln Sarko
Gary A. Gotto
T. David Copley
Erin Riley
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 Defendant Merrill Lynch Trust
Company FSB:
William J. Kilberg
Paul Blankenstein
Antoinette DeCamp
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

For Individual Defendants:

George M. Newcombe
Paul C. Curnin
Patrick E. King
Simpson Thacher & Bartlett LLP
3330 Hillview Avenue
Palo Alto, California 94304

For Defendant Bernard J. Ebbers
David Wertheimer
Lyndon M. Tretter
Hogan & Hartson L.L.P.

MASTER FILE
02 Civ. 4816(DLC)

OPINION & ORDER

875 Third Avenue
New York, NY 10022

DENISE COTE, District Judge:

Plaintiffs have moved for certification of a class in this action brought pursuant to Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 et seq. ("ERISA"). The class definition includes five plans of WorldCom, Inc. ("WorldCom") and companies acquired by WorldCom. Defendant Merrill Lynch Trust Company FSB ("Merrill Lynch") contends that the class definition is overbroad and should be restricted to include only participants and beneficiaries in each of the plans from the time that the plans were merged into the WorldCom 401(k) plan.¹ For the same reasons, Merrill Lynch contends that the three class representatives fail to meet the typicality and adequacy requirements of Rule 23, Fed. R. Civ. P. ("Rule 23"). As explained below, the motion for certification is granted.

Background

On June 25, 2002, WorldCom announced a massive restatement of its financial statements. On July 21, it filed for bankruptcy. The first ERISA class action had been in this district on June 21. The Judicial Panel on Multi-District Litigation has transferred all ERISA actions arising from the

¹Since the opposition to certification was filed, most of the defendants have settled with the plaintiffs. One non-settling defendant, Merrill Lynch, continues to oppose certification.

WorldCom collapse to this Court. The WorldCom ERISA actions were consolidated on September 18, and are referred to as the ERISA Litigation. The civil litigation arising under securities laws is also assigned to this Court and is referred to as the Securities Litigation. The pretrial proceedings in both sets of litigation have been coordinated.

The first consolidated ERISA complaint was filed on December 20. On June 17, 2003, the motions to dismiss lodged against that complaint were granted in part. In re WorldCom, Inc. ERISA Litig., 263 F. Supp. 2d 745 (S.D.N.Y. 2003) (the "Opinion"). Familiarity with the Opinion is assumed; its discussion of the allegations in this action are incorporated. The plaintiffs filed a third amended consolidated class action complaint ("Complaint") on September 12. The Complaint brings three claims for relief pursuant to ERISA § 502(a)(2) and (a)(3) for alleged breaches of fiduciary duty. The Complaint asserts that Merrill Lynch, the Officer Defendants,² the Employee Defendants,³ Bert C. Roberts and Gordon S. 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; that Ebbbers, Sullivan, and the WorldCom Directors

² The Officer Defendants are Bernard J. Ebbbers ("Ebbbers"), Scott Sullivan ("Sullivan"), Dennis W. Sickle.

³ The Employee Defendants are Dona Miller, Pamela Titus, Ray Helms, Stephanie Scott, Sandra Faircloth.

Defendants⁴ failed to monitor as required by ERISA § 404(a) the fiduciary performance by ERISA plan fiduciaries appointed by those directors; and that WorldCom, Merrill Lynch, the Officer Defendants, and the Employee Defendants failed to provide ERISA plan participants with complete and accurate information regarding WorldCom stock. Merrill Lynch is therefore a defendant in the first and third claims.

The proposed class definition refers to the WorldCom 401(k) Salary Savings Plan (the "Plan") and 401(k) plans from four identified predecessor companies that were merged into WorldCom beginning in 2000 -- MCI Communications Corporation ESOP and 401(k) Plan ("MCI Plan"), the IDB Communications Group, Inc. 401(k) Savings and Retirement Plan, the Western Union International, Inc. 401(k) Plan for Collectively Bargained Employees, and the SkyTel Communications, Inc. Section 401(k) Employee Retirement Plan (collectively, "Predecessor Plans"). It reads as follows:

All participants and beneficiaries in the WorldCom 401(k) Salary Savings Plan (the "Plan") and its predecessor plans, including but not limited to, the MCI Communications Corporation ESOP and 401(k) Plan, the IDB Communications Group, Inc. 401(k) Savings and Retirement Plan, the Western Union International, Inc. 401(k) Plan for Collectively Bargained Employees, and the SkyTel Communications, Inc. Section 401(k) Employee Retirement Plan, for whose individual accounts the Plan held shares of WorldCom stock at any time from September 14, 1998 to the present.

⁴ The Director Defendants are: Roberts, Macklin, James C. Allen, Judith Areen, Carl J. Aycock, Max E. Bobbit, Francesco Galesi, Stiles A. Kellet, Jr., Clifford L. Alexander, John A. Porter, John W. Sidgmore, and Lawrence C. Tucker.

The plaintiffs seek certification pursuant to Rule 23(b) (1) and (2).

Two of the three named plaintiffs, Gail M. Grenier and John T. Alexander, were at all relevant times members of the Plan. The third, Stephen Vivien, was at all relevant times a member of the Plan or the MCI Plan. On September 14, 1998, the first date of the proposed class period, MCI merged with WorldCom. Just over two years later, on November 1, 2000, the MCI Plan and the Plan were merged. While Merrill Lynch was the directed trustee of the Plan, it was not the directed trustee of the MCI Plan prior to November 1, 2000. Merrill Lynch operated as the directed trustee of the Plan beginning on October 10, 1994 through the relevant class period.

At the time each of the predecessor companies merged into WorldCom, WorldCom became the ERISA sponsor for each of the Predecessor Plans, the Predecessor Plans held WorldCom stock, and one or more of the individual defendants became ERISA fiduciaries for the Predecessor Plans. For instance, from September 1998 until the merger into the Plan, the company stock offered by the MCI Plan was WorldCom stock, WorldCom was the sponsor of the plan, and an individual defendant WorldCom employee was the identified plan administrator for the MCI Plan.

Merrill Lynch does not oppose class certification of the ERISA Litigation, but objects to the class definition. It contends that the definition should be modified to add that participants or beneficiaries in the Predecessor Plans are members of the class "only from and after the date that said

plans were merged into the" Plan. It argues that without such a modification the class does not share common questions of law or fact and that the named plaintiffs' claims are not typical.

Discussion

The standards for class certification are set forth in the Opinion issued in connection with the motion for certification of a class in the Securities Litigation, and the discussion of those standards is incorporated herein. In re WorldCom, Inc. Sec. Litig., 219 F.R.D. 267 (S.D.N.Y. 2003).

It is undisputed that the number of class members is so numerous that joinder is impracticable. There are common questions of law and fact including whether Merrill Lynch and the other defendants were ERISA fiduciaries for the Plan and Predecessor Plans, whether they breached their fiduciary duties, and whether those breaches injured class members. The named plaintiffs' claims are typical of those of the class, and there is sufficient evidence that each of them will fairly and adequately act to protect the interests of the class. There is no dispute that their attorneys are qualified, experienced, and competent to conduct this litigation.

While the plaintiffs seek certification under Rule 23(b) (1) (B)⁵ and (b) (2), certification is only appropriate under

⁵While plaintiffs contend that certification is also appropriate under Rule 23(b) (1) (A), they recognize that it is unnecessary to reach that issue and that many courts do not after they have concluded that certification is appropriate under Rule 23(b) (1) (B).

Rule 23(b)(1)(B). Any adjudication with respect to individual members of the class will as a practical matter be dispositive of the interests of the other members of the class.

To certify a class under Rule 23(b)(2), a court must find that the equitable relief sought by the plaintiff predominates over any claims for monetary relief. Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001). In making this assessment, a court should satisfy itself that "(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits." Id. Plaintiffs' predominant claim in this action is for the recovery of money damages. They have not claimed that they would seek declaratory relief in the absence of any monetary recovery. Therefore, this action may not be maintained under Rule 23(b)(2). See Spann v. AOL Time Warner, Inc., 219 F.R.D. 307, 322 (S.D.N.Y. 2003) (DLC).

Merrill Lynch's argument against class certification can be swiftly rejected. Merrill Lynch contends that the class should be defined to exclude participants and beneficiaries in Predecessor Plans for any time before the Predecessor Plans were merged into the Plan. Its proposed amendment of the class definition would operate effectively to exclude those individuals from the class between the time that their companies merged with WorldCom and the time that the Predecessor Plans were merged into the Plan. In the case of the MCI Plan, the period that would be

excluded would amount to over two years of the class period. During that period, WorldCom stock was purchased through the MCI Plan by participants, WorldCom was the MCI Plan sponsor, and one or more individual WorldCom employees functioned as fiduciaries to the MCI Plan.

Merrill Lynch contends that, because it was not a fiduciary of the Predecessor Plans before their merger into the Plan, the class definition does not present common issues of law and fact. It is wrong. As outlined above, there are sufficient common issues. Indeed, the issue of when Merrill Lynch became a fiduciary to the class is a common issue. The fact that Merrill Lynch may not have fiduciary obligations to all class members for the entire period of the class, that is, from September 14, 1998 onward, is not fatal to the class definition. The period of liability of individual defendants may differ, but the claims belonging to the class are united by, among other things, the class members' purchase of WorldCom stock and WorldCom's own relationship to each of the plans.

Since Merrill Lynch's attack on the adequacy of the named plaintiffs and the typicality of their claims rests on the same fallacy, there is no need for a further discussion of that portion of their argument. The named plaintiffs are appropriate class representatives.

Conclusion

The motion for class certification is granted.

SO ORDERED:

Dated: New York, New York
October 4, 2004

DENISE COTE
United States District Judge