

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE WORLDCOM, INC. ERISA LITIGATION : MASTER FILE  
This Document Relates to: : 02 Civ. 4816(DLC)  
ALL ACTIONS : MEMORANDUM OPINION &  
 : ORDER  
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DENISE COTE, District Judge:

An Opinion and Order of October 18, 2004 granted the request of Vivien Counsel in the WorldCom ERISA Litigation for reimbursement of \$5,533.48 in litigation expenses and, finding that they had provided valuable pre-appointment legal services to the class, permitted them to apply for "some" compensation for those services on the condition that the request was supported by their contemporaneous billing records. In re WorldCom, Inc. ERISA Litig., No. 02 Civ. 4816 (DLC), 2004 WL 2338151, \*11 (S.D.N.Y. Oct. 18, 2004). Vivien Counsel now seek reimbursement for costs of \$18,392.83 (including the \$5,533.48 already awarded) and fees of over \$510,000. The Vivien Counsel are composed of a consortium of four entities whose individual fee requests for work done through either October or mid-November 2002<sup>1</sup> are as follows: Lewis, Feinberg, Renaker & Jackson, P.C. ("Lewis Firm") seeks \$191,375; Lief, Cabraser, Heimann & Bernstein, LLP ("Lief Firm") seeks \$98,911; Schatz & Nobel, P.C. ("Schatz Firm") seeks

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<sup>1</sup>The Schatz Firm seeks an award for minor amounts of work done beyond these dates. Many of the submissions seek reimbursement for small amounts of work that predated 2002.

\$202,762.50; and the AARP Foundation Litigation ("AARP") seeks \$9,555.<sup>2</sup>

The principal benefit conferred on the class by Vivien Counsel for their work on the WorldCom ERISA action filed in the Northern District of California on March 18, 2002, was the successful defense of a motion to dismiss. See Vivien v. WorldCom, Inc., No. C 02-01329 (WHA), 2002 WL 31640557 (N.D. Cal. July 26, 2002). Vivien Counsel represent that the opinion denying the motion to dismiss was the first favorable opinion for plaintiffs in any of the recent wave of cases arising out of 401(k) plan investments in company stock. Of particular note, the Vivien Action complaint included two of the legal theories that are presently found in the consolidated complaint in the ERISA Litigation. It is unnecessary to evaluate whether the pleading of these two claims was novel or an obvious choice since the opposition to the motion to dismiss deserves recognition in either circumstance. The Lewis Firm performed the bulk of the work in connection with the motion to dismiss. Because of the benefit that this successful defense conferred on the class, the Lewis Firm is awarded \$100,000 in attorney's fees.

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<sup>2</sup> In addition, Elizabeth Cabraser ("Cabraser") seeks an award of \$13,320 for work she did from November 19, 2002 through July 31, 2004 as a member of the Steering Committee for the plaintiff class. This request is unsupported by contemporaneous billing records. In any event, due to a conflict, Cabraser has not functioned sufficiently as a Steering Committee member to warrant an award.

The Court declines to award fees to the other members of the consortium or for the other work identified by Vivien Counsel as deserving of compensation out of the settlement fund. Vivien Counsel have identified fourteen tasks that they performed that they assert deserve reimbursement. Most of the tasks, however, are similar in nature to those that would have been performed by any law firm that filed any of the WorldCom ERISA actions and do not deserve reimbursement from the settlement fund. In addition, some substantial percentage of the time reflected in the billing records is attributable to each firm reviewing the same material and discussing the case with each other, an inevitable consequence of working as co-counsel. It is particularly difficult to ascertain from their submission what work by the Schatz Firm was of benefit to the class. The AARP does not explain why its salaried counsel should be paid out of the settlement fund.

There are, however, three tasks that merit discussion since they are presented as work uniquely done for the class by Vivien Counsel. An award of fees out of the settlement fund is not justified for any of these three tasks. Awarding fees for filing the first WorldCom ERISA action, which the Vivien Action was, would simply add further encouragement to the already unseemly rush to the courthouse. WorldCom ERISA actions were destined to be filed, and there was no particular benefit conferred on the class by filing the first in the inevitable wave of such actions. For similar reasons, counsel's interaction with the WorldCom insurers does not merit an award. Plaintiffs' counsel in ERISA

actions were inevitably going to provide notice to insurance carriers, and obtain the WorldCom insurance policies. An unsuccessful application to the Bankruptcy Court to lift the bankruptcy stay, even if it reflects excellent representation of the class, did not ultimately confer a benefit on the class. It is in this latter effort that the Lief Firm did much of its work.

Denying the remainder of the application for an award of attorney's fees here is not meant as a judgment about the quality of representation provided by Vivien Counsel in the Vivien Action. It would appear that Vivien Counsel acted with appropriate and commendable vigor in pursuing the litigation that they filed. The issue, instead, is whether the work that they did in that action conferred any identifiable and lasting benefit on the class such that they should be distinguished from all of the other counsel who, like them, filed ERISA actions around the country and were not ultimately selected as Lead Counsel. They have shown that they did confer such a benefit in connection with the successful defense of the motion to dismiss but not in connection with their other work.

The Lewis Firm is awarded the expenses it incurred from the time the Vivien Action was filed, March 18, 2002, through the filing of the amended complaint, and up to the date Vivien Counsel submitted its corrected opposition to the motion to dismiss, June 28, 2002. All other requests for reimbursement of expenses are denied.

Conclusion

The Vivien Counsel's application for an award of fees and expenses to be paid from the WorldCom ERISA Settlement Fund is granted to the following extent. Lewis, Feinberg, Renaker & Jackson, P.C. is awarded \$100,000 in attorney's fees and its expenses for the period from March 18 to June 28, 2002. The Lewis Firm shall submit an order within ten days.

SO ORDERED:

Dated: New York, New York  
November 15, 2004

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DENISE COTE  
United States District Judge