United States Courts
Southern District of Texas
FILED
MAR 17 2003
Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| IN RE ENRON CORPORATION SECURITIES LITIGATION | Consolidated Civil Action No. H-01-3624 |
| This Document Relates To:<br>MARK NEWBY, et al., individually and on behalf of all others similarly situated,<br>Plaintiffs,<br>v.<br>ENRON CORPORATION, et al.,<br>Defendants. | |
| AMERICAN NATIONAL INSURANCE COMPANY, et al.,<br>Plaintiffs,<br>vs.<br>J.P. MORGAN CHASE & COMPANY,<br>Defendant. | Civil Action No. G-02-0299 |

**DEFENDANT J.P. MORGAN CHASE & CO.'S RESPONSE TO PLAINTIFFS' REQUESTS FOR COURT CONSIDERATION OF SUPPLEMENTAL AUTHORITY**

1290

Defendant J.P. Morgan Chase & Co. ("JPMorgan Chase") respectfully submits this memorandum in response to the February 25, 2003 Request for Court Consideration of Supplemental Authority and the March 13, 2003 Second Submission of Supplemental Authority in Support of Motion to Remand filed by American National Insurance Company, *et al.* (collectively, the "Plaintiffs"). Plaintiffs ask this Court to consider (i) a February 20, 2003 decision issued in *Principal Global Investors LLC v. Citigroup, Inc.*, No. 4:02-CV-90615 (C.D. Iowa Feb. 20, 2003) (the "*Principal Global* Order"); (ii) a February 20, 2003 decision issued in *OCM Opportunities Fund III, L.P. v. Citigroup, Inc.*, No. LA02-99911 (Bankr. C.D. Cal. Feb. 20, 2003) (the "*OCM* Order"); and (iii) a March 4, 2003 decision issued in *Pacific Investment Management Company, LLC v. Citigroup, Inc.*, SA02-99911 (Bankr. C.D. Cal. Mar. 4, 2003) (the "PIMCO Order").[1]

**Preliminary Statement**

JPMorgan Chase respectfully submits that all three of the orders submitted by Plaintiffs were wrongly decided and irreconcilable with the detailed and carefully reasoned opinion issued on March 3, 2003 by the court presiding over similar multi-district securities litigation relating to Worldcom, Inc. ("Worldcom"), *New York City Employees' Retirement System v. Ebbers* (*In re Worldcom, Inc. Sec. Litig.*), No. 02 Civ. 3288, 2003 WL 716243 (S.D.N.Y. Mar. 3, 2003) ("*NYCERS*") (attached as Exhibit A to Supplemental Affidavit of David E. Miller, dated March 11, 2003, submitted in *American National Insurance Company v. Lehman Brothers Holding Inc.*, Civil Action No. G-02-463). JPMorgan Chase does not address in detail the *OCM* and *PIMCO* orders in this Response because the *OCM* and *PIMCO* courts without

[1] Plaintiffs incorrectly refer to this case as "*Basic Pension Plan, et al. v. Citigroup, Inc., et al.*" in their papers.

analysis merely adopted a form of order prepared by plaintiffs. Those orders are on appeal to the United States District Court for the Central District of California.

The *Principal Global* opinion is contrary to the law established throughout the country regarding the scope of federal subject matter jurisdiction under 28 U.S.C. § 1334(b) and squarely at odds with *NYCERS*. Standing in the same position as this Court, and addressing the identical remand and abstention issues, Judge Cote held in *NYCERS* that (i) "related to" jurisdiction exists where there are potential underwriter or other contribution or indemnity claims, and that (ii) it would have been inappropriate to equitably remand, mandatorily abstain or discretionarily abstain.

## Argument

## POINT I

## THE COURT PRESIDING OVER THE CONSOLIDATED *WORLDCOM* SECURITIES LITIGATION DENIED SUBSTANTIVELY IDENTICAL REMAND MOTIONS

Defendants removed this lawsuit from state court because it is "related to" the Chapter 11 bankruptcy case of debtor Enron through, among other things, the existence of "conceivable" indemnification and contribution claims against Enron. Plaintiffs moved to remand this action to state court, and on August 9, 2002, this Court denied the motion. Plaintiffs' motion for reconsideration of this ruling is now pending before this Court.

This Court's order denying remand and exercising federal subject matter jurisdiction is in harmony with the relevant law and with the March 3, 2003 decision of The Honorable Denise L. Cote in *NYCERS*. Just as this Court presides over a large number of consolidated securities actions arising out of Enron's demise, Judge Cote presides over a number of actions arising out of the collapse of the telecommunications giant, WorldCom. Like the Enron litigation, the WorldCom securities litigation is now a consolidated class action, *In re*

*WorldCom, Inc. Securities Litigation*, 02 Civ. 3288 (DLC) (S.D.N.Y. Filed Aug. 15, 2002), with a centralized Multi-District Litigation forum in the United States District Court for the Southern District of New York. *NYCERS*, 2003 WL 716243, at *1. Also like Enron, WorldCom filed for bankruptcy under Chapter 11 shortly after the influx of litigation, thus staying all claims against WorldCom.

In addition to the consolidated class action complaints in the WorldCom litigation, numerous individual actions were also filed by state pension funds and others in state courts across the country. The defendants in those cases, including 18 "Underwriter Defendants," removed the state court actions to federal court "on the basis of the litigation's relationship to WorldCom's bankruptcy." *NYCERS*, 2003 WL 716243, at *1. Municipal pension funds that had brought an individual action in state court moved to remand their action for lack of federal subject matter jurisdiction. *Id.* at *4. In response, the Underwriter Defendants argued "that subject matter jurisdiction exists because the *NYCERS* action is 'related to' WorldCom's bankruptcy principally through the indemnification and contribution rights these Defendants have asserted against WorldCom." *Id.*

Relying on the Third Circuit's decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) and other "persuasive authority," the court held that "jurisdiction over a third party action exists where a claim for indemnification or contribution arising from that litigation has a conceivable effect on a bankruptcy proceeding" and "where there is a 'reasonable' legal basis for the claim." *NYCERS*, 2003 WL 716243, at *6, *8. In particular, the court noted that based on the *Pacor* test, "[s]everal Circuit Courts of Appeals have also found jurisdiction over third party litigation based on an indemnification or contribution claim that has a conceivable effect on the debtor's estate." *Id.* at *7 (citing *Refinery Holding Co. v. TRMI Holdings, Inc.* (*In re El Paso Refinery, LP*), 302 F.3d 343 (5th Cir. 2002), *Belcufine v. Aloe*, 112 F.3d 633 (3d Cir.

1997), *Lindsey v. O'Brien, Tanski, Tanzer and Young Health Care Providers* (*In re Dow Corning Corp.*), 86 F.3d 482 (6th Cir. 1996), and *Michigan Employment Sec. Comm'n v. Wolverine Radio Co.* (*In re Wolverine Radio Co.*), 930 F.2d 1132 (6th Cir. 1991)).

In concluding that there was a "reasonable basis" for the Underwriters' contribution claims against WorldCom sufficient to support "related to" jurisdiction, the court observed that the case against the Underwriters was necessarily entangled with WorldCom's conduct:

> A finding that . . . [the] Underwriter Defendants are liable is entirely dependent on a finding that WorldCom engaged in wrongful conduct. Since the conduct of WorldCom and these Defendants was indisputably intertwined, the theories of liability pressed by NYCERS are necessarily interconnected with these Defendants' rights to contribution. Because the effect of contribution claims on the bankruptcy estate is at the very least 'conceivable,' the NYCERS action is related to the bankruptcy and subject to the jurisdiction of this Court.

*NYCERS*, 2003 WL 716243, at *9. It was immaterial to the court's decision that WorldCom itself was not a defendant in the third party action: "[B]ut for WorldCom's bankruptcy, it would have been named as a defendant in the NYCERS action, and despite its absence as a party, its conduct will remain at the heart of the NYCERS litigation." *Id.*

Moreover, the court also distinguished the very language in *Pacor* relied upon by Judge Pratt in *Principal Global*:

> *Pacor's* holding is fairly narrow. . . . *Pacor* should not be read as requiring a judgment to have been entered against a third party defendant before the third party action can ever be found to be 'related to' the bankruptcy proceeding. It is more consistent with the holding and all of the language in *Pacor* to read it as requiring, in effect, that there be a reasonable basis for a claim against the estate in order to find that the third party litigation could conceivably affect the bankruptcy estate.

*Id.* at *10; *see also id.* at *11 ("Claims that are contingent today nonetheless have a 'conceivable' effect on the bankruptcy."); *id.* ("The contribution claims have the potential to alter the

distribution of assets among the estate's creditors.").[2] Judge Cote thus found "related to bankruptcy" federal jurisdiction because of the defendants' indemnity and contribution claims against the debtor, notwithstanding that the litigation before her could be characterized as a "precursor" to those contribution and indemnity claims.[3] *See also Belcufine*, 112 F.3d at 636; *Owens-Illinois, Inc. v. Rapid Am. Corp.* (*In re Celotex Corp.*), 124 F.3d 619, 627 (4th Cir. 1997).

Addressing the issue of mandatory abstention, Judge Cote held that "[t]he mandatory abstention requirement in Section 1334(c)(2) does not apply to the *NYCERS* action" because plaintiffs failed to show that the action could be timely adjudicated in state court. *NYCERS*, 2003 WL 716243, at *18. In light of "[t]he size of the Worldcom bankruptcy, the close connections between the defendants in this action and the debtor, and the complexity of this litigation," it was inescapable that "remanding to state court could slow the pace of litigation dramatically." *Id.* at *19.

Finally, Judge Cote held that discretionary abstention—even if available—would be contrary to the interests of judicial economy, particularly in a large, nationwide and multi-district litigation:

> [I]t is beyond cavil that judicial economy and efficiency are best served by exercising the jurisdiction that so clearly exists. The MDL panel has consolidated scores of cases before this Court to promote the expeditious and efficient resolution of the claims arising from the collapse of WorldCom. . . . With the consolidation of the litigation in one court, the motion practice and discovery process can be managed to protect the rights of all parties and to preserve, to the extent possible, the maximum amount of assets for recovery by plaintiffs with meritorious claims.

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2 The court explicitly declined to follow the decisions of The Honorable Judge W. Harold Albritton in *Retirement Systems of Alabama v. Merrill Lynch & Co.*, 209 F. Supp. 2d 1257 (M.D. Ala. 2002) ("*RSA I*") and *Retirement Systems of Alabama v. J.P. Morgan Chase & Co.*, 285 B.R. 519 (M.D. Ala. 2002) ("*RSA II*"). *Id.* at *12 & n.22.

3 The *NYCERS* court based it holding on the existence of conceivable common law and equitable indemnification rights, rather than contractual indemnification. *Id.* at *9.

> In contrast, if this Court were to abstain pursuant to Section 1334(c)(1) and remand the litigation originally filed in state court, motion practice and discovery would proceed separately in many jurisdictions. The litigation that would ensue in the various fora would be entirely duplicative and wasteful. It would eat into the funds available to pay the alleged victims identified in this litigation. As deep as some of the pockets in this action may be, they are in all likelihood not limitless. A remand would encourage a race for assets, a race that may deprive many victims of the alleged fraud of their fair share of any recovery.

*Id.* at *20. On the same grounds, the *NYCERS* court refused to equitably remand under Section 1452(b).

We respectfully submit that—as this Court has already determined—these considerations apply with equal force in the Enron litigation.

## POINT II

## THE *PRINCIPAL GLOBAL* DECISION IS INCONSISTENT WITH WELL-ESTABLISHED LAW ACROSS THE COUNTRY

In *Principal Global*, plaintiffs filed suit in Iowa District Court for Linn County, alleging that they sustained losses after they purchased notes issued by various entities "sponsored" by bankrupt debtor Enron. Plaintiffs alleged that the notes they bought were backed by Enron and distributed by various bank defendants (not including JPMorgan Chase), whom plaintiffs described as Enron's "relationship banks." Defendants removed that case to the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. § 1452, on the basis that it is "related to" Enron's Chapter 11 bankruptcy case, which is pending in the Southern District of New York (the "New York Bankruptcy Court"). Defendants also moved for a transfer of venue to the New York Bankruptcy Court. Upon plaintiffs' motion, the *Principal Global* court remanded the action to state court. Acknowledging that subject matter jurisdiction would exist under 28 U.S.C. § 1334(b) if "*the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy,*" *Principal Global* Order, slip op. at 2

(quotation marks and citation omitted), the court nevertheless concluded that "[t]he outcome of [that] case has no effect on the Enron bankruptcy" because "Enron is neither a named party nor a necessary party in these proceedings" and "Plaintiffs' petition alleges violation of Iowa securities law by Defendants, not Enron." *Id.* at 3.

The *Principal Global* court correctly stated the well-accepted legal standard that an action is "related to" a bankruptcy case if it could "conceivably" impact the bankruptcy estate. There is subject matter jurisdiction if the action could have any *conceivable* impact on a debtor's rights, liabilities, options, or freedom of action, or if it could *conceivably* have any effect on the administration of a bankruptcy case. *See Principal Global* Order, slip op. at 2; *see also American Nat'l Ins. Co. v. J.P. Morgan Chase & Co.*, Civil Action No. G-02-0299 (S.D. Tex. Aug. 9, 2002) (the "Order"), slip op. at 14 ("The test for 'related to' bankruptcy jurisdiction is whether 'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.") (quoting *Randall & Blake, Inc. v. Evans* (*In re Canion*), 196 F.3d 579, 585 (5th Cir. 1999); *id.* (noting that the Fifth Circuit has "adopt[ed], like the majority of the circuit courts of appeals, the test from *Pacor*") (footnote omitted).

However, the *Principal Global* court's application of the above-described standard to the facts at issue is irreconcilably at odds with the multitude of opinions, including *NYCERS*, consistently holding that an action can affect the bankruptcy estate even if the debtor is not a defendant. Under these cases, where a defendant has potential indemnity and contribution claims against the debtor (or the debtor's former directors and officers), such indemnity and contribution claims against a debtor and its estate bring a lawsuit within the "related to" jurisdiction of the bankruptcy courts, because such claims "conceivably" can have an impact on the estate and affect its administration. *See Arnold v. Garlock, Inc.*, 278 F.3d 426, 434 (5th Cir. 2001); *Kocher v. Dow Chem. Co.,* 132 F.3d 1225, 1230-31 (8th Cir. 1997); *In re Celotex Corp.,*

124 F.3d at 627; *Belcufine,* 112 F.3d at 636; *In re Dow Corning*, 86 F.3d at 490-94. In *Principal Global*, as here, Order, slip op. at 15-16, JPMorgan Chase has potential claims for contribution and indemnity against Enron. The *Principal Global* court's conclusion that, notwithstanding the existence of such claims, there was no conceivable effect on the Enron bankruptcy estate is therefore inconsistent with the opinions of virtually every other court to address the issue.

**Conclusion**

For the foregoing reasons and for the reasons stated more fully through JPMorgan Chase's prior briefing in this action, Plaintiffs' motion for reconsideration should be denied.

Dated: Houston, Texas
March 17, 2003

Respectfully submitted,

MITHOFF & JACKS, L.L.P.

By:_____

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## CERTIFICATE OF SERVICE

A true and correct copy of the foregoing response to Plaintiffs' Requests for Court Consideration of Supplemental Authority has been served by mail and email upon the following this 17th day of March, 2003:

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