UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLDCOM, INC. SECURITIES LITIGATION				
This Document Relates to:				MASTER FILE NO. 02 Civ. 3288 (DLC)
02 Civ. 3288	02 Civ. 4990	02 Civ. 9514		
02 Civ. 3416	02 Civ. 5057	02 Civ. 9515		
02 Civ. 3419	02 Civ. 5071	02 Civ. 9516		
02 Civ. 3508	02 Civ. 5087	02 Civ. 9519		
02 Civ. 3537	02 Civ. 5108	02 Civ. 9521		
02 Civ. 3647	02 Civ. 5224	02 Civ. 2841		
02 Civ. 3750	02 Civ. 5285	02 Civ. 3592		
02 Civ. 3771	02 Civ. 8226	03 Civ. 6229		
02 Civ. 4719	02 Civ. 8228	03 Civ. 7298		
02 Civ. 4945	02 Civ. 8229	03 Civ. 7299		
02 Civ. 4946	02 Civ. 8230			
02 Civ. 4958	02 Civ. 8234			
02 Civ. 4973	02 Civ. 9513			

LEAD PLAINTIFF'S MOTION *IN LIMINE* NO. 2:
TO PRECLUDE PURPORTED LAY OPINION TESTIMONY
THAT FALLS UNDER FED. R. EVID. 702
AND CUMULATIVE EXPERT TESTIMONY

Pursuant to FRE 701, 702, and 403, Lead Plaintiff respectfully submits this motion *in limine* to preclude the Underwriter Defendants and Andersen from offering any testimony from lay witnesses regarding matters that are properly the subject of expert testimony.[1] Specifically, the Underwriter Defendants should be precluded from offering any testimony from lay witnesses regarding industry standards, customs and practices for due diligence and related matters, the adequacy of the Underwriters' due diligence for the 2000 and 2001 offerings at issue in this case, or any testimony from lawyers who have not been identified as experts "generally" on topics such as bond offerings, prospectuses, due diligence and matters of disclosure. Likewise,

[1] Unless otherwise defined here, the defined terms used in this memorandum shall have the meaning as defined in Lead Plaintiff's Pre-trial Memorandum submitted concurrently herewith.

Andersen should be precluded from offering any testimony from lay witnesses regarding telecommunications generally, auditing and accounting standards generally, or Andersen's compliance with GAAS in its audits of WorldCom.

PRELIMINARY STATEMENT

In order to escape liability for materially false and misleading statements in the Registration Statements at issue in this litigation, Defendants will have to establish that they conducted a "reasonable investigation" into the truth and accuracy of those documents, regardless of whether or not that investigation would have uncovered the fraud at WorldCom. *In re WorldCom, Inc., Sec. Litig.* No. 02 Civ. 3288, 2004 WL 2924601 at *27 (S.D.N.Y. Dec. 15, 2004). Each of the defendants has hired an expert to assist the jury in ascertaining what is "reasonable" -- the Underwriter Defendants have retained Robert Haft to give expert testimony on what constitutes a "reasonable investigation" on behalf of underwriters, and Andersen has retained LeGrand C. Kirby as its "Auditing and Accounting" expert. Nevertheless, each of the defendants has indicated that it also intends to introduce additional opinion testimony from multiple lay witnesses that touches on these subjects. None of this additional testimony should be permitted by the Court.

Specifically, the Underwriter Defendants have indicated that they intend to introduce testimony from approximately sixty lay witnesses (all of whom are current or former employees of the Underwriter Defendants) who will opine on topics such as "the operation of the capital markets, due diligence related to bond offerings, corporate disclosure and financial analysis," *see, e.g.*, Ex. C.2 to the Joint Pre-Trial Order at 2 (Jennifer Bishop), and "industry standards, customs and practices" relating to things like "capital markets, investment banking, telecommunications, commercial lending, due diligence disclosure, financial analysis and the

role of research and rating agencies in underwritings." *See, e.g., id.* at 17 (Jennifer Nason). Similarly, the Underwriter Defendants have indicated that they intend to introduce testimony from their former counsel "generally" on topics such as "bond offerings, prospectuses, due diligence and matters of disclosure, including counsel's role in the drafting of an investment grade offering prospectus." *See, e.g., Id.* at 3 (Thomas Brome).

Likewise, Andersen has indicated that it intends to introduce evidence from lay witnesses touching on the requirements of GAAS and Andersen's compliance with GAAS, as well as "substantive audit and accounting issues." *See, e.g.,* Ex. D.2 to the Joint Pre-Trial Order at 4 (Melvin Dick). *See also* Andersen's Expert Witness Disclosure (Ex. L[2]), dated July 16, 2004 (stating that "Andersen hereby discloses that it may adduce opinion testimony from former Andersen engagement personnel").

The introduction of such opinion testimony should be precluded because it would violate FRE 701's explicit prohibition against "proffering an expert in lay witness clothing." In addition, all of this testimony would be cumulative and unduly prejudicial to the Class and, therefore, should be excluded under FRE 403. Accordingly, the Court should issue a ruling in advance of trial precluding Defendants from introducing any opinion testimony from witnesses who did not submit expert reports and did not subject themselves to expert discovery.

ARGUMENT

I. FRE 701 SPECIFICALLY PROHIBITS THE OPINION TESTIMONY THAT DEFENDANTS SEEK TO INTRODUCE

[2] Unless the context indicates otherwise, references to "Ex. _" herein are to the Declaration of John P. Coffey, dated January 7, 2005 and submitted herewith.

The question of whether opinion testimony is admissible is a legal question that must be determined by the Court before the testimony goes before the jury. *United States v. Rea*, 958 F.2d 1206, 1217 (2d Cir. 1992). FRE 701 provides that:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and ***(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.***

Fed. R. Evid. 701 (emphasis added).

FRE 701 was amended in 2000 specifically to add subsection (c). Before the amendment, FRE 701 contained no express prohibition against lay opinion testimony if it was based on scientific, technical or other specialized knowledge. See Appendix to Report of the Advisory Committee on Evidence Rules, May 1, 1999 at 13. See also US NITA Fed Rules Evid. 701 ("Rule 701 was amended by the addition of subdivision (c), which forbids the practice—which had been approved by some circuits—of allowing lay witnesses who were more experienced in a particular subject matter than the average lay person to provide expert opinions despite never being qualified to do so under Rule 702.").

As the Advisory Committee Note to the 2000 Amendment explains, "Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." The Note explains further that "[b]y channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26... by simply calling an expert witness in the guise of a layperson." Id.

Courts that have considered this issue since the amendment to FRE 701 have concluded that opinion testimony from lay witnesses such as that which the defendants seek to introduce here must be excluded. For example, the Second Circuit in Bank of China v. NBM LLC, 359

F.3d 171 (2d Cir. 2004), held that the district court had abused its discretion by permitting a non-expert witness to provide testimony and opinions regarding several business concepts, including the definition of a "trust receipt" and how it is used in international commercial transactions; how certain transactions engaged in between two of the defendants did not meet the business community's understanding of normal business transactions between a buyer and a seller; and how it is considered fraud when an importer presents a trust receipt to a bank for a loan knowing that there are no real goods involved. Id. at 180. The district court had determined that this testimony was admissible based upon the witness' specialized knowledge and many years of experience in international banking. Id. at 181.

The Second Circuit disagreed. Quoting the language of FRE 701, the Court held that 701(c) "explicitly bars the admission of lay opinions that are 'based on scientific, technical, or other specialized knowledge within the scope of Rule 702.'" Id. The Second Circuit noted that the purpose of this prohibition "is 'to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.'" Bank of China, 359 F.3d at 181 (quoting the Advisory Committee Note). See also United States v. Glenn, 312 F.3d 58, 67 (2d Cir. 2002) (purpose of Rule 701(c) is to ensure Rule 702's reliability requirements are not side stepped by offering expert witness under guise of lay witness); United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997) (testimony based on education, training and experience of witness requires specialized knowledge and district court must ensure that witness is qualified under FRE 702 to render such opinions).

Further, the Court emphasized that it was not merely the fact that the witness possessed specialized knowledge that precluded his testimony under FRE 701, but the fact that his testimony was based on that specialized knowledge:

> [T]o the extent Huang's testimony was not a product of his investigation, but rather reflected specialized knowledge he has because of his extensive experience in international banking, its admission pursuant to Rule 701 was error.... Thus, Huang's explanations regarding typical international banking transactions or

> definitions of banking terms, and any conclusions that he made that were not a result of his investigation, were improperly admitted.

Bank of China, 359 F.3d at 181-82.[3]

Likewise, any testimony from the defendants' witnesses here that is based on "scientific, technical, or other specialized knowledge" and was not the subject of expert reports and discovery pursuant to FRE 702 and Fed. R. Civ. P. 26 must be precluded under FRE 701. With respect to the Underwriter Defendants, this would include any testimony aimed at their understanding of the markets generally; industry standards, customs and practices for due diligence generally; and the adequacy of the Underwriters' due diligence in this case.. *Id.* *See also Baumgart v. Transoceanic Cable Ship Co.*, No. 01 Civ. 5990, 2003 U.S. Dist. LEXIS 19921, at *7 (S.D.N.Y. Nov. 7, 2003) (issuing *in limine* ruling precluding evidence because witness' testimony "clearly relies on technical or specialized knowledge within the scope of Rule 702"); *Wechsler v. Hunt Health Sys., Ltd.*, 198 F. Supp. 2d 508, 529 (S.D.N.Y. 2002) (testimony of non-expert witness "in the form of opinions or inferences is limited, *inter alia*, to those that are 'not based on scientific, technical, or other specialized knowledge within the scope of Rule 702'") (citation omitted); *Giles v. Rhodes*, 94 Civ. 6385, 2000 U.S. Dist. LEXIS 13980, at *21

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[3] Relatedly, Fed. R. Evid. 701(a) provides that lay testimony is limited to opinions or inferences that are "rationally based on the perception of the witness." This requirement echoes the well-established requirement set forth in FRE 602 that a witness have first-hand knowledge of the facts underlying his or her testimony. *Rea*, 958 F.2d at 1215. This "foundational requirement goes to the admissibility of evidence, not merely its weight...." *United States v. Garcia*, 291 F.3d 127, 140 (2d Cir. 2002). Thus, in *Garcia*, the Circuit overturned a conviction because a key government witness offered opinion testimony that was based on his past experience. *Id.* at 139 n. 9. Similarly, here, the Underwriter Defendants seek to introduce purported lay testimony based, not on facts the witnesses may have observed in this case, but on their specialized knowledge and experience. This testimony is inadmissible under FRE 701. *Id.* at 141-42; *Sowell v. Butcher & Singer, Inc.*, 926 F.2d 289, 299 (3d Cir. 1991) (affirming exclusion of testimony because witness' opinions were based on more than his own perceptions); *Baumgart*, 2003 U.S. Dist. LEXIS 19921, at *6-7 (testimony was inadmissible under FRE 701 because witness' opinion was not based on personal knowledge but, at least in part, on "specialized or technical" outside knowledge).

(S.D.N.Y. Sep. 27, 2000) (excluding evidence under *in limine* ruling because "it is evident that testimony cannot be characterized as lay if it is based on experience, training or specialized knowledge rather than on the particularized, personal knowledge of the witness").

It would also include any testimony from the Underwriters' former counsel "generally" as to bond offerings, prospectuses, due diligence and matters of disclosure and counsels' role in drafting offering documents. *Id.* Similarly, these lawyer witnesses should not be permitted to introduce "expert" testimony in the guise of opinions about how they may or may not have advised their clients with regard to disclosure had they been aware of certain facts. For example, Thomas Brome, a lawyer from Cravath Swaine & Moore who the Underwriter Defendants have indicated they will call at trial, should not be permitted to testify that had he known about the many conflicts of interest that existed between the Underwriters and WorldCom, he would have advised them not to disclose them in the 2000 and 2001 Registration Statements. Professor Haft might have standing to say that; Mr. Brome -- who was never identified as an expert in accordance with the Court's scheduling order -- does not. Further, such testimony would be akin to expert testimony on the issues of disclosure and materiality and would be wholly improper under FRE 701. *See, e.g. Washington v. Dept. of Transportation,* 8 F.3d 296, 300 (5th Cir. 1993) (affirming court's refusal to allow witness to testify as to what he would have done under different circumstances because "such testimony would not have been based upon [the witness'] perception, but upon his self-serving speculation"); *Kloepfer v. Honda Motor Co.,* 898 F.2d 1452, 1459 (10th Cir. 1990) (upholding district court's decision to exclude "speculative and self-serving" testimony of what lay witness would have done under different set of facts); *United States v. Burlington Res. Oil & Gas Co.*, No. Civ. A. H-98-611, 2000 WL 1058972, at *7 (S.D. Tex May 13, 2000) ("Under the Federal Rules of Evidence, a speculative opinion by a lay

witness, that is, testimony concerning what the witness would have done if presented with a particular factual scenario, is generally considered inadmissible . . . as fact witnesses, these affiants may not offer testimony about what they would have instructed [someone] to do, or what they would have done if presented with the same facts"); *Radiofone, Inc. v. Pricellular Corp*, No. 91-4306, 1992 WL 395207, at *7 (E.D. La. Dec. 11, 1992) (granting motion ***in limine*** on grounds that "testimony from a [witness] of what course of action he/she would have taken under a different set of circumstances can be based on nothing but speculation. Speculative testimony from a lay witness is precluded under Fed. R. Evid. 701.").

In fact, Defendants have already effectively admitted that the opinion testimony they seek to introduce is improper. Pursuant to the Court's Scheduling Order, on July 16, 2004, the Underwriter Defendants served Lead Plaintiff with their list of five retained experts. *See* Ex. M. That disclosure also listed 61 "fact witnesses" from whom the Underwriter Defendants claimed they might elicit "opinion testimony . . . based in whole or in part on their knowledge, skill and experiences." (*Id.* at 2). The Underwriter Defendants further specifically stated that these witnesses were not experts and that their opinion testimony should not be subject to expert discovery. *Id.* Similarly, as noted above, Andersen took the position in its July 16, 2004 expert witness disclosure that the proffered opinion testimony of its so-called "fact witnesses" was not subject to expert witness provisions of the Scheduling Order or Federal Rule of Evidence 702." (Ex. L). Thus, the Defendants have admitted that these witnesses are not expert witnesses and, therefore, Defendants should not be permitted to offer testimony based on these fact witnesses' "scientific, technical, or other specialized knowledge" in violation of FRE 701(c).

In sum, all of the opinion testimony proffered by the defendants' lay witnesses flies in the face of FRE 701 and, accordingly, it should be precluded in its entirety.

II. THE PROFFERED TESTIMONY SHOULD ALSO BE EXCLUDED UNDER FRE 403

Even if the testimony proffered by the Underwriter Defendants and Andersen did not violate FRE 701, it should still be excluded under FRE 403. FRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Any relevance of the proffered testimony is substantially outweighed by each of these factors. First, all of this testimony would be cumulative of the proffered testimony of the defendants' retained experts, Professor Robert J. Haft and LeGrand C. Kirby. The Underwriter Defendants have indicated that Professor Haft will opine on the "custom, practice and industry standards relevant to the issuance and underwriting of securities, registration statements, prospectuses, capital market transactions, SEC pronouncements and guidelines, capital markets and underwriters' due diligence investigation." Ex. J at 7. Likewise, Andersen has indicated that "Mr. Kirby is Andersen's accounting and auditing expert," Ex. L, who will testify about auditing standards and the compliance of Andersen's audits of WorldCom with GAAS. (See Ex. N at 26 (August 20, 2004 Kirby Report) Consequently, any testimony from lay witnesses on these points would be unnecessarily duplicative and should, therefore, be excluded. *See Mengele v. Patriot II Shipping Corp., No. 99 Civ. 8745 (LTS)(KNF)*, 2002 U.S. Dist. LEXIS 2550, at *4-5 (S.D.N.Y. February 19, 2002) (granting motion *in limine* to exclude evidence because, among other things, the testimony "does not meet the helpfulness criterion of Rule 702" and is cumulative under Rule 403); *United States v. Elksnis*, 528 F.2d 236, 238-39 (9th Cir. 1975) (district court properly excluded evidence on grounds that it was cumulative and would waste time).

Further, if the Underwriter Defendants' proffered testimony were presented to the jury, it would unfairly prejudice the Class and trigger unnecessary confusion for the jury. The Underwriter Defendants have repeatedly argued in their summary judgment papers and elsewhere that the advent of the integrated disclosure system and shelf registrations resulted in a shift in industry standards, customs and practices vis-à-vis due diligence for so-called "expedited offerings." Specifically, they have argued that in view of time pressures and cost considerations associated with shelf take-downs, these bankers, as a matter of practice, are unable to spend the time and energy conducting due diligence that they would commit in other circumstances, such as initial public offerings or junk bond offerings. Thus, according to the Underwriter Defendants, in circumstances such as those presented here, the "industry standards, custom and practice" -- which they argue inform the standard of "reasonableness" -- dictates a lower legal standard for the establishment of a due diligence defense. Undoubtedly, this would be the gist of the testimony of the investment banking and lawyer witnesses identified by the Underwriter Defendants. However, the Court has now made clear that the standard of "reasonableness" has not been altered by these changes in the underwriting industry. *See WorldCom,* 2004 WL 2924601, at *28. Consequently, testimony from upwards of 60 lay witnesses suggesting that this is the case would be unfairly prejudicial and extremely confusing for the jury.

CONCLUSION

For all of these reasons, Lead Plaintiff respectfully requests that the Court grant this motion *in limine* and (1) preclude the Underwriter Defendants from offering any testimony from lay witnesses regarding industry standards, customs and practices for due diligence, the adequacy

or "reasonableness" of the Underwriter's due diligence for the 2000 and 2001 Offerings, the adequacy of the disclosures in the Registration Statements, or related topics that are properly the subject of expert testimony; (2) preclude any testimony from lawyers "generally" on topics such as bond offerings, prospectuses, due diligence, matters of disclosure, or the adequacy of the Underwriters' due diligence or the disclosures in the Registration Statements; and (3) preclude Andersen from offering any testimony from lay witnesses regarding telecommunications generally, auditing and accounting standards generally, or Andersen's compliance with GAAS in its audits of WorldCom.

Dated: New York, New York
January 7, 2005

Respectfully Submitted,

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