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	02 Civ. 4990	02 Civ. 9514	:	02 Civ. 3288 (DLC)
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. 3:
TO PRECLUDE PURPORTED TESTIMONY OF RANDALL CHAFETZ

Lead Plaintiff submits this motion *in limine*, made pursuant to Rule 37(d) of the Federal Rules of Civil Procedure, to preclude or limit the Underwriter Defendants from offering testimony of Randall Chafetz of the Bank of Tokyo-Mitsubishi ("BOTM") concerning due diligence that Chafetz purportedly performed on behalf of an affiliate, Tokyo-Mitsubishi International plc (n/k/a Mitsubishi Securities International plc.) ("TMI").[1] TMI acted as an underwriter of the May 2001 bond offering and is a defendant in this action.

The issue raised by this motion is simple – may the Underwriter Defendants perform a "bait and switch" by first offering up one witness in response to a Rule 30(b)(6) deposition notice (the "30(b)(6) Notice") to testify about an Underwriter's due diligence, and then for trial

[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.

designate an entirely different witness – presumably to offer different testimony than the 30(b)(6) witness gave? We respectfully submit that this tactical maneuver should be rejected.

ARGUMENT

In June 2004, Lead Plaintiff noticed the deposition of TMI under Rule 30(b)(6) to probe the basis of TMI's asserted due diligence defense. The 30(b)(6) Notice advised TMI to designate a witness or witnesses to testify on its behalf regarding: (1) "All due diligence performed in conjunction with the Offerings, whether performed by [TMI] or on [TMI's] behalf" and (2) "To the extent not included in No. 1, the business relationship between [TMI] and WorldCom." *See* Ex. O.[2] Pursuant to the Notice, the Underwriter Defendants designated Dennis Kelleher – who is based in London and was flown to New York to testify. He was deposed on June 25, 2004.

Kelleher testified that, although TMI had turned over its due diligence responsibilities to Chafetz and other personnel at the New York Branch of BOTM, *see* Kelleher Tr., Ex. P, at 44:21-45:13, 59:4-9, Kelleher was nevertheless prepared to provide full responses on the bank's behalf with respect to what due diligence took place. *Id.* at 15:15-16:3. Kelleher testified, in part, that the New York Branch would have relied on the lead managers of the May 2001 Offering, (*id.* at 25:25-26:8), but that neither he nor Chafetz recalled any specific work performed on the 2001 Offering. *Id.* at 43:21-44:20. Kelleher also testified that he and Chafetz were not aware of any documents related to the due diligence work performed on behalf of TMI, and he could not locate any documents related to that work. *Id.* at 29:2-8.

When asked to confirm whether he had testified fully about the due diligence, Kelleher testified that "we've covered pretty much everything":

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[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.

> Q. . . . Other than the things that we've already talked about, can you tell me anything else that the New York branch did on TMI's behalf in terms of due diligence?
>
> A. ***I think we've covered pretty much everything.***
>
> Q. And other than what we've covered, can you think of anything else done at TMI in terms of due diligence?
>
> A. No. TMI again relied upon BTM, capital markets group.

Id. at 88:20-89:06 (emphasis added).

Based on the statements of TMI's designated witness, Lead Plaintiff believed that TMI had complied with its obligations under Rule 30(b)(6) with regard to testimony about its due diligence. The Underwriter Defendants never suggested that Kelleher's testimony had been partial or inaccurate, or that testimony by other witnesses would be required to fully respond to the 30(b)(6) Notice concerning the due diligence performed on behalf of TMI. Nor did they supplement any of their discovery responses to indicate that the bank's chosen representative had provided incomplete or inaccurate information.

As indicated in the PTO, the Underwriter Defendants have now designated both Kelleher and Chafetz as live witnesses to testify at trial about topics virtually identical to those propounded in the 30(b)(6) Notice. PTO Ex. C.2. Either the Underwriter Defendants intend to offer entirely ***duplicative*** evidence, or they intend to have Chafetz provide ***different*** testimony than that provided by Kelleher. Either way, Chafetz's testimony should be barred.

The purpose of issuing a notice under Rule 30(b)(6) was to allow Lead Plaintiff to inquire into the totality of the due diligence work performed on behalf of TMI. This is what Rule 30(b)(6) is designed to provide:

> [A] deposition pursuant to Rule 30(b)(6) is substantially different from a witness's deposition as an individual. A 30(b)(6) witness testifies as a representative of the entity, ***his answers bind the entity and he is responsible for***

> ***providing all the relevant information known or reasonably available to the entity.***

Sabre v. First Dominion Capital, LLC, No. 01 Civ. 2145 (BSJ) (HBP), 2002 LEXIS 22193, at *7-8 (S.D.N.Y. Nov. 7, 2002) (emphasis added) (*citing* 8A Charles A. Wright *et al.*, Federal Practice and Procedure § 2103 (2d ed. 1994)); *accord, Reilly v. NatWest Markets Group*, 181 F.3d 253, 268 (2d. Cir. 1999) ("[t]o satisfy Rule 30(b)(6), the corporate deponent has an affirmative duty to make available '***such number of persons as will be able to give complete, knowledgeable and binding answers on its behalf***") (citation omitted; emphasis added); *Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc.*, No. 01 Civ. 3016(AGS) (HB), 2002 U.S. Dist. LEXIS 14682, at *6, 8 (S.D.N.Y. Aug. 8, 2002) (an entity "must produce a witness prepared to testify with the knowledge of the subsidiaries and affiliates if the subsidiaries and affiliates are within its control").

The Underwriter Defendants may not now suddenly at trial, and to the prejudice of the Class, introduce evidence through Chafetz that was previously available to TMI and explicitly called for in the 30(b)(6) Notice. As Judge Schwarz stated in *Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc.*, No. 01 Civ. 3016(AGS)(HB), 2002 WL 1835439 (S.D.N.Y. Aug. 8, 2002):

> Rule 30(b)(6) explicitly requires [a corporation] to have persons testify on its behalf as to all matters known or reasonably available to it and, therefore, implicitly requires such persons to review all matters known or reasonably available to it in preparation for the Rule 30(b)(6) deposition. ***This interpretation is necessary in order to make the deposition a meaningful one and to prevent the "sandbagging" of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial. This would totally defeat the purpose of the discovery process.***

2002 WL 1835439, at *3 (emphasis added).

In *Reilly*, for example, the Second Circuit affirmed the exclusion of two witnesses from testifying at trial due to a corporate party's failure to produce them for a Rule 30(b)(6) deposition, even though the opposing party was aware that they had pertinent information. The Second Circuit noted that:

> To comply with Rule 30(b)(6), as well as Judge Sprizzo's order regarding the completion of discovery, NatWest was required to produce for deposition by March 31, 1998 such of its representatives who were familiar with the specifics of and thus the value of Reilly's work. NatWest chose to produce only Sayre by that date, despite Reilly's complaints that Sayre was not sufficiently knowledgeable about Reilly's work. Nevertheless, before and during trial, NatWest sought to have Adams and Letzler testify on that very issue, claiming that they were knowledgeable in the area. ***By failing to produce Adams and Letzler for deposition, NatWest violated Rule 30(b)(6). Moreover, by failing to produce those witnesses in a timely fashion, NatWest violated Judge Sprizzo's order regarding the completion of discovery.***
>
> ***Having determined that NatWest violated both rule 30(b)(6) and Judge Sprizzo's order, we have little difficulty in concluding that barring Adams and Letzler from testifying about Reilly's work was proper.***

183 F.3d at 268-269. *See also Black Horse Lane Assoc.* v. *U.S. Land Resources, L.P.*, 228 F.3d 275 (3d Cir. 2000) (affirming grant of monetary sanctions for failure to produce appropriate 30(b)(6) witness and noting that "the purpose of Rule 30(b)(6) undoubtedly is frustrated in the situation where a corporate party produces a witness who is unable or unwilling to provide the necessary factual information on the entity's behalf"); *Constellation New Energy, Inc. v. PowerWeb, Inc.*, No. 02-2733, 2004 U.S. Dist. LEXIS 15865, at *15 (E.D. Pa. Aug. 10, 2004) (excluding evidence in tortuous interference case about thirteen prospective customers that 30(b)(6) witness failed to identify during his deposition because the designee "'failed to appear' in a meaningful way for that portion of the deposition which discussed the interference with prospective contractual relations with [the] thirteen utilities") (citation omitted).

Lead Plaintiff allotted a portion of its prescribed deposition time to discover what due diligence work TMI would offer in support of its due diligence defense. TMI, knowing what work had been performed and by whom, designated Kelleher. Lead Plaintiff relied on Kelleher's statements that there was no additional due diligence work performed on TMI's behalf other than what was discussed at the deposition. Kelleher Tr. at 83:20-84:12. Given the undue prejudice that would result to the Class, the Underwriter Defendants should be precluded from offering any testimony of Chafetz on the subjects of due diligence performed by or on behalf of TMI, or at least offering any testimony that contradicts the testimony of TMI's 30(b)(6) witness.

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court grant this motion *in limine* to preclude or limit the Underwriter Defendants from offering testimony from Randal Chaletz at trial.

Dated: New York, New York
January 7, 2005

Respectfully Submitted,

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