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. 4:
TO PRECLUDE THE DEFENDANTS FROM INTRODUCING EVIDENCE RELATING TO WITNESSES' INVOCATION OF THE FIFTH AMENDMENT

Lead Plaintiff respectfully submits this memorandum of law in support of its motion *in limine* to preclude Defendants from introducing evidence relating to witnesses' invocation of the Fifth Amendment of the United States Constitution and similar state constitutional protections.[1]

PRELIMINARY STATEMENT

During the course of discovery, Defendants deposed three former employees of WorldCom, each of whom asserted his or her right to remain silent under the Fifth Amendment in response to all questions asked by the parties, other than the question asking the witness his or

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

her name. Specifically, these witnesses are: Ronald Beaumont, the former Chief Operating Officer at WorldCom; Stephanie Scott, the former Director of Financial Reporting at WorldCom; and Ronald Lomenzo, the former Vice President of Financial Operations at WorldCom. Defendants have now indicated that they intend to introduce large portions of these depositions as substantive evidence in their case-in-chief. They should not be permitted to do so.

By way of example, the Underwriter Defendants have designated the following "testimony" that they elicited from Beaumont:

> UNDERWRITERS' COUNSEL: Isn't it true that Salomon Smith Barney conducted substantial due diligence in connection with a May, 2000 and May, 2001 bond offering?
>
> BEAUMONT: Due to the advice of counsel, I respectfully decline to answer based upon my rights under the fifth amendment to the United States Constitution and other state constitutional protections.
>
> UNDERWRITERS' COUNSEL: Isn't it true that the information transmitted by you and others to Salomon Smith Barney in connection with the due diligence conducted by Salomon..would not have given anyone at Salomon any reason to believe the company's financial statements were fraudulent and misleading?
>
> BEAUMONT: Due to the advice of counsel, I respectfully decline to answer based upon my rights under the fifth amendment to the United States Constitution and other state constitutional protections.
>
> UNDERWRITERS' COUNSEL: In fact, isn't it true that you were aware that individuals at WorldCom were providing information they knew to be false to Salomon Smith Barney in connection with its due diligence for the May, 2000 and May, 2001 bond offerings?
>
> BEAUMONT: Due to the advice of counsel, I respectfully decline to answer based upon my rights under the fifth amendment to the United States Constitution and other state constitutional protections.
>
> UNDERWRITERS' COUNSEL: Isn't it true that because of efforts by you and others at WorldCom to conceal the fact that the company was reporting false financial information, no amount of due diligence by Salomon Smith Barney

would have allowed individuals at Salomon to detect the fact that the company was misstating its financial results?

BEAUMONT: Due to the advice of counsel, I respectfully decline to answer based upon my rights under the fifth amendment to the United States Constitution and other state constitutional protections.

Ex. Q[2] (Beaumont Tr.) at 149-51. The Underwriter Defendants designated similar testimony from Scott and Lomenzo. *See* Ex. C.4 to the Joint Pre-Trial Order. Andersen also designated excerpts from each of these witnesses' depositions along these same lines.

None of this "testimony" is admissible against the Class. It is neither trustworthy, nor probative, and it will not assist the jury in its search for the truth; indeed, Defendants simply took advantage of these witness' unwillingness to testify to purportedly testify for them. In addition, the Class has no relationship with these witnesses, and their interests are not aligned in any manner that might justify the drawing of an adverse inference against the Class. For all of these reasons, and as more fully set forth below, the Court should preclude Defendants from introducing any evidence relating to any witnesses' invocation of the Fifth Amendment in this Action.

ARGUMENT

It is well-settled that a non-party witness' assertion of the Fifth Amendment may be admissible against a party in only limited circumstances. *See LiButti v. United States*, 107 F.3d 110 (2d Cir. 1996). The decision of whether to admit such evidence depends on the particular circumstances of the case and is governed by the fundamental, overarching concern of "whether the adverse inference is trustworthy under all of the circumstances and will advance the search

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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.

for the truth." *Id.* at 124. Here, the introduction of evidence against the Class relating to the invocation of the Fifth Amendment by WorldCom employees simply does not satisfy this concern.

To the extent that Defendants seek to introduce this "evidence" to demonstrate that their due diligence was somehow adequate, or that they could not have discovered the fraud at WorldCom, it is neither trustworthy nor probative. *LiButti*, 107 F.3d at 122. In fact, there is no "testimony" contained in these depositions -- there are only the lawyers' questions and the witnesses' refusals to answer those questions. Fully cognizant of the fact that these witnesses would refuse to answer ***any*** questions (other than providing their names), the Defendants purposefully asked leading questions that would imply that their due diligence investigation was adequate. Courts have routinely recognized that such tactics are improper and do not afford the questioning party the right to an adverse inference. *See, e.g., RAD Services, Inc. v. Aetna Casualty & Surety Co.*, 808 F.2d 271, 277-78 (3d Cir. 1986) (condemning the use of "fact-specific questions by which the examining attorney effectively testifies for the invoking witness").

For example, in *Cavalier Clothes, Inc. v. Major Coat Co.*, No. 89-3325, 1995 U.S. Dist. LEXIS 7023 (E.D. Pa. Apr. 6, 1995), the court considered circumstances similar to those presented here. There, the court specifically held that the defendants were not entitled to an adverse inference, stating:

> [T]he Third Circuit specifically warned against 'sharp practices' which would allow the systematic interrogation of witnesses on direct examination by counsel who knows they will assert the privilege against self-incrimination. In this case, counsel for [defendants] had notice that Mr. Wertheimer, on advice of counsel, intended to invoke his privilege against self-incrimination as to every question asked other than his name and address. Despite this information, counsel for [defendants] took Mr. Wertheimer's deposition and engaged in a 'systematic interrogation' in an attempt to create sufficient adverse inferences..This type of calculated

> questioning by which the examining attorney effectively testifies for the invoking witness has been specifically eschewed by the Third Circuit.

Id. at *17-18 (citations omitted); *see also Ullman-Briggs, Inc. v. Salton/Maxim Housewares*, No. 92 C 680, No. 92 C 2394, 1996 U.S. Dist. LEXIS 13261, at *50 (N.D. Ill. 1996) ("[D]uring Briggs' deposition testimony, he made a blanket assertion of his fifth amendment privilege against self-incrimination, answering only the question asking his name. He refused to answer any other question whatever. It is therefore impossible to draw a negative inference from his refusal to answer any given question, as it would be if his assertion of the privilege had been selective"); *In re Citric Acid Litig.*, 996 F. Supp. 951 (N.D. Cal. 1998), *aff'd*, 191 F.3d 1090 (9th Cir. 1999) ("[O]nce a party invoked the Fifth Amendment for any question, it is its right to invoke it for all questions. For that reason, no inference that Cargill conspired can fairly be drawn from these depositions").

Further, this evidence is not probative of any issues in the case, for as this Court has held, whether or not the underwriters could have discovered the fraud is irrelevant to their due diligence defense:

> [A]n underwriter must conduct a reasonable investigation to prevail on the due diligence defense, even if it appears that such an investigation would have proven futile in uncovering the fraud. Without a reasonable investigation, of course, it can never be known what would have been uncovered or what additional disclosures would have been demanded.

In re WorldCom, Inc., Sec. Litig. No. 02 Civ. 3288, 2004 WL 2924601 (S.D.N.Y. Dec. 15, 2004) at *48; *see also WorldCom* at FN40 (underwriters "must shoulder the burden of establishing their due diligence even if that due diligence would not have revealed the existence of fraudulent conduct").

Finally, this evidence will ***not*** aid the jury in its search for the truth. *Libutti*, 107 F.3d at

122. To the contrary, the introduction of this evidence, along with Lead Plaintiff's counter-designations, would only serve to hopelessly confuse the jury. In order to demonstrate the absurdity of the defendants' questioning of these witnesses, on cross-examination Lead Plaintiff asked similarly leading questions that were designed to establish that the Underwriters' due diligence was ***not*** reasonable. Once again, each of these witnesses asserted the Fifth Amendment in response to these questions. (*See, e.g.*, Beaumont Tr. at 70-79, 83-85.) Taken together, this 'evidence' would obviously be impossible for the jury to decipher, and it should be excluded for that reason also.

In any event, the only fair inference that a jury could draw from the refusal of any WorldCom witness to answer a question would be an adverse inference against the ***Defendants***. In *Libutti*, the Second Circuit set forth four non-exclusive factors that the Court should consider in determining whether to allow evidence of a third-party witness' invocation of the Fifth Amendment against a party to a litigation. Those factors include the following:

(1) The nature of the relevant relationships;

(2) The degree of control of the party over the non-party witness;

(3) The compatibility of the interests of the party and non-party witness in the outcome of the limitation; and

(4) The role of the non-party witness in the litigation.

Id. at 123-24. Each of these factors weighs heavily against allowing Defendants to introduce the proffered evidence against the Class, and several actually support an adverse inference against Defendants.

First, in terms of the nature of the relevant relationships, the Second Circuit held in *LiButti* that "while no particular relationship governs, the nature of the relationship will invariably be the most significant circumstance." *Id.* at 123. The Court explained that this factor should be

examined "from the perspective of a non-party's witness' loyalty to the plaintiff or defendant, as the case may be. The closer the bond, whether by reason of blood, friendship or business, the less likely the non-party would be to render testimony in order to damage the relationship." *Id.* at 123-24.

In accord with *LiButti,* courts that have allowed the imputation of an adverse inference from a non-party witness' refusal to testify have done so only because they "found that the nonparty witness and the party against whom the adverse inference would be drawn had allied interests." *Kontos v. Kontos*, 968 F. Supp. 400, 407 (S.D. Ind. 1997). The reason for this is best exemplified by *LiButti* itself. There, the daughter of a delinquent taxpayer brought a wrongful levy action against the government after the government placed a tax levy on a horse that the government contended was owned by her father. The father invoked the Fifth Amendment when asked at his deposition whether he or his daughter owned the horse. In those circumstances, the Second Circuit held that an adverse inference could be drawn against the daughter, because father and daughter "had precisely the same interest against the drawing of adverse inferences from [the father's] invocation of the Fifth Amendment: their collective desire that Devil His Due and all of Lion Crest's assets be deemed in [the daughter's] ownership so that they would be insulated from levy by the government." *Id.* at 408.

Here, in stark contrast to *LiButti,* the witnesses who took the Fifth never had any relationship with the Class. All of these witnesses were former WorldCom employees, and there is no "bond" or other connection between them and the Class. Further, the interests of the Class and of these witnesses cannot be said to be allied–to the contrary, because their employer, WorldCom, surely would have been a defendant in this action had it not filed for bankruptcy, these witnesses are adverse to the Class.

By contrast, there is a significant relationship between these witnesses and Defendants. WorldCom hired the Underwriter Defendants and Andersen to be their principle advisors with respect to two of the biggest bond offerings in history and the accuracy of their financial statements. Indeed, the record is replete with evidence demonstrating close business ties between these entities and WorldCom and its senior management. Consequently, if the invocation of the Fifth Amendment by WorldCom witnesses is to be allowed at all, the only permissible inference would be an adverse inference ***against*** Defendants.

Second, "the degree of control which the party has vested in the non-party witness in regard to the key facts and general subject matter of the litigation will likely inform the trial court whether the assertion of the privilege should be viewed as akin to testimony approaching admissibility under Fed. R. Evid. 801(d)(2), and accordingly may be viewed as a vicarious admission." *Libutti,* 107 F.3d at 123. Here, the Class obviously never had "control" over the non-party witnesses, nor can their testimony possibly be viewed as vicarious admissions by the Class that Defendants conducted adequate due diligence, or could not have uncovered the fraud. *See, e.g. Banks v. Yokemick*, 144 F. Supp.2d 272, 290 (S.D.N.Y. 2001) (court denied a request by plaintiff in civil rights case to read deposition testimony by two non-party police patrol partners in which they invoked Fifth Amendment concerning pertinent events, holding that "these ties do not strike the Court as sufficient to establish that Yokemick could exercise any form of control over Krumm or Geraghty to guide their testimony or to support a necessary inference that at this time their interests coincide"); *In re Handy & Harman Ref. Group*, 266 B.R. 32, 35 (Bankr. D. Conn. 2001) (denying motion to admit into evidence Fifth Amendment assertions by witness due to lack of current relationship between witness and parties, holding there is "no basis for finding that there is presently any relationship between the witness [who invoked the Fifth Amendment]

and the debtor; nor that there is, or ever was, any relationship between the witness and the committee (factor 1); nor is there any–financial, emotional or otherwise -control over the witness (factor 2)."

Third, with respect to the compatibility of the interests of the party and non-party witness in the outcome of the limitation, "the trial court should evaluate whether the non-party is pragmatically a non-captioned party in interest and whether the assertion of the privilege advances both the non-party witness and the affected party in the outcome of the litigation." *Libuttii*, 107 F.3d at 123. As noted above, the interests of Scott, Beaumont and Lomenzo are not compatible with the interests of the Class. Indeed, if anything, the interests of these witnesses is aligned with Defendants. All of these entities have a strong interest in demonstrating that WorldCom's financial statements were true and, thus, avoiding liability -- be it criminal or civil -- under the federal securities laws. Thus, while the defendants should not be entitled to introduce this evidence, the Class might be entitled to do so and to receive an adverse inference against Defendants.[3]

Finally, while it may be true that these non-party witnesses played a role in the fraud, that fact alone does not justify allowing Defendants to admit this testimony, particularly where the fraud has already been admitted and all of the parties have indicated their intention to introduce the plea allocutions of WorldCom employees who testified that they purposefully

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[3] To the extent that Defendants attempt to argue that the Court should allow evidence of these witnesses' invocation of the Fifth Amendment because the jury is entitled to draw an adverse inference against WorldCom, such an argument would be specious. WorldCom is not a party to this litigation, and it would be the height of unfairness to allow this testimony to come in against the same Class that was precluded from suing WorldCom as a result of its bankruptcy and, when, in reality, it is the interests of these former WorldCom employees and Defendants that are aligned.

manipulated WorldCom's financials results in fiscal 2000 and 2001. *See* PTO Exs. A.2-E.2. Further, this Court has already held as a matter of law that WorldCom's financial statements for the first quarter of 2001 were materially false and misleading as a result of the line cost fraud. Thus, to the extent that the defendants seek to introduce witnesses' invocation of the Fifth Amendment to prove this aspect of the fraud, this evidence is entirely unnecessary and redundant.

CONCLUSION

For all of the foregoing reasons, the Court should preclude Defendants from introducing any evidence relating to the assertion of the Fifth Amendment by witnesses in this Action.

Dated: New York, New York
January 7, 2005

Respectfully Submitted,

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