BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
ATTORNEYS AT LAW
NEW YORK • CALIFORNIA • NEW JERSEY • LOUISIANA

JOHN P. COFFEY
sean@blbglaw.com
212-554-1409

February 7, 2005

By Hand

The Honorable Denise Cote
United States District Court
Southern District of New York
500 Pearl Street, Room 1040
New York, New York 10007

Re: In re WorldCom, Inc. Securities Litigation, Master File No. 02 Civ. 3288 (DLC)

Dear Judge Cote:

On behalf of Lead Plaintiff New York State Common Retirement Fund and Co-Lead Counsel Barrack, Rodos & Bacine, we write with regard to the February 4, 2005 motion by the Underwriter Defendants to adjourn for over three months (and perhaps much longer, see UW Br. at 31 n.14), the trial that is scheduled to start three weeks from today. As explained below, the Underwriter Defendants' latest effort to delay the trial rests on a number of factual and legal premises that are either irrelevant or wrong. Nonetheless, considering all the circumstances (including our communications with the Government), Lead Plaintiff would not oppose a four week adjournment of the trial, until March 28.[1]

Addressing first what is proffered as the principal basis for the requested delay, the notion that the testimony elicited in the Ebbers trial somehow vindicates Defendants and undermines the Class' claims is specious. Among other things, the testimony shows that the fraud on investors began even earlier than had been previously disclosed; that the most basic corporate reports that senior management relied on to understand the true state of WorldCom's business (and which the bankers chose not even to request) showed enormous discrepancies between WorldCom's publicly reported results and its true operating results; and that the fraudsters were not concerned that Internal

[1] Given the timing of this request, Lead Plaintiff is providing this brief response today to advise the Court of its position on the requested adjournment. In the event that the Court considers granting a longer extension, or if the Court would like a more detailed response from Lead Plaintiff, we are prepared to submit a memorandum addressing this matter later this week. We note that we have just received by email a similar motion by Arthur Andersen, which was apparently filed on Friday but not provided to Lead Plaintiff until 10:30 a.m. this morning.

Audit would find the fraud in 2001 because that group did operational audits, not financial statement audits as Defendants suggest. Indeed, the very testimony cited by Defendants as proof that these witnesses would be of help to them compels quite the opposite conclusion. For example, Defendants cite certain testimony for the unremarkable proposition that the people who were committing the fraud took steps to hide it. See UW Br. at 12-14 and 19 (conspirators anticipated manner in which auditors and banks would analyze WorldCom). But the most notable import of this testimony is that the criminals viewed the efforts of the auditors and the bankers as so predictable, trivial, and superficial that they concluded that they could make these huge, hundred million dollar-plus manipulations without fear of discovery (and that they were correct in so concluding).

The Underwriter Defendants' brief also confirms that this motion, like those that preceded it, is made more for purposes of delay and generating claims of prejudice than in genuine pursuit of the merits. Take, for example, their breathless references to the testimony of Myers on line costs. Defendants claim that one reason the Court would be abusing its discretion by making them stand trial without access to Myers is because his testimony "explodes" a central tenet of Lead Plaintiff's case (and the Court's summary judgment opinion) concerning the composition of WorldCom's line costs. UW Br. at 1, 3, 21. But the idea that Defendants need access to Myers or any other Embargoed Witness to discover what WorldCom considered to be part of its line costs is ridiculous; there were any number of non-culpable witnesses readily available during discovery (including a Rule 30(b)(6) witness from MCI, if needed) to provide such evidence for Defendants if it was that critical. They sought no such deposition.[2]

The request is also infirm on legal grounds. An entire section of the Underwriter Defendants' brief is devoted to explaining how this evidence is vital because it will show that the Underwriter Defendants never could have found the fraud. UW Br. at 18-24, 33. But as Lead Plaintiff has repeatedly explained, and as the Court recently held in its summary judgment decision, that argument is inapposite because the proper focus at trial is on what these Defendants did or did not do, not on the WorldCom fraudsters. In an opinion that contained the most painstaking exposition of an underwriter's obligation issued by any court in a generation, this Court concluded that, to prevail on a due diligence defense, the Underwriter Defendants must prove that they did a reasonable investigation "even if it appears that such an investigation would have proven futile in uncovering the fraud." SJM Op. at 120; see also SJM Op. at 64 n.40 (Underwriter Defendants "must shoulder the burden of establishing their due diligence even if that due diligence would not have revealed the existence of fraudulent conduct."). Defendants' entire motion is premised on the notion

[2] Similarly inapposite is the claimed need to depose Myers because the Government's direct examination did not "focus[] on communications between WorldCom and the 2001 Underwriters." UW. Br. at 23. As to that evidence, the Underwriter Defendants most certainly have access to their own participants in those communications.

that details of a cover-up somehow substitutes for their failure to conduct appropriate due diligence for the largest bond offering in history. That is not the law of this case.[3]

The Underwriter Defendants also overstate the Court's past rulings on their purported "need" to obtain testimony from the Embargoed Witnesses to establish their due diligence defense. Contrary to what Defendants contend, the Court has never held that they must be allowed to depose the Embargoed Witnesses before trial. To the contrary, as the Court has explicitly recognized, the "defendants themselves are the most obvious and best witnesses to present their own defenses." In re WorldCom, Inc. Sec. Litig., 2004 WL 802414, at *6 (S.D.N.Y. Apr. 15, 2004). In particular, the Court has already emphatically rejected the primary contention that Defendants raise here -- that the depositions are important to show the steps WorldCom and its employees took to conceal the fraud from Defendants -- holding that "[t]his evidence is available from many sources, and not only from the embargoed witnesses." Id. While the Court did recognize that, "to the extent possible," Defendants were entitled at trial to choose the persons whom they believed to be the best witnesses to support their defense, the Court did not hold that they had established the absolute need to obtain testimony from the Embargoed Witnesses, if such testimony would inordinately delay the trial of this action. Id.

Notwithstanding the foregoing, Lead Plaintiff would consent to an adjournment of no more than four weeks. We are mindful of the need to minimize disruption of the Government's ongoing trial and to avoid unnecessary distractions to the Assistants trying that case by imposing on them yet another round of motion practice. And while we vigorously dispute the proposition that Defendants can evade trial of the Class' claims until no one can assert their Fifth Amendment rights -- which Defendants acknowledge could be much longer than the three months they currently seek (UW Br. at 31 n.14) -- we believe that the timing is such that a brief adjournment to see whether these witnesses will indeed invoke the Fifth Amendment at their depositions is prudent.[4]

Finally, we flatly reject Defendants' argument that the Class suffers no prejudice from another delay in the trial. As the Court has repeatedly stated, it is in the best interests of all concerned, including Defendants (and the Individual Action plaintiffs), to try this mammoth case as soon as possible. Where, as here, the grounds for insisting that the Court postpone the trial date a second time are manufactured for the purpose of delay (and, apparently, generating appellate arguments) rather than a genuine interest in the merits, any delay in presenting the Class' claims to a jury is prejudicial. Nevertheless, given all the circumstances present today, Lead Plaintiff will consent to this brief adjournment.

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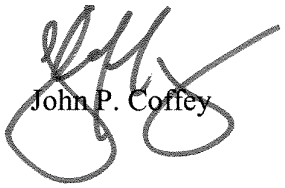
[3] Further, while Lead Plaintiff is reluctant to provide Defendants with any preview of its trial strategy, we add here that the evidence at trial will show that, notwithstanding the Underwriter Defendants' claim that the Embargoed Witnesses kept key financial information away from them, the bankers did indeed have in their possession, prior to the May 2001 Offering, certain highly material financial information which showed that statements WorldCom was making to the investing public were demonstrably false.

[4] As we read the Government's request and Judge Jones' rulings, these witnesses remain embargoed only until the Government rests its rebuttal case. Accordingly, there is no need to wait until verdict to begin the depositions, which could of course be multi-tracked.

Thank you for your consideration of this matter. As noted above, we stand ready to provide a more complete point-by-point response to Defendants' request should the Court so desire.

Respectfully submitted,



John P. Coffey

cc (by fax):
Jay Kasner (Counsel for the Underwriter Defendants)
All Other Counsel of Record
AUSA Bill Johnson