UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE WORLDCOM, INC.
SECURITIES LITIGATION

MASTER FILE NO.
02 Civ. 3288 (DLC)

This Document Relates to:

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
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02 Civ. 4946	02 Civ. 8230	
02 Civ. 4958	02 Civ. 8234	
02 Civ. 4973	02 Civ. 9513	

LEAD PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE MOTION FOR LEAVE TO AMEND THE DIRECTORS' ANSWER FILED ON BEHALF OF STILES A. KELLETT, JR.

Lead Plaintiff, the New York State Common Retirement Fund, respectfully submits this memorandum in opposition to the Motion for Leave to Amend the Directors' Answer filed on Behalf of Stiles A. Kellett, Jr. ("Kellett") pursuant to Rules 15(a) and/or 16(b) of the Federal Rules of Civil Procedure (the "Motion"). Kellett seeks to amend the Directors' Answer to add an additional affirmative defense of the reliance on the advice of counsel. For the reasons stated herein, Kellett's eleventh hour motion to amend the December 15, 2003 Answer should be denied.

PRELIMINARY STATEMEMENT

On August 1, 2003, Lead Plaintiff filed its First Amended Class Action Complaint. In a Scheduling Order dated September 22, 2003, this Court extended the defendants' deadline to answer this complaint until October 14, 2003. The WorldCom Directors then filed their answer to the First Amended Class Action Complaint on that date. Thereafter, on December 1, 2003, this Court granted Lead Plaintiff's motion for leave to amend its First Amended Class Action Complaint to add additional underwriter defendants. Lead Plaintiff filed its Corrected First Amended Class Action Complaint on the same date.[1]

On December 15, 2003, the Director Defendants[2] filed their Answer to Lead Plaintiff's Corrected First Amended Class Action Complaint (the "Answer"). In their Answer, the Director Defendants pled thirty-nine affirmative defenses, but did not assert an affirmative defense of reliance of counsel. Now, over fourteen months later, and over seven months after the completion of fact discovery and less than one month before the date trial is set to begin, Kellett requests leave to amend the Answer to add reliance of counsel, a fortieth defense.

For the reasons stated below, this motion should be denied because it is untimely, the excuses for the long delay in seeking to add an additional affirmative defense do not withstand scrutiny, and furthermore, because the addition of the defense at this juncture would inflict unfair prejudice to the Class on the eve of trial.

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[1]With the permission of this Court, Lead Plaintiff filed a Corrected First Amended Complaint to add additional underwriter parties as defendants. However, the last complaint that was applicable to the Director Defendants was the First Amended Complaint, filed on August 1, 2003, to which the Director Defendants filed an Answer on October 14, 2003.

[2] Identified in the pleading as: Clifford L. Alexander, James C. Allen, Judith Areen, Jr., Carl J. Aycock, Max E. Bobbitt, Francesco Galesi, Stiles A. Kellett, Jr., Gordon S. Macklin, John A. Porter, Bert C. Roberts, Jr., John W. Sidgmore and Lawrence Tucker.

ARGUMENT

A motion for leave to amend a pleading is governed by either Rule 15(a) or Rule 16(b) of the Federal Rules of Civil Procedure. Rule 15(a) provides in pertinent part that a party may amend a pleading only by leave of the Court or by written consent of the adverse party if the party has already amended such pleading. Leave to amend a pleading under Rule 15(a) "'may *only* be given when factors such as undue delay or undue prejudice to the opposing party are absent.'" *In re WorldCom, Inc. Sec. Litig.*, No. 03 Civ. 6225, 2004 WL 2889974, at *8 (S.D.N.Y. Dec. 15, 2004) (quoting *SCS Communications, Inc. v. The Herrick Co.*, 360 F.3d 329, 345 (2d Cir. 2004) (emphasis in original)). This standard places the burden on the moving party to show a lack of unfair prejudice and undue delay resulting from the amendment.

Rule 16(b), which governs leave to amend pleadings after a court has entered a scheduling order setting a time limit for amendments, states that such order "shall not be modified except upon a showing of good cause and by leave of the district judge." This Court has already held that it is not an abuse of discretion for a district court to deny a party "leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause." *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288(DLC), 2003 WL 22831008, at *2 (S.D.N.Y. Dec. 1, 2003) (quoting *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000)). This Rule 16(b) good cause standard requires a different analysis than that undertaken in connection with Rule 15 because, if Rule 15(a) were considered without regard to Rule 16(b), "we would render scheduling orders meaningless and effectively would read Rule 16(b) and its good cause requirement out of the Federal Rules of Civil Procedure." *Id.* at *3 (quoting *Parker*, 204 F.3d at 340). Further, "Rule 16 is designed to offer a measure of certainty in pretrial proceedings, ensuring that at some point both the parties and the pleadings will be fixed." *Id.* (quoting *Parker*, 204 F.3d at 340).

Applying these well-settled standards, whether under Rule 15(a) or the more stringent standards of Rule 16(b), Kellett's Motion should be denied. In *Grace v. Rosenstock*, the Second Circuit stated that it is within the sound discretion of a district court to deny a motion for leave to amend the pleadings "where the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice other parties." 228 F.3d 40, 53-4 (2d Cir. 2000) (quoting *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72 (2d Cir. 1990)). A district court may also deny such belated motion when it would "unduly delay the course of proceedings by, for example, introducing new issues for discovery." *Id.* at 54.

A. The Motion is Untimely and No Satisfactory Explanation Has Been Given for the Delay

The Motion to add an additional affirmative defense on behalf of Kellett to the Directors' Answer is untimely and no satisfactory explanation has been given for the delay. As this Court stated in *Cartier, Inc. v. Four Star Jewelry Creations, Inc.*, where "considerable time has elapsed between the filing of the [pleading] and the motion to amend, the moving party has the burden to provide a satisfactory and valid explanation for the delay." No. 01 Civ. 11295 (CBM), 2004 WL 169746, at *3 (S.D.N.Y. Jan. 28, 2004). Kellett has failed to provide an adequate justification for the belated request to add an additional affirmative defense at this juncture.

1. <u>The Motion is Overdue</u>

The Motion for leave was filed: (i) over seven months after the close of fact discovery, (ii) one month after the trial was originally set to begin and one month before the current trial date, (iii) sixteen months after the date set by this Court for filing answers to the amended complaints, (iv) sixteen months after the Director Defendants filed their Answer to the First Amended Complaint, and (v) over fourteen months after the Director Defendants filed their Answer to the Corrected First Amended Complaint. In addition, the parties' respective motions in limine have already been filed and decided in this case.

Furthermore, the period between the filing of the Answer and the filing of this Motion encompassed months of discovery during which Kellett had ample opportunity to assert a reliance of counsel defense. As this Court has previously stated, "courts often deny a motion for leave to amend if discovery is complete or the parties have moved for summary judgment." *Id.* at *3. Instead of asserting this defense in the amended pleadings or at the close of discovery, Kellett now seeks leave to amend the Answer over seven months after fact discovery ended and one month before the trial is set to begin.

Because of his delay in filing this Motion, Kellett has effectively waived his right to assert an additional affirmative defense. This situation resembles the Director Defendants' prior waiver of their right to bring summary judgment motions.[3] In a September 16, 2004 Order, this Court agreed to adjourn the summary judgment motion schedule with respect to the Director Defendants. Because of their delay in filing after multiple requests for adjournment and because of the insufficient time for briefing and decision, the Director Defendants were deemed to have waived their right to bring summary judgment motions if a settlement was not reached. Accordingly, as the Director Defendants have waived their rights to file summary judgment motions in the hopes that a settlement would ensue, so too have they effectively waived their right to file any amendments to the pleadings at this stage in the proceedings now that settlement negotiations have ended.

2. <u>No Satisfactory Explanation</u>

Kellett has failed to provide a satisfactory explanation for the long delay in moving to amend the Answer to add an additional affirmative defense of reliance of counsel. He and the other Director Defendants, like the Underwriters, made a tactical decision not to assert the

[3] This waiver applied to all Director Defendants with the exception of Bert C. Roberts, Jr., who filed a Motion for Summary Judgment on August 20, 2004.

affirmative defense in their original and amended pleadings, and should therefore not be given the opportunity to amend the Directors' Answer to add such defense when the case is trial-ready.

One of the justifications that Kellett provides for the delay is the "reasonably perceived prospect that a settlement would be achieved between the plaintiffs and [WorldCom] directors." However, serious settlement discussions did not begin between the Director Defendants and the plaintiffs until months after the filing of their Answer. Consequently, even if Kellett has delayed asserting the reliance of counsel defense in reasonable reliance that a settlement would be achieved, this defense could easily have been asserted prior to the commencement of any serious negotiations. This explanation does not justify the addition of an affirmative defense or fulfill the "good cause" requirement necessary to amend the pleadings at this stage in the litigation

Furthermore, all of the pertinent facts giving rise to this Motion were known to Kellett at the close of the discovery period and leave to amend could have been requested at that time. In his Motion, Kellett states that reliance on the advice of counsel was raised at the depositions of Kellett, Francesco Galesi, and P. Bruce Borghardt (who served as inside counsel to the WorldCom Board of Directors) ("Borghardt") and referred to in the reports of the Bankruptcy Examiner and Kellett's corporate governance expert. Therefore, this information was known months and/or years prior to the filing of this Motion and thus the affirmative defense should have been asserted at a more appropriate time, such as date of the filing of the Answer, or at the very latest, at the close of the discovery period.

In addition, a party's request to amend a pleading is more likely to be granted if there is disclosure of new evidence or a change in circumstances prompting such amendment after the filing of the pleadings. *See, e.g.*, *In re WorldCom*, 2003 WL 22831008, at *3 (granting plaintiff's motion to amend complaint when new evidence disclosed days before filing motion). However, in his Motion and supporting Memorandum, Kellett fails to address any additional

evidence disclosed after the close of discovery that would justify the belated motion to add a reliance of counsel defense at this stage. Because the relevant facts and circumstances were known at the time of the filing of the Directors' Answer or at the very latest, at the end of the discovery period, the addition of an affirmative defense after such an excessive delay is overdue and unreasonable.

B. The Motion Would Introduce New Issues for Discovery and Require Waiver of the Attorney-Client Privilege

The addition of a reliance of counsel affirmative defense on behalf of Kellett at this juncture would necessitate the re-opening of discovery just one month before the trial is set to begin. This will be especially complex in light of the attorney-client privilege that currently exists with respect to the attorney-client related communications between MCI, the WorldCom Board of Directors, and the parties' inside and outside legal counsel.

1. <u>The Motion Would Re-Open Discovery One Month Before Trial</u>

As the Second Circuit has previously acknowledged, a court may deny a motion for leave to amend a pleading is if such belated motion would introduce new issues for discovery. *See Grace*, 228 F.3d at 54 (denying leave to amend). Prior to this Motion, neither Kellett nor the other Director Defendants had ever disclosed their intention to assert a reliance of counsel defense in these proceedings. Therefore, "it is readily apparent that the proposed amendment would require a new wave of discovery," further motion practice, and perhaps delay the resolution of the action. *See Krumme v. WestPoint Stevens, Inc.*, 143 F.3d 71, 87 (2d Cir. 1998) (quoting *Krumme v. WestPoint Stevens, Inc.*, 1996 WL 257633, at *1 (S.D.N.Y. May 15, 1996); *see also Cartier,* 2004 WL 169746, at *3 (even though colorable basis for proposed amendment existed, district court did not abuse its discretion in denying motion for leave to amend).

Kellett's request also parallels the prior litigation in this suit over the Underwriter Defendants' belated assertion of the advice of counsel defense, and resulting waiver of the

attorney-client privilege. After the Underwriter Defendants asserted this defense and conceded the privilege, they were required to provide extensive additional discovery. Lead Plaintiff was also given the opportunity to re-depose various witnesses who failed to respond to certain questions in their original depositions on the basis of this privilege.

Therefore, based on the circumstances of this case, the granting of this Motion would clearly introduce new issues for discovery after the discovery period has ended. The plaintiffs would need to depose and/or re-depose the relevant parties, including inside and outside counsel to the Board, and gather evidence at a time that should be devoted to trial preparation and not to additional discovery. While reopening discovery does not in and of itself justify denying a motion to amend, "courts often deny a motion for leave to amend if discovery is complete or the parties have moved for summary judgment." *Cartier*, 2004 WL 169746, at *3. Amending the directors' Answer at this stage would clearly introduce new issues for discovery, launch further motion practice, and unfairly broaden the theories of the suit just weeks before trial.

2. The Motion Would Require Litigation Over the Waiver of the Attorney-Client Privilege

The re-opening of the discovery process and resulting production of documents relating to the reliance of counsel defense will necessitate a waiver of the attorney client-privilege as to attorney-client communications between Kellett, the other WorldCom Directors, MCI, as successor to WorldCom, and the company's inside and outside legal counsel. As Kellett states in his Memorandum of Law, however, WorldCom, through its General Counsel, has insisted on asserting a privilege as to all attorney-client communications. Therefore, the discovery of evidence relating to this reliance of counsel defense will be especially burdensome under these circumstances.[4]

[4] Other than the selected waiver of the attorney-client privilege with respect to: (i) attorney-client communications concerning the loans, compensation, and separation agreement for Ebbers disclosed in an October 29, 2003

Throughout the discovery process, Kellett and others, such as Francesco Galesi and Borghardt, refused to provide information concerning attorney-related communications on the basis of privilege. For example, as Kellett states in his Memorandum of Law in Support of this Motion, during his deposition he agreed to withhold from disclosure the contents of legal advice provided to the WorldCom Board, but "obtained an express acknowledgement from MCI that he reserved the right to challenge that assertion at a later time." MCI has also reserved such right. In addition, at their depositions, both Galesi and Borghardt repeatedly refused to answer questions on the basis of attorney-client privilege. The Individual Directors have also objected to the production of any documents that may have been subject to the attorney-client privilege in their Objections and Responses to the Lead Plaintiff's various document production requests.

It is apparent that if this Motion is granted, it will be necessary to litigate the parties' respective rights to pierce the attorney-client privilege based upon a reliance of counsel defense since MCI, the holder of that privilege, has not waived it. Accordingly, the untimely assertion of this defense would require significant discovery, motion practice, and even appeals, to challenge Lead Plaintiff's right to conduct discovery on this issue, particularly with respect to any information protected by the privilege.

C. The Motion Would Unfairly Prejudice the Class

The addition of a reliance of counsel affirmative defense at this stage would also unfairly prejudice the Class. A proposed amendment to a complaint is "especially prejudicial ... [when] discovery ha[s] already been completed and [the movant] ha[s] already filed a motion for summary judgment." *Krumme.*, 143 F.3d at 88 (citations omitted) (denying defendants' motion to amend answer).

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interview of Kellett conducted by counsel for the WorldCom Board, the Bankruptcy Examiner and the SEC, and (ii) other communications with these three entities in April of 2003, no other attorney-client communications have been disclosed at the request of MCI.

As explained above, the circumstances that gave rise to this Motion were known to Kellett at a much earlier date and this defense could easily have been asserted within the deadlines proscribed by this Court for amending pleadings. A more timely amendment would have given Lead Plaintiff a more reasonable amount of time to gather evidence and respond to this defense. Instead, if the Court were to grant Kellett's motion for leave at this juncture, Lead Plaintiff would be required to respond to a reliance of counsel defense without adequate notice and a reasonable amount of time to conduct discovery. For these reasons, the addition of another affirmative defense just one month before trial would unduly prejudice the Class.

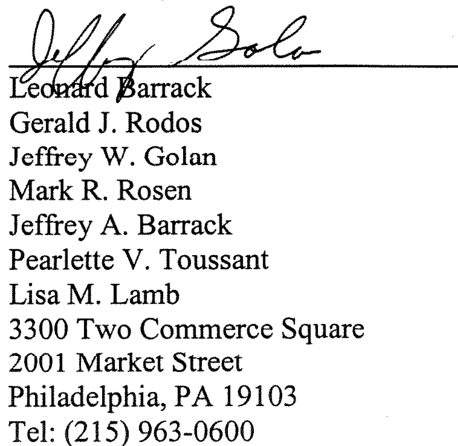
CONCLUSION

For the reasons state above, Lead Plaintiff respectfully requests that the Court deny the Motion for Leave to Amend the Directors' Answer Filed on Behalf of Stiles A. Kellett, Jr. to add an additional affirmative defense of reliance of counsel.

Dated: March 3, 2005

Respectfully submitted,

BARRACK, RODOS & BACINE



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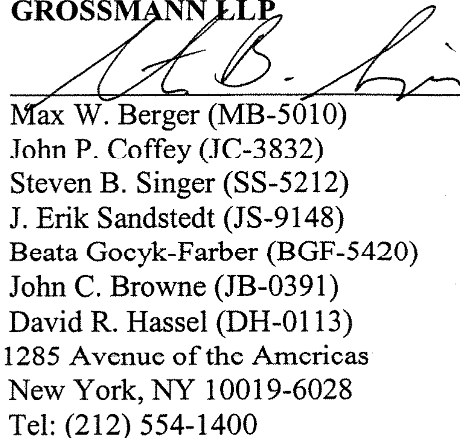

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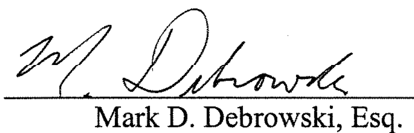
CERTIFICATE OF SERVICE

I, Mark D. Debrowski, Esq. hereby certify that a true and correct copy of Lead Plaintiff's Memorandum In Opposition To The Motion For Leave To Amend The Directors' Answer Filed On Behalf Of Stiles A. Kellett, Jr.is being served on this date upon all involved parties by sending a copy of same to all counsel listed on the attached service list by e-mail.

Dated: New York, New York
March 3, 2005



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