



questions posed to him, relying on the assertion that the communications with counsel were privileged.

On January 6, 2005, Kellett and certain other Director Defendants announced that they had reached a settlement with the Lead Plaintiff. Through an Opinion of February 14, a material term of that settlement was found to be in violation of the Private Securities Litigation Reform Act ("PSLRA"). See In re WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288 (DLC), 2005 WL 335201, at \*1 (S.D.N.Y. Feb. 14, 2005). Given that ruling, the Lead Plaintiff withdrew from the settlement, and Kellett and the other settling defendants have proceeded to prepare for trial.

On February 16, Kellett filed this motion to amend, seeking to add as a fortieth defense that the WorldCom Directors were entitled to and did rely upon the opinions and advice of WorldCom's inside and outside counsel. The Lead Plaintiff opposes the motion. The trial is scheduled to begin on March 17, 2005.

#### Discussion

Kellett's motion is brought pursuant to Rules 15(a) and 16, Fed. R. Civ. P. The governing law in this Circuit has recently been described in In re Wireless Tel. Svcs. Antitrust Litig., No. 02 Civ. 2637 (DLC), 2004 WL 2244502, at \*4-\*5 (S.D.N.Y. Oct. 6, 2004), both parties have relied on that Opinion's description of the legal standard, and that description is incorporated herein. It is Rule 16 that governs this motion since the date for filing an answer has been set through a scheduling order. In

brief, Rule 16 requires a party seeking to modify a scheduling order to show good cause. Id. at \*5.

Kellett has not shown good cause for this untimely application. A waiver of the attorney-client privilege will require at a minimum that discovery be reopened. It will require that documents withheld during discovery because of the assertion of the privilege be produced, that Kellett and others who have been deposed be deposed again, and that depositions be taken of persons who have never been deposed. It may also require further motion practice since Kellett has not shown that all of those implicated by the assertion and waiver of the privilege have consented to the waiver.

Kellett has offered no good explanation for his extraordinarily prejudicial delay in bringing this motion. He asserts that he postponed moving to amend the answer until it became clear that a settlement would not be achieved. This vague assertion does not address the many months over which fact discovery was conducted, and in any event would provide no good excuse for ignoring the scheduling of discovery. All parties, whether they hoped to settle or not, were on notice that the cut-off for fact discovery was firm. The parties to this massive class action made tactical decisions during the discovery period about whom to depose and how to use their resources. Had Kellett included an advice of counsel defense in his answer or timely moved to do so, the other parties to this litigation would have been given a fair opportunity to address the issues raised by

that defense. It is too late now, on the eve of trial, to interpose this defense.

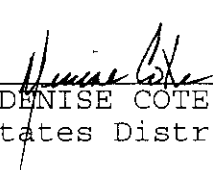
Kellett argues that the other parties will not be surprised by his assertion of this defense. This argument misses the point. The other parties will be unfairly prejudiced by the late amendment to add it as an affirmative defense, with the necessary accompanying assertion that Kellett is waiving the privilege. He has not shown that at any prior point in this litigation he adequately advised the other parties that he would be formally asserting this defense at trial and that he was, as a result, waiving the privilege.

Conclusion

For the reasons stated above, Kellett's motion for leave to amend the answer to the Corrected First Amended Complaint is denied.

SO ORDERED:

Dated: New York, New York  
March 15, 2005

  
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DENISE COTE  
United States District Judge