

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE WORLDCOM, INC. SECURITIES : MASTER FILE  
LITIGATION : 02 Civ. 3288 (DLC)  
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This Document Relates to: : MEMORANDUM OPINION &  
: ORDER  
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ALL ACTIONS :   
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DENISE COTE, District Judge:

At a pretrial conference held yesterday, the Lead Plaintiff made an application to alter a demonstrative that defendant Arthur Andersen LLP ("Andersen") intends to use in that part of its opening statement addressed to its Section 11 liability. The Lead Plaintiff wants the demonstrative to reflect Andersen's preparation of unaudited interim financial information for the first quarters of both 2000 and 2001. The Lead Plaintiff represented that it does not intend to argue at trial that Andersen's preparation of unaudited interim financial information subjects it to liability under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k. Instead, the Lead Plaintiff argued, it believes that the unaudited interim financial information constituted red flags that should have forced Andersen to "look deeper and inquire more" in conducting its investigation of those portions of the registration statement prepared or certified by Andersen, namely the audited financial statements for 1999 and 2000. In re WorldCom, Inc. Sec. Litig., 346 F. Supp. 2d 628, 677 (S.D.N.Y. 2004).

Section 11 provides in pertinent part:

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact

required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . may . . . sue--

. . . .  
(4) every accountant . . . who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement . . . .

15 U.S.C. § 77k(a)(4) (emphasis supplied). A subsequent regulation promulgated by the SEC known as Rule 436 makes clear that a report on unaudited interim financial information "shall not be considered a part of a registration statement prepared or certified by an accountant within the meaning of sections 7 and 11 of the [Securities] Act." 17 C.F.R. § 230.436(c); see also WorldCom, 346 F. Supp. 2d at 665 (purpose of Rule 436 was "to assure auditors that their review of unaudited interim financial information would not subject them to liability under Section 11").

Based on the plain text of Section 11 and Rule 436, it is clear that Andersen may not be liable for any reports on or reviews of unaudited interim financial information. It is less clear, however, whether such unaudited interim financial information is pertinent to Andersen's due diligence obligation under Section 11(b)(3)(B)(i). 15 U.S.C. § 77k(b)(3)(B)(i). That provision provides that no person who sustains his burden of proof shall be liable

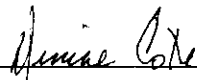
as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert [if] he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated

therein or necessary to make the statements therein not misleading.  
15 U.S.C. § 77k(b)(3)(B)(i) (emphasis supplied). Therefore,  
whether Andersen's review of the quarterly financial information  
for the first quarters of 2000 and 2001 should matter to an  
assessment of Andersen's due diligence depends on the meaning of  
the phrase "at the time such part of the registration statement  
became effective," the determination of that date, and evidence  
regarding what work Andersen had performed as of that date. For  
the reasons explained above, it is hereby

ORDERED that the Lead Plaintiff and Andersen may each submit a  
letter of no more than five pages by 5:00 p.m. on Thursday, March  
24, 2005, explaining its respective view of this language and how  
it bears on the evidence each side is entitled to present at trial.  
The parties should also submit any documentation necessary to  
demonstrate the date for both the 2000 and 2001 Offerings "at which  
such part of the registration statement became effective."

SO ORDERED:

Dated: New York, New York  
March 23, 2005

  
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DENISE COTE  
United States District Judge