

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v.- : S4 02 Cr. 1144 (BSJ)

BERNARD J. EBBERS, :

Defendant. :

- - - - -x

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT'S SENTENCING MOTIONS

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**GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION
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The Government respectfully submits this Memorandum of Law In Opposition To Defendant Bernard J. Ebbers's Sentencing Motions. First, Ebbers objects to virtually every calculation in the Presentence Report ("PSR") that was made to determine the applicable Sentencing Guidelines range. These claims should be rejected, as the PSR properly calculated the applicable Sentencing Guidelines range. Second, Ebbers makes a series of downward departure motions. Based on current Second Circuit law, however, Ebbers is not entitled to a downward departure from the applicable Guidelines range. Third, Ebbers describes a variety of factors that, in his view, the Court should consider under Title 18, United States Code, Section 3553(a), which support a non-Guidelines sentence. In response, the Government sets forth its view of issues relevant to sentencing under this provision.

BACKGROUND

On March 15, 2005, after an eight-week trial, a jury convicted Ebbers of one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371, one count of securities fraud, in violation of 15 U.S.C. § 78j(b), and seven counts of making false filings with the United States Securities and Exchange Commission ("SEC"), in violation of 15 U.S.C. § 78ff. As the Indictment in this case alleged -- and as the evidence at trial overwhelmingly demonstrated -- from October 2000 through June 2002, the defendant, the Chief Executive Officer of WorldCom, Inc. ("WorldCom") conspired with several other individuals in a scheme to defraud purchasers and sellers of WorldCom common stock. The following factual summary is taken from the proof adduced at trial.

I. WorldCom

WorldCom was a public company, which provided to businesses and consumers around the world a broad range of communications services, including, among other things, data transmission services, Internet-related services, commercial voice services, international communication services, long distance service, and other telecommunication services. Ebbers, WorldCom's CEO, and Scott Sullivan, WorldCom's Chief Financial Officer, regularly provided members of the investing public with information concerning WorldCom's financial results and operating

performance. Ebbers and Sullivan provided such information through various methods, including in WorldCom's public filings with the SEC, in periodic news releases and other corporate announcements, in statements made in conference calls with professional securities analysts and investors, and in meetings and conferences held with analysts and investors.

At the close of each month and each quarter of WorldCom's fiscal year, employees in WorldCom's financial and accounting departments collected and summarized information regarding WorldCom's operating performance and financial results for the particular period in question. This information was reflected in various financial statements and reports. WorldCom tracked its revenue on a monthly basis through the use of a report referred to internally as "MonRev." Revenue that was not generated through a particular sales channel was tracked separately and classified in MonRev as "Corporate Unallocated." WorldCom tracked its primary expense, line costs, on a quarterly basis through the preparation of a preliminary income statement. Members of WorldCom's General Accounting Department prepared a preliminary income statement each quarter and provided it to Scott D. Sullivan and others. Sullivan, in turn, provided these preliminary income statements to Ebbers. At the close of each financial reporting period, Ebbers and Sullivan met to discuss

WorldCom's preliminary operating results, including WorldCom's line cost expenses.

II. Ebbers's Criminal Conduct

From in or about September 2000 through in or about June 2002, Ebbers and his co-conspirators engaged in an illegal scheme to deceive members of the investing public, WorldCom shareholders, securities analysts, the SEC, and others concerning WorldCom's true operating performance and financial results. As Ebbers and his co-conspirators knew, by no later than September 2000, WorldCom's true operating performance and financial results were in decline and had fallen materially below analysts' expectations. Ebbers nevertheless insisted that WorldCom publicly report financial results that met analysts' expectations. As a result, rather than disclosing WorldCom's true condition and suffer the ensuing decline in the price of WorldCom's common stock, Sullivan, with Ebbers's knowledge and approval, directed co-conspirators to make false and fraudulent adjustments to WorldCom's books and records.

Thereafter, from September 2000 through June 2002, for the purpose of disguising WorldCom's true operating performance and financial results, Ebbers and his co-conspirators caused WorldCom's reported figures for revenue, SG&A and line cost expenses, EBITDA, depreciation expense, net income, and EPS to be falsely and fraudulently manipulated. As Ebbers and his co-

conspirators knew, the aggregate effect of these adjustments, which were made in round-dollar amounts and consistently totaled hundreds of millions of dollars per quarter, was to present a materially false and misleading picture of WorldCom's true operating performance and financial results.

In furtherance of the scheme, Ebbers and his co-conspirators made repeated public statements in which they (a) falsely described WorldCom's operating performance and financial results, (b) omitted to disclose material facts necessary to make the statements that they made about WorldCom's operating performance and financial results complete, accurate, and not misleading, and (c) caused WorldCom to file financial statements with the SEC that presented a materially false and misleading description of WorldCom's operating performance and financial results. Through this scheme, Ebbers and his co-conspirators inflated and maintained artificially the price of WorldCom common stock.

On or about June 25, 2002, WorldCom announced that, as a result of an internal investigation, it would have to issue restated financial statements. In the days following this announcement, the price of WorldCom's common stock plummeted more than 90%, resulting in an aggregate decline in shareholder value of more than \$2 billion.

III. The Presentence Investigation Report

On May 11, 2005, the Probation Office made its initial disclosure of the PSR. The Probation Office made the following calculations regarding the application of the Sentencing Guidelines to this case.¹ According to the PSR, Ebbers's base offense level is 6. (PSR ¶ 120). The PSR determined that the loss amount is, at a minimum, \$2.223 billion. Thus, pursuant to U.S.S.G. § 2B1.1(b)(1)(N), 26 levels are added to the offense level. (PSR ¶ 121). The PSR next determined that there were more than 50 victims of the offense. Thus, pursuant to U.S.S.G. § 2B1.1(b)(2)(b), 4 levels are added to the offense level. (PSR ¶ 122). The PSR next found that Ebbers derived more than \$1 million gross receipts from the offense, namely, the loans he obtained and the delay in paying margin calls. Thus, pursuant to U.S.S.G. § 2B1.1(b)(12)(A), 2 levels are added to the offense level. (PSR ¶ 123). Next, the PSR adds 4 levels for Ebbers's role as leader of the offense, pursuant to U.S.S.G. § 3B1.1(a). (PSR ¶ 125). The PSR also adds 2 levels because Ebbers abused a position of public trust, pursuant to U.S.S.G. § 3B1.3. (PSR ¶ 126). The PSR notes that the Government will seek an obstruction of justice enhancement, but does not add this enhancement to the Guidelines calculation. (PSR ¶ 127). Ebbers total offense level

¹ The Probation Office used the 2001 Guidelines manual in calculating Ebbers's total offense level because it is more favorable to Ebbers than the current manual. (See PSR ¶ 118).

according to the PSR is 44. (PSR ¶ 132). Ebbers is in Criminal History Category I, and thus the PSR concluded that his sentencing range is life imprisonment. (PSR ¶¶ 139, 209).

ARGUMENT

I. Applicable Law

Although the law governing sentencing has been in flux since the jury returned its verdict in this case, the Supreme Court clarified the continuing role of the Sentencing Guidelines and the scope of the sentencing court's discretion in United States v. Booker, 125 S. Ct. 738 (2005). Booker makes clear that this Court must consider both the sentencing factors set forth in Title 18, United States Code, Section 3553(a) and the Sentencing Guidelines in fashioning a reasonable sentence. Booker, 125 S. Ct. at 764. Under Booker, the Sentencing Guidelines are no longer mandatory, but must still be considered in determining the appropriate sentence. Booker and other courts have recognized the continuing relevance of the Sentencing Guidelines in determining an appropriate sentence. As recently stated by the Second Circuit:

[I]t is important to bear in mind that Booker/Fanfan and section 3553(a) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge. Thus, it would be a mistake to think that, after Booker/Fanfan, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable

statutory maximum and minimum. On the contrary, the Supreme Court expects sentencing judges faithfully to discharge their statutory obligation to "consider" the Guidelines and all of the other factors listed in section 3553(a). We have every confidence that the judges of this Circuit will do so, and that the resulting sentences will continue to substantially reduce unwarranted disparities while now achieving somewhat more individualized justice.

United States v. Crosby, 397 F.3d 103, 113-14 (2d Cir. 2005).

Under the non-mandatory Guideline regime established by Booker and Crosby, the sentencing judge is empowered to make the factual findings necessary for determining what the recommended Guideline Sentence is in a particular case. United States v. Crosby, 397 F.3d at 113 ("the sentencing judge is entitled to find all the facts appropriate for determining either a Guidelines sentence or a non-Guidelines sentence.").

Thus, following the decisions in Booker and Crosby, sentences are no longer solely determined under the Sentencing Guidelines, and are now governed by Title 18, United States Code, Section 3553(a), which provides that:

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced;

* * *

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

II. The Appropriate Sentencing Guidelines Calculation

Ebbers objects to the Guidelines calculation in the PSR “in virtually every respect.” (Sentencing Br. 21). Ebbers makes the following specific objections: (1) the loss enhancement does not apply; (2) the enhancement for number of victims does not apply; (3) the enhancement for deriving more than \$1 million in gross receipts does not apply; (4) the enhancement for being a leader of criminal activity does not apply; and (5) the obstruction of justice enhancement does not apply. (Sentencing Br. 22-27). Ebbers’s objections are simply without merit, as the PSR calculation is proper.

A. The Loss Calculation

Ebbers makes a series of arguments challenging the loss calculation in the PSR. These arguments fall into two basic categories. First, Ebbers argues that loss should be calculated based on the revenue aspects of the case as opposed to the line cost aspects of the case, and that such a calculation results in zero loss. (Loss Br. 5-12). Second, Ebbers argues that the loss attributable to the line cost aspects of the case cannot be reasonably estimated and thus should be zero. (Loss Br. 12-21). Ebbers also argues that the Government should be required to prove loss beyond a reasonable doubt, that there was no “intended” loss, and that the Court should not apply an enhancement for gain. (Loss Br. 2-5, 21-22). These arguments

simply ignore Second Circuit law regarding the proper computation of loss in a criminal case. Accordingly, they should be rejected.

1. Burden of Proof

As a threshold matter, Ebbers argues that the Court should require the Government to establish the applicable loss beyond a reasonable doubt. Ebbers's position simply finds no support in the law.

Prior to the Supreme Court's recent decision in United States v. Booker, 125 S. Ct. 738 (2005), the Second Circuit squarely and repeatedly held that disputed facts relevant to sentencing determinations under the Sentencing Guidelines need only be proved by a preponderance of the evidence. See, e.g., United States v. Cordoba-Murgas, 233 F.3d 704, 708 (2d Cir. 2000); United States v. Franklyn, 157 F.3d 90, 97 (2d Cir. 1998); United States v. Ruggiero, 100 F.3d 284, 290 (2d Cir. 1996); United States v. Onumonu, 999 F.2d 43, 45 (2d Cir. 1993); United States v. Candito, 892 F.2d 182, 186 (2d Cir. 1989). The Supreme Court ultimately came to the same conclusion. United States v. Watts, 519 U.S. 148 (1997).

In reaching that conclusion, the Second Circuit explicitly rejected the claim that the Due Process Clause required sentencing courts to apply a higher standard of proof. United States v. Guerra, 888 F.2d 247 (2d Cir. 1989). There,

citing the “long history of judicial discretion in sentencing, the strong interest in judicial economy, and the fact that already over-burdened trial courts would be greatly disserved by the time-consuming hearings that would be constantly called for under any higher standard,” this Court held that “the preponderance of the evidence standard satisfies the requisite due process in determining relevant conduct pursuant to the Sentencing Guidelines.” Id. at 251.

Ebbers suggests that the Supreme Court’s recent decision in Booker undermines the reasoning of these cases. (Loss Br. 4-5). In Booker, the Supreme Court ruled that the combination in the Guidelines of (1) mandatory increases in sentencing ranges where the Government proved certain aggravating facts at sentencing, and (2) judicial determination of those aggravating facts, violated defendants’ Sixth Amendment right to a jury trial. United States v. Booker, 125 S. Ct. at 751, 756. To remedy that constitutional problem, the Supreme Court declared unconstitutional those statutory provisions making the Guidelines binding on District Courts, leaving the Guidelines to stand instead as one factor that District Courts are required to consider in imposing sentence. Booker, 125 S. Ct. at 764.

Thus, the net effect of Booker is to make the Sentencing Guidelines, and the factual determinations that district courts make to set Guidelines ranges, less important in

setting a defendant's sentence then they were before Booker. The process due a defendant with regard to a particular factual determination turns on the importance of the factual determination to the defendant. See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). It follows that Booker's decrease in the importance of facts used to make Guidelines determinations cannot have increased the process to which a defendant is constitutionally entitled with regard to the determination of those facts. Accordingly, simple logic establishes that Booker provides no basis for reconsidering the settled rule that finding facts relevant to Guidelines determinations under the preponderance of evidence standard fully comports with the requirements of the Due Process clause.

The Second Circuit's recent decision in United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), further supports that conclusion. There, this Court ruled that the applicable Guidelines range "is normally to be determined in the same manner as before [Booker]," id. at 112, that is, by the court under the preponderance standard. See also United States v. Duncan, 400 F.3d 1297, 1304 (11th Cir. 2005) (ruling, post-Booker, that the preponderance of the evidence standard continues to apply). Simply put, nothing about the Supreme Court's recent decision in Booker changes the applicable standard of review. As the Second Circuit has explained, "[t]he remedial portion of Booker held

that decisions about sentencing factors will continue to be made by judges, on the preponderance of the evidence'" Guzman v. United States, 404 F.3d 139, 142 (2d Cir. 2005) (citing McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005)).

Ignoring both the logical implications of Booker's decrease in the importance of the Guidelines and the plain language of Crosby and Guzman, Ebbers relies on an array of district court decisions from other circuits, see United States v. Huerta-Rodriguez, 355 F. Supp.2d 1019 (D. Neb. 2005); United States v. Gray 362 F. Supp. 2d 714, (S.D. W. Va. 2005); United States v. Pimental, 367 F. Supp. 2d 143 (D. Mass. 2005), in support of his claim that the Due Process Clause requires the use of the beyond-a-reasonable-doubt standard to resolve factual disputes relevant to Sentencing Guidelines calculations.² (Loss Br. 4-5). These district court decisions in no way undermine the Second Circuit precedent holding that the preponderance of the evidence standard is sufficient. For instance, in United States v. Huerta-Rodriguez, the district court did not rule that the Due Process Clause required use of the beyond-a-reasonable-doubt standard. Rather, the district court found that although Booker did "not require" this procedure, it remained "up to this court

² Ebbers also cites to Judge Sweet's decision in United States v. West, 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005), in support of this proposition. This decision, however, does not address the issue of the standard of proof.

to determine a reasonable sentence and the court will not rely on facts proved to a mere preponderance of evidence in order to increase a defendant's sentence to any significant degree." United States v. Huerta-Rodriguez, 355 F. Supp. 2d at 1029. Accordingly, the Court should apply the preponderance standard when evaluating the Government's evidence of loss.³

2. The Court Should Calculate Loss Based On The Counts Of Conviction

Ebbers next argues that the Court should calculate loss solely based on the "revenue prong" of the conspiracy. (Br. 5). In support of this argument, Ebbers relies on the Second Circuit's decision in United States v. Orozco-Prada, 732 F.2d 1076 (2d Cir. 1984), and its progeny, holding that when a jury returns a general guilty verdict on a single count of a multi-object conspiracy, the court must sentence the defendant on the conduct that triggers the lowest statutory sentencing range. (Br. 7); see also United States v. Zillgitt, 286 F.3d 128, 133 (2d Cir. 2002). This argument is fatally flawed because it rewrites the charges in this case to fit Ebbers's theory regarding loss. Put differently, Ebbers's argument confuses the means and methods of the conspiracy with the objects of the conspiracy.

³ As discussed below, even under a higher standard, the Government can easily establish that the loss was greater than \$100 million, which is the top of the applicable loss table.

Furthermore, Ebbers simply ignores the fact that he was convicted of eight substantive counts in addition to a conspiracy count.

Ebbers was charged with conspiracy to commit securities fraud, substantive securities fraud, and seven counts of false filings with the SEC. The thrust of these charges was that Ebbers and his co-conspirators made changes to WorldCom's financial results that caused them to mislead the public regarding WorldCom's true financial condition. (Sup. Ind. ¶ 15). The Indictment contains three objects of the conspiracy: securities fraud, false statements in SEC filings, and false books and records. (Sup. Ind. ¶¶ 37-39). In addition to the charges, the Indictment contains a means and methods section, which describes some of the ways that Ebbers and his co-conspirators committed the crimes charged in the Indictment, such as by making adjustments to line cost results and by recognizing revenue that had never been recognized before, solely to meet analysts' expectations. (Sup. Ind. ¶ 40). Ebbers was not charged with any separate crimes, nor were there any objects of the conspiracy, based solely on the revenue or line cost aspects of the fraud.

As these facts make clear, Ebbers's reliance on the Orozco-Prada line of cases is therefore misplaced. First, the holding in these cases is quite narrow. Contrary to Ebbers's suggestion, these cases do not require courts to analyze every

possible theory supporting a conviction to determine which theory would result in the lowest possible sentence. Instead, this line of cases holds that, where a general verdict form is used in connection with a multi-object narcotics conspiracy, courts must “assume that the conviction is for conspiracy to possess the controlled substance that carries the most lenient statutorily prescribed sentence.” United States v. Barnes, 158 F.3d 662, 668 (2d Cir. 1998). To say nothing of the application of this doctrine to non-narcotics and non-conspiracy cases, the Second Circuit has rejected claims that present even a minor deviation from these facts. For instance, the Second Circuit has rejected claims based on differing mandatory minimum sentences because “the nature of the offense of conviction thus [had] no impact on the maximum term of imprisonment permitted by statute.” United States v. Stephenson, 183 F.3d 110, 119 (2d Cir. 1999). These cases do nothing more than create a sentencing ceiling based on the object of a conspiracy that carries the lowest statutory maximum. Here, there is no issue regarding the applicable statutory maximum penalties for the conspiracy count – it is five years.

Second, these cases do not limit a district court’s ability to find facts relevant to sentencing – they simply limit the court’s ability to use those findings to increase the statutory maximum penalty. United States v. Zillgitt, 286 F.3d

at 135 (“where a sentencing court makes its own factual findings regarding the drugs that are the objects of a conspiracy, it may not impose a sentence, based on those findings, that exceeds the statutory maximum sentence permissible for the other drug that is the object of the conspiracy.”). A district court must make certain factual findings that are necessary to calculate the applicable Sentencing Guidelines range for each count of conviction. Here, Ebbers seeks to limit the Court’s ability to determine the amount of loss applicable to the conspiracy count as charged in the Indictment. There is simply no legal basis to impose such a limit.

Third, Ebbers simply ignores the other counts in the Indictment. Even assuming, arguendo, that the Orozco-Prada cases were applicable here, which they plainly are not, the Court will still need to calculate loss for each of the substantive counts. No court has applied the Orozco-Prada cases to substantive counts and they have no application here.

In sum, the references to the “revenue prong” and the “line cost prong” of the case are distinctions without a difference.⁴

⁴ Ebbers claims that it is “highly likely” that the jury convicted Ebbers on the “revenue prong” of the case based on certain isolated post-verdict comments by jurors. (Loss Br. 8-9). Putting aside the fact that there is no basis to draw any conclusions about any aspect of the jury’s verdict from these isolated comments, juror comments are simply not relevant under the applicable case law.

Because the Court must calculate the loss for the counts of conviction, and not for some partial aspect of those counts that the defense selects, Ebbbers's arguments regarding loss causation for the "revenue prong" are moot. (Br. 9-12). As discussed more below, however, Ebbbers's reliance in this section on the standard for determining loss in civil securities cases is completely misplaced and is contrary to Second Circuit law and the Sentencing Guidelines.

Moreover, Ebbbers's reliance on the district court's finding in United States v. Bayly, is misleading. In Bayly, the Government's theory of loss involved the amount that Enron's stock was artificially inflated as a result of the fraudulent conduct. (Heberlig Decl. Ex. 170, at 17). As Ebbbers notes, the district court there concluded that it could not make a reasonable estimate of the loss or intended loss. (Loss Br. 11). What Ebbbers fails to mention, however, are the comments the district court made before reaching that conclusion:

the Court is of the opinion that in certain cases, perhaps including certain Enron related cases not before the Court today, a theory such as was advanced by [the Government's loss expert] may be helpful and sufficiently well founded to permit a Court to make a reasonable estimate of loss in a criminal case which in many ways is different from a private securities case. That all depends upon the particular facts associated with the crime, the amounts involved, and many other surrounding circumstances regarding both the magnitude and the details of what transpired. In this case, however,

based upon the announcement of earning on January 17, 2000, which included the \$0.01 per share attributed to the fraudulent Nigerian barge transaction, when considered in the midst of all of Enron's other misconduct established at trial and the totality of the circumstances, this Court is unable to accept [the Government's loss expert's] theoretical estimate of loss.

(Heberlig Decl. Ex. 170, at 19-20) (emphasis added).

As this excerpt makes clear, absent the specific complications presented in the Nigerian barge case, the district court may very well have calculated a loss amount, even where the fraud was disclosed after Enron had declared bankruptcy, rendering its stock worthless.

As noted above, however, there is no need to rely solely on the "revenue prong" of the fraud to calculate loss. As discussed below, the Court can calculate loss in a traditional manner by evaluating the stock price before and after disclosure of the fraud.

3. The Loss Can Be Reasonably Determined For Guidelines Calculation Purposes

Ebbers next argues that the applicable loss is not capable of being reasonably estimated in this case, even with respect to the "line cost prong." (Loss Br. 12-21). Ebbers claims, essentially, that intervening factors which harmed WorldCom's stock price render it impossible to calculate loss attributable to the fraud. (Loss Br. 13). Ebbers further claims that it is not possible to reasonably determine the number of

harmed shares. (Loss Br. 13). These arguments are without merit for two reasons. First, and most basically, Ebbers completely ignores the evidence offered at trial regarding loss. Based on Colin Glinsman's testimony alone - which was virtually uncontested at trial - the Government can establish that the loss resulting from the fraud was well over the \$100 million threshold that is at the top of the applicable loss table in the Guidelines. Second, Ebbers ignores Second Circuit law and the Sentencing Guidelines' pronouncements regarding loss calculation. The principles of civil securities laws do not apply to calculating loss for Sentencing Guidelines purposes.

a. Applicable Law

"Sentences for offenses involving fraud are imposed under U.S.S.G. § 2F1.1(b), which requires the base offense level to be predicated on the higher of the actual loss or intended loss from the offense."⁵ United States v. O'Neil, 118 F.3d 65, 74 (2d Cir. 1997). In determining the amount of loss resulting from a fraud offense, the sentencing court is not required to compute the loss "'with precision.'" United States v. Jacobs, 117 F.3d 82, 95 (2d Cir. 1997) (quoting U.S.S.G. § 2F1.1, cmt. n.9).

⁵ The Sentencing Guidelines were amended in 2001 to eliminate Section 2F1.1. As a result, Guidelines calculations for fraud offenses are calculated under Section 2B1.1. The principles governing such calculations remain the same.

Instead, the 2001 Sentencing Guidelines, which are applicable here, provide that:

The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference.

U.S.S.G. § 2B1.1, cmt. n.2(c); see also United States v. Bennett, 252 F.3d 559, 565 (2d Cir. 2001), cert. denied, Bennett v. United States, 535 U.S. 932; United States v. Geramosen, 139 F.3d 120, 129 (2d Cir. 1998); United States v. Burns, 104 F.3d 529, 536 (2d Cir. 1997); United States v. Phaneuf, 91 F.3d 255, 261 (1st Cir. 1996) (“[c]ourts can, and frequently do, deal with rough estimates’ when calculating the amount of loss”).

Recognizing these principles, courts frequently calculate loss in securities fraud cases by relying on the change of market capitalization as a result of the disclosure of the fraud. See, e.g., United States v. Moskowitz, 215 F.3d 265 (2d Cir. 2000) (loss calculated based on the decline in market capitalization upon disclosure of the fraud); United States v. Hedges, 175 F.3d 1312 (11th Cir. 1999) (calculating loss by taking the difference between the average share price during the fraud and the share price after disclosure of the fraud and multiplying that difference by the total number of shares outstanding).

b. Discussion

Here, even without regard to the firmly established law regarding loss calculation, the Government has established that the loss exceeded \$100 million. The Government proved this loss through the testimony of Colin Glinsman. Glinsman was an investment manager for Oppenheimer Capital, a firm that managed money for its clients, including institutional investors such as pension funds, by investing it in stocks and bonds. Glinsman testified that Oppenheimer owned, on behalf of its clients, approximately 200 million shares of WorldCom stock between 2000 and 2002, which represented, at its peak market value, approximately \$1.5 billion. (Tr. at 2872). On June 25, 2002, WorldCom issued a press release announcing that it was restating its financial statements. Glinsman testified that, after he read the press release on the morning of June 25, 2002, he attempted to sell all approximately 200 million shares of WorldCom stock owned by Oppenheimer. (Tr. 2875). Because the market never opened for trading that day, Oppenheimer was able to sell only approximately one million shares. Glinsman testified that the remaining shares were rendered worthless. (Tr. 2879-80). He specifically testified that, if loss were measured by calculating the difference between the value of Oppenheimer's shares before and after the June 25, 2002 announcement, Oppenheimer clients lost approximately \$200 million. (Tr. 2915). Plainly, the

Government established through this testimony alone that the loss amount is more than \$100 million.⁶ Moreover, the loss that Oppenheimer suffered is just a fraction of the total loss incurred by investors.

Consistent with Glinsman's testimony, a reasonable calculation of the total loss can be computed by looking at WorldCom's stock price before and after the fraud was disclosed and the number of outstanding shares. Here, it is undisputed that WorldCom's stock price was \$0.83 on June 25, 2002, immediately before the fraud was disclosed, and that WorldCom's stock price dropped to \$0.06 by July 1, 2005. It is also undisputed that WorldCom had approximately 2.9 billion shares outstanding at the time of the fraud announcement. Thus, the Government has demonstrated that WorldCom shareholders lost no less than approximately \$2.223 billion between the date of the announcement of the fraud and July 1, 2005.⁷

⁶ Indeed, during a colloquy with counsel at sidebar, the Court noted that "[i]t seems fairly obvious without this testimony [of Colin Glinsman] that people lost billions of dollars and it can be argued right now." (Tr. 2918). Thereafter, the Court stated that "[i]t seems to me there is in the record evidence of how many millions of shares that were out there and what the price went from during the time period of the fraud." (Tr. 2919). The Court then stated that those facts were sufficient to provide a basis from which to calculate loss. Thus, the measure of loss approved by the Court would provide an even larger loss figure than that relied upon by the Government.

⁷ Yet another basis for calculating loss would be to rely on the testimony of the plaintiff's expert in the WorldCom class action lawsuits. See United States v. Moskowitz, 215 F.3d at 272

Relying on an expert opinion and a recent Supreme Court case, Dura Pharms., Inc. v. Broudo, 125 S. Ct. 1627 (2005), Ebbers argues that the decline in the stock price can be attributed primarily to market factors and thus it is not possible to determine the impact of the fraud. (Loss Br. 14-17). Ebbers's arguments are inapplicable to this case. In civil matters, investor losses cannot be assessed as damages under Rule 10b-5 unless the investor demonstrates both that the violation caused the investors to buy (or sell) the security, and that this transaction led to the investors loss. See, e.g., Castellano v. Young & Rubicam, Inc., 257 F.3d 171, 186 (2d Cir. 2001). In addition, such civil damages must be proved with specificity, usually to the dollar.

However, the Government is aware of no case, and Ebbers cites none, where this standard for civil damages under Rule 10b-5 has been applied to determining loss in a criminal case. Rather, the determination of loss in a criminal case is governed by the United States Sentencing Guidelines. See United States v. Sarno, 73 F.3d 1470, 1500-1501 (9th Cir. 1995). The Sentencing

(upholding the district court's findings regarding loss by noting that it also had an analysis from a class action plaintiffs' expert on that subject). In this case, the expert at the WorldCom securities class action testified that the loss attributable to the fraud was \$24 billion for individuals who purchased WorldCom stock. (PSR ¶ 106). As explained, however, the Court need not rely on this measure as all reasonable calculations of loss far exceed \$100 million, which is the top of the Guidelines range.

Guidelines require a connection between the defendant's illegal conduct and the loss that his sentence is based upon, but that connection need not be nearly as great as that required for damages in civil cases under Rule 10b-5. See id. at 1501.

Under the Sentencing Guidelines, the Government must only show that the loss "resulted from the acts or omissions" of the defendant. U.S.S.G. § 1B1.3(a)(3); United States v. Hicks, 217 F.3d 1038, 1048 (9th Cir. 2000); United States v. Molina, 106 F.3d 1118, 1124 (2d Cir. 1997). The "resulted from" causation standard in the Sentencing Guidelines is far less demanding than the civil damages standard. The Second Circuit has explained that a defendant need not intend the harm that "results from" his offense, so long as he "knowingly risked" that harm coming about. Molina, 106 F.3d at 1124. Indeed, under Second Circuit law, "a defendant is responsible for all losses - foreseen or unforeseen - that result from the defendant's actions or that result from the foreseeable actions of co-participants." U.S.S.G. Supp. to Appendix C, at 182, Amend. 617 (citing United States v. Lopreato, 83 F.3d 571 (2d Cir. 1996)). Thus, to satisfy the causation requirement, the Guidelines require only that the Government show that losses "resulted from," in the sense of logically following from, the fraudulent scheme. See Hicks, 217 F.3d at 1048; Molina, 106 F.3d at 1124.

Thus, even accepting the analysis contained in the

report of Dr. McCann - Ebbers's loss expert - as true, the Government's proposed determination of loss would be appropriate. Dr. McCann notes that there were "other adverse corporate developments in the June 25, 2002 press release that contributed" to the decline in WorldCom's stock price. (Expert Report 4, 5). Dr. McCann further speculates that, given market conditions, WorldCom's stock price would have continued to decline even without disclosure of the fraud. (Expert Report 4, 6). Under Second Circuit law, these opinions, even if true, do not require this Court to conclude that there is no loss for Sentencing Guidelines purposes. The Court is not required to make a strict loss causation conclusion to determine the loss. The Court need only conclude that the loss logically followed from the scheme. Hicks, 217 F.3d at 1048; Molina, 106 F.3d at 1124. Even Dr. McCann would have to acknowledge that fact.⁸

Similarly, the Court need not address Dr. McCann's other points to determine loss in this case. Dr. McCann believes the low stock price for purposes of calculating the fraud should be \$0.25 instead of \$0.06 and believes that certain shareholders - such as Ebbers and Sullivan - should not be included in the calculation. (Expert Report 4, 7, 9). Yet these changes will

⁸ Dr. McCann's conclusion is flawed in that he ignores evidence such as the testimony of Colin Glinsman. As explained above, this testimony in fact establishes the precise loss causation that Dr. McCann claims is absent here.

still result in a loss far greater than \$100 million, which is the top of the applicable loss table in the Guidelines. U.S.S.G. § 2B1.1(a). Finally, Dr. McCann believes that the calculation should exclude shareholders who purchased WorldCom stock prior to September 2000, the beginning of the fraud. (Expert Report 4, 8-9). This analysis misses the mark, because it ignores shareholders who held their shares as a result of the misrepresentations at the heart of this case, only to suffer losses as a result. In any event, as discussed above, even excluding these shareholders, the loss here is far greater than \$100 million.

Finally, Ebbers argues that the loss should be zero because there was no "intended" loss - the conspirators committed this fraud hoping to increase the value of WorldCom stock. (Loss Br. 21). This prong of the definition of loss is not relevant, however, because the Government is calculating loss based on actual loss. Similarly, there is no need to rely on Ebbers's gain in computing loss. (Br. 21-22). The victims of this fraud lost billions of dollars. By any measure, the loss exceeded \$100 million, requiring a 26-level increase in the Sentencing Guidelines range.

B. The Enhancement for Number of Victims Is Appropriate

Ebbers next argues that the four-level enhancement for the number of victims is inappropriate. (Sentencing Br. 22).

Ebbers concedes that this argument relies on his argument that the amount of loss is zero. (Sentencing Br. 23). For the reasons set forth above, that argument should be rejected. Accordingly, the four-level enhancement is appropriate.

C. Ebbers Derived More Than \$1 Million From The Fraud

Ebbers also objects to the imposition of the financial institution enhancement required by U.S.S.G. § 2B1.1(b)(12)(A), which provides for a 2-level enhancement of the defendant's base offense level where "the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense." Ebbers claims that this enhancement is not applicable because he obtained no further bank loans after the commencement of the fraud in September 2000. (Sentencing Br. 24-25). Ebbers further claims that the delay in paying margin calls does not qualify as "gross receipts" under this section. Ebbers ignores, however, the commentary to this Guidelines provision. Application note 9 defines "gross receipts from the offense" as "all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense." U.S.S.G. § 2B1.1(b)(12)(A), cmt. n. 9.

The evidence at trial proved that Ebbers had borrowed hundreds of millions dollars from Bank of America by September 2000, and that these loans were secured with millions of shares of WorldCom stock. Jayne Hammond, Ebbers's relationship manager

at Bank of America, testified that from April 2000 through November 2000, Bank of America repeatedly called Ebbers's loans, and he repeatedly met those margin calls with pledges of existing or new stock. Although, in November 2000, WorldCom agreed to guarantee Ebbers's loans to the Bank, and the margin calls ceased, Bank of America continued to rely on Ebbers's stock as a source of collateral for the loans. Because he was permitted to keep hundreds of millions of dollars during the life of the fraud, Ebbers plainly received an indirect benefit from a financial institution.

Finally, on October 3, 2000, Ebbers received over \$70 million from Bank of America from the forward sale of approximately three million shares of WorldCom stock. The Bank gave Ebbers \$70 million based on a discounted value of WorldCom shares of common stock on the open market on the date of the transaction, September 28, 2000. In other words, the amount of money that Ebbers received was directly related to the price of WorldCom stock. As the Government established at trial, before Bank of America agreed to the forward sale transaction, Ebbers and others knew that WorldCom's financial performance for the third quarter of 2000 was not going to meet analysts' expectations. Bank of America never learned this information. Had the Bank known of WorldCom's declining performance, the terms of the forward sale clearly would have been worse for Ebbers. By

failing to disclose WorldCom's true financial condition, Ebbers derived well over \$1 million from the Bank. Accordingly, the proceeds from the forward sale can only be characterized as gains derived directly from the offense.

D. Ebbers Was A Leader Of Criminal Activity

Ebbers next argues that his offense level should not be increased by four levels for his role in the offense. He claims that he did not instruct others to commit fraud and thus is not eligible for the increase. (Sentencing Br. 26). Ebbers misconstrues this Guidelines provision.

Sentencing Guidelines Section 3B1.1 provides for a four-level increase in offense level "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). In determining whether a defendant was an organizer or leader, the Guidelines direct that the sentencing court should consider the following factors: the exercise of decision-making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. U.S.S.G. § 3B1.1, cmt. n. 4; see United States v. Beaulieu, 959 F.2d 375, 379-80 (2d Cir.

1992). Thus, the "organizer or leader" enhancement is appropriate where the defendant "played a crucial role in the planning, coordination, and implementation of a criminal scheme." United States v. Paccione, 202 F.3d 622, 624 (2d Cir. 2000).

A defendant may qualify for the four-level organizer/leader adjustment as long as he organized or led even one other participant, so long as the criminal activity involved at least five participants. See United States v. Zichettello, 208 F.3d 72, 107 (2d Cir. 2000) (under Section 3B1.1(a), defendant need only organize or lead one other person, so long as criminal activity involved at least five participants). Nor is there any requirement that one single person be identified as the leader or organizer. Rather, "[t]here can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." U.S.S.G. § 3B1.1, cmt. n. 4. Accordingly, "comparative [analysis is] irrelevant, since one conspirator's leadership role is not dispositive on the question of whether another was also a leader." United States v. Duncan, 42 F.3d 97, 105 n.6 (2d Cir. 1994); see United States v. Garcia, 936 F.2d 648, 656 (2d Cir. 1991).

Under these standards, Ebbers plainly qualifies as an organizer or leader. Scott Sullivan's testimony made clear that Ebbers was the driving force behind this fraud. Ebbers oversaw and approved of the various fraudulent entries, which were

executed, most directly, by Sullivan, Myers, and others in the General Accounting Department. Specifically, when regularly presented with WorldCom's poor financial results, Ebbers commanded Sullivan to "hit the number," knowing that the only way to hit the number was through fraudulent accounting entries. Without this command, this enormous fraud could not have occurred. Ebbers's leadership and supervision make the aggravating role adjustment applicable in this case.

E. Ebbers Obstructed Justice By Committing Perjury At Trial

Ebbers's Guidelines range should be enhanced two levels based on his trial perjury. The Sentencing Guidelines mandate a two-level upward adjustment of the applicable offense level if the Court finds that:

the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and . . . the obstructive conduct related to the defendant's offense of conviction

U.S.S.G. § 3C1.1. This enhancement applies where a defendant, testifying under oath, "gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory." United States v. Dunnigan, 507 U.S. 87, 94 (1993). In other words, the enhancement applies where a

defendant commits perjury. See U.S.S.G. § 3C1.1, cmt. n.4(b).

In United States v. Dunnigan, the Supreme Court upheld the constitutionality of the obstruction guideline. As noted by the Court, “[t]he commission of perjury is of obvious relevance” in sentencing, “because it reflects on a defendant’s criminal history, on her willingness to accept the commands of the law and the authority of the court, and on her character in general.” 507 U.S. at 94. The Court further explained:

It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process. The perjuring defendant’s willingness to frustrate judicial proceedings to avoid criminal liability suggests that the need for incapacitation and retribution is heightened as compared with the defendant charged with the same crime who allows judicial proceedings to progress without resorting to perjury.

Id. at 97-98.

Before applying an obstruction enhancement based on perjury, the sentencing judge must “find that the defendant (1) wilfully (2) and materially (3) committed perjury, which is (a) the intentional (b) giving of false testimony (c) as to a material matter.” United States v. Zagari, 111 F.3d 307, 329 (2d Cir. 1997). In this context, “material” means “evidence, fact, statement or information that, if believed, would tend to affect or influence the issue under determination.” U.S.S.G. § 3C1.1,

comment. (n.6); see also United States v. Fayer, 573 F.2d 741, 745 (2d Cir. 1978) (“The test of materiality is whether the false testimony was capable of influencing the fact finder in deciding the issue before him”).

In imposing an upward adjustment based on a defendant’s trial perjury, a district court should “review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out.”

United States v. Dunnigan, 507 U.S. at 95. However, “separate findings of fact” are not required, so long as “a general finding of obstruction . . . tracks those factual predicates necessary to support a finding of perjury.” United States v. Catano-Alzate, 62 F.3d 41, 42 (2d Cir. 1995) (per curiam) (internal quotation marks and citations omitted).

The court should apply a “preponderance of the evidence” standard in making factual determinations regarding a defendant’s perjury. United States v. Khedr, 343 F.3d 96, 102 (2d Cir. 2003). Once its factual predicates have been established, the obstruction adjustment is mandatory. United States v. Ruggiero, 100 F.3d 284, 293 (2d Cir. 1996).

In this case, the Government submits that Ebbers committed blatant perjury during the trial that resulted in his conviction. In his trial testimony, Ebbers unequivocally

maintained that he had no knowledge of the improper line cost entries that were at the heart of the case.

Q. Now, you knew that line cost expenses were a problem for WorldCom starting in the year 2000, didn't you?

A. No.

Q. Didn't you know that WorldCom's line cost as a percentage of its revenue starting in the third quarter of 2000 were higher than expected?

A. No.

Q. Scott Sullivan didn't tell you that WorldCom's line costs as a percentage of revenue were too high in the third quarter of 2000 to meet guidance numbers for earnings per share?

A. No, he did not.

Q. You knew that the accounting department made adjustments to line costs in the third quarter of 2000, didn't you?

A. I did not.

Q. Are you testifying you had no idea that \$800 million over that of line costs adjustments were made in the third quarter of 2000? Is that your testimony?

A. That is my testimony.

(Tr. 4046-47).

Q. You didn't know about any adjustments that were made to line costs, right?

A. No, sir.

Q. You didn't know about a \$610 million adjustment at the end of the second quarter of 2001?

A. Absolutely not.

Q. You didn't know about a \$742 million adjustment at

the end of the third quarter of 2001?

A. Absolutely not.

Q. You didn't know about a \$941 million adjustment at the end of the fourth quarter of 2001?

A. I did not.

Q. So it's your testimony that WorldCom reduced its line costs through adjustments by over \$2 billion and you had no idea?

A. That's correct.

(Tr. 4068).

This testimony was flatly inconsistent with the jury's verdict and is, on its face, incredible. The Government proved that Ebbers was familiar with all aspects of WorldCom's business, including WorldCom's financial results. Also, Sullivan specifically conferred with Ebbers regarding the line cost adjustments.

But Ebbers's testimony went further than mere denials of knowledge - Ebbers made affirmative statements that were, quite simply, not believable. For instance, Ebbers's testimony regarding the forward sale was invented. Ebbers admitted that he asked another WorldCom lawyer whether he could do the forward sale if he knew about an "earnings warning." (Tr. 3942). Ebbers then claimed, however, that he could not recall the answer "because it was not a real question at that time." (Tr. 3943). Ebbers then gave the following explanation:

Q. You just came up with the idea of an earnings

warning out of the blue?

A. As CEO of the company I need to take those types of possibilities into account.

Q. Nothing to do with the fact that you had seen July and August results and they weren't very good?

A. No, sir, nothing to do with that.

Q. Nothing to do with the fact that Mr. Sullivan had told you that the company needed to do an earnings warning?

A. He did not tell me that.

Q. So you just came up with the term "earnings warning" on your own?

A. It's a precautionary question you would normally ask, yes.

Q. You just so happened to ask it on September 26th?

A. That's the only time I was asking about doing a sale. There wouldn't be an occasion for another question like that.

(Tr. 3943).

Similarly, Ebbers fabricated an explanation for the difference between capital expenditures and revenue growth rates that were displayed on Government Exhibit 480, the graph that Ron Beaumont presented to Ebbers and Sullivan:

Q. Do you have any explanation for the difference between \$3 billion in this graph and reporting to the public 5 to \$5-1/2 billion?

A. I can only tell you the explanation we were given.

Q. Given by whom?

A. Scott.

Q. Scott Sullivan gave you an explanation?

A. Yes.

Q. What was that?

A. It was items like Embratel, Avantel, the other subsidiaries that we had, they required some capital, software system development that was corporate related, things like that, capitalized labor.

Q. These items you're talking about, it's your testimony that Scott Sullivan said that's the \$2 billion difference?

A. I didn't say that. Those were some of the things that made up some of the gap.

Q. What else did he say it was?

A. I don't think he completely defined it so that it matched.

(Tr. 4072-73). This explanation was patently false, as it both contradicted Scott Sullivan's testimony and was illogical. Embratel had been de-consolidated from WorldCom's reported financial results at the close of the second quarter of 2001. It would have made no sense for Sullivan to use Embratel as a basis for higher capital expenditure numbers in February 2002.

Ebbers also lied when he denied the central aspects of his hallway conversation with David Myers. Myers testified on direct, cross, and re-direct that he met Ebbers in the hallway of the executive offices and Ebbers said that he had spoken to Sullivan and thus understood what the accountants had been asked to do; Ebbers apologized for putting them in that position; and Ebbers promised they the accountants would never have to do it

again. (Tr. 498-99, 806, 1004). During his testimony, Ebbers essentially denied this conversation occurred. (Tr. 3718) ("I didn't have anything to apologize for. I don't have any recollection of that conversation. I don't know what I would have been apologizing for."). This statement was deliberately false, as Ebbers lied to distance himself from all evidence of his knowledge of line cost adjustments.

Finally, Ebbers lied regarding the items on the close the gap lists. Ebbers refused to concede that the items on the close the gap lists that were necessary to hit revenue targets were new revenue items. (Tr. 4032-33). This testimony is demonstrably false, as it was inconsistent with the documents themselves, which distinguished new items from approved items. (See, e.g., GX 459). Ebbers was confronted with this fact, yet continued to maintain that these obviously new items had been booked before. (Tr. 4033, 4037). This testimony was false.

The jury's conviction of Ebbers on each count in the Indictment demonstrate that the jury simply did not believe him. Simply put, if the jury had credited Ebbers's testimony, it could not have convicted him. This fact alone supports a finding that Ebbers perjured himself. As the Second Circuit has recognized, where, as here, "the defendant's testimony relates to an essential element of his offense, such as his state of mind or his participation in the acts charged in the indictment, the

judgment of conviction necessarily constitutes a finding that the contested testimony was false.” United States v. Bonds, 933 F.2d 152, 155 (2d Cir. 1991); accord United States v. Onumonu, 999 F.2d 43, 46-47 (2d Cir. 1993); United States v. Shonubi, 998 F.2d 84, 87 (2d Cir. 1993).

The evidence also demonstrates that Ebbers’s trial perjury was unquestionably willful, as opposed to the result of confusion, mistake, or faulty memory. Given his obvious incentive to exculpate himself and the critical importance of the facts as to which he testified falsely, it is inconceivable that Ebbers’s false testimony was anything but an intentional effort to mislead the jury in pursuit of an acquittal. Indeed, Ebbers was evasive in answering even basic questions, as he plainly sought to distance himself from any meaningful responsibility at the company. The following exchange is instructive:

Q. Of the executives in management at WorldCom, you would agree you had the final decision as to what you should recommend to the board of directors?

A. I think that was, in fact, I know that was a decision that was made amongst several executives.

Q. So are you saying that if there was disagreement, you didn’t have the final word?

A. There was rarely a disagreement.

Q. That wasn’t my question, Mr. Ebbers. If there was a disagreement, you would agree you had to make the final decision?

A. I guess if there was a disagreement, I could have exercised my authority as CEO. I don’t believe I ever

did.

Q. Is it fair that you had the final word on setting WorldCom's budget?

A. Along with the participation of all the budgeters, yes.

Q. You had the final word on internal revenue targets, didn't you?

A. We came to a consensus agreement amongst the people who were required to produce the revenue.

Q. People made proposals to you, right, people gave you information about what the budget should be?

A. People knew the process for deciding and for calculating what their revenue growth should be, yes.

Q. Then you would make a decision, either the numbers they had set were acceptable or they weren't acceptable and they had to go back, isn't that how the process worked?

A. Yes, along with their management, we would talk about the numbers that had been submitted. Core sales people always submit numbers that are on the low end because they want to have low targets.

Q. You would say go back, we need higher targets?

A. I would say go back and calculate the revenue, the new billed revenue your planning per sales rep, and the number is too low, yes.

Q. And the process would continue until you were satisfied, right?

A. The process would continue until we came up with what we thought was a reasonable number.

Q. At the end of the day, you had to say that you were satisfied?

A. At the end of the day, we had to have a number that everybody could live with.

(Tr. 3889-91). This evasive testimony is inconsistent with the testimony of both Brady Connor and Scott Sullivan, who made it clear that Ebbers made the final decisions on issues such as acquisitions and the budget, and common sense, as the evidence demonstrated that Ebbers was a "hands-on" CEO.

Ebbers was similarly evasive when talking about his relationship with Scott Sullivan. Ebbers refused to admit that he spoke with Sullivan, alone, about WorldCom's financial results:

Q. When you did speak to Mr. Sullivan, you talked to him about WorldCom's financial results, sometimes, right?

A. Generally, when we talked about WorldCom's financial results, it was with a group of other people.

Q. That wasn't my question. You spoke to Mr. Sullivan on occasion about WorldCom's financial results, is that right?

A. He was one of the people I spoke with with others about financial results.

Q. So the answer is yes, you spoke with him?

A. I think I gave my answer.

(Tr. 3855). Ebbers's refusal to answer this simple question is further evidence of the wilful nature of his perjury. While commonsense indicates that Ebbers spoke with Sullivan about financial results, Ebbers evaded these questions in a transparent

effort to bolster his defense.⁹

While by no means an exhaustive list of every example of Ebbers's trial perjury, these examples demonstrate that the Ebbers's testimony on the issues of his knowledge and intent were false, and the jury's verdict indicates that it rejected his self-serving explanations. Ebbers's false testimony on these issues obviously concerned material matters, as his testimony tended to influence or affect the issue of his guilt or innocence. See U.S.S.G. § 3C1.1, cmt. n.6. In other words, each of these statements, if believed, would have tended to support Ebbers's theory that he did not participate in the fraudulent conduct.

Because Ebbers's testimony was willfully false regarding a material matter, the Court should enhance his offense level by two levels pursuant to U.S.S.G. § 3C1.1.

III. Ebbers's Downward Departure Motions

Ebbers makes a series of downward departure motions. None of these motions are appropriate under applicable Second Circuit precedent.

A. General Principles

Departures from the sentencing range dictated by the

⁹ Ebbers even felt the need to explain that Scott Sullivan was not the only person invited to his wedding. (Tr. 3858). Ebbers simply did not want the jury to believe he had ever been alone with Scott Sullivan.

Guidelines are sanctioned only in select cases. As the Supreme Court has stated:

Congress allows district courts to depart from the applicable Guideline range if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

Koon v. United States, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. § 3553(b)). As the Guidelines provide, and as the Koon Court explained, "[t]he Commission intend[ed] the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes,'" acknowledging that departures may be considered when the conduct differs "significantly" from the norm. Id. at 93 (quoting U.S.S.G. Ch. 1, Pt. A(4)(b)).

In Koon, the Court found that the Sentencing Commission had provided "considerable guidance as to the factors that are apt or not apt to make a case atypical, by listing certain factors as either encouraged or discouraged bases for departure." The Court thus recommended that sentencing courts ask the following questions in determining whether a departure is warranted:

- 1) What features of this case, potentially take it outside the Guidelines' 'heartland' and make of it a special, or unusual case?
- 2) Has the Commission forbidden departures

based on those features?

3) If not, has the Commission encouraged departures based on those features?

4) If not, has the Commission discouraged departures based on those features?

Koon, 518 U.S. at 95 (quoting United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993) (Breyer, J.)). The Court went on to advise that in the case where "the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." Id. at 96.

Because Ebbers seeks a departure, he bears the burden of showing, by a preponderance of the evidence, that it should be granted. See United States v. McDowell, 888 F.2d 285, 291 (3d Cir. 1989). If granted, the departure must be a "reasonable" one. United States v. Alba, 933 F.2d 1117, 1123 (2d Cir. 1991).

B. Loss Overstates The Seriousness Of The Offense

Ebbers first argues for a downward departure because, he asserts, the loss overstates the seriousness of the offense. (Sentencing Br. 28). The commentary to Guideline § 2B1.1 states that "[t]here may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be

warranted." U.S.S.G. § 2B1.1, cmt. n.15(B).

Ebbers relies on three separate rationales for his departure argument. First, Ebbers relies on United States v. MacCaul1, No. 00 Cr. 91 (RWS), 2002 WL 31426006 (S.D.N.Y. Oct. 28, 2002). (Sentencing Br. 29). MacCaul1 stemmed from the prosecution of 21 people who worked at Sterling Foster, a boiler room operation that employed between 150 and 250 brokers. Id. at *12. Under the facts of that case, the district court departed because it found it difficult to apportion loss fairly among the participants in the fraud. Id. (because of the "vagaries of proof of how much loss could be attributed to each defendant," "defendants who played the same organizational role have widely varying enhancements based on the specific offense characteristic of loss"). The reasoning in MacCaul1 provides no basis for a departure here. Ebbers played a unique role in the fraud at WorldCom - he was the CEO and the driver of the fraud. The issues confronting the district court in MacCaul1 simply are not present here.

To the extent Ebbers complains that the loss is unfair because he committed a fraud while CEO of a "large public corporation" (Sentencing Br. 29), this fact does not provide a basis for departure. Indeed, the fraud tables of the Sentencing Guidelines were amended, in part, in reaction to this very fraud. Yet the only change to the loss tables was to increase the

potential penalty for frauds at "large public corporations." See U.S.S.G. § 2B1.1(b) (2004) (30 levels are added for frauds over \$400 million; 26 levels are added for frauds over \$100 million). Thus, this argument must be rejected.

Next, Ebbers seeks a departure on the premise that where there are purportedly multiple causes of loss, the amount of loss may overstate the seriousness of the offense. (Sentencing Br. 30); United States v. Redemann, 295 F. Supp. 2d 887, 889 (E.D. Wis. 2003). This avenue also fails to provide a basis for departure. Here, victims of the fraud suffered losses in the billions of dollars. Even if other factors contributed to the decline in WorldCom's stock price over time, the sheer size of the losses at issue in this case dwarf even the largest amount of fraud - \$100 million - contemplated by the applicable loss tables. Thus, there is no basis for a departure. Indeed, if at all relevant, the fact that other market forces may have contributed to the decline in WorldCom's stock price provides a basis for the Court not to upwardly depart in this case. See U.S.S.G. § 2B1.1, cmt. n.15(A)(v) (upward departure may be warranted when "the offense endangered the solvency or financial security of one or more victims").

Third, Ebbers seeks a departure on the ground that the loss overstates the seriousness of the offense because his fraud "may have been for little or no gain, especially in comparison to

the size of the loss.” (Sentencing Br. 31); United States v. Forchette, 220 F. Supp. 2d 914, 925 (E.D. Wis. 2002). This ground does not provide a basis for departure either. Courts have held that a departure based on a defendant’s purported lack of personal gain from the offense is “discouraged”. United States v. Broderson, 67 F.3d 452, 458-59 (2d Cir. 1995) (“Nor is lack of personal profit ordinarily a ground for departure, because the Commission generally took that factor into account in drafting the Guidelines.”). A departure on this ground is particularly unwarranted here because, although Ebbers ultimately lost money, his motive in directing this scheme was to save his personal fortune. Ebbers directed others to manipulate WorldCom’s books in an effort to save WorldCom’s stock from collapse - and to save himself from financial ruin. The fact that his scheme ultimately failed to save the company and himself does not make a downward departure warranted.

C. Ebbers’s Medical Condition

Ebbers seeks a downward departure based on his serious medical condition. (Sentencing Br. 32). Under Second Circuit law, such a departure is not warranted.

Under the Guidelines, a defendant’s physical condition is not ordinarily a ground for departure; rather, it is an actively discouraged factor, “not ordinarily relevant in determining whether a sentence should be outside the applicable

guideline range.” U.S.S.G. § 5H1.4. Pursuant to Section 5H1.4, a departure may be warranted in cases where the defendant suffers from an “extraordinary physical impairment.” Nonetheless, “[t]he standards for a downward departure on medical grounds are strict.” United States v. Persico, 164 F.3d 796, 806 (2d Cir. 1999). The “central inquiry involves the degree to which imprisonment unduly imperils a defendant’s physical health.” United States v. Hilton, 946 F.2d 955, 959 (1st Cir. 1991).

Moreover, if the defendant suffers from a condition that can be monitored and treated by the Bureau of Prisons (the “BOP”), the condition is unlikely to be so extraordinary as to warrant departure. United States v. Altman, 48 F.3d 96, 104 (2d Cir.1995); see also United States v. Napoli, 179 F.3d 1, 18 (2d Cir. 1999) (finding no proper ground to appeal district court’s refusal to depart where, among other reasons, the BOP could treat the defendant’s physical ailment); United States v. Farraj, 210 F. Supp. 2d 399, 401 (S.D.N.Y. 2002) (rejecting requested departure for defendant’s medical condition, finding that, although “serious enough to require vigilance,” defendant’s condition was treatable by the BOP and not so extraordinary as to qualify for relief under § 5H1.4); cf. United States v. Jimenez, 212 F. Supp. 2d 214, 219–20 & n.1 (S.D.N.Y. 2002) (availability of adequate BOP medical services often relevant, but not controlling; defendant suffered brain aneurism after crime

committed, departure appropriate).

The BOP's ability to tend to a defendant's medical needs is highly germane to the factual determination of whether a defendant has an extraordinary physical impairment warranting a downward departure. United States v. Woody, 55 F.3d 1257, 1276 n.15 (7th Cir. 1995); United States v. LeBlanc, 24 F.3d 340, 349 (1st Cir. 1994). The BOP's capability is important because an impairment that can be readily accommodated should not be considered "extraordinary" within the class of persons who are housed in federal prisons. Cf. United States v. Hilton, 946 F.2d at 960 n.5 (affirming finding that defendant's disease, though "rare and serious" was not "extraordinary" and could be treated by BOP).

The Government has provided all of the records that it obtained from Ebbers to BOP to determine whether Ebbers's medical condition is capable of adequate treatment within BOP facilities. According to Barbara J. Cadogan, the Health Systems Administrator of the BOP, Ebbers's condition and medical needs can be met by the BOP. (See Cadogan Letter, dated June 20, 2005, attached hereto as Exhibit A). The fact that BOP can adequately treat Ebbers demonstrates that his condition is not "extraordinary." See United States v. Barton, 76 F.3d 499, 502 (2d Cir. 1996) (denying downward departure based on alleged extraordinary mental or emotional condition where defendant submitted letter from

treating psychiatrist indicating that he suffered from, among other things “untreated depression for many years”); United States v. Cimino, No. 00 Cr. 632, 2002 WL 1733650, at *4 n.3 (S.D.N.Y. July 25, 2002) (“no downward departure would be warranted by Cimino’s bipolar disorder”).

D. Charity, Community Service, and Prior Good Works

Ebbers next seeks a departure based on his “exceptional history of community service and good works.” (Sentencing Br. 33). Once again, Second Circuit law counsels against such a departure.

The Sentencing Guidelines explicitly provide that “civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.” U.S.S.G. § 5H1.11; see United States v. Rioux, 97 F.3d 648, 663 (2d Cir. 1996). Thus, the Guidelines treat a defendant’s civic and charitable works, as well as the good works a defendant performed that were related to his employment, as a “discouraged” basis for downward departure. Where the ground for a requested departure is “discouraged,” the Supreme Court has directed that “the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.” Koon v. United States, 518 U.S. at 96.

Departures based on good works require very unusual circumstances. Although the Second Circuit has upheld a downward departure involving charitable efforts, it has never upheld a departure on that basis alone. See United States v. Rioux, 97 F.3d 648 (2d Cir. 1996) (affirming departure based on combination of defendant's medical condition and prior good works). But see United States v. Acevedo, 229 F.3d 350, 356 (2d Cir. 2000) (declining to review denial of downward departure to defendant who prevented suicide of another inmate; District Court found that defendant's action was charitable "good work" falling within U.S.S.G. § 5H1.11, and as such was not relevant to determining whether departure was warranted, and even assuming it was relevant, "his act was not so exceptional as to warrant a departure from the heartland situations covered by the Guidelines").

Numerous Courts of Appeals have ruled that departing in white collar cases based on the type of record that Ebbers has made is an abuse of discretion. "[I]t is usual and ordinary, in the prosecution of similar white-collar crimes involving high-ranking corporate executives such as [the defendant], to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts." United States v. Kohlbach, 38 F.3d 832, 838-39 (6th Cir. 1994). White-collar criminals "enjoy sufficient income and community status so that

they have the opportunities to engage in charitable and benevolent activities.” United States v. Haversat, 22 F.3d 790, 796 (8th Cir. 1994). “Likewise, excellent character references are not out of the ordinary for an executive who commits white-collar crime; one would be surprised to see a person rise to an elevated position in business if people did not think highly of him or her.” United States v. McClatchey, 316 F.3d 1122, 1135 (10th Cir. 2003). “[W]e expect the district courts to view such evidence with the skepticism of experience in sentencing executives who commit white-collar offenses.” Id.

In Kohlbach, the District Court departed based on testimonial letters “showing encomia upon [the defendant] for his charitable works, community involvements, public good deeds, and church activities.” The record showed that the defendant “has performed many fine deeds in his life and has won the devotion of people who he has helped and who have honored him with positions of community leadership.” The Sixth Circuit reversed the downward departure as an abuse of discretion, recognizing that the sentencing guidelines “already considered the nature of white-collar crime and criminals when setting the offense levels that govern this offense.”

On remand, the defendant in Kohlbach supplemented the sentencing record with further evidence of his good works. Finding that the Court of Appeals’ decision left no discretion to

revisit this potential basis for departure, the District Court denied the defendant's renewed application for departure. On appeal of that decision, the Sixth Circuit reviewed the supplemented record and again held that the defendant's good works could not justify departure, stating: "In Kohlbach, we explained forcefully that white-collar executives such as Crouse generally could not qualify for the community service departure even in light of extensive community service work The basis for our reasoning was that corporate executives are commonly involved with community service and that the guidelines already take into account the nature of white-collar crime and reward individuals who have previously led crime-free lives." United States v. Crouse, 78 F.3d 1097, 1101 (6th Cir. 1996); see also United States v. Millar, 79 F.3d 338, 345 (2d Cir. 1996) (refusing to review District Court's decision not to depart based upon priest's charitable works and public service, noting that District Court recognized authority to depart but decided not to do so because defendant "had benefits that few defendants have, including education, respect in his work, skills of advocacy, intelligence, and the calling to serve as a priest"); United States v. Morken, 133 F.3d 628, 630 (8th Cir. 1998) ("On the subject of Morken's service to his community, the letters [received by the district court at sentencing] document a commendable record. In addition to being an accommodating

neighbor and a good friend, Morken advised local business owners, hired young people, served on his church council, and raised money for charity Although laudable, Morken's record of good works is neither exceptional nor out of the ordinary for someone of his income and preeminence in a small Minnesota town with a population barely over a thousand."); Haversat, 22 F.3d at 796 ("We conclude that Haversat's charitable and volunteer activities, while considerable, do not make him an atypical defendant in antitrust price-fixing cases."); United States v. Jordan, 130 F. Supp. 2d 665, 672-73 (E.D. Pa. 2001) (denying departure for defendant convicted of money laundering, despite numerous letters detailing substantial charitable contributions, generosity to community members in need of food, and service as mentor for neighborhood youths; these acts, "while commendable, are not so exceptional or extraordinary for a person" like the defendant who owned small business); United States v. Scheiner, 873 F. Supp. 927, 933-35 (E.D. Pa. 1995) (departure not warranted for doctor convicted of conspiring to defraud insurance company, despite contributions to the young and poor minorities, including financial sponsorship of several basketball teams and at least one league, serving on several community boards, working in a podiatry clinic where free services were provided to the poor, and "generally [having] served as a source of support and inspiration to many"; defendant's charitable activities, while

"considerable" and "commendable," were not extraordinary in the context of (a) defendant's background, (b) the effect a departure would have on others in his professional community, (c) the absence of mitigating financial circumstances, (d) the four-year duration of defendant's crimes, and (e) the fact that defendant's criminal conduct continued until detection became inevitable); United States v. DeMasi, 40 F.3d 1306, 1324 (1st Cir. 1994) (court should compare defendant to other defendants with community service backgrounds, not just to other bank robbers, to determine if defendant's record of civic involvement "stands out from the crowd").¹⁰

These decisions are grounded in the recognition that individuals with sufficient stature, ability and opportunity to commit white-collar crimes are commonly involved in community service and charitable endeavors, and such activities do not

¹⁰ Moreover, Courts of Appeals have reversed as an abuse of discretion departures predicated on service to the public arguably much more compelling than, though dissimilar from, that credited to Ebbers. See, e.g., United States v. Winters, 105 F.3d 200, 209 (5th Cir. 1997) (reversing departure based on the defendant's distinguished national service in the military, including service in which he was twice wounded in combat and awarded two purple hearts); United States v. Rybicki, 96 F.3d 754, 758-59 (4th Cir. 1996) (reversing departure based on the national service of "a highly decorated Vietnam War veteran who had saved a civilian's life during the My Lai incident and had an unblemished record of 20 years of service to his country, both in the military and in the Secret Service"); United States v. Ziegler, 39 F.3d 1058, 1062 (10th Cir. 1994) (reversing departure based on the distinguished national service of a recipient of the National Defense Medal for service in the U.S. Army).

remove the defendant from the contemplated heartland of defendants charged with white-collar offenses. Indeed, it is widely recognized that "the [Sentencing] Commission intended its guidelines and policy statements to 'equalize punishments for white collar and blue collar crime,'" and courts have endeavored to implement that intention in sentencing. United States v. Thurston, 358 F.3d 51, 80 (1st Cir. 2004) (quoting United States v. Rivera, 994 F.2d 942, 955 (1st Cir. 1993)), vacated on other grounds, 125 S. Ct. 984 (2005) (reversing district court's granting of downward departure for charitable good works where white-collar defendant's good works, although "admirable," were insufficient to qualify as exceptional in light of, among other things, his status as a prominent corporate executive with the means to make financial contributions and engage in civic and charitable activities); see also United States v. Wright, 363 F.3d 237, 248-49 (3d Cir. 2004) (upholding district court's denial of a downward departure for charitable works where good works of the defendant minister, although "profound," "substantial," and "sustained," were not so extraordinary as to justify a downward departure).

Ebbers has been blessed with tremendous wealth and success. And perhaps in response to this success, Ebbers has certainly made significant charitable contributions, which are commendable. Yet the defendant has not presented a basis to

conclude that his record of charitable contributions, community service, and other good works has been so extraordinary as to justify a downward departure.

Although the defendant's record of good works is laudable, it falls far short of being so extraordinary as to justify a downward departure. Most of the good works cited by Ebbers -- showing kindness and compassion for friends, family, staff and colleagues going through difficult times, and acting as a role model for others in their professional lives -- are what one should expect of decent, hardworking people. Ebbers has clearly gathered during his life a group of loyal and dedicated friends, which reflects well on him. However, this does not distinguish his good works from what would ordinarily be expected of any individual who claims to care about others, and particularly those with the means to devote time and resources to assisting others in need. Nor does the fact that many of the defendant's friends and colleagues think highly of him as a person and as a professional distinguish him from other white-collar criminals. See McClatchey, 361 F.3d at 1135 ("excellent character references are not out of the ordinary for an executive who commits white-collar crime; one would be surprised to see a person rise to an elevated position in business if people did not think highly of him or her"). Indeed, as described above, the case law is legion with convicted felons who, other than their

criminal conduct, appear to be otherwise compassionate and praiseworthy people. The Sentencing Guidelines do not, however, authorize a downward departure merely because a defendant has shown kindness, even considerable kindness, to others or because he or she has had an otherwise successful career.

Nor does Ebbers's record of contributing time and money to various charitable and religious organizations merit a downward departure. Courts have widely recognized that it is far from unusual for white-collar defendants, because they are often quite wealthy, educated, and well-connected, to be heavily involved in charities and civic organizations. See, e.g., Kohlbach, 38 F.3d at 838-39 ("[I]t is usual and ordinary, in the prosecution of similar white-collar crimes involving high-ranking corporate executives such as [the defendant], to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts."); Haversat, 22 F.3d at 796 (white-collar criminals "enjoy sufficient income and community status so that they have the opportunities to engage in charitable and benevolent activities"). Ebbers has not documented the specific amount of charitable contributions he has made. There is no basis to conclude on this record that the amount of contributions is so great that it warrants a departure. Cf. United States v. Thurston, 358 F.3d at 79 (reversing district court's decision to depart downward, holding that defendant's

acts of tithing 10% of his income to his church, devoting hours each week to his church, and opening his home to parents of a woman undergoing medical attention were not sufficiently extraordinary to warrant a downward departure).

E. Combination of Factors

Ebbers next asserts that even if no one factor, standing alone, warrants a downward departure, their combined effect provides a sufficient basis for such relief. (Sentencing Br. 35).

The Sentencing Commission has acknowledged that in extremely rare cases, where numerous factors and circumstances are present, a departure may be warranted even though no one factor or circumstance, standing alone, would justify a departure:

The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the "heartland" cases covered by the Guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.

U.S.S.G. § 5K2.0, commentary (emphasis added); see United States v. Volpe, 224 F.3d 72, 78-79 (2d Cir. 2000) (district court properly refused to depart downward on basis of combination of defendant's efforts to exonerate supposedly innocent man and

inculcate another, and other factors claimed to make Guidelines sentence unusually harsh); United States v. Payton, 159 F.3d 49, 61-62 (2d Cir. 1998) (district court abused discretion in departing downward based on combination of defendant's lack of positive role models as a youth, history of drug abuse and failed treatment, possible ineligibility for credit for pretrial detention, and learning disability).

Ebbers's circumstances are neither "extraordinary" nor "extremely rare." As discussed above, none of the enumerated departure grounds supports a downward departure. Those grounds, individually without merit, are no more persuasive when viewed in combination. Ebbers has failed to show why, in light of the combination of factors he cites, he merits sentences lower than that set by the Sentencing Commission. Nor has he explained how a downward departure can be squared with the need "to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," and "to promote respect for the law." 18 U.S.C. § 3553(a)(2)(A)&(B). In consequence of these failures, a downward departure based on a combination of factors is inappropriate.

F. Overlapping Sentencing Enhancements

Finally, Ebbers seeks a downward departure to mitigate the alleged "cumulative effects" of overlapping sentencing enhancements, pursuant to United States v. Lauersen, 348 F.3d 329

(2d Cir. 2003), cert. denied, Lauersen v. United States, 541 U.S. 1044, and United States v. Jackson, 346 F.3d 22 (2d. Cir. 2003). Specifically, Ebbers seeks at least a 12-level departure under Lauersen and Jackson on the grounds that every applicable sentencing enhancement “overlaps” with the enhancement for loss and thus has a cumulative effect to a degree not anticipated by the Sentencing Commission. (Sentencing Br. 36-41). While the Court has the power to depart on this basis, the Government respectfully submits that the Court should exercise its discretion and decline to do so.

Upon a motion for rehearing, the Second Circuit panel that decided Lauersen and Jackson reiterated its original position that:

when the addition of substantially overlapping enhancements results in a significant increase in the sentencing range minimum (as it does at the higher end of the sentencing table), a departure may be considered. What is present to a degree not adequately considered by the Commission is the combined effect of the aggregation of the substantially overlapping enhancements and the large increase in the sentencing range minimum at the higher end of the sentencing table.

United States v. Lauersen, 362 F.3d 160, 164 (2d. Cir. 2004) (emphasis in original). The Second Circuit, however, emphasized that “not many combinations of enhancements will be substantially overlapping.” Id. at 167. For example, the court made clear that enhancements for leadership role and abuse of trust do

not substantially overlap with each other. Id. at 168 n.12.

The Government respectfully submits that the other enhancements applicable in this case also are not "substantially overlapping," inasmuch as no two such enhancements are triggered by the same facts. Cf. Lauersen, 348 F.3d at 343-44 (13-level loss enhancement and 4-level enhancement for affecting a financial institution were both "significantly trigger[ed]" by "large amount of money involved in the fraud"). Indeed, fraud offenses with large losses such as this one do not necessarily involve five or more participants. Accordingly, there is no "substantial overlap" between Ebbers's 26-level enhancement for loss and his 4-level enhancement for organizing and leading the offense. Nor do cases with large loss amounts necessarily involve an abuse of trust, such as Ebbers's abuse of his position as CEO of a publicly head corporation. Similarly, the fact that Ebbers's crime resulted in losses to more than 50 victims and that Ebbers derived more than \$1 million in gross proceeds from the offense have independent significance separate and apart from the loss in this case. In short, because Ebbers's sentencing enhancements do not substantially overlap, a departure under Lauersen and Jackson is unwarranted. See United States v. Rigas, (June 21, 2005 sentencing proceeding) (district court denied Lauersen departure on facts similar to those present here).

IV. Application Of Factors Under 18 U.S.C. § 3553(a)

In light of the Supreme Court's decision in Booker, the Court must now consider an array of other factors, in addition to the Sentencing Guidelines, when determining the appropriate sentence for a defendant. In that regard, Ebbers provided the Court with a detailed discussion of various factors under Section 3553(a) of Title 18. (Sentencing Br. 41-71). In weighing these factors, the Court should consider certain counterbalancing facts, as set forth below.

A. The Nature And Circumstances Of The Offense

An initial factor for the Court to consider is the nature and circumstances of the offense. 18 U.S.C. § 3553(a)(1).

Here, the enormity of the crimes that Ebbers committed cannot be overstated: the fraud at WorldCom was the largest securities fraud in history. Along with Enron, the name WorldCom has become synonymous with fraud. The revelation of the fraud at WorldCom caused a dramatic blow to investor confidence and spawned a revolution in the enforcement of the securities laws. In direct response to the fraud at WorldCom, new laws were passed that strengthened the ability to police corporate misconduct and a Presidential Task force was created to monitor corporate fraud across the country.

One person established the culture that allowed this fraud to occur and, more fundamentally, specifically directed

WorldCom employees to commit fraud rather than reveal WorldCom's true financial condition to the public: Bernard Ebbers. And what's more, Ebbers caused this fraud to occur for one reason: to prop up WorldCom's stock price in order to avoid personal financial ruin. In directing this fraud, not only did Ebbers fail to save himself from financial ruin, but his conduct hastened this former Fortune 500 company's trip into bankruptcy and caused literally tens of thousands - or more - of innocent shareholders to suffer billions of dollars in losses. These factors merit consideration in deriving the appropriate sentence.

B. The Court Should Consider General Deterrence

One of the factors the Court must consider in imposing sentence is the need for the sentence to "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Ebbers claims that "the message to corporate America has already been sent" by means of his highly publicized trial and conviction. (Sentencing Br. 59). The Government disagrees. Corporate executives across the country, and the American public as a whole, will be measuring the seriousness of Ebbers' conduct in part by the seriousness of his sentence. More importantly, corporate executives will, in the future, consider the sentence imposed on Ebbers whenever those executives are tempted to mislead shareholders or manipulate the financial statements of their companies. General deterrence serves an important function

and works, perhaps even more effectively than in the context of other types of criminal conduct, to prevent financial crimes of the sort committed by Ebbers. Thus, to effect the goal of general deterrence, the Court should impose a sentence commensurate with the nature and seriousness of his crime and sufficient to cause others who may be tempted to engage in similar conduct to refrain from criminal activity for fear of the potential sanctions that might follow.

The defense argues that a substantial term of imprisonment is not necessary to achieve the goals of general deterrence in this case. The defense suggests that defendants such as Ebbers are peculiarly sensitive to the "ignominy" of conviction and, therefore, the fear of "ignominy" alone is sufficient to achieve general deterrence. This argument fails for two reasons. First, recent history has starkly demonstrated that the risk of a felony conviction alone has not been sufficient to deter corporate executives who are tempted to put their personal financial interests above their legal and fiduciary duties to make full and truthful disclosures to their shareholders and creditors. Second, the defense argument, at its core, relies on premises inimical to basic principles of equal application of the laws. The defense argument boils down to a claim that defendants who have all the advantages that education, business experience, reputation and wealth can provide, should be

sentenced more lightly because, for them, the embarrassment of conviction and the stigma of prison are more devastating.

C. The Need To Avoid Unwarranted Sentence Disparities

The Sentencing Guidelines were promulgated, in part, to minimize disparities in federal sentences. Although those Guidelines are no longer mandatory, the importance of eliminating sentencing disparities remains an important factor which the Court must separately consider pursuant to 18 U.S.C. § 3553(a)(7).

Although securities fraud prosecutions are by no means rare in this District, there have been very few recent sentences in cases which involved truly similar criminal conduct. Measured in terms of the extent of the harm caused (both in terms of the financial losses and number of victims), the scope and complexity of the schemes, and duration of the schemes, Ebbers's conduct is rare. However, there are three fairly analogous cases within the past ten years: John Rigas, Patrick Bennett and Steven Hoffenberg.

John J. Rigas was the founder, Chairman of the Board of Directors and Chief Executive Officer of Adelphia, which in 2002 was the sixth largest cable television service provider in the United States. Rigas and his co-conspirators simply looted Adelphia for their personal benefit and the benefit of their family. Further, like Ebbers, Rigas lied to public investors

about Adelphia's financial and operational performance by fraudulently: (a) understating Adelphia's debts to banks and concealing the size of Adelphia's liability for borrowings by the Rigas family under various co-borrowing agreements; (b) overstating Adelphia's EBITDA in nearly every quarterly and year-end financial report; (c) overstating the number of Adelphia's subscribers and the pace at which Adelphia was rebuilding its physical plant; and (d) representing that the Rigas family had invested cash of more than \$1.6 billion to purchase newly-issued Adelphia securities, when in fact those securities had effectively been stolen from Adelphia.

Rigas's fraudulent schemes wreaked financial havoc on both Adelphia and the many thousands of investors who entrusted billions of dollars to him and his co-conspirators as officers and fiduciaries of Adelphia. Between August 1998 and January 2002, Adelphia sold to the public approximately \$4.5 billion in bonds and convertible notes. During that same period, Adelphia raised an additional \$4.8 billion in capital through the public sale of newly issued common and preferred stock. As of January 2, 2002, 228,600,000 shares of Adelphia's Class A common stock had been issued to the public and were valued at \$31.85 per share, for a market capitalization of approximately \$7 billion. The majority of those investments, including essentially all of Adelphia's multi-billion dollar equity market capitalization,

were lost as a direct result of the crimes perpetrated by the defendants.

On June 20, 2005, the Honorable Leonard B. Sand sentenced John Rigas to 15 years' imprisonment. This sentence was a non-Guidelines sentence, as Judge Sand calculated Rigas's Sentencing Guidelines range to be life imprisonment, with a statutory maximum of 215 years' imprisonment. In imposing a non-Guidelines sentence, Judge Sand made clear that he was considering Rigas's age (80 years' old) and poor health. Were these factors not present, Judge Sand indicated that he would have imposed a greater sentence.¹¹

Patrick Bennett was the CFO of the Bennett Funding Group ("BFG"), a company which specialized in providing equipment leasing and financing for office equipment. BFG started as a small family-owned business. Patrick Bennett's father was the Chairman of the company and his brother was the Chief Operating Officer. Although, unlike WorldCom, BFG never went public, BFG raised capital by selling debt securities and interests in the equipment leases that BFG originated. Following two jury trials, Bennett was convicted of numerous counts of money laundering, securities fraud, and bank fraud. The evidence at trial demonstrated that, among other schemes, Patrick Bennett (1)

¹¹ Indeed, Judge Sand sentenced Timothy Rigas, Adelphia's former CFO, to 20 years' imprisonment.

engaged in accounting fraud by inflating BFG's revenue as reported to debt-holders in audited financial statements in two separate years; and (2) securitized and sold to investors leases that did not exist and/or leases that had been previously sold to other investors. See United States v. Bennett, 252 F.2d 559, 560-61 (2d Cir. 2001). As a result of selling leases that did not exist, BFG quickly turned into both a massive accounting fraud and one of the largest Ponzi schemes ever prosecuted. The losses from Bennett's conduct, as found by the Probation Department, exceeded \$600 million. Id. at 565. And the number of victims reached well into the thousands.

Bennett was sentenced under an earlier version of the Sentencing Guidelines which prescribed a sentencing range of 188 to 235 months. Id. at 561. At sentencing, the Honorable John S. Martin upwardly departed from that range and imposed a term of imprisonment of 30 years based, in part, on efforts by Patrick Bennett and his wife to shield some of the proceeds of the fraud from recovery by the victims. Bennett appealed from his sentence and the Second Circuit, finding that the wife's refusal to voluntarily return assets was not a proper basis for an upward departure, remanded for reconsideration of the upward departure. Id. at 565. Bennett also challenged the 30 year sentence on Eighth Amendment grounds. Even though the Circuit's remand mooted the Eighth Amendment issue, the Court took pains to

resolve the question. In language that would be equally applicable on the facts here, the Court stated: “[w]hether the final sentence is thirty years or twenty years (or something in between), we think there is no disproportion between sentence and conduct. Bennett’s conduct wiped out the savings of thousands of people, and is not longer than the sentences meted out in other large fraud cases.” Id. at 567.

On remand, Judge Martin again upwardly departed and imposed a sentence of twenty-two years on the basis of the extraordinary amount of the loss, the number of victims, and Bennett’s efforts to shield his assets by placing them in his wife’s name while the scheme was ongoing. See United States v. Bennett, No. 02-1379 (2d Cir. Sep. 18, 2003) (unpublished).

Similarly, the Honorably Robert Sweet imposed a sentence of twenty-years imprisonment on Steven Hoffenberg. See United States v. Hoffenberg, Nos. 94 Cr. 213 (RWS), 95 Cr. 321 (RWS), 1997 WL 96563 (S.D.N.Y. Mar. 5, 1997). Hoffenberg was the CEO and Chairman of Towers Financial Corporation (Towers). Through various subsidiaries, Towers was engaged in the insurance business as well as providing receivables financing. Id. at *3-4. Although Hoffenberg’s relevant conduct included schemes to defraud various insurance regulators, the principal offense for which he was sentenced involved the fraudulent sales of notes to investors. As a result of Hoffenberg’s fraudulent note sales,

more than 3,000 victims suffered losses of approximately \$475 million. Id. at *6.

After considering the factors set forth in Section 3553(a), Judge Sweet stated:

The greatest weight must be given to retribution and just punishment. Here, an unstable individual with manic tendencies and a sense of grandiosity violated the law in order to satisfy his own greed and sense of entitlement. His acts resulted in the loss of the savings and investments of thousands of people. Not only must he be punished, he must be effectively barred from causing further damage to the society.

Id. at *14.

By any objective measure of the harm caused, Ebbers's conduct was as detrimental to shareholders as that of John Rigas and was demonstrably worse than that of Patrick Bennett and Steven Hoffenberg. The Government respectfully submits that the sentences imposed on Ebbers should therefore be proportionate to the sentences imposed in those cases.

CONCLUSION

The Government respectfully submits that, for the reasons explained above, Ebbers should be sentenced to a term of imprisonment consistent with the Sentencing Guidelines and the sentences imposed in the three similar cases involving John Rigas, Patrick Bennett, and Steven Hoffenberg.

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Respectfully submitted,

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