

Jury in Ebbers Trial Asks: Whom do we Believe?

By Michael Bobelian
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This week's conviction of Bernard Ebbers, the former CEO of WorldCom, of all nine counts of securities fraud and related crimes, turned on two key questions.

Did Scott Sullivan, WorldCom's former CFO who was the government's chief witness, falsely accuse Ebbers of fraud to reduce his own sentence? And could Ebbers, a successful businessman who built WorldCom from a backwater operation to one of the world's leading telecommunications companies, not have known of the massive fraud taking place under his watch?

The verdict, handed down by a jury of seven women and five men sitting before U.S. District Judge Barbara Jones in Manhattan, was another victory for the government in its ongoing pursuit of corporate wrongdoing.

Last year, prosecutors in the Southern District of New York won convictions on obstruction of justice charges against former Credit Suisse First Boston executive Frank Quattrone and Martha Stewart, the founder of Martha Stewart Living Omnimedia.

In the case against Ebbers, Sullivan played the critical role. It was only after he pleaded guilty to charges of securities fraud last year on the verge of his own trial that the prosecutorial team, led by assistant U.S. attorneys David Anders and William Johnson, brought charges against Ebbers.

Sullivan was the only person to have received direct orders from Ebbers to orchestrate the \$11 billion accounting fraud that sent WorldCom into bankruptcy from which the company emerged last April as MCI.

Prosecutors tried to convince the jury that "the fraud was of such scale that [Mr. Ebbers] could not have been unaware," said Jason Brown of Holland & Knight, who is not involved in the case.

Reid Weingarten of Steptoe & Johnson, the lead defense attorney for Ebbers, argued that Sullivan masterminded the fraud and hid it from his boss, who the defense claimed never scrutinized financial and accounting matters closely.

Simply being the "captain of the ship" sinking under the weight of deception would be insufficient to convict the defendant, Weingarten pointed out in his opening statements.

In proving securities fraud, the government faced the high standard of having to convince the jury that Ebbers knowingly committed fraud and was an active participant. Failing to do so could make the ignorance defense plausible.

"With Sullivan having pleaded guilty to the fraud, [the defense] couldn't claim the fraud didn't take place," Brown said.

Nor did the defense have many other options.

"Given the government's main witness claiming that Ebbers was familiar with these frauds, the defendant had no choice but to plead ignorance," Brown said.

Michael Himmel, a former federal prosecutor now at New Jersey-based Lowenstein Sandler, agreed. "I'm convinced that the tact Reid took was the correct one," he said. Himmel is not involved in the case.

This strategy required careful navigation.

Weingarten could not use what Johnson in his closing arguments called the "aw-shucks" defense - depicting Ebbers as a bumpkin cluelessly running a multibillion dollar company while his subordinates carried out the fraud. Such a move would strain credulity.

Weingarten instead argued that Ebbers was a top-notch executive, just one who did not focus on technology and finances.

In the end, his delicate strategy did not sway jurors.

The second flank of attack for the defense involved an extensive campaign to discredit Sullivan. On cross-examination, Weingarten extracted from Sullivan that he was a serial liar - having deceived WorldCom insiders as well as the investing public to conceal his hand in the crime.

Most of Weingarten's closing arguments attacked Sullivan's credibility as the defense tried to minimize the government's other witnesses and documents used in building the case.

"It all comes down to whether you can accept the uncorroborated word of Scott Sullivan," Weingarten repeated throughout his closing.

The key for the government, said Seth Farber of Dewey Ballantine, who is not involved in the case, was to have Sullivan bring together all the evidence garnered from other witnesses and documents in an attempt to counteract the defense's tactics and buttress his credibility.

Prosecutors offered a host of documents - mostly revenue and expense reports - and witnesses that depicted WorldCom's efforts to make up the difference between expected earnings and actual results through accounting tricks.

Sullivan not only provided context to this evidence, but in doing so, perhaps boosted his own believability, said Brown of Holland & Knight.

The defense succeeded in painting Sullivan as a liar, but this success failed to dislodge the former CFO's numerous and specific references to conversations he had with Ebbers, in which the defendant allegedly ordered him to create accounting gimmicks to meet unreachable Wall Street expectations.

Under cross-examination, Sullivan did not waiver when asked about specific meetings with Ebbers in which he received marching orders to proceed with the fraud. Nor did he offer grave

inconsistencies about times and dates that would have cast doubt on the veracity of these conversations.

Ebbers Testifies

Perhaps fearing that Sullivan had not been sufficiently undermined, Ebbers took the stand in his own defense, a risky maneuver according to experts.

"Before Bernard Ebbers got on the stand, the defense didn't have to offer any explanation for what happened," said Farber of Dewey Ballantine. "It's much harder to defend yourself if you have a particular story and have to back it up."

In other words, the defense had to walk that tightrope again, and depict Ebbers as a capable executive who was nonetheless duped by the "whiz-kid" CFO.

When Ebbers's testimony directly contradicted Sullivan's, the trial once again pitted the two in a head-on collision.

The conflict was a reverberating theme throughout the case, which in many ways came down to whether one believed Ebbers or Sullivan.

The jury believed Sullivan. They found Ebbers guilty of one count of conspiracy, one count of securities fraud and seven counts of false regulatory filings. The maximum sentence is 85 years.

Ebbers's sentencing is scheduled for June 13.