



U.S. Department of Justice

United States Attorney  
Southern District of New York

The Silvio J. Mollo Building  
One Saint Andrew's Plaza  
New York, New York 10007

October 4, 2019

**BY ECF**

The Honorable Valerie E. Caproni  
United States District Judge  
Southern District of New York  
40 Foley Square  
New York, New York 10007

**Re: *United States v. Bernard Ebbers*, 02 Cr. 1144 (VEC)**

Dear Judge Caproni:

The Government writes in response to the motion of Bernard Ebbers, the defendant in the above-captioned case, for a sentence reduction pursuant to 18 U.S.C. § 3582, as amended by the First Step Act. Ebbers—the former President and CEO of WorldCom, Inc. (“WorldCom”)—is currently serving a 25-year sentence following his conviction at trial of securities fraud and related charges. He has requested that the Court reduce his term of imprisonment to time served and order his immediate release under the least restrictive conditions. As detailed further below, Ebbers’ request should be denied. First, Ebbers has not carried his burden of demonstrating that his medical conditions have substantially diminished his ability to provide self-care within the environment of a correctional facility. Second, Ebbers’ medical conditions remain manageable—and are being well-managed—through treatment by the Bureau of Prisons (the “BOP”). Third, the Court already considered Ebbers’ advanced age and medical history during Ebbers’ sentencing, including the likelihood that the below-Guidelines sentence imposed would result in a life sentence for Ebbers. Finally, given the massive nature and effect of Ebbers’ crimes, the factors set forth in 18 U.S.C. § 3553(a) weigh strongly against his early release.

**I. Factual Background to Ebbers’ Case**

On September 15, 2004, a federal grand jury sitting in the Southern District of New York returned a Superseding Indictment S4 02 Cr. 1144 (BSJ) (“the Indictment”), which charged Ebbers in nine counts. Count One charged Ebbers with conspiring with others to commit securities fraud and related crimes, in connection with his role in a scheme to defraud investors in securities issued by WorldCom, in violation of Title 18, United States Code, Section 371. Count Two charged Ebbers with securities fraud in connection with the same scheme to defraud WorldCom investors, in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5. Counts Three through Nine charged Ebbers with making false filings with the United States Securities and Exchange Commission (the “SEC”) from after the

close of the fourth quarter of WorldCom's 2000 fiscal year through the first quarter of its 2002 fiscal year, in violation of Title 15, United States Code, Sections 78m(a) and 78ff.<sup>1</sup>

Trial commenced on January 24, 2005 and concluded on March 15, 2005, when the jury returned guilty verdicts on all counts. The evidence at trial established that Ebbers and his co-conspirators engaged in an illegal scheme to deceive the investing public and the SEC concerning WorldCom's true operating performance and financial results. Ebbers and his co-conspirators knew, by no later than in or about 2000, that WorldCom's true operating performance and financial results were in decline and had fallen materially below securities analysts' expectations. Ebbers nevertheless insisted that WorldCom publicly report financial results that met those expectations. 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 financial results to be falsely and fraudulently manipulated. After the fraud was disclosed on June 25, 2002, WorldCom's stock price declined more than 90%, a loss of more than \$2 billion.

Before the sentencing hearing in this matter, which took place on July 13, 2005 (the "Sentencing Hearing"), Judge Barbara S. Jones received information concerning Ebbers' age, health and the ability of the BOP to manage any age and health issues. Specifically, on July 6, 2005, in advance of sentencing, the U.S. Probation Office ("Probation") prepared a presentence investigation report (the "PSR," attached hereto as Exhibit A<sup>2</sup>). In the PSR, Probation noted that Ebbers was 63 years old and detailed Ebbers' cardiac-related conditions, including his diagnosis of "idiopathic cardiomyopathy," which the PSR described as "a weakening of the heart muscle or a change in the heart muscle structure . . . , often associated with inadequate heart pumping or other heart function abnormalities," PSR ¶169 and n. 4; "mild to moderately reduced overall left ventricular systolic function with global hypokineses (the decreased ability of the left ventricle to contract), and an EF of 40 percent." *id.* ¶170; "bradycardia (an abnormally slow or unsteady hearth rhythm," *id.* ¶172; and "the possibility that he may need a pacemaker," *id.* In addition, prior to sentencing, the BOP informed the Court that it had "the capacity to monitor and treat Mr. Ebbers for his heart condition." Sentencing Hearing Tr., attached hereto as Exhibit B, 50:5-6. At the Sentencing Hearing, Ebbers' defense counsel argued that Ebbers' health was a ground for a downward departure. *See id.* at 41:13-16 ("The Court knows Mr. Ebbers has a serious heart condition. It needs to be regulated. There is a complex combination of drugs. He has regular care. It's a tricky situation.").

During the Sentencing Hearing, in addition to considering age and health issues, as set forth below, the Court heard from a victim, ruled on the relevant Guidelines range and discussed the nature and seriousness of the offense. At the beginning of the Sentencing Hearing, the Court heard from Henry J. Bruen, a former shareholder and employee of WorldCom, who made a lengthy statement, *see id.* at 8:7-16:4, which included the following:

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<sup>1</sup> The Indictment was the final in a series of charging instruments relating to the same securities-fraud scheme.

<sup>2</sup> Given the personal details contained in the PSR, the Government has not publicly filed the PSR. A copy of the PSR is included in the courtesy copy of the Government's opposition, provided to the Court by hand delivery.

Over the last two years, I have suffered the loss of all my savings, medical benefits, retirement funds, stock market investments, and personal property assets as a result of the financial devastation and inability to replace my personal income stream. . . due to no fault of my own. I was just one of many hard-working employees that put their faith and belief in what was and still is a great company, which was destroyed by the greed of Bernard Ebbers and his co-conspirators. What happened to me as a result of the fraudulent activities of Bernard Ebbers is representative of tens of thousands of other employees and investors who had their careers, retirement and livelihoods literally destroyed by the layoffs and bankruptcy of WorldCom that resulted from the fraud which occurred between 1999 and 2002.

*Id.* at 14:20-15:9.

As to the Guidelines calculation, the Court ruled that a 26-level enhancement was appropriate because the loss exceeded \$100 million. *See id.* at 30:4-33:22. Specifically, Judge Jones found that the loss amount calculated by the Probation Department – over \$2 billion – was “a reasonable estimate.” *Id.* at 31:3-6. The Court acknowledged that \$200 million was “a second alternative reasonable estimate of the loss figure in this case,” *id.* at 33:1-2, but determined that “[i]n [the Court’s] opinion, a figure of \$200 million severely underestimates the loss amount, precisely because it does not take into account the millions of other investors, who relying on and encouraged by Mr. Ebbers’ statements, bought WorldCom stock and continued to hold it until the truth came to light,” *id.* at 33:12-16. Relatedly, in denying Ebbers’ motion for a downward departure on the theory that the loss amount overstated the seriousness of the crime, Judge Jones held that Ebbers’ “overlooked the fact that regardless of whether one calculates the loss based on the change in market capitalization or the harm suffered by individual investors, this fraudulent scheme defrauded the market as a whole as well. And the loss figure in this case it seems to me in no way can be said to overstate the seriousness of the defendant’s conduct.” *Id.* at 49:3-10.

The Court further found that an enhancement for Ebbers’ leadership role was appropriate. *See id.* at 36:23-37:13 (“The jury heard testimony, which I credit, that Mr. Ebbers was the instigator of the fraud. He repeatedly issued guidance to the investing public knowing that WorldCom was not going to meet it. He submitted 10-Ks and 10-Qs to the SEC knowing those forms contained fraudulent numbers . . .”). The parties agreed that an enhancement for abuse of a position of public trust was appropriate, *see id.* 37:14-18, and the Court denied the Government’s request for an enhancement for obstruction of justice, *see id.* 38:18-39:8. In sum, the Court found an offense level of 42, yielding a Guidelines range of 30 years to life imprisonment. *See id.* at 51.

In determining the appropriate sentence, Judge Jones acknowledged Ebbers’ medical condition and age. Although the Court denied Ebbers’ request for a medical condition departure, *see id.* at 49:23-50:11, Judge Jones noted that she took “into account the defendant’s age, his serious heart condition, and his charitable works” in determining the appropriate sentence in this case, *id.* at 60:1-3. Judge Jones “recognize[d] . . . that this sentence is likely to be a life sentence for Mr. Ebbers, [but found] that a sentence of anything less would not sufficiently reflect the

seriousness of this crime.” *Id.* at 60:3-6. Judge Jones sentenced Ebbers to a below-guidelines term of imprisonment of 25 years. *See id.* at 61:1-6.<sup>3</sup>

Ebbers appealed his conviction, which was denied in full on January 30, 2006. *United States v. Ebbers*, 458 F.3d 110, 113 (2d Cir. 2006).

Ebbers is currently incarcerated at the Federal Medical Center in Fort Worth, Texas (“FMC Fort Worth”). Ebbers surrendered to BOP custody on September 26, 2006. His Good Conduct Release date is July 4, 2028.

## **II. BOP’s Evaluation and Denial of Ebbers’ Request for Compassionate Release**

On or about July 16, 2019, Ebbers submitted a “Compassionate Release Request” to the BOP at FMC Fort Worth.<sup>4</sup> In support of his request, Ebbers listed two medical conditions: (1) “macular degeneration,” which Ebbers describes as “incurable” and “severe,” resulting in Ebbers being “legally blind”; and (2) cardiomyopathy, which Ebbers states “has recently worsened.” *See Ebbers’ Mot.*, Exhibit 2.

On or about August 7, 2019, Dr. Sergio Mercado, Jr., the Medical Officer at FMC Fort Worth, evaluated Ebbers and completed a “Reduction In Sentence Medical Review/Summary” and accompanying “Clinical Encounter.” *See* RIS Medical Summary, attached hereto as Exhibit C, and Clinical Encounter, attached hereto as Exhibit D. On the same date, a Physical Therapist evaluated Ebbers and prepared documents regarding “Physical Self-Maintenance” and “Instrumental Activities of Daily Living.” *See* PT Evaluation, attached hereto as Exhibit E. As part of his evaluation, Dr. Mercado noted that Ebbers informed him that Ebbers “has no difficulty navigating around his housing unit or throughout the institution. He holds a job as an orderly in the unit, and has no problems doing that job.” Exhibit D at 1. Dr. Mercado also noted that Ebbers’ macular degeneration is “progressive and [i]ncurable,” but added that “[t]he BOP has inmates that are totally blind (no light perception) and they are able to function perfectly well within a prison setting. As Mr. Ebbers condition worsens, we should be able to make accommodations to house him in a safer environment and provide him with assistive devices and/or companions to facilitate independent completion of his ADLs.”<sup>5</sup> Exhibit C at 1. As to Ebbers’ cardiomyopathy, Dr. Mercado noted that the “the condition has been managed medically and Cardiology has found [Ebbers] to be stable.” *Id.* Dr. Mercado further noted that, in or about July 2019, following reports

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<sup>3</sup> Judge Jones did not impose a fine, and, in light of a settlement agreement reached among the Government, Ebbers, and members of the WorldCom class action litigation, did not order Ebbers to pay restitution. *See id.* at 61:10-17 (“I am not imposing restitution in this case because, to the extent that it can be made, it is covered by the settlement agreement in the WorldCom securities litigation. Under that agreement, Mr. Ebbers is required to transfer substantially all of his remaining cash and noncash assets . . . .”)

<sup>4</sup> The request was submitted by Ebbers’ daughter, Joy Ebbers Bourne.

<sup>5</sup> ADLs stands for Activities of Daily Living.

from Ebbers' housing unit coordinator, BOP conducted a mental health evaluation and "there were no concerns for any significant cognitive defects." *Id.*<sup>6</sup>

On or about August 7, 2019, the Warden of FMC Fort Worth approved the recommendation to send Ebbers' request for compassionate release to the BOP Central Office for a final decision. *See* Robles Mem., attached hereto as Exhibit G. On or about August 8, 2019, Dr. Jeffery D. Allen submitted a memorandum to BOP Associate General Counsel Zachary J. Kelton reviewing Ebbers' medical records in connection with his request for compassionate release. *See* Allen Mem., attached hereto as Exhibit H. Dr. Allen determined that Ebbers did not qualify for compassionate release under the relevant BOP guidelines. *See* Program Statement 5050.50, available at [https://www.bop.gov/policy/progstat/5050\\_050\\_EN.pdf](https://www.bop.gov/policy/progstat/5050_050_EN.pdf).

On or about August 12, 2019, the BOP issued a memorandum denying Ebbers' request for compassionate release. *See* Memorandum from Assistant Director/General Counsel Ken Hyle, attached hereto as Exhibit I. The BOP noted that Ebbers is "closely followed by cardiology and ophthalmology, and his treatment providers report that his medical conditions are chronic but stable at this time." Exhibit I at 1. The BOP recognized that Ebbers is "legally blind" but further noted that Ebbers: (i) "remains capable of independently performing his activities of daily living (ADLs) . . . such as bathing, dressing, grooming, toileting, ambulating, using the telephone with large numbers, managing his medication with a magnifying glass<sup>7</sup>, performing light housekeeping, and navigating the correctional environment"; (ii) "currently works as a unit orderly and has acknowledged he is not having any difficulties performing his duties; and (iii) is "capable of navigating stairs on the unit without difficulty." *Id.*

### **III. Ebbers' Motion for Compassionate Release**

On September 5, 2019, Ebbers filed a motion with the Court for a sentencing reduction pursuant to 18 U.S.C. § 3582 and the First Step Act. In support of his motion, Ebbers lists five medical conditions: (1) macular degeneration; (2) cardiomyopathy; (3) diabetes; (4) inguinal hernia; and (5) significant weight loss and physical and mental deterioration. *See* Ebbers Mot. 15-18. Ebbers also relies on a letter of support from retired Judge Barbara S. Jones, who sentenced Ebbers. Although Judge Jones writes in support of Ebbers' motion for compassionate release, she simply restates the macular degeneration-related issues that Ebbers details in his motion, and opines that "given [Ebbers'] serious health problems, [Ebbers] has been punished enough." *Id.*,

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<sup>6</sup> On or about September 15, 2019, after the BOP's denial of Ebbers' request, the BOP conducted a wellness check on Ebbers following reports that Ebbers had been increasingly confused. *See* September 15, 2019 Clinical Encounter, attached hereto as Exhibit F. Ebbers "recall[ed] being confused at some points but states he is able to care for himself." *Id.* at 1. The BOP concluded that Ebbers was "safe to return to the unit [and] was released in stable condition." *Id.* at 2.

<sup>7</sup> On or about September 26, 2019, the BOP confirmed that Ebbers has been issued a magnifier.

Exhibit 1.<sup>8</sup> Notably, Ebbers does not allege, nor could he, that he is receiving inadequate medical care at the medical center where he is incarcerated.

With respect to the Section 3553(a) factors, Ebbers notes that his offenses were non-violent and that he does not have other criminal history. *See id.* at 28. He also emphasizes his charitable work. Finally, Ebbers argues that the nearly 13 years that he has served in prison is adequate deterrence, and that 13 years of prison time is in-line with sentences imposed on similarly situated defendants. *See id.* at 29-30.

### **A. Applicable Law**

Under 18 U.S.C. § 3582(c)(1)(A), the Court “may not modify a term of imprisonment once it has been imposed except” as provided by the statute. As relevant here,

[T]he court . . . may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . .

*Id.*

Before Congress passed the First Step Act, a defendant’s prison term could only be modified “upon motion of the Director of the Bureau of Prisons.” *See United States v. Johns*, No. CR 91-392-TUC-CKJ, 2019 WL 2646663, at \*1 (D. Ariz. June 27, 2019). The First Step Act amended the statute to permit a defendant to file a motion for compassionate release directly with a court, “after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier. . . .” 18 U.S.C. § 3582(c)(1)(A). The First Step Act, however, did not alter the substantive analysis required to grant a motion for compassionate release. *See United States v. Willis*, 382 F. Supp. 3d 1185, 1187 (D.N.M. 2019) (“Aside from allowing prisoners to bring a motion directly, the First Step Act did not change the standards for compassionate release.”).

The United States Sentencing Guidelines contain a provision, Section 1B1.13, applicable to motions for sentencing reductions pursuant Section 3582(c)(1)(A). That section provides:

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering

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<sup>8</sup> Judge Jones’ recent commentary contrasts with her statements at sentencing in which she deemed it appropriate to sentence Ebbers to what she described at the time as effectively a life sentence. *See Exhibit B at 60:3-6.*

the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that--

- (1) (A) Extraordinary and compelling reasons warrant the reduction; or
  - (B) The defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
- (2) The defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
- (3) The reduction is consistent with this policy statement.

U.S.S.G. § 1B1.13.

Ebbers agrees that subsection (1)(B) is inapplicable. With respect to subsection (1)(A), which relates to “extraordinary and compelling reasons” warranting a reduction, the Application Notes to Section 1B1.13 describe the circumstances under which “extraordinary and compelling reasons” exist. *See id.* § 1B1.13 comment (n.1). Ebbers argues that he qualifies for release under the following subsections:

- (A) Medical Condition of the Defendant.—
  - ...
  - (ii) The defendant is—
    - (I) suffering from a serious physical or medical condition,
    - (II) suffering from a serious functional or cognitive impairment, or
    - (III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

- (B) Age of the Defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

...

- (D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

*Id.* § 1B1.13 comment (n.1).

As the proponent of the motion, Ebbers bears the burden of proving that “extraordinary and compelling reasons” exist. *See, e.g., United States v. Butler*, 970 F.2d 1017, 1026 (2d Cir. 1992) (“A party with an affirmative goal and presumptive access to proof on a given issue normally has the burden of proof as to that issue.”).

### **B. Analysis**

The Court should deny Ebbers’ motion. As detailed further below, Ebbers’ medical conditions have been, and remain, manageable within the BOP. Indeed, Ebbers’ claims about his ability to provide self-care are not supported by the medical evaluations performed by the BOP in August 2019. Moreover, in light of the massive fraud that Ebbers perpetrated, with a loss amount in the billions and countless victims, including the “market as a whole,” the 3553(a) factors weigh heavily against any reduction in his sentence.

*First*, Ebbers has not demonstrated that he satisfies the Sentencing Guideline’s factors for relief based on the “Medical Condition of the Defendant.” *See* U.S.S.G. § 1B1.13 comment (n.1(A)(ii)). That is, Ebbers has not demonstrated that “serious physical or medical condition[s]” or “serious functional or cognitive impairment[s]” have “substantially diminishe[d] [his] ability . . . to provide self-care within the environment of a correctional facility.” *Id.* Although there is no dispute that Ebbers is legally blind, and that his macular degeneration is incurable, Ebbers has no issues independently navigating FMC Fort Worth, and indeed works as an orderly. *See* Exhibit D, at 1. Moreover, while Ebbers is unable to use a computer, needs assistance to complete his commissary list, and requires a magnifier to take medication, he eats, bathes, utilizes the restroom, and is well-groomed without assistance. *See* Exhibit E. As Dr. Mercado explained, “BOP has inmates that are totally blind (no light perception) and they are able to function perfectly well within a prison setting.” Exhibit C at 2.

In addition, nothing in Ebbers’ motion evidences that his cardiomyopathy, which was considered at the time of sentencing, has greatly deteriorated since his sentencing. Indeed, the ongoing medical care provided to Ebbers with respect to his heart issues, for example, demonstrates his ability to obtain necessary medical care while incarcerated. Dr. Mercado explained that Ebbers’ cardiomyopathy “has been managed medically and Cardiology has found him to be stable. While it is true that this condition predisposes a person to sudden cardiac death, his condition is no worse than many other inmates that are currently at [FMC Fort Worth].” *Id.* Although Ebbers also cites to diabetes and hernias, he does not allege that either have had any effect on his ability to provide self-care. Finally, Ebbers includes a declaration from his daughter

noting observations of Ebbers' physical and mental condition, but, as noted above, in or about July 2019 and again on or about September 15, 2019, the BOP evaluated Ebbers' mental health and determined that "there were no concerns for any significant cognitive defects." *Id.*; *see also* Exhibit F at 2.

Accordingly, Ebbers has not provided any basis for the Court to find that his ability to provide self-care within the environment of a correctional facility has, in fact, been diminished by any of his conditions. Ebbers is therefore ineligible for release based on the "Medical Condition of the Defendant." *See, e.g., United States v. Lynn*, No. CR 89-0072-WS, 2019 WL 3082202, at \*2 (S.D. Ala. July 15, 2019) (denying defendant's motion for compassionate release because "the record lacks any evidence that his ability to care for himself in prison has been substantially diminished"); *United States v. Heromin*, No. 8:11-CR-550-T-33SPF, 2019 WL 2411311, at \*2 (M.D. Fla. June 7, 2019) (concluding that defendant had failed to demonstrate "a foundation for compassionate release based on his medical condition" because his medical provider did not indicate that defendant's medical conditions were either terminal or resulted in an inability "to 'provide self-care' within the correctional facility").

*Second*, Ebbers has not demonstrated that he satisfies the Sentencing Guideline's factors for relief based on the "Age of the Defendant." *See* U.S.S.G. § 1B1.13 comment (n.1(B)). Although Ebbers is over 65 years old and has served more than 10 years in prison, Ebbers has not demonstrated that "he is experiencing a serious deterioration in physical or mental health because of the aging process." *Id.* As detailed above, the Government recognizes Ebbers' incurable macular degeneration, but given Ebbers' ability to provide self-care, and even hold a job in prison, and the BOP's ability to accommodate and adequately provide for blind inmates, and inmates with cardiac conditions and other conditions no worse than Ebbers' at FMC Fort Worth, Ebbers cannot be said to have experienced a "a serious deterioration in physical or mental health" that constitutes "extraordinary and compelling reasons" for a reduction in his sentence.<sup>9</sup> Although the application

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<sup>9</sup> Ebbers has not cited, and the Government is not aware of, any case law specifically interpreting "a *serious deterioration* in physical or mental health because of the aging process." *See* U.S.S.G. § 1B1.13 comment (n.1(B)) (emphasis added). Courts that have analyzed this factor have considered the inmate's ability to provide self-care in prison, *see, e.g., United States v. Bellamy*, No. CV151658JRTLJB, 2019 WL 3340699, at \*5 (D. Minn. July 25, 2019) (finding that inmate's "health is seriously deteriorating because of the aging process and that his ability to function in a prison facility is substantially diminished as a result"); *United States v. Johns*, No. CR 91-392-TUC-CKJ, 2019 WL 2646663, at \*3 (D. Ariz. June 27, 2019) (holding that inmate "is on the cusp of or is suffering from a serious physical or medical condition and is experiencing deteriorating physical or mental health because of the aging process that substantially diminishes his ability to provide self-care within the BOP and from which he is not expected to recover"), or have applied an independent fact-based analyses, *see, e.g., United States v. Stowe*, No. CR H-11-803 (1), 2019 WL 4673725, at \*2 (S.D. Tex. Sept. 25, 2019) ("[A]fter reviewing the exhibits attached to the defendant's motion, the court finds that although the defendant's physical condition may have deteriorated over the last 50 months, the defendant has not shown the "serious deterioration of physical ... health because of the aging process that would justify compassionate release.[?]").

of this provision is admittedly the most persuasive aspect of Ebbers' motion, the Government respectfully submits that the Court should not exercise its discretion to release Ebbers based on the ailments he references, and in consideration of the 3553(a) factors detailed further below.

*Third*, Judge Jones' letter is not an "extraordinary and compelling reason" for a reduction in Ebbers' sentence. As an initial matter, Judge Jones appears to overlook the fact that she was well aware of and considered Ebbers' cardiac-related health issues, including the BOP's ability to provide adequate care for Ebbers, when she weighed the factors set forth in Section 3553(a) and imposed a below-Guidelines sentence of 25 years' imprisonment on the then 63-year old Ebbers. *See* Exhibit B at 49:23-50:11, 60:2-3. In addition, in her letter, Judge Jones focuses on Ebbers' macular degeneration, and specifically his ability to read forms and groom himself. As detailed above, however, Ebbers provides self-care in prison, bathes and grooms himself independently, uses a magnifying glass to administer his medication, and independently navigates FMC Fort Worth. Perhaps most notably, although there is no reason to believe that Ebbers is nearing death (indeed, Dr. Mercado found that "there is no data the leads to giving a life expectancy that is less than 12-18 months" and that Ebbers "scores with a life expectancy of 5 years or more," Exhibit C at 2), Judge Jones expressly stated at the time of sentencing that she understood that the sentence she imposed was likely to be a life sentence for Ebbers, but that anything less would not be appropriate. *See* Exhibit B at 60:3-6.

*Finally*, even assuming that Ebbers meets one of the categories of relief described above, a nearly 50% reduction in Ebbers' sentence would be grossly insufficient to comply with the sentencing goals set forth in Section 3553(a). The severity of Ebbers' crimes cannot be overstated. Ebbers' was responsible for one of the largest frauds in history. As CEO of WorldCom, Ebbers directed the massive fraud, which caused tens of thousands of innocent shareholders to suffer billions of dollars in losses. As Judge Jones determined at the Sentencing Hearing, "[a]ny lesser sentence also has the potential to create sentencing disparities among defendants convicted of securities fraud." Exhibit A at 60:6-9.<sup>10</sup> Ebbers' 25-year sentence appropriately reflects the seriousness of his offense, provides just punishment, and reflects the need to provide general deterrence for massive financial crimes and avoid unwarranted sentence disparities.

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<sup>10</sup> In advance of Ebbers' sentencing in 2005, the Government offered the sentences of John Rigas (15 years), Patrick Bennett (22 years) and Steven Hoffenberg (20 years) as "three fairly analogous cases within the past ten years." *See* Government Sentencing Memorandum, Dkt. # 295, at 68-73, 73 ("By any objective measure of the harm caused, Ebbers' conduct was as detrimental to shareholders as that of John Rigas and was demonstratively worse than that of Patrick Bennett and Steven Hoffenberg.").



# Exhibit A

*FILED UNDER SEAL*

# Exhibit B

57D8EBBS

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 UNITED STATES OF AMERICA,

4 v. 02 Cr. 1144 (BSJ)

5 BERNARD J. EBBERS,

6 Defendant.

7 -----x

8 July 13, 2005  
9 10:00 a.m.

10 Before:

11 HON. BARBARA S. JONES

12 District Judge

13 APPEARANCES

14 DAVID N. KELLEY  
15 United States Attorney for the  
16 Southern District of New York  
17 BY: DAVID ANDERS  
18 KATHERINE GOLDSTEIN  
19 Assistant United States Attorneys

20 STEPTOE & JOHNSON  
21 Attorneys for Defendant  
22 BY: REID H. WEINGARTEN  
23 ERIK KITCHEN  
24 BRIAN HEBERLIG

25 -and-  
BRUNINI GRANTHAM GROWER & HUGHES  
BY: DAVID KAUFMAN

57D8EBBS

1 (In robing room)

2 THE COURT: Mr. Anders.

3 MR. ANDERS: Just to bring to the Court's attention,  
4 at 9:30 this morning our victim witness coordinator gave me a  
5 stack of e-mails, which I provided a copy to defendant. I  
6 actually haven't had a chance to read them yet, but they are  
7 from victims. She also told me that she had received phone  
8 calls, in total, somewhere over 200, from victims just about  
9 the sentencing. A much smaller subset, she guessed perhaps 20  
10 people, had indicated that they were interested in speaking at  
11 sentencing.

12 Obviously, none of these people have complied with  
13 your Honor's order which indicated they had to contact the  
14 Court about whether they wanted to speak. Nevertheless, sort  
15 of as a general matter, under the Justice for All Act, they do  
16 have some right to speak. We are trying but have no way of  
17 identifying who these people are or whether they are even here.

18 Wendy Olsen is here and is prepared, to the extent  
19 people make themselves known, to sort of get their names and  
20 talk to them. Ms. Goldstein can also talk to them, and we can  
21 determine whether it makes sense, but I sort of -- that's the  
22 information. I defer to the Court on how to proceed further.

23 THE COURT: Mr. Weingarten.

24 MR. WEINGARTEN: Our decision as to how to proceed  
25 today was heavily influenced by the Court's order. Obviously,

57D8EBBS

1 from our submission, there are an enormous number of people who  
2 feel very strongly on the other side about this, and they were  
3 willing to walk from Mississippi or Canada to come to court.  
4 After discussions with the government and observing the Court's  
5 order, and assuming maybe there was going to be one person  
6 speaking, we chose not to do it.

7 THE COURT: When you say my order, I think I was under  
8 the impression that we had one person speaking today. Is that  
9 what you're talking about?

10 MR. WEINGARTEN: Yes.

11 MR. HEBERLIG: I would also add, the Victims Rights  
12 Act does list a variety of rights, but it also specifically  
13 says, in cases with a large number of victims, the Court has  
14 discretion to fashion reasonable ways to deal with that. The  
15 Court did so here. You issued an order. It was very explicit  
16 and told people to notify the Court in writing a week prior to  
17 sentencing. Even if notifying the government was sufficient,  
18 most of these e-mails came in yesterday or the day before.  
19 They are not in compliance with the Court's order, and like Mr.  
20 Weingarten said, we proceeded under that order. Certainly, if  
21 there is going to be a parade of people from the crowd coming  
22 up to the stand, we would ask for a continuance to get  
23 witnesses from Mississippi to come.

24 THE COURT: I am looking at e-mails apparently  
25 received by the victim witness coordinator Monday and Tuesday.

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1 One is a request to speak this morning from a Glenn Klupsak,  
2 who claims he is going to be here. Another is a request for an  
3 adjournment of these proceedings because of the short notice so  
4 that this person can be here. I have to go through the rest of  
5 these.

6 I have read a number of them and they simply express  
7 their feelings about the case and don't add much frankly to  
8 what I have already read with respect to a number of letters  
9 from people. Let me just continue.

10 This one expresses strong feelings, but also indicates  
11 a little bit of a complaint about not receiving notice in time  
12 to get here.

13 All right. These are all the e-mails, Mr. Anders?

14 MR. ANDERS: Those are all the ones I received this  
15 morning, yes.

16 THE COURT: I have read them all. I will certainly  
17 make them available to defense.

18 MR. ANDERS: I gave them copies.

19 THE COURT: You have done that already. OK.

20 Is Mr. Klupsak here, do we know?

21 MR. ANDERS: I don't know. I think he may have  
22 actually been here for the trial. That name is familiar.

23 THE COURT: We did have a procedure. It's regrettable  
24 that at least two people indicated that they would like to have  
25 been here but the notice was too late. I have read what they

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1 have to say and all I will permit, I think, at this point,  
2 because I frankly don't think it's fair to the defendant in  
3 this case to adjourn this at this point, and I think that  
4 outweighs to some extent the interests of the victims speaking  
5 personally, and I want to underscore that because I have read  
6 everything that any and every victim has sent in here, so I am  
7 going to rule that if Mr. Klupsak is here and wishes to speak,  
8 I will add him. If anyone else wishes to speak, I am going to  
9 indicate that unfortunately we only had specific notice with  
10 respect to two people, and I have read whatever they may have  
11 written in, but we won't have the opportunity to hear from them  
12 personally.

13 Mr. Weingarten, that's my ruling. I don't know  
14 whether it will add Mr. Klupsak or not, whether he is here or  
15 not, but that will be it.

16 MR. WEINGARTEN: May I ask how we are going to proceed  
17 this morning, the order?

18 THE COURT: Sure. What I am going to do is I will  
19 begin by frankly letting anyone -- I use the term loosely --  
20 letting Mr. Klupsak and Mr. Bruen speak. Once that's done, we  
21 will get to factual objections. Then I would like to hear some  
22 argument.

23 To give you some signal here, not too subtle, I have  
24 read a lot of briefs. I don't think I need lengthy argument  
25 this morning, but I will hear some argument with respect,

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1 first, to the guideline range, enhancements first, then  
2 departures, and then I will hear obviously from the government,  
3 if they have anything in addition they want to say, and Mr.  
4 Ebbers. And then I will proceed to sentence. But that will be  
5 the order. I will clue you in as we go along so there will be  
6 no lack of clarity about where I am at in the sentencing. OK?

7 MR. ANDERS: Does your Honor want us to try to figure  
8 out if Mr. Klupsak is here? I think under the circumstances it  
9 makes sense not to encourage people.

10 THE COURT: I am not going to. I would like to try to  
11 simply say, I understand Mr. Bruen and -- if we find  
12 Mr. Klupsak -- Mr. Klupsak are here, and I will hear from you  
13 gentlemen now, and we will start with Mr. Bruen, and then we  
14 will hear from Mr. Klupsak.

15 If anybody else rises and wants to speak, because I  
16 think it would be unfair to the defendant, both adjourning it  
17 or letting additional victims speak who did not give us notice,  
18 I will just tell them that I have read everything that every  
19 victim has written in, and I am sorry but I cannot accommodate  
20 them. OK?

21 (Continued on next page)

22  
23  
24  
25

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1 (In open court)

2 (Case called)

3 THE DEPUTY CLERK: Is the government ready?

4 MR. ANDERS: David Anders and Katherine Goldstein for  
5 the government.

6 THE DEPUTY CLERK: Is the defendant ready?

7 MR. WEINGARTEN: Steve Weingarten for Mr. Ebbers.

8 THE COURT: Good morning.

9 All right. I have read the presentence report dated  
10 July 6. I have also received many letters, both on behalf of  
11 Mr. Ebbers and from investors and others who lost money in  
12 WorldCom. I have read them all and considered them. I have  
13 also read and considered the sentencing memoranda submitted by  
14 both defense counsel and the government.

15 Mr. Weingarten, have you read the presentence report  
16 and discussed it with your client?

17 MR. WEINGARTEN: Yes, your Honor.

18 THE COURT: Mr. Ebbers, have you gone through this  
19 presentence report and discussed it with Mr. Weingarten?

20 THE DEFENDANT: Yes, I have.

21 THE COURT: Now, before I hear from counsel with  
22 respect to factual objections to the presentence report, and of  
23 course on what the appropriate sentence in this case should be,  
24 I have been notified that Mr. Bruen wishes to address the  
25 Court.

57D8EBBS

1           Would you come forward, sir?

2           Mr. Bruen, could you just give us your full name?

3           MR. BRUEN: Henry J. Bruen, Jr.

4           THE COURT: Go ahead, sir.

5           MR. BRUEN: Good morning.

6           THE COURT: Good morning.

7           MR. BRUEN: My name is Henry J. Bruen, Jr. I am a  
8           37-year-old black male, a former shareholder, a former employee  
9           of WorldCom's New York national sales group, whose offices were  
10          located in 100 Park Avenue here in Manhattan, New York.

11           I requested the opportunity to address this Court  
12          today because I am a victim of the crimes that have been  
13          committed by Bernard J. Ebbers. More importantly, I am a pro  
14          se individual victim. Not represented by a lawyer; I am not  
15          associated with a big hedge fund, investment banking  
16          conglomerate or institutional bondholder. I represent the  
17          common man, the working professional, and the average investor  
18          that has suffered untold human carnage financially, personally  
19          and professionally as a result of the criminal activities of  
20          Bernard Ebbers and his co-conspirators.

21           This story, my story, is a story that has not grabbed  
22          the headlines over the past several years in the midst of the  
23          billions of dollars of accounting fraud, the tens of thousands  
24          of personnel laid off as a result, which led to the largest  
25          corporate bankruptcy in business history.

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1 I want to take this opportunity to thank the court and  
2 the Honorable Judge Barbara S. Jones for granting me this  
3 opportunity to speak today because the impact that I felt and  
4 am still dealing with as a result of these crimes can be  
5 multiplied and amplified by thousands when you look at the  
6 individuals like me across the United States of America and  
7 around the world.

8 I met Bernard J. Ebbers, or Bernie as everyone in  
9 WorldCom affectionately called him, on January 20, 2000. It  
10 was a Thursday and I was in Clinton, Mississippi for a full  
11 week of national mandatory new employee sales training,  
12 entitled Winning Strategies. I was told prior to leaving from  
13 New York that Bernie made a point of speaking to every group of  
14 new salespeople. We were also told that Bernie personally  
15 signed off on every new hire, which was why the final phase of  
16 the hiring process took about two weeks.

17 But here I was, the second to last day of training,  
18 standing in line to eat at the corporate cafeteria, and there  
19 was Bernie three people behind me in jeans and a T-shirt on  
20 line also waiting to see what was for lunch that day. I left  
21 my place and briefly walked up to him, shook his hand, and let  
22 him know that I was one of his new employees out of the New  
23 York national sales group here for training. I remember being  
24 greeted with a warm smile and a firm grip, followed by a  
25 sincere welcome to the company. I will never forget it.

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1           Moving into the telecom industry for me was a career  
2 transition. Being hired as a national accounts manager in the  
3 fall of 1999 by WorldCom was my first major carrier position.  
4 I had worked in the media industry for over 15 years, with  
5 experience in industry leading companies like Time Warner,  
6 where I had senior executive and CEO exposure on many occasions  
7 for many years, but none seemed as genuine as this.

8           By the end of the week, I was honored by the  
9 instructors and by my peers with the highest award given to a  
10 new employee in WorldCom, the MVP award, given for the most  
11 outstanding performance of all the participants of that class.  
12 I found out later that there were two predecessors in the New  
13 York office who had won this award when they were new  
14 employees. Each had gone on to make over \$600,000 per year.  
15 This, I thought to myself, could be the start of something  
16 good.

17           I was a legacy WorldCom employee hired by a legacy  
18 WorldCom manager and a member of the national accounts group,  
19 which was the most profitable sales channel of all six WorldCom  
20 sales channels, dealing with global, multinational and national  
21 size enterprise businesses. Both the vice president of the  
22 United States nationals and the senior vice president of U.S.  
23 nationals were based at my location at 100 Park Avenue, and  
24 they too were legacy WorldCom employees. My sales territory  
25 was the number-one market in the United States: New York City,

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1 Manhattan. It didn't get much better than that.

2 At the time, New York City was a \$90 billion telecom  
3 market with some of the most prominent national, multinational  
4 and global businesses to prospect for services. WorldCom had  
5 recently completed the successful acquisition of MCI  
6 Communications, and one of WorldCom's little known assets was a  
7 company called UUNet which boasted that over 80 percent of all  
8 global Internet traffic flowed over its network backbone.  
9 WorldCom was the number-two U.S. telecom carrier with no sign  
10 of sales growth and expansion slowing in sight. Internet  
11 applications were booming, the acquisition of Sprint  
12 telecommunications was pending, and WorldCom was squarely  
13 positioned as the industry leading carrier with the best  
14 collection of assets globally for any telecom needs.

15 I was hired with the understanding that I would need  
16 to build my own account list. This was something that was very  
17 hard to do at the enterprise level. From January 2000 to June  
18 2002, I went from zero dollars in sales and being ranked last  
19 to being ranked number 18 out of all 7,000 salespeople,  
20 nationally averaging over 35,000 in sales per month. I had  
21 brought and established new business accounts to WorldCom from  
22 Con Edison and Series Satellite Radio resulting in over \$5  
23 million in new business sales commitments. I had become a top  
24 5 percent President's Club winner four consecutive times in a  
25 row and had been recognized in my branch over 15 times for

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1 outstanding sales performance over quota in that period.

2 A key part of my job responsibilities in order to be  
3 successful was to communicate the financial strength of the  
4 company and services to customers and prospective customers at  
5 the CEO level and all levels in an enterprise in order to  
6 secure sales. September 11, 2001 arrived in New York City and  
7 WorldCom responded with getting the City of New York's key  
8 government offices back up and running with a private line  
9 network. Since this product was my specialty, I was tapped to  
10 be on the Mayor's special task force for WorldCom, headed by  
11 Deborah Surette. Within 30 days immediately following 9/11, I  
12 personally wrote over \$350,000 in orders to reestablish  
13 communications between key government agencies, like the  
14 Mayor's Office, Sanitation Department, Fire Department, FBI,  
15 Police Department, etc., for which I never did receive any  
16 compensation which was promised by the company.

17 On April 29, 2002, Bernard Ebbers gave his resignation  
18 with a separation agreement that allowed him to be compensated  
19 \$1.5 million per year in cash on May 1st of each year for the  
20 rest of his life. And if he should die, his wife would receive  
21 \$750,000 per year from the company for the balance of her life.

22 Finally, in June 2002, I was ranked the number-one  
23 salesperson in New York City nationals region. I averaged over  
24 180,000 in total personal income per year in salary plus  
25 commissions for that period of time and would maintain or

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1 double that level of income due to the three- and five-year  
2 contract commitments gained from my customers. After the fraud  
3 announcement on June 26, 2002, my commission income diminished,  
4 greatly due to an inability to obtain new business that was  
5 previously committed and contracted to the company.

6 Since there were high-level company officials at my  
7 location, TV, radio and newspaper reporters were posted outside  
8 our building every day to obtain comments from employees coming  
9 and going from work. Our switchboard operator complained about  
10 being swamped with daily calls from every major TV network and  
11 other media outlets, and I made sure to hide my company ID  
12 before I left the building every day to avoid any unwanted  
13 interaction, media or otherwise, during my daily commute.

14 Over the period of the next six months, I was saddled  
15 with the stigma of being a legacy WorldCom employee, in  
16 addition to being tasked with explaining the accounting fraud  
17 and subsequent scandals that unfolded in the media daily to my  
18 customers. There were rounds of layoffs that began immediately  
19 starting at the senior management levels and working their way  
20 down. Almost all the executives laid off on multiple levels of  
21 the company were legacy WorldCom employees.

22 As a part of my year-end bonus, in lieu of a  
23 retirement pension, I was given WorldCom stock option grants of  
24 which I had accumulated close to 5,000 shares, which became  
25 worthless after the bankruptcy declaration.

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1           Finally, I was laid off in the sixth company-wide  
2           layoff round in early 2003. I was never given a specific  
3           reason, but I found out that it was to reduce costs since I was  
4           one of the most highly paid salespeople in the branch.

5           During my tenure at WorldCom, I watched over 30,000  
6           coworkers get laid off, while each day wondering if I would be  
7           on the list the next day. The psychological effect of watching  
8           CNBC in the morning and finding out what new disaster awaited  
9           me at work each day was heart-wrenching and devastating. There  
10          was a constant assault on my credibility when trying to sell  
11          telecom services to major enterprise businesses because their  
12          daily reading about massive improprieties in the newspaper was  
13          hard to explain. This was sheer hell, and I was totally  
14          devastated physically and emotionally by the experience.

15          I have been unemployed ever since that day, unable to  
16          secure a telecom position due to the stigma attached to all  
17          legacy WorldCom employees. With the high sales achievements  
18          and track record of success that I had achieved, I thought  
19          future employment would not be a problem.

20          Over the last two years, I have suffered the loss of  
21          all my savings, medical benefits, retirement funds, stock  
22          market investments, and personal property assets as a result of  
23          the financial devastation and inability to replace my personal  
24          income stream totaling over \$800,000 due to no fault of my own.  
25          I was just one of many hard-working employees that put their

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1 faith and belief in what was and still is a great company,  
2 which was destroyed by the greed of Bernard Ebbers and his  
3 co-conspirators.

4 What happened to me as a result of the fraudulent  
5 activities of Bernard Ebbers is representative of tens of  
6 thousands of other employees and investors who had their  
7 careers, retirement and livelihoods literally destroyed by the  
8 layoffs and bankruptcy of WorldCom that resulted from the fraud  
9 which occurred between 1999 and 2002.

10 Today is the sentencing proceeding in which Bernard J.  
11 Ebbers will be sentenced for his crimes which led to the  
12 disintegration of WorldCom. After reading the June 30th  
13 settlement agreement regarding Mr. Ebbers' restitution  
14 obligations, I found it disturbing that I saw no provisions for  
15 any restitution to people like me. Where do I get my life  
16 savings back from, or my career reinvigorated? How am I  
17 compensated for the loss of my retirement security funds?  
18 Where is the attempt to make individuals like me whole, not  
19 just the class action litigants?

20 The only thing that I as an individual can take solace  
21 in today is in the hope that, and reverent prayer, that the  
22 sentence that Bernard Ebbers receives today receive a tone that  
23 this type of behavior is unacceptable, for he can never repay  
24 me or the tens of thousands of people like me whose lives  
25 disintegrated before them in the blink of an eye.

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1 I hereby respectfully submit this statement which  
2 reflects my personal feelings and sentiment of many people like  
3 me who are trying to piece back the parts of their lives in the  
4 wake of this WorldCom tidal wave.

5 THE COURT: Thank you, Mr. Bruen.

6 All right. Mr. Weingarten, are there any factual  
7 objections that you have to the report? If there are, I will  
8 rule on them. I did read the PSR at page 46 which indicated  
9 that you objected to information in a number of paragraphs. Is  
10 that still an issue?

11 MR. WEINGARTEN: I would like Mr. Heberlig to address  
12 that.

13 MR. HEBERLIG: We did object essentially to the  
14 factual characterizations in the PSR that were inconsistent  
15 with our defense at trial and with Mr. Ebberts' testimony. We  
16 do not agree that those represent the true facts in this case.  
17 For that reason, we object to them.

18 There are also several paragraphs in the presentence  
19 report reflecting activities that were not proven at trial,  
20 things like WorldCom's bankruptcy, unrelated civil settlements.  
21 We object to their inclusion as well, and we do not agree they  
22 were caused by or attributable to the fraud.

23 Those are the principal bases for our objections,  
24 other than the legal objections, which I understand we will be  
25 addressing later in this proceeding.

57D8EBBS

1 THE COURT: Let me just state that as to paragraphs  
2 87, 90, 94, 97, 99, 106, and that you will know is Dr. Nye's  
3 expert assessment of damages from the civil litigation, and 109  
4 through 111, which, as you have alluded to, largely deal with  
5 the results of other litigations, while I believe these  
6 paragraphs probably correctly state the facts, none of the  
7 information in them has formed any part in my sentencing  
8 consideration so I don't think there is any need to debate them  
9 this morning.

10 As for paragraphs 91 and 92, which relate to the  
11 substance of the June 25 press release and the computation of  
12 loss method used by the probation department, they have been  
13 disputed in your papers and I will rule on them this morning  
14 after argument.

15 I will now hear from counsel with respect, first, to  
16 what the appropriate advisory guideline range is for this  
17 sentence. We all know the guidelines are no longer mandatory,  
18 but they are a factor that I must consider in deciding what a  
19 reasonable sentence is. Parties in this case clearly dispute  
20 what the correct guideline range is, although I gather there is  
21 no dispute that the 2001 edition of the guidelines is the  
22 correct edition.

23 Is that correct, gentlemen?

24 MR. ANDERS: I believe that's correct, your Honor.

25 MR. HEBERLIG: Yes, your Honor.

57D8EBBS

1 THE COURT: I would like to begin with loss  
2 enhancement, and I will hear from the defense.

3 MR. HEBERLIG: Judge, very briefly, before addressing  
4 the loss enhancement, as the Court said, now under this  
5 advisory guidelines regime under *Booker*, we would just like to  
6 emphasize that many courts have held, following that  
7 groundbreaking decision, that the guidelines are merely one of  
8 the many factors in 18 U.S.C. 3553(a) that the Court must now  
9 consider, and they are entitled to no greater weight than the  
10 other factors in that statute, and that's certainly our  
11 position, that the Court should consider them as a factor but  
12 certainly not anywhere approaching the level of importance that  
13 they used to carry in our system.

14 We do greatly dispute the loss enhancement in this  
15 case. It's the single largest potential enhancement that has  
16 the greatest ability to impact this sentence. The government  
17 and the probation office have concluded or recommended that the  
18 Court impose a 26-level enhancement for loss, under the theory  
19 that the loss in this case exceeded \$100 million. We  
20 respectfully disagree. In reality, the loss in this case is  
21 either zero or it's incapable of being reasonably estimated.  
22 Under either scenario, the Court should decline to apply the  
23 enhancement.

24 Your Honor, it's our contention that the Court should  
25 base the loss enhancement in this case on the revenue conduct

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1 that was proven at trial. The government's case proceeded  
2 under two very distinct theories and two distinct sets of  
3 conduct: The artificial inflation of revenue at WorldCom and  
4 the decreases to line cost expenses. Their case was broken up  
5 essentially in half. It began with the line cost conduct and  
6 the testimony of Mr. Myers, Vinson, Normand, Abide, and then  
7 Scott Sullivan. And the second half of the case dealt with  
8 revenue. They were really very different parts of the case.  
9 And Mr. Ebbers' defense was very different with respect to both  
10 sets of conduct.

11 With respect to line costs, Mr. Ebbers disputed the  
12 testimony of Scott Sullivan and the direct knowledge that Mr.  
13 Sullivan put in Mr. Ebbers' head. And the government's only  
14 direct proof of Mr. Ebbers' involvement in that line cost  
15 portion of the case was Mr. Sullivan's testimony.

16 With respect to revenue, the defense was very  
17 different. Essentially, there was no dispute that Mr. Ebbers  
18 participated in the close the gap process, but he did contest  
19 that he acted with criminal intent.

20 We have cited to the Court an analogous line of cases  
21 that I think supports the determination that revenue should  
22 apply when the Court calculates loss. There is a series of  
23 cases in the Second Circuit -- the *Zillgitt* case and  
24 *Orozco-Prada* -- where essentially courts, where there has been  
25 a general verdict of conviction in a multi-object conspiracy,

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1 have sentenced defendants on the basis of the conduct that  
2 produces the lower sentence. It typically arises in a  
3 narcotics context where, for instance, or, for example, a  
4 defendant was charged with both a marijuana and a cocaine  
5 conspiracy. The jury returned a general verdict of guilty.  
6 There is no way to know on which conduct they based their  
7 decision, and the marijuana part of the case resulted in a far  
8 lower sentence.

9 We submit that the same result should apply here.  
10 It's an analogous context. We recognize those cases don't  
11 directly control, but the Court has the discretion to make  
12 factual findings relevant to sentencing. The government  
13 doesn't dispute that.

14 Here there was a general verdict. We don't know if  
15 the jury convicted Mr. Ebbers on the basis of his participation  
16 in the revenue process or the line cost reductions. We submit  
17 that the evidence is far more persuasive and far more likely  
18 that the conviction was based on revenue. Again, primarily  
19 because the line cost case rested on Scott Sullivan's testimony  
20 and there were numerous post-verdict comments by jurors that  
21 disregarded that testimony and didn't believe him. And here,  
22 where there is at least a substantial question as to whether  
23 the jury convicted Mr. Ebbers on the basis of revenue, line  
24 cost or both, and they produce an extraordinarily disparate  
25 sentence, we ask the Court to apply the revenue conduct.

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1           The reason why revenue, if the Court sentences and  
2 calculates loss enhancement on the basis of revenue, results in  
3 an applicable loss of zero is because there is no loss  
4 causation that the government can establish. That's a  
5 fundamental part of calculating a loss in a criminal case. The  
6 government has to prove both that a fraud inflated a company's  
7 stock price and that the investors in the market suffered a  
8 loss when the fraud was revealed to the public.

9           Here, if the Court focuses on the revenue conduct, the  
10 market and the public did not learn about any potential revenue  
11 fraud at WorldCom until June of 2003 when WorldCom's board  
12 released an internal investigation report prepared by Wilmer,  
13 Cutler & Pickering. That was the first time anyone had any  
14 inkling, other than perhaps the government, that there was a  
15 potential revenue fraud at WorldCom. By that date, WorldCom's  
16 stock price had been rendered worthless, there was a bankruptcy  
17 almost a year prior, and the company was delisted by the Stock  
18 Exchange. As a result, there was no market impact by the  
19 disclosure of the revenue fraud because the company's stock  
20 price was already worthless.

21           We cited to the Court the *Bayly* case of Texas that is  
22 directly on point. It was a high-profile case within the last  
23 couple of months involving executives of Merrill Lynch. They  
24 were convicted of securities fraud for their participation in  
25 the Nigerian Barge Transaction at Enron. What the court

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1 concluded in that case is that by the time the marketplace, the  
2 public, learned that there is potential fraud relating to this  
3 Nigerian Barge situation, Enron's stock price was worthless, it  
4 had undergone a bankruptcy and there was no stock remaining.  
5 As a result, the court said it would be pure speculation to  
6 calculate a loss attributable to that conduct. The same result  
7 we submit should apply in this case.

8 But even if the Court does consider the line cost  
9 portion of the case, we respectfully submit there still should  
10 be no loss enhancement because there is no way to reasonably  
11 estimate what the loss is attributable to that line cost fraud.  
12 The probation calculation grossly overstates the potential loss  
13 here and suffers from a number of fundamental flaws.

14 Essentially, how the probation office has calculated  
15 loss is they have taken the closing price of WorldCom stock on  
16 June 25th, which was \$0.83, subtracted from that the closing  
17 price of the stock on July 1st, which was \$0.06, and multiplied  
18 that figure by the total number of outstanding shares of  
19 WorldCom stock. As the Court knows, June 25th was the day that  
20 WorldCom announced a restatement and July 1st was the date that  
21 WorldCom recommenced trading for the first time because the  
22 trading of the company stock had been halted during that  
23 period.

24 We submit there are a number of problems with the  
25 probation office's calculation, and because of these flaws,

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1 there is no way to make a reasonable estimate. The first  
2 problem is and the first step in the analysis in calculating  
3 loss is there needs to be a showing that the stock price was  
4 inflated as a result of the fraud. But in this case, from the  
5 beginning of the fraud period in September of 2000 until the  
6 fraud was disclosed on June 25, WorldCom's stock dropped like a  
7 stone, from \$35 to less than a dollar, before the market had  
8 any inkling of a potential fraud at WorldCom. That entire drop  
9 is attributable to economic forces and the marketplace.

10 If anything, the government's theory was that WorldCom  
11 was inflating its stock price during that period of time, but  
12 there is no way to calculate to what extent the stock price was  
13 inflated because of that sharp decline due to economic factors.  
14 And we cited to the Court a case from the Eastern District of  
15 Virginia involving a public company PurchasePro. Under the  
16 same scenario, where during the fraud period there was both a  
17 sector decline and a specific decline in that company's stock  
18 price, the Court concluded there was no way to reasonably  
19 estimate the extent of the inflation of the stock price.

20 The government didn't address that case at all in its  
21 papers.

22 Even beyond that, if you get over that first step, the  
23 probation office's calculation failed to take into account a  
24 number of other factors that led to that drop in the stock  
25 price between June 25 and July 1. There was \$0.77 stock drop

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1 and it wasn't caused solely by the announcement that WorldCom  
2 would be restating its financials. We cited a number of  
3 decisions to the Court that say loss for purposes of the  
4 sentencing guidelines must be based on the loss that's  
5 attributable to the fraud, not independent intervening factors  
6 like economic forces.

7 On the same date that WorldCom announced this  
8 restatement, they announced a significant number of adverse  
9 corporate developments. They announced that they would be  
10 laying off 17,000 employees; they announced they would be  
11 reducing their capital expenditures going forward; they would  
12 be eliminating dividends in the future; and they would be  
13 abandoning non-core lines of business.

14 We submitted an expert report from Craig McCann, a  
15 former SEC financial analyst. He said that those four factors  
16 were significant and could have had, and likely did have, a  
17 major impact on that \$0.77 stock drop. The layoffs alone he  
18 opined to the Court could have caused 25 percent of the stock  
19 reduction. The other factors were 10 percent or greater.

20 The point to all this is there is no way to reasonably  
21 estimate, as the Court must do, what portion of that \$0.77 drop  
22 between June 25 and July 1 is attributable to the fraud and not  
23 these independent economic factors, and the government hasn't  
24 offered a more precise calculation for the Court. They simply  
25 said, by any measure, it has to be over \$100 million. We

57D8EBBS

1 respectfully submit that is not the applicable standard. The  
2 Court has to make a reasonable estimate of loss, and the Second  
3 Circuit in the *Deutsch* case we submitted expressly held the  
4 loss calculation can't be speculation. It can't be simply a  
5 best guess; it has to be a reasonable estimate.

6           Very quickly, there were two other significant flaws  
7 in the probation office's calculation. The probation office  
8 used July 1, the first day that WorldCom started trading again,  
9 as the baseline to measure the drop of the stock price. And  
10 that happened to be the day that WorldCom traded at the lowest  
11 level it traded at any point in 2002 before it was delisted.  
12 Dr. McCann stated in his expert report that in reality the  
13 marketplace did not absorb all the information of WorldCom's  
14 restatement announcement and the other factors for several  
15 days. WorldCom's stock price traded at extraordinarily high  
16 levels for those first three days; three, four, five times  
17 greater in volume than it had ever traded before.

18           All that suggests, as Dr. McCann opined, that the  
19 market didn't settle down, it didn't absorb the information  
20 until those trading levels came back down, and when they did,  
21 the stock price settled at \$0.25 a share, not the \$0.06 that  
22 the probation office has used. It has a significant impact on  
23 the loss calculation. It is a \$500 million difference. Even  
24 if you use all of the outstanding shares of WorldCom stock  
25 which, as I will address in a minute, is an incorrect

57D8EBBS

1 calculation.

2 That's the final flaw of the probation office's  
3 calculation. It simply used all 2.9 billion shares of WorldCom  
4 outstanding as the multiplier to try to identify what the loss  
5 was in this case. That's not the correct formulation where  
6 there has been a public disclosure of a potential fraud that  
7 leaves the company still with some value.

8 We cited the *Snyder* case from the 11th Circuit; the  
9 *Brown* case involving a Rite Aid executive out of Pennsylvania.  
10 What those courts have said, and what Dr. McCann opined as  
11 well, is when calculating loss for purposes of the guidelines,  
12 you can't include shares that were purchased prior to the  
13 fraud. There is a simple economic reason for that. The fraud  
14 in this case is alleged to have begun in September of 2000. As  
15 a result, shares purchased prior to that date were not  
16 inflated. Investors who purchased in, say, August of 2000 paid  
17 the true value for the share. The stock decreased in value  
18 between September of 2000 until the fraud was announced. But  
19 that decrease in value was attributable to market forces.  
20 People who then sold after the fraud had been announced to the  
21 marketplace again sold at the true value and therefore didn't  
22 suffer a loss as a result of the conduct in this case. People  
23 who bought prior to the fraud and sold during the period of the  
24 fraud in fact gained any inflated value that there was.

25 The point to all this is that the 2.9 billion shares

57D8EBBS

1 used by the probation office is not the correct number. We  
2 submit it would be extremely complicated to calculate what the  
3 correct number is. Again, the burden is not on the defendant  
4 to make that calculation, it's on the government, and we  
5 respectfully submit they haven't done so here.

6 The last reason why the probation office uses too  
7 great a number of shares is that they include in the  
8 calculation of loss insider shares, for lack of a better term,  
9 shares owned by Mr. Ebbers, by Mr. Sullivan, the other  
10 co-conspirators identified by the government at trial. Those  
11 individuals were not victims of this crime. This is not an  
12 insignificant number. For Mr. Ebbers alone, he owned  
13 significantly more than 20 million shares of stock. Those  
14 shares should not have been included in the calculation of  
15 loss, yet the probation office did.

16 For all those reasons, if the Court focuses on the  
17 line cost part of this case, there is no way to make a  
18 reasonable estimate of loss, both because you can't calculate  
19 the market drop caused by the fraud and you can't calculate the  
20 number of shares that were harmed in this case without a very  
21 time-consuming and complicated analysis.

22 Very briefly, the government's principal argument is  
23 that Colin Glinsman's testimony establishes the loss in this  
24 case, and that that testimony was somehow undisputed at trial.  
25 Both are not true. His testimony doesn't establish loss. It

57D8EBBS

1 was conclusory. He didn't address any of these intervening  
2 factors that Dr. McCann identified. He didn't identify what  
3 number of the shares that his Oppenheimer clients owned were  
4 purchased prior to the start of the fraud period. His  
5 testimony really doesn't add much to the Court's analysis.

6 Since the Court has already indicated it has not taken  
7 into account the civil expert in this case, I won't address it,  
8 unless the Court would like me to.

9 THE COURT: No, that's OK.

10 MR. HEBERLIG: I am happy to proceed to other factors.

11 THE COURT: I think a more sensible way to go would be  
12 for me to hear from the government with respect to this  
13 enhancement.

14 Mr. Anders.

15 MR. ANDERS: Thank you, your Honor. I know you have  
16 received extensive briefing so I will be brief.

17 With respect to the revenue versus line cost issue,  
18 the *Orozco-Prada* line of cases upon which defense relies simply  
19 does not apply here. It deals with counts of conviction,  
20 objects of the conspiracy, and there is no revenue object of  
21 the conspiracy, or securities fraud objects of the conspiracy.  
22 So that argument simply has no legal support. Your Honor  
23 should calculate loss based on fraud as a whole in the  
24 government's view.

25 With respect to what the loss calculation is, the

57D8EBBS

1 guidelines make clear that all that is required is a reasonable  
2 estimate of the loss. Ebbers argues essentially that there is  
3 no middle ground between precision and speculation, and of  
4 course, if that were true, then the Court could never calculate  
5 loss because loss involves things that are often incalculable  
6 otherwise.

7 Here, the government has chosen really the most  
8 conservative method of loss. It doesn't take into account the  
9 fact that the stock was plainly inflated, for had the public  
10 known about this fraud that was ongoing, which was affecting  
11 the earnings per share, the net income of the revenue, all  
12 along their fraud period, plainly people would have sold the  
13 stock, the stock value would have plummeted far earlier than it  
14 did. In fact, there is a benefit to Ebbers that the fraud was  
15 revealed when the stock was so low. Had this fraud been  
16 revealed when the stock was trading at 10, it is certainly  
17 reasonable to conclude the stock would have plummeted at that  
18 point, and of course the loss would have been much greater.

19 Your Honor addressed this briefly during the testimony  
20 of Mr. Glinsman during a side bar colloquy, and the method that  
21 your Honor alluded to is supported in the 11th Circuit case of  
22 *U.S. v. Hedges*. It's calculating the inflated value of the  
23 stock during the fraud period.

24 The probation department nor are we urging that  
25 method. We are really taking the simplest method and the most

57D8EBBS

1 conservative value of loss, and that is that \$2 billion number.

2 Unless the Court has any questions, we will rest on  
3 our papers.

4 THE COURT: No. Thank you.

5 I am going to rule on this now and then we will  
6 proceed to the next enhancement.

7 Because this is the largest sentencing enhancement, I  
8 am going to put my findings on the record in some detail.

9 First of all, what is totally clear here is that as a  
10 matter of law I need not calculate the loss amount with  
11 precision. I need only arrive at a reasonable estimate of the  
12 loss.

13 I want to start with a couple of the first arguments  
14 made by the defendant.

15 First of all -- and this was made in papers, although  
16 not urged on me this morning -- the government must prove the  
17 amount of loss in this case by a preponderance, not beyond a  
18 reasonable doubt.

19 Having said that, I also reject *Orozco-Prada* and the  
20 other cases cited by the defendant that would, according to  
21 their argument, require me to calculate the loss amount in this  
22 case based solely on the revenue aspect of the fraud. I agree  
23 with the government that those cases relating to general  
24 verdicts are talking about the objects of the conspiracy, not  
25 the means and methods of the fraud conspiracy that we have

57D8EBBS

1 here. So for the following reasons, I find a 26-level  
2 enhancement for the amount of loss in this case is appropriate.

3 First, I think the market capitalization estimate used  
4 by the probation department, while not precise but which  
5 results in a loss figure of over \$2 billion, is a reasonable  
6 estimate. In reaching this conclusion, I recognize that when  
7 the fraud was disclosed in a press release on June 25, 2002,  
8 WorldCom also announced in the release that it had fired Scott  
9 Sullivan and was laying off thousands of employees, as well as  
10 a number of other facts which Mr. Heberlig mentioned this  
11 morning.

12 While these facts were indeed announced in that press  
13 release, I reject the notion that they played any significant  
14 role in the ensuing further drop in WorldCom's value. The  
15 headline of the release read, "WorldCom announces intention to  
16 restate 2001 and first quarter 2002 financial statements." The  
17 first paragraphs disclosed that close to \$4 billion in line  
18 cost expenses had been improperly transferred to capital  
19 accounts during that period, and that without these transfers,  
20 the company's EBITDA would be reduced by over 6 billion for  
21 2001 and over 1.3 billion for the first quarter of 2002.

22 The press release further discloses that absent the  
23 fraud, the company would have reported a net loss for 2001 and  
24 for the first quarter of 2002 instead of net income and  
25 earnings growth.

57D8EBBS

1           Scott Sullivan's termination was announced right above  
2 the statement that the audit committee of the board of  
3 directors had begun an independent investigation into the  
4 matter, clearly part and parcel of the fraud disclosure.

5           Since these disclosures relating to the fraud and  
6 restatement dwarfed the later announcements in the release,  
7 such as the methods that the company intended to take to  
8 restructure the company, I don't find that they could have  
9 played a significant role in the decline of the stock.

10           There is also support in the record for determining a  
11 loss amount of over 2 billion from other sources. Adam  
12 Quinton, a securities analyst at Merrill Lynch, testified that  
13 when WorldCom announced it would be issuing a restatement due  
14 to the fraud, he could no longer even make estimates about the  
15 company's earnings. Colin Glinsman, an institutional investor,  
16 testified that on the morning that the fraud was announced, he  
17 tried to sell his fund's shares in WorldCom. He testified that  
18 he did so based on the announcement of the restatement. He did  
19 not testify that either the layoffs or Scott Sullivan or any of  
20 the other announcements motivated him to try to sell WorldCom  
21 stock.

22           I understand, and I have certainly read Professor  
23 McCann's expert report, and I could not agree more that we  
24 cannot obtain precision here, but we can certainly obtain a  
25 reasonable estimate.

57D8EBBS

1           There is, indeed, a second alternative reasonable  
2 estimate of the loss figure in this case, and that is the  
3 figure of \$200 million, which alone exceeds the more than \$100  
4 million requirement for the 26-point guideline enhancement.  
5 And that \$200 million is derived and can be derived from the  
6 testimony of Mr. Glinsman. He testified that before the fraud  
7 was announced, his clients owned \$200 million worth of WorldCom  
8 stock, which was rendered essentially worthless after the fraud  
9 was disclosed. In fact, so many investors tried to sell their  
10 WorldCom stock after the fraud was disclosed that the market  
11 stopped trading.

12           In my opinion, a figure of \$200 million severely  
13 underestimates the loss amount, precisely because it does not  
14 take into account the millions of other investors, who relying  
15 on and encouraged by Mr. Ebberts' statements, bought WorldCom  
16 stock and continued to hold it until the truth came to light on  
17 June 25, 2002.

18           In any event, I reject the defendant's arguments about  
19 the immeasurability of the loss here, and I believe that they  
20 overlook all of these factors and the standard, which is that  
21 loss must be computed in a reasonable fashion and it's not  
22 necessary to be precise.

23           Mr. Heberlig, do you want to go on to the next  
24 enhancement?

25           MR. HEBERLIG: Thank you, your Honor.

57D8EBBS

1           The next enhancement was the four-level enhancement  
2 based on the number of victims exceeding 50 in this case. We  
3 disputed that that applied based on our argument that the Court  
4 should sentence or calculate the loss enhancement on the  
5 revenue conduct which produced no loss. Now that the Court has  
6 reached the decision that the line cost conduct comes into  
7 play, obviously we don't dispute that more than 50 shareholders  
8 incurred a loss.

9           I would add, however, the suggestion in the probation  
10 office's report that the 17,000 employees who were laid off as  
11 a result of this offense are victims of the crime is just  
12 simply incorrect. Those layoffs were caused by economic forces  
13 and not the crime.

14           THE COURT: You agree, though, that even without  
15 attributing the number produced by the layoffs, we have well  
16 over 50 victims under my analysis?

17           MR. HEBERLIG: Yes, your Honor.

18           THE COURT: OK.

19           The next enhancement.

20           MR. HEBERLIG: The next enhancement is a two-level  
21 enhancement that applies if the defendant has received gross  
22 receipts of more than a million dollars from a financial  
23 institution as a result of the offense.

24           THE COURT: Mr. Heberlig, I am not going to find that  
25 enhancement, and I have thought long and hard about it and

57D8EBBS

1 reviewed the government's papers, so let me just rule on that.

2 I don't think it applies in this case. There is  
3 little, if any, case law on this provision, let alone in  
4 support of the government's factual theories, which I think are  
5 novel. It doesn't make them necessarily wrong, but I make that  
6 note.

7 Essentially, the government has argued that Mr. Ebbers  
8 received an indirect benefit from a financial institution  
9 because the Bank of America relied on his WorldCom stock as  
10 collateral for his margin loans. They also contend that Mr.  
11 Ebbers' forward sale of WorldCom stock in September 2000  
12 satisfies the gross receipts factual predicate.

13 I don't find either of these arguments convincing on  
14 the facts of this case. I personally do not believe the  
15 benefits Mr. Ebbers received from the Bank of America, either  
16 in the form of the collateral or his forward sale, are what was  
17 intended by gross receipts, as that term is contemplated by the  
18 guidelines.

19 All right, Mr. Heberlig.

20 MR. HEBERLIG: Thank you, your Honor.

21 The next enhancement in dispute is the four-level  
22 enhancement that applies based on leadership role. The  
23 government and the probation office says it applies, and we  
24 dispute that fact.

25 At first blush, you look at Mr. Ebbers. He was CEO of

57D8EBBS

1 the company. How can the leadership enhancement not apply?  
2 Respectfully, the guidelines definition of leadership role  
3 indicates that it should not apply in this case. At worst, the  
4 evidence at trial showed that Scott Sullivan periodically went  
5 to Mr. Ebbers, told him that he would have to commit fraud to  
6 hit the numbers, and Mr. Ebbers said, "We have to hit the  
7 numbers. There was no showing that Mr. Ebbers participated in  
8 the details of the offense, that he directed others, that he  
9 recruited accomplices, he had any role in planning or  
10 organizing the types of reductions in this case, or even that  
11 he exercised control over these underlings. In fact, there was  
12 no testimony that Mr. Ebbers even spoke to Ms. Vinson,  
13 Mr. Yates, Mr. Normand, or Mr. Abide at any time during the  
14 tenure at WorldCom.

15 The government's claim that Mr. Ebbers was the driving  
16 force behind this fraud is not supported by the record. Scott  
17 Sullivan was the driver, and Mr. Ebbers may have approved his  
18 decisions, but he was not a leader for purposes of the  
19 guidelines.

20 THE COURT: All right. Mr. Anders, I don't think I  
21 need to hear from you with respect to this enhancement.

22 MR. ANDERS: That's fine, your Honor.

23 THE COURT: It seems quite clear to me that Mr. Ebbers  
24 was clearly a leader of criminal activity in this case. He did  
25 exercise control and authority over his co-conspirators, and

57D8EBBS

1 that would of course include Scott Sullivan and members of  
2 WorldCom's general accounting department. The fact that Mr.  
3 Sullivan was also a leader who managed the details necessary  
4 for the commission of the fraud does not make Mr. Ebbbers any  
5 less the leader.

6 The jury heard testimony, which I credit, that Mr.  
7 Ebbbers was the instigator of the fraud. He repeatedly issued  
8 guidance to the investing public knowing that WorldCom was not  
9 going to meet it. He submitted 10-Ks and 10-Qs to the SEC  
10 knowing those forms contained fraudulent numbers, all the while  
11 repeatedly telling Scott Sullivan that they had to hit the  
12 numbers. So I am going to add the four-level enhancement for  
13 leadership role. I think it clearly applies here.

14 Just to move to the next enhancement, there is no  
15 dispute that an abuse of trust enhancement is warranted in this  
16 case, is that right?

17 MR. HEBERLIG: Under controlling Second Circuit  
18 precedent, that's correct, your Honor.

19 THE COURT: Go ahead, Mr. Heberlig.

20 MR. HEBERLIG: The last enhancement that's at issue,  
21 Judge, is a two-level enhancement for obstruction of justice.

22 The probation office took no position on this issue,  
23 left it to the Court. And the government has asked the Court  
24 to apply that enhancement based on their position that Mr.  
25 Ebbbers committed perjury at trial.

57D8EBBS

1           Obviously, Mr. Ebbers testified in this case,  
2           proclaimed his innocence, and the jury convicted him. We don't  
3           dispute that, yet we do not concede that Mr. Ebbers committed  
4           perjury.

5           In any event, the government's position is essentially  
6           that the obstruction enhancement applies any time that there is  
7           perjury by a testifying defendant. And, respectfully, that is  
8           not the law. Perhaps the government can be forgiven for not  
9           citing the *Canova* case because it was decided about two days  
10          before their papers were due, but that case, recently decided  
11          by the Second Circuit, is directly on point. The defendant  
12          *Canova* testified at trial, maintained his innocence, and he was  
13          convicted. The trial court ruled that the obstruction  
14          enhancement should not apply, and the Second Circuit affirmed  
15          that decision on appeal and said that perjury alone is not  
16          enough. There has to be something more. There has to be a  
17          specific intent to obstruct justice.

18                 THE COURT: I am not going to apply the two-level  
19                 enhancement for obstruction of justice, and let me rule.

20                 MR. HEBERLIG: Thank you, your Honor.

21                 THE COURT: I agree that Mr. Ebbers' testimony  
22                 regarding the line cost and revenue fraud does not necessarily  
23                 conflict with the jury's guilty verdict. The jury could have  
24                 believed Mr. Ebbers' testimony, but, nonetheless, convicted him  
25                 based on a finding that he consciously avoided learning the

57D8EBBS

1 truth behind WorldCom's reported financial performance.

2 As to the government's other examples of portions of  
3 Mr. Ebbers' testimony, which they argue are perjurious, it is  
4 true that more than perjury is required for this enhancement,  
5 and I am not persuaded by a preponderance of the evidence that  
6 Mr. Ebbers willfully committed perjury with the intent to  
7 obstruct justice. So I am declining to apply that adjustment  
8 for obstruction of justice.

9 I think now we should proceed to the departure  
10 motions.

11 MR. WEINGARTEN: Your Honor, we cite five reasons for  
12 you to depart. We think they are all meritorious. I will  
13 mention all of them briefly. I would like to emphasize one or  
14 two.

15 The first one we cite concerns the overstatement of  
16 the seriousness of the offense. Obviously we go back to loss.  
17 It is our respectful view that the 26-level enhancement  
18 dramatically overstates the offense. We have cited a bunch of  
19 cases where courts around the country have taken a look at this  
20 issue and believe that overstatement of loss should be an area  
21 of departure.

22 The reason is obvious. In virtually every securities  
23 case involving a publicly traded company, the guidelines go  
24 through the roof, and courts around the country have observed  
25 that that's not necessarily fair, it's a flaw in the system.

57D8EBBS

1 You can have a situation where 50 widows and orphans are  
2 specifically defrauded by a miscreant for purposes of  
3 self-enhancement, and you can have a situation where there is a  
4 publicly traded company and someone is trying to save the  
5 company, as Scott Sullivan told the Court, and the sentencing  
6 guidelines go through the roof in the publicly traded setting  
7 but not in the other setting. And courts have observed that,  
8 and it's just not right, it's just not fair. We have cited the  
9 cases on pages 29 and 30 of our brief, and we think this is a  
10 perfectly appropriate reason to depart downward.

11 Similarly, there are cases that we cite in our brief  
12 on page 30 about the multiple cause theory, that is, if there  
13 are a bunch of causes contributing to the loss, the court is  
14 free to depart downward. And of course, based upon the  
15 argument Mr. Heberlig made, we think this one is appropriate as  
16 well.

17 Similarly, when there is a loss figure in a case where  
18 there is no personal gain, that is, the crimes committed were  
19 not committed for personal gain, that is viewed as well as a  
20 reason to depart downward when the guidelines overstate the  
21 seriousness of the offense.

22 I think any one of those three fit. I think all three  
23 fit, and I think the overstating of the seriousness of the  
24 offense in this instance is a cause for a downward departure.

25 Should I do all five, your Honor?

57D8EBBS

1 THE COURT: Yes, why don't you. Then I will hear from  
2 the government.

3 MR. WEINGARTEN: The second ground for a downward  
4 departure, we point to Mr. Ebbers' health situation.  
5 Obviously, 5H1.4 allows for a downward departure for a  
6 seriously infirm defendant. And the issues that the courts  
7 talk about in these cases: Is incarceration likely to  
8 deteriorate the condition? Is incarceration likely or the  
9 sentence considered likely to shorten the life of the  
10 defendant? I am not exactly sure how to pronounce this. The  
11 Second Circuit case *Rioux* sort of lays it out, it's a '96 case.  
12 And *Barbato*, 2002 from the Southern District, reaffirms this.

13 We have submitted papers. The Court knows Mr. Ebbers  
14 has a serious heart condition. It needs to be regulated.  
15 There is a complex combination of drugs. He has regular care.  
16 It's a tricky situation. In response, the government says,  
17 Well, the BOP maintains that they can treat him adequately.  
18 What the Court received, of course, was a form letter. I don't  
19 want to be disrespectful of the BOP, but it's common knowledge  
20 that the BOP is not the place you want to go if you have a  
21 complicated health condition. The GAO report was recently  
22 submitted that confirms all that.

23 I would simply advise the Court -- I am sure the Court  
24 knows this -- for Mr. Ebbers' condition, he will need  
25 sophisticated medical care. The lower the guideline or the

57D8EBBS

1 lower the sentence, the lower the facility where he eventually  
2 winds up will be very important to whether or not he gets that  
3 care. There is a public safety requirement in the sentencing  
4 calculation that will dictate where Mr. Ebbers winds up, and we  
5 would respectfully ask that this be considered. And because of  
6 his medical situation, I think the Court can depart downward.

7 The third area is sort of the charity, community  
8 service and prior good works. We know from the guidelines that  
9 5H1.11 is not normally a factor for a downward departure. But  
10 there are cases and recent cases that talk about exceptional  
11 charity, exceptional community service, and we cite two that  
12 have been cited this year. One, the *Canova* case that Mr.  
13 Heberlig talked about, and one, the *Cooper* case in the Third  
14 Circuit.

15 In *Canova*, the court approved a downward departure for  
16 community service for an individual who served in the military  
17 more than 20 years prior to his sentence, served as a volunteer  
18 fireman for a number of years and saved three people through  
19 CPR, and that was enough for a significant downward departure.

20 In *Cooper*, another 2005 case from the Third Circuit,  
21 the individual made charitable contributions; he coached a  
22 football team in the inner city; he helped a couple of the kids  
23 on the football team go to high school, and then helped one in  
24 particular go to college.

25 When you read these cases, certain themes come

57D8EBBS

1 through. The charity has to be real, it has to be substantial  
2 charity; two, it should not be for self-aggrandizement; three,  
3 it's good if the defendant is hands-on, it's also good if kids  
4 are involved, and it's also good if there is a real effect, the  
5 charity has a real effect on human beings.

6 Well, your Honor, we have submitted 169 letters, and I  
7 found them overwhelming. I have known Mr. Ebbers for years,  
8 and I read things in those letters that I never knew, and I  
9 think it's because he is basically a modest man. You cannot  
10 help but be moved by those letters. The numbers are  
11 staggering.

12 We know that Mr. Ebbers over the years has contributed  
13 about \$100 million in charity. That's certainly a real amount.  
14 One of the most remarkable things about the charity -- and I  
15 know you know this from all these letters -- is it's anonymous.  
16 He wanted no self-aggrandizement. There are no plaques on the  
17 wall that Mr. Ebbers built this gymnasium or built this  
18 educational facility for disadvantaged children. That's just  
19 not who he is. Does it involve children? Well, we know the  
20 orphanages, we know the schools, we know the special ed  
21 facilities. The scholarships, the anonymous scholarships. You  
22 saw all the letters from those children who have an illness in  
23 the family or a death in the family and their education was  
24 about to stop and then an angel appeared, and they never knew  
25 who it was, and the angel was Bernard Ebbers.

57D8EBBS

1           Now, the government says, You know, the contribution  
2 is laudable, but that's what we see in white-collar cases. I  
3 don't know what white-collar cases are handled by the Southern  
4 District of New York. I have been in the business 30 years. I  
5 have never seen such a production as this.

6           They also say that these acts of kindness, these  
7 unsolicited acts of generosity are what one would expect from  
8 decent, hard-working people. Maybe they run in different  
9 crowds than I do. I don't know people who do the things that  
10 Mr. Ebbers has done over and over and over again. I don't  
11 think you can read the letters that we submitted to the Court  
12 and conclude that his charitable contributions, his community  
13 services, his commitment to his people is anything but  
14 extraordinary.

15           We had significant downward departures in *Canova* and  
16 *Cooper*. Bernard Ebbers makes the defendants in *Canova* and  
17 *Cooper* look like pikers. Their contributions are miniscule  
18 compared to what this man has done his entire adult life.

19           Again, I just don't think you can fairly read the 169  
20 letters that we submitted and conclude that what he has done is  
21 anything but extraordinary.

22           The fourth reason for a downward departure is the  
23 combination of these factors. If you conclude that they are  
24 meritorious, but one doesn't quite reach the level that you  
25 need to depart, you can combine them. And that's the *Rioux*

57D8EBBS

1 case. The *Leung* case, a 2004 Second Circuit case, says  
2 precisely the same thing. In *Rioux*, it was a combination of  
3 health and charity. Again, I remember reading the case; I  
4 don't know the specifics right now. The charitable  
5 contributions of the individual in that case are nothing even  
6 remotely close to what this man has done his entire adult life.

7 The fifth is, do the enhancements overlap? There is a  
8 clear body of Second Circuit and Southern District law, when  
9 the guidelines are high, they often overlap, and when you talk  
10 about a securities case and you're talking about a corporate  
11 official, obviously there is going to be more than 50 victims,  
12 obviously financial institutions will be implicated, obviously  
13 there will be questions of leadership, obviously there will be  
14 questions of abuse of trust, all the things you just ruled  
15 upon. They obviously all overlap. So that reason for  
16 departing downward is applicable as well.

17 Those are the five, your Honor.

18 THE COURT: I will hear from the government.

19 MR. ANDERS: I am just going to briefly respond to two  
20 points Mr. Weingarten made, the first and the last.

21 First, with respect to the loss overstates, he made  
22 the point that this is a big case so you're necessarily going  
23 to have a big loss number, and that by itself should be a  
24 grounds for a departure because it's, I guess, somewhat  
25 fortuitous that the loss is so big.

57D8EBBS

1           Here, we actually have some evidence that that's not a  
2 valid ground for departure where, as we point out in our  
3 papers, subsequent editions of the guidelines after this fraud  
4 was revealed in fact increased the guideline levels to make the  
5 enhancements even greater for losses like this. Congress  
6 clearly had in mind this case when they revised the guidelines  
7 and made the sentences even more onerous. So it can't be that  
8 Congress intended a valid basis for a departure for a big case,  
9 which just happens to result in a big loss amount, when they  
10 had this very case in mind in revising the guidelines and in  
11 fact went the other way.

12           The only other point I would make in response to the  
13 departure motions involves the *Lauerson* departure. If you look  
14 at the factors, these enhancements that your Honor has ruled  
15 upon in fact do not overlap. Just because there are a lot of  
16 enhancements doesn't automatically make them overlapping. You  
17 can go through each one and you can find they address different  
18 grounds for an enhancement. They are not overlapping.

19           Otherwise, unless the Court has any questions, we will  
20 rely on our papers.

21           THE COURT: Do you know anything about the argument  
22 that there would not be a designation to an appropriate medical  
23 facility depending on the --

24           MR. ANDERS: The direct answer is no, I don't know  
25 specifically. I can't imagine that BOP determines how to treat

57D8EBBS

1 inmates based on what facility. I have to imagine that they  
2 have to take each case on its merits and treat people  
3 adequately.

4 THE COURT: That hasn't been my experience either. I  
5 was just wondering if you knew anything more, Mr. Anders.

6 Mr. Weingarten.

7 MR. WEINGARTEN: Maybe I wasn't clear. What I am  
8 suggesting is if an inmate is housed in a minimum facility  
9 institution, the ability to go out for a furlough is much  
10 greater than, for example, if he is in a maximum security  
11 institution. That is what I am talking about.

12 THE COURT: I see.

13 So you weren't suggesting that he would not receive  
14 the best possible treatment that could be provided because his  
15 sentence might be longer than some other?

16 MR. WEINGARTEN: No. There is a general  
17 understanding, anecdotal and now in a GAO report, that if you  
18 have a complex medical situation that needs monitoring, and Mr.  
19 Ebbers obviously does, it is a good thing if you have access to  
20 care outside the BOP.

21 THE COURT: Let me rule then on the departures.

22 First, I reject the defendant's argument that the loss  
23 amount overstates the seriousness of the offense.

24 The first argument was that Mr. Ebbers will be  
25 unfairly penalized because WorldCom was a large public

57D8EBBS

1 corporation with millions of outstanding shares which  
2 necessarily goes into the calculation of loss. This was gone  
3 into at some extent in the papers. Even if it is  
4 hypothetically true that a minor fraud causing losses of a  
5 penny per share in a company the size of WorldCom could trigger  
6 the 26-level enhancement, that's not this case. Those are not  
7 the facts of this case. This was not a minor fraud.  
8 Furthermore, as Mr. Anders argued, it's pretty clear that the  
9 guidelines contemplate the application of the loss enhancement  
10 to cases involving large public companies like WorldCom.

11 I also reject the claim that this is a multiple  
12 causation scenario in which the amount of loss was caused by  
13 sources like an economic downturn in addition to the  
14 defendant's comments.

15 Look, I agree, and Mr. Ebbers is correct, that the  
16 precise amount of loss cannot easily be calculated in this  
17 case, and I recognize that it's likely that WorldCom's stock  
18 price would have dramatically declined, notwithstanding the  
19 fraud, because of a number of economic factors, and, indeed, we  
20 heard testimony from Mr. Glinsman that the stock prices of all  
21 the major telecommunication companies dropped throughout the  
22 year 2000. Nonetheless, Mr. Ebbers committed a fraud that  
23 caused numbers of investors to suffer losses. His statements  
24 deprived investors of the truth about WorldCom's financial  
25 performance and they encouraged investors to buy and hold

57D8EBBS

1 WorldCom stock, who might have made different decisions had  
2 they known the truth.

3 I think Mr. Ebbers' arguments concerning the loss  
4 amount overstating the seriousness of the conduct overlooked  
5 the fact that regardless of whether one calculates the loss  
6 based on the change in market capitalization or the harm  
7 suffered by individual investors, this fraudulent scheme  
8 defrauded the market as a whole as well. And the loss figure  
9 in this case it seems to me in no way can be said to overstate  
10 the seriousness of the defendant's conduct.

11 There was also an argument here that Mr. Ebbers did  
12 not personally gain from the scheme. First of all, I have to  
13 note that lack of personal profit is not ordinarily a ground  
14 for departure because the guidelines do take this into account.  
15 In any rate, in this case, I don't believe it justifies a  
16 departure. It is true Mr. Ebbers did not cash out his shares  
17 in WorldCom; he did not advise his friends and family to sell  
18 their WorldCom shares; he bought more shares of WorldCom after  
19 his April 2003 resignation. However, the fraud did enable him  
20 to maintain his position of CEO and president of WorldCom, and  
21 it allowed him to continue to receive salary and bonuses which  
22 came with that position.

23 With respect to the medical condition departure, I am  
24 denying that as well. Mr. Ebbers has a serious heart  
25 condition, although I do not believe, based on what I have

57D8EBBS

1 reviewed, that it is an extraordinary physical impairment or  
2 condition so as to justify a departure. He is being treated  
3 with a course of medication and regular care, although it has  
4 not required him to be hospitalized. The Bureau of Prisons has  
5 informed me that it has the capacity to monitor and treat Mr.  
6 Ebbers for his heart condition. I do not take that as total  
7 gospel. I evaluate it in the context of the records that I  
8 have been given with respect to his condition, and in the  
9 circumstances that relate to his particular condition, I do not  
10 have any reason to believe that they cannot give him adequate  
11 medical care.

12 I find the charity, community service and prior good  
13 acts departure a very close one, but I am denying that motion  
14 for a downward departure, although I intend to take it into  
15 consideration with respect to the nature and characteristics of  
16 the defendant under my analysis of what a reasonable sentence  
17 should be. I think that while Mr. Ebbers has certainly been a  
18 leader in his community in charities, civic organizations,  
19 church efforts, I am also mindful of the fact that individuals  
20 who do have large sums of money and standing in the community  
21 may typically be said to behave this way. As I said earlier,  
22 while I don't believe his activities justify a departure, I was  
23 impressed with them, as anyone would have been who read those  
24 letters, and I intend to factor those into my analysis in terms  
25 of what a reasonable sentence should be.

57D8EBBS

1           With respect to the cumulative effects departure, I am  
2 denying that. I think the departure is simply inappropriate in  
3 this case. I do not find, I cannot find that the enhancements  
4 in this case substantially overlap with one another. This  
5 isn't like *Jackson*. The enhancements here do not arise from  
6 the same set of operative facts. Each has its own independent  
7 significance based on the nature of the crimes. So that's  
8 denied.

9           All right. Mr. Weingarten, I may have missed this.  
10 Did you argue the combination of factors? Yes, you did, under  
11 *Rioux*. I don't believe this is the extremely rare case where  
12 the combination of the loss enhancement, Mr. Ebbers' medical  
13 problems and his charitable contributions, extensive as they  
14 are, take us outside the heartland of the guidelines.  
15 Individually I have already ruled that they do not form a basis  
16 for departing downward. Viewing them together does not  
17 persuade me that he is entitled to a departure there either. I  
18 do intend, however, as I said earlier, to take some of these  
19 factors into consideration with respect to what I believe a  
20 reasonable sentence is in this case under the guidelines.

21           Having ruled with respect to the issues relating to  
22 what the advisory guideline sentence should be, I find that the  
23 proper guideline offense level in this case is 42 and that the  
24 advisory sentencing range would be 30 years to life.

25           Before I ask Mr. Ebbers if he wishes to say anything,

57D8EBBS

1 I want to know whether the government has any comments that it  
2 would like to make?

3 MR. WEINGARTEN: Can I make one observation? As Mr.  
4 Heberlig indicated, we think the guidelines are one factor.  
5 There are all of the 3553 characteristics and issues as well.

6 THE COURT: I agree.

7 MR. WEINGARTEN: We wouldn't mind arguing about them  
8 just a little.

9 THE COURT: I thought most of them were subsumed in  
10 your other arguments.

11 Go ahead, Mr. Weingarten.

12 MR. WEINGARTEN: Thank you.

13 We made eight separate arguments on 3553 issues. Some  
14 of them are self-evident. I don't think the Court is going to  
15 worry about recidivism or rehabilitation. But I would like to  
16 comment just on one or two.

17 Since the Court talked about the history and  
18 characteristics of the defendant, let me just talk a little  
19 more about that. I won't repeat the charity and public service  
20 piece because we have already discussed that, as much as I  
21 would like to. I just would repeat, I cannot help but be very  
22 moved by the submission that we made.

23 I think the key that comes out of the submission is  
24 that people who have written to you, and have known Mr. Ebbers  
25 for 30-some years, describe a man completely different than the

57D8EBBS

1 man you heard about from the witness stand, primarily from  
2 Scott Sullivan. It's just not the same person. Perhaps my  
3 favorite letter is from a person with a restaurant in  
4 Brookhaven, who perhaps not as eloquently as some, but said  
5 from her heart, Mr. Ebbers was in that restaurant all the time,  
6 was a different person from the person you knew from the trial  
7 here in New York.

8           Who is he? Who is Bernard Ebbers? We know about the  
9 family piece from the loving letters from his children. So  
10 there is obviously no dispute about that, and from his wife.  
11 Obviously it's not admissible evidence, but you have letters  
12 from the CFOs who worked for Mr. Ebbers before Scott Sullivan.  
13 You have a letter from Wilkie Colyer who did all the merger  
14 deals before Scott Sullivan arrived on the scene in a prominent  
15 position. You have letters from CPAs who worked closely with  
16 Bernard Ebbers on financial matters, personal and business. To  
17 a letter, they all tell you that they confronted him with  
18 issues involving finances, about self-enhancement,  
19 self-enrichment, and they all wrote to you and they said, on  
20 every occasion Mr. Ebbers instructed them, do the right thing.  
21 So we have a situation where the record is completely clear,  
22 right up until the time Scott Sullivan is pulling the trigger  
23 on accounting decisions, there is no evidence whatsoever that  
24 he ever committed a misdeed in the financial area. That is  
25 supported by our record.

57D8EBBS

1           Then, of course, you have the endless numbers of acts  
2 of kindness and generosity, helping children, helping families.  
3 Not the formal charity, not the \$100 million, not the  
4 orphanages, not going to Georgia and contributing \$100,000 to a  
5 pastor because his church was going broke, but sort of the  
6 personal things that he did over and over and over again. I  
7 would simply say to you, Judge, doesn't that count? If you  
8 live 60 years, 60-some-odd years, and you have an unblemished  
9 record and you have endless numbers of people who attest to  
10 your goodness, doesn't that count? Doesn't it count  
11 particularly on this day?

12           You have law enforcement people writing to you, you  
13 have the sheriff of his county writing to you attesting to his  
14 character. It's not just Mississippi. You have people from  
15 Canada writing about what kind of man he was when he took over  
16 that big ranch at Douglas Lakes. It's not just  
17 correlative religionists. You have people from all sorts of walks of  
18 life that have dealt with him his entire adult life, and they  
19 all say the same thing. Does that not count?

20           Let me say a little bit about sentence disparity. The  
21 government says you should take a look at the *Adelphia* case,  
22 you should take a look at some Ponzi schemes, and that's where  
23 you should look to see what the appropriate sentence would be.  
24 With all respect to the defendants in those cases, they have  
25 nothing whatever to do with the charges here. Obviously,

57D8EBBS

1 Adelphia and other cases that are in the news are involved with  
2 looting; corporate executives looked at their company as a  
3 piggy bank. We don't have any of that here. We all know what  
4 a Ponzi scheme is; a guy sitting down and saying we are going  
5 to rip off money from the investors. One of the things that  
6 drives me crazy about this case is the victims coming in and  
7 saying, he stole, he took my pension. He didn't steal any  
8 money. The largest individual shareholder who lost money in  
9 the WorldCom debacle was Bernie Ebbers. The analogies don't  
10 work.

11 I think the sentence that is fair to look at, so that  
12 there is no sentencing disparity, is Scott Sullivan's. Now,  
13 obviously, Scott Sullivan is in his 40s; Bernie Ebbers is in  
14 his 60s. Bernie Ebbers is a big man; Scott Sullivan is a  
15 little man. Bernie Ebbers was the founder and CEO; Scott  
16 Sullivan was not. So all the instincts are Bernie Ebbers  
17 should get the big sentence; Scott Sullivan shouldn't.

18 I think the record supports the following. In the  
19 real world, at WorldCom, they were, for all intents and  
20 purposes, on a day-to-day operation, co-equals with Scott  
21 Sullivan having autonomy and control over the accounting.

22 I believe on the accounting decisions, the evidence  
23 looked, at worst from our perspective, that this was Scott  
24 Sullivan; he was the mastermind of this. This was his way to,  
25 quote, make the numbers. The evidence worst to us, he

57D8EBBS

1 presented his suggestion, his idea to Bernie Ebbers, and Bernie  
2 Ebbers, without an ability to independently gauge the bona  
3 fides of the decision or how bad it was, approved it. That's  
4 the evidence on the accounting decisions worst to us.

5 Obviously, Scott Sullivan is going to be sentenced  
6 here. I don't want to do anything that cranks up his sentence.  
7 But in terms of the wrongdoing here, it is very difficult for  
8 me to conclude that Bernard Ebbers' crimes are worse than Scott  
9 Sullivan's. Obviously, I know Scott Sullivan cooperated, I  
10 understand how the system works, and I understand about 5K  
11 letters. I think we have a situation here, however, where the  
12 cooperation was at the 11th hour, 59th minute, and it was at  
13 the last target of convenience. According to the jurors who  
14 were interviewed after the trial, at least half of them didn't  
15 believe Scott Sullivan. So I am suggesting whatever sentence  
16 the Court has in mind for Scott Sullivan, I think the sentence  
17 of Bernie Ebbers should be comparable.

18 Finally, the restitution question. I am assuming the  
19 Court knows that there was an agreement reached. Judge Cote  
20 said nice things about Bernie Ebbers' cooperation. The long  
21 and short of it is the plaintiffs in that case are enhanced  
22 because of his efforts to cooperate and make due and make the  
23 situation right for the victims. This is also a  
24 misunderstanding out there. He has grieved from the day of the  
25 failure of WorldCom for people who have lost money. It's not

57D8EBBS

1 just me saying it. It leaps out of the letters that you have.  
2 It's not a man who took this lightly; it's not a man who is  
3 indifferent to the suffering of the employees and the  
4 shareholders of WorldCom. Just the opposite. Coming out of  
5 those 169 letters is that he has grieved every day from the  
6 debacle.

7 Thank you, your Honor.

8 THE COURT: Mr. Anders.

9 MR. ANDERS: The only thing I would like to respond to  
10 is just the comment Mr. Weingarten made --

11 THE COURT: I can't hear.

12 MR. ANDERS: The comment Mr. Weingarten made about  
13 Scott Sullivan. I think this probably goes without saying, but  
14 it's certainly not the government's view that Scott Sullivan  
15 was the mastermind and Mr. Ebbers passively went along and  
16 approved the fraud. We certainly don't think that is what the  
17 evidence showed in this case. It's obviously our view that  
18 Scott Sullivan's testimony was entirely credible. Obviously,  
19 that will be addressed on a different day when Scott Sullivan  
20 is sentenced, but we don't think that's a fair comparison for  
21 that reason, one, what the fraud was about, and, two, the most  
22 important distinction is that obviously Scott Sullivan has  
23 accepted responsibility, has pled guilty, has acknowledged all  
24 of his participation in these events, and it's something that  
25 Mr. Ebbers has not done, and that is obviously a factor that

57D8EBBS

1 courts consider in determining the appropriate sentence.

2 THE COURT: Would you just address the disparity  
3 argument?

4 MR. ANDERS: Yes, your Honor. We set forth primarily  
5 our position in the papers that under 3553(a) the Court is not  
6 bound by the guidelines. Essentially, you need to look at  
7 other factors, and one of them is disparity. And that's a  
8 difficult thing to do in this case because this fraud, while  
9 perhaps different in definition and description from *Adelphia*  
10 and the *Bennett* case and the *Steven Hoffenberg*, the people we  
11 identified in our papers, it is identical or frankly far worse  
12 when you look at the scope and the effects on the victims of  
13 the fraud.

14 It is difficult in sentencing to compare one case to  
15 another and trying to determine what the appropriate sentence  
16 is. So, in our view, the best way to do that is to look at  
17 large financial frauds, each in their own right led to victims  
18 suffering tremendous losses. And that is why this case is  
19 comparable to the *Adelphia* case or the *Bennett* case. Because  
20 in all of these cases, defendants were convicted of  
21 participating in crimes, crimes which led to tremendous losses  
22 to victims. And it's for that reason that this case is  
23 comparable to those other cases because that's sort of the best  
24 analogy that we can come up with. And to compare this case not  
25 to, for example, the *Adelphia* case, but to compare it to other

57D8EBBS

1 far smaller frauds is probably not the right message to send  
2 because this is the case that is almost the standard for large  
3 frauds and is frankly a case that defendants for years to come  
4 will point to. And this case appropriately is compared to  
5 *Adelphia* and not to a fraud where there were far fewer victims  
6 who suffered far fewer losses.

7 It is for that reason that we think it is appropriate  
8 in determining disparity to look at the frauds we identified in  
9 our sentencing papers.

10 MR. WEINGARTEN: Can I just say one thing? On the  
11 Sullivan thing, this fraud could not and would not have  
12 happened without Scott Sullivan. Bernie Ebbers did not have  
13 anything close to the accounting acumen to pull this off. He  
14 would not have a clue what to do about capitalizing line costs.  
15 This could not have and would not have happened without Scott  
16 Sullivan. The worst interpretation on the accounting side of  
17 this is that he passively received a suggestion from Scott  
18 Sullivan and blessed it. That is a far cry from Scott  
19 Sullivan's role of dreaming it up, masterminding it, and  
20 directing his people under him to execute it.

21 THE COURT: All right. Thank you, Mr. Weingarten.

22 As I have indicated, I am going to impose a  
23 nonguideline sentence of 25 years in this case because I find  
24 30 years would be excessive and is unnecessary to satisfy the  
25 purposes of the sentencing statute.

57D8EBBS

1           In making this determination, I have taken into  
2 account the defendant's age, his serious heart condition and  
3 his charitable works. Although I recognize, as the defense has  
4 pointed out, that this sentence is likely to be a life sentence  
5 for Mr. Ebbers, I find that a sentence of anything less would  
6 not sufficiently reflect the seriousness of this crime. Any  
7 lesser sentence also has the potential to create sentencing  
8 disparities among defendants convicted of serious securities  
9 fraud.

10           I have considered Mr. Ebbers' arguments that he did  
11 not loot WorldCom or engage in a Ponzi scheme or cash out his  
12 WorldCom stock, and I have now heard today that he very much  
13 has regretted and indeed has mourned over the losses of the  
14 victims in this case. I credit those statements. None of  
15 these facts, however, make his offense any less serious. I do  
16 not know what motivated Mr. Ebbers to commit these crimes.  
17 Perhaps he had the same motive as Scott Sullivan, who said at  
18 his guilty plea that he committed the fraud in a misguided  
19 effort to preserve the company and to allow it to withstand  
20 what he believed were temporary financial difficulties before  
21 returning to profitability. Such an effort is precisely what  
22 the securities laws forbid, and whatever the motive here, the  
23 effect of Mr. Ebbers' fraud was to deprive the public and the  
24 market of accurate information.

25           Let me now state the sentence I intend to impose.

57D8EBBS

1           It is the judgment of this Court that the defendant be  
2 remanded to the custody of the Bureau of Prisons for a term of  
3 5 years on Count One and 10 years on Counts Two through Nine.  
4 Counts One, Two and Three shall run consecutive to each other  
5 and concurrent with Counts Four through Nine, for a total  
6 sentence of 25 years.

7           This sentence shall be followed by a term of three  
8 years of supervised release on each count to run currently for  
9 a total of three years.

10           I am not imposing restitution in this case because, to  
11 the extent that it can be made, it is covered by the settlement  
12 agreement in the WorldCom securities litigation. Under that  
13 agreement, Mr. Ebbers is required to transfer substantially all  
14 of his remaining cash and noncash assets either directly to the  
15 class in the WorldCom securities litigation or to a liquidation  
16 trust that will be established to sell off his assets for the  
17 benefit of the class and MCI.

18           I also note that no victim has formally notified this  
19 Court that they have any objection to the settlement after  
20 being given notice of it approximately two weeks ago.

21           There will also be no fine in this case because it  
22 would interfere with the restitution efforts that Mr. Ebbers is  
23 making through this settlement. This is the sensible approach  
24 here in order to avoid prolonging this sentencing proceeding.

25           There will also be a special assessment of \$900, which

57D8EBBS

1 is due and payable immediately.

2 With respect to supervised release, there are four  
3 mandatory conditions:

4 The defendant shall not commit another federal, state  
5 or local crime;

6 He will not illegally possess a controlled substance;

7 He will not possess a firearm or destructive device;

8 and

9 He will cooperate in the collection of DNA as directed  
10 by the probation officer.

11 I suspend the mandatory drug testing condition because  
12 I agree with the probation department that this defendant poses  
13 a low, if any, risk of future substance abuse.

14 The standard conditions of supervision 1 through 13  
15 are imposed. They will be explained to the defendant by the  
16 probation office.

17 The following special conditions are also imposed:

18 The defendant shall comply with his obligations under  
19 the settlement agreement in the class action litigation.

20 He will provide the probation officer with access to  
21 any requested financial information, and he will not incur new  
22 credit charges or open additional lines of credit without the  
23 approval of the probation officer unless he is in compliance  
24 with any remaining obligations under the settlement agreement.

25 The defendant will report to the nearest probation

57D8EBBS

1 office within 72 hours of his release from custody, and I order  
2 that he be supervised by the district of residence.

3 Other than the substantive arguments that have already  
4 been made with respect to the sentencing factors in this case,  
5 is there any legal reason why the sentence I have just stated  
6 should not be imposed?

7 Mr. Anders?

8 MR. ANDERS: Can I have just one moment to confer with  
9 Mr. Weingarten?

10 THE COURT: Yes.

11 (Pause)

12 MR. WEINGARTEN: Two things, your Honor.

13 One, you didn't ask Mr. Ebbers if he wanted to say  
14 anything. It turns out that he doesn't.

15 THE COURT: I apologize. I had been told that he did  
16 not, but perhaps I was mistaken.

17 He does not wish to say anything. All right.

18 MR. WEINGARTEN: I know that the Court has imposed  
19 sentence. It turns out that for purposes of BOP it makes a  
20 huge difference if the Court sentenced to 23 years and 6 months  
21 for purposes of designation. It would give him the opportunity  
22 to be in a minimum security facility which would facilitate his  
23 medical care. It seems hardly a difference --

24 THE COURT: That was sort of my question earlier.

25 Is that accurate, Mr. Anders?

57D8EBBS

1 MR. ANDERS: I really have no idea. This is the first  
2 I am hearing of it. Perhaps I could have looked into it had I  
3 known that would have been requested beforehand.

4 MR. WEINGARTEN: Mr. Heberlig looked into it.

5 THE COURT: Let me hear from Mr. Heberlig.

6 MR. HEBERLIG: Our understanding from reviewing the  
7 Bureau of Prisons' designation materials, and also speaking to  
8 a consultant who deals with these issues, essentially Mr.  
9 Ebbers on every factor would qualify for a minimum security  
10 facility, except for the length of sentence. The Bureau of  
11 Prisons has what appear to be essentially per se rules. If a  
12 sentence length is greater than 10 years, the defendant is no  
13 longer eligible for a minimum security facility; he must be in  
14 a low security facility. If the sentence exceeds 20 years, the  
15 designation goes up to a medium security facility. However,  
16 the way the number is calculated is that the Bureau of Prisons  
17 takes into account the net time that a person will spend  
18 incarcerated, which takes into account the 15 percent of a  
19 sentence reduction eligible for good time.

20 In this case, in order for Mr. Ebbers to qualify for a  
21 low security designation, the sentence has to be 282 months or  
22 lower, which is the equivalent of 23 years and 6 months. It's  
23 our view that for an individual Mr. Ebbers' age, there is no  
24 difference, no practical real-world difference between a  
25 sentence of 25 years and a sentence of 23 years and 6 months.

57D8EBBS

1 I suppose, as an alternative, if the Court is not  
2 inclined to reduce the length of incarceration, we would  
3 recommend that the Court put in the judgment and commitment  
4 order a recommendation that the Bureau of Prisons find that  
5 there is no need for a security designation in this case, based  
6 on the Court's understanding of Mr. Ebbbers' characteristics,  
7 any greater than a low security facility. A medium security  
8 facility would be absurd in this case and a waste of taxpayer  
9 dollars. Mr. Ebbbers is no risk to anyone.

10 The other thing that we like to mention before the  
11 proceeding adjourns is we would ask the Court to put in the  
12 judgment and commitment order a recommendation that the Bureau  
13 of Prisons designate Mr. Ebbbers to the federal correction  
14 institute in Yazoo City, Mississippi, which is the closest  
15 facility to his home. It is also a three-part facility that  
16 has a minimum camp, a low facility and a medium. Our hope was  
17 for minimum, but at least we would request that the Court help  
18 us get Mr. Ebbbers into a low security facility rather than a  
19 medium.

20 Thank you.

21 THE COURT: Mr. Anders.

22 MR. ANDERS: We take no position on this issue of the  
23 length of sentence, your Honor. I guess we agree that there is  
24 no need for a medium as opposed to a low. I have no  
25 information about the different levels and what the sentence

57D8EBBS

1 impact on that is.

2 THE COURT: Well, I will make a recommendation that  
3 Mr. Ebbers qualify, despite the length of his sentence, for  
4 treatment as though he has been sentenced to 282 months, which  
5 would be 23 years and 6 months.

6 I will also recommend that, consistent with Bureau of  
7 Prisons' policies, he be designated to the -- is there actually  
8 a facility in Yazoo City, Mississippi?

9 MR. HEBERLIG: Yes, there is.

10 THE COURT: I am not familiar with that one.

11 MR. HEBERLIG: There is.

12 THE COURT: To that facility in order to make it  
13 easier for his family and his friends to visit with him.

14 Again I ask, other than the substantive arguments  
15 made, is there any legal reason why the sentence that I have  
16 just stated should not be imposed?

17 MR. ANDERS: I am aware of none.

18 THE COURT: Mr. Weingarten?

19 MR. WEINGARTEN: No.

20 THE COURT: All right. I am going to set a voluntary  
21 surrender date. The defendant will report to whatever Bureau  
22 of Prisons facility is designated on October 12, 2005.

23 Now, are there any applications?

24 I should also advise the defendant before I ask for  
25 additional applications that he does have a right to appeal his

57D8EBBS

1 conviction and sentence in this case. If he cannot afford to  
2 do so, he can apply for leave to appeal in forma pauperis. If  
3 he directs or requests, the clerk of the court will  
4 automatically file a notice of appeal on his behalf.

5 Do you understand that, Mr. Ebbers?

6 THE DEFENDANT: Yes.

7 THE COURT: Your counsel did indicate that you waive  
8 making a statement at this proceeding, is that correct?

9 THE DEFENDANT: Yes.

10 THE COURT: All right. Are there any other  
11 applications?

12 MR. ANDERS: There are underlying indictments which  
13 the government moves to dismiss at this time.

14 THE COURT: All right. The underlying indictments are  
15 dismissed.

16 Mr. Weingarten, Mr. Heberlig, because of Mr. Ebbers'  
17 health condition, if you want to, you can prepare a statement  
18 that can be attached to the judgment and conviction with any  
19 special needs, any doctors' reports, anything else that you  
20 think will be helpful so that it would be available to the  
21 Bureau of Prisons in their efforts to give him adequate medical  
22 care.

23 Anything else?

24 MR. HEBERLIG: There is one more application.

25 We did reach an agreement with the government on the

57D8EBBS

1 approximately 90-day surrender date, and the Court obviously  
2 just imposed an October 12th date. However, Mr. Ebbers does  
3 move this Court at this time to grant bail pending appeal. As  
4 the Court knows, Mr. Ebbers has announced his intention to  
5 appeal his conviction and likely his sentence as well. So we  
6 ask the Court at this time to grant bail pending appeal.

7 As the Court knows, the standard for such a motion is  
8 well settled. There are essentially two things for the Court  
9 to consider. Is the defendant a flight risk and are there  
10 substantial issues for appeal?

11 With respect to the flight risk point, obviously Mr.  
12 Ebbers is not a flight risk.

13 THE COURT: I agree.

14 MR. HEBERLIG: With respect to the substantial issues  
15 on appeal, we did submit a lengthy motion for a new trial in  
16 this case, and we did recently receive the Court's opinion  
17 denying that motion. However, with respect, there are  
18 substantial legal issues in this case that we will be pursuing  
19 on appeal, and perhaps the most significant is the Court's  
20 conscious avoidance instruction that had, we believe, an  
21 overwhelming impact on the outcome of this case. I believe the  
22 Court struggled over this issue and it was a very close call.  
23 Certainly, I recall prior to Mr. Ebbers testifying the Court  
24 signified that it did not believe there was a sufficient  
25 foundation at that point for the instruction to be granted to

57D8EBBS

1 the government. The Court changed its mind after Mr. Ebbers'  
2 testimony, but this was an incredibly close call, and we submit  
3 it's quite possible the Court of Appeals could view the issue  
4 differently.

5 In addition, there are a variety of issues with the  
6 individuals we deem the exculpatory witnesses. Failure to  
7 grant immunity to those witnesses, preclusion of impeachment of  
8 those individuals under Rule 806, the denial of a missing  
9 witness instruction, and the government's improper argument in  
10 summation.

11 We also believe there is a genuine issue on appeal for  
12 the venue motion that was denied pretrial. We believe this  
13 trial should have been in Mississippi and could have resulted  
14 in a far different outcome.

15 And without having a significant amount of time to  
16 dwell on the issues, I think there are going to be significant  
17 issues with the sentence, with all due respect, Judge.

18 For these reasons, there are substantial legal issues  
19 on appeal. Given the length of the sentence and Mr. Ebbers'  
20 lack of any propensity for flight, we respectfully submit there  
21 is no reason not to grant bail pending appeal.

22 THE COURT: I will hear from the government.

23 MR. ANDERS: We oppose bail pending appeal. We are  
24 happy, since there is a 90-day surrender date, to submit papers  
25 on this issue. I think there is substantial case law, for

57D8EBBS

1 example, on the conscious avoidance issue on why that is highly  
2 unlikely to be a grounds of reversal of a conviction.  
3 Similarly, we don't believe that there are substantial issues  
4 with respect to any of the other issues that the defense has  
5 just commented on such that there likely is to be a reversal in  
6 this case.

7 If your Honor is inclined to grant them bail pending  
8 appeal, I would suggest that we set a schedule to brief it, but  
9 we certainly oppose the application.

10 THE COURT: I would like briefing on the issue, and  
11 the government should begin that. How long do you want, Mr.  
12 Anders?

13 Obviously, some of the issues in this case are not  
14 likely to result in a reversal, although no one can ever  
15 predict, but I would like some briefing with respect to the  
16 conscious avoidance issue and whatever else the government  
17 believes they should cover.

18 MR. ANDERS: I guess, your Honor, respectfully, we  
19 would like the defense to go first so we can see what issues  
20 they believe would qualify. I don't know if that was an  
21 exhaustive list that we just heard. I can use the transcript.  
22 I imagine they may cite some law in support of their point.

23 THE COURT: Mr. Heberlig has never been reluctant to  
24 brief an issue.

25 Mr. Heberlig.

57D8EBBS

1 MR. HEBERLIG: I don't know if that's a compliment or  
2 not.

3 THE COURT: It was intended to be one.

4 MR. HEBERLIG: While we are happy to submit briefs to  
5 the Court, what I heard is that there is no dispute on the  
6 flight issue. Both sides briefed 70-page motions on the new  
7 trial that laid out these legal issues.

8 THE COURT: I think you're content with your briefing.  
9 So that's essentially why I asked the government if they want  
10 to --

11 MR. ANDERS: That's fine then, your Honor. If we  
12 could have three weeks.

13 THE COURT: That's fine. We have 90 days before a  
14 surrender date here so I will give the government three weeks  
15 to submit their brief with respect to why I should deny bail  
16 pending appeal, and I will give the defense three weeks to  
17 respond. All right? In the meantime, I reserve on that  
18 decision.

19 Is there anything else?

20 MR. ANDERS: Nothing from the government.

21 THE COURT: From the defense?

22 MR. WEINGARTEN: No.

23 oOo

24

25



# Exhibit C

**Reduction In Sentence Medical Review/Summary**

A medical summary is required for any inmate who is recommended by the warden for a Reduction in Sentence due to a medical condition. There are two categories to consider: 1) Elderly Component (Age 65 or over with a medical condition), or 2) Medical Component (terminal or medical debilitated). The "Elderly" component and "Medical" component both require a medical summary from the institution Clinical Director documenting the inmate meets the medical criteria. See PS 5050.49 for further clarification.

**This form is a tool that can be used to document the medical summary for a RIS.**

INSTITUTION FMC Ft Worth	REGION South Central	COMPLETED BY Sergio Mercado Jr. MD	DATE 8/7/2019
INMATE NAME EBBERS, BERNARD J	REG. NO. 56022-054	INMATE AGE 77	DATE OF INCARCERATION Incarceration Date
PREJCTED RELEASE DATE 07/04/2028			
FOR WHAT RIS CATIGORY IS INMATE BEING CONSIDERED? (CHOOSE ONLY ONE CATIGORY)			
Elderly with a Medical Condition <input checked="" type="checkbox"/>	Medically Debilitated <input type="checkbox"/>	Terminal Medical Condition <input type="checkbox"/>	
<p><i>If category is "Elderly with Medical Condition" complete Section I &amp; II.</i>  <i>If "Terminal" or "Medically Debilitated", complete Section I &amp; III.</i></p>			
<b>SECION I: MEDICAL SUMMARY</b>			
<b>HISTORY OF COMPLAINT</b>			
Mr. Ebbers is applying for a reduction in sentence under the criteria for elderly with a debilitated medical condition. He claims that during the time of his incarceration he has developed severe macular degeneration that has left him blind and unable to function inside a prison. He also says that he has ischemic cardiomyopathy with a low ejection fraction which puts him at risk for sudden cardiac death. He cites these two medical conditions as sufficient to meet the criteria for this request.			
<b>PAST MEDICAL HISTORY</b>			
Hypertension, hyperlipidemia, ischemic cardiomyopathy, CHF, prediabetes, iron deficiency anemia, Age Related Macular Degeneration.			
<b>PAST SURGICAL HISTORY</b>			
Cardiac Catheterization in 2016, Cardiac defibrillator was placed on 2/23/17			
<b>MEDICATIONS</b>			
Aspirin 81 MG EC Tab, Take one tablet (81 MG) by mouth every morning with food; Atorvastatin 10 MG Tab Take one tablet (10 MG) by mouth each evening; Ferrous Gluconate 324 (5 GR) MG Tab Take one tablet by mouth twice daily; Lisinopril 5 MG Tab Take three tablets (15 MG) by mouth each day; Metoprolol Succ XL 24 Hour 25 MG Tab Take one tablet (25 MG) by mouth each day.			
<b>ALLERGIES</b>			
No Known Allergies			
<b>SOCIAL HISTORY</b>			
Non Contributory			
<b>FAMILY HISTORY</b>			
Non Contributory			
<b>PHYSICAL EXAMINATION</b>			
8/7/19			
<b>VITAL SIGNS</b>			
Temperature: 96.8	Heart Rate: 88	Respiratory Rate: 16	Blood Pressure 110/55
<b>GENERAL</b>			
He walks in on his own without any difficulty, he is fully alert and oriented as to person, place and time. He is well groomed and appears well.			
<b>HEAD AND NECK</b>			
Head is normocephalic, without any deformities, neck is symmetric without any thyroidmegaly or palpable nodules. EYES are PERLA with pale conjunctiva.			
<b>RESPIRATORY</b>			
Lungs are clear bilaterally, no wheezing or crackles.			
<b>CARDIOVASCULAR</b>			
Heart rate is regular, with a systolic murmur. Pacemaker/Defibrilator in upper left chest.			

<b>ABDOMEN</b>
Abdomen is flat, soft, depressible, non-tender, and without any palpable masses. No inguinal hernia(s) palpated.
<b>EXTREMITIES</b>
Symmetrical, no deformities, full range of motion, pulses normal, reflexes present, muscle tone normal.
<b>DIAGNOSTIC DATA (INCLUDE TEST RESULTS, CONSULTATIONS, REFERRAL REPORTS/OPINIONS)</b>
CMP 7/16/19 CBC 7/16/19 Lipids, TSH, A1c 7/31/18 Cardiology consults: 4/4/19, 1/17/19, 7/12/18, 12/14/17, 8/10/17 Cardic Device Checks: 8/8/19, 11/15/18, 7/26/18 Echocardiogram: 12/12/18 Ophthalmology consults: 1/29/19, 11/2/18 GI consult: 10/18/17
<b>DIAGNOSIS</b>
Hypertension, hyperlipidemia, ischemic cardiomyopathy, CHF, iron deficiency anemia, age related macular degeneration, Bilateral inguinal hernias.
<b>HOSPITAL COURSE AND TREATMENT</b>
Mr. Ebbers was transferred from FCI Oakdale to FTW on 4/27/17 for continuation of care after having placement of a defibrillator secondary to CHF with a low ejection fraction. It was noted that he had a history of hypertension, ischemic cardiomyopathy, hyperlipidemia, and AGE RELATED MACULAR EDEMA. Upon his initial evaluation, his vision was found to be 20/400 in both eyes, which met criteria for being legally blind. Despite this level of visual impairment, Mr. Ebbers stated that he had no physical limitations and was actually physically active. He admitted that on occasions he would ask for assistance from his cellmate to ambulate for long distances. His main complaint at the time was his inability to read. He was consulted to Cardiology, Ophthalmology, and Gastroenterology. Throughout his course at FTW he has been followed by Cardiology and Ophthalmology. His visual acuity has decreased, and currently is 20/CF (Counting Fingers). In addition, during his time here, he complained of inguinal pain and found to have bilateral inguinal hernias for which the General Surgeon recommended surgery if he got Cardiology Clearance. He was seen by Cardiology in April of 2019 and at the time was deemed to be stable, and was cleared to have the inguinal hernia repair surgery. Less than a month ago he was evaluated in the clinic due to complaints from his housing unit officer about Mr. Ebbers wandering around the unit appearing confused. A mental health evaluation followed and there were no concerns for any significant cognitive deficits. He is pending to be re-evaluated by Cardiology and will continue to have Ophthalmology services while still in our custody. At present surgical clearance has been withdrawn for the inguinal hernia repair until he a full work up for anemia has been completed. Currently he is able to ambulate from his housing unit without any assistance as he is able to follow the sidewalks without much problem. He is also employed as an orderly in his unit, which is a job he says is not difficult for him to perform.
<b>CURRENT CONDITION</b>
Mr. Ebbers does have a medical condition that is progressive and incurable; most notably the Macular Degeneration. There is no treatment that will allow him to recover his vision, and preserving his vision is unlikely. The BOP has inmates that are totally blind (no light perception) and they are able to function perfectly well within a prison setting. As Mr. Ebbers condition worsens, we should be able to make accommodations to house him in a safer environment and provide him with assistive devices and/or companions to facilitate independent completion of all his ADL's. He also has ischemic cardiomyopathy with a low ejection fraction. So far this condition has been managed medically and Cardiology has found him to be stable. While it is true that this condition predisposes a person to sudden cardiac death, his condition is no worse than many other inmates that are currently at FTW. At this time there is no data that leads to giving a life expectancy that is less than 12-18 months.
<b>PROGNOSIS</b>
Mr. Ebbers condition is stable. Historically his parents died when they were in their 90's, and using the Seattle Heart Failure Model for life expectancy, he still scores with a life expectancy of 5 years or more.
<b>SECTION II: ELDERLY WITH MEDICAL CONDITION</b>
Does the inmate suffer from a chronic or serious medical condition related to the aging process or is experiencing deteriorating physical (or mental) health that substantially diminishes his/her ability to function in a correctional facility?
YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>
Can the BOP provide conventional treatment that can substantially improve the inmate's mental or physical condition?
YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>

Are there functional or cognitive limitations evidenced by the inmate's inability to perform instrumental activities of daily living (IADL)? (See OPI: HSD/HPB Number: 002-2015)

YES  NO

**SECTION III: MEDICAL(TERMINAL OR DEBILITATED)**

Has the inmate been diagnosed with a terminal, incurable disease and whose life expectancy is eighteen (18) months or less?

YES  NO

If yes, what is the current life expectancy? Enter Life Expectancy

Does the inmate have an incurable, progressive illness (or)  
Has the inmate suffered a debilitating injury from which he/she will not recover?

YES  NO

AND, is the inmate completely disabled, unable to perform activities of daily living and totally confined to a bed or chair OR Is the inmate only capable of limited self-care and confined to a bed or chair more than 50% of waking hours?

YES  NO

SIGNATURE

Sergio Mercado Jr., MD  
Medical Officer  
FMC Fort Worth  
Federal Bureau of Prisons

8/2/19

# Exhibit D

**Bureau of Prisons  
Health Services  
Clinical Encounter**

Inmate Name: EBBERS, BERNARD J  
Date of Birth: [REDACTED]/1941  
Encounter Date: 08/07/2019 12:48

Sex: M Race: WHITE  
Provider: Mercado, Sergio MD

Reg #: 56022-054  
Facility: FTW  
Unit: D06

Physician - Follow up Visit encounter performed at Health Services.

**SUBJECTIVE:**

**COMPLAINT 1**      **Provider:** Mercado, Sergio MD

**Chief Complaint:** GENERAL

**Subjective:** Seen today for follow up s/p evaluation by PT in inmates housing unit. Noted to have significant issues with vision and PT has assistive devices they can issue this inmate to assist in maintaining independence.  
Mr. Ebbers comes in without any difficulty and sits down to talk to me. Tells me that he was seen today by PT, but does not think it of any significance. He has no difficulty navigating around his housing unit or throughout the institution. He holds a job as an orderly in the unit, and has no problems doing that job. His only complaint is that for the past 5-6 months he has experienced worsening SOB and due to that he has become inactive. He no longer goes out to exercise as he once used to do. The only benefit of this has been that he is no longer having any inguinal pain. He lives in an upper tier unit and he complains that he is exhausted by the time he reaches the top. He likes where he is living and does not want to be placed in a lower tier unit, He instead request to be allowed a to wear soft shoes that would make it easier for him to climb up the stairs.

**Pain:** No

**OBJECTIVE:****Temperature:**

<u>Date</u>	<u>Time</u>	<u>Fahrenheit</u>	<u>Celsius</u>	<u>Location</u>	<u>Provider</u>
08/07/2019	12:48 FTW	96.8	36.0		Mercado, Sergio MD

**Pulse:**

<u>Date</u>	<u>Time</u>	<u>Rate Per Minute</u>	<u>Location</u>	<u>Rhythm</u>	<u>Provider</u>
08/07/2019	12:48 FTW	88			Mercado, Sergio MD

**Respirations:**

<u>Date</u>	<u>Time</u>	<u>Rate Per Minute</u>	<u>Provider</u>
08/07/2019	12:48 FTW	16	Mercado, Sergio MD

**Blood Pressure:**

<u>Date</u>	<u>Time</u>	<u>Value</u>	<u>Location</u>	<u>Position</u>	<u>Cuff Size</u>	<u>Provider</u>
08/07/2019	12:48 FTW	110/55				Mercado, Sergio MD

**SaO2:**

<u>Date</u>	<u>Time</u>	<u>Value(%)</u>	<u>Air</u>	<u>Provider</u>
08/07/2019	12:48 FTW	97	Room Air	Mercado, Sergio MD

**Weight:**

<u>Date</u>	<u>Time</u>	<u>Lbs</u>	<u>Kg</u>	<u>Waist Circum.</u>	<u>Provider</u>
08/07/2019	12:48 FTW	167.0	75.8		Mercado, Sergio MD

**Exam:**

**General**

**Affect**

Yes: Cooperative

Inmate Name: EBBERS, BERNARD J  
Date of Birth: [REDACTED]/1941  
Encounter Date: 08/07/2019 12:48

Sex: M Race: WHITE  
Provider: Mercado, Sergio MD

Reg #: 56022-054  
Facility: FTW  
Unit: D06

**Exam:****Appearance**

Yes: Appears Well, Alert and Oriented x 3  
No: Appears Distressed

**Nutrition**

Yes: Within Normal Limits

**Head****General**

Yes: Symmetry of Motor Function, Atraumatic/Normocephalic  
No: Facial Asymmetry

**Eyes****General**

Yes: PERRLA, Extraocular Movements Intact

**Ears****Tympanic Membrane**

Yes: Within Normal Limits

**Nose****General**

Yes: Nares Patent

**Mouth****Pharynx**

Yes: Within Normal Limits, Uvula Midline  
No: Erythema, Tonsillar Hypertrophy

**Pulmonary****Auscultation**

Yes: Clear to Auscultation  
No: Crackles, Wheezing

**Cardiovascular****Auscultation**

Yes: Regular Rate and Rhythm (RRR), Systolic Murmur  
No: Diastolic Murmur

**Abdomen****Palpation**

Yes: Soft  
No: Guarding, Rigidity, Tenderness on Palpation

**ASSESSMENT:**

Cardiomyopathy in other diseases classified else, 425.8 - Current  
Hypertension, Unspecified essential, 401.9 - Current  
Macular degeneration (senile), unspecif, 362.50 - Current  
Heart failure, I509 - Current  
Iron deficiency anemia, D509 - Current  
Prediabetes, R7303 - Current

Inmate Name: EBBERS, BERNARD J	Sex: M Race: WHITE	Reg #: 56022-054
Date of Birth: [REDACTED]/1941	Provider: Mercado, Sergio MD	Facility: FTW
Encounter Date: 08/07/2019 12:48		Unit: D06

**PLAN:****New Laboratory Requests:**

<u>Details</u>	<u>Frequency</u>	<u>Due Date</u>	<u>Priority</u>
Chronic Care Clinics-Diabetic-CBC w/diff	One Time	08/12/2019 00:00	Routine
Chronic Care Clinics-Diabetic-Lipid Profile			
Chronic Care Clinics-Diabetic-TSH			
Chronic Care Clinics-Diabetic-Hemoglobin A1C			
Chronic Care Clinics-Diabetic-Urinalysis w/Reflex to Microscopic			

**New Consultation Requests:**

<u>Consultation/Procedure</u>	<u>Target Date</u>	<u>Scheduled Target Date</u>	<u>Priority</u>	<u>Translator</u>	<u>Language</u>
Physical Therapy	08/16/2019	08/16/2019	Routine	No	

**Subtype:**

ADL/IADL

**Reason for Request:**

This is a request to evaluate and treat this 77 year old inmate with advanced macular degeneration for which he is legally blind. Needs assistance to be able to read and see items up close.

**Provisional Diagnosis:**

Advanced Macular Degeneration.

**Disposition:**

Follow-up at Sick Call as Needed  
 Follow-up at Chronic Care Clinic as Needed  
 Return Immediately if Condition Worsens

**Other:**

MDS modified to allow alternate shoes and continue on lower bunk.

**Patient Education Topics:**

<u>Date Initiated</u>	<u>Format</u>	<u>Handout/Topic</u>	<u>Provider</u>	<u>Outcome</u>
08/07/2019	Counseling	Plan of Care	Mercado, Sergio	Verbalizes Understanding

Copay Required: No

Cosign Required: No

Telephone/Verbal Order: No

Completed by Mercado, Sergio MD on 08/07/2019 13:05

# Exhibit E

**Physical Self-Maintenance Scale (PSMS)**

Adapted for Use in the Correctional Environment

Circle the scoring point for the statement that **most closely corresponds** to the inmate's current functional ability for each task. Add each section number circled to arrive at the final score. The examiner should complete the scale based on information about the inmate from the inmate him/herself, cellmates, inmate care companions/nursing assistants, staff, and recent records. This tool is useful for indicating specifically how a person is performing at the present time.

Inmate Name <i>Ebbers, Bernard J</i>	Reg. No. <i>56022-054</i>
---	------------------------------

**A. Toilet** Score

- |   |   |
|---|---|
| 1. Care for self at toilet completely; no incontinence  | ① |
| 2. Needs to be reminded, or needs help in cleaning self, or has rare (weekly at most) accidents | 0 |
| 3. Soiling or wetting while asleep more than once a week  | 0 |
| 4. Soiling or wetting while awake more than once a week   | 0 |
| 5. No control of bowels or bladder  | 0 |

**B. Feeding** Score

- |   |   |
|---|---|
| 1. Eats without assistance  | ① |
| 2. Eats with minor assistance at meal times and/or with special preparation of food, or help in cleaning up after meals | 0 |
| 3. Feeds self with moderate assistance and is untidy  | 0 |
| 4. Requires extensive assistance for all meals  | 0 |
| 5. Does not feed self at all and resists efforts of others to feed him or her   | 0 |

**C. Dressing** Score

- |  |   |
|--|---|
| 1. Dresses, undresses, and wears uniform according to BOP Policy                     | ① |
| 2. Dresses and undresses self, with adaptive equipment                               | 1 |
| 3. Needs moderate assistance in dressing   | 0 |
| 4. Needs major assistance in dressing, but cooperates with efforts of others to help | 0 |
| 5. Completely unable to dress self and resists efforts of others to help             | 0 |

**D. Grooming** Score

- |  |   |
|--|---|
| 1. Always neatly dressed, well-groomed, without assistance                       | ① |
| 3. Needs moderate and regular assistance or supervision with grooming            | 0 |
| 3. Needs total grooming care, but can remain well-groomed after help from others | 0 |

**E. Physical Ambulation** Score

- |   |   |
|---|---|
| 1. Moves about the unit and institution independently                                   | ① |
| 2. Ambulates only short distances   | 0 |
| 3. Ambulates with assistance of (check one)   | 0 |
| <input type="checkbox"/> a. Another Person <input type="checkbox"/> b. Railing          |   |
| <input type="checkbox"/> c. Cane <input type="checkbox"/> d. Walker                     |   |
| <input type="checkbox"/> e. Wheelchair: Transfers without help <input type="checkbox"/> |   |
| Needs help to transfer <input type="checkbox"/>   |   |
| 4. Sits unsupported in chair or wheelchair, but cannot propel self without help         | 0 |
| 5. Bedridden more than half the time  | 0 |

**F. Bathing** Score

- |   |   |
|---|---|
| 1. Bathes self (tub, shower, sponge bath) without human assistance        | ① |
| 2. Bathes self with help getting in and out of tub                        | 0 |
| 3. Washes face and hands only, but cannot bathe rest of body              | 0 |
| 4. Does not wash self, but is cooperative with those who bathe him or her | 0 |
| 5. Does not try to wash self and resists efforts to keep him or her clean | 0 |

**Scoring:** The inmate receives a score of 1 for each section labeled A – F if his or her competence is rated at some minimal level or higher. Add the total points circled for A – F. The total score may range from 0 to 6.

**A lower score indicates a higher level of dependence.**

<b>Total Score for Section A thru F</b>	<b>6</b>
---	----------

*WAC [Signature]*  
Completed By *1* *8-7-19*  
Date

Adapted from: Lawton MP, Brody EM, *Assessment of Older People: Self-Maintaining and Instrumental Activities of Daily Living*. Gerontologist 9(1969):179-186.

## Instrumental Activities of Daily Living (IADL)

Adapted for Use in the Correctional Environment

Circle the scoring point for the statement that **most closely corresponds** to the inmate's current functional ability for each task. Add each section number circled to arrive at the final score. The examiner should complete the scale based on information about the inmate from the inmate him/herself, cellmates, inmate care companions/nursing assistants, staff, and recent records. This tool is useful for indicating specifically how a person is performing at the present time.

Inmate Name <b>Ebbers, Bernard J</b>	Reg. No. <b>56022-054</b>
---	---------------------------

A. Ability to Use the Telephone	Score
1. Operates telephone on own initiative; looks up and dials numbers, etc. <i>Compensated</i>	1
2. Dials a few well-known numbers <i>Log font</i>	(1)
4. Unable to use telephone without human assistance	0

B. Ability to use the Computer	Score
1. Uses the computer to communicate with staff and family via email	1
2. Needs assistance to use the computer	1
3. Unable to use computer at all	(0)

C. Shopping	Score
1. Able to complete commissary list and manage commissary independently	1
2. Needs assistance to complete commissary list and managing commissary	(0)
3. Needs to be accompanied to commissary for full assistance	0
4. Completely unable to shop	0

D. Food Preparation/Nutrition	Score
1. Able to independently plan and prepare snacks/meals outside of food services	1
2. Needs assistance to plan and prepare snacks/meals outside of food services	(0)
3. Does not maintain adequate diet by eating snacks or going to food service	0
4. Needs complete assistance in obtaining meals	0

E. Housekeeping	Score
1. Maintains cell independently according to BOP Policy	(1)
2. Performs light daily tasks such as dishwashing, bed making	1
3. Performs light daily tasks but cannot maintain acceptable level of cleanliness	0
4. Needs help with all housekeeping tasks	0
5. Does not participate in any housekeeping tasks	0

F. Laundry	Score
1. Does personal laundry completely	1
2. Launders small items; rinses socks, etc.	(1)
3. All laundry must be done by others	0

G. Mode of Transportation if Released	Score
1. Able to travel independently on public transportation or drive own car	1
2. Able to arrange own travel via taxi, but would not otherwise be able use public transportation	(1)
3. Able to travel on public transportation when assisted or accompanied by another	0
4. Travel would be limited to taxi or automobile with assistance of another	0
5. Would not travel at all	0

H. Responsibility for Own Medications	Score
1. Is responsible for taking medication correct dosages at correct time <i>Compensated Magnifier</i>	(1)
2. Takes responsibility if medication is prepared in advance in separate dosages	0
3. Is not capable of managing own medication	0

I. Ability to Handle Finances	Score
1. Manages TRULINCS account independently	1
2. Needs help managing account	(1)
3. Incapable of managing account	0

**Scoring:** The inmate receives a score of 1 for each section labeled A – I if his or her competence is rated at some minimal level or higher. Add the total points circled for A – I. The total score may range from 0 to 9. **A lower score indicates a higher level of dependence.**

<b>Total Score for Sections A thru I</b>	<b>6</b>
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 Completed By \_\_\_\_\_ Date **8-7-19**

Adapted from: Lawton MP, Brody EM, *Assessment of Older People: Self-Maintaining and Instrumental Activities of Daily Living*. Gerontologist 9(1969):179-186.

# Exhibit F

**Bureau of Prisons  
Health Services  
Clinical Encounter**

Inmate Name: EBBERS, BERNARD J  
Date of Birth: [REDACTED]/1941  
Encounter Date: 09/15/2019 11:34

Sex: M Race: WHITE  
Provider: Darnell, V. LVN

Reg #: 56022-054  
Facility: FTW  
Unit: D06

Nursing - Evaluation encounter performed at Health Services.

**SUBJECTIVE:**

**COMPLAINT 1**      **Provider:** Darnell, V. LVN

**Chief Complaint:** Other Problem

**Subjective:** Wellness check- Per inmates on the unit, "Ebbers has been putting his shirt on as pants, peeing in the sinks, getting in other inmates beds, and is confused about the time".

**Pain:** No

**OBJECTIVE:**

**Temperature:**

<u>Date</u>	<u>Time</u>	<u>Fahrenheit</u>	<u>Celsius</u>	<u>Location</u>	<u>Provider</u>
09/15/2019	11:46 FTW	98.4	36.9		Darnell, V. LVN

**Pulse:**

<u>Date</u>	<u>Time</u>	<u>Rate Per Minute</u>	<u>Location</u>	<u>Rhythm</u>	<u>Provider</u>
09/15/2019	11:46 FTW	80			Darnell, V. LVN

**Respirations:**

<u>Date</u>	<u>Time</u>	<u>Rate Per Minute</u>	<u>Provider</u>
09/15/2019	11:46 FTW	18	Darnell, V. LVN

**Blood Pressure:**

<u>Date</u>	<u>Time</u>	<u>Value</u>	<u>Location</u>	<u>Position</u>	<u>Cuff Size</u>	<u>Provider</u>
09/15/2019	11:46 FTW	122/59				Darnell, V. LVN

**Blood Glucose:**

<u>Date</u>	<u>Time</u>	<u>Value (mg/dl)</u>	<u>Type</u>	<u>Regular Insulin</u>	<u>Provider</u>
09/15/2019	11:46 FTW	136	Unknown		Darnell, V. LVN

**SaO2:**

<u>Date</u>	<u>Time</u>	<u>Value(%)</u>	<u>Air</u>	<u>Provider</u>
09/15/2019	11:46 FTW	100	Room Air	Darnell, V. LVN

**Weight:**

<u>Date</u>	<u>Time</u>	<u>Lbs</u>	<u>Kg</u>	<u>Waist Circum.</u>	<u>Provider</u>
09/15/2019	11:46 FTW	156.8	71.1		Darnell, V. LVN

**Exam:**

**General**

**Affect**

Yes: Pleasant, Cooperative

**Appearance**

Yes: Alert and Oriented x 3

**Skin**

**General**

Yes: Within Normal Limits

Inmate Name: EBBERS, BERNARD J  
Date of Birth: [REDACTED]/1941  
Encounter Date: 09/15/2019 11:34

Sex: M Race: WHITE  
Provider: Darnell, V. LVN

Reg #: 56022-054  
Facility: FTW  
Unit: D06

**Exam:****Face****General**

Yes: Symmetric

**Mouth****General**

Yes: Within Normal Limits, Poor Oral Hygiene

**Pulmonary****Observation/Inspection**

Yes: Within Normal Limits

**Cardiovascular****Observation**

Yes: Within Normal Limits

**Peripheral Vascular****General**

Yes: Within Normal Limits

**Abdomen****Inspection**

Yes: Within Normal Limits

**Gastrointestinal****General**

Yes: Within Normal Limits

**Genitourinary****General**

Yes: Within Normal Limits

**ASSESSMENT:**

No Significant Findings/No Apparent Distress

It was reported this AM in pill line that inmate Ebbers has been increasingly confused. Per inmates on the unit inmate Ebbers has been getting into other peoples beds, he has been urinating in the sinks on the unit, hes confused about the time, and has been witness using a shirt as pants to go to chow.

I went to the unit to perform a wellness check on inmate Ebbers, it was noted he was in visitation. At visitation, he was noted to be visiting a man and a woman, he appears to be groomed appropriately, and was eating a biscuit. Inmate appeared to be in no distress, or discomfort. I instructed the visitation officers to notify me when his visitation was over. I approached inmate Ebbers and informed him that after visit I would like to bring him to medical to check on him, to which he agreed.

At approx. 1115, visitation informed me that he was ready to leave visit, I escorted him to medical from visitation, he ambulates with a steady gate, answers questions appropriately and is cooperative.

During evaluation it is noted the inmate is AAOx3, he is able to verbalize needs, recalls being confused at some points but states he is able to care for himself, and carries on a job mopping the upstairs closets.

Inmate is able to verbalize how many medications he takes a day and instructed me on his method for ensuring he takes the right medications, he states he is able to see well enough to read the pill bottles.

Per inmate he does recall going to the wrong room however, he states he realizes he is in the wrong room and he found the correct room.

At this time the inmate appears safe to return to the unit, he was released in stable condition, instructed to notify staff of change or worsening in condition, inmate verbalized understanding.

Inmate Name: EBBERS, BERNARD J

Reg #: 56022-054

Date of Birth: [REDACTED]/1941

Sex: M Race: WHITE

Facility: FTW

Encounter Date: 09/15/2019 11:34

Provider: Darnell, V. LVN

Unit: D06

**PLAN:**

**Disposition:**

Follow-up at Sick Call as Needed  
Return Immediately if Condition Worsens

**Patient Education Topics:**

<u>Date Initiated</u>	<u>Format</u>	<u>Handout/Topic</u>	<u>Provider</u>	<u>Outcome</u>
09/15/2019	Counseling	Access to Care	Darnell, V.	Verbalizes Understanding

**Copay Required:** No                      **Cosign Required:** Yes

**Telephone/Verbal Order:** No

Completed by Darnell, V. LVN on 09/15/2019 13:48

Requested to be cosigned by Eilert, Charles D.O..

Cosign documentation will be displayed on the following page.

**Bureau of Prisons**  
**Health Services**  
**Cosign/Review**

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Inmate Name:	EBBERS, BERNARD J	Reg #:	56022-054
Date of Birth:	██████/1941	Sex:	M
Encounter Date:	09/15/2019 11:34	Provider:	Darnell, V. LVN
		Race:	WHITE
		Facility:	FTW

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**Cosigned by Eilert, Charles D.O. on 09/16/2019 06:10.**

# Exhibit G



**U.S. Department of Justice**

*Federal Bureau of Prisons*

*Federal Medical Center*

*Fort Worth, Texas 76119-5996*

August 7, 2019

MEMORANDUM FOR ERIC D. WILSON  
WARDEN

FROM:

A handwritten signature in black ink, appearing to read "M. Robles".

M. Robles  
Associate Warden (M)

SUBJECT:

Reduction in Sentence Committee Recommendation  
RE: EBBERS, Bernard J  
Reg. No. 56022-054

This recommendation is being submitted in accordance with Program Statement 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S. C. 3582(c) (1) (A) and 4205(g), dated January 17, 2019. The Reduction in Sentence (RIS) Committee met on August 7, 2019, to review a request submitted by inmate Ebbers' daughter Joy Ebbers Bourne. The bases of the request refers to Program Statement 5050.50, Section 4(b), Non-Medical Circumstances – Elderly Inmates with Medical Conditions.

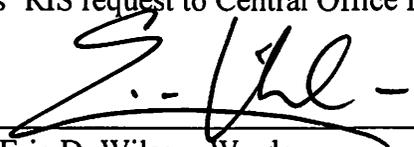
Inmate Ebbers is a 77-year old white male with diagnosis of macular degeneration, legally blind in both eyes due to end stage exudative age related macular edema, hypertension, cardiomyopathy, iron deficiency anemia, heart failure, prediabetes, dermatitis, hyperlipidemia, sicca syndrome, and inguinal hernia. The RIS Committee reviewed Program Statement 5050.50, Sections 4b, Elderly Inmates with Medical Conditions in consideration of this request. In reviewing the criteria for these provisions, it is noted inmate Ebbers meets the age requirement and has served 51.4% of his time. Regarding the other criteria involved in determination, he does suffer from chronic medical conditions related to the age related process and conventional treatment promises no substantial improvement to his physical health. Regarding his ability to function in a correctional environment he is able to function in the prison setting and as his condition worsens accommodations can be made as needed. He currently has a job as an orderly in his unit, which he stated to his provider is not difficult for him to perform. Inmate Ebbers was evaluated by the Physical Therapist in regards to his ADLs and IADLs. His IADLs score was a 6 and ADLs was also a 6. Per conversation with the Physical Therapist his ADL score is normal due to his other senses adjusting and helping him get around his unit and compound. Please note it has been discussed if the inmate was put into an unfamiliar area and his ADL

assessment was redone he would be more dependent if not totally dependent on someone else. The Physical Therapist assessments are attached to the medical summary.

In reference to inmate Ebbers' offense and criminal history, he is serving a 25 year sentence, for conspiracy to commit securities fraud, make false statements, and falsify corporate financial records. Inmate Ebbers was 59 when he committed his offense. He was remanded to the custody of the Bureau of Prisons on September 26, 2006. Inmate Ebbers' projected release date is July 4, 2028, via Good Conduct Time release. He has served 51.4% of his sentence.

Inmate Ebbers' daughters, Joy E. Bourne and Faith E. Gates, have stated they are willing to be inmate Ebbers' caregivers upon release. A relocation request regarding his release plan has been submitted to USPO. Inmate Ebbers' medical care will be covered under Medicare and Social Security, along with private pay from his family if needed.

Based on the review, inmate Ebbers meets all criteria, but one under section 4(b) –Elderly Inmates with Medical Conditions. The inmates ADLs and his medical summary do not show he has trouble functioning in a correctional environment, but his IADLs are lower and uses devices to achieve these results. The RIS Committee is recommending approval from the Warden to send inmate Ebbers' RIS request to Central Office for a final decision.

✓  
Approved/Denied:   
Eric D. Wilson, Warden

8-7-19  
Date

# Exhibit H



**U.S. Department of Justice  
Federal Bureau of Prisons**

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*Washington, D.C. 20534*

August 8, 2019

MEMORANDUM FOR ZACHARY J. KELTON  
ASSOCIATE GENERAL COUNSEL

FROM: Jeffery D. Allen, M.D., Medical Director  
Health Services Division

SUBJECT: **EBBERS, Bernard**  
**Register Number: 56022-054**  
**Reduction in Sentence Request**

This is in response to your request for a review of a reduction in sentence (RIS) submission provided for in 18 USC §3582 (c)(1)(A) for Bernard Ebbers, Reg. No. 56022-054.

Mr. Ebbers is a 77-year-old male with a medical history of hyperlipidemia, hypertension, cardiomyopathy, heart failure, macular degeneration, low vision in both eyes and considered legally blind, and inguinal hernia. Mr. Ebbers is closely followed by cardiology and ophthalmology, and according to treatment providers, Mr. Ebbers medical conditions are chronic but stable at this time. Although Mr. Ebbers is visually impaired he is still capable of performing his Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IALDs) independently such as: bathing, dressing, grooming, toileting, ambulating, using the phone with large numbers, managing his medication with a magnifying glass, light housekeeping, and navigating the correctional environment. Mr. Ebbers is currently working as a unit orderly and has acknowledged that he is not having any difficulties performing his duties. Mr. Ebbers is physically active and is capable of navigating stairs on the housing unit without difficulties. There is no indication that Mr. Ebbers has received services or training that can teach him how to live more independently with his blindness. These services and trainings would likely

improve his ability to function independently as his visual impairment progresses.

Based on our review of the medical record, Mr. Ebbers does not meet the BOP elderly with medical conditions RIS criteria. He is independent with the majority of his ADL and IADL needs, and is not experiencing deteriorating mental or physical health that substantially diminishes his ability to function in a correctional environment. He further does not meet the debilitated RIS criteria as he is not confined to a bed or wheelchair for more than 50% of his waking hours.

If I can offer any further information on the matter, please do not hesitate to contact me.

# Exhibit I



Federal Bureau of Prisons

Washington, D.C. 20534

**AUG 12 2019**

MEMORANDUM FOR ERIC D. WILSON, WARDEN  
FEDERAL MEDICAL CENTER  
FORT WORTH, TEXAS

FROM:

*Zachary J. Kelton*  
*for* Hyle

Assistant Director/General Counsel

SUBJECT: EBBERS, Bernard J.  
Federal Register No. 56022-054  
Request for Reduction in Sentence

Please be advised that Mr. Ebbers' request for a reduction in sentence (RIS) pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) and PS 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g), section 4(b) ("Elderly Inmates with Medical Conditions"), is denied. We have carefully reviewed the documentation submitted with this request and have consulted with BOP's Medical Director.

Section 4(b) of PS 5050.50 provides that an inmate who meets the following criteria may be considered for a RIS: (1) is age 65 and older; (2) suffers from chronic or serious medical conditions related to the aging process; (3) is experiencing deteriorating mental or physical health that substantially diminishes his ability to function in a correctional facility; (4) conventional treatment promises no substantial improvement to his mental or physical condition; and (5) has served at least 50 percent of his sentence.

Mr. Ebbers is 77 years old and has served 12 years and 10 months, or 51.5 percent, of his term of imprisonment. He has a history of hyperlipidemia, hypertension, cardiomyopathy, heart failure, macular degeneration, low vision in both eyes, and inguinal hernia. He is considered legally blind. He is closely

followed by cardiology and ophthalmology, and his treatment providers report that his medical conditions are chronic but stable at this time. Although Mr. Ebbers is visually impaired, he remains capable of independently performing his activities of daily living (ADLs) and instrumental ADLs such as bathing, dressing, grooming, toileting, ambulating, using the telephone with large numbers, managing his medication with a magnifying glass, performing light housekeeping, and navigating the correctional environment. He currently works as a unit orderly and has acknowledged he is not having any difficulties performing his duties. He also is physically active and capable of navigating stairs on the unit without difficulty.

As Mr. Ebbers is independent with the majority of his ADLs and instrumental ADLs and is not experiencing deteriorating mental or physical health that substantially diminishes his ability to function in a correctional facility, he does not meet the criteria for a RIS under section 4(b). Accordingly, his RIS request is denied.

Please provide Mr. Ebbers with a copy of this decision.

cc: J. Baltazar, Regional Director, South Central Region