

5348EBB1
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x

UNITED STATES OF AMERICA,

v.

02 Cr. 1144 (BSJ)

BERNARD J. EBBERS,

Defendant.

-----x

March 4, 2005
9: 40 a. m.

Before:

HON. BARBARA S. JONES

District Judge

APPEARANCES

DAVID N. KELLEY
United States Attorney for the
Southern District of New York
BY: DAVID ANDERS
WILLIAM JOHNSON
KATHERINE GOLDSTEIN
Assistant United States Attorneys

STEPTOE & JOHNSON
Attorneys for Defendant
BY: REID H. WEINGARTEN
ERIK KITCHEN
BRIAN HEBERLIG
- and -
BRUNINI GRANTHAM GROWER & HUGHES
BY: DAVID KAUFMAN

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(Trial resumed)
(Jury present)
THE COURT: Good morning, ladies and gentlemen.
I am about to give you my instructions, and they are
going to take a little over an hour. So at some sensible point
in the middle we will take a five-minute break, you can go into
the jury room, stretch your legs, whatever, and come back out
and we will finish.
All right. Mr. Clerk.
THE DEPUTY CLERK: The Court is about to charge the

11 jury. Any spectator wishing to leave the courtroom should do
 12 so now or remain seated until the completion of the Court's
 13 charge.

14 Marshal, please lock the door.

15 THE COURT: Ladies and gentlemen, we are now
 16 approaching the most important part of this case, your
 17 deliberations. You have heard all of the evidence, as well as
 18 the final arguments of the lawyers for the parties. Before you
 19 retire to deliberate, it is my duty to instruct you as to the
 20 law that will govern your deliberations. As I told you at the
 21 start of this case, and as you agreed, it is your duty to
 22 accept my instructions of law and to apply them to the facts as
 23 you determine them.

24 Regardless of any opinion that you may have as to what
 25 the law may be or ought to be, it is your sworn duty to follow
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1 the law as I give it to you. Also, if any attorney or other
 2 person has stated a legal principle different from any that I
 3 state to you in my instructions, it is my instructions that you
 4 must follow.

5 Also, please remember that you should not single out
 6 any particular instruction as alone stating the law, but you
 7 should instead consider my instructions as a whole.

8 Your duty is to decide the fact issues in the case and
 9 arrive, if you can, at a verdict. You, the members of the
 10 jury, are the sole and exclusive judges of the facts. You pass
 11 upon the weight of the evidence; you determine the credibility
 12 of the witnesses; you resolve such conflicts as there may be in
 13 the testimony; and you draw whatever reasonable inferences you
 14 decide to draw from the facts as you determine them.

15 In determining the facts, you must rely upon your own
 16 recollection of the evidence. None of what the lawyers have
 17 said in their opening statements, their closing arguments,
 18 their questions or their objections, is evidence, nor is
 19 anything that I may have said evidence.

20 The evidence before you consists of just two things:
 21 The testimony given by witnesses that was received in evidence
 22 and the exhibits, including stipulations, that were received in
 23 evidence.

24 Testimony consists of the answers that were given by
 25 the witnesses to the questions that were permitted. Remember,
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1 you may not consider any answer that I directed you to
 2 disregard or that I directed be stricken from the record.

3 Now, also remember, it is the duty of the attorney for
 4 each party in a case to object when another party offers
 5 testimony or other evidence that the attorney believes is not
 6 properly admissible. Counsel also have the right and duty to
 7 ask me to make rulings of law and to request conferences out of
 8 the hearing of the jury. And you will remember we had a few of
 9 those over at the side bar.

10 Now, all such questions of law must be decided by me.
 11 You should not show any prejudice against any attorney or party
 12 because the attorney objected to the admissibility of evidence,
 13 or asked for a conference out of your hearing, or asked me for
 14 a ruling on the law.

15 I also ask you to draw no inference from my rulings or

16 from the fact that upon occasion I asked questions of certain
 17 witnesses. My rulings were no more than applications of the
 18 law and my questions were only intended for clarification or to
 19 expedite matters. You are expressly to understand that I have
 20 no opinion as to the verdict you should render in this case.

21 Now, you are to perform your duty of finding the facts
 22 without bias or prejudice as to any party. You are to perform
 23 your duty with an attitude of complete fairness and
 24 impartiality.

25 The fact that the prosecution is brought in the name
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1 of the United States of America entitles the government to no
 2 greater consideration than that accorded any other party. By
 3 the same token, it is entitled to no less consideration. All
 4 parties, whether the government or individuals, stand as equals
 5 before the court.

6 In addition, the question of possible punishment that
 7 may be imposed upon the defendant, if convicted, should not
 8 enter into or influence your deliberations in any way. The
 9 duty of imposing a sentence is mine and mine alone.

10 It would also be improper for you to consider, in
 11 reaching your decision as to whether the government sustained
 12 its burden of proof, any personal feelings that you may have
 13 about the defendant's race, religion, national origin, sex or
 14 age. All persons are entitled to the presumption of innocence
 15 and the government has the burden of proof, as I will discuss
 16 in more detail in a moment. It would be equally improper for
 17 you to allow any feelings you might have about the nature of
 18 the crimes charged to interfere with your decision-making
 19 process.

20 You are not to be swayed by sympathy. Rather, the
 21 crucial question that you must ask yourselves as you sift
 22 through the evidence is: Has the government proven the guilt
 23 of the defendant beyond a reasonable doubt?

24 It must be clear to you that if you were to let bias,
 25 prejudice, fear, sympathy or any other irrelevant consideration

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1 interfere with your thinking, there would be a risk that you
 2 would not arrive at a true and just verdict. So do not be
 3 guided by anything except clear thinking and calm analysis of
 4 the evidence.

5 Now, the charges in this case are set forth in a
 6 document called an indictment. Remember that an indictment is
 7 only an accusation; it is not evidence in any respect.

8 The defendant has pled not guilty to the charges in
 9 the indictment. As a result, the burden is on the government
 10 to prove the guilt of the defendant beyond a reasonable doubt.
 11 This burden never shifts to the defendant, for the simple
 12 reason that the law presumes a defendant to be innocent and
 13 never imposes upon any defendant in a criminal case the burden
 14 or duty of calling any witness or producing any evidence.

15 In other words, the defendant starts with a clean
 16 state, and is presumed innocent until such time, if ever, that
 17 you as a jury are satisfied that the government has proven the
 18 defendant guilty beyond a reasonable doubt. If the government
 19 fails to sustain this burden, you must find the defendant not
 20 guilty.

21 Now, the indictment contains a total of nine counts.
 22 You must, as a matter of law, consider each count of the
 23 indictment separately, and you must return a separate verdict
 24 on each count.

25 I have said that the government must prove that the
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1 defendant is guilty beyond a reasonable doubt. I told you this
 2 burden never shifts to the defendant; instead, it is always the
 3 government's burden to prove beyond a reasonable doubt each of
 4 the elements of the crime charged against the defendant.

5 The question then for you is: What is reasonable
 6 doubt? Well, the words almost define themselves. It is a
 7 doubt based upon reason. It is doubt that a reasonable person
 8 has after carefully weighing all of the evidence. It is a
 9 doubt that would cause a reasonable person to hesitate to act
 10 in a matter of importance in his or her life. Proof beyond a
 11 reasonable doubt must, therefore, be proof of such a convincing
 12 character that a reasonable person would not hesitate to rely
 13 and act upon it in the most important of his or her own
 14 affairs.

15 A reasonable doubt is not a caprice or whim; it is not
 16 speculation or suspicion. It is not an excuse to avoid the
 17 performance of an unpleasant duty. The law does not require
 18 that the government prove guilt beyond all possible doubt;
 19 proof beyond a reasonable doubt is sufficient to convict.

20 If, after fair and impartial consideration of all of
 21 the evidence, you have a reasonable doubt as to the guilt of
 22 the defendant, it is your duty to acquit the defendant. On the
 23 other hand, if after fair and impartial consideration of all
 24 the evidence you are satisfied of the defendant's guilt beyond
 25 a reasonable doubt, it is your duty to convict.

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1 Now, in deciding whether the defendant is guilty or
 2 not, you may consider both direct evidence and circumstantial
 3 evidence.

4 Direct evidence is evidence that proves a disputed
 5 fact directly. For example, where a witness testifies to what
 6 he or she saw, heard or observed, that is called direct
 7 evidence.

8 Circumstantial evidence is evidence that tends to
 9 prove a disputed fact by proof of other facts. To give a
 10 simple example, suppose that when you came into the courthouse
 11 today the sun was shining and it was a nice day, but that the
 12 courtroom blinds were drawn so you couldn't look outside. Then
 13 later, as you were sitting here, someone walked in with a
 14 dripping wet umbrella and, soon after, someone else came in
 15 with a dripping wet raincoat.

16 Now, on our assumed set of facts, you cannot look
 17 outside the courtroom so you cannot see whether or not it is
 18 raining. So you have no direct evidence of that fact. But, on
 19 the combination of the facts about the umbrella and the
 20 raincoat, it would be reasonable for you to conclude that it
 21 had begun raining.

22 That is all there is to circumstantial evidence.
 23 Using your reason and experience, you infer from established
 24 facts the existence or the nonexistence of some other fact.

25 Now, I have spoken to you of inferences to be drawn

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1 from the evidence. This is what the law means when it speaks
2 of inferring one fact from another. An inference is the
3 deduction or conclusion that reason and common sense prompt a
4 reasonable mind to draw from facts that have been proven by the
5 evidence. Not all logically possible conclusions are
6 legitimate or fair inferences. Only those inferences to which
7 the mind is reasonably led or directed are fair inferences from
8 direct or circumstantial evidence in this case. Whether or not
9 to draw a particular inference is, of course, a matter
10 exclusively for you, as are all determinations of fact.

11 Now, the law makes no distinction between direct and
12 circumstantial evidence. Circumstantial evidence is of no less
13 value than direct evidence, and you can consider either or
14 both, and can give them such weight as you conclude is
15 warranted.

16 Now, it must be clear to you by now that counsel for
17 the parties are asking you to draw very different conclusions
18 about various factual issues in this case. An important part
19 of that decision will involve making judgments about the
20 testimony of the witnesses that you have listened to and
21 observed. In making these judgments, you should carefully
22 scrutinize all of the testimony of each witness, the
23 circumstances under which each witness testified, and any other
24 matter in evidence that may help you to decide the truth and
25 the importance of each witness's testimony.

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1 Your decision whether or not to believe a witness may
2 depend on how that witness impressed you. Was the witness
3 candid, frank and forthright; or, did the witness seem to be
4 evasive or suspect in some way? How did the way the witness
5 testified on direct examination compare with how the witness
6 testified on cross-examination? Was the witness consistent or
7 contradictory? Did the witness appear to know what he or she
8 was talking about? Did the witness strike you as someone who
9 was trying to report his or her knowledge accurately? These
10 are examples of the kinds of common sense questions you should
11 ask yourselves in deciding whether a witness is or is not
12 truthful.

13 How much you choose to believe a witness may also be
14 influenced by the witness's bias. Does the witness have a
15 relationship with the government that may affect how he or she
16 testified? Does the witness have some interest, incentive,
17 loyalty or motive that might cause him or her to shade the
18 truth? Does the witness have some bias, prejudice or hostility
19 that may cause him or her -- consciously or not -- to give you
20 something other than a completely accurate account of the facts
21 that he or she testified to?

22 Now, if a witness made statements in the past that are
23 inconsistent with his or her testimony during the trial
24 concerning facts that are at issue here, you may consider that
25 fact in deciding how much of the testimony, if any, to believe.

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1 In making this determination, you may consider whether the

2 witness purposefully made a false statement, or whether it was
3 an innocent mistake. You may also consider whether the
4 inconsistency concerns an important fact or merely a small
5 detail, as well as whether the witness had an explanation for
6 the inconsistency and, and if so, whether that explanation
7 appealed to your common sense.

8 If you find that a witness has testified falsely as to
9 any material fact, or if you find that a witness has been
10 previously untruthful when testifying under oath or otherwise,
11 you may reject that witness's testimony in its entirety, or you
12 may accept only those parts that you believe to be truthful or
13 that are corroborated by other independent evidence in the
14 case.

15 You should also consider whether the witness had an
16 opportunity to observe the facts he or she testified about, and
17 whether the witness's recollection of the facts stands up in
18 light of the other evidence in the case.

19 In other words, what you must try to do in deciding
20 credibility is to size up a person just as you would in any
21 important matter where you are trying to decide if a person is
22 truthful, straightforward and accurate in his or her
23 recollection.

24 Now, a witness may be discredited or impeached by
25 contradictory evidence, or by evidence that at some other time

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1 the witness has said or done something that is inconsistent
2 with the witness's present testimony. You may also consider a
3 witness's earlier silence or inaction that is inconsistent with
4 his or her courtroom testimony to determine whether the witness
5 is impeached.

6 If you believe that any witness has been impeached and
7 thus discredited, then it is for you to give the testimony of
8 that witness as much or as little weight, if any, as you think
9 it deserves.

10 Please remember, it is for you, the jury, and for you
11 alone, not the lawyers, or the witnesses, or me as the judge,
12 to decide the credibility of witnesses who appeared here and
13 the weight that their testimony deserves. With these
14 preliminary instructions in mind, I am now going to turn to the
15 charges against the defendant as contained in the indictment.

16 The defendant, Bernard J. Ebbers, is formally charged
17 in an indictment. As I instructed you at the outset of this
18 case, the indictment is simply a charge or accusation, it is
19 not evidence.

20 The indictment in this case contains nine separate
21 counts, on each of which you will be called upon to render a
22 separate verdict.

23 Count One of the indictment charges the defendant,
24 Bernard J. Ebbers, with participating in a criminal conspiracy.
25 It alleges that this conspiracy had three different objectives:

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1 (1) to commit securities fraud; (2) to make and cause to be
2 made false and misleading statements in annual and quarterly
3 reports filed with the United States Securities and Exchange
4 Commission; and (3) to falsify the books and records of a
5 public company.

6 As I will explain in more detail in a few moments, a

7 conspiracy, such as the one charged in Count One, is a criminal
8 agreement to violate the law. The other charges in the
9 indictment, which are set forth in Counts Two through Nine,
10 allege what are called "substantive" violations. Unlike the
11 conspiracy charge, which is a charge of agreeing to commit
12 offenses, the substantive counts are based on the actual
13 commission of offenses.

14 The substantive charges in the indictment are as
15 follows: Count Two of the indictment charges the defendant
16 with committing securities fraud; and Counts Three through Nine
17 charge the defendant with making and causing to be made false
18 and misleading statements with the SEC.

19 As you may have noticed, each of the crimes charged as
20 a substantive offense in Counts Two through Nine is also
21 charged as one of the objectives of the conspiracy charged in
22 Count One.

23 To begin with Count Two. Count charges the defendant,
24 Bernard J. Ebbers, with securities fraud in connection with the
25 purchase and sale of securities issued by WorldCom. Count Two
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1 alleges the following:

2 From on or about September 2000 up to and including in
3 or about June 2002, in the Southern District of New York and
4 elsewhere, Bernard J. Ebbers, the defendant, unlawfully,
5 willfully and knowingly, directly and indirectly, by the use of
6 the means and instrumentalities of interstate commerce, and of
7 the mails, and of the facilities of national securities
8 exchanges, in connection with the purchase and sale of
9 securities, used and employed manipulative and deceptive
10 devices and contrivances in violation of Title 17, Code of
11 Federal Regulations, Section 240.10b-5 by (a) employing
12 devices, schemes and artifices to defraud; (b) making untrue
13 statements of material fact and omitting to state material
14 facts necessary in order to make the statements made, in light
15 of the circumstances under which they were made, not
16 misleading; and (c) engaging in acts, practices and courses of
17 business which operated and would operate as a fraud and deceit
18 upon purchasers and sellers of WorldCom securities.

19 The relevant law here is Section 10(b) of the
20 Securities Exchange Act of 1934, which is also Title 15 of the
21 United States Code, Section 78j(b). Section 10(b) provides, in
22 pertinent part, as follows:

23 "It shall be unlawful for any person, directly or
24 indirectly, by the use of any means or instrumentality of
25 interstate commerce or of the mails, or of any facility of any
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1 national securities exchange, to use or employ, in connection
2 with the purchase or sale of any security registered on a
3 national securities exchange any manipulative or deceptive
4 device or contrivance in contravention of such rules and
5 regulations as the SEC may prescribe as necessary or
6 appropriate in the public interest or for the protection of
7 investors."

8 Based on its authority under this statute, the SEC has
9 created a number of rules and regulations, one of which, known
10 as Rule 10b-5 is relevant here. Rule 10b-5 reads as follows:

11 "Employment of manipulative and deceptive devices. It

12 shall be unlawful for any person, directly or indirectly, by
 13 the use of any means or instrumentality of interstate commerce,
 14 or of the mails, or of any facility of any national securities
 15 exchange (a) to employ any device, scheme, or artifice to
 16 defraud, (b) to make any untrue statement of a material fact or
 17 to omit to state a material fact necessary in order to make the
 18 statements made, in light of the circumstances under which they
 19 were made, not misleading, or (c) to engage in any act,
 20 practice, or course of business which operates or would operate
 21 as a fraud or deceit upon any person, in connection with the
 22 purchase or sale of any security."

23 Now, Congress enacted the Securities Exchange Act of
 24 1934 to ensure fair dealing and outlaw deceptive and
 25 inequitable practices by those selling or buying securities on

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1 the securities exchanges, in over-the-counter markets, or in
 2 face-to-face transactions. In doing so, Congress recognized
 3 that the purchase of a stock is different from the purchase of
 4 a vegetable bought in a grocery store, in that the average
 5 investor is not in a position to make a personal investigation
 6 to determine the worth, quality, and value of securities.
 7 Among the primary objectives of the Exchange Act are the
 8 maintenance of fair and honest security markets and the
 9 elimination of manipulative practices that tend to distort the
 10 fair and just price of stock.

11 Now, to establish a violation of Section 10(b), the
 12 government must prove each of the following elements beyond a
 13 reasonable doubt:

14 First, that in connection with the purchase or sale of
 15 the common stock of WorldCom, the defendant did any one or more
 16 of the following:

- 17 (1) employed a device, scheme or artifice to defraud,
- 18 (2) Made an untrue statement of a material fact or
 19 omitted to state a material fact which made what was said,
 20 under the circumstances, misleading, or
- 21 (3) Engaged in an act, practice or course of business
 22 that operated, or would operate, as a fraud or deceit upon a
 23 purchaser or seller;

24 Second, that the defendant acted knowingly, willfully,
 25 and with the intent to defraud; and

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1 Third, that the defendant used, or caused to be used,
 2 any means or instruments of transportation or communication in
 3 interstate commerce or the use of the mails in furtherance of
 4 the fraudulent conduct.

5 Now, the first element that the government must prove
 6 beyond a reasonable doubt is that in connection with the
 7 purchase or sale of the common stock of WorldCom, the defendant
 8 did any one or more of the following:

- 9 I am repeating again, but I will go ahead and do it.
- 10 (1) employed a device, scheme or artifice to defraud,
 11 or
- 12 (2) Made an untrue statement of a material fact or
 13 omitted to state a material fact which made what was said,
 14 under the circumstances, misleading, or
- 15 (3) Engaged in an act, practice or course of business
 16 that operated, or would operate, as a fraud or deceit upon a

17 purchaser or seller.

18 Now, it is not necessary for the government to
19 establish all three types of unlawful conduct in connection
20 with the purchase or sale of securities. Any one will be
21 sufficient for a conviction if you so find. However, you must
22 be unanimous as to which type of unlawful conduct was agreed
23 upon between two or more conspirators.

24 Now, a device, scheme or artifice to defraud is merely
25 a plan for the accomplishment of any objective. Fraud is a

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1 general term which embraces all deceptive efforts and means
2 that individuals devise to take advantage of others. It
3 includes all kinds of manipulative and deceptive acts. The
4 fraudulent or deceitful conduct alleged need not relate to the
5 investment value of the securities involved in this case.

6 Now, a statement, representation, claim or document is
7 false if it is untrue when made and was then known to be untrue
8 by the person making it or causing it to be made. A
9 representation or statement is fraudulent if it was falsely
10 made with the intention to deceive. The concealment of
11 material facts in a manner that makes what is said or
12 represented deliberately misleading may also constitute false
13 or fraudulent statements under the statute.

14 Now, you need not find that the defendant actually
15 participated in any specific purchase or sale of a security if
16 you find that the defendant participated, or agreed to
17 participate, in fraudulent conduct that was "in connection
18 with" a purchase or sale of securities.

19 The requirement that the fraudulent conduct be "in
20 connection with" a purchase or sale of securities is satisfied
21 so long as there was some nexus or relation between the
22 allegedly fraudulent conduct and the sale or purchase of
23 securities. Fraudulent conduct may be "in connection with" the
24 purchase or sale of securities if you find that the alleged
25 fraudulent conduct "touched upon" a securities transaction.

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1 It is no defense to an overall scheme to defraud that
2 the defendant was not involved in the scheme from its inception
3 or played only a minor role with no contact with the investors
4 and purchasers of the securities in question. Nor is it
5 necessary for you to find that the defendant was or would be
6 the actual seller of the securities. It is sufficient if the
7 misrepresentation or omission of material fact involved the
8 purchase or sale of stock. By the same token, the government
9 need not prove that the defendant personally made the
10 misrepresentation or that he omitted the material fact. It is
11 sufficient if the government establishes that the defendant
12 caused the statement to be made or the fact to be omitted.
13 With regard to the alleged misrepresentations and omissions,
14 you must determine whether the statements were true or false
15 when made, and, in the case of alleged omissions, whether the
16 omissions were misleading.

17 It does not matter whether the alleged unlawful
18 conduct was or would have been successful, or whether the
19 defendant profited or would have profited as a result of the
20 alleged scheme. Success is not an element of a violation of
21 Section 10(b) or Rule 10b-5. However, you can consider whether

22 or not the defendant expected to or did profit from the alleged
23 scheme in relation to the element of intent, which I will
24 discuss in a moment.

25 Now, if you find that the government has established
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1 beyond a reasonable doubt that a statement was false or a
2 statement was omitted rendering the statements that were made
3 misleading, you must next determine whether the statement or
4 omission was material under the circumstances.
5 The word "material" is used to describe the kind of
6 false statements or omissions that are wrongful under the fraud
7 statutes. A material fact is one that would have been
8 significant to a reasonable investor in making an investment
9 decision. In other words, the government must prove beyond a
10 reasonable doubt that the misstated or omitted fact altered the
11 total mix of information available and was of such importance
12 that it could reasonably be expected to cause or to induce a
13 person to invest or not to invest. The securities fraud
14 statute does not prohibit misstatements or omissions that would
15 not be important to a reasonable investor. We use the word
16 "material" to distinguish between the kinds of statements we
17 care about and those that are of no real importance.

18 This is not to say that it is a defense to the crime
19 if the material misrepresentation or omission would not have
20 deceived a person of ordinary intelligence. Once you find, if
21 you do, that the conspiracy involved the making of material
22 misrepresentations or omissions of material facts, it does not
23 matter whether the intended victims were gullible buyers or
24 sophisticated investors, because the securities laws protect
25 the gullible and unsophisticated as well as the experienced

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1 investor.
2 Now, the second element that the government must
3 establish beyond a reasonable doubt is that the defendant
4 participated in the scheme to defraud knowingly, willfully and
5 with intent to defraud.
6 "Knowingly" means to act voluntarily and deliberately,
7 rather than mistakenly or inadvertently.
8 "Willfully" means to act knowingly and purposely, with
9 an intent to do something the law forbids, that is to say, with
10 bad purpose either to disobey or to disregard the law.

11 "Intent to defraud" in the context of the securities
12 laws means to act knowingly and with intent to deceive.

13 Now, the question of whether a person acted knowingly,
14 willfully and with intent to defraud is a question of fact for
15 you to determine, like any other fact question. This question
16 involves one's state of mind.

17 Direct proof of knowledge and fraudulent intent is
18 almost never available. It would be a rare case where it could
19 be shown that a person wrote or stated that as of a given time
20 in the past he committed an act with fraudulent intent. Such
21 direct proof is not required.

22 The ultimate facts of knowledge and criminal intent,
23 though subjective, may be established by circumstantial
24 evidence, based upon a person's outward manifestations, his
25 words, his conduct, his acts and all the surrounding

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1 circumstances disclosed by the evidence and the rational or
2 logical inferences that may be drawn therefrom.

3 What is referred to as drawing inferences from
4 circumstantial evidence is no different from what people
5 normally mean when they say, "use your common sense." Using
6 your common sense means that when you come to decide whether
7 the defendant possessed or lacked an intent to defraud, you
8 don't limit yourself to what the defendant said, but you also
9 look at what he did and what others did in relation to the
10 defendant and, in general, everything that occurred.

11 Circumstantial evidence, if believed, is of no less
12 value than direct evidence. In either case, the essential
13 elements of the crime charged must be established beyond a
14 reasonable doubt.

15 Since an essential element of the crime charged is
16 intent to defraud, it follows that good faith on the part of
17 the defendant is a complete defense to a charge of securities
18 fraud. A defendant, however, has no burden to establish a
19 defense of good faith. The burden is on the government to
20 prove fraudulent intent and consequent lack of good faith
21 beyond a reasonable doubt.

22 Under the antifraud statutes, even false
23 representations or statements or omissions of material facts do
24 not amount to a fraud unless done with fraudulent intent.
25 However misleading or deceptive a plan may be, it is not

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1 fraudulent if it was carried out in good faith. An honest
2 belief in the truth of the representations made by a defendant
3 is a complete defense, however inaccurate the statements may
4 turn out to be.

5 Now, in considering whether or not a defendant acted
6 in good faith, you are instructed that a belief by the
7 defendant, if such belief existed, that ultimately everything
8 would work out so that no investors would lose any money does
9 not require a finding by you that he acted in good faith. No
10 amount of honest belief on the part of a defendant that the
11 scheme will ultimately make a profit for the investors will
12 excuse fraudulent actions or false representations by him.

13 Now, to conclude on this element, the government must
14 establish beyond a reasonable doubt that the defendant knew
15 that his conduct as a participant in the scheme was calculated
16 to deceive and nonetheless he associated himself with the
17 alleged fraudulent scheme. If you find that the defendant was
18 not a knowing participant in the scheme and lacked the intent
19 to deceive, you must acquit the defendant. On the other hand,
20 if you find that the government has established beyond a
21 reasonable doubt not only the first element, namely, the
22 existence of a scheme to defraud, but also this second element,
23 that the defendant was a knowing participant and acted with
24 intent to defraud, and if the government also establishes the
25 third element, as to which I am about to instruct you, then you

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1 have a sufficient basis upon which to convict the defendant.

2 Now, the third and final element that the government

3 must prove beyond a reasonable doubt is that the defendant
4 knowingly used, or caused to be used, the mails or the
5 instrumentalities of interstate commerce in furtherance of the
6 scheme to defraud or fraudulent conduct.

7 It is not necessary that the defendant be or would
8 have been directly or personally involved in any mailing or use
9 of an instrumentality of interstate commerce. If the conduct
10 alleged would naturally and probably result in the use of the
11 mails or an instrumentality of interstate commerce, this
12 element would be satisfied.

13 Nor is it necessary that the items sent through the
14 mails or communicated through an instrumentality of interstate
15 commerce did or would contain the fraudulent material, or
16 anything criminal or objectionable. The matter mailed or
17 communicated may be entirely innocent so long as it is in
18 furtherance of the scheme to defraud or fraudulent conduct.

19 Now, the use of the mails or instrumentality of
20 interstate commerce need not be central to the execution of the
21 scheme or even be incidental to it. All that is required is
22 that the use of the mails or instrumentality of interstate
23 commerce bear some relation to the object of the scheme or
24 fraudulent conduct.

25 In fact, the actual purchase or sale of a security
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1 need not be accompanied by the use of the mails or
2 instrumentality of interstate commerce, so long as the mails or
3 instrumentality of interstate commerce are used in furtherance
4 of the scheme and the defendant is still engaged in actions
5 that are part of a fraudulent scheme when the mails or the
6 instrumentalities of interstate commerce are used.

7 Now, let me turn to Counts Three through Nine.

8 Counts Three through Nine of the indictment charge
9 that Bernard J. Ebbers made, or caused to be made, false
10 statements in reports and documents required to be filed under
11 the Securities Exchange Act of 1934. Each of Counts Three
12 through Nine charges a different filing in which the defendant
13 either made or caused to be made its alleged false statements.

14 Count Three through Nine of the indictment read, in
15 pertinent part, as follows:

16 On or about the following dates, in the Southern
17 District of New York and elsewhere, Bernard J. Ebbers, the
18 defendant, unlawfully, willfully, and knowingly made, and
19 caused to be made, statements in reports and documents required
20 to be filed with the SEC under the Act and the rules and
21 regulations promulgated thereunder, which statements were false
22 and misleading with respect to material facts, to wit, Ebbers
23 caused others to submit in New York, New York, the following
24 filings to the United States Securities and Exchange
25 Commission: Counts Three, Five, Six, Seven and Nine relate,

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1 respectively, to WorldCom's quarterly reports filed on Forms
2 10-Q for the third quarter of 2000, the first, second and third
3 quarters of 2001, and the first quarter of 2002. Counts Four
4 and Eight relate to WorldCom's annual report filed on Form 10-K
5 for 2000 and 2001.

6 These counts charge violations of Section 32 of the
7 Securities Exchange Act of 1934, which is Title 15 of the

8 United States Code, Section 78ff. That section provides in
9 relevant part:

10 "Any person who willfully and knowingly makes, or
11 causes to be made, any statement in any application, report, or
12 document required to be filed under this title or any rule or
13 regulation thereunder, which statement was false or misleading
14 with respect to any material fact, shall be guilty of a crime."

15 Now, this section is the general provision of the
16 federal securities laws which makes it unlawful to willfully
17 violate any provision of the Securities Exchange Act of 1934,
18 or any rule or regulation thereunder, by making materially
19 false and misleading statements in applications, reports, and
20 documents required to be filed with the SEC.

21 Now, for each of Counts Three through Nine, to
22 establish a violation of Title 15, United States Code, Section
23 78ff, the government must prove each of the following elements
24 beyond a reasonable doubt:

25 First, that WorldCom was required by the Securities
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1 Exchange Act of 1934 to file the document charged in that
2 count;

3 Second, that the defendant knowingly and willfully
4 made, or caused to be made, a materially false or misleading
5 statement in that document.

6 The parties have stipulated that WorldCom is a public
7 company required to file documents and reports as prescribed by
8 the SEC. These include annual reports on Form 10-K and
9 quarterly reports on Form 10-Q. I therefore instruct you that
10 the first of these two elements has been met. Now I will
11 explain the second element in more detail.

12 The government next must prove, with respect to each
13 of Counts Three through Nine, that the defendant made, or
14 caused to be made, materially false and misleading statements
15 in the financial statement you are considering.

16 A statement or representation is "false" if it was
17 untrue when made, and known at the time to be untrue by the
18 person making it or causing it to be made.

19 As I have explained previously, a statement or
20 representation is misleading if it is either an untrue
21 statement as to a material fact or if it omits to state a
22 material fact necessary in order to make the statements made,
23 in light of the circumstances under which they were made, not
24 misleading.

25 I have defined the term "material" for you previously
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1 and you should use that definition here. I have also defined
2 "willfully" and "knowingly." Those same definitions apply
3 here.

4 Just as I instructed you with Count Two, good faith is
5 a complete defense to Counts Three through Nine. I have
6 defined good faith for you previously, and you should use that
7 definition here.

8 Now, to establish this element, the government need
9 not prove that the defendant himself physically made or
10 otherwise personally prepared the statements in question. It
11 is sufficient if the government has proven the defendant caused
12 materially false information to be filed by some person.

13 Now, each of Counts Three through Nine of the
 14 indictment is based on a different report or document filed
 15 with the SEC. The government contends that each of these SEC
 16 reports contains a number of materially false statements and
 17 misleading omissions.

18 The government is not required to prove all of these
 19 false statements and omissions. However, in order to convict
 20 the defendant, each juror must agree with each of the other
 21 jurors that the same statement in the SEC report you are
 22 considering was in fact materially false or misleading. You
 23 need not unanimously agree on each such statement alleged, but,
 24 in order to convict the defendant of a particular count, you
 25 must unanimously agree upon at least one such statement as

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1 materially false and misleading in the SEC report at issue in
 2 that count.

3 Now, unless the government has proved to you beyond a
 4 reasonable doubt the same materially false and misleading
 5 statement in the particular SEC report you are considering, you
 6 must acquit the defendant of the charge in the count based upon
 7 that SEC report.

8 Now, with respect to Counts Two and Three through
 9 Nine, in determining whether the defendant knew of the
 10 existence of a particular fact, you may consider whether the
 11 defendant deliberately closed his eyes to what otherwise would
 12 have been obvious.

13 The necessary knowledge on the part of the defendant
 14 with respect to Count Two and Counts Three through Nine cannot
 15 be established by showing that the defendant was careless,
 16 negligent, or foolish. In addition, you may not conclude that
 17 the defendant knew of the existence of a particular fact merely
 18 because he held the position of chief executive at WorldCom.
 19 However, one may not willfully and intentionally remain
 20 ignorant of a fact material and important to his conduct in
 21 order to escape the consequences of criminal law.

22 Thus, if you find beyond a reasonable doubt that the
 23 defendant was aware that there was a high probability of a
 24 fact, but that the defendant deliberately and consciously
 25 avoided confirming this fact, then you may treat this

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1 deliberate avoidance of positive knowledge as the equivalent of
 2 knowledge, unless you find that the defendant actually believed
 3 the fact not to be true.

4 All right. Ladies and gentlemen, we are going to take
 5 that five-minute break at this point. We are just about
 6 midway. Please don't begin to discuss the case.

7 (Jury exits courtroom)

8 THE COURT: All right. Five minutes.

9 (Recess)

10 (Jury present)

11 THE COURT: All right, ladies and gentlemen. Now we
 12 are going to talk about the conspiracy charged in Count One.

13 A conspiracy to commit a crime is an entirely separate
 14 and different offense from the substantive crime which may be
 15 the objective, also known as the "object" of the conspiracy.
 16 The essence of the crime of conspiracy is an agreement or
 17 understanding to violate other laws or to defraud the United

18 States. Thus, if a conspiracy exists, even if it should fail
 19 of its purpose, it is still punishable as a crime.
 20 Consequently, in a conspiracy charge there is no need to prove
 21 that the crime or crimes that were the objects of the
 22 conspiracy were actually committed.

23 Of course, if a defendant participates in a conspiracy
 24 and the crime or crimes which were the object of the conspiracy
 25 were committed, the defendant may be guilty of both the

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1 conspiracy and the substantive crime, as I will instruct you
 2 shortly. The point simply is the crime or crimes that were the
 3 object of the conspiracy need not have been actually committed
 4 for a conspiracy to exist.

5 Count One of the indictment charges that the
 6 defendant, Bernard J. Ebbers, violated Section 371 of Title 18
 7 of the United States Code. That section provides in relevant
 8 part:

9 "If two or more persons conspire either to commit any
 10 offense against the United States, or to defraud the United
 11 States, or any agency thereof, in any manner or for any purpose
 12 and one or more of such persons do any act to effect the object
 13 of the conspiracy, each is guilty of a crime.

14 Now, as I have already mentioned, the defendant is
 15 charged in this count with participating in a conspiracy to
 16 violate several federal statutes. Specifically, Count One
 17 charges that the defendant, with others known and unknown,
 18 conspired and agreed together (i) to commit securities fraud;
 19 (ii) to make or cause to be made false and misleading
 20 statements in annual and quarterly SEC reports; and (iii) to
 21 falsely the books and records of a public company.

22 The indictment also lists the overt acts that are
 23 alleged to have been committed in furtherance of the
 24 conspiracy.

25 You will get a copy of the indictment to take back to
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1 the jury room.

2 A conspiracy is a kind of criminal partnership -- a
 3 combination or agreement of two or more persons to join
 4 together to accomplish some unlawful purpose.

5 As I have noted, the crime of conspiracy -- or
 6 agreement -- to violate a federal law, as charged in this
 7 indictment, is an independent offense. It is separate and
 8 distinct from the actual violation of any specific federal
 9 laws, which the law refers to as "substantive crimes."

10 Let me just tell you this again. You may find the
 11 defendant guilty of the crime of conspiracy to violate the
 12 federal securities laws even if you find that the substantive
 13 crimes which were the objects of the conspiracy -- securities
 14 fraud, filing false and misleading statements, or falsifying of
 15 the books and records of WorldCom -- were never actually
 16 committed. In other words, a conspiracy standing alone is a
 17 separate crime, even if the conspiracy is not successful.

18 Now, in order to sustain its burden of proof with
 19 respect to the charge of conspiracy, the government must prove
 20 beyond a reasonable doubt the following three elements:

21 First, the existence of the conspiracy charged in
 22 Count One. In other words, the government must prove that

23 there was, in fact, an agreement or understanding to commit at
 24 least one of the substantive crimes charged in the indictment.
 25 Therefore, the first question for you on Count One is: Did the
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1 conspiracy alleged in that count of the indictment exist?
 2 Second, that the defendant knowingly and willfully
 3 became a member of the conspiracy with intent to further its
 4 unlawful purpose; and
 5 Third, that any one of the conspirators -- not
 6 necessarily the defendant, but any one of the parties involved
 7 in the conspiracy -- knowingly committed at least one overt act
 8 in furtherance of the conspiracy during the life of the
 9 conspiracy.

10 Now let us separately consider the three elements:
 11 First, the existence of the conspiracy; second, whether the
 12 defendant knowingly and willfully associated himself with and
 13 participated in the conspiracy with intent to further its
 14 unlawful purpose; and third, whether an overt act was committed
 15 in furtherance of the conspiracy.

16 Starting with the first element, what is a conspiracy?
 17 As I mentioned just a few minutes ago, a conspiracy is an
 18 agreement or an understanding, between two or more persons, to
 19 accomplish by joint action a criminal or unlawful purpose.

20 The gist, or the essence, of the crime of conspiracy
 21 is the unlawful agreement between two or more people to violate
 22 the law. As I mentioned earlier, the ultimate success of the
 23 conspiracy, or the actual commission of the crime that is the
 24 object of the conspiracy, is not required.

25 The conspiracy alleged here is therefore the agreement
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1 to commit the crimes which are alleged to be the objects of the
 2 conspiracy, and it is an entirely distinct and separate offense
 3 from the actual commission of those crimes.

4 Now, to show a conspiracy, the government is not
 5 required to show that two or more people sat around a table and
 6 entered into a solemn pact, orally or in writing, stating that
 7 they had formed a conspiracy to violate the law. Common sense
 8 tells you that when people, in fact, agree to enter into a
 9 criminal conspiracy, much is left to the unexpressed
 10 understanding. It is rare that a conspiracy can be proven by
 11 direct evidence of an explicit agreement.

12 To show that a conspiracy existed, the evidence must
 13 show that two or more persons, in some way or manner, through
 14 any contrivance, explicitly or implicitly, came to an
 15 understanding to violate the law and to accomplish an unlawful
 16 plan.

17 Now, in determining whether there has been an unlawful
 18 agreement as alleged, you may consider acts and the conduct of
 19 the alleged co-conspirators that were done to carry out the
 20 apparent criminal purpose. Often, the only evidence that is
 21 available with respect to the existence of a conspiracy is that
 22 of disconnected acts and conduct on the part of the alleged
 23 individual co-conspirators. When taken all together and
 24 considered as a whole, however, those acts and conduct may
 25 warrant the inference that a conspiracy existed as conclusively

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1 as would direct proof.
 2 So, you must first determine whether or not the proof
 3 established beyond a reasonable doubt the existence of the
 4 conspiracy charged in the indictment. In considering this
 5 first element, you should consider all the evidence which has
 6 been admitted with respect to the conduct and statements of
 7 each alleged co-conspirator and such inferences as may be
 8 reasonably drawn from them. It is sufficient to establish the
 9 existence of the conspiracy, as I have already said, if, from
 10 the proof of all the relevant facts and circumstances, you find
 11 beyond a reasonable doubt that the minds of at least two
 12 alleged co-conspirators met in an understanding way to
 13 accomplish, by the means alleged, at least one object of the
 14 conspiracy.

15 Now, the objects of a conspiracy are the illegal goals
 16 the co-conspirators agree or hope to achieve. As I have
 17 mentioned, the indictment here charges the following objects of
 18 this conspiracy: (i) securities fraud; (ii) making false and
 19 misleading statements in annual and quarterly reports to the
 20 SEC; and (iii) falsifying the books and records of a public
 21 company. I have already described the elements of the first
 22 two of these three objects, securities fraud and the making of
 23 false and misleading statements in annual and quarterly reports
 24 to the SEC, in connection with my instructions on Counts Two
 25 and Three through Nine. I will not repeat those instructions

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1 here. You must bear those elements in mind, however, as you
 2 decide whether the government has proven the existence of the
 3 conspiracy alleged in the indictment.

4 Now, in considering the objects, however, you should
 5 keep in mind that you need not find that the conspirators
 6 agreed to accomplish each one of these objects. An agreement
 7 to accomplish any one of the three objects is sufficient. If
 8 the government fails to prove that at least one of the objects
 9 was an objective of the conspiracy, then you must find the
 10 defendant not guilty of the conspiracy count.

11 However, if you find that the conspirators agreed to
 12 accomplish any one of the three charged objects, the illegal
 13 purpose element will be satisfied.

14 Let me instruct you now on the third alleged object of
 15 the conspiracy, falsifying the books and records of a public
 16 company.

17 The third crime alleged to be an object of the
 18 conspiracy charged in Count One is falsifying or causing the
 19 falsification of the books and records of a public company,
 20 here WorldCom.

21 Federal law mandates that public companies are
 22 required to file documents and reports as prescribed by the
 23 SEC.

(Continued on next page)

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5347EBB2 Charge

1 THE COURT: These include annual reports on form 10K
 2 and quarterly reports on form 10Q. Public companies that are
 3 required to file reports containing financial statements with

4 the SEC must also make and keep books, records and accounts,
5 which in reasonable detail accurately and fairly reflect the
6 transactions and dispositions of the assets of the issuer.

7 Now, federal law also provides that "No person shall
8 directly or indirectly, falsely or cause to be falsified, any
9 book, record or account" that is required to be made or kept.

10 To prove this object the government must show four
11 things.

12 First, the government must show that WorldCom was
13 required to file reports under federal law. I have already
14 instructed you that the parties have stipulated or agreed that
15 WorldCom is a public company, which means that it was required
16 to file documents and reports as prescribed by the SEC. It
17 would also mean that WorldCom was required to make and keep
18 books, records and accounts, which, in reasonable detail,
19 accurately and fairly reflected their financial transactions.

20 The term "records" means "accounts, correspondence,
21 memorandums, tapes, discs, papers, books, and other documents
22 or transcribed information of any type, whether expressed in
23 ordinary or machine language." Such records include, for
24 example, income statements, balance sheets, general ledgers,
25 journals, and account records.

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5347EBB2 Charge

1 Now, second, the government must show that two or more
2 persons agreed that a member of the conspiracy would falsify,
3 or cause another person to falsify, the books, records, or
4 accounts of WorldCom or cause those books, records, or accounts
5 to be falsified.

6 To satisfy this element, the law does not require that
7 a defendant personally make the false entries in the books,
8 records or accounts. It is enough if he causes or directs
9 others to make such false entries. You are also advised that
10 it is permissible for a corporation to make journal entry
11 adjustments in its books and records for earlier financial
12 periods or after the close of a financial quarter as long as
13 those adjustments are not made pursuant to a scheme
14 deliberately designed to distort the financial conditions or
15 operations of the company.

16 Third, the government must prove that such books,
17 records or accounts were of the type that were required to
18 reflect in reasonable detail the transactions and dispositions
19 of the assets of WorldCom.

20 Fourth, the government must prove that the defendant
21 acted knowingly and willfully. Again, the term "knowingly"
22 means to act voluntarily and deliberately, rather than
23 mistakenly or inadvertently. The term "willfully" means to act
24 knowingly and purposely, with an intent to do something that
25 the law forbids, that is to say, with bad purpose either to

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disobey or disregard the law.

1 Just as I instructed you with Count Two and Counts
2 Three through Nine, good faith is a complete defense to this
3 third alleged object of the conspiracy. I have defined good
4 faith for you previously, and you should use that definition
5 here.
6 here.

7 All right. That concludes my description of the third
8 object of Count One of the indictment. Again, you need not

9 find that the conspirators agreed to accomplish all three of
 10 the alleged objects of the conspiracy. An agreement to
 11 accomplish any one of these objects is sufficient. However,
 12 you must all unanimously agree on which specific object the
 13 conspirators agreed to try to accomplish. On the other hand,
 14 if the government fails to prove that at least one of the
 15 objects was an object of the conspiracy, then you must find the
 16 defendant not guilty on the conspiracy count.

17 Now, if you conclude that the government has proven
 18 beyond a reasonable doubt that the conspiracy charged in Count
 19 One existed, then you must next determine the second question:
 20 Whether the defendant participated in the conspiracy with
 21 knowledge of its unlawful purposes, and in furtherance of its
 22 unlawful objects.

23 You are instructed that, while proof of a financial
 24 interest in the outcome of a scheme is not essential, whether
 25 the defendant had such an interest is a factor that you may

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5347EBB2 Charge

1 properly consider in determining whether or not the defendant
 2 was a member of the conspiracy charged in the indictment.

3 Now, the government must prove beyond a reasonable
 4 doubt that the defendant knowingly and willfully entered into
 5 the conspiracy with a criminal intent -- that is, with a
 6 purpose to violate the law -- and that the defendant agreed to
 7 take part in the conspiracy to promote and cooperate in its
 8 unlawful objects. You should consider whether the government
 9 has proven beyond a reasonable doubt that the defendant was a
 10 knowing and willful participant in the conspiracy.

11 The terms "unlawfully," "willfully" and "knowingly"
 12 are intended to ensure that if you find that the defendant did
 13 join the conspiracy, you also conclude beyond a reasonable
 14 doubt that, in doing so, he acted with the requisite criminal
 15 intent as I will now define it for you.

16 "Knowingly" means to act voluntarily and deliberately,
 17 rather than mistakenly or inadvertently.

18 "Willfully" means to act knowingly and purposely, with
 19 an intent to do something that the law forbids, that is to say,
 20 with bad purpose either to disobey or disregard the law.

21 "Unlawfully" simply means contrary to law. The
 22 defendant need not have known that he was breaking any
 23 particular law, but he must have been aware of the generally
 24 unlawful nature of his acts.

25 Now, science has not yet devised a manner of looking

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5347EBB2 Charge

1 into a person's mind and knowing what that person is thinking.
 2 However, you do have before you evidence of certain acts and
 3 conversations alleged to have taken place with the defendant or
 4 in his presence. The government contends that these acts and
 5 conversations show, beyond a reasonable doubt, the defendant's
 6 knowledge of the unlawful purposes of the conspiracy.

7 If you determine that the conspiracy had unlawful
 8 objects, in determining whether the defendant joined the
 9 conspiracy with knowledge of those unlawful objectives, you may
 10 consider whether the defendant deliberately closed his eyes to
 11 what otherwise would have been obvious. The necessary
 12 knowledge however, cannot be established by showing that the
 13 defendant was careless, negligent, or foolish. However, one

14 may not willfully and intentionally remain ignorant of a fact
 15 material and important to his own conduct in order to escape
 16 the consequences of criminal law. If you find beyond a
 17 reasonable doubt that the defendant was aware of a high
 18 probability that any object or objects you have already found
 19 existed -- securities fraud, false or misleading statements in
 20 financial statements, or the falsification of the books and
 21 records of a public company -- but deliberately and consciously
 22 avoided confirming their existence, then you may treat this
 23 deliberate avoidance of positive knowledge as the equivalent of
 24 knowledge, unless you find that the defendant actually believed
 25 that these objects did not exist.

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1 Now, it is not necessary for the government to show
 2 that the defendant was fully informed as to all the details of
 3 the conspiracy in order for you to infer knowledge on his part.
 4 To have guilty knowledge, the defendant need not know the full
 5 extent of the conspiracy, or all of the activities of all of
 6 its participants. It is not even necessary for the defendant
 7 to know every other member of a conspiracy. In fact, the
 8 defendant may know only one other member of a conspiracy and
 9 stilling be a coconspirator. Nor is it necessary for the
 10 defendant to receive any monetary benefit from his
 11 participation in a conspiracy, or have a financial stake in the
 12 outcome. It is enough if he participated in the conspiracy
 13 unlawfully, willfully and knowingly, as I have defined those
 14 terms.

15 Now, the duration and extent of the defendant's
 16 participation in the conspiracy has no bearing on the issue of
 17 his guilt. The defendant need not have joined the conspiracy
 18 at its beginning. He may have joined it any time in its
 19 progress. Each member of a conspiracy may perform separate and
 20 distinct acts. Some conspirators play major roles, while other
 21 conspirators play minor roles in the scheme. An equal role is
 22 not what the law requires. In fact, even a single act may be
 23 sufficient to draw the defendant within the scope of a
 24 conspiracy.

25 However, I want to caution you that a person's mere
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1 association with a member of a conspiracy does not make that
 2 person a member of the conspiracy, even when that association
 3 is coupled with knowledge that a conspiracy is taking place.
 4 Mere presence at the scene of a crime, even coupled with
 5 knowledge that a crime is taking place, is not sufficient to
 6 support a conviction. Similarly, mere association with one or
 7 more members of the conspiracy does not automatically make the
 8 defendant a member. A person may know, or be friendly with, a
 9 member of a conspiracy, without being a conspirator himself.
 10 Mere similarity of conduct or the fact that the individuals may
 11 have assembled together and discussed common aims and interests
 12 does not necessarily establish proof of the existence of a
 13 conspiracy. In other words, knowledge without agreement and
 14 participation is not sufficient. Moreover, the fact that the
 15 acts of a defendant happen to further the purposes or
 16 objectives of a conspiracy does not make the defendant a member
 17 of the conspiracy. What is necessary here is that the
 18 defendant participated in the conspiracy with knowledge of its

19 unlawful purposes, and with an intent to aid in the
20 accomplishment of its unlawful objectives.

21 In sum, the defendant, with an understanding of the
22 unlawful nature of the conspiracy, must have intentionally
23 engaged, advised or assisted in the conspiracy for the purpose
24 of furthering the illegal undertaking. The defendant thereby
25 becomes a knowing and willing participant in the unlawful

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1 agreement -- that is to say, a conspirator.

2 Now, a conspiracy, once formed, is presumed to
3 continue until either its objectives are accomplished or there
4 is some affirmative act of termination by its members. So too,
5 once a person is found to be a member of a conspiracy, he is
6 presumed to continue his membership in the venture until the
7 last act in furtherance of the conspiracy, unless it is shown
8 by some affirmative proof that he withdrew and disassociated
9 himself from it.

10 Now, the third element is the requirement of an overt
11 act. To sustain its burden of proof with respect to the
12 conspiracy charged in the indictment, the government must show
13 beyond a reasonable doubt that at least one overt act was
14 committed in furtherance of that conspiracy by at least one of
15 the coconspirators -- not necessarily the defendant.

16 The purpose of the overt act requirement is clear.
17 There must have been something more than mere agreement; some
18 overt step or action must have been taken by at least one of
19 the conspirators in furtherance of that conspiracy.

20 The alleged overt acts in this case are set forth in
21 the indictment, and as I indicated earlier, you will be
22 provided with a copy of the indictment.

23 Now, for the government to satisfy the overt act
24 requirement, it is not necessary for the government to prove
25 all of the overt acts alleged in the indictment. Nor must you

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1 find that the defendant committed the overt acts alleged. It
2 is sufficient for the government to show that one of the
3 alleged coconspirators knowingly committed an overt act in
4 furtherance of the conspiracy.

5 The overt act element is a requirement that the
6 agreement went beyond the mere talking stage, the mere
7 agreement stage. The requirement of an overt act is a
8 requirement that some action be taken during the life of the
9 conspiracy by one of the coconspirators to further that
10 conspiracy.

11 Let me also instruct you that the overt act need not
12 have been committed at precisely the time alleged in the
13 indictment. It is sufficient if you are convinced beyond a
14 reasonable doubt that it occurred at or about the time and
15 place stated, as long as it occurred while the conspiracy was
16 still in existence.

17 And you should keep in mind that the overt act,
18 standing alone, may be an innocent, lawful act. An apparently
19 innocent act sheds its harmless character if it is a step in
20 carrying out, promoting, aiding or assisting the conspiratorial
21 scheme. You are therefore instructed that the overt act does
22 not have to be an act which in and of itself is criminal or
23 constitutes an object of the conspiracy.

24 Now, the indictment statements that the conspiracy
25 charged in Count One existed from in or about September 2000
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1 through in or about June 2002. It is not essential that the
2 government prove that the conspiracy started and ended on any
3 specific dates. Indeed, it is sufficient if you find that the
4 conspiracy was formed and existed for some time around the
5 dates set forth in the indictment, and that at least one overt
6 act was committed in furtherance of the charged conspiracy
7 within that period.

8 Ladies and gentlemen, I am now going to instruct you
9 on aiding and abetting. With respect to each of the eight
10 substantive counts, there are two other ways the government may
11 establish guilt. One way is called "aiding and abetting," and
12 the other is called "willfully causing a crime." That is, in
13 each of Counts Two through Nine, the defendant is charged not
14 only as a principal who committed the crimes, but as aider and
15 abettor or with having willfully caused the crime. Now, the
16 aiding and abetting statute, which is Title 18, United States
17 Code, Section 2, reads as follows:

18 "Who commits an offense against the United States or
19 aids or abets or counsels, commands or induces, or procures its
20 commission, is punishable as a principal."

21 Under the aiding and abetting statute, it is not
22 necessary for the government to show that a defendant himself
23 physically committed the crime with which the defendant is
24 charged in order for you to find that defendant guilty. Thus,
25 if you do not find beyond a reasonable doubt that the defendant

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1 himself committed the crime charged, you may, under certain
2 circumstances, still find the defendant guilty of that crime as
3 an aider or abettor.

4 Now, a person who aids or abets another to commit an
5 offense is just as guilty of that offense as if he committed it
6 himself. Accordingly, you may find the defendant guilty of the
7 substantive crime if you find beyond a reasonable doubt that
8 the government has proved that another person actually
9 committed the crime, and that the defendant aided and abetted
10 that person in the commission of the crime.

11 As you can see, the first requirement is that another
12 person has committed the crime charged. Obviously, no one can
13 be convicted of aiding and abetting the criminal acts of
14 another if no crime was committed by the other person in the
15 first place. But if you do find that a crime was committed,
16 then you must consider whether the defendant aided or abetted
17 the commission of the crime.

18 Now, to aid or abet another to commit a crime, it is
19 necessary that the defendant willfully and knowingly associate
20 himself in some way with the crime, and that the defendant
21 willfully and knowingly seek by some act to help make the crime
22 succeed.

23 Participation in a crime is willful if action is taken
24 voluntarily and intentionally, or, in the case of a failure to
25 act, with the specific intent to fail to do something the law

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1 requires to be done; that is to say, with a bad purpose either
2 to disobey or to disregard the law.

3 Now, the mere presence of a defendant where a crime is
4 being committed, even coupled with knowledge by the defendant
5 that a crime is being committed, or the mere acquiescence by a
6 defendant in the criminal conduct of others, even with guilty
7 knowledge, is not sufficient to establish aiding and abetting.
8 An aider or abettor must have some interest in the criminal
9 venture.

10 To determine whether the defendant aided or abetted
11 the commission of the crime with which the defendant is
12 charged, ask yourselves these questions:

13 Did the defendant participate in the crime charged as
14 something the defendant wished to bring about? Did the
15 defendant associate himself with the criminal venture knowingly
16 and willfully? Did the defendant seek by his actions to make
17 the criminal venture succeed?

18 If the defendant did, then the defendant is an aider
19 and abettor, and therefore guilty as an aider and abettor of
20 the offense. If the defendant did not, then the defendant is
21 not an aider and abettor, and is not guilty as an aider and
22 abettor of that offense.

23 Now, the other potential means for establishing the
24 defendant's guilt on Counts Two through Nine is through a
25 finding beyond a reasonable doubt that the defendant willfully

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1 caused a crime. Section 2(b) of the aiding and abetting
2 statute, which relates to willfully causing a crime, reads as
3 follows:

4 "Whoever willfully causes an act to be done which if
5 directly performed by him or another would be an offense
6 against the United States shall be guilty of a federal crime."
7 What does the term "willfully caused" mean? It means
8 that the defendant himself need not have physically committed
9 the crime or supervised or participated in the actual criminal
10 conduct charged in the indictment.

11 The meaning of the term "willfully caused" can be
12 found in the answers to the following questions:

13 First, did the defendant take some action without
14 which the crime would not have occurred?

15 Second, did the defendant intend that the crime would
16 be actually committed by others?

17 If you are persuaded beyond a reasonable doubt that
18 the answer to both of these questions is "yes" then the
19 defendant is guilty of the crime charged just as if the
20 defendant himself had actually committed it.

21 Now, I want to talk about venue. In addition to all
22 of the elements I have described for you in the indictment, you
23 must also decide whether any act in furtherance of the crimes
24 occurred within the Southern District of New York. This means
25 that, with regard to each count, you must decide whether the

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1 unlawful agreement, or any act committed to further or promote
2 the scheme, occurred within the Southern District of New York.
3 In this regard, I instruct you that Manhattan is in the
4 Southern District of New York.

5 Now, I should note that on this issue -- and only this
6 issue, this issue alone -- the government need not prove venue
7 beyond a reasonable doubt, but only by a mere preponderance of
8 the evidence. Thus, the government has satisfied its venue
9 obligations if you conclude that it is more likely than not
10 that any act in furtherance of the crimes charged occurred in
11 the Southern District of New York.

12 If you find that the government has failed to prove
13 this venue requirement by a preponderance of the evidence, then
14 you must acquit the defendant of the charge that you are
15 considering.

16 All right. Scott Sullivan, David Myers, Betty Vinson
17 and Troy Normand testified pursuant to cooperation agreements
18 with the government after they pled guilty to charges arising
19 out of the same facts as this case. These witnesses testified
20 that they were actually involved in carrying out aspects of the
21 crimes charged in the indictment. There has been a great deal
22 said about these so-called accomplice witnesses in the
23 summations of counsel and whether or not you should believe
24 them.

25 Experience will tell you that the government
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1 frequently must rely on the testimony of witnesses who admit
2 participating in the alleged crimes at issue. The government
3 must take its witnesses as it finds them and frequently must
4 use such testimony in a criminal prosecution because otherwise
5 it would be difficult or impossible to detect and prosecute
6 wrongdoers.

7 The testimony of such accomplices is properly
8 considered by you the jury. If accomplices could not be used,
9 there would be many cases in which there was real guilt and
10 conviction should be had, but in which convictions would be
11 unobtainable.

12 For these very reasons, the law allows the use of
13 accomplice testimony. Indeed, it is the law in federal courts
14 that the testimony of an accomplice may be enough in and of
15 itself for conviction, if the jury believes that the testimony
16 establishes guilt beyond a reasonable doubt.

17 However, because of the possible interest an
18 accomplice may have in testifying, the accomplice's testimony
19 should be scrutinized with special care and caution.

20 The fact that a witness is an accomplice can be
21 considered by you as bearing upon his his or her credibility.
22 However, it does not follow that simply because a person has
23 admitted to participating in one or more crimes, that he or she
24 is incapable of giving a truthful version of what happened.

25 Like the testimony of any other witness, accomplice
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1 witness testimony should be given such weight as it deserves in
2 light of the facts and circumstances before you, taking into
3 account the witness's demeanor, candor, the strength and
4 accuracy of a witness's recollection, his or her background,
5 and the extent to which his or her testimony is or is not
6 corroborated by other evidence in the case.

7 You may consider whether the accomplice witness --
8 like any other witness called in this case -- has an interest
9 in the outcome of the case, and, if so, whether it has affected

10 his or her testimony.

11 Now, in evaluating the testimony of an accomplice
12 witness, you should ask yourselves whether this accomplice
13 would benefit more by lying, or by telling the truth. Was his
14 or her testimony made up in any way because he or she believed
15 or hoped that he or she would somehow receive favorable
16 treatment by testifying falsely? Or did he or she believe that
17 their interests would be served by testifying truthfully? If
18 you believe that the witness was motivated by hopes of personal
19 gain, was the motivation one which would cause him or her to
20 lie, or was it one which would cause him or her to tell the
21 truth? Did this motivation color his or her testimony?

22 If you find that the testimony was false, you should
23 reject it. However, if, after a cautious and careful
24 examination of the accomplice witness's testimony and demeanor
25 upon the witness stand, you are satisfied that the witness told

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1 the truth, you should accept it as credible and act upon it
2 accordingly.

3 As with any witness, let me emphasize that the issue
4 of credibility need not be decided in an all-or-nothing
5 fashion. Even if you find that a witness testified falsely in
6 one part, you still may accept his or her testimony in other
7 parts, or may disregard all of it. That is a determination
8 entirely for you, the jury.

9 Now, I'm also instructing you that you are to draw no
10 conclusions or inferences of any kind about the guilt of the
11 defendant, Mr. Ebbers, from the fact that Scott Sullivan, David
12 Myers, Betty Vinson and Troy Normand pled guilty to similar
13 charges. Each witness's decision to plead guilty was a
14 personal decision about his or her own guilt. It may not be
15 used by you in any way as evidence against or unfavorable to
16 the defendant.

17 Now, with respect to Mark Abide and Lisa Taranto, you
18 heard testimony that in exchange for their testimony, the
19 government promised them that they will not be prosecuted for
20 any crimes that they may have admitted here in court or in
21 interviews with the prosecutors.

22 The government is permitted to make these kinds of
23 promises and is entitled to call as witnesses people to whom
24 these promises are given. You may convict a defendant on the
25 basis of such a witness's testimony alone, if you find that his

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1 or her testimony proves the defendant guilty beyond a
2 reasonable doubt.

3 However, the testimony of a witness who has been
4 promised that he or she will not be prosecuted should be
5 scrutinized by you with great care and you should act upon it
6 with caution. If you believe it to be true, and decide to
7 accept the testimony, you may give it such weight, if any, as
8 you believe it deserves.

9 Now, you have heard evidence during the trial, ladies
10 and gentlemen, that witnesses have discussed the facts of the
11 case and their testimony with their lawyers before the
12 witnesses appeared in court.

13 Although you may consider that fact when you are
14 evaluating a witness's credibility, I should tell you that

15 there is nothing either unusual or improper about a witness
 16 meeting with lawyers before testifying so that the witness can
 17 be aware of the subjects he or she will be questioned about,
 18 focus on those subjects, and have the opportunity to review
 19 relevant exhibits before being questioned about them.

20 Again, the weight you give to the fact or the nature
 21 of the witness's preparation for his or her testimony and what
 22 inferences you draw from such preparation are matters
 23 completely within your discretion.

24 Now, in a criminal case, a defendant cannot be
 25 required to testify, but, if he chooses to testify, he is, of

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1 course, permitted to take the witness stand on his own behalf.
 2 In this case, the defendant, Bernard J. Ebbers, has testified.
 3 The fact that the defendant has testified does not alter in any
 4 way the government's burden of proof in this case. Obviously,
 5 the defendant has a personal interest as a result of his
 6 prosecution. In appraising the defendant's credibility, you
 7 may take that into account. It by no means follows, however,
 8 simply because a person has an interest in the end result, that
 9 he is not capable of telling a truthful and straightforward
 10 story. Accordingly, you should not disregard or disbelieve his
 11 testimony simply because he is charged as a defendant in this
 12 case. Again, it is for you to decide to what extent, if at
 13 all, the defendant's interests have affected or colored his
 14 testimony.

15 Now, you have heard evidence that the defendant
 16 received information that outside auditors retained by WorldCom
 17 issued annual audit opinions approving WorldCom's reported
 18 financial statements or otherwise approved the accounting
 19 policies at WorldCom based on the information the outside
 20 auditors had received from WorldCom. The defendant contends
 21 that such evidence supports his contention that he acted in
 22 good faith.

23 In determining whether the involvement of these
 24 professional advisors is evidence of good faith, you should
 25 consider the following. The mere fact that a defendant may

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1 have been aware of the involvement of outside auditors does
 2 not, in itself, constitute good faith. You should consider
 3 whether the defendant received and honestly relied on any
 4 information communicated by the outside auditors believing that
 5 the auditors opinions were correct. If he did so, you may
 6 consider that as evidence of good faith. On the other hand, no
 7 one can willfully and knowingly violate the law and excuse
 8 himself from the consequences of his conduct merely by pleading
 9 that auditors were involved.

10 Whether the defendant acted in good faith, whether he
 11 or others made full and complete reports to WorldCom's outside
 12 auditors, and whether the involvement of these auditors
 13 demonstrates good faith are questions for you to determine.

14 Now, both the government and the defendant have the
 15 same power to subpoena witnesses to testify on their behalf.
 16 If a potential witness could have been called by the government
 17 or by the defendant and neither called the witness, then you
 18 may draw the conclusion that the testimony of the absent
 19 witness might have been unfavorable to the government or to the

20 defendant or to both.
21 On the other hand, it is equally within your province
22 to draw no inference at all from the failure of either side to
23 call a witness.

24 You should remember that there is no duty on either
25 side to call a witness whose testimony would be merely

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1 cumulative of testimony already in evidence, or who would
2 merely provide additional testimony to facts already in
3 evidence.

4 If you conclude that other persons may have been
5 involved in criminal acts charged in the indictment, you may
6 not draw any inference, favorable or unfavorable, toward the
7 government or the defendant, from the fact that such persons
8 were not named as defendants in the indictment. Whether a
9 person should be named as a coconspirator or indicted as a
10 defendant is a matter within the sole discretion of the United
11 States attorney and the grand jury. Therefore, you may not
12 consider it in any way in reaching your verdict as to the
13 defendant Mr. Ebbers. Your task is limited to considering the
14 charges contained in the indictment against him.

15 Now, certain stipulations have been entered into by
16 the parties and have been reported to you. A stipulation is --
17 and I am sure you know this, but I will tell you again
18 anyway -- is an agreement between the government and the
19 defendant that a certain fact is true or that a certain
20 witness, if called, would have given certain testimony. Each
21 of these stipulations is the equivalent for your purposes of
22 the presentation of evidence or live testimony to the same
23 effect. You should regard such agreed facts as true, and
24 accept that the witness would have given that testimony.
25 However, it is for you to determine the effect to be given

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1 those facts or that testimony.
2 Now, there have been a few summary charts and exhibits
3 introduced in this case. These charts and exhibits were
4 introduced merely as a summary and analysis of testimony and
5 documents in the case. The charts and exhibits are here to act
6 as visual aids for you. They are not, however, evidence in
7 themselves. They are graphic demonstrations of underlying
8 evidence. It's the underlying evidence and the weight which
9 you attribute to it that gives value and significance to these
10 charts. To the extent that the charts conform to what you
11 determine the underlying fact to be, you should accept them.
12 To the extent that the charts differ from what you determine
13 the underlying evidence to be, you may reject them.

14 All right, ladies and gentlemen, you are about to go
15 into the jury room and begin your deliberations. It's your
16 duty as jurors to consult with one another and to deliberate
17 with a view to reaching an agreement. You must each decide the
18 case for yourself, but you should do so only after discussing
19 the case with your fellow jurors, and you should not hesitate
20 to change an opinion when convinced that it is wrong. Your
21 decision must be unanimous, but you are not bound to surrender
22 your honest beliefs concerning the effect or weight of the
23 evidence for the mere purpose of returning a verdict or solely
24 because of the opinion of other jurors. Discuss and weigh your

1 the verdict, which will be announced here in open court. Once
2 your verdict is announced by your foreperson in open court and
3 officially recorded, it cannot ordinarily be revoked.

4 Now, lastly, nothing that I've said in these jury
5 instructions and nothing in the verdict form that's been
6 prepared for your convenience is meant to suggest or convey in
7 any way or manner any hint as to what verdict I think you
8 should find. What the verdict shall be is your sole and
9 exclusive duty and responsibility.

10 All right. That completes my instructions of law.
11 For one final time I'm going to see the lawyers at the sidebar,
12 and then I will permit you to begin your deliberations.

13 (Continued on next page)
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5347EBB2 Charge

1 (At the sidebar)
2 THE COURT: I'm going to excuse the two alternates but
3 ask them not to discuss the case, to avoid any news reports and
4 to remain on stand-by, lest anything should occur with a
5 deliberating juror. One of them has already asked that she be
6 apprised of when the verdict is coming in because she would
7 like to be here. Naturally we will keep in touch with them.

8 You obviously have all of your objections from before
9 on the record, but did I misspeak or is there any instruction
10 you need?

11 MR. HEBERLIG: No. I just want to make it perfectly
12 clear for the record that all of the previous objections we
13 raised in prior conferences we continue to maintain.

14 THE COURT: Yes, absolutely, you have that. OK.
15 Unless there is anything else, then we are going to proceed.

16 MR. ANDERS: Nothing from the government.

17 (Continued on next page)
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1 (In open court)
2 THE COURT: All right. At this point in time I'm
3 going to excuse our two alternates, Ms. Marchant and Ms.
4 Villamil-Ballard. I have some important instructions for you
5 though. Essentially I would like you to remain on stand-by. I

6 am certain that there will be no problems or issues, but if a
 7 deliberating juror is unable to continue deliberating, then the
 8 law permits that an alternate can be put on a deliberating
 9 jury. I don't expect this will happen, but I need you to not
 10 discuss the case and to avoid any reports, news reports or
 11 otherwise, that may be out there, and essentially to be on
 12 stand-by. You don't have to come to the courthouse. You can
 13 go about your daily life, but we will need to know where to
 14 reach you in case we need to substitute you for a deliberating
 15 juror.

16 So with that understanding you are excused. And,
 17 again, I am instructing you not to discuss the case with
 18 anyone, and I expect that no one will make any efforts to
 19 interview you or talk to you, since you are on stand-by and
 20 there is some possibility you might become a deliberating
 21 juror.

22 As soon as the verdict is in, you will be notified
 23 immediately, and then you won't have to follow those
 24 instructions anymore. My thanks, and you are both excused now.
 25 You may want to go to the jury room, I suppose and get your

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1 things. Would you also make sure that we have a way to reach
 2 you. I think we have your numbers, but just in case.
 3 All right. Would you swear in the marshal, please.
 4 (Marshal sworn)
 5 THE COURT: All right. Then if you would provide the
 6 foreperson with the indictment and the verdict form.
 7 Ladies and gentlemen, you may begin your
 8 deliberations. Let me instruct you with a couple of final
 9 things.

10 You can set your own time now. I think normal times
 11 that we have used as a good example is 9:30 to 4:30 or 5, but
 12 it's up to you how long you wish to deliberate.

13 If you decide you need to take a break, please
 14 remember this: Never deliberate unless all 12 of you are
 15 present. If one or two people need to take a break, just stop
 16 deliberating, everybody take a break, and then you may resume
 17 when all 12 of you are together.

18 Let us know when you intend to leave at the end of the
 19 day and when you intend to come back the next morning, because
 20 it's important that we know when you are deliberating so that
 21 we are here and can respond to any requests. And in the
 22 morning, particularly, please do not begin your deliberations
 23 until all 12 of you are present. OK? Thank you very much.

24 (Jury retires to deliberate at 11:17 a.m.)

25 THE COURT: Typically there are notes in the first
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1 hour or so, so I would appreciate it if counsel would remain in
 2 the courtroom at least for that period of time. After that, I
 3 would like at least one lawyer for each party to be here so
 4 that we can get ahold of everyone quickly. OK? And I would
 5 like to see counsel in the robing room briefly.

6 (Discussion held off the record in the robing room)
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