July 15, 2005

More on the Enron Broadband trial closing arguments

EBS21.jpg

Following on **this post** from earlier this week on the closing arguments in the Enron Broadband trial, a Clear Thinkers reader offered the comments below on the closing arguments, a transcript of which is downloadable **here** (the pdf file is bookmarked in Adobe Acrobat for each morning and afternoon session of the arguments).

Inasmuch as the author of the following comment actually attended the closing arguments (I did not), the author's account is different -- and likely far more accurate -- than mine:

> The trial may have been a snoozer, but the closing arguments were not -- everything but [Prosecutor Ben] Campbell's arguments, that is.
>
> From watching the jury, about three of the fourteen were even looking at Campbell during his three hour argument, which included such "zinger" lines as: "I'm from Iowa, and I didn't just fall of the turnip truck, and neither did you," and "As Jerry Maguire said, 'Show me the money!'" That's right, he referenced Jerry Maguire.
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> Defense attorneys had a better time holding the jury's attention, Dave Angeli through power-points and videos, and Tony Canales through colorful analogy and talking directly to the jury. At the end of both attorneys' arguments, the jury was intent and leaning forward. After Mr. Canales's, half the jurors -- and all of the defendants' families and friends -- were in tears. At some point Canales retorted, "Show me the money? How about show me the evidence!" He also showed the indictment to the jury (though the government filed a motion to keep it away from the jury) which, if you read it, is all about the Shelby BOS video, which was never shown. He then said, in reference to the supposedly damning Collins lipstick email, "you can put all the lipstick you want on this indictment, it isn't going away." If at this point the jury just wants relief from the drudgery of the trial, they got their wish from the defense.
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> It's interesting, however, that you think the prosecution laid off of the Braveheart group, because both Campbell and [Prosecutor Cliff] Stricklin spent over half their time talking about them. This is a stark contrast from the one-tenth of the time spent on them during the actual trial. If Campbell and Stricklin laid off of anyone, it was actually Shelby and Yeager. Yeager was hardly mentioned in Champbell's argument, and both he and Shelby were mentioned for ninety seconds each during Stricklin's argument. My impression of the end was that they are cutting their losses and going after Hirko for insider trading (the conspiracy theory has pretty much fallen flat) and after Kraus and Howard.
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> Though the Braveheart deal is ridiculously confusing, those defendents might be in trouble. It is tough for the government to prove an "oral side deal" because the accountants and experts say it was completely in compliance with accounting rules *and* what the contract said was exactly what happened (there was never a third party buyout, the money was lost, etc.). Yet because it is so confusing, the defense has not been able to explain clearly to the jury exactly what happened. Not even closing arguments brought clear explanation. The Braveheart case might keep the jury out for a while.

> Last, (and I'm clearly showing my bias here), I like what I'm hearing about the prosecutors' tactics. Though I see the need for anti-mafia laws that make prosecuting organized crime easier, I don't agree those tactics should be used for white-collar crime. Our government has turned into a brute squad. They sent five guys to bang on Beth Steir's door on Friday night after the Shelby II debacle, and made her cry on the stand. Why? They said she lied to the government by not giving them the correct tapes.
>
> In reality, the FBI had the raw footage from her for six months and never watched it. Canales said yesterday, "doesn't the 'I' in FBI stand for 'investigation'?" The defense got the raw footage from the government - not Beth Steir. Also, The government called Larry Ciscon three times the night before he testified to remind him he was a target.
>
> Even worse, the government destroyed the evidence in this case, namely, the software and the servers. They went to the POPs and scrapped the servers and sold them off. Arthur Anderson gets dismantled for destroying backup copies of non-critical documents. The American government destroys evidence and three years of a defendent's life goes down the drain. This is our America . . . with liberty and justice for all.
>
> I know I'm running the risk of sounding inflammatory, but this whole case has been an abuse of power. Campbell said that money corrupts. I say power corrupts, and the abolute power of an Enron Task Force backed by millions of tax dollars, Rico, and the Patriot Act, has corrupted them absolutely.

Update: Dave, the Clear Thinkers reader who wrote the above account of the closing arguments in the Broadband trial, makes an interesting further comment below about the probable genesis of the Task Force prosecution's closing argument in the Broadband trial -- former Enron Task Force prosecutor's **John Kroger**'s law review article, *Enron, Fraud and Securities Reform: An Enron Prosecutor's Perspective*.

As noted in **this previous post**, one of the most outrageous aspects of the government's investigation of Enron has been the Enron Task Force's misguided demonization of many of Enron's perfectly legitimate structured finance transactions. As Dave notes, this criminalization of structured finance has been the product of decisions of people such as Kroger who have no background or specialized knowledge regarding structured finance. Moreover the Task Force did not bother to obtain expert guidance on those transactions before making the decision to criminalize them. The misguided nature of the Enron Task Force criminalization of many of Enron's valid structured finance transactions has already been well-chronicled by University of Chicago structured finance expert **Christopher Culp** and others in two recent books, **Corporate Aftershock** (Cato 2003) and **Risk Transfer** (Wiley 2004).

Thus, the Enron Task Force's mischaracterization during the Enron Broadband trial of the Braveheart transaction -- a standard structured finance transaction that had no criminal intent or purpose -- is simply another outrage by a Task Force that is quickly becoming synonomous with prosecutorial misconduct.

Posted by Tom at July 15, 2005 9:43 AM |

Comments

I've made a discovery about why, possibly, the prosecution has pushed so hard for conviction on the Braveheart deal in their closing. If you read John Kroger's Law Review article "Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective," you'll see from where the Enron Task Force got their unalterable paradigm through which they have been seeing this monetization. It makes it clear why they think they can - and indeed must - convict these accountants of fraud.

First, some background. John Kroger is the federal prosecutor who headed the Prosecution team for EBS while they were trying to throw together the indictment. He was on the team for two weeks before he decided to indict the EBS execs. He talked to two people - Shawna Meyer and Bill Collins (both were impeached, both gave testimonies contradicting videos or emails made in '99-'00)- , he showed them the Shelby II video and reminded them of their stock sales after the analysts' conference. Nor surprisingly, on the stand for the government they said nothing at EBS was working (all this is verifiable from their FBI 302 forms). Where did he get those tactics? He made his career prosecuting mafiosos. From his bio: "Kroger successfully prosecuted over one hundred federal criminal cases involving the mafia, violent gangs, public corruption, and narcotics trafficking." This is the man they get to bring Internet Executives to justice.

Kroger's belief on how Enron collapsed is the lynch-pin in this case. He believes Enron fell because of the bunk monetizations that

were secured with "oral side deals." Why is this bad? Because Enron gets to count loans as income. This inflates the profit they report to analysts, which gives a false view of the company's profitability. When all of this became public, Enron collapsed, in Kroger's view.

Now, back to Braveheart. On the surface, this deal fits perfectly with Kroger's paradigm. It is a monetization of a deal with Blockbuster that never turned a profit, and the Enron contact-person says there was an oral side deal to buy them out in the first quarter of '01. Since Big Enron (Energy) has been doing these deals, then probably little Enron (EBS) was doing them too. Therefore, he can reasonably conclude that the Braveheart deal was actually a loan misreported to the SEC as income.

But wait. EBS never bought out the deal. The investor lost their money, just like in a real investment. Kroger says the money was never at risk, but they lost the money. Plus, the company was spending millions to make the Blockbuster deal work, even to the detriment of the rest of the company. But worst of all, it turns out Kroger told Louie Fischer, the contact person, that she'll be deported to Germany unless she testifies that there was an oral side deal.

Kroger may be right that Big Enron made tons of these deals, and the Task Force probably hopes to prosecute the many other accountants for those deals. Obviously, they want a conviction on Braveheart, the first of the supposedly bunk monetizations with oral side deals. If they get an acquittal, they'll lose momentum going into Skilling and Lay, and have a worse chance of getting convictions on the Big Enron deals.

Reading Kroger's law review article gave me a pretty clear picture of why Ben Campbell and Cliff Stricklin shifted tactics for their closing. They need Braveheart to go down. And, in the style of mafioso giant-killer John Kroger, they're willing to go over any fences to get it, even if it means cutting down men like Mike Krautz, who spent months working minimum wage in a dry cleaner's so he can pay for his legal fees.

Posted by: david at July 16, 2005 10:30 AM

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