

Latham's Sean Berkowitz Talks Shop About a Rare Criminal Bench Trial Win for a Former CEO Facing Fraud Charges

A decade-and-a-half after he led the prosecution of Enron executives, Berkowitz last week won the acquittal of the former CEO of Power Solutions International Inc. after a four-week federal bench trial in Chicago this summer.

By Ross Todd
September 29, 2021

When Sean Berkowitz calls something he worked on “a career-type case,” you sit up and listen.

This is the same guy, after all, who led a team of federal prosecutors in the 2006 trial that resulted in the fraud and conspiracy convictions of former Enron chairman Kenneth Lay and ex-CEO Jeffrey Skilling.

Definitely a career-type case.

This summer, more than a decade-and-a-half after the Enron trial, Berkowitz, now the global chair of the complex commercial litigation practice at **Latham & Watkins**, found himself leading the defense in another rare trial involving a CEO facing fraud and conspiracy charges. Berkowitz and company represented Gary Winemaster, the former CEO and founder of engine and power system maker Power Solutions International Inc., in a four-week criminal bench trial in front of U.S. District Judge Robert Gettleman in Chicago. The judge last week issued **a full acquittal** to Winemaster and his codefendants, PSI general managers Craig Davis and James Needham, represented by counsel at Burke, Burns & Pinelli and McGuireWoods, respectively.

It's that result that prompted Berkowitz's “career-type case” remark when the Litigation Daily caught up with him earlier this week.

Granted, the COVID-era bench trial didn't cut nearly the same national profile as the Enron jury trial in Houston. But the stakes were similar for Winemaster, who faced **14 charges** of conspiracy and fraud, and his codefendants. PSI had entered into **a non-prosecution agreement** with the Justice Department last year and consented to pay **a \$1.7 million civil penalty** to the SEC based on allegations that the three codefendants engaged in a scheme to use side deals, early deliveries of unordered items to customers, and early booking of future sales to artificially boost revenues to meet market projections.

“We had a number of hands tied behind our back,” Berkowitz said. “We had a company that essentially had given up and acknowledged wrongdoing based on the same facts that the government was going to be using to prosecute our clients.”

Lawyers at Sidley Austin represented the company in the non-prosecution agreement. **Vedder Price** represented the company in the SEC settlement,



Sean Berkowitz, the global chair of the complex commercial litigation practice at Latham & Watkins.

Courtesy photo

and the firm previously known as Drinker Biddle & Reath represented the company's audit committee in an independent investigation. Government witnesses were represented by those same firms.

"Their interests weren't necessarily aligned with ours," Berkowitz said.

But unlike in the Enron case where the government called at least half a dozen people who pleaded guilty to testify they committed wrongdoing alongside Lay and Skilling, there were no guilty pleas in the PSI case.

Berkowitz highlighted that point with the government's first witness, Mark Doebler, a PSI sales engineer who was among the unindicted alleged conspirators. After Berkowitz greeted Doebler and asked him how he was doing, Doebler said "Nervous."

"Okay. Are you nervous because you committed a crime?" Berkowitz asked.

"No," Doebler said.

"Did you commit a crime, sir?" Berkowitz asked again, for good measure, eliciting another "no" from the government's lead witness.

"In most cases you have an insider who says 'I committed a crime' and 'I did it with him' or 'I did it with her,'" Berkowitz said. "Here, nobody was saying that they individually had committed a crime."

The defense made the case that Winemaster and his codefendants were making legitimate deals with customers to keep them and the company afloat during a downturn in the oil and gas market. Much of the company's growth in the middle of the past decade was driven by the company's innovative generators which were fueled by flare gas produced as a by-product at well-heads, the defense lawyers contended. Winemaster, they said, was making legitimate moves based on a genuine belief that the oil and gas market would make a comeback.

The defense closed their case this summer with Winemaster himself taking the stand. "We had a very strong-willed client. He believed he didn't do anything

wrong and wanted to tell his story. And we believed in him," Berkowitz, who handled Winemaster's direct examination. He said his client admitted when he didn't have a perfect memory of events that happened five years ago. But Winemaster did take issue on a couple occasions when other witnesses testified about specific conversations they had with him. "He felt it important to answer those in certain instances saying 'Look, I don't remember that conversation, but what I can tell you is I would never have said x, because I never did x.' Which was much more believable than saying 'I have a specific recollection. Here's exactly what I said,'" Berkowitz said.

Berkowitz and his team also pointed out the company actually downgraded its earnings guidance twice during the time of the alleged conspiracy, including one time when it missed even the lowered estimates. Winemaster didn't sell any stock during the time, and, in fact, had used half his \$500,000 salary one year to buy more stock.

"When you step back and look at it, it didn't make a lot of sense for the CEO, who was the single largest shareholder of the company at the time, to artificially inflate the price of the stock and then buy more, and not sell any," Berkowitz said.

Six Latham lawyers, Berkowitz, partners **John Sikora**, **Eric Swibel** and **Heather Waller** and associates **Jack McNeily** and **Adam Rosenbloom**, cross-examined government witnesses at trial. Associates **Kirsten Lee**, **Linda Qiu** and **Sydney Black** put in regular 16 hour days during trial helping out the in-court trial team.

"We spent a tremendous amount of time and energy working on this both because we were his lawyers, but also because everybody believed in him," Berkowitz said. "All of these cases are huge risk situations where you're putting your faith in your ability to elicit the truth. I still believe our system of cross-examination is the best vehicle for getting to the bottom of truth and I think that played out well in this case."