IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

STATUS REPORT
RELATING TO DISCOVERY FOR 2/8/07 HEARING

Defendant Joseph P. Nacchio, by and through undersigned counsel, sets forth the following report to identify continuing discovery issues as this case progresses toward trial.

I. NON-CIPA BRADY ISSUES

A. Recent Developments

1. During the January 12, 2007 Status Conference, counsel for Mr. Nacchio expressed concern that the government was not honoring its *Brady* and *Giglio* obligations. In response, the government stated, "as soon as we get *Brady* and *Giglio* material, we'll turn it over to the defense." 1/12/07 Tr. At 4. When specifically asked by the Court, "is it the Government's representation that you have turned over all the

Giglio, Brady material that's in the possession, custody or control of the Government," the government replied, "Yes, sir." *Id*.

2. On January 25, 2007, Mr. Nacchio filed Defendant's Status Report and Motion Relating to Discovery [Doc. 213], which *inter alia* alerted the Court to his concern that, despite the government's representation, reports of interviews -- which the defense believed contained *Brady* material -- were not being seasonably produced as trial approaches.

3. Later in the evening of January 25, we received disclosures in the form of two witness interviews: follow up interviews of both Nicole Bonsness and Afshin Mohebbi. These interviews were conducted on *November 17*, 2006 and *December 6*, 2006, respectively, and were transcribed November 27, 2006, and December 22, 2006, respectively. In other words, both interviews had been transcribed *well before* the government's January 12, 2007 representation in open Court that all *Brady* material had been turned over, yet they were not produced to Mr. Nacchio for *another 13 days*, on the very eve of the next Status Conference.

4. At the Status Conference the following day, January 26, 2007, defense counsel explained how at least one of these interviews is clear *Brady* material, and how a delay of up to two (2) months in production could render any such *Brady* material meaningless in a constitutional sense. The Court, having been told of these dates in relation to the date of production, concluded that the delay was "too long," and asked the government to turn around *Brady* interviews within 48 hours of the date of

transcription. 1/26/07 Tr. at 5-6, 9. The attorney for the government, while disputing that either report was *Brady*, agreed the delay was too long, and agreed to the quicker turnaround expected by the Court. *Id.* at 6, 10.

5. The defense also expressed concern over the government's apparently narrow view of *Brady*, and the Court further observed:

> As I've said before, the Government has to make the initial determination of what is *Brady*. And without getting into it, it's clear to me from what Mr. Richilano said and what you said, Mr. Stricklin, that there is maybe a different view as to what constitutes *Brady* material.
>
> The Government, I think, needs to err on the side of caution, because what inevitably happens is somebody comes back later on and begins to look at those decisions with the benefit of hindsight, and the government can get itself in trouble.

1/26/07 Tr. at 9.

B. <u>The Government's Impermissibly Narrow View of *Brady*</u>

6. The government's narrow view of *Brady*, as well as timely production, remain a concern. Counsel for Mr. Nacchio explained in open court how the Bonsness interview was *Brady* as it relates to the first two counts of the indictment. 1/26/07 Tr. at 4-5. Our concern is heightened by the receipt, on February 2, 2007, of four (4) additional witness interviews, each of which took place in November, 2006. These interviews were of brokers: Salvatore A. Tiano of Bear Stearns, Richard K. Olson of Salomon Smith Barney, James Schlueter of Morgan Stanley, and Jonathan Harris of Morgan Stanley. As more fully set forth below, each of these contains important *Brady* material. Yet, here, too, the government had already conducted the interviews when it

represented to the Court on January 12, 2007 that it had "turned over all the *Giglio, Brady* material that's in the possession, custody or control of the Government," and two of these interviews (Harris and Schlueter) had actually been transcribed a week earlier, on December 7, 2006.[1] Despite this, we didn't receive any of these documents prior to the January 26 Status Conference. Instead, we received them a full week after the attorney for the government agreed that *Brady* statements would be turned over within 48 hours (2 business days) of transcription.

C. At a Minimum, Brady Material Is Defined by the Scienter and Good Faith Requirements of this Case

7. The government's overly narrow view of *Brady* is unsupportable in light of the legal requirements of this criminal securities fraud case. At the October 12, 2006 hearing in this matter, the Court presaged the type of scienter and good faith instructions that will be given to the jury at trial. There the Court ruled, as to the intent to defraud element: "'With intent to defraud', the jury will be instructed, means to act knowingly with the intention or purpose to deceive or cheat." 10/12/06 Tr. at 5. (Quotes within quotes added.) And, further as to intent to defraud, the Court made clear that the jury would be instructed that "even though some individual may have lost money in the transactions, this does not rise to the level of fraud unless the evidence establishes beyond a reasonable doubt that the transaction was designed and intended by defendant to deceive or trick or injure or damage." *Id.* at 6.

[1] The Olson interview was transcribed three days after the Status Conference, on December 15, 2006. The Tiano interview, conducted on November 15, 2006, does not bear a date of transcription.

8. As to good faith, the Court made clear that:

> The good faith of the defendant is a complete defense to the charge of securities fraud contained in the Indictment, because good faith on the part of the defendant is simply inconsistent with the intent to defraud alleged in each charge of the Indictment.

Id. at 8.

9. Thus, any evidence or witness interview that is inconsistent with the stringent scienter requirements or is consistent with the good faith defense, is *Brady* material and should be turned over within 48 hours of its *receipt* by the government.[2] Or, as succinctly put by Judge Matsch in the *McVeigh* case:

> What [the government] may not do is suppress or secrete information known to them which does not fit into the narrative, or which contradicts the evidence used to support that narrative, or which may diminish the credibility of the evidence relied on to tell the story. Stated simply, the prosecutors must not present proof of an historical narrative that they know not to be true. They must disclose to the defense the information known to or available to them which may develop doubt about the truth of the government's narrative.

United States v. McVeigh, 954 F. Supp. 1441, 1449 (D. Colo. 1997).

D. <u>The Recently Disclosed Witness Interviews are *Brady*</u>

10. The recently (and belatedly) disclosed witness interviews indeed "may develop doubt about the truth of the government's narrative" in this case. (*Id.*) In the government's interview of Salvatore Tiano on November 15, 2006 (QUSA0033789-807), Mr. Tiano, a broker with Bear Stearns who handled several of Mr. Nacchio's stock

[2] The information becomes *Brady* the moment it is learned by the government. The government may not then avoid promptly turning over the information to the defense by delaying the transcription of the interview.

transactions in 2001, told the government that: a) he had advised Mr. Nacchio to diversify out of Qwest holdings as early as July, 2000, (well before the government alleges Mr. Nacchio acquired the alleged inside information and sold "on the basis" of that information); b) that he advised Mr. Nacchio that he was overexposed in telecom stock, that he would not have recommended telecom stocks, that he encouraged Mr. Nacchio to reduce his exposure in Qwest stock, which comprised 90% of his holdings, that it was a conventional strategy to diversify in this situation, and that he, Mr. Tiano, believed Mr. Nacchio would systematically divest in open trading windows (all of which is inconsistent with the government's theory that Mr. Nacchio sold on the basis of material inside information); and c) that between April 27 and May 15, 2001, Mr. Tiano called Mr. Nacchio to recommend that he amend the 10b5-1 sales plan which was to go into effect on May 15, 2001 to lower the $38 floor, but that Mr. Nacchio was "adamant" that the stock was a great buy at $38 and he did not want to sell below that price (which is inconsistent with the government theory that Mr. Nacchio sold the stock on the basis of warnings that the company would not meet its public guidance, and which if known to the public would have negatively affected the stock price).

11. Similarly, on November 30, 2006, the government interviewed Richard K. Olson (QUSA0033871-81), a broker with Salomon Smith Barney who solicited Mr. Nacchio to manage his asset portfolio and was the broker on many of the sales listed in the indictment. Mr. Olson told the government that his "goal was to help people like Mr. Nacchio to diversify their asset base selling their stock in the company

and reinvesting the proceeds." (Again, this casts doubt on the government's theory as to why Mr. Nacchio was selling.)

12. On November 29, 2006, the government interviewed James Schlueter (QUSA0033858-70) and Jonathan Harris (QUSA0033808-870), who worked together as brokers at Morgan Stanley specializing in holdings of individuals with assets of $10 million or more. The government learned in these interviews that Schlueter and Harris met with Mr. Nacchio as early as July 1999 in an effort to secure his investment business, and made specific recommendations to diversify his holdings at a meeting in October 2000. Schlueter told the government that Mr. Nacchio had been given an "incredible package" to run Qwest, but that the expiration date on his options was approaching and he, Mr. Nacchio, was trying to figure out how to structure his trades to make it go smoothly. (This again would provide an explanation for Mr. Nacchio's stock sales that would cast doubt on the government's insider trading theory.)

13. These repeated and belated disclosures, in spite of its own representations as well as the admonitions and rulings of this Court, confirm that the Government does not take its *Brady* obligations seriously. We respectfully request that the Court take appropriate action to compel the government to abide both by its obligations and the orders of this Court.

II. CIPA ISSUES

We, of course, have no way of knowing the details of other instances of the failure of the government to abide by its obligations under *Brady*, but perhaps the most

serious and prejudicial obstacle to our ability to defend this case is the government's casual and unilateral approach to its responsibilities under CIPA.

A. The Government's Delays Require a Continuance of Trial to Prevent Injustice

The government's inordinate delay in producing CIPA discovery and CIPA section 6(f) reciprocal information, and its most recent act of dumping voluminous *Brady/Rule 16* materials on the defense, have made it impossible for the defense to prepare for trial within the Court's schedule, with which we have made every effort to comply.

The Court may recall that in November 2005, that is, even prior to the indictment, the defendant, in an attempt to convince the prosecution that there was no basis to the contemplated charges, advised the Department of Justice of its CIPA defense. Immediately thereafter, that is to say, the same month, the government interviewed former employees of Qwest, including Jim Payne and Afshin Mohebbi, and queried them about the defendant's assertions that there were potential classified government contracts which were not included in Qwest's 2001 budget forecast. Nonetheless, the government brought the charges on December 20, 2005. At the initial Status Conference that very day, December 20, 2005, at the request of the Court, the defense confirmed that this would be a defense.

Despite being advised directly by Mr. Payne that there were potential classified government contracts which would not be included in the budget until they were actually finalized, the government, nevertheless, filed a "CIPA Memorandum" on January 17, 2006 stating that there was no basis at all to the CIPA defense, repeatedly

representing that all prospective government contracts, including classified contracts, had been included in the budget. [Doc. #20, pages 5-6)

After a painstaking process of getting cleared, the defense, which was limited to interviewing only the defendant, filed a section 5 submission on May 15, 2006, [Doc. # 73]. As the government repeatedly contended that the defendant's CIPA filings were not specific enough, the defendant, finally granted permission to interview witnesses with classified knowledge, including Payne who had been interviewed by the government months before, but who the defense could not interview until cleared, filed further CIPA section 5 submissions on September 29, 2006 [Doc. #159] and October 31, 2006 [Doc. #183].

Thus, by at least as early as May – some nine months ago, the defendant had revealed the outline of his defense, as he was forced to do under CIPA, and, at the demand of the government, was required to fully investigate that case to the best of his ability and reveal his evidence to the Government by October 31, 2006. For its part, the government conducted its own interviews, some being government people not available to the defense, and contacted many of the witnesses who the defense had been required to identify, once that identification had been made. It should be noted that no 302's of witnesses who the government interviewed following defense CIPA disclosures have been provided. Thus, throughout this period, from May through October, the government produced nothing to the defense, as to CIPA, while the defense was forced to bare its entire case.

The Court conducted a section 5 hearing on October 12, 2006 and issued an order dated October 24, 2006 which found that portions of the defendant's CIPA defense were relevant and admissible. Thereafter, on December 8, 2006, the Court made further findings pursuant to section 5 of the use and admissibility of defendant's CIPA defense.

B. Sanctions Should be Imposed for the Government's Failure to Abide by Its Section 6(f) Obligations

In addition to having received nothing from the government by way of *Brady*, or otherwise, throughout this period, on December 13, 2006 defendants formally moved for an order to compel the Government to immediately produce section 6(f) rebuttal information. We still have received nothing pursuant to 6(f).

Despite knowing the nature of the CIPA defense for more than a year, and having been provided with the extensive details about the defense, and having interviewed various witnesses it deemed knowledgeable about the CIPA defense, the government, until late yesterday, had not provided the defendant with any discovery documents, *Brady* material or 6(f) material. Late yesterday -- at 7:41 p.m. -- we received notice that pursuant to Rule 16, *Brady v. Maryland*, and this Court's order of January 12, 2007, the government had delivered to the Court's security officer 6 CD ROMs containing voluminous materials, consisting of thousands of pages. *See* Exhibit A. In its cover letter, the government advised that if we intended to disclose any of these classified documents in our defense we would have to submit another section 5 notice, which would trigger section 6(a), and, if the Court found classified documents to

be relevant and admissible, that in turn would "trigger 6(c) and other relevant sections of CIPA."

Furthermore, as of today, we still have not received any 6(f) materials, although the Court has repeatedly indicated that there can be no basis of withholding – on national security grounds – rebuttal evidence to be offered by the government in open court at trial, in terms of the cross examinations of our witnesses or the direct examination of its own.

One thing is clear - - the government has yet to comply with its reciprocal obligations under section 6(f). The time is nigh and further delay will make an already difficult trial preparation impossible for the defense. The Court should therefore bar any rebuttal evidence under section 6(f).

C. The Government's Ex Parte Filing is Improper

On top of the foregoing, yesterday, the government also filed an *ex parte* motion, pursuant to section 4 of CIPA. This filing is improper and should be rejected by the Court.

The government did not provide any basis for an *ex parte* filing nor did it ask for permission. In *U.S. v. Rezaq*, 899 F. Supp. 697, 707 (D.D.C. 1995), *affirmed*, 134 F3d 1121, *cert. denied*, 525 U.S.834 (1998), a CIPA case, the court held that "*ex parte* communications between a district court and the prosecution in a criminal case are greatly discouraged, and should only be permitted in the rarest of circumstances," (citations omitted). There the government conceded that *ex parte* motions were

appropriate in only certain circumstances -- such as the information exceeds the security clearance of counsel. *Id*. at 707, n.10. None of those situations are applicable here and therefore the motion should be unsealed. In any event, we do not have any idea what we have to contend with in terms of this filing.

III. CONCLUSION

Thus, we find ourselves less than six weeks before trial, with the government having had more than a year to investigate the CIPA defense and collect all relevant discovery, as well as *Brady* material, with the government providing nothing until late yesterday when it produced voluminous documents with an admonition that if defense intended to use any of them, we would first have to file a section 5 submission and go through a section 6(a) hearing, thus placing an onerous burden on the defense at this late stage in the pre-trial proceedings when the defendant is concentrating on many other aspects of the defense, including interviewing witnesses around the country.

As the Court is aware, reviewing classified documents and making another section 5 submission must be done in a SCIF. The only SCIF available to Mr. Nacchio's New Jersey counsel is in Washington, DC, approximately 250 miles from our office, requiring extensive travel to do even the most minuscule tasks.

The government has chosen the eve of trial to place a heavy burden on the defendant -- to review voluminous materials and then make applications to the Court, and we do not even know the full extent of that burden as we have not seen the section 4 documents or the 6(f) information -- when it could have produced these

materials anytime in the past year. Thus, in order to adequately prepare for trial and fulfill all of the CIPA requirements now imposed by the government, we have no choice but to request a continuance of at least 60 days so that we can evaluate the new documents just produced and, if necessary, to go through the laborious process demanded by the government before they can be used in the defense of the case.

This request is not of our making, but if not granted will prejudice our ability to mount a full defense as required by the Sixth Amendment.

Respectfully submitted this 6th day of February 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February 2007, a true and correct copy of the foregoing **STATUS REPORT RELATING TO DISCOVERY FOR 2/8/07 HEARING** was served on the following via the USDC CM/ECF system:

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