

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.

**TENDERED FOR FILING  
MARCH 9, 2007**

Edward W. Nottingham  
United States District Judge  
by Jamie L. Hodges  
Judicial Assistant/Deputy Clerk

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DEFENDANT JOSEPH P. NACCHIO'S TRIAL BRIEF

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I. INTRODUCTION

Defendant Joseph P. Nacchio, by and through undersigned counsel, respectfully submits this Trial Brief in order to apprise the Court of his position with respect to certain key evidence and testimony expected to be offered by the government, which we submit contains entire categories of inadmissible evidence.

The first category of inadmissible evidence is evidence of alleged acts that are not within the scope of the Indictment. This evidence consists of Mr. Nacchio's alleged: 1) backdating of instructions to sell securities ("Growth Shares Instructions" or "Growth Shares evidence"); 2) transfer of certain assets well after the indictment period; and, 3) seeking to alter dates of invoices for financial services to get Qwest to pay for them.

None of this evidence is intrinsic to the crimes charged or admissible for a limited purpose under Fed. R. Evid. 404(b).

This Court has made clear that reference to such evidence will not be allowed prior to a judicial determination of admissibility:

What I can do is caution the Government, and do caution the Government, concerning reference to that kind of evidence in opening statements, or reference before the Court makes the determination.

8/25/06 Hearing Tr. at 48. We expect the government to adhere to the Court's admonition, and herein move, not for an *in limine* determination of admissibility, but to bind the government to the Court's admonition.

The other categories are: 4) evidence and testimony that is irrelevant because it relates to a time period that post-dates the date of the last charged completed offense of insider trading;<sup>1</sup> 5) evidence and testimony that relates to internal policy of Qwest on insider trading, which is irrelevant for purposes of defining the alleged violations and the legal standard against which Mr. Nacchio's conduct must be evaluated by a jury;<sup>2</sup> 6) irrelevant testimony from persons who the local newspapers have characterized as "victims," and the government, in its Trial Brief has simply referred to "others" who will

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<sup>1</sup> Allegations post-dating May 29, 2001 were included within the indictment, and Mr. Nacchio filed a motion to strike the language from the indictment, which the Court denied without prejudice on August 25, 2006. The Court indicated that "there may come a point in these proceedings at which parts of the indictment will need to be stricken." 8/25/06 Transcript of Pretrial Conference at 18. The Court also indicated that it did not intend to read the indictment verbatim or to show it to the jury until deliberations. Therefore, at appropriate time, Mr. Nacchio intends to renew his motion to strike as surplusage the post 5/29/01 references in the indictment.

<sup>2</sup> The indictment also includes a paragraph dedicated to the Qwest insider trading policy, which was also the subject of Mr. Nacchio's motion to strike surplusage. Mr. Nacchio also intends to renew this motion at the appropriate time.

be providing testimony “regarding the significance of insider information that was not publicly disseminated” during the period of Mr. Nacchio’s trades in 2001; and 7) the testimony of investment analysts who have been identified as witnesses and will almost certainly be asked to opine as experts about matters that are ultimately irrelevant to the offenses charged, and without the government having provided the proper expert notice.

In addition, we submit that any attempt to offer evidence of Robin Szeliga’s guilty plea would constitute improper vouching for the credibility of a government witness. The defense has no intention of impeaching this witness with the felony conviction, and for the government to do so would violate Fed. R. Evid. 609 and the confrontation clause of the Sixth Amendment.

Finally, this trial brief addresses the government’s improperly restrictive view of the requirements of the admissibility of classified information.

## II. GROWTH SHARES INSTRUCTIONS

### A. Statement of Facts

Counts 1 and 2 of the Indictment allege sales of Qwest stock on January 2 and 3, 2001, at a time when Mr. Nacchio allegedly possessed material inside information. These sales involve Mr. Nacchio's so-called Growth Shares, which were owing to Mr. Nacchio in accordance with a Qwest Growth Share Plan Agreement dated January 1, 1997. On August 13, 1999, the Board of Directors accelerated Mr. Nacchio's growth share payment, in the *fixed amount* of \$25,482,004 for calendar year 2001, to be paid in full on January 1, 2001. On February 4, 2000, Mr. Nacchio received \$1,107,913 in the form of some 25,360 shares at \$43.6874, leaving the total January 1, 2001 payment to be \$24,374,091.

Instructions to sell securities under Rule 10b5-1 need not be in writing, nor is there any requirement that the instructions be given during a company-imposed trading window. Yash Rana, who was assistant general counsel for Qwest, acted as Mr. Nacchio's personal counsel in providing legal assistance with respect to the growth shares. On January 2, 2001, Mr. Rana as Mr. Nacchio's attorney-in-fact filed an SEC Form 144 (Notice of Proposed Sale of Securities) in connection with the sales of the growth share stock. This document, which he signed as Mr. Nacchio's attorney-in-fact, contains the following attestation by Mr. Rana:

#### ATTENTION:

The person for whose account the securities to which this notice relates are to be sold hereby represents by signing this notice that,

as of November 3, 2000, the date on which he provided irrevocable instructions for the sale of such securities in accordance with Rule 10b5-1 promulgated under the Securities and Exchange Act of 1934, as amended, he did not know any material adverse information in regard to the current and prospective operations of the Issuer of the securities to be sold which has not been publicly disclosed.

The government intends to offer evidence that an irrevocable instructions letter bearing the typewritten date of November 3, 2000 and bearing Mr. Nacchio's signature was created by Yash Rana on December 13, 2000, was backdated to create the appearance that Mr. Nacchio gave the instructions prior to receiving material adverse information about the company's future performance and at a time when the Qwest trading window was open, allegedly in an attempt to secure an affirmative defense to the crime of insider trading found in 17 C.F.R. § 240.10b5-1(c).

The government's hypothesis is untenable - - it assumes unprovable facts and unsupportable law and for the reasons set forth below, the late endorsement of the experts purporting to support this hypothesis should be excluded.

B. The Allegation Backdating Of The Growth Shares Is Inadmissible Under Fed. R. Evid. 402.

The government contends that proposed Government Exhibit 0100, identified as 11/3/00 Growth Share Instructions, and evidence surrounding its creation and execution, are intrinsic evidence and not subject to Fed. R. Evid. 404(b). The backdating allegation does not appear in the Indictment, nor is it set forth in the government's Bill of Particulars [Doc. 47] or Supplemental Bill of Particulars [Doc. 155].

Mr. Nacchio contends that the evidence is not intrinsic, it is not relevant under Fed. R. Evid. 401, and is inadmissible under Fed. R. Evid. 402, 404(b), and 403.

1. Legal Standards

Uncharged act evidence is generally considered to be subject to the strictures of Fed. R. Evid. 404(b). The Tenth Circuit has identified two exceptions to this rule. The evidence is intrinsic to the charged offense and therefore not subject to Rule 404(b) if the act 1) was part of the scheme for which a defendant is being prosecuted, or 2) was “inextricably intertwined” with the charged crime such that a witness’ testimony would be confusing without mention of the other act. *United States v. Johnson*, 42 F.3d 1312, 1316 (10<sup>th</sup> Cir. 1994), *cert. den.*, 514 U.S. 1055 (1995), (citing *United States v. Record*, 873 F.2d 1363, 1372 n.5 (10<sup>th</sup> Cir. 1989)). Neither exception applies here. As stated, the alleged backdating is not part of the scheme for which Mr. Nacchio is being prosecuted, even as elucidated in the government’s Bill of Particulars and Supplemental Bill. Nor is it so “inextricably intertwined” with the charged crime that a witness’ testimony would be confusing or incomplete without it. This is because *no witness* will testify that any backdating occurred. The government’s backdating theory is mere conjecture built on impermissible inferences and faulty legal reasoning which cannot be supported by the testimony of any witness. It is a theory in search of a witness, which will ultimately fail as trial proof.

The government appears to rely on *United States v. Nichols*, 374 F. 3d 959, 966 (10<sup>th</sup> Cir. 2004), *vacated by* 543 U.S. 1113 (2005), *reinstated by* 410 F. 3d 1186 (10<sup>th</sup>

Cir. 2005). However, *Nichols* (and for that matter, *Johnson*) were drug conspiracy cases in which the other acts were found to be overt acts of the crimes charged. Such is not the case here. Here, the indictment alleges that Mr. Nacchio, “did knowingly and willfully . . . use and employ . . . in connection with the purchase and sale of a security . . . a manipulative and deceptive device, scheme, artifice or contrivance to defraud in contravention of Rule 10b-5 ([ ]) and Rule 10b5-1 . . . ;” and, in furtherance of this scheme to defraud, “did knowingly and willfully sell . . . Qwest common stock on the dates and in the amounts set forth in Count 1 through 42 while aware of and on the basis of material, non-public information . . . .”

But Rule 10b5-1 is not violated if a verbal instruction to sell is later confirmed in writing. This is because Rule 10b5-1 does not require irrevocable instructions to sell to be written. See SEC Div Corp Fin, Manual of Publicly Available Telephone Instructions, Interp. 17 (4<sup>th</sup> Supp. May 2001) (The SEC’s own interpretation that the instruction to another person under Rule 10b5-1(c) need not be written.)

Because the alleged backdating of the growth shares instructions is not intrinsic, it must pass the rigors of Rule 404(b) (see III. infra). Of course, it must first be relevant under Rule 401.

## 2. The Growth Shares Backdating Evidence, Including Late Endorsed Expert Testimony, Is Not Relevant

Pursuant to Fed. R. Evid. 401:

‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence.

Evidence that is not relevant is inadmissible at trial. Fed. R. Evid. 402. The purported expert testimony is unnecessary and irrelevant as it fails to establish or aid in the determination of any element of the charges against Mr. Nacchio. Mr. Nacchio has been charged with forty-two counts of insider trading. The backdating evidence fails to make the existence of any fact that is of consequence to the charges of insider trading more or less probable.

a. The Growth Shares Evidence Does Not Tend to Prove Any Fact of Consequence to the Indictment

The argument that the written instruction to sell the growth shares was backdated proves nothing of consequence in this case. According to the government's evidence, the original source of *IrrevocableInstructions.doc* is Gregory P. Patti, Esq. of O'Melveny & Myers,<sup>3</sup> who created a document labeled *nacchio.doc* and sent it to Rana on December 10, 2000. On February 23, 2007, the government for the first time endorsed experts - - Edward Stroz and Samuel Ruben, who created a draft computer metadata report ("The Stroz Report"). The Stroz Report purports to conclude that Mr. Rana converted *nacchio.doc* and relabeled it *IrrevocableInstructions.doc* on or about December 13, 2000. Thus, the government appears to be suggesting that because Mr. Rana saved an unknown document on his computer on a certain date, a writing bearing the date of November 3, 2000 signed by Mr. Nacchio must have been

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<sup>3</sup> Similarly to Mr. Rana, we submit that Mr. Patti and other O'Melveny & Myers attorneys were providing legal representation to Mr. Nacchio at the time in question and therefore object to the government's intrusion into the attorney-client privilege and to its use of such information.



back-dated by him. However, the defendant has seen no documents establishing that *IrrevocableInstructions.doc* is the letter signed by Joseph P. Nacchio dated 11/3/00. That is, while the government alleges *nacchio.doc* becomes *IrrevocableInstructions.doc*, they fail to establish how it is the document signed by Joseph P. Nacchio.

In reality, the Stroz Report fails to discuss any actions allegedly taken by Mr. Nacchio. Nor is there any analysis of any other computer that may have created the November 3, 2000 letter. Instead, the only conclusion reached in the Stroz Report is that "*IrrevocableInstructions.doc*" was created from a modified version of "*nacchio.doc*" – neither of which is linked to Mr. Nacchio.

As noted above, the indictment accuses Mr. Nacchio of a scheme to defraud in contravention of Rule 10b-5 and Rule 10b5-1. But Rule 10b5-1 is not violated if a verbal instruction to sell is later confirmed in writing. This is because Rule 10b5-1 does not require irrevocable instructions to sell to be written. See SEC Div Corp Fin, Manual of Publicly Available Telephone Instructions, Interp. 17 (4<sup>th</sup> Supp. May 2001) (The SEC's own interpretation that the instruction to another person under Rule 10b5-1(c) need not be written.) Therefore, the evidence does not tend to prove any fact of consequence to the indictment.

b. The Testimony of Gregory Patti is Irrelevant.

Mr. Patti is expected to testify that there is nothing inherently wrong with backdating such a document, where verbal instructions had been given previously. (QUSA00033585-592, 1/11/07 Report of Interview of Gregory P. Patti at 335891.)

With both the rules of the SEC and the government's own witness establishing that irrevocable instructions to sell a) need not be written, and b) may be confirmed in a later writing, evidence surrounding the growth shares instructions does not tend to prove the "scheme to defraud in contravention of Rule 10b-5 . . . and rule 10b-5(1)" as alleged in the indictment. For this reason, the proposed expert testimony is irrelevant under Fed. R. Evid. 401 and should be excluded under Rule 402.

- c. Evidence Relating to Trading Windows is Irrelevant Because They are a Creature of Corporate Policy and not Rule 10b-5(1).

The government also intends to argue that the instructions letter was backdated "to give the false impression that those instructions were issued while the Qwest trading window was open." There is no requirement under Rule 10b-5 or Rule 10b5-1 that shares must be traded in an open window. Rather, trading windows are creatures of corporate policy, not statute or regulation. Thus, by definition, the growth shares instruction evidence is irrelevant to the extent it would be offered to show compliance or lack of compliance with corporate policy.

- d. An Assessment of the Relevance of the Growth Shares Instruction Evidence Requires Consideration of the Other Evidence Bearing on the Issue.

The evidence will show that Qwest's Board of Directors, and Qwest's legal staff all knew that Mr. Nacchio would be receiving a fixed amount of compensation in dollars (payable in Qwest shares) on a date certain, that this knowledge was widely held 15 months prior to any mid or late-December 2000 memoranda allegedly left on

Mr. Nacchio's office chair by Afshin Mohebbi, and that steps were taken by Qwest to assist in deferring portions of the sale proceeds. At trial the evidence will show:

1) The Qwest Board of Directors Compensation Committee awarded the accelerated growth share payment to Mr. Nacchio on August 13, 1999, to be paid in full on January 1, 2001.

2) Knowing of the impending growth share payment as well as Mr. Nacchio's other stock options, Mr. Rana (and many others) had been advising Mr. Nacchio on diversification strategies as early as March, 2000.

3) According to documents disclosed for the first time on February 28, 2007, Qwest was entertaining a request by Mr. Nacchio's financial advisors to defer a portion of the proceeds of the January 1, 2001 growth share payment as early as October 2, 2000. (See QDSEC S42966-78, Qwest Communications International Inc. Estate Enhancement Plan (EEP), Prepared for Joseph P. Nacchio October 2, 2000.) This proposal for an EEP was presented to Qwest by The Ayco Company, Mr. Nacchio's financial advisors, and contemplated deferring \$4.5 million of the anticipated growth share payment through a "split-dollar" arrangement with Qwest. On November 1, 2000, Ayco transmitted the plan to Felicity O'Herron at Qwest.

4) Billing records from O'Melveny & Myers show that Rana had an hour-long discussion with O'Melveny lawyer Steve Grossman on November 3, 2000, the as-of date of the instructions letter, and several other conversations with Rana during November.5)

Mr. Nacchio's financial advisor, David Weinstein, spoke to Mr. Rana on December

7, 2000, confirming that Mr. Nacchio “previously made an irrevocable election to sell the shares during the last window period and according to their [Qwest’s] legal counsel, this qualifies for an exemption for the insider trading rules.”

6) On November 27, 2000, Rana emailed Mike Sirkin, an attorney for Mr. Nacchio, and Drake Tempest, general counsel for Qwest, seeking to confirm the exact amount of the growth share payment on January 1, 2001. Mr. Rana asks: “Let me know if you agree with the numbers. Assuming you do, I’ll make sure it gets paid into the deferred compensation account as he [Mr. Nacchio] has requested.” The message ends, “I have heard preliminarily from the HR guys [Human Resources at Qwest] that the payment can be made without deducting any withholding taxes.”

7) The SEC Form 144 filed in relation to the growth shares was signed by Rana as attorney in fact for Mr. Nacchio, and contains the representation that the irrevocable instructions were provided by Mr. Nacchio on November 3, 2000. No witness interviewed by the government gives any evidence that this filing was not truthful or proper.

8) Finally, the government implicitly concedes that the relevance of the growth shares instruction evidence rests on *when* Mr. Nacchio received the first December memo from Mr. Mohebbi. That memo, which is undated, and which Mr. Mohebbi says he did not hand to Mr. Nacchio but left it on his chair on a date unspecified, may be read to be critical of the internal budget which had just been completed in early December. That memo does not address the *public guidance* which

was put out on the 8 K of September 7, 2000 and which is substantially lower than the December budget. The inference that an undated memo addressing an internal budget, created months after the issuance of the public guidance, drove Rana to create a false document with the intent to defraud, is unreasonable. Moreover, if the government cannot establish that Mr. Nacchio received the memo before December 10, 2000, when Mr. Patti created *nacchio.doc*, even the ephemeral inference the government seeks evaporates.

The relevance of the growth shares evidence rests upon a series of impermissible inferences. *First*, the government asks us to infer that the Rana document *IrrevocableInstructions.doc* created December 13, 2000, became the document signed by Mr. Nacchio dated November 3, 2000. There is no such link. *Second*, we are asked to infer that *IrrevocableInstructions.doc* was intended by Mr. Nacchio to falsely establish that the instructions in fact were created on November 3. But this is a Rana document. No one, certainly not Rana, claims this was the purpose of the document. *Third*, the government seeks the inference that Mr. Rana was acting at the direction of Mr. Nacchio. This would mean that Mr. Rana, a licensed attorney, participated in a fraud with Mr. Nacchio and filed a false Form 144. There is absolutely no evidence to support this inference. *Fourth*, the government's hypothesis requires us to assume that a subsequently created writing reflecting an earlier verbal instruction is fraudulent or illegal. Yet, there is nothing inherently false about a subsequent writing confirming a previous 10b5-1 instruction, because such instruction

need not be written in the first place. Each of these inferences is too thin a reed upon which to build relevancy, and the government's hypothesis falls of its own weight.

3. The Growth Shares Evidence Should Be Excluded Under Rule 403

Even if the growth shares evidence and expert testimony did have any probative value related to Mr. Nacchio, it should nonetheless be excluded under Fed. R. Evid. 403, as any such value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay and waste of time.

a. Expert Testimony on the Alleged Backdating Will Create Side Issues that Will Confuse the Jury and Waste Time.

If the government goes forward with expert testimony in support of a backdating case, which as noted is foreign to the indictment, the following side issues will emerge:

1) The legal status of a 10b5-1 instruction that need not be written which is later documented in writing. This may involve expert testimony and lead the jury far afield from the issues properly raised in the indictment.

2) The Attorney-Client privilege. As stated above, we contend that with respect to the growth shares, Mr. Rana was acting as Mr. Nacchio's personal attorney because his legal efforts were solely for the benefit of Mr. Nacchio and not the corporation. The privilege would extend to Mr. Patti, who was enlisted by Mr. Rana to assist in the legal work for Mr. Nacchio. An officer may assert a personal attorney-client privilege with respect to dealings with corporate counsel under the standards set

forth in *In re: Grand Jury Subpoenas*, 144 F. 3d 653, 659 (10<sup>th</sup> Cir. 1998) (adopting test of Second and Third Circuits). Allowing the growth shares instruction evidence would necessitate litigation over the existence and extent of this privilege, including whether the government improperly invaded the privilege by securing the documents created in the course of that attorney-client relationship without Mr. Nacchio's consent. All of this would take up precious court time and delay trial proceedings.

As set forth above, the defense would ~~Conduct a Computer Analysis and Expert Testimony by the Defense~~ (2 laptops used by Rana), critique the Stroz Report, and possibly offer expert testimony to rebut the government's evidence. Aside from the clear prejudice to Mr. Nacchio, this digression will take the jury far afield from the issues properly raised in the indictment.

By creating an expert issue at the 11<sup>th</sup> hour, after persistently claiming there would be no experts in its case in chief, the government will force a side show to take over the trial of the issues central to the indictment. This is exactly the type of situation the exercise of the Court's powers under Rule 403 can prevent.

- a. The Expert Testimony Would Force the Defense to Hire Its Own Experts, Examine Computers, and Waste Time Not Available.

With so little time before trial, Mr. Nacchio does not have sufficient time to meaningfully prepare a challenge to the proposed expert testimony. To do so would require engaging an expert to review not only the Stroz Report, but also the physical computers and hard drives that were examined by Stroz over 18 months ago. It would also require counsel to prepare for cross-examination on this collateral issue, as well as potentially preparing a competing expert to testify on behalf of the defense. As the

Court is aware, the parties are consumed with trial preparation, a number of CIPA and discovery related issues remain unresolved, and discovery continues to be produced. To add the work associated with the government's designation to this mix would severely prejudice Mr. Nacchio's right to a fair trial.

### III. OTHER UNCHARGED ACTS EVIDENCE IS INADMISSIBLE UNDER FED. R. EVID. 404(B) AND 403

In its 404(b) notice, the government announced it may offer other evidence of alleged wrongful acts of Mr. Nacchio, to wit: (a) the alleged transfer by Mr. Nacchio of assets to his spouse in 2002, which occurred one year after the conduct alleged in the indictment and years before he was even notified that he was a target of a criminal investigation; and (b) the alleged altering of dates of invoices for personal investment services for which Mr. Nacchio sought reimbursement from Qwest. Neither type of evidence should be admitted at trial - - this is precisely the sort of bad character evidence Fed. R. Evid. 404(a) prohibits.

In both instances, the proffered evidence is extrinsic to the charged crimes and cannot be considered "intrinsically intertwined" with the acts alleged to constitute offenses; the evidence, therefore, must pass muster under Rule 404(b), if at all, in order to be admitted.<sup>4</sup> However, these allegations are not admissible for any proper purpose identifiable under Rule 404(b) -- indeed, the Government failed even to suggest any permissible purposes under the Rule for their admission -- but are offered instead simply to smear the defendant. Even if any of the allegations had the slightest probative value, that probative value is substantively outweighed by its prejudicial impact on the jury and the prospect of undue delay at trial in its resolution.

#### A. Statement of Facts - - Other 404(b)

On October 14, 2005, Mr. Nacchio's legal counsel received notification that the United States Department of Justice considered him a target of an investigation involving possible violations of federal securities laws. On December 20, 2005, Mr. Nacchio was indicted. The indictment identifies 42 instances of alleged insider trading by Mr. Nacchio, through his sales of Qwest stock on the dates set forth in Counts 1-42. The final sale alleged to have been effected by Mr. Nacchio was on May 29, 2001 (Count 42). Thus, the last charged offense was completed on May 29, 2001.

The government has given notice that it may offer the following under Fed. R. Evid. 404(b):

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<sup>4</sup> All three matters listed in the preceding paragraph in the body of the brief were the constituent elements of a Rule 404(b) notice letter sent by the Government to Mr. Nacchio's attorneys on January 17, 2007.



1. Subsequent Transfer of Assets

"From February 2002 through October 2002, authorized the transfer of over \$90 million in assets from accounts held in his name or held jointly in his name and his spouse's name to accounts held solely in the name of his spouse." The transfers were alleged to be of cash and securities among brokerage firms, as well as one parcel of real property. The Government also supplied its view of the motivation behind the transfers: "Defendant Nacchio ordered the transfers of such assets out of his name as well as the purchase of additional assets in solely (sic) in the name of his spouse *in an attempt to put them beyond the reach of potential creditors, including plaintiffs in civil actions and the government in potential civil and criminal actions.*" (*Letter of Cliff Stricklin, First Asst. U.S. Atty., January 17, 2007, at 1-2*) (emphasis added).

The Government's letter notice fails to note that those alleged transfers of property occurred *one year following* the charged activity in the indictment and *three years prior to* the date Mr. Nacchio was advised that he was a criminal target, leaving, according to the Government's own postulation, the only possible motivation in 2002 as placing property beyond the reach of *civil* creditors.

2. AYCO Invoices

The government may also offer evidence that, on October 17, 2000 Mr. Nacchio allegedly asked Ayco, his personal financial advisors, to alter the date of a \$4,900 invoice so that Qwest would pay for services he would otherwise have to pay for; and, that on June 18, 2002, he asked Ayco to prebill him for \$25,000 for the same purpose.

B. The Other Acts Evidence is Not Intrinsic

In *United States v. Johnson*, 42 F.3d 1312 at 1316 the Tenth Circuit set forth the standard for identifying intrinsic evidence from 404(b) evidence. See p. 5 above. Where, as here, the alleged other acts are not part of the charged scheme and not intertwined with the charged acts, the evidence is admissible only under Rule 404(b).

Activities that occur after the purchase of a security cannot form the basis for liability under Rule 10b-5. *Seattle-First Nat'l Bank v. Carlstedt*, 678 F. Supp. 1543, 1547 (D. Okla. 1987). Thus, there can be no after-trade activity which is intrinsic to the offense charged here, no further acts necessary to effect an already-completed scheme, and no additional acts which can be argued to be inherently a part of the

completed crime. *Beck v. Cantor, Fitzgerald & Co.*, 621 F. Supp. 1547, 1555 (N.D. Ill. 1985) (conduct occurring after securities fraud scheme has been fulfilled is not in furtherance of that scheme) (citations omitted), *overruled on other grounds*, *Pinter v. Dahl*, 486 U.S. 622 (1988).

C. The Evidence In Neither Instance Is Admissible Under Rule 404(B)

Under Rule 404(b), evidence of other crimes, wrongs or acts is admissible only for limited purposes and only when various prerequisites are satisfied. *United States v. Robinson*, 978 F.2d 1554, 1558-1559 (10th Cir. 1992), *cert. den.*, 507 U.S. 1034 (1993). The rule by its terms excludes evidence of other crimes, wrongs, or acts offered to show bad character in conformity with the charged offense, and only allows such evidence for other purposes, such as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident". Fed. R. Evid. 404(b).

Consideration by the Court of evidence under the Rule implicates a multi-part test. *United States v. Zamora*, 222 F.3d 756, 762 (10th Cir.) (*citing Huddleston v. United States*, 485 U.S. 681, 691-92 (1988)), *cert. den.*, 531 U.S. 1043 (2000). That test includes: (a) Rule 404(b)'s requirement that the evidence be offered for a proper purpose; (b) Rule 402's relevancy requirement; (c) Rule 403's requirement that the evidence be more probative than prejudicial; and (d) Rule 105's requirement that the trial court, upon request, instruct the jury that the evidence should only be considered for the proper purpose for which it was admitted. *United States v. Esparsen*, 930 F.2d

1461, 1477 (10th Cir. 1991) (*citing Huddleston*, 485 U.S. at 691), *cert. den.*, 502 U.S. 1036 (1992). Under Rule 404(b), the Government "must carry the burden of showing how the proffered evidence is relevant to one or more issues in the case; specifically, it must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence." *United States v. Biswell*, 700 F.2d 1300, 1317 (10th Cir. 1983).

The threshold inquiry of Rule 404(b) is whether evidence has been introduced for a proper purpose. *United States v. Tan*, 254 F.3d 1204, 1208 (10th Cir. 2001). . "The trial court must specifically identify the purpose for which such evidence is offered." *Robinson*, 978 F.2d at 1559 (quoting *United States v. Kendall*, 766 F.2d 1426, 1436 (10th Cir. 1985), *cert. den.*, 474 U.S. 1081 (1986)). There must be a clear association between the purported purpose for introducing the evidence and the act itself. *Id.* "A broad statement merely invoking or restating Rule 404(b) will not suffice." *Id.*

The Government has not identified any proper purpose for admissibility under Rule 404(b), nor can it. Generally, other acts evidence must share similarities with the charged crime. *United States v. Mares*, 441 F.3d 1152, 1159 (10th Cir. 2006) (*citing Zamora*, 222 F.3d at 762.), *cert. petit. Filed*, \_\_ U.S.L.W. \_\_ (U.S., June 21, 2006). There must be a clear and logical connection between the "other acts" evidence and the case being tried. *United States v. Kunzman*, 54 F.3d 1522, 1530 (10th Cir. 1995). The Tenth Circuit has considered a number of non-exclusive factors in assessing

similarity: (1) whether the acts occurred closely in time; (2) geographical proximity; (3) whether the charged offense and the other acts share similar physical elements; and (4) whether the charged offense and the other acts are part of a common scheme. *Mares*, 441 F.3d 1152, 1159. See, e.g., *United States v. Chiarella*, 588 F.2d 1358, 1371 (2<sup>nd</sup> Cir. 1978) *overruled on other grounds*, *Chiarella v. United States*, 445 U.S. 222 (1980), (in insider trading prosecution evidence that defendant had disgorged his profits to the sellers of his target securities in compliance with an SEC decree excluded as bearing on state of mind).

The assets transfers occurred nearly a year after the conclusion of charged conduct at Qwest. The transfer of assets represents lawful conduct that is of an entirely different nature than behavior that would constitute insider trading. The asset transfers are described by the government as relating to a decision to place assets beyond the reach of creditors; yet, a forward-looking concern about the potential consequences of civil litigation against him cannot be used to ascribe to Mr. Nacchio's any consciousness that there was merit to even those civil allegations. See *Keller v. Orix Credit Alliance*, 130 F.3d 1101, 1113 (3d Cir. 1997) (concern over civil liability does not imply a belief that such claims are meritorious).

Moreover, the June 18, 2002 Ayco invoice is dated over a year after the charged conduct; both Ayco invoices involve issues that are dissimilar to the charge conduct; they are trivial in comparison to the charged conduct; and, they require collateral explanations from witnesses who will lead the jury far afield from the issues in the case.

For example, concerning the \$25,000 invoice, Mr. Nacchio would present evidence that was entitled to full reimbursement of this expense pursuant to his separation agreement with Qwest at the time of the invoice. The upshot would be that the jury, having seen “cheap shot” evidence from the government and Mr. Nacchio’s responsive evidence, would be no more illuminated as to the core issues for the trial time consumed.

The lack of fit between the time period of alleged alteration of invoices and transfer of assets and the time period of the acts charged in the indictment further attenuates any relevancy. The Tenth Circuit has held that substantial temporal gaps between criminal activity and the conduct which is argued to suggest a guilty conscience may diminish the probative value of such circumstantial evidence. See *Martinez*, 681 F.2d at 1259. The more remote in time the conduct is “from the commission or accusation of an offense, the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense.” *United States v. Lacey*, 86 F.3d 956, 973 (10th Cir.) (quoting *U.S. v. Myers*, 550 F.2d 1036, 1051 (5<sup>th</sup> Cir. 1977)), *cert. den.*, 519 U.S. 944 (1996). See also, *United States v. Cassese*, 428 F.3d 92, 101 (2d Cir. 2005) (district court’s exclusion of the evidence insider later sought to cancel trades because he felt he made a “stupid mistake” upheld, since only defendant’s state-of-mind at the time of the illegal purchase was relevant, not any regret he suffered after selling the stock).

Because there is no proper limited purpose for this other act evidence, it is evidence of bad character of the kind expressly prohibited by Fed. R. Evid. 404(a).

D. The Asset Transfer Evidence is an Invasion of the Attorney Client Privilege

The source of the government's evidence concerning Mr. Nacchio's alleged transfer of assets in 2002 is Robert Bortek, Mr. Nacchio's estate planning attorney. The evidence will show that Mr. Bortek had been advising Mr. Nacchio to transfer assets out of his name since at least 2000, well before even any civil suit. Mr. Bortek enlisted Mr. Weinstein, Mr. Nacchio's financial advisor, to assist in this representation - - therefore, Weinstein is covered by the attorney-client privilege. *See Import Export Bank of the United States v. Asia Pulp & Paper Co., Ltd.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005) (communications with a financial advisor are covered by the attorney-client privilege if the financial advisor's role is limited to helping a lawyer give effective advice by explaining financial concepts to the lawyer, citing [United States v. Kovel, 296 F.2d 918, 922 \(2d Cir.1961\)](#)).

The government seeks to use Mr. Weinstein's memos generated pursuant to the attorney-client relationship against Mr. Nacchio. This evidence is inadmissible. At a minimum, the government's attempts to offer the asset transfer evidence, whether or not admissible under Rule 404(b), invites the very kind of collateral issues and jury confusion that is prohibited by Rule 403.

E. Rule 403 mandates exclusion of the evidence

Even if the strictures of Rule 404(b) could be satisfied, the proffered evidence would still be inadmissible under Rule 403's balancing test. The alleged falsification of Ayco invoices has no probative value in relation to the charged offenses, but even if there were any, it would be overwhelmed by the risk of unfair prejudice.

Similarly, the asset transfer evidence is not only terribly prejudicial without illuminating any of the elements of the charged offense, but its disputation will consume huge amounts of time at trial. Admission of evidence regarding the asset transfers will require Mr. Nacchio and the defense into a mini-trial in order to place into context for the jury the existence of civil actions filed against him. Introduction of the asset transfers and the corollary trial-within-a-trial of the civil cases will unfairly lead to revealing to the jury the allegations underlying the civil actions. Such allegations are broader than the charges in the criminal trial, so their full exposition will also substantially delay the criminal trial. That, too, is a reason under Rule 403 to exclude the evidence. *See United States v. Perholtz*, 842 F.2d 343, 360 (D.C. Cir. 1988) (extensive delay implicated in exploring low-probative value consciousness of guilt issue not warranted where the evidence did not "go directly to an essential issue").

IV. TESTIMONY OF ANALYSTS AND INVESTORS IS IRRELEVANT OR IN THE NATURE OF EXPERT TESTIMONY AND SHOULD BE EXCLUDED

The government, in its Trial Brief, represents that it "anticipates offering testimony from investment analysts and others regarding the significance of insider information that was not publicly disseminated during the period" that Mr. Nacchio

made the alleged illegal trades. It appears the government has identified four professional analysts on its Witness List (2 on its "Will Call" list and 2 on its "May Call" list). According to the government, these witnesses are prepared to testify about whether the information disseminated to the public was actually "public," and whether such information was material to a reasonable investor. For the reasons set forth below, such testimony is inadmissible because it is in the nature of expert testimony for which no notice has been given by the government, and because such testimony is irrelevant in the context of the jury's determination about whether the information was non-public and material under the law. Furthermore, even if such evidence has some minimal probative value, it is substantially outweighed by the considerable delay and confusion of the issues that will be occasioned by Mr. Nacchio's need to defend against such evidence. This would leave the defense in a position to consider having to call some number of analysts equal to or greater than that called by the government to provide an alternative view. The materiality and the public or non-public nature of the alleged inside information in an insider trading case is not, and should not be, dependant upon which side is able to call more witnesses that espouse its position. Instead, materiality determination must be based upon the nature of the information itself as measured against an objective standard, not by the subjective views of individuals or professionals.

The government does not identify in its Trial Brief the "others" who have this supposed relevant testimony concerning the material or nonpublic nature of the inside



information. However, on its "May Call" Witness List, the government has identified eight witnesses who were apparently solicited to testify, and appear eager and prepared to testify that that they bought Qwest shares, lost money, and blame Mr. Nacchio. This testimony is also irrelevant for the reasons discussed below, and again, any minimal probative value is far outweighed by the strictures of Fed. R. Evid. 403.

A. A Professional Analyst Is Not In The Position Of A Reasonable Investor, And Information Sought By The Professional Analyst Is Irrelevant In The Context Of The Objective Standard.

As noted above, Fed. R. Evid 401 and 402 taken together require that in order for evidence to be admissible, it must have a tendency to make the existence of a fact of consequence more probable or less probable than it would be without the evidence. Here, the government contends that the analysts can provide testimony that will tend to establish two facts of consequence to the determination of this action: the materiality of the inside information and; the non-public nature of the inside information. The government is incorrect. A professional securities analyst has no more personal knowledge about these subjects than any other individual, and their testimony is unnecessary and irrelevant as it fails to establish or aid in the determination of either of these two elements of the offense of insider trading.

Materiality is not determined by what a professional securities trader or analyst would like to know. *United States v. Teicher*, 1990 WL 29697, \*1 n.3 (S.D.N.Y., Mar. 9, 1990) (information that may be of interest to a professional securities trader because of professional interest in the stock market does not mean that such information is

material when judged through the eyes of a reasonable investor. "To be material, the information must meet the objective standard."); *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10<sup>th</sup> Cir. 1997) ("A statement or omission is only material if a reasonable investor would consider it important in determining whether to buy or sell stock." (citation omitted)). Testimony that is based upon the personal knowledge of any individual, analyst or not, is not relevant to a determination by the jury of the objective standard of materiality. The material nature of information that a "reasonable investor" would consider important cannot be measured as against what any one individual may have wanted to know or claims that they were not told; rather, it must be considered in the context of the information itself as measured against an objective standard. See e.g., *Michaels v. Michaels*, 767 F.2d 1185 (7th Cir. 1985) (objective standard of materiality measured in terms of "the *hypothetical* reasonable man")(citation omitted)(emphasis added); *Gohler v. Wood*, 919 P.2d 561 (materiality requirement requires proof that a hypothetical "reasonable person" would have relied on the misrepresentations, not that any particular plaintiff actually relied on them) (S.Ct. Utah, 1996).

Whether information is material also depends on other information already available to the market. Unless the statement "significantly altered the 'total mix' of information" available, it will not be considered material. *Grossman v. Novell, Inc.*, 120 F.3d at 1119, quoting, *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

The material, non-public information alleged by the Government in this case relates to other information already available to the market: the forward-looking revenue statement issued by Qwest and Mr. Nacchio to the public on September 7, 2000, which forecasted Qwest's revenue for the future 15 month period, ending December 31, 2001. Such statements may not even be material and therefore not actionable as securities fraud where they are not subject to objective verification. *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119-1120 (10<sup>th</sup> Cir. 1997) ("Statements classified as 'corporate optimism' . . . are typically forward-looking statements, or are generalized statements of optimism that are not capable of objective verification. . . [and] are not actionable because reasonable investors do not rely on them in making investment decisions"). Projections which turn out to be inaccurate are not fraudulent simply because subsequent events reveal that a different projection would have been more reasonable. *Grassi v. Information Resources, Inc.*, 63 F.3d 596, 599 (7<sup>th</sup> Cir. 1995); *Goss v. Summa Four, Inc.*, 93 F.3d 987994 (fraud does not result from the mere contrast between a defendant's past optimism and less favorable actual results) (1<sup>st</sup> Cir. 1996).

Even more importantly, the alleged material undisclosed information in this case consists of statements as to beliefs, opinions, and assumptions that, for the most part, simply differed from those of Mr. Nacchio. The Government's case is based upon internal opinions or concerns that Qwest *might not* be able to meet its publicly stated financial targets (that is, the targets to be reached by 12/31/01 publicly announced in

the Qwest 8K of 9/7/00). It is not alleged that Mr. Nacchio *knew* Qwest *could not* make its numbers, or even that he *believed* Qwest *would not* make its numbers, but merely that he had been told that Qwest *might not* be able to make its numbers. See e.g., ¶ 6 of the Indictment.<sup>5</sup>

These circumstances implicate legal principles concerning materiality, which could be impermissibly affected by the proffered analyst testimony concerning what they may have wanted to know. For example, once Qwest made reasonable forward-looking statements of future revenue, internal projections that conflicted with its publicly-issued projections are not considered material under the law, and Qwest and Mr. Nacchio would not be required to disclose such tentative internal projections unless they were so certain that they showed the published figures to have been materially

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¶ 6 of the indictment alleges in part that between January 2 and May 29, 2001, Mr. Nacchio:

[W]as aware of material, non-public information about Qwest's business, including, but not limited to: (a) that Qwest's *publicly stated financial targets*, including its targets for 2001, were extremely *aggressive* and a "*huge stretch*"; (b) that in order to achieve its *publicly stated financial targets* for 2001, Qwest would be required to significantly increase its recurring revenue business during the first few months of 2001; (c) that Qwest's past experience or "track record" in growing recurring revenue at a sufficient rate to meet its *publicly stated financial targets* was poor; (d) that Qwest's recurring revenue business was underperforming from early 2001 and was not growing at a sufficient rate to meet Qwest's *publicly stated financial targets*; (e) that there were material undisclosed risks relating specifically to Qwest's recurring and non-recurring revenue streams that put achievement of Qwest's 2001 *publicly stated financial targets* in *jeopardy*; (f) that the gap between Qwest's *publicly stated financial targets* and Qwest's recurring revenue was increasing, thus increasing Qwest's reliance on *risky* and unsustainable one-time transactions; and (g) that there would be insufficient non-recurring revenue sources to close the gap between Qwest's *publicly stated financial targets* and its actual performance. (emphasis added)

misleading. As recognized by the Seventh Circuit Court of Appeals, to require otherwise is completely impractical and would cause chaos in the market place:

Any other position would mean that once the annual cycle of estimation begins, a firm must cease selling stock until it has resolved internal disputes and is ready with a new projection. Yet because large firms are eternally in the process of generating and revising estimates-they may have large staffs devoted to nothing else - a demand for revelation or delay would be equivalent to a bar on the use of projections if the firm wants to raise new capital.

*Wielgos v. Commonwealth Edison Company*, 892 F.2d 509, 516 (7<sup>th</sup> Cir. 1989).<sup>6</sup> Neither Qwest nor Mr. Nacchio were not required to reveal the company's internal views of the published guidance before trading. *Id.* at 515; *See also, Garcia v. Cordova*, 930 F.2d 826, 830 (Court held that after careful consideration of all facts and circumstances, the soft information at issue here was too speculative and unreliable to require disclosure under Rule 10b-5 as "material fact.") (10<sup>th</sup> Cir. 1991); *SEC v. Butler*, 2005 U.S. Dist. LEXIS 7194 (E.D.Pa. 2005) (internal projections of revenues, including information available to the alleged insider trader through forecast meetings at the time he made the trades at issue, "was simply not a reliable indicator" of the company's probable quarterly revenue, and the court found that the trader did not possess material nonpublic information when he made his trades); *In re Healthcare Compare Corp. Sec. Lit.*, 75 F.3d 276, 282 (7<sup>th</sup> Cir. 1996) (no duty to correct projections unless conflicting internal projections which were certain and reliable, not merely tentative estimates, made the previously public guidance materially misleading); *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 998 (10<sup>th</sup> Cir. 2002) (*aff'g* Nottingham, J.) (accurate reporting of historic financial results does *not* give rise to a duty "to further disclose contingencies that might alter the revenue picture.") (emphasis added).

Therefore, the testimony of individual analysts about what information, which in hindsight following the loss of value of Qwest stock, they each would have wanted to know, is irrelevant to the issues that will be before the jury.<sup>7</sup> The jury will

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Yesterday we were served with the government's objections to our requests to charge, in which it insists on a different definition of materiality for corporate disclosures than for insiders *or* corporate trading. This distinction is without any intellectual basis, and the quoted language in *Wielgos* puts the sword to it. This is because *Wielgos* was a trading case. The trades were pursuant to a shelf registration by the company, and the quoted language is specifically directed to the ability of the corporation to trade its own stock without disclosing internal disputes about existing financial projections that conflict with public projections.

For example, Drake Johnstone, who is identified on the Government's "Will Call" list, and is further identified in an FBI interview report as a research analyst reportedly told the government on 2/7/07, after reviewing an internal Qwest product review document dated 4/9/01, he "was surprised to see a reference to one time capacity sales that was not disclosed at the meeting two weeks later" and "found it 'outrageous' that Qwest

have complete information concerning the forward looking revenue statements issued by Mr. Nacchio and Qwest on September 7, 2000. They will be provided with the undisclosed information allegedly provided to Mr. Nacchio immediately prior to, and during, the alleged trades. They will also be provided with the legal principles necessary to evaluate the significance of the undisclosed information as compared with the total mix of information made available by the company and Mr. Nacchio. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988). This evidence and the relevant legal principles will provide the jury with all that is necessary to enable them to determine *objectively* whether or not the undisclosed information was material.

This type of analysis is not enhanced by the individual accounts of the Government's proposed analyst witnesses as to what they may have wanted to know, and such testimony should be excluded pursuant to Fed. R. Evid. 401 and 402. The testimony that the Government apparently seeks to introduce from these professional analysts will also likely inject an incorrect legal definition of materiality, which will unfairly prejudice Mr. Nacchio, even with an appropriate limiting instruction.

Nor is the testimony of individual analysts relevant to whether or not the information was effectively disseminated to the investing public. Information is "nonpublic" if it has not been disseminated in a manner making it available to investors generally. In contrast, information is "public" when it is available to investors, even if it was not published in a press release, newspaper, or other form of media but is available through sources such as analysts' reports, rumors, word of mouth, or other sources. *United States v. Cusimano*, 123 F.3d 83, 89 & n.6 (2nd Cir. 1997) (approving charge), *cert. denied*, 522 U.S. 1133 (1998). Again, this determination can be made based exclusively upon a review of the nature and extent of the disclosures actually made. The individual opinions of research analysts adds nothing to the determination of this element, and should be excluded pursuant to Fed. R. 401 and 402, and as improper expert testimony. See below.

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would use one time capacity sales to fill the gap caused by a 19 percent shortfall." Johnstone earlier referenced his "visceral" reaction to other news released in the 2<sup>nd</sup> Quarter of 2001. Johnstone also opined that if the information had been disclosed, the stock value would have changed dramatically. No notice as to expert testimony from Mr. Johnstone has been provided. (See point 3, *infra*). Prashant Khemka, who also appears on the Government's "Will Call" list, reportedly told government agents on 2/5/07 that "materiality from the investors view, is anything that changes the value of the business," (which is not the standard for materiality) and that the information he gained in 2001 was important and material *to him* in making his models.

B. The Testimony To Be Elicited From A Professional Securities Analyst Will Almost Certainly Be In The Nature Of Expert Testimony Pursuant To Fed. R. Evid. 702, And Should Be Excluded For Failure To Provide Notice Pursuant To Fed. R. Crim. P. 16(A)(1)(G).

It may be that the government will argue that the analysts are not simply testifying in their individual capacity, but rather in the capacity of a person with particular experience or expertise in the area of evaluating the type of information that is important to the investing community as a whole. While Mr. Nacchio submits that such position does not cure the irrelevant nature of the proffered testimony, it becomes inadmissible for another reason. Such opinion testimony would only be admissible by someone qualified as an expert witness, and the government has failed to provide notice of such expert testimony as required by Fed. R. Crim. P. 16(a)(1)(G). This is especially so where, as here, the Government has persistently claimed there would be no experts in its case in chief. Again, this is exactly the type of situation that justifies the Court's exercise of its discretionary power to exclude evidence.

The purpose of Rule 16(a)(1)(G) is "to minimize surprise that often results from unexpected testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997), *cert. denied*, 523 U.S. 1131 (1998); *accord United States v. Cruz*, 363 F.3d 187, 196 n.2 (2d Cir. 2004) (*citing Figueroa-Lopez*).

Fed. R. Evid. 702 applies to all types of expert testimony, scientific or otherwise, the admissibility of which is to be determined preliminarily by the Court under Fed. R. Evid. 104(a). Advisory Committee Notes to 2000 Amendment of Rule 702 (*citing Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999)).<sup>8</sup> Rule 702, and the concomitant disclosures mandated by Rule 16(a)(1)(G), do not rest upon the witness's status as retained, subpoenaed, or volunteer. Rather, the focus is solely on the nature of the anticipated testimony.

Nor does it matter that the "expert" opinion testimony comes from a lay witness who also possesses fact knowledge. "The amendment [of 2000 to both Federal Rules of Evidence 701 and 702] does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*." Advisory Committee Notes to the 2000 Amendments (emphasis in original); *accord United States v. Caballero*, 277 F.3d 1235, 1247 (10th Cir. 2002) (same).

New Rule 701(c) explicitly excludes from its bounds any lay opinion testimony which is based on "specialized knowledge" within the meaning of Rule 702 (which encompasses "scientific, technical, or other specialized knowledge"). "Rather [by virtue of the amendments], a lay opinion must be the product of reasoning processes familiar to the average person in everyday life." *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005). If the witness's opinion rests "in any way" upon technical or specialized

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<sup>8</sup> In contrast, Rule 701 governs lay opinion testimony. The Rule provides: If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on a perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.



knowledge, its admissibility must be determined by Rule 702, not Rule 701. *Id.* (citation omitted).

The purpose of this final foundation requirement is to prevent a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness without satisfying the reliability standard for expert testimony set forth in Rule 702 *and the pre-trial disclosure requirements set forth in Fed. R. Crim. P. 16 and Fed. R. Civ. P. 26.*

*Id.* (emphasis added); *accord United States v. Ayala-Pizarro*, 407 F.3d 25, 28 (1st Cir.) (amendment was intended “to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing,” *quoting* Advisory Committee’s Note on 2000 Amendment; amendment also ensures that such testimony is subject to pretrial disclosure requirements of Fed. R. Crim. P. 16 and Fed. R. Civ. P. 26), *cert. denied*, 126 S. Ct. 247 (2005); *United States v. Martinez-Figueroa*, 363 F.3d 679, 682 (8th Cir. 2004)(amendment designed to prevent a party from using the rubric of lay opinion testimony to “subvert” the disclosure and discovery requirements of Fed. R. Crim. P. 16 and Fed. R. Civ. P. 26)(citation omitted).

Any opinions offered by witnesses such as Mr. Johnstone or Mr. Khemka as to what was material to the market place or whether or not some fact or another was public or non-public, and the like, stem from their claimed specialized knowledge as research analysts. These opinions plainly fall under Rule 702 and trigger pretrial disclosure, which has not been provided.

As previously established in *Russell*, the Tenth Circuit enunciated the standards for evaluating the exclusion of a witness pursuant to a discovery order violation. While the three *Russell* factors intended to serve as guidelines for trial courts, “the paramount concern [in evaluating the sanction for a discovery violation] is maintaining the integrity of the judicial process itself.” *Combs*, 276 F.3d at 1178 (emphasis added). Thus, “even in the absence of prejudice, a district court may suppress evidence that ‘did not comply with discovery orders to maintain the integrity and schedule of the court . . . .’” *United States v. Adams*, 371 F.3d 1236, 1244 (10<sup>th</sup> Cir. 2001).

Here, the government apparently persists in its view that the testimony it seeks to elicit from these research analysts is not in the nature of expert opinion testimony since no Rule 16 notice on this subject has been provided. In that case, the Court should exclude the evidence as improper Fed. R. Evid. 701 lay witness opinion testimony. The opinions of these professional analysts 1) are not rationally based on the perception of the witness, 2) are not helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and 3) are based on specialized knowledge within the scope of Rule 702.

C. The Testimony Of Persons Who Lost Money Investing In Qwest Stock And Blame Mr. Nacchio Is Irrelevant And Any Minimal Probative Value Is Substantially Outweighed By The Danger Of Unfair Prejudice.

The government offers no explanation as to the identity of the “others” referenced in its Trial Brief as it concerns proffered testimony of “the significance of insider information.” However, there appear to be three categories of witnesses that

the government intends to call to testify, all of whom have similar information to provide: they invested in Qwest stock and they lost money. Two of these prospective witnesses, Sally Anderson and Bruce Fiebach, were solicited to be witnesses by Curtis Kennedy, who is an attorney for the Association of US West Retirees. A third witness, David Speranza, was identified and contacted because he wrote an email to Mr. Nacchio in November 2000, complaining about Mr. Nacchio's sales of Qwest stock. Five other persons identified on the government's "May Call" list were named plaintiffs and representative parties in a class action retirement plan ERISA lawsuit brought against Mr. Nacchio, Qwest, the Qwest subsidiary that acted as the fiduciary of the plan, the plan investment committee (of which Mr. Nacchio was not a member), an insurance company, and twenty-six other named individuals (consisting mainly of board of director and investment committee members).

1. The witnesses solicited by the U.S. West Retirees Association

According to the FBI interview reports, Sally Anderson and Bruce Fiebach "responded to an email received from [Mr.] Kennedy [that] invited the recipients to respond if they were interested in providing testimony pertaining to their [financial] loss after the drop / plunge in the value of Qwest stock."<sup>9</sup> Ms. Anderson reportedly had

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It was reported in the Rocky Mountain News on January 26, 2007, that federal prosecutors asked the Association of US West Retirees "to help identify potential witnesses who suffered large financial losses after buying Qwest stock during the first five months of 2001." *Wanted: Qwest witnesses*, January 26, 2007, Rocky Mountain News. Reportedly, the group has tens of thousands of members, and the letter from Mr. Kennedy indicated that Prosecutor Colleen Conry would be meeting with potential witnesses. This appears to be confirmed by the email thread attached to the Anderson 302 report, which includes an email from a woman "assisting government attorney Colleen Conry in following up on emails sent in response to Curtis Kennedy's email on 1/24/07." The article also reported that a former federal prosecutor opined that the prosecutors were employing a good strategy to put "victims" on the stand to personalize the case with "gut-

been employed by US West since 1982, reallocated the contributions in her retirement plan to have 100% invested in Qwest stock sometime in 2000 based upon positive forward looking financial projections made by Mr. Nacchio, and “ultimately” lost over \$250,000. Mr. Fiebach stated that he considered changing the allocation of his contributions, but changed his mind after hearing Mr. Nacchio make positive forward looking financial projections and explain that he (Mr. Nacchio) was selling his stock to diversify his portfolio. Mr. Fiebach wrote in his reply email to Mr. Kennedy that this event “may or may not have occurred during the time frame in question.”

2. The investor who wrote an email to Mr. Nacchio complaining about executive stock sales

According to the interview report of Mr. Speranza, he wrote an email to Mr. Nacchio in November 2000, complaining that because Mr. Nacchio and other executives were selling stock, “[i]t looks like rats are deserting the sinking ship and taking theirs with them.” The interview report of Mr. Speranza indicates that he had been employed by US West, participated in the Qwest Shares Fund, and that the value of his fund went from \$300,000 (at some unspecified time) to \$30,000 by the end of February, 2005, years after Mr. Nacchio was no longer employed by Qwest.

3. The civil plaintiffs

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wrenching stories’ by people who lost their life savings,” which was employed effectively in the Enron criminal case. Both Ms. Conry and Mr. Stricklin served on the Enron task force, which involved very different charges than those here. Despite a 3/2/07 request for additional information pursuant to Brady v Maryland, to date the government has not provided Mr. Nacchio with a copy of Mr. Kennedy’s email, or with any information about the size of the distribution list for the solicitation email from Mr. Kennedy, the number of responses received, or the existence of any responses that may be considered favorable to the defense.

Four other persons on the government's "May Call" List, Dan Connors, Janice Dudley, Jim Rooney, and Paula Smith, for which no interview reports have yet been provided, were named plaintiffs and representative parties in a class action retirement plan ERISA lawsuit brought against Mr. Nacchio, Qwest, the Qwest subsidiary that acted as the fiduciary of the plan, the plan investment committee (of which Mr. Nacchio was not a member), an insurance company, and twenty-six other named individuals (consisting mainly of board of director and investment committee members). The complaint makes numerous and complex allegations, to include that certain participants in the US West retirement plan were prohibited from removing contributions from the plan and placing them in other investment vehicles until April 2002, allegations relating to events that caused a drop in the price of Qwest stock, which both pre-date and post-date the relevant time period of this indictment; and, most importantly, allegations relating to the drop in price of Qwest stock that otherwise have nothing to do with the insider trading allegations of this indictment.

The eighth person that Mr. Nacchio believes to have irrelevant testimony for similar reasons discussed herein is identified only as the California State Teachers' Retirement System ("CALSTRS") plan manager. Again, CALSTRS is a named plaintiff in a recently settled class action lawsuit that included a myriad of allegations concerning the reasons behind the drop in Qwest's stock price.

4. The testimony of all of these prospective witnesses is irrelevant in the context of the insider trading charges brought against Mr. Nacchio.

The fact that any of these persons invested in Qwest stock and ultimately lost money when the price of the stock dropped is completely irrelevant to the charges of insider trading. The Government's Trial Brief indicates only that in addition to the investment analysts, "others" are expected to testify regarding whether the information was material to a reasonable investor. As indicated above, the reasonable investor test is an "objective standard." The testimony by these individual investors about hearing Mr. Nacchio speak positively about the financial projections of the company on one (or even two or several) occasions is anything but objective. Where as here, there were likely hundreds of thousands of investors in Qwest during the relevant time period, the material nature of information that a "reasonable" investor would consider important can not be measured by what one or ten individual investors may have wanted to know or claim that they were not told.

The materiality of the information must be considered in the context of the nature of the information itself as measured against an objective standard, not as viewed by any particular person or persons. *Michaels v. Michaels*, 767 F.2d 1185 (7th Cir. 1985). Whether the undisclosed information would have "significantly altered the total mix of information made available concerning the company," *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988), is almost certainly not subject to being known by any particular person or even group of persons. The individual accounts of what the government's proposed

witnesses heard, did or didn't do as a result, or claim they would have wanted to know is irrelevant and should be excluded pursuant to Fed. R. Evid. 401.

The manner and nature of the solicitation to the US West Retirees Association, and status as plaintiffs in very complex civil litigations against Mr. Nacchio and others further define the subjective nature of the testimony of the Government's proposed witnesses. Furthermore, while this type of bias is generally subject to the rigors of cross examination, such an exercise is almost impossible under the circumstances of this case. Any effort to point out the obvious bias likely held by civil litigants, who brought a myriad of civil claims against Mr. Nacchio and many others in related, but very different cases from this one, opens the proverbial "Pandora's box." A proper cross examination would require a full exploration of the many and varied allegations made by these individuals about the reasons for their financial losses. The danger of unfair prejudice, confusion of the issues, and time expense that would result from such an exercise makes clear that the evidence should be excluded pursuant to Fed. R. Evid. 403.

Nor is the testimony of these individual investors admissible under some theory that they are testifying as "victims" of the insider trading offenses brought against Mr. Nacchio. This insider trading case such as this one, unlike a mail or wire fraud allegation, does not allege a fraud against a particular individual or individuals. To allege such an offense would require the government to identify specific buyers of the stock that Mr. Nacchio sold. The government has not done that, and the government

has also not alleged that Mr. Nacchio caused false information to be disseminated to investors.<sup>10</sup> The government can not have it both ways. In bringing these insider trading charges against Mr. Nacchio, the Government chose to rely on the general fraud on the market place theory, and it can not now seek to introduce the “gut-wrenching stories” of a very select few, who very well may have lost money for reasons having nothing to do with the alleged acts of insider trading brought against Mr. Nacchio.

The unfair prejudice created against Mr. Nacchio by this type of testimony, considering all of the circumstances discussed herein, substantially outweighs any probative value. under Fed. R. Evid. 403.

#### V. EVIDENCE OF SZELIGA’S GUILTY PLEA

Robin Szeliga, Qwest’s CFO during the portions of the indictment period, entered into a plea bargain with the government in which she pled guilty to one instance of insider trading on her own account. Szeliga is not a coconspirator, and her guilty plea is admissible only Fed. R. Evid. 609. Mr. Nacchio asserts to the Court and the government that he does not intend to be the proponent of this evidence to impeach her credibility, unless it is first raised on direct examination. Accordingly, there is no basis for the government to seek to introduce the evidence on direct examination (or to refer to it in opening). Such would be improper bolstering of unimpeached testimony

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<sup>10</sup> The government itself has recently recognized this in its Objections to Defendant’s Additional Requests to Charge at p. 19: “As note, Defendant is not charged with affirmative misrepresentations to the public. The proper focus is on *internal* statements that were made *to* Defendant and *inside* information that was provided *to* him prior to his trades.” (emphasis in original).



and vouching for the credibility of a government witness, amounting to nothing more than an out-of-court prior consistent statement. See *United States v. Harlow*, 444 F. 3d 1255, 1265 (10<sup>th</sup> Cir. 2006) (introduction of government witnesses' plea agreements and Rule 35(b) impermissible vouching, where sentence reductions sought were to be imposed by the judge presiding in the trial).

## VI. ADMISSIBILITY OF CLASSIFIED EVIDENCE UNDER CIPA

Without a single citation to a statute or case law, the government asserts that CIPA evidence can only be introduced into evidence if Mr. Nacchio testifies in his own defense. Govt's Brief, § IV. This novel assertion subverts Mr. Nacchio's Fifth Amendment right not to testify, and there is nothing in the CIPA statute that changes the Constitution or the Rules of Evidence. Indeed, it is well settled that the CIPA statute in no way alters the Rules of Evidence. *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363-64 (11<sup>th</sup> Cir. 1994).

It is a bedrock of constitutional law that a criminal defendant has the right not to testify in his own behalf, without any negative inference being drawn. The notion that Mr. Nacchio cannot introduce classified evidence unless he first takes the stand (Govt's Brief at 29) is not supported anywhere in the CIPA statute and would not pass constitutional muster if it were.

The government's assertion that only testimony from Mr. Nacchio can lay a proper foundation as to his state of mind is also not supported by the Federal Rules of Evidence. The issue of Mr. Nacchio's state of mind can be introduced by either

documents, or by witnesses in at least two ways: as lay opinion testimony and under the “state of mind” exception to the hearsay rule.

When a defendant’s state of mind is an issue in the case, lay opinion testimony may properly be offered to prove it. *United States v. Rea*, 958 F.2d 1206, 1214-15 (2d Cir. 1992). *See also United States v. DePeri*, 778 F.2d 963, 977 (3d Cir. 1985) (agent could testify as to his understanding of tape recorded conversations of the defendant), *cert. denied*, 475 U.S. 1110 (1986). *See also United States v. Graham*, 856 F.2d 756, 759 (6th Cir. 1988) (agent permitted to offer lay opinion testimony “with regards to what he understood Graham intended” when he made a certain statement), *cert. denied*, 489 U.S. 1022 (1989).

The state of mind exception to the hearsay rule is also a basis for admitting the evidence. *See United States v. Joe*, 8 F.3d 1488, 1491-92 (10th Cir. 1993) (doctor permitted to testify about wife’s stated post-rape “fear” of husband as “reflecting her then-existing state of mind”), *cert. denied*, 510 U.S. 1184 (1994). In *Webb v. ABF Freight System, Inc.*, 155 F.3d 1230, 1248 (10th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999), the Court upheld the allowance of testimony by one witness about what another had been thinking when he made a statement. *See also Oberman v. Dun & Bradstreet*, 507 F.2d 349, 351 (7th Cir. 1974) (witness allowed to offer his account of a telephone conversation with another, “under the state of mind exception to the hearsay rule, ... even though the declarant is available to testify.”). Fed. R. Evid. 803(3) thus

permits others to testify about Mr. Nacchio's state of mind regarding potential classified government contracts.

Respectfully submitted this 9th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March 2008, a true and correct copy of the foregoing DEFENDANT JOSEPH P. NACCHIO'S TRIAL BRIEF as served on the following via email:

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