

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

**MOTION BY THE UNITED STATES FOR AN ORDER
CONCERNING THE RIGHTS OF CRIME VICTIMS PURSUANT TO
TITLE 18, UNITED STATES CODE, SECTION 3771(d)(2)**

The United States of America, by its undersigned counsel, respectfully moves pursuant to Title 18, United States Code, Section 3771(d)(2), for an order establishing a reasonable procedure concerning the notification of crime victims of the upcoming sentencing of Mr. Nacchio on July 27, 2007.

I. The Court has authority to create a “reasonable procedure” to notify victims regarding the sentencing.

Congress has provided that a “crime victim” has “[t]he right to be reasonably heard at any public proceeding in the district court involving ... sentencing” 18 U.S.C. § 3771(a)(4). Such crime victims are also entitled to “reasonable, timely, and accurate notice” of the sentencing. § 3771(a)(2). Congress has further required the Department of Justice and other investigating agencies to “make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).” § 3771(c)(1).

Congress has further provided that “[i]n a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.” § 3771(d)(2). The United States submits that this is a case where there is a large number of crime victims such that it would be impracticable to accord them all the right to speak at sentencing.

Congress has defined “crime victim,” in relevant part, as “a person directly and proximately harmed as a result of the commission of a Federal offense” § 3771(e). Where the offense of insider trading is at issue, the United States Sentencing Commission has concluded that “the victims and their losses are difficult if not impossible to identify” *See* 2000 United States Sentencing Guidelines Manual, § 2F1.2 (Insider trading), Application Note 1.

For purposes of 18 U.S.C. § 3771, victims of the insider trading offenses on which Mr. Nacchio was found guilty (which relate to his trades during the period April 26, 2001 through May 29, 2001) may include a wide range of investors, such as (a) Qwest shareholders who may have directly bought from Mr. Nacchio the stock at issue in Counts 24-42 (the counts as to which Mr. Nacchio was found guilty); (b) other Qwest shareholders during the period in question who may have made investment decisions during the period covered by those offenses and who may have been affected by Mr. Nacchio’s conduct; and (c) Qwest itself (and its shareholders), which had an interest in avoiding the legal and reputational injury resulting from the conduct of its president and chief executive officer in using Qwest’s material nonpublic information to engage in a scheme to deceive or cheat investors.

It would be extraordinarily difficult and expensive even to attempt to contact the first subgroup — *i.e.*, those who purchased stock directly from Mr. Nacchio between April 26, 2001 and May 29, 2001. In connection with the counts on which Mr. Nacchio was found guilty, he sold 1,330,000 shares of Qwest stock. *See* Docket No. 412, Att. 2. Identification of individual purchasers would be further complicated by the fact that many, if not most, Qwest shares would be held in “street name” — *i.e.*, the brokerage firm would hold the investor’s securities in its name or another nominee, but would keep internal records reflecting the identity of the beneficial owner.¹ Therefore, even if the Government were to contact the nominal group of purchasers, this group would not accurately reflect the actual investors. Because of these hurdles, contacting the actual investors for all of the trades at issue in the counts as to which Mr. Nacchio was found guilty would be extraordinarily expensive.

III. The United States’ proposal for a reasonable procedure

The United States believes that although it is not practical to individually contact all of the potential victims to notify them of the sentencing, the purposes of 18 U.S.C. § 3771 can be satisfied in this case through an alternative “reasonable procedure” pursuant to § 3771(d)(2). The United States proposes the following:

First, the United States notes that some notice to victims regarding the sentencing has already been provided.

- a. The United States Attorney’s Office has established a link on its website

¹ *See* <http://www.sec.gov/answers/street.htm>.

for interested individuals to obtain the contact information for a person in the United States Attorney's Office who can answer questions regarding the sentencing. The website also includes current information from the Court's docket sheet about scheduled Court dates (including the sentencing), as well as the text of the victim rights described in 18 U.S.C. § 3771(a)(1)-(8). The United States intends to continue to maintain this link.

b. The Court has made available, through its ECF system, prompt notification to members of the general media and the public all pleadings and important orders about hearings taking place in this matter, including notice of the sentencing. The United States assumes that the Court intends to continue to maintain this system through the sentencing. The United States further observes that if the Court issues an order regarding victim notification (as proposed below), that order will likely itself receive press coverage, which would have the salutary effect of providing further notice of the procedures regarding victims.

Second, the United States proposes that additional notice could be provided by the United States to victims through the following means:

a. A shareholder class action was filed in the District of Colorado on behalf of all purchasers of Qwest stock from May 24, 1999 through July 28, 2002. That class was represented by a sophisticated class plaintiff, New England Health Care Employees Pension Fund, and by experienced counsel. The United States expects that some of the class members are likely victims. The United States could provide notice of the sentencing, by letter, to class counsel.

b. As noted above, Qwest itself is a victim of Mr. Nacchio's conduct. The

United States could provide notice of the sentencing, by letter, to Qwest counsel.

c. There is an Association of US West retirees, many of whom likely invested in Qwest stock during the spring of 2001. The United States could provide notice of the sentencing, by letter, to this association.

d. The United States Attorney's Office, if authorized by the Court, could publish a notice in the *Denver Post* and the *Rocky Mountain News* that would explain to potential victims how they might proceed if they had a desire to speak at sentencing.

e. The United States Attorney's Office could also issue a press release that would be directed to the *Denver Post*, the *Rocky Mountain News*, and the *Wall Street Journal*, and any other interested publications, and that would provide notice of the sentencing and explain that potential victims could contact the Court if they wished to speak at sentencing.

Third, the United States proposes the following language for the statement to be made in the letters and notices discussed above:

The Office of the United States Attorney for the District of Colorado provides the following notice: Joseph P. Nacchio, the former President and Chief Executive Office of Qwest Communications International, has been found guilty on nineteen counts of insider trading securities fraud, relating to sales of Qwest stock between April 26, 2001 and May 29, 2001. Mr. Nacchio is scheduled to be sentenced in the United States District Court for the District of Colorado before the Honorable Edward W. Nottingham on July 27, 2007. Any investor who believes that he or she was a victim of these offenses and who wishes to make a statement to the Court regarding the sentencing must submit a brief statement, *in writing*, to the Court (1) stating whether he or she was a shareholder of Qwest stock between April 26, 2001 and May 29, 2001; (2) stating whether he or she purchased Qwest stock between April 26, 2001 and May 29, 2001; (3) stating whether he or she wishes to make a statement at sentencing, and (4) explaining briefly why he or she believes he is a victim and summarizing

what he or she wishes to say at the sentencing. Submitting this statement does not mean that the person is entitled to speak at the sentencing; that determination will be made by the Court. The written statement must indicate that it is submitted in connection with the sentencing in United States v. Nacchio, 05-cr-545-EWN, and should be directed to the Clerk of Court, 919 19th Street, Denver, CO 80202, and must be *received* by the Clerk no later than July 13, 2007.

Fourth, the United States proposes that these statements be made available by the Clerk to counsel for the parties for review. The parties then could, after having an opportunity to review any statements that have been submitted, file briefs with the Court proposing an appropriate procedure for handling the sentencing procedures as to these victims in accordance with 18 U.S.C. § 3771.

CONCLUSION

For the reasons set forth above, the United States respectfully moves for an order pursuant to 18 U.S.C. § 3771(d)(2) incorporating the procedures set forth above and finding that these procedures are reasonable under the circumstances. A proposed order is attached. Defense counsel has been consulted regarding this motion and does not consent.

Respectfully submitted this 26th day of June, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2007, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

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**RESPONSE TO MOTION OF THE UNITED STATES
FOR AN ORDER CONCERNING THE RIGHTS OF CRIME VICTIMS
PURSUANT TO 18 U.S.C. SECTION 3771(d)(2)**

INTRODUCTION

Joseph P. Nacchio, by and through undersigned counsel, hereby opposes the motion of the United States for an order concerning notification to "crime victims" of the upcoming sentencing of Mr. Nacchio, and inviting them to speak.

Under the guise of fulfilling an obligation that it knows it does not have and has not bothered to comply with since the inception of this case, the government seeks to create a mob scene at the July 27, 2007 scheduled sentencing proceeding of Mr. Nacchio. The government's inappropriate and untimely actions which should not be sanctioned by the Court.

The government concedes, as it must, that it has no reasonable possibility of notifying any “crime victim” as that term is defined by the very statute which it purports to rely upon as imposing the obligation upon it. As the government points out, 18 U.S.C. § 3771(e) defines “crime victim” as “a person *directly and proximately* harmed as a result of the commission of a Federal offense . . .” (emphasis added). See *United States v. Sharp*, 463 F.Supp.2d 556, 563 (E.D.Va. 2006) (court interpreting language of § 3771(e) held that “an individual is only directly and proximately harmed when the harm results from conduct underlying an element of the offense of conviction”). The government acknowledges that it would be prohibitively expensive and too difficult “even to attempt to contact . . . those who purchased stock directly from Mr. Nacchio between April 26, 2001, and May 29, 2001.” Government Motion [Doc 438] at 3. The government knows that there are no identifiable persons who would be able to establish that they actually purchased the shares that Mr. Nacchio sold on any given day.¹ The government therefore knows very well that given the nature of the offense, the statute imposes upon it no obligation to notify anyone because there are no “direct and proximately harmed” persons that can be identified.²

¹ Government Trial Exhibit 413 shows that between April 26, 2001, and May 29, 2001, the volume of Qwest shares traded on any given day was generally between 5 and 7 million, was three times between 9 and 12 million, and was less than 3 million on only one occasion. On 14 of the same 19 trading dates, Mr. Nacchio sold from approximately 4,000 to 70,000 shares; he sold approximately 100,000 shares on 3 dates; and a total of 650,000 on the other 2 days.

² It is far from clear that in this type of case, even assuming the statute applies, the court would be required to provide anyone with an opportunity to speak at the sentencing (footnote cont.)

The government has acknowledged this fact by its failures to notify anyone at any prior time during these proceedings. 18 U.S.C. § 3771(a)(2) provides that “crime victims” have “[t]he right to “reasonable . . . and timely notice of *any* public court proceeding.” It is only now, after the Probation Department has concluded its Presentence Report that this so-called “Notice” to victims is sought.

The sentencing proceeding is scheduled to take place in about one month. There is simply no justification for the government to have waited until now to “make their best efforts to see that crime victims are notified of, and accorded, the rights” to which they are entitled by law. 18 U.S.C. § 3771(c)(1).

The government’s application offers no reasonable opportunity to identify and provide notice to persons that were directly and proximately harmed by Mr. Nacchio’s insider trading offenses. This the government admits. The government submits instead that because it is difficult, if not impossible, to identify such persons, they should instead involve the Court in ordering that a much broader scope of persons, to include “Qwest shareholders who *may have made investment decisions*” and “*may have been affected* by Mr. Nacchio’s conduct” during the relevant time period. Government Motion [Doc 438] at 2.³

hearing, other than the defendant’s attorney, the defendant, and an attorney for the government. See Fed. R. Crim. P. 32(i)(4), which in addition to the above, only requires the court to provide “any victim of a crime *of violence or sexual abuse*” with an opportunity to speak or submit information about the sentence. (emphasis added).

³ This request is especially egregious when one considers the contrary position taken by the government throughout these proceedings as it concerns the type of material inside (footnote cont.)

Incredibly, the government proposes to provide notice to hundreds of thousands of investors with the advice that they decide for themselves whether they “believe” themselves to be “a victim of these offenses.” Government Motion [Doc 438] at 5. They identify “Qwest itself,” and of course, all of “its shareholders,” not as persons directly or proximately harmed, but as persons who “had an *interest* in avoiding the legal and reputational injury” resulting from the CEO being convicted of insider trading. *Id.* at 2.

These then are the so-called purported “best efforts” of the government to comply with its statutory obligation to notify persons “directly and proximately harmed” by the offenses. The government’s proposal is not an effort to meet its statutory obligations, but is instead an effort to stimulate vitriolic letters to be sent to the Court, and to provide a public platform, certainly to be covered by the media, for individuals to express their outrage about any number of details concerning their personal financial travails likely having nothing to do with the offenses for which this Court will sentence Mr. Nacchio.

The government seeks by its actions to incite the many residents of this community that harbor ill will toward Mr. Nacchio, people who blame him for much more than was decided by the jury, to come forward to demand that strong punishment be meted out by this Court. This is reminiscent of the tenor of the statement by the head of the office upon the verdict: “For anybody who

information at issue in the case. The government represented on any number of occasions that Mr. Nacchio and Qwest were not obligated to disclose the information at issue in this case. See e.g. 3/20/07 at 22, 4/10/07 at 2737.

has ever made a call from Qwest's 14-state service area, 'convicted felon Joe Nacchio' has a nice ring to it." Andy Vuong, *Nacchio convicted on 19 counts. What's next: Former Qwest CEO to be sentenced July 27*, Denver Post, April 20, 2007, available at http://www.denverpost.com/business/ci_5708804.

The government's proposal will serve no legitimate purpose, and will likely burden the Court, primarily, and the defense, secondarily, with overwhelming and unnecessary responsibilities. Mr. Nacchio respectfully requests that the Court not sanction the government's effort to infect these proceedings with even greater outside pressures than already exist.

Respectfully submitted this 28th day of June, 2007.

s/Herbert J. Stern

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June 2007, a true and correct copy of the foregoing **DEFENDANT JOSEPH P. NACCHIO'S RESPONSE TO MOTION OF THE UNITED STATES FOR AN ORDER CONCERNING THE RIGHTS OF CRIME VICTIMS PURSUANT TO 18 U.S.C. SECTION 3771(d)(2)** was served on the following via email:

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