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.

DEFENDANT JOSEPH P. NACCHIO'S REPLY TRIAL BRIEF

Defendant Joseph P. Nacchio, by and through undersigned counsel, replies briefly to the Government's Response to Defendant's Trial Brief ("Response") as follows:

I. Alleged Backdating Evidence

The government seeks to open on evidence as to which the Court has yet to rule. We have presented our grounds for exclusion of this evidence in Mr. Nacchio's Trial Brief, and will not reargue those grounds here, except to say that the admissibility of this evidence is *sub judice* before this Court. The computer and documentary evidence upon which the government's expert testimony is based were acquired in violation of the attorney-privilege. Moreover, there are the other grounds for exclusion, including that the evidence is really Fed. R. Evid. 404(b) evidence and/or is otherwise

subject to Rule 403. Because of this there is no difference between the alleged backdating evidence and other 404(b) evidence, which the Court admonished the government it should not refer to in opening statements before an admissibility determination. 8/25/06 Hearing Tr. at 48. Given the nature of the issues, including privilege, the defense cannot open as long as the issue is *sub judice*.

On a minor point, the government thinks we should have raised this issue in a motion in limine. This Court has made clear both on the record and in its Practice Standards that in limine motions are discouraged, so we chose our trial brief to present our position to the Court.

II. CIPA Evidence

The government continues to insist that before Mr. Nacchio may introduce evidence of classified matters, he is required by the Federal Rules of Evidence to waive his constitutional right not to testify. Government Response To Defendant's Trial Brief at 33-34 (April 14, 2007). It is not correct that only Mr. Nacchio's own testimony is capable of laying the foundation for the admission of this evidence.

The government's contention to the contrary is wrong under constitutional, statutory and case law, not to mention this Court's view. The defendant's state of mind can be established by evidence other than Mr. Nacchio's own testimony, for example pursuant to Rule 803(3), through out of court statements, or as lay opinion, and also through extrinsic evidence which can be used by a jury in making that determination. For example, the testimony of a witness like Mr. Payne can establish what was said by

him to Mr. Nacchio, and by others to Mr. Nacchio, in his presence. The government points to no provision of the CIPA statute that mandates the defendant's testimony as the only source for classified evidence.

The sole case relied upon by the government, the recent opinion in *United States v. Libby*, -- F.Supp.2d --, 2007 WL 623646 (D.D.C.), is inapposite to the government's position and actually supports this Court's view that a proper foundation for the introduction of classified information may be laid in any manner allowed under the Rules of Evidence -- by documents or testimony of witnesses -- and, if necessary, due to the absence of any other source, by the defendant.

First, contrary to *Libby,* throughout all of the CIPA hearings in this matter we have never represented to the Court that Mr. Nacchio would testify. None of this Court's CIPA rulings have been premised on the assumption that Mr. Nacchio was going to testify. This is in sharp contrast to the *Libby* case, where the Court stated that its own CIPA rulings were premised on defense representations that the defendant would testify and present the necessary foundation for the admissibility of a previously negotiated list of classified matters. *See Libby*, 2007 WL 623646, *7-*8.

Second, the predicate facts in the instant case are distinguishable from those in *Libby.* In *Libby*, the disallowed evidence consisted of a list of classified matters which so "consumed" the defendant that he forgot other events happening at the same time. Even though the defendant chose not to testify, the defense still sought to introduce the "Statement Admitting Relevant Facts," without any connection as to how those

"relevant facts" bore upon the defendant's intent to commit the crime of perjury before the grand jury. The court therefore ruled the list inadmissible on the grounds that a proper foundation had not been laid:

> [T]he Court concluded that the Statement was inadmissible in the absence of the defendant's testimony. During the course of the CIPA hearings, this Court concluded that certain pieces of evidence were relevant to assist in establishing the defendant's "memory defense" based upon the expectation that the defendant's own testimony would establish that his attention was consumed by various matters other than the key events outlined in the indictment.

2007 WL 623646, *8.

In contrast, here, the classified evidence we seek to introduce through documents and witnesses other than Mr. Nacchio bears directly on Mr. Nacchio's state of mind by presenting what was imparted to him concerning Qwest's prospects for new government business in 2001.

Third, in *Libby*, Judge Walton observed that the defendant had, if he had chosen, many ways to introduce the evidence without testifying himself:

> The defendant also had a number of other vehicles of presenting to the jury the nature and scope of his work responsibilities. In fact, during the defendant's case, John Hannah, the Vice President's current National Security Advisor, and formerly the defendant's deputy, testified about the nature and scope of the national security work the defendant performed during the critical dates of this case. And had he chosen to do so, the defendant could have also recalled David Addington during his case to testify about the scope of his responsibilities as Chief-of-Staff to the Vice President, a position also held by the defendant during the times pertinent to this case. Additionally, the defendant's former administrative assistant could have been called as a witness to discuss his daily schedule, and his calendars could have been introduced as exhibits to show the jury the demands of the defendant's daily schedule. Moreover, the defendant could have called the Vice President to testify concerning the issues he

> directed the defendant to address and upon which the Vice President expected the defendant would devote his time and attention.

Id., *13 n.21.

Here, the evidence we seek to introduce is the same underlying evidence which the *Libby* Court stressed was admissible to lay a foundation, evidence going directly to what Mr. Nacchio was informed about potential classified business for Qwest which bears directly on the issues in this case.

Because the government is insisting that this otherwise perfectly proper and admissible evidence may not be allowed unless Mr. Nacchio first testifies, the government is asking the Court to impose the very "additional, artificial costs upon the defendant" that are constitutionally impermissible. *See Libby*, 2007 WL 623646, *15. As phrased by Judge Walton, "burdens imposed by … a court that penalize the exercise of a defendant's Fifth Amendment rights by levying some additional, artificial cost upon the invocation of that right do run afoul of that Amendment's guarantees." *Id*.

The premise upon which this Court determined the use, relevance and admissibility of Mr. Nacchio's classified evidence - - that it is not conditioned on Mr. Nacchio's testimony - - is not changed by *Libby*.

III. Investor/Analyst Testimony

A. Proffered testimony by analysts about what they considered to be important (and "material") is irrelevant and in the nature of expert testimony.

The government represents on one hand that analysts will not be called to testify about whether certain information was "material," and on the other hand states

that the analysts will testify about "what information they considered important." Response at 16-17, 27-29. But according to the government's own proposed legal instructions, it is the government's view that "information may be material . . . so long as a reasonable investor would consider the information *important* in deciding whether to buy, sell, or hold securities, or at what price to buy or sell . . . [and the jury] should evaluate the *importance* of the information to a reasonable investor . . ." United States Proposed Disputed Jury Instruction No. 12 at 18 (emphasis added). The government intends to elicit testimony from these professionals about what they considered (generally after considerable hindsight) to be "important;" therefore, such testimony should not be permitted.

First, the analysts are being called as experts since their opinions about the relative importance of market information is clearly based upon specialized knowledge within the scope of Fed. R. Evid. 702, and the government has not provided the requisite notice. Second, the views and expertise of these professionals is irrelevant to the issues before this jury.

The testimony of analysts, whose job it was to ferret out every conceivable fact that they could, is not the standard of materiality, nor is it relevant for the purpose of determining materiality. Such testimony will serve only to confuse the jury and unduly prolong the trial. In so doing, it will also unfairly prejudice the defendant.

Furthermore, the proffered testimony should not be admitted under Rule 701. In contrast to the cases cited by the government, the analysts are not being called to

testify about their knowledge of their own companies. They are being called to testify about opinions concerning the securities market for the telecom industry in general, which necessarily involves specialized knowledge, and therefore, Rule 702.

B. The solicitation email by Mr. Kennedy shows that the non-professional witnesses have irrelevant and overly prejudicial testimony, which should be excluded pursuant to Rules 401 and 403.

The email sent by Curtis Kennedy, who is an attorney for the Association of US West Retirees, soliciting "victims" to come forward and assist the prosecution, is attached as Exhibit A. A review of this email is further proof of the inadmissibility of the proffered testimony of persons who will say little more than that they invested in Qwest stock and lost a lot of money. The proffered testimony is not objectionable because they are humans, but because of what these particular humans are being called to say. Their testimony is also irrelevant to the issue of materiality and will serve only to confuse the jury.

Respectfully submitted this 16th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March 2007, a true and correct copy of the foregoing DEFENDANT JOSEPH P. NACCHIO'S REPLY TRIAL BRIEF as served on the following via email:

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