IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 05-cr-00545-MSK

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

RESPONSE BY UNITED STATES TO DEFENDANT NACCHIO'S MOTION FOR NEW TRIAL

The Government hereby responds to Defendant Joseph Nacchio's Motion for New Trial. The motion should be denied.

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I. INTRODUCTION

In criminal cases, "motions for new trial on grounds of newly discovered evidence 'are not favored by the courts and are viewed with great caution.'" 3 C. Wright *et al.*, Federal Practice & Procedure § 557 (1982), *quoted in INS v. Abudu*, 485 U.S. 94, 107 n.12 (1988). "[M]otions for new trials on the basis of newly discovered evidence" are "disfavored" because once the adversaries have presented their cases, "[t]here is a strong public interest in bringing litigation to a close." *Abudu*, 485 U.S. at 107.

A defendant who moves for a new trial based on allegedly newly discovered evidence has a heavy, multi-part burden. He must show that the evidence (1) is newly discovered and became known only after the trial, (2) could not have been obtained earlier through reasonable diligence, (3) is neither cumulative nor merely impeaching, (4) is material to the principal issues involved, and (5) is so powerful that when presented in a new trial it would probably lead to an acquittal. *See generally United States v. Gwathney*, 465 F.3d 1133, 1143 (10th Cir. 2006).

Defendant Nacchio's motion does not satisfy all of these elements. It does not even come close.

The most obvious problem with Nacchio's motion is that the evidence at issue is not "newly discovered" for purposes of Rule 33. The witness at issue, Robin Szeliga, testified at trial. She did so at length. She even discussed the matter on which Nacchio's motion rests – a conversation with Nacchio himself. At her deposition, Szeliga simply testified about the conversation again. Such evidence is not newly discovered.

Nor can Nacchio show that he could not have obtained this evidence at trial. She testified at trial, and counsel for Nacchio could have asked at trial the same questions he

asked at her deposition. Indeed, the record shows that defense counsel was aware of an ambiguity at trial, but chose not to clarify it, and chose not to call Szeliga as a witness as part of the defense case.

The evidence is also cumulative, in that it simply rehashes — though with far less clarity — testimony Szeliga gave at trial. And to the extent it is inconsistent with her trial testimony and with other evidence at trial, it is merely impeaching.

Finally, Nacchio cannot show that the evidence is so powerful that it would probably result in an acquittal. First, the allegedly new evidence relates to Szeliga's testimony about a single conversation with Nacchio. At trial, a great deal of evidence of materiality was adduced besides that one conversation, all of which Nacchio ignores in his motion. Second, Szeliga's recent deposition testimony about that conversation shows that her memory has faded. She does not recant her trial testimony, but indicates that she recalled the facts better at the time of trial. It is hardly powerful evidence showing that an acquittal is probable. Third, the deposition testimony, even read generously, does not come close to supporting the bold claims that Nacchio makes about it.

In short, the Court should find that (1) the evidence is not newly discovered, (2) that even if it was newly discovered, it could have been obtained earlier through reasonable diligence, (3) that it is cumulative, (4) that it is merely impeaching, and (5) that such evidence would not probably lead to an acquittal.

II. BACKGROUND

The government summarizes below the relevant proceedings and testimony that relate to the issues raised by Nacchio. These proceedings show that (1) the alleged new

information from Szeliga is not newly discovered, and (2) there was other ample evidence of materiality.

Because the Szeliga testimony is more easily understood in the context of the case, the materiality evidence is discussed first in this section, and the relevant Szeliga testimony (both at trial and during her deposition) is discussed second.

A. Nacchio was charged with selling stock on the basis of an array of material non-public information.

The indictment charged Joseph Nacchio, the former Chief Executive Office of Qwest Communications International, Inc. (Qwest), of exercising options and sold more than $100 million in stock from January to May 2001 on basis of material, nonpublic information, in violation of SEC Rule 10b-5. *See* Ex. 1 (Doc. 1 (Indictment)) at ¶ 9.

On the issue of materiality, the indictment was not nearly as narrow as Nacchio suggests. It detailed several different pieces of material non-public information about Qwest's business. One focus was on Qwest's "financial guidance, generally referred to as targets." Ex. 1 (Indictment) at ¶ 2. This "financial guidance" or "targets" included three components on which Qwest had announced its expectations for 2001: revenue, earnings, and growth.[1] *Id.* at ¶ 2.

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[1] If Nacchio means to question whether an insider trader can be prosecuted for forward-looking information (Br. 2), that suggestion should be swiftly rejected. He made a similar suggestion in his appeal to the Tenth Circuit, which rejected it. *United States v. Nacchio*, 519 F.3d 1140, 1158 (10th Cir. 2008) (holding that "information about future events" can be material). *See also United States v. O'Hagan*, 521 U.S. 642, 653 (1997) (affirming insider trading conviction involving trading based on knowledge of possible future merger). In *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998), the Ninth Circuit affirmed an insider trading conviction based on "forecasts of future sales and revenue," and held that forward-looking information can clearly be material to investors and that it had never indicated otherwise, "[n]or has any other court for that

The indictment also focused, however, on the fact that Qwest's business included two types of revenue: "recurring" revenue, which Qwest earned each month during the life of a customer as it rendered services to that customer; and "non-recurring" revenue, which resulted from one-time transactions. *Id.* at ¶ 5.

The indictment identified several types of material, nonpublic information that Nacchio knew in early 2001 about Qwest's business. *Id.* at ¶ 6. This information included, *inter alia*, such matters as (1) Qwest's business plan for 2001, under which Qwest could not achieve its financial targets unless it significantly increased "its recurring revenue business during the first few months of 2001"; (2) Qwest's poor past experience in growing its recurring revenue fast enough to meet its public targets; (3) Qwest's actual performance in early 2001, which was that its recurring revenue business was "underperforming from early 2001"; and (4) Qwest's increasing reliance "on risky and unsustainable one-time transactions." *Id.* at ¶¶ 6-7.

During the fifteen months between indictment and trial, the Government provided two bills of particulars. In the first, the Government made clear that the "financial guidance" at issue included not just revenue, but also earnings and growth rates. *See* Ex. 2 (Bill of Particulars) at 2. The Government also indicated that the material information at issue was not solely a risk to those three aspects of the financial guidance. *See id.* at 4-9. Instead, it explained that the material information included "historic information, internal assessments of Qwest's business prospects, and actual operating results" that

matter." *Id.* at 1064-65. Indeed, it stressed that "investors are concerned, perhaps above all else, with the future cash flows of the companies in which they invest." *Id.* at 1064 n.20.

"deviated from its plan." *Id.* at 4-5. It included, for example, reliance "on quarter-end nonrecurring transactions" as well Qwest's expectation that such "non-recurring revenue would decline precipitously." *Id.* at 5.[2]

In a supplemental second bill of particulars, the Government again explained that the material information did not relate to revenue figures alone. Ex. 3 (Supplemental Bill of Particulars). In discussing the material undisclosed risks, the Government cited, *inter alia*, the fact that Qwest had relied on nonrecurring revenue sources to offset shortfalls in increase in recurring revenue, that it anticipated nonrecurring revenue to experience a significant decline, and that investors sought more information into the makeup of Qwest's revenue numbers. *Id.* at 2, 5.

B. At trial, the Government adduced a great deal, and variety, of evidence regarding materiality.

The trial testimony was extensive. Because Nacchio's motion relates to the materiality element, the testimony relating to materiality is summarized below.[3]

1. In 2001, Nacchio informed investors of Qwest's expectations for revenue, earnings, and growth rates.

In July 2000, after Qwest had just completed a merger with US West, Nacchio told employees that the newly-formed Qwest would "grow or die." GX 514A (video exhibit).[4]

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[2] Thus, to the extent Nacchio's motion suggests (Br. 2-3) that the Government's case was limited to a single warning of a year-end revenue gap, Nacchio is wrong.

[3] This section does not seek to summarize the testimony regarding the other elements of the crime, such as Nacchio's mens rea.

[4] GX 514A is a video exhibit. All of the video exhibits will be delivered to the Court (and opposing counsel) by hand, as it cannot be e-filed.

He explained that Qwest's stock price would suffer if the company did not meet its high revenue, earnings, and growth targets. GX 506A (video exhibit); *see* Ex. 4 (Robin Szeliga trial testimony excerpts) at App. 2117-2122.

As of early September 2000, Qwest had not yet built an overall budget plan for 2001. *See* Ex. 4 (Szeliga trial excerpts) at App. 2137-2138; Ex. 5 (Greg Casey excerpts) at App. 2716. Nevertheless, on September 7, 2000, Nacchio issued a public announcement that Qwest was raising its targets. *See* Ex. 6 (announcement raising targets) at App. 4781-4782.

These public targets consisted of three factors: (1) revenue, (2) earnings or "EBITDA" (Earnings Before Interest, Taxes, Depreciation and Amortization, *see* Ex. 7 (Lee Wolfe trial excerpts) at App. 1566), and (3) growth rates. *See* Ex. 6. He announced that "for 2001, Qwest expects to achieve revenue of $21.3 to $21.7 billion." *Id.* He announced that Qwest's earnings or EBITDA was "expected to be $8.5 to $8.7 billion." *Id.* He also stated that Qwest expected revenue to grow by 15% to 17%, and earnings by 20%, through 2005. *Id.*[5]

Nacchio also set internal targets, which were slightly higher than high end of the public range. For example, he set an internal revenue target that totaled $22.0 billion at one point (later reduced to $21.8 billion) — thus exceeding the publicly announced expected range of $21.3 to $21.7 billion. *See* Ex. 4 (Szeliga trial excerpts) at App. 2164-2165; Ex. 8 at App. 4975 (lowered budget target).

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[5] Nacchio has previously pointed out that those growth rates were reflected in a report by a financial firm it hired, but the testimony at trial was that the financial firm was "fed" those numbers by Qwest. *See* Ex. 4 (Szeliga trial excerpts) at App. 2106, 2429.

2. Nacchio learned that the targets were highly unrealistic.

Nacchio's senior executives told him that the targets were highly unrealistic. He was told this by Afshin Mohebbi (then Qwest's president of worldwide operations and later its chief operating officer), Robin Szeliga (then head of financial planning and later chief financial officer). *See* Ex. 4 (Szeliga trial excerpts) at App. 2122-2156; Ex. 9 (Afshin Mohebbi trial excerpts) at App. 3110-3143.

The heads of Qwest's three major business units also made this clear to Nacchio, in detailed presentations. At budget meetings in November 2000 and early December 2000, these unit heads reported to Nacchio that there were gaps of hundreds of millions of dollars between Qwest's actual projected revenue and the targets Nacchio had set. *See* Ex. 10 (Grant Graham excerpts) at App. 2612-14, 2617; Ex. 11 (Mark Schumacher excerpts) at App. 2746-48; Ex. 12 (Jim Smith excerpts) at App. 2868, 2874; Ex. 9 (Mohebbi) at App. 3132 . The units' gaps often were discussed in terms of the internal targets, but far outstripped the small difference (or "cushion") between the internal and public or "external" targets. Ex. 13 (Bickley memorandum) at App. 4936.

For example, Betsy Bernard, the head of the national mass markets unit, told Nacchio in a December business unit meeting that she "had no idea" how she was going to close a $444 million gap to her target. Ex. 4 (Szeliga trial excerpts) at App. 2147. This unit never, through the entire budget process, had any plan of how to close this gap. *Id.* at App. 2147-48. Greg Casey, the head of the wholesale unit, similarly told Nacchio that his unit's target was too high by $362 million. *Id.* at App. 2154-55. Steve Jacobson, the head of the global business unit, told Nacchio, after rounds of business reviews, that the gap to his target "was not going to show up anymore," but that he was "adamant" that he

did not know how to close his gap. *Id.* at App. 2159. Jacobson said he simply "would put dollars in product lines, even though he didn't have a plan to grow the products that much." *Id.* at App. 2159. Jacobson also explained to Nacchio that he did not even have the sales force necessary to achieve the numbers. Ex. 10 (Graham) at App. 2602.

3. Nacchio also learned that Qwest's business plan depended on a dramatic shift to recurring revenue.

Nacchio also learned in late 2000 that Qwest's 2001 business plan required it to rapidly increase its growth of "recurring" revenue, as opposed to "nonrecurring" or "one-time" revenue.

By way of background, Qwest's business included both nonrecurring and recurring revenue. Recurring revenue was revenue earned each month from a regular customer. Non-recurring revenue typically resulted from one-time transactions, such as equipment sales or extremely long-term (often 20-year) leases called "IRUs" (indefeasible rights of use). Because Qwest booked the revenue from an IRU sale all at once, and because Qwest had to discover new IRUs every quarter, it was "axiomatic" that IRUs were less reliable income than "recurring revenue" — *i.e.*, income earned monthly from regular subscribers. *See* Ex. 5 (Casey) at App. 2459-2460, 2463, 2466.

Nacchio himself had long acknowledged that IRUs were an "accounting trick[]" Qwest used to "make [its] numbers" when recurring revenue fell short, and that recurring revenue was "more valuable" than IRUs "in terms of what the marketplace valued in Qwest." *See* Ex. 5 (Casey) at App. 2461, 2464-2466; *see also* Ex. 7 (Wolfe) at App. 1574 (Nacchio knew these "one-timers" were a "problem").

In late 2000, Nacchio learned that Qwest's 2001 budget required it to make a highly dramatic increase in its growth rate for recurring revenue. It would need to *double* the growth rate it had in 2000 for recurring revenue. *See* Ex. 4 (Szeliga) at App. 2203; Ex. 10 (Graham) at 2599-2600. Nacchio knew this shift was "unnatural" and probably not "achievable" (Ex. 10 at App. 2604), because Qwest had a poor "track record" in growing recurring revenue (Ex. 14 (Mohebbi memorandum) at App. 4990).

Nacchio also learned that this shift would have to happen "right out of the gates" in 2001. Ex. 4 (Szeliga trial excerpts) at App. 2176-2179. Qwest needed new subscribers early in the year so it could count on and build upon their revenue; if it failed to sign up enough new customers early in the year, it would not later benefit from sufficient "compounding" to reach the public target. *Id.* at App. 2179; *see* Ex. 9 (Mohebbi) at App. 3166 ("[I]f somebody at home subscribes to a telephone service that costs $1 a month, if you sell it in January, you're going to collect $12 because they paid 12 times. If you sell that same product in December, you collect $1."). Qwest's budget for 2001 relied on this compounding effect — which applied only for recurring revenues — to generate "a ramp-up in revenues for [the] third and fourth quarter[s]" of 2001. Ex. 9 (Mohebbi) at App. 3200. To grow fast enough to meet the public targets, Qwest would need to make an "aggressive pivot," or "shift," from IRUs to recurring revenue streams. Ex. 4 (Szeliga trial excerpts) at App. 2177; Ex. 10 (Graham) at App. 2600, 2625.

Nacchio learned from Afshin Mohebbi (then Qwest's president of worldwide operations and later its chief operating officer) that "if we don't crank up recurring growth by April," "we got big problems" — "there won't be enough one timers to close the gap in 3Q and 4Q." Ex. 15 (Mohebbi memo) at Supp. App. 231. If recurring

business did not "literally take off" by April (Ex. 14 at App. 4990), Qwest would "have to bring the numbers down" (Ex. 9 (Mohebbi) at App. 3199).

Nacchio agreed that making a "pivot" from one-time revenue to recurring revenue was critical. Ex. 10 (Graham) at App. 2601. He understood that a slow start in obtaining new recurring revenue would have "a snowball effect," dooming Qwest's targets later in the year. Ex. 5 (Casey) at App. 2493-2494. At a 2001 kick-off event, he explained to Qwest's sales staff that "something big" had to happen "by April." GX 559B (video exhibit); *see also* GX 551A (video exhibit) (Nacchio said the first half of 2001 would be "absolutely critical" and "[s]liding into home in December ... is probably not the way you can make this year's numbers").

4. Investors made clear their intense interest in Qwest's projected growth rates and the makeup of its revenue.

In early 2001, analysts and investors persistently questioned Nacchio and Lee Wolfe (the head of Qwest's investor relations group) about how Qwest could still meet its targets, and about the makeup of Qwest's revenue. Ex. 7 (Wolfe) at App. 1557-1558, 1585, 1599-1620 .

Wolfe told Nacchio — repeatedly — that investors wanted to know how Qwest made its numbers, and also how much nonrecurring revenue Qwest had. *Id.* at App. 1558, 1576. Nacchio was told that investors wanted to understand how Qwest was going to achieve its 2001 financial targets, and that investors wanted to know more about Qwest's revenue, EBIDTA, and one-time transactions. *Id.* at App. 1514, 1567-68, 1600. Investors raised the issue that "other telecom companies were reducing their guidance" (Ex. 7 (Wolfe) at App. 1613) but that Qwest, in contrast, had not reduced its numbers and

that Nacchio was still "confirming that ... Qwest would make their business plan." Ex. 4 (Szeliga) at 2250.

Nacchio exercised close control and "final say" over everything Qwest told the public (Ex. 7 (Wolfe) at App. 1533-1537, 1536), and decided to refuse the calls for disclosure. *Id.* at App. 1574-75, 1600, 1605-06, 1611-12. Going a step further, he directed Wolfe to tell Qwest executives that, when speaking with investors, they could not "engage in any conversations about the use of the one-time transactions." *Id.* at App. 1829-1830. Wolfe did as he was told. *Id.* at App. 1830; Ex. 5 (Casey) at 2468. Nacchio would address questions, but Wolfe noted that Nacchio failed to fully disclose Qwest's reliance on the one-timers to make its numbers. Ex. 7 (Wolfe) at App. 1613, 1618.

As 2001 progressed, the investors' questions about Qwest's ability to make its public guidance and about the makeup of its revenue became urgent. By April 2001, investors were growing "increasingly frustrated" because Qwest had still given them no "visibility" into the "black box" of revenue and growth. Ex. 7 (Wolfe) at App. 1592, 1615, 1618. As Wolfe and Nacchio regularly discussed, the investors' questions became more "accusatory in terms of ... 'what are you guys doing that enables you to continue to meet the numbers.'" *Id.* at App. 1618-1619.

5. Top Qwest officials believed greater disclosure was necessary.

In early 2001, several of Nacchio's top corporate officers stated that Nacchio should provide greater disclosure to investors about Qwest's earnings and revenue, including how much of Qwest's revenue depended on the IRUs or "one-timers."

Lee Wolfe, the head of investor relations, told Nacchio "three or four times" that he should disclose the information because investors needed it to determine whether

Qwest would "be able to continue to grow" and because it would enable them "to make an informed decision whether to buy or sell the stock." *Id.* at App. 1632-1633, 1655, 1799.

Qwest's controller, Mark Schumacher, advocated for disclosure because IRUs were such a significant percentage of the overall growth in Qwest's revenue. Ex. 11 (Schumacher) at App. 2759.

After the early 2001 numbers were known internally, Afshin Mohebbi, the president of worldwide operations, gave Nacchio a memorandum stating that the market was "now demanding more visibility in terms of our revenues," and Mohebbi recommended that Nacchio break down the data further. Ex. 9 (Mohebbi) at App. 3214. In response to the memorandum, Nacchio confronted Mohebbi and demanded, "why are you writing this? ... It's not your job." Id. at App. 3216.

Nacchio responded with disdain to requests that he disclose more to investors. When Mr. Wolfe told him that investors wanted greater disclosure, "[a] couple of other times he [the defendant] would say, you know, why do they need to know? And I would say, to make an informed decision whether to buy or sell the stock. And basically, he responded, screw them, go tell them to buy." Ex. 7 (Wolfe) at App. 1798-99.

6. The market was highly sensitive to information about whether Qwest would make or miss its financial targets, and to information about Qwest's revenue growth.

In 2000, Qwest was known as a fast growth company, which affected its stock price. Ex. 7 (Wolfe) at App. 1561-62, 1567-68.

The evidence indicated that in 2001, if Qwest missed its public financial targets, even by a small amount, it would cause a great swing in Qwest's stock price. Nacchio

told Qwest staff that the financial targets were extremely important. Ex. 4 (Szeliga) at App. 2119; GX 551B (video exhibit). In January 2001, he told Qwest staff that given the "skittish" and "mercurial" telecommunications market, even a $50 million, or 0.2%, miss in the $21.3 billion target would cause the stock price to drop at least 15% to 20%. GX 559A. Lee Wolfe, the head of investor relations, similarly testified that "pricing pressure" in the telecommunications industry "was strong" in 2001, and investors were focused on whether "Qwest was going to be able to make their numbers." Ex. 7 (Wolfe) at App. 1611-12. He was concerned that if Qwest "missed our financial targets," the stock price "was going to come down dramatically." *Id.* at App. 1632.

The quality of Qwest's revenue — whether it was recurring revenue, or nonrecurring "one-timers" — also mattered to investors, because it affected Qwest's ability to sustain its growth. Nacchio repeatedly stated that Qwest's growth was "very important" because Qwest held itself out "as a growth company." Ex. 4 (Szeliga) at App. 2109. He spoke "on several occasions" about that Qwest was "a growth company." *Id.* at App. 2117. Nacchio believed that Qwest needed to "grow or die" (GX 514A (video exhibit) and that if Qwest missed its growth targets, it would get "whacked" (GX 506A (video exhibit). Wolfe explained his concern that if investors "anticipated the earnings results were not sustainable," investors "would sell the stock and/or not buy it." Ex. 7 (Wolfe) at App. 1632-33. And Nacchio made clear that his reason for not disclosing more about Qwest's one-timers was that such disclosure would drive down the stock price. When the defendant was urged by Mr. Wolfe to provide greater disclosure, he repeatedly responded by asking, "[C]an you guarantee me the stock price won't go

down," and Mr. Wolfe told him each time that the stock price would go down if he disclosed. Ex. 7 (Wolfe) at App. 1655.

7. In April 2001, Nacchio learned of Qwest's actual first quarter results, and that the shift to recurring revenue had not occurred as planned.

In early April 2001, Nacchio was provided "business unit reviews" with the major Qwest business units — and learned that the results from the first quarter of 2001 (January through March) showed major problems for Qwest's business plan.

As to the global business unit, Nacchio was told that the unit had made its target for that quarter, but had missed its objective for recurring revenue for the first quarter of 2001, and was "way off target" in its projected recurring revenue results for 2001. Ex. 10 (Graham) at App. 2630, 2635. Nacchio expressed concern about the recurring revenue results. *Id.* at App. 2635. Nacchio was specifically told that there was $300 million in recurring revenue in this unit that was "absolutely not going to happen." Ex. 10 (Graham) at App. 2649-50. To balance, the unit could only "plug[]" in $190 million in one-time initiatives that it would "try and go after." Id. at App. 2650.

Similarly, during the review of the consumer and small business unit, Nacchio was told that the unit had missed its budget in the first quarter, and was going to miss its 2001 revenue target by about a third of a billion dollars — $323 million. Ex. 4 (Szeliga) at App. 2234; Ex. 12 (Smith) at 2895, 2900.

The head of Qwest's wholesale unit, Greg Casey, told Nacchio that his unit showed a gap projected of $675 million — two thirds of a billion dollars. Ex. 4 (Szeliga) at App. 2228; Ex. 5 (Casey) at 2499; Ex. 16 (GX 959, business unit review) at 6. This

$675 million miss was to be concentrated "in the second half of the year." Ex. 5 (Casey) at App. 2499.

Casey also told Nacchio another important fact: that Qwest was "draining the pond" on IRUs. Ex. 5 (Casey) at App. 2496-97, 2545. Worse yet, most of Qwest's IRUs to date in 2001 had involved "swaps," or trades of assets with other companies, of which accountants took "a very dim view." Id. at App. 2495. Casey explained that while his prior warnings to Nacchio in the fall of 2000 had been about the "difficulty" in the 2001 plans, his April 2001 meeting with Nacchio was different because in that meeting, Casey was "adamant that the market was drying up. There was nothing there. It was qualitatively and quantitatively different from what I had said in the past ...." *Id* at App. 2581. Casey told Nacchio that IRUs were "going away." *Id.* at App. 2509. He explained that he had never given Nacchio a warning like that before. *Id.*.

Nacchio was also presented with an overall product review update in early April 2001, showing results from the first three months of 2001. Ex. 4 (Szeliga) at App. 2200. The update showed, in large font, that as to recurring revenue growth, Qwest faced a "shortfall of recurring revenue growth of 19 percent." *Id.* at App. 2212-13; Ex. 9 (Mohebbi) at App. 3257; Ex. 17 (GX 929, April 2001 update). The review highlighted for Nacchio several significant shortfalls in certain key recurring-revenue areas where growth early in 2001 had been essential, including a shortfall in hosting of "$111 million or 40 percent" and in wireless of "$156 million or 15 percent." Ex. 4 (Szeliga) at App. 2210. This plan showed an "internal estimate" of $21.5 billion, but that was no source of comfort because Qwest's practice was to "plug[] in numbers" so the year-end estimate would not change. Ex. 5 (Casey) at App. 2508; Ex. 10 (Graham) at App. 2653. Szeliga

noted that the only proposed solution "to cover estimated gaps [was] IRUs," and it was clear that "the plan was very risky if we were going to rely on IRUs." Ex. 4 (Szeliga) at App. 2211. Nacchio's reaction was clear: he was "not happy" and was "visibly disappointed" with the report. Ex. 9 (Mohebbi) at App. 3260.

8. Nacchio engaged in a selling spree, and investors noticed.

Though Nacchio was "not pleased" with the news he was receiving (*e.g.*, Ex. 12 (Smith) at App. 2921), he "very bullish[ly]" (Ex. 18 (Drake Johnstone excerpts) at App. 3579) told investors on Qwest's April 24 first-quarter earnings call that "we are very pleased with the quarter reconfirming our estimates for 2001" and that "[w]e see nothing to dissuade us from the plan we announced" (GX 594A (video exhibit); *see* Ex. 19 (end of April 2001 earnings call) at App. 4833).

Two days later, when Qwest's trading window for executives opened, Nacchio—who had made such bullish representations two days earlier—sold 350,000 shares of Qwest stock. Ex. 20 (Nacchio sales record) at Supp. App. 239. The next day, he sold another 300,000 shares. *Id.* In comparison, Nacchio had averaged sales of about 131,000 shares per *month* from 1998 to 2000 — meaning that, in the first two trading days after the window opened, he made about five months' worth of sales. Ex. 21 (Dana Chamberlin excerpts) at App. 3733. Nacchio sold 210,000 additional shares in the next two trading days and 395,000 more in the following eight trading days. Ex. 22 (Nacchio trading chart) at App. 4764-65. From April 26 to May 15, he sold 1,255,000 shares, reaping total proceeds of nearly $50 million. He averaged sales of about 105,000 shares

per trading day.[6] In comparison, he had averaged sales of about 27,000 shares per trading day from 1998 to 2000. Ex. 21 (Chamberlin) at App. 3734.[7]

Investors noticed Nacchio's selling, and passed along to Lee Wolfe (who told Nacchio) that when a CEO sells stock, "the concern in the investment community is that the CEO knows something bad about the company that investors don't know." App. 1681-82.

9. Other Qwest officials believed that the undisclosed information was material.

During this same period, several other Qwest officers viewed this same information as material enough that they should not be selling Qwest stock. Qwest's head of investor relations, Lee Wolfe, sold Qwest stock in early 2001 but testified that "it was wrong" and that he had a "crisis of conscience over this." Ex. 7 (Wolfe) at App. 1622, 1696. Qwest's chief financial officer, Robin Szeliga, sold Qwest stock in April 2001, but later pleaded guilty with respect to those sales to insider trading on the basis of material inside information. Ex. 4 (Szeliga) at App. 2246. Qwest's controller advocated for disclosure because the IRU sales—which comprised 39% of the company's first-quarter growth—were an "over significant" source of income, and viewed the information as

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[6] Some of Nacchio's options were set to expire two years later. Assuming a steady pace, he would have needed to sell 672,727 per quarter to avoid expiration. By March 2001, he had exercised and sold 1,567,000. To stay on schedule, he needed to sell 451,181 in the second quarter of 2001. But he exercised and sold 1.33 million in shares in April and May 2001 — *i.e.*, about three times as much as he would have needed to if he were merely trying to stay on schedule. *See* Ex. 22 (trading chart).

[7] Nacchio sold 75,000 more shares (for nearly $3 million) through the rest of May 2001. *See* Ex. 22 (trading chart).

significant enough that he should not sell his stock. Ex. 11 (Schumacher) at App. 2755, 2759, 2765-66.

10. Nacchio trickled out the information because he was worried disclosure would drive down the stock price.

Nacchio did not release the inside information all at once. Instead, he trickled it out.

On July 24, during the earnings call for Qwest's second quarter results, Nacchio again refused to disclose the breakdown of IRUs and recurring revenue. Ex. 7 (Wolfe) at App. 1652. He confided in Wolfe that he "didn't want to muddy what he felt was * * * a good news quarter." *Id.* On the call, Nacchio also pretended that the growth target for annual earnings he had announced back in September 2000 was "17 percent, or 17 plus" (*id.* at App. 1658), when in fact the target had long been 20% (Ex. 6 at App. 4782). Investors "were beside[] themselves" at this dissembling (Ex. 7 (Wolfe) at App. 1661), and Prashant Khemka (a Goldman Sachs analyst) warned Wolfe and Nacchio: "Agreed that most investors are fools, but at least don't tell * * * them in their face." Ex. 7 at App. 1661-1670; Ex. 23 (Khemka) at 3674-3675; Ex. 24 (Khemka memo) at Supp. App. 225.

Following the July 24 call, investors again demanded a revenue breakdown so they could determine the "[q]uality" of Qwest's revenue. Ex. 23 (Khemka excerpts) at App. 3676-3677; Ex. 24 (Khemka memo) at Supp. App. 226. Khemka, who had been seeking that information "throughout" 2001 and was "not getting answers" (Ex. 23 (Khemka excerpts) at App. 3663), sent an angry letter to Wolfe and Nacchio telling them there was "a big credibility issue now surrounding Qwest" because of the "opaqueness in * * * your revenue breakdown." Ex. 24 (Khemka memo) at Supp. App. 224 ("[T]he lack of

transperancy [sic] is going to hurt you because investors don't know how many cockroaches you still have in your bag."). The "revenue breakdown" to which Khemka referred was how much Qwest was relying on IRUs (including "swaps") instead of recurring revenue. Ex. 23 (Khemka excerpts) at App. 3677-3680.

In August 2001, Nacchio told Wolfe he wanted to release but "spin" the magnitude of IRUs Qwest had done in 2001. Nacchio expected that investors "would not be happy" and "would be surprised at the magnitude of the [IRUs]," and "the stock price would go down." Ex. 7 (Wolfe) at App. 1652-1653.

So Nacchio released the bad news over time. He waited until August 15 to actually report past IRU information in the company's second-quarter SEC 10Q filing. Ex. 7 (Wolfe) at App. 1651-1652. From the 10Q, investors learned for the first time that Qwest had relied on IRUs to make its first- and second-quarter numbers. *Id.* at App. 1672-1673; App. 3639-41 (investors learned that almost 40% of Qwest's first-quarter growth had been IRUs). Nacchio told Wolfe: "[S]ee, this is what happens when you disclose." *Id.* at App. 1676. Wolfe also told Nacchio that analysts were "very surprised by the magnitude" of the IRU revenue. *Id.* at App. 1673-1676. These new numbers showed that when Qwest's recurring revenue was considered, its growth rate was only 6% or 7%, not 12%. *Id.* at App. 1819.

11. Nacchio lowered the public guidance by a billion dollars.

Nacchio waited even longer to lower Qwest's public guidance. In August, Wolfe overheard Nacchio discussing with Drake Tempest, Qwest's general counsel, the need for a further delay "to give the sense that [there] was something *new* that caused the lowering of the targets." *Id.* at App. 1677 (emphasis added). Nacchio said he wanted investors to

think that "lowering the targets was something that * * * [he] would not have reasonably known" about earlier. *Id.* at App. 1678.

On September 10, Nacchio issued a press release (Ex. 25 (reduction in guidance) at App. 4933) taking the target down to $20.5 billion — essentially lowering it by the billion-dollar amount he had been warned of long before. Ex. 4 (Szeliga) at App. 2258-2259. He also reduced the EBITDA target to 8 billion, taking it down from its prior target range of $8.5 to $8.7 billion. *Id.* at App. 2258-2259. He did not provide a full explanation, however, because he did not mention that Qwest's 2001 plan rested on dramatic growth in recurring revenue that had not occurred, and that the projections were now relying on growth in IRU revenues, which Qwest expected would shrink. *Id.* at App. 2445-46.

Even after this reduction, Qwest proceeded to miss its third-quarter and fourth-quarter public target numbers. Ex. 7 (Wolfe) at App. 1681; Ex. 5 (Casey) at App. 2512; Ex. 10 (Graham) at App. 2714; Ex. 9 (Mohebbi) at App. 3442.

12. The stock price fell after the disclosures.

Starting April 24, 2001, the first day in April Nacchio was allowed to sell under Qwest's trading window, Nacchio dumped 1,255,000 shares (~$50 million) in the next 12 trading days. During those days, the stock price ranged between $37 and $41. Ex. 26 (summary of trading) at App. 5199 (showing stock prices when Nacchio sold).

By July 24, Qwest already had "a big credibility issue" because of the "opaqueness in [its] revenue breakdown" (Ex. 24 (Khemka memo) at Supp. App. 224), and the stock price had dropped about 27%, to $27. Ex. 27 (stock prices) at App. 4762.

Nacchio trickled out news of the IRUs' magnitude in August. Ex. 7 (Wolfe) at App. 1651-1653, 1672-1674. When an analyst report was released on August 22, 2001 disclosing this lower growth rate in recurring revenue, the stock price fell further. *See* Ex. 28 (analyst report) at Supp. App. 227; Ex. 27 (stock price chart) at App. 4762-63. By September 7, the price had fallen another 33%, to $18. Ex. 27 (stock price chart) at App. 4763.

Nacchio lowered Qwest's targets on September 10. Ex. 4 (Szeliga) at App. 2446; Ex. 25 (reduction in guidance) at App. 4933). The New York Stock Exchange never opened on September 11, 2001, and remained closed for several days. After Qwest announced its third-quarter results, its stock fell another 34%, to $12 — less than a third of what investors had paid Nacchio for his stock in April and May. Ex. 7 (Wolfe) at App. 1678.

C. Szeliga's testimony about a conversation with Nacchio about a billion dollars in risk was covered at trial.

Nacchio's motion for new trial does not address the wide swath of evidence relating to materiality. Instead, it relates to a single, narrow point: testimony presented at trial by Robin Szeliga about a conversation she had with Nacchio in December 2000 or January 2001. That trial testimony is discussed in detail below. As shown below, that conversation with Nacchio was mentioned multiple times during her testimony. And defense counsel readily could have explored it more, but chose not to do so.

1. The conversation was discussed on Szeliga's direct examination.

Robin Szeliga was a vice-president of financial planning at Qwest from 1998 through 2001, when she became Qwest's Chief Financial Officer. Ex. 4 (Szeliga) at App.

2086-87, 2090. In September 2000, she worked with staff members Mark Evans and Steve Bickley on financial planning and analysis. *Id.* at App. 2122.

Szeliga testified that she received a memorandum from Bickley and one of his staff members, Pat Pritchard, on or about September 5, 2000, regarding a risk estimate. Id. at App. 2123; Ex. 13 (Bickley memorandum) at 4936. The memorandum showed a "risk estimate" for Qwest revenue for 2001. Ex. 13. It showed that assuming Qwest's internal targets were set at $22 billion for 2001, the "risk" to that internal target — a risk the memorandum referred to as the "Grand Total BU [Business Unit] Risk Assessment" — was $1.592 billion. *Id.* It also showed a $1.2 billion risk to a potential public (or "street") disclosure of $21.6 billion. Ex. 13.

At trial, Szeliga discussed and explained this memorandum at length. Ex. 4 (Szeliga) at App. 2126-31. She was asked whether she talked to anyone about it. *Id.* at App. 2131. Still discussing the memorandum, she explained that she discussed it with the then-CFO, Robert Woodruff, and then with her employees in the financial planning and analysis group. *Id.* at App. 2132. And she recalled that "later on in the year, I brought up *the billion dollars of risk* again. And at that time I brought it up to both Mr. Woodruff and Mr. Nacchio together." *Id.* at App. 2132.

Szeliga explained that when she went to Woodruff and Nacchio "to discuss *this billion dollars in risk*," the conversation took place on the 52nd floor of the Qwest building, and took place in "[m]id to late December [2000], into early January [2001]." *Id.* at App. 2132 (emphasis added). She indicated that around this time, she and her staff had still been "trying to finalize our budgets for 2001." *Id.* at App. 2133.

Szeliga then explained that she told Nacchio that at that time, the business units still "could not meet the targets that had been assigned to them," and "we aggregated all the risk they were identifying" but "were still at this time coming to a billion dollars of risk as it related to the target that we had set." *Id.* at App. 2134. She did not state whether she was referring to internal or public targets.

Szeliga then testified that after this meeting, this target did not go down. *Id.* at App. 2134. Szeliga later explained that the *internal* target did go down shortly thereafter, from $22.0 billion to $21.8 billion; in contrast, the external target did *not* go down. *Id.* at App. 2164-65.

Szeliga also testified that she discussed with Nacchio that in the first and second quarters of 2001, Qwest needed to shift "to high growth products that were recurring and "away from ... the nonrecurring products." *Id.* at App. 2177. Nacchio did not disagree, but himself "made statements about the fact that we had high growth recurring revenue that needed to take place early on in the year so that it would compound over the year." *Id.* at App. 2177-82. Szeliga also separately asked Afshin Mohebbi to "to go Mr. Nacchio and ask him to be very firm, aggressive ... in terms of how important the recurring revenue takeoff ... the acceleration of selling recurring revenue needed to be right out of the gates." *Id.* at App. 2185.

Later in her examination, Szeliga was asked how the April 2001 update compared to the original budget. She noted that it was "as risky or riskier." *Id.* at App. 2211. She added, "The explanation I would give for that is when we originally presented the budget and I articulated that I thought we had a billion dollars of risk built into the stretch targets." *Id.* at App. 2211. She added that after the quarter, "we've seen what has

happened in terms of our growth products, and they're not kicking off the way we needed them to in order to make our plan." *Id.* at App. 2211. She explained that this was "exactly what we didn't want to have happen." *Id.* at App. 2211.

At the end of her direct examination, Szeliga explained that on September 10, 2001, Nacchio reduced the external target to $20.5 billion, which was "about a billion dollar reduction" to the previous target range of $21.3 to $21.7 billion. *Id.* at App. 2259-60. When she was asked how that compared to the amount of revenue in the budget she had warned Nacchio about in "late 2000, early 2001," she explained that this warning, too, had been of "about a billion dollars of risk." *Id.* at App. 2259.

2. It was discussed again in her cross examination.

Defense counsel cross-examined Szeliga at length. *Id.* at App. 2259, 2415.

At the beginning of the cross-examination, he asked Szeliga a long series of questions about Qwest's business unit meetings in the fall of 2000. In these questions, defense counsel focused on whether those meetings related to an internal target of $21.99 billion. He asked whether "the criticisms, meetings, business unit conversations you've been testifying about concern" an internal Qwest target of $21.99 billion. *Id.* at App. 2265. Szeliga stated that this was not correct. *Id.* at App. 2265.

Defense counsel repeatedly asked questions that referred to "internal budgets" and "internal targets" as if they were one and the same, leading to some confusion. He asked whether, at the meetings in October 2000, "the complaints about the internal targets, that is, the internal budgets," were directed to the $21.99 billion target. *Id.* at App. 2265. Szeliga stated that this was not correct. She explained that the "target objections ... at business unit meetings" were to a "breakdown of the overall company budget" that did

not sum up to $21.99 billion. *Id.* at App. 2265-67. Defense counsel then asked whether meetings and conversations that had occurred in October 2000 were addressed to a "proposed budget" of $21.99 billion. *Id.* at App. 2267. Szeliga said they were not. *Id.* at App. 2267. Defense counsel then showed Szeliga a November 2000 budget summary. *Id.* at App. 2266-67; Ex. 29 (GX 814, Nov. 2000 budget update). That document showed an internal "target" of ~$21.99 million, through it showed that Qwest's internal budget submissions were lower, at ~$21.7 billion. *Id.* at App. 2267. Szeliga then corrected herself, explaining that she was "recalling the $21.7." Ex. 4 at App. 2267.

Defense counsel also asked Szeliga whether she would agree that a $21.99 billion target was "substantially higher than the street guidance known as public stated financial targets." *Id.* at App. 2267-68. Szeliga stated that she "wouldn't consider" a $291 million gap to be "substantial." *Id.* at App. 2268.

Defendant then asked a rather long and vague question, "Now, when you were talking about a billion dollar risk that all of these folks were debating and discussing, that was a billion dollar risk in their view at the time to the internal budget which was $21,991,000,000. That's true, isn't it?" *Id.* at App. 2268. He did not explain who he meant by "all of these folks," or what time period he was referring to. Szeliga responded, "In the – yes, in the original, we showed that as it rounded up to $22 billion." *Id.* at App. 2268.

This response was not clear. It was not clear whether Szeliga was agreeing with the entire long question, or just with the last piece – *i.e.*, simply that the internal target was $21,99,000,000. Also, her reference to "the original" appeared to be a reference to

the original Bickley memorandum — a document that showed the $21.99 billion internal target rounded up to "$22B." Ex. 29 (GX 814).

Defense counsel immediately recognized the lack of clarity. He commented, "Judge, I believe that's a yes-or-no question." *Id.* at App. 2268. It was not clear whether the court agreed; the court remarked, "It was a yes-or-no answer – question. I think her addition is fair." *Id.* at App. 2268-69. Defense counsel then stated, "I hope you ruled for me, but I can't hear." *Id.* The court responded, "Sort of." *Id.* at App. 2269.

Defense counsel then chose not to probe further. He stated that he wanted to "leave the topic of budgets" and move on to another topic. *Id.* at App. 2269. He then covered numerous other topics, and did not return to this one.

3. It was addressed again in her redirect.

On redirect examination, Szeliga again discussed the Bickley memorandum (Ex. 13). Government counsel asked, "And you discussed this with Mr. Nacchio, I think you told us in your direct, sometime between December [2000] and February of 2001?" Ex. 4 at App. 2421. Referring to the memorandum, Szeliga responded, "I discussed *the billion dollar risk* with Mr. Nacchio at that time, not this – not the specifics of this memo, necessarily." *Id.* at App. 2421. But she did not indicate that the overall billion dollar risk that she had discussed with Nacchio was somehow different from the amounts shown on the memorandum.

Szeliga then explained the memorandum, explaining that when the risk was subtracted from $22 billion, the expected net revenue was $20.4 billion. *Id.* at App. 2423-24. Szeliga explained that this revenue projection was $1.3 billion lower than the public

targets' high end of the range (which was $21.7 billion) and $900 million less than the low end of the range (which was $21.3 billion). *Id.* at App. 2423-24.

4. Defense counsel did not ask to re-cross Szeliga on this point.

After the conclusion of Szeliga's redirect, defense counsel asked for "a minute." The court then commented that "maybe I can help you out. There are two areas in which I would allow a limited recross." *Id.* at App. 2446. The court then identified two areas. Defense counsel then commented that he felt he was "entitled to do more." *Id.* at App. 2447. The court then responded, "All right." *Id.* But defense counsel did not proceed to identify any further areas in which he wished to inquire. *Id.* at App. 2447. (Notably, at other times during the trial, both before and after Szeliga testified, the court had granted several defense requests to explore certain areas on re-cross. Ex. 30 (Oneth) at App. 2084; Ex. 10 (Graham) at App. 2716-17; Ex. 11 (Schumacher) at App. 2854; Ex. 12 (Smith) at App. 2935.)[8]

5. Defendant did not elect to recall Szeliga as part of his case.

At the conclusion of defense counsel's re-cross examination of Szeliga, the court inquired, "Is she going to be recalled?" Ex. 4 at App. 2453. Indeed, earlier in the trial, the court had indicated to defense counsel a willingness to allow defense to reserve the right to recall government witnesses as part of the defense case. Ex. 7 (Wolfe) at App. 1830; Ex. 31 (Slater) at App. 1959.

With Szeliga, however, defense counsel did not ask the court to keep Szeliga under subpoena so he could call her as part of the defense case. Instead, defense counsel stated

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[8] On appeal, Nacchio did not claim any error in this suggestion by the district court of the two areas on which the court would allow re-cross examination of Szeliga.

that he had "no objection" to Szeliga being excused from further appearance. Ex. 4 at App. 2453. And when it came time for the defense case, defense counsel then did not re-call Szeliga.

D. On appeal, the Tenth Circuit noted the importance of the Bickley memorandum and of additional factors relating to materiality.

On March 17, 2008, a panel of the Tenth Circuit issued its decision, which reversed and remanded for a new trial on the sole ground that an expert had been improperly excluded, but also ruled that the evidence was sufficient for conviction and affirmed the jury instructions. *See United States v. Nacchio*, 519 F.3d 1140 (10th Cir. 2008).

As relevant here, Nacchio argued to the Tenth Circuit — much as he does here — that Szeliga's testimony showed that all of the information Nacchio possessed was not material. The Tenth Circuit rejected this argument.

The Tenth Circuit started by observing that "[t]he parties do not contest that the basic test for the materiality of inside information is whether there is 'a substantial likelihood' that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." 519 F.3d at 1158 (quoting *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). The court noted that this test is "fact-specific" and that it applies to "information about future events." 519 F.3d at 1158.

The court then observed that in assessing materiality, the "magnitude of a potential loss" is "regularly" considered as a factor, but that there is no "threshold" to be met. *Id.*

at 1162. The court observed that it had "found no case that adheres rigidly to a mathematical threshold." *Id.* at 1162.

The court explained that it took "its cue" in interpreting materiality from the SEC's guidelines on assessing materiality in preparing financial statements. *See* Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150 (1999) [hereinafter "SAB 99"]. Quoting SAB 99, the court stated that "quantifying, in percentage terms, the magnitude of a misstatement is only the beginning of an analysis of materiality; it cannot appropriately be used as a substitute for a full analysis of all relevant considerations." 519 F.3d at 1162 (quoting 64 Fed. Reg. at 45,151). The court thus noted that a 5% effect could be a "starting place" for assessing the materiality "of Mr. Nacchio's information about risks to Qwest's revenues," but that this cannot "end the inquiry." *Id.* at 1163.

The court then observed that the parties did not agree on their reading of the record on a particular point: "the size of the potential shortfall predicted to Mr. Nacchio." *Id.* at 1163. The court explained that this particular dispute "revolves around interpreting testimony" by Robin Szeliga about a "December/January meeting with Nacchio." *Id.* The court noted that Szeliga had testified on direct that she told Nacchio about "a billion dollars of risk as it related to the target," and that in this conversation she was "telling Mr. Nacchio about" facts from a September memorandum discussing a billion dollars of risk. *Id.* The court stated that this testimony was "ambiguous" because there were both public and internal targets. *Id.*

The court then observed that Szeliga had addressed this issue again, on cross-examination. The court commented that Szeliga "appeared to testify that she meant one billion dollars less than the internal target of $22 billion." *Id.*

Even with that cross-examination testimony, the court concluded that the trial evidence still supported the conclusion that the size of the shortfall was $900 million from the low end of Qwest's publicly disclosed financial guidance. It explained that the testimony suggested that although Szeliga never showed Nacchio the memorandum, she appeared to be talking to him about its contents, that this conclusion was supported by Szeliga's discussion of the memorandum on re-direct, and the memorandum itself supported the government's version of the size of the shortfall. *Id.* at 1163-64.

The court then assessed Nacchio's argument that "a risk that a company's revenue will fall $900 million short of its public guidance — a 4.2% shortfall[9] — is necessarily immaterial." *Id.* at 1164. The court stated that this was "a close question" but that "the answer is 'no.'" *Id.*

The court cited several reasons for rejecting Nacchio's argument. It noted that a 4.2% shortfall was close to the 5% starting rule of thumb discussed by the SEC. *Id.* And the court further added that there "was enough evidence of additional factors that we cannot reject the possibility of materiality as a matter of law." *Id.* It cited SAB 99 and also *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162-64 (2d Cir. 2000) — a case in which, notably, the Second Circuit refused to find a 1.7% effect on annual revenue immaterial where various factors showed that the effect could be material.

As to the "additional factors," the court did not address all of the ones the government had cited in its appellate brief, but focused on just one. It noted that the

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[9] The 4.2% is calculated by taking the revenue amount suggested on the Bickley memorandum ($20.4 billion) and dividing it by the bottom end of the public guidance range ($21.3 billion).

shortfall Qwest faced "had particular salience given the state of the economy and the industry." *Id.* Specifically, it observed, "Mr. Nacchio himself had said in January that the 'skittish market' was so 'mercurial' that even a $50 million shortfall could create a 15-20% drop in stock price." *Id.* Citing no other "additional factors" besides this statement, the court concluded that a reasonable jury could find information about a 4.2% shortfall material. *Id.*

The court next turned to Nacchio's argument about the materiality of "information on the IRUs." *Id.* Specifically, Nacchio had argued that "information on the IRUs" was immaterial due to insufficient stock price reactions. *Id.* In rejecting this argument, the court cited a number of factors, including the fact that when Qwest released how much of its early-2001 revenue was due to IRUs, "investors were very surprised by the magnitude." *Id.* at 1164. The court ruled that the evidence was enough for a reasonable jury to "find Mr. Nacchio's information to be material." *Id.*

E. The recent SEC testimony by Szeliga is vague and not new.

Almost two years after the criminal trial, Nacchio is now seeking to re-argue the point on which he lost on appeal, on the ground that he has new evidence from Szeliga. His allegedly new evidence is a deposition taken in a civil action in which Nacchio is a defendant (and in which Szeliga was originally a defendant as well), *SEC v. Nacchio, et al.*, 05-cv-480-MSK-CBS. Szeliga's deposition was taken in that case on February 4 and 5, 2009.[10] As shown below, this is hardly new evidence.

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[10] In that civil case, certain deposition discovery was stayed at the request of the United States from July 27, 2005 until April 26, 2007, after the criminal jury verdict was entered. *See* SEC v. Nacchio *et al.*, 05-cv-480-MSK-CBS, Docs. 118 (granting stay), 291 (lifting stay). At that point, the United States withdrew its request for a stay, and no

1. Szeliga emphasized that her memory had faded.

Szeliga made clear in that deposition that her memory was less clear than it had been during the April 2007 trial. She reaffirmed her trial testimony. She offered no new evidence on the conversation with Nacchio that had not been covered at trial. And it is hard to see how defense counsel could not have asked Szeliga the same questions at trial.

At the deposition, Szeliga explained that she had prepared for the deposition only briefly. She said she had "reviewed briefly, skimmed through testimony that I had given before." Ex. 32 (Szeliga civil deposition, Vol. 1) at transcript pp. 176:7-19. She also looked through some documents, which were associated with some testimony she had previously given before the SEC, but "didn't spend any significant time. I flipped through it and didn't really spend time on those." *Id.* at 176:23 to 177:4. She also met with SEC attorneys, but it "was brief," and also had "a brief conversation" with one of the prosecutors from this case. *Id.* at 177:5-9, 25, 178:5-9.

Szeliga was asked several questions by counsel for Nacchio about the budget process in late 2000. In response, she repeatedly stated that she could not recall the exact numbers. For example, she recalled that there had been an internal target number, but did not recall what the number had been. *Id.* at 203:2-7. She stated that there was also a combined number that totaled the submissions by the business units, but "without looking at some documents, I can't recall." *Id.* at 203:22 to 204:2. As to the gaps faced by the

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stay prevented Szeliga's deposition in that case at that time. After the Tenth Circuit ordered a new trial, the United States again moved to stay deposition discovery relating to certain witnesses, including Szeliga, in anticipation of a potential new trial. *Id.*, Doc. 411. The Magistrate Judge granted this motion (*id.*, Doc. 419), but later lifted the stay (*id.*, Doc. 509).

units, she stated that she "can't really recall the exact numbers. I don't know how big their gaps were." *Id.* at 246:24 to 247:10. When asked about the gap for the wholesale unit, she repeated, "I can't remember the numbers. I couldn't – I don't remember – I mean, I know he had gaps and he had issues. And I just don't remember numbers. I don't have a quantity or size in mind." *Id.* at 250:17 to 251:1.

Szeliga was also asked about the Bickley memorandum. Vol. 1, 205:20 to 213:10. Her memory of it was not clear. She had "a vague recollection of speaking about the risk and the plan with Mr. Bickley." *Id.* at 210:7-11. She recalled that the conversation took place in the fall of 2000, but did not recall whether it was "around the time of the memo." *Id.* at 210:12-16. She explained that she "didn't really remember that there was a 22 billion dollar target when I started reviewing documents," and "I was kind of struggling with that," but that "then I started to recall that we started at 22 billion and then that changed." *Id.* at 211:24 to 212:13. As to the street target, she could not recall what it was, but "can only see what's on here." *Id.* at 212:22-25.

Szeliga also testified that she could not recall her conversations during this period, or what the process had been. When pressed for details about a conversation in the fall of 2000, she stated, "I don't have recollection of conversations around this time frame." *Id.* at 254:5-12. She testified that she could not recall what was happening in the budget process near the end of the year, explaining, "I don't recall what was happening in terms of this date through the end of the year and subsequently on the budget. I'm not really sure what processes we were going through at that point." *Id.* at 257:6-15.

2. Szeliga did not testify as to the source of the billion dollar figure.

Counsel for Nacchio then asked some questions relating to a certain Mark Evans. Szeliga had mentioned that Mr. Evans was an individual who had worked in the fall of 2000 with Steve Bickley in the budgeting process at Qwest. *Id.* at 204:7 to 205:15.

Counsel for Nacchio asked Szeliga if she recalled any conversations with Mr. Evans about risk "in the October, November, December time period." *Id.* at 265:17-20. Szeliga stated that she had a "general recollection that Mark and I had conversations with regard to the risks in the budget." *Id.* at 265:17-23. But she stated that she did not recall what those discussions were, "not without looking at documents, I don't have a specific recollection." *Id.* at 266:3-6.

Counsel for Nacchio then asked Szeliga whether she recalled telling the FBI that "at some point in the budgeting process, Mr. Evans came to you and said that there might be $900 million worth of risk to the budgeted number?" *Id.* at 266:7-11. Szeliga agreed that this was her vague recollection: "Generally, I think he came to me with a big number like that. Again, I'd have to look at the documents again to try to refresh my memory." *Id.* at 266:12-15.

Counsel for Nacchio did not ask any more questions referring to Mr. Evans. He did not proceed to show Szeliga any documents relating to Mr. Evans. Nor did he ever ask whether her testimony at trial related in any way to Mr. Evans.

Counsel for Nacchio then asked Szeliga about the conversation with Nacchio in which she told him about a billion dollars in risk. But it is important to note what counsel for Nacchio chose not to ask before proceeding to those questions. He did *not* ask Szeliga whether her conversation with Nacchio related somehow to her conversation with Mr. Evans, as Nacchio now claims (Br. 12).

Nor did Szeliga say (as Nacchio also claims, Br. 12) that her conversation with Nacchio did not relate to the Bickley memorandum. Counsel for Nacchio simply did not ask such questions. And notably, Szeliga did not testify (as Nacchio suggests) that she did *not* bring the Bickley memorandum into the meeting with Nacchio. She stated that she simply did not recall whether or not she took a document into the meeting. *Id.* at 269:1-3.

3. Szeliga had a faded recollection of the conversation.

About the conversation with Nacchio, Szeliga stated that "[m]y general recollection is I was talking to Robert Woodruff [the former CFO] and Joe Nacchio about a billion dollars of risk in the plan." *Id.* at 267:1-3. Counsel for Mr. Nacchio then asked whether this meant that the actual number, if things didn't go right, could have been as low as $21 billion." *Id.* at 267:8-11. But Szeliga decline to confirm this understanding, stating, "I don't recall the specifics of the numbers." *Id.* at 267:12-13.

Throughout the questioning regarding this conversation, Szeliga stressed her lack of recollection. When counsel for Mr. Nacchio asked when she first had a recollection of the meeting, Szeliga stated, "I don't know." *Id.* at 268:13-15. When asked who was at the meeting, she stated that she thought it was Nacchio and Robert Woodruff, but commented, "I don't have a recollection of the exact meeting." *Id.* at 267:18-21. When asked whether she kept any notes on the meeting, she responded, "I don't know." *Id.* at 268:16-18.

Szeliga further explained that her memory was less clear than it previously had been. She explained that "this is a vague recollection because I can't place it – you notice, I can't see it happening in my mind." *Id.* at 269:4-17. When counsel pressed for

details, she stated again, "I don't remember the meeting. I remember talking about it before, when I was being questioned about it, but my – my recollection is becoming less and less clear. Again, I'm trying to remember the difference between remembering a meeting and remembering talking about it after the meeting, which is very difficult to do when there's the distance of years in between." *Id.* at 269:20 to 270:6. And she agreed that it was difficult to recall the original conversation as distinguished from later discussion about it. *Id.* at 270:13-17.

4. Szeliga's testimony about the conversation was unclear.

Notwithstanding her protestations of lack of memory, counsel for Mr. Nacchio continued to press Szeliga for specifics, asking, "I want to know what you remember telling [Nacchio]." *Id.* at 270:23-24. Szeliga replied that she recalled "talking about approximately a billion dollars of risk in the plan." *Id.* at 270:25 to 271:2. But she added, "But I can't give you any more specifics than that." *Id.* at 271:4-5.

Counsel for Nacchio then continued to press for details. He asked Szeliga to agree that this was a risk to "the $22 billion plan that was in place." *Id.* at 271:6-7. Szeliga again cited her lack of memory, stating, "I can't remember the number that was in place at the time, so – but that – from everything we've looked at, we were approximately at $22 billion of target action, but, again, there's just not that level of recollection." *Id.* at 271:8-13. Counsel then asked her to agree that "whatever the budget target was, the internal target, that's what the billion dollars of risk was to." *Id.* at 271:14-17. Szeliga responded, "Yes," but added, "I was trying to communicate that in our budget that we had put together that summed up to whatever it summed up to at that point in time that there was about a billion dollars worth of risk." *Id.* at 271:18-22.

Notably, counsel for Nacchio did not ask Szeliga if she could clarify who she meant by "we" — *i.e.*, whether she meant an amount put together by her own staff (including Bickley), or whether she meant an internal target, or whether she meant some other amount, such as the total of the budget submissions by the units.[11] Counsel for Nacchio chose not to probe this answer, or offer her any documents to review, or ask her to review her trial testimony.

Counsel for Nacchio did ask what Nacchio's reaction was to this information. Szeliga stated that Nacchio "was angry. Irate." *Id.* at 271:23-25. But as to what Nacchio specifically said, Szeliga stated, "I don't recall now." *Id.* at 272:1-2. Counsel for Nacchio then moved on to other topics.

5. Szeliga did not recant her trial testimony.

The following day, Szeliga was questioned by counsel for the SEC. Szeliga agreed that she had no reason to doubt the accuracy of her testimony she had given during the criminal trial. She explained that she had prepared more before the criminal trial: "I reviewed documents before I testified there. I tried to testify completely and fully and truthfully." Ex. 34 (Szeliga civil deposition transcript, Vol. II) at 176:21 to 177:7. In

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[11] It is not clear what the sum total of the budget submissions would have been at the time of this conversation — especially because defense counsel did not ask Szeliga. But there is strong reason to believe that this budget total would have been significantly lower than the $21.99 billion internal revenue target. As of early December 2000, the internal budget "submissions"— which were highly unreliable because, as noted above, they included numbers that the unit heads had simply plugged in, without any plan to back them up — totaled only $21.63 billion of revenue. Ex. 33 (Dec. 12, 2000 budget update) at App. 4957-59. That total was almost $400 million less than the internal revenue "target" of $21.99 billion. *Id.* at App. 4959. And that $21.63 billion total may have changed, since Szeliga's meeting did not take place until late December or early January.

contrast, in preparing for the deposition, she explained, "I did very little review before I came into this, other than flipping through some testimony." *Id.* at 177:7-10.

6. Szeliga confirmed that the Bickley memorandum showed a $900 million risk to the low end of the public guidance.

SEC counsel asked Szeliga about the Bickley memorandum. She confirmed that it showed a risk of approximately $1.5 billion to the $22 million target, and approximately $1.2 billion to the street disclosures. *Id.* at 172:1-12. She confirmed that this memorandum reflected a risk of "approximately $900 million" to the "low end of the street guidance," which was $21.3 billion. *Id.* at 173:12-19.

7. Szeliga testified that she spoke with Nacchio about "approximately" a billion dollars of risk, and that it was a significant risk.

SEC counsel then asked Szeliga about the conversation with Nacchio. She stated that her recollection was that she spoke with Nacchio about "approximately a billion dollars of risk." *Id.* at 179:8-12. Szeliga also testified, "To bring it to Mr. Nacchio's attention, it had to be a risk that I considered significant." *Id.* at 180:8-17. She agreed that it "took some resolve" on her part to talk to Nacchio about the risk. *Id.* at 180:3-7.

8. Szeliga made clear that she would have discussed with Nacchio the risk to the public targets, but she did not recall the exact numbers.

When the SEC's counsel pressed for details about whether this related to the street targets, Szeliga indicated that she believed the discussion included both a billion dollars or risk to the plan and also a discussion of risk to the street targets, but she added, "I can't recall the specific numbers associated with both. I just recall communicating about a billion dollars of risk." *Id.* at 181:24 to 182:13. She also testified that Nacchio "would

have asked" about the street targets, and "[w]e spoke about internal targets and street targets almost in the same breath." *Id.* at 182:15 to 183:1. SEC counsel then moved on to other topics.

III. ARGUMENT

Nacchio has not met the stringent standards applicable to his motion.

A. The standards are extremely stringent.

Nacchio's motion for new trial is brought pursuant to Federal Rule of Criminal Procedure 33(b)(1), which relates to motions for new trial based on "newly discovered" evidence.

"The standard for granting ... a motion based on new evidence is extremely stringent." *United States v. Weninger*, 624 F.2d 163, 167 (10th Cir. 1980). The defendant must show five elements: "1) the evidence was discovered after trial; (2) the failure to learn of the evidence was not caused by his own lack of diligence; (3) the new evidence is not merely impeaching; (4) the new evidence is material to the principal issues involved; and (5) the new evidence is of such a nature that in a new trial it would probably produce an acquittal." *United States v. Redcorn*, 528 F.3d 727, 743 (10th Cir. 2008) (quoting *United States v. Gwathney*, 465 F.3d 1133, 1144 (10th Cir. 2006)). The burden is on the defendant to establish each of the elements. C. Wright *et al.*, Federal Practice & Procedure § 557 (2008 update) ("Regardless of how the factors [for granting a new trial] are numbered, it is clear that the defendant has the burden of establishing all of them.").

As noted above, "motions for new trial on grounds of newly discovered evidence 'are not favored by the courts and are viewed with great caution." 3 C. Wright, Federal

Practice & Procedure § 557 (1982), quoted in *INS v. Abudu*, 485 U.S. 94, 107 n.12 (1988). There are several reasons for this disfavor.

First, there is a strong public interest in the finality of a criminal verdict. "[M]otions for new trials on the basis of newly discovered evidence" are "disfavored" because once the adversaries have presented their cases, "[t]here is a strong public interest in bringing litigation to a close." *INS v. Abudu*, 485 U.S. 94, 107 (1988) (comparing motions for new trial to motions to reopen in the immigration context).

Second, after a criminal verdict had been reached by a unanimous jury, a defendant is not longer presumed innocent; instead, he is presumed guilty. *See Herrera v. Collins*, 506 U.S. 390, 399 (1993) (observing that after conviction, "the presumption of innocence disappears" and so a defendant seeking a new trial comes before the court in a different posture).

Third, there is a legitimate concern that motions for new trials based on newly discovered evidence will lead to delay or abuse of the process. The Supreme Court has observed that "defendants often use new trial motions 'as a method of delaying enforcement of just sentences.'" *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (quoting *United States v. Johnson*, 327 U.S. 106, 112 (1946)).

Due to this disfavor, a defendant in a criminal case seeking a new trial based on newly discovered evidence "bears a heavy burden." *INS v. Abudu*, 485 U.S. 94, 110 (1988). The defendant must overcome a presumption that the elements are not met. *See Taylor v. Illinois*, 484 U.S. 400, 414 (1988) ("We presume that evidence that is not discovered until after the trial is over would not have affected the outcome.").

There is no merit in Nacchio's argument that his burden on this motion is merely to convince this Court, as a "thirteenth juror," that his conviction should be considered against the weight of the evidence (Br. 13-14). First, as shown above, there are special, heavy burdens applicable to motions based on newly discovered evidence. In contrast, the "thirteenth juror" standard applies (if at all) to motions for a new trial based on the "weight of the evidence." This is not such a motion. Motions based on the weight of the evidence must be filed within 7 days of verdict. Fed. R. Civ. P. 33(b)(2). Such a motion here would be untimely. *Cf.* C. Wright, Federal Practice & Procedure § 553 (describing motions for new trial based on the weight of the evidence presented at trial) *with id.* § 557 (describing special standards for motions based on newly discovered evidence). And a 7-day time limit is appropriate for such "weight-of-the-evidence" motions, as it enables the trial judge to decide the motion just after observing the trial.

Second, it is not clear that the "thirteenth juror" standard cited by Nacchio applies to motions for new trial based on the weight of the evidence. This "thirteenth juror" analysis appears to date back to "older cases," and it is not clear that it is good law. *See* C. Wright *et al.*, Federal Practice & Procedure § 553 (2008 ed.). Indeed, Nacchio cites only dicta, in a footnote, from a 1978 Tenth Circuit case. *Contrast United States v. Sampson*, 486 F.3d 13, 50 (1st Cir. 2007) (rejecting the use of the "thirteenth juror" standard in considering a motion for new trial, noting that it would not be "appropriate for the court to disregard the jury's decision"). The more generally applicable standard for motions for new trial based on the ground that the verdict is against the weight of the evidence is that such motions should be granted "only in exceptional cases in which the

evidence preponderates heavily against the verdict." *See* C. Wright *et al.*, Federal Practice & Procedure § 553 (2008 ed.).

Finally, this Court should take special note that Nacchio has already raised almost the identical arguments on Szeliga's testimony to the Tenth Circuit. This Court should view with great caution this request by Nacchio to essentially have this Court reconsider, in the context of this motion, arguments that he has already presented — unsuccessfully — to the Tenth Circuit.

Here, Nacchio cannot show (1) that the information in Szeliga's recent testimony is "newly discovered" evidence within the meaning of the rule, or (2) that the information at issue could not have been obtained at trial through reasonable diligence; or (3) that the new testimony is not merely impeaching or cumulative, or (4) that the new evidence would probably produce an acquittal.

B. The evidence is not newly discovered.

The Court should find that the evidence at issue is not newly discovered.

1. The standards for determining whether evidence is "newly discovered" are strict.

The standards are very difficult for a defendant to show that evidence is "newly discovered" within the meaning of Rule 33(b)(1).

In general, the information at issue must have been discovered since the trial. "'[T]he defendant has the burden to show *that the evidence was discovered since trial....*'" *United States v. Franklin*, 704 F.2d 1183, 1192 (10th Cir. 1983) (emphasis in original) (quoting *United States v. Maestas*, 523 F.2d 316, 320 (10th Cir. 1975)).

Courts have developed several principles in applying this test.

First, if the information relates to a matter that would have been within the defendant's own knowledge, the evidence is not newly discovered. *See United States v. Fallis*, 131 F.3d 152, 1997 WL 760646, *2 (10th Cir. Dec. 10, 1997) (unpublished) (evidence that the defendant — who was accused of stealing Marlboro cigarettes — had Camel cigarettes at the time of his arrest was not "newly discovered" because the defendant would have known the information at trial); *United States v. Maestas*, 523 F.2d 316, 320 (10th Cir. 1975) (because the defendant would have known at trial about his own relationship with a government witness, later testimony by the witness about her relationship with the defendant could not be considered "newly discovered")*; United States v. Howell*, 240 F.2d 149, 159 (3d Cir. 1956) (where a government witness provided allegedly incorrect information, but the information was such that "must have been known or suspected" by the defendant at the time of trial, this evidence "could not now constitute newly discovered evidence").

This rule is strictly applied. If the information would have been known by the defendant, it is not "newly discovered." Courts have applied this rule *even when the witness was wholly unavailable at trial*. *United States v. Muldrow*, 19 F.3d 1332, 1339 (10th Cir. 1994) (holding that if a former codefendant who originally refused to testify later comes forward with "testimony exculpating a defendant," that new exculpatory testimony is not "newly discovered" — despite its prior unavailability — if the defendant had been aware of that testimony); *United States v. Owen*, 500 F.3d 83 (2d Cir. 2007) (citing several other circuits agreeing with this position). Such testimony may be "newly available," but if the defendant knew the information, it is not "newly discovered." *Owen*, 500 F.3d at 89.

In *Owen*, the Second Circuit explained that to extend "newly discovered" information to cover "newly available" information that the defense was aware of would "stretch[] the meaning of the word 'discover' beyond its common understanding." *Id.* at 90. In that case, the Second Circuit found that where the defendant knew of what was said in his conversations with other witnesses, he surely would have been aware of those witnesses' ability to exculpate him, and so their later testimony was not "newly discovered evidence." *Id.* at 90-91.

Second, if defense counsel knew of the information or evidence at the time of trial, it is not "newly discovered." *See United States v. Pordum*, 451 F.2d 1015, 1017 (2d Cir. 1971) (evidence was not newly discovered where the evidence was merely "an extension of what [defense counsel] already knew"); *United States v. Lee*, 513 F.2d 423, 425 (D.C. Cir. 1975) (evidence was not newly discovered where defendant counsel "knew about it at the time of [the] trial").

On this point, evidence is not newly discovered if the witness was available to provide the testimony at trial, but defense counsel simply chose not to call the witness to elicit the testimony. *See United States v. Aiuppa*, 440 F.2d 893, 896 (10th Cir. 1971) (evidence was not "newly discovered" where there was no showing that it had been "unavailable at the time of trial").

Third, if the information or evidence was mentioned at trial in any way, it is not "newly discovered." *See United States v. Shipp*, 233 Fed. Appx. 847, 851 (10th Cir. 2007) (unpublished) (evidence that was "mentioned at the trial" was not "discovered after trial" as required by Rule 33); *United States v. Franklin*, 704 F.2d 1183, 1192 (10th Cir. 1983) (holding that the district court properly found that evidence had not been "discovered

since trial" where the evidence "was found during the course of trial"); *United States v. Parness*, 408 F. Supp. 440, 443 (S.D.N.Y. 1975) (where defendant based motion for new trial on a witness's testimony from a civil deposition that allegedly differed from his earlier trial testimony, district court denied motion as not new where counsel had already cross-examined the witness on this topic at trial).

This rule, too, is applied strictly. Where the information was mentioned at trial but there was conflicting information before the jury on the same point, courts have refused to view additional evidence on the same point as "newly discovered." *See United States v. Ramsey*, 761 F.2d 603, 604 (10th Cir. 1985) (holding that government witness's full recantation of his trial testimony did not warrant a new trial where "the issue of [the witness's] vacillation had been before the jury in the trial"); *Dirring v. United States*, 353 F.2d 519, 520 (1st Cir. 1965) (affidavits did not present "newly discovered" evidence when they presented an "explanation the jury had already considered").

Fourth, information is not "newly discovered" if defense counsel sought to cover the issue at trial, but the coverage was unsuccessful or inadequate. *See United States v. Hoffa*, 376 F.2d 1020, 1023 (6th Cir. 1967) (ruling that new information from witness was "not new" where "an attempt was made to go into this subject at trial"); *United States v. Austin*, 387 F. Supp. 540, 544 (M.D. Pa. 1974) (evidence not newly discovered where counsel "did not raise that point in his cross-examination" of the witness); *United States v. Kampas*, 189 F. Supp. 720, 722 (W.D. Pa. 1960) (where evidence was "available at" trial but was "not probed," it did "not fall into the category of newly-discovered evidence"). Courts have explained that it is not enough that the witness could have provided additional testimony but did not, because it always the case that "[t]he precise

testimony of any potential witness cannot be known until it is had." *United States v. Beasley*, 582 F.2d 337, 339 (5th Cir. 1978) (where the testimony was available at trial, but the witness was not called, "the defendant is not entitled to a new trial so that he may employ a different strategy"); *United States v. Matos*, 781 F. Supp. 273, 279-80 (S.D.N.Y. 1991) (where evidence was "readily available" at trial, but the defendant did not elicit it, there was "no newly discovered evidence within the meaning of Rule 33" because doing so would simply allow the defendant to use a different strategy).

2. Nacchio cannot show that Szeliga's testimony is newly discovered.

Under these standards, the Court should find — on several grounds — that Szeliga's testimony about her conversation with Nacchio is not newly discovered evidence.

First, Nacchio cannot reasonably claim that what Szeliga told him in a conversation with him is newly discovered to him. After all, he himself was a party to the conversation. He cannot claim to have discovered two years after trial what he knew back in 2000 or 2001, and what he surely knew at the time of trial.

Second, Szeliga's conversation with Nacchio about the billion dollar risk was not unknown to defense counsel at trial. On the contrary, defense counsel specifically asked about what the billion dollar risk related to. Defense cannot reasonably claim that the fact that Szeliga had information on this topic was evidence of which he was not aware.

Third, the fact that this evidence was not newly discovered is especially clear here because the witness not only testified, but addressed the specific point at issue. The point on which Nacchio focuses — what the billion dollar risk related to — was discussed in

her testimony at trial. Indeed, it was discussed *repeatedly* – on direct examination, on cross-examination, and on redirect. Her trial testimony was not entirely consistent, but that does not suggest that it was unknown at trial.

Fourth, to the extent that Nacchio may claim that his counsel did not adequately cover this point at trial by not asking enough questions, this does not make Szeliga's deposition testimony newly discovered. Indeed, as discussed above, it appears that Nacchio's counsel at trial intentionally decided not to press her for details about the conversation. Defense counsel in this situation should not be permitted to refrain from asking questions, and then later claim that the evidence was newly discovered.

Finally, Szeliga did not state that she was abandoning her trial testimony. She made clear at her deposition that she had prepared more for the trial by reviewing documents, that she had testified truthfully at the trial, and that her recollection had significantly faded since the trial. Szeliga's recent testimony is simply an additional (and far vaguer) statement on a point that was covered at trial.

C. Even if new, the evidence could have been discovered at trial with reasonable diligence.

Even if the Court finds that the evidence at issue is newly discovered since trial, it should find that the evidence could have been discovered at trial with reasonable diligence.

1. New trials may not be granted, even based on new evidence, if the evidence could have been obtained at trial with reasonable diligence.

"New trials should not be allowed simply because after the verdict the losing party has come upon some witness or information theretofore unknown to him or his attorney."

Taylor v. Illinois, 484 U.S. 400, 414 n.18 (1988) (discussing new trial motions) (quoting *Rowlik v. Greenfield*, 87 F. Supp. 997, 1001 (E.D. Pa. 1949)). A defendant who shows that he has come upon newly discovered evidence must also show that "the failure to learn of the evidence was not caused by his own lack of diligence." *United States v. Gwathney*, 465 F.3d 1133, 1144 (10th Cir. 2006); *see also United States v. LaVallee*, 439 F.3d 670, 701 (10th Cir. 2006) (requiring "reasonable diligence").

Courts have found a lack of reasonable diligence whenever any reasonable steps could have led to discovery of the evidence.

For example, such diligence is lacking where the evidence could have been discovered if defense counsel had asked questions of a witness at trial. *See United States v. Franklin*, 704 F.2d 1183, 1192 (10th Cir. 1983) (affirming denial of new trial motion where evidence was found during the course of trial; "[i]f counsel desired, he could have moved the Court to reopen the defense for one more witness").

This rule — focusing on whether the witness was available — has been applied strictly. Even where a witness was not available at trial, courts have found the witness's testimony to have been available through reasonable diligence if defense counsel could have secured witness's availability by taking reasonable steps. *See In re United States*, 565 F.2d 173, 177 (1st Cir. 1977) (ruling that counsel did not exercise due diligence sufficient to support a new trial motion where the issue arose at trial about the existence of a document, but "counsel did not request a continuance to search for the document" or examine the witness about its existence); *Dirring v. United States*, 353 F.2d 519, 520 (1st Cir. 1965) (denying new trial where evidence offered from witnesses who were claimed to have been unavailable at trial; observing that the defendant "did not request a

continuance of the trial for the purpose of further seeking the two witnesses" – even though the witnesses had already been subpoenaed).

Courts have held that where a defense counsel's examination of a witness on a point did not elicit the testimony, that is not enough to show that the testimony could not have been elicited with reasonable diligence. *See United States v. Maestas*, 523 F.2d 316, 320 & n.4 (10th Cir. 1975) (explaining that a few brief cross-examination questions on a topic were insufficient to show that the defendant could not have offered the evidence through the witness at the trial); *Wheeler v. United States*, 382 F.2d 998, 1002 (10th Cir. 1967) (finding that "[c]learly there was no abuse of discretion" when a district court denied a motion for new trial based on new testimony by a witness where the witness had testified at trial and the defendant had "ample opportunity" to elicit the testimony).

2. Nacchio cannot show that he could not have elicited the testimony at issue at trial with reasonable diligence.

Nacchio has no reasonable argument that he could not have elicited at trial the testimony on which he now relies in his motion for new trial.

Nacchio himself was on notice of this evidence before trial. He knew well of Szeliga (his former CFO) long before trial. He would have been aware of her conversations with him. And at trial, Szeliga was present, and defense counsel was given ample opportunity to explore the testimony. Counsel for Nacchio could have asked Szeliga at trial in 2007 the same questions that counsel for Nacchio asked Szeliga at her deposition in 2009. This is sufficient to show that reasonable diligence could have elicited the testimony.

But the record here makes clear that defense counsel had even more opportunities to elicit the testimony at issue. As noted, at trial, defense counsel subjected Szeliga to a very lengthy cross-examination. He did ask Szeliga about the billion dollar risk. He then saw ambiguity in Szeliga's answer, but affirmatively chose not to probe further. He also chose not to revisit this issue throughout the cross-examination. After the re-direct, he did not ask for permission to examine Szeliga further on this issue. And he did not seek to recall Szeliga as part of his case, even though the court asked him if he wished to keep Szeliga under subpoena. And Nacchio did not claim on appeal that the district court had in any way unfairly limited his examination of Szeliga.

D. The "new" evidence is cumulative and impeaching.

A motion for new trial based on newly discovered evidence must be based on evidence that is "more than impeaching or cumulative." *See United States v. Trujillo*, 136 F.3d 1388, 1394 (10th Cir. 1998); *accord United States v. Carney*, 2006 WL 979304, *2 (10th Cir. Apr. 14, 2006). Nacchio cannot show that Szeliga's deposition testimony on the conversation with Nacchio is not merely cumulative or impeaching.

1. Evidence is cumulative if evidence on the same point was presented at trial.

Testimony is "cumulative" for purposes of Rule 33 if evidence on the same point was already presented at the trial.

If the government put on evidence that was questioned at trial, further similar evidence calling it into question is generally considered cumulative evidence. *See United States v. Trujillo*, 136 F.3d 1388, 1394-95 (10th Cir. 1998) (affirming district court's denial of motion for new trial on ground that testimony potentially implicating a third

party in the crime was "cumulative" where the witness whose testimony was being questioned was "subjected to thorough impeachment at trial"); *see also United States v. Sutton*, 767 F.2d 726, 728-29 (10th Cir. 1985) (ruling that where a defendant had moved for a new trial based in large part on testimony in a civil deposition of a key government witness, the district court properly denied the motion on the ground that the information in the deposition "would be only cumulative" to her testimony at the criminal trial).

Evidence can be cumulative even if it comes from another witness. *See United States v. Caro*, 965 F.2d 1548, 1558 (10th Cir. 1992) (affirming district court's denial of motion for new trial that was based on the arrest of a witness who had been a fugitive at the time of the trial; observing that the defendant had not show that the new witness's "testimony would be any different than that already presented at trial"); *Jones v. United States*, 393 F.2d 491, 493 (10th Cir. 1968) (testimony by new witness was "merely cumulative" where it was "substantially the same" as that given by other defense witnesses).

This requirement that the evidence not be cumulative — that it not be a matter on which there was already evidence presented at the trial — is a longstanding one. The Tenth Circuit's standards on new trials based on newly discovered evidence are based on the standards discussed in *Berry v. Georgia*, 10 Ga. 511, 1851 WL 1405 (1851). *See United States v. Jackson*, 579 F.2d 553, 557 (10th Cir. 1978) (citing the *Berry* case as the origin of the Tenth Circuit's standards for such motions). In *Berry*, the court explained that a motion for new trial must be based on newly discovered evidence that is "not cumulative only – *viz.*; speaking to facts, in relation to which there was evidence at the trial." 1851 WL 1405, *12.

2. The deposition testimony about the billion dollar risk is cumulative.

The testimony by Szeliga from her recent deposition is merely cumulative of her testimony at trial. At trial, Szeliga gave testimony indicating that the billion dollar risk that she discussed with Nacchio referred to a billion dollar risk to the public guidance (consistent with the Bickley memorandum), but she then gave testimony on cross-examination indicating that the billion dollar risk may have related to Qwest's higher internal target. The jury thus had conflicting testimony before it. At her deposition, Szeliga gave extremely vague testimony, due to her lack of recollection, and Nacchio reads part of this testimony as supporting the view that there was a billion dollar risk to the internal target. Because this same point was covered at trial, this is no more than cumulative testimony.

Nacchio argues that the operative premise of the Tenth Circuit decision is that Szeliga "did not give testimony of this nature at the trial." (Br. 17.) This argument lacks support. The Tenth Circuit stated that on cross-examination, Szeliga "appeared to testify that she meant one billion dollars less than the internal target of $22 billion." 519 F.3d at 1163. The Tenth Circuit thus found that Szeliga did give such testimony, but that there was other evidence on this point (such as the Bickley memorandum, and Szeliga's other testimony) that sufficiently supported the government's contention of a $900 million risk to the bottom end of the public guidance. And in any event, the record stands on its own, and makes clear that Szeliga did give testimony on the same point at trial.

3. Evidence is merely impeaching where the matter was covered at trial, and the new evidence simply impeaches it.

A motion for new trial based on newly discovered evidence must also be based on evidence that is "more than impeaching." *See Trujillo*, 136 F.3d at 1394.

Where an specific issue was testified to at trial, later evidence contradicting the witness's testimony on that point is considered merely "impeaching" for purposes of Rule 33. *See United States v. Youngpeter*, 986 F.2d 349, 356 (10th Cir. 1993) (evidence contradicting trial testimony by witness"[c]learly" was "merely impeaching"); *United States v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991) (where a witness's spouse provided a sworn affidavit stating that a witness had given false testimony at trial, this contradiction was "merely impeaching" and so the "district court did not err in summarily denying the motion for a new trial").

4. The deposition testimony about the billion dollar risk is merely impeaching.

Szeliga's deposition testimony, even read in the light most favorable to Nacchio (a standard the Court should not apply), is, at best, merely impeaching. Szeliga already testified at trial about her conversation with Nacchio about the billion dollar risk. As the Tenth Circuit found, part of her testimony supported the view that she was discussing with Nacchio a billion dollar risk to the public guidance. Nacchio now claims that Szeliga has given later testimony contradicting her earlier testimony on this point. Such alleged inconsistent statements by a witness fall squarely in the category of impeachment testimony.

E. Szeliga's testimony at her deposition was not highly material.

To support a Rule 33 motion, newly discovered evidence must be "material to the principal issues involved" in the case. *United States v. LaVallee*, 439 F.3d 670, 700 (10th Cir. 2006).

Here, the Government does not go so far as to contend that testimony relating to Szeliga's conversations with Nacchio about a billion dollar risk is irrelevant to the principal issues involved in this case. Szeliga's testimony at trial on this point was certainly relevant to the materiality issue, as it related to an element of the crime of trading on the basis of material nonpublic information.

But this testimony was hardly "material" to the entire materiality inquiry, let alone "dispositive," as Nacchio claims (Br. 17). Nacchio's bold claim that Szeliga's testimony is dispositive warrants a brief discussion of the legal standards for determining the materiality of corporate information. As set forth below, materiality is not dependent on a numerical threshold, and numerous quantitative factors — many of which were present here — can make corporate information material.

1. Materiality depends on the significance that a reasonable investor would assign to the information.

The Supreme Court "repeatedly has described the 'fundamental purpose' of [the Securities Exchange Act of 1934] as implementing a 'philosophy of full disclosure.'" *Basic, Inc. v. Levinson*, 485 U.S. 224, 230 (1988) (quoting *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477-78 (1977)). But the Supreme Court has also observed that liability should not extend to "insignificant omissions," because such liability could cause a company "to bury the shareholders in an avalanche of trivial information." *See TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976).

Accordingly, the Supreme Court has held that the disclosure requirements apply only to "material" information. "[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic, Inc. v. Levinson*, 485 U.S. 224, 240 (1988). *See TSC Indus.*, 426 U.S. at 449 (holding, in the context of a challenge to a proxy statement, that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.").

2. Materiality is a highly fact-specific inquiry, usually reserved for the trier of fact.

Materiality is a highly fact-specific inquiry. *See TSC Indus.* , 426 U.S. at 450 ("[t]he [materiality] determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts"). It requires assessment of *all* the factual circumstances. *Id.* at 449 (the materiality standard contemplates that there was "a substantial likelihood that, *under all the circumstances*, the omitted fact would have assumed actual significance in the deliberations of a reasonable shareholder") (emphasis added).

Because assessments of materiality are so fact-specific, they are "peculiarly ones for the trier of fact." *Id.*

There is no test or formula for determining materiality. The Supreme Court has noted that "[a] bright line rule is easier to follow ... But ease of application alone is not an excuse for ignoring the purposes of the Securities Acts and Congress' policy decisions. Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or

underinclusive..” *Basic,* 485 U.S. at 236. In *Basic*, the Court noted that the SEC’s “Advisory Committee on Corporate Disclosure cautioned the SEC against administratively confining materiality to a rigid formula. Courts also would do well to heed that advice.” *Id.* at 235.

3. Materiality requires consideration of qualitative factors.

In assessing the factual circumstances, it is necessary to consider qualitative as well as quantitative factors. *See TSC Indus.* , 426 U.S. at 450 (observing that the “underlying objective facts” are “merely the starting point for the ultimate determination of materiality”); *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 162 (2d Cir. 2000) (citing cases finding materiality based on qualitative factors rather than pure numerical measures, and noting that “[w]ith respect to financial statements, the SEC has commented that various ‘qualitative factors may cause misstatements of quantitatively small amounts to be material’”); *id.* (noting that the SEC has suggested looking at other factors, such as whether a statement “masks a change in earnings or other trends”); *Flynn v. Bass Bros. Enterps.*, 744 F.2d 978, 988 (3d Cir. 1984) (listing seven factors relevant to the materiality of omitted information, including, for example, “the facts upon which the information is based”; “the qualifications of those who prepared or compiled it”; the “availability to the investor of other more reliable sources of information”).

Facts relating to future results can be especially significant. *See Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1333 (7th Cir. 1995) (ruling that predictions of growth can be material, and observing that the SEC has stated that “Persons invest with the future in mind and the market value of a security reflects the judgments of investors about the future economic performance of the issuer.”); *SEC v. Texas Gulf Sulphur Co.*,

401 F.2d 833, 849 (2d Cir. 1968) ("material facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the probable future of the company").

Information need not be precise to be material. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1092-93 (1991) (holding that statements of opinion or belief by corporate directors, such as that a price was "high" and that a proposal was "fair," could be statements of material fact, and commenting "[t]hat such statements may be materially significant raises no serious question"); *SEC v. Happ*, 392 F.3d 12, 22-23 (1st Cir. 2004) (holding that a jury could find that voicemails from a company executive about financial "difficulties" were material information).

In assessing materiality, it is appropriate to consider the "reaction of those who were exposed to the inside information." *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 166 (2d Cir. 1980). "[T]rading (and profit making) by insiders can serve as *an* indication of materiality." *Basic*, 485 U.S. at 241 n.20 (emphasis in original). And statements by insiders may be significant because shareholders know that insiders "have knowledge and expertness far exceeding the normal investor's resources." *Sandberg*, 501 U.S. at 1092-93.

4. Many qualitative considerations can render a quantitatively small item material.

Because the Tenth Circuit indicated that it took its "cue" from SEC Staff Accounting Bulletin 99, 64 Fed. Reg. 45,150 (Aug. 19, 1999) ["SAB 99"], and cited it repeatedly and quoted it at length, it is appropriate for this Court to consider that bulletin as useful guidance for its inquiry.

SAB 99 is relevant here in a few respects. First, SAB makes clear "the views of the staff that items of corporation information are "not immaterial simply because they fall beneath a numerical threshold." *Id.* at 45,150.

Second, SAB 99 also makes clear that there are numerous qualitative and subjective considerations that "may well render material" a "quantitatively small" item. Id. at 45,152. These include (but are not limited to) such factors as (1) whether the item "masks a change in earnings or other trends" or "hides a failure to meet analysts' consensus expectations"; (2) whether the item "concerns a segment or other portion of the registrant's business that has been identified as playing a significant role in the registrant's operations or profitability"; (3) "the demonstrated volatility of the price of a registrant's securities in response to certain types of disclosures"; (4) whether the expectation of management is that an item "may result in a significant positive or negative market reaction" and (5) "the intent of management." *Id.*

F. The deposition testimony is not so powerful that it would "probably" result in an acquittal.

Nacchio cannot show that the deposition testimony he cites is so powerful that, if there were a retrial, it would probably result in an acquittal.

1. The newly discovered evidence must be so powerful that it would probably result in an acquittal.

A defendant moving for a new trial based on newly discovered evidence also bears the very heavy burden of showing that the new evidence "probably would have changed the outcome." *See Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987); *United States v. Sinclair*, 109 F.3d 1527, 1531 (10th Cir. 1997) (citing the "well-established probability standard"); *see also United States v. Tucker*, 836 F.2d 334, 336 (7th Cir. 1988) (a

defendant must show the newly discovered evidence "'would probably lead to an acquittal in the event of a trial"), *quoted in INS v. Abudu*, 485 U.S. 94, 107 n.12 (1988); *Lloyd v. Gill*, 406 F.2d 585, 587 (5th Cir. 1969) (the facts must be such that "they will probably change the result if a new trial is granted"), *quoted in Taylor v. Illinois*, 484 U.S. 400, 414 n.18 (1988); *United States v. Jones*, 2009 WL 514200, *3 (10th Cir. Mar. 3, 2009) (newly discovered evidence "must be so powerful that it would 'probably produce an acquittal in a new trial'") (quoting *United States v. Pearson*, 203 F.3d 1243, 1274 (10th Cir. 2000)).

This standard is higher than the "reasonable probability" standard Nacchio urges (Br. 19). The Supreme Court has explained that the "probability" standard applicable to motions for new trial based on newly discovered evidence is a more difficult standard than the "reasonable probability" standard applicable to structural constitutional errors in the trial. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In *Strickland*, the Suprene Court made clear that the "probability" requirement requires a showing that it is "more likely than not" that an acquittal would occur at a new trial. *Id.*

The Supreme Court has recognized that this more-likely-than-not standard is a "high standard," Strickland, 466 U.S. at 694, and imposes a "severe burden" on a defendant. *United States v. Agurs*, 427 U.S. 97, 111 (1976). This high threshold is considered necessary to "reflect[] the profound importance of finality in criminal proceedings." *Strickland*, 466 U.S. at 694.

In assessing whether newly discovered evidence shows that an acquittal would be probable, it is also relevant to consider the fact that later evidence is often not strong evidence due to fading memories. The reality is that witnesses' memories fade over time.

See United States v. Owens, 484 U.S. 554, 562 (1988) (quoting from a congressional report on Federal Rule of Evidence 801(d)(1)(C) observing that "[a]s time goes by, a witness' memory will fade" and identifications will "become less reliable"); *Dennis v. United States*, 384 U.S. 855, 872 n.19 (1966) (noting the value of witness's statements that were made "before time dulls treacherous memory"); *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1124 n5 (10th Cir. 2006) ("Not surprisingly, a witness's memory fades over time."). The passage of time thus can lead to less accurate results. *New York v. Hill*, 528 U.S. 110, 117 (2000) (observing that delay in trial "can lead to a less accurate outcome as witnesses become unavailable and memories fade").

Indeed, courts have noted that fading memories may serve defendants' interests. *Vermont v. Brillon*, 129 S. Ct. 1283, 1290 (2009) (observing the "reality" that "delay may work to the accused's advantage" partly because witnesses' "memories may fade over time") (internal quotation marks omitted); *Barker v. Wingo*, 407 U.S. 514 (1972) (observing that delaying a trial "is not an uncommon defense tactic" because government witnesses' "memories may fade")

The Court should also consider whether the new evidence is a "recantation" of the prior testimony, or just inconsistent. A recantation is where party specifically recants or disavows trial testimony. *See, e.g., United States v. Sapp*, 166 F.3d 349, 1998 WL 883231, *6 (10th Cir. Dec. 18, 1998) (observing that an affidavit by a trial witness contradicting his trial testimony was not a recantation where the witness did not withdraw or repudiate his trial testimony). But even where a witness recants his or her testimony, "[r]ecantation of testimony given under oath at trial" is "generally looked upon with downright suspicion." *United States v. Ahern*, 612 F.2d 507, 509 (10th Cir. 1980).

Indeed, a witness who was once a defendant may "say whatever they think might help their co-defendant." *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992).

The Court has discretion to find that later conflicting evidence does not overcome prior testimony, and courts generally are inclined to believe the trial testimony over later testimony. *See* C. Wright *et al.*, Federal Practice & Procedure § 557.1 (2008 ed.) (noting that "usually" district courts decide to believe "the testimony at the trial rather than the recantation"); *United States v. Smith*, 997 F.2d 674, 677, 682 (10th Cir. 1993) (affirming trial judge's decision that the contents of affidavits by a government witness that "recanted key portions of her trial testimony" were "insufficient to overcome the witness' trial testimony"); *United States v. Yosuf*, 508 F. Supp. 24, 30 (E.D. Va. 1980) (deciding to believe prior testimony as opposed to evidence from three later affidavits, where one detailed affidavit was contradicted by a prior one, and two other affidavits were of "a general nature" and thus did not overcome testimony that had been "vigorously challenged" at trial).

2. Nacchio has not established that it is more likely than not that Szeliga's recent deposition testimony would result in an acquittal at a new trial.

Nacchio's new trial motion focuses on the materiality of the information at issue. Nacchio takes a narrow view of materiality, and urges that Szeliga's deposition testimony on the topic of her warning to Nacchio would produce an acquittal because that testimony is dispositive of materiality. This argument should be rejected for a wide variety of reasons, as set forth below.

a. The deposition testimony shows Szeliga's lack of recollection.

Szeliga's recent deposition testimony is hardly powerful evidence, since the overall theme of that testimony is her faded memory. As discussed above, Szeliga repeatedly testified at the deposition that her memory had faded. *See generally* Part II.E above. On point after point, she told counsel that she did not recall general details, let alone the exact numbers. She specifically told counsel that she did not recall the details of her conversation with Nacchio, or the details of the numbers she spoke to him about.

This deposition testimony is far too vague and uncertain for Nacchio to show that it would probably produce an acquittal.[12]

b. Szeliga did not recant her trial testimony.

It is also significant that Szeliga did not purport to recant any portion of her trial testimony. She commented that before her trial testimony she had reviewed documents, but that she had done much less review before her deposition. She affirmed that she had testified fully and truthfully at the trial. And defense counsel did not show Szeliga her trial testimony to question her about it. Absent such a recantation of *any* portion of her testimony, the jury on a retrial would be faced with almost the same conflicting testimony. The deposition testimony thus fails to show that it is probable that the jury would reach a different result.

c. The deposition testimony does not support defense counsel's reading of it.

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[12] Given Ms. Szeliga's obvious lack of memory of the details, the Government submits that a hearing would not be worthwhile. There is no reason to believe that her testimony will become clearer now that more time has passed since the events at issue.

Even if the Court reads the evidence as Nacchio wishes, it does not support the interpretation Nacchio seeks to give it – i.e., that Szeliga "testified unequivocally that she had informed Nacchio about a risk of a shortfall of 1.4%" (Br. 3).

First, Szeliga said no such thing. Defense counsel never asked her to do such a calculation. The math is all defense counsel's. Defense counsel did not even suggest this calculation to Szeliga.

Second, defense counsel's math rests on precise calculations that are unsupported by Szeliga's opaque deposition testimony. Nacchio's premise is that the starting point was exactly "$21.99 billion," and that the warning was of exactly $1 billion. But Szeliga's deposition testimony cannot carry the weight of this kind of precise interpretation. First, Szeliga testified that she warned Nacchio of "approximately a billion dollars of risk" — not *exactly* $1 billion. Ex. 34 at 179:8-12. Notably, a warning of approximately $1 billion is consistent with the Bickley memorandum. Id. at 173:12-19. Szeliga did not confirm that the starting point was the internal target. Instead, she referred vaguely to a number that "we" had "summed up to." It was not clear if she was referring to a number that her team had summed up to (such as in the Bickley memorandum), or perhaps a sum of the business unit submissions. In either case, it was not clear that the sum to which she referred was $21.99 billion. Counsel for Nacchio chose not to clarify this.

Third, this warning reflected Szeliga's calculations in late December 2000 or early January 2001. At that point, Qwest still was hoping to shift its growth to recurring revenue early in 2001. But the convictions in this case relate to sales by Nacchio in April and May 2001 (as he was acquitted as to his sales in January and February 2001). By

April, the evidence is clear that the shift on which Qwest's business plan for 2001 was premised had not occurred at the rate expected, and that the business units were expecting to fall short of their year-end targets by hundreds of millions of dollars. *See supra generally* Part II.B.7.

d. Other evidence confirmed that the shortfall Qwest faced was substantial.

Even if the Court were to focus only on the narrow evidence of materiality on which Nacchio focuses his argument — i.e., the amount of the revenue shortfall Qwest faced — and if the Court were also to accept Nacchio's reading of Szeliga's deposition testimony, there was ample other evidence showing that the shortfall was material.

First, the Bickley memorandum itself is evidence that Qwest budget managers had calculated that Qwest faced almost a billion dollar shortfall. *See* Ex. 13; Ex. 34 at 172-173.

Second, Szeliga herself confirmed that for her to bring this risk to Nacchio's attention, it had to be a risk she considered significant. Ex. 34 at 180:8-17.

Third, Nacchio's reaction the warning — that he was "irate," Ex. 32 at 271:23-25 — also supports the view that this warning was of a material risk.

Fourth, Nacchio was separately warned of a "huge" shortfall by Qwest's president of worldwide operations, Afshin Mohebbi. While that warning related to the internal targets, Mohebbi's warning that the shortfall supports the conclusion of a material shortfall to the external guidance. *See* Ex. 14.

Fifth, in the fall of 2001, Qwest's business unit heads informed Nacchio of gaps of hundreds of millions of dollars in their respective units – gaps they could not fill. *See supra* Part II.B.2.

Sixth, in April 2001, these same business heads informed Nacchio of shortfalls hundreds of millions of dollars in their respective units, especially in recurring revenue. *See supra* Part II.B.7.

Seventh, the fact that Qwest's later actual reduction in its public targets was approximately $1 billion is evidence supporting the view that the risk at issue was a $1 billion risk to the public targets

e. There was ample other evidence of materiality.

Finally, the Court should not ignore that there was far-ranging evidence of the materiality of the nonpublic information.

There were several types of material information. Some of this related to Qwest's public financial targets. There was information about Qwest's revenue: that Qwest's business plan for 2001 depended on a risky premise (a dramatic growth in recurring revenue) that, by April 2001, Nacchio knew had not materialized. There was information regarding EBITDA, which was projected as early as November 2000 to have an enormous miss (Ex. 29, showing EBITDA projected at $7.6 billion, or 11% below the low end of the public EBITDA range of $8.5 to $8.7 billion Ex. 6), and after which the business units started simply plugging their numbers. And there was information relating to Qwest's long-term projected growth rates. This information included the undisclosed makeup of its revenue, including the fact that nonrecurring revenue made up almost 40% of its growth in early 2001.

There was also a variety of evidence of materiality of this information, as discussed more fully in Part II.B above.

First, there was evidence of the significance of Qwest's trends, including the impact that its heavy (and undisclosed) reliance on one-timers to generate growth (especially in early 2001) had on Qwest's ability to sustain its projected growth rates — especially in light of Qwest's dire forecasts for the market for these one-timers in the latter half of 2001.

Second, there was the evidence of the views of Nacchio himself, who was "irate" upon receiving the warning from Szeliga; who was "visibly disappointed" at the results he learned of in April 2001; and who even indicated that he resisted disclosure of this information because he thought it would adversely affect the stock price.

Third, there was evidence of the views of several other Qwest executives, including Lee Wolfe (the head of investor relations) and Mark Schumacher (the controller), who viewed the nonpublic information as highly significant.

Fourth there was ample evidence of the concerns of investors, who repeatedly indicated concerns about the makeup of Qwest's revenue and about the fact that other telecommunications companies were reducing targets while Qwest was not.

Fifth, there was evidence of the telecommunications market generally: that it was skittish and (as Nacchio expressed himself) that it would punish any miss of the low end of the public target range.

Sixth, there was evidence that when the nonpublic information was finally released, investors were in fact surprised, and a price decline did occur.

Seventh, there was the evidence that Qwest was indeed forced to reduce its public targets substantially by September 2001, and that it then failed to meet even those lowered targets.

Eighth, there was the evidence of Nacchio's own sales, which were swift and huge and were noticed by investors.

In light of all this additional evidence, Nacchio's vague evidence from Szeliga's deposition is hardly sufficient to show that introducing that evidence at trial would probably result in acquittal.

IV. CONCLUSION

The Court should find that Nacchio has not met his heavy burden. He has not even come close to showing that the evidence on which he relies (1) is newly discovered within the meaning of Rule 33 and became known to him and his counsel only after the trial, (2) could not have been obtained earlier through reasonable diligence, (3) is not cumulative, (4) is not merely impeaching, (5) is material to the principal issues involved, and (6) is so powerful that when presented in a new trial, and in light of all the other evidence, it would probably lead to an acquittal. The Court should deny the motion.

The Government requests oral argument only if the Court wishes to hear argument from the Government on any new issues or arguments that the defendant may raise in his reply brief.

Respectfully submitted this 6th day of April, 2009.

DAVID M. GAOUETTE
ACTING UNITED STATES ATTORNEY

s/Kevin T. Traskos
Kevin T. Traskos
James O. Hearty
Assistant U.S. Attorneys
United States Attorney's Office
1225 17th Street, Suite 700
Denver, Colorado 80202
Telephone: (303) 454-0100
Fax: (303) 454-0400
E-mail: Kevin.Traskos@usdoj.gov

Attorneys for the United States

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Alain Leibman
aleibman@foxrothchild.com

Edward Nathan
enathan@sgklaw.com

Everett Clifford Johnson, Jr.
everett.johnson@lw.com

Herbert J. Stern
hstern@sgklaw.com

Jeffrey Speiser
jspeiser@sgklaw.com

Joel M. Silverstein
jsilverstein@sgklaw.com

Mark Rufolo
mrufolo@sgklaw.com

Maureen E. Mahoney
maureen.mahoney@lw.com

Sean M. Berkowitz
sean.berkowitz@lw.com

Paul E. Pelletier
paul.pelletier@usdoj.gov

Nathan H. Seltzer
nathan.seltzer@lw.com

s/Andrea Hough
United States Attorney's Office
1225 17th Street, Suite 700
Denver, Colorado 80202