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.

REPLY BRIEF BY THE UNITED STATES
REGARDING THE PROPER SCOPE OF RESENTENCING

The Government hereby responds to the Defendant's Brief Regarding the Scope of Resentencing (Docket # 580).

I. THE COURT CAN LIMIT THE SCOPE OF RESENTENCING.

The main point of contention between the Government and the Defendant as to the law of resentencing appears to be whether the scope of resentencing is set by the Court, or by the parties. The Government submits that the Court has the discretion to determine the proper scope of resentencing and to permit the introduction of new evidence. *See generally* Docket #581 at 10-15. The Defendant argues, instead, that "when resentencing is *de novo*, the parties may introduce any evidence that could have been introduced at the first sentencing hearing." Docket #580 at 6. In other words, the Defendant believes that

the scope of the resentencing depends on what the *parties* choose to present. The Government submits that the cases cited in its opening brief amply support the Government's view.

The Government will not repeat the arguments it has already made (Docket #581 at 10-15), but notes that the only two cases Defendant cites in support of his view — *i.e.*, that the parties have a right to submit new evidence — do not support it. *See* Docket #580 at 6 (citing *United States v. Ortiz*, 25 F.3d 934 (10th Cir. 1994) and *United States v. Warner*, 43 F.3d 1335 (10th Cir. 1994)). In *Ortiz*, the Tenth Circuit held that the district court "did not err by receiving new evidence" at a resentencing. 25 F.3d at 935. It explained, "We now hold that *de novo* resentencing permits the receipt of any relevant evidence the court could have heard at the first sentencing hearing." *Id.* The court explained that the district court was not precluded from hearing the evidence at issue and that "fully de novo sentencing was appropriate." *Id.* It thus held that the district court had the authority to receive new evidence at a resentencing; it did *not* hold the converse, *i.e.*, that the district court could not limit the scope of the resentencing in any way. Similarly, in *Warner*, the Tenth Circuit – quoting *Ortiz* — rejected the view that a district court lacks the authority to expand the record at resentencing. 43 F.3d at 1339-40. It did *not* hold that a district court is required to accept all new evidence.

In any event, even if *Ortiz* and *Warner* could be read otherwise, the Tenth Circuit decisions issued since 1994 have clarified the issue. Specifically, the Tenth Circuit has repeatedly indicated that what it means by "de novo" resentencing[1] is simply that the

[1] The meaning of "de novo" often varies, depending on the context. *Contrast United States v. Santos,* 403 F.3d 1120, 1124 (10th Cir. 2005) (explaining that the Tenth

district court has the *authority* to take new evidence, if it chooses to exercise its discretion to do so.[2] In other words, there is no automatic bar on new evidence at resentencing.

Significantly, the most recent (albeit unpublished) Tenth Circuit decisions addressing this resentencing issue strongly indicate that the Tenth Circuit currently views this issue the same way as the Government – *i.e.*, that a district court has *discretion* to

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Circuit conducts "*de novo*" review of whether an officer had reasonable suspicion, but that in this context it is a "peculiar sort of *de novo* review" in which the appellate court must uphold the factual findings "unless those findings are clearly erroneous") (internal quotations omitted) *with Timmons v. White*, 314 F.3d 1229, 1233 (10th Cir. 2003) (discussing the meaning of a "trial *de novo*" in the civil context after an agency's administrative determination); *cf. United States v. Raddatz*, 447 U.S. 667, 676 (1980) (observing that 28 U.S.C. § 636(b)(1)(B)'s direction that a district court must make a "de novo determination" of a matter heard before a magistrate does *not* require the district court to hold its own hearing, but instead "permit[s] whatever reliance a district judge, in the exercise of sound judicial discretion, ch[ooses] to place on a magistrate's proposed findings and recommendations"). These cases make clear that the meaning of *de novo* in a particular context requires a careful examination of the case law regarding that specific context.

[2] *See United States v. Todd,* 515 F.3d 1128, 1139 (10th Cir. 2008) ("On remand, resentencing proceeds *de novo*. Accordingly, the district court is *free to receive* any relevant evidence that it could have heard at the first sentencing hearing. It is *free to make* new findings of fact, credibility determinations, and conclusions of law based on that evidence.") (emphasis added); *United States v. Fortier*, 242 F.3d 1224, 1232 (10th Cir. 2001) ("On remand from this Court, a district court *may* resentence a defendant on different grounds ... as long as they are not foreclosed by the scope of the appellate decision.") (emphasis added); *United States v. Hicks*, 146 F.3d 1198, 1200-02 (10th Cir. 1998) (discussing the court's "inherent *discretionary power to expand the scope* of the resentencing") (emphasis added); *United States v. Moore*, 83 F.3d 1231, 1234 (10th Cir. 1996) ("[T]he de novo resentencing '*permits the receipt* of any relevant evidence the court could have heard at the first sentencing. As a consequence, the court on remand *has the discretion* to entertain evidence that could have been presented at the original sentencing....") (emphasis added).

either limit the scope of resentencing, or expand it. For example, earlier this year in *United States v. Hopkins*, the Tenth Circuit explained:

> The district court, however, is not obligated to conduct a de novo resentencing. "[O]n remand [the court] has the *discretion* to entertain evidence that could have been presented at the original sentencing even on issues that were not the specific subject of the remand." [*United States v.*] *Keifer*, 198 F.3d [798,] 801 [(10th Cir. 1999)] (emphasis added). Thus, a court's discretion to limit the scope of resentencing is reviewed for abuse of discretion.

310 F. App'x 254, 259 (10th Cir. Feb. 4, 2009).

Similarly, in a 2008 decision, *United States v. Gaither*, the Tenth Circuit emphasized that in a "de novo sentencing determination," "there is no legal authority for the proposition that a district court must 'expand the scope of the resentencing beyond the issue that resulted in the reversal and vacation of sentence.' .... Thus, the district court did not err in adopting its prior findings and then applying the Guidelines in an advisory fashion on remand after *Booker*." 300 F. App'x 612, 614 (10th Cir. Nov. 25, 2008).[3] These recent cases confirm that this Court is not *required* to take evidence on issues beyond those that directly resulted in the reversal.

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[3] There is no reason to assume that the Tenth Circuit panel that issued the resentencing remand here had a different view of the rules regarding *de novo* resentencing than the views expressed in *Hopkins* and *Gaither*. Of the three judges who issued the Tenth Circuit panel opinion regarding resentencing (*Holmes*, Kelly, McConnell, JJ.), all three participated in *Hopkins* or *Gaither*. Judge Holmes was a member of the panel that issued the decision in *Hopkins*, and Judges McConnell and Holmes were members of the panel that issued the decision in *Gaither*.

II. THE TENTH CIRCUIT DID NOT REVERSE THE FINE.

The Defendant argues that the Tenth Circuit's opinion vacated reversed the fine. It argues that (1) reversal of the fine is "a matter of the plain language of the opinion" (Docket #580 at 7); (2) that "any other reading ... would be inconsistent with the parties' arguments on appeal" (*id.*); and (3) that it would be "nonsensical to interpret the Tenth Circuit's decision as anything other than reversing the term of imprisonment and the fine." *Id.* at 8. These arguments lack merit.

A. The plain language did not reverse the fine.

The Defendant's "plain language" argument faces a serious problem: the opinion's plain language. The opinion's language says nothing about vacating the fine. It reverses the sentencing order in just two specific respects: "with respect to its gain calculation and its forfeiture calculation." 573 F.3d at 1090. The Tenth Circuit elected to say nothing about the punishment imposed by the sentencing order.

The Defendant's argument is really an inferential one: he argues that the sentencing order "included both the term of imprisonment and the fine," and so the Tenth Circuit *must have* reversed the fine. Docket #580 at 7. But the fact that the sentencing order includes the fine does not prove the Defendant's point, because the Tenth Circuit did not reverse the sentencing order in *all* respects. Indeed, the Defendant's argument clearly proves too much: it would mean that the Tenth Circuit reversed *all* terms of the sentencing order – including all terms of his supervised release (that he may not possess firearms or controlled substances, that he may not commit any crimes, etc.). *See* Docket #463 at 8.

Such a broad reading of the Tenth Circuit's opinion — *i.e.*, as reversing the *entire* sentencing order — does not make sense and is contrary to the plain language of the opinion describing the scope of the remand. A more sensible reading is that the Tenth Circuit expressly reversed just those paragraphs of the sentencing order that relate "to its gain calculation and its forfeiture calculation." This indicates that the Tenth Circuit expressly reversed paragraphs 3-7 of the sentencing order. *See* Docket #463 at 3-4. The Tenth Circuit did not expressly reverse anything more.

B. Defendant did not argue on appeal that the fine needed to be recalculated based on the gain.

The Defendant also argues that reading the Tenth Circuit's opinion as not reversing the fine "would be inconsistent with the parties' arguments on appeal." Docket #580 at 7.

He first focuses on his own arguments on appeal. He suggests (without saying so) that he argued on appeal that any recalculation of gain meant that the fine would also need to be redetermined. To the extent he makes this suggestion, it is incorrect. His appeal brief made only one terse reference to the fine, and his sole argument on fine was a constitutional one based on the Eighth Amendment. Specifically, he argued that the Tenth Circuit "should also vacate the fine for further consideration in light of the relevant money gain. Imposition of a $19 million fine, in combination with a forfeiture of $44 million (see below), would represent a penalty 35-times greater than the $1.8 million gain, raising a serious Eighth Amendment question." App. Br. at 54. In other words, he argued that the gain, if recalculated, might support an Eighth Amendment argument. But

he made absolutely no argument that any gain error meant that the fine was necessarily wrongly determined under the guidelines or the statute.

Another, more significant problem with the Defendant's argument is that the Tenth Circuit's opinion is quite explicit about its understanding of the Defendant's argument on fine. The Tenth Circuit's opinion shows that it recognized that the Defendant's only argument on appeal as to the fine was based on the Eighth Amendment, and that the Defendant did not otherwise contest his fine as unlawful. 573 F.3d at 1090 n.28 ("Mr. Nacchio additionally argues that imposition of a $19 million fine, when combined with a $44.6 million (or, ostensibly, a $52 million) forfeiture order, raises 'a serious Eighth Amendment question' because it 'would represent a penalty 35-times greater than the $1.8 million gain.' ... *Mr. Nacchio does not argue that either his fine or his forfeiture, considered separately, would be unlawful*; he asserts only that the fine, *taken together with* the forfeiture, constitutes an unconstitutional 'excessive fine.'") (emphasis added in first part).

Similarly, the Tenth Circuit focused on the district court's need, on remand, to recalculate the *forfeiture* amount, but it did *not* suggest that it was requiring the district court to recalculate the *fine* amount. See Docket #581 at 9; 573 F.3d at 1090 n.28 ("Assuming that the fine and forfeiture amounts would be considered in tandem for Eighth Amendment purposes, our disposition *of Mr. Nacchio's forfeiture order* nullifies his Eighth Amendment argument; at this time, there is *no set forfeiture amount*. The district court will determine *the exact forfeiture amount* upon resentencing.") (emphasis added). The court thus made clear that there was "no set forfeiture amount" and that the

district court would need to calculate "the exact forfeiture amount"; it did *not* say that the district court should recalculate the *fine* amount.

Finally, the Defendant focuses on the Government's arguments on appeal, arguing that the Government "never argued" that the fine could stand if the district court calculated the gain incorrectly. Docket #580 at 7-8. In other words, rather than focusing on his own arguments, he argues about what the Government did not argue. It is not clear what relevance this has, other than to distract attention from the fact that the Defendant did not argue on appeal that if the gain was incorrect, the fine necessarily needed to be recalculated. In any event, the Defendant identifies no concession on appeal by the Government (and there is none). The Government had no reason to respond to an argument about the fine that the Defendant had not even made.

C. It is not nonsensical to interpret the opinion as not reversing the fine.

The Defendant further argues that it would be "nonsensical" to interpret the Tenth Circuit's decision "as anything other than reversing the term of imprisonment and the fine." Docket #580 at 8. His main argument is that the fine was "dependent on the gain calculation." *Id.* But that is not correct. The district court sentenced the Defendant to the maximum fine. The maximum amount ($1 million per count) was set by statute and thus was entirely unaffected by the gain calculation.[4] *See generally* Docket #463 at 5-6.

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[4] The maximum guideline fine was $1 million per count – the maximum statutory fine per U.S.S.G. § 5E1.2(c)(4). As such, the maximum fine was is not affected by the offense level calculation. "Although the fine table normally links the fine to the offense level, § 5E1.2(c)(4) breaks that linkage whenever a statute authorizes a fine exceeding $250,000." *United States v. Tedder*, 403 F.3d 836, 840 (7th Cir. 2005) (citing *United States v. Ming Hong,* 242 F.3d 528, 533 (4th Cir. 2001)).

The gain would affect the *minimum* amount of fine under the guidelines table, but that number had exceedingly little relevance here: the minimum was extremely low ($12,500 per count) in the context of the amounts at issue in this case; the Defendant never argued that he was entitled to such a minimal fine; and the district court made no indication, in determining the fine, that it was affected in any significant way by the bottom end of the range. On the contrary, the district court indicated that a wide range of factors supported a fine of $1 million per count. Given this context, it is a stretch to say that the fine was "dependent" on the gain calculation, let alone that it would be "nonsensical" to find that the Tenth Circuit did not vacate the fine for redetermination in light of the recalculated gain.

III. THE COURT SHOULD NOT REVISIT THE FINE (OR OTHER ISSUES).

As the Government has argued (Docket #581 at 15-19), the Court should exercise its sound discretion in establishing the scope of the resentencing, and should be guided by the law of the case, the issues the Defendant previously chose not to raise before the district court or on appeal, the narrow mandate, and Fed. R. Crim. P. 32(i)(1)(D), which requires a showing of good cause before a party can make a new objection.

Here, the Defendant has not given the Court or the Government any indication of what issues it may wish to relitigate other than the fine. Accordingly, the Government will focus on the fine. As set forth below, the Court should either (a) exercise its discretion not to revisit the fine or (b) defer its determination of whether to revisit the fine amount in light of the gain until after the new gain amount has been determined.

There are sound reasons that militate against relitigation of the fine. One factor is that the Defendant did not appeal his fine on the ground that the gain was incorrectly calculated. Rather, as noted, his sole argument on fine was a constitutional one, based on the Eighth Amendment. He made absolutely no argument that any gain error meant that the fine was improperly calculated. In determining the scope of resentencing, the Court may take this waiver into account. *See Greenlaw v. United States*, 128 S. Ct. 2559, 2570 n.8 (2008) (observing that on resentencing after a remand, "default and forfeiture doctrines" can "confine the trial court").

Another relevant factor here is that the mandate here gives the Court a great deal of guidance, and it does not suggest that the district court should redetermine the fine in light of the recalculated gain. The Defendant's discussion of the mandate at pages 4-5 of his brief (Docket #580 at 4-5) is incomplete. At pages 4-5, the Defendant quotes from a few places in the Tenth Circuit's opinion, but strikingly omits the final statement in the Tenth Circuit's opinion: "Based upon the foregoing, we **REVERSE** the district court's sentencing order *with respect to its gain calculation and its forfeiture determination* and **REMAND** for resentencing consistent with this opinion." 573 F.3d at 1090-91 (emphasis added). This statement should not be overlooked, as it includes the very important clarification that the Tenth Circuit was not reversing the sentencing order in all respects, but only with respect to its gain calculation and its forfeiture determination.

This concluding statement is unquestionably part of the mandate — as, indeed, is the whole opinion. When the Tenth Circuit ended its opinion by remanding "for resentencing consistent with this opinion," 573 F.3d at 1091, this concluding statement made the entire opinion the mandate. *See Gulf Refining Co. of La. v. United States*, 269

U.S. 125, 135 (1925) (observing that "the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length"). Accordingly, the mandate includes the Tenth Circuit's clarification at the end of the opinion, as well as its earlier statements that the district court, on remand, should "focus on arriving at a figure that more closely approximates Mr. Nacchio's gain resulting from the offense of insider trading" (emphasis deleted) and also should "determine the exact forfeiture amount upon resentencing." 573 F.3d at 1087, 1090 n.28. The opinion does not suggest that the district court should recalculate the fine.

It is also premature for the Defendant to argue how any gain calculation might affect the fine. The Court has not yet determined the gain amount in accordance with the Tenth Circuit's approach. Until a gain amount is determined, it is not possible to opine on how the gain amount should or should not affect the fine determination.[5]

Finally, as a practical matter, limitations on the scope of resentencing are necessary to promote justice and to avoid unnecessarily wasting the Court's (and the parties') time.

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[5] The Defendant's unstated premise appears to be that the recalculated gain will support a lower fine. That is not necessarily the case. As noted, the district court found that numerous reasons supported a fine of $1 million per count. *See* Docket #463 at 5-6. In addition, the new gain amount to be determined is essentially a kind of new information, viewing the offense from a new angle dictated by the Tenth Circuit. The new gain amount will not be a mere mathematical correction; instead, it will reflect a new perspective. At the original sentencing, the district court never calculated a gain figure using the Tenth Circuit's angle, nor did it assess the nature of the Defendant's offense when viewed from that angle. As this will be new information, it is premature to assume that this new information, seen from this new perspective, will make the offense appear more or less serious to this Court than the offense originally appeared to the sentencing court.

The Defendant does not appear to disagree; for example, the Defendant appears to agree that the Court is not required to prepare a new Presentence Investigation Report from scratch. *See* Docket #579 at 21-22 (Scheduling Hearing; defense counsel agrees with Court that the Defendant will file his sentencing statement "based on the presentence investigation report as it currently is configured"). The Court does not have unlimited time and resources, and such considerations are reasonable for the Court to take into account in determining the scope of resentencing of any issues, including whether to revisit the fine.

CONCLUSION

The Court should recognize, on the record, that it is not *precluded* from considering issues *de novo*, but that it also retains the discretion to determine the proper scope of the resentencing. The Court should exercise this discretion, under the discretion-guiding principles discussed in the Government's opening brief (Docket #581 at 15-20), to find good cause to limit the scope of the resentencing to recalculating gain and forfeiture amounts (as directed by the Tenth Circuit's order) and then determining a sentence in light of the § 3553(a) factors. Finally, as to the fine, the Court should either (a) exercise its discretion not to revisit the fine or (b) defer its determination of whether to revisit the fine amount in light of the gain until after the new gain amount has been determined.

Respectfully submitted this 17th day of November, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 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:

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