

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

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

GOVERNMENT'S BILL OF PARTICULARS

The United States of America, by and through its undersigned counsel, hereby submits this Bill of Particulars pursuant to the Court's March 24, 2006 Order. This Bill of Particulars does not identify all evidence and proof that the government intends to offer at trial; rather, it provides certain information consistent with the Court's Order and Tenth Circuit case law on the purpose of a bill of particulars. *See United States v. Francisco*, 575 F.2d 815 (10th Cir. 1978). The purpose of a bill of particulars is to better inform the defendant of the *nature* of the charges against him with sufficient precision to enable him to prepare for trial and to minimize the danger of surprise at trial. A bill of particulars does not change the indictment in any way. *Id.* at 819. In addition, this Bill of Particulars does not set forth all the government's evidence because that is not required in a bill of particulars, *id.*, nor was that required by the Court's Order.

The defense has already been provided with substantial discovery, indexed and selected to help avoid surprise at trial. That discovery, which was provided to the defendant well in advance of when it would be required by statute or rule, includes the information set forth below and other evidence the government may seek to introduce at trial. The discovery includes the key exhibits selected out of the universe of available information and made exhibits before the Grand Jury, as well as Grand Jury testimony, interview memoranda of key witnesses, internal forecasts and updates, business unit presentations, and e-mail communications. The government does not intend to limit its proof by describing the nature of the case with more particularity.

1. With respect to Paragraph 3 of the Indictment: *Identify the financial guidance that the government claims was issued, including the date the guidance was issued and the specific time period the guidance covered.*

The “financial guidance” (often referred to as targets) referred to was formal guidance concerning revenue, earnings, and growth issued by Qwest in public releases from time to time. For purposes of the time period in the Indictment, the relevant financial guidance was first issued on or about September 7, 2000, remained in effect until on or about September 10, 2001, is a public document and has been provided to the defendant in discovery (QUSA 0024613-17). That guidance included 2001 revenue between \$21.3 and \$21.7 billion, EBITDA of \$8.5-8.7 billion, five year compounded growth targets of 15-17% for revenue and 20% for EBITDA, and other performance metrics that are derivative of or included within this guidance, such as earnings per share.

That same guidance was reaffirmed from time to time in a variety of ways, including, without limitation, in SEC Filings such as Form 8-Ks, press releases, during both regular and periodic audio/video earnings and investor conference calls, and in conversations with analysts and investors, all of which have been provided to the defendant in discovery.

The Court's Order does not extend to instances on which the guidance was reaffirmed. However, to assist the defendant's preparation, and without limiting the instances on which the defendant or others acting on his behalf reaffirmed the formal financial guidance issued on September 7, 2000, that guidance was frequently reaffirmed, including on or about the following dates:

- A. September 8, 2000
- B. October 24, 2000
- C. October 25, 2000
- D. October 31, 2000
- E. November 3, 2000
- F. December 21, 2000
- G. December 22, 2000
- H. January 23, 2001
- I. January 24, 2001
- J. January 25, 2001
- K. February 26, 2001
- L. February 27, 2001
- M. March 13, 2001
- N. March 15, 2001
- O. March 22, 2001
- P. March 29, 2001
- Q. April 24, 2001
- R. April 25, 2001
- S. April 26, 2001
- T. April 27, 2001

U. May 25, 2001
V. June 5, 2001
W. June 19, 2001
X. June 20, 2001
Y. June 22, 2001
Z. July 24, 2001
AA. July 26, 2001
BB. August 7, 2001
CC. August 22, 2001

2. With respect to Paragraph 6: Identify when the defendant became aware of all of the material non-public information the government claims the defendant was aware of between December 4, 2000 and September 10, 2001.

The Indictment alleges a required element of insider trading, specifically, that the defendant was aware of material non-public information, and then describes that information by category in paragraphs 6(a) - 6(g). The government understands that the Court's Order, set forth at pp. 29-31 of the March 24, 2006 hearing transcript, requires it to further elaborate on the general descriptions of material inside information set forth in paragraphs 6(a) - 6(g) as specified by the Court, but not to specify all of its evidence.

By way of further particularization, in 2001, at the times set forth in the Indictment in each count, the defendant was aware of material, non-public information about Qwest that triggered a duty to abstain from selling his stock. In the most general sense, the government contends that at the time the defendant sold his stock, he knew the risk of an investment in Qwest was materially greater than what the public knew based on publically available information. The defendant knew the true risks because he was privy to material, non-public information about Qwest. The information known to the

defendant regarding the true risk of an investment in Qwest stock was a combination of non-public historic information, internal assessments of Qwest's business prospects, and actual operating results beginning in January 2001, that deviated from the internal plan that supported Qwest's public financial guidance. The defendant became aware of this information over time. Generally, as the internal updates and analysis about Qwest's business increasingly worsened, the defendant sold his stock at an increasing rate. For example, in the 16 months prior to January 1, 2001, and following the announcement of the Qwest/US West merger, the defendant sold approximately \$106 million in stock. Conversely, in the five months of sales charged in the Indictment, from January 2, 2001 to May 29, 2001, the defendant sold in excess of \$100 million in stock. *See* Exhibit A attached hereto.

The government will present the material non-public information known to the defendant over time against this backdrop of accelerated sales. It will be for the jury to determine the point at which the information in the defendant's possession was of sufficient importance that a reasonable shareholder would want to know it and whether the defendant unlawfully took advantage of the fact that the investing public was unaware of this material information. The Indictment alleges that the warnings and information received by the defendant prior to January 2, 2001, was sufficient to trigger the duty to abstain or disclose.

No later than January 2, 2001 (the date of the sales alleged in Count 1), Defendant Nacchio knew of the information alleged in paragraphs 6(a)-(c), (e) and (g). That information included that Qwest's targets for 2001 were a significant stretch, that recurring revenue would have to increase significantly by March and April for Qwest to meet its budget targets and Wall Street guidance for 2001, that Qwest had a poor historical record of growing its recurring revenue sources, and that there would not be sufficient non-recurring revenue sources to fill the gap between Qwest's actual recurring revenue performance and its financial guidance, whereas historically Qwest had met its targets by utilizing large non-recurring transactions.

The material inside information of which the defendant was aware no later than January 2, 2001, includes information he learned as early as January 2000, that Qwest was not meeting its recurring revenue forecasts and was reliant on quarter-end non-recurring transactions. It includes information received in August 2000, following the Qwest/US West merger when the defendant met with Qwest business unit heads, including the heads of Consumer/National Mass Markets, DEX, Wholesale, and Global Business, and was advised of numerous risks with respect to Qwest's 2001 financial targets. It includes information received by the defendant during the budgeting process that took place between October and December 2000, in which defendant was further advised of material risks to achieving Qwest's 2001 targets, including Qwest's non-public forecast that non-recurring revenue would decline precipitously in 2001.

The negative material inside information of which defendant was aware, culminated in severe, specific, warnings received by the defendant in December 2000. The government intends to present substantial evidence that warnings similar to those set forth below, were conveyed to the defendant orally and in writing, by multiple witnesses, and in multiple contexts prior to the date of the first sale charged in the Indictment. Although the government does not intend to limit its evidence, the key material inside information is summarized in written memos provided to the defendant in December 2000, in which he is warned that: (1) "If we don't crank up recurring revenue growth by April, we got big problems"; (2) "There won't be enough one-timers to close the gap in Q3 and Q4 if recurring revenues don't take off"; (3) As much as \$587 million in "one time revenue" would be needed for the first quarter alone; (4) "If the economy slows down, recurring revenue growth could be at big risk"; (5) "one time things...cannot continue"; (6) "We need recurring to take off big time by the end of the first quarter or we are screwed"; (7) "The revenue and EBITDA numbers for next year are a huge stretch"; (8) "We need recurring business to literally take off by April-May time frame or the amount of one time business required to fill the gap will just be too large to deal with"; (9) "Our track record in this area [growing recurring revenue business] is not good as you know"; and (10) "If we don't develop new products we have a big risk in making the top line."

After January 2, 2001, the defendant continued to receive similar warnings. In addition, the defendant became aware of the material inside information described in paragraphs 6(d) and (f) after January 2, 2001. These categories of material inside information relate to actual results of Qwest's business operations. The defendant learned of the true status and performance of the business after January 2, 2001, in numerous ways, formal and informal, including discussions with business unit heads and others, discussions with other Qwest executives including investor relations and finance personnel, in formal quarter-end and informal interim business unit reviews, and from documentary presentations. Evidence related to this information has been provided to the defendant in discovery. Such documents include, by way of example only, business unit forecast updates, business initiative sheets, business unit review updates, and earnings release binders.

The government does not understand the Court's Order to require it to identify all of its evidence with respect to paragraphs 6(d) and (f). However, without limiting its proof at trial, and by way of providing further particulars, the defendant knew from early in 2001 through September 2001, that the business units were underperforming with regard to their specific internal budgets, and that such under-performance would inhibit Qwest's ability to meet its 2001 financial guidance issued on September 7, 2000. More specifically, the defendant learned that (1) Qwest's recurring revenue business was underperforming against plan and that sales were weak in numerous product lines

including hosting, long distance, local, private line, consumer, Qwest interactive, switched services, ISDN, wireless, global business, DEX, hosting, DIA (dedicated internet access), and virtually all core IP/Data business; and that (2) Qwest's ability to complete one-time non-recurring transactions, especially in the 3rd and 4th quarters was materially deteriorating and would be insufficient to offset underperformance in recurring revenue units.

3. With respect to Paragraph 6(a): Identify the financial targets referred to in this paragraph.

The financial targets are those set forth in response number one above.

4. With respect to Paragraph 6(b): Identify the financial targets referred to in this paragraph.

The financial targets are those set forth in response number one above.

5. With respect to Paragraph 6(c): Specify or identify the "past experience" or "track record" referred to in this paragraph.

Qwest's "past experience" or "track record" was that Qwest's recurring revenues did not meet Qwest's historic plan for recurring revenue and did not grow at a rate sufficient for Qwest to meet its overall revenue targets. As early as 1999, Qwest tracked and reported to the defendant its recurring revenue performance against its recurring revenue plan. Historically, Qwest underperformed against its internal plan with respect to recurring revenue and achieved its aggregate financial guidance only by doing non-recurring revenue deals at the end of each quarter.

6. With respect to Paragraph 6(b): *Identify which financial target would not be met.*

The financial targets that would not be met were the revenue, earnings, and growth targets first provided on September 7, 2000, and re-affirmed on at least the occasions set forth in response number one above.

7. With respect to Paragraph 6(e):

a. *Identify the material undisclosed risks referred to in this paragraph.*

Paragraph 6(e) is intended to put the defendant on notice that in addition to the specific information described elsewhere in paragraph 6 and further particularized in response number 2 above, the government alleges that he was aware that Qwest's business was experiencing other difficulties that posed a significant risk to Qwest's ability to achieve its public financial targets. Those difficulties are described in the discovery provided to the defendant. Those difficulties include the risk that by missing 2001's targets, future targets would be jeopardized. Those risks also include the fact that Qwest's business was impacted negatively by the deteriorating economy, reduced demand, pricing pressure, and increased competition.

b. *Identify which financial targets were in jeopardy.*

The financial targets identified in response number one above were in jeopardy.

c. *Identify in what way the risks put the financial targets in jeopardy.*

On several occasions, including those set forth in response number one above, the defendant asserted, or caused to be asserted, that Qwest's business was not impacted by the risks identified in response 7(a) above. In fact, the defendant knew that Qwest's business was impacted thus making it less likely that Qwest would achieve its financial targets.

8. With respect to Paragraph 6(f):

a. *Identify the gap or specify the gap, not necessarily in numerical terms.*

The "gap" is the difference between Qwest's publicly stated financial targets described in response one above and the actual recurring revenue performance, *i.e.*, actual recurring revenue generated.

b. *Identify the specific financial targets referred to in this paragraph.*

The financial targets referred to are those set forth in response number one above.

c. *Identify the recurring revenue referred to in this paragraph.*

As set forth in paragraph 5 of the Indictment, Qwest's recurring revenue was revenue other than what its documents classified as non-recurring. Recurring revenue consisted of revenue that Qwest earned each month during the life of a customer as it rendered services to that customer. Non-recurring revenue consisted almost entirely of IRU and equipment sale revenue.

d. *Identify the increase referred to in this paragraph.*

The difference between Qwest's publicly stated financial targets and Qwest's recurring revenue could only be filled by non-recurring one time deals. The increase referred to is the increase in the amount of revenue that Qwest would have had to have generated from non-recurring, one-time transactions to make up the difference between its recurring revenue and its publicly stated financial targets.

e. *Identify the risky and unsustainable one-time transactions that are referenced in this paragraph.*

The risky and unsustainable one-time transactions were primarily capacity sales known as IRUs (indefeasible rights of use) and equipment sales.

9. With respect to Paragraph 6(g): *Identify the risky and unsustainable one-time transactions Qwest was relying on.*

There is no reference to risky and unsustainable one-time transactions in paragraph 6(g). However, the non-recurring revenue sources referred to were primarily IRUs and equipment sales.

10. With Respect to Paragraph 8: *Identify the additional material, nonpublic information that the defendant learned in January of 2001.*

The material non-public information alleged in paragraph 8 is included in the material non-public information alleged in paragraph 6, as more particularly set forth in response number two above.

Respectfully submitted this 10th day of April, 2006.

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ATTORNEYS FOR THE GOVERNMENT

CERTIFICATE OF SERVICE

I hereby certify that on this 10 th day of April, 2006, I electronically filed the foregoing **GOVERNMENT'S BILL OF PARTICULARS** 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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