

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

TENDERED FOR FILING
FEBRUARY 27, 2007

Edward W. Nottingham
United States District Judge
by Jamie L. Hodges
Judicial Assistant/Deputy Clerk

**DEFENDANT JOSEPH P. NACCHIO'S MOTION TO EXCLUDE PROPOSED
GOVERNMENT EXPERT TESTIMONY**

Defendant Joseph P. Nacchio, by and through undersigned counsel, respectfully moves the Court to exclude the testimony of the government's proposed expert witnesses, Edward M. Stroz and Samuel S. Rubin. As grounds, Mr. Nacchio sets as follows:

I. PROCEDURAL HISTORY

From the inception of this case, the government has maintained that it has no intention of calling experts. This unwavering stance began at the Pretrial Conference on December 20, 2005, when the Court specifically inquired of the government:

THE COURT: Are you going to have expert testimony?

MR. LEONE: We don't anticipate a specially retained expert at this point. We think there are lay witnesses that may have expert opinions as part of - - they have both fact testimony and opinions based on their expertise that's inherent in their job position. At this point we're not anticipating a specially retained expert.

THE COURT: Okay.

Tr. of December 20, 2005 Pretrial conference at 6-7.¹

Thereafter on May 1, 2006, based on the government's representation to the Court, Mr. Nacchio filed his "Motion to Compel the Government to Produce Summaries of Any Anticipated Opinion Testimony, Including the Witness' Opinions and Bases and Reasons Therefore and the Witness' Qualifications" [Doc. 64]. This motion sought immediate disclosure of "a complete list of all witnesses expected to provide 'expert' opinions as represented to the Court by Mr. Leone, or opinion testimony of any kind, as well as the opinions themselves, their bases and reasons, and the qualifications of each witness to provide the referenced opinion." [Doc. 64 at 2.] Thus, while directed to the sort of hybrid opinion testimony referenced by the government in open court on December 20, the motion also sought disclosure of any expert opinion testimony.

In response, on June 2, 2006 the government argued only that the anticipated testimony of two key government witnesses, Robin Szeliga and Afshin Mohebbi, will contain permissible lay opinions for which no *expert* disclosure is necessary under Fed. R. Crim. P. 16(a)(1)(G) [Doc. 89 at 3-11] (emphasis original). The government further proposed that written summaries of *expert* testimony be disclosed by both sides 90 days prior to trial. *Id.* at 2, 12.

¹ In the Discovery Conference Memorandum and Order entered by the Court February 16, 2006, the Court required the government to turn over Rule 16 discovery material by February 3, 2006. [Doc. 33 at 8]

Then, in its August 28, 2006 Order and Memorandum of Decision [Doc. 151] the Court, clearly taking the government at its word that it only intended to offer the lay opinions of witnesses Szeliga and Mohebbi, ruled “on the arguments presented” that “the Government need not make Rule 16 disclosures as to these witnesses.” [Doc. 151 at 36] It being apparent to all that the government intended to offer no other expert opinion testimony, the Court concluded: “The court declines at this time to set a deadline for Rule 16 disclosures for the parties.” *Id.*

However, all this changed on February 22, 2007, 25 days before trial. On that date, the government gave notice to the defense of its intent to call Messrs. Stroz and Rubin to offer testimony under Fed. R. Evid. 702, 703, and 705 in its case in chief, despite its representations to this Court and to the defense that it intends to present no “specially retained expert” testimony in its case in chief.²

For the following reasons this Court should exercise its supervisory powers to preclude the government’s *volte-face* on the eve of trial.

² In its notice, the government attempted to make it appear that it had provided the expert notice in June 2006. This is manifestly incorrect. The Stroz report was a *draft* Qwest document produced in June 2006 together with hundreds of thousands of other Qwest documents and investigative materials. It was not separately identified as a government report. See Part V. *infra*.

II. FACTUAL HISTORY

Counts 1 and 2 of the Indictment allege sales of Qwest stock on January 2 and 3, 2001, at a time when Mr. Nacchio allegedly possessed material inside information. These sales involve Mr. Nacchio's so-called Growth Shares, which were owing to Mr. Nacchio in accordance with a Qwest Growth Share Plan Agreement dated January 1, 1997. On August 13, 1999, in anticipation of the merger, the Board of Directors accelerated Mr. Nacchio's growth share payment, in the *fixed amount* of \$25,482,004 for calendar year 2001, to be paid in full on January 1, 2001. (QDSEC S43069, attached hereto as Exhibit A.) On February 4, 2000, Mr. Nacchio received \$1,107,913 in the form of some 25,360 shares at \$43.6874, leaving the total January 1, 2001 payment to be \$24,374,091. (QDSECAM 0705568, attached hereto as Exhibit B)

Thus, in contrast to Counts 3-42, which involve Mr. Nacchio's sale of Qwest options grants set at a certain price per share on a given date of sale, the growth share payment underlying Counts 1-2 was a fixed aggregate dollar amount and not determined on a share price basis.

The Qwest board elected to make the growth share payment in the form of Qwest shares rather than cash. Because of this, even though the payment to Mr. Nacchio on January 1, 2001 was for a fixed dollar compensation amount, in order to benefit from the Safe Harbor provisions of Rule 10b5-1, Mr. Nacchio decided to provide an irrevocable instruction to sell in a period designated by Qwest as a trading window. As more fully explained below, such instructions need not be in writing as long as they are timely given. His decision to do so is reflected in a document dated November 3, 2000, which the government wrongly alleges is fraudulently back-dated.

Yash Rana was assistant general counsel for Qwest, but in his dealings with Mr. Nacchio in assisting in the sale of Mr. Nacchio's (not Qwest's) growth shares he was providing personal legal representation. This we intend to prove if necessary. What is certain is that on January 2, 2001, Mr. Rana as Mr. Nacchio's attorney-in-fact filed an SEC Form 144 (Notice of Proposed Sale of Securities) in connection with the sales of the growth share stock. This document, which he signed as Mr. Nacchio's attorney-in-fact, contains the following attestation by Mr. Rana:

ATTENTION:

The person for whose account the securities to which this notice relates are to be sold hereby represents by signing this notice that, as of November 3, 2000, the date on which he provided irrevocable instructions for the sale of such securities in accordance with Rule 10b5-1 promulgated under the Securities and Exchange Act of 1934, as amended, he did not know any material adverse information in regard to the current and prospective operations of the Issuer of the securities to be sold which has not been publicly disclosed.

EMC2_0000113-115, attached as Exhibit C.

In support of its fraudulent back-dating theory the government seeks to present the expert opinion testimony of Messrs. Stroz and Rubin of Stroz Friedberg, LLC, a computer metadata analysis firm. Stroz Friedberg was engaged by counsel for Qwest in June 2005 and produced a *draft* report on June 13, 2005 ("Stroz Report"). (QDSECAM 0705612-617, attached as Exhibit D) This draft report purports to conclude that a certain document entitled *IrrevocableInstructions.doc* was created on Yash Rana's computer on December 13, 2000, following the receipt on December 10, 2000 of a draft document entitled *nacchio.doc* from Greg Patti, Esq., of O'Melveny & Myers. What is entirely missing from the draft Stroz Report, and

from the entirety of the discovery received thus far, is whether and how *IrrevocableInstructions.doc* relates to the document dated November 3, 2000 signed by Mr. Nacchio. We have conducted Boolean searches of all discovery produced by the government and nothing matching *IrrevocableInstructions.doc* exists.

On January 17, 2007, the government served letter notice of 404(b) evidence, asserting that the signed document memorializing irrevocable instructions to sell the growth shares, was backdated “to give the false impression that those instructions were issued while the Qwest trading window was open and during a time in which Mr. Nacchio was presumably not in possession of material inside information in an attempt to secure an affirmative defense to the crime of insider trading found in 17 C.F.R. § 240.10b5-1(c).”

The government’s hypothesis is untenable - - it assumes unprovable facts and unsupportable law and for the reasons set forth below, the late endorsement of the experts purporting to support this hypothesis should be excluded.

III. THE STROZ TESTIMONY IS NOT RELEVANT

Pursuant to Fed. R. Evid. 401:

‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Evidence that is not relevant is inadmissible at trial. Fed. R. Evid. 402. The purported expert testimony is unnecessary and irrelevant as it fails to establish or aid in the determination of any element of the charges against Mr. Nacchio. Mr. Nacchio has been charged with forty-two

counts of insider trading. The testimony the government seeks to admit through Mr. Rubin fails to make the existence of any fact that is of consequence to the charges of insider trading more or less probable.

A. The Stroz Report Does Not Tend to Prove Any Fact of Consequence to the Indictment

The argument that the written instruction to sell the growth shares was back-dated proves nothing of consequence in this case. According to the government's evidence, the original source of *IrrevocableInstructions.doc* is Gregory P. Patti, Esq. of O'Melveny & Myers,³ who created a document labeled *nacchio.doc* and sent it to Rana on December 10, 2000. The Stroz Report purports to conclude that Mr. Rana converted *nacchio.doc* and relabeled it *IrrevocableInstructions.doc* on or about December 13, 2000. Thus, the government appears to be suggesting that because Mr. Rana saved an unknown document on his computer on a certain date, the document dated November 3, 2000, must have been back-dated by Mr. Nacchio. However, the defendant has seen no documents establishing that *IrrevocableInstructions.doc* is the letter signed by Joseph P. Nacchio dated 11/3/00. That is, while the government alleged *Nacchio.doc* becomes *IrrevocableInstructions.doc*, they fail to establish how it is the document signed by Joseph P. Nacchio.

In reality, the Stroz Report fails to discuss any actions allegedly taken by Mr. Nacchio. Nor is there any analysis of any other computer that may have created the November 3, 2000

³ Similarly to Mr. Rana, we submit that Mr. Patti and other O'Melveny & Myers attorneys were providing legal representation to Mr. Nacchio at the time in question and therefore object to the government's intrusion into the attorney-client privilege and to its use of such information.

letter. Instead, the only conclusion reached in the Stroz Report is that

“*IrrevocableInstructions.doc*’ was created from a modified version of ‘*nacchio.doc*’” – neither of which is linked to Mr. Nacchio.

The disconnect between the actions of Mr. Rana and those of Mr. Nacchio is not the only flaw in the government’s logic. The evidence does not tend to prove any fact of consequence to the indictment. The indictment alleges that Mr. Nacchio, “did knowingly and willfully . . . use and employ . . . in connection with the purchase and sale of a security . . . a manipulative and deceptive device, scheme, artifice or contrivance to defraud in contravention of Rule 10b-5 ([]) and Rule 10b5-1 . . . ;” and, in furtherance of this scheme to defraud, “did knowingly and willfully sell . . . Qwest common stock on the dates and in the amounts set forth in Count 1 through 42 while aware of and on the basis of material, non-public information”

But Rule 10b5-1 is not violated if a verbal instruction to sell is later confirmed in writing. This is because Rule 10b5-1 does not require irrevocable instructions to sell to be written. *See* SEC Div Corp Fin, Manual of Publicly Available Telephone Instructions, Interp. 17 (4th Supp. May 2001) (The SEC’s own interpretation that the instruction to another person under Rule 10b5-1(c) need not be written.)

When Mr. Patti was interviewed by the government he stated that there is nothing inherently wrong with backdating such a document, where verbal instructions had been given previously. (*See* QUSA00033585-592, 1/11/07 Report of Interview of Gregory P. Patti at 335891, attached as Exhibit E.)

With both the rules of the SEC and the government's own witness establishing that irrevocable instructions to sell a) need not be written, and b) may be confirmed in a later writing, the government's proposed expert testimony establishes only the observance of an SEC-approved method of timely placing an irrevocable order to sell. The Stroz Report does not tend to prove the "scheme to defraud in contravention of Rule 10b-5 . . . and rule 10b-5(1)" as alleged in the indictment. For this reason, the proposed expert testimony is irrelevant under Fed. R. Evid. 401 and should be excluded under Rule 401.

The government fares no better with its other claim, that the document was backdated "to give the false impression that those instructions were issued while the Qwest trading window was open." There is no requirement under Rule 10b-5 Rule 10b5-1 that shares must be traded in an open window. Rather, trading windows are creatures of corporate policy, not statute or regulation. There is no allegation in the indictment that the scheme to defraud involved the violation of Qwest's trading window policy. Thus, by definition, the Stroz testimony is irrelevant to the extent it would be offered to show compliance or lack of compliance with corporate policy.

Moreover, the known evidence involving the growth shares issue is innocent if not exculpatory, which further attenuates the relevance, if any, of the Stroz Report. It shows:

1) The Qwest Board of Directors Compensation Committee awarded the accelerated growth share payment to Mr. Nacchio on August 13, 1999, to be paid in full on January 1, 2001.

(See Exhibit A and QDSEC S43070, attached as Exhibit F.) This means that Mr. Nacchio, Qwest's Board of Directors, and Qwest's legal staff all knew that he would be receiving a fixed amount of compensation in dollars (payable in Qwest shares) on a date certain and this knowledge was widely held 15 months prior to any mid or late-December 2000 memoranda allegedly left on Mr. Nacchio's office chair by Afshin Mohebbi. To create a specter of fraud because a writing evincing a previous instruction to sell was created later, when the instruction need not have been written when given, improperly exalts form over substance.

2) Knowing of the impending growth share payment as well as Mr. Nacchio's other stock options, Mr. Rana (and many others) had been advising Mr. Nacchio on diversification strategies as early as March, 2000 (see, e.g., QDSECAM 0705682-83, attached as Exhibit G) Mr. Nacchio's receipt of the growth share payment was long anticipated by Mr. Rana and other legal and financial advisors. This further undermines the government's strained attempt to make a backdating fraud out of whole cloth.

3) Billing records from O'Melveny & Myers show that Rana had an hour-long discussion with O'Melveny lawyer Steve Grossman on November 3, 2000, the as-of date of the instructions letter, and several other conversations with Rana during November.

(OMMDOJ000320-325, attached as Exhibit H) This would tend to corroborate a conversation about the instructions between Mr. Rana and Mr. Grossman, although when asked about it by the

government Mr. Grossman could not recall what the hour-long discussion was about. (Mr. Rana, on advice of counsel, has not cooperated with either side so no one knows the extent of his recollection.) The O'Melveny billing records for Grossman also show conversations with Rana on November 6, November 13, November 21, and November 27. In any one of these conversations, Rana could have been discussing Mr. Nacchio's previously given instructions. Before we are accused of speculating, we only point out that it is also speculative, and therefore inadmissible under Rule 402, to assign a fraudulent motive to the documents created on December 10 and 13, the subjects of the Stroz Report.

4) Mr. Nacchio's financial advisor, David Weinstein, spoke to Mr. Rana on December 7, 2000, confirming that Mr. Nacchio "previously made an irrevocable election to sell the shares during the last window period and according to their [Qwest's] legal counsel, this qualifies for an exemption for the insider trading rules." (NAC 13221, attached as Exhibit I) This is a memo to Mr. Weinstein's file memorializing the conversation with Rana. Thus, there is independent corroboration for the fact that Mr. Nacchio made the election during the previous trading window (October 30-November 17, 2000). Since this election need not be in writing, the expert testimony to prove that a writing confirming it was created later is simply irrelevant.⁴

⁴ Another Weinstein memo written the next day reflects a conversation with Mr. Nacchio and his wife, in which Mr. Weinstein notes, "Joe is signing a (sic) irrevocable election to sell the shares now and that is why he can sell the shares during a nonwindow period." NAC13218. This is consistent with signing a writing confirming an earlier verbal instruction.

5) On November 27, 2000, Rana emailed Mike Sirkin, an attorney for Mr. Nacchio, and Drake Tempest, general counsel for Qwest, seeking to confirm the exact amount of the growth share payment on January 1, 2001. (see Exhibit B) Mr. Rana asks: “Let me know if you agree with the numbers. Assuming you do, I’ll make sure it gets paid into the deferred compensation account as he [Mr. Nacchio] has requested.” The message ends, “I have heard preliminarily from the HR guys [Human Resources at Qwest] that the payment can be made without deducting any withholding taxes.” This shows that arrangements for dealing with the growth share payment were being undertaken by Rana and others well before the documents created on December 10 and December 13, and would tend to support the fact that the election had previously been made.

6) The SEC Form 144 filed in relation to the growth shares was signed by Rana as attorney in fact for Mr. Nacchio, and contains the representation that the irrevocable instructions were provided by Mr. Nacchio on November 3, 2000.

No witness interviewed by the government claims any recollection or gives any evidence that this filing was not truthful, proper, and filed in the ordinary course. The government’s hypothesis making the Stroz expert testimony relevant would also require evidence that this Form 144 was a patent fraud, engaged in by Mr. Rana. There is no such evidence.

In sum, the government’s hypothesis rests upon a series of impermissible inferences. *First*, the government asks us to infer that the Rana document *IrrevocableInstructions.doc* created December 13, 2000, became the document signed by Mr. Nacchio dated November 3,

2000. There is no such link. *Second*, we are asked to infer that *IrrevocableInstructions.doc* was intended by Mr. Nacchio to falsely establish that the instructions in fact were created on November 3. But this is a Rana document. No one, certainly not Rana, claims this was the purpose of the document. *Third*, the government seeks the inference that Mr. Rana was acting at the direction of Mr. Nacchio. This would mean that Mr. Rana, a licensed attorney, participated in a fraud with Mr. Nacchio and filed a false Form 144. There is absolutely no evidence to support this inference. As with Ockham's razor, the simpler explanation is the correct one - - that the Form 144 filed by Mr. Rana reflected the true state of affairs. *Fourth*, the government's hypothesis requires us to assume that a subsequently created writing reflecting an earlier verbal instruction is fraudulent or illegal. Yet, there is nothing inherently false about a subsequent writing confirming a previous 10b5-1 instruction, because such instruction need not be written in the first place. Each of these inferences is too thin a reed upon which to build relevancy, and the government's hypothesis falls of its own weight.

B. The Stroz Report Fails to Meet the Threshold Standards of *Daubert*

Throughout the Stroz Report, the author continually refers to what he believes “may have been,” what “most likely” occurred or what “supports the theory,” not what can be testified to with reasonable certainty. In fact, there are a number of occasions in which the Stroz Report cannot explain where the subject documents were moved, how they ended up in certain files or even on certain computer drives. Accordingly, the Stroz Report fails to meet the threshold standards for admissibility under *Daubert* and its progeny. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (evidence must be relevant and reliable); *United States v. Gabaldon*, 389 F.3d 1090 (10th Cir. 2004) (expert testimony “must be based on scientific knowledge, which implies a grounding in the methods and procedures of science based on actual knowledge, not subjective belief or unsupported speculation.”) (internal quotations omitted) (emphasis added); *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1222 (10th Cir. 2003).

Whatever the Stroz Report may indicate about the possible actions of Mr. Rana, it does not tend to establish facts that bear on the actions or intent of Mr. Nacchio. This disconnect means that any inference as to Mr. Nacchio’s state of mind is impermissibly speculative. Therefore, the Stroz testimony is not relevant and should be excluded under Fed. R. Evid. 401 and 402.

IV. THE EVIDENCE SHOULD BE EXCLUDED UNDER RULE 403

Even if the Stroz Report did have any probative value related to Mr. Nacchio, the expert testimony should nonetheless be excluded under Fed. R. Evid. 403, as any such value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay and waste of time.

A. Allowing the Expert Testimony Would Force the Defense to Hire Experts, Examine Computers, and Waste Time Not Available.

With less than a month before trial, Mr. Nacchio does not have sufficient time to meaningfully prepare a challenge to the proposed expert testimony. To do so would require engaging an expert to review not only the Stroz Report, but also the physical computers and hard drives that were examined by Mr. Rubin in formulating his opinion over 18 months ago. It would also require counsel to prepare for cross-examination on this collateral issue, as well as potentially preparing a competing expert to testify on behalf of the defense. As the Court is aware, the parties are consumed with trial preparation, a number of CIPA and discovery related issues remain unresolved, and discovery continues to be produced. To add the work associated with the government's designation to this mix would severely prejudice Mr. Nacchio's right to a fair trial.

B. Expert Testimony on the Alleged Backdating Will Create Side Issues that Will Confuse the Jury and Waste Time.

If the government goes forward with expert testimony in support of a backdating case, which as noted is foreign to the indictment, the following side issues will emerge:

1. The legal status of a 10b5-1 instruction that need not be written later documented in writing. This may involve expert testimony and lead the jury far afield from the issues properly raised in the indictment.

2. The Attorney-Client privilege. As stated above, we contend that with respect to the growth shares, Mr. Rana was acting as Mr. Nacchio's personal attorney because his legal efforts were solely for the benefit of Mr. Nacchio and not the corporation. The privilege would extend to Mr. Patti, who was enlisted by Mr. Rana to assist in the legal work for Mr. Nacchio. An officer may assert a personal attorney-client privilege with respect to dealings with corporate counsel under the standards set forth in *In re: Grand Jury Subpoenas*, 144 F. 3d 653, 659 (10th Cir. 1998) (adopting test of Second and Third Circuits). Allowing the Stroz expert testimony would necessitate litigation over the existence and extent of this privilege, including whether the government improperly invaded the privilege by securing the documents created in the course of that attorney-client relationship without Mr. Nacchio's consent. All of this would take up precious court time and delay trial proceedings.

3. Computer Analysis and Expert Testimony by the Defense. As set forth above, the defense would be forced to hire experts to examine the computers involved (2 laptops used by Rana), critique the Stroz Report, and possibly offer expert testimony to rebut the government's evidence. Aside from the clear prejudice to Mr. Nacchio, this will take the jury far afield from the issues properly raised in the indictment.

By creating an expert issue at the 11th hour, after persistently claiming there would be no experts in its case in chief, the government will force a side show to take over the trial of the issues central to the indictment. This is exactly the type of situation the exercise of the Court's powers under Rule 403 can prevent.

V. THE GOVERNMENT'S LATE DESIGNATION VIOLATES THE COURT'S DISCOVERY INSTRUCTIONS IN THIS CASE

Pursuant to Federal Rule of Criminal Procedure 16(d)(2), a district court has broad discretion in imposing sanctions on a party who fails to comply with discovery orders. *United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988). These sanctions include the ability to: (1) order the party to permit discovery or inspection; (2) grant a continuance; or (3) prohibit the party from introducing evidence not disclosed. Fed. R. Crim. P. 16(d)(2). Even where Rule 16 is inapplicable, the district court has discretion to exclude evidence for violations of pretrial discovery orders in appropriate circumstances. *United States v. Russell*, 109 F.3d 1503, 1510-11 (10th Cir. 1997). In this regard, the Tenth Circuit has recognized a district court's discretion to exclude a witness' testimony after counsel "tacitly assented" to, and then violated, the district court's discovery instructions. *United States v. Combs*, 267 F.3d 1167, 1179 (10th Cir. 2001).

In this case, the government did just that when it informed the Court there would be no expert witnesses at trial – thereby negating the need for an expert-specific designation deadline – and then attempted to designate a computer expert a mere three weeks before trial.

In *Russell*, the Tenth Circuit enunciated the standards for evaluating the exclusion of a witness pursuant to a discovery order violation. Those standards include an analysis of: (1) the reason for the delay; (2) whether the delay prejudiced the other party; and (3) the feasibility of curing prejudice with a continuance. *Id.* at 1511. While the three *Russell* factors were intended to serve as guidelines for trial courts, "the paramount concern [in evaluating the sanction for a discovery violation] is maintaining the integrity of the judicial process itself." *Combs*, 276 F.3d at

1178 (emphasis added). Thus, “even in the absence of prejudice, a district court may suppress evidence that ‘did not comply with discovery orders to maintain the integrity and schedule of the court . . .’” *United States v. Adams*, 321 F.3d 1236, 1244 (10th Cir. 2001); citing *Wicker*, 848 F.2d at 1061.

A. The Government Cannot Justify Its Late Disclosure

As is indicated above, Stroz Friedberg was engaged by counsel for Qwest in June 2005 and produced a draft report on June 13, 2005. Upon information and belief, the Stroz Report, still in its draft form, was then turned over to the government by Qwest in August, 2005. The government asserts that the Stroz Report was provided to the defense in June 2006. However, this document was produced as a Qwest document, not identified in any way as a government expert report. Moreover, it was provided without contextual moorings, because nothing matching the description of the one critical document to the report, *IrrevocableInstructions.doc.*, was ever produced. Awash in a sea of 615,815 pages of discovery, the defense could not place the “draft” Stroz Report in any meaningful context, especially in light of the government’s consistent assertion that it intended to use no outside experts.

Moreover, even though the government knew about the Stroz Friedberg analysis well before the indictment was presented to the grand jury on December 20, 2005, and well before Mr. Leone asserted to the Court at the December 20th pretrial conference that the government intended to make no use of specially retained experts, nothing the government has filed, starting with the indictment [Doc. 1], and including the Bill of Particulars [Doc. 47], and Supplement to

Bill of Particulars [Doc. 155], makes any allegation that any document was backdated in furtherance of the alleged scheme to defraud in contravention of Rule 10b-5 and Rule 10b5-1, or for any other reason material to the indictment.

Even in its January 17, 2007 404(b) notice, in which the government first notified the defense of its intent to offer evidence of the alleged backdating of the growth share instructions, there is not even a hint that the government intended to use expert testimony to prove it. There is no possible justification for the government to have delayed designation of this purported expert testimony – the draft report of which has been in its possession for over a year and one-half.

B. The Delay Will Prejudice Mr. Nacchio

With less than three weeks before trial, Mr. Nacchio does not have sufficient time to meaningfully prepare a challenge to the proposed expert testimony. To do so would require engaging an expert to review not only the Stroz Report, but also the physical computers and hard drives that were examined over 18 months ago. It would also require counsel to prepare for cross-examination on this collateral issue, as well as potentially preparing a competing expert to testify on behalf of the defense. As the Court is aware, the parties are consumed with trial preparation, CIPA has created unique burdens for the Court and the government but especially the defense, and discovery continues to be produced. (Just last Friday, after the court hearing, we received an additional 929 pages of discovery. *See* Index attached as Exhibit J. With two exceptions (Schumacher Queen for a Day letter and Szeliga 302), the entire production is of documents from the 2000 – 2001 period. We received no explanation why these documents were

produced so late.) To add the work associated with the government's designation to this mix would severely prejudice Mr. Nacchio's right to a fair trial.

C. A Continuance Will Not Cure the Prejudice to Mr. Nacchio

Mr. Nacchio believes the prejudice he will suffer as a result of the government's nondisclosure justifies the exclusion of the government's expert witnesses. Mr. Nacchio recognizes that "in the absence of a finding of bad faith, the court should impose the least severe sanction that will accomplish prompt and full compliance with the discovery order" – that being a continuance. *United States v. Golyansky*, 291 F.3d 1245, 1249 (10th Cir. 2002). Nonetheless, the Court has discretion to exclude the witnesses based solely upon the government's disregard of and failure to comply with discovery orders which have disturbed the integrity and schedule of the court. *See Adams*, 371 F.3d at 1244.

In this case, where the government has been aware of the potential expert testimony since August of 2005, has consistently asserted that it would call no outside experts, and a trial date has been set for over four months, a continuance is not justified. That being said, if the Court does not exclude the Stroz testimony, Mr. Nacchio has no choice but to request a continuance of the trial date.

VI. CONCLUSION

For the host of reasons set forth above, the Court should exercise its supervisory powers to deny the late endorsement by the government.

Respectfully submitted this 27th day of February, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 2008, a true and correct copy of the foregoing **DEFENDANT JOSEPH P. NACCHIO'S MOTION TO EXCLUDE PROPOSED GOVERNMENT EXPERT TESTIMONY** as served on the following via email:

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