IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

TENDERED FOR FILING
MARCH 13, 2007

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

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE PROPOSED GOVERNMENT EXPERT TESTIMONY

The United States, by its undersigned counsel, respectfully responds to Defendant Joseph P. Nacchio's Motion to Exclude Proposed Government Expert Testimony [hereinafter "Def. Mot. to Exc."]. A table of contents is provided on the following page.

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BACKGROUND

I. The expert testimony at issue

The expert testimony at issue relates to the contents of a hard drive. A summary of the testimony is set forth in a six-page report. That report is attached to Defendant's motion. *See* Def. Mot. to Exc., Ex. D. The report was generated by two computer forensic specialists as part of an internal investigation by Qwest in 2005, Edward M. Stroz and Samuel S. Rubin.

The report is very limited in scope. It simply addresses two Microsoft Word files — a document called *nacchio.doc* and another called *IrrevocableInstructions.doc* — that were found by Qwest on the hard drive of a computer that had been used by Yash Rana, who was employed by Qwest as a corporate counsel back in the 2000-2001 time period.

The report describes the hard drive's "metadata" — *i.e.*, the computer data about the documents — for those documents. It explains where the two files were found on the hard drive, and when they were received or created. For example, the report observes that the hard drive shows that *irrevocableinstructions.doc* document was created around December 11, 2000, and was last saved on December 13, 2000.

The report notes several similarities in the metadata for the two documents. It describes such metadata as the document properties and statistics; the last ten authors; the template; the path names, the document identification numbers; and the times and dates of use. The report notes that the shared metadata statistics between the two documents indicate that the two files are linked.

The examination of the hard drive that led to this report was a brief project. As Defendant's own motion notes, the forensic experts were hired in June 2005 and produced this report by June 13, 2005. *See* Def. Mot. to Exc. at 5. In fact, it took the forensic experts less than a full workday (only about six to eight hours) to examine the electronic documents at issue and reach their results.

II. The surrounding circumstances

To understand the relevance of the electronic documents at issue in the report, it is necessary to consider briefly the background of Counts One and Two of the indictment, which charge insider trading in connection with Defendant's sales of Qwest stock on January 2 and 3, 2001.

The sales charged in Counts One and Two related to Defendant's sales of restricted stock deriving from growth shares he had been issued by Qwest. Defendant Nacchio sold these shares almost immediately upon receipt. These shares were ones Qwest had determined to grant to him years back, although nothing in that grant required Defendant to turn around and sell them immediately upon receipt. *See* Def. Mot. to Exc., Ex. A (letter to Defendant granting growth shares). Indeed, on prior occasions Defendant had elected not to sell.

The sales were completed on January 2 and 3, 2001. This was during a closed trading window at Qwest – *i.e.*, a period during which corporate insiders ordinarily could not sell.

Defendant Nacchio sold these shares by signing an "Irrevocable Instruction" document that was dated November 3, 2000. (That document is attached as Exhibit 1.) Defendant's clear purpose for signing this "Irrevocable Instruction" was to insulate himself from charges of insider

trading or violating company policy. He states in the Irrevocable Instruction, "It is my intent to require the sales to be made in accordance with the provisions of Rule 10b5-1." As the Court is aware, SEC Rule 10b5-1 enables corporate insiders to avoid charges of insider trading by entering into a pre-set trading plans in which an insider must, before becoming aware of material nonpublic information and in good faith, adopt a firm plan for trading securities that meets certain criteria. Here, Defendant Nacchio plainly indicated that his plan to sell was "irrevocable" and could not be abandoned, stating, "Please note that these instructions are final and cannot be revoked by the undersigned."

As noted, the Irrevocable Instruction is dated November 3, 2000. Defendant Nacchio certified in the document that he had no material information as of that date, attesting that "In accordance with the Company's insider trading policy, the undersigned certifies that, *as of the date hereof,* he has no material non-public information and is not otherwise prohibited from trading in the Company's securities." *See* Ex. 1 (emphasis added).

The government intends to show that this Irrevocable Instruction was *not* signed on November 3, 2000, but was instead signed by Defendant more than a month later, in mid-December 2000. The November 3, 2000 date is significant. It is a date within the last open trading window, a window that had been open during a brief two-week period from October 30, 2000 through November 17, 2000. Moreover, after that trading window closed, Defendant Nacchio received very material adverse nonpublic information about Qwest's future prospects – *i.e.*, information upon which he could not have traded. The government thus will show that the

"irrevocable instruction" for the sales at issue in Counts One and Two was not signed until mid-December — more than a month later — but had been conveniently backdated to November 3.

There is a variety of evidence that shows this backdating. It includes records of a December 9, 2000 telephone call between Defendant Nacchio and his financial adviser, where Defendant told the adviser that he was "signing an irrevocable election to sell the shares now and that is why he can sell the shares during a nonwindow period." *See* Def. Mot. to Exc. at 11 n.4. It includes the statements of Gregory Patti, an O'Melveny & Myers attorney representing Qwest, who sent Mr. Rana, the corporate counsel at Qwest who effected the sale, a sample 10b5-1 attestation for the instruction on December 10, 2000. *See* Def. Mot. to Exc., Ex. E at 4.

Another piece of evidence that shows this backdating is the metadata information from the hard drive of Yash Rana. That hard drive shows that a draft 10b5-1 attestation was not received from Mr. Patti until December 10, 2000, was entitled *nacchio.doc*, and was transformed into *IrrevocableInstructions.doc* on December 13, 2000. *IrrevocableInstructions.doc*, in turn, is *identical* to the document signed by Defendant Nacchio that is dated November 3, 2000. The only difference is Defendant Nacchio's signature. In other words, the "Irrevocable Instruction" that purports to be signed by Defendant Nacchio on November 3, 2000 is identical to an electronic document named *IrrevocableInstructions.doc* that was not even created until more than a month later.

III. The government's disclosure of the report and the experts

Defendant claims that the government "persistently claim[ed] there would be no experts

in its case in chief" and "fail[ed] to comply with discovery orders." *See* Def. Mot. to Ex. at 16-17. This is not correct.

At the December 20, 2005 initial conference, the government stated that it did not anticipate a specially retained expert "at this point." There is no indication that Defendant ever took this early estimate to mean that the government meant that it was committing to have no experts in its case. On May 1, 2006, Defendant filed his Motion to Compel the Government to Produce Summaries of Any Anticipated Opinion Testimony, Including the Witness' Opinions and Bases and Reasons Therefor and the Witness' Qualifications. *See* Docket No. 64. In the motion, Defendant requested an order that the government turn over a "complete list of all witnesses expected to provide expert opinions." *See id.* at 2.

On June 2, 2006, the United States filed its response. Docket No. 89. The government observed in its brief that Rule 16 does not include specific timing requirements related to expert disclosures. *Id.* at 2. The government also contended that any disclosure requirement should apply only to expert opinion testimony and not to lay witnesses who reached conclusions in the context of their professional employment, background, and expertise. *Id.* at 3. On June 22, 2006, Defendant filed a reply, again requesting an Order directing the government to promptly produce discovery as to any proposed opinion testimony. *See* Docket No. 103 at 8.

In the same month — June 2006 — the government produced the expert report that is now at issue. *See* Def. Mot. to Exc. at 3 n.2. Because that report had been generated as part of Qwest's internal investigation, it was produced with other Qwest documents. *Id.*

On August 28, 2006, the Court denied Defendant's motion for disclosure of experts. *See* Docket No. 151. The Court's order did not set a deadline for experts, as Defendant had requested, but stated, "The court declines at this time to set a deadline for Rule 16 disclosures for the parties." *Id.* at 36.

In February 2007, in preparing its witness list, the government determined that it would need to call Messrs. Stroz and Rubin to the stand to explain what they had found about the two electronic documents at issue on Yash Rana's hard drive. The government further determined that because Messrs. Stroz and Rubin have specialized knowledge about how to read a hard drive and because their knowledge of the hard drive was a result of their being specially retained to examine the hard drive, they should be disclosed as experts.

Accordingly, on February 22, 2007, a week before the deadline for listing other witnesses, the Government provided an expert disclosure to defense counsel. Government counsel identified Messrs. Stroz and Rubin as trial expert witnesses, identified for Defendant the location of their report in the materials that had been provided in June 2006,[1] and enclosed a copy of the report, a resume for Mr. Stroz, and a resume for Mr. Rubin. That disclosure is attached as Exhibit 2.

The following day (February 23, 2007), government counsel produced to defense counsel a copy of the *IrrevocableInstructions.doc* that is referred to as Exhibit A of the expert report. That document is attached as Exhibit 3. The government had obtained that copy only two days before, on February 21, 2007. The document was identified as "Exhibit A: Rana docs examined

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[1] That report had the statement "Draft" on it, but it is the final report; there were no changes.

by Stroz." *See* Def. Mot. to Exc., Ex. G (showing production index and description "Exhibit A: Rana docs examined by Stroz").

Four days later, on February 27, 2007, Defendant filed his motion to exclude. Since that date (or before), Defendant has not made any request to examine the hard drive examined by Messrs. Stroz and Rubin, or suggested in any way that Defendant intends to hire an expert who would conduct such a review.

ARGUMENT

I. EXCLUSION OF THE EVIDENCE UNDER RULE 16 IS NOT WARRANTED.

A. There was no violation of a Rule 16 deadline.

The government did not violate a Rule 16 deadline when it provided the expert disclosures on February 22, 2007. As noted, the Court expressly stated in its August 2006 Order that it was declining to set a deadline for this Rule 16 discovery. *See* Docket 151 at 36. The government disclosed this brief report twenty-five days before the first day of trial, which is well more than a month before the testimony is expected to be offered.

This amount of time is far from insufficient for defendant to obtain a rebuttal expert. *Cf. United States v. Edmondson*, 962 F.2d 1535, 1546 (10th Cir. 1992) (ruling that seven days was sufficient for a defendant to respond to fingerprint tests); *United States v. Stevens*, 380 F.3d 1021, 1025-26 (7th Cir. 2004) (holding that no discovery sanction was appropriate where a fingerprint expert's report was provided 10 days before trial). Indeed, courts setting expert disclosure deadlines frequently have concluded that a few weeks before trial is adequate for the government to identify its experts. *See, e.g., United States v. Wilkins*, 2005 WL 1799203, at *5 (D. Kan. June

17, 2005) (requiring expert testimony 20 days prior to trial); *United States v. Oliva*, 2003 WL 260676, at *3 (N.D. Ill. Feb. 6, 2003) (granting expert disclosures 21 days before trial); *United States v. Trippe*, 171 F. Supp. 2d 230, 237 (S.D.N.Y. 2001) (in a case where three executives were charged with securities fraud, mail fraud, and conspiracy, requiring the government to provide expert disclosures 10 business days before trial); *United States v. Pirro*, 76 F. Supp. 2d 478, 488 (S.D.N.Y. 1999) (in a prosecution of an accountant and client for various tax crimes, the court required the government to provide expert disclosures 15 days prior to trial); *United States v. Costen*, 1996 WL 137483, at *2 (S.D.N.Y. Mar. 27, 1996) (requiring expert disclosures 15 days before trial).

B. Even if there were a violation, exclusion would not be a proper sanction.

Even if the Court had set a deadline and the government counsel had missed it, exclusion of this evidence would not be warranted.

In situations where a court finds that the government has violated a Rule 16 order, the court should consider "(1) the reasons the government delayed producing the requested materials, including whether or not the government acted in bad faith when it failed to comply with the discovery order; (2) the extent of prejudice to the defendant as a result of the government's delay; and (3) the feasibility of curing the prejudice with a continuance. Applying these factors, the district court should apply the least severe sanction that will accomplish prompt ... and full compliance with the court's discovery orders." *United States v. Martinez*, 455 F.3d 1127, 1130 (2006) (quoting *United States v. Wicker*, 848 F.2d 1059, 1060-61 (10th Cir. 1998)).

These factors show that exclusion is not appropriate here. First, the government did not

violate any court order in bad faith. The government never represented that it was committing never to have any experts. Defendant did not act as if there was any such commitment. On the contrary, in May 2005 he filed a motion for immediate disclosure seeking a list of the government's expert witnesses. The Court did not grant any part of that motion, but denied it and expressly stated in its order that it was declining to set a disclosure deadline at that time. The government then, after determining that Messrs. Stroz and Rubin would need to be called to provide expert testimony, made its expert disclosure well before trial. Finally, the report itself was not improperly withheld in bad faith, but was disclosed to Defendant back in June 2006, nine months before trial.

Second, Defendant has shown no prejudice whatsoever from the disclosure. Defendant does not attempt a showing that he has been unable to have an expert to review the hard drive. Nor has Defendant suggested to government counsel that he intends to have an expert review the hard drive. In fact, defense counsel has not even asked for a copy of the hard drive.

Defendant also does not indicate that it is somehow impossible for him to find an expert who can analyze the hard drive. Such a suggestion would not be credible, given that the skills involved are not unique. As discussed above, the report is extremely limited in scope: it addresses just what a hard drive shows regarding two electronic documents. It took less than a day to gather the information from the hard drive, and the report is very short. Under these circumstances, Defendant cannot reasonably claim undue prejudice from the report.[2]

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[2] The government further observes that although Defendant's counsel protests that hiring an expert would take time, Defendant has ample litigation resources and attorneys at his

Third, a continuance is not warranted. As noted, there is no demonstrated prejudice to Defendant. Defendant requests a continuance, but only in passing; his request does not even try to suggest how many days he would need. *See* Def. Mot. to Exc. at 20. In the absence of any showing that he has had difficulty retaining an expert, there is no basis for any continuance.

In any event, exclusion of the evidence is an unusual remedy that is not warranted here. "It would be a rare case where, absent bad faith, the district court should exclude evidence rather than continue the proceedings." *United States v. Bishop*, 469 F.3d 896, 905 (10th Cir. 2006) (quoting *United States v. Golyansky*, 291 F.3d 1245, 1249 (10th Cir. 2002)). Here, even if there had been a discovery violation (which there was not) and even if a discovery sanction were warranted (which it is not), the appropriate sanction should not be exclusion but instead a sanction that ensures that this evidence is not presented before Defendant has had a chance to have an expert review the hard drive. For example, the Court could address this issue by extending Defendant's disclosure deadline for an expert on this particular issue until March 22, 2006. But given that Defendant has not even attempted to show that an expert would have needed four weeks to respond to the report, even that sanction would not be warranted.

II. THE COURT SHOULD REJECT DEFENDANT'S ARGUMENT THAT THE EXPERT EVIDENCE CANNOT BE RELEVANT.

Defendant also argues that the proposed expert testimony is "unnecessary and irrelevant,"

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disposal and was able to prepare and submit a motion of more than twenty pages (with numerous exhibits) in five days. Hiring an expert to review two documents on a hard drive in the 25 days before trial surely would have been far simpler and less time-consuming.

and should be excluded at trial on this basis. *See* Def. Mot. to Exc. at 6. Based on certain selected evidence he presents in his motion, Defendant contends that there is no possibility that the expert testimony would have "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." *See id.* (quoting Fed. R. Evid. 401).

"The standard of probability under [Rule 401] is more ... probable than it would be without the evidence.' Any more stringent requirement is unworkable and unrealistic." *See* 1972 Adv. Comm. Notes to Fed. R. Evid. 401 (internal quotation marks omitted). The relevance of any item of evidence must be considered in context. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." *Id.*

At trial, the expert testimony at issue — regarding what Yash Rana's hard drive shows about two documents — will readily meet this test. The dates of these draft documents and similarities between them are relevant because these electronic documents were not created until mid-December 2000, and thus raise the inference that the Irrevocable Instruction that Defendant signed was not even created until mid-December 2000.

This information is highly relevant. It is proper for the jury to consider the day Defendant made the decision to trade. Because the jury will be considering whether Defendant made that decision on the basis of material nonpublic information, it is proper to offer evidence from which the jury could determine that Defendant did not issue this instruction until mid-December 2000.

In addition, this evidence that Defendant did not issue this instruction until mid-December

2000 is even more significant when seen as part of a larger context. As noted, the document is dated November 3, 2000. The jury may properly consider the reasons why Defendant may have signed a document that is dated more than month earlier than the date he signed it. The jury could reasonably conclude that Defendant backdated this instruction in an attempt to cover up that the instruction was not actually given until the date he signed it. The jury may consider that this is a significant change in date — after all, it is not just a day or two, or even a week or two — and may consider why he backdated the document all the way to November 3, 2000. The jury can consider Defendant's reasons in light of other evidence, such as when the last trading window closed and when Defendant learned of key adverse nonpublic information. The jury thus may consider whether this backdating was innocent or whether it shows that Defendant had a bad purpose and a lack of good faith.

Defendant contends that there is no relationship between the Irrevocable Instruction Defendant signed and the two electronic documents found on Yash Rana's hard drive. *See* Def. Mot. to Exc. at 7-8. Defendant appears to wish to convince the Court to draw a conclusive presumption in Defendant's favor, despite weight of the evidence, that the documents have no relationship.

The Court should reject this argument, as there are numerous connections between the documents. For example: (1) there is no dispute that Mr. Rana prepared the hard copy of the Irrevocable Instruction for Defendant; (2) a document on Mr. Rana's computer is actually entitled *IrrevocableInstructions.doc*, and was created from the other (which was entitled *nacchio.doc*), (3) the *IrrevocableInstructions.doc* is identical to the Irrevocable Instruction Defendant signed (as

can be seen by comparing Exhibit 1 with Exhibit 3); (4) these documents were all created within the same general period as the date shown on the Irrevocable Instruction Defendant signed, and (5) there is no evidence of any earlier electronic document Mr. Rana created that matches this Irrevocable Instruction that Defendant signed.

This evidence is more than sufficient to raise a proper inference that the documents are related. *Cf. Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 833 nn.8-9 (10th Cir. 1993) (observing, in a copyright case, that similarity between computer programs may "give rise to the inference that copying occurred" and that when this inference arises, a defendant "can come forward with evidence of independent creation to rebut the inference of copying created by the evidence of access and factual similarity").

Defendant's brief next suggests that he may not even dispute the backdating. Notably, he never refers to the document "Mr. Nacchio signed on November 3, 2000," but instead refers to it as the document "signed by Mr. Nacchio dated November 3, 2000." *See* Def. Mot. to Exc. at 5, 13. His contention appears to be that backdating was proper because various indirect pieces of evidence are arguably consistent with an inference that there was an earlier oral instruction. *See* Def. Mot. to Exc. at 8-12. Defendant argues that this other evidence "is innocent if not exculpatory." *See id.* at 9.

This argument is not even a relevancy argument. After all, if the evidence in context did establish his innocence, it would surely be relevant. What Defendant apparently seeks is to have the Court exclude, prior to trial, expert testimony about the hard drive evidence (which supports

the backdating) on the ground that there might be an explanation for the backdating. Defendant cites no rule of law that requires the Court to accept Defendant's possible explanation prior to trial and exclude contrary evidence on that basis.

The government submits that Defendant seeks the exclusion of this evidence not because of any irrelevance but because of its potential probative value. The Court should reject Defendant's argument.

III. THE COURT SHOULD REJECT DEFENDANT'S *DAUBERT* ARGUMENT.

Defendant next argues that the expert testimony regarding the metadata on the hard drive should be excluded pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

But Defendant does not suggest that the experts at issue lack the ability or skill to ascertain the contents of the hard drive, nor does he criticize their qualifications. Nor does Defendant suggest that testimony about computer evidence is inherently inadmissible. The law does not establish that such computer evidence is somehow suspect. On the contrary, testimony regarding computers and hard drives is regularly admitted. *See, e.g., United States v. Lauder*, 409 F.3d 1254, 1265 (10th Cir. 2005) (observing that "every case involving equipment — whether it be computers, cameras, or speed guns – does not automatically require a *Daubert* hearing regarding the physics behind the operation of the machine"); *United States v. Tucker*, 305 F.3d 1193, 1204 (10th Cir. 2002) (agent testified regarding how a browser would cache files); *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1300 (D.C. Cir. 2002) ("A growing number of courts now permit expert testimony regarding substantial similarity in cases involving computer

programs, reasoning that such testimony is needed due to the complexity and unfamiliarity [of computer programs] to most members of the public.") (internal quotation marks omitted); *Galaxy Computer Svcs., Inc. v. Baker*, 325 B.R. 544, 562 (E.D. Va. 2005) (rejecting a *Daubert* motion challenging a computer forensics expert).[3]

Defendant makes just two arguments. First, he argues that "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." *See* Def. Mot. to Exc. at 13-14. But Defendant does not identify a single specific alleged deficiency in the report. Nor does he explain why this evidence shows that the expert testimony is unreliable. The fact that an expert cannot ascertain certain facts from a hard drive does not mean that his testimony about what he can ascertain is inadmissible. Defendant does not show any facts (or even suggest) that another expert could make those determinations from the hard drive. Defendant also offers no challenge to what the experts did find.

Second, Defendant contends that the report "does not establish facts that bear on the

[3] *See also United States v. Romm*, 455 F.3d 990, 994-95 (9th Cir. 2006) (forensic specialists testified regarding the contents of a hard drive); *United States v. Ray*, 428 F.3d 1172, 1174 (8th Cir. 2005) (computer forensic specialist testified); *United States v. Regan*, 281 F. Supp. 2d 795, 807 (E.D. Va. 2002) (computer expert testified about the contents of a hard drive); *Jackson v. Microsoft Corp.*, 211 F.R.D. 423, 430 (W.D. Wash. 2002) (court's decision relied on expert testimony regarding contents of hard drive); *United States v. Scott-Emuakpor*, 2000 WL 288443, at *12 (W.D. Mich. Jan. 25, 2000) (explaining that where a party proposed to have experts testify about a hard drive, and the experts were challenged under *Daubert*, "[t]he question is whether they have the skill to find out what is on a hard drive or a zip drive. Apparently, they have this skill because they determined what was on the drives").

actions or intent of Mr. Nacchio." *See* Def. Mot. to Exc. at 14. This argument lacks merit. This appears to be another version of Defendant's contention that the evidence of when the documents were created and edited is irrelevant. As set forth above, that argument lacks merit.

IV. EXCLUSION UNDER RULE 403 IS NOT WARRANTED.

Defendant last contends that these government experts should be excluded pursuant to Rule 403.

Defendant first contends that exclusion is proper under Rule 403 because allowing them to testify would force the defense to hire similar experts. This argument lacks merit. As noted above, there is no indication that Defendant was unable to find an expert to examine the hard drive in the weeks before trial or that Defendant lacks the resources to pay for such an expert.

Defendant also contends that three side issues will emerge if this testimony is permitted: (1) the legal status of 10b5-1 instructions, (2) the attorney-client privilege, and (3) a battle of experts over the hard drive. All of these claims lack merit, as set forth below.

A. Legal status of 10b5-1 instructions

Defendant contends that allowing testimony that supports a finding of backdating will lead to a discussion of "the legal status of a 10b5-1 instruction that need not written later documented in writing." Without any explanation, Defendant contends that this discussion of Rule 10b5-1 will "lead the jury far afield" from the charged conduct. Def. Mot. to Exc. at 15. Although Defendant does not explain this point, it is the government's understanding that Defendant apparently seeks to show that "Rule 10b5-1 does not require irrevocable instructions to sell to be written" and that the backdating was thus not in itself illegal. *Id.* at 8.

This argument lacks merit. First, to the extent the issue is whether irrevocable instructions must in all cases be written, there is no dispute over this issue that will cause a substantial "side issue." The government agrees with Defendant that there is no *per se* rule that an irrevocable instruction must always be written.

Second, as for Defendant's argument that the backdating is not itself a separate crime, this argument misses the point. Each piece of evidence in an insider trading case does not need to be a separate crime. As explained in more detail above, the government's contention is that this evidence is relevant not only because these irrevocable instructions enabled and directed the stock sales charged in Counts One and Two, but also because these instructions were backdated (as supported by the hard drive evidence), which is one piece of evidence that supports the government's contention that Defendant Nacchio wished to conceal the fact that he issued the "irrevocable" instructions after he learned materially adverse nonpublic information.

Nor does the evidence cited by Defendant (the notes of the interview with Gregory Patti, an O'Melveny & Myers attorney) establish that such backdating is perfectly proper, as Defendant suggests. *See* Def. Mot. to Exc. at 8. On the contrary, Mr. Patti stated that he "would never advise someone to do that" and that "[h]is advice would have been not to back date it." *See* Def. Mot. to Exc., Ex. E at 8.

Third, even if the standards for Rule 10b5-1 plans do become an issue at trial, this is not "far afield" from the indictment, which charges a violation of that rule. In fact, these standards are likely to be relevant, because the government contends that Defendant Nacchio established a

plan pursuant to that Rule and then decided not to follow the plan.

B. Claim of attorney-client privilege

Another potential "side issue" that Defendant claims may arise at trial if the expert testimony is presented is attorney-client privilege. Specifically, Defendant asserts that Yash 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." *See* Def. Mot. to Exc. at 15-16. Defendant contends that because of this attorney-client privilege issue, allowing expert testimony on the hard drive "would take up precious court time and delay trial proceedings." *See id.* at 16.

This assertion of individual attorney-client privilege appears half-hearted. Defendant does not attempt to lay a thorough factual foundation for the assertion of this privilege. But in any event, as set forth below, it is entirely without merit, for several independent reasons: (1) there is no attorney-client privilege issue with respect to the expert testimony about metadata; (2) there is no showing that Defendant Nacchio had a personal attorney-client privilege with Mr. Rana; (3) even if he had such a personal privilege, the evidence would clearly come within the crime-fraud exception; (4) even if there were such a privilege, it has been waived; and (5) there is no need for this issue to take up time at trial.

1. The expert testimony does not address an attorney-client communication.

The expert testimony at issue does not refer to any communication between Defendant

Nacchio and Yash Rana. The subject of the expert testimony is not the content of the documents, but the metadata relating to those documents. The subject of the testimony thus is not a confidential communication from a client to a lawyer.

Defendant's unarticulated premise appears to be that because this metadata has something to do with an attorney, the privilege must apply to the metadata. This premise lacks merit. "'[T]he mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege.'" *United States v. Johnston*, 146 F.3d 785, 794 (10th Cir. 1998) (holding that attorney-client conversations on a wiretap were covered by the crime-fraud exception) (quoting *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550-51 (10th Cir. 1995)). Absent some showing of how the expert testimony about the hard drive addresses a confidential communication from a client to his own lawyer, there is no privilege issue at all.

2. Defendant has not shown a personal attorney-client privilege relationship with Qwest corporate counsel.

Defendant also has not shown the highly unusual circumstances that are necessary to support a claim of *personal* attorney-client privilege with corporate counsel Yash Rana.

It is highly unusual for a corporate officer to have a personal attorney-client privilege with the corporation's counsel. "The default assumption is that [corporate counsel] only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption." *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001).

In fact, even if a corporate officer has a reasonable belief that the corporate counsel was representing him individually, that reasonable belief is not sufficient. *In re Grand Jury*

Subpoenas, 144 F.3d 653, 659 (10th Cir. 1998) ("A personal privilege does not exist merely because the officer 'reasonably believed' that he was being represented by corporate counsel on an individual basis."); *United States v. International Bhd. of Teamsters*, 119 F.3d 210, 216 n.2 (2d Cir. 1997) (observing that a "reasonable belief" standard "would provide employees seeking to frustrate internal investigations with an exceedingly powerful weapon, and would stray quite far from the principle that the attorney-client privilege should strictly confined in order to allow public access to every man's evidence") (internal citations and quotation marks omitted).

The Tenth Circuit has set forth five elements that *all* must be met before a corporate officer will have a personal attorney-client privilege with corporate counsel:

> First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.

In re Grand Jury Subpoenas, 144 F.3d 653, 659 (10th Cir. 1998) (observing that this holding is "extremely limited").

The burden is on the party seeking the personal privilege to show that these elements are met. *Id.* at 659-60. And even where such a privilege can be established, the officer then has the additional burden of showing that the privilege actually applies to any documents at issue. *In re Grand Jury Subpoenas*, 156 F.3d 1038, 1042 (10th Cir. 1998) (observing that even if a corporate

officer was "able to show the existence of existence of a personal attorney-client relationship with corporate counsel, he still had the burden in this case of showing that the privilege actually applies to *the documents at issue*") (emphasis in original).

Defendant does not even try to meet his burden. He asserts no facts showing that he meets this test. On the contrary, it appears clear that several of these elements were not met, as briefly discussed below.

First, Defendant makes no showing that these December 2000 documents (which were not e-mailed to or from him) were an attempt by him to obtain personal advice about irrevocable instructions. Indeed, Defendant's apparent contention is that he issued the instruction back in November 2000, and that Mr. Rana was simply carrying out his instruction in December 2000.

Second, there is no evidence that Mr. Rana ever communicated with Defendant and made clear he was representing him in his personal capacity "knowing that a possible conflict could arise." *In re Grand Jury Subpoenas*, 144 F.3d at 659; *see also United States v. International Bhd. of Teamsters*, 119 F.3d 210, 217 (2d Cir. 1997) (finding no personal attorney-client privilege and observing that the attorneys at issue had failed to adequately clarify who they represented despite the fact that "attorneys in all cases are required to clarify who they represent, and to highlight potential conflicts of interest to all concerned as early as possible"). Similarly, there is no showing of any such discussion with Gregory Patti, who did not work at Qwest and has never met Mr. Nacchio. *See* Def. Mot. to Exc., Ex. E at 2.

Third, there is no showing of any confidentiality between Mr. Nacchio and Mr. Rana. "Under the common law, a critical component of the [attorney-client] privilege 'is whether the

communication between the client and the attorney is made in confidence and under circumstances from which it may reasonably be assumed that the communication will remain in confidence.'" *In re Qwest Comm. Int'l Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) (quoting *United States v. Lopez*, 777 F.2d 543, 552 (10th Cir. 1985)). Indeed, the evidence set forth by Defendant suggests the opposite. For example, Mr. Rana spoke about the irrevocable instructions in a conversation with a third party (David Weinstein, Defendant's financial consultant), and Defendant himself discussed the instructions with third parties as well his wife and Mr. Weinstein. *See* Def. Mot. to Exc. at 11 & n.4 and Ex. I.

In any event, it is Defendant's burden to show that every one of these elements is satisfied, and then to show that any such privilege applies to the metadata on the documents analyzed by the government's experts. Defendant has not even tried to meet this burden.

3. The crime-fraud exception applies.

Even if Defendant could show all of the elements necessary to establish a personal attorney-client relationship with corporate counsel that applied to the metadata in the documents at issue, he still could not claim the privilege because the crime-fraud exception applies.

"The Supreme Court has required caution in the arena of testimonial privileges: 'these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *In re Qwest Comm. Int'l Inc.*, 450 F.3d 1179, 1195 (10th Cir. 2006) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)). Accordingly, it is well established that "[a] client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." *Clark v. United States*,

289 U.S. 1, 15 (1933); *see also United States v. Zolin*, 491 U.S. 554, 563 (1989) (the attorney-client privilege "does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime") (internal quotation marks omitted); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 354 (1985) (discussing the attorney-client privilege in a bankruptcy case and observing that one party pointed out "that the privilege does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary torts"); *In re Grand Jury Proceedings*, 857 F.2d 710, 712 n.6 (10th Cir. 1988) (explaining the crime-fraud exception and distinguishing "between a party who seeks advice from an attorney concerning past crime and a party who consults an attorney to *further* a crime of fraud") (emphasis in original).

For the crime-fraud exception to apply, the government need not actually prove a fraud, but must simply make a *prima facie* showing that the allegation of participation in a fraud "has some foundation in fact." *In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998). This determination of whether the exception applies "can be made ex-parte and a 'preliminary minitrial' is not necessary." *In re Grand Jury Proceedings*, 857 F.2d 710, 712 (10th Cir. 1988) (observing that the *prima facie* foundation may be laid by documentary evidence or good faith statements by the prosecutor as to testimony already received by the grand jury") (quoting *In re September 1975 Grand Jury Term*, 532 F.2d 734, 1467 (10th Cir. 1976)); *White v. American Airlines*, Inc., 915 F.2d 1414, 1424 (10th Cir. 1990) (observing that "for purposes of federal law, independent evidence is not required in order to invoke the crime-fraud exception") (citing *United States v. Zolin*, 491 U.S. 554 (1989)).

Here, a *prima facie* showing can be readily made. These electronic drafts of the irrevocable instructions were part of the fraud of insider trading, as the final instructions led to the sales charged in the first two counts of the indictment. In addition, the metadata for these electronic documents show that the document Defendant signed was backdated, which supports the government's contention that he sought to cover up the date on which his actual decision was made. *In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998) (observing that the crime-fraud exception applies "if the assistance was used to cover up and perpetuate the crime or fraud"); *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) (observing that the crime-fraud exception applies where "communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity") (cited with approval in *In re Grand Jury Subpoenas*, 144 F.3d at 660).

Finally, the government notes that it need not show that Rana himself committed a crime. For this exception to apply, the government must show just that an individual consulted an attorney to further a fraud, not that the attorney committed fraud. *See, e.g., In re Grand Jury Proceedings, Subpoena to Vargas*, 723 F.2d 1461, 1467 (10th Cir. 1983) ("The privilege does not apply where the client consults an attorney to further a crime or fraud."). The attorney thus may not be culpable in any way. *In re Grand Jury Subpoenas*, 144 F.3d at 661 n.3 (ruling that the crime-fraud exception applied but that the court did "by no means imply that [the attorneys] are guilty of any crimes or that they were in fact, culpable in any way").

4. Any personal privilege has been waived.

Even if Defendant could show that (1) the expert testimony at issue involved attorney-

client communications, (2) there was a personal attorney-client relationship between him and Mr. Rana that applied to the electronic documents, and (3) the crime-fraud exception did not apply, the privilege *still* would not apply because it has been waived.

When Qwest produced to the government the expert report on the two documents, it waived any privilege. *See In re Qwest Comm. Int'l Inc.*, 450 F.3d 1179, 1182 (10th Cir. 2006) (rejecting Qwest's claim of continued privilege where Qwest had produced documents to the government). Even if Defendant had once had a personal attorney-client relationship with Mr. Rana, that did not prevent Qwest from waiving that privilege in disclosing these materials of Mr. Rana (who was Qwest's employee) to the government. "[A] corporation may unilaterally waive the attorney-client privilege with respect to any communications made by a corporate officer in his corporate capacity, notwithstanding the existence of an individual attorney-client relationship between him and the corporation's counsel." *In re Grand Jury Subpoena*, 274 F.3d 563, 573 (1st Cir. 2001) (explaining that this rule was due to the fact that corporate officers owe a fiduciary duty to the corporation); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 353-54 (1985) (holding that a bankruptcy trustee holds the attorney-client privilege and observing that if the debtor's directors retained control over the privilege, that power "might effectively thwart

an investigation into their own conduct" as they could "use the privilege as a shield against the trustee's efforts to identify those assets").

In sum, the government submits that Defendant has not even come close to establishing a personal attorney-client privilege that bars the testimony by the government experts. Because

there is no merit in that half-hearted argument, there is also no merit in his argument that this issue supports exclusion of the government's experts on the ground that this issue would "delay trial proceedings." *See* Def. Mot. to Exc. at 16.

C. Analysis of the electronic documents at issue

Defendant contends that another "side issue" that would result from the government's expert testimony is that Defendant would be forced to respond to that testimony by hiring an expert to do another computer analysis of the hard drive at issue. This argument that responding to the testimony creates a "side issue" assumes that the government's expert testimony is irrelevant. In other words, this is simply Defendant's "relevance" argument over again, in different guise. As set forth above, the expert testimony is relevant, and Defendant has not conclusively shown that it is not.

CONCLUSION

The government respectfully submits that Defendant's motion should be denied.

Respectfully submitted this 13th day of March, 2007.

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