

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

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

**TENDERED FOR FILING
MARCH 18, 2007**

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

**UNITED STATES' MOTION FOR CLARIFICATION OF
THE COURT'S MARCH 16, 2007 EVIDENTIARY ORDER
CONCERNING SO-CALLED BACKDATING EVIDENCE**

The government respectfully moves for clarification of a few points relating to the Court's March 16, 2007 "Evidentiary Order Concerning So-Called Backdating Evidence."

In the Order, the Court ruled as follows with respect to one of Defendant's arguments:

Third, according to Defendant, the issue of whether the irrevocable instructions was conveyed within or outside of a trading window when Qwest insiders were permitted to trade stock is irrelevant. The court agrees with this argument. The content and parameters of the Qwest policy or directive are unclear, and trial time would be required to elucidate them. Whatever they may be, the court finds them irrelevant under rule 401. The court does not see how trading within a window would afford any sort of protection against criminal liability for insider trading; conversely, while trading outside a window might violate a policy, it is of marginal relevance on the question of whether it would violate any rule against insider trading. This marginal probative value is outweighed by (1) the undue delay and waste of time consumed in presenting evidence of the "windows," their significance, and the significance of trading within or outside them and (2) the danger that jurors' attention will be focused on the windows and not the larger issue of whether Defendant was actually trading on material inside information. While the government may open by

referring to evidence about what information was available to Defendant when he signed the irrevocable instructions in mid-December, it may not refer to trading windows.

Order at 4.

In accordance with this Order, the government will not address in opening statement whether the irrevocable instruction was conveyed within or outside of a trading window when Qwest insiders were permitted to trade stock. However, the government seeks clarification with respect to the scope of the Order, as set forth below.

I. Applicability to defendant

The government first requests clarification that this prohibition against referring in opening statement to whether the instruction in late 2000 was conveyed within or outside of a trading window applies to both sides. The Court's order specifies only that the *government* may not refer to this evidence. Defendant should have to abide by this limitation as well. It would be unfair for the Court to prohibit the government from making any reference to trading windows when discussing this irrevocable instruction, but for Defendant then to try, for example, to justify his conduct with respect to the irrevocable instruction by referring to that same window.

II. Scope of limitation regarding trading windows

The government also requests clarification on the scope of the prohibition in the Court's order. As noted, the Court agreed with the Defendant's argument that "the issue of whether the irrevocable instructions was conveyed within or outside of a trading window when Qwest insiders were permitted to trade stock is irrelevant." *See* Order at 4; *see also* Defendant's Trial Brief dated March 9, 2007, at 10 (arguing that "the growth shares instruction evidence is irrelevant to

the extent it would be offered to show compliance or lack of compliance with corporate policy”).

The government submits that trading windows are significant in explaining the facts to the jury in a different context — a separate series of events four months later, in March and April 2001 — and that the Court should not extend its Order’s reach to bar any reference to the trading windows in that context. Specifically, the government alleges that Defendant Nacchio learned material adverse nonpublic information in March 2001 and early April 2001. Defendant Nacchio then made very substantial sales on this information. These sales were *not* made immediately after Defendant Nacchio made the information, however. Rather, these substantial sales did not begin until April 26, 2001 — a few weeks after he had received the adverse information.

If the jury were just told these facts, without more, this delay of a few weeks between Defendant Nacchio’s receipt of the information and his sizable sales of stock might seem to significantly weaken the government’s case, as it would suggest that his receipt of the adverse information caused no immediate reaction.

But the picture changes considerably if it can be explained to the jury that at the time Defendant Nacchio told this information in March and early April 2001, he was barred by Qwest policy from selling because it was within a “closed window.” Qwest’s trading window for Defendant Nacchio had closed on February 15, 2001, and did not re-open until April 26, 2001. In other words, Mr. Nacchio’s very substantial sales (*e.g.*, \$13,599,565.00 on April 26, and another \$11,901,48.00 on April 27) began on the *very first days* that the window opened. *See* Docket No. 1 at 5. The government thus submits that the fact that his trading window was closed at the time Defendant Nacchio received the information is a very important fact in this context — *i.e.*, in

understanding the timing of Mr. Nacchio's substantial sales beginning in late April 2001.

The government affirms that it does *not* intend to suggest in its opening statement that Mr. Nacchio violated the closed-window policy in March or April 2001. The government thus would be discussing the fact that there was a closed window simply so the jury could understand the significance of the timing of Defendant Nacchio's substantial sales of shares that started on April 26, 2001.

The government further observes that Defendant did *not* suggest in his trial brief that these trading windows are somehow unclear. The facts are quite simple: high-level insiders like Mr. Nacchio were permitted by company policy to trade only during certain well-defined periods. Defendant himself issued a memorandum in October 2000 that explains that Qwest policy prohibited high-level insiders from trading in Qwest stock except during clearly defined periods. Defendant's memorandum states that for insiders like himself, the rule was the following: "No trades in Securities except during the 3-week period commencing two full business days after the public release of earnings for each quarter (or year, if it is the fourth quarter)." *See* Ex. 1 at 4. In early 2001, this meant (and Qwest documents confirm) that the window for Defendant Nacchio was open from January 26 to February 15, then closed until April 26, when it reopened. *See* Exs. 2, 3 (e-mails to Defendant Nacchio showing the dates of these windows); Ex. 4 (Qwest chart showing all of the windows in 2001 for section 16 insiders like Mr. Nacchio).

Accordingly, the government respectfully requests clarification that it is not precluded from referring to the trading windows as just a background fact in the context of the *April 2001* events. The government submits that it is crucial for it to be able to reference this fact that the

trading window was closed in March and in April (until April 26) because — as explained above — this fact is *highly* relevant in understanding why Defendant started selling large quantities of stock on April 26 and not immediately after he learned this information. Absent this fact, the jury will be left with a huge misimpression about the facts.

The government also submits that reference to this closed trading window is not unfairly prejudicial to Defendant because, as noted, the government will not suggest that Defendant violated this window.

III. Defendant’s knowledge of the criminal nature of trading on insider information

The government requests clarification in one further respect of the Court’s ruling, just to confirm that it does not bar an unrelated general reference in opening statement to Defendant’s knowledge of the laws against insider trading.

As background, the government observes that Defendant’s mental state at the time of the charged conduct is a hotly contested issue in this case (as in all insider trading cases). The government must prove that Defendant acted with the intent to defraud, and also must prove that Defendant acted willfully. The Court has defined “willfully” as meaning “to act voluntarily and purposefully with the specific intent to do something the law forbids, that is to say, with bad purpose, either to disobey or disregard the law.”¹ *See also* 15 U.S.C. § 78ff(a) (providing that a lack of knowledge of a rule or regulation is an affirmative defense to imprisonment at sentencing).

¹ The Court determined the content of this definition at the October 12, 2006 conference. *See* Transcript of October 12, 2006 hearing at 4, *United States v. Nacchio*, 05-cr-545-EWN. The United States preserves for the record the objections it raised in its prior submissions. *See* Docket Nos. 162, 168.

The government also observes that it is well established that in view of the difficulty or impossibility of proving a individual's state of mind directly, the government may seek to convince the jury of Defendant's state of mind indirectly from circumstantial evidence. *See United States v. Bailey*, 327 F.3d 1131, 1140 (10th Cir. 2003) ("Because it is difficult to prove intent to defraud from direct evidence, a jury may consider circumstantial evidence of fraudulent intent and draw reasonable inferences therefrom.").

In connection with Defendant's state of mind, the government intends to briefly address in its opening statement a memorandum that was issued from Defendant Nacchio to all Qwest employees regarding insider trading in October 2000 (shortly before the charged conduct began). Defendant Nacchio's memorandum made clear that insider trading was a crime — and thus shows that he knew this fact. At the top of the first page, his memorandum explained that there are two purposes of the memorandum, one of which was "to assure compliance with the laws prohibiting 'insider trading'" *See* Ex. 1 at 1. His memorandum also affirmed that trading on material nonpublic information "is a crime." *See* Ex. 1 at 5.

Defendant submits that Defendant's own statements in this memorandum are highly relevant to his knowledge, intent, and willfulness. Specifically, it is highly probative of his knowledge that insider trading is a crime, which is directly relevant to his willfulness and alleged good faith. His own statements to this effect are relevant, for example, to whether he had the intent to disobey or disregard the law when he later sold large quantities of Qwest stock.

The government does not intend to quote from the memorandum in opening statement, but intends to refer to the fact that Defendant himself issued a memorandum to all Qwest

employees in October 2000 warning them that there are laws against insider trading and that insider trading is a crime. Given that the government must prove intent and willfulness beyond a reasonable doubt to the jury and must also address Defendant's good faith defense, this general reference to highly relevant evidence of Defendant's own statements in October 2000 should not be precluded.² The government does not view such a general reference in opening statement to be violative of the Court's order regarding the relevance of a violation of trading windows in connection with the irrevocable instruction, but is simply noting its intention now in an abundance of caution.

CONCLUSION

For the reasons stated, the government respectfully requests clarification of the Court's order.

² The government submits that this memorandum should be admissible at trial with a limiting instruction and perhaps some redactions of certain definitions set forth in the policy.

Respectfully submitted this 18th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2007, I e-mail this document to the following e-mail addresses:

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