

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.

ORDER AND MEMORANDUM OF DECISION

This is a criminal insider trading and securities fraud case. Plaintiff United States of America (“the Government”) alleges that Defendant Joseph P. Nacchio violated federal securities laws by selling certain securities while in possession of, and based upon, material non-public information. The facts and procedure of this case are well known by all parties involved and, therefore, are not set forth here.

This matter is before the court on the “United States’ Motion for Proper Expert Disclosure by Defendant Regarding Daniel Fischel,” Filed March 19, 2007. The Government asserts that Defendant’s expert disclosure concerning Professor Daniel Fischel is insufficient and requests the court to order Defendant to produce a compliant disclosure by March 23, 2007. On March 16, 2007, Defendant disclosed via electronic mail to the Government that he may call

Professor Daniel Fischel as an expert. Defendant announced that he intended his letter to serve as “a summary of [Professor Fischel’s] anticipated testimony, together with a statement of his qualifications.” Defendant then set forth the following summary, to which he attached Professor Fischel’s *curriculum vitae*:

1. Professor Fischel may testify about Mr. Nacchio’s holdings and transactions of Growth Shares, Qwest options, and Qwest stock. With respect to Growth Shares, Mr. Fischel is expected to testify about how Mr. Nacchio obtained the Growth Shares, the role of Growth Shares as an incentive compensation device, and Mr. Nacchio’s sales of Growth Shares. With respect to Qwest options, Mr. Fischel is expected to testify about how Mr. Nacchio obtained his Qwest options, the role of options as an incentive compensation device, Mr. Nacchio’s holdings of options, and Mr. Nacchio’s sales of shares obtained from the exercise of options. With respect to Qwest stock, Mr. Fischel is expected to testify about how Mr. Nacchio obtained Qwest stock as well as Mr. Nacchio’s contributions of stock to the Nacchio foundation and a family partnership. Mr. Fischel may also testify about Qwest stock held by Mr. Nacchio’s sons.
2. Professor Fischel may testify about Qwest’s repurchase of approximately 22.22 million shares from BellSouth for \$45 per share in January 2001. Professor Fischel will explain that Qwest’s board and management would not have considered the repurchase of shares from BellSouth to have been in the interest of Qwest or holders of Qwest securities (including themselves) if they were in possession of material adverse insider information about the Company. Professor Fischel may also compare the BellSouth repurchase price with Mr. Nacchio’s sales prices.
3. Professor Fischel may testify about the guidance Qwest provided during 2000 and 2001 as well as the effect, if any, of Qwest’s guidance on Qwest’s stock price, analysts’ recommendations, analysts’ target prices, and analysts’ forecasts. Among other things, Professor Fischel is expected to testify that after Qwest announced its guidance on September 7, 2000, its stock price declined. Professor Fischel will also explain that most analysts did not change their recommendations, target prices or forecasts after Qwest announced its guidance. Professor Fischel will also explain that analysts had their own forecasts, and did not adopt Qwest’s guidance as their forecasts. Professor Fischel will also explain that analysts understood that changes in economic conditions could cause Qwest’s financial performance to be worse than expected.

4. Professor Fischel may testify about the guidance provided by other companies, including telecommunications companies during 2000 and 2001, and the effect, if any, of such guidance on stock prices, analysts' recommendations, analysts' target prices, and analysts' forecasts. Professor Fischel may also testify about how the actual results reported by these companies compares with their previous guidance.

5. Professor Fischel may testify about changes in economic conditions which resulted in changes in stock prices, guidance, and consensus earnings forecasts of telecommunications companies during 2001. Professor Fischel is expected to testify that these changes in economic conditions can explain why the financial performance of Qwest and other companies in 2001 turned out to be worse than had been previously expected, and that these performance shortfalls do not establish that guidance provided at earlier dates was unreasonable.

6. Professor Fischel may testify about the disclosures made by Qwest and other telecommunications companies concerning recurring and non-recurring sources of revenue. Professor Fischel may testify that companies that sold IRUs did not always disclose separately the amounts of IRUs sold. Professor Fischel may also testify about stock sales by officers and directors of these companies.

7. If necessary, Professor Fischel may testify about the gains to Mr. Naccio, if any, from the allegedly improper insider trading.

The court sets forth Defendant's summary *in toto* to serve the dual interests of analyzing the Government's motion and developing the record in this case.

The Government asserts that Defendant's disclosure does not satisfy Federal Rule of Criminal Procedure 16 and Federal Rules of Evidence 401, 403, 602, 702, and 704. The matter may be settled through analysis under Rule 16, which requires in relevant part that:

The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial if . . . the defendant requests disclosure under subdivision (a)(1)(G) and the government complies. . . . This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Fed. R. Crim. Pro. 16(b)(1)(C). The Government's general compliance with Defendant's requests under Rule 16(a) in this case obligates Defendant to comply with the Government's requests under Rule 16(b). Nevertheless, even a cursory review of Defendant's submission reveals his plain violation of the Rules. Defendant offers no bases or reasons whatsoever for Professor Fischel's opinions contained in the summary.

Moreover, the Government has noted its difficulty in determining whether Defendant intends for Professor Fischel to testify concerning facts or opinions and, in either case, the scope of that testimony. The court agrees. Defendant has not suggested that Professor Fischel possesses personal knowledge of the facts underlying his purported testimony, which may invoke the limitations of Rule 602. The court urges Defendant to clarify the character and content of Professor Fischel's testimony, as well as the bases and reasons therefor, in bringing his submission into compliance with Rule 16.

Based on the foregoing, it is therefore ORDERED that the Government's motion for expert disclosure is GRANTED in part and DENIED in part. Defendant shall produce an expert disclosure compliant with the federal rules described herein by March 26, 2007.

Dated this 22nd of March, 2007

BY THE COURT:

s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
United States District Judge