IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

DEFENDANT JOSEPH P. NACCHIO'S MOTION TO EXCLUDE TESTIMONY BY ANALYSTS AND PURPORTED "VICTIMS"

I. INTRODUCTION

In his March 8, 2007 Trial Brief, Mr. Nacchio presented argument as to why testimony should not be allowed from the government by financial industry analysts or by purported "victims" who owned shares in Qwest Communications International, Inc. We now formally move for that relief.

II. TESTIMONY OF ANALYSTS AND INVESTORS IS IRRELEVANT OR IN THE NATURE OF EXPERT TESTIMONY AND SHOULD BE EXCLUDED

The government, in its Trial Brief, represents that it "anticipates offering testimony from investment analysts and others regarding the significance of insider information that was not publicly disseminated during the period" that Mr. Nacchio made the alleged illegal trades. It appears the government has identified four

professional analysts on its Witness List (2 on its "Will Call" list and 2 on its "May Call" list). According to the government, these witnesses are prepared to testify about whether the information disseminated to the public was actually "public," and whether such information was material to a reasonable investor. For the reasons set forth below, such testimony is inadmissible because it is in the nature of expert testimony for which no notice has been given by the government, and because such testimony is irrelevant in the context of the jury's determination about whether the information was non-public and material under the law. Furthermore, even if such evidence has some minimal probative value, it is substantially outweighed by the considerable delay and confusion of the issues that will be occasioned by Mr. Nacchio's need to defend against such evidence. This would leave the defense in a position to consider having to call some number of analysts equal to or greater than that called by the government to provide an alternative view. The materiality and the public or non-public nature of the alleged inside information in an insider trading case is not, and should not be, dependant upon which side is able to call more witnesses that espouse its position. Instead, materiality determination must be based upon the nature of the information itself as measured against an objective standard, not by the subjective views of individuals or professionals.

The government does not identify in its Trial Brief the "others" who have this supposed relevant testimony concerning the material or nonpublic nature of the inside information. However, on its "May Call" Witness List, the government has identified

eight witnesses who were apparently solicited to testify, and appear eager and prepared to testify that that they bought Qwest shares, lost money, and blame Mr. Nacchio. This testimony is also irrelevant for the reasons discussed below, and again, any minimal probative value is far outweighed by the strictures of Fed. R. Evid. 403.

A. A Professional Analyst Is Not In The Position Of A Reasonable Investor, And Information Sought By The Professional Analyst Is Irrelevant In The Context Of The Objective Standard.

As noted above, Fed. R. Evid 401 and 402 taken together require that in order for evidence to be admissible, it must have a tendency to make the existence of a fact of consequence more probable or less probable than it would be without the evidence. Here, the government contends that the analysts can provide testimony that will tend to establish two facts of consequence to the determination of this action: the materiality of the inside information and; the non-public nature of the inside information. The government is incorrect. A professional securities analyst has no more personal knowledge about these subjects than any other individual, and their testimony is unnecessary and irrelevant as it fails to establish or aid in the determination of either of these two elements of the offense of insider trading.

Materiality is not determined by what a professional securities trader or analyst would like to know. *United States v. Teicher*, 1990 WL 29697, *1 n.3 (S.D.N.Y., Mar. 9, 1990) (information that may be of interest to a professional securities trader because of professional interest in the stock market does not mean that such information is material when judged through the eyes of a reasonable investor. "To be material, the

information must meet the objective standard."); *Grossman v. Novell, Inc.,* 120 F.3d 1112, 1119 (10th Cir. 1997) ("A statement or omission is only material if a reasonable investor would consider it important in determining whether to buy or sell stock." (citation omitted)). Testimony that is based upon the personal knowledge of any individual, analyst or not, is not relevant to a determination by the jury of the objective standard of materiality. The material nature of information that a "reasonable investor" would consider important cannot be measured as against what any one individual may have wanted to know or claims that they were not told; rather, it must be considered in the context of the information itself as measured against an objective standard. See e.g., *Michaels v. Michaels*, 767 F.2d 1185 (7th Cir. 1985) (objective standard of materiality measured in terms of "the *hypothetical* reasonable man")(citation omitted)(emphasis added); *Gohler v. Wood*, 919 P.2d 561 (materiality requirement requires proof that a hypothetical "reasonable person" would have relied on the misrepresentations, not that any particular plaintiff actually relied on them) (S.Ct. Utah, 1996).

Whether information is material also depends on other information already available to the market. Unless the statement "significantly altered the 'total mix' of information" available, it will not be considered material. *Grossman v. Novell, Inc.,* 120 F.3d at 1119, quoting, *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

The material, non-public information alleged by the Government in this case relates to other information already available to the market: the forward-looking

revenue statement issued by Qwest and Mr. Nacchio to the public on September 7, 2000, which forecasted Qwest's revenue for the future 15 month period, ending December 31, 2001. Such statements may not even be material and therefore not actionable as securities fraud where they are not subject to objective verification. *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119-1120 (10th Cir. 1997) ("Statements classified as 'corporate optimism' . . . are typically forward-looking statements, or are generalized statements of optimism that are not capable of objective verification. . .[and] are not actionable because reasonable investors do not rely on them in making investment decisions"). Projections which turn out to be inaccurate are not fraudulent simply because subsequent events reveal that a different projection would have been more reasonable. *Grassi v. Information Resources, Inc.,* 63 F.3d 596, 599 (7th Cir. 1995); *Goss v. Summa Four, Inc.,* 93 F.3d 987994 (fraud does not result from the mere contrast between a defendant's past optimism and less favorable actual results) (1st Cir. 1996).

Even more importantly, the alleged material undisclosed information in this case consists of statements as to beliefs, opinions, and assumptions that, for the most part, simply differed from those of Mr. Nacchio. The Government's case is based upon internal opinions or concerns that Qwest *might not* be able to meet its publicly stated financial targets (that is, the targets to be reached by 12/31/01 publicly announced in the Qwest 8K of 9/7/00). It is not alleged that Mr. Nacchio *knew* Qwest *could not* make its numbers, or even that he *believed* Qwest *would not* make its numbers, but merely

that he had been told that Qwest *might not* be able to make its numbers. See e.g., ¶ 6 of the Indictment.[1]

These circumstances implicate legal principles concerning materiality, which could be impermissibly affected by the proffered analyst testimony concerning what they may have wanted to know. For example, once Qwest made reasonable forward-looking statements of future revenue, internal projections that conflicted with its publicly-issued projections are not considered material under the law, and Qwest and Mr. Nacchio would not be required to disclose such tentative internal projections unless they were so certain that they showed the published figures to have been materially misleading. As recognized by the Seventh Circuit Court of Appeals, to require otherwise is completely impractical and would cause chaos in the market place:

> Any other position would mean that once the annual cycle of estimation begins, a firm must cease selling stock until it has resolved internal disputes and is ready with a new projection. Yet because large firms are eternally in the process of generating and revising estimates-they may have large staffs devoted to nothing else - a demand for revelation or

[1]¶ 6 of the indictment alleges in part that between January 2 and May 29, 2001, Mr. Nacchio:

[W]as aware of material, non-public information about Qwest's business, including, but not limited to: (a) that Qwest's *publicly stated financial targets*, including its targets for 2001, were extremely *aggressive* and a "*huge stretch*"; (b) that in order to achieve its *publicly stated financial targets* for 2001, Qwest would be required to significantly increase its recurring revenue business during the first few months of 2001; (c) that Qwest's past experience or "track record" in growing recurring revenue at a sufficient rate to meet its *publicly stated financial targets* was poor; (d) that Qwest's recurring revenue business was underperforming from early 2001 and was not growing at a sufficient rate to meet Qwest's *publicly stated financial targets*; (e) that there were material undisclosed risks relating specifically to Qwest's recurring and non-recurring revenue streams that put achievement of Qwest's 2001 *publicly stated financial targets* in *jeopardy*; (f) that the gap between Qwest's *publicly stated financial targets* and Qwest's recurring revenue was increasing, thus increasing Qwest's reliance on *risky* and unsustainable one-time transactions; and (g) that there would be insufficient non-recurring revenue sources to close the gap between Qwest's *publicly stated financial targets* and its actual performance. (emphasis added)

> delay would be equivalent to a bar on the use of projections if the firm wants to raise new capital.

Wielgos v. Commonwealth Edison Company, 892 F.2d 509, 516 (7th Cir. 1989).[2] Neither Qwest nor Mr. Nacchio were not required to reveal the company's internal views of the published guidance before trading. *Id*. at 515; *See also*, *Garcia v. Cordova*, 930 F.2d 826, 830 (Court held that after careful consideration of all facts and circumstances, the soft information at issue here was too speculative and unreliable to require disclosure under Rule 10b-5 as "material fact.") (10th Cir. 1991); *SEC v. Butler*, 2005 U.S. Dist. LEXIS 7194 (E.D.Pa. 2005) (internal projections of revenues, including information available to the alleged insider trader through forecast meetings at the time he made the trades at issue, "was simply not a reliable indicator" of the company's probable quarterly revenue, and the court found that the trader did not possess material nonpublic information when he made his trades); *In re Healthcare Compare Corp. Sec. Lit.,* 75 F.3d 276, 282 (7th Cir. 1996) (no duty to correct projections unless conflicting internal projections which were certain and reliable, not merely tentative estimates, made the previously public guidance materially misleading); *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 998 (10th Cir. 2002) (*aff'g* Nottingham, J.) (accurate

[2] Yesterday we were served with the government's objections to our requests to charge, in which it insists on a different definition of materiality for corporate disclosures than for insiders *or* corporate trading. This distinction is without any intellectual basis, and the quoted language in *Wielgos* puts the sword to it. This is because *Wielgos* was a trading case. The trades were pursuant to a shelf registration by the company, and the quoted language is specifically directed to the ability of the corporation to trade its own stock without disclosing internal disputes about existing financial projections that conflict with public projections.

reporting of historic financial results does *not* give rise to a duty "to further disclose *contingencies* that might alter the revenue picture.") (emphasis added).

Therefore, the testimony of individual analysts about what information, which in hindsight following the loss of value of Qwest stock, they each would have wanted to know, is irrelevant to the issues that will be before the jury.[3] The jury will have complete information concerning the forward looking revenue statements issued by Mr. Nacchio and Qwest on September 7, 2000. They will be provided with the undisclosed information allegedly provided to Mr. Nacchio immediately prior to, and during, the alleged trades. They will also be provided with the legal principles necessary to evaluate the significance of the undisclosed information as compared with the total mix of information made available by the company and Mr. Nacchio. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988). This evidence and the relevant legal principles will provide the jury with all that is necessary to enable them to determine *objectively* whether or not the undisclosed information was material.

[3] For example, Drake Johnstone, who is identified on the Government's "Will Call" list, and is further identified in an FBI interview report as a research analyst reportedly told the government on 2/7/07, after reviewing an internal Qwest product review document dated 4/9/01, he "was surprised to see a reference to one time capacity sales that was not disclosed at the meeting two weeks later" and "found it 'outrageous' that Qwest would use one time capacity sales to fill the gap caused by a 19 percent shortfall." Johnstone earlier referenced his "visceral" reaction to other news released in the 2nd Quarter of 2001. Johnstone also opined that if the information had been disclosed, the stock value would have changed dramatically. No notice as to expert testimony from Mr. Johnstone has been provided. (See point 3, *infra).* Prashant Khemka, who also appears on the Government's "Will Call" list, reportedly told government agents on 2/5/07 that "materiality from the investors view, is anything that changes the value of the business," (which is not the standard for materiality) and that the information he gained in 2001 was important and material *to him* in making his models.

This type of analysis is not enhanced by the individual accounts of the Government's proposed analyst witnesses as to what they may have wanted to know, and such testimony should be excluded pursuant to Fed. R. Evid. 401 and 402. The testimony that the Government apparently seeks to introduce from these professional analysts will also likely inject an incorrect legal definition of materiality, which will unfairly prejudice Mr. Nacchio, even with an appropriate limiting instruction.

Nor is the testimony of individual analysts relevant to whether or not the information was effectively disseminated to the investing public. Information is "nonpublic" if it has not been disseminated in a manner making it available to investors generally. In contrast, information is "public" when it is available to investors, even if it was not published in a press release, newspaper, or other form of media but is available through sources such as analysts' reports, rumors, word of mouth, or other sources. *United States v. Cusimano,* 123 F.3d 83, 89 & n.6 (2nd Cir. 1997) (approving charge), *cert. denied*, 522 U.S. 1133 (1998). Again, this determination can be made based exclusively upon a review of the nature and extent of the disclosures actually made. The individual opinions of research analysts adds nothing to the determination of this element, and should be excluded pursuant to Fed. R. 401 and 402, and as improper expert testimony. See below.

B. The Testimony To Be Elicited From A Professional Securities Analyst Will Almost Certainly Be In The Nature Of Expert Testimony Pursuant To Fed. R. Evid. 702, And Should Be Excluded For Failure To Provide Notice Pursuant To Fed. R. Crim. P. 16(A)(1)(G).

It may be that the government will argue that the analysts are not simply testifying in their individual capacity, but rather in the capacity of a person with particular experience or expertise in the area of evaluating the type of information that is important to the investing community as a whole. While Mr. Nacchio submits that such position does not cure the irrelevant nature of the proffered testimony, it becomes inadmissible for another reason. Such opinion testimony would only be admissible by someone qualified as an expert witness, and the government has failed to provide notice of such expert testimony as required by Fed. R. Crim. P. 16(a)(1)(G). This is especially so where, as here, the Government has persistently claimed there would be no experts in its case in chief. Again, this is exactly the type of situation that justifies the Court's exercise of its discretionary power to exclude evidence.

The purpose of Rule 16(a)(1)(G) is "to minimize surprise that often results from unexpected testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997), *cert. denied*, 523 U.S. 1131 (1998); *accord United States v. Cruz*, 363 F.3d 187, 196 n.2 (2d Cir. 2004) (*citing Figueroa-Lopez*).

Fed. R. Evid. 702 applies to all types of expert testimony, scientific or otherwise, the admissibility of which is to be determined preliminarily by the Court under Fed. R.

Evid. 104(a). Advisory Committee Notes to 2000 Amendment of Rule 702 (*citing Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999)).[4] Rule 702, and the concomitant disclosures mandated by Rule 16(a)(1)(G), do not rest upon the witness's status as retained, subpoenaed, or volunteer. Rather, the focus is solely on the nature of the anticipated testimony.

Nor does it matter that the "expert" opinion testimony comes from a lay witness who also possesses fact knowledge. "The amendment [of 2000 to both Federal Rules of Evidence 701 and 702] does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*." Advisory Committee Notes to the 2000 Amendments (emphasis in original); *accord United States v. Caballero*, 277 F.3d 1235, 1247 (10th Cir. 2002) (same).

New Rule 701(c) explicitly excludes from its bounds any lay opinion testimony which is based on "specialized knowledge" within the meaning of Rule 702 (which encompasses "scientific, technical, or other specialized knowledge"). "Rather [by virtue of the amendments], a lay opinion must be the product of reasoning processes familiar to the average person in everyday life." *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005). If the witness's opinion rests "in any way" upon technical or specialized

[4] In contrast, Rule 701 governs lay opinion testimony. The Rule provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on a perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

knowledge, its admissibility must be determined by Rule 702, not Rule 701. *Id.* (citation omitted).

> The purpose of this final foundation requirement is to prevent a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness without satisfying the reliability standard for expert testimony set forth in Rule 702 *and the pre-trial disclosure requirements set forth in Fed. R. Crim. P. 16* and Fed. R. Civ. P. 26.

Id. (emphasis added); *accord United States v. Ayala-Pizarro*, 407 F.3d 25, 28 (1st Cir.) (amendment was intended "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing," *quoting* Advisory Committee's Note on 2000 Amendment; amendment also ensures that such testimony is subject to pretrial disclosure requirements of Fed. R. Crim. P. 16 and Fed. R. Civ. P. 26), *cert. denied*, 126 S. Ct. 247 (2005); *United States v. Martinez-Figueroa*, 363 F.3d 679, 682 (8th Cir. 2004)(amendment designed to prevent a party from using the rubric of lay opinion testimony to "subvert" the disclosure and discovery requirements of Fed. R. Crim. P. 16 and Fed. R. Civ. P. 26)(citation omitted).

Any opinions offered by witnesses such as Mr. Johnstone or Mr. Khemka as to what was material to the market place or whether or not some fact or another was public or non-public, and the like, stem from their claimed specialized knowledge as research analysts. These opinions plainly fall under Rule 702 and trigger pretrial disclosure, which has not been provided.

As previously established in *Russell*, the Tenth Circuit enunciated the standards for evaluating the exclusion of a witness pursuant to a discovery order violation. While the three *Russell* factors 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,* 371 F.3d 1236, 1244 (10th Cir. 2001).

Here, the government apparently persists in its view that the testimony it seeks to elicit from these research analysts is not in the nature of expert opinion testimony since no Rule 16 notice on this subject has been provided. In that case, the Court should exclude the evidence as improper Fed. R. Evid. 701 lay witness opinion testimony. The opinions of these professional analysts 1) are not rationally based on the perception of the witness, 2) are not helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and 3) are based on specialized knowledge within the scope of Rule 702.

C. Proffered testimony by analysts about what they considered to be important (and "material") is irrelevant and in the nature of expert testimony.

The government represents on one hand that analysts will not be called to testify about whether certain information was "material," and on the other hand states that the analysts will testify about "what information they considered important."

Government Response to Mr. Nacchio's Trial Brief at 16-17, 27-29 (March 13, 2007). But according to the government's own proposed legal instructions, it is the government's view that "information may be material . . . so long as a reasonable investor would consider the information *important* in deciding whether to buy, sell, or hold securities, or at what price to buy or sell . . . [and the jury] should evaluate the *importance* of the information to a reasonable investor . . ." United States Proposed Disputed Jury Instruction No. 12 at 18 (emphasis added). The government intends to elicit testimony from these professionals about what they considered (generally after considerable hindsight) to be "important;" therefore, such testimony should not be permitted.

First, the analysts are being called as experts since their opinions about the relative importance of market information is clearly based upon specialized knowledge within the scope of Fed. R. Evid. 702, and the government has not provided the requisite notice. Second, the views and expertise of these professionals is irrelevant to the issues before this jury.

The testimony of analysts, whose job it was to ferret out every conceivable fact that they could, is not the standard of materiality, nor is it relevant for the purpose of determining materiality. Such testimony will serve only to confuse the jury and unduly prolong the trial. In so doing, it will also unfairly prejudice the defendant.

Furthermore, the proffered testimony should not be admitted under Rule 701. In contrast to the cases cited by the government, the analysts are not being called to

testify about their knowledge of their own companies. They are being called to testify about opinions concerning the securities market for the telecom industry in general, which necessarily involves specialized knowledge, and therefore, Rule 702.

III. THE TESTIMONY OF PERSONS WHO LOST MONEY INVESTING IN QWEST STOCK AND BLAME MR. NACCHIO IS IRRELEVANT AND ANY MINIMAL PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE

The government offers no explanation as to the identity of the "others" referenced in its Trial Brief as it concerns proffered testimony of "the significance of insider information." However, there appear to be three categories of witnesses that the government intends to call to testify, all of whom have similar information to provide: they invested in Qwest stock and they lost money. Two of these prospective witnesses, Sally Anderson and Bruce Fiebach, were solicited to be witnesses by Curtis Kennedy, who is an attorney for the Association of US West Retirees. A third witness, David Speranza, was identified and contacted because he wrote an email to Mr. Nacchio in November 2000, complaining about Mr. Nacchio's sales of Qwest stock. Five other persons identified on the government's "May Call" list were named plaintiffs and representative parties in a class action retirement plan ERISA lawsuit brought against Mr. Nacchio, Qwest, the Qwest subsidiary that acted as the fiduciary of the plan, the plan investment committee (of which Mr. Nacchio was not a member), an insurance company, and twenty-six other named individuals (consisting mainly of board of director and investment committee members).

A. The witnesses solicited by the U.S. West Retirees Association.

According to the FBI interview reports, Sally Anderson and Bruce Fiebach "responded to an email received from [Mr.] Kennedy [that] invited the recipients to respond if they were interested in providing testimony pertaining to their [financial] loss after the drop / plunge in the value of Qwest stock."[5] Ms. Anderson reportedly had been employed by US West since 1982, reallocated the contributions in her retirement plan to have 100% invested in Qwest stock sometime in 2000 based upon positive forward looking financial projections made by Mr. Nacchio, and "ultimately" lost over $250,000. Mr. Fiebach stated that he considered changing the allocation of his contributions, but changed his mind after hearing Mr. Nacchio make positive forward looking financial projections and explain that he (Mr. Nacchio) was selling his stock to diversify his portfolio. Mr. Fiebach wrote in his reply email to Mr. Kennedy that this event "may or may not have occurred during the time frame in question."

[5] It was reported in the Rocky Mountain News on January 26, 2007, that federal prosecutors asked the Association of US West Retirees "to help identify potential witnesses who suffered large financial losses after buying Qwest stock during the first five months of 2001." *Wanted: Qwest witnesses*, January 26, 2007, Rocky Mountain News. Reportedly, the group has tens of thousands of members, and the letter from Mr. Kennedy indicated that Prosecutor Colleen Conry would be meeting with potential witnesses. This appears to be confirmed by the email thread attached to the Anderson 302 report, which includes an email from a woman "assisting government attorney Colleen Conry in following up on emails sent in response to Curtis Kennedy's email on 1/24/07." The article also reported that a former federal prosecutor opined that the prosecutors were employing a good strategy to put "victims" on the stand to personalize the case with "'gut-wrenching stories' by people who lost their life savings," which was employed effectively in the Enron criminal case. Both Ms. Conry and Mr. Stricklin served on the Enron task force, which involved very different charges than those here. Despite a 3/2/07 request for additional information pursuant to Brady v Maryland, to date the government has not provided Mr. Nacchio with a copy of Mr. Kennedy's email, or with any information about the size of the distribution list for the solicitation email from Mr. Kennedy, the number of responses received, or the existence of any responses that may be considered favorable to the defense.

B. The investor who wrote an email to Mr. Nacchio complaining about executive stock sales.

According to the interview report of Mr. Speranza, he wrote an email to Mr. Nacchio in November 2000, complaining that because Mr. Nacchio and other executives were selling stock, "[i]t looks like rats are deserting the sinking ship and taking theirs with them." The interview report of Mr. Speranza indicates that he had been employed by US West, participated in the Qwest Shares Fund, and that the value of his fund went from $300,000 (at some unspecified time) to $30,000 by the end of February, 2005, years after Mr. Nacchio was no longer employed by Qwest.

C. The civil plaintiffs.

Four other persons on the government's "May Call" List, Dan Connors, Janice Dudley, Jim Rooney, and Paula Smith, for which no interview reports have yet been provided, were named plaintiffs and representative parties in a class action retirement plan ERISA lawsuit brought against Mr. Nacchio, Qwest, the Qwest subsidiary that acted as the fiduciary of the plan, the plan investment committee (of which Mr. Nacchio was not a member), an insurance company, and twenty-six other named individuals (consisting mainly of board of director and investment committee members). The complaint makes numerous and complex allegations, to include that certain participants in the US West retirement plan were prohibited from removing contributions from the plan and placing them in other investment vehicles until April 2002, allegations relating to events that caused a drop in the price of Qwest stock, which both pre-date and post-date the relevant time period of this indictment; and, most importantly, allegations

relating to the drop in price of Qwest stock that otherwise have nothing to do with the insider trading allegations of this indictment.

The eighth person that Mr. Nacchio believes to have irrelevant testimony for similar reasons discussed herein is identified only as the California State Teachers' Retirement System ("CALSTRS") plan manager. Again, CALSTRS is a named plaintiff in a recently settled class action lawsuit that included a myriad of allegations concerning the reasons behind the drop in Qwest's stock price.

D. The testimony of all of these prospective witnesses is irrelevant in the context of the insider trading charges brought against Mr. Nacchio.

The fact that any of these persons invested in Qwest stock and ultimately lost money when the price of the stock dropped is completely irrelevant to the charges of insider trading. The Government's Trial Brief indicates only that in addition to the investment analysts, "others" are expected to testify regarding whether the information was material to a reasonable investor. As indicated above, the reasonable investor test is an "objective standard." The testimony by these individual investors about hearing Mr. Nacchio speak positively about the financial projections of the company on one (or even two or several) occasions is anything but objective. Where as here, there were likely hundreds of thousands of investors in Qwest during the relevant time period, the material nature of information that a "reasonable" investor would consider important can not be measured by what one or ten individual investors may have wanted to know or claim that they were not told.

The materiality of the information must be considered in the context of the nature of the information itself as measured against an objective standard, not as viewed by any particular person or persons. *Michaels v. Michaels*, 767 F.2d 1185 (7th Cir. 1985). Whether the undisclosed information would have "significantly altered the total mix of information made available concerning the company," *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988), is almost certainly not subject to being known by any particular person or even group of persons. The individual accounts of what the government's proposed witnesses heard, did or didn't do as a result, or claim they would have wanted to know is irrelevant and should be excluded pursuant to Fed. R. Evid. 401.

The manner and nature of the solicitation to the US West Retirees Association, and status as plaintiffs in very complex civil litigations against Mr. Nacchio and others further define the subjective nature of the testimony of the Government's proposed witnesses. Furthermore, while this type of bias is generally subject to the rigors of cross examination, such an exercise is almost impossible under the circumstances of this case. Any effort to point out the obvious bias likely held by civil litigants, who brought a myriad of civil claims against Mr. Nacchio and many others in related, but very different cases from this one, opens the proverbial "Pandora's box." A proper cross examination would require a full exploration of the many and varied allegations made by these individuals about the reasons for their financial losses. The danger of unfair prejudice, confusion of the issues, and time expense that would result from such

an exercise makes clear that the evidence should be excluded pursuant to Fed. R. Evid. 403.

Nor is the testimony of these individual investors admissible under some theory that they are testifying as "victims" of the insider trading offenses brought against Mr. Nacchio. This insider trading case such as this one, unlike a mail or wire fraud allegation, does not allege a fraud against a particular individual or individuals. To allege such an offense would require the government to identify specific buyers of the stock that Mr. Nacchio sold. The government has not done that, and the government has also not alleged that Mr. Nacchio caused false information to be disseminated to investors.[6] The government can not have it both ways. In bringing these insider trading charges against Mr. Nacchio, the Government chose to rely on the general fraud on the market place theory, and it can not now seek to introduce the "gut-wrenching stories" of a very select few, who very well may have lost money for reasons having nothing to do with the alleged acts of insider trading brought against Mr. Nacchio.

The unfair prejudice created against Mr. Nacchio by this type of testimony, considering all of the circumstances discussed herein, substantially outweighs any probative value. under Fed. R. Evid. 403.

[6] The government itself has recently recognized this in its Objections to Defendant's Additional Requests to Charge at p. 19: "As note, Defendant is not charged with affirmative misrepresentations to the public. The proper focus is on *internal* statements that were made *to* Defendant and *inside* information that was provided *to* him prior to his trades." (emphasis in original).

E. The solicitation email by Mr.Mr.Kennedy shows that the non-professional witnesses have irrelevant and overly prejudicial testimony, which should be excluded pursuant to Rules 401 and 403.

The email sent by Curtis Kennedy, who is an attorney for the Association of US West Retirees, soliciting "victims" to come forward and assist the prosecution, is attached as Exhibit A. A review of this email is further proof of the inadmissibility of the proffered testimony of persons who will say little more than that they invested in Qwest stock and lost a lot of money. The proffered testimony is not objectionable because they are humans, but because of what these particular humans are being called to say. Their testimony is also irrelevant to the issue of materiality and will serve only to confuse the jury.

IV CONCLUSION

For the foregoing reasons, Defendant Joseph P. Nacchio requests entry of an Order barring testimony offered by the government from analysts or purported "victims."

Respectfully submitted this 21st day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March 2008, a true and correct copy of the foregoing **DEFENDANT JOSEPH P. NACCHIO'S MOTION TO EXCLUDE TESTIMONY BY ANALYSTS AND PURPORTED "VICTIMS"** as served on the following via email:

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s/Donna M. Brummett
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