

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 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. This matter is before the court on “Defendant Joseph P. Nacchio’s Motion to Exclude Proposed Government Expert Testimony,” tendered for filing February 27, 2007.

FACTUAL BACKGROUND

1. Facts

The facts and procedural history of this case have been discussed at length in this court’s previous orders. (*See, e.g.*, Order [filed Aug. 28, 2006].) Familiarity therewith is assumed. On December 20, 2005, a federal grand jury handed down an indictment alleging forty-two counts of

securities fraud and insider trading against Defendant in violation of: (1) Title 15 United States Code sections 78j and 78ff; (2) United States Securities and Exchange Commission (“SEC”) Rule 10b–5, 17 C.F.R. § 240.10b–5 (2006); and (3) SEC Rule 10b5–1, 17 C.F.R. §10b5–1 (2006) (hereinafter “Rule 10b5–1”). (Indictment [filed Dec. 20, 2005] [hereinafter “Indictment”].) The Government alleges that while Defendant was Qwest’s chief executive officer and a member of its board of directors, he “knowingly and willfully s[old], using the instrumentalities of interstate commerce and the facilities of a national securities exchange[,] more than [one hundred] million [dollars] worth of Qwest common stock . . . while aware of and on the basis of material, non-public information.” (*Id.* ¶¶ 1, 9.)

Counts 1 and 2 of the Indictment allege Defendant sold Qwest stock on January 2 and 3, 2001, at a time when Defendant possessed material inside information. (*Id.* ¶ 1.) The charges relate to Defendant’s sales of restricted stock deriving from growth shares Defendant had been issued by Qwest. (Def. Joseph P. Nacchio’s Mot. to Exclude Proposed Gov’t Expert Testimony at 4–5 [tendered for filing Feb. 27, 2007] [hereinafter “Def.’s Br.”]; United States’ Resp. to Def.’s Mot. to Exclude Proposed Gov’t Expert Testimony at 2 [tendered for filing Mar. 13, 2007] [hereinafter “Gov’t’s Resp.”].) These sales were completed during a closed trading window at Qwest — *i.e.*, a period during which corporate insiders ordinarily could not sell company stock. (Def.’s Br. at 4–5; Gov’t’s Resp. at 2–3.) Defendant sold these shares by signing an “Irrevocable Instruction” document that was dated November 3, 2000 (hereinafter “Irrevocable Instructions”), a date within a period designated by Qwest as an open trading window. (Gov’t’s Resp., Ex. 1 [Signed Irrevocable Instructions.]) Irrevocable Instructions stated that Defendant, as of November

3, 2000, possessed no material non-public information and irrevocably committed to selling his growth shares immediately upon issuance on January 2, 2001. (Def.'s Br., Ex. 1 [Signed Irrevocable Instructions].) Further, the intent of the Irrevocable Instructions was expressly to ensure Defendant's compliance with Rule 10b5-1. (*Id.*) Rule 10b5-1 enables corporate insiders to avoid charges of insider trading by entering into a pre-set trading plan in which the insider, before becoming aware of material non-public information and in good faith, adopted a firm plan for trading securities on a specific date. *See* 17 C.F.R. § 240.10b-1 (2007).

The Government seeks to introduce expert testimony that Irrevocable Instructions, though dated November 3, 2000, was actually signed by Defendant in mid-December 2000, at which point Defendant was allegedly in possession of material adverse non-public information about Qwest's future prospects (hereinafter "Expert Testimony"). (Gov't's Resp. at 3-4.) This Expert Testimony is based on analysis of the hard drive of Yash Rana, assistant general counsel for Qwest, who assisted Defendant in the sale of his growth shares. (*Id.*) The analysis allegedly revealed that a sample 10b5-1 attestation, entitled "*nacchio.doc*" was sent from Gregory Patti, an O'Melveny & Meyers attorney representing Qwest, to Mr. Rana on December 10, 2000. (*Id.* at 4.) Then, on December 13, 2000, that document was allegedly transformed on Mr. Rana's computer into a document entitled "*IrrevocableInstructions.doc*," which was purportedly identical to the Irrevocable Instructions signed by Defendant on November 3, 2000. (*Id.*)

Central to the instant conflict between the parties is that it was not until February 22, 2007, twenty-five days before trial, that the Government gave Defendant notice of its intent to present the Expert Testimony in its case-in-chief regarding the alleged backdating. The following

timeline alleged by Defendant is not contested by the Government and is thus presumed to be true for the purposes of this motion. Stroz Friedberg was engaged by counsel for Qwest in June 2005 and produced a draft report on the alleged backdating on June 13, 2005. (Def.'s Br. at 18.) The draft report has been in the Government's possession since at least June 2006 (and, upon information and belief of Defendant, was produced by Qwest for the Government in August of 2005), when the Government produced the Report as part of discovery for Defendant. (*Id.*) At that time, the report was produced as a Qwest document, was marked as a "Draft," and was not identified by the Government as an expert report.

Further, the Government's January 17, 2007 404(b) notice, in which the Government first notified the Defendant of its intent to offer evidence of the alleged backdating, the Government did not disclose that it intended to use the Expert Testimony to prove it. (*Id.* at 19.) Finally, on February 22, 2007, twenty-five days before trial, the Government gave notice of its intent to call experts in its case-in-chief to testify regarding the Report. (*Id.*)

2. Relevant Procedural History

On February 27, 2007, Defendant tendered for filing a motion to exclude the Expert Testimony based on: (1) lack of relevance; (2) Federal Rule of Evidence 403; and (3) Federal Rule of Criminal Procedure 16. (Def.'s Br.) On March 13, 2007, the Government responded to the motion. (Gov't's Resp.) On March 16, 2007 Defendant replied in support of his motion. (Def. Joseph P. Nacchio's Reply to Gov't's Resp. to Mot. to Exclude Proposed Gov't Expert Testimony [tendered for filing Mar. 16, 2007] [hereinafter "Def.'s Reply"].) This issue is fully briefed and ripe for review.

ANALYSIS

1. Violation of Federal Rule of Criminal Procedure 16(a)(1)(G)

Although Defendant proffers several bases for excluding the Expert Testimony, I need only address exclusion under Federal Rule of Criminal Procedure 16. Defendant argues that in failing to timely disclose its intention to utilize Expert Testimony, the Government violated the court's discovery instructions, warranting exclusion under Federal Rule of Criminal Procedure 16(d)(2). (Def.'s Br. at 17–20.) The Government counters that it did not violate any discovery deadline because: (1) the court declined to set a deadline for Rule 16 discovery; and (2) twenty-five days is sufficient for Defendant to obtain a rebuttal expert. (Gov't's Resp. at 7–9.) Further, the Government argues that even if it did violate a discovery deadline, a continuance rather than exclusion is the appropriate remedy. (*Id.* at 8–11.)

Based on generalized representations that neither party planned on calling expert witnesses in its case-in-chief, this court declined to set an expert witness disclosure deadline. (*See* Order and Mem. of Decision at 36 [filed Aug. 28, 2006].) Nonetheless, I find the Government violated the spirit, if not the letter of Federal Rule of Criminal Procedure 16(a)(1)(G). This rule requires the Government to provide, at defendant's request, a written summary of expert testimony to be used during its case-in-chief. Fed. R. Crim. P. 16(a)(1)(G) (2006). Although the Rule does not mandate disclosure by a specific date, the advisory committee's notes make clear that "it is expected that the parties will make their requests and disclosures in a timely fashion." Fed. R. Crim. P. 16(a)(1)(G) 1993 advisory committee's notes. As the Government aptly explained in one of its earlier submissions to the court, "The purpose of the Rule was to prevent surprise, to

both parties, arising from the use of scientific and non-scientific expert testimony. . . . Rule 16 is intended to recognize that fairness dictates that both parties have adequate notice of the other's experts to prepare for trial." (Gov't's Resp. to Def.'s Mot. to Compel the Gov't to Produce Summs. of Any Anticipated Opinion Testimony, Including the Witness' Opinions and Bases and Reasons Therefor and the Witness' Qualifications at 1–2 [filed June 2, 2006] [hereinafter "Gov's Resp. to Mot. to Compel"].) In fact, in this submission, the Government proposed that the court set a Rule 16 expert witness disclosure deadline for both parties ninety days prior to the start of trial. (*Id.* at 2.) "Such a schedule," explained the Government, "will allow all expert summaries to be prepared and exchanged sufficiently in advance of trial so that the court can entertain motions with respect to the experts and conduct any necessary hearing in advance of trial to facilitate trial preparation." (*Id.* at 2–3.) Coincidentally, ninety days is also the default deadline in the civil rules. *See* Fed. R. Civ. P. 26(a)(2)(C) (2006).

In the instant case, I find the Government violated Rule 16(a)(1)(G) by patently failing to make a timely disclosure of its intent to introduce the Expert Testimony. Arguably, the Government should have met its own proposed ninety-day expert disclosure deadline. Regardless, at the very least, the Government should have disclosed its intention to use the Expert Testimony by January 17, 2007, when it notified Defendant of its intent to offer evidence of the alleged backdating, at which point it is difficult to conceive that the Government did not know it would need to utilize the testimony. *See United States v. Davis*, 244 F.3d 666, 673 (8th Cir. 2001) ("Delayed disclosure is inconsistent with the discovery obligations set forth in Fed. R. Crim. P. 16 . . ."); *cf. United States v. Stevens*, 380 F.3d 1021, 1025–26 (7th Cir. 2004) (finding

no violation of Rule 16 when the government turned over an expert fingerprint report ten days before trial “because it turned over the expert report as soon as it learned the report existed”).

The Government points to several cases finding no Rule 16 violation when expert testimony was disclosed much closer to the start of trial than in the instant case. (See Gov’t’s Resp. at 7–8 [citing, *inter alia*, *United States v. Edmondson*, 962 F.2d 1535, 1547 (10th Cir. 1992) (finding no abuse of discretion when trial court ruled seven days was sufficient for defendant to respond to newly introduced fingerprint test); *United States v. Stevens*, 380 F.3d 1021, 1025–26 (7th Cir. 2004) (finding no violation of Rule 16 when the government disclosed an expert fingerprint report ten 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 ten business days before trial).] This court finds none of the cases cited by the Government are sufficiently analogous to the case at hand.

The national security aspects of this case place heavy burdens on all parties. In particular, the Classified Information Procedures Act (“CIPA”), 18 U.S.C. App. 3 §§ 1–16 (2006), has greatly complicated and increased the work involved in the trial-preparation process.¹ This court

¹CIPA section 6(a) provides that, upon request by the government, a court must conduct a hearing in order to “make all determinations concerning the use, relevance, or admissibility of classified information.” 18 U.S.C. App. 3 § 6(a) (2006). Once section 6(a) determinations have been made, CIPA section 6(c) provides that, upon motion by the Government, a court may order substitution of relevant classified evidence with either: (1) a statement “admitting relevant facts that the specific classified information would tend to prove;” or (2) a summary of the specific classified information that provides the defendant with “substantially the same ability to make his defense as would disclosure of the specific classified information.” *Id.* § 6(c).

has held numerous CIPA hearings in the months leading up to trial, with the last hearing only ten days ago, and each presumptively requiring extensive preparation by both parties. Further, this case has led to the production of thousands of pages of discovery by the Government. None of the cases cited by the Government contemplate the complexity of case such as the one at bar; thus, I find them all poignantly distinguishable.

Moreover, I find twenty-five days notice of the Expert Testimony is insufficient to comply with Rule 16(a)(1)(G) as formulated by the Government. Considering the complexity of the case at bar, as well as the extensive pre-trial interaction between the parties, a Rule 16 disclosure a mere twenty-five days prior to this trial is akin to making the disclosure on the eve of a more common criminal prosecution. Such an eleventh-hour disclosure fails to “prevent surprise,” give “adequate notice,” and allow the court to “entertain motions with respect to the experts and conduct any necessary hearing in advance of trial to facilitate trial preparation.” (Gov’t’s Resp. to Mot. to Compel at 2–3.) Thus, this court finds the Government has failed to comply with the dictates of Rule 16(a)(1)(G).

2. Sanction Under Federal Rule of Criminal Procedure 16(d)(2)

“Rule 16(d)(2) of the Federal Rules of Criminal Procedure gives the district court broad discretion in imposing sanctions on a party who fails to comply with a discovery order” or other Rule 16 discovery mandates. *United States v. Wicker*, 848 F.2d 1059, 1060 (10th Cir. 1988). If the court finds a Rule 16 violation, Rule 16(d)(2) provides a number of ways for the court to address the violation:

(A) order the party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.

Fed. R. Crim. P. 16(d)(2) (2006). Additionally, the Tenth Circuit has identified:

several considerations a district court should make in determining which sanction is appropriate for failure to comply with Rule 16: (1) the reasons the government delayed in 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.

United States v. Martinez, 455 F.3d 1127, 1130 (10th Cir. 2006). It is important to note that “these three factors should merely guide the district court in its consideration of sanctions; they are not intended to dictate the bounds of the court’s discretion.” *Wicker*, 848 F.2d at 1061; accord *United States v. Russell*, 109 F.3d 1503, 1511–12 (10th Cir. 1997). I consider each of these factors below.

First, I find that although there is no evidence of bad faith on the part of the Government, there is clear evidence of gross negligence. As discussed above, at minimum, the Government should have disclosed its intention to use the Expert Testimony by January 17, 2007, when it notified Defendant of its intent to offer evidence of the alleged backdating, at which point it is difficult to conceive that the Government did not actually know it would need to utilize the testimony. Even absent actual knowledge, due diligence clearly would have led the Government to realize its need to utilize the Expert Testimony at a far earlier date. Thus, I find the Government has no mitigating reason for failing to make a timely Rule 16 disclosure.

Second, I find the Government's delay caused prejudice to Defendant. "To support a finding of prejudice, the court must determine that the delay impacted the defendant's ability to prepare or present its case." *United States v. Golyansky*, 291 F.3d 1245, 1250 (10th Cir. 2002). As discussed above, considering the extensive pre-trial burdens on all parties, the delay in disclosing proposed expert testimony would clearly prejudice Defendant absent a continuance.

Finally, although any prejudice to Defendant may be cured by granting a continuance, I find other factors militate in favor of exclusion rather than a continuance. *See Russell*, 109 F.3d at 1512 (finding that a continuance is not mandated "just because it will cure prejudice"). This court recognizes that it is the "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 *Golyansky*, 291 F.3d at 1249). This is just such a rare case.

The Tenth Circuit has made clear that "[e]ven in the absence of prejudice, integrity and scheduling considerations *alone* may justify suppression of otherwise admissible evidence offered by the delinquent party." *Russell*, 109 F.3d at 1510–12 (emphasis added) (citing *Taylor v. Illinois*, 484 U.S. 400, 414 [1988] [stating that when determining whether preclusion is an appropriate sanction for a discovery violation, "[t]he interest in the fair and efficient administration of justice" is one factor that courts must "weigh in the balance"]); *accord Wicker*, 848 F.2d at 1061 ("On occasion the district court may need to suppress evidence that did not comply with discovery orders to maintain the integrity and schedule of the court even though the defendant may not be prejudiced."). I find in the case at bar that scheduling considerations as well as the fair and efficient administration of justice counsel strongly against granting a continuance.

An eight-week trial has been set. Because of concerns over the length of the trial, the large number of Colorado residents who may perceive themselves to have been affected by financial losses at Qwest, as well as extensive publicity regarding the case, one thousand juror questionnaires were sent out in mid-January 2007 to two divisions of the court. Once returned, this court carefully reviewed the questionnaires, ultimately requesting that eighty jurors report to the court house today, March 19, 2007. If I were to grant a continuance in this case to allow Defendant sufficient time to prepare a rebuttal to the Expert Testimony, it would require this court to go through the entire jury questionnaire process again, as juror availability and exposure to publicity would once again be an issue. Further, this court, like most federal district courts in the country, has a full docket. A continuance in the instant case, particularly considering the length of the trial, will almost assuredly prejudice parties in other criminal matters and conceivably raise speedy trial concerns. Based on the prejudice caused by the Government's gross negligence in delaying disclosure of the Expert Testimony, as well as the burdens on the judicial process in granting a continuance, this court finds exclusion of the Expert Testimony is the appropriate sanction for the Government's Rule 16 violation. *See Davis*, 244 F.3d at 673 ("We hold the district court was justified in excluding evidence that was produced late because of the government's reckless misconduct that prejudiced the defense, rather than granting a continuance, in order to maintain the integrity of the judicial process and respect the pressing scheduling problems of the district court."); *Russell*, 109 F.3d at 1512 (upholding district court's exclusion of testimony, even in the absence of bad faith on the part of the government, to preserve the "integrity and schedule" of the court); *see also Wicker*, 848 F.2d at 1062 (upholding district

court's exclusion of expert testimony and report in view of the court's "pressing schedule" and "the failure of a prior continuance and deadline to ensure timely discovery").²

3. Conclusion

Based on the foregoing it is therefore ORDERED that Defendant's motion to exclude the Expert Testimony is GRANTED.

Dated this 22nd day of March, 2007

BY THE COURT:

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

²The court notes that its decision here does not prohibit the Government from introducing the Expert Testimony as rebuttal. The language of Rule 16 only requires summaries for expert witnesses the Government plans to use in its case-in-chief. *See* Fed. R. Crim. P. 16(a)(1)(G) (2006). "[T]he [G]overnment [is] *not* required to provide notice of expert rebuttal witnesses." *United States v. Cervantes-Cardenas*, No. 06-50182, 2007 U.S. App. LEXIS 4175 at *3 (10th Cir. Feb. 16, 2007); *accord United States v. Frazier*, 387 F.3d 1244, 1269 (11th Cir. 2004); *United States v. DiCarlantonio*, 870 F.2d 1058, 1063 (6th Cir. 1989); *United States v. Barrett*, 766 F.2d 609, 617 (1st Cir. 1985); *United States v. Angelini*, 607 F.2d 1305, 1308-09 (9th Cir. 1979).