

**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.

**MOTION TO STRIKE TESTIMONY OF DAVID WEINSTEIN
RELATED TO CHARACTER EVIDENCE,
OR, IN THE ALTERNATIVE, FOR A MISTRIAL**

Defendant Joseph P. Nacchio, by and through undersigned counsel, moves a) to strike the testimony of government witness David Weinstein as it relates to character evidence of Mr. Nacchio, and b) for a mistrial on the basis of prejudicial, inadmissible testimony presented to the jury.

On March 29, 2007, Mr. Weinstein was asked a series of questions on cross-examination related to detailed financial information that Mr. Nacchio provided to Mr. Weinstein in the course of his services as a financial advisor. (Tr., Vol. 13 at p. 1627 and 1642-1644). Specifically, Mr. Weinstein testified that although he advised Mr. Nacchio to sell more of his Qwest stock options in 2000 and 2001, Mr. Nacchio did

not do so because he expected great things of the company and believed in the future of the company. (*Id.* at 1643).

Mr. Weinstein then testified about specific conversations he had with Mr. Nacchio in 2000 and 2001 in which Mr. Nacchio indicated that he believed the telecom industry and Qwest in particular were “getting hammered” but that they would recover. (*Id.* at 1644) Mr. Weinstein was then asked if he believed that Mr. Nacchio was telling him the truth about those statements and Mr. Weinstein said yes. (*Id.*)

On redirect examination, the government requested a bench conference to address an issue that the Court had already excluded under Rule 404(b) - namely that Mr. Nacchio allegedly asked Mr. Weinstein to backdate an invoice so that Qwest would pay for services performed by Mr. Weinstein.

At first, the government argued that defense counsel “raised the issue of whether it could be just a mistake that Mr. Nacchio did not discuss the – that he had previously signed irrevocable election.” (*Id.* at 1674-1675). The Court correctly recognized that asking Mr. Weinstein whether he had made a mistake in his memorandum did not implicate the issue the government wanted to raise, as “he was talking about this witness making a mistake, not Mr. Nacchio making a mistake on the date.” (*Id.* at 1676).

The government then argued that it should be able to raise the issue under Rule 608(b) as a specific instance of misconduct. The Court instructed the government that “you can ask him if there were other occasions when you thought he wasn’t telling you

the truth. I think that's fair rebuttal." (*Id.* at 1677). However, the government argued that the question it wanted to ask was not about other occasions when Mr. Nacchio did not tell Mr. Weinstein the truth, but rather whether Mr. Weinstein was "aware of another time when Mr. Nacchio asked you to assist him in an act of dishonesty." The Court permitted the question, finding that defense counsel had opened the door to this question because "you asked him to vouch for his truthfulness on this occasion." (*Id.* at 1678).

The government was thus permitted to engage in the following colloquy with Mr. Weinstein:

Q: I believe you – that Mr. Stern asked you a series of questions about your relationship with Mr. Nacchio and whether or not you thought he was telling you the truth on a matter. Do you recall that?

A: Yes

Q: And are you aware of another occasion in 2000 where Mr. Nacchio asked you to assist him in an act of dishonesty involving Qwest?

A: Yes

The Court erred in permitting this questioning. Prior to Mr. Weinstein's testimony, the Court had already ruled that the invoice evidence was not permitted under Rule 404(b), and the government was clear at the bench conference that the testimony was not being offered for any of the bases permitted under Rule 404(b). Thus, Rule 404(b) can not be a proper basis for its admission.

The questioning was not authorized under Rule 608(b). As an initial matter, Rule 608(b) deals with specific instances of conduct that attack a *witness's* character for

truthfulness. The instance the government asked Mr. Weinstein about was not a specific instance of conduct by Mr. Weinstein, but an alleged act by Mr. Nacchio. Mr. Weinstein's truthfulness or untruthfulness was not at issue, and the truthfulness or untruthfulness of a non-testifying defendant cannot be raised under Rule 608(b).

Moreover, the question asked by the government was not what the Court allowed - - whether "there were other occasions where you thought he (Mr. Nacchio) wasn't telling the truth." Instead, it went to a matter entirely outside of the scope of the cross-examination and beyond the narrow question asked by defense counsel of Mr. Weinstein. The government's question had nothing to do with Mr. Nacchio being untruthful with Mr. Weinstein on that particular occasion or any other occasion - it had to do with alleged act of dishonesty of Mr. Nacchio toward Qwest.

More importantly, the defense did not put Mr. Nacchio's character for truthfulness at issue under Rule 404(a) or Rule 405. Rather, defense counsel's question was narrowly directed to whether Mr. Weinstein believed Mr. Nacchio was sincere with his financial advisor, on this particular occasion in the course of his professional relationship, when he told him he was bullish on Qwest stock. This is not evidence of his general character for truthfulness - a topic specifically not raised with Mr. Weinstein. Rather, it is evidence of Mr. Nacchio's state of mind concerning the sale of stock alleged in the indictment, and tended to negate the element of scienter and establish good faith. Defense counsel's efforts to develop these defenses, as he did on this occasion, cannot be construed as opening the door to a general assault on

Mr. Nacchio's honesty. Evidence of character for truthfulness is only proper if it comports with the Rules of Evidence. Evidence of good faith and lack of scienter does not swallow those rules.

Finally, because the question dealt with Mr. Nacchio's actions in relation to Qwest, wholly collateral from the issues raised in the indictment, it was also highly inflammatory and prejudicial and should have been excluded under Rule 403.

Ultimately, if the government did not want Mr. Weinstein to testify that he believed Mr. Nacchio was truthful with him in a particular conversation, the government should have objected to the question as irrelevant or improper opinion testimony. The government should not be rewarded for failing to object by being allowed to raise wholly prejudicial inferences not admissible under the Rules of Evidence.

Because this questioning was improper, inadmissible and highly prejudicial, we move for a mistrial. In the alternative, the evidence should be stricken from the record and the government should be instructed that it cannot discuss this testimony during closing arguments in this case.

Respectfully submitted this 1st day of April, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April 2007, a true and correct copy of the foregoing **MOTION TO STRIKE TESTIMONY OF DAVID WEINSTEIN RELATED TO CHARACTER EVIDENCE, OR, IN THE ALTERNATIVE, FOR A MISTRIAL** was served on the following through the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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