IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

UNITED STATES' RESPONSE TO MOTION FOR A MISTRIAL
ON THE BASIS OF EXCLUSION OF EXHIBIT A-1031
OR PROPER EXAMINATION RELATING THERETO

The United States respectfully responds to Defendant's "Motion for a Mistrial on the Basis of the Exclusion of Exhibit A-1031 or Proper Examination Relating Thereto" (Docket No. 329).

BACKGROUND

During the direct examination of David Weinstein, government counsel offered into evidence two paragraphs in Exhibit 210. Tr. 1583. The exhibit was received without objection and published to the jury. Tr. 1583. The exhibit reflected Mr. Weinstein's memorandum regarding a December 9, 2000 conversation he had had with Defendant. Tr. 1584. The last line stated, "Joe is signing an irrevocable election to sell the shares now, and that is why he can sell the shares during a non-window period." Tr. 1585.

On cross-examination, defense counsel showed Mr. Weinstein defense exhibit A-1031. Tr. 1665. This exhibit, as explained in defense counsel's motion, is a memorandum of a December 7, 2000 conversation that Mr. Weinstein had with Yash Rana, who was a corporate counsel at Qwest. *See* Docket No. 329. The memorandum does not reflect that Defendant was on the call. The language in which Defendant seems most interested is the following: "I asked Yosh if there was a problem from an insider trading perspective and Yosh told me there was not. Joe previously made an irrevocable election to sell the shares during the last window period and according to their legal counsel, this qualifies for an exemption under the insider trading rules." *See* Docket No. 329, Ex. 2 at 2.

During the cross-examination, Mr. Weinstein confirmed that he had prepared the memorandum of that conversation in the ordinary course of his business. Tr. 1665. Defense counsel then offered the exhibit into evidence. The following colloquy ensued:

> MR. STRICKLIN: Objection, 805, hearsay within hearsay, Your Honor.
> THE COURT: Well, when you say hearsay within hearsay, what you mean is, the first person in the chain is under no business duty to report, right?
> MR. STRICKLIN: I mean that exactly, Your Honor. This is a classic hearsay contained in this memorandum.
> THE COURT: Sustained.

Tr. 1666.

Defense counsel then established that Mr. Weinstein had this conversation in the course of his duties as a financial advisor, and was giving Mr. Rana advice, and that it was part of his business to report his duties. Tr. 1666-67. Defense counsel then offered the exhibit again,

government counsel again objected, and the Court again sustained the objection. Tr. 1667. Defense counsel then proceeded as follows:

> Q. Using that exhibit, does it refresh your recollection in any way as to whether or not Mr. Nacchio had already signed or made an irrevocable election before December in terms of the growth shares.
> MR. STRICKLIN: He did not say his memory needed refreshing, inappropriate.
> THE COURT: Sustained.
> BY MR. STERN: Q. Do you know the memorandum I'm referring to, Mr. Weinstein?
> A. Yes.
> Q. Is it possible you made a mistake in that memorandum?
> A. Anything is possible. yes.

Tr. 1667.

ARGUMENT

Defense counsel now contends that this exhibit should have been admitted into evidence. Defendant makes four arguments. First, defense counsel argues that the Court should have admitted the exhibit as a business record under Federal Rule of Evidence 803(6). Second, defense counsel argues that the Court should have allowed defense counsel to cross-examine the witness using the memorandum to refresh his recollection under Rule 803(5). Third, defense counsel argues that the exhibit should have been admitted under the residual hearsay exception in Rule 807. Finally, defense counsel argues that the Court's decision to exclude the exhibit deprived him of his opportunity to cross-examine Mr. Weinstein and therefore deprived him of his rights under the Confrontation Clause and the Due Process Clause. As set forth below, all of these arguments are meritless.

I. The memorandum is hearsay

It is undisputed that the memorandum at issue contains multiple levels of hearsay, each of which must be admissible. *See* Fed. R. Evid. 805. The memorandum is an out-of-court statement reflecting a narration by Mr. Weinstein of a conversation he had with Mr. Rana, in which Mr. Rana discussed what he may have learned from "Joe" and/or from Qwest's "legal counsel." *See* Docket No. 329, Ex. 2 at 2. It also mentions Mr. Rana's opinion that based on what he knew at the time, there was not "a problem from an insider trading perspective." *Id.* It also is clear that defense counsel seeks to have the memorandum admitted for the truth of the hearsay statements contained in it. *See* Docket No. 329 at 5 (noting that the memorandum was "offered as evidence of a material fact"). As set forth below, none of the rules of law cited by defense counsel establish that this document should have been admitted.

II. Rule 803(6)

Rule 803(6) applies, in relevant part, to "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation ... unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

It is well established that Rule 803(6) "is premised on the reliability of records that an employee has a business duty to keep." *United States v. Arteaga*, 117 F.3d 388, 395 (9th Cir. 1997); *see* Adv. Comm. Notes to Fed. R. Evid. 803(6) (observing that in a business, all

participants ordinarily are "acting routinely, under a duty of accuracy, with employer reliance on the result, or in short 'in the regular course of business. If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail."). As one court has explained:

> We recognize, of course, that normally statements by one not a party to the business are not admissible for the truth of the matter stated unless some exception other than the business records exception is involved; the business records exception merely avoids having to call the person in the business who had the telephone conversation but does not justify admitting the statements of the outsider for their truth.

United States v. Goodchild, 25 F.3d 55, 62 (1st Cir. 1994)

Here, Defendant did not produce evidence establishing that Mr. Rana worked for Mr. Weinstein's business, or even that Mr. Rana had a duty of accuracy with respect to the specific information at issue. In fact, the memorandum suggests that Mr. Rana was largely passing along the statements of others — *i.e.*, Defendant and Qwest's legal counsel. Defense counsel's speculation that the information Mr. Rana passed along may have been truthful is insufficient to establish Mr. Rana's statement as one that is itself a business record under Rule 803(6). *United States v. Bortnovsky*, 879 F.2d 30, 34 (2d Cir. 1989) (observing that an outsider's statement did not satisfy Rule 803(6) absent a "showing that he had a duty to report the information he was quoted as having given") (citing cases); *cf. Romano v. Howarth*, 998 F.2d 101, 108 (2d Cir. 1993) (where a nurse recorded her notes with a corrections officer, the officer's statements were

not admissible under Rule 803(6) because the "nurse's business duty ... ensures only the accuracy of her notes; it is no guarantee at all of the accuracy of the information supplied by the officer").

A few courts have found a third party statement to be admissible where the person making the memorandum independently confirms the fact and finds it to be true. *Arteaga*, 117 F.3d at 395 (ruling that third-party statements were inadmissible under Rule 803(6) "unless the employee was responsible for verifying the statements"). Here, however, there was no such verification by Mr. Weinstein of the information passed along by Mr. Rana. On the contrary, when Mr. Weinstein spoke to Mr. Nacchio a few days later, Mr. Nacchio told Mr. Weinstein that he was signing the irrevocable election "now," thus contradicting any prior suggestion that he had done so earlier.

There is also no basis to assume that Mr. Rana is a completely reliable witness on this issue. He may have simply been repeating the statements of others. Also, given that it appears that Mr. Rana appears to have had some involvement in the backdating of the irrevocable instruction (*see* United States' Response to Motion to Exclude Testimony by Stroz and Rubin, submitted March 13, 2007, at 1-4), it is not proper to assume, with any evidentiary basis, that his statements must be accurate as to all points.

III. Rule 803(5)

Rule 803(5) applies to "[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly."

As the record clearly shows, the Court did not prohibit defense counsel from using the document for this purpose. Rather, defense counsel simply asked Mr. Weinstein whether the memorandum refreshed Mr. Weinstein's recollection. As government counsel correctly observed, refreshing Mr. Weinstein's recollection in this manner was inappropriate, given that Mr. Weinstein had not indicated that he had "insufficient recollection to enable [him] to testify fully and accurately," as the rule requires. Defense counsel then proceeded on to other matters, without laying any adequate foundation for admission under this rule. Moreover, defense counsel's motion makes clear that the point of this questioning was *not* to refresh Mr. Weinstein's recollection, but to introduce the evidence "as evidence of a material fact." Docket No. 329 at 5. The Court's ruling thus was not in error.

IV. Rule 807

Rule 807 provides the following narrow "residual hearsay exception":

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement, and the particulars of it, including the name and address of the declarant.

Fed. R. Evid. 807.

"It is intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b)." 1974 Adv. Comm. Notes to Fed. R. Evid. 803(24), recodified at Fed. R. Evid. 807. The Tenth Circuit has repeated noted "that 'an expansive interpretation of the residual exception would threaten to swallow the entirety of the hearsay rule.'" *United States v. Lawrence*, 405 F.3d 888, 902 (10th Cir. 2005) (quoting *United States v. Tome*, 61 F.3d 1446, 1452 (10th Cir. 1995)).

The rule requires a district court to make specific findings. *See Herrick v. Garvey*, 298 F.3d 1184, 1192 n.6 (10th Cir. 2002) (finding that the rule did not apply where the defendant "has made no showing, and the district court made no finding, that the statement in question meets the requirements of Rule 807"). Notably, during defense counsel's examination of Mr. Weinstein, defense counsel never stated or even suggested to the Court that this memorandum should be admitted under Rule 807. Defense counsel would have had to cite this rule and present evidence that would support the findings that the Court would have needed to make. It was not error for the Court not to admit the memorandum under a rule that defense counsel never cited.

Nor has defense counsel, even now, presented evidence that establishes that the memorandum would have been admissible under Rule 807. For example, he has made no showing that the memorandum is more probative on the point for which it is offered — the information Mr. Rana passed along — than "any other evidence which the proponent can procure through reasonable efforts." As noted, the memorandum reflects the memorialization by Mr.

Weinstein of statements to him by Mr. Rana, and focuses on information Mr. Rana learned from other declarants, which appear to be Defendant and Qwest's legal counsel. Defense counsel does not suggest that all of those declarants are unavailable. *See* Fed. R. Evid. 804 (defining when a hearsay declarant is unavailable). Absent a showing that of reasonable efforts to secure this other evidence, admission pursuant to Rule 807 would be improper. *See United States v. Zamora*, 784 F.2d 1025, 1031 (10th Cir. 1986) (noting that there had been no showing "as to efforts made by defendant to obtain the information from other sources" and concluding that the residual hearsay exception did not apply).

Defense counsel also has not shown that the other requirements of the rule were met. Defense counsel has not shown that the information Mr. Rana passed along to Mr. Weinstein reflects sufficient "circumstantial guarantees of trustworthiness" that are "equivalent" to the other hearsay exceptions. For example, defense counsel has not shown that the information from Mr. Rana was confirmed by several other sources. *Contrast United States v. Harrison*, 296 F.3d 994, 1005 (10th Cir. 2002) (ruling that a statement met the trustworthiness requirement of Rule 807 where there was evidence of "consistent repetition" of the statement by the declarant on several occasions). On the contrary, Mr. Rana's impression appears to have been contradicted in large part by Mr. Nacchio's own statement to Mr. Weinstein shortly thereafter.

Nor has defense counsel shown that the notice required by the rule was provided prior to Mr. Weinstein's testimony. *See Herrick*, 298 F.3d at 1192 n.6 (ruling that Rule 807 did not apply where "there is no evidence that [the defendant] provided the government with notice");

Sours v. Glanz, 24 Fed. Appx. 912, 914 (10th Cir. 2001) (unpublished) (observing that "[t]he notice requirements of the residual hearsay rule are strictly construed").

Accordingly, even if defense counsel had offered the memorandum pursuant to Rule 807, it still would have been inadmissible.

V. Defendant's constitutional rights to cross-examination

Defendant's final argument for admission is that even if the statement was hearsay, he "has a constitutional right to vigorously confront and cross examine witnesses against him." Docket No. 329 at 6. Defense counsel submits that to the memorandum is evidence of a material fact and that the Court's failure to admit it violated Defendant's rights under the Confrontation and Due Process Clauses.

It is well settled that "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). The Tenth Circuit has recognized that "the constitutional right to cross-examine prosecution witnesses is not unlimited." *Morris v. Burnett*, 319 F.3d 1254, 1268 (10th Cir. 2003). Trial judges have "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination," at least for legitimate reasons. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).[1]

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[1] In several cases, the Supreme Court has found that certain unusual evidentiary rules limiting a defendant's ability to present an effective defense may run afoul of the Confrontation Clause. *See Holmes v. South Carolina*, 547 U.S. 319 (2006) (rule provided that where prosecution's forensic evidence was sufficiently strong, defense could not challenge it);

The Tenth Circuit has repeatedly rejected claims that a defendant's Confrontation Clause rights were violated when the defendant was prohibited from using hearsay statements to cross-examine a prosecution witness — even where the witness discussed similar evidence that was admitted as non-hearsay. *United States v. Larsen*, 175 Fed. Appx. 236, 241 (10th Cir. 2006) (unpublished) (finding no Confrontation Clause violation where a defendant had provided both inculpatory and exculpatory statements to a detective, the detective then testified on direct examination as to the defendant's inculpatory statements, and the trial court then prevented the defendant on cross-examination from eliciting the exculpatory statements, and holding that the trial court properly excluded those statements of the defendant as hearsay not subject to any exception); *Shackelford v. Champion*, 156 F.3d 1244, 1998 WL 544363, at *5-6 (10th Cir. 1998) (finding no error in a trial court's refusal to allow a defendant to cross-examine a detective with respect to a statement given by the defendant to the detective the morning after the shooting, and rejecting the argument that this hearsay evidence should have been permitted to correct a misimpression left by the prosecution); *Matthews v. Price*, 83 F.3d 328, 332 (10th Cir. 1996) (rejecting the argument that admission of hearsay evidence for the prosecution entitled the defendant, as a constitutional matter, to meet that evidence with other hearsay evidence, and noting that the "[a]dmission or exclusion of hearsay is not an exercise in scorekeeping").

Chambers v. Mississippi, 410 U.S. 284 (1973) (rule providing that party could not impeach his own witness); *Washington v. Texas*, 388 U.S. 14 (1967) (rule barred co-conspirators from testifying on each other's behalf). Defendant does not contend here that any of the rules applied by the Court here are similarly suspect.

Here, the facts are far *less* compelling for Defendant than in those cases. As noted, it is clear that defense counsel's primary purpose for seeking the admission of the memorandum was not to cross-examine Mr. Weinstein, but to present "evidence of a material fact." *See* Docket No. 329 at 5. His primary concern thus was not really to confront the government's witness, but to introduce evidence that, in the eyes of defense counsel, would support Defendant's case.

Indeed, admission of this hearsay-within-hearsay-within-hearsay information would contradict one of the central tenets of the Confrontation Clause, which is that cross-examination is an effective vehicle for determining the truth, If this memorandum had been admitted, it would have provided the jury with the purported statements of declarants who were not subject to cross-examination about those statements.

In addition, defense counsel has made no showing that he cannot call the intermediary declarant (Yash Rana) or the original declarants (Mr. Nacchio and Qwest's legal counsel) to testify. Defense counsel does not even attempt such a showing. Indeed, Defendant's case has not even begun. Because defense counsel has not shown that all of these declarants are actually unavailable, he has not been prevented from presenting his defense. He has not shown that he has any constitutional right to present his defense by submitting hearsay evidence by out-of-court declarants to the jury and thereby evading the cross-examination of those declarants whose statements he wishes to put in evidence.

VI. A mistrial is not warranted

In addition, Defendant has not shown error of such magnitude and prejudice that a mistrial is necessary. "The standard for ruling on a motion for mistrial was set down long ago in

United States v. Perez, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824). The Supreme Court held that 'courts of justice ... [may] discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.'" *United States v. Taylor*, 605 F.2d 1177, 1178-79 (10th Cir. 1979). This standard requires examination not only of whether there was error, but also of whether the error had such prejudicial impact that it impaired the defendant's right to a fair and impartial trial. *See United States v. Meridyth*, 364 F.3d 1181 (10th Cir. 2004) ("A district court has discretion to grant a mistrial only when a defendant's right to a fair and impartial trial has been impaired."); *United States v. Gabaldon*, 91 F.3d 91, 93-94 (10th Cir. 1996) (observing that motions for mistrial require "an examination of the impact of the prejudicial impact of an error or errors when viewed in the context of an entire case"). Here, defense counsel has not shown that the refusal to admit this hearsay evidence was error, let alone that it was such prejudicial error that Defendant's right to a fair and impartial trial has been impaired in the context of the entire trial.

CONCLUSION

The United States respectfully requests that the motion be denied.

Respectfully submitted this 3rd day of April, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2007, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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