

**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 TO REDACT GOVERNMENT
EXHIBIT 215, AND TO STRIKE TESTIMONY RELATING THERETO**

The United States respectfully responds to Defendant's "Motion to Redact Government Exhibit 215, and to Strike Testimony Relating Thereto" (Docket No. 327), and submits that the motion should be denied.

BACKGROUND

On March 29, 2007, David Weinstein began testifying just before lunch. Before lunch, counsel for the United States provided defense counsel with a set of the exhibits the United States intended to offer. After lunch, counsel the United States offered the introductory paragraph and paragraph 6 of government exhibit 215 into evidence. Tr. 1589. Defense counsel stated he had no objection. Tr. 1589. Those paragraphs then were published to the jury, again without objection. Tr. 1589. Counsel for the United States then asked Mr. Weinstein to read aloud paragraph 6, which he did, without objection from defense counsel. Tr. 1590. Mr

Weinstein read as follows:

I believe Joe had 5 million options – I believe Joe has 5 million options that mature in 2004 and 2005. These options were granted at \$39 per share. Joe never signed the agreement because he had a discrepancy about a specific issue. Given the fact that he never signed the agreement, it turns out Qwest can reprice the options now, and he told me this need not be disclosed. Can you believe it?

Tr. at 1590.

Counsel for the United States then asked Mr. Weinstein numerous questions about paragraph 6, drawing no objection from defense counsel. Tr. 1590-91. The following colloquy then took place:

Q. And you wrote, “Can you believe it?” Why did you ask — why did you ask, can you believe it?

MR. STERN: Excuse me, I object.

BY MR. STRICKLIN:

Q: I mean, why did you write that?

MR. STERN: This isn’t a reflection of the conversation with Mr. Nacchio. That’s his expostulation.

THE COURT: The objection is sustained.

Tr. 1591. Counsel for the United States then moved on to other matters. Tr. 1591-92.

Defendant now complains about the last sentence – *i.e.*, “Can you believe it?” — and “seeks to redact the irrelevant and prejudicial statement from government exhibit 215 before it is presented to the jury. In addition, we move to strike the questioning and testimony relating to the offending passage.” *See* Docket No. 327 at 2.

ARGUMENT

Striking the testimony and redacting the testimony is not warranted. First, the evidence was admitted — twice — without objection. *See United States v. Pflum*, 150 Fed. Appx. 840,

845 (10th Cir. 2005) (unpublished) (“[u]nder Fed.R.Evid, 103 evidentiary objections generally must be made at the time the evidence is offered”); *see id.* (citing *Sorensen v. City of Aurora*, 984 F.2d 349, 355 (10th Cir. 1993), *United States v. Gibbs*, 739 F.2d 838, 849 (3d Cir. 1984) (*en banc*) (objection was untimely when made “not when the evidence was offered, but during a motion to strike made after the government had rested”) and *United States v. Kanovsky*, 618 F.2d 229, 231 (2d Cir. 1980) (ruling that an objection was not timely “since it was not made until after the witness was excused and the jury dismissed from the courtroom”)). Given that the statement was read aloud to the jury, there is no basis for concluding that defense counsel could not have objected to the admission of the statement at the time. The only objection the Court sustained was not to the entire exhibit, but to a question seeking to have Mr. Weinstein explain what he now thinks he might have been thinking when he wrote the last statement.

Second, the statement is not irrelevant. The paragraph as a whole relates to a conversation about Defendant’s maneuvers in not signing an options agreement in early 2001 but instead signing it in August 2001, when the strike price was much lower. These maneuvers are relevant to Defendant’s state of mind, particularly regarding whether he had believed in early 2001 that Qwest’s stock price was likely to fall. The last sentence of this paragraph is part of the context of this conversation, and sheds light on the tenor of the conversation. For example, the jury could infer that this query indicates that Defendant’s representation, as communicated to Mr. Weinstein, was the kind that inspires suspicion or incredulity. If the last sentence had been “I see no problem,” Defendant would surely recognize the statement as having relevance. And this

detail is exactly the kind of fact that lends credibility and character to a witness's description of a conversation.

Third, defense counsel has pointed to no authority that requires the Court to sift through exhibits after they have been admitted and examine, word by word, whether each sentence is relevant. Courts are not required to cut and paste each piece of evidence to excise the parts that lawyers do not like.

Finally, Defendant has not identified any strong prejudice from this statement that would warrant striking it from the record after the fact.

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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