IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH P. NACCHIO,

Defendant.

REPORTER'S TRANSCRIPT
TRIAL TO JURY
VOLUME TWENTY-FOUR

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM, Judge, United States District Court for the District of Colorado, commencing at 1:04 p.m., on the 10th day of April, 2007, in Courtroom A1001, United States Courthouse, Denver, Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
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APPEARANCES

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P R O C E E D I N G S

THE COURT: Good afternoon, members of the jury.

I would like to explain to you what is going on. We have an unusual procedure, and I would like to share with you as much information as the law permits me to share.

You may recall that during the testimony of Mr. Weinstein last week there was considerable controversy and discussion about an exhibit numbered as Defendant's Exhibit A -- Exhibit A-1031, and you may not remember what that exhibit was, and I'm sure we'll find out in a few moments.

I thought that the rule -- that the exhibit contained some hearsay within hearsay, so I sustained an -- a Government objection to the offer of that exhibit by the defendant.

Later on, the defendant raised additional arguments and convinced me that the exhibit ought to come in, but I allowed it to come in only under the condition that Mr. Weinstein could come back here and testify fully about the exhibit, because the original examination about the exhibit was somewhat truncated.

So procedurally, what I've allowed the Government to do is to reopen its case for a limited purpose at this time. So you're really hearing a part of the Government's case at this juncture. And I will start by receiving Exhibit A-1031, as I said, if Mr. Weinstein appeared, that is now received as an exhibit, and it's part of the record.

(Exhibit A-1031 admitted.)

MR. STRICKLIN: May it please the Court.

I think we need to have the witness sworn in.

THE COURT: All right.

(**DAVID WEINSTEIN, GOVERNMENT'S WITNESS, SWORN**)

COURTROOM DEPUTY: Please be seated.

Please restate your name for the record.

THE WITNESS: David A. Weinstein.

DIRECT EXAMINATION

BY MR. STRICKLIN:

Q. Good afternoon, sir.

A. Good afternoon.

Q. Thank you for being available and coming back here today.

Now, the other day when you testified, one of the -- we addressed a number of subjects. One of the subjects we addressed was a series of phone calls you had between the defendant, Mr. Nacchio, and yourself between November 3 and December 13. Do you recall that, sir?

A. Yes.

Q. If you look in the binder before you, Government's Exhibit 210, do you see that before you?

A. 210?

Q. Yes, sir.

This has been admitted. We would ask to publish it to the jury, Your Honor.

THE COURT: Proceed.

THE WITNESS: Yes.

BY MR. STRICKLIN:

Q. Tell the -- remind the jury exactly -- this is a phone call between you and Mr. Nacchio. And what was the date that this phone call occurred?

A. December 9, 2000.

Q. And there was some parts obviously that had been redacted and removed. They weren't relevant to the case. On paragraph 3 there, about halfway down, it says -- it says, "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."

When you wrote "shares" there, what shares are you referring to?

A. The growth shares.

Q. And is that what Mr. Nacchio told you on December the -- December the 7th?

A. I believe so, yes.

Q. Okay. Now, I -- also look in your book, you see Government's Exhibit 100.

If I could have this published to the jury, Your Honor.

THE COURT: All right.

BY MR. STRICKLIN:

Q. Sir, I asked you if you had ever seen this document prior to me showing it to you. Please remind us, what was your answer to that, sir?

A. No, I have not seen that document.

Q. Is that Mr. Nacchio's signature on Government's Exhibit 100?

A. I believe so, yes.

Q. What is the date of that document?

A. November 3, 2000.

Q. On November 3, 2000, did you have a phone call with Mr. Nacchio?

A. Yes.

Q. If you go in your binder there to Government's Exhibit 206, is that -- is that the memorandum you took of the phone call that you had on November 3?

A. Yes.

MR. STRICKLIN: If we could publish this to the jury, Your Honor. It's been admitted.

THE COURT: It has been admitted?

MR. STRICKLIN: It has been.

THE COURT: All right. Proceed.

BY MR. STRICKLIN:

Q. And this is the phone call you had with Mr. Nacchio, November 3. Now, during this phone call, did you take any notes that you discussed the growth shares with Mr. Nacchio in that phone call?

A. No.

Q. And did you note anywhere that he had told you about making some sort of election to sell those growth shares on that day?

A. No.

Q. There is also one other phone call, and -- I ask you to look in your binder at Defendant's Exhibit 1030. Do you happen to that have that in your binder?

A. 1030, no.

Q. Would you look on the screen there. Do you see that on the screen?

A. Yes.

MR. STRICKLIN: Ask permission to publish this. This has already been admitted, Your Honor.

THE COURT: All right. Proceed.

BY MR. STRICKLIN:

Q. If we could --

THE COURT: Let's make sure it is admitted.

BY MR. STRICKLIN:

Q. Now that it's up on the screen. This is another phone call you had with Mr. Nacchio. And what is the date of this phone call, sir?

A. November 27, 2000.

Q. There is a number of subjects that the memorandum addresses. But paragraph 3, I believe it talks about the growth shares; is that correct?

A. Correct.

Q. All right. Now, in this -- anywhere in this memorandum, but specifically in paragraph 3, did Mr. Nacchio tell you that he had already made an election -- an irrevocable election to sell these growth shares?

A. No.

Q. Now, aside from working with Mr. Nacchio directly, did you occasionally have a chance to speak with others that were assisting him with his finances?

A. Yes.

Q. I think you mentioned during your testimony Nicole

Bonsness. Do you recall that?
A. Yes.
Q. What about a Yash Rana, did you ever speak with a Mr. Yash Rana?
A. Yes.
Q. Okay. And tell the jury who you understood Mr. Rana to be.
A. I believe he's an attorney at Qwest, in the legal department.
Q. Okay. And do you -- did you make a notation of a phone call that you had with Mr. Rana that occurred on December the 7th?
A. Yes.
Q. Of 2000?
A. Yes.
Q. If you look before you -- Defendant's Exhibit A-1031. Is that the note you made about the phone call you had with Mr. Rana?
THE COURT: Did you want it published?
MR. STRICKLIN: I do, Your Honor. There is at the bottom part there, addendum, it's -- it's a message he left with somebody else that I would ask to redact that portion of it, just out of relevance and hearsay, and whatever else.
THE COURT: The words "addendum" and the paragraph.
MR. STRICKLIN: Yes, sir.
MR. RICHILANO: Your Honor, it's part of the exhibit,

the exhibit is admitted. It's relevant to the context of the preceding paragraph.

THE COURT: All right. The -- you may offer all the exhibit for what it's worth.

MR. STRICKLIN: That's fine. It's in evidence.

If we could publish it then, Your Honor.

THE COURT: Proceed.

BY MR. STRICKLIN:

Q. Okay. Now, let's -- if we could on the top there, the date to the file says December 12, 2000, but the phone call actually occurred on December the 7th, 2000?

A. Correct.

Q. And that is two days prior to your phone call with Mr. Nacchio that we've discussed about that happened on December the 9th; is that correct?

A. Correct.

Q. And that was contained in Government's Exhibit 210.

Now, there -- there about on the first large paragraph, it says -- it says, "The remaining" -- beginning with, "The remaining two-thirds will be paid to Joe."

Now, this is in relationship to the growth shares?

A. Yes.

Q. And it says, "Remaining two-thirds will be paid to Joe. In essence, there will be a share withholding, and the net amount of shares will then be immediately sold."

Now, who is telling you this information?

A. The remaining two-thirds, nobody is telling me that. That's a note to myself.

Q. Okay. And it says -- it says -- the information contained in here, who are you getting the information from?

A. Yash Rana.

Q. Okay. And it says, "The remaining -- there will be share withholding." Remind the jury what share withholding is.

A. Share withholding is, out of the payment that was due Mr. Nacchio in January, taxes have to be withheld. You can pay the taxes by either writing out a check or use existing shares. The game plan was to use existing shares to receive less shares.

Q. There was also a side benefit to that. This way, less shares are reported sold?

A. Correct.

Q. Why is that -- why did you include that note in this memorandum?

A. Well, instead of selling $16 million worth of stock, we'd be selling $12 million worth of stock.

Q. So it would reflect differently in the public; is that right?

A. Right.

Q. Now, it says, "I asked Yash if there was a problem from an insider trading perspective, and Yash told me there was not."

That's clearly what Mr. Rana told you?
A. Yes.
Q. And it says, "Joe previously made an irrevocable election to sell the shares during the last window period, and according to their legal counsel, this qualifies as an exemption from the insider trading rules."
Once again, to be clear, it's Mr. Rana that is telling you this, not Mr. Nacchio?
A. That's correct.
Q. Okay. Now, did you keep up when the window periods were for Qwest Communications?
A. No.
Q. And did you know the specific dates of when the last -- on December 7, when the window had most recently closed?
A. No.
Q. Now, the -- did Mr. Rana ever contact you later and tell you that he was contacting a law firm to draft an instruction to do just this, just two days later?
MR. RICHILANO: Objection, hearsay.
MR. STRICKLIN: If I may be heard, Your Honor.
THE COURT: Yes.
MR. STRICKLIN: Two things. First of all, if he didn't say it, he didn't hear it, it's not hearsay.
And second of all, considering the document -- about -- the document, I have a right to ask the witness

whether there were further communications he had with Mr. Rana on this particular memorandum.

THE COURT: The Court believes this is not hearsay, because the question is not what he told him but whether he ever called and told him this. If the answer is no, that's true.

BY MR. STRICKLIN:

Q. Did he ever -- sorry.

THE COURT: The objection is overruled.

BY MR. STRICKLIN:

Q. So did Mr. Rana ever tell you that he was -- that he was on the next day, Friday, December 8, that he was -- he had contacted a law firm to draft an irrevocable election?

A. No.

Q. Did Mr. Rana ever get back with you later and tell you that Mr. Nacchio had decided on Salomon Smith Barney as the broker who was going to sell the shares?

A. No.

Q. Did Mr. Rana ever get back with you later and tell you that Mr. Nacchio had signed a document that had been backdated to reflect --

MR. RICHILANO: Objection, Your Honor, misstates the evidence. Argumentative. I ask that it be stricken.

THE COURT: All right. You can cross-examine. I've persisted in saying, that's not a legal objection. You can cross-examine as to whatever portion you disagree with, Mr. Richilano. Objection is overruled.

MR. RICHILANO: Argumentative, Your Honor.

THE COURT: Well, let me look at the argumentative objection.

All right. That is argumentative. I'll sustain that objection.

MR. STRICKLIN: I'll rephrase the question.

BY MR. STRICKLIN:

Q. Did Mr. Rana ever come back later and tell you that Mr. Nacchio had signed a document that was merely papering a previous oral instruction?

A. No.

MR. RICHILANO: Same objection, Your Honor.

THE COURT: Well, I don't know how he rephrased it, to make it not argumentative.

MR. RICHILANO: Well, it's --

THE COURT: You don't like the word "papering"?

MR. RICHILANO: Because what he's doing is essentially testifying.

THE COURT: I disagree. I think this one is not argumentative. I don't see how else he could phrase it.

BY MR. STRICKLIN:

Q. Did Mr. Rana ever call you and tell you that Mr. Nacchio had signed a document that had somehow papered the deal that he

had -- of an oral instruction he had given before?
A. No.
Q. And how about Mr. Nacchio himself, did he ever tell you he was signing -- that he had signed a document that had papered an oral instruction that he had previously given?
A. No.

MR. STRICKLIN: I'll pass the witness, Your Honor.

THE COURT: Mr. Richilano, cross-examination.

CROSS-EXAMINATION

BY MR. RICHILANO:
Q. Mr. Weinstein, good afternoon.
A. Good afternoon.
Q. We've never met, have we?
A. Nope.
Q. You testified last time that you had several meetings with the prosecutors and that you refused to meet with the defense; is that correct?
A. Yes.
Q. Remember? And you just had recent meetings with Mr. Stricklin concerning your testimony here today; is that correct?
A. Yes.
Q. And you, again, refused to meet with us; is that correct?
A. Yes.
Q. Sir?

A. Yes.
Q. Mr. Weinstein, I'd like you to look at A-1031, Exhibit A-1031.
A. Okay.
MR. RICHILANO: Permission to publish, Your Honor?
THE COURT: Yes.
BY MR. RICHILANO:
Q. You talked about this a moment ago, and I want to go through it with you.
Now, you had been dealing with Mr. Rana on behalf of Mr. Nacchio before this conversation; is that correct?
A. I don't believe so. I might have.
Q. You knew that he was involved on behalf of Mr. Nacchio in connection with how to handle the payment of these growth shares, correct?
A. Yes.
Q. Yes. And in fact, your company, Ayco, on behalf of Mr. Nacchio, proposed to Qwest an enhanced estate plan, EEP?
A. Yes.
Q. And that was as early as October of 2000, right?
A. I don't remember the date, but, okay.
Q. It was well before this, correct?
A. I -- I don't recall, but -- probably.
Q. And that was in anticipation of doing something with the proceeds of this growth share payment that was sure to occur on

January 2, correct?
A. Yes, with a portion of it, that's correct.
Q. All right. And the idea was to defer as much of that income as possible for tax purposes, right?
A. Well -- well, not as much as possible. We decided on a specific dollar amount, yes.
Q. Defer that portion, correct?
A. Defer a portion.
Q. Right. And that turned out to be a third, correct?
A. No, it was $4-1/2 million.
Q. All right. Let's go through this. You say that on December 7 you spoke with Mr. Rana.
A. Correct.
Q. The third sentence, where it says, "I believe all outstanding issues regarding the growth shares have been resolved," right?
A. Yes.
Q. Is that your statement to you in your notes?
A. That's my statement to myself, yes.
Q. In other words, you're not saying it was Mr. Rana telling you that, right?
A. That's correct.
Q. And then it says, the next says, "100 percent of the shares will be sold immediately on January 2," correct?
A. Correct.

Q. All right. Now, is that information received from Mr. Rana, or was that your understanding prior to this conversation?
A. That's my understanding.
Q. All right. In fact, that was your understanding well before this conversation?
A. That was the game plan, yes, that's correct.
Q. The game plan was always to sell 100 percent of those shares, right?
A. Of the net shares, that's correct.
Q. And so here the next sentence says, "One-third will go into the deferral plan as cash." And that's -- we just discussed that, right?
A. Right, that about 7 or 8 million, part of that was for the EEP you mentioned.
Q. Okay. So the one-third -- maybe I was confusing. The one-third is the total amount of the plan deferral, right?
A. Correct.
Q. And then 4.5 million of which is this EEP thing that you proposed to Qwest, right?
A. Correct.
Q. Previously proposed to Qwest, right?
A. That is correct.
Q. All right. And then as you testified on direct, the next sentence, where you say, "The remaining two-thirds will be paid

to Joe," that's, again, not what Mr. Rana's telling you, that's your note to yourself, right?
A. That is correct.
Q. Now, I want to go down to the next sentence -- two sentences after that, where it says, "I asked Yash if there was a problem."
Could you highlight that, please.
You asked Mr. Rana that question, correct?
A. Yes.
Q. And then in response, he told you -- well, maybe I shouldn't ask it that way.
The next sentence says, "Joe previously made an irrevocable election to sell the shares during the last window period," right?
A. Yes.
Q. "And according to their legal counsel, this qualifies as an exemption from the insider trading rules," right?
A. Correct.
Q. Is that information Mr. Rana was giving you?
A. Yes.
Q. All right. Now, is this why you start out the memo saying, "I believe all the outstanding issues regarding the growth shares have been resolved"?
A. Yes.
Q. Or had you been satisfied that all the issues had been

resolved before this?

A. I believe that all the -- this conversation helped me draw the conclusion that all the issues were resolved. In other words, we're going to defer one-third, receive two-thirds and sell the shares upon receipt.

Q. And there was never any deviation from the plan that all 100 percent of those shares were going to be sold on January 2, correct?

A. That's correct.

Q. Now, where you say, "Joe previously made an irrevocable election to sell the shares during the last window period," and it says, "According to their legal counsel," T-H-E-I-R, "their legal counsel"?

A. Meaning Qwest.

Q. Qwest legal counsel?

A. Correct.

Q. So Rana is telling you that from Qwest's perspective this transaction is exempt from insider trading rules?

A. Correct.

Q. That's what you took away from this, right?

A. Yes.

Q. That's why you felt satisfied that all the issues were resolved?

A. Yes.

Q. And then finally, you say, "The bottom line is, we are in

good shape as far as the growth shares are concerned." So you were satisfied everything was handled?
A. Yes.
Q. Right? You were satisfied that Qwest legal counsel was involved in this situation, right?
A. Yes.
Q. Now, you weren't involved in being a broker on behalf of Mr. Nacchio in connection with these shares, correct?
A. That's correct.
Q. In fact, you were aware, were you not, that there was discussion between a couple of different brokers as to who was going to handle this account, right?
A. Vaguely, yes.
Q. At this point in time, no one broker had been decided about, correct?
A. I don't believe so.
Q. Now, you were asked about Exhibit 210.
Could the witness please be shown that.
Do you recall testifying about this on March 29?
A. Yes.
Q. All right. And do you recall when you were asked about this you testified that you had a conversation with Joe, and you said Joe had made an irrevocable election? Do you remember that?
A. Well, according to this memo, he's making an irrevocable

election.

Q. I'm talking about your sworn testimony, sir. Do you remember that?

A. I believe that I said, according to my memo, he is making an irrevocable election.

Q. Let me help you.

Could the witness please be shown page 1585 of the transcript from March 29.

Do you see that on your screen?

A. Yes.

Q. I want to direct -- then the following page is 1586. I want to direct you to line 22.

Do you see where you were asked, "What did you mean by irrevocable election?"

A. Yes.

Q. And do you see where you respond, "Well, because the shares were vesting during the first week in January, my instinct told me that this was not during a window period"?

A. Yes.

Q. "So I believe we had a conversation in that Joe -- when I raised the issue, Joe told me, it's not a problem, I made an irrevocable election to sell the shares, even though it's not in a window period."

Do you recall that testimony?

A. Yes.

Q. All right. Now, Mr. Stricklin asked you, did you select the words in your memo, Exhibit 210, precisely. Do you remember that question?

A. Yes.

Q. And you said you believed so?

A. Yes.

Q. Were you under oath when you prepared Exhibit 210?

A. No.

Q. You were under oath when you testified on March 29; is that correct?

A. Yes.

Q. Did you select your words precisely on March 29 under oath?

A. Well, the answer -- precisely. I just answered the question to the best of my ability.

Q. Thank you.

No further questions.

THE COURT: Redirect.

MR. STRICKLIN: Yes, sir.

REDIRECT EXAMINATION

BY MR. STRICKLIN:

Q. In Defendant's Exhibit A-1031 when it said -- Mr. Rana said there was not a problem as far as insider trading was concerned, sir, do you know that when someone trades shares and stock they cannot trade with material non-public information? You understand that, right?

A. Yes.

Q. And did you understand Mr. Rana to mean -- can we publish this, Your Honor?

THE COURT: All right.

MR. RICHILANO: Your Honor, this is beyond the scope, and calls for a legal conclusion.

THE COURT: Overruled.

BY MR. STRICKLIN:

Q. Did you understand Mr. Rana to mean that this qualifies for -- when he said, this qualifies for an exemption under insider trading rules, that meant he could trade based on material non-public information?

A. Yes.

Q. That he could use material non-public information?

A. No, no.

Q. Explain what you mean.

A. Okay.

Q. I want to make sure we're all clear.

A. What I mean by this memo is that an insider cannot trade company stock if he is privy to material non-public information, so any time an executive sells stock, he needs to be certain that he's not privy to material non-public information, given the fact that this trade was going to occur in January, which I believe was during a non-window period that needed approval to sell the stock, to make sure everybody's

okay with it, including Qwest.
Q. And why did he need approval to trade in a non-window period, in your understanding?
A. Because he would be violating the insider trading rules.
Q. Okay. You said that this was the game plan all along about the growth shares. The first time you wrote about the growth shares was on November 27, in your conversation with Joe on November 27; isn't that right?
A. Yes.
MR. RICHILANO: Objection, leading.
THE COURT: Already answered. Too late.
BY MR. STRICKLIN:
Q. And Mr. Nacchio, had he exercised -- had he taken the growth shares in the past and held those growth shares?
A. Yes -- which ones?
Q. Well, he had -- prior to this January sell, there had been several other tranches of growth shares; is that correct?
A. I believe there were two others, yes.
Q. And he had held those growth shares, correct?
A. Correct.
Q. Okay. Now, ask you, sir, in your testimony here before the Court that was isolated and brought out on cross-examination just a few minutes ago, when was your memory the most fresh? Was it when you wrote this memo or was it when you testified in court?

A. When I wrote the memo.

Q. And tell the jury, as you sit here today, as you sit here today, did -- is what is contained in Government's Exhibit, I believe, 210, is that what Mr. Nacchio told you two days after you talked to Yash Rana?

A. Yes.

MR. STRICKLIN: Pass the witness.

THE COURT: All right.

Is he excused from his subpoena?

MR. STRICKLIN: I think he hopes so, Your Honor.

THE COURT: Is he excused?

MR. RICHILANO: Well -- yes.

THE COURT: All right. Mr. Weinstein, you are excused from your subpoena at this point.

THE WITNESS: Okay. Thank you.

THE COURT: And you may leave.

All right. In light of the limited reopening, I will allow the defendant an opportunity to reopen his case if it wishes to do so.

MR. STERN: May we approach the bench for a minute?

THE COURT: I asked a question. I don't know why there is a problem that we need to approach the bench on. I don't know why Mr. Richilano and Ms. Gilligan were conferring about this.

MR. RICHILANO: I wanted to make sure we had all of the corollary exhibits in. I think we do.

THE COURT: All right. You can check that.

All right. Come up to the bench.

(Hearing at the bench.)

MR. STERN: The testimony just elicited concerning insider trading violations because of the company window was deliberately wrong, deliberately confusing to the jury, delivered a false impression. I ask for a mistrial. In any event, I ask for an instruction to the jury that trading in and out of windows is no evidence whatsoever of insider trading. The two are not the same.

MR. STRICKLIN: Can I be heard?

THE COURT: Yes.

MR. STRICKLIN: The witness testified about something in a memorandum that came in because of the defendant's urging, and explaining what he understood Mr. Rana is telling him at the time. It otherwise would leave a false and misleading impression with the jury. So I think it's fair testimony, for what it's worth.

THE COURT: All right. First of all, I've already told you that the jury will be instructed to the effect that Mr. Stern just requested. I think when the dust all settles, it will be clear to the jury what to consider and what it can consider and what the significance of trading inside or outside a window is. Therefore, your motion for a mistrial is denied.

(Hearing in open court.)

MR. STERN: Your Honor, members of the jury, Mr. Nacchio rests again.

MR. STRICKLIN: Your Honor, we close.

THE COURT: All right. Members of the jury, there is one -- before we begin to hear the closing arguments from the lawyers, there is one more evidentiary matter that I need to bring to your attention.

You will recall that I told you at the beginning of the case the evidence would include the statements of witnesses or testimony of witnesses, all the exhibits that are received in evidence, and any stipulations. We now have a single stipulation that will be a part of the evidence in the case, and it's proper for you to have it when the evidence is coming in.

The stipulation is as follows:

Mr. Nacchio's son, David, was continuously hospitalized from January 19, 2001, to February 21, 2001, for a condition which has been referred to in the testimony that you've already heard.

That is the stipulation of the parties, and it's a part of the evidence in the case.

Now, let's take about a five-minute recess simply for the purpose of breaking up the afternoon, in fact, a 10-minute recess, although we've only been going half an hour. The clerk needs to move the lectern to the proper position for closing arguments, and that will take a few minutes, and we might all want to stretch our legs, because I expect we're going to be here for a good deal of the afternoon, if not all of the afternoon.

Take a 10-minute recess.

(Recess from 1:35 p.m. to 1:44 p.m.)

THE COURT: All right. Members of the jury, we will now hearing the closing arguments by the lawyers.

Ms. Conry.

CLOSING ARGUMENT

MS. CONRY: Thank you, Your Honor.

Ladies and gentlemen of the jury, this is a case about choices.

In late 2000 and early 2001, defendant Nacchio had a choice. He could tell investors exactly what he knew they wanted to know, and that is, how was Qwest fueling this unparalleled, unprecedented growth, while the titans of the industry were crumbling, titans like AT&T taking out their numbers, how was Qwest doing it. That was the question on every analyst's and every investor's mind.

And he made a choice at that time. He made a choice not to tell them that Qwest was doing it through the sale of one-timers, IRUs, equipment sales, things that were difficult to replicate and things that were, as he knew, scheduled to go away in the second half of 2001.

So the plan that he knew of, that he chose not to tell investors about, was the fact that Qwest was planning on ramping up its recurring revenue at two times the rate it had ever done and hadn't done in the year before. Qwest had a bad track record of ramping up recurring revenue.

He also knew, as the first quarter progressed, that this shift from non-recurring to recurring wasn't happening. The shift was not recurring. We've seen a couple of documents. We're going to look at a couple more today. The shift was not occurring, the gap was becoming larger and larger, and they were using IRUs in the first quarter to fill that gap. And in fact, it was -- 40 percent of the first quarter growth was made up of IRUs, and it was Mr. Nacchio's decision not to tell investors and not to tell analysts that.

And I think most importantly, it was his decision not to tell investors and analysts that the only plan they had internally, the April 9 document, which we're also going to spend a little time on later today, the only plan they had to hit the number for the rest of the year required them to sell a billion dollars in IRUs.

And four days after he gets that document, the guy in the company who knows more about IRUs than anybody, tells him, we have drained that pond. Greg Casey goes in on April 13 and says, it's over for the third and fourth quarter. I think I can hit the second quarter, but it's over. At that point, he knows, of course. That's more information he had coming through the budget process and seeing the huge stretch that he -- it's a building mountain of information that he acquires, and he makes a decision through those five or six months not to tell the investing public exactly what he knows.

If that's all he did -- I want to be very clear about this, if that's all he did is not tell investors, none of us would be here, because, ladies and gentlemen, this is not a disclosure case. If the defendant had simply chosen not to tell investors, we would not be here. But the decision he made -- if we could pull up 63, please.

The decision he made which landed him in this courtroom today is not telling investors and then selling his stock. And it's a very simple theme I'd like to impress upon you; that is, if you don't tell, you can't sell. It's that simple. He decided not to tell. He couldn't sell. He sold, and he sold at a rate that was unprecedented for him. And that's why he's here today and he's here today, because of his own choices which were criminal choices. And you'll see that as we go through the evidence related to these sales.

Now, I want to be very, very clear, the choice to tell was his and his alone. 55 times during the period when he was selling stock he met with analysts in the investment community. He knew what they were asking for. You heard from Mr. Khemka.

You heard from Mr. Johnstone. This was the obvious question on everyone's mind. How are they doing it? He chose not to tell them.

He had the final say on press releases, according to the head of investor relations, Mr. Lee Wolfe. He fielded most of the analyst questions on the earnings conference calls. This was his choice. And I hope you keep that in mind when you deliberate.

He also made the choice to sell, and I want to be clear on this too.

He talks about his options expiring. He had a couple of choices on it. They didn't expire for two years. Why not just wait and let the dust settle? See how we're going to do on this shift. Give it six months. Just take your time, say, now, I'm not really comfortable getting some mixed results in here. I think I'll sit back. You know, I still have a year and a half left. It's not a big deal.

But he doesn't. He puts his foot to the accelerator, and he dumps stock like he's never done before, and that is intent to deceive.

He also could have exercised and simply held the shares. So exercise, pay the taxes. You heard earlier in the case he had $70 million of cash in February. That's plenty of money to pay the tax. He could have exercised and held, shown some confidence in the company. That was his choice. He chose not to do it. He chose to sell, and that's why we're here today.

Now, why did he do it? What would drive a man who doesn't have much problem in the past, what would drive him to do something like this? Well, there are 100 million reasons that drove him to do what he did. He knew he had to get out in the first two quarters, because he knew that the house of cards that he built by deciding not to tell investors was about to come crashing down, and he -- get out he did. He got out to the tune of $100 million.

Now, I want to walk you through some evidence, but before I do, I want to thank you for your time. The prosecution and the defense, I know, want to thank you. You've been here on time every day, been very attentive, taking notes. I appreciate that.

If you bear with me as with go through some of these documents one more time, I'll send you on your way.

I want to start by focusing on how Mr. Nacchio knew how the scheme worked, and that is, you've got to promise growth, you've got to deliver growth, and if you don't deliver growth, you're going to get -- in his words, you're going to get whacked. And you're going to get whacked even if you miss by a little bit.

Let's review some of the evidence that goes with that.

We know that the DLJ projections -- if we can look at

Government's Exhibit 500.

If we can look at the page with the big red arrow.

Now, this is the plan that the company put out in July of '99 when they were first announcing the merger. And this big red arrow didn't get there by accident. Mr. Nacchio put it there. You heard from Mr. Wolfe and I believe Mr. Mohebbi that it was Mr. Nacchio's decision to spin this merger as a growth merger to set the hook with Wall Street on that basis.

And the growth rate that is promised here in 1999 is 15 to 17 percent in revenue and 20 percent in EBITDA. And we've heard a lot about that. Revenue is just the money that you make, your sales, and EBITDA is some sort of proxy for your cash flow, but those are the numbers we've heard a lot about. Those are the numbers you'll hear when you go back to the jury room and listen to the tapes that he talks about so much.

So here he is in 1999, setting the standard of growth to drive up the stock price.

Now, Mr. Wolfe, the head of investor relations, explained to you that all else equal, the higher the growth rate, the higher the stock price, and again, nobody knew that better than the defendant. This didn't happen by accident.

Let me play for you some clips where we talk -- where the defendant talks about the importance of the five-year plan.

If we can play the July 10, 2000, Qwest leadership conference. So this is, again, 10 days after the merger, and the defendant goes and addresses the company shortly after they've just merged.

(Tape played.)

So in his own words, that's the importance of the five-year plan, grow or die.

And I want to also follow up -- this is a clip we played with you when Ms. Szeliga was here demonstrating the defendant's understanding as to what happens when you don't deliver that growth. And I think his words are, you're going to get whacked. This is from the July 10, 2000, Qwest leadership conference, the same conference.

(Tape played.)

All right. He also understood at the time that you were going to get whacked even if you missed by a very small amount. This is a very important concept. The judge is going to talk to you about materiality, and that's a word that has a lot of legal meaning, and I don't want to even try to define it for you. But it hinges around what is important to investors. And when something is important to investors, it makes -- it affects their decision whether to buy or sell. That can sometimes affect the stock price.

But Mr. Nacchio himself at the time in early 2001 spoke about the importance of not missing at all, and particularly not even missing by a small amount.

This is an excerpt from the January 10, 2001, Las

Vegas kickoff meeting which was held at the Bellagio in Las Vegas.

(Tape played.)

Now, focusing back for a moment on the five-year plan, at the time of the merger, you heard throughout the trial that Mr. Nacchio for two years stood by those plans, stood by those estimates, and the company didn't take down those estimates until September 10 of 2001, so two years after they were made.

And at the time, Wall Street reacted not very favorably to that. If you remember, there was some testimony at the time of the merger, when they first announced the merger, that the stock price went down by about a third. I think Mr. Mohebbi and Mr. Wolfe talked about that. And the defendant stood by his numbers and vehemently denied there was any problem, Qwest would be able to deliver them, and affirmed for a period of two years that they would make the numbers, and, in fact, once raised the guidance.

The sad thing we came to learn during the trial when we talked with Mr. Khemka or he spoke to you, the defendant admitted in January of 2002, he himself never believed in those numbers. With a wink and a nod and $100 million in his pocket, he said to Prashant Khemka, you never should have believed me in the first place. You never -- everybody going through a merger has to say something special about their numbers. We'll play that later.

That, ladies and gentlemen, is intent to deceive. That is a lack of good faith. That is not believing in the numbers you're touting and taking advantage of the other people on the other side of those $100 million in sales, and that's criminal.

Let me move now to September 7. So the merger takes place June 30, 2000. There is some meetings in July and August. Ms. Szeliga spoke to you about those. Not too much is going on, sort of getting to know each other, kicking the tires a little bit. And on September 7, the defendant decides, his choice, again, to go out and raise guidance.

If we can look at Government's Exhibit 528.

So here we are on September 7, it says, "Based on the strength of our business and our success in executing our strategic merger, we are raising our 2000 revenue target from 18.5 billion to a range of 18.8 to 19.1, and reiterating our EBITDA target of 7.4 billion, said Qwest chairman and CEO Joseph Nacchio." This is the important part, "We are raising 2001 targets for revenue from 21 billion to a range of 21.3 to 21.7 billion and for EBITDA from 8.5 billion to a range of 8.5 to 8.7 billion."

Here we are again, two months after the merger -- let me give a little background on this.

When Qwest took over, they didn't have any inside information on U S WEST. It was a hostile -- I think

Mr. Mohebbi says, a not friendly merger. They weren't sharing a lot of information. They didn't have great information to start with.

It's eight weeks after the merger. Now they're inside, meeting, kicking the tires. Ms. Szeliga told you they didn't have a plan for 2000 yet, as of September 2000, 2000, let alone a plan for 2001. She's the head of financial planning at this time. If she doesn't know how they're going to get there, who would know? She's the person who is in the detail. The defendant on his own went out and not only affirmed guidance, but raised it, without any basis.

There is -- they're in the middle of the budget process, shortly following the September 7, 2000, increase in guidance, and I want to spend a little bit of time talking about that with you. And there is -- we've heard a lot about this in terms of the difference between the external targets and the internal targets at Qwest, and I want to put that issue to rest, because I think it's a little bit of a distraction and nothing more.

Let me focus to go through that issue on an exhibit that we talked a lot about at trial, and that's Exhibit 803.

Now, this is a September 5, 2000, memo, and it may look familiar to you. We talked to you about this with Ms. Szeliga. And I want to focus your attention -- this is, again, Bickley and Pritchard are people in the financial planning group, and they've gone out as part of this kicking-the-tires process and part of the initial budget process, decided to take a look at these targets, these internal targets and see how much risk is in them, and risk the way it was used at Qwest -- I guess I'd ask you to evaluate Ms. Szeliga's testimony on this. She explained it as simply being unlikely revenue. It was a billion dollars of risk. She viewed that, as the head of the planning unit, as unlikely revenue.

As of September 5, Bickley and Pritchard give Szeliga the memo that says the grand total of the business unit risk with the $22 billion internal target would be 1.6 billion. Then they say there is a cushion to the street of about 400 million, so they back that out, and they get the 1.2 billion grand total risk in the street disclosures -- and this is really important -- there isn't a $700 million cushion to the street. We're going to go through that in a minute. There is a billion 2 in risk in the street disclosure.

So let's look -- I prepared some charts that I'm hoping are going to help you understand this. Those are the 69 series, Mr. Denno. Could we start with those.

All right. And just to orient you to this, on September 5, 2000, the internal budget was at 22 billion, okay. Two days later, on September 7, they set that guidance range, which you see in the yellow shading. That's the 21.3 to the

21.7. And we just reviewed a document that says there is 1.2 billion in the risk to the street. So let's take a look at that.

So if you factor in or you adjust for that unlikely revenue that's in the guidance, that brings it back to 20.4 billion. That's well below what Mr. Nacchio is continuously touting to Wall Street.

So that's one example of that. Let me run through -- because the budget changes over time, so we may as well finish this out.

On February 5, the budget changing to 21.8 billion, I think Ms. Szeliga said there might have been some mathematical error or double counting, so they changed the budget. Again, the guidance remains the same. It's 21.3 to 21.7.

Ms. Szeliga's testimony was, even at the time of that budget, bringing it down to 21.8 billion. Now there is just a billion dollars of risk in there.

Okay. When you factor in for that billion of risk, unlike revenue in her words, again, you're well below, you're 21.8 billion while you're out continuously touting to the street that you're going to hit 21.3 to 21.7.

And then finally, on April 9, the company performs what they call a current estimate. And that is, after having a quarter's worth of information on how we're doing, what do we think we're going to do for the rest of the year? So their best estimate on April 9 is 21.5, which on its face is right within what you're telling Wall Street, but Ms. Szeliga explained, having gone through three months of operational reviews -- and again, we'll look at some of those documents in a few minutes, when you adjust for the risk that is still in that April 9 document, if we look at the next chart, you're down to 20.56 billion. Again, still well outside this guidance range of 21.3 to 21.7, which is being told to the public during this time period.

And then finally, we know the company took down its number on September 10 of 2001. You heard a little bit of testimony about that. Ms. Szeliga talked about that. They took it down by a billion dollars. Not coincidentally, the same billion dollars of risk she told him about in the fall, they finally realized and tell the public what he's known all along.

So when you adjust for that, from the guidance in place at the time, new guidance is 21.5 billion, that's in the press release on September 10, like a good card trick, the 20.5, 20.4 billion has been there all along, because that's really what they had a shot at, and defendant knew that all along.

So when you hear these discussions about $700 million gap between the street budget and the internal budget, it's a distraction, and I urge you not to fall for it for the reasons that we set forth in this. Keep an eye on the Bickley memo. Everybody knows -- not everybody, on September 5, Ms. Szeliga knows, the testimony she came to you was she talked internally with people at Qwest about it. Sometime between mid December and the middle of January, she went to the defendant in his office on the 52nd floor and explained to him this billion dollars in risk, and he told her to mind her own business and do her job, and didn't lower the guidance. That's the testimony that goes with those charts. And I ask that you keep that in mind as you evaluate the evidence.

So that's the start of the budget process.

Let me go through some of the business units with you. And you heard from a lot of these guys. The business units, you'll remember -- I think we have a chart on that, actually.

Can you bring up the pie chart, Mike.

Perfect.

So Qwest was divided in business units, like a lot of companies are. And luckily for us, there are only three that really mattered or drove the revenue there. And the big three are wholesale, global business, and small business and consumer. The only thing that is a little bit tricky as we go through this, small business and consumer used to be called national mass markets. In the fall we're going to talk about national mass markets. That's like the standard phone company. They're going to sell you your phone line, DSL, internet service, that kind of stuff. That's what that part of the business does.

So small business is about a third, wholesale is about 22 percent, and global is the largest at around 34.6 percent, and that's all based on the planned revenue for 2001.

Let's take a minute to look at the wholesale division and see, again, walking through the budget process in the fall of 2000, to see how they thought they were going to do for 2001.

If we could look at the 2001 wholesale, the October 11, 2000, submission.

Great.

So -- Mike can you show the title page, Qwest Wholesale 2001 Revenue Outlook. This document is dated October 11, 2000. I believe it is Government's Exhibit 808.

So on October 11 of 2000, the head of the -- the head of the wholesale division is Greg Casey, you may remember him from his picture here.

On October 11 of 2000, he met with Mr. Nacchio, Afshin Mohebbi, Robin Szeliga, and others from the wholesale business unit. And they met to discuss what the estimates were for the following year.

And Mr. Casey -- first of all, in this chart -- you'll remember these charts, this is where the stair steps down show how they're going to lose some revenue, they think, in the following year, and the stair steps up show how they're going to make it back up. They call those initiatives. That's how they're going to make back the revenue. And the goal is to get to the 4.92 billion -- 4.9 billion target.

And you can see there as of October 11 that there is a gap, and the gap, according to the testimony, is something that they simply had no plan for.

The testimony from Mr. Casey was that during these fall meetings, he explained that the IRUs were -- the market for IRUs was predicted to become more and more difficult through 2001, particularly in the second half of 2001. And Ms. Szeliga talked about that as well.

He also explained in his testimony to you that getting to the 4.5 billion, which is right before -- can you enlarge that, Mike, just a little bit, the right-hand side.

Great.

So just getting to the 4.5 billion, Mr. Casey's testimony was, that would take a herculean effort; in other words, everything would have to go just about exactly right for that to happen. And of course, even after trying that, he still got a $362 million gap for his section of the business.

This isn't the last we hear from Mr. Casey on this. If you remember, there is a series of e-mail exchanges. If we could pull up Government's Exhibit 825.

There are a series of meetings in the fall with each of these business units, and there is a constant pushback from the business unit saying, we can't get there. It's not possible. It's unprecedented growth, especially in light of the marketplace. And Mr. Casey gets an e-mail from Mr. Bromberg saying, we're going to increase your target up another couple hundred million dollars, and Mr. Casey, a man of few words, choose -- this is what is important, I don't show this out of the humor, although take from it what you will. I show this because Mr. Casey on his own chose to add Mr. Nacchio to this e-mail. So Mr. Nacchio knows on December 13 exactly how Mr. Casey feels about his ability to meet his target in the wholesale division.

All right. Let's move on to the global division. And I want to be clear, following this e-mail exchange, Mr. Casey got no relief from his target.

Let's move on to the global division. From that business unit, you heard from Grant Graham, who is on the far right side here.

Now, just summarize the testimony from the global division. Global is 34.6 percent, so it's, again, about a third of the company.

Their business unit submission for November 20, I think, is Government's Exhibit 985. And if we can go to the next page for that.

So, again, everybody's got their waterfall chart identifying what their gaps are. And just to give you some leeway here, Mr. Graham's testimony on this was that his target for 2001 was 30 percent higher than his target for the prior year, just to put it in perspective, a target he never thought he could attain.

Even assuming all the initiatives he could divine, he still comes up with $714 million in IRUs, which is basically what they used to plug -- national mass markets, as we'll visit, they usually didn't fill their gap. They would list it as a gap. Casey -- I think the testimony was, Casey and Graham would plug it to IRU. Here you see $714 million in IRU.

And again, the testimony is during this time period, during these meetings, Mr. Casey was very clear with Mr. Nacchio about the likelihood and unlikelihood of hitting that number in the IRU market for 2001.

If we look at Government's Exhibit 986, which is the December 7 submission from the same unit.

There is one piece of testimony you might remember, and this is Mr. Graham -- if you go to the page where it shows the 67 percent.

Great. Can you enlarge that, Mike?

So here we're talking about the productivity that is assumed in the budget, and you can see in the bottom right-hand corner, the 70 percent increase in productivity. And Mr. Graham gave a very compelling piece of testimony when he explained that, at least in terms of what made sense to me. It's like asking a door-to-door encyclopedia salesman to go from selling 10 to 17 encyclopedias --

MR. STERN: Your honor, I hate to interrupt. I'm not sure that counsel did this intentionally, but saying something made sense to her is not correct. If she doesn't do that again, that would be fine with me.

MS. CONRY: Doesn't happen that often, so I thought it was noteworthy.

THE COURT: Try not to inject --

MS. CONRY: All right. I will.

So his testimony was that there was -- is 70 percent assumed increase in productivity for that time period. Again, more than he thought he could handle in his unit. And he told Mr. Nacchio so.

Let's look at the October 9 submission for the national mass markets. And, again, I think national mass markets was roughly a third. This is Government's Exhibit 806. And if we go to their waterfall chart, their gap was 444 million.

So when you add these up, these problems, you can see how Bickley and Pritchard got to their billion dollars in risk. It's not coincidence. They're all sort of evaluating the same process. Again, this was a document that was presented to Mr. Nacchio in the October time period during these business unit reviews. And I think Mr. Schumacher's testimony during this time period was, they go back to this chart and Mr. Nacchio folded it up and said, I don't want to talk to you guys until you have a plan to hit your number, which is fine. I want to be clear on this. The Government's contention is not that it's criminal to be a hard-line executive. That's fine. It's just a disclosure issue. If you know that your people haven't a plan hit these targets and they're telling you they're unrealistic, you can't keep that inside and continue to sell your stock.

So at the end of the budget process -- the budget process -- and there were a series of these meetings that went on in the fall of 2000. And Mr. Mohebbi was an active member in each of those proceedings. And he testified here to you about those.

And toward the end of those proceedings, he issued a couple of e-mails which he printed out and put on Mr. Nacchio's chair, and you heard a lot of testimony about that.

In late December, the testimony was, from Mr. Mohebbi and Ms. Szeliga, that each of them had spoken to Mr. Nacchio about the huge stretch in the budget, based on these billion dollar risks and based on the submissions and the complaints from the business unit heads.

And Ms. Szeliga specifically urged Mr. Mohebbi to go forward and to really push Mr. Nacchio, because she thought, I think you'll remember, she said she thought Mr. Nacchio would pay a little more attention to her because -- to him because Mr. Mohebbi was an operations guy.

So Mr. Mohebbi had a discussion with Mr. Nacchio in December of 2000 about these issues of the recurrent -- shift to recurring revenue, the issues with IRUs and non-recurring revenue and one-timers, and he summarizes those in a couple of memos, and I'd like to look at those with you now.

Let's look at what Mr. Mohebbi's first warning is, and I think that's Government's Exhibit 904.

If we could enlarge that.

And I think the date from the testimony on this was late November or early December. And Mr. Mohebbi is telling Mr. Nacchio in this memo, first he's describing some meetings he's having internally at Qwest. Then he's saying, "As we discussed this week" -- to Mr. Nacchio, referencing their discussions they had had earlier -- "the revenue and EBITDA numbers for next year are huge stretch and they require day-to-day monitoring as well as close cooperation between the units. We need our recurring revenue -- we need our recurring business to literally take off by April/May time frame or the amount of one-time businesses required to fill the gap will just be too large to deal with. Our track record in this area is not good, as you know."

And I want to focus for a moment on the comment that

Mr. Mohebbi makes -- we've already talked about the huge stretch in the budget, we've seen all the gaps, so I think you understand where that comes from. I want to focus or to -- for a minute on the recurring business, literally needs to take off by the April/May time period.

If you could play, Mr. Denno, Government's Exhibit 559B, which is the January 10, 2001, Las Vegas kickoff meeting, and this is an instance where Mr. Nacchio himself acknowledges the importance of getting things going before April.

(Tape played.)

So this is January 10, 2001, just to put the timing together. Mr. Mohebbi puts his memos -- there is another one coming, to Mr. Nacchio in late November, early December, and there is another memo that we'll talk about that he dates it around December 20. And then we have Mr. Nacchio discussing exactly that concept on January 10, 2001.

And, of course, that's no surprise to any of us, because Mr. Nacchio knows exactly how this works. He knows how important the recurring revenue ramp-up was. He's an integral part of the plan, as the evidence shows.

So that's Mr. Mohebbi's first warning to Mr. Nacchio. I'd like to look at the second warning, which is Government's Exhibit 905.

I'm sorry, before we do that, I want to focus back on 904. I apologize. The last sentence I want to focus on, that is, "Our track record in this area is not that good, as you know," and that is, filling -- that is the takeoff of recurring revenue.

If we could look at Government's Exhibit 417A.

Robin Szeliga addressed this when she was with you, and that's talking about historically how was Qwest doing with its recurring revenue. Did it have a good track record like Mr. Mohebbi said? This is the chart we submitted in evidence. And what this is is how recurring revenue was growing quarter over quarter from 1999 to 2000.

So basically, how did we do at growing recurring revenue in 2000. And you can see, they didn't have a great track record. In fact, it's pretty much flat, I think her testimony was.

So flat in 2000. The plan for 2001 calls for a ramp-up, and we're going to increase recurring revenue, hopefully two times. So here you see the dramatic difference between the historical inability to ramp up recurring revenue and the plan based on over time doubling it. Again, this is what we refer to as the material non-public information. I'll shorthand it to important inside information that Mr. Nacchio chooses not to share with the people who are on the other side of those $100 million of sales, who we argue in the reasonable mix of information would like to have known this.

So that's the we don't have a good track record point.

Let me move to Mr. Mohebbi's second warning, which is Government's Exhibit 905.

And, again, these are undated. Mr. Mohebbi's testimony puts this at around December 20 of 2000. And I'd like to focus your attention to paragraph 3 of this. Again, this is to Mr. Nacchio. This -- I think the testimony about this document is, he put -- he put it on Mr. Nacchio's chair, and he also submitted it by -- he put it in the pouch which was Fed Exed to Mr. Nacchio because he was out of Denver for the holidays and doing some other work, and I think Mr. Stricklin showed you the Fed Ex receipt for that shipment.

So that's -- that's the evidence we submit that it -- that it actually did get to Mr. Nacchio.

So in paragraph 3, it says, "I am attaching our best estimate of first quarter 2001 revenues, which I think is the most critical aspect, EBITDA, again, is much more manageable.

"As you can see, we need to hit at least 5,100,000,000. Our best guess says we require $580 million of non-recurring."

This, again, is for Q1 -- "about the same level as the fourth quarter" -- referring to 2000 -- "but a huge number nonetheless. It's doable, but if we don't crank up recurring revenue by April, we got big problems."

April, again, Mr. Mohebbi is focusing Mr. Nacchio that if something big doesn't happen by April the rest of the year is in danger.

Then the fourth paragraph he says, "I have also included some historical revenue growth numbers so you can see what we need to do in the next year to deliver our commitments. Again, there won't be enough one-timers, IRUs -- or equipment sales to close the gap in 3Q and 4Q if recurring revenue does not take off."

And let's just look briefly at the charts behind there. The first quarter 2001 chart -- not that chart. It's -- it's another page of this memo.

So this is, again, an attachment to Mr. Mohebbi's December 20, 2001 warning to Mr. Nacchio. The heading is, First Quarter 2001, Recurring Versus One-time Revenue.

And it says here -- I want to highlight it, and literally have -- the column for one-time revenue needed, total $587 million. And the highlighted footnote from Mr. Mohebbi is, "If economy slows down, recurring growth could be at big risk."

And this evidence establishes that Mr. Nacchio knows the reliance on recurring -- non-recurring revenue in the first quarter. And we've already talked about the testimony from Mr. Casey and from Mr. Graham about their dim prospects for the IRU market for the second half, in particular, of 2001.

So the defendant knows, again, what the predictions are, and, of course, none of this is a surprise to him, given his experience in the telecom industry.

I want to play one more clip for you where the defendant also emphasizes in his own words the importance of getting out of the blocks quickly, and references something we've talked about, which is called the Rule of 78s. And I'm not sure how clear it is, but I'll give it one more shot.

That is this notion of compounding. If I get a client or customer in January, and I sign him up for the year, I'm going to count on that customer to pay me every one of those 12 months throughout the year, more or less. So that's the recurring nature of recurring revenue.

And then when I go to the next month in February, I have a little bit of a higher growth rate, so I can count on that January customer because I've got him in the fold. I just need to bring in -- I've built that brick, I believe was Ms. Szeliga's explanation, need to bring in a few more customers, and I've hit my February number. It's compounding, almost like you put money in the bank and it compounds itself. I think that's the derivation.

Mr. Nacchio is quite familiar with that concept and used it quite often. And I want to play this next clip where he uses this terminology.

(Tape played.)

So, again, looking at January results, the first month, they're going to focus on those and try to take corrective action in February, and, again, referring to this Rule of 78, so we know he's talking about recurring revenues. He's basically saying, we're going to keep an eye on those recurring revenues right out of the blocks.

Let me stop and summarize what we have, because we're about to head into the period where he makes some trades.

So through the fall of 2000 -- if we can look at Government's Exhibit 68.

This is what the evidence has shown he knows. He knows, first of all, the 2001 targets are a huge stretch. We've been through all the budgeting memos, and there are more, you'll see. There are more submissions and more and more issues on that front.

He also knows that the 2001 targets are based on a major shift, and this is a very important concept; that is, the shift from weaning off the reliance on the one-time IRUs because they know they're going away, and ramping up the recurring revenue in hopes of filling the gap with those, rather than the one-timers.

We also know that Mr. Nacchio believes that this shift has to happen early. And they also need recurring revenue to grow two times as fast as it had in the prior year.

Mr. Nacchio also knows they don't have a good track record on that front. He knows that one-time transactions had filled the gaps in the past. We saw the Mohebbi memo telling him $580 million in IRUs were done in the fourth quarter of 2000, at least, as of the date of that memo. That was that estimate.

And he also knows from his discussions with Mr. Casey during the budget meetings and his discussions with Mr. Graham that the IRU market is predicted to go away or dry up, I think were Mr. Casey's words, in the second half of 2001.

So let's move now into the trading period. And the first trade I'd like to focus you on -- there are two trades early on, I think it's January 2 and January 3. And you've heard probably more about these trades than just about any other.

And those are -- have been referred to as the growth shares, and I want to try to clarify that for you.

They're really just normal Qwest shares of stock, and I think Ms. Bonsness talked to you about that. There is no magic G on them or anything like that to show they're growth. It's Qwest stock. We concede this stock was given to Mr. Nacchio because he did a terrific job of growing the company in the past. This is a bonus, reward, whatever you want to call it. It's undisputed on our side he got it because he did a good job in the past.

But the judge will explain the law to you, and ask you to listen and see if you hear an exception for growth shares, and I don't think you're going to hear it. And the reason you're not is because if you think about it, the person on the other side of that sale, they don't really care how he got the shares. They just know they're going to pay in aggregate, I don't know, $20 million or whatever he sold. I'll have to look at the data to refresh my memory. They're paying full value. It sort of makes sense it doesn't matter to them if he inherits them or gets them as a bonus because he's done a terrific job. There is somebody on the other side of those sales, and they're entitled to know what he knows when he sells them.

And that's, again, why those sales are part of our Indictment, because the person on the other side, or the people on the other side of those shares didn't know what he knew, didn't know that list of things we just went through.

So there is another issue that comes with the growth shares, and that is, the notion of the dating of the authorization. And you've sure heard a lot of testimony about that. In fact, you just heard some earlier today.

So let me try to explain what we think the evidence shows and did show on that.

Now, if we could look at Government's Exhibit 100.

Now, this is the -- Mr. Nacchio's authorization of -- for the sale of his -- again, we'll call them growth shares, but there is nothing magical. They're just Qwest stock.

And this is -- the date next to the signature there, you'll see, is November 3 of 2000.

And there are a couple of things that he warrants in this. He warrants in this -- if we could enlarge the first couple -- warrants, I mean, he's saying they're true.

He says, "The undersigned is a director and officer of Qwest Communications International." Goes through, he says, he's executing these instructions pursuant to the 10b5-1 regulation, SEC Act, and assure that all sales pursuant to these instructions will be made on the basis -- will not be made on the basis of material non-public information concerning the company that may be in the possession of the undersigned at the time the transactions occur.

"In accordance with the company's insider trading policy, the undersigned certifies that, as of the date hereof," as of November 3, "he has no material non-public information and is not otherwise prohibited from trading in the company's shares -- securities."

And he goes on to say, he wants the shares to start to be sold on January 2. And the only other paragraph I'd like to draw your attention to, before we get into the dates on this, is please note that these instructions are final and cannot be revoked by the undersigned.

So irrevocable instructions, you've heard these referred to.

And, of course, you see the date next to his signature, and this is very important, is November 3 of 2000.

And that's his signature. Mr. Mohebbi identified his signature. And Ms. Mar -- Maggie Martinez came in and explained to you that she found that document in Yash Rana's files, and she found the original in his files over at Qwest when she searched his office when he left.

So that's how that document got to you today.

So I want to go walk back here for a minute and visit the evolution of this document.

Now, what do we know? We know -- I think it's Exhibit 4 -- actually, yeah, 433. Thank you.

And if you could -- this is an exhibit that Mr. Patti walked through with you. And Mr. Patti was an attorney from O'Melveny, and he was the guy who Yash Rana called and said, hey, can you put together one of these irrevocable instructions for me. We'll go through the timing on that. But Mr. Patti does that. And if you look at the page -- this is a couple of pages in, compare the paragraphs.

The document on the right-hand side is the document that Mr. Nacchio eventually signs, okay. And the document on the left-hand side is the draft that Mr. Patti e-mailed to Mr. Rana.

And we'll go through the timing on that in just one minute. Before we do that, I want to draw your attention to the similarities.

This paragraph is just about verbatim, and I think the evidence shows that Mr. Patti's e-mail of the draft to Mr. Rana becomes what is eventually the growth shares irrevocable authorization for the sale.

So let's go back to the timing, then. And that's 433.

It's not 433. I'm sorry, 432. I apologize.

If we can go to the last page of that, so we have the benefit of -- 432 should just be the bullet points.

There we go. Great.

So here is the timing. The timing is, Greg Patti receives his assignment from Yash Rana on December 8. All right. He confers with Mr. Grossman, who is also at O'Melveny. He confers with Mr. Boehmer, who is also at O'Melveny, and he confers with Yash Rana, who is at Qwest. And then he creates, Mr. Patti, the first draft of Government's Exhibit 102, which was his draft that he sent, using the template from O'Melveny.

So the reason this matters is, if Mr. Patti doesn't even begin to draft the document until December 8, it is impossible absent a time machine for that document to have been signed on November 3. It simply is not in existence on November 3, so it can't have been signed on November 3.

All right. So we're trying to put some time parameters about when -- when is it possible that it might have been signed? And we're not specific on that, but we can certainly put the earliest date on that.

We know on December 10, Patti finalizes Government's

Exhibit 102, which is just the e-mail that attaches the draft. And he sends that to Yash Rana.

And we also know on December 12, Patti confers with Salomon Smith Barney, Rana and Grossman. And there is no broker identified as of December 12. And if you go back -- can we go back to 100, please.

You can see at the top of Government's Exhibit 100 -- if you can fly out who it's to, Mr. Denno.

So it's to Salomon Smith Barney. All right. If you haven't identified who the broker is going to be until December 12, and yet the broker's name is typed in here, we argue that this document wasn't created -- certainly wasn't signed until at least December 12, which was the earliest time where they would have identified a broker.

But the more important thing, without struggling on exactly the date it was signed, because that's not quite as important to us here, but what is important is, we know it wasn't signed on November 3. And the reason you can know that is because it wasn't even in creation.

So let's talk about why somebody would do that, somebody like Mr. Nacchio would just backdate a document.

Well, we know he got a lot of bad news in November and December. We've been through the budget process. You've seen the gaps. You've seen testimony or heard testimony from Mr. Casey warning that the IRU market is going to go away. You heard that from Mr. Graham. You heard testimony from Mark Schumacher, who was the CFO of the national mass markets business saying, they never had a plan to fill that gap, and their gap was $400 million to start with.

So what would cause a man to backdate a document back to November 3, back to before there was firm bad news in his mind that would constitute material inside information? It is bad news.

So he backdates it to November 3, a time where he feels comfortable enough saying, I've got a little bad news, but maybe not quite so much. I'm going to backdate to that time frame. And most importantly, it's before he's gotten the Mohebbi warnings.

Mr. Mohebbi was very clear about what was going on with recurring revenue, what had to go on with recurring revenue, what was going to happen with the one-timers, would there be enough in Q1 and Q4, and is -- that is what motivated the defendant to backdate the document to November 3.

And then the irrevocable instruction is signed on November 3, and as of November 3.

And you've heard a lot of questions here about whether there might have been a phone call between Mr. Nacchio and Mr. Rana about irrevocable instructions. And I want you to bring what you bring, which is so valuable to all of us, and that is your common sense.

If you were authorizing irrevocably a sale of millions of dollars worth of stock, and you're the chairman of the board, you are the chief executive officer, would you think to write it down? Would you think, just give yourself a little cover to say, you know, I think I'll put a little note in my calendar here that I'm going to talk to Yash Rana today.

I want you to look at his calendar. You'll see nothing here. Make a phone call, make a note, tell Yash Rana to send a confirming e-mail. There is nothing.

Think about in your commons sense, who would have heard about this? It's to Salomon Smith Barney. We had two of them come in here and tell you they never heard of it. We had the broker, we had the paralegal, we had the administrative assistant. They're ready to kill us for dragging their employees here. And none of them ever heard of it.

It sat in Yash Rana's desk the whole time. It wasn't signed on November 3. It was signed in the middle of December after the defendant had lots of bad news, lots of material non-public information. And he knew -- he knew he couldn't sell those shares even though he's receiving those because of a bonus. He knows he can't sell those in early January, he's got all of this bad news, all of this material nonpublic information. So he's got to jump in the time machine, go back to November 3, and date it as of November 3.

Again, put on your common sense hat. Why wouldn't he just say what really happened, if one version they may offer is, there was a phone call, and I told Yash, I want to sell them, and we'll paper the deal later? Well, that -- just put that in a letter. It's December 12, and sign this document, I want to make sure everybody knows I talked to Yash Rana on the 3rd and authorize this. Why not just make it factually accurate? Because it would draw too many questions. Something dated December 12 or later, the 20th, in this period when he's getting all of this bad information, it would sure raise a lot of questions. And one way to get around that is to backdate the document, which is exactly what they did.

Let me continue to move through -- actually, let me show you one more piece of evidence on this, and that is Government's Exhibit 210.

And you see Mr. Weinstein twice, the latest this morning. And if you could enlarge, Mike, that paragraph down below.

This document -- actually, I'm sorry, pull back out. Can you show the jury the date.

So it's December 12 of 2000. We heard from Mr. Weinstein. He's very careful in how he keeps his memos, very meticulous. Writes a memo just about every time he talks to the defendant. Very careful in what he writes down.

He says, if I can read it, "Joe is signing a irrevocable election to sell the shares now," and that is why he can sell the shares during a non-window period. These are the only shares that are sold outside the trading window. There -- when the window is closed, because he authorized them in theory on November 3. That's the rationale as to why it was okay.

But we know it wasn't created on November 3. It wasn't created until the middle of December.

We asked Mr. Weinstein, Mr. Stricklin did, did he mention to you at the time he had a call with Yash Rana earlier? And it's actually November 3 is going to be the date. It's not a big deal. There is no mention of that in his phone call.

Think who he would tell. He would certainly tell his most trusted advisor, Mr. Weinstein. No mention of that whatsoever, because it didn't happen. He was signing it on or around this date. That's why he backdated it.

So that's why -- that's the base for the charges, in the first two counts.

If we can look at a summary of the counts for you.

Sorry, Mike.

If you can -- Mike, just for a second, pull up Government's Exhibit 62A. We're going to sort of walk through all the trades. There are 42 of them. We're going to take them in groups. Don't worry.

Okay. If you could enlarge the top part there.

So the two shares -- the two sales I was just talking about are the growth shares that were sold pursuant to the backdated document we just discussed, and those -- total sales for those were a little over $14 million. All right.

So let's move on through the first quarter and look at what other information the defendant got as he's going through his sales from January 2, 2001, through the end of May 2001.

And the -- I'd like to focus on early 2001. And this is the time period which Ms. Szeliga puts as the latest time at which she would have gone to the defendant and did go to the defendant and talk to him about this billion dollars in risk. Remember, she got the Bickley memo on the 5th. She admits she didn't go right to the defendant and tell him then, but she believes as the budget process was maturing, and she had gone through the business unit reviews, she went to the defendant somewhere between mid December and mid January.

So this is new information -- if we could go back to, then, our timeline, Mr. Denno.

Okay. So here we are in January. And I think the next chart may show -- the next would show Ms. Szeliga -- great.

Here we have somewhere in late January, Ms. Szeliga, head of financial planning, the person who knows the budget process better than anybody else, going to the defendant and telling him, we've got -- and it's not news to him because he's been through all the business unit reviews, but confirming with them there is still a billion dollars of unlikely revenue in our most current budget.

The next important piece of information for us is the January 23, 2001 -- I'm sorry, it's February 23, 2001, January dashboard. That's Government's Exhibit 921.

And let's look at this.

Ms. Szeliga talked about this. These are monthly financial statements circulated, as you can see, to Mr. Nacchio and others, including Ms. Szeliga. You heard from Mark Schumacher. He became the controller. Mr. Tempest was the administrative officer and the general counsel. Mr. Woodruff was the CFO. So it's a pretty select group this was going to. As you can imagine in a company like this, you're going to circulate monthly financial statements, because you want to keep track, just like Mr. Nacchio said, of how you're doing in January.

This was circulated on February 23. That's how the bad news gets in his mind. It's for January 2001. There is a typo in the re: line which Ms. Szeliga addresses. It's actually January 2001.

Let's look briefly at this document, on the executive summary.

In January 2001, January revenue of 1.512 billion was 8 percent higher than last year but 59 million worse than budget. The budget miss was primarily in small business and consumer markets, down by 54 million, due to gap not being covered, which was 34 million, and a wireless miss.

So, again, not that this is the end of the world and the walls are crashing in, but let's put it in perspective. This is the man who just said, we've got to keep an eye on January, because we need to take corrective action in February, because the Rule of 78s say, if we don't build that immediately, our recurring revenue won't be taking off the way it will, and it's the house of cards coming tumbling down as we know it did.

So this is the first red flag in January. We're already off budget, we're $60 million off right away, because national mass markets had a gap, and they didn't have any way to fill it, and wireless was part of that.

All right. So let's look at the next document, which is dated March 20 of '01. And this is the first quarter forecast update. And you heard some testimony on this from Ms. Szeliga and Mr. Mohebbi.

And Ms. Szeliga's testimony was, she prepared this for the purpose of showing Mr. Nacchio where they were for the quarter. Right. This was, I think, right before she was leaving town. She wanted to make sure he knew before she left where they were going to be for the months of January and February. And I think she was interim CFO at this time.

Now, she told you she didn't recall whether she actually sat down with the defendant or not. So I want to be clear on that. She may have. She may not have. She didn't have a clear vision. But she knew that was the purpose of the preparation.

Mr. Mohebbi did have a clear recollection, that he did sit down with Mr. Nacchio, and walked through this document with him.

So let's see what Mr. Nacchio saw on March 20 of 2001. And along those lines -- I'm not going to drag you through Mr. Nacchio's calendar, but I encourage you for any of these meetings to look and see whether he's meeting with them, with Mr. Mohebbi, with Ms. Szeliga, with Woodruff on those days. You'll see, these meetings are there. Sometimes a meeting might get moved a day or so, but they're usually meeting. Usually a description, business unit review or budget review or strategy and policy review, but these are going to tie to his calendars, as you'll see.

Let's look at the March 20, '01, first quarter forecast update. I'd like to take you to page 3 of that.

This is the detailed view. And you'll see in the bottom right, what I want to emphasize to you is this -- this notion of A, B, C initiatives. You heard a little bit about that. I think -- and, again, let's put this in perspective, 10 days, 11 days away from the end of the quarter.

If you have a C initiative, which I think Mr. Casey described as something that was just sort of a new idea, that that's going to be rough -- rough to bring in, it's a little bit risky. They do wind up bringing these in. I don't want to mislead you. This is what Mr. Nacchio is looking at on August 20. We see, we're stuck only -- if you look at the variance -- variance to budget, and the total revenue is the bottom line.

If they have just the B initiatives, which are the ones that are a little bit more certain, they're still going to miss by 472 million.

If they get all the C initiatives, which were about 486 million, they're going to make it, they'll be fine. And they do wind up making it. The reason this is important, or I want you to focus on this, is Mr. Nacchio gets this document. He knows they're making it through IRUs. He knows they're making -- the only plan at this time is to make it through one-timers.

You're not going to make it. You're not going to be able to sign up enough wireless subscribers to make that in this time frame, in the last 11 days of the month. And of course, that's the testimony of Mr. Graham and Mr. Casey, that this is going to be made with one-timers.

And if we look at -- the next exhibit is Government's Exhibit 924.

This is another dashboard, again, to Mr. Nacchio, so we know he's tracking. We know he's getting documents that are tracking how the company is doing through the quarter. It's dated March 21. And this is going to be about the same type of data we just saw, January and February.

Let's look at the executive summary to see what he is being told. And I'll just hit the highlights.

February revenue of 1.425 million was 9 percent higher than last year but 72 million worse than budget. So January is down, so is February. They pin it on small business and consumer and wireless, and --

If you can skip down to February quarter to date revenue of 2.937 million is unfavorable to budget for 132 million.

So the first two months you're already off 132 million. And you're mostly off because of recurring revenue, for the reasons we talked about. You look at those little categories, national mass markets, consumer. You heard a lot of testimony, that's really the bread and butter recurring revenue.

So this is telling Mr. Nacchio, recurring revenue is not taking off as planned. All right. And the way they're doing it -- you're going to see these initiatives, the last paragraph says this includes 5.5 million in revenue initiatives.

If we can look at the next page. If you can sort of highlight the top third of that page -- enlarge, I should say.

You can see -- this is how we know they're doing it through IRUs. Look at the business units that are going to grow in March. Look how much they're going to grow in March. Global, 488, 478, going to jump to 729. Those are all IRUs. Wholesale, it's going to from 327 in January, 316 in February. It's going to just about double in March. Again, IRUs. Mr. Nacchio knows that. He knows this business better than anybody. He knows Qwest better than anybody. He knows they're planning on making the numbers through IRUs. And he's already been told these are not going to be around for Q3 and Q4 of this year.

Again, more material non-public information to this defendant.

All right. Let's move ahead now to the April 9, 2001, product revenue update. And you've heard a fair amount on this. And I really -- I would like to emphasize this document to you. And the reason I ask that you pay special attention to this is that this is the time -- we have three months now of information. We have January and February, which we just talked about. Those aren't going so well in terms of recurring revenue. Now this is going to incorporate March data. This is going to say, how did we do in March? We just saw we're going to have to close some initiatives. Let's see how we did.

Let's look at what they summarize in this document on the next page.

To be clear, just for background, you heard two people speak about this, Mr. Mohebbi and Ms. Szeliga. And Ms. Szeliga's group prepared this. And, again, the purpose of this, her testimony was, was to update the defendant on where they were. She wasn't trying to hide any information from him. She's actually sort of making sure her boss is kept in the loop, to make sure he knows exactly what is going on.

In the summary under current view of 2001 -- I'm sorry, Mr. Mohebbi also addressed this and also confirmed that he discussed this with Mr. Nacchio in the same meeting.

Again, I encourage you to look at his calendar. You're going to see an entry for it.

The first bullet point is 21.5 billion current estimate versus BOD plan of 21.8, acknowledging we're already 300 million off the plan, to be fair, current estimate, still within the range, 21.3 to 21.7. But as you'll see when we go down here, the only plan they have for hitting that 21.5 billion is the billion dollars in IRUs for the rest of the year.

So it's -- it's -- you're clinging to a sinking life raft there. You've been told those are going away, and more bad news on that front is about to come.

Let me go to the second bullet point, "2001 revenue plan driven by sales shift to data and IP products, data and IP account for 60 percent or nearly 1.7 billion in year-over-year plan." Again, this is the shift we're talking about or part of it.

And then it says, "As a result, base recurring revenues were planned to grow 3.5 percent to 11 percent per quarter, two times the rate experienced in 2000."

That is the unrealistic growth expectation that was embedded in the budgets, in the plans.

And then here is the summary of where they are. "Current estimate indicates this shift is not occurring at the rate expected. Annual shortfalls in private line of 125 million, hosting of 111 million, wireless of 156 million, residential, small business local services, 157 million."

Those are annual shortfalls in recurring revenue projected here on April 9 in a document that goes to the defendant.

And how are they going to fill up that gap? How are they going to make it up? Their old friend IRU. Annual gaps to be filled by IRUs, 329 million or 30 percent higher than planned.

So, again, their only plan -- and Ms. Szeliga testified, I won't drag you through the supporting schedules, but for the year, the plan was a billion dollars more -- a billion dollars in IRUs that would need to be closed over the following three quarters. That was her testimony.

If you look at the next page, page 3 -- and, again, this isn't a coincidence that these are in font that's about 40 point. This is not somebody trying to hide information from Mr. Nacchio. This is an interim, at this time, CFO trying to make sure her boss knows what is going on. You don't put it in that kind of font if you're trying to hide that information.

Current estimate includes a shortfall of recurring revenue growth of 19 percent.

So, again, think back to the clips we've played of the defendant's own voice, got to keep an eye out in January, because we've got to be able to fix it in February. If we don't, right, Rule of 78s. They didn't hit it in January. Recurring revenue wasn't happening. They didn't hit it in February. They didn't take corrective action. The recurring was continuing to stay below where they had budgeted, and now we know in March they didn't hit it in March. The recurring revenue remained flat. Wasn't where the plan said it should be. And they dig into the old IRU, one-timer market one more time to save the quarter, which is incredibly convenient for the defendant, because as he's trading, they're making their numbers, but he knows what the people on the other side of those sales to this point don't know, that that house of cards is going away. And this is a critical part of this case.

It is not that while he's trading they're not making their numbers. Of course, they are. They're hitting these

IRUs as hard as they can, to keep the house of cards up until he can dump as much stock as the market can possibly digest. And that is a lot.

So he is inflating, keeping up the house of cards, dumping stock as fast as he can, knowing that they can probably make it to first quarter. They can probably make it to second quarter as we're just about to visit with Mr. Casey's business unit review. But in Mr. Casey's words, they're draining the pond in those IRUs. Those are going to be gone. The market demand is declining. That's the importance of the April 9 document. In the defendant's own words, if something big doesn't happen by April, they're in trouble. And you can listen to the clip when you're back in the jury room. You can take his word for it, not mine.

All right. So after the April 9 document is reviewed by the defendant, there are a series of business unit reviews, and you heard from all of our business unit guys about that. You heard from Mr. Smith on what is now called consumer and small business, you heard from Mr. Casey on the wholesale group, and you heard from Grant Graham on global.

So let's spend a little bit of time and hear what Mr. Nacchio heard during that time frame.

Let's start with wholesale. And let's start with Government's Exhibit 959.

All right. So this is an e-mail from Kathy Kochis who was -- we didn't hear a lot about her. She was Mr. Casey's business unit CFO. So she is circulating to everybody the -- actually, she's circulating to everybody here the business unit review that's about to be discussed in the following day with Mr. Nacchio.

All right. Let's look at what is discussed in that meeting.

Here we see on the first page of this business unit review -- not the first page, this is the sixth page -- again, to be clear, if you want to look at this in the jury room, this is Government's Exhibit 959, wholesale markets, first quarter review. Top of page 6, this risk they like to use at Qwest, again, Ms. Szeliga describes it as unlikely revenue, 675 million in unlikely revenue for the rest of the quarter. All right.

Mr. Casey, again, came here and spoke to you about that. And he explained to you the market for IRUs tightening as capital spending among carriers -- remember, he's the guy who sells to the other phone companies, right, they're running out of money. And you've heard a lot of testimony about other telecom companies aren't doing well either, so they're not out buying a lot of IRUs, just as Mr. Casey had projected.

So that market is drying up. Local IRU accounting issues of $180 million is also built into that.

And this is the meeting, April 13, where Greg Casey, again, the guy who knows more about IRUs than anybody in the company, tells Mr. Nacchio, we have drained the pond, were his exact words to you. That's going away. We can probably get Q2, but we're not -- we're not going to be able to rely on those to hit Q3 and Q4.

On April 13, keep in mind, that's the day he gets that. In fact, maybe we can go back to our timeline for a moment. Sort of been skipping through some documents and sort of bring you up to date for what bad information the defendant has been getting.

So you have Szeliga telling him about the billion dollars of risk. Go to the next one. He sells shares February 20 through March 1. Those are Counts 16 through 23.

February 23, he gets that January dashboard that tells you about how the company did for the month of January. And that's Government's Exhibit 921.

The next bad news he gets is the March 20 first quarter forecast update. That's Government's Exhibit 923. That's the document Ms. Szeliga prepared in -- for him to see before she went on vacation.

And then March 21 is what we call the February dashboard. That's Government's Exhibit 924. Again, that's showing -- they haven't taken corrective action. Down in January, down in February.

Then the April 9 document that we just reviewed, again, I urge you to take a look at when you go back to the jury room, very clear what has happened the first quarter and what bad news he's gotten by April 9. That's the product revenue forecast. And then we're in the midst right now of reviewing business unit reviews, and we just talked about what Mr. Casey told him on the 13th.

The reason you'll see there are no sales during that time period is the window is closed. You've heard a lot of testimony about that, so I won't drag you through that again. The window is closed until they hold their earnings conference call, and the window doesn't open until April 26. The fact that there are no sales there, that's the reason for that.

All right. Let's keep going through the business unit reviews. Let's talk about global business, which is another entity that does a large amount of IRUs.

And I think their business unit review is the 11th. If we can look at -- what I would like to direct your attention to, one of the pages in there.

Again, this is Mr. Graham focusing Mr. Nacchio's attention on this recurring and non-recurring.

And you can see what they were hoping to happen with the budgets is, well, we'll get non-recurring up to 58 percent -- we'll try to keep it at 58 percent, I should say, and get recurring up to 42, because this business unit did tend to do a lot of IRUs. And their current estimate now, recurring estimate is only going to be 30 percent for the year, and non-recurring will be 70 percent. Again, more of the shift is not occurring in global.

I think Mr. Graham's testimony was that one-time transactions were used to close the gap in the first quarter. Recurring revenue plan was not performing. And in his words, it was way off the target, I think was his testimony on that.

Let's just briefly look at another entry from the global business unit on May 21, 2001, while we're talking about global.

This is May 21, 2001, if we could look at page 5.

What I want to emphasize here, the one piece of data I'd like to focus your attention on here is, again, this is second quarter forecast. Most of the others are negative in that variance column, under -- they're making it up as the IRUs -- straightforward enough to call them other one-timers. Again, defendant knows this is how they're planning on making it for the second quarter.

If we could go ahead and look at the third and fourth quarter, 3Q and 4Q performance, it's at -- same thing, 370,254,000 IRUs that they have plugged basically there in light of what they know is going to happen with the market to help make the third and fourth quarter.

So let me move now just to consumer and small business to round out our big three. And I think their April submission was on the 12^{th}.

And I think that's Government's Exhibit 972.

And, again, this was Mr. Smith, you heard from him, explaining his meetings that Mr. Mohebbi attended, he and Ms. Szeliga attended and, of course, Mr. Nacchio attended.

And his report from that meeting, if you can show that, Mr. Denno -- it's Mr. Smith's handwriting. He testified about that. And I want to direct your attention to the 2001 estimate. How are we going to do for the rest of the year in revenue? $323 million negative variance. And, again, no surprise, you know, they went through the budget process in the fall. They racked their brains to try as hard they could, squeeze blood from every stone. At some point, there is no more blood. They have 323 negative guarantee EBITDA after the first quarter -- that's their projection going forward. That's the projection for the negative variance for the year. And EBITDA also has a forecasted negative $305 million variance for the year.

So those are the big three business units.

Now, let me -- let's go back to our timeline.

Okay. I think let's go ahead and fill out -- I think I addressed the May 21 one. Let's go ahead and put that one there, Mike, if you've got it.

We're filling out our timeline.

After the April 9, 2001, forecast update where he's told the shift is not recurring, recurring revenue is down 20 percent, after he goes through the operational reviews, where he does hear from Mr. Casey, we've drained the pond, it's another time he's got a choice, and he's got a big one now. What do I do? I'm about to go on the earnings conference call. I'm going to tell the whole investment community what happened at Qwest during the first quarter. Lots of interest. You know, this is first quarter of the new full year they're going to be together. He's got a big decision. When I say this is about choices, this is exactly the moment I'm talking about.

He has a choice. Don't tell. You know what? Don't tell. You've got this proprietary information. You want to keep it to yourself. You think this is terrific. None of us would be here, none of us would be here. Keep it to yourself. But he makes a decision.

He makes a decision to go out and -- can we play that clip from the April 24, 2001, earnings conference call. All the analysts following Qwest is on the call. This is the comment he leaves them with.

(Tape played.)

Nothing to dissuade us? Nothing to dissuade us. I got a binder full of things that he should have told these people about at the other end of that call. Or not tell them and not sell. But if you don't tell, you can't sell. That's the choice he had in front of him. And what does he do that lands him here in this courtroom with us today? He sells and does he.

Let's look at his April sales. If we can look at the stock sale chart, again, Mike, with the 42 counts.

I think it's 62.

Okay. So, again, this is the list of the 42 sales which he's charged.

In we can go to the next slide.

Now, remember the window, the first day he can sell in the open window after this quarter is April 26 of 2001. Let's look at what he does in the first four days when he had a chance to sell after he says there is nothing to dissuade us.

$34 million worth of sales.

I mean, look at the dump he puts out there relative to the rest of the sales on this chart. Nothing to dissuade us.

A third of the amount charged in this case takes place in those four days. Again, he knows recurring revenue is not taking off at this time. He knows the one-time market is going away. He knows the house of cards is about to implode. Knows he drained the pond. He tells them, we've seen nothing to dissuade us, and he goes on a selling binge that is unparalleled. That is -- the judge is going to talk to you about what is criminal intent, what is intent to deceive. I really ask that you pay a lot of attention to this time period.

Again, I don't want to focus on the April counts. I want you to look at the mounting evidence over time, and that's one of the most important things you're going to do is evaluate, is there enough material non-public information at any one point for there to be a crime. I ask as you start that period you really focus on the backdating of the growth shares, because I think that's very indicative of someone who knows he has material non-public information at the time he's trying to sell the January and February.

So I draw your attention to the April sales at this point because of the amount of information he has at this time, because of the misleading impression that he's seen nothing to dissuade us. And of course, you'll be the judge of that, whether it is misleading or not, but the contrast between that statement and the documents we've just reviewed.

Let's walk through the rest of his trades, then.

The rest of his trades -- let's take a look at this chart. Again, I believe -- I'm not certain, but I believe you're going to get some sort of summary of the sales that might look something like this when you go back to the jury room. So let me -- it won't have the descriptions on the side. These are the count on the first column. When you go down -- first two are the growth shares, backdated documents.

The next -- if you look at the timing, you wonder why it's timed this way. The first quarter trading window doesn't open up until January 26, so you won't see any trades before then, because, under Qwest's policy, the window is closed.

Then you see the February trading plan. He enters into a plan February 15 to sell 11,500 shares a day. All right. And there is a big announcement about this, and you've heard actually a lot of testimony about that plan as well, so now would be a good time for me to focus on that.

He has a plan to sell 11,500 shares a day for the next couple of years, because, as he says, his options are expiring. If he sells a little bit every day, he can get rid of all his shares before they expire. He can diversify. Everybody loves this plan. Slater loved the plan. Weinstein, personal advisor, loved the plan. Mr. Nacchio originally loves the plan. But you can't tell somebody you're going to sell 11,500 shares a day and then start dumping a million shares within a couple of days. So he cancels the plan and goes on the April purge, which we see there.

You'll see following the large April sales are Counts 28 through 35, which are, again, just more selling -- exercising of options and selling of shares during the window when he has material non-public information, and then he enters another plan May 18, and he sells -- I think you have the plan back with you in evidence, but I think the gist of it is he's agreed to sell 10,000 shares a day, but there is some sort of catchup routine if the stock goes below $38. You're going to be able to sell a lot more shares once the stock goes up. I haven't read it recently, but take a look at it yourself to make sure you understand it. He puts a $38 floor in there.

There is a lot of discussion, I'm sure you'll hear, about the $38 floor. But if you think about it, the stock -- stock is at about a 52-week low at this time. I mean, look at the stock evidence that's in, I think it's 1880, and think of how it looks for a CEO to be selling shares as his market price is plummeting, when he's already sold a million shares in the last week or so. There comes a point when even the CEO just can't sell anymore.

You heard Mr. Wolfe talk about how the analysts were calling, asking. He gets several calls a day, why is he selling.

So there does come a point where you really can only cash in at a point. I'll let Mr. Stricklin talk to you about that when he talks to you after the defense talks to you. But there does come a point where the CEO can't unload because then the whole market will implode.

Following the -- actually, let me look at a few more charts on the stock sales. I apologize.

If we could take a look at 400, Government's Exhibit 400.

Again, I want to focus your attention on the magnitude of his sales during this time period when he knows the IRU market is going away. He's got this two-quarter window in which he could get rid of this stuff, because the house of cards is about to fall down.

In these two quarters, first two quarters of 2001, he sells 250,000 more shares in those two quarters than he did in those gray bars combined. I think that's 18 months.

So 250,000 more in five months than he sold in the 18 months before that. And that's the ramp-up of the sales that we talked about, again, we think evidence of a man who knows that the party is about to be over. He's dumping his shares.

Let's also look at the stock price chart, if we could.

All right. And I just want to draw your attention to some of the fortuitous timing. He stops selling -- I don't know if you can put a dot -- he stops selling just about the end of May. So you can see he enjoyed good times, gotten out while the getting is good.

And stock goes down, and throughout the summer of 2001, and I want to focus you now just for a minute on the summer of 2001.

Actually, before I leave his rate of sales, I want to be clear with you, that February plan that we talked about, that would have solved all of his problems. It would have enabled him to exercise and sell every single option that he had before it expired. So that was a viable alternative for him. And he chose not to do it because he couldn't sell fast enough.

All right. Now let me move forward to the summer of 2001.

The evidence shows that the defendant's goal during the summer of 2001 was to put as much distance between himself and eventually having to take down that number, because he knows it's coming, and that last sale. When you go back to the jury room, I ask you to look at your notes or think through the testimony, because he affirms guidance so vehemently through this summer.

You'll remember June 18. There is some discussion on this from Ms. Szeliga. There was a really bad article in the *Wall Street Journal*, and it says, there is a glut in the fiber optics industry, and Level 3's stock is falling. Mr. Wolfe testified about this and so did Ms. Szeliga. And it was just really bad for Qwest, because it compared them to some companies who did a lot of IRUs, and Mr. Nacchio insists that they have a conference call the following day, and they get all the analysts on the call immediately, and he wants to make sure that the stock price doesn't go out. He wants to go out and affirm guidance.

Ms. Szeliga is in Pennsylvania on East Coast time. They're talking. It's about 2:00 a.m. in the morning, I think her testimony was. She is begging him, this is a quiet period. We can't affirm for the year. We don't know if we made it for the second quarter yet. It's June 18. We're sort of in an IRU period. We don't know if we're going to close it or not.

She begs him. He says to her, you go to sleep, see what I do in the morning. Wakes up, holds a conference call, affirms guidance, very strongly touting that this company is going to make its numbers for the year. Again, knowing all the documents that he's seen, knowing the business unit reports that he's seen, having talked to the business unit heads, he goes out and affirms on June 18. Why? Because he has to. How would it look if he takes the number down on June 18? He has to. It's too close in time.

He doesn't have much of a choice there. Throughout the summer, he continues in this pattern. There was a Piper Jaffray conference on August 7, which Mr. Wolfe, head of IR talked about. In that conference, he decides to talk about the fact they do have IRUs.

I encourage you to review your notes or exhibits on this, because this is another kicker that the guy does. He goes out and sort of pretends everyone's known it all along. After insisting that nobody disclose this and being wholly unwilling to tell the people how they're making the number, he's been caught. People know they're doing it now. Wall Street has stopped believing him, I think the testimony was from Mr. Wolfe. So he comes out and pretends you've known we've done this all along. What's the big deal? He still confirms guidance. We're terrific.

Now, this is August. We're well into the third quarter. When Casey has told them we're not going to be there, he's still affirming guidance strongly. Again, trying to put some distance between himself and that last trade on May 29.

Finally, on August 15, the company finally does for the first time -- and I think you heard this from Mr. Johnstone, the company finally does describe the volume of IRUs that they were doing in the first quarter and the second quarter. And, you know, I think Mr. Johnstone's testimony was, he immediately stripped it out of his model. I think his testimony was -- when I say, stripped it out of his model, that growth was that related to the IRUs, he just took it out. I think his testimony was, he used to think that Qwest was growing at 12 percent, and now he knows they're really only growing at 7-1/2 percent because he knows these IRUs are also going away, very difficult market, one-timers.

You know, very difficult to have sustainable growth in that market, particularly during this time. So he strips them out.

And then Qwest, I think the testimony was from Mr. Johnstone as well, Qwest does the same later on, takes it out of their growth estimates.

The first time that Qwest reveals and Mr. Nacchio reveals that the IRUs actually went away and were going away was in the third quarter. So he doesn't tell the investing public what he knows in the fall of 2000 until almost a year later.

And I think Mr. Casey testified that the IRUs dissipated throughout the fourth quarter as well.

Let me just stop for a minute and go -- let's review -- you're going to go back to the jury room, and the judge is going to give you a lot of instructions on how to view the counts. And I wouldn't be so cavalier as to speak on the law, but I do know the judge is going to talk to you about a couple of key words.

And one concept is, taking advantage of investors, or is he taking advantage of the information.

And I'd like to show you a couple of pieces of evidence that I would like you to focus on when you go back and you review.

If we can show chart 64A.

Now, this is testimony that you heard from Lee Wolfe when he was discussing with Mr. Nacchio the concerns that the analysts were raising. This is Mr. Wise's question. "Now, what did Mr. Nacchio tell you in response to your concerns that were raised by the analysts about these one-time transactions?" What was his response to you?

He says, "Well, as I testified earlier, there were different responses in terms of what the impact on the stock price would be. A couple of other times he would say, you know, why do they need to know? And I would say, to make an informed decision whether to buy or sell the stock. And basically Mr. Nacchio responded, screw them. Go tell them to buy."

Now, that is the clearest form of taking advantage of investors. Unambiguous. And it was not attacked further on cross.

Let's go to the next example of taking advantage of other investors.

Now, this is Prashant Khemka who came to us from the investment banking firm of Goldman Sachs. And he testified about finding out about the IRUs and writing a memo to Wolfe that eventually went to Nacchio, and we all remember this because it said, "How many more cockroaches do you have in your bag?" And we all -- unfortunately, my college days -- remember, you see one cockroach, we know you have a lot of them. That was the reference Mr. Khemka was making.

He says in January of 2002, to set the scene, this is the investment conference he's at, asking Mr. Nacchio how he's going to recover from what they've been through, Mr. Khemka says, "I recall specifically quoting Mr. Nacchio, smiling, and he was saying, first of all, let me give you a piece of free advice. Never believe a word of what management says at the time of a merger. Do you think AOL/Time Warner management believed what they said at the time of their merger?

Management have to say things in order to get the merger done."

And then question, "When he says management had to say things to get the merger done, what merger is he referring to?"

Answer: "The Qwest/U S WEST merger."

Question: "And when he said management had to say things to get things done, who is management? Who is he referring to?"

Answer: "Mr. Nacchio himself."

So those are two examples, and you look at your notes, look through the record, certainly not suggesting it's limited to that. I think those are two very good examples of Mr. Nacchio's intent to take advantage of investors.

The another thing the judge is going to talk to you about is, did the defendant really know what he was doing is wrong? And there is a very specific instruction on that, but did he have the intent to do something wrong or bad. And listen to the judge's instruction on that, because that's what governs, not what I say.

But what I do want to do is focus your attention on why we think he did know what he was doing was wrong.

Let's look at Government's Exhibit 308.

And I want to be clear, he knew not only what he was doing was wrong, he knew it was unlawful.

So this is Qwest's insider trading policy. And I think Ms. Oneth talked to you about this. This is Government's

Exhibit 308, if you want to take a look at it, from October of 2000.

And can you highlight who it's from, Mr. Denno.

It's from the defendant, Mr. Nacchio, coming out over his name, just before he had this trading period, to all employees -- officers and employees of Qwest Communications International, company-wide, to all insiders subject to this restriction, and the purpose of this policy, if you can -- bring that out a little bit. Great.

So this is a policy adopted by the board. And the purpose is to ensure compliance with insider trading policies and disclosure of tipping of material non-public information to outsiders.

And so this is basically telling the people in the company -- giving them notice of what the company policy is. Again, the judge will instruct you on the law. This is just a company policy. But I'd like you to go to the page that talks about the consequences.

If you could highlight that.

So this is the memo going out under his name. These are the consequences for insider trading violations. It says, "Failure to abide by this policy will result in sanctions. This may include removal or dismissal as the circumstances may warrant for cause."

That's the policy. You're going to get in trouble with the company. There is a bigger ramification coming up, that is, "Trading on material non-public information is a crime subject to significant fines and jail terms for individuals. In addition, the SEC may seek civil penalties and violators may -- "must disgorge any profits made and may be subject to civil liability to private plaintiffs."

So -- and you're back there deliberating, did he really know that if you sell stock with material non-public information it can get you in trouble with the law? Specifically, is it criminal? He knew it because the memo went out under his name to all employees.

So I ask that you consider that when the judge gives you that instruction and you're back in your deliberations.

Also, you're going to hear a lot about materiality, what is material, and what kind of information can be material. And I want to, again, not instruct you on the law, but just ask you to consider a little bit of evidence that we've pulled together that you might want to look at for that.

Let's look at, again, Government's Exhibit 308, because in this same policy Qwest identifies types of information that can lead to -- that can be material. All right. So this is, again, the document that went out under Mr. Nacchio's name.

The first one is certainly relevant. This is examples of information that may be material.

Financial results, especially quarterly and year-end earnings.

The second bullet is projections of future earnings or losses, which depart materially from market expectations based on prior disclosures.

Now, I've heard a lot of questions particularly on cross with our witnesses of, these are projections and nobody should count on them. How can investors rely on projections for 16 months? Their own policy that went out under his name says at least in Qwest policy, that's material information, disclosures of material information. Projections are material information.

All right. So focusing just on those two, we've prepared another chart on examples of those, and I think that's -- Mr. Denno, slide 48 series.

So, again, this is examples of information that may be material. Qwest inside policy says, financial results, especially quarterly and year-end earnings.

If we go to the next slide, examples of that, presented to Nacchio on April 9 -- so these are financial results for the first quarter. They are reporting to him recurring revenue, missed the first quarter plan by nearly 20 percent. In that document, they also report to him that in the first quarter Qwest was relying more on one-time transactions than they had planned because recurring revenue did not take off in the first quarter.

And if we can go to the next slide.

Another example that may be material, we believe is, is presented to Nacchio in April of 2001, based on current performance, annual shortfalls in private line, hosting, wireless and residential, totaled 549 million.

And then that also is from the April document.

Another example of information that may be material are projections of future earnings. Again, this is just from the Qwest policy.

The evidence I direct your attention to on that point -- and, again, lots of examples of this, but I -- I ask you to consider at least the Mohebbi warnings, and it -- this one is Government's Exhibit 905 and 904. 904 says, Qwest's recurring business had to take off by April or May or the gap would be too large to deal with in the second half of 2001.

And Government's Exhibit 905, which is the second warning from Mr. Mohebbi, which came in, I think, around December 20, testimony shows, if Qwest's recurring revenues don't take off, there would not be enough one-timers to close the gap in the third and fourth quarter of 2001.

All right. So those -- I'm sorry, let's go to one more. In December of 2000, in his meetings with Qwest executives -- this -- to be clear, this -- this could have happened in December of 2000 to the middle of January, so I want to be clear on that. The chart might be off. CFO warned 1 billion of risk in 2001 budget, and national mass markets warnings of a gap as high as 444 million, and it has no plan to fill it and never did have a plan to fill it.

Again, those are examples of material non-public information.

And let me focus on that -- another aspect of this just very briefly. And that is, is something non-public? Do -- what do we know is out there in the public? And it's got to be something Mr. Nacchio hasn't told other people. To get over that hump and evidence, I'd like you to consider the testimony of Mr. Johnstone. And Mr. Wise went through the series of questions with him.

Great.

And those -- this is from the testimony of Drake Johnstone, research analyst with Davenport and Company, and you remember Mr. Johnstone testified that he was a *Wall Street Journal* number one analyst of the year in the telecom industry based on his reporting.

The question is, "Now, Mr. Johnstone, did" -- I think this is after the first quarter earnings release conference call. "Now, Mr. Johnstone, did the defendant tell you and investors listening on that first quarter earnings call that in 2001 recurring revenue had to grow at twice the rate it grew in 2000 or Qwest wouldn't make its numbers in 2001?"

Answer: "No."

Question: "Did the defendant tell you and the other investors on that call that Qwest's recurring business needs to literally -- recurring business needs to literally take off by April or May time frame or the amount of one-time business required to fill the gap will be too large to deal with in the second half of 2001?"

Answer: "No."

Question: "Did the defendant tell you that recurring business missed the first quarter plan by nearly 20 percent?"

Answer: "No."

Next slide.

"Did the defendant tell you that Qwest would not have made its numbers in the first quarter of 2001 without over $500 million of one-time transactions?"

Answer: "No."

Question: "Did he tell you that one-time transactions amounted to 38 percent of Qwest's growth in the first quarter?"

Answer: "No.

"When, if ever, did you learn that fact?"

Answer: "Qwest published a second quarter 10Q filing with the SEC in August of 2001.

"And what information did that filing in August of 2001 contain as it related to one-time transactions?"

Answer: "Qwest disclosed in the 10Q filing in August of 2001 that it had included in the first quarter results over $400 million of one-time optical capacity sales."

Sorry, one more slide.

Question: "Did Mr. Nacchio tell you and other investors listening on that call, the first quarter call, that as a result of the recurring business not taking off in the first quarter that Qwest was relying more on one-time transactions that they had planned -- than they had planned, particularly in the second half of the year?"

Answer: "No."

Question: "Did the defendant tell you on that first quarter earnings call that the market for IRUs was drying up?"

Answer: "No."

So that is some of the evidence that we ask you to look at to evaluate whether something was public or non-public when you go back in your deliberations.

Now, there is one more chart I'd like to show you, and that is regarding Mr. Mohebbi's warnings.

Mike, if you could pull up chart 70. Do that you have?

Now, these are a couple of warnings -- these are Mohebbi's and others, but these are a couple of warnings that the defendant received -- and I want to review these with you, because he received them fairly early in the game, and they came true.

Now, the first one is, there is a billion dollars of risk in the 2001 budget. That's the unlikely revenue that Ms. Szeliga talked to the defendant about, again, either late December or through January. Did it come true? Yes, it came true. I'll spoil the surprise.

And what's the final result? Qwest takes their number down by a billion dollars on September 10, nine, eight months later than she told him, warns him of this, and well past his trading that brings him here today.

The next warning, if Qwest's recurring revenues don't take off, there would not be enough one-timers to close the gap in the third and fourth quarters of 2001. That's from the Mohebbi warning.

Yes, that came true. Qwest missed their numbers in the third quarter, and the IRU market did dry up. I think Mr. Casey testified that it -- I'm sorry, they missed it in the third quarter, the IRU market dried up. This is from the Casey warning that he gave him in the fall, and, again, in April 13 of 2001. Yes, it did. October 31, 2001, Qwest missed their numbers in the -- Qwest missed their numbers in the third quarter. I think there is testimony they missed in the fourth quarter as well.

So the warnings that the defendant had but didn't heed intentionally and deliberately did come true.

I want to just wrap up by thanking you again for your time and by reminding you, again, this defendant is here, not because we wanted him to be here. He's here because of his own choices. And every one of those trades, he could have simply decided, if I'm not willing to disclose, I can't sell. And none of us would be here.

But we're here because he made the wrong choice. He made the choice not to tell and to sell, which is the one choice you can't make. That's the lethal combination.

And so I ask you to go back and to review the evidence and to return a verdict of guilty on all 42 counts. Thank you for your time.

THE COURT: Members of the jury, we'll take the afternoon recess at this time and be in recess until 10 minutes of 4:00.

I'll let you go out first.

(Jury out at 3:35 p.m.)

I have a note here to myself to bring up the question of instructing the jury to disregard the testimony of Sally Anderson and telling me -- telling them the Court struck that testimony. I deferred doing that, Mr. Stern, because I thought you had -- you asked me to do it for some reason that I don't recall.

MR. STERN: As I remember, my best recollection is, you said you were going to strike, and we had no problem with that. You were going to give some reasons that we weren't in agreement with, but certainly, you -- the testimony should be stricken. You have struck it. And I think the jury should be told.

THE COURT: Well, I think that it makes sense to tell them I've stricken it because it's outside the time frame. It was made when Mr. Nacchio had no material information and her decision to change the investment was before he even started to sell.

MR. STERN: I -- I, frankly, don't remember what -- I'm sorry.

THE COURT: I say, what's wrong with that?

MR. STERN: Well, because that wasn't the only basis of our objection. And it might lead them to believe that they otherwise would be admissible. I would ask simply say the testimony has been stricken.

THE COURT: Well, you know, you get juries to comply with court orders if you tell them -- explain a little bit what is going on, rather than just say, I've stricken the testimony, and they say, why did he strike it?

MR. STERN: I understand that's the Court's view, and I don't want to argue with you. But since the instruction is for my benefit and the efficacy is for my benefit --

MR. STRICKLIN: My only request would be you do that at the time when you instruct the jury in general.

THE COURT: All right. That's fine. Do you have any problem with that?

MR. STERN: I don't have any objection.

THE COURT: All right.

(Recess from 3:38 p.m. to 3:56 p.m.)

THE COURT: Mr. Stern.

CLOSING ARGUMENT

MR. STERN: Thank you, Your Honor.

Good afternoon.

I know how I'm going to end, and I know how I'm going to begin, but we have a long way to go in between.

I think you know that I'm going to end by asking you in the name of justice to acquit Joseph Nacchio, who not only has not been proven to be guilty, but is not guilty, and that's why he hasn't been proven to be guilty.

I know how I'm going to begin, and that's by most sincerely thanking you, each one of you, whether alternates or main jurors, the promise of the Constitution that everybody should have the right to a trial not before professional lawyers or judges, but before a cross-section of the community requires the kind of sacrifice, effort, time, attention that each one of you has paid. I've been kind of sneaking glances at you from time to time, and I've seen how diligent you've been in the performance of your duty. I'm sure it could not have been easy for you from time to time. And I hope you do believe that no matter what you do, I'm sincere in telling you that you have my appreciation and that of everybody at this side of the table, and I'm sure the prosecution as well.

Joe Nacchio is charged with 42 counts of what amounts to fraud. That's what insider trading is.

It's alleged on 42 occasions he deliberately, intentionally and with a bad purpose to disregard the law cheated people who he sold his stock to by taking advantage of them. That is a false charge. It's not true. And in the time remaining that I have, I'm going to do everything in my power to show you why it's not true.

Interestingly enough, in spite of what I said to you in my opening, the prosecution's never shown you the Indictment in this case.

Mr. Nacchio is not charged with concealing information about budget disputes conversations. He's not even charged with concealing information about the publicly stated financial targets of the company. And that's what the Indictment concerns. Not targets, not stretch goals, not efforts by company management to have employees exceed what they thought they could do for the benefit of the shareholders, those efforts. But, rather, this Indictment focuses on the publicly stated financial targets of the company, which, as I think you now know, the critical period of time is September 7 of the year 2000. I'll take us through it, I'm afraid, one last time.

The Indictment charges that with the knowledge that those targets were unavailable, 21.3 to 21.7, by December 31 of 2001, Joe Nacchio sold stock using -- using information which led him to believe that those targets were unattainable.

That is not true. He knew no such thing. Believed no such thing.

As a matter of fact, most of what we've heard this morning and most of what you've heard for about three weeks or more did not even concern the publicly stated financial targets of the company. They were discussions about what the business plan, the internal budget of the company, would be as Nacchio and Woodruff and others in authority were trying to get the business heads to exceed the publicly stated financial targets of the company and were meeting resistance, which I think is not -- I suggest to you is not unusual for -- it is not unusual for those in charge of a business to seek to urge and get people who are working to do more than they think they can do, and it is not unusual for the people being thus stimulated to resist, particularly where their own financial interests lie in not having internal, not external, but internal targets set not too high.

Now, I think even as I begin to talk to you about what this Indictment actually contains, namely, the accusation, that Joe Nacchio with the deliberate intention to defraud people, that is, people buying stock that he sold, used inside information as a reason to sell.

I think it might be appropriate to tell you what I believe the judge will charge you the law is on this subject. I know this because he's been kind enough to tell us in advance about what it would be.

A person trades on the basis of inside information if the Government proves beyond a reasonable doubt that that person actually used material non-public information in deciding to trade.

It is not sufficient for an insider merely to have possessed material non-public information when he traded. The information -- inside information must be a cause of the trade.

Now, I'm not trying to hide out behind the law. The fact of the matter is, Joe Nacchio had no material inside information. The debates and discussions about whether or not the business units heads could reach their internal budgets which were substantially higher -- you know $700 million higher than the publicly stated financial targets, that was not then material information.

And the fact that between September 7, 2000, and December 31, 2001, 16 months into the future, economic circumstances which nobody could be confident about in September or October or November or December or January of 2000, economic circumstances proved to be worse than most people anticipated, is immaterial to the issue before this jury.

The fact of the matter is, what was his conduct at the time? Was it reasonable? Did he have a right to believe in the reasonableness of the public targets which he put out to the public? Did he personally believe in them, and did he personally act in such a way that his conduct conformed to such a belief?

Now, I'm going to have to go through a little bit of history, I think, that many of you know pretty well.

You know that in December of 1996, Nacchio joined forces with Anschutz to create a telecom company, because at that time, it basically wasn't that yet. It was basically more of a construction company.

And I know that you've heard a great deal about one-timers and IRUs. And at the appropriate time, I'm going to try to explain to you in more detail why that is a figment in terms of this case. One-timers and so-called non-recurring income were not one-timers and not non-recurring.

They were not one-timers. They were not non-recurring. They may have called them that for internal purposes, and there was a time when the company had 60 percent, 40 percent, 20 percent of such income. What that was merely was capacity sales.

It is no different than if a car company sells cars. Is that recurring income or not recurring income? But as I say, we'll deal with that at the appropriate time.

Now, what was Joe Nacchio's deal? He was paid a substantial salary, and yet not grand for CEO types, $600,000 a year. He was given -- and the reason that he did the deal -- a 3 percent interest in the growth of the company, for purposes of this contract. As you know, the company was valued at $1 billion. And that meant that in addition to his salary and in addition to his bonus he was entitled to receive from the company, which was then owned by Anschutz entirely -- he was entitled to receive 3 percent of what he and the other people working there could do to improve the value of the company.

That, as you know, ultimately becomes the growth shares.

Now, the testimony is pretty clear that that 3 percent interest amounted to something less than $30 million at the time -- this doesn't seem to have much juice in it.

At the time that that company -- thanks. At the time that the company went public.

So in June of -- in June of 1997, Qwest, as it had become known, became a public company. And at that time, in addition to everything else, he was entitled to 3 percent of the difference between the way the company was valued in 1996 when he joined and the public price that was put on it when it went public.

Now, I have to go through some detail. I hope it isn't too boring for you.

All of that money did not vest at once. 20 percent a year is what his vesting period on that particular money was.

And so that money would entirely vest when? At the end of 2001, December. Because, you see, folks, he had begun in December 1996. That was the starting point of his contract. And his entitlement would vest 20 percent a year, one-fifth a year, until it reached the 100 percent, which would not be for five years.

But there was another provision of the contract which was that he could withdraw 20 percent of each 20 percent. I hope that's not too confusing. That means that as each year the 20 percent vested, he could take 20 percent of that and realize it.

Now, the testimony of Craig Slater was completely clear. As the years went by after it became a public company, he took his 20 percent of the 20 percent. It was a little over $1 million.

And he did not want stock. Now, the prosecution has constantly talked about the fact that he took the 20 percent of the 20 percent in stock. I hope you remember that they told you that. And it is true that he did. But it is not true that he wanted to. And Craig Slater took the stand, he was not our witness, they called him, and testified that on each of those occasions Nacchio had asked for cash, and the company said no. You have to take stock.

Slater said to you, "I do remember him asking for cash at various times, and I do remember -- and I do recall at least one of them -- one of those him asking for cash if not both." And I'm citing to page 523 of the record.

So he was due a little less than $30 million and had the right and did exercise that right to take periodic payments, 20 percent of 20 percent, something between 1,000,000 and 1,200,000 each time, and each time he asked for cash.

By the time he reached final payment, he was due approximately -- I'm rounding numbers, because otherwise it would make us entirely crazy here. He was due approximately $24 million. That money would have been due him -- that money would have been due him on December 31, 2001. But the company did him a favor. They advanced the payment. They said, at the time of the Qwest merger, we will allow you to receive this money on January 1, 2001. In other words, they advanced it one year, a couple days difference, but one year.

Now, it is indisputable, Slater testified to it, even Weinstein, who as you can see is no friend of ours, although he has presented himself so, has testified that Nacchio did not want the stock. He wanted cash. And he asked Slater, please don't give me the stock, give me cash. And Slater said, no, our deal is, you have to take the $24 million in stock.

There is a letter in evidence dated, I believe, August 13, 1999, written just a month or two after the Qwest merger, which advanced the $24 million payment to December -- to December 31 -- rather, withdrawn -- January 1, 2001. And that begins the story of the growth share payment.

I don't know in my mind, frankly, as to whether to take us through that or to leave it there for a moment or to go back through the history of what occurred entirely, and I think it might be wise for me to do that.

But I want to leave you with this point, and I promise you, upon my word of honor, that I will come back to this.

I want you please to remember, and I will document it before you, that that $24 million was to be paid in shares irrespective of the price of the stock, that he had no interest whatsoever in terms -- pardon me -- in terms of that $24 million in what the price of the stock would be on January 1 of the year 2001, because if the price of the stock was a dollar, he'd get 24 million shares, if it was $10, he would get 2.4 million shares. I think you heard that ad infinitum, and I have the testimony before me, which can establish it, if there is any doubt about it.

And there is no doubt about it, that both Slater and Weinstein testified he did not want the stock. He wanted to have cash and, no, they wouldn't do it.

Now, as I say, if I had less confidence in the fact that you have been paying careful attention, I would attempt to carry through this transaction right now. But I'm going to come back to it, secure in the knowledge that this jury understands what I'm talking about.

In June, when Qwest went public, not only did Joe Nacchio become entitled to the growth share payment at the time of the public offering, he received, as you know, 3 percent of the public offering in terms of options.

There were 100 million shares that came to the public market. Consistent with the growth plan, which was now terminated because it was no longer a private company, and to continue to incentivize him to remain with the company, he was given 3 percent of the new public company in the form of options. I'm sure you will recall that.

Because there were 100 million shares issued, he was given 3 million options at $22 a share. And I think you will recall that there were two splits thereafter. It split to 11, and then it split to 5.50. So he got -- his shares became 6 million at 11 and then 12 million at 5.50.

Now, that happened in 1998 -- well, the last split didn't happen right at the beginning, but for purposes of our discussion and so we don't lose track of the numbers, I propose to do what I did at the opening, and what everybody has done throughout this case, to deal with this as 12 million shares at 5.50. Otherwise, we'll just -- we'll all just lose it.

I am going to use Professor Fischel's chart.

'98 -- 1998 opens. He has -- as of the end of 1997, which is the year that Qwest goes public, he has 24 -- 2,400,000 shares vested. I should have mentioned and didn't that these 12 million shares would vest over a six-and-a-half-year period -- no, withdrawn. That was the life. They would vest over a five-year period. 2,400,000 per year. Every year, every single year on December 31.

2,400,000 of his 12 million options would vest, which would mean you can do anything you wanted with them.

You could sell them. He could execute and keep them. He could do nothing with them. They were his. They belonged to him.

You also know something else about those. They had an inherent defect. What was it? Slater told you, he said, the board made a mistake. They made the mistake not only with Joe Nacchio, they made that mistake with everybody they gave options to in June of 1997 when the company went public. They were 6-1/2 year options rather than the 10 years that they had preferred, which began in time, as you know, to put pressure upon every single one of those corporate officers who got those, what became $5-1/2 options to eventually execute, and I suggest to you, sell, because otherwise they would be under water. They'd lose them.

So he began the year with his 2.4 million. He executed on 1,131,000 of them. That was 47 percent of his inventory.

In this, he disobeyed Weinstein.

You remember Weinstein. He wanted him to execute and sell more, more. In this, he disobeyed him. Why? Because he believed in his company. Why did he execute? Well, wouldn't it be ridiculous to sit around with 12 million options at $5-1/2? What are you going to do with them?

Yes, you could execute and hold. But is there any member of this jury that does not have to pay taxes to the United States government? Is there any member of this jury that doesn't have to pay state taxes, as well as national taxes? Is there any member of this jury that doesn't understand that in terms of net proceeds that a tax is due? And that tax is due whether you sell or you hold.

In other words, hypothetically, if you take a $5-1/2 option, execute on it and hold it, and let's say the price was $25.50, I'm making it up just to be easy, you'd owe $20 income. That's $20 income, ordinary income, and you'd have to pay tax to the nation and the state.

In any event, 47 percent is what he did.

1999. He had 1,268,000 -- this one may be the one with the typographical error, I'm not sure, but -- that's what was left over. And December 31, another 2.4 million vests.

Now he has 3,668,902, $5.50 options that are fully vested.

Again, he begins to execute and sell. 51 percent.

What happens on October 13, 1999? What happens was, in July they announced the merger of U S WEST and Qwest. And U S WEST is going to merge into Qwest. It takes about a year to do it.

But at that time and as a reward for achieving this, Nacchio and Mohebbi and other high-ranking corporate executives are granted additional options.

What are they granted? Well, Nacchio's granted 9 million options at a strike price of $28.50, which will vest each year, 25 percent. But these are not defective. They're ten-year options. They don't have that short shelf life of the first.

How is this figured out? That's about the price, you see, at the time they're granted.

So he's got 9 million, but they will vest every year, right, 25 percent on August 18 of each next four years until they too will be fully vested.

Now we come to an important year, ladies and gentlemen, the year 2000.

He has 1,787,000 some odd options remaining from the preceding year. On December 31, 1999, another 2.4 million options vest and become available. That means he now has 4,187,902, $5-1/2 fully vested options at the beginning of the year.

Notice how those numbers are increasing in terms of the inventory from year to year.

And I should also point out that it is in this letter on October 13 that his growth -- penmanship I don't think is my thing -- but his growth shares are accelerated to January 1, 2001.

Now, he knows that on January 1, 2001, that hasn't happened yet, he's going to get roughly $24 million in Qwest shares, irrespective of the value of the stock, and he's trying not to get it in stock.

We know that by November, even by October, he's working with Weinstein trying his best not to get the cash -- the stock. He wants the cash.

So what's he working on? He's working on a deferred compensation program in which, Weinstein told you this morning, one-third of the entire amount will be withheld, not even put forward into the marketplace. $8 million will be treated as deferred compensation. Of that 8 million, 4 million would go into a life insurance policy.

We know that they've been working on this since at least October. And we know because Weinstein testified the last time he was here that on November 7 Nacchio went for a physical examination for that life insurance policy.

What else do we know that is going on exactly in this period of time?

Nacchio knows that his $5-1/2 options are going to expire in June of 2002. And that's not that far away when you've got 4,187,000 of them with another 2.4 million coming at the end of 2000, and another 2.4 million coming after that.

And so what does he do? He approaches the Board of Directors. And what does he ask them to do?

In direct violation of what David Weinstein told him to do, he asked the board to extend the life of the options. There is no dispute about it. Craig Slater testified to that fact before you.

Question: "I think you told us, didn't you, in hindsight, not deliberately, but in hindsight you made a mistake in terms of the expiration period of these options, true?"

Answer: "That's correct."

Question: "They had an" -- question: "There was a clock on those options, right?"

Answer: "They had an expiration date of June 30, 2003."

Question: "If he had not exercised any of them by June 3, by June 3 of 2003, or whenever he had -- whatever he had not exercised by that time he would have lost, true?"

Answer: "Correct. Whatever he had not exercised by June 30, 2003, would expire and be useless and worthless."

Question: "Hindsight, then, it can be appreciated, he would have had to exercise, whether sell or hold, but exercise 12 million options by June 2003, that's true, isn't it?"

Answer: "That's correct.

"And I think you told us that created a problem for the board."

Answer: "Yes.

"But it also created a problem for Mr. Nacchio, didn't it?"

Answer: "Yes."

Now, why did it create a problem for the board? Well, no Board of Directors is very happy about having -- having a CEO exercising and selling 12 million options in a relatively short period of time. I think you can appreciate, from their point of view, that would send an incorrect message to the marketplace.

Question: "And he told you, didn't he, that he didn't want to sell or execute all of those options, didn't he?"

Answer: "That's correct."

Now the question then is, why doesn't he just execute and hold?

Question: "On or about October of 2000" --

Answer: "Right --

-- "there was a public announcement by Mr. Nacchio that he was going to have to sell a million shares a quarter because the board was unable to extend the life of the options.

They couldn't -- they couldn't fix the mistake. That's true."

Answer: "That's right."

Question: "He did go to you folks earlier, didn't he, and ask you to extend the life?"

Answer: "Yes, he did.

"And you wanted to help him, didn't you?"

Answer: "Yes."

Question: "But you couldn't do it in terms of the company's interest. That's true, wasn't it?"

Answer: "That's correct."

Question -- and then I turn him over to you folks. "Why don't you tell these people and His Honor why you couldn't."

Answer: "Well, it goes back -- it's accounting. You can blame everything on accounting. I was very frustrated by it. To me, it's pretty simple. You get -- you -- say you've got a -- six and a half year options, we'll give you another three and a half years on it. The answer is, if you do that, and we looked at it for months, probably, three or four months, and I was very frustrated to me, there has got to be an answer. The bottom line was, if you do that, you have to take the entire value of these options and it will be an accounting charge.

"So, say, the value of these options was $300 million, just by the simple fact of extending it by three and a half years, and there was no way that our experts could get around it, so that -- is that simple enough?"

He said it was, but it's not so simple.

But I hope you folks understand. Nacchio went to the company, he says, look, I don't want to have to execute on this stuff. I want to hold it. Give me some life, give me some more time. They said they couldn't do it because they'd have to take an accounting charge, and the accounting charge was in the area of $300 million.

"There is no doubt about the fact that you would have done it for him if you could have?"

Answer: "That's correct.

"There is no doubt about the fact that it would have cost the shareholders of the company too much money to do that?"

Answer: "It would have been a negative for the company."

And then I got right to it, "The number you picked out, $300 million, that wasn't just a number you picked out, as my grandmother would say, just for an instance, right, you have some recollection?

"Well, I was actually doing quick math, so it wasn't a recollection. But I think it's close enough.

"As a matter of fact, when those conversations were going on, the math was done, wasn't it?

"Oh, absolutely, yeah.

"And it was in the hundreds of millions, several hundred millions of dollars it would have cost the company, right?

"At least."

Well, ladies and gentlemen, I want you to understand what that means in terms of what it meant to Nacchio.

If he executes and holds, he's got to pay that kind of money because that's the gain involved. And so obviously, and with reluctance, on October the 31st, in light of the history that I just read you -- and I didn't make it up. I didn't call Mr. Slater to the stand. He wasn't called by the defense. He was called by Mr. Stricklin. And the testimony that I just read to you, you probably remember, was all on cross-examination.

And so, on October 31, Joe Nacchio made an announcement. You actually, I think, saw a clip of him yesterday, feels longer ago, but I think it was just yesterday, actually saying the words that are on this chart, but I want to trouble you by going through them again.

I know your board -- this is the question -- board has required you and other senior officers to exercise and sell.

Forgive me, if I'm in your way, would you just give me a --

So -- then Nacchio makes a complete, total public statement about what is going on, about what you heard going on behind the curtain.

Now, I don't know if they're going to contend that this is part of his great coverup. If it is, then Slater, their witness, is involved. Nonsense.

Right now I've got two grants. I've got a '97 grant -- ladies and gentlemen, that's 1997, when Qwest went public and he got the 12 million options. I've got a '97 grant in which there is 7.4 million options, all of -- outstanding, all of which expire, not just mature, most of them are vested -- by the way, is every word the man is saying publicly true? It's right there on the charts. But they expire in under 30 months.

Then I've got a 9 million option grant that goes on for another nine years.

Is that true? Yes, it is. You know it. You saw it. That's the $28.50 stock.

The problem we have, who is the "we"? Me and my board have.

Is that true? You just heard Slater tell you.

Is that my grants expire. It's use them or lose them. And they have a big gain in them.

Do they? You bet they do.

On October -- I don't have the price -- and I'm not going to start thumping around with that bloody chart. But this is close enough.

On October 30, one day before the price of that stock is $49.48, right? No doubt about that, folks.

Well, if you deduct 5.50 from that, you've got $44 a share in profit. Multiply that by 7.4 million, and you're in the hundreds of millions of dollars.

Well, he's a lucky man, right? Not so lucky now, because they're accusing him of doing all of these bad things, of executing and selling all of this stock he had no choice but to do, told his board he didn't want to do, told his financial advisor he didn't want to do. And nobody's making this up. We're not the ones on this side of the courtroom that's making anything up. But I may show you who is before I'm done.

So I can't just exercise and hold. Oh, why not? He'll tell you why in a minute. I have to sell every quarter, and you'll see me sell a substantive amount every window, and I'll dribble it out over the period. Now, I have gone to the board and said they ought to think about a different method, because we're running out of quarters, and they still have 7.4 million to sell.

I think he meant I still had 7 -- you know, that's the way it is, but we put it down the way it is on the record.

So you've got to sell about a million a quarter just to break even, and that -- you know, that's a concentrated selling period. Didn't want to do it.

So my board is actually considering whether they want to do something different with my outstanding options. Well, we know they did want to consider. We know they did want to help them. We know Slater told us that they did want to help him.

So I'm not caught in that squeeze, that I don't have to just dump them in a short window. But right now I'm in this little window, and it's really where the big selling is coming. And just for the record -- gosh, I feel terrible, I'm probably -- just for the record, I'm not selling anything that is vested that I've got nine years left.

What are those, folks? You know what they are by now. That's these. That's the $28.50. option. I'm not going to sell a one of them, he says, because I don't have to.

Now, this is a man, you understand, that throughout this period of time in October, November, all of these good folks doing their budget hearing, are telling him all of these terrible things about what I heard in the summation about the company, all of these harbingers of doom, all of these things that are going to happen, the company is going to be worth nothing, company is going to tank.

What he's selling to the public is, look, I've got to sell these. I'm not going to sell these under any circumstances, and you know he never did.

Now, folks, if you think the company's going to hell in a hand basket and you think that the stock price is going to plummet down to the floor, don't you think it might be smart to get rid of the $28.50 options? But he says, no.

I got nine years left. I already have 2-1/2 million of these vested, but I'm holding. He says he's got 2-1/2 million of them. You got 2-1/2 million. I guess he just exaggerated. He only had 2,250,000. But 2-1/2 million is in the ballpark, as we say.

I'm only selling the use-them-or-lose-them ones right now. And that should, you know -- you should not interpret that in any other way, other than, I can do the math, and you know, you have to exercise them, and you can't lose them, and you've got to pay the taxes.

Unless you believe that he was so clever, so Machiavellian that he could anticipate that all of these folks here would come into court and accuse him of insider trading, that's a pretty prophetic statement, isn't it? Do you think he made that just to defend himself against some case that would be brought years and years later?

That is the simple honest truth.

Look, maybe his business projections didn't come true. Maybe the same optimism, energy, drive and ambition that built the company in the first place led him in the end to miscalculate what could be achieved in the terrible year of 2001. That may be true. But that is not a crime, at least not yet.

And what he said to the public, to the shareholders, to the press was the truth, and I believe that you people know it.

And so he's selling. He's selling while the budget process is underway.

What else is he doing in the year 2000? In the year 2000, you may remember, he took 90,000 of his shares in July -- oh, I'm even at the right place, roughly. Took 90,000 of his shares of Qwest stock, which were worth nearly $4-1/2 million, and with the help of his good friend, David Weinstein, set up a family limited partnership. That's a little complicated, but, you know, I did that with Weinstein, and he explained it to you, and I'm sure you understand, even if you don't understand the nitty-gritty details of it. It's a way of conveying wealth during your lifetime to your heirs, getting money out of your estate.

You can't, however, totally escape, you know, the United States Department of the Treasury. So even though you're conveying it during your lifetime, you still have to pay a gift tax. And Weinstein said, the man paid a gift tax of nearly $2 million.

Now, folks, about the last thing you'd want to do in all the world is to convey an asset, pay a $2 million gift tax on it if you believe the asset was going to depreciate.

I mean, that would be absolutely financially suicidal.

Can anybody doubt that when he made that family partnership and that gift in July of 2000, he had anything but the highest expectations and hopes for his company?

Now, what else is going on in the year 2000?

In, I think it was, July of 1999, the announcement of the Qwest/U S WEST merger took place. And then it took them about a year to put it together. And so it was not finalized until the year 2000.

Now, I want to get one thing straight, if I can, before the clock ends my time with you at least for today. And that isn't the way to do it.

On July 19, 1999, a press release was issued by Nacchio, as chairman of Qwest, and Sol Trujillo, as chairman and CEO of U S WEST. And that document has been presented to you today in slides by Ms. Conry, and it was presented to you by the testimony of Mr. Wolfe, who Mr. Wise called to the stand.

And during the testimony of Mr. Wolfe and during the presentation of Ms. Conry, they showed you Government Exhibit 500. This is the press release.

And in that exhibit, they showed you that projections were made of 15 to 17 percent growth rate. And they have suggested to you that this was the creation of Joseph Nacchio. That's what they said to you. And that's what Wolfe swore to you.

Wolfe went further. He said, not only was this the creation of Joseph Nacchio on July 18 or 19th of 1999, he said that he protested. He said, these figures are outrageous. He said, you can't do this to the American consuming public. He even swore to you that he brought in representatives the night before this release was made, he brought in representatives from DLJ and Lehman Brothers to beg and plead with Nacchio not to issue such an aggressive growth statement. And they have charged him and continue to charge him with overreaching because, you see, he created this 15 to 17 percent figure back in '99, then promulgated it again in 2000 when the merger took place, and reinforced it and said it again and again every time he could.

You've heard that. And there is not one word of truth in it. And some of you may even remember, because the document they never want to talk about is Exhibit 502.

This is Project America. And this document, 502, is the Donaldson, Lufkin & Jenrette report survey that they took weeks to do. I hope you remember it, because every opportunity I had, I brought it to the attention of Ms. Szeliga and Mr. Mohebbi. And you remember both of them worked on this. I will later show you the testimony where both of them said they worked on this, and when Mr. Mohebbi himself, under his calendar, was there on July 18, the Sunday before the Monday, which was July 19, that this report was done.

And do you remember, folks? I surely hope you do, because if you don't, I'm going to read it to you anyway in due time. He testified before you that this report cost $31 million to the company. $31 million.

Why don't they ever want to talk about it? Why didn't Mr. Wise show this to Mr. Wolfe when he was saying that this press release and this number was a figment, came out of Nacchio's aggressiveness, overreaching? Two investment banking houses turned both companies as inside out as they could. Then they issued a report.

Remember, I kind of bored you at one point. I made us go through a couple of the charts, the tables. And it's Donaldson, Lufkin & Jenrette that on July 19, after for about five or six weeks, studying the books and the records of both companies, came out with the strategy.

Can we show --

Am I allowed to show things that are in evidence?

THE COURT: Of course.

MR. STERN: Okay.

502, page 5, please -- well, first put it on -- first put 502 on the stand.

That's Project America. I wonder if you would blow up the name of the author of this.

Donaldson, Lufkin & Jenrette.

I wonder if you would be good enough to turn to page 5, handwritten 5.

I wonder if you would be kind enough to blow up, make big, financial projections and 2000 to 2005 growth rates.

Let's yellow the part where the combined company has targeted growth rates of, and show what it says.

That was the study and the report that was made by the investment banking houses for which they were paid tens of millions of dollars, so that they could evaluate, give fairness opinions, give guidance, and make projections.

Now, let's take a look at the kinds of things they were doing.

If we turn the page to page 6, what do we see? They break down between Qwest and U S WEST and the synergies.

I wonder if we could blow up and make big the revenue breakdown.

And then they do it by type.

Could you blow up and make big the type.

I'm not suggesting that you have to remember these figures, folks. My purpose in showing these things is a simple one. I want to show you the pain, the time, the care, the professionalism that went into this on the part of investment banking houses, who gave these figures to Nacchio, who, as we shall see, in the months and years ahead, used this work as the basis for the reasonable sound financial projections, the publicly stated financial targets that he is under attack for in this trial.

Now, let's turn some pages.

Next page, page 7, is entitled "Synergy Breakdown."

Let's go to page 11, which is entitled "Qwest and U S WEST Transaction Multiples."

Let's turn to page 12, which deals with combined enterprise values -- value and multiples.

Let's turn the page and take a look at revenue breakdown by product, estimated.

This is a good one, folks, because if we go to the bottom of the column, where it says "total," the first -- it says, "total company revenue."

Can you enlarge the total -- it says total there.

Now, let's just take a look at 2000 and 2001. Folks, do those numbers look familiar? Donaldson, Lufkin & Jenrette was projecting combined revenue of $18.5 billion for the year 2000, and a combined revenue of $21 billion for the year 2001, and this is what they were projecting when they were making their report to both companies and to the investors about what they should expect the revenue of the combined enterprise to be.

And there is in this report, but I think my sticky has fallen off, a projection of a synergy number of $1.7 billion. And some of you may remember when I had Mohebbi on the stand under cross-examination, and he was going around town, you know, talking about what the synergies would be, even before the merger finally closed, and he said he stood by the $1.7 billion in synergies, which was projected by this report.

Members of the jury, I have taken this time to go through this, and I could take more, but I think it would be an extravagant use of your time, because I think I have established the point that I was trying to make.

It is not true that Joe Nacchio in July of 1999 out of his ear came up with the 15 to 17 percent of growth rate under the five-year plan. It is not true that in June 30 of 2000, when the merger was consummated and announced, that he came up out of his ear with the projection of $18.5 billion for the year 2000.

It is not true that in July 6, when he issued the next 8-K of 2000, and gave a projection for the year 2001, and he gave that projection July of $21 billion, it is not true that he made that up out of thin air or out of hope or out of aggressiveness or to deceive somebody or to promote his stock or to cheat anybody. He did it because those were the figures that he had been given by the two investment banking houses that had been paid a tremendous sum of money to analyze what this merger would look like in terms of revenue, in terms of EBITDA, in terms of prospects for the years ahead, and had given him tables of what to expect the revenue would be for the years 2000, 2001 and going forward.

There is no purpose to the going forward, obviously.

I hope I have -- I have no burden of proof in this room. They're the ones who are supposed to prove everything. They're the ones who are supposed to prove everything beyond a reasonable doubt, and it has fallen to me to show to you that the revenue projections which were issued in the year 2000, in the months of June and July, were reasonable, were appropriate, and were completely authenticated by two of the major investment banking houses of the United States.

I don't know what your pleasure is, but --

THE COURT: Well, like Alphonse and Gaston, I don't know what your pleasure is. Do you want to go on further, or -- I'm perfectly willing to take a break.

MR. STERN: I think -- it's a little after 5:00. Jury's been sitting listening to lawyers chatter at them for a while, and I think it might be fair.

THE COURT: All right.

MR. STERN: Thank you.

THE COURT: Members of the jury, we'll take the evening recess. Once again, as I always do before you go home -- at some point, I'm going to ask you to recite this. Remember not to discuss this case with anyone, including your families or one another. Do not read press accounts or listen to press accounts. Do not speak to any party, attorney or witness. Call me immediately if you receive an improper contact or call the clerk. Keep an open mind. We're very close to the end of the case, but you haven't heard all you need to hear before it would be proper for you to start thinking about your verdict in this case.

We'll start at 8:45 a.m. tomorrow morning. And ask you to be in your jury room ready to go by that time.

You are excused. Have a pleasant evening.

(Jury out at 5:04 p.m.)

MR. STRICKLIN: I'm getting shoved up here, Your Honor. So -- just --

THE COURT: Who is shoving you?

MR. STRICKLIN: The whole table, I think.

THE COURT: You know, just shove back, Mr. Stricklin.

MR. STRICKLIN: I've tried. It doesn't work out so well.

It's my understanding the Court's practice is you don't give the charge back to the jury to take back with them, and it's also my understanding the Court's practice, obviously, you don't give the Indictment to take back with them.

The question I have is one of, we have -- when you have a case like this, where there are 42 counts of the same -- they charge the same criminal offense but on different dates in question. And is the Court going -- my suggestion would be to give some sanitized version of the table that's in the

Indictment so that the jury can understand what count it relates to.

MR. STERN: I believe --

THE COURT: You've nicely anticipated something I was going to cover. It is not the case that I give -- don't send the Indictment to the jury. Maybe your team has misinformed you. At any rate, that's not my -- my practice is to the contrary, to send the Indictment to the jury.

The reason I was going to raise the issue on my own is because the defendant at various points on a pretrial basis has moved to strike various parts of the Indictment. And I denied those motions when they were made on pretrial basis with the suggestion that we could revisit them at trial if there proved to be parts of the Indictment that turned out to be appropriately stricken.

So I don't think that the listing of insider trade counts is the part that should be stricken. If there is a part that needs to be stricken, a redacted Indictment goes to the jury.

So I think we'll have time -- if somebody on each team will over the evening try to confer with one another and see what areas of agreement, if any, there are. And as to the defense, review the Indictment and find out or let me know or let the prosecutor know first what part of your motion to strike, if any, you persist in. And then I'll rule if there is any dispute. The prosecution -- if the Government thinks -- acquiesces in your motion to strike certain portions, that will be the end of it. I'll resolve any disputes.

MR. STERN: May I ask a question?

THE COURT: Yes.

MR. STERN: Number one, I think we would agree -- I hope you would agree that the forfeiture count would not go at this stage.

THE COURT: That's right. But that's another subject we need to get going on.

And I understand the forfeiture count will become ripe pursuant to discussions I had with counsel this morning if and when the jury returns with a guilty verdict.

MR. STERN: That's right.

THE COURT: And I don't -- I don't want there to be too much of a delay in submitting the forfeiture count to the jury under proper instructions.

MR. STERN: We'll work with them on that.

THE COURT: All right.

MR. STERN: The other thing I wanted to ask you -- excuse me, I didn't want to interrupt you.

THE COURT: All right. Go ahead.

MR. STERN: Do you intend to charge tomorrow, or does that depend on when we all finish?

THE COURT: Kind of depends on when you all finish.

MR. STERN: I thought so.

THE COURT: I'd love to. And I really think -- I'd be surprised -- I don't mean to anticipate the length of anybody's closing. But I'd be surprised if we can't at least get the instructions done tomorrow, which brings me --

MR. STERN: I forgot one thing. Sorry.

THE COURT: All right.

MR. STERN: We move to dismiss at the close of the Government's case.

THE COURT: All right. Motion denied.

MR. STERN: Thank you.

THE COURT: I forgot my ruling on it too, but that's close enough.

MR. STERN: I have to do it as a matter of form. I mean no disrespect.

THE COURT: I understand.

As I mentioned to the attorneys during colloquy this morning concerning instructions, the one thing that got left out of the instructions is an -- a carrying instruction on definition of interstate commerce or the means of any national securities exchange.

I know not all of the Government's lawyers were here, but I understand that that's really not an element that's in dispute. But it is an element of the charge, and it will be submitted to the jury. As I said this morning, I guarantee you that if we submit that as an element and don't define it for the jury, the jury will get hung up and we'll get a question on it.

I have prepared a charge, but it's not in final form, so I think what I'll do -- it should be non-controversial. I think it's a pattern instruction as a matter of fact. So I'll bring that tomorrow morning and ask counsel to comment on it before we get any further.

But that's really the third element of the insider trading charge. It needs to be defined to avoid confusion.

Let's see. Anything else?

MR. STRICKLIN: No, Your Honor.

MR. STERN: No, Your Honor.

THE COURT: Court will be in recess.

(Recess at 5:11 p.m.)

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 10th day of April, 2007.

____
Therese Lindblom,CSR,RMR,CRR