

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

JOSEPH P. NACCHIO'S ADDITIONAL REQUESTS TO CHARGE

DEFENDANT'S INSTRUCTION NO. 1

**CREDIBILITY OF WITNESSES -- DEFENDANT DID NOT TESTIFY
[if applicable]**

The defendant did not testify and I remind you that you cannot consider his decision not to testify as evidence of guilt. The fact that the defendant did not testify must not be discussed or considered in any way when deliberating and in arriving at your verdict.¹

You must understand that the Constitution of the United States grants to a defendant the right to remain silent. That means the right not to testify. That is a constitutional right in this country, it is very carefully guarded, and you must not presume or infer guilt from the fact that a defendant does not take the witness stand and testify or call any witnesses.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or of producing any evidence.²

Tenth Circuit, Pattern Jury Instructions, No. 1.08.1 (2006); *United States v. de Hernandez*, 745 F.2d 1305, 1309 (10th Cir. 1984); *see United States v. Vincent Hunt*, Inst. No. 2.10, 1:06-cr-00155 (EWN) (Jan. 16, 2007)

¹ K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions § 15.14 (5th ed.).

² *Id.*

DEFENDANT'S INSTRUCTION NO. 2

**EVIDENCE OF GOOD CHARACTER
[if applicable]**

The defendant has offered evidence of his reputation for good character. [Or: The defendant has offered evidence of someone's opinion as to his good character.] You should consider such evidence along with all the other evidence in the case.

Evidence of good character may be sufficient to raise a reasonable doubt whether the defendant is guilty, because you may think it improbable that a person of good character would commit such a crime. Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt.

You should also consider any evidence offered to rebut the evidence offered by the defendant.

You should always bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

DEFENDANT'S INSTRUCTION NO. 3

**IMMUNIZED WITNESS -- CREDIBILITY
[if applicable]**

A person may testify under a grant of immunity (an agreement with the Government). His or her testimony alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilt even though it is not corroborated or supported by other evidence. You should consider testimony given under a grant of immunity with greater care and caution than the testimony of a witness who is appearing in court without the need for such an agreement with the Government.¹

You should consider whether testimony under a grant of immunity has been affected by the witness's own interest, the Government's agreement, the witness's interest in the outcome of the case, or by prejudice against the defendant.

On the other hand, you should also consider that an immunized witness can be prosecuted for perjury for making a false statement. After considering these things, you may give testimony given under a grant of immunity such weight as you feel it deserves.

You should not convict a defendant based on the unsupported testimony of an immunized witness, unless you believe the unsupported testimony beyond a reasonable doubt.

Tenth Circuit, Pattern Jury Instructions, No. 1.14 (2006)

¹ K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions § 15.03 (5th ed.).

DEFENDANT'S INSTRUCTION NO. 4

**WITNESS—PLEA AGREEMENT --- CREDIBILITY
[if applicable]**

The Government called as one of its witnesses a person who has pled guilty to a criminal charge. The Government has entered into a plea agreement with that person providing for an agreement by the Government not to prosecute the individual for certain activity and a recommendation by the Government of a lesser sentence than the person would otherwise likely receive. Plea bargaining is lawful and proper, and the rules of this court expressly provide for it.

An individual who has entered into a plea agreement with the Government is not prohibited from testifying. You should receive this type of testimony with caution and weigh it with great care. That testimony should be weighed by the jury with greater care than the testimony of a witness who did not allegedly participate in the commission of a crime.¹

You should never convict a defendant upon the unsupported testimony of an individual who has entered into such an agreement with the Government, unless you believe that testimony beyond a reasonable doubt. The fact that a witness has entered a guilty plea to the offense charged is not evidence of the guilt of any other person.

Adapted from Tenth Circuit, Pattern Jury Instructions, No. 1.15 (2006)

¹ K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions § 15.04 (5th ed.).

DEFENDANT'S INSTRUCTION NO. 5

**SIMILAR ACTS
[if applicable]**

You have heard evidence of other [crimes] [acts] [wrongs] engaged in by the defendant. You may consider that evidence only as it bears on the defendant's [e.g., motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident] and for no other purpose. Of course, the fact that the defendant may have previously committed an act similar to the one charged in this case does not mean that the defendant necessarily committed the act charged in this case.

Tenth Circuit, Pattern Jury Instructions, No. 1.30 (2006)

DEFENDANT'S INSTRUCTION NO. 6

ALL COUNTS - INSIDER TRADING: ESSENTIAL ELEMENTS¹

Each one of the 42 Counts charge Mr. Nacchio with insider trading on or about a certain date. For you to find him guilty of each or any one of these alleged crimes, you must be convinced that the government has proven both of the following two elements beyond a reasonable doubt:

First: That in connection with the alleged sale of Qwest securities, Mr. Nacchio employed a device, scheme, or artifice to defraud; and

Second: That Mr. Nacchio acted willfully, knowingly, and with the specific intent to defraud.

¹ Adapted from K. O'Malley, J. Grenig & W. Lee, Federal Jury Practice and Instructions (5th ed.) ("O'Malley"), § 67.07.

DEFENDANT'S INSTRUCTION NO. 7

**ALL COUNTS - INSIDER TRADING FIRST ELEMENT: DEVICE, SCHEME, OR
ARTIFICE TO DEFRAUD¹**

The "device, scheme, or artifice to defraud" the government alleges Mr. Nacchio employed is known as insider trading. To establish this, the government must prove beyond a reasonable doubt (1) that Mr. Nacchio was aware of material, nonpublic information about Qwest or its stock; and (2) that, as to each Count alleged, Mr. Nacchio sold stock, on the basis of material, non-public information. I will next explain each of these concepts.

¹ O'Malley, § 62.14; *United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997) ("on the basis of"); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *United States v. Smith*, 155 F.3d 1051, 1066-69 & 1068 n.25 (9th Cir. 1998).

DEFENDANT'S INSTRUCTION NO. 8

**ALL COUNTS – INSIDER TRADING FIRST ELEMENT: MATERIAL
NON-PUBLIC INFORMATION**

Information is “nonpublic” if it has not been disseminated in a manner making it available to investors generally. In contrast, information is “public” when it is available to investors, even if it was not published in a press release, newspaper, or other form of media but is available through sources such as analysts’ reports, rumors, word of mouth, or other sources.¹ For information to be considered “public,” it is not necessary that most or even any investors act on the information, as long as the information is made available in a way that gives investors an opportunity to make investment judgments.

Information is “material” if, under all the circumstances, it would be expected to cause or to induce a reasonable investor to invest or not to invest.²

Materiality is not determined by what a professional securities trader or analyst would like to know.³

¹ *United States v. Cusimano*, 123 F.3d 83, 89 & n.6 (2nd Cir. 1997) (approving charge), *cert. denied*, 522 U.S. 1133 (1998); Instruction No. 16 given in *United States v. James T. Anderson*, Crim. No. 05-249 (D. Minn., June 16, 2006) (Hon. Paul A. Magnuson, U.S.D.J.) (available on PACER, docket entry No. 165).

² *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997) (citations omitted) (“A statement or omission is only material if a reasonable investor would consider it important in determining whether to buy or sell stock. (citation omitted). Whether information is material also depends on other information already available to the market; unless the statement ‘significantly altered the “total mix” of information’ available, it will not be considered material.”), quoting, *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 449 (1976).

³ *United States v. Teicher*, 1990 WL 29697, *1 n.3 (S.D.N.Y., Mar. 9, 1990).

The material, non-public information alleged by the government in this case relates to the revenue guidance issued by Qwest and Mr. Nacchio to the public on September 7, 1990, which forecasted Qwest's revenue for the future 15 month period, ending December 31, 2001. This projection of future income is what is termed in the law a "forward-looking statement."

DEFENDANT'S INSTRUCTION NO. 9

ALL COUNTS – INSIDER TRADING FIRST ELEMENT: MATERIAL NON-PUBLIC INFORMATION -- FORWARD-LOOKING STATEMENTS AND "SOFT INFORMATION"

A "forward-looking" financial statement is a statement containing a projection of revenues, income, or earnings, or other financial items.¹

Predictions of future corporate performance are inevitably inaccurate because things almost never go exactly as planned.² Projections which turn out to be inaccurate are not fraudulent simply because subsequent events reveal that a different projection would have been more reasonable.³

In this case, the forward-looking financial statement consisted of the September 7, 2000 projection 15 months into the future that revenues of Qwest would be between \$21.3 and \$21.7 billion, and each subsequent affirmation of that projection through May 29, 2001, when Mr. Nacchio stopped selling Qwest stock.

A forward-looking statement of the type conveyed to the public by Qwest and Mr. Nacchio on or about September 7, 2000, cannot be considered by you to be

¹ 17 C.F.R. § 230.175(c)(1) relating to 1933 Securities Act); 127 C.F.R. § 240.3b-6 Exchange Act).

² *Arazie v. Mullane*, 2 F.3d 1456, 1468 (7th Cir. 1993) (citation omitted); *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119-1120 ("Statements classified as 'corporate optimism' . . . are typically forward-looking statements, or are generalized statements of optimism that are not capable of objective verification. . . [and] are not actionable because reasonable investors do not rely on them in making investment decisions," citing *Raab v. General Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993)(statements in Annual Report that company expected "10% to 30% growth rate over the next several years" and was poised to carry the growth and success of 1991 well into the future" held to be immaterial "soft 'puffing'" statements)(other citations omitted).

³ *Grassi v. Information Resources, Inc.*, 63 F.3d 596, 599 (7th Cir. 1995); *Goss v. Summa Four, Inc.*, 93 F.3d 987994 (fraud does not result from the mere contrast between a defendant's past optimism and less favorable actual results)(1st Cir. 1996).

“material” under the law unless it is shown that the statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.⁴ Forward-looking statements need not be correct; it is enough that they have a reasonable basis.⁵ Similarly, statements as to beliefs or opinions, which is sometimes referred to as “soft information,” can only be material if that opinion or belief is known by the speaker at the time it is expressed to be untrue or to have no basis in fact since such information, including projections and estimates, inherently involves some subjective analysis or extrapolation.⁶

⁴ *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997) (“Statements classified as ‘corporate optimism’ . . . are typically forward-looking statements,” which the 10th Circuit Court of Appeals indicated through citations are often held to be immaterial, even sometimes as a matter of law (citations omitted), but further noted that “[t]his is not to say that forward looking statements cannot be material” because the U.S. Supreme Court (citation omitted) “made it quite clear that a statement as to beliefs or opinions . . . may be actionable if the opinion is known by the speaker at the time it is expressed to be untrue or to have no reasonable basis in fact”)

⁵ *Id.*; *Wielgos v. Commonwealth Edison Company*, 892 F.2d 509, 513 (7th Cir. 1989). *Accord Arazie v. Mullane*, 2 F.3d 1456, 1466 (7th Cir. 1993) (“If all estimates are made carefully and honestly, half will turn out too favorable to the firm and the other half too pessimistic”). *See Raab v. General Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993) (“Projections of future performance not worded as guarantees are generally not actionable under the federal securities laws”.

⁶ *Garcia v. Cordova*, 930 F.2d 826, 830 (“ ‘soft information,’ that is, ‘information about a particular issuer or its securities that inherently involves some subjective analysis or extrapolation, such as projections, estimates, opinions, motives, or intentions.’ ” (citation omitted). Court held that after careful consideration of all facts and circumstances relating to the nature of the subject information, the soft information at issue here (relating to corporate asset appraisals) was too speculative and unreliable to require disclosure under 10b-5 as ‘material fact.’ ”)(10th Cir. 1991); *See also, SEC v. Butler*, 2005 U.S. Dist. LEXIS 7194 (“Internal projections of profits and revenues,” including information available to the alleged insider trader through forecast meetings at the time he made the trades at issue, “was simply not a reliable indicator of [the company’s] probable quarterly revenue, nor was it a valid indicator of its earnings,” and the court found that the trader did not possess material nonpublic information when he made his trades.) (E.D.Pa. 2005) (10th Cir. 1991).

In making forward-looking statements of future revenue, Qwest and Mr. Nacchio were not required to reveal their data, assumptions, and methods.⁷ Nor were they required to reveal the projections generated internally. Even if some of those internal projections conflicted with its publicly-issued projections or guidance that information would not be considered material, and Qwest and Mr. Nacchio would only be required to disclose such tentative internal projections that conflicted with the published projections if the internal figures were so certain that they show the published figures to have been without a reasonable basis.⁸

If the September 7, 2000 projections were reasonable, then after September 7, 2000, there was no duty to correct projections unless conflicting internal projections which were certain and reliable, not merely tentative estimates, made the previously public guidance materially misleading.⁹

⁷ *Wielgos*, 892 F.2d at 515.

⁸ See *Wielgos*, 892 F.2d at 516 ("Any other position would mean that once the annual cycle of estimation begins, a firm must cease selling stock until it has resolved internal disputes and is ready with a new projection. Yet because large firms are eternally in the process of generating and revising estimates-they may have large staffs devoted to nothing else-a demand for revelation or delay would be equivalent to a bar on the use of projections *if the firm wants to raise new capital*").

⁹ *In re Healthcare Compare Corp. Sec. Lit.*, 75 F.3d 276, 282 (7th Cir. 1996); *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 998 (10th Cir. 2002) (*aff'g* Nottingham, J.) (accurate reporting of historic financial results does *not* give rise to a duty "to further disclose *contingencies* that might alter the revenue picture." (emphasis added)).

DEFENDANT'S INSTRUCTION NO. 10

ALL COUNTS – INSIDER TRADING FIRST ELEMENT: MATERIAL, NON-PUBLIC INFORMATION – CAUTIONARY LANGUAGE ACCOMPANYING PROJECTIONS AND STATEMENTS

When reasonable forecasts, opinions, or projections in a disclosure statement are accompanied by warnings and cautionary language which provide the investing public with sufficiently specific risk disclosures, forward-looking statements cannot be material.¹

As an example, cautionary language accompanying a projection would include a statement that forward-looking statements are attended by risks and uncertainties that could cause actual results, including financial results, to differ materially from those expressed or implied by the projections.

Therefore, I instruct you that while forward looking statements can be "material," as I have defined the term for you, they cannot be "material" if:

¹ *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1120 (10th Cir. 1997) (cautionary statements that "future earnings and stock price could be subject to significant volatility, particularly on a quarterly basis" and "Novell's revenues and earnings may be unpredictable" and "Quarterly financial results are difficult to predict and quarterly financial results may fall short of anticipated levels" were "highly specific, very factual, and directly address[ed] the predictive statements" in question); *Id.*, ("Forward-looking representations are also considered immaterial when the defendant has provided the investing public with sufficiently specific risk disclosures or other cautionary statements concerning the subject matter of the statements at issue to nullify any potentially misleading effect."); *Id.* at 1121 ("Accordingly, we hold that the 'bespeaks caution' doctrine, as articulated in this opinion, is a valid defense to a securities fraud claim in the Tenth Circuit."); *United States v. Morris*, 80 F.3d 1151, 1167 (7th Cir.) (citation omitted), *cert. denied*, 519 U.S. 868 (1996); *United States v. Morris*, 80 F.3d 1151, 1167 (7th Cir.) (citation omitted), *cert. denied*, 519 U.S. 868 (1996).

- (a) the forward looking statement had a reasonable basis in fact when issued;² and
- (b) the investing public has been provided with sufficient specific risk disclosures, or other cautionary statements to nullify any potentially misleading effect.³

Thus, in order to find Mr. Nacchio guilty on any of the counts in the indictment you must first find that it has been proven beyond a reasonable doubt that the forward-looking projections of revenue were "material," that they had no reasonable basis in fact, and that the warnings which accompanied them were insufficient to nullify any potentially misleading effect.

If the materiality of the September 7, 2000 guidance has not been proven beyond a reasonable doubt, then you must find Mr. Nacchio not guilty. However, if you find that materiality has been proven beyond a reasonable doubt then you must also consider whether Mr. Nacchio traded on the basis of the material, non-public information.

² *Wielgos*, 892 F.2d at 514 ("Forward looking statements need not be correct. It is enough if they have a reasonable basis"); *Grossman*, 120 F.3d at 1120 n.6 ("This is not to say that forward looking statements cannot be material ... a statement as to beliefs or opinions ... may be actionable if the opinion is known by the speaker at the time it is expressed to be untrue or to have no reasonable basis in fact") (emphasis added); *Id.* at 1120 ("Forward looking statements are also considered immaterial when the defendant has provided the investing public with sufficiently specific risk disclosures or other cautionary statements concerning the subject matter of the statements at issue to nullify any potentially misleading effect. This doctrine ... is called the 'bespeaks caution' doctrine").

³ In *Grossman*, the Tenth Circuit specifically approved the "bespeaks caution" doctrine: "Accordingly, we hold that the 'bespeaks caution' doctrine, as articulated in this opinion, is a valid defense to a securities fraud claim in the Tenth Circuit." 120 F.3d at 1121.

In this case, the indictment alleges that the material, non-public information upon which basis Mr. Nacchio traded was the views of other corporate officials who, as time went by, advised him, among other things, that the publicly-issued guidance for 2001 was a "huge stretch," "aggressive," and in "jeopardy." However, so long as the publicly-issued guidance remained reasonable, any contrary views which you find to have been expressed by insiders to Mr. Nacchio would not be considered by the law to be "material" and therefore would pose no legal prohibition to anyone trading on the basis of those views.

On the other hand, if additional non-public information deprived the existing public guidance of its reasonable basis, then such non-public information would be "material" for purposes of the law if the risk disclosures or other cautionary statements were not sufficient to nullify any potentially misleading effect.⁴

⁴ *Wielgos*, 892 F.2d at 516 ("*Panter v. Marshall Field & Co.*, 646 F.2d 271, 291-93 (7th Cir. 1981), holds that firms need not disclose tentative internal estimates, even though they conflict with published estimates, unless the internal estimates are so certain that they reveal the published figures as materially misleading ... Issuers need not reveal all projections. Any firm generates a range of estimates internally or through consultants. It may reveal the projection it things best while withholding others, as long as the one revealed has a 'reasonable basis' – a question on which other estimates may reflect without automatically depriving the published one of foundation. Because firms may withhold even completed estimates, they may withhold in-house estimates that are in the process of consideration and revision. Any other position would mean that once the annual cycle of estimation begins, a firm must cease selling stock until it has resolved internal disputes and is ready with a new projection. Yet because large firms are eternally in the process of generating and revising estimates – they may have large staffs devoted to nothing else – a demand for revelation or delay would be equivalent to a bar on the use of projections if the firm wants to raise new capital").

Simply put, tentative internal estimates need not be disclosed even though they conflict with public estimates, unless those internal estimates are so certain that they reveal that the published figures as unreasonable.

In determining whether those providing conflicting estimates were expressing material information, you should consider whether such proponents were aware of all of the facts necessary to make their opinions material, such as their awareness or lack of awareness of the full scope of all of the business prospects of Qwest, including potential government contracts.

DEFENDANT'S INSTRUCTION NO. 11

ALL COUNTS – INSIDER TRADING FIRST ELEMENT:
“ON THE BASIS OF”

To establish that Mr. Nacchio sold Qwest stock “on the basis of material, nonpublic information,” the government must prove beyond a reasonable doubt that Mr. Nacchio actually used the material, nonpublic information with the intent to defraud purchasers of his stock. It is not sufficient that the government prove that Mr. Nacchio sold Qwest stock while merely in possession of material, non-public information or while simply aware of such information. Therefore, as to each individual count of the indictment, unless the government has proven beyond a reasonable doubt that Mr. Nacchio in fact actually used the material, nonpublic information with the intent to defraud purchasers of the stock that he sold, you must find him not guilty on that count.¹

¹ *O'Hagan*, 521 U.S. at 656; *Smith*, 155 F.3d at 1068 n.28 (“material nonpublic information [must] be a ‘significant factor’ in the insider’s decision to buy or sell”); *United States v. Causey*, 2005 WL 3560632 at *5 n.7 (S.D. Tex. Dec. 29, 2005) (material, nonpublic information must “factor in the decision to make the charged trades”); Instruction No. 18 given in *United States v. James T. Anderson*, Crim. No. 05-249 (D. Minn., June 16, 2006) (Hon. Paul A. Magnuson, U.S.D.J.) (available on PACER, docket entry no. 165) (“Government must prove that the defendant actually used material, nonpublic information”); jury charges given in *United States v. Skilling, et al*, Case 4:04-cr-25, at 49 (S.D. Tex., May 15, 2006) (Hon. Sim Lake, U.S.D.J.) (available on PACER, docket entry no. 960) (government must prove defendant used the information in making his decision to sell Enron stock); *United States v. Wolff*, Case 05-0398, at 34 (C.D. Cal., June 21, 2006) (Hon Percy Anderson, U.S.D.J.) (trading “on basis of” material nonpublic information means the defendant “actually used” the information in formulating or consummating a trade); Stuart Sinai, *A Challenge to the Validity of Rule 10b5-1*, 30 SEC. REG. L.J. 261 (2002)

DEFENDANT'S ALTERNATIVE INSTRUCTION NO. 11**ALL COUNTS – INSIDER TRADING FIRST ELEMENT:
“ON THE BASIS OF”**

To establish that Mr. Nacchio sold Qwest stock “on the basis of material, nonpublic information,” the government must prove beyond a reasonable doubt that Mr. Nacchio actually used the material nonpublic information with the intent to defraud purchasers of his stock, and that such inside information was a significant factor in Mr. Nacchio’s decision to sell. It is not sufficient that the government proves that Mr. Nacchio sold Qwest stock while merely in possession of the material nonpublic information or while simply aware of that information. Therefore, as to each individual count of the indictment, unless the government has proven beyond a reasonable doubt that Mr. Nacchio in fact actually used the material, nonpublic information with the intent to defraud purchasers of the stock that he sold, and that the information was a significant factor in that decision, you must find him not guilty on that count.¹

¹ *O’Hagan*, 521 U.S. at 656; *Smith*, 155 F.3d at 1068 n.28 (“material nonpublic information [must] be a ‘significant factor’ in the insider’s decision to buy or sell”); *United States v. Causey*, 2005 WL 3560632 at *5 n.7 (S.D. Tex. Dec. 29, 2005) (material, nonpublic information must “factor in the decision to make the charged trades”); Instruction No. 18 given in *United States v. James T. Anderson*, Crim. No. 05-249 (D. Minn., June 16, 2006) (Hon. Paul A. Magnuson, U.S.D.J.) (available on PACER, docket entry no. 165) (“Government must prove that the defendant actually used material, nonpublic information”); jury charges given in *United States v. Skilling, et al*, Case 4:04-cr-25, at 49 (S.D. Tex., May 15, 2006) (Hon. Sim Lake, U.S.D.J.) (available on PACER, docket entry no. 960) (government must prove defendant used the information in making his decision to sell Enron stock); *United States v. Wolff*, Case 05-0398, at 34 (C.D. Cal., June 21, 2006) (Hon Percy Anderson, U.S.D.J.) (trading “on basis of” material nonpublic information means the defendant “actually used” the information in formulating or consummating a trade); Stuart Sinai, *A Challenge to the Validity of Rule 10b5-1*, 30 SEC. REG. L.J. 261 (2002)

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 12

All Counts - Insider Trading Second Element: Knowledge, Intent, and Willfulness¹

A "scheme to defraud" means that the government must prove beyond a reasonable doubt that Mr. Nacchio participated in the scheme to defraud, which, in this case is alleged to be insider trading, knowingly, willfully, and with the specific intent to defraud, manipulate or deceive.²

"Knowingly" means to act voluntarily and intentionally, and not because of mistake or accident.³

"Willfully" means to act voluntarily and purposely with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.⁴

"Intent to defraud" means to act knowingly and with the intention or the purpose to deceive or to cheat.⁵

¹ O'Malley, § 17.04; 15 U.S.C. §§ 78b, 78ff; 17 C.F.R. § 240-1 10b5; *Arthur Andersen LLP*, 544 U.S. at 705-06; *United States v. Overholt*, 307 F.3d 1231, 1244-46 (10th Cir. 2002).

² Taken from transcript of October 12, 2006 Motion Hearing in *United States v. Nacchio*, Crim. No. 05-00545 (EWN) at 4.

³ Tenth Circuit's Criminal Jury Pattern Instructions, No. 1.37; *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511, 1521 n.1 (10th Cir. 1983) (Holloway, C.J., dissenting in part).

⁴ Taken from transcript of October 12, 2006 Motion Hearing in *United States v. Nacchio*, Crim. No. 05-00545 (EWN) at 4; O'Malley, § 17.04; *Overholt*, 307 F.3d at 1244-46; *United States v. Peltz*, 433 F.2d 48, 55 (2d Cir. 1970) ("willfully" under securities laws); *United States v. Dixon*, 536 F.2d 1388, 1397 (2d Cir. 1976) (willfully requires intent to break the law); *United States v. Charnay*, 537 F.2d 341, 352 (9th Cir. 1976) (willful act is "wrongful *under the securities laws*" (emphasis added)). With respect to the term "willfully," the comment to § 1.38 of the Tenth Circuit's Criminal Jury Pattern Instructions states that, "when a statute uses this word, care should be taken to distinguish between its meanings."

⁵ Taken from transcript of October 12, 2006 Motion Hearing in *United States v. Nacchio*, Crim. No. 05-00545 (EWN) at 5; O'Malley, § 16.07; *United States v. Dowlin*, 408 F.3d 647, 667 (10th Cir. 2005) (securities fraud requires showing of intent to defraud, mislead, or deceive); *United States v. Gross* 961 F.2d 1097, 1102 (3d Cir. 1992).

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 13

All Counts - Good Faith Defense¹

The good faith of the defendant is a complete defense to the charge of securities fraud contained in each of the 42 counts of the Indictment, because good faith on the part of the defendant is simply inconsistent with the intent to defraud alleged in each charge of the Indictment.

A person who acts on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct.

The law is written to subject criminal punishment to only those people who knowingly defraud or attempt to defraud. While the term 'good faith' has no precise definition, it encompasses among other things a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another.

¹ Taken from transcript of October 12, 2006 Motion Hearing in *United States v. Nacchio*, Crim. No. 05-00545 (EWN) at 7-8, and as further ruled by the court, from O'Malley, Instruction 19.06. See *Williamson v. United States*, 207 U.S. 425, 453 (1908); *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) ("[A] good faith instruction is required, even if an instruction on willfulness has been given."); *United States v. Grissom*, 44 F.3d 1507, 1512 (10th Cir. 1995) (good faith negates the requisite *mens rea* element of the offense); see also *United States v. Janusz*, 135 F.3d 1319, 1322 (10th Cir. 1998); *Steiger v. United States*, 373 F.2d 133, 135 (10th Cir. 1967); and see *Gross*, 961 F.2d at 1103 ("commend[ing]" to district courts the use of good. faith instructions "as a supplement to the 'knowing and willful' charge" in securities fraud cases).

In determining whether or not the government has proven that Mr. Nacchio acted with an intent to defraud, or whether he acted in good faith, the jury must consider all of the evidence received in the case bearing on Mr. Nacchio's state of mind.

The burden of proof is not on Mr. Nacchio to prove his good faith, since a defendant has no burden to prove anything. The government must establish beyond a reasonable doubt that Mr. Nacchio acted with the specific intent to defraud as charged in the indictment.

If the evidence in the case leaves you with a reasonable doubt as to whether Mr. Nacchio acted with the intent to defraud or in good faith then you must acquit him.

Thus, for example, unless you find that Mr. Nacchio did not honestly believe that Qwest's financial projections were reasonable, he is entitled to the defense of good faith and a verdict of not guilty.²

² *Steiger*, 373 F. 2d at 135.