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 RESPONSE TO GOVERNMENT'S OBJECTIONS TO DEFENDANT'S ADDITIONAL REQUESTS TO CHARGE

INTRODUCTION

Mr. Nacchio hereby responds to those government objections to our additional requests to charge, which in our view are most contentious and most critical to the trial of this matter.

Defendant's Proposed Instruction No. 9 includes modified language, which is indicated by the insertion of brackets [ ] around the word or words to be deleted, and underlining the language to be added. One legal term (""materially misleading") is replaced by a legally synonymous term ("without a reasonable basis") in order to maintain internal consistency. Defendant's Proposed Instruction No. 10 corrects a mistake, as noted. In addition, Mr. Nacchio's response to the government's objection to Defendant's Instruction No. 11 includes an alternative instruction, which follows our response. A complete set of Mr. Nacchio's Additional Instructions, including the modifications and alternative No. 11, is being simultaneously submitted for the convenience of the Court and the government.

DEFENDANT'S INSTRUCTION NO. 6

ALL COUNTS - INSIDER TRADING: ESSENTIAL ELEMENTS[1]

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.

Response to Government's Objection

The government contends that Mr. Nacchio's proposed instruction is confusing because it refers to the crime as "insider trading" rather than as one type of several types of deceptive or fraudulent devices. The government apparently does not object to the substance of the instruction (other than use of the term "specific intent" rather than "intent to defraud"). Mr. Nacchio submits that on balance, Defendant's Proposed Instruction No. 6 is much less confusing than the United States Proposed Instruction No. 8.

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[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 DEFRAUD[1]

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.

Response to Government's Objection

In each of the 42 counts of "insider trading" brought against Mr. Nacchio, he is accused not just of illegally trading in Qwest stock, but more specifically with selling Qwest stock in furtherance of the alleged scheme to defraud. Paragraph 9 (the charging paragraph) of the indictment reads:

"More specifically, NACCHIO, in furtherance of this scheme to defraud did knowingly and willfully sell . . .more than $100 million worth of Qwest common stock on the dates and in the amounts set forth in Counts 1 through 42 while aware of and on the basis of material, non-public information on or about the dates and in the amounts set forth below."

[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).

One of the important purposes of instructing the jury on the law is to provide them with legal principles that are applicable to the facts. It serves no purpose to instruct the jury that 10b-5 is violated when a corporate insider "trades" in the securities of his corporation when the indictment specifically alleges that he violated the law by "selling" shares of his company's stock.

Whether or not it is referred to as a "constituent fact," 10b5-1 uses the term "aware" to define the term "on the basis of," in order to make clear that "on the basis of" means more that mere possession. Moreover, as indicated above, the government uses the term "aware and on the basis of" in the charging paragraph of the indictment.

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]

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."

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[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).

Response to Government's Objection

The government's objection to Mr. Nacchio's proposed instruction on "non-public" and "material" are without merit. The instructions are in accord with legal principles that are applicable to the facts and circumstances of this case.

1. Non-public

The government objects to Mr. Nacchio's use of the word "available" in favor of the word "disseminated." Both words are used in the cases, and both concepts together better capture the meaning of the concept of public and non-public than either of words alone. The government apparently overlooks the first sentence of Mr. Nacchio's proposed instructions, which clearly states that "Information is 'nonpublic' if it has not been *disseminated* in a manner making it available to investors generally."

The cases cited by the government do not indicate that dissemination to the investing public is required to the exclusion of making the information available to the investing public. None of the cases cited by the government dictate that the company must be the provider of the information before it can be considered public. Clearly, there are numerous other ways for information to be considered public, especially under the circumstances of this case where the type of information involved concerns financial projections and extrapolations that with sufficient information can be and often are calculated by outside research analysts. What is important is that the information *is* public, not how it became public. See *Wielgos v. Commonwealth Edison Company,* 892

F.2d 509, 517 (7th Cir. 1989) ("It is pointless and costly to compel firms to reprint information already in the public domain"); *In re Goodyear Tier and Rubber Company Securities Litigation*, 1993 WL 130381 (E.D.Pa), slip op. at *9 ("The law is well established that there can be no liability under the securities laws because of an alleged failure to disclose information that is already *available* to the public and which is apart of the total mix of information *available* to the reasonable investor") (emphasis added). The *Cusimano* case cited by Mr. Nacchio makes clear that "information that has become public through rumors or other sources should not be considered non-public for purposes of § 10(b) and Rule 10b-5," and that it is in the court's discretion to determine what language to use in instructing the jury as long as it adequately states the law. *United States v. Cusimano,* 123 F.3d 83, 89 & n.6 (2d Cir. 1997) (approving charge), *cert. denied*, 522 U.S. 1133 (1998).

The government's concern about the test being "mere availability" overlooks the latter part of the same first sentence of Mr. Nacchio's instruction, which makes clear that to be considered non-public, the information must be made available to investors generally. Moreover, the government's concern that an availability test would make it too easy for insiders to use inside information by trading "as soon as the information had been made available through some means, rather than having to wait until the information had been broadly and effectively disseminated" is simply not relevant under the circumstances of this case. The alleged inside information concerns projections of financial revenues a full 15 months in advance. The alleged illegal sales by Mr. Nacchio

took place over a five month period. Mr. Nacchio is not alleged to have sold stock in advance of the publication of a one-time event knowing that the event, although known by a select few, was not yet broadly and effectively disseminated. In fact, it will be beyond dispute that Mr. Nacchio announced his stock sales months in advance.

The government also notes that "some selective disclosure is not sufficient." Again, it is almost certain that even under the government's theory of the case, the disclosures were not faulty because made only to a select few. The evidence will depict disclosures that were almost always notoriously public and widely disseminated, whether through analyst conferences, televised interviews, press releases, or internet / telephone conference calls.

2. Materiality

The government submits that Mr. Nacchio's proposed instruction does not adequately explain that forecasts and other forward-looking information may be material. The government's proposed instruction on "material information" launches almost immediately into an explanation about the probability that future *events* will or will not occur, and urges the jury to consider the importance to a reasonable investor of the *anticipated magnitude of the events*. The government's instructions provide no assistance in the context of this case, which has nothing to do with the type of merger or acquisition events that are at issue in the government's cited case of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); see also, *Garcia v. Cordova*, 930 F. 2d 826, 829 (10th Cir. 1991) (Court did not feel obligated to apply the test of materiality set forth in *Basic*

Inc. v. Levinson to the facts of this case, which concerned the materiality of "soft information," "inasmuch as the Supreme Court in *Basic* specifically limited its decision to the context of merger negotiations and disavowed any attempt to 'address . . .any other kinds of contingent or speculative information, such as earnings forecasts or projections'")(quoting *Basic*, 485 U.S. at 232, n.9).

Consistent with this same inapposite approach, the government objects to the last statement in Mr. Nacchio's proposed instruction number 8, which introduces the concept of a "forward-looking statement" by indicating that 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, 2000." According to the government, apparently, the jury instructions should ignore the context in which the legal principles relate to the charges that have been brought by the government against Mr. Nacchio.

Paragraph 3 of the indictment charges that Qwest, through Mr. Nacchio, "issued financial guidance, generally referred to as targets, to the investing public concerning Qwest's future revenue, growth, and earnings." The government contends that the targets referred to in the indictment were the projections of revenue issued on September 7, 2000, for the year ending December 31, 2001. This paragraph 6 specifically alleges in part that between January 2 and May 29, 2001, Mr. Nacchio:

> [W]as aware of material, non-public information about Qwest's business, including, but not limited to: (a) that Qwest's *publicly stated financial targets*, including its targets for 2001, were extremely *aggressive* and a "*huge stretch*"; (b) that in order to

> achieve its *publicly stated financial targets* for 2001, Qwest would be required to significantly increase its recurring revenue business during the first few months of 2001; (c) that Qwest's past experience or "track record" in growing recurring revenue at a sufficient rate to meet its *publicly stated financial targets* was poor; (d) that Qwest's recurring revenue business was underperforming from early 2001 and was not growing at a sufficient rate to meet Qwest's *publicly stated financial targets*; (e) that there were material undisclosed risks relating specifically to Qwest's recurring and non-recurring revenue streams that put achievement of Qwest's 2001 *publicly stated financial targets* in *jeopardy*; (f) that the gap between Qwest's *publicly stated financial targets* and Qwest's recurring revenue was increasing, thus increasing Qwest's reliance on *risky* and unsustainable one-time transactions; and (g) that there would be insufficient non-recurring revenue sources to close the gap between Qwest's *publicly stated financial targets* and its actual performance. (emphasis added)

Paragraph 7 of the indictment ties it all up into a single sentence by alleging that Mr. Nacchio "was specifically and repeatedly warned about the material, non-public financial risks facing Qwest and about Qwest's *ability to achieve its aggressive publicly stated financial targets*." (emphasis added)

In other words, the indictment specifically and repeatedly charges that the materiality of the inside non-public information related to the publicly stated guidance. The government admits that the publicly stated financial guidance specifically cited in the indictment were forward-looking projections of estimated revenues expected at the end of the 15 month period. There are legal standards that protect corporations and insiders who make such projections for the benefit of the investing public (as will be explained), and Mr. Nacchio has every right to have the jury instructed accordingly. If the publicly stated guidance is itself not material (because of the application of legal

principles defined and explained below) then the alleged inside information charged in the indictment, which clearly relates to the public guidance, can likewise not be material. Moreover, were such forward-looking publicly stated revenue projections to be considered material, but found by the jury to have been reasonable under the circumstances, the law does not require the disclosure of internal disputes about the public projection before trading by anyone. See, SEC Safe Harbor Rule 175, 17 C.F.R. § 230.175; *Wielgos v. Commonwealth Edison Company,* 892 F.2d 509 (7th Cir. 1989); and *Panter v. Marshall Field & Co.,* 646 F.2d 271, 291-93 (7th Cir. 1981), quoted and explained *infra.* These legal principles apply to the case and must be applied by the jury to the facts that it finds to be relevant.

Contrary to the government's contention, the instruction "relating" the "alleged" non-public material information to the "alleged" publicly stated guidance is not an assertion of fact by the defendant. Rather, it is the very allegation of the indictment to be tried. It would be misleading *not* to instruct the jurors in accordance with the legal principles relevant to the accusation they are to judge.

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 "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

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[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).

[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")

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]

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

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[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).

[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*").

tentative estimates, made the previously public guidance [materially misleading] <u>without a reasonable basis</u>.[9]

<u>Response to Government's Objection</u>

The government objects that this instruction improperly focuses on statements Qwest made to the public rather than the internal information provided to Mr. Nacchio. For the reasons discussed above, proposed instruction No. 9 does not improperly "focus" on the publicly stated guidance, it simply provides the jury with the legal tools to assess the importance and significance - the "materiality" - of the alleged inside information to the public guidance (targets) as alleged in the indictment.

The reasonable investor is obligated by law to consider the nature of the forward-looking projections to which the alleged inside information relates. An historical perspective is helpful to understanding the principles of securities law. In 1976, the SEC admitted error in previously prohibiting disclosure of soft information (such as predictions, and other subjective evaluations, including forward-looking statements concerning the future, such as projections, forecasts, and predictions), and stated that it would not discourage the disclosure of projections of future corporate performance as long as the disclosure of such information was made in good faith, had a reasonable basis, and was accompanied by information sufficient to permit informed investment decisions. *A Walk Through the Circuits: The Duty to Disclose Soft Information*, LEXSEE 46 MD.L.Rev. 1071,

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[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).

1074 (1987) (citing Securities Act Release No. 5699, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) p86,200-01 (April 23, 1976).

In 1978, the SEC further announced that it would encourage voluntary disclosure of management projections, and "to further enhance the SEC's policy of permissive disclosure of future-oriented information the Commission adopted rule 175, which provides a 'safe harbor' for certain types of issuers who wish to disclose 'forward-looking' statements." LEXSEE 46 MD.L.Rev. at 1074. The rule protects issuers *and managers* from liability for misleading investors if projections and other soft information are made in good faith and have a reasonable basis. Id., at n.21; *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194, 1211 (1st Cir. 1996) (forward-looking projections made with reasonable basis and in good faith are protected by the SEC's safe harbor provision).

As the court in *Wielgos* explained, the principles of the safe harbor rule embody principles of "materiality" and "fraudulent schemes," and the purpose of the rule is to protect those who make careful and honest estimates because "half will turn out too favorable to the firm and the other half too pessimistic. In either case the difference may disappoint investors. . . . Thus the role of a safe harbor: the firm is not liable despite error." *Wielgos* at 514. *Wielgos* was a stock trading case, just as this case to be tried is a trading case. It is not a case where the company was permitted not to disclose as long as it abstained from trading. In *Wielgos,* the company did not disclose internal estimates, but nonetheless did trade. The issue concerned forward-looking statements, at the time the company traded, that turned out to be inaccurate. *Id.* at 513. The trades were

pursuant to a shelf registration by the company, and the quoted language is specifically directed to the ability of the corporation to trade its own stock without disclosing internal disputes about existing financial projections that conflict with public projections.

The same legal principles obviously apply to Mr. Nacchio, who like the company in *Wielgos*, made forward-looking statements while selling company stock. As previously indicated, Paragraph 3 of the indictment charges that *Qwest, through Mr. Nacchio, "issued financial guidance,* generally referred to as targets, to the investing public *concerning Qwest's future revenue*, growth, and earnings." (emphasis added)

In *Grossman,* the 10th Circuit Court of Appeals adopted the principle that forward-looking statements are not actionable because reasonable investors do not rely on them in making investment decisions unless the statement is known by the speaker at the time it is expressed to be untrue *or to have no reasonable basis in fact*. *Grossman v. Novell, Inc.,* 120 F.3d at 1119 & n.6 (10th Cir. 1997) (emphasis added). Similarly, it should be explained to the jury that in assessing the materiality of the alleged *inside* information in respect to the forward-looking projections, the jurors should recognize that projections inherently involve some subjective analysis or extrapolation and that such factors may dictate that the information is too speculative and unreliable to be considered a material fact under 10b-5. *Garcia v. Cordova*, 930 F.2d 826, 830 (10th Cir. 1991).

The jury must be instructed how the law views the forward-looking public statements to which the alleged *inside* information relates, in order for it to properly

assess whether the alleged inside information was certain enough to make the publicly stated financial guidance materially misleading or made without a reasonable basis. *See*, *Wielgos,* 892 F.2d at 516; *Panter v. Marshall Field & Co.,* 646 F.2d 271, 291-93 (7th Cir. 1981); *In re Goodyear Tire and Rubber Company Securities Litigation*, 1993 WL 130381, slip op. at *12 (E.D.Pa). The reasoning of these courts is entirely consistent with the SEC's stated purpose of encouraging forward-looking disclosures while also affording protection to issuers and management responsible for such disclosures. *See also*, *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1427 (3rd Cir. 1996) ("Before management releases estimates to the public, it must ensure that the information is reasonably certain. If it discloses the information before it is convinced of its certainty, management faces the prospect of liability."). It also has the benefit of protecting the investing public from being barraged with tremendous amounts of information that have not been fully vetted and would "bury stockholders in trivia." *Garcia v. Cordova*, 930 F.2d at 829; *In re Goodyear Tier and Rubber Company Securities Litigation*, *8 ("The federal securities laws do not require a corporation's management to bury investors or the public with every shred of negative information about its day to day operations, [citing *TSC v. Northway,* 426 U.S. at 448]).

Wielgos also makes clear that there is also a need to permit trading without the fear of liability when companies engage in the continuous process of updating and reassessing internal projections that may relate to external statements:

> Issuers need not reveal all projections. Any firm generates a range of estimates internally or through consultants. It may reveal the

> projection it thinks 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.

Wielgos, 892 F.2d at 516.

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:

(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]

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[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).

[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 <u>or to have no reasonable basis in fact</u>") (emphasis added); I*d.* 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").

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.*

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]

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[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.

[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.

***NOTE:**

As pointed out by the government, this paragraph of proposed instruction No. 10 contains error. It should read: "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 the materiality of the September 7, 2000 guidance and the materiality of the alleged inside information have been proven byond a reasonable doubt then you must consider whether Mr. Nacchio traded on the basis of the material, non-public information." A corrected version has been submitted for the convenience of the Court and the government.

<u>Response to Government's Objection</u>

The government again objects to the proposed instruction, complaining this instruction has the wrong focus. For all of the reasons set forth above, Mr. Nacchio submits that the focus of these instructions is exactly what is required.

The Tenth Circuit has made very clear that "the 'bespeaks caution' doctrine . . . is a valid defense to a *securities fraud claim* in [this Circuit]." *Grossman v. Novell, Inc.,* 120 F.3d 1112, 1121 (10th Cir. 1997) (emphasis added). As the government itself ultimately concedes, "[a]t bottom, the bespeaks caution doctrine stands for the unremarkable proposition that statement musts be analyzed in context when determining whether or

not they are materially misleading." *Id* at 1120. *Grossman* also makes the clear point that "[i]n applying the *materiality element*, courts have identified several categories of statements which are not considered *materially* misleading," to include "[f]orward-looking representations 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 1119-1120; *See also, In re Goodyear Tire*, 1993 WL 130381 at *18 ('bespeaks caution' doctrine has been applied to economic projections)(citations omitted). The Sixth Circuit Court of Appeals articulated the doctrine as follows:

> . . . projections are not actionable if they bespeak caution. . . . When a corporation . . . states an honestly held view based on the information currently before it, neither it nor its officers may be held liable pursuant to section 10(b) or Rule 10(b)(5). . . . the court must scrutinize the nature of the statement to determine whether the statement was false when made. . . .While analyzing the nature of the statement, the court must emphasize whether the 'prediction' . . . bespoke caution.

Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1040 (6th Cir. 1991) (citations omitted); *accord Polin v. Conductron Corp.,* 552 F2d F.2d 797 (8th Cir. 1977); *In re Donald J. Trump Casino Securities Litigation,* 793 F. Supp. 543, 552-54 (D.N.J. 1992).

There is no dispute: the September 7, 2000 publicly stated revenue projection, which estimated a total amount of revenue expected for the year 2001, the close of which was still more than 15 months in the future, was accompanied by cautionary statements of risk. (An SEC 8K filing from 9/7/00, which includes the subject cautionary language, is attached as an exhibit). In order for the jury to evaluate the materiality of

the alleged inside information, they must be provided with the legal tools to assess the materiality of the forward-looking statements to which it relates, and the Court should provide them with the principles of the "bespeaks doctrine" as proposed by Mr. Nacchio.

The government contends that Mr. Nacchio's proposed jury instruction on the "bespeaks doctrine" is incorrect because it does not allow for the materiality of true information. It certainly does. The legal principles explained herein provide every opportunity for the jury to conclude that the alleged inside information is true and material. The government ignores that such information can only be material if it establishes the falsity or unreasonableness of the prior forward-looking statements to which it relates – the September 7, 2000 public revenue guidance. Moreover, the government forgets the actual allegations it has brought in the indictment and instead argues hypotheticals that are not in the case. But whether a hypothetical corporate president's knowledge of a fire at the hypothetical corporate headquarters is material is not a determination this jury will make, although some other jury might well find such an event highly material if the company knows that the incapacity of the factory will render its previous financial guidance misleading. Rather, as charged in the indictment and repeatedly asserted by the government, the jury will be asked to determine whether the alleged warnings imparted to Mr. Nacchio about risks to Qwest's "publicly stated financial guidance" were material. Thus, the government's contention that the "prior public guidance is not necessarily the controlling fact in a materiality inquiry" is refuted by the very indictment it brought in this case. *Grossman* 120 F.3d at 1119 & n6 (alleged inside

information can only be material if such information "'significantly altered the "total mix" of information [already] available,'" *citing TSC Indus.,* 426 U.S. at 449, and such information could only have had such an effect if it deprived the existing public guidance of its reasonable basis).

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]

Response to Government's Objection

The government objects to the proposed requirement that the jury find that Mr. Nacchio "used" the material non-public information. The government contends that the instruction does not make clear how he must have used the information, and suggests that the jury might infer that the need for some "physical" or "neurological" use. Nowhere does Mr. Nacchio's proposed instruction mention either of these terms, nor is it

[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)

logical to conclude that a juror might conjure such notions after hearing the instruction. Instead, the instruction says quite simply and directly (twice) that Mr. Nacchio must have "used the material non-public information *with the intent to defraud*." The government complains that it may be "difficult" to establish actual use of inside information. The difficulty in proving actual use with intent to defraud is no more difficult than proving intent in any criminal case. But, difficult or not, that is what the law requires. The government's objections are without merit. Moreover, the government's proposed jury instruction is inadequate.

The government has recognized throughout these proceedings, including in its most recently submitted Proposed Disputed Jury Instructions, that the controversy over the meaning of the term "on the basis of" breaks down to whether the correct standard is the "knowing possession standard" or the "use standard." *See e.g.,* United States Proposed Instruction No. 13, n1 ("SEC description of [the aware of] standard as 'closer to the "knowing possession" standard than the "use" standard'"). The government has conceded that mere possession is insufficient to establish the requisite *mens* rea or scienter. It is also not urging the Court to use the term "was aware of," and for good reason, since as the government concedes, such standard is "closer to the 'knowing possession' standard than the 'use' standard," which has been more universally adopted by courts that have addressed the issue. *See* n17 to Defendant's Instruction No. 11.

Instead, however, the government seeks to diminish the degree of use that must be proven, and requests the Court to instruct the jury that the information must have

been "a factor, however small." (United States Proposed Instruction No. 13). The government's requested charge is inconsistent with the requirements of "scienter" and "willfulness," instructions that the government concedes must be given to the jury. (United States Proposed Instruction No. 14). In its attempt to diminish the amount of use required to establish the requisite intent to defraud, the government has impermissibly obscured and negated it.

The government's proposed instructions on scienter and willfulness virtually mirror the proposed instructions submitted by Mr. Nacchio, relying on many of the same citations. (*Cf.* Defendant's Proposed Jury Instruction No. 12, incorporated herein for the convenience of the Court, *with* United States Proposed Jury Instruction No. 14). The government agrees that both instructions must be given: that scienter requires a "mental state embracing intent to deceive, manipulate, or defraud;" and willfulness requires a "bad purpose" and "knowledge that ... conduct was unlawful." It is for these reasons that a jury instruction that relegates use to just "a factor, however small" is inadequate. If the government must prove that by trading on each of the 42 days alleged in the indictment, Mr. Nacchio willfully intended to do something the law forbids, that is to say, with a bad purpose either to disobey or disregard the law, then it must prove that in each instance Mr. Nacchio intended to use the material nonpublic information to defraud the purchasers of Qwest stock. This cannot be "a small reason."

The definitions of "intent to defraud," and "willfully," inform the degree to which use must be proven. It is not the weighing of the "amount" of use that is the test, it is

the weighing of the presence or absence of a criminal intent that is determinative. The amount of use that is required to establish the requisite intent is that amount which is required to formulate that intent. In an earlier submission, the defense requested an instruction that required the government to prove that the inside information was a "significant factor" in Mr. Nacchio's decision to sell Qwest stock. Upon further reflection, we concluded that it was best not to attempt to quantify the amount required at all. However, use of the term "factor" alone begs the question as to how many. "Factors" generally come in multiples, and use of the term will likely cause confusion when the jury inevitably questions which were more or less important, and what significance needs to be placed on the relative importance. Unlike the government's proposal, Mr. Nacchio's proposed jury instruction on this element does not seek to quantify the amount of scienter required.

The government relies upon civil cases that refer to the "causal role" or "causal connection" between the inside information and the insider's trading. These cases are completely unhelpful as they obviously employ a negligence-type standard that is inappropriate in a criminal insider trading case. *United States v. O'Hagan,* 521 U.S. 642 (1997). Furthermore, the government cites only a single instance where its requested instruction has been employed. As indicated in the government's Objection to Defendant's Instruction No. 11, the only authority for the use of it requested language comes from the instruction used by the district court in *United States v. Robles*, 00-CR-1169. Use of this language has not been tested on appeal.

The "use" standard, on the other hand, has been employed several times, and tested once by a court of appeals. *See*, 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).

In *United States v. Smith*, 155 F.3d 1051, 1067 (9th Cir. 1998), the Ninth Circuit ruled that: "It is sufficient, as the district court observed, that the material nonpublic information be a 'significant factor' in the insider's decision to buy or sell." 155 F.3d at 1070 n.28. The jury in *Wolff* was also charged that: "It is sufficient that the inside information was a significant factor in the insider's decision to sell stock." In *Smith*, the court made clear why proof of "significant" use was necessary in a criminal case: "'[T]he fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he *uses the information* to purchase or sell securities.'" *Id.* (quoting *United States v. O'Hagan,* 521 U.S. 642, 655

(1997) (emphasis in the original)). If the Court is inclined to instruct the jury that the "on the basis of" test is met if the information was "a factor," Mr. Nacchio submits that the Court must use the "significant factor" language in order to ensure that the requisite *mens rea* is not missing. In that case, Mr. Nacchio's proposes the following:

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.

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 12

All Counts - Insider Trading Second Element: Knowledge, Intent, and Willfulness[1]

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]

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[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) (favorably commenting on the instruction of "knowingly" given by the District Court).

[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"* and involves "a significant risk of effecting the violation" of those 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) (securities fraud requires intent).

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 13

All Counts - Good Faith Defense[1]

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.

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]

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[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).

[2] *Steiger*, 373 F. 2d at 135.

Response to Government's Objection

As the government concedes, Mr. Nacchio's good faith instruction is drawn from the standard O'Malley instruction, which the Court has already determined it will give. See Transcript of October 12, 2006 Motion Hearing in *United States v. Nacchio*, Crim. No. 05-00545 (EWN) at 7-8. The government contends, however, that the instruction is missing an important point because it does not make clear that a good faith defense is sufficient only if it refutes the intent to defraud, and goes on to quote language that "the defendant must 'completely rebut evidence that he or she intended to defraud.'" (citing *United States v. Chavis*, 46 F.3d 1201, 1209 (10th Cir. 2006).

The government confuses two very different concepts. The issue in *Chavis* was whether or not the defendant was entitled to a good-faith instruction, not the content of the instruction. In the en banc decision of *United States v. Hopkins*, 744 F.2d 716, 717 (10th Cir. 1984), and as recognized in *Chavis,* 46 F.3d at 1209, the Tenth Circuit ruled that a defendant is entitled to a good-faith instruction if he requests it, and if "there is sufficient evidence to support the theory." The quoted language in *Chavis* explored this concept further noting that the evidence "must have the *capacity* to rebut" evidence of criminal intent. *Chavis* 46 F.3d at 1209. This Court clearly recognized this principle during its October 12, 2006 ruling ("I am cognizant of the government's position that [the good faith defense] has to be supported by proof. . . .But if it's supported by proof, a good faith instruction will be given. . . ."). Any suggestion by the government that the language quoted in *Chavis* should be made part of the instruction

would be to create error since, again as this Court recognized on October 12, it is very well established that the defendant does not have to prove anything, including good faith. *See e.g.*, *United States v. Alkins*, 925 F.2d 541, 550 (2nd Cir. 1991) ("A defendant has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt").