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.

MOTION BY JOSEPH P. NACCHIO FOR
NEW TRIAL AND CHANGE OF VENUE

INTRODUCTION

When, on August 25, 2006, this Court denied Mr. Nacchio's Motion seeking a change of venue on grounds of overly prejudicial pretrial publicity, it did so in part upon the stated assumption that the prejudicial publicity would die down and not be a factor as the trial neared. Unfortunately, this assumption proved incorrect. In fact, if anything, the volume and shrillness of the media's coverage increased in the weeks prior to and during trial, which was acknowledged several times by the Court and led to our filing two additional written applications and the Court's *sua sponte* entry of an Order limiting and controlling media activities during trial.

As a result of the unceasing publicity, much of the *voire dire* was devoted to individual questioning of the venire panel about their prior knowledge concerning the case. This revealed that, of the 44 individuals who were called into the jury box and questioned,[1] an *overwhelming majority* of 32 jurors responded yes, that they had learned about the case from the media or other outside sources. The Court nevertheless denied the motion to dismiss for cause prospective jurors with prior knowledge, denied our renewed application for change of venue, completed *voire dire* and impaneled a jury. The result was that, among the 18 jurors and alternates who were ultimately impaneled, an *even larger* majority of 14 had prior knowledge of the case. The prejudicial publicity then continued unabated throughout the trial.

Because the pervasive publicity was so intensely negative and long lasting, a new trial should be granted pursuant to Fed.R.Crim.P. 33, and a change of venue ordered pursuant to Fed.R.Crim.P. 21.

PROCEDURAL HISTORY AND FACTS OF THE CASE

On July 31, 2006, Mr. Nacchio filed a Motion seeking a change of venue on grounds of extremely prejudicial pretrial publicity. [Doc. No. 113] The Court denied the motion, explaining in part, that "[s]ometimes that negative publicity dissipates, and there is every reason to believe that it will dissipate in this case. People will not have it

[1] Three other prospective jurors were called into the jury box but excused before they could be individually questioned on the subject.

in mind when it is finally time to choose the jury." Transcript of Proceedings, 75:10-13 (August 25, 2006).

Despite this expectation, however reasonable at the time it may have seemed, prejudicial media coverage continued throughout pre-trial proceedings and actually intensified as the trial approached. Exhibits 1 and 2, respectively, consist of copies of news articles and a written index of the articles, which document the even more extensive subsequent media coverage leading up to and continuing through trial.[2] Some examples of the media coverage in just the few months preceding the trial (*see* Exhibits 1 and 2) include:

- January 26, 2007 -- A Denver Post article titled, "Wanted: Qwest witnesses," reported on the government's solicitation to the U.S. West Retiree's Association of "potential witnesses who suffered large financial losses after buying Qwest stock during the first five months of 2001."

- February 8, 2001 - A Rocky Mountain News article titled, "Tug of war tightens in Nacchio case" reported on pre-trial procedural wrangling, replete with "analysis" by "experts."

- February 10, 2007 - A Denver Post article titled, "1,000 quizzed for jury service" reported on the questionnaire which the Court sent out to prospective jurors.

[2] The media accounts for the period preceding our initial Motion for change of venue were annexed as exhibits thereto. *See* Doc. Nos. 113 and 138. Exhibits 1 and 2 hereto cover the period July 5, 2006 - May 11, 2007, that is, the media accounts subsequent to our initial change of venue motion and continuing forward, through the immediate aftermath of the trial itself.

Because details concerning the questionnaire were inadvertently made publicly available through the Court's ECF system and obtained by the press before the error was discovered and corrected, the Court was thwarted in its effort to shield the identity of the case from the questionnaire recipients. This allowed any of the questionnaire recipients who read the newspaper to know with certainty that it was this case they were being summoned for and tailor their answers so as to be picked for the jury. This was a concern the Court itself had recognized, which is why it included questions about other companies besides Qwest in the questionnaire sent to the 1,000 potential jurors. Unfortunately, the miscue defeated the Court's efforts and some prospective jurors conceded that they knew this was the case for which they had been summoned and "googled" or otherwise read about the publicity.

- February 27, 2007 – Just three weeks before the start of the trial, a Denver Post blog entry posted side-by-side pictures of Mr. Nacchio and Kim Jong Il, the North Korean dictator, both wearing sun glasses, sensationally linking Mr. Nacchio to one of the world's most reviled men, the ruler of a country dubbed by the President of the United States as a member of the "axis of evil."[3]

- March 2, 2007 - A Rocky Mountain News article noted that the U.S. West Retiree's Association had "passed on 12 to 20 names to the prosecution as potential witnesses."

[3] This was brought to the attention of the Court during the chambers portion of the March 1, 2007 status conference. Transcript of chambers Proceedings, 24:19-25 (March 1, 2007).

- March 3, 2007 - A Denver Post article titled, "Key decision: Will Nacchio testify?" reported on speculation in the community at large and among so-called "experts" as to whether Mr. Nacchio would testify in his own defense.

- March 7, 2007 - A Denver Post article titled, "NACCHIO ON TRIAL - Ex-Qwest CEO accused of criminal insider trading - Judge reveals rules for long-anticipated trial" reported on the March 6, 2007 Order entered by the Court regulating media presence in the courtroom and on the court grounds.

- March 8, 2007 - A Denver Post article titled "Until the Denver detour that could put him in prison, Nacchio's story was as American as apple pie" reprinted a story first published on December 25, 2005.

- March 9, 2007 – Only one week before the start of the trial, a Denver Post "Nacchio on Trial" blog entry noted that "the buzz is picking up on the trial, as national papers such as the Wall Street Journal and USA Today, have told courthouse staff that they plan on covering at least a portion of the trial." The lead reader comment began, "Joe Nacchio is simply a thug who has defrauded Americans though illegal sole-source federal contracts..."

- March 10, 2007 - A Rocky Mountain News article titled, "US West retirees still angry" reported on how the retirees were mobilizing to attend the trial, how they were eagerly providing witnesses to serve as "victims" and how their lives had been adversely affected by the downturn in Qwest stock.

- March 18, 2007 – On the very eve of the start of the trial, a Denver Post column by Al Lewis was titled "Stern's approach in front of a jury: 'Don't be brilliant. Just be right.' " The piece gives the columnist's incendiary spin on a 1985 trial advocacy video in which Mr. Nacchio's counsel appeared, asserting: "Mostly, what lawyers should know about jurors, Stern opines, is that they are lowbrows." That column was obviously aimed at the future members of the venire, and several prospective jurors admitted that they had read it.

In the face of this full bloom media onslaught -- little of which dealt with the actual accusations and much of it calculated to tell any prospective juror that the community expected the conviction of a wealthy man who had defrauded the largest employer in the state, causing loss of jobs and savings to tens of thousands of Colorado residents -- the Court advised counsel during the chambers portion of the March 1, 2007 status conference as to rules it would implement, *sua sponte*, restricting and controlling media presence not just in the courtroom, but anywhere on the court grounds. Even then, however, the Court stated, "I think we need to prepare for all of this and realize, as somebody said, I think it's likely to fall off after the first week. You guys will very soon bore them to death." Transcript of chambers Proceedings, 13:3-6 (March 1, 2007).[4] The Court declined Mr. Nacchio's request that all jurors with prior knowledge about the case be automatically excused for cause. *Id.*, 22:22 - 23:13. The

[4] As demonstrated by the media coverage during the trial, this did not happen and the intensity of coverage never died down. *See generally infra* and Exhibits 1 and 2.

Court premised this declination on the expectation that at least half of the 18 final jurors and alternates would not have previously heard about the case. *Id.*, 23:19-23.

On March 6, 2007, the Court entered an Order (which was posted on the Court's website) limiting and structuring media presence in and around the courthouse during the trial. [Doc. No. 267] As has been shown, the media immediately reported on the Order itself. This graphically demonstrates how, in the run-up to trial, everything connected with the case -- no matter how minute -- was the instant subject of media attention.

During the chambers portion of the March 9, 2007 status conference, the Court acknowledged the intensity of media coverage, noting that: "I'm still kind of nonplussed by the press picking up on the eight days [estimate as to the length of the government's case in chief], because I was -- I was really -- to use the vernacular, I was pulling her chain when I said eight days. And the press picked up on that and reported that it was going to be done in eight days." Transcript of chambers Proceedings, 17:12-16 (March 9, 2007).

On March 15, 2007, Mr. Nacchio filed a "Motion For Forthwith Status Hearing Based Upon Recent Prejudicial Pretrial Publicity." [Doc. No. 279] We apprised the Court that survey research -- conducted by Mr. Nacchio on the eve of trial -- revealed that ***49%*** of people in the Denver district had heard of Mr. Nacchio and ***32%*** had a negative opinion, and that the negative numbers went up substantially among people who read one or both local Denver newspapers. Among Rocky Mountain News readers,

61% had heard of Mr. Nacchio, with ***45%*** having a negative impression. ***Sixty-four percent*** of Denver Post readers had heard of Mr. Nacchio, and an astonishing ***52%*** had a negative view. *Id.*, ¶ 3. By Order entered the same day, the Court denied our application even as it agreed that "there has been recent publicity in the business sections of local newspapers." Order at 2 (March 15, 2007) [Doc. No. 282].

Subsequently, on March 18, 2007, we filed "Defendant's Motion Regarding Jury *Voire Dire*." [Doc. No. 299][5] There, we expressed concern that the local media had created web pages dedicated to trial coverage on which they had taken to publishing diatribes against Mr. Nacchio by members of the public, they were actively soliciting people with criticism of Mr. Nacchio to come forward, and that the press was also now publishing accounts of what the key named witnesses would say at the trial. The Motion was accompanied by exhibits documenting the media coverage just during the period March 1-18, 2007. *See, e.g., supra* and Exhibits 1 and 2 hereto.

The Court nevertheless began *voire dire* on March 19, 2007, and it rapidly became apparent that an overwhelming percentage of prospective jurors had not only general awareness of the case but also specific knowledge about the case, much of it unfavorable. Mr. Nacchio's counsel quickly alerted the Court that the extent of prejudicial pre-trial publicity which the prospective jurors were reporting might, in the aggregate, be grounds for change of venue. Transcript of Proceedings, 39:23 - 40:5

[5] The Court's March 22, 2007 Minute Order ultimately dismissed the motion as moot in light of rulings made from the bench during jury selection.

(March 19, 2007). Next, counsel articulated why jurors who had been exposed to the pervasive pre-trial prejudice should be excused for cause:

> MR. STERN: I challenge for cause on the ground that whatever the existing standards may be in the Tenth Circuit, we don't need jurors who have opinions that have to be set aside. There is no reason for that. The law is not static, it is evolving. We should not be forced to change people's minds here. We should start out with people who have no view. Thank you.
>
> THE COURT: I don't think that's the view of the Tenth Circuit or any other circuit, to the best of my knowledge. On this one, the challenge for cause is overruled.

Id., 130:9-18. Then, as the extent to which the entire venire panel had been exposed to the prejudicial pre-trial publicity continued to unfold, counsel renewed Mr. Nacchio's motion for change of venue. *Id.*, 299:7-13.

In fact, by the time the 18 jurors and alternates were selected, 44 members of the *venire* panel had been called into the jury box and asked if they had prior knowledge about the case.[6] An overwhelming majority of 32 prospective jurors responded yes, that they had learned about the case from the media or other outside sources. Only 12 prospective jurors said that they had not learned about the case from the media or other outside sources. Among the 18 actual jurors and alternates who were impaneled, 14 out of the group had previously heard about the case through the

[6] Three other prospective jurors were called into the jury box but excused before they could be individually questioned on the subject.

media or other outside sources, an astounding ***78%***. *See* Exhibit 3, a chart breaking down by individual prospective juror the extent of their prior knowledge of the case.[7]

In particular, the prospective jurors learned about the case from the following sources:[8]

- 11 prospective jurors from the Denver Post
- 10 prospective jurors from the Rocky Mountain News
- 1 prospective juror from a smaller local Colorado newspaper
- 14 prospective jurors from the local television news
- 5 prospective jurors from national television news
- 9 prospective jurors from radio news or talk shows
- 3 prospective jurors from Google News searches
- 2 prospective jurors from the court's website
- 4 prospective jurors from national newspapers or magazines.
- 5 prospective jurors had read the March 18, 2007 column by Al Lewis in the Sunday Denver Post attributing to Mr. Nacchio's counsel -- in an out of context manner calculated to inflame -- allegedly critical comments about the nature of jurors.
- 1 prospective juror had knowledge from accounting seminars on Sarbanes Oxley.
- 1 prospective juror had knowledge from family members who were Qwest and/or US West retirees.

[7] Pursuant to the Court's May 22, 2007 Order, the prospective jurors are only identified by Juror Number.

[8] The total exceeds 100% because many prospective jurors had heard about the case from multiple sources.

See Exhibit 3. Indeed, many of the prospective jurors had formed exceedingly negative impressions from their exposure to the pervasive pre-trial publicity. For example, one prospective juror stated:

A. I come in believing he's guilty.

Transcript of Proceedings, 82:20 (March 19, 2007). A second admitted having preconceived beliefs:

Q. So you kind of formed an opinion?

A. Yes, I have.

Q. What is that?

A. Guilty.

Id., 121:21-24. Colloquy between the Court and another prospective juror was as follows:

> Q. Based on your recollection, would you characterize what you have heard as -- or read as unfavorable to Mr. Nacchio, favorable to Mr. Nacchio, neutral, or would you use some other word to describe it?
>
> A. I would generally say -- the two specifics I remember is kind of a summary of Nacchio and the defense attorney and didn't seem very favorable to me.

Id., 111:23-25.

The problems with the overwhelming, and unfavorable, media coverage of the case did not end with the start of the trial. During the first day of *voire dire*, a member of the press engaged in conversation with one of the prospective jurors who was sitting in the gallery, which caused an admonishment from the Court. *Id.*, 245:18 - 248:19.

On just the third day of trial, one of the jurors reported being told by someone that profiles of all the jurors had been published by the press. Transcript of Proceedings, 381:16-22 (March 22, 2007). Even more alarming, counsel for the government reported that people claiming to be reporters had been calling one of the jurors at home, asking for information. *Id.*, 382:21-24. This caused the Court to again publicly admonish the press. On April 9, 2007, one of the jurors reported having been accosted on the elevator by someone she believed was a member of the press, who asked her how she thought the case was going. Transcript of Proceedings, 2567:6-14 (April 9, 2007). This caused the Court to interview the juror in chambers, in the presence of counsel, and resulted in the Court admonishing the entire gallery about contact with any of the jurors.

Additional proof of the prejudice created by the pervasive publicity prior to and during the trial can be readily drawn from two incidents in which Mr. Nacchio, while walking in downtown Denver with one of his attorneys, was publicly accosted by motorists who stopped to scream invective or obscenities at him. Exhibit 4 hereto is the Declaration of Mark W. Rufolo (June 4, 2007), recounting an incident which took place during the early evening of April 11, 2007, when a motorist drove up from behind Mr. Nacchio, yelled out his window, "Hey, Nacchio, I hope you get cancer and die," then remained in the vicinity acting suspiciously for some time before finally driving off. *Id.* A second incident occurred late the following afternoon, when a taxi driver stopped in the middle of the street and screamed out, "fuck you Nacchio, fuck you." *See* Exhibit 5,

Declaration of Edward S. Nathan (June 4, 2007). This second incident took place in the presence of Mr. Nacchio's wife, who was badly shaken by the episode and said that her first thought was that her husband was about to be physically attacked. *Id.*[9]

The simple truth is that the Denver community was extremely hostile to Mr. Nacchio, and had been so for many years. And that hostility did not arise from the charges in the indictment. Quite the contrary. The community, which included many Qwest and U.S. West retirees and persons who were terminated by Qwest and people who lost their savings in the nation-wide telecom bust, and the hundreds of thousands of their family and their friends, was totally hostile to this Defendant for reasons that had nothing to do with the charges of insider trading that were brought years after Mr. Nacchio had left Qwest. As article after article make very plain, the media, undeniably spurred on by their readership, was demanding Mr. Nacchio's head upon any charge that could be brought and, indeed, often remonstrated with the prosecutor for not bringing additional charges. A review of the media coverage can leave no doubt that any juror who had been exposed to it could not fail to understand that the community was demanding a conviction.

The community feelings about the case even entered the court house. Our May 1, 2006 "Motion For Order Directing Production Of Evidence By Government Agencies" [Doc. No. 59] detailed how Mr. Nacchio was improperly restrained by members of the

[9] These incidents were not reported to the police for fear that the inevitable shrill coverage from the press would only spawn more copycat incidents.

U.S. Marshal's service following his arraignment on December 20, 2005, so that he could be marched into this Court hours later in handcuffs, coatless, tieless and beltless, before a gallery filled with press. And, just recently, not just one, but two, sitting Judges of this District -- including the Chief Judge -- were reported by the press as having left their Courts or chambers to personally witness the verdict. *See* Exhibits 1 and 2, Rocky Mountain News article from April 20, 2007 titled, "Prosecution lands the big one."

Following the verdict, the media reported on the government's press conference held outside the courthouse. *See id.*, quoting the "gloating" United States Attorney for the District of Colorado as stating, "'Convicted felon Joe Nacchio' has a very nice ring to it." These remarks, grossly out of proportion to the proceedings which had just concluded, reflect the pandering to what was, literally, a deafening chorus of the citizenry of Denver who had been unremitting in their lobbying for a conviction.

Finally, subsequent to the trial, the Court recognized the overwhelming prejudice to Mr. Nacchio of being repeatedly linked by the press to wrongdoing going far beyond the scope of the indictment:

> Plentiful pre-trial publicity posed a second unusual challenge for jury selection. The publicity, mostly from Denver's two daily newspapers and *mostly unfavorable* to Defendant, was documented extensively in material supporting Defendant's motion to change venue (Doc. Nos. 113-122). ... This publicity included accounts of stockholders who were seriously affected by this decline [in Qwest stock] and stories about employees and retirees who lost savings when portfolios consisting of Qwest stock declined in value. Underlying much of this publicity was the suggestion that improper actions by Defendant and other Qwest managers contributed to Qwest's financial misfortunes.

Order Concerning Juror Qualification Questionnaires And Supplemental Juror Questionnaires at 2-3 (May 22, 2007) (emphasis added) [Doc. No. 420].

ARGUMENT

We incorporate by reference our moving and reply papers on our original motion for change of venue (and all Exhibits thereto), as well as our April 15 and 18, 2007 filings (and all Exhibits thereto). [Doc. Nos. 113, 138, 279 and 299]

Federal Rule of Criminal Procedure 33(a) recites, in relevant part, that: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." When the Court denied our initial motion for change of venue it did so, in part, with the expectation that the prejudicial pre-trial publicity would abate. It did not. *See generally, supra* and Exhibits 1 and 2. As the Court itself has acknowledged, the expectation that media interest would die down did not come to pass. And, as we have shown, nearly *three quarters* of the venire persons questioned during jury selection had heard about the case from media or other outside sources, leaving many with extremely negative impressions. In the face of denied defense challenges for cause, Mr. Nacchio was left with a panel of 18 jurors and alternates, 78% of whom had been exposed to the pervasively negative pre-trial publicity.

It is true, to be sure, that the Court did carefully question each prospective juror out of the presence of the other prospective jurors and did a careful exercise in excluding prospective jurors who were willing to admit prejudicial feelings towards the Defendant. It is also true that the prevailing law is that, as to any one juror, his or her

statement that the prejudicial material would not be influential obviates automatic disqualification. *See, e.g., Goss v. Nelson*, 439 F.3d 621, 627 (10th Cir. 2006), *citing Irvin v. Dowd*, 366 U.S. 717, 723 (1961). But, here, the situation was different. We dealt not with one or two or three prospective jurors who were exposed to prejudicial publicity. We instead confronted a panel where any prospective juror who claimed not to have been so exposed was the exception. Against this background, merely asking prospective jurors who were exposed to such virulent attacks on this Defendant whether they believed everything they read, saw or heard in the media -- which evoked the predictable "no" -- is simply not curative when the entire venire has been subjected for years to the unremitting and vituperative tattoo of a hostile press obviously reflecting the bias of present or former Qwest and/or U.S. West employees, and the Denver community at large, who believe they have an axe to grind. This is not a case where actual prejudice was revealed in a number of sitting jurors. This is a case where prejudice must be presumed irrespective of the prospective jurors' answers.

The Tenth Circuit has opined that a change of venue should be ordered, "where the pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community. We 'presume prejudice' before trial in those cases, and a venue change is necessary." *Goss*, 439 F.3d at 628. The *Goss* Court carefully examined when the Sixth Amendment, the Supreme Court and its own prior opinions require this result. 439 F.3d at 627-31. The Court concluded:

> In this circuit, in summarizing these cases, we held that prejudice will only be presumed where publicity "created either a circus atmosphere in the

> court room or a lynch mob mentality such that it would be impossible to receive a fair trial." *Hale v. Gibson,* 227 F.3d 1298, 1332 (10th Cir. 2000) [, *cert. denied*, 533 U.S. 957 (2001)]. In other words,
>
> > [T]o demonstrate that prejudice should be presumed, the defendant must "establish that an irrepressibly hostile attitude pervaded the community" .... "Simply showing that all the potential jurors knew about the case and that there was extensive pretrial publicity will not suffice to demonstrate that an irrepressibly hostile attitude pervaded the community." This presumed prejudice is "rarely invoked and only in extreme circumstances."
>
> *Id.* (quoting *Stafford v. Saffle,* 34 F.3d 1557, 1567 (10th Cir. 1994) [, *cert. denied*, 514 U.S. 1099 (1995)]). In *Hale,* we went on to find no pretrial prejudice since the bulk of the press coverage occurred seven months prior to trial, even though thirty-four of thirty-seven potential jurors had prior knowledge of the case.

Goss, 439 F.3d at 628-29.

As the 10th Circuit noted, prejudice was not presumed in *Hale* because the press coverage abated seven months before trial. Indeed, there were only thirty articles in total written in that case. *Hale*, 227 F.3d at 1332-33. That is far different from what occurred here, where *thousands* of articles were written, and the intensity of media coverage never abated and actually increased in both volume and fervor as the trial approached.

Similarly, in *Goss*, presumed prejudice was not found because, for a trial which began in October 1987, the most intense press coverage diminished after November 1986, with no coverage whatsoever until February 1987, when the press reported on a preliminary hearing. Thereafter, no further articles were published until the trial. 439 F.3d at 631. Again, as this Court has itself acknowledged, the media attention devoted

to the instant proceedings never diminished. The entire jury panel was hopelessly infected by the massive prejudicial pre-trial publicity. Indeed, in *Goss*, contrary to the circumstances here, there were but 34 total newspaper articles, which "were predominately factual and non-inflammatory." *Id*. at 631-32. This case, then, is the rare and extreme exception when prejudice should have been presumed and a change of venue ordered.[10]

In *Welch v. United States*, 371 F.2d 287, 290 (10th Cir.), *cert. denied*, 385 U.S. 957 (1966), the 10th Circuit rejected the defendant's assertion that he did not receive a fair trial, because "[v]oire dire examination of prospective jurors was complete and, perhaps surprisingly, revealed that the panel members had little knowledge of the case beyond the fact of its existence." But, the *Welch* Court noted, "the prominence of publicity may produce prejudice, actual or so inherent in the circumstances that realism requires its recognition." *Id*. at 291. As has been shown, just such a realistic situation existed here.

Neither are the circumstances here like those reviewed in *United States v. Tokoph*, 514 F.2d 598 (10th Cir. 1975), where:

> The clippings included in the record on appeal are not of a sensational or accusatorial nature; they are factual accounts of court proceedings and pleadings. ... The trial judge consistently questioned prospective jurors as to their prior knowledge of this case. ... Only one prospective juror admitted having prior knowledge and he was excused. ... The pretrial

[10] It is true, of course, that in some other District -- whether in this or any other circuit -- there may have been some publicity, but nothing like the unremitting hostility and volume as transpired in Denver.

> publicity was not shown to be so highly prejudicial or pervasive that appellant could not receive a fair or impartial trial....

514 F.2d at 606-07 (multiple citations omitted); *see also United States v. Smaldone*, 485 F.2d 1333, 1346 (10th Cir. 1973) (denial of change of venue upheld because, "[n]inety-seven prospective jurors were summoned by the trial court, twenty-two of whom were immediately dismissed upon indicating that they had read or heard of some of the defendants"), *cert. denied*, 416 U.S. 936 (1974).

Here, in sharp contrast, the Court itself has acknowledged that pre-trial publicity did not abate, the press obsessed over every bit of minutiae, and the overwhelming proportion of the pre-trial publicity was highly prejudicial to Mr. Nacchio. And, rather than a single prospective juror having prior knowledge and being immediately excused for cause (as in *Tokoph*), let alone excusing for cause all 22 jurors with prior knowledge (as in *Smaldone*), no prospective jurors in this matter were excused for cause due to prior knowledge, despite that three out of four prospective jurors -- and almost 80% of the impaneled jurors and alternates -- had *detailed* prior knowledge.[11] Instead, the Court denied our renewed application, made during *voire dire*, for a change of venue, based on the overwhelming number of prospective jurors who had been exposed to what can truly be called the unremitting vituperative public attacks on the Defendant.

[11] Clearly, however, the Court recognized that prior connection with Qwest or U.S. West was grounds for excusal for cause, since it disqualified from even being summoned to *voire dire* any prospective jurors who had (or who's relatives or friends had) previously worked for Qwest or U.S. West.

CONCLUSION

Because pervasive prejudicial pre-trial publicity remained unceasing, because three quarters of the prospective jurors questioned -- and 78% of the jurors and alternates ultimately impaneled -- had heard about the case from media or other outside sources -- all of which were overwhelmingly hostile to the defense -- because anyone who had read, seen or heard about this case, as a matter of simple truth, had to have been exposed to inflammatory and prejudicial material about the Defendant, the interests of justice require a new trial and the grant of a change of venue.

Respectfully submitted this 4th day of June, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2007, a true and correct copy of the foregoing **MOTION BY JOSEPH P. NACCHIO FOR NEW TRIAL AND CHANGE OF VENUE** was served on the following via the USDC CM/ECF system:

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