

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

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

**MOTION BY THE UNITED STATES FOR AN ORDER
CONCERNING THE RIGHTS OF CRIME VICTIMS PURSUANT TO
TITLE 18, UNITED STATES CODE, SECTION 3771(d)(2)**

The United States of America, by its undersigned counsel, respectfully moves pursuant to Title 18, United States Code, Section 3771(d)(2), for an order establishing a reasonable procedure concerning the notification of crime victims of the upcoming sentencing of Mr. Nacchio on July 27, 2007.

I. The Court has authority to create a “reasonable procedure” to notify victims regarding the sentencing.

Congress has provided that a “crime victim” has “[t]he right to be reasonably heard at any public proceeding in the district court involving ... sentencing” 18 U.S.C. § 3771(a)(4). Such crime victims are also entitled to “reasonable, timely, and accurate notice” of the sentencing. § 3771(a)(2). Congress has further required the Department of Justice and other investigating agencies to “make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).” § 3771(c)(1).

Congress has further provided that “[i]n a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.” § 3771(d)(2). The United States submits that this is a case where there is a large number of crime victims such that it would be impracticable to accord them all the right to speak at sentencing.

Congress has defined “crime victim,” in relevant part, as “a person directly and proximately harmed as a result of the commission of a Federal offense” § 3771(e). Where the offense of insider trading is at issue, the United States Sentencing Commission has concluded that “the victims and their losses are difficult if not impossible to identify” *See* 2000 United States Sentencing Guidelines Manual, § 2F1.2 (Insider trading), Application Note 1.

For purposes of 18 U.S.C. § 3771, victims of the insider trading offenses on which Mr. Nacchio was found guilty (which relate to his trades during the period April 26, 2001 through May 29, 2001) may include a wide range of investors, such as (a) Qwest shareholders who may have directly bought from Mr. Nacchio the stock at issue in Counts 24-42 (the counts as to which Mr. Nacchio was found guilty); (b) other Qwest shareholders during the period in question who may have made investment decisions during the period covered by those offenses and who may have been affected by Mr. Nacchio’s conduct; and (c) Qwest itself (and its shareholders), which had an interest in avoiding the legal and reputational injury resulting from the conduct of its president and chief executive officer in using Qwest’s material nonpublic information to engage in a scheme to deceive or cheat investors.

It would be extraordinarily difficult and expensive even to attempt to contact the first subgroup — *i.e.*, those who purchased stock directly from Mr. Nacchio between April 26, 2001 and May 29, 2001. In connection with the counts on which Mr. Nacchio was found guilty, he sold 1,330,000 shares of Qwest stock. *See* Docket No. 412, Att. 2. Identification of individual purchasers would be further complicated by the fact that many, if not most, Qwest shares would be held in “street name” — *i.e.*, the brokerage firm would hold the investor’s securities in its name or another nominee, but would keep internal records reflecting the identity of the beneficial owner.¹ Therefore, even if the Government were to contact the nominal group of purchasers, this group would not accurately reflect the actual investors. Because of these hurdles, contacting the actual investors for all of the trades at issue in the counts as to which Mr. Nacchio was found guilty would be extraordinarily expensive.

III. The United States’ proposal for a reasonable procedure

The United States believes that although it is not practical to individually contact all of the potential victims to notify them of the sentencing, the purposes of 18 U.S.C. § 3771 can be satisfied in this case through an alternative “reasonable procedure” pursuant to § 3771(d)(2). The United States proposes the following:

First, the United States notes that some notice to victims regarding the sentencing has already been provided.

- a. The United States Attorney’s Office has established a link on its website

¹ *See* <http://www.sec.gov/answers/street.htm>.

for interested individuals to obtain the contact information for a person in the United States Attorney's Office who can answer questions regarding the sentencing. The website also includes current information from the Court's docket sheet about scheduled Court dates (including the sentencing), as well as the text of the victim rights described in 18 U.S.C. § 3771(a)(1)-(8). The United States intends to continue to maintain this link.

b. The Court has made available, through its ECF system, prompt notification to members of the general media and the public all pleadings and important orders about hearings taking place in this matter, including notice of the sentencing. The United States assumes that the Court intends to continue to maintain this system through the sentencing. The United States further observes that if the Court issues an order regarding victim notification (as proposed below), that order will likely itself receive press coverage, which would have the salutary effect of providing further notice of the procedures regarding victims.

Second, the United States proposes that additional notice could be provided by the United States to victims through the following means:

a. A shareholder class action was filed in the District of Colorado on behalf of all purchasers of Qwest stock from May 24, 1999 through July 28, 2002. That class was represented by a sophisticated class plaintiff, New England Health Care Employees Pension Fund, and by experienced counsel. The United States expects that some of the class members are likely victims. The United States could provide notice of the sentencing, by letter, to class counsel.

b. As noted above, Qwest itself is a victim of Mr. Nacchio's conduct. The

United States could provide notice of the sentencing, by letter, to Qwest counsel.

c. There is an Association of US West retirees, many of whom likely invested in Qwest stock during the spring of 2001. The United States could provide notice of the sentencing, by letter, to this association.

d. The United States Attorney's Office, if authorized by the Court, could publish a notice in the *Denver Post* and the *Rocky Mountain News* that would explain to potential victims how they might proceed if they had a desire to speak at sentencing.

e. The United States Attorney's Office could also issue a press release that would be directed to the *Denver Post*, the *Rocky Mountain News*, and the *Wall Street Journal*, and any other interested publications, and that would provide notice of the sentencing and explain that potential victims could contact the Court if they wished to speak at sentencing.

Third, the United States proposes the following language for the statement to be made in the letters and notices discussed above:

The Office of the United States Attorney for the District of Colorado provides the following notice: Joseph P. Nacchio, the former President and Chief Executive Office of Qwest Communications International, has been found guilty on nineteen counts of insider trading securities fraud, relating to sales of Qwest stock between April 26, 2007 and May 29, 2001. Mr. Nacchio is scheduled to be sentenced in the United States District Court for the District of Colorado before the Honorable Edward W. Nottingham on July 27, 2007. Any investor who believes that he or she was a victim of these offenses and who wishes to make a statement to the Court regarding the sentencing must submit a brief statement, *in writing*, to the Court (1) stating whether he or she was a shareholder of Qwest stock between April 26, 2001 and May 29, 2001; (2) stating whether he or she purchased Qwest stock between April 26, 2001 and May 29, 2001; (3) stating whether he or she wishes to make a statement at sentencing, and (4) explaining briefly why he or she believes he is a victim and summarizing

what he or she wishes to say at the sentencing. Submitting this statement does not mean that the person is entitled to speak at the sentencing; that determination will be made by the Court. The written statement must indicate that it is submitted in connection with the sentencing in United States v. Nacchio, 05-cr-545-EWN, and should be directed to the Clerk of Court, 919 19th Street, Denver, CO 80202, and must be *received* by the Clerk no later than July 13, 2007.

Fourth, the United States proposes that these statements be made available by the Clerk to counsel for the parties for review. The parties then could, after having an opportunity to review any statements that have been submitted, file briefs with the Court proposing an appropriate procedure for handling the sentencing procedures at to these victims in accordance with 18 U.S.C. § 3771.

CONCLUSION

For the reasons set forth above, the United States respectfully moves for an order pursuant to 18 U.S.C. § 3771(d)(2) incorporating the procedures set forth above and finding that these procedures are reasonable under the circumstances. A proposed order is attached. Defense counsel has been consulted regarding this motion and does not consent.

Respectfully submitted this 26th day of June, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2007, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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