

**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.

**RESPONSE TO MOTION OF THE UNITED STATES
FOR AN ORDER CONCERNING THE RIGHTS OF CRIME VICTIMS
PURSUANT TO 18 U.S.C. SECTION 3771(d)(2)**

INTRODUCTION

Joseph P. Nacchio, by and through undersigned counsel, hereby opposes the motion of the United States for an order concerning notification to "crime victims" of the upcoming sentencing of Mr. Nacchio, and inviting them to speak.

Under the guise of fulfilling an obligation that it knows it does not have and has not bothered to comply with since the inception of this case, the government seeks to create a mob scene at the July 27, 2007 scheduled sentencing proceeding of Mr. Nacchio. The government's inappropriate and untimely actions which should not be sanctioned by the Court.

The government concedes, as it must, that it has no reasonable possibility of notifying any "crime victim" as that term is defined by the very statute which it purports to rely upon as imposing the obligation upon it. As the government points out, 18 U.S.C. § 3771(e) defines "crime victim" as "a person *directly and proximately* harmed as a result of the commission of a Federal offense" (emphasis added). See *United States v. Sharp*, 463 F.Supp.2d 556, 563 (E.D.Va. 2006) (court interpreting language of § 3771(e) held that "an individual is only directly and proximately harmed when the harm results from conduct underlying an element of the offense of conviction"). The government acknowledges that it would be prohibitively expensive and too difficult "even to attempt to contact . . . those who purchased stock directly from Mr. Nacchio between April 26, 2001, and May 29, 2001." Government Motion [Doc 438] at 3. The government knows that there are no identifiable persons who would be able to establish that they actually purchased the shares that Mr. Nacchio sold on any given day.¹ The government therefore knows very well that given the nature of the offense, the statute imposes upon it no obligation to notify anyone because there are no "direct and proximately harmed" persons that can be identified.²

¹ Government Trial Exhibit 413 shows that between April 26, 2001, and May 29, 2001, the volume of Qwest shares traded on any given day was generally between 5 and 7 million, was three times between 9 and 12 million, and was less than 3 million on only one occasion. On 14 of the same 19 trading dates, Mr. Nacchio sold from approximately 4,000 to 70,000 shares; he sold approximately 100,000 shares on 3 dates; and a total of 650,000 on the other 2 days.

² It is far from clear that in this type of case, even assuming the statute applies, the court would be required to provide anyone with an opportunity to speak at the sentencing (footnote cont.)

The government has acknowledged this fact by its failures to notify anyone at any prior time during these proceedings. 18 U.S.C. § 3771(a)(2) provides that "crime victims" have "[t]he right to "reasonable . . . and timely notice of *any* public court proceeding." It is only now, after the Probation Department has concluded its Presentence Report that this so-called "Notice" to victims is sought.

The sentencing proceeding is scheduled to take place in about one month. There is simply no justification for the government to have waited until now to "make their best efforts to see that crime victims are notified of, and accorded, the rights" to which they are entitled by law. 18 U.S.C. § 3771(c)(1).

The government's application offers no reasonable opportunity to identify and provide notice to persons that were directly and proximately harmed by Mr. Nacchio's insider trading offenses. This the government admits. The government submits instead that because it is difficult, if not impossible, to identify such persons, they should instead involve the Court in ordering that a much broader scope of persons, to include "Qwest shareholders who *may have made investment decisions*" and "*may have been affected* by Mr. Nacchio's conduct" during the relevant time period. Government Motion [Doc 438] at 2.³

hearing, other than the defendant's attorney, the defendant, and an attorney for the government. See Fed. R. Crim. P. 32(i)(4), which in addition to the above, only requires the court to provide "any victim of a crime *of violence or sexual abuse*" with an opportunity to speak or submit information about the sentence. (emphasis added).

³ This request is especially egregious when one considers the contrary position taken by the government throughout these proceedings as it concerns the type of material inside (footnote cont.)

Incredibly, the government proposes to provide notice to hundreds of thousands of investors with the advice that they decide for themselves whether they “believe” themselves to be “a victim of these offenses.” Government Motion [Doc 438] at 5. They identify “Qwest itself,” and of course, all of “its shareholders,” not as persons directly or proximately harmed, but as persons who “had an *interest* in avoiding the legal and reputational injury” resulting from the CEO being convicted of insider trading. *Id.* at 2.

These then are the so-called purported “best efforts” of the government to comply with its statutory obligation to notify persons “directly and proximately harmed” by the offenses. The government’s proposal is not an effort to meet its statutory obligations, but is instead an effort to stimulate vitriolic letters to be sent to the Court, and to provide a public platform, certainly to be covered by the media, for individuals to express their outrage about any number of details concerning their personal financial travails likely having nothing to do with the offenses for which this Court will sentence Mr. Nacchio.

The government seeks by its actions to incite the many residents of this community that harbor ill will toward Mr. Nacchio, people who blame him for much more than was decided by the jury, to come forward to demand that strong punishment be meted out by this Court. This is reminiscent of the tenor of the statement by the head of the office upon the verdict: “For anybody who

information at issue in the case. The government represented on any number of occasions that Mr. Nacchio and Qwest were not obligated to disclose the information at issue in this case. See e.g. 3/20/07 at 22, 4/10/07 at 2737.

has ever made a call from Qwest's 14-state service area, 'convicted felon Joe Nacchio' has a nice ring to it." Andy Vuong, *Nacchio convicted on 19 counts. What's next: Former Qwest CEO to be sentenced July 27*, Denver Post, April 20, 2007, available at http://www.denverpost.com/business/ci_5708804.

The government's proposal will serve no legitimate purpose, and will likely burden the Court, primarily, and the defense, secondarily, with overwhelming and unnecessary responsibilities. Mr. Nacchio respectfully requests that the Court not sanction the government's effort to infect these proceedings with even greater outside pressures than already exist.

Respectfully submitted this 28th day of June, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June 2007, a true and correct copy of the foregoing **DEFENDANT JOSEPH P. NACCHIO'S RESPONSE TO MOTION OF THE UNITED STATES FOR AN ORDER CONCERNING THE RIGHTS OF CRIME VICTIMS PURSUANT TO 18 U.S.C. SECTION 3771(d)(2)** was served on the following via email:

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