NO. 07-1311

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH P. NACCHIO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF OF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT SEEKING REVERSAL

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302 (telephone)
(202) 588-0386 (facsimile)
pkamenar@wlf.org

Andrew J. Levander
David S. Hoffner
Jason O. Billy
David P. Staubitz
DECHERT LLP
30 Rockefeller Plaza
New York, NY 10012
(212) 698-3500 (telephone)
(212) 698-3599 (facsimile)
david.hoffner@dechert.com

Michael L. Kichline
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-4000 (telephone)
(215) 994-2222 (facsimile)
michael.kichline@dechert.com

Counsel for Amicus Curiae
The Washington Legal Foundation

Dated: October 17, 2007

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INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a national, non-profit public interest law and policy center based in Washington, D.C. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, business civil liberties, and a limited and accountable government. To that end, WLF has appeared before the Supreme Court and lower federal courts in numerous cases that raise these issues. In particular, WLF has participated as *amicus curiae* in cases about the proper scope of securities law, scienter, and mens rea. *See*, *e.g.*, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

In addition, WLF publishes policy papers that oppose abusive securities class action cases that are detrimental to the public interest. *See, e.g.*, James Maloney, *Strict Standing Requirement For Securities Fraud Suits Upheld* (WLF Counsel's Advisory, June 3, 2005); Lyle Roberts & Paul Chalmers, *Lower Courts Will Determine Impact Of Supreme Court's Securities Fraud Suit Ruling* (WLF Legal Backgrounder, May 20, 2005). This amicus brief is being filed with the consent of the parties.

As detailed below, the WLF believes that the conviction of Joseph Nacchio was based on inadequate jury instructions that raise substantial public policy concerns and warrant reversal.

Governmental efforts to charge corporate executives with insider trading premised on securities trading while in the possession of information relating to financial projections, i.e., "soft information," raise significant public policy concerns and have the potential to cause negative repercussions in corporate America by creating a chilling effect that thwarts the full and frank exchange of ideas and viewpoints both between corporations and securities markets and internally within corporations. It is essential to the proper functioning of a corporation that such exchanges of information be allowed to flourish rather than be stymied by the fear that prosecutors might seize on an inchoate financial assessment or the mere existence of a debate as to future business prospects to charge a criminal violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act").

The jury instructions given in this case expand the scope of securities fraud under the Exchange Act to encompass insider trading based on the possession of "soft" information that could be deemed immaterial as a matter of law. In addition, the instructions provided by the district court improperly impeded and prejudiced the defendant's ability to assert as a defense his good faith belief that his conduct was not in violation of the law. On either of these bases, the conviction should be reversed.

SUMMARY OF ARGUMENT

This submission focuses on Nacchio's contention on appeal that the district court's jury instructions (1) defining "materiality" in the context of a criminal prosecution based on the possession of "soft" information and (2) regarding a defendant's good faith as a

defense to the charges of securities fraud were erroneous and highly prejudicial, and require a retrial. If a conviction based on the jury instructions given in this case is allowed to stand, the door will likely be opened to the prosecution, both civilly and criminally, of securities fraud claims any time there is trading while in the possession of the merest ephemera of "soft" information that ultimately turns out to have been a harbinger of negative results. Such a precedent would contribute to a climate of fear inhibiting the exchange of information as to future financial trends and performance, a dialogue that is essential to the proper functioning of both the corporation and the market in general. The court's good faith instruction, which effectively eviscerated the defense by allowing the jury to reject a showing of the defendant's lack of criminal intent based on unrelated conduct, would also result in the improper expansion of liability under the statute.

Over the last 35 years, the enactment of statutory and administrative "safe harbors" and the judicial adoption of the "bespeaks caution" doctrine reflect the growing recognition that corporations and their officers and directors must have the latitude to make good faith pronouncements of financial estimates and projections to the market without running the risk that they will be sued or held liable for the dissemination of such soft information if, as frequently happens, such projections turn out to be erroneous. The

prosecution and conviction of Joseph Nacchio run counter to this trend of increased protections with respect to the dissemination of "soft" information.[1]

Indeed, in this case, Nacchio was convicted of insider trading based on jury instructions as to "materiality" that ceded to the jury full and unfettered discretion to find "materiality" on the basis of even the most inchoate and speculative soft information. At a minimum, the instructions should have told the jury how to make the very difficult and nuanced determination as to when "soft" information is sufficiently certain and definite that it may be deemed "material."

By tying the allegedly material new soft information to the earlier public disclosure, the defendant's proposed instructions with respect to materiality would have provided the jury with the proper context to analyze the charges in this case. As the defense sought, the jury should have been instructed that the new soft information was "material" only if it was so certain that it caused the earlier publicly disclosed projection to no longer have a "reasonable basis." At a minimum, the court should have provided the jury with the materiality instruction proposed by the Government, which was uncontroversial but nonetheless rejected by the court in favor of an instruction that

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[1] This Court has defined soft information as "information about a particular issuer or its securities that inherently involves some subjective analysis or extrapolation, such as projections, estimates, opinions, motives, or intentions." *Garcia v. Cordova*, 930 F.2d 826, 830 (10th Cir. 1991) (quoting Bruce A. Hiler, *The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views*, 46 Md. L. Rev. 1114, 1116 (1987)). "Soft information contrasts with hard information which is typically historical information or other factual information that is objectively verifiable and subject to disclosure if material to the relevant transaction." *Garcia*, 930 F.2d at 830 (internal citation omitted).

provided even less guidance. Such errors, especially when coupled with the jury instructions as to good faith and scienter that severely and improperly hindered the defendant's ability to demonstrate that he did not act with any criminal intent, effectively deprived Nacchio of his defense that the soft information at issue was not certain enough and not substantial enough to constitute material information. These errors require, at a minimum, that the conviction be reversed and the case remanded for a new trial.

ARGUMENT

I. THE DISTRICT COURT'S INSTRUCTIONS AS TO MATERIALITY FAILED TO PROVIDE THE JURY WITH ADEQUATE INSTRUCTION AS TO HOW TO DRAW THE LINE BETWEEN "MATERIAL" AND "IMMATERIAL" "SOFT" INFORMATION

A. The Proposed Instructions And The Court's Determination

The linchpin of the prosecution's theory of the case was that, in early 2001, Nacchio came into possession of information that led him to conclude that the Company's "publicly stated financial targets" issued in September 2000 were risky and "aggressive." (Indictment ¶ 6, Dec. 19, 2005). Notably, the prosecution did not argue that this new information would have been material in the absence of the public pronouncement. Nonetheless, the court's proffered jury instruction omitted any mention whatsoever of the public projection and instead invited the jury to find materiality if it simply concluded that "a reasonable investor would consider it important in deciding to act or not to act with respect to the securities transaction at issue." (Trial Tr. vol. 27, 3171:7-11, Apr. 12, 2007). The only caveat the district court provided was that securities

fraud "does not cover minor or meaningless or unimportant matters or omissions." (*Id.* at 3171:12-15).

In reaching the determination to provide these perfunctory instructions as to materiality, the court rejected the instructions proposed by the defense that would have required that, in order to be "material," the jury determine that the new information render the public disclosure without a "reasonable basis" and that the materiality of the new information be viewed in light of the cautionary language accompanying the public disclosure. (Trial Tr. vol. 23, 2682-2684, Apr. 10, 2007). Notably, the court also spurned even the Government's far from controversial proposed instruction. (*Id*. at 2680-82). The prosecution's proposed instruction, although it failed to tie the materiality of the new soft information to the public projection, at least delineated materiality in terms of the teachings of *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988), and *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), the seminal Supreme Court cases regarding materiality, by directing the jury that, in order to find materiality, it must be "substantially likely that a reasonable investor would have viewed [the information] as significantly altering the total mix of information made available concerning the company." (United States Proposed Instruction No. 12).[2]

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[2] The Government's Proposed Instruction No. 12 would also have instructed the jury that "[i]n evaluating whether forecasts and forward-looking information is material, you should evaluate the importance of the information to a reasonable investor, such as the probability that the future events will or will not occur and the anticipated magnitude of the events in light of the totality of company activity."

In civil securities fraud cases involving projections, juries are normally afforded far more guidance than the court provided here with respect to "materiality" and "reasonable basis" principles; such guidance is necessary to mitigate the risk that juries will wrongly impose liability on the basis of hindsight. *See*, *e.g.*, Modern Federal Jury Instructions – Pattern Jury Instructions (Civil), Ninth Circuit ¶ 21.2 cmt. (Matthew Bender ed. 2006) (materiality instruction "should be adjusted for cases involving … statements of reasons, opinions or beliefs" and "when the alleged fraud concerns certain forward-looking statements the jury may be compelled to examine whether the statement falls within the safe harbor and therefore does not qualify as a fraudulent statement under the Act"); Eleventh Circuit Pattern Jury Instructions (Civil Cases), Instruction 4.2 (2005) ("If, at the time the predictions, expressions of opinion or projections were made, and the speaker actually believed them or there was a reasonable basis for making them, then the statements are not materially misleading statements of fact.").

Yet, here, in a criminal context where the defendant's liberty was at stake, the court rejected even these basic safeguards. Instead, the court offered an instruction to the jury that was devoid of any useful guidance as to how to assess the materiality of the new soft information in the context of the prior pronouncement. This is especially troublesome here, where the prosecution's case explicitly hinged on the public projection that the Government claimed was, in light of the new information, no longer accurate. Given the Government's theory of the case, as well as the unique issues presented by any criminal prosecution for insider trading premised on the possession of allegedly material

"soft" information, a more detailed instruction providing the jury with more guidance was clearly required.

The actual instruction provided the jury with *no* basis for understanding how to draw the line between the rare case of near *certain* soft information, which may be material, and the routine estimates and prognostications that companies circulate internally. Absent more concrete guidance, the *Nacchio* jury was free to determine materiality improperly without any reference to the "total mix" of information and the underlying disclosure that was at the crux of the Government's case and without any sensitivity to the fact that, although an investor might, out of context, consider forecasts to be important, the law recognizes that such information may nevertheless still be speculative and without sufficient certainty to make it "material."

B. The Inherent Difficulties In Determining Materiality And The Recognized Need To Encourage And Protect The Dissemination Of Soft Information

The general difficulties inherent in performing determinations of materiality under the Supreme Court's standard for materiality, as articulated in *Basic*, 485 U.S. at 238, and *TSC Industries*, 426 U.S. at 449, are well recognized. One commentator has noted:

> The facial simplicity of the basic legal standard governing materiality masks the complexities encountered by transaction planners, litigants, the SEC, the U.S. Department of Justice [], and courts in interpreting and applying that standard. The interpretation and application of the materiality

> standard are highly fact-dependent and do not always produce predictable or certain planning options or judicial results.[3]

Such determinations are even more difficult when the information whose materiality is being assessed is so-called "soft" information and is, by definition, lacking absolute certainty and clarity. Indeed, until 1973, the United States Securities and Exchange Commission (the "SEC") prohibited the inclusion of forward-looking information in a public disclosure document out of concern that the dissemination of soft information could not be adequately gauged by the marketplace.[4] The rationale behind this prohibition was the concern that unsophisticated investors, lacking an understanding of the instability and uncertainty of published forecasts, might unduly rely on corporate projections publicly filed with and reviewed by the SEC.[5]

In the early 1970s, however, the SEC began to acknowledge various overriding factors supporting the release of forward-looking statements: the relevance of future-oriented data in investment decisions; the increased reliability and sophistication of corporate forecasts due to both improved information systems and increasing use of

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[3] Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call For Action*, 52 Am. U. L. Rev. 1131, 1138-39 (2003).

[4] Statement by the Commission on the Disclosure of Projections of Future Performance, Securities Act Release No. 5362, Exchange Act Release No. 9984, 38 Fed. Reg. 7220 (Feb. 2, 1973).

[5] John C. Burton, Chief Accountant, SEC at the Northwestern University Conference on Public Reporting of Corporate Financial Forecasts, *Forecasts: A Changing View From the Securities and Exchange Commission* (Apr. 2, 1973), *available at* http://www.sec.gov/news/speech/1973/040273burton.pdf.

budgets and forecasts in corporations; and the need for companies to disclose projections to investors in a nondiscriminatory manner.[6]

As a result of this emerging view of the normative advantages of allowing forward-looking statements, the SEC and Congress implemented administrative and statutory protections with the goal of promoting the exchange of forward-looking information. In 1979, the SEC formally adopted a "safe harbor" for the release of forward-looking statements made with good faith and with a reasonable basis, with the goal of "encouraging the disclosure of projections and other items of forward-looking information." In adopting the safe harbor, the SEC noted that several commentators "urged the adoption of a safe harbor rule for projections made by issuers and reviewed by third parties, stating that the absence of a safe harbor rule might discourage the dissemination of projections."[7]

Since the lifting of the SEC's prohibition on forward-looking statements, the public dissemination of soft information has come to play a critical role in maintaining and enhancing visibility, predictability and uniformity of access to information in the marketplace. The increasing importance of the public availability of soft information has been recognized by Congress through the codification of safe harbor protections for forward-looking statements in the Private Securities Litigation Reform Act, 15 U.S.C.

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6 *Id.*

7 Safe Harbor Rule for Projections; Final Rule, Securities Act Release No. 6084, Exchange Act Release No. 15944, 44 Fed. Reg. 38810 (July 2, 1979).

§ 78u-5 (1995), passed for the primary purpose of reducing the "chill on voluntary disclosures by issuers." S. Rep. No. 104-98, at 5 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679, 684. The House Conference Report specifically noted:

> Fear that inaccurate projections will trigger the filing of securities class action lawsuit[s] has muzzled corporate management. One study found that over two-thirds of venture capital firms were reluctant to discuss their performance with analysts or the public because of the threat of litigation. Anecdotal evidence similarly indicates corporate counsel advise clients to say as little as possible, because "legions of lawyers scrub required filings to ensure that disclosures are as milquetoast as possible, so as to provide no grist for the litigation mill."

H.R. Rep. No. 104-369, at 43 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 742 (quoting testimony of Hon. J. Carter Beese, former SEC Commissioner).

The importance of the availability of soft information to the overall economy has also been recognized by the SEC, which has acknowledged that forward-looking statements "occup[y] a vital role in the United States securities markets:"

> Investors typically consider management's forward-looking information important and useful in evaluating a company's economic prospects and consequently in making their investment decisions. Analysts and other market participants report that they view considerations of management's own performance projections, i.e., earnings and revenues, to be critical to their own forecasts of company's future performance. As such, forward-looking information is often considered a critical component of investment

> recommendations made by broker-dealers, investment advisors and other securities professionals.[8]

Indeed, "[i]f a company won't provide information, investors become reluctant to invest . . . . [and,] [w]ithout investors, companies wither on the vine. . . [and,] [i]n the end, the entire American economy suffers."[9]

Comporting with the expressed public policy of Congress and the SEC, the courts have consistently recognized the need to protect corporate use of soft information in the form of forward-looking statements to the market and internally-generated projections. Every United States Court of Appeals addressing this issue, including this Court, has adopted protections such as the "bespeaks caution doctrine," which "provides a mechanism by which a court can rule as a matter of law . . . that defendants' forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1120 (10th Cir. 1997) (quoting *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1413 (9th Cir. 1994), *cert. denied*, 516 U.S. 868 (1995)). *See also Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 (1st Cir. 1991); *I. Meyer Pincus & Assoc., v. Oppenheimer & Co.*, 936 F.2d 759, 763 (2d Cir. 1991); *In re Donald J. Trump Casino*

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[8] Safe Harbor For Forward-Looking Statements, Securities Act Release No. 7101, Exchange Act Release No. 34831, Investment Company Act Release No. 20613, 59 Fed. Reg. 52723 (Oct. 13, 1994).

[9] *Securities Litigation Abuses: Hearing Before the Subcomm. on Securities of the S. Comm. on Banking, Housing and Urban Affairs* (Oct. 29, 1997) (testimony of Thomas E. O'Hara, Chairman, National Association of Investors Corporation) *available at* 1997 WL 683748.

Sec. Litig, 7 F.3d 357, 371-73 (3d Cir. 1993), *cert. denied*, 510 U.S. 1178 (1994); *Gasner v. Board of Supervisors*, 103 F.3d 351, 358 (4th Cir. 1996); *Rubinstein v. Collins*, 20 F.3d 160, 167 (5th Cir. 1994); *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1040 (6th Cir. 1991); *Harden v. Raffensperger, Hughes & Co.*, 65 F.3d 1392, 1404-06 (7th Cir. 1995); *Polin v. Conductron Corp.*, 552 F.2d 797, 807 n.28 (8th Cir. 1977), *cert. denied*, 434 U.S. 857 (1977); *Saltzberg v. TM Sterling/Austin Assocs.*, 45 F.3d 399, 400 (11th Cir. 1995). *Cf. In re XM Satellite Radio Holdings Sec. Litig.*, 479 F. Supp. 2d 165, 177-78 (D.D.C. 2007).

These cases make clear that corporations and their officers and directors have the latitude to make good faith pronouncements of financial estimates and projections to the market without running the risk that they will be sued or held liable for the dissemination of such soft information if, as frequently happens, such projections turn out to be erroneous:

> Predictions of future growth . . . will almost always prove to be wrong in hindsight. If a company predicts twenty-five percent growth, that is simply the company's best guess as to how the future will play out . . . . If growth proves less than predicted, buyers will sue; if growth proves greater, sellers will sue. Imposing liability would put companies in a whipsaw, with a lawsuit almost a certainty. Such liability would deter companies from discussing their prospects, and the securities markets would be deprived of the information those predictions offer. We believe this is contrary to the goals of full disclosure underlying the securities laws, and we decline to endorse it.

Raab v. General Physics Corp., 4 F.3d 286, 290 (4th Cir. 1993).

The above discussion highlights the importance that both the Congress and the courts give to ensuring that the securities laws do not inhibit a corporation's public dissemination of soft information as long as the disclosure is made in good faith and with a reasonable basis. In order to support such a principle effectively, however, the courts and the SEC are obliged to extend protections to corporations and their officers and directors to ensure that the public dissemination of financial projections does not lead to the destructive result of forcing companies to update such disclosure every time new internal data, information or analysis is received that might arguably have an impact on such prior public assessment.[10]

The United States Court of Appeals for the Seventh Circuit was confronted with this very situation in *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509 (7th Cir. 1989). In *Wielgos*, Judge Easterbrook, writing for the Court, made clear the importance of ensuring that companies have the benefit of free and unfettered internal discussion and debate as to business prospects and forecasts without being compelled constantly to worry that the daily vicissitudes of business render their prior public statements

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[10] The lack of clarity with respect to the materiality of soft information also impedes the ability of corporate employees to increase liquidity and diversify assets by selling stock received as part of a stock-based incentive compensation package, which courts have recognized is an important component of modern day corporate remuneration. *See, e.g., In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1424 (3d Cir. 1997) ("A large number of today's corporate executives are compensated in terms of stock and stock options. It follows then that these individuals will trade those securities in the normal course of events. We will not infer fraudulent intent from the mere fact that some officers sold stock.") (internal citation omitted).

inaccurate and preclude the company or its officers from buying or selling securities. In concluding that a company's possession of internal information with respect to projections of construction costs did not preclude it from selling its own securities to the market, Judge Easterbrook cogently stated:

> 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.

Id. at 516 (citing *Painter v. Marshall Field & Co.*, 646 F.2d 271, 291-93 (7th Cir. 1986)).

In light of the law's recognition of the importance of the need to encourage and protect forward-looking disclosures and the concomitant obligation to shelter corporations from a constant obligation to refine or update such disclosures (as well as be free of the stressful need to analyze daily whether the most recent variations in data are so substantial as to warrant a reassessment), any criminal prosecution for insider trading premised on the possession of soft information that allegedly undermines a prior publicly made projection must ensure that the soft information at issue is "material" as a matter of law by requiring that the Government prove that the prior statement no longer has a reasonable basis. Allowing the materiality of such soft information to be determined by a jury without a framework obligating it to determine materiality with regard to the specific content of the prior statement wrongfully deprives the jury of context and guidance. Moreover, it allows the jury to determine materiality based on an open-ended

construction that erroneously pays no heed to the acknowledged public policy behind the numerous protections that have developed over the past three decades to protect and encourage the dissemination of forward-looking information.

In order to provide the jury with sufficient guidance enabling it to assess adequately whether the soft information at issue was indeed material, the *Nacchio* jury should have been instructed that to find that the new information that Nacchio allegedly possessed was "material," the information had to be "so certain" that, as a result, the previously publicly announced forecast no longer had a "reasonable basis." In analyzing whether there continued to exist a "reasonable basis" for the prior statement, the jury should have been advised to make such assessment in light of the cautionary language in the statement and with the recognition that, in disclosing the projection, Qwest was not required to reveal its "data, assumptions, and methods." *Wielgos*, 892 F.2d at 515. At a minimum, the jury should have been advised, as the Government's proposed but rejected instruction acknowledged and as the Supreme Court's decision in *Basic*, 485 U.S. at 231-32, mandates, that in order to find that the soft information at issue was material, it had to be "substantially likely that a reasonable investor would have viewed it as significantly altering the total mix of information made available concerning the company." (United States Proposed Instruction No. 12).

The failure of the district court to instruct the jury adequately in this regard was reversible error, which if not rectified by this Court, will accentuate the already uncertain landscape of corporate obligations with respect to soft information and have a deleterious

impact on the ability of corporations to engage in the open and uninhibited internal dialogue that is so essential to the health and future of American business. Indeed, as Judge Easterbrook stated in *Wielgos*, "[i]f enterprises cannot make predictions about themselves, then securities analysts, newspaper columnists, and charlatans ["whose access to information is not as good as the issuer's"] have protected turf." *Wielgos*, 892 F.2d at 514.

II. THE DISTRICT COURT'S INSTRUCTIONS WITH RESPECT TO SCIENTER WERE ERRONEOUS AND CONSTITUTE REVERSIBLE ERROR

The court's instruction to the jury with respect to the defendant's requisite scienter was also erroneous and itself constitutes reversible error. Scienter is a necessary element of a securities fraud claim, "regardless of the identity of the plaintiff or the nature of the relief sought." *Aaron v. SEC*, 446 U.S. 680, 691 (1980). *See, e.g.*, *United States v. Lake*, 472 F.3d 1247 (10th Cir. 2007) (reversing a fraud conviction on the ground that the instructions failed to inform the jury of SEC rules that were relevant to a fair understanding of the defendants' state of mind).

The instruction itself amply demonstrates the problem. As an initial explanation, the court opined: "The good faith of the defendant is a complete defense to the charge of securities fraud contained in each count of this Indictment because good faith on the part of the defendant, if it is found by the jury, is simply inconsistent with the intent to defraud alleged in each charge of the Indictment." (Trial Tr. vol. 27, 3173:24-3174:4,

Apr. 12, 2007). If the court had stopped there, the jury would have been properly charged.

The court went on, however, to qualify and improperly denude this instruction by adding: "A defendant does not act in good faith if even though he honestly holds a certain opinion or a belief if [sic] he also knowingly employs a device, scheme or artifice to defraud." (*Id.* at 3174:10-12). This additional instruction significantly diluted the court's acknowledgement of the good faith defense by inviting the jury to reject Nacchio's showing of good faith if it found he had engaged in any dishonest conduct, whether or not related to the receipt of the alleged material information and/or the relevant securities trading. Nor is this concern academic: the prosecution took full advantage of this strategy in attacking Nacchio's good faith defense. *See* Trial Tr. vol. 26., 3126-28, Apr. 11, 2007 (arguing at closing that an alleged act of dishonesty unrelated to the alleged insider trading negated defendant's good faith).

By giving the jury unfettered discretion to find that unrelated dishonest conduct negated good faith, the court effectively eviscerated the defense by instructing the jury to ignore evidence of Nacchio's reliance on the judgment of the company's auditors, audit committee, in-house lawyers and other executives with respect to their views as to the significance of the soft information found by the jury to be "material." *Cf. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. ___, 127 S. Ct. 2201, 2216 (2007) (liability even for recklessness is foreclosed as a matter of law when defendant's interpretation of the law is wrong but not "objectively unreasonable"); *Arthur Andersen LLP v. United States*, 544

U.S. 696, 706 (2005) (reversing obstruction of justice conviction where jury was improperly instructed that "even if [the defendant] honestly and sincerely believed that its conduct was lawful, you may find [it] guilty").

The court's error with respect to the instruction as to the good faith defense was compounded by the district court's instruction that "[t]o prove that the information was non-public, the Government is not required to additionally prove that Qwest was required to disclose the information at issue. A corporation has no general duty to disclose all of its non-public or its proprietary information." (Trial Tr. vol. 27, 3172:5-9, Apr. 12, 2007). By making such an unnecessary statement, the court effectively negated the defense's effort to demonstrate Nacchio's good faith by reference to the company's decision throughout the relevant period to reaffirm the guidance that the jury subsequently implicitly found to be materially misleading.

This instruction was extremely prejudicial as there is no basis whatsoever in this case to distinguish the company's duties of disclosure and Nacchio's duties as a seller of securities. By instructing the jury to ignore the company's disclosure obligations, the court deprived Nacchio of the best evidence of his good faith – his reliance on the conduct of Qwest and the apparent conclusion of its board of directors, lawyers, auditors and other executives that the soft information at issue was not material and did not require a public reassessment of the projections. And, by impeding this defense, the court effectively wrote the scienter element of securities fraud out of the statute. On this basis alone, the conviction should be reversed.

CONCLUSION

For all of the foregoing reasons, the Washington Legal Foundation respectfully submits that the judgment of the district court should be reversed.

Dated: October 17, 2007

Respectfully submitted,

/s/ Paul D. Kamenar

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302 (telephone)
(202) 588-0386 (facsimile)
pkamenar@wlf.org

Andrew J. Levander
David S. Hoffner
Jason O. Billy
David P. Staubitz
DECHERT LLP
30 Rockefeller Plaza
New York, NY 10012
(212) 698-3500 (telephone)
(212) 698-3599 (facsimile)
david.hoffner@dechert.com

-and-

Michael L. Kichline
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-4000 (telephone)
(215) 994-2222 (facsimile)
michael.kichline@dechert.com

Counsel for Amicus Curiae
The Washington Legal Foundation

12961185

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify in accordance with Fed. R. App. P. 32(a)(7)(C) that this brief has been prepared with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), and, this brief contains 5,142 words, excluding the parts of the brief exempted by Fed. R. App. P. 37(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of the 10th Circuit Rule 32(a) because this brief was prepared using Microsoft Word 2003 in 13-point Times New Roman font.

/s/ Paul D. Kamenar

Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302 (telephone)
(202) 588-0386 (facsimile)
pkamenar@wlf.org

CERTIFICATION OF DIGITAL SUBMISSIONS

I, PAUL D. KAMENAR, hereby certify that:

(1) there were no privacy redactions to be made in the documents submitted on October 17, 2007, and every document submitted in Digital Form or scanned PDF format is an exact copy of the written document that was sent to the Clerk; and

(2) the digital submissions have been scanned for viruses using Symantec AntiVirus, version 10.1.5.5000 (last updated October 17, 2007), and according to the program, are free from viruses.

/s/ Paul D. Kamenar

Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302 (telephone)
(202) 588-0386 (facsimile)
pkamenar@wlf.org

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2007, I caused the foregoing **BRIEF OF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT SEEKING REVERSAL** to be sent via electronic mail to:

U.S. Court of Appeals for the 10th Circuit:
esubmission@ca10.uscourts.gov

Stephan Oestreicher
Stephan.Oestreicher@usdoj.gov

James O. Hearty
james.hearty@usdoj.gov

Cliff Stricklin
Cliff.stricklin@usdoj.gov

Leo J. Wise
leo.wise@usdoj.gov

Colleen Ann Conry
colleen.conry@usdoj.gov

Paul E. Pelletier
paul.pelletier@usdoj.gov

Kevin Traskos
kevin.traskos@usdoj.gov

Maureen Mahoney
maureen.mahoney@lw.com

/s/ Paul D. Kamenar

Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302 (telephone)
(202) 588-0386 (facsimile)
pkamenar@wlf.org