IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE MARCIA S. KRIEGER

Criminal Action No. 05-cr-00545-MSK

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

DEFENDANT'S BRIEF REGARDING THE SCOPE OF RESENTENCING

Pursuant to this Court's Order on October 26, 2009 (Doc. No. 578), Defendant Joseph P. Nacchio respectfully submits this brief regarding the scope of resentencing before this Court.

I. PROCEDURAL HISTORY

On April 19, 2007, Nacchio was convicted on nineteen counts of insider trading. (Jury Verdict, Doc. No. 407.) On July 27, 2007, Nacchio was sentenced to seventy-two months' imprisonment, two years of supervised release, fined $19 million, and ordered to forfeit approximately $52 million. (Sentencing Minutes, Doc. No. 458.)

On appeal, Nacchio argued that the district court improperly calculated the "gain resulting from the offense" under U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 2F1.2 (2000), which led the court to use the wrong range for determining the term of imprisonment and any fine. Nacchio also argued that the district court applied the incorrect subsection of the

forfeiture statute. The Tenth Circuit agreed on both points. The Tenth Circuit held that the "gain resulting from the offense" is "'the value of the defendant's misrepresentation.'" *United States v. Nacchio*, 573 F.3d 1062, 1074 (10th Cir. 2009) (quoting 4 Thomas Lee Hazen, *The Law of Securities Regulation* § 12.12[3] (6th ed. 2009).[1] Thus, the Tenth Circuit "REVERSE[D] the district court's sentencing order and REMAND[ED] for further proceedings." *Id.* at 1064. The Court also remanded for the district court to determine the forfeiture under the proper statutory subsection. *Id.* at 1088. The mandate issued on August 24, 2009.

On October 7, 2009, Nacchio filed a motion with the Court requesting a scheduling conference to set a sentencing date. (Motion to Reset Scheduling Conference, Doc. No. 575.) On October 23, 2009, this Court held a law and motion hearing during which the parties discussed the scope of the Tenth Circuit's mandate, and this Court ordered briefing to address the scope of the remand. (Minute Entry, Doc. No. 578.)

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[1] The Tenth Circuit explained that because "[u]nder the government's prosecution theory, the market would have viewed the inside information in a negative light, and disclosure of that information would have detrimentally impacted the value of Qwest stock … [i]t is that illicit, artificially high value that should be reflected in the gain calculation, not the underlying value of the stock." *Nacchio*, 573 F.3d at 1076; *id.* at 1075 (Gain is "the gain actually resulting from the offense, not … gain attributable to legitimate price appreciation and the underlying inherent value of Qwest's shares."); *id.* at 1077 (Gain "'is the amount by which the stock was overvalued.'") (citation omitted). Another way to look at the calculation, the Tenth Circuit explained, is that the "gain" is the "'loss avoided.'" *Id*. at 1077 n.12 (citing 3 Alan R. Brombert & Lewis D. Lowenfels, *Bromberg and Lowenfels on Securities Fraud & Commodities Fraud* § 6:335 (2d ed. 2009). This approach "takes into consideration the fact that stocks have inherent value (quite apart from criminally fraudulent conduct) and seeks to exclude that unrelated value from the computation of a defendant's punishment, and it sets a logical, temporal cutoff point for assessing the gain of the illegal conduct, i.e., the point when the information is disclosed and absorbed by the market." *Id.* at 1082. The Tenth Circuit further emphasized the need to exclude the impact on Qwest's stock price of factors unrelated to the fraud—most specifically, negative industry developments and negative company specific information unrelated to the fraud. *E.g.*, *id.* at 1074-77, 1084-85.

II. ARGUMENT

A. Tenth Circuit Law Establishes That Nacchio's Resentencing Must Be Conducted *De Novo* And May Include Any Relevant Evidence That Could Have Been Heard At The Prior Sentencing Even If It Was Not The Subject Of The Appeal

1. "[W]hen a defendant's sentence is vacated on appeal and remanded for new sentencing, the lower court *must* begin anew with *de novo* proceedings." *United States v. Moore*, 83 F.3d 1231, 1234 (10th Cir. 1996) (emphasis added); *see also United States v. Ortiz*, 25 F.3d 934, 935 (10th Cir. 1994) (same); *United States v. Smith*, 930 F.2d 1450, 1456 (10th Cir. 1991) (stating that vacating and remanding for resentencing is an "order" that "directs the sentencing court to begin anew, so that 'fully *de novo* resentencing' is entirely appropriate").

The only limited exception to this rule is when the Tenth Circuit includes precise and specific instructions restricting the district court's authority on remand. *See United States v. Westcott*, 214 Fed. Appx. 787, 792 (10th Cir. 2007).[2] The Tenth Circuit has only limited the scope of resentencing in circumstances entirely distinguishable from this case. *E.g.*, *United States v. Brunson*, No. 96-6246, 1997 WL 288957, at *3 (10th Cir. May 30, 1997) (specifically limiting remand to district court to the sole question of defendant's ability to pay restitution); *United States v. Webb*, 98 F.3d 585, 588 (10th Cir. 1996) (explicitly limiting remand and

[2] The Tenth Circuit is not alone in holding that a resentencing absent limiting instructions by the appellate court narrowing the scope of the remand is to be conducted *de novo*. *See, e.g.*, *United States v. Stinson*, 97 F.3d 466, 470 (11th Cir. 1996) (district court was free to depart from sentencing range on resentencing even though it did not so depart in original sentencing); *United States v. Jennings*, 83 F.3d 145, 152-53 (6th Cir. 1996) (holding that the district court should have considered defendant's objections to presentence report, notwithstanding the defendant's failure to raise them in prior sentencing); *United States v. Klump*, 57 F.3d 801, 803 (9th Cir. 1995) (stating that "[r]esentencing on remand is *de novo*"); *United States v. Cornelius*, 968 F.2d 703, 705-06 (8th Cir. 1992) (district court should have heard on remand defendant's evidence relating to issue not decided by appellate court).

"specifically instruct[ing] the district court to resentence defendant within the guideline range of 27-33 months and … not grant[ing] the court the opportunity to consider mitigating factors").

In *Westcott*, the Tenth Circuit vacated and remanded the defendants' sentences after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). On resentencing, the district court reassessed its determination of the quantity of drugs for which each defendant was responsible. 214 Fed. Appx. at 791. On appeal, the defendants argued that the district court erred by reconsidering drug quantity because the Tenth Circuit's original mandate was limited. The Tenth Circuit disagreed, stating that "our caselaw requires that we be *specific* if we intend to limit a district court's discretion on remand for re-sentencing." *Id.* at 792 (emphasis added). It then held that "[o]ur remand in this case was not specific. We simply 'set aside Defendants' sentences and remand for resentencing.' It is true that we urged the district court to 'note a concern regarding the determination of the *purity* of [drugs] prepared by Defendants.' This language, however, did not limit the district court's discretion [to consider issues beyond drug purity], but explicitly advised it to consider using its broad discretion to revisit its earlier finding regarding drug purity." *Id.* (emphasis added) (citations omitted).

Here, just as in *Westcott*, the Tenth Circuit included no limiting instructions. The court's opinion stated that "we REVERSE the district court's sentencing order and REMAND for further proceedings consistent with this opinion." *United States v. Nacchio*, 573 F.3d 1062, 1064 (10th Cir. 2009). "Mr. Nacchio is entitled to resentencing under the principles outlined above. On remand, the district court should focus on arriving at a figure that more closely approximates Mr. Nacchio's gain resulting from the offense of insider trading." *Id*. at 1087. "The district court will determine Mr. Nacchio's gain resulting from the offense upon resentencing." *Id*. at

1090 n.28. The Tenth Circuit's Order states even more generally that "[t]he case is remanded to the United States District Court for the District of Colorado for further proceedings in accordance with the opinion of this Court." (Judgment filed July 31, 2009.) This language mirrors the language in *Westcott*, which the Tenth Circuit found to be general, not specific. The Court's statement that the district court should "focus on" calculating a proper gain figure is not the kind of restricting language the Tenth Circuit has used when it intends to make an exception to the default rule that resentencing is *de novo*. *Compare Webb*, 98 F.3d at 587-88 (explaining that "[a]lthough resentencing on remand is typically *de novo* … [h]ere, the *Webb I* panel specifically instructed the district court to resentence defendant within the guideline range of 27-33 months …. Stated differently, the mandate in *Webb I* directed the district court to do one thing on remand—impose a sentence within the 27- to 33- month range").

Moreover, in *Brunson* and *Webb*, it was possible for the court to address only discrete issues on remand—whether the defendant was able to pay restitution and what the sentence should be within an already established range. Here, that is simply not possible and the mandate cannot be limited to determining only the "gain." That would only yield a guidelines range, not an actual sentence or fine. This Court must have some basis for setting a guidelines or non-guidelines sentence. That basis is 18 U.S.C. § 3553. The properly-calculated guidelines range is one of the § 3553(a) factors, which necessarily means that this Court must conduct a full guidelines analysis. The guidelines range may provide an appropriate starting place for a court. *See, e.g., United States v. Brown*, 514 F.3d 256, 259 (2d Cir. 2008) (stating that calculating a defendant's guidelines range is the first step in imposing a sentence under the post-*Booker*, advisory guidelines regime); *United States v. Gunter*, 462 F.3d 237, 247 (3d Cir. 2006) (The first

step in the sentencing process is that '[c]ourts must … calculate a defendant's Guidelines sentence ….'). But a court cannot fulfill its mandate under § 3553 without a full consideration of all the § 3553(a) factors. *Gall v. United States*, 129 S. Ct. 586, 597 (2007) (identifying a district court's failure to consider the § 3553(a) factors as "significant procedural error"); *United States v. Smart*, 518 F.3d 800, 803 (10th Cir. 2008) (same). These factors include any relevant information the parties put before the Court. *See, e.g., United States v. Huckins*, 529 F.3d 1312, 1318-19 (10th Cir. 2008) (noting that after the Supreme Court's decisions in *Gall* and *Kimbrough v. United States*, 552 U.S. 85 (2007), "a factor's disfavor by the Guidelines no longer excludes it from consideration under § 3553(a)").

2. The Tenth Circuit has also held that when resentencing is *de novo*, the parties may introduce any evidence that could have been introduced at the first sentencing hearing, even if it was not previously raised or the subject of the appeal. *Ortiz*, 25 F.3d at 935 ("We now hold that *de novo* resentencing permits the receipt of any relevant evidence the court could have heard at the first sentencing hearing."); *United States v. Warner*, 43 F.3d 1335, 1340 (10th Cir. 1994) (same). Thus, this Court must, in the exercise of its discretion, consider all relevant information the parties present as if it were the first sentencing held in the case.

3. Accordingly, this Court must make a *de novo* determination of any term of imprisonment. The guidelines range for incarceration depends upon the base offense level. The base offense level depends in turn upon a proper calculation of "the gain resulting from the offense." U.S.S.G. § 2F1.2(b)(1). Because the district court incorrectly calculated the "gain," Nacchio's base offense was incorrectly increased, and thus the guidelines range was incorrect. Thus, this Court will have to first determine the correct guidelines sentencing range and then

impose a term of imprisonment. For the reasons set forth in the next section, the same holds true for the imposition of any fine as part of the sentence.

B. The Tenth Circuit's Opinion Unquestionably Reversed The District Court's Sentencing Order, Which Included The Sentence Of Imprisonment And The $19 Million Fine

1. The Court raised the question whether the mandate reversed the imposition of a $19 million fine. For the reasons set forth, there is only one reasonable reading of the Tenth Circuit's opinion: The reversal of the "sentencing order" necessarily included a reversal of the $19 million fine.

First, the express terms of the decision "reverse[d] the district court's *sentencing order with respect to its gain calculation*." *Nacchio*, 573 F.3d at 1090 (emphasis added). The Court did not merely reverse the "term of imprisonment with respect to the gain calculation." To the contrary, the Tenth Circuit used the broader term "sentencing order." The district court's "sentencing order" (Doc. No. 459) included *both* the term of imprisonment and the fine. Paragraph 17 of that sentencing order, titled "Imposition of Sentence," imposed both the seventy-two months' imprisonment *and* the $19 million fine. As a matter of the plain language of the opinion, therefore, both the fine and the term of imprisonment were reversed.

Second, any other reading of the Tenth Circuit's opinion would be inconsistent with the parties' arguments on appeal. Nacchio's brief argued that the district court erred in its gain calculation, and then explained that this error not only infected the calculation of the term of imprisonment, but that the Tenth Circuit "should also vacate the fine for further consideration in light of the relevant monetary gain." *See* Appellant's Opening Brief at 54. The government did not contest Nacchio's assertion that an erroneous calculation of the gain required reversal of both

the fine and the term of imprisonment. It never argued that the fine could stand if the district court calculated the gain incorrectly. *See* Appellee's Response Brief at 63-69 (addressing Nacchio's sentencing arguments).

Finally, even if the terms of the mandate had been ambiguous (and they are not), both the term of imprisonment and the fine are dependent on the gain calculation, so it would be nonsensical to interpret the Tenth Circuit's decision as anything other than reversing the term of imprisonment and the fine. Just as with the term of incarceration, the sentencing guidelines range for any fine is determined by the base offense level, which increases according to "the gain resulting from the offense." U.S.S.G. § 2F1.2(b)(1). The increase is calculated pursuant to the table in § 2F1.1(b)(1), which prescribes progressively greater increases to the offense level based on the amount of gain. Thus, just as this court will determine the new guidelines range for a term of imprisonment, it will determine the new guidelines range for the fine.[3]

Moreover, once the fine range is determined, as a court is required to consider the § 3553(a) factors, "[i]n determining the amount of the fine, the court *shall* consider" *inter alia* "the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant)." U.S.S.G. § 5E1.2(d). Because the gain

[3] The Tenth Circuit recognized that the constitutionality of the combined fine and forfeiture amount could not be assessed until there was a new determination of the gain resulting from the offense. *Nacchio*, 573 F.3d at 1090 n.28. Although the Court states that Nacchio "does not argue that either his fine or his forfeiture, considered separately, would be unlawful," the Court was merely referring to the fact that Nacchio did not argue that his fine, standing alone, violated the Eighth Amendment. As explained above, Nacchio plainly did argue that the fine would be unlawful to the extent that it was predicated on an erroneous calculation of the gain, and the Tenth Circuit recognized that "Nacchio's challenges" on appeal included the "district court's gain . . . determination[]" which is, by definition, broader than a challenge to the term of imprisonment. *Id.*, at 1064.

must be calculated to determine the correct offense level (for imprisonment and fine), the guidelines range must be determined (for imprisonment and fine), and the court must consider the factors under § 5E1.2—*including the new gain amount*—this court must impose any fine anew.[4] *See, e.g.*, *United States v. Osuna*, 189 F.3d 1289, 1295 (10th Cir. 1999) (holding that an erroneously calculated guidelines range compels a remand for resentencing); *United States v. Hollis*, 971 F.2d 1441, 1460-61 (10th Cir. 1992) (remand for resentencing was required in light of evidence that district court had miscalculated fine range).

CONCLUSION

For the reasons stated above, this Court must conduct a *de novo* resentencing proceeding.

Respectfully submitted this 2nd day of November, 2009.

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[4] When a court considers an improper factor in the sentencing calculus or gives the factor excessive weight, courts must remand for resentencing. *See, e.g., United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006) ("A sentence may be substantively unreasonable if the court relies on an improper factor …."); *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006) (If the district court "provides an inadequate statement of reasons[,] relies on improper factors," or gives "excessive weight to any relevant factor," the sentence "will be found unreasonable and vacated."); *United States v. Webb*, 403 F.3d 373, 385 (6th Cir. 2005) (noting that a sentence may be unreasonable where the district court "giv[es] an unreasonable amount of weight to any pertinent factor"). Here, because the Court was required to consider the gain when it imposed Nacchio's sentence but it had a legally erroneous understanding of the gain, the fine was necessarily erroneous and has to be redetermined.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November 2009, I electronically filed the foregoing **DEFENDANT'S BRIEF REGARDING THE SCOPE OF RESENTENCING** with the Clerk of the Court using the Court's CM/ECF system, which will send notification of the filing to the following:

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