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.

DEFENDANT JOSEPH P. NACCHIO'S REPLY TO
GOVERNMENT'S RESPONSE TO MOTION TO EXCLUDE
PROPOSED GOVERNMENT EXPERT TESTIMONY

Defendant Joseph P. Nacchio, by and through undersigned counsel, replies to the government's Response to Defendant's Motion to Exclude Proposed Government Expert Testimony ("Response") as follows:

The government concedes two essential points in its March 13, 2007 Response: 1) that its proposed expert testimony does not include an opinion as to the provenance of the signed instruction letter, Gov't Ex. 0100, and 2) that there is no requirement under Rule 10b5-1 for an instruction to sell securities to be in writing. Beyond that, the government wiggles its way through its assertion that it never led the Court to believe it did not intend to call outside experts in this case. Counsel cannot speak for the Court,

but will rest on the record set forth in our original motion on this point. Nor is there any dispute that in June 2006 the government produced the *draft* Stroz Report, which Qwest had previously commissioned for its own purposes, not identified as a government expert report and buried in a 500-odd page production. This reply will address the attorney-client privilege implicated by the use of the proposed expert testimony.

In providing legal advice and services in connection with Mr. Nacchio's sale of his growth shares, Mr. Rana acted as Mr. Nacchio's personal attorney. No corporate task or purpose was entailed in Mr. Rana's drafting of documents and 144 filings in connection with Mr. Nacchio's sale of his stock. In its Response, the government asserts that: 1) the attorney-client privilege does not apply to the expert testimony about metadata; 2) Mr. Nacchio has not shown he had a personal attorney-client relationship with Mr. Rana; 3) the crime-fraud exception applies; 4) the privilege was waived; and 5) there is no need for the issue to take up trial time. Mr. Nacchio replies in logical order as follows:

First, Mr. Nacchio has made a sufficient showing as to the existence of a personal attorney-client relationship with respect to Mr. Rana's work on the growth shares. His Motion to Exclude and attached exhibits make a prima facie showing that: a) the growth shares were part of Mr. Nacchio's *personal* compensation and not that of the corporation (Ex. A to Motion to Exclude); b) the need to comply with Rule 10b5-1

was a personal and not a corporate concern (Ex. E, Patti 302[1]); c) Mr. Rana was advising Mr. Nacchio how to comply with Rule 10b5-1 in implementing his own *personal* diversification strategy as early as March 2000 (Ex. G); and d) the Form 144 filed by Mr. Rana as attorney in fact for Mr. Nacchio was a *personal* obligation of the individual on whose account the securities were to be sold (Ex. C).

Because the legal work creating these computer files and documents served Mr. Nacchio's personal interests exclusively, the privilege was personal to him. No other conclusion is possible and none has been offered by the government. Therefore, the elements of *In re: Grand Jury Subpoenas*, 144 F. 3d 653, 659 (10th Cir. 1998) are satisfied.

Second, the attorney-client privilege most certainly applies to the proposed metadata testimony, because the computer files examined by Stroz Friedberg were themselves attorney-client documents covered by the privilege. It is clear from Mr. Patti's interview (Ex. E) that he was brought in to assist Mr. Rana in the personal legal representation of Mr. Nacchio. Thus the privilege extends to his work as well. Mr. Patti is the source of the computer file *nacchio.doc*. This is an attorney-client document that cannot be disclosed absent a waiver from Mr. Nacchio. Mr. Rana's

[1] While the specific references from the Patti 302 were not in the Motion to Exclude, Ex. E contains the following: "Later in 2000, Patti was involved in the 10b5-1 process for Nacchio."(p.4); "Patti did not recall that the instruction was for Nacchio but from the documents it is obvious to him that the instruction was for Nacchio."(*Id.*); "Patti did know that Nacchio's intention was to sell as soon as the shares became available."(*Id.*); "It was not uncommon and there was a general understanding that Tempest and Rana did this for their executives."(p. 6)

IrrevocableInstructions.doc file also is attorney-client. If, as we contend, Qwest did not own the personal privilege as to these files, it had no right to waive the privilege. It is only by right of Qwest's waiver that the government claims entitlement to these files. There has been no waiver by Mr. Nacchio. Therefore, the metadata analysis is in violation of the privilege.

Third, for the reasons stated in the previous paragraph, there is no valid waiver of the privilege. Contrary to the government's reading of *In re Grand Jury Subpoena*, 274 F. 3d 563, 573 (1st Cir. 2006), the corporation is powerless to waive an individual privilege of its officers "to the extent that communications regarding individual acts and liabilities are segregable from discussions about the corporation." 274 F. 3d at 573. Such is the case here. There is nothing concerning the sale of Mr. Nacchio's stock that is corporate business. The corporation may waive the privilege only where the protected communications with counsel on matters of individual concern are indistinguishable from such communications of corporate concern. *Id*.

Fourth, the government asserts that the crime-fraud exception to the attorney-client privilege applies, and in attempting to make its *prima facie* showing, essentially repeats its *theory* that Mr. Nacchio "sought to cover up the date on which his actual decision was made." Response at 24. However, as we asserted in our Motion to Exclude, the government cannot bootstrap its burden by presenting a series of impermissible inferences. Nor can it use the fruit of its breach of the privilege in the

first instance to later justify its invasion. In order to assert the crime-fraud exception, the party opposing the privilege must present prima facie evidence that the allegation of attorney participation in the crime or fraud has some foundation in fact. *In re: Grand Jury Subpoenas*, 144 F. 3d at 660. The exact quantum of evidence has been described variously by the courts,[2] but at bottom the opponent of the privilege must produce some evidence that, if believed by the trier of fact, would establish the elements of an ongoing or imminent crime or fraud. *In re Sealed Case*, 107 F. 3d 46, 50 (D.C. Cir. 1997). Repeating the government's theory does not suffice. In any event, if the opponent of the privilege establishes a prima facie case, the proponent has an absolute right to be heard by testimony and argument. *Haines v. Liggett Group, Inc.* 975 F. 2d 81, 97 (3rd Cir. 1992).

Finally, for all of these reasons, litigation over the existence and extent of this privilege, including whether the government improperly invaded the privilege by securing the documents created in the course of that attorney-client relationship

[2] *See e.g., In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir.1995) (probable cause to believe a crime or fraud has been committed); *Haines v. Liggett Group Inc.*, 975 F.2d 81, 95-96 (3d Cir.1992) (evidence that if believed by the fact finder would be sufficient to support a finding that the elements of the crime-fraud exception were met); *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir.1982) (evidence such as will suffice until contradicted and overcome by other evidence); *United States v. Davis*, 1 F.3d 606, 609 (7th Cir.1993) (evidence presented by the party seeking application of the exception is sufficient to require the party asserting the privilege to come forward with its own evidence to support the privilege); *In re Grand Jury Proceedings (Appeal of Corporation)*, 87 F.3d 377, 381 (9th Cir.1996) (reasonable cause to believe attorney was used in furtherance of ongoing scheme); *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir.1987) (evidence that if believed by the trier of fact would establish the elements of some violation that was ongoing or about to be committed) - - all cited in *In re: Grand Jury Subpoenas*, 144 F. 3d at 660.

without Mr. Nacchio's consent, is necessary, would indeed take up valuable court time and delay trial proceedings, and would create undue confusion under Fed. R. Evid. 403.

Respectfully submitted this 15th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March 2007, a true and correct copy of the foregoing DEFENDANT JOSEPH P. NACCHIO'S REPLY TO GOVERNMENT'S RESPONSE TO MOTION TO EXCLUDE PROPOSED GOVERNMENT EXPERT TESTIMONY as served on the following via email:

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