

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.

**TENDERED FOR FILING
MARCH 18, 2007**

Edward W. Nottingham
United States District Judge
by Jamie L. Hodges
Judicial Assistant/Deputy Clerk

DEFENDANT'S MOTION REGARDING JURY *VOIRE DIRE*

Introduction¹

On March 15, 2007, Mr. Nacchio filed a "Motion For Forthwith Status Hearing Based Upon Recent Prejudicial Pretrial Publicity," in which he asked that jury *voire dire* be conducted on an individual basis. By Order entered the same day, although noting the "there has been recent publicity in the business sections of local newspapers," the Court denied that request. Order at 2 (March 15, 2007). Unfortunately, the level of attention in the local press has grown even greater, with a clearly escalating trend evident in the weeks leading up to trial. The local media has taken to publishing

¹ At the start of business on March 19, 2007, we will hand deliver to chambers and to the government copies of a CD Rom containing the Exhibits to this motion, which consist of materials published or posted by the *Denver Post* and *Rocky Mountain News* since March 1, 2007, as well as a recent posting by Channel 9 News.

diatribes against Mr. Nacchio by members of the public, and actively soliciting people with criticism of Mr. Nacchio to come forward. The press is also now publishing accounts of what the key named witnesses will say at the trial.

We continue to believe that only individual *voire dire* will provide the most conducive atmosphere for questioning jurors as to their exposure to this case in the media. Group questioning in a crowded open courtroom is simply not an effective inquiry of jurors as to exposure to the pretrial information under the circumstances of in this case. Respectfully, we are required to lay out the evolution of juror *voire dire* in this matter and supplement the record with the last several weeks of intense media scrutiny, to offer the Court an opportunity to consider the additional publicity, and to make a record in the event an appeal should ever prove to be necessary.

Procedural History

On July 31, 2006, Mr. Nacchio filed a Motion seeking a change of venue on grounds including overly prejudicial pretrial publicity. [Doc. No. 113] The Court denied that Motion on August 25, 2006. In so doing, however, the Court stated that, “[t]he classic and preferred way of dealing with this kind of prejudice is to question jurors in the *voire dire* process.” Transcript of Proceedings, 71:10-12 (August 25, 2007). The Court contrasted this matter with the *McVeigh* case, where a change of venue was granted because the jury would be hearing inflammatory victim testimony, stating that:

In this case, it appears unlikely that this court will be hearing victim testimony.... In other words, it might be during sentencing that the Court would consider that testimony; but certainly not during jury proceedings.

Id. 72:8-13.²

The Court also observed on August 25 that, “[s]ometimes that negative publicity dissipates, and there is every reason to believe that it will dissipate in this case. People will not have it in mind when it is finally time to choose the jury.” *Id.*, 75:10-13.³ Even upon that assumption, the Court stated that, “this is going to be a case where we’re going to work very hard on *voire dire* and *voir dire* procedures. ... But it will be a case where dealing with publicity that’s occurred will require that we work on *voir dire*.” *Id.*, 86:10-16. In furtherance of that effort, on August 25 the Court stated an inclination to begin the process by mailing questionnaires to the venire panel. *Id.*, 86:19-22.

Subsequently, the parties jointly submitted a proposed questionnaire to be mailed to the venire panel. During the open portion of the January 26, 2007 Status Conference, however, the Court stated:

I know some judges and some courts send out extensive jury questionnaires, such as the ones that you have prepared. In my view, if a question is going to be propounded to the jurors in open court in the *voire dire* process, which many of these questions are -- questions

² The government has, however, included on its witness list testimony from several alleged “victims,” located after employing assistance from counsel for the U.S. West Retiree’s Association to solicit former or present Qwest employees who had either purchased stock during the period of the indictment, or retained Qwest stock after hearing Mr. Nacchio speak positively about Qwest’s prospects. See Defendant Joseph P. Nacchio’s Trial Brief at 36-38 (March 9, 2007). The Court has not yet ruled the testimony of these witnesses inadmissible, so the prospect exists that the jurors in this case will, in fact, be exposed to inflammatory “victim” testimony during the trial.

³ As the Court itself has recently acknowledged, this has not proved to be the case.

concerning prejudice, for example, will be explored in open court -- I don't propose to duplicate that effort by a jury questionnaire. I think that's, as I say, duplicative and pointless.

Transcript of Open Proceedings, 25:17-24 (January 24, 2007). The Court added, "If the juror is going to be called to the courthouse, then we might as well propound the question on voire dire, where we can look the juror in the eye, propound the question, and get the juror's answer to the question at that point." *Id.*, 26:20-24.

During the closed chambers portion of the January 26, 2007 Status Conference, the Court advised of its intention to excuse from the venire any "jurors who have owned any stock in Qwest.... We don't even need to call them to the courthouse, in my opinion." Transcript of Closed Proceedings, 5:25 - 6:4 (January 24, 2007). Counsel for Mr. Nacchio then noted the importance of using answers to an expanded juror questionnaire to "aid both sides in exercising their peremptories, which after all is a part of the questioning process as well." *Id.*, 8:9-19. The Court demurred, observing of the proposed expanded questionnaire that "the prototype is all the questions about prejudice and Mr. Nacchio. That needs to be explored, but it needs to be explored, I think, in open court. ... I think your peremptory challenges, the information for them comes from what we do in open court." *Id.*, 9:3-11. When the government suggested that it should not be grounds for automatic expulsion if a venire member answered the Court's proposed mail questionnaire by admitting having lost money in a stock option plan, the Court stated:

That's the kind of question where I'm inclined to say, let's cut through the lengthy voir dire process, shorten the voir dire by not even having those people present at the courthouse, because the likelihood of getting a fair juror from that pool, that sub pool of people, is very low. That's what I think I want to do in the jury questionnaire, is just in a common sense way figure out what in this court's view, at least, is something where the brain damage, so to speak, that we go through by trying to get a fair and impartial juror with certain opinions and certain backgrounds is so small.

Id., 10:12-21.

On February 7, 2007, the Court transmitted to the parties the abbreviated questionnaire which would be mailed to 1,000 prospective jurors. Letter from Hon. Edward W. Nottingham, U.S.D.J. to Messrs. Stricklin and Richilano (February 7, 2007). During the closed, chambers, portion of the February 8, 2007 Status Conference, the Court advised counsel that yes answers to certain questions would result in automatic disqualification from the prospective jury pool. One of those was Question No. 8, which asked whether the prospective juror, any family members or friends ever owned stock in Qwest Communications International, Inc. or U.S. West.⁴ Transcript of Closed Proceedings, 3:24 (February 8, 2007). The Court advised counsel that this would be done automatically, "without the parties' input..." *Id.*, 10:17-20.

During the public portion of the March 1, 2007 Hearing, counsel for Mr. Nacchio raised the possibility of having the remaining venire panel complete a jointly submitted,

⁴ These were just two of the companies listed, but it would only be a yes answer as to either of these two which would result in automatic disqualification.

more detailed, written questionnaire. Transcript of Proceedings, 11:25 - 12:2 (March 1, 2007). The Court replied:

I see no purpose in that questionnaire. In saying that I see no purpose in the written questionnaire, I recognize, first, that some of my colleagues do this as a matter of course in every case. It's overkill in most cases. I don't claim it would be overkill in this case. It's overkill because the same things are covered on *voire dire*. ... I also point out to you that many of the questions, in fact most of the questions that you proposed to be on the written questionnaire will be posed by the jury -- by -- to the jury by the Court in open court. And you will have an opportunity, as I've said before, with the benefit of looking at the demeanor of these folks as they fill this out. Which, if they fill out these questionnaires before the trial, you don't have the opportunity to look at their body language. You don't have the opportunity to observe all the intangible elements of communication that you have an opportunity to observe in open court.

Id., 13:25 - 14:20. During the subsequent chambers portion of the Hearing, counsel for Mr. Nacchio sought to confirm that the reason the Court declined to have the jurors complete a detailed written questionnaire was not "because [the questions] were not appropriate, but rather because you wanted to see the jurors' answers in the flesh." The Court concurred, stating, ""When I ask a question, that's what I want." *Id.*, 22:8-10. The Court then indicated that it had not yet decided whether the questions would be asked of the jurors individually, out of the presence of the rest of the panel. *Id.*, 22:14-18.

Counsel for Mr. Nacchio then proposed that any juror who had read anything about this case be excused for cause by the Court, because otherwise, "you're going to have to go through the dance of what they read." *Id.*, 22:22 - 23:1. The Court agreed

not to immediately reject the request. *Id.*, 23:2. Further colloquy on the subject ensued among both counsel and the Court, after which the Court stated:

I think both points are well taken. I do believe we can -- you can read every article that has been printed about Mr. Nacchio and still believe that he's entitled to an independent factual determination based on the evidence. ... And we'll just have to figure out those jurors who sincerely have that. And, of course, an important part of that is looking at their demeanor when they look at you, not the questionnaire. ... You know [Mr. Stern], I don't think you have lost. I'm not ruling either way. We'll see how it goes on voir dire.

Id., 25:10-25. The Court concluded by stating, "I intend to conduct a voire dire to determine whether we have a jury that's tainted by the pretrial publicity." *Id.*, 26:12-14. The Court nevertheless expressed an expectation that a jury could be selected within a day. *Id.*, 26:23-24.

The Court then informed the parties that it had, *sua sponte*, changed the procedure it had previously announced with respect to automatic exclusion from the jury panel based on responses to the mailed questionnaire:

Well, the questionnaires that I sent out are unremarkable. I mean, I should make one qualification, I said that anybody who had ever owned stock or had a relative or family member who owned stock in Qwest would be in the excluded pile, I think I said that. ... I think that's not a good decision. I've -- there are a few questionnaires that say, my cousin once removed owned stock in US West in the 1980s. I don't know how many we've gotten like that, but it seems to me those folks can probably serve.

Finally, during the closed, chambers, portion of the March 9, 2007 Status Conference, the Court advised counsel that only 78 jurors were actually being called to

report for *voire dire* on March 19, 2007. Transcript of Closed Proceedings, 3:6-9 (March 9, 2007). The Court indicated that, once the first 18 prospective jurors are seated in the box, "we'll have the remaining people come in about five minutes later." *Id.*, 21-25. The Court then intends to begin questioning the 18 prospective jurors, apparently as a group. *Id.*, 4:21-23.

The Media Coverage Has Been Intensifying Over The Past Two Weeks

As we have noted, when the Court denied our change of venue on August 25, 2007, it did so, we believe, in the expectation that the media hoopla would die down and not be a major factor in the days before trial. A review of just the local newspapers and television reports demonstrate that in the two weeks prior to trial there has been, if anything, a new high in the extent and degree of prejudicial publicity. The *Denver Post* has not just been printing articles on a virtually daily basis, but it has also created -- and continuously features in the published editions of the paper -- a special "Joe Nacchio On Trial" webpage. (see <http://www.denverpost.com/nacchio>)

The "Joe Nacchio On Trial" site offers "one stop shopping" for prejudicial pretrial publicity including not just the new articles published in the paper, but also a complete archive of prior articles, links to multi-media files, and links to documents related not just to this trial, but to civil actions containing allegations vastly more far reaching than the sole insider trading allegation of the indictment.⁵ Even more vitriolic is a "blog"

⁵ This linking, of course, falsely implies some connection between the civil allegations and the subject matter of this criminal proceeding.

featured prominently on the site, in which *Post* reporters start a provocative thread, then invite members of the community to post their uncensored comments. The site offers the community opportunities to "submit your comment on the case" or to "share your Qwest/US West story." The public has responded with a multitude of hateful and pejorative postings.

Not to be outdone, the *Rocky Mountain News* has also been publishing articles on a near-daily basis. The paper recently created its own "Nacchio On Trial" webpage. (<http://cfapp2.rockymountainnews.com/business/nacchio/>). This site, too, features not just current and past articles, documents from civil cases implying a link between those multiple causes of action and the sole allegation here, but also highlighted a series of "notable" quotes, one more inflammatory than the next, as well as a blog which has already attracted 16 entries -- all negative -- in just two days time. Additionally, the *Rocky Mountain News* site promises trial commentary from "our panel of US West retirees."

Television stations are broadcasting news stories anticipating the start of the trial. For example, Channel 9 ran a critical story on the Saturday before the start of jury selection. (<http://www.9news.com/video/player.aspx?aid=31208&bw>). Channel 9 News also asks, on its web site, "If you are a current or former employee of Qwest or

US West and are interested in sharing your story with 9NEWS, please [click here](#) to email us now." (<http://www.9news.com/news/article.aspx?storyid=66356>).⁶Argument

When, on August 25, 2006, the Court denied our motion for change of venue, it did so in the expectation that press attention would abate. It has not. It has increased. The Court expressed an intention, instead, to protect against prejudicial pretrial publicity by conducting a rigorous *voire dire*. The parties jointly submitted an extensive questionnaire to start off this process, precisely the step indicated by the Court on August 25, 2006. The Court then decided against extensive written questionnaires.

Instead, the Court sent out a much more limited questionnaire, which it planned to use to automatically exclude any member of the venire pool that had a prior employment, business, or financial relationship to Qwest of US West. We acceded to this, without any waiver of our position that a more substantive written questionnaire was in order. The Court subsequently modified its rules for automatic disqualification, and has summoned some unknown number of prospective jurors who may be connected, themselves, through family or through friends, with the purchase of Qwest or US West stock.

The Court has repeatedly since explained that the ability to judge the demeanor of prospective jurors while questioning them would be the best method to allow the

⁶ A CD Rom containing all the local area media accounts which have appeared just since March 1, 2007 will be hand delivered to the Court on March 19, 2007.

Court to excuse prospective jurors for cause, and for counsel to determine how to exercise their peremptory challenges. However, when 78 people -- or even 18 people -- are questioned as a group, it becomes difficult if not impossible to achieve this goal.

Although 1,000 questionnaires were sent out, we have been informed that only 78 jurors have been notified to report for *voire dire*. Yet we do not have the responses by the 1,000, nor even by the 78, and we have no way to ascertain the manner in which the former number became the latter. To be sure, we are not suggesting any impropriety in the manner in which the venire pool has been culled down from 1,000 to 78 -- we simply do not know how it was achieved, even as the press accounts have multiplied in both number and degree while this process was in motion. We respectfully request that all responses to the mailed questionnaire -- both of the selected 78 and the original 1000 -- be provided to counsel and, if not, that they be sealed for any appellant review that may be necessary.

It is with this history and in this public environment that the Court has expressed an expectation that a jury be empanelled in but one day, using group -- rather than individual -- questioning during *voir dire*. Given the amount of community interest, however, we respectfully renew our still pending request that any prospective juror who has read anything about this case be excused for cause. Alternatively, we suggest that only individual questioning (by the Court) during *voire dire* can hope to accomplish the

Court's stated goal of carefully and thoroughly screening the venire pool against prejudicial pretrial publicity.

It simply cannot be denied that substantial portions of the local coverage has been highly unfavorable. The recent run-up to trial in the media has also included detailed exposition of the expected testimony of many of the government's major witnesses. Much of this expected testimony may never be offered into evidence, or, if offered, excluded by the Court. The recent press accounts have also repeatedly included speculation by strangers touted in the press as "legal experts."

The prejudice from this cannot be cured by other, more favorable, articles. We commissioned a scientific survey (with a margin of error of 4.38%), conducted on March 10-12, 2007, which revealed that in the Denver metro area (Boulder, Broomfield, Adams, Arapahoe, Denver, Jefferson and Douglas Counties), 53% of respondents have heard of the case and 34% of them have a negative impression of Mr. Nacchio. Of those who read the *Rocky Mountain News*, 61% have heard of Mr. Nacchio and 45% of them have a negative impression. Of those who read the *Denver Post*, 64% have heard of Mr. Nacchio and an astonishing 52% have a negative impression of Mr. Nacchio.⁷

Given these results, we are entitled to know through *voire dire* what the prospective jurors were exposed to, under questioning designed to elicit accurate and

⁷ As we have shown, the media coverage since this survey was conducted has grown even more voluminous and intense.

complete answers. This is surely more likely to occur if questioning is done on an individual basis, outside of the presence of others. Prospective jurors will feel pressure associated with answering questions in front of their fellow-venire members, let alone in a crowded courtroom filled with press recording each answer given, wondering whether their answers will be published for all of Denver to read. The community pressure the prospective jurors will necessarily feel when formulating their answers can only exacerbate matters, if not effectively thwart the Court's stated goal of dealing with this kind of prejudice by carefully questioning jurors in the *voire dire* process.

We are not prophesizing that any prospective juror will knowingly lie. However, given the extraordinary recent media attention to this case and the resultant prejudicial effect, the Sixth Amendment protections to which Mr. Nacchio is entitled require that the Court adopt *voire dire* procedures that afford the greatest likelihood for giving those prospective jurors the comfort to speak honestly and fully when answering the Court's questions.

Respectfully submitted this 18th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March 2007, a true and correct copy of the foregoing DEFENDANT'S MOTION REGARDING JURY *VOIRE DIRE* was served on the following via email:

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