

**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.

**MOTION TO STRIKE TESTIMONY OF SALLY ANDERSON,
FOR A MISTRIAL IN THE ALTERNATIVE,
AND TO EXCLUDE FURTHER INVESTOR TESTIMONY**

Defendant Joseph P. Nacchio, by and through undersigned counsel, moves a) to strike the testimony of government witness Sally Anderson, b) for a mistrial on the basis of prejudicial, inadmissible testimony presented to the jury, and c) to exclude further investor testimony.

Mr. Nacchio's objections to investor testimony have been set forth in his trial brief and in a motion filed March 21, 2007 [Doc. #288]. Following trial on that day, the government made a proffer as to Sally Anderson's testimony:

First, she would talk about the things in the e-mail from Mr. Nacchio which discussed growth, which she underlined in the e-mail. She printed it out and actually outlined the revenue growth.

Discussing - - it was an e-mail from Mr. Nacchio discussing growth targets.

THE COURT: E-mailed to her?

MR. TRASKOS: E-mailed to all Qwest employees, and she actually printed it out to show the effect of statements about growth and growth targets, and they actually had an effect. So materiality.

She would also testify that Mr. Nacchio made statements periodically to employees, and she can testify about what things were not stated. She could testify as to what was not disseminated to the Qwest employees.

And also, I think it's also relevant that Mr. Nacchio made statements periodically to employees, and she can testify about what things were not stated. She could testify as to what was not disseminated to the Qwest employees.

* * *

THE COURT: If it's limited in the way Mr. Traskos says, this is some evidence of materiality. It's not determinative of materiality, but it tends to demonstrate what a normal investor, usual investor would find important, what she found important.

It also establishes that Mr. Nacchio was making statements to employees as well as to the investment community.

I will allow the testimony, limited in the manner that Mr. Traskos has articulated, and this testimony only.

3/21/07 Trial Tr. at 376-78.

However, when Sally Anderson took the stand, the government began eliciting testimony beyond its proffer, asking for amount of money invested and the percentage allocation (3/22/07 Tr. at 619). The Court expressed concern that that the testimony went beyond the proffer after the witness testified that she began her withholding after September 7, 2000 (*Id.* at 623-24). The Court held, "She can testify that she bought those stocks, and that's the end of it. . . . And she can testify as to why that was important to her." *Id.* at 624.

The witness never testified she bought Qwest stock in 2001.

The government's presentation of Ms. Anderson's testimony stands in sharp contrast to the government's position as to whether investors can be deemed "victims" of alleged insider trading, if it cannot be shown that they purchased the stock sold by Mr. Nacchio. At the sentencing hearing of Robin Szeliga, AUSA Leone asserted that "it's only people who purchase shares of the same class at the time of the sales, the insider sales that are in a victim capacity." (7/28/06 Transcript of Sentencing, *United States v. Robin Szeliga*, 05-CR-00234-WDM, at 13) (Excerpt attached as Ex. A).

The testimony of Sally Anderson is not proper "victim" testimony and is irrelevant and prejudicial. We move to strike her testimony and to exclude any further testimony of the like. Finally, we move for a mistrial based upon the introduction of prejudicial testimony before the jury.

Respectfully submitted this 26th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26^h day of March 2008, a true and correct copy of the foregoing **MOTION TO STRIKE TESTIMONY OF SALLY ANDERSON, OR A MISTRIAL IN THE ALTERNATIVE, AND TO EXCLUDE FURTHER INVESTOR TESTIMONY**

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