IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

UNITED STATES' RESPONSE TO MOTION TO STRIKE TESTIMONY OF SALLY ANDERSON, FOR A MISTRIAL IN THE ALTERNATIVE, AND TO EXCLUDE FURTHER INVESTOR TESTIMONY

The United States hereby responds to Defendant's "Motion to Strike Testimony of Sally Anderson, For a Mistrial in the Alternative, and To Exclude Further Investor Testimony" (Docket No. 306), and submits that the motion should be denied.

BACKGROUND

Prior to the testimony of Sally Anderson, government counsel explained that Ms. Anderson was an individual who had made an election to purchase Qwest shares every two weeks in response to an e-mail by Mr. Nacchio. *See* 3/21/07 Tr. at 376:12 to 377:9. Government counsel further explained that her testimony would be relevant to a number of purposes, including (1) materiality, "to show the effect of statements about growth and growth targets, and they actually had an effect," (2) to show what information was nonpublic — *i.e.*, to show "what was not disseminated to the Qwest employees." *See* 3/21/07 Tr. at 376:12 to 377:9. Government

counsel represented that he would limit Ms. Anderson's testimony by not "asking her or offering her testimony to say how much money have you lost or anything like that." *See* 3/21/07 Tr. at 377:11-13. The Court then ruled that this testimony, as "if it's limited in the way [government counsel] 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." *See* 3/21/07 Tr. at 377:21 to 378:8.[1]

The direct testimony Ms. Anderson gave at trial conformed to this description. Ms. Anderson explained that she had a savings and retirement plan that allowed her to invest. *See* 3/22/07 Tr. at 618:9-11, 14-16. She explained that new deposits were made into her plan through a payroll deduction every two weeks, and that she could control where her investments were directed. *See* 3/22/07 Tr. at 618:17 to 619:2.[2] Ms. Anderson then explained about the effect an e-mail from Mr. Nacchio had on her. She first explained that as of July 2000, her investment allocation had directed 50% to Qwest shares and 50% to other assets. *See* 3/22/07

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[1] The Court did *not* allow government counsel to ask Ms. Anderson about what information had not been disseminated to her. *See* 3/22/07 Tr. at 623:10-19.

[2] Contrary to defense counsel's suggestion, government counsel did not elicit the amount of money Ms. Anderson had invested. Government counsel did ask one question regarding roughly how much money Ms. Anderson had in her plan in 2000, but defense counsel objected and the Court sustained the objection. *See* 3/22/07 Tr. at 619:3-6. Government counsel believed this question was proper because a jury might reasonably infer that an individual investor might pay more attention to investments in a savings plan if she had a more than a *de minimis* amount of money in the plan. Government counsel never asked Ms. Anderson about any losses of any sort, and never had any intention to do so. In any event, as noted, the testimony was never given.

Tr. at 619:13-20. She then testified that in the fall of 2000, she changed her mind about where her money should be directed after receiving an e-mail from Defendant Nacchio. *See* 3/22/07 Tr. at 620:7-16. In this e-mail, Defendant Nacchio stated that "we are raising our revenue and EBITDA targets for 2000 and 2001." *See* 3/22/07 Tr. at 625:19-23. As noted, before this e-mail Ms. Anderson had been directing only 50% of her biweekly contributions to Qwest shares; but after the e-mail, she decided to change that allocation towards Qwest stock from 50 % to 100%. *See* 3/22/07 Tr. at 626:14-22.

ARGUMENT

Defendant seeks multiple forms of relief in his motion: (1) that the testimony of Ms. Anderson be stricken as inadmissible, (2) that the Court should declare a mistrial, and (3) that the Court should exclude further investor testimony. Defendant does not, however, set forth why he believes the Court's admission of the testimony was error, let alone why he should be entitled to such relief.

I. The Court did not err in admitting the testimony

The Court did not err in allowing the testimony described above.

Defendant does not clearly explain why he believes this testimony was inadmissible. Defendant's argument seems first to be based on the premise that Ms. Anderson was testifying only as a victim. But Defendant does not dispute that Ms. Anderson's testimony was clearly relevant to materiality. Her testimony focused on the fact that an e-mail she received from Defendant Nacchio that discussed 2001 revenue and EBITDA targets — targets that are indisputably of central importance in this case — was important enough to her that it spurred her

to change where she was directing her investments (to direct not just 50% but 100% of her biweekly contributions into Qwest shares). This testimony was entirely consistent with government counsel's representation the day before that Ms. Anderson was an individual who had made an election in response to an e-mail by Mr. Nacchio about 2001 targets.

Defendant's next argument seems to start from the opposite premise — *i.e.*, that Ms. Anderson was not a true victim. Defendant argues that (1) Ms. Anderson did not testify that she bought stock in 2001, and that (2) the United States had previously stated at a sentencing of another individual that victims are "people who purchase shares of the same class at the time of the sales." *See* Docket No. 306 at 3.

This argument lacks merit on multiple levels. Most importantly, it was not the purpose of Ms. Anderson's testimony to establish that she was a "victim." Rather, as government counsel stated and as the Court recognized, her testimony was relevant to materiality. Accordingly, any prior statement by the government in a separate case about which people are victims of insider trading is not inconsistent with the government's position here that Ms. Anderson's reaction to the e-mail about 2001 targets is relevant evidence of the materiality of those 2001 targets.

In addition, Defendant is also wrong in asserting that Ms. Anderson was not an actual victim. As noted, Ms. Anderson testified that she directed money into her investments, that these payments were made every two weeks, and that after Defendant's September 2000 e-mail, she changed this biweekly investment allocation to 50% of her deposit into Qwest shares to 100% of her deposit into Qwest shares. In other words, during the period in early 2001 Defendant began

selling substantial amounts of his Qwest shares , Ms. Anderson was buying Qwest shares every two weeks.

II. The relief Defendant seeks is unwarranted.

Defendant cites not a single case or rule of procedure or evidence in support of his requests for relief.

Striking the testimony of Ms. Anderson is not warranted. As noted, the Court did not err in admitting it. To the extent Defendant's argument is that government counsel should have crafted his questions differently, Defendant offers no authority in support of his view that the proper relief to address this issue is to strike the witness's testimony several days later, after the jury has already heard from the witness and the witness has been excused. *See United States v. Pflum*, 150 Fed. Appx. 840, 845 (10th Cir. 2005) (unpublished) ("[u]nder Fed.R.Evid, 103 evidentiary objections generally must be made at the time the evidence is offered"); *see id.* (citing *Sorensen v. City of Aurora*, 984 F.2d 349, 355 (10th Cir. 1993), *United States v. Gibbs*, 739 F.2d 838, 849 (3d Cir. 1984) (*en banc*) (objection was untimely when made "not when the evidence was offered, but during a motion to strike made after the government had rested") and *United States v. Kanovsky*, 618 F.2d 229, 231 (2d Cir. 1980) (ruling that an objection was not timely "since it was not made until after the witness was excused and the jury dismissed from the courtroom")).

In addition, Defendant has not shown error of such magnitude and prejudice that a mistrial is necessary. "The standard for ruling on a motion for mistrial was set down long ago in *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824). The Supreme Court held

that 'courts of justice ... [may] discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.'" *United States v. Taylor*, 605 F.2d 1177, 1178-79 (10th Cir. 1979). This standard requires examination not only of whether there was error, but also of whether the error had such prejudicial impact that it impaired the defendant's right to a fair and impartial trial. *See United States v. Meridyth*, 364 F.3d 1181 (10th Cir. 2004) ("A district court has discretion to grant a mistrial only when a defendant's right to a fair and impartial trial has been impaired."); *United States v. Gabaldon*, 91 F.3d 91, 93-94 (10th Cir. 1996) (observing that motions for mistrial require "an examination of the impact of the prejudicial impact of an error or errors when viewed in the context of an entire case").

Here, Defendant has not shown that the admission of Ms. Anderson's brief testimony was error, let alone that it was such prejudicial error that his right to a fair and impartial trial has been impaired in the context of the entire trial. Indeed, the Tenth Circuit has indicated that a mistrial is not mandated even where inadmissible and far more prejudicial testimony has been elicited. *Cf. United States v. Short*, 947 F.2d 1445, 1453-55 (10th Cir. 1991) (ruling that improper conduct by a prosecutor eliciting testimony about a defendant's prior convictions did not require a finding of a mistrial), *discussed with approval in United States v. Jameson*, __ F.3d __, 2007 WL 614267 (10th Cir. Mar. 1, 2007).

Finally, Defendant does not set forth any valid reason that other investor testimony should be excluded in general. Defendant submits no reason why the admissibility of any such future

testimony should not be evaluated on its own merits, and subject to the Court's rulings, and admitted if it is relevant.

CONCLUSION

The United States respectfully requests that the motion be denied.

Respectfully submitted this 27th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2007, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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