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 RELATED TO CHARACTER EVIDENCE, OR, IN THE ALTERNATIVE, FOR A MISTRIAL

The United States respectfully responds to Defendant's "Motion to Strike Testimony of David Weinstein Related to Character Evidence, Or, In the Alternative, for a Mistrial" (Docket No. 328).

BACKGROUND

During the cross-examination of David Weinstein, defense counsel asked a number of questions relating to the truthfulness of Defendant Nacchio:

> Q. ... And you made it plain to them, I'm sure unless they were candid with you and full in their disclosures you wouldn't be able to help them, right?
>
> A. That's correct.
>
> Q. And you don't have any doubt about the fact that you had a

confidential – I don't mean in the sense of legal privilege, but a confidential situation in which your client, Joseph Nacchio, was giving you accurate detailed information about his financial circumstances, right?

A. Yes.

Tr. 1627. Defense counsel then broadened his questioning to include Mr. Nacchio's truthfulness about matters far beyond his personal financial circumstances:

Q: Including his position at Qwest, right?

A. I don't understand the question. In what respect?

Q. In respect to the holdings he had in Qwest stock,

A. Yes.

Q. In respect to his view of the company?

A. Yes.

Q. In respect to his view of the prospects for the company?

A. In general terms, yes.

Tr. 1627-28. Defense counsel later elicited further testimony regarding Mr. Weinstein's opinion of Defendant's truthfulness:

Q. Did he ever tell you that he believed the industry would recover?
A. Yes.
Q: You knew the man very well, didn't you?
A. Yes.
Q. You knew his wife, you knew his children, yes?

A. Yes.
Q. You were in his home, he was in your home?
A. He was never in my home, but, yes, I was in his home.
Q. Numerous occasions?
A. Yes.
Q. Do you feel you know the man?
A. I believe so, yes.
Q. Did you believe he was telling the truth?
A. Yes.

Tr. 1644.

On redirect examination, government counsel proposed to ask Mr. Weinstein regarding other instances of truthfulness. After some discussion at sidebar, government counsel proposed as follows:

> MR. STRICKLIN: I'm sorry, if you just give me a moment. I'll tell you what, I'll make this easier. I do think that my [by] asking this witness if Mr. Nacchio – if he thought Mr. Nacchio – you've known him for a long time, he set it up, been friends, been at each other's house, do you think he was telling the truth, I think under 608(b) – this man knows that he has not always been truthful with him. I have a right not to turn on him and ask him if he knows that – did you know or had you heard under 608(b) –.

Tr. 1676-77.[1] The Court then, after some discussion, ruled:

> THE COURT: He can – you can ask him if there were other occasions when you thought he wasn't telling you the truth. I think that's fair rebuttal.

Tr. 1677. Government counsel then clarified to the Court that he intended to ask about whether Mr. Nacchio "asked you to assist him in an act of dishonesty." Tr. 1678. The Court ruled:

> THE COURT: It's permitted. You opened it up by asking him – you asked him to vouch for his truthfulness on this occasion. I'm astonished.

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[1] Government counsel had intended to cite Rule 404(a).

Tr. 1678.

Government counsel then asked whether Mr. Weinstein was "aware of another occasion in 2000 where Mr. Nacchio asked you to assist him in an act of dishonesty involving Qwest." Tr. 1679. Defense counsel did not object to the form of that question. Mr. Weinstein responded, "Yes." Tr. 1679. Government counsel did not ask any further questions. Defense counsel now contends that the Court erred in permitting this examination, and requests a mistrial.

ARGUMENT

The Court did not err in admitting the evidence, because defense counsel clearly opened the door to it.

Federal Rule of Evidence 404(a)(1) provides that evidence relating to a trait of character may be permitted where the accused introduces evidence of that trait of character. It permits, in relevant part, "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." In other words, when a defendant introduces evidence of an opinion about one trait of his character, the prosecution is entitled to rebut it. And once the evidence of that opinion is admitted, Rule 405(a) provides that "[o]n cross-examination, inquiry is allowable into relevant specific instances of misconduct."

"Thus, once evidence of defendant's character is offered, "the government may counter that evidence on cross-examination by referencing relevant specific instances of conduct." *United States v. McHorse*, 179 F.3d 889, 901-02 (10th Cir. 1999). The prosecution can allude to pertinent bad acts by asking the witness if he knew of them. *Id.* at 902 (holding that the government properly addressed a impression of the defendant's character left by defense

counsel's examination, and explaining that the "government was entitled to expound on the question to give the jury a more complete understanding of the circumstances"); *accord United States v. Reich*, ___ F.3d ___, 2007 WL 625210, at *9 (2d Cir. Mar. 2, 2007) (explaining that once a witness gave his opinion about the defendant, it was proper for the government to cross-examine the witness regarding a similar incident that contradicted the witness's opinion).

Here, defense counsel opened the door to cross-examination of Mr. Weinstein on Defendant's truthfulness by asking numerous questions about it. The Court was correct in ruling that this was proper rebuttal evidence.

The United States also submits that this evidence would have been properly admitted pursuant to Rule 404(b). The government believes that this evidence that Defendant Nacchio was involved in the altering of dates on multiple occasions is probative of absence of mistake or accident in the backdating of the irrevocable instruction in December 2000 (which relates to Counts 1 and 2). The absence of mistake or accident is a valid purpose for offering 404(b) evidence. *See United States v. Rackstraw*, 7 F.3d 1476, 1479 (10th Cir. 1993) (affirming the admission of evidence of other acts to show "intent, knowledge, and absence of mistake"). Admissibility on this ground is appropriate because "'the recurrence of similar acts incrementally reduces the possibility that the given instance ... is the result of inadvertence, mistake, or other innocent event." *United States v. Holloway*, 740 F.2d 1373 (6th Cir. 1984) (quoting *United States v. Semak*, 536 F.2d 1142, 1144-45 (6th Cir. 1976)).

Numerous courts have admitted evidence relating to other acts that tended to show that an action in controversy was not the result of a mistake or accident. *See, e.g., United States v.*

Johnson, 463 F.3d 803, 808 (8th Cir. 2006) (holding that evidence of overpayments was admissible to show that other overpayments were not the result of a mistake); *United States v. Walsh*, 928 F.2d 7, 9-10 (1st Cir. 1991) (in a case charging the filing of false reports, affirming a ruling allowing into evidence other discrepancies in the defendant's receipts); *United States v. Knight*, 898 F.2d 436, 439 (1st Cir. 1990) (holding that evidence of incorrectly reported expenses was admissible to show that the making of a false tax return was not the result of mistake or accident); *United States v. Micke*, 859 F.2d 473, 478-79 (7th Cir. 1988) (holding that evidence of an offer by the defendant to backdate a document for one client was properly admissible to show absence of mistake or accident in preparing false tax returns for another client); *United States v. McNeill*, 728 F.2d 5, 13 (1st Cir. 1984) (holding that an instance where the defendant had provided a false address was admissible in a case where the defendant had sought to attribute inconsistencies in backdated documents to carelessness or mistake); *United States v. Cooper*, 577 F.2d 1079, 1087 (6th Cir. 1978) (holding that a defendant's willingness to falsify a financial statement was admissible to show that another misrepresentation on another form (an altered age) was not the product of accident or mistake).

The United States observes that to the extent defense counsel is concerned with the form of the question, that concern is very belated, as no objection was made to the form at the time. *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").

Finally, the United States disagrees with the defense that this statement was so unfairly prejudicial to Defendant that a mistrial is warranted.

CONCLUSION

The United States respectfully requests that the motion be denied.

Respectfully submitted this 4th day of April, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 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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