IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 05-CR-545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION TO PERMIT EXPERT REBUTTAL OF, OR, ALTERNATIVELY, TO STRIKE, OPINION TESTIMONY BY WITNESSES JOHNSTONE AND KHEMKA ADDUCED BY THE GOVERNMENT IN CONTRAVENTION OF THE COURT'S PRIOR ORDER AND MEMORANDUM OF DECISION LIMITING THEIR TESTIMONY

The United States of America, by its undersigned counsel, respectfully submits this opposition to Defendant's Motion to Permit Expert Rebuttal of, or, Alternatively, to Strike, Opinion Testimony By Witnesses Johnstone and Khemka Adduced by the Government in Contravention of the Court's Prior Order and Memorandum of Decision Limiting their Testimony (document number 348, filed April 8, 2007). Defendant's motion is meritless and should be denied.

Counsel for the defendant, not counsel for the United States, repeatedly attempted to elicit opinion testimony from Drake Johnstone and Prashant Khemka in contravention of the Court's prior order and memorandum of decision limiting their testimony. Since it

was the defense that so moved the Court, defendant has either waived his right to raise objections to such testimony or is now moving the Court to strike testimony he elicited. Under either theory defendant's motion is frivolous. For example, counsel for the defendant asked Mr. Johnstone, "[s]o you formed your own **opinions** about what the guidance should be and what the projections of revenue should be is that correct? Trial Transcript at 2241:23-25 (emphasis added). This questions was unrelated to any question asked on direct examination. In fact counsel for the United States had not elicited any testimony from Mr. Johnstone on "what Qwest's guidance should be." Similarly, in a longer series of questions, counsel for the defendant attempted to elicit opinion testimony from Mr. Johnstone on the Qwest/US West merger:

> Q. And your job is not simply to spoon feed the press releases or the statements of the company to your customers; is that correct?
> A. That is correct.
> Q. You do your own analysis, do you not?
> A. I do.
> Q. And you don't just accept on faith what the company tells you; is that right?
> A. That's correct.
> Q. Now, it's true, one of the things you disagreed with, that you thought that the merger was not necessarily a good idea between Qwest and U S WEST; is that correct?
> A. At the time that Qwest announced that it was acquiring U S WEST –
> Q. Yes.
> A. -- I had concerns on valuation.
> Q. And you publicly expressed those **opinions**, correct?

Trial Transcript at 2237:13-2238:4 (emphasis added). Counsel for the United States had not elicited any testimony from Mr. Johnstone on what he thought of the Qwest/US West

merger. Counsel for the defendant also attempted to elicit opinion testimony from Mr. Johnstone on the impact of disclosure on shareholders:

> Q. All right. And if disclosing proprietary information would hurt Qwest and result in its losing business, wouldn't that hurt the shareholders as well?
> A. It hurts shareholders much more to not disclose material information than to actually disclose information that -- as the company should have.
> Q. That's your **opinion**, sir, correct?

Trial Transcript at 2245:24-2246:5. It is worth noting that in these exchanges counsel for the defendant is deliberately eliciting opinion testimony through leading questions. Mr. Johnstone is not volunteering opinions in response to open-ended questions. In fact, on at least one occasion, Mr. Johnstone, who was informed of the Court's ruling by counsel for the United States, declined to provide the opinion testimony counsel for the defendant tried to elicit:

> Q. So Qwest was part of this trend, the price of the stock going down was part of this entire trend in the telecom industry, was it not?
> A. Qwest's stock did go down as did the other stocks, and I'll just respond to that, as you indicated. **I won't comment further.**

Trial Transcript at 2248:21-25.

Not only did counsel for the defendant attempt to elicit opinion testimony from Mr. Johnstone but he also attempted to move other analysts' opinions in evidence through Mr. Johnstone in contravention of the Court's order. In cross examination, counsel for the defendant attempted to offer A-1720, a report from another analyst:

> MR. WISE: I'm going to object. . . This is another analyst report. First of all, it's hearsay; second of all, Mr. Speiser objected to opinion testimony right out of the gate and has now elicited a truckload of it.

> THE COURT: This is unbelievable. You're now soliciting opinion testimony which I said the prosecution couldn't get it because it disclosed expert testimony. And they told you they weren't calling experts. And now you're trying to get in the testimony of other analysts . .

Trial Transcript at 2250:6-25. It is worth noting that in response to a question on this document, counsel for the defendant stated, "I'm not treating him as an expert" referring to Mr. Johnstone. Trial Transcript at 2251:17. In any event, none of the opinion testimony counsel for the defendant deliberately elicited, nor any of the testimony the defendant cites in his brief amounts to expert testimony that should be struck or that Mr. Fischel could or should be allowed to address.

In contrast to counsel for the defendant, counsel for the United States asked questions meant to elicit testimony on whether information was public or non-public. Such testimony is proper fact testimony, as the Court ruled from the bench on several occasions. For example, counsel for the United States inquired into whether Mr. Johnstone disseminated Qwest's increased guidance to his clients after September 7, 2000:

> Q. Mr. Johnstone, did you disseminate the information in this [Qwest] press release to Davenport clients?
> MR. SPEISER: Objection, Your Honor. May we approach on this?
> THE COURT: I don't see the necessity of approaching, but I guess I should be cautious. (Hearing at the bench.)
> MR. SPEISER: Your Honor ruled in regard to our motion to bar his testimony completely, that his testimony be limited solely to requesting information from Qwest and what the response was. And I see counsel is beginning to start to stray from that.
> THE COURT: Well, you obviously have my ruling there, so you have a combination. But I never intended to get – limit this kind of testimony

> because it goes directly to the question of whether this was publicly disclosed. If he sent it on to investors, then it was publicly disclosed. And likewise, if something wasn't disclosed, obviously he didn't send it on to investors. I think this is not outside the range of what I intended.

Trial Transcript at 2180:6-25. Then, in a pattern that was repeated for each of the three research notes the United States offered, the Court granted defendant's oral motion to redact Mr. Johnstone's research notes to excise any opinions. The first research note offered as Exhibit 703:

> MR. SPEISER: I'm objecting to the opinion part.
> THE COURT: Well, so that's the -- are you -- do you agree, that's the opinion part that I said would be redacted?
> MR. SPEISER: Are you saying from --
> THE COURT: I'm saying, look at the last paragraph on the first page.
> THE WITNESS: Yes, correct.
> THE COURT: It is the first two sentences.
> MR. SPEISER: Okay. That's okay, Your Honor.
> THE COURT: All right. Exhibit 703 is received with the provision that the first two sentences in the last paragraph on the first page will be redacted. And you can mark the redacted copy as 703A, if you wish, Mr. Wise.

Trial Transcript 2184:5-17. As the above citation makes clear, counsel for the defendant did not object to the redacted version of the research note being admitted in evidence.

On only one occasion did Mr. Johnstone offer testimony that could be construed as an opinion. Defense counsel objected and the Court struck the testimony:

> Q. And how did you -- what's the vehicle that you disseminated this information to Davenport investors in?
> A. I published a note in August 2001 in which I went from a buy rating to a sell rating.
> MR. SPEISER: Your Honor –
> THE COURT: That part of it is improper opinion and is stricken. The jury is instructed to disregard that answer.

Trial Transcript at 2203:22-2204:1.

In its Order and Memorandum of Decision Limiting Testimony of Financial Analysts, the Court summarized the United States pretrial proffer as to these witnesses' testimony as follows:

> Here, the Government proposes to introduce testimony regarding "historical facts" based on the Analysts' personal experience, "such as their personal involvement with Qwest, what specific information they requested from Qwest, what specific information was disclosed to them, what information was not disclosed to them."

Order and Memorandum of Decision Limiting Testimony of Financial Analysts, Document 305 at 4 (March 26, 2007). The Court ruled as follows:

> Mirroring the requirements of Fed. R. Evid. 702, I find this testimony is: (a) "rationally based on the perception of the witness" because it is based on the personal experience of the Analysts; (b) "helpful to a clear understanding of . . . a fact in issue" – namely whether the information was public or non-public; and (c) "not based on scientific, technical, or other specialized knowledge," because the testimony simply relays the actual experiences of the Analysts.

Id. The testimony elicited by the United States at trial is precisely what it proffered and fits squarely within the parameters set by the Court. Both analysts offered fact testimony concerning what information was released from the company and when that information was released. Mr. Johnstone testified about information provided in the company's public filings and conference calls and Mr. Khemka testified about those topics and the

information he specifically requested from the defendant.[1] Since neither analysts offered expert opinions and because Mr. Fischel has no firsthand knowledge of the facts described by these analysts defendant's motion should be denied.

Respectfully submitted this 8th day of April, 2007.

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[1]As the Court noted,

> [I]t is clear to this court that knowing the information at issue was provided to financial analysts who closely follow Qwest stock could aid a jury in determining whether that information was "public." Certainly, if an analyst requested information from Qwest and was rebuffed, then that testimony would tend to support the conclusion that such information was nonpublic.

Order and Memorandum of Decision Limiting Testimony of Financial Analysts, Document 305 at 4 (March 26, 2007). The testimony of Messrs. Johnstone and Khemka aids the jury in precisely this way.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th 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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