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' SENTENCING STATEMENT

The United States of America, by its undersigned counsel, hereby files its Sentencing Statement in accordance with the Court's Order Concerning Sentencing Proceedings entered April 20, 2007. This Sentencing Statement is organized in the following three sections: I. What the Evidence at Trial Established; II. Relevant Sentencing Factors; and III. Aggravating Factors Supporting a Sentence at the Top of the Guidelines.

I. WHAT THE EVIDENCE AT TRIAL ESTABLISHED

At trial, the evidence conclusively showed that the defendant engaged in insider trading. Below is a summary of some of the key evidence. Because the trial spanned four

weeks, this summary is not intended to be exhaustive, but simply to highlight several facts proved at trial.

A. The Defendant Knew the 2001 Targets Were Unrealistic

Defendant Joseph P. Nacchio was the President and Chief Executive Office of Qwest Communications International from 1997 through 2002. Qwest is a publicly held telecommunications company whose shares traded, beginning in January 2000, on the New York Stock Exchange.

In September 2000, soon after Qwest had merged with US West (a much larger telecommunications company), the defendant raised Qwest's revenue and earnings targets for 2001. He did so despite the fact that Qwest had just completed the merger and was still in the initial stages of budget planning for 2001. Tr. 747 (Szeliga). Qwest had not yet built a budget plan for 2001 at the company level, or from a business unit perspective. Tr. 1329 (Casey).

The defendant then was informed — in detailed presentations by the heads of Qwest's various business units — that there was a very large gap between the targets he had set and the business units' own estimates. Tr. 759, 766-67 (Szeliga). These gaps were huge: for example, in a meeting with his national mass markets unit, the gap was $444 million. Tr. 1339, 1355 (Schumacher).

Another consistent topic in these budget meetings was that for Qwest to reach these 2001 targets, Qwest needed to rapidly increase its growth of "recurring" revenue, as

opposed to "nonrecurring" or "one-time" revenue. Qwest's business included both nonrecurring and recurring revenue. Recurring revenue was revenue earned each month from a regular customer. Non-recurring revenue typically resulted from one-time transactions, such as equipment sales or long-term contracts called "IRUs" (indefeasible rights of use). The defendant was informed that for Qwest to hit its targets for the third and fourth quarters of 2001, Qwest needed to hit its recurring revenue objectives in the first two quarters of 2001. Tr. 1238 (Graham). In these meetings, the defendant agreed that making a "pivot" from one-time revenue to recurring revenue was critical. Tr. 1214 (Graham).

The business unit heads repeatedly informed the defendant that the 2001 targets he had set were highly unrealistic. At budget meetings in November 2000 and early December 2000, the business unit heads reported to the defendant that there were gaps of hundreds of millions of dollars between Qwest's actual projected revenue and the targets the defendant had set. For example, one unit did not even have the salespeople that would be necessary to make the target a possibility. Tr. 1215, 1225, 1227, 130 (Graham); 1359, 1361 (Schumacher); 1481, 1487 (Smith); 1745 (Mohebbi).

Despite these warnings, the defendant did not lower the unrealistic targets. A "sign in blood" meeting was held in December 2000 where the business unit heads each were required to commit to their targets. Tr. 1099 (Casey). And after that meeting, some of the targets were again increased. Tr. 1100. Greg Casey, the head of Qwest's

wholesale unit, was assigned a new, higher target that was a "huge jump." Tr. 1101-03 (Casey). He responded by calling the new target "bullshit," and copied the defendant on the e-mail to ensure that the defendant knew his view of the target. Tr. 1088, 1100 (Casey); GX825.

In December 2000, the defendant received more information about how unrealistic Qwest's 2001 targets were. He was informed that for Qwest to meet its 2001 targets, it needed to double its growth rate for recurring revenue in 2001. Tr. 1053 (Szeliga). Both Robin Szeliga and Afshin Mohebbi told him how important this shift was. Tr. 794 (Mohebbi). Ms. Szeliga informed the defendant that the "risk" or gap between Qwest's external targets and the projected revenue reflected in its budgets was huge – a billion dollars. Tr, 736, 741 (Szeliga), GX803.

To ensure that the defendant knew of this risk, Mr. Mohebbi wrote several memoranda in December 2000 and January 2001 and left each one on the defendant's chair as well as having one sent directly to the defendant's home by Federal Express. Tr. 1763, 1769, 1772, 1811, 1829, 1833, 1840 (Mohebbi). One memorandum informed the defendant that the 2001 revenue and earnings projections were "huge stretch" and that Qwest would "need our recurring business to literally take off by April-May time frame or the amount of one-time business required to fill the gap will be too large to deal with. Our track record in this area is not that good, as you know." Tr. 1775 (Mohebbi), GX 904. In another memorandum, he informed the defendant that Qwest that would need

$587 million in one-time revenue to fill the gap. Tr. 1811 (Mohebbi). Another memorandum explained, "If Qwest's recurring revenues don't take off, there would not be enough one-timers to close the gap in the 3rd and 4th quarters of 2001." GX 905.

In short, the defendant was well aware that recurring revenue growth needed to take place early in 2001 for Qwest to have any chance of reaching its targets. The defendant himself commented that the recurring revenue growth needed to take place early in the year so it would compound over the year. Tr. 789-91 (Szeliga). At an employee meeting early in 2001, he told Qwest employees they needed to "get out of the gates" early, and that "something big" had to happen by April 2001. GX 559B. He mentioned the "rule of 78s" (a compounding principle), and stated that missing targets early in the year would have a "snowball effect." GX 551A.

B. In Early 2001, the Warnings Became Reality

In the first few months of 2001, the defendant received bad news: the warnings he had received in late 2000 were being reflected in actual 2001 results. Qwest's risks turned into a reality, because its actual performance failed to meet its projections. Qwest's results from the first two months of 2001 showed, in particular, a lag in the growth of recurring revenue. Tr. 806, 810 (Szeliga). Early projections for data and IP products alone showed that Qwest would miss its internal targets in the third and fourth quarters of 2001 by almost a quarter billion dollars. Tr. 1323-24 (Graham). During this period, Jim Smith, the head of Qwest's consumer and small business unit – Qwest's

largest source of recurring revenue — began telling the defendant, in "a routine aspect" of his conversations with him, that the 2001 target was "not attainable." Tr. 1492-93 (Smith), 1832 (Mohebbi). And the defendant was told that the market for one-time IRUs was "drying up." Tr. 779 (Szeliga).

C. The Defendant Refused to Tell Investors About Qwest's Problems

During this period, the defendant met with investors frequently. He generally kept tight control over what Qwest told investors. Tr. 140, 146, 155-56 (Wolfe). He reserved personal control over Qwest's press releases. Tr. 196 (Wolfe). On investor calls, he controlled what guidance was issued, and he was the one who answered most questions. Tr. 148-50, 155-56 (Wolfe), 2191 (Johnstone). The head of investor relations, Lee Wolfe, advised the defendant frequently about what questions investors were asking. Tr. 128 (Wolfe).

The defendant also knew that his statements to investors had a direct effect on Qwest's stock price. The rule the defendant enforced at Qwest was known as the "Golden rule" – that employees should not do anything to make the stock price go down. Tr. 139 (Wolfe). And the defendant knew from experience that his statements could boost the stock price. For example, on December 21, 2000, in response to a drop in Qwest's stock price, the defendant decided to have a conference call with investors. During that call, he distinguished Qwest from other telecommunications companies and

affirmed Qwest's external guidance. Tr. 162 (Wolfe). After that call, Qwest's stock price shot up $5. Tr. 163 (Wolfe).

The defendant repeatedly stated that Qwest's stock price would depended on Qwest's growth. Tr. 729 (Szeliga). And in one speech to Qwest employees in early 2001, he told the audience that Qwest had to "grow or die" and that if Qwest did not make its numbers, even by a small amount, its stock price would get "whacked." Tr. 730-31 (Szeliga); GX 505A, 506A, 514A, 515A, 551.

In early 2001, after the early results came out, the defendant was urged by several of his top corporate officers to provide greater disclosure to investors about Qwest's earnings and revenue, including, for example, how much of Qwest's revenue depended on one-time transactions called IRUs (indefeasible rights of use). Qwest's controller advocated for disclosure to the defendant because IRUs were such a significant percentage of the overall growth in Qwest's revenue. Tr 1372 (Schumacher). Qwest's head of investor relations, Lee Wolfe, told the defendant repeatedly that investors wanted to know how Qwest made its numbers and how much nonrecurring revenue Qwest had. Tr. 170, 188 (Wolfe). The defendant was told that investors wanted to understand how Qwest was going to achieve its 2001 financial targets, and that investors wanted to know more about Qwest's revenue, EBIDTA, and one-time transactions. Tr. 126, 179-80, 212 (Wolfe).[1]

[1] Other Qwest officers clearly saw this information as material enough that they should not be selling Qwest stock. Qwest's head of investor relations, Lee Wolfe, sold Qwest

But the defendant responded with disdain to these requests that he tell investors about how much of Qwest's revenue was non-recurring. When Mr. Wolfe told him that investors wanted greater disclosure, "[a] couple of other times he [the defendant] would say, you know, why do they need to know? And I would say, to make an informed decision whether to buy or sell the stock. And basically, he responded, screw them, go tell them to buy." Tr. 410-11 (Wolfe). After the early 2001 numbers were known internally, Afshin Mohebbi gave the defendant a memorandum stating that the market was "now demanding more visibility in terms of our revenues," and he recommended that the defendant break down the data further. Tr. 1827 (Mohebbi). But in response to the memorandum, the defendant confronted Mr. Mohebbi and demanded, "why are you writing this? ... It's not your job." Tr. 1829 (Mohebbi).

The defendant made clear that his reason for not telling investors more was that the disclosure would drive down the stock price. When the defendant was urged by Mr. Wolfe to provide greater disclosure, he would respond by asking, "[C]an you guarantee me the stock price won't go down," and Mr. Wolfe told him each time that the stock price would go down. Tr. 267 (Wolfe).

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stock in early 2001 but testified that "it was wrong" and that he had a "crisis of conscience over this." Tr. 234, 308 (Wolfe). Qwest's chief financial officer, Robin Szeliga, sold Qwest stock in April 2001 but later pleaded guilty to insider trading. Tr. 858 (Szeliga). And Qwest's controller viewed the information as significant enough that he should not sell his stock. Tr. 1378-79 (Schumacher). Mohebbi likewise did not sell stock during this time frame. Tr. 1884 (Mohebbi).

In his meetings with investors, the defendant refused to even hint to them what he himself knew about Qwest's revenue, its one-time transactions, and the fact that it was almost certain not to meet its 2001 targets. For example, at a meeting with investors in March 2001, the defendant claimed that Qwest would "meet or beat" all of its targets. Tr. 2270, 2272 (Khemka). The defendant also declined to tell investors the magnitude or amount that one-timers were contributing to Qwest's growth. Tr. 186, 227, 230 (Wolfe). When he was asked for specific information about one-time transactions, he declined to provide this information. Tr. 186-87, 212, 217-18, 223-24 (Wolfe).[2]

D. The Defendant Received More Negative Information in April 2001

In April 2001, the defendant received more bad news from his business units. In that month, several presentations were made to him showing Qwest's results from the first quarter of 2001. Tr. 836 (Szeliga). The general product review update showed projected annual shortfalls of more than a half billion dollars, including a "shortfall of recurring revenue growth of 19 percent." Tr. 824 (Szeliga), 1870 (Mohebbi); GX 929, 929a. The defendant's reaction to this news was clear: he was "not happy" and was "visibly disappointed" with the report. Tr. 1873 (Nacchio).

The individual business unit reviews in April 2001 further confirmed this bad news. Greg Casey, the head of Qwest's wholesale unit, told the defendant that they were

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[2] During this period (in February 2001), he refused to agree to an options package; he did not agree until much later in 2001, when those options had a far lower strike price. Tr. 480-81 (Slater), 1589-90 (Weinstein).

"draining the pond" on IRUs and that the unit would not be able to make its numbers for the second half of 2001. Tr. 1109-10, 1158 (Casey). Moreover, most of Qwest's IRUs in 2001 had been "swaps" or trades with other companies, rather than outright sales. Tr. 1108 (Casey). Mr. Casey explained that while his prior warnings to the defendant in 2000 had been about the "difficulty" in making the 2001 numbers, his April 2001 meeting with the defendant was different because in that meeting, he was "adamant that the market was drying up. There was nothing there. It was qualitatively and quantitatively different from what I had said in the past ...." Tr. 1194 (Casey). He made clear to the defendant that IRUs were "going away." Tr. 1122 (Casey). As a result, his unit showed a gap projected of $675 million — two thirds of a billion dollars — in his unit alone for the rest of 2001. Tr. 1109 (Casey); GX 959 at 6. Mr. Casey explained that he had never given the defendant a warning like that before. Tr. 1122 (Casey).

The defendant was given similar bad news at his meetings with the other business units. For example, he was told that the global business unit had missed its objective for recurring revenue for the first quarter of 2001, and was "way off target" in its recurring revenue results. Tr. 1243, 1248 (Graham). At that meeting, the defendant expressed his concern about the recurring revenue results. Tr. 1248 (Graham). And during the review of the consumer and small business unit, Jim Smith, that unit's head, reported to the defendant that his unit had missed its budget in the first quarter, and was going to miss its

2001 revenue target by about a third of a billion dollars — $323 million. Tr. 1508-10, 1513 (Smith).

E. On the April 2001 Earnings Call, the Defendant Lied to Investors

After the first quarter earnings numbers came out in April 2001, several of the defendant's top officers urged him to take down the numbers. Lee Wolfe urged him not to be too bullish. Tr. 242-43 (Wolfe). Robin Szeliga, the Chief Financial Officer, discussed with him taking down the external guidance. Tr 848 (Szeliga). The defendant responded by telling Ms. Szeliga, "I'll answer the questions." Tr. 852 (Szeliga).

Casting aside these warnings, Mr, Nacchio got on the April 24, 2001 earnings call — where hundreds of investors were listening — and flat-out lied to those investors. He first told investors, accurately, that Qwest had "just finished 3 weeks of detailed operational reviews in every operation inside Qwest." GX 594A. He then claimed that he was very bullish on Qwest's results and outlook. Tr. 2192 (Johnstone). He reaffirmed Qwest's 2001 guidance, and told investors that "we are very pleased with the quarter reconfirming our estimates," and added, "We see nothing to dissuade us from the plan we announced almost 18 months ago." GX 593A; Tr. 240-43 (Wolfe), 1521 (Smith), 2192 (Johnstone); GX593. That last statement was an astonishing misrepresentation of what he knew.

The defendant did not mention to investors all the crucial negative information he knew. For example, he did not tell them that Qwest's recurring business had missed the

first quarter targets by nearly 20 percent. Tr. 2193 (Johnstone). He did not tell them that Qwest had relied on more one-time transactions than had been planned, and that Qwest would not have made its numbers in the first quarter of 2001 without over $500 million of one-time transactions. Tr. 2193-94 (Johnstone). He did not tell them that one-time transactions had accounted for almost forty percent of Qwest's growth in 2001 to date. Tr. 2193 (Johnstone). Nor did he tell them that the market for IRUs was drying up. Tr. 2195 (Johnstone). He refused to answer questions about Qwest's revenues and its revenue growth. Tr. 1373-74 (Schumacher).

F. The Defendant Then Accelerated His Sales of Stock

The defendant engaged in a selling spree of Qwest stock in the first four months of 2001. He sold 250,000 more shares in the first four months of 2001 than he had in the previous eighteen months. Tr. 2244 (Chamberlin).

But even within that period, it is notable that the defendant's selling accelerated to a whole new level just after the April 2001 earnings call. When the trading window opened on April 26, 2007, he exercised and sold 350,000 shares that day alone, reaping total proceeds of $11,674,565. Tr. 2648 (Fischel). The following day, he exercised and sold another 300,000 shares, generating total proceeds of $10,251,480. Tr. 2648 (Fischel). He then made another seventeen trades in the next month. Tr. 2648-49 (Fischel). Through these rapid stock sales, he generated gross sales proceeds of over $52 million in about a month.

G. The Defendant Knew Insider Trading was Against the Law

During that month of furious selling, the defendant was well aware that it was against the law to sell Qwest stock on the basis of material nonpublic information. In fact, back in October 2000 the defendant had himself issued a code of conduct to all Qwest employees warning them that "trading on material, non-public information is a crime." GX 308 at 5. He had sent out similar directives against insider trading several other times, warning employees that it was a federal crime to trade Qwest stock on "information not publicly available that could affect the price of the securities." Tr. 665-67 (Oneth). And the defendant was himself repeatedly reminded of Qwest's own rules prohibiting insider trading. Tr. 644 (Oneth).

H. To Protect His Trades, the Defendant Delayed the Disclosure of the Negative Information

After the defendant had used the material inside negative information to dump $52 million of his own stock, he then sought to put some time between his own sales and the disclosure of that information. What he sought to do was spin the disclosure of the one-time transactions. Tr. 264 (Wolfe).

For months after his sales, he continued to reject calls by his officers for disclosure. After a negative Wall Street Journal article discussing Qwest appeared in June 2001, Robin Szeliga, the defendant's chief financial officer, and Lee Wolfe, his head of investor relations, both urged the defendant not to reaffirm Qwest's 2001 guidance. Tr. 253, 256 (Wolfe), 866 (Szeliga). The defendant responded by telling Ms. Szeliga

"you'll see what I decide in the morning," and then issued a buoyant press release saying nothing about Qwest's one-timers. Tr. 258 (Wolfe), 866 (Szeliga). And on the second quarter earnings call at the end of July 2001, he still did not disclose magnitude of one-timers or its nonrecurring revenue, but instead reiterated Qwest's guidance. Tr. 263-64 (Wolfe), 2260-61 (Johnstone). Investors thus still did not have information about Qwest's recurring and nonrecurring revenue, and also could not determine how much of Qwest's revenue was legitimate and how much was "bogus," from deals such as "swaps" — which, as noted above, accounted for much of Qwest's one-time deals. Tr. 2282-85 (Khemka).

At this point, investors began to lose some confidence in the defendant and in Qwest. The defendant was informed in July 2001 that there was a "credibility issue now surrounding Qwest." Tr. 2282 (Khemka). Some of this loss of credibility stemmed from the defendant's dissembling during a July 2001 earnings call, where he tried to fool investors on the call by pretending that Qwest's earnings target had been 17 percent all along instead of 20 percent. Tr. 270-72 (Wolfe), 2288 (Khemka); GX 739A. One investor warned the defendant, "Agreed that most investors are fools, but at least don't tell that to them in their face." Tr. 282 (Wolfe), 2287 (Khemka); GX 739.

The defendant still delayed disclosure. Tr. 2293 (Khemka). He did not disclose the magnitude of the Qwest's reliance on one-timers until August 2001. Tr. 284 (Wolfe). At that point, investors learned Qwest's recurring revenue growth had not been 12

percent, as they had thought, but only 7.5 percent. Tr. 2202 (Johnstone). The defendant knew investors would react strongly to this news: when he decided to disclose this information, he discussed with Mr. Wolfe the fact that investors would be surprised and that Qwest's stock price would go down. Tr. 265 (Wolfe).

Even in August 2001, the defendant still refused to lower Qwest's 2001 targets. During this period, he discussed with Drake Tempest, another Qwest officer, the need "to give the sense that this was something new that caused the lowering of the targets." Tr. 289 (Wolfe). He also discussed the need to create a delay so that investors would accept that the reason for lowering the targets was not something the defendant would have known in August 2001. Tr. 290 (Wolfe). The defendant waited to lower Qwest's targets until September 10, 2001, when he took Qwest's numbers down by about a billion dollars. Tr. 289 (Wolfe), 871 (Szeliga). And it was not until months later that some of the other inside information the defendant had known back in April 2001 — such as that the market for one-timers had gone away — became known to investors. Tr. 2055 (Mohebbi), 2195 (Johnstone). At the end of 2001, Qwest missed its targets. Tr. 1125, 1327 (Graham). And Qwest's stock price reacted accordingly, continuing its downward trend. Tr. 2675, 2677 (Fischel).

The defendant, having reaped over $100 million in proceeds before Qwest's stock price crashed, appeared to see no problem with his earlier lies to investors. In early 2002 — by which point Qwest's stock price was in the single digits — the defendant was asked

by an institutional investor how he intended to restore Qwest's credibility. The defendant responded, with a smile on his face, "Never believe a word of what management says at the time of a merger." Tr. 2297 (Khemka).[3]

I. The Defendant's Excuses at Trial were Bogus

At trial, defense counsel offered several excuses for why the defendant unloaded his options so quickly in the first half of 2001: (1) the defendant wanted to diversify his holdings; (2) he wanted to ensure that his options did not expire; (3) the taxes made it too expensive for him to exercise the options but then hold them (rather than selling them); and (4) the defendant knew of possible classified government contracts.

All of these excuses were unsupported by evidence, and they were all proven to be entirely bogus. First, as to diversification, there was no new urgent need to diversify: the defendant's longtime financial adviser made clear that he had been recommending

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[3] This dissembling by the defendant did not stand alone. His financial adviser admitted that the defendant had asked him to assist him in an act of dishonesty involving Qwest. Tr. 1679 (Weinstein). And the evidence also made clear that the defendant backdated a document. Just after receiving bad news about the business units in December 2000, the defendant made a decision to sell certain growth shares he was due to receive in January 2001. On December 13, 2000, the defendant told his financial adviser that he was signing an irrevocable instruction to a broker to sell certain "growth shares" in January 2001. GX 210. However, when he signed the document, he indicated that he had signed it back on November 3, 2000, during an open trading window. GX 100. This was an impossibility, since the lawyers who helped drafted the document testified that they did not even start drafting the document until well in December. Tr. 2081 (Grossman); 2139, 2143, 2156 (Patti). And the defendant's broker never received the supposed "irrevocable instruction" ever. Tr. 2722 (Olson). While the United States recognizes that the jury did not find the defendant guilty as to the January 2001 sales, the United States believes that it is consistent with the jury's verdict to recognize that overwhelming evidence shows that the defendant did backdate this document, and that this was yet another act of dishonesty by the defendant.

diversification to the defendant since 1986, and that as of 2001 the defendant was already much more diversified than many of Mr. Weinstein's other executive clients. Tr. 1563 (Weinstein). Second, as to expiration, there was no urgent timing issue: the options at issue were not set to expire until mid-2003, and so if the defendant had stayed in the trading plan he entered into in February 2001, he would have completed the sale of those options well before the expiration date. Tr. 1573 (Weinstein), 2252 (Chamberlin). Third, as to taxation, the defendant had ample cash to pay the taxes: he was worth $547 million on paper, with more than $60 million in cash, which Mr. Weinstein had urged him during 2001 was a "considerable amount." Tr. 1602, 1614, 1619; GX214. Fourth, as to classified contracts, the evidence showed that prospective classified contracts were known to others at Qwest (under code names like "Ferrari" and "Moby Dick") and that such potential contracts in 2001 were both small and unlikely. Tr. 1122 (Casey), 1259-60, 1272-73 (Graham).

J. The Jury's Findings

The jury found the defendant guilty beyond a reasonable doubt on nineteen counts of insider trading between April 26, 2001 and May 29, 2001. The Court should accept the jury's finding that the defendant traded on the basis of material nonpublic information. Tr. 3169-70.

More specifically, the Court should take into account that the jury found that the evidence showed, beyond a reasonable doubt, that: (1) the defendant "actually used

material non-public information in deciding to trade," Tr. 3172; (2) the inside information he used was "material" and was "of such importance that it could reasonably be expected to cause a person to act or not to act with respect to the securities transaction at issue," Tr. 3171; (3) the inside information was "a significant factor in [his] decision to sell stock," Tr. 3172; (4) he acted "willfully, knowingly, and with the intent to defraud," Tr. 3173, and (5) the defendant acted with the "intention or purpose to deceive or cheat." Tr. 3173.

II. RELEVANT SENTENCING FACTORS

A. Statutory Penalties

The defendant was found guilty of 19 counts of a form of securities fraud known as insider trading in violation of 15 U.S.C. §§ 78j(b) and 78ff(a) and 17 C.F.R. 240.10b-5 and 240.10b5-1. Each of the 19 counts are punishable by up to 10 years imprisonment, $1,000,000 fine, or both, three years supervised release and a $100 special assessment.

B. Sentencing Guidelines

Consistent with USSG § 1B1.11(b)(1), the government used the 2000 edition of the Guidelines Manual because the 2006 edition of the Manual would result in a higher offense level and therefore create *ex post facto* issues.

1. Base Offense Level: the applicable Guideline Section for the offense of Insider Trading is §2F1.2. The base offense level is 8.

2. Specific Offense Characteristics: subsection § 2F1.2(b)(1) requires, as a specific offense characteristic, that the offense level be increased the number of

levels from the table at § 2F1.1 corresponding to the defendant's gain from the offense. The defendant gained over $52 million from his 19 illegal sales of Qwest stock charged in Counts 24 - 42.

The Application and Background Commentary further explain what is intended by use of the term "gain resulting from the offense" in § 2F1.2. To measure the severity of the offense, the Guidelines expressly instruct courts as follows: "[b]ecause victims and their losses are difficult if not impossible to identify, **the gain, *i.e.*, the total increase in value realized through trading in securities by the defendant** . . . is employed instead of the victims' losses." U.S.S.G. § 2F1.2, cmt. background (2000) (emphasis added). The commentary provides concrete guidance as to how the guideline is to be applied in practice and is "an authoritative guide to the meaning" of the guideline. *Stinson v. United States*, 508 U.S. 36, 42-44 (1993). *See also United States v. Smith*, 433 F.3d 714, 716 (10th Cir. 2006) ("Unlike statutes, regulations, or any other legislative directives of which we are aware, courts are bound (but for their newly-discovered discretion pursuant to *United States v. Booker* [citation omitted]) not only by the language of the United States Sentencing Guidelines, but also by the interpretive and explanatory commentary to the guideline provided by the Sentencing Commission." (internal quotation and citation omitted)).

The leading case interpreting § 2F1.2, *United States v. Mooney*, 425 F.3d 1093 (8th Cir. 2005) (*en banc*), is discussed more fully *infra*. In *Mooney*, the court held that "[b]y

use of the word realized, the commentary makes clear that **gain is the total profit** actually made from a defendant's illegal securities transactions." *United States v. Mooney*, 425 F.3d 1093, 1100 (8th Cir. 2005) (*en banc*) (emphasis added). Therefore, even if the defendant is credited for his cost in acquiring the Qwest stock that the jury found that he illegally sold, the total increase in value he realized by selling the 1.33 million shares of stock exceeded $44.6 million in total profit.

Accordingly, the offense level is increased 17 levels.

3. Adjustments for Role in the Offense: the offense level is increased 2 additional levels because the defendant abused a position of trust in a manner that significantly facilitated the commission of the offense under § 3B1.3.

As the Chairman and CEO of a publically traded company, the defendant was clearly in a position of public trust. He used his position as the head of Qwest 1) to inflate the stock price by setting unrealistic growth targets for the company, 2) to keep the stock price high by preventing disclosure of inside information about severe problems with Qwest's ability to achieve the projections, and 3) to sell his stock while the stock price was still high, before he disclosed to outside investors Qwest's problems.

The Commentary to the insider trading guideline, makes it clear that the abuse of position of trust enhancement applies where a corporate officer trades stock in his company on the basis of inside information. Application Note 1 to § 2F1.2 states that this enhancement applies "if the defendant occupied and abused a position of special trust.

Examples might include a corporate president or an attorney who misused" inside information – in contrast with an outsider, or "tippee."

4. Total Offense Level: adding the offense levels discussed above results in a total offense level of 27. Based on a criminal history category of I, the defendant's imprisonment range is 70 to 87 months.

C. Defendant's Alternative Gain Calculations are Erroneous

According to the PSR, the defendant argues for a lower "gain"calculation under § 2F1.2. He proposes two alternative calculations: 1) gain is not more than $1.8 million based on a yet to be presented civil damages analysis of the amount the stock was inflated due to the inside information, and 2) the gain is reduced by the amount of income taxes withheld by Qwest when he received the proceeds for the illegal sales. Both calculations are wrong under the Sentencing Guideline and applicable precedent applying the Guidelines.

1. Defendant's Civil Damages Calculation is Contrary to the Sentencing Guidelines

The defendant claims that he will establish, using a civil damages model, that the stock the defendant illegally sold was inflated by no more than $1.8 million due to the inside information. The defendant apparently intends to argue that the nonpublic information that the defendant used when he illegally sold Qwest stock caused the stock price to be inflated by less than $1.35/share ($1.8 million/1.33 million shares) which is less than 3.5% of the Qwest stock price at the time. The defendant's position is not only

preposterous as a factual matter, it also relies on exactly the kind of speculative analysis that the U.S. Sentencing Commission expressly rejects in a separate guideline section for the offense of insider trading – § 2F1.2. As set forth above, the plain language of the guideline and the authoritative commentary direct the use of the defendant's profits from the illegal transaction. "As the commentary succinctly points out, the guideline applies to insider trading offenses under Rule 10b-5 and by gain it means 'the total increase in value realized through *trading* in securities.'" *Mooney*, 425 F.3d at 1099 (quoting U.S.S.G. § 2B1.4, cmt. background (2002)).

In an *en banc* opinion, the Eighth Circuit expressly rejected the same approach to calculating gain in a criminal insider trading case that the defendant intends to assert in this case. Holding that the proper measure of gain under the guideline is the total profit the defendant made from the illegal trade, the *Mooney* court found that the sentencing guideline for insider trading does not use a market absorption approach borrowed from civil insider trading cases because "the commentary specifically rejects using victim losses in the calculation." *Id.* at 1098, 1100. The court explained:

> The guideline employs the concept of gain resulting from the offense as an alternative measure of loss because of the difficulty of ascertaining the victims and their losses for such offenses. [citation omitted] It thus rejects the kind of remedy used in [*SEC v.*] *MacDonald* and the civil securities laws which are based on victim losses rather than the defendant's gain.

Id. at 1100.

Applying § 2F1.2, the Second Circuit also upheld an insider trading sentence based on calculating gain as equal to the total profits the defendant and his tippees made from illegal sales. *United States v. Cusimano*, 123 F.3d 83 (2d Cir. 1997). Similarly, in *United States v. Cherif*, the Seventh Circuit applied the insider trading guideline gain analysis even though the defendant was convicted of mail and wire fraud because "his conduct involved 'misuse of inside information for personal gain,' akin to insider trading." 943 F.2d 692, 702 (7th Cir. 1991) (quoting U.S.S.G. § 2F1.2, cmt. background). The Seventh Circuit explained that "it was appropriate to use [the defendant]'s gain" because the loss was difficult to quantify. *Id.* at 703. "The whole point of § 2F1.2 is to allow the court to place a monetary value on losses that are hard to identify. . . . To disregard the gains [the defendant] made from his scheme would be to disregard an essential part of his scheme and underestimate the seriousness of [the defendant]'s crime." *Id.*

Simply put, the defendant's approach ignores the directive of the Sentencing Guidelines. If the Sentencing Commission intended insider trading sentences to be determined by estimating victim losses, it would not have promulgated a separate guideline section for such offenses. Rather, the Commission would have relied on the loss approach in the general fraud guideline – § 2F1.1. The market absorption approach is borrowed from civil cases that are intended to be remedial not punitive. By promulgating a separate guideline for insider trading offenses, the Sentencing Commission directed courts to use the defendant's gain as the measure of the severity of

the offense not a speculative estimate of victim losses. Therefore, the offense level is calculated by the gain – that is the total increase in value – that the defendant realized from his illegal stock trades.

a. Defendant Had to Abstain from Trading Because He Chose to Not Disclose

The gain approach in the guidelines makes sense in this case because had the defendant not criminally violated the securities laws, he would have made no profit. The law is clear that because the defendant was in possession of material nonpublic information about the financial condition of Qwest, he had a duty to disclose or abstain. As the Supreme Court explained in *United States v. O'Hagan*, a relationship of trust and confidence exists between shareholders of a corporation and insiders who have obtained confidential information because of their position in the corporation. 521 U.S. 642, 651-52 (1997). That relationship "gives rise to a duty to disclose or abstain from trading because of the necessity of preventing a corporate insider from taking unfair advantage of uninformed stockholders." *Id.* at 652 (internal citations and quotations omitted). *See also, Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 179 (2d Cir. 2001) ("Any insider 'in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed") (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968) (en banc)); *Shaw v. Digital*

Equip. Corp., 82 F.3d 1194, 1203-04 (1st Cir. 1996) (explaining that the primary rationale for the disclose or abstain rule is to prohibit inside traders from exploiting their informational advantage to profit at the expense of investors); *Simon v. American Power Conversion Corp.*, 945 F.Supp. 416, 424 (D.R.I. 1996) ("One instance where such a duty to disclose arises is where a corporate insider trades on confidential information.") (citing *Chiarella v. United States*, 445 U.S. 222, 225-30 (1980)).

The evidence at trial clearly established that:

- it was the defendant who set the unrealistic growth targets to inflate Qwest's stock price;
- it was the defendant who controlled what information was disclosed to the public; and
- it was the defendant who prevented the disclosure of adverse information because he knew it was important to investors and would cause Qwest's stock price to drop if disclosed.

Because the defendant, the CEO of the company, chose not to disclose the material adverse information during the April 24, 2001 earnings call and earnings release, it was illegal for him to sell **any** stock. Therefore, 100% of his profits from the illegal sales he made between April 26th and May 29th, 2001 represent "the total increase in value realized."

b. Defendant Would Not Have Sold if He Disclosed

Another problem with the defendant's speculative estimate is that, as a practical matter, the defendant would not have sold 1.33 million shares of Qwest stock in April and

May 2001 if the adverse information had been disclosed. If the defendant dumped his stock on the heels of such negative announcements, Qwest stock would have cratered, causing severe damage to the defendant's remaining holdings and his credibility and exposing him personally to an inevitable avalanche of private lawsuits. Evidence at trial showed that: 1) the defendant knew how sensitive the market was to his stock sales, and 2) after the inside information at issue in this case was finally made public, he did not sell any more stock even though he had millions of vested options. If the defendant had disclosed the material adverse information about Qwest's financial condition during the April 24, 2001 earnings call, he could not have – as a practical matter – started dumping his stock when the trading window opened two days later even though he may not have been legally prohibited from doing so. Accordingly, his gain from his illegal sales was his total profit.

The evidence at trial demonstrated that investors were sensitive to and closely followed the defendant's sales of Qwest stock as an indication of the financial health of the company. Industry analysts and institutional investors questioned the defendant and Qwest's Investor Relations Department when he did sell Qwest stock. *See, e.g.*, Tr. at 293-94 (Wolfe). The defendant was well aware of the investor crisis that would have been created if he started dumping huge amounts of stock immediately after he made negative announcements and while the stock price was in a sharp decline.

In fact, the evidence at trial demonstrated that had the adverse information been disclosed in April, the defendant would not have sold large quantities of stock following the disclosure. After the inside information at issue in this case started trickling out during the summer and fall of 2001, the defendant did not sell any more stock even though he had millions of vested, in-the-money options.[4] During that time: 1) Qwest's stock price was falling rapidly, 2) investors were concerned about how Qwest had made its numbers in the past and whether it would make its numbers in the future, 3) the defendant personally and the company generally was losing credibility with the investor community, and 4) internally Qwest was struggling to mitigate the crisis and minimize the impact on the stock price. If the defendant started selling large quantities of stock during this period, the investor crisis that Qwest was in the midst of would have escalated.

Also, the defendant intentionally disclosed the inside information in a slow trickle, not on any single date. The inside information the defendant had in April 2001 was not fully disclosed to the market prior to Qwest's earnings release for the full year 2001 which occurred on January 29, 2002. Qwest stock closed at $10.75/share the next day. Shortly thereafter, even the defendant's $5.50 options were "under water."

[4]Defense counsel repeatedly argued this point at trial.

c. Civil Damages Remedy not Applicable in Criminal Sentencing

Criminal punishment is motivated by different principles and serves different goals that civil remedies. As the Eighth Circuit noted in *Mooney*, the market absorption theory of recovery is borrowed from civil cases and "has been characterized as solely remedial in nature in contrast to criminal punishment." 425 F.3d at 1098 (citing *SEC v. MacDonald*, 699 F.2d 47, 54 (1st Cir. 1983) ("Disgorgement is remedial and not punitive.") and *United States v. Perry* 152 F.3d 900, 903-04 (8th Cir. 1998)). In civil cases, the purpose of the remedy is not to punish the wrongdoer or to provide deterrence. *See SEC v. Bilzerian*, 814 F. Supp. 116, 120 (D.D.C. 1993). Even in civil litigation there are differing methodologies: private plaintiffs must show losses whereas the Securities and Exchange Commission can seek disgorgement.

Criminal sentencing, on the other hand, has much broader goals. The goals of the Sentencing Guidelines include the need to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the crime, and deter criminal conduct generally. There are good policy reasons for the Guideline's approach of using the defendant's profits as the measure the severity of the offense. It provides a brightline rule and eliminates the need for extensive fact-finding applying imprecise standards which are inappropriate in the criminal context. *Mooney,* at 1101. "The focus in [the guideline] on the increase in value realized by the defendant's trades provides a simple, accurate, and

predictable rule for judges to apply and follows the congressional mandate that sentences reflect the seriousness of the offense." *Id.* (citing 18 U.S.C. § 3553 and 28 U.S.C. § 991).

In calculating the defendant's gain under the Guidelines, it is inappropriate to use a speculative analysis such as the one proposed by the defendant. "[T]he Guidelines do not determine a wrongdoer's gain based on what-if scenarios. Imagine a bank robber who argues that, had he known about the presence of a guard, he would have robbed a grocery store instead and thus caused a lower loss." *United States v. Krilich*, 257 F.3d 689, 692 (7th Cir. 2001). Here, the defendant knew full well what his profit was when he committed the crime because he knew the option price and the sales price. He did not hire an economist to speculate about the value of the information he had not told investors. His offense level should not depend on some entirely speculative analysis the results of which he could not possibly even have guessed at when he committed the crime.

d. Defendant's Calculation Grossly Understates the Harm

Even if the Sentencing Guidelines used victim losses to measure the severity of the offense, the defendant's methodology grossly understates the harm caused by the defendant's conduct. Presumably, the defendant's methodology will come up with an estimate of the amount Qwest stock was inflated by lack of disclosure of the inside information and then multiply that amount by the number of shares he sold in April and

May based on the counts of conviction. Not only is this type of analysis contrary to the Guidelines and speculative, it ignores much of the harm caused by the offense.

In this case, the defendant controlled the information and exploited it to benefit himself at the expense of other investors – not just investors who bought the stock that he sold. First, the defendant, over the objections of his executive team, caused Qwest stock to be over-priced by setting unrealistic growth projections. Second, the defendant, ignoring the urging of the head of Investor Relations, made the decision to keep highly adverse information from the public. Therefore, **all** investors who purchased Qwest stock during the relevant time period or decided not to sell were harmed – not just those investors who bought the 1.33 million shares of stock he sold.

The defendant's conduct caused additional harm as well. Regardless of when they purchased shares, all Qwest shareholders during 2001 were harmed because the market generally lost faith in the defendant after they realized he kept material adverse information from the public. *See generally,* Tr. 2282-97 (Khemka). As a result, Qwest stock price suffered long after the nonpublic information was disclosed. Similarly, Qwest suffered reputation injury, civil liability, and litigation expense connected primarily to the defendant's refusal to disclose the magnitude of Qwest's one-time revenue business and the awareness that the one-time sources of revenue were drying up.

Finally, the capital markets were harmed by the defendant's offense. Illegal insider trading erodes investor confidence and undermines the integrity of the market.

Common investors do not want to invest in a rigged game. As a result, insider trading causes less investment in capital markets.

2. Defendant is Not Entitled to an Offset for Taxes

Remarkably, the defendant also claims that the calculation of his gain from his illegal stock sales should be reduced by the amount of income taxes withheld. The defendant cites no authority to support this novel position. The defendant is not entitled to offset "the total increase in value realized through" his illegal stock sales by income tax withholdings. U.S.S.G. § 2F1.2, cmt. background. Of course, the amount of *estimated* income tax that Qwest withheld on the defendant's illegal proceeds is not the same as what tax he actually paid when he filed his tax returns for 2001.

In evaluating the seriousness of the offense, it would be improper to reduce the defendant's gain by income tax he paid on the gain. Doing so could skew the calculation based upon income tax factors that have nothing to do with the offense – such as the type of income, the defendant's tax bracket, his state of residence, his charitable giving, his number of dependents, his other income, and economic losses in the year, and so on. It would introduce needless confusion from irrelevant issues – confusion that was clearly not intended by the Sentencing Commission. "[A] deduction for taxes could create unwarranted complexities . . . . The amount of taxes that a person pays depends upon the nature of deductions taken by the taxpayer." *United States v. DeFries*, 129 F.3d 1293, 1314 (D.C. Cir. 1997) (in the context of criminal forfeiture).

Finally, the Commentary to §2F1.2 states that gain is "the **total** increase in value realized through trading in securities by the defendant." U.S.S.G. § 2F1.2, cmt. background (2000) (emphasis added). Inclusion of the word "total" indicates that the Sentencing Commission intended use of the gross amount rather than allowing deductions for expenses or income taxes resulting from the gain.

III. AGGRAVATING FACTORS SUPPORTING A SENTENCE AT THE TOP OF THE GUIDELINES

A. The Defendant Should Be Sentenced To The Top Of The Guideline Range

The United States requests that the Court impose a sentence at the top of the guideline range.[5] Should the Court agree with the United States' calculation of the applicable guideline range, the United States requests that the Court sentence the defendant to 87 months incarceration followed by three years of supervised release, and the maximum fine of $19 million. Any less severe sentence would fail "to provide just punishment, to promote respect for the law, and to protect the public." *See United States v. Dalton*, 409 F.3d 1247, 1253-54 (10th Cir. 2005).

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[5]The sentencing guidelines are not mandatory, but rather, serve as a non-binding factor. *United States v. Ramirez*, 479 F.3d 1229, 1256 (10th Cir. 2007) (applying *United States v. Booker*, 543 U.S. 220 (2005)). Sentencing decisions that enhance the recommended guideline range under Chapter 5 of the Sentencing Guidelines are referred to as "departures." *United States v. Cage*, 451 F.3d 585, 591 n.2 (10th Cir. 2006). In contrast, "Courts now frequently refer to sentencing decisions that are outside the Guideline ranges under the district court's discretion in applying the § 3553(a) factors as 'variances.'" *Id.* The United States uses that terminology in addressing the application of the Guidelines herein.

A review of the factors to be considered in imposing a sentence pursuant to 18 U.S.C. § 3553(a) supports a sentence at the top end of that range in this case. First, the extreme "nature and circumstances" surrounding the defendant's improper trades require a sentence at the top of the guideline range. *See* 18 U.S.C. § 3553(a)(1). The evidence at trial established that the defendant constructed the very situation that enabled him to take advantage of important information that he knew investors wanted to know. The defendant set the wholly unrealistic targets for 2001. He refused to lower the targets even after a series of meetings in the fall of 2000 with the business unit heads who told him that they had no plan to attain their assigned targets. He ignored the warnings of his Chief Operating Officer that Qwest would need to grow its recurring revenue at a rate significantly higher than it had ever grown it at before. Similarly, he ignored the warnings of his Chief Financial Officer who told him in late December or early January that the 2001 revenue target contained $1 billion in revenue that was at "risk" (which she described as unlikely revenue). The defendant refused to lower Qwest's targets even after his business unit heads informed him throughout early 2001 that the shift from non-recurring to recurring revenue was not occurring at the rate required to enable Qwest to hit its targets for the third and fourth quarter of 2001.

Moreover, the defendant alone controlled the message to existing and potential investors. The defendant chose not to tell analysts that non-recurring revenue was fueling a significant portion of Qwest's growth. Specifically, he instructed the head of investor

relations, Lee Wolfe, not to disclose Qwest's reliance on non-recurring revenue because he knew that it would cause the stock price to go down.

Within the first four trading days of telling investors he had seen "nothing that would dissuade him" from Qwest's publicly-stated targets, the defendant sold $34 million in Qwest stock. This statement was directly contradicted by Mr. Casey's warning just days earlier that his business unit had "drained the pond" on the one-timers and that they would not be able to close enough one-timers to make the projections for the third and fourth quarter. Moreover, the defendant sold his stock through 19 separate sales over a six week period. The sales were not a panicked response over bad news, but rather a calculated scheme to unload as much stock as possible while misleading the markets about Qwest's financial future.

Similarly, the "history and characteristics of the defendant" warrant a sentence at the top end of the guideline range. *See* 18 U.S.C. § 3553(a)(1). Here, the defendant had the benefit of years of graduate level education (obtaining two masters degrees) and had worked at the highest levels of the telecommunications industry for decades. He was the top ranking officer at Qwest where he served as Chief Executive Officer and Chairman of the Board of Directors. No one knew better than the defendant how important the information was that he refused to share with investors. In summary, the defendant *alone* created the environment that enabled him to exploit the fact the he knew in April and May

of 2001 that Qwest likely was not going to hit its targets for the third and fourth quarters of 2001.

Similarly, a sentence at the top of the guidelines range is required to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). The defendant's sales of $52 million in Qwest stock in April and May 2001 lead to one of the largest insider trading verdicts in history. Additionally, the offense is particularly serious in light of the defendant's position at Qwest as the Chief Executive Officer and Chairman of the Board.

A sentence at the top of the guidelines range is required "to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Any lesser sentence would send a message of tolerance of the egregious behavior proven at trial. The need to deter other corporate insiders from taking advantage of the material non-public information they receive as a result of their positions within publicly traded companies is critical.

The United States acknowledges that the defendant is unlikely to commit additional crimes. *See* 18 U.S.C. § 3553(a)(2)(C). Similarly, the defendant is not in need of vocational training, medical care, or other correctional treatment. *See* 18 U.S.C. § 3553(a)(2)(D). None of the policy statements warrant a sentence outside of the guideline ranges. *See* 18 U.S.C. § 3553(a)(5).

Finally, a sentence at the top of the guideline range will not impose "unwarranted sentence disparities among defendants with similar records who have been found guilty of

similar conduct." *See* 18 U.S.C. § 3553(a)(6). The only other Qwest employee convicted of insider trading is the former Chief Financial Officer, Robin Szeliga. PSR at ¶ 37. She exercised options and sold 10,000 shares of Qwest stock on or about April 30, 2001 at $41 per share and netted a pre-tax gain of $125,000. PSR at ¶ 49. She received a sentence of two years probation, six months home detention, a $250,000 fine, and $125,000 restitution. PSR at ¶ 37. Her guideline range of imprisonment was 15 to 21 months. *Id.* Ms. Szeliga received a downward departure for providing substantial assistance to the government pursuant to §5K1.1. The Court also departed downward based on a finding of aberrant behavior and unwarranted sentencing disparity pursuant to 18 U.S.C. § 3553(a)(6). PSR at ¶ 37.

The defendant's position is dramatically different from Ms. Szeliga's and thus warrants a significantly harsher sentence. First, as described above, the defendant controlled both the unrealistic targets as well as the flow of information to existing and potential investors. Ms. Szeliga did not. In fact, Ms. Szeliga on several occasions warned the defendant of the billion dollars in "risk" in the 2001 targets. The defendant refused to decrease the targets in spite of that warning. Second, the magnitude of the defendant's sales dwarfs Ms. Szeliga's sales. The defendant sold $52 million in Qwest stock while Ms. Szeliga sold approximately $410,000 in Qwest stock. No other defendants were convicted of insider trading and thus were not convicted of "similar conduct." *See* 18 U.S.C. § 3553(a)(6).

B. No Downward Departure Is Warranted

While it does not advocate for a downward departure, the PSR identified two "factors that may warrant departure from the advisory guideline range." Those potential factors are the defendant's purported "extraordinary" family responsibilities (governed by § 5H1.6) and history of "prior 'good works.'" (governed by § 5H1.11). PSR at ¶ 199-200. The defendant bears the burden of proving entitlement to a downward departure. *United States v. Sierra-Castillo*, 405 F.3d 932, 938 (10th Cir. 2005). While the defendant has not yet requested a downward departure, the United States will oppose any request for a departure below the low end of the guideline range should the defendant choose to make such a request on any basis. Neither factor identified in the PSR provides a basis for rendering a sentence at or below the low end of the guidelines.

Family circumstances are a discouraged factor under the guidelines. *See United States v. McClatchey* , 316 F.3d 1122, 1130-31(10th Cir. 2005) (reversing the district court's downward departure based on defendant father's purported need to care for 22-year old son suffering from "severe psychological disabilities"). In fact, § 5H1.6 specifically states that "[f]amily ties and responsibilities and community ties are *not ordinarily relevant* in determining whether a sentence should be outside the applicable guideline range." (emphasis added). "A departure based on the need to care for a family member is warranted only where the 'defendant [is] the only individual able to provide the assistance the family member needs.'" *United States v. Sierra-Castillo*, 405 F.3d 932,

938 (10th Cir. 2005) (quoting *United States v. Reyes-Rodriguez*, 344 F.3d 1071, 1074-75 (10th Cir. 2003)). Here, the defendant fails to meet his burden as the defendant's wife has the time and the resources to take care of other family members. While Dr. Hammer certainly paints an unfortunate picture of David Nacchio's prognosis, it simply does not justify absolving the defendant from his crimes and allowing him to avoid his just punishment. *McClatchy*, 316 F.3d at 1133 ("sympathy for [defendant's] son cannot justify a reduction in the penalty [defendant] would otherwise be required to suffer for his criminal conduct").

Similarly, the defendant's charitable works do not support a departure below the low end of the guidelines. Charitable works "are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." § 5H1.11; *see United States v. Repking*, 467 F.3d 1091, 1095 (7th Cir. 2006) ("charitable works must be exceptional before they will support a more-lenient sentence"). "'It is usual and ordinary, in the prosecution of similar white-collar crimes involving high ranking corporate executives . . . to find that a defendant was involved as a leader in community charities, civic organizations and church efforts." *Id.* (quoting *United States v. Cooper*, 394 F.3d 172, 176-77 (3d Cir. 2005)). Here, the defendant's charitable works are not "extraordinary," but rather are "entirely consistent" with Qwest's business development goals. *Repking*, 467 F.3d at 1095-96.

Respectfully submitted this 6th day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6 th day of July, 2007, I electronically filed the foregoing **UNITED STATES' SENTENCING STATEMENT** 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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