IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

MOTION BY JOSEPH P. NACCHIO
FOR BAIL PENDING APPEAL

This Court is scheduled to sentence Defendant Joseph P. Nacchio ("Nacchio") on July 27, 2007. Nacchio respectfully moves for bail pending appeal and submits this memorandum of law in support of his motion for bail pending appeal pursuant to 18 U.S.C. § 3143(b).

SUMMARY OF ARGUMENT

A defendant is entitled to bail pending appeal if he is not a flight or safety risk, the appeal is not for purposes of delay, and he will raise a "substantial question" on appeal which, if decided in his favor, will likely result in reversal of the conviction or a new trial. 18 U.S.C. § 3143(b)(B). The Court has already recognized that Nacchio is not a flight risk or danger to the community. Tr. of Verdict at 10-11. His appeal is not for purposes of delay. The standards for the third requirement under § 3143(b) are well established. "First, the court must decide that the appeal raises a 'substantial' question of law or fact. Second, 'if that substantial question is determined favorably to defendant on appeal, the decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.'" *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (citation omitted). A "'"substantial question" is one of more substance than would be necessary to a finding that it was not frivolous. It is a "close" question or one that very well could be decided the other way.'" *Id.* (citation omitted). And a decision on that substantial question is "likely" to result in reversal or a new trial if "'the question is so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial.'" *Id.* at 953 (citation omitted). This standard does not require the Court to certify that Nacchio is likely to prevail on appeal. *Id.* At least four issues meet this standard.

First, we respectfully submit that there are quite substantial issues for appeal surrounding the jury instructions on materiality, scienter, and good faith. The analysis of those instructions must begin with the very unusual nature of this criminal prosecution. The Government did not contend that Nacchio had material inside information about already pending merger negotiations or some other present *fact* about Qwest's business. The supposedly material information at issue in this case was forward-looking and predictive on both ends: The government's theory was that in March and April of 2001 Nacchio was hearing forward-looking predictions from some of his subordinates about internal targets for year-end 2001 earnings (still eight months away) that should have convinced him that the publicly disclosed 2001 earnings estimates were materially misleading, either because they could not be achieved or because they did not separately disclose Qwest's reliance on IRU revenue in the prediction.

Against that backdrop, Nacchio asked that the jury be instructed on the various specific rules that courts have developed to guide materiality determinations in the particular context of predictive, forward-looking statements. In *Basic Inc. v. Levinson*, the Supreme Court recognized that when information concerns events that are "contingent or speculative in nature," it is particularly "difficult to ascertain whether the 'reasonable investor' would have considered the omitted information significant at the time." 485 U.S. 224, 232 (1988). The courts, the SEC, and Congress have all recognized that in the context of forward-looking predictions a bare focus on the "importance" of the prediction fails to capture the inherent risks and uncertainty associated with such forecasting, and poses an unacceptable risk that juries will rely on 20/20 hindsight to impose liability under circumstances where there was no material fraud at the time. And so they have developed a variety of doctrines designed to clarify when a forward-looking statement (or forward-looking knowledge) is immaterial as a matter of law, such as the rule that financial predictions are not materially misleading so long as the company believes them in good faith and with a factually reasonable basis, and the rule that limitations and caveats that "bespeak caution" about the reliability of predictions must be considered when assessing their materiality.

This Court declined to give any proposed instructions on materiality as to forward looking statements by Qwest, because it concluded that applying standards established in "misleading statement" cases like *Grossman v. Novell, Inc.*, 120 F.3d 1112 (10th Cir. 1997), would confuse Nacchio's obligation to refrain from insider trading with the precise contours of the company's disclosure obligations. Nacchio has no quarrel with the Court's basic premise that an insider's obligation to refrain from trading and a corporation's duty to disclose may not always be identical. But the "reasonable basis" and "bespeaks caution" doctrines do not address a corporation's interest in avoiding disclosure of "proprietary" information. Tr. 2696-97. The point of those doctrines is that unlike hard facts privately known, forecasts and predictions are inherently limited and uncertain, and that the materiality of such "information" must be assessed differently. The Tenth Circuit's holding in *Grossman* that cautionary qualifying language "cannot be ignored in construing the materiality of optimistic predictions," 120 F.3d at 1121, is therefore highly relevant to evaluating whether Nacchio's "inside" knowledge really was *materially* different from what the market had been told. And the Seventh Circuit's decision in *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509 (7th Cir. 1989), which Nacchio also relied upon for his proposed "reasonable basis" instruction, *was* a trading case, not a disclosure case. Commonwealth Edison was not merely sitting silent; it was actively selling stock after issuing publicly stated financial targets. The Seventh Circuit held that the company need not disclose its internal debates about those publicly stated financial targets until it had reached a certain and definite, and not merely tentative, conclusion that those previously disclosed financial predictions no longer had a factually reasonable basis—*and that it could continue to trade in the meantime*. The fact that in this case the stock was sold by Qwest's CEO rather than the company itself does not alter that analysis.

The distinction this Court drew between Qwest's disclosure obligations and Nacchio's trading obligations was also illusory on these facts. As this Court recognized, the Government's insider trading theory was that by March and April Nacchio knew that the public guidance would be materially misleading to investors unless they were told more concerning the degree of risk in those numbers and the specific revenue mix as between IRU and so-called "recurring" revenue. Tr. 2696. Qwest was not exercising any theoretical right to remain silent; it was actively reaffirming guidance, and doing so would plainly have been securities fraud if the Government's allegations were true. The company's CFO, its audit committee, its General Counsel, and its outside auditor were all therefore confronted with the same questions on which Nacchio's liability for insider trading must turn. All agreed to reaffirm the guidance and none of them took the position at the time that the company had material information that prevented Qwest from reaffirming or required additional disclosures when doing so. A jury simply could not find that Nacchio knew that the undisclosed information was material, or acted with any bad purpose to willfully disregard the law, on the facts of this case.

On these facts, this Court's instruction that the Government need not prove "that Qwest was required to disclose the information at issue," and that "[a] corporation has no general duty to disclose all of its non-public or its proprietary information," Tr. 3172, was inaccurate and could only have confused the jury. In context, that instruction effectively told the jury that Qwest's broader decision not to disclose this information in the spring of 2001 had no bearing on a core question it had to decide: whether Nacchio *knew* that the inside information he (and the rest of senior management) had was "material" and had to be disclosed before he could trade. The jury was essentially directed to ignore what may have been the best contemporaneous evidence of Nacchio's state of mind concerning the materiality of the information at issue.

All of these harms were compounded by serious flaws in the "good faith" instruction, which explicitly invited the jury to find bad faith even if Nacchio honestly held the belief that he possessed no material inside information, if in some other context he "knowingly employed" some *other* deceptive device. The government made ample use of this flawed instruction by inviting the jury in closing arguments to find bad faith on the basis of Nacchio's alleged use of a backdated document that had no relationship to the trades at issue here. Tr. 3127.

Second, the Tenth Circuit could certainly conclude that this Court's exclusion of defendant's expert on materiality issues, Professor Daniel Fischel, was reversible error. Counsel for defendant are aware of no case in which a court has ever upheld the exclusion of a defense expert on the ground that the Rule 16 notice did not fully establish the reliability of the expert's testimony under Federal Rule of Evidence 702. The purpose of the Rule 16 disclosure is just to put the government on notice of the "general nature" of the expert's testimony; it need not be a preemptive *Daubert* brief, and Tenth Circuit precedent establishes that a district court can abuse its discretion by not holding an evidentiary hearing.

That error presents a substantial issue for appeal. Professor Fischel would have provided the jury with important context about how the market in fact incorporates and responds to earnings estimates and other predictions, and about the significance of revenue mix issues such as the IRU questions that formed a central part of the Government's case. Several courts of appeals have held that matters like these are beyond the common experience of juries and that expert testimony is helpful and appropriate. Fischel's proposed testimony was directly relevant to Nacchio's own state of mind, and "forbidding the jury to consider evidence that might negate willfulness would raise a *serious question* under the Sixth Amendment's jury trial provision." *Cheek v. United States*, 498 U.S. 192, 203 (1991) (emphasis added). This exclusion further prejudiced the defense because the court later allowed analysts called by the government to testify on direct examination about their own view of what sorts of information are important to investors and whether the specific information in question here was material, but then refused to allow Fischel to rebut this testimony.

Third, there is a substantial question for appeal concerning whether the evidence was sufficient to permit a reasonable to jury to find guilt on every element of the offense beyond a reasonable doubt. The Government's evidence fell short on both objective materiality and state of mind. Objective materiality was not proven because the alleged knowledge of excessive risk to the public projections was still speculative at the time of the trades, and disclosure of what Nacchio knew would not have significantly altered the total mix of information already available to the market. And the jury could not reasonably infer that Nacchio knew the information in question was material, when the company's lawyers and/or auditors apparently concluded otherwise by (1) approving IRU disclosure statements that did not provide the revenue breakdown, (2) permitting Qwest to reaffirm the guidance without additional disclosures, and (3) electing not to close the trading windows. Nor could they infer beyond a reasonable doubt that he decided to sell the shares at issue here because of that information. Nacchio announced his intention to make these very sales six months earlier and before the time he is even alleged to have acquired inside information. Courts have repeatedly refused to allow juries to find scienter on the basis of circumstantial evidence, even in civil cases governed by a lower scienter standard, unless the violation of the law (defined here by the materiality of the information Nacchio had) is so obvious that no reasonable person could have missed it. There is far too much evidence of good faith and uncertainty about the underlying law here to permit a criminal conviction.

Fourth, there is a substantial question whether this Court erred in its admissibility determinations under Section 6(a) of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, § 6(a). Despite this Court's efforts to manage the difficulties posed by a criminal case that implicates classified information, the rulings effectively deprived the defendant of the opportunity to provide the jury with information that bore directly on his good faith and could have led to an acquittal.

I. WHETHER THE JURY WAS PROPERLY INSTRUCTED PRESENTS A SUBSTANTIAL ISSUE FOR APPEAL

The Court of Appeals reviews a trial court's instructions *de novo* to determine whether, taken as a whole, the instructions "correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards." *United States v. Bowen*, 437 F.3d 1009, 1016 (10th Cir. 2006). Although the trial court's decision whether to give a particular jury instruction is reviewed for abuse of discretion, *United States v. Haslip*, 160 F.3d 649, 653 (10th Cir. 1998), the court must instruct the jury on the defendant's theory of the case, and failure to do so can constitute reversible error, *United States v. Butler*, 485 F.3d 569, 571-72 (10th Cir. 2007). Reversal is required if the court has "substantial doubt the jury instructions properly guided the jury in its deliberations *and* … find[s] prejudice." *Haslip*, 160 F.3d at 654.

This is a rare, if not unique, criminal prosecution. Counsel for Nacchio is not aware of any prior criminal insider trading case where the defendant was charged with trading on supposed "knowledge" that the company would not meet long-range projections like the revenue projections here.[1] The Tenth Circuit has certainly never been confronted with such a case. And this Court already appeared to recognize that there were substantial questions of law at issue here. When this Court rejected defendant's argument that civil cases like *Grossman* on forward-

[1] Although the prosecution in *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998), was based in part on an insider's knowledge about earnings projections, there was also evidence that the insider knew of an impending negative announcement by the company. *See id.* at 1053 & n.2.

looking statements governed the jury instructions on materiality in this context as well, it held that "[t]he cases that the defendant relies on out of the Tenth Circuit are all inconsistent … with Supreme Court cases," and expressly acknowledged that "that's why we have appellate courts, is to figure that one out if it's necessary to figure out." Tr. 2694-95.

A. There Is A Substantial Question Whether The Materiality Instructions, Particularly In Light Of The Failure To Instruct On "Reasonable Basis" and "Bespeaks Caution," Correctly Stated The Applicable Law

The Tenth Circuit and other courts have held that predictive information is immaterial *as a matter of law* if it amounts only to a vague statement of optimism, *see, e.g.*, *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005), or is accompanied by appropriate cautionary language, *see, e.g., In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 371 (3d Cir. 1993). *See generally Grossman v. Novell, Inc.*, 120 F.3d 1112 (10th Cir. 1997); *see also Garcia v. Cordova*, 930 F.2d 826, 830 (10th Cir. 1991) (holding "soft" information "'that inherently involves some subjective analysis or extrapolation'" immaterial as a matter of law because it was "too speculative or unreliable") (citation omitted). And because predictive statements, unlike a verifiable historical fact, inherently involve some uncertain judgment about the future in light of present circumstances, courts have recognized that forward-looking statements are materially misleading only if they were "issued without good faith or lacked a reasonable basis when made." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1277 (D.C. Cir. 1994); *see also Grassi v. Info. Res., Inc.*, 63 F.3d 596, 599 (7th Cir. 1995). The SEC has promulgated binding regulations under the Exchange Act providing that a "forward-looking statement," including a "projection of revenues, income (loss), earnings (loss), … or other financial items," cannot form the basis of a securities fraud case "unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith." Rule 3b-6, 17 C.F.R. § 240.3b-6 (2005).[2] The point of that rule is that investors understand the limits of predictive information, and that such information is therefore *materially* misleading only if certain implicit representations by the speaker (that he at least subjectively believes the projection and has a reasonable factual basis for doing so) are out-and-out false.

Of course the requirements for proof of materiality are not relaxed in a criminal case. Indeed, "[t]he *same standard* for materiality is used in insider trading cases as in cases alleging a fraudulent failure to disclose on the part of a company." *SEC v. Hoover*, 903 F. Supp. 1135, 1148 (S.D. Tex. 1995) (emphasis added); *see also United States v. Smith*, 155 F.3d 1051, 1065 (9th Cir. 1998) ("The standard for materiality is a constant (at least for Rule 10b-5 purposes); it does not vary 'depending on who brings the action or whether insiders are alleged to have profited.'" (quoting *Basic*, 485 U.S. at 240 n.18)); *cf.* Tr. 2694 (distinguishing Tenth Circuit decisions on "soft" information because they were civil "statement" cases). That relationship between civil and criminal materiality makes perfect sense. First, there is but one statutory standard no matter whether the action is civil or criminal. (The sole difference is the burden of proof required to establish a violation of the statutory prohibition.) And second, the theory of the Government's criminal case against Nacchio is that he defrauded the investors by selling when he somehow knew the company's predictive projections to be materially misleading. If neither the public predictive information nor the private predictive information he retained could form

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[2] The rule is phrased in terms that such predictions "shall be deemed not to be a fraudulent statement," but it also contains a broad definition of "fraudulent statement" that, as the Seventh Circuit explained when interpreting the essentially identical Rule 175 under the '33 Act, "turns out to be shorthand for all of the bases of liability in the ['34] Act and its implementing rules." *See Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509 (7th Cir. 1989).

the basis of a civil fraud claim, then those investors could not be defrauded.

In *Grossman*, the plaintiffs alleged that the defendant company had made a number of material misstatements and omissions about the likely effect of an impending merger on the company. 120 F.3d at 1116. The Tenth Circuit found that the defendant's statements and omissions fell into two categories, and that none of the statements violated the statute. In the first category were "vague statements of corporate optimism" and "mere puffing." *Id.* at 1119. The second category consisted of statements and omissions that were not actionable under the "bespeaks caution" doctrine. Under this doctrine, forward-looking representations are deemed, as a matter of law, not materially misleading when accompanied by "sufficiently specific risk disclosures or other cautionary statements." *Id.* at 1120. The Tenth Circuit expressly "h[e]ld that the 'bespeaks caution' doctrine, as articulated in this opinion, is a valid defense to a securities fraud claim in the Tenth Circuit." *Id.* at 1121. It also observed that the Supreme Court has held that "a statement as to beliefs or opinions … may be actionable if the opinion is known by the speaker at the time it is expressed to be untrue or to have no *reasonable basis* in fact." *Id.* at 1119 n.6 (emphasis added) (citing *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1093-94 (1991)).

This Court was reluctant to equate false statement principles with the principles governing insider trading, but Nacchio's argument was far more limited. Given the theory of the indictment in this particular case, the cautions expressed in *Grossman* about the materiality of forward-looking statements were directly relevant to this prosecution and should have been considered by the jury. The language of Nacchio's proposed instructions on materiality[3] was drawn directly from *Grossman* and *Wielgos.* The most important of these, Instruction No. 9, would have instructed the jury in part as follows:

> A forward-looking statement … cannot be considered by you to be "material" under the law unless it is shown that the statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith. Forward-looking statements need not be correct; it is enough that they have a reasonable basis.
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> …
>
> In making forward-looking statements of future revenue, Qwest and Mr. Nacchio were not required to reveal their data, assumptions, and methods. Nor were they required to reveal the projections generated internally.

Ex. 7 to Joint Motion to Add to the Docket Certain Materials (May 31, 2007), Nacchio's Add'l Req. to Charge at 11-13 [Doc. No. 424]. Instruction No. 10 would have added, in part, an instruction regarding the significance of cautionary language:

> When reasonable forecasts, opinions, or projections in a disclosure statement are accompanied by warnings and cautionary language which provide the investing public with sufficiently specific risk disclosures, forward-looking statements cannot be material.

Id. at 14. The Court denied both instructions. Tr. 2676-77.

Nacchio's proposed instructions were faithful to the "bespeaks caution" doctrine, which this circuit in *Grossman* explicitly adopted as a defense to a securities fraud prosecution, and to the other relevant cases, in several critical respects:

First, his proposed instruction would have properly instructed the jury that the reaffirmed public guidance about 2001 revenues and earnings did not materially mislead any investor, as a matter of law, even if there were internal doubts or other predictions inconsistent with the public numbers, so long as the projections continued to have a good-faith reasonable basis. In *Wielgos*,

[3] *See* Nacchio Additional Requests to Charge, at 11-16 (Instructions No. 9 and 10).

the Seventh Circuit considered a suit against a company selling stock at a time that it was internally reevaluating its public financial projections. The plaintiffs argued that the company had an obligation to disclose its preliminary doubts and discussions about the previously disclosed projections, or refrain from selling securities. The Seventh Circuit disagreed, citing both its own prior cases and Rule 175 under the Securities Act of 1933, as amended, which provides a safe harbor from liability for projections so long as the projections are made in good faith and have a reasonable basis.[4] Put differently, the internal budgeting debates did not qualify as information *materially* different from what had been publicly disclosed to the market until they went beyond merely "tentative internal estimates" and became "so certain that they reveal the published figures as materially misleading." 892 F.2d at 516.[5] Because Commonwealth Edison still had a reasonable good faith basis for its projections, internal doubts or debates did not have to be disclosed, *and the company could continue to sell*. The court explained that "[a]ny other position would mean that once the annual cycle of estimation begins, a firm must cease selling stock until it has resolved internal debates and is ready with a new projection. Yet because large firms are eternally in the process of generating and revising estimates—they may have large staffs devoted to nothing else—a demand for revelation or delay would be equivalent to a bar on the use of projections if the firm wants to raise new capital." 892 F.2d at 516. The

[4] 17 C.F.R. § 230.175. *Wielgos* arose under the '33 Act; in the present context the relevant rule would be the essentially identical Exchange Act Rule 3b-6.

[5] Rule 175 is not phrased explicitly in materiality terms, but materiality principles are what make it consistent with the statute. In addition, the proposing and adopting releases for Rules 175 and 3b-6 make clear that they were adopted to restate and clarify principles in case law regarding when a forward-looking statement can be considered materially misleading. *See* SEC Release No. 33-5993, 43 Fed. Reg. 53251, 53251 & n.3 (1978); *see, e.g.*, *Marx v. Computer Sciences Corp.,* 507 F.2d 485, 489-90 (9th Cir. 1974).

Tenth Circuit similarly endorsed the "reasonable basis in fact" standard in *Grossman*, 120 F.3d at 1119 n.6.

This Court refused to give the requested instructions on the ground that a company may have no duty to disclose even if insiders have material inside information that precludes them from trading. As *Wielgos* makes clear, however, a good faith reasonable basis for continuing to believe in published financial projections does not just entitle the company to remain silent. It entitles the company *to trade*. The relevant SEC rules do not distinguish between liability for the company and liability for individuals, and any such distinction would be untenable.[6] *See* 18 Donald C. Langevoort, *Insider Trading: Regulation, Enforcement, and Prevention* § 3.6 (2007) ("[A] strong line of case dicta strongly endorses the application of the abstain or disclose rule to corporate issuers, whether buying or selling their shares ….") (footnote omitted).[7] The Seventh Circuit that decided *Wielgos* obviously would not have concluded that, although the corporation could sell stock, the CEO could not under the same facts and circumstances. Qwest's publicly stated financial targets were either materially deficient or they were not. If they were not, as the government repeatedly argued (*see, e.g.*, Tr. 9, 22), then anyone could enter the market and trade. Any other rule would be profoundly disruptive and unpredictable. In any event, the jury

[6] Of course, the company's obligations and those of particular insiders may diverge if an individual officer has different information than what can fairly be attributed to the company. But there is no such divergence here. The Government's case that Nacchio had material inside information was based on information available to Qwest executives, including the CFO and General Counsel, with responsibility for ensuring SEC compliance.

[7] Even if *Wielgos* did not explicitly frame the company's obligation as a duty to abstain or disclose, it was nevertheless clear to the court that the company had a duty to disclose all material facts in its registration statement before selling shares to the public. *See Wielgos*, 892 F.2d at 512-13; Securities Act § 11, 15 U.S.C. § 77k. Nacchio's case accordingly cannot be distinguished from *Wielgos* on duty-to-disclose grounds.

was obviously troubled enough to specifically ask for guidance on materiality (Trial Minutes, Apr. 17, 2007) and would undoubtedly have been helped by a full instruction under the principles of *Wielgos* and *Grossman*. The Ninth Circuit's opinion in *United States v. Smith* does not make clear whether the defendant there asked for, or received, such clarifying instructions. It simply rejected his far broader (and incorrect) contention on appeal that a forward-looking prediction can *never* be material, as a matter of law. 155 F.3d at 1064-65. When civil cases involving forward-looking projections reach juries, materiality instructions are tailored to reflect these principles.[8]

Second, the instruction concerning "cautionary statements" would have required the jury to consider cautionary statements accompanying Qwest's prior disclosures in its assessment of what the market already knew. The Tenth Circuit held in *Grossman* that "[f]orward-looking representations are … immaterial when the defendant has provided the investing public with sufficiently specific risk disclosures or other cautionary statements concerning the subject matter of the statements at issue to nullify any potentially misleading effect." 120 F.3d at 1120. The Tenth Circuit held that such cautions "*cannot be ignored* in construing the materiality of

[8] *See, e.g.*, *Schwartz v. Sys. Software Assocs., Inc.*, 32 F.3d 284, 289 (7th Cir. 1994) (jury instructed that there is no liability if it finds the defendant's statement had "a reasonable basis" and "was made in good faith"); Eleventh Circuit Pattern Jury Instructions (Civil Cases), Instruction 4.2 (2005) ("If, at the time the predictions, expressions of opinion or projections were made, and the speaker actually believed them or there was a reasonable basis for making them, then the statements are not materially misleading statements of fact."); *Modern Federal Jury Instructions – Civil, Ninth Circuit* ¶ 21.2 cmt. (2006) (materiality instruction "should be adjusted for cases involving … statements of reasons, opinions or beliefs" and "when the alleged fraud concerns certain forward-looking statements the jury may be compelled to examine whether the statement falls within the safe harbor and therefore does not qualify as a fraudulent statement under the Act").

optimistic predictions," and that therefore "the 'bespeaks caution' doctrine, as articulated in this opinion, *is a valid defense* to a securities fraud claim in the Tenth Circuit." *Id.* at 1121 (emphasis added). Of course an insider trading case like this one *is* a species of securities fraud claim.

Without *Grossman*'s qualifications, the bare-bones materiality instruction as given was inadequate to "guide[] the jury in its deliberations." *Haslip*, 160 F.3d at 654. The cautionary language accompanying all of Qwest's public disclosures seriously undermines the government's theory of materiality by making clear that much if not all of the supposedly non-public "risks" to the publicly disclosed projections were in all *material* respects already disclosed to the market. It warned investors that the projections "may differ materially from actual future events or results" and, importantly with regard to the government's theory that the IRU information would have undermined the guidance, expressly identified "changes in demand for [Quest's] products and services" as a risk factor. *See, e.g.*, GX530; A-236; A-251. Even the Government's proposed instruction, which the court refused to give, would at least have instructed the jury to consider whether it was "substantially likely that a reasonable investor would have viewed it *as significantly altering the total mix of information* made available concerning the company." *See* Ex. 3 to Joint Motion to Add to the Docket Certain Materials (May 31, 2007), Gov't Proposed Instr. No. 12 at 19 [Doc. No. 424]. The "bespeaks caution" doctrine is merely a refinement of that "total mix" concept—a refinement that the Tenth Circuit considers important enough to declare that it "is a valid defense" and "cannot be ignored." *Grossman*, 120 F.3d at 1121; *see also Rubinstein v. Collins*, 20 F.3d 160, 168 (5th Cir. 1994) ("Inclusion of cautionary language … is, of course, relevant to the materiality inquiry, for such inclusion or disclosure is part of the 'total mix of information.'"); Law of Securities Regulation § 10.4 ("cautionary language properly is considered as part of [the] total mix"). And because the Government's entire theory of materiality was that Nacchio had private information that the public projections were unreliable, if those public projections were themselves immaterial as a matter of law then conviction was obviously improper.

Third, the Supreme Court held in *Basic* that in the context of forward-looking statements materiality depends "'upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'" 485 U.S. at 238 (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968)). Even the Government's proposed instruction told the jury that it must consider both the "probability" of the predictions at issue and the potential "magnitude" of their impact in assessing their importance. Ex. 3 to Joint Motion to Add to the Docket Certain Materials (May 31, 2007), Gov't Proposed Instr. No. 12 at 19 [Doc. No. 424]. The probability that Qwest would not meet the projections, and the extent to which it could miss the targets, were critical determinants of whether the information in question was material (and whether Nacchio would have known that it was material, as required to prove intent to defraud).

Finally, these deficiencies also bore, significantly, on the jury's consideration of whether Nacchio had an intent to defraud—that is, whether he *knew* any forward-looking information he had was material. The instructions allowed the jury to measure Nacchio's knowledge of materiality by a standard that took no account of the special rules governing predictive information, even though Nacchio and everyone around him were assessing the materiality of the information they possessed by reference (implicitly or explicitly) to those very rules. The Tenth Circuit recently reversed a corporate fraud conviction premised on the defendants' supposed concealment of personal travel on corporate aircraft, because the jury was not instructed on what actually had to be disclosed in SEC filings under the relevant regulations. *See United States v.* Lake, 472 F.3d 1247 (10th Cir. 2007). To negate scienter, the defendants had relied on evidence that "on only two occasions between 1995 and 2002 did any officer or director report personal travel on a D & O form, and, in particular, the corporation's general counsel neither reported his own personal flights nor took action when others failed to report." *Id.* at 1261. The Tenth Circuit held that the jury was unable to evaluate the evidence concerning the state of mind of the defendants, and those around them, without understanding in detail what the SEC regulations required in terms of disclosure. The Tenth Circuit held that the court's failure to instruct on those regulations was reversible error "[i]n the context of this case," because "[w]hen a defendant's defense is so dependent on an understanding of an applicable law, the court has a duty to instruct the jury on that law, rather than requiring the jury to decide whether to believe a witness on the subject or one of the attorneys presenting closing argument." *Id.* at 1263.

The Court's materiality instruction did not "provide[] the jury with an ample understanding of the issues and applicable standards" before it. *Bowen*, 437 F.3d at 1016. The instruction placed almost exclusive weight on whether information was "important" without providing sufficient guidance as to what could qualify in the unusual context of this case.

B. The "Non-public" Instruction Created Additional Risk That The Jury Could Convict Nacchio Based Upon A Misunderstanding Of The Applicable Law

Language in the "non-public" charge compounded the risk that the jury could convict Nacchio even if he traded in good faith, believing the information he possessed was not material inside information. The Court adopted, with certain modifications, an instruction proposed by the Government regarding the meaning of "non-public." The jury was instructed as follows:

> To prove that the information was non-public, the Government is not required to additionally prove that Qwest was required to disclose the information at issue. A corporation has no general duty to disclose all of its non-public or its proprietary information. Rather, you must decide whether the information at issue here was effectively disseminated to the investing public as I have defined that term in these instructions.

Tr. 3171-72. The defense objected to this instruction. Tr. 2673-78.

Again, the apparent purpose of this instruction was to instruct the jury that Qwest's disclosure obligations as to information were not precisely coextensive with Nacchio's obligation not to trade on the basis of the identical information. Tr. 2675. On the facts of this case that instruction was incorrect. Given the Government's theory and evidence Qwest's obligations and Nacchio's obligations were identical. If and when there was no longer any reasonable basis for the September 7 guidance, the duty upon both the company and Nacchio as spokesman, or Nacchio as trader were the same. *See, e.g., Grossman*, 120 F.3d at 1125 ("[I]f a defendant makes a statement on a particular issue, and that statement … later turns out to be false, the defendant may be under a duty to correct any misleading impression left by the statement."). And even if there were no general duty to update disclosures, Qwest's and Nacchio's duties were unquestionably the same here, because the company continued to affirm the guidance. If the Government's theory were correct that Nacchio had information that caused him to know that the public guidance was materially misleading, then it would also have been securities fraud for Qwest to reaffirm the guidance, without further clarification or elaboration, as it did throughout this period. For that reason, Qwest's lawyers and other senior managers—all of whom possessed the very same "inside" information that Nacchio possessed, *see infra* at 47-50—were necessarily confronted at the time with essentially the same questions on which this prosecution has turned. The evidence is, of course, undisputed that Qwest's management did not inform Nacchio that the public numbers had become so unlikely that they had to be reduced, or that IRU revenues had to be disclosed, until nearly three months after all of the trades relevant here.

This Court's instruction effectively directed the jury to disregard this rich and critical source of evidence as to Nacchio's state of mind concerning his duty to refrain from trading. The instruction in effect told the jury that the company's decision not to disclose the information that Nacchio is accused of trading upon was irrelevant to the issues before the jury, because "[a] corporation has no general duty to disclose all of its non-public or its proprietary information." Tr. 3171. That is not fair to the evidence, and improperly constrained the jury's prerogative to weigh all of the evidence on the critical issue of Nacchio's good faith. The Government set up a false double standard here. It argued to the jury and apparently persuaded the Court that on the facts of this case the company and the defendant had different duties of disclosure about the identical information. This is not only incorrect, but impermissible. The risk that a jury might not give adequate weight to Nacchio's evidence on this score was potentially devastating to his defense, particularly in light of other deficiencies in the instructions. It is completely implausible to infer that Mr. Nacchio *knew* that the same information that his colleagues were disregarding for disclosure purposes was nonetheless "material" for trading purposes. In an attempt to clarify an abstract point of no relevance to these facts (*i.e.*, that a company that was not reaffirming guidance might have no duty to update an outdated projection), this Court's instruction unwittingly invited the jury to ignore the elephant in the room.

C. The "Good Faith" Instruction Permitted The Jury To Convict Even If It Found That Nacchio Had No Intent To Trade In Violation Of The Law

Over Nacchio's objection, Tr. 2692, the Court included the following as part of the good faith instruction: "A defendant does not act in good faith if even though he honestly holds a certain opinion or a belief if he also knowingly employs a device, scheme or artifice to defraud." Tr. 3174. Nacchio respectfully submits that this instruction (which, to counsel's knowledge, has no precedent[9]) is internally inconsistent and impossible for the jury to apply. If Nacchio had a good faith belief that the company would meet the guidance by year-end, and that the inside information he possessed was not material, then there was nothing more for the jury to decide. He was not guilty under the law.

The Tenth Circuit could readily determine that the instruction was error. Of most importance, the instruction allowed the jury to find Nacchio lacked good faith simply because he engaged in any other dishonest act, even if he honestly believed he had not engaged in insider trading. The instruction refers generally to "a device, scheme, or artifice to defraud," not specifically to insider trading. It therefore permitted the jury to find that *any* fraudulent act on the part of the defendant—including acts unrelated to insider trading—sufficed to defeat Nacchio's good faith belief that his conduct was lawful.

This error was more than theoretical. The Government expressly argued in its closing, on the basis of this very instruction, that *any* act of dishonesty by Nacchio *foreclosed* a finding that Nacchio had a good faith belief that he was not engaged in insider trading. The Government read this paragraph of the good faith instruction to the jury, and told the jury that "you *cannot* be dishonest and have good faith at the same time." Tr. 3127. It cited as acts of dishonesty,

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[9] The instruction apparently represents a modified version of a proposed good faith charge in 1A Kevin O'Malley et al., *Federal Jury Practice and Instructions* § 19.06 (5th ed. 2000). However, we are aware of no authority, in any type of fraud case, supporting the precise formulation the Court employed.

allegations of (1) a backdated document related to the growth shares; (2) a discussion between Tempest and Nacchio, months after Nacchio's trades, about putting "some time" between Nacchio's August 7 presentation in Boston and the lowering of guidance in September; (3) a statement Nacchio made in January 2002 to analyst Prashant Khemka (while smiling) that one should "[n]ever believe a word of what management says at the time of a merger"; and (4) Weinstein's testimony that Nacchio "asked him to do a dishonest act involving Qwest." Tr. 3127. The instruction erroneously told the jury that if it determined that Nacchio engaged in any of these peripheral bad acts, it *had to conclude* that Nacchio lacked good faith—even if the jury agreed that Nacchio honestly believed that he was not trading on material, non-public information and that his trading conduct was lawful. The instruction negated the scienter element for insider trading—the sole offense charged in the indictment.

D. Nacchio Was Prejudiced By The Errors In The Jury Charge

The question of whether the jury instructions were erroneous, if resolved in Nacchio's favor, will likely result in reversal of his convictions and a new trial. Because the deficiencies in the instruction go to the elements of materiality and intent, the Court of Appeals will deem the errors harmless only if "'it appears beyond a reasonable doubt that [they] did not contribute to the verdict obtained.'" *United States v. Holly*, No. 05-7130, 2007 U.S. App. LEXIS 13727, at *25 & n.7 (10th Cir. June 12, 2007) (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999)). The burden of proving harmless error lies with the government. *United States v. Lott*, 310 F.3d 1231, 1251 (10th Cir. 2002). In light of the thin evidence of materiality and intent in Nacchio's case, as discussed in Section III below, and the jury's evident confusion over the definition of materiality, *see* Trial Minutes, Apr. 17, 2007, the instructional errors were certainly not harmless beyond a reasonable doubt.

II. THE EXCLUSION OF PROFESSOR FISCHEL'S EXPERT TESTIMONY PRESENTS A SUBSTANTIAL QUESTION FOR APPEAL

Defendant's March 29, 2007, Rule 16(b)(1)(C) statement provided a summary of Professor Fischel's opinions and their bases and reasons. However, this Court excluded *all* of Fischel's expert testimony, concluding that: (1) the Rule 16 notice did not establish the reliability of Fischel's testimony under Federal Rule of Evidence 702; (2) much of the testimony was irrelevant or was a list of facts that did not require an expert; and (3) the testimony was excludable under Federal Rule of Evidence 403.

It bears emphasis that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," *Taylor v. Illinois*, 484 U.S. 400, 408 (1988), and "due process guarantees are implicated whenever the exclusion of evidence acts to obstruct this right," *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1121 (10th Cir. 2006). For this reason, convictions have been reversed due to the exclusion of expert testimony in similar circumstances. The Court's ruling accordingly presents a substantial question for appeal and, if erroneous, would require a new trial.

A. The Court's Conclusion That The Rule 16(b)(1)(C) Disclosure Did Not Establish The Reliability Of Fischel's Testimony Under Rule 702 Was Not A Proper Basis For Excluding The Testimony

This Court excluded Fischel's expert testimony because "the deficiencies under *Daubert* and *Kumho Tire* in the [Rule 16 notice] are so egregious," and the notice "made no attempt to comply with Rule 702 or *Daubert* and establish that Fischel's testimony is the product of reliable principles and methods or that Fischel applied some principles and methods reliably …." Tr. 2427-28. The Court of Appeals reviews *do novo* whether a district court applied the proper legal standard in determining whether to admit or exclude expert testimony. *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003). This is not a proper basis for exclusion under the express wording of the rule, and we are not aware of any precedent holding that a Rule 16 disclosure must establish the reliability of testimony under Rule 702.

1. The Rule 16(b)(1)(C) Notice Was Adequate

All Rule 16 requires is that the defendant "give to the government a written summary of any [expert] testimony that the defendant intends to use" that "must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." There is a substantial question for appeal (reviewed *de novo*) whether this Court impermissibly conflated the minimal disclosure requirements of Rule 16 with the *Daubert* gatekeeping function a court must perform to assess the reliability of expert testimony.

The notice described Fischel's qualifications and his opinions, the factors he considered, and listed the documents he reviewed. *First*, Fischel would testify about Qwest's guidance and its impact on stock price in 2000 and 2001, particularly the impact of the September 10, 2001 reduced guidance—*i.e.*, the materiality of the alleged inside information. *Second*, Fischel would testify "that the economic evidence does not establish that information concerning the magnitude of Qwest's IRU revenue would have been material to reasonable investors on the date of the Questioned Sales." Rule 16 Disclosure at 7-8 (Mar. 29, 2007). The statement also disclosed that Fischel's "opinion is based on," *inter alia*, the economics and profitability of recurring versus non-recurring revenues, Qwest's projected future sales and profitability of IRUs, and more.

A "summary" "presents the substance of a general idea in brief form." Webster's New World Dictionary 1341 (3d College Ed. 1988). Courts have held sufficient disclosures far less informative than Nacchio's. In *United States v. Jackson*, 51 F.3d 646 (7th Cir. 1995), the Seventh Circuit held that the government satisfied Rule 16 with a statement consisting solely of:

> "In response to your letter of November 24, 1993, please be advised that [several officers] may testify at trial concerning the use of beepers, firearms, walkie-talkies, and Western Union wire transfers in connection with the sale of narcotics. In addition, each of these officers may testify that narcotics traffickers often secure locations such as houses or apartments to serve as a base for dealing narcotics. Each of these police officers will base their testimony on their years of training and experience in the area of drug investigations."

Id. at 650. The Seventh Circuit held the notice "'described the witnesses' opinions'" because it identified the substance of the testimony and notified the defendants of the expert's opinions about narcotics and drug houses. *Id.* at 651 (citation omitted). "The government's statement also sufficiently 'described … the bases and the reasons' for their opinions, and 'the witnesses' qualifications.'" *Id.* (citation omitted). The short letter explained that "the officers' testimony would, in part, be based on the use of beepers, firearms, walkie-talkies and wire transfers" and "'on their years of training and experience.'" *Id.* (citation omitted).[10]

Exclusion of a defense expert because more detailed information was not provided has led to the reversal of convictions. In *United States v. Finley*, 301 F.3d 1000 (9th Cir. 2002), for example, the Ninth Circuit reversed a conviction after the defendant's expert was excluded under Rule 16. The court explained that "the entire purpose behind the Rule 16 disclosure … is to alert opposing counsel of [the general nature of expert testimony] bearing upon the issue of guilt," and

[10] The disclosure held adequate in *Jackson* was *by the government*. In a criminal case, if anything, the government should be held to a *higher* standard than the defendant when it comes to discovery. *See also Wardius v. Oregon*, 412 U.S. 470, 475 n.9 (1973) (noting the inherent discovery advantages of the prosecution and concluding that "if there is to be any imbalance in discovery rights, it should work in the defendant's favor"); 2 Charles Alan Wright, *Federal Practice and Procedure* § 256 (3d ed. 2000).

held that the defendant's notice complied with the rule because it "supplied the government with sufficient notice of the *general nature* of Dr. Wicks' testimony." *Id.* at 1017-18 (emphasis added). A defendant's notice is sufficient if it ensures that the testimony is "not going to take the government by surprise." *United States v. Mehta*, 236 F. Supp. 2d 150, 157 (D. Mass. 2002). To require more in the criminal context "would be to require not an expert summary, but effectively an expert deposition" and complete prior disclosure like that required under the Federal Rules of Civil Procedure—but, pointedly, *not* by the Criminal Rules. *Id.*

Even if the disclosure were somehow inadequate under Rule 16, excluding the *entire* testimony was overbroad. *Finley*, 301 F.3d at 1018 ("excluding the entire testimony" was "too harsh remedy for the violation"); *United States v. Harvey*, 117 F.3d 1044, 1048 (7th Cir. 1997) (exclusion of testimony under Rule 16 was erroneous). Only in the most extraordinary case should the court exclude a defendant's expert witness on the basis of a Rule 16 violation. *E.g.*, *United States v. Sarracino*, 340 F.3d 1148, 1170 (10th Cir. 2003) ("[T]he sanction of exclusion of a witness's expert testimony is 'almost *never* imposed ….'") (citation omitted) (emphasis added). Because "[t]he stakes in criminal prosecutions are high, and defendants' Sixth Amendment rights must be protected to ensure that the truth is ultimately found," *Harvey*, 117 F.3d at 1048, "courts should use particular caution in applying the drastic remedy of excluding a witness altogether," *Finley*, 301 F.3d at 1018. The *discovery* violation should not lead to exclusion unless it "was willful and motivated by a desire to obtain a tactical advantage." *Taylor*, 484 U.S. at 415.[11] No such claim could be made here.

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[11] *See also Sarracino*, 340 F.3d at 1170 ("[I]t would be 'a rare case where, absent bad faith, a district court should exclude evidence rather than continue proceedings.'") (citation

The Fischel notice eliminated any possibility the government would be *surprised*. Nacchio's defense was clear and the notice adequately informed the government. The underlying data was public and the government could have used its own experts to conduct the same materiality analyses. But Fischel was the only defense witness who would have presented objective expert evidence on materiality and factors bearing on Nacchio's state of mind, the reasonableness of his beliefs, and the economic significance of the information at issue. This testimony was essential and its exclusion is a substantial question for appeal.

2. This Court Erred In Applying *Daubert*

Consistent with "the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony,'" *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 588 (1993), Rule 702 does not set a high bar for the admissibility of expert testimony. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744-45 (3d Cir. 1994). Particularly "[w]hen a defendant's liberty is at stake, it is incumbent upon the trial court to … follow the appropriate decision-making steps and articulate the bases upon which its decision rests," *United States v. Smithers*, 212 F.3d 306, 315 (6th Cir. 2000) (reversing defendant's conviction where trial court failed to properly apply *Daubert*). This Court never found Fischel's testimony to be *un*reliable; it simply found that the methodology was not adequately disclosed in the Rule 16 notice. No appellate court has held that the reliability of the expert's methodology must be established in a

omitted); *Harvey*, 117 F.3d at 1048 ("[T]he drastic sanction of precluding a witness altogether is unwarranted" absent being "ambushed by expert testimony" and the "violation of a[] clearly-established rule or duty."); *United States v. DeLoach*, No. 99-4441, 2000 U.S. App. LEXIS 3824, at *7 (4th Cir. Mar. 14, 2000) (excluding witness under Rule 16 was not necessary where the defendant "never alleged that he was surprised by the Government's witnesses or the content of their testimony").

Rule 16 notice or that it can *be judged* exclusively on the notice to the government.[12] The Court's inability to actually make a reliability determination makes plain that the Court abused its discretion "by unreasonably limiting the evidence upon which to base the decision." *Dodge*, 328 F.3d at 1228.

"[A]n appellate court must have before it a sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law. The analysis outlined in *Daubert* is extensive, requiring the district court to 'carefully and meticulously' review the proffered [expert] evidence." *United States v. Call*, 129 F.3d 1402, 1405 (10th Cir. 1997) (citation omitted). A district court has discretion in determining how to carry out the gatekeeper function but the Tenth Circuit has emphasized that a district court's gatekeeper "obligation can be satisfied only if 'the court has sufficient evidence to perform the task,'" and it abuses its discretion by unreasonably limiting the evidence it will consider. *Dodge*, 328 F.3d at 1228 (citation omitted); *Call*, 129 F.3d at 1405; *United States v. Sandoval*, 390 F.3d 1294, 1301 (10th Cir. 2004) ("Similarly, when the reliability of [expert] evidence is disputed, we have held that the district court 'must hold an evidentiary hearing unless the proffer on its face is insufficient to raise a material issue of fact.'") (citation omitted). Relying only on the Rule 16 notice in this case was not a reasonable procedure.[13]

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[12] "Although the summary required by Rule 16 provides the [opposing party] with some notice, the requirement of setting forth 'the bases and reasons for' the witnesses' opinions does not track the methodological factors set forth by the *Daubert* Court." Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345, 1360 (1994).

[13] As the Tenth Circuit has held, "[i]n a case like this one, where the expert testimony is crucial to the ultimate outcome, is vigorously challenged, and [the opposing party alleges that there are] several obvious areas of concern, we think it unreasonable to limit so severely both the underlying documentation and the use of live witness testimony upon which the court might base

In addition, this Court provided no basis for its decision to exclude Fischel's testimony "that the economic evidence does not establish that information concerning the magnitude of Qwest's IRU revenue would have been material to reasonable investors on the date of the Questioned Sales." This Court's ruling excluding Fischel makes no mention of that testimony. Tr. 2427-34. The *heart* of the government's case was its claim that in 2001, Nacchio knew the extent to which Qwest's revenues were derived from non-recurring versus recurring sources, and that this information was "material." Fischel's testimony would have directly refuted the government's argument, but this Court excluded the testimony without mentioning it, overlooking that "a district court 'must adequately demonstrate by *specific findings on the record* that it has performed its duty as a gatekeeper.'" *Dodge*, 328 F.3d at 1223 (citation omitted); *id.* ("'Without specific findings or discussion on the record, it is impossible on appeal to determine whether the district court carefully and meticulously reviewed the proffered [expert] evidence or simply made an off-the-cuff decision to admit [or exclude] the expert testimony.'") (citation omitted). That is a substantial issue for appeal.

B. Fischel's Proposed Testimony Was Relevant, Reliable And Central To Nacchio's Defense

The Tenth Circuit could also conclude that this Court's specific findings on relevance and reliability were an abuse of discretion.

Fischel would have testified about two principal subjects bearing directly on the elements of materiality and intent. The first of these topics is the one discussed above relating to the materiality of the information about the magnitude of IRU revenue, which the Court did not even

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a decision." *Dodge*, 328 F.3d at 1229. This Court excluded Fischel and would not permit any argument or evidence. Tr. 2434-35.

mention in its ruling excluding Fischel. The second area related to Qwest's guidance in 2000 and 2001 and its impact on stock price, Qwest's performance relative its guidance, and the economic factors that led Qwest to miss its targets in the second half of 2001. This included the impact of the reduced September 10, 2001 guidance on Qwest stock—*i.e.*, the materiality of the alleged inside information. This Court ruled that this testimony was inadmissible because it simply represented "facts" that could be established by other evidence. Other courts, however, have held that expert testimony on these subjects is important to explain the significance of facts beyond ordinary jurors' knowledge, and is particularly relevant when offered by a criminal defendant to negate scienter.

In a case where materiality is at issue, evidence of that information's impact on the market is plainly relevant. "Many variables have the potential to and do affect a stock price—the daily market average; national, local and industry-specific economic news; competitors' activities; and on and on. The overall volatility of the stock price and the speed of its reaction to company news may also be significant. To this end, expert testimony may be helpful …." *Unger v. Amedisys, Inc.*, 401 F.3d 316, 325 (5th Cir. 2005) (citation omitted); *United States v. Russo*, 74 F.3d 1383, 1388-89, 1395 (2d Cir. 1996) (holding admissible expert testimony on "breadth and impact of [a stock] manipulation scheme," and "trading patterns" because expert "described certain stock transactions and *his opinion of their effect on the market*") (emphasis added); *see also* Ex. 3 to Mr. Nacchio's Resp. to Pre-Sentence Report (tendered July 6, 2007), Report of Daniel Fischel ("Fischel Report") at 5 (report calculating loss submitted for sentencing, explaining that in evaluating information's impact, it is necessary to "take into account the effect of market factors on stock returns"). The Tenth Circuit has explained that "the *dispositive factors*" in assessing materiality "are the nature of the undisclosed predictive information and its *importance*, reliability and *investor impact*." *Garcia*, 930 F.2d at 830 (emphasis added).[14]

The Fourth Circuit has similarly permitted expert testimony about stock price declines and topics essentially identical to those that Fischel would opine about. In *Miller v. Asensio & Co.*, 364 F.3d 223, 233 (4th Cir. 2004), "Plaintiff's expert … testified that in his expert opinion the Asensio *reports caused CCSI's stock price to 'decline[] tremendously'* in the relevant time period …. Dr. Woodside explained that he *based this opinion on the timing of Asensio's statements* … and their extremely negative and untrue assessment of CCSI's sole product …. *Dr. Woodside further explained that he had examined other market factors that might have borne 'upon the decline in the value of stock at the point in time' and found none.*" (Emphasis added) (alteration in original).

Fischel's testimony was also relevant to whether Nacchio acted with scienter. In criminal cases where state of mind is an element of the offense, "forbidding the jury to consider evidence that might negate willfulness would raise a *serious question* under the Sixth Amendment's jury trial provision." *Cheek*, 498 U.S. at 203 (emphasis added). To protect a defendant's rights where state of mind is at issue, a defendant has wide latitude to introduce evidence bearing on that issue. In *United States v. Brown*, the Tenth Circuit held: "The critical issue … in this case was not a determination of the acts done by [the defendant] but whether such acts … were done

[14] *See also Sowell v. Butcher & Singer, Inc.*, 926 F.2d 289, 301 (3d Cir. 1991) ("As a general rule, plaintiffs alleging securities fraud rely on expert testimony to establish both the fact of damage and the appropriate method of calculation."); *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) ("[T]he materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's stock.").

with the specific intent to violate [the law], a necessary element of the charges. Accordingly, the accused as part of his defense *is entitled to wide latitude in the introduction of evidence which tends to show lack of specific intent*. 'Evidence on the question of intent, where that is material, may take *a wider range than is allowed in support of other issues* ….'" 411 F.2d 1134, 1137 (10th Cir. 1969) (citation omitted) (emphasis added).[15]

Courts have reversed convictions because of the exclusion of expert testimony bearing on the defendant's state of mind. In *United States v. Lankford*, for example, the court reversed the defendant's conviction for willfully filing false tax returns because the district court prevented the defendant's expert witness from testifying that the defendant's belief in the legality of his acts was reasonable. 955 F.2d 1545 (11th Cir. 1992). The Eleventh Circuit recognized that

> it would be difficult if not impossible for a defendant to introduce direct evidence specifically about his mental state. Consequently, he had to focus on providing circumstantial evidence concerning collateral matters, such as the reasonableness of his beliefs, from which the jury could infer what his mental state was. The more untenable his belief that he was acting legally, the less likely he actually held it. Because proof demonstrating the "reasonableness" of the defendant's beliefs was therefore indirectly relevant to an actual element of the offense ("willfulness") through a short chain of inferential reasoning, the defendant had the constitutional right to introduce it.

United States v. Hurn, 368 F.3d 1359, 1365 (11th Cir. 2004) (describing *Lankford*).[16]

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[15] *See also United States v. Payne*, 978 F.2d 1177 (10th Cir. 1992) (same); *United States v. Vreeken*, 803 F.2d 1085 (10th Cir. 1986) (same); *United States v. Neujahr*, No. 97-4260, 1999 U.S. App. LEXIS 3770, at *27 (4th Cir. Mar. 10, 1999) ("Forbidding the jury to consider evidence that might negate willfulness calls into question the right to a jury trial under the Sixth Amendment. Thus, a defendant … is entitled to wide latitude … to introduce evidence tending to show a lack of specific intent or willfulness."); *United States v. Powell*, 955 F.2d 1206, 1214 (9th Cir. 1991) (a district court "ordinarily cannot exclude evidence relevant to the jury's determination of what a defendant thought the law was … [when] willfulness is an element of the offense"); *United States v. Sternstein*, 596 F.2d 528, 530 (2d Cir. 1979) (collecting cases).

[16] Likewise, in *United States v. Sheffield*, 992 F.2d 1164 (11th Cir. 1993), the court reversed a defendant's conviction even though the evidence the defendant offered was not

The Court's concern that Fischel would discuss underlying facts was misplaced. Fischel was not going to list facts, but opine on their economic *significance*. The raw number price change following reduced guidance may be within the juror's knowledge, but the significance of the price change and the economic factors explaining it are not. *See* Fischel Report, at 1-9. The significance of Qwest's IRUs to the company's income and market valuation is also beyond the knowledge of an ordinary juror. "Providing the jury with this raw information would simply not have been enough." *Finley*, 301 F.3d at 1014; *see also United States v. Scarberry*, No. 99-6234, 2000 WL 235270, at *3 (10th Cir. Mar. 2, 2000) ("[T]he revenue agent's testimony [was admissible on the issue of materiality because it] merely assisted the jury in understanding the facts in evidence ….").

C. This Court Erred In Excluding The Testimony Under Rule 403

This Court's Rule 403 ruling also presents a substantial question. "'Rule 403 is an extraordinary remedy and should be used sparingly.'" *United States v. Roberts*, 88 F.3d 872, 880 (10th Cir. 1996) (citation omitted). "'[I]n reviewing a 403 balancing [in a criminal case], the court must look at the evidence in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect.'" *Smithers*, 212 F.3d at 317 n.5 (citation omitted) (second alteration in original). This evidence was highly probative and essential to Nacchio's defense. And it is hard to understand how this testimony "would be a needless presentation of evidence" would "lead to delay and waste of time" or would "mislead the jury," Tr. 2432-2433, much less that these factors could "substantially outweigh" the "probative value"

directly relevant to an element of the crime, because "the existence of the custom was a collateral matter that was itself relevant to the *mens rea* element of the offense. That is, if the defendant was acting pursuant to an established, authorized custom, then he was not intentionally doing anything wrong." *Hurn*, 368 F.3d at 1364 (describing *Sheffield*, 992 F.2d at 1170).

of the evidence, as required by Rule 403. *See, e.g.*, *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991) (reversing conviction based on improper exclusion under 403).

D. This Court Erred By Denying Defendant's Motion To Permit Fischel To Testify In Rebuttal

Even if Fischel's exclusion were otherwise proper, the Tenth Circuit could find that this Court should have at least permitted Fischel to rebut the government's analysts' testimony that the magnitude of IRUs was important and material to the value of Qwest stock.

Despite this Court's earlier ruling that the government's analysts could not testify as to their subjective opinions regarding the materiality of Qwest's IRU revenue, on direct examination the analysts' testimony plainly covered this topic. Drake Johnstone stated that he "was ranked by the Wall Street Journal as the best fixed telecom analyst in the U.S.," Tr. 2176, and proceeded to tell the jury that Qwest's IRUs were worthless and that when he finally learned the breakdown between recurring and non-recurring revenues, it significantly altered his evaluation of the company. Johnstone testified that "in the first quarter of 2001, Qwest published in their press release that they grew revenue 12 percent. But investors … did not know that that figure included over $400 million of one-time optical capacity revenue, which if you look at recurring revenue, the company actually grew its revenue 7-1/2 percent year over year, not 12 percent." Tr. 2201-02. In short, Johnstone testified that when evaluating Qwest's growth rate, non-recurring IRU revenues are worthless and not taken into account.[17] Prashant Khemka similarly testified on direct examination that he was "an expert on the [telecom] sector," Tr.

[17] Johnstone testified that "the company had been touting that they're growing revenue at 12 percent in the first and second quarter of 2001. And in fact, that was not the case, that their growth rate was 7-1/2 percent, that the company was touting mid teens operating cash flow growth when, in fact, it was not the case." *See also* Tr. 2202-03.

2265, and that Qwest's non-recurring revenues were worthless: "In the revenues that were reported, it wasn't clear what component of it was coming from non-recurring revenues that were one time in nature and *were not meaningful when we look at as an investor*, *versus recurring*, *genuine revenues*, which would be generated in the regular course of business." Tr. 2284 (emphasis added). Khemka testified that "revenue quality is considered *good* if it is the regular recurring revenues … [and] *would be considered poor if there were one-time or non-recurring items* …." Tr. 2289-90 (emphasis added).

Nacchio moved to permit Fischel to rebut the analysts' testimony regarding the materiality of "non-recurring" revenues, which was at the heart of the government's case. Johnstone and Khemka clearly testified on direct examination by the government that this information was material—Johnstone even testified that once it was disclosed it "warranted a change in rating and point of view on the company." Tr. 2203.[18] This Court denied Nacchio's motion,[19] finding that neither Johnstone or Khemka testified about materiality, Tr. 2582-87, and that the testimony did not require expert rebuttal. Tr. 2588. This allowed the government to introduce *subjective* analyst assessments of materiality, while Nacchio's *objective* economic evidence was excluded. At the very least this presents a substantial question.

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[18] Although this Court determined that any arguably prohibited testimony came out on cross-examination, Tr. 2578, 2582, all of the above-cited testimony bearing on materiality and the significance of Qwest's IRU revenues, was solicited on direct examination.

[19] The motion stated that Fischel would testify based on "an economic study comparing the revenue multiples of telecommunications companies that disclosed non-recurring revenues during the relevant period with those that did not disclose such revenues, to test whether, as the government and its analysts contend, companies that disclosed such revenues had a lower revenue multiple, which would reflect that investors collectively, perceived them as less valuable than recurring revenues …." Mot. to Permit Expert Rebuttal of, or, Alternatively, to Strike, Opinion Testimony by Witnesses at 7-8 (Apr. 8, 2007) [Doc. No. 348].

In *United States v. Lueben*, 812 F.2d 179 (5th Cir.), *vacated in part on other grounds*, 816 F.2d 1032 (5th Cir. 1987), for example, the defendant argued that the district court improperly excluded his expert witness on the issue of the materiality of his misrepresentations to the government. The Fifth Circuit held "that the district court abused its discretion in this case because it allowed the government to offer evidence on the issue of materiality but not the defense. … *We find it difficult to understand why this testimony would not confuse the jury when offered by the government but would confuse the jury when offered by the defendant.*" *Id.* at 184 (emphasis added); *see also United States v. Kessi*, 868 F.2d 1097, 1108 (9th Cir. 1989) ("If one party introduces inadmissible testimony, then, at the discretion of the court, the opposing party may also introduce testimony on this same issue to rebut any false impression that may have resulted from the original testimony.").

III. WHETHER THE EVIDENCE AGAINST NACCHIO WAS SUFFICIENT PRESENTS A SUBSTANTIAL ISSUE FOR APPEAL

There is also a substantial question for appeal concerning whether the evidence was sufficient to support the conviction. The Court of Appeals will consider the sufficiency of the evidence *de novo*. *United States v. Rahseparian*, 231 F.3d 1257, 1261-62 (10th Cir. 2000). Acquittal is required unless the evidence, with respect to each element of the offense, is "such that a reasonable jury could find the defendant guilty beyond a reasonable doubt." *United States v. Fox*, 902 F.2d 1508, 1513 (10th Cir. 1990). Although the evidence must be viewed in the light most favorable to the Government, it "must raise more than the mere suspicion of guilt, and the jury's inferences must be 'more than speculation and conjecture in order to be reasonable.'" *United States v. Trung Huu Truong*, 425 F.3d 1282, 1288 (10th Cir. 2005) (quoting *United States v. Leos-Quijada*, 107 F.3d 786, 794 (10th Cir. 1997)). Where the "'evidence is equally consistent with both guilt and innocence the conviction cannot be sustained.'" *Fox*, 902 F.2d at 1513-14 (citation omitted).[20]

A. The Information Concerning Alleged Risks To Attaining The Public Revenue Projections Was Immaterial As A Matter of Law

The Government's theory at trial was that internal reports and management discussions throughout the period of Nacchio's trading provided material inside information that Qwest would miss its public revenue targets for 2001. Qwest's public revenue and earnings guidance for 2001, which was rooted in a study prepared by investment bankers (Tr. 945, 968), was plainly reasonable and justified when first issued in September 2000. The verdict suggests that even this jury rejected the Government's weak contention that Nacchio had material inside information relating to the public projections prior to March. The critical question becomes, therefore, whether the budgeting discussions and other information that Nacchio came to know during March and April 2001 changed that picture in a way that mandated disclosure to the public (or, in the Court's view, a bar on trading). The Government's evidence did not remotely establish that Nacchio lacked a reasonable, good faith basis for believing that those estimates were attainable in March or April. But even leaving aside the disputed "reasonable basis"

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[20] One recent Court of Appeals case questioned the "equally consistent" formulation based upon *United States v. Hooks*, 780 F.2d 1526 (10th Cir. 1986). *See United States v. Celio*, No. 05-1330, 2007 U.S. App. LEXIS 9955, at *9 n.1 (10th Cir. Apr. 30, 2007). But *Hooks* merely rejected the claim that "a criminal conviction cannot be sustained if a *reasonable hypothesis* could be designed which is *consistent* with innocence." 780 F.2d at 1530 (emphasis added). The "equally consistent" formulation is not the same thing. A "reasonable hypothesis" consistent with innocence need not be *equally* consistent with guilt. In any event, the "equally consistent" formulation has been applied on many occasions by the Court of Appeals since *Hooks,* and survives despite the disapproving footnote in *Celio*. *See Jennings v. Natrona County Det. Ctr. Med. Facility*, 175 F.3d 775, 780 n.3 (10th Cir. 1999) ("'[W]hen faced with an intra-circuit conflict, a panel should follow earlier, settled precedent over a subsequent deviation therefrom.'") (citation omitted)).

standard, the Tenth Circuit could readily conclude, based on the *undisputed facts*, that the jury simply could not conclude, beyond a reasonable doubt, that Nacchio's "inside" information would have significantly altered the total mix of available information available to the market.

1. The Additional Information Concerning Risk To The Public Projections Was Still Speculative

First, a prediction, more than eight months out, that Qwest *might* miss public projections for the year was information of little value to a reasonable investor and immaterial as a matter of law. There is no "[n]o shortage of cases" holding that "materiality may be resolved by a court as a matter of law," *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 657 (4th Cir. 2004). The Tenth Circuit has held that "soft" information that "'inherently involves some subjective analysis or extrapolation, such as projections, estimates, opinions, motives, or intentions'" about future risks to a company's earnings, is immaterial as a matter of law where it is "too speculative and unreliable." *Garcia v. Cordova*, 930 F.2d at 830 (citation omitted). Moreover, with respect to disclosures of financial projections,"[t]he law recognizes that 'companies [should] be given leeway' when their forecasts are evaluated because 'by their very nature, forecasts are imprecise.'" *In re Apple Computer, Inc.*, 127 Fed. Appx. 296, 304 (9th Cir. 2005) (citation omitted) (alteration in original); *see also Raab v. Gen. Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993) ("Predictions of future growth … will almost always prove to be wrong in hindsight."); *Apple Computer*, 127 Fed. Appx. at 305 (holding that "a revenue estimate that was missed by approximately 10% was immaterial as a matter of law" (citing *In re Convergent Techs. Sec. Litig*, 948 F.2d 507, 514 (9th Cir. 1991)).

The Government failed to present evidence from which a reasonable jury could infer, beyond a reasonable doubt, that Nacchio's soft and subjective "information" in April and May

2001 about the risk of Qwest missing its revenue projections was material. There was *no* evidence of any internal projections at the time of Nacchio's trades which forecast that Qwest would miss the public targets, nor was there evidence that anyone at Qwest had gone to him at any time between September and June and recommended that he lower the guidance. Had Nacchio disclosed everything he knew about Qwest before trading, he could not have simply made public a lower internal estimate, or announced that management no longer believed those projections were attainable. The "inside" information the Government alleges here was far more nebulous than that, because management continued to generate internal estimates that exceeded the public guidance for the balance of the year throughout the relevant time period.

The evidence readily established that, according to internal projections, the company would likely miss its *internal* budget goal for 2001 revenue. The April 9 product update estimated 2001 revenues at $21.56 billion—less than the internal goal of $21.8 billion but comfortably above the midpoint of the publicly-stated guidance range of $21.3 to $21.7 billion. GX929. The secret internal goals of course held no significance for the reasonable outside investor. The Government nevertheless contended that the fact Qwest was missing its internal goals was material evidence that things were not going well—and that the "house of cards" was about to come down. Tr. 2739, 2774, 2781, 2789, 2793. But its evidence for this theory is not sufficient. The February 23, 2001 "dashboard" report showed that revenues for the month of January were short of the *internal* budget by $59 million dollars, or a mere 3.75%. GX921. The March 21, 2001 dashboard contained more of the same: revenues for the first two months of 2001 were 4.3% off the internal budget goal. GX924. The Government makes much of a March 20 first quarter update, which indicated the company would need to have a good final month of the quarter if it was going to hit its internal goals. Tr. 2775-76; GX923. This is a sign of trouble, the Government says, because "the only plan at this time is to make [the goals] through one-timers [IRUs]." Tr. 2776. But at Qwest, as at many companies, the third month of a quarter was *always* the biggest because there was pressure to finalize deals before the close of quarterly numbers. Tr. 779-80 (Szeliga). 2001 was no different in this regard. In the end, of course, Qwest came up only $4 million short of its *internal* revenue numbers in the first quarter and met Wall Street's expectations. A-20; Tr. 997 (Szeliga).

The April product update forecasted that the company would make its 2001 public revenue projections, but miss its internal goals. GX929. Operational reviews of the three main business units were consistent with this outlook. GX959; GX965; GX972. Both Robin Szeliga and Afshin Mohebbi testified that as of April 9, despite the internal debates at Qwest, the current internal view was that the company would exceed $21.5 billion in revenues by the end of the year. Tr. 935, 1890.

The Government nevertheless attempted to show that Nacchio knew the April current estimate for 2001 revenues was too optimistic because it included "risky" revenues from IRUs. Tr. 822-23. This included $675 million ($530 million of which were IRU-related) from the wholesale markets unit identified by Greg Casey, the head of that unit, as subject to "risk." Tr. 1196-97; GX959. The current estimate also included an unspecified degree of IRU-related "risk" in the revenues of the global business unit. Tr. 1258 (Graham). In addition, the April 9 product update raised the 2001 estimate for non-recurring revenue (principally IRUs) by approximately $329 million over the internal budget. GX929.

That there was significant risk in the public projections would have come as no surprise to a reasonable investor. A projection is never risk free—quite the contrary: "[p]redictions of future growth … will almost always prove to be wrong in hindsight." *Raab*, 4 F.3d at 290. For the notion that revenues subject to risk should have been excluded from the estimates entirely (rendering the public estimates not just subject to some risk, but materially misleading), the Government relied on Szeliga's testimony that "risk" in the context of a September 5, 2000 memorandum meant "[u]nlikely, generally speaking." Tr. 737 (Szeliga).[21] But the evidence established that the managers responsible for preparing the estimates believed that these revenues were sufficiently likely to provide a reasonable foundation for the internal current estimate that was submitted to the board of directors. Tr. 935. There was ample evidence of this category of potential revenues materializing in large quantities. For example, the so-called "C" revenue initiatives were characterized as having "much higher risk" than the "50/50" "B" initiatives. Tr. 1259 (Graham). As the first quarter drew to a close, management estimated that it would need $486 million in revenue from "C" initiatives to meet its internal budget goals for the quarter. GX923. Nearly *all* of the initiatives materialized. *See* Tr. 2776 (Government stating that Qwest succeeded in bringing in "risky" "C" revenue initiatives in the first quarter). Yet if only *half* of the revenues identified in April as subject to risk were realized by the end of the year, the company would have fallen less than 1.6% short of the April current estimate (and less than 0.4% short of the public guidance range).

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[21] The backdrop for this testimony is a memorandum from two subordinates to Szeliga that Nacchio never saw. Tr. 1034; GX803. The memorandum was dated September 5, 2000—i.e., before the budget planning process got under away in the fall—and estimated "risk" revenues in the internal budget goals at $1.592 billion (the internal revenue goal was $22 billion at the time). GX803. Szeliga testified that sometime in December 2000 or January 2001, she discussed the risk with Nacchio, but "not the specifics of [the] memo." Tr. 1034.

The Government also suggests that Nacchio had inside information about the prominence of IRUs in the overall revenue mix, which was material because the estimates assumed substantial revenues from an IRU market that was projected to soften. But the internal budget goals themselves assumed the IRU market would decline throughout the year. Tr. 767-68; GX929. The only question under debate was the pace at which the market would shrink, which of course required a crystal ball about the economy and the U.S. Government's needs for capacity, Tr. 1009, during the balance of the year. Little wonder there was debate within the company. The Government repeatedly cites Greg Casey's prediction that IRUs were "going away" and "drying up." Tr. 1121, 1194 (Casey); Tr. 2783, 3115, 3118, 3131. But one subordinate's speculation about the future state of the economy cannot be material inside information, particularly when his own personal financial interests were bound up with convincing Nacchio to lower his sales goals. As Nacchio knew, the hard data was far less clear than the Government's sound bites. Wholesale unit IRU revenues were just $16 million, or 6%, short of the internal budget goal in the first quarter, GX959, despite Casey's worries about a shrinking market and a struggling telecommunications industry. In the global business unit, IRU revenues were much stronger than expected in the first quarter—$82.6 million, or *61.4%, greater than planned*. GX965. On the heels of this strong quarter, the company raised its estimate for IRU revenue from the global business unit. Indeed, the entire $329 million increase in forecasted IRU revenues in the April 9 product update came from higher forecasts in the global business unit. GX 929; GX965. And of that $329 million, $82.6 million had *already been realized* during the unit's strong first quarter. GX965. Moreover, it became clear in the second quarter, after the April planning meetings, that additional IRU opportunities were out there. Sometime in April or May, Qwest landed a large deal with Microsoft, and a $200 million IRU opportunity with Enron was discussed in May. Tr. 1313 (Graham); Tr. 1185-86 (Casey). Neither opportunity was included as potential revenue in the early April reports. Tr. 1186, 1313. Given this mixed picture, a jury could not reasonably conclude beyond a reasonable doubt that Casey's subjective predictions that the IRU market would decline constituted material inside information that the company's public projections needed to be altered.

2. Disclosure Of The Additional Information Would Not Have Significantly Altered The Total Mix Available

The evidence also established that the risk Qwest might not hit its publicly stated 2001 revenue projections was already known to the market in all material respects.

Qwest adequately warned investors of the risks associated with its public projections. This is beyond question. The company's April 26, 2001 press release, filed with the Securities and Exchange Commission, identifies "important risk factors" such as "intense competition in the communications services market, changes in demand for Qwest's products and services, [and] dependence on new product development and acceleration of the deployment of advanced new services, such as broadband data, wireless and video services." Ex. A-236. The release also notes that the company might "fail[] to achieve the projected synergies and financial results expected to result from the acquisition of U S WEST, Inc. timely or at all and difficulties in combining the operations of Qwest and U S WEST." *Id.* The company's September 7, 2000 press release, in which it announced revenue projections for 2001, had given similar cautionary warnings to investors. GX530. The Tenth Circuit held in *Grossman* that such cautions "cannot be ignored" when assessing the materiality of a forward-looking statement, as a matter of law.

The possible effects of these trends in the marketplace were also disclosed in financial reports filed by Qwest *before* the trades. Qwest's press release announcing earnings in the first quarter revealed that the company had fallen short of its publicly announced targets for wireless subscribers—a key component of "recurring" revenue. Analyst Drake Johnstone noted in an April 25 report that, based on these disclosures, he "doubt[ed] the company will achieve its objective of doubling wireless subscribers from 800,000 to 1.6 million by year-end." GX726. The potential IRU risk was also known. The evidence established that investors were aware that IRU revenues had long been included in Qwest's financials, and that IRUs were common in the telecommunications industry. Tr. 2223. Johnstone testified that in 1999 he "was aware that Qwest at that time had a significant IRU business." Tr. 2226-28; *see also* Tr. 2304 (Khemka).

The identical risks disclosed by Qwest and well known to investors were also evaluated in the company's April 2001 current internal estimate. The wholesale markets unit identified difficulties in the telecommunications industry as posing a risk to its revenues because "capital spending among Carriers has slowed." GX959. Investors had long been aware of this risk. As early as September 2000, analysts were "concerned about companies being able to meet revenue projections" in light of "a glut or an overcapacity of fiber … in the industry." Tr. 200-01 (Wolfe). As head of the global business unit, Grant Graham observed similar risks: "competitive activity" and "the economy slow[ing] a little bit." Tr. 1258. These were risks that Qwest had warned investors about and investors clearly already appreciated. In all, there was never a mystery that if the economy fell off Qwest's business would fall off. Optimists discounted and pessimists highlighted these risks, but there was no concealment that they existed.

The effect of eventual disclosure on Qwest's stock price is further evidence that the information did not significantly alter the "total mix" of information available. Several Courts of

Appeals have recognized that materiality may be measured by looking to the movement of a company's stock price immediately following disclosure of the relevant information. *See In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 269 (3d Cir. 2005); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1218 (1st Cir. 1996); *cf. Grossman*, 120 F.3d at 1123 (plaintiffs failed to allege that there was "any impact on Novell's stock price when [the] falsity [of prior statements] was disclosed"). The rule is a grounded in the insight that an efficient market rapidly incorporates "information important to reasonable investors" into stock prices. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997) (Alito, J.). Where disclosure has no discernible negative effect on the price, courts have held the information "*immaterial as a matter of law*." *Merck & Co.*, 432 F.3d at 269 (emphasis added); *see also Burlington Coat Factory*, 114 F.3d at 1425.

When the "inside" information in Nacchio's possession was disclosed, Qwest's stock price hardly budged. On August 7, 2001, in a presentation to an investor conference in Boston, Nacchio disclosed that "non-recurring" broadband capacity sales (i.e., IRUs) would amount to an estimated 8% of 2001 revenues, A-251. Over the course of August 7 and 8, the company's stock price gave up a mere $0.09, or 0.37%, of its share price (against a 1.4% decline in the S&P 500 during the same period). A-1880. In its 10-Q for the second quarter, filed on August 14, 2001, Qwest made additional disclosures about the magnitude of IRU revenues. GX641 (disclosing that during the first six months of 2001, Qwest recognized $857 million in optical capacity sales under IRU agreements). By the close of trading on August 15, Qwest shares had *risen* by $0.58, or 2.35%. A-1880. Similarly, on September 10, 2001, before the market opened, the company issued a press release lowering its public projections for 2001 revenues. GX646. That day, the stock rose $1.76, or 9.30%. A-1880. The disclosures were met with indifference, or even apparent optimism, by the market. "[I]t follows that the information disclosed … was immaterial as a matter of law." *Burlington Coat Factory*, 114 F.3d at 1425.[22]

B. The Evidence Was Insufficient To Establish That Nacchio Acted Willfully, Knowingly, Or With Intent To Defraud

1. Nacchio Did Not Know That The Risk Qwest Would Miss Its Public Projections Was Material

Even in civil cases under §10(b) and Rule 10b-5, the plaintiff must show a high level of scienter with regard to the materiality of the information.[23] In the context of criminal liability, that requirement is reinforced and made more stringent by the requirement that a defendant act

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[22] The point holds even though Qwest's stock price fell following an August 22, 2001 analyst report from Davenport & Co. discussing the August 14, 2001 10-Q. GX745. In *Merck & Co.*, the Third Circuit found immateriality as a matter of law in almost identical circumstances. 432 F.3d at 269. Merck's stock price saw no negative effect immediately after disclosure of certain revenue recognition practices in a securities filing. Two months later, an article in the Wall Street Journal "did the math," *id.* at 271, and estimated the magnitude of these practices on the company's revenues; the stock price dropped. The court nevertheless held that the market had already incorporated the information at the time of the initial disclosure: "[t]he facts were disclosed … and it is simply too much for us to say that every analyst following Merck, one of the largest companies in the world, was in the dark." *Id.* Likewise, in this case, materiality is appropriately assessed at the time of the initial August 14 disclosure, not more than a week later, at which time the market had already incorporated the disclosure.

[23] The Tenth Circuit's decision in *City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1261 (10th Cir. 2001), is instructive. The plaintiffs accused senior management of failing to disclose material litigation involving the company. They argued that their complaint adequately pleaded scienter because it alleged that the defendants, by virtue of their positions in the company, knew of the litigation. The Court of Appeals held that the plaintiffs also had to establish "that Defendants *knew the [litigation] was material* and thus that buyers would be misled if the lawsuit was not explicitly disclosed." *Id.* at 1264 (emphasis added); *see also SEC v. MacDonald*, 699 F.2d 47, 50 (1st Cir. 1983) (requiring proof that "at the time defendant purchased stock he had actual knowledge of undisclosed material information; knew it was undisclosed, and knew it was material."); *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 167 (2d Cir. 1980) ("knowing" in the context of tipper liability requires that defendant tip "information which he knows to be material"); Langevoort, *Insider Trading: Regulation, Enforcement, and Prevention* § 5.5 ("[S]cienter is established if the defendant *knew that the information was material* and nonpublic, or recklessly disregarded facts that would indicate that the information in his possession was material and nonpublic") (emphasis added).

knowingly, willfully, and with intent to defraud. "Willfully" requires "'a realization on the defendant's part that he was doing a wrongful act'" under the securities laws. *United States v. Peltz*, 433 F.2d 48, 55 (2d Cir. 1970) (citation omitted); *see also Safeco Ins. Co. of America v. Burr*, 127 S. Ct. 2201, 2209 n.9 (2007).[24] The Government thus was clearly required to prove, beyond a reasonable doubt, that Nacchio *knew* that the "inside" information he possessed was material.

The evidence was insufficient to allow the jury to reach that conclusion beyond a reasonable doubt. The undisputed evidence at trial established that (1) after the September guidance was issued, Nacchio was not advised by anyone at Qwest to reduce those public projections until August 2001, months after his last trade, (2) Nacchio was optimistic about Qwest's prospects and had a more favorable view of the IRU market in 2001 than several of his employees, and (3) he was guided by the judgments of the auditors, the audit committee, and Qwest's lawyers in his understanding of whether any information he possessed was material. In April and May, Nacchio was confronted with, at most, a mixed picture of Qwest's financial performance to date in 2001. A few key facts stand out and negate any inference that he *knew* there was a material undisclosed risk to the public projections.

First, and most importantly, during this entire period it was the considered judgment of

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[24] The Government proposed an instruction "consistent with the definition of willfulness" in *Bryan* even though it argued that the instruction "is *not* legally required in an insider trading case." Mem. of the United States in Support of Proposed Jury Instr. on Insider Trading at 14 (Oct. 4, 2006) [Doc. No. 162]. In addition, it did not object to the willfulness instruction adopted by the Court. Tr. of Mot. Hr'g at 9 (Oct. 12, 2006). The Government is accordingly bound by that instruction. *See United States v. Williams*, 376 F.3d 1048, 1051 (10th Cir. 2004) ("The law of the case … hold[s] the government to the burden of proving each element of a crime as set out in a jury instruction to which it failed to object, even if the unchallenged jury instruction goes beyond the criminal statute's requirements.").

the company and its senior management that its public projections were reasonable. If the company had been in possession of material information that those projections were unattainable, then its repeated reaffirmations of the guidance throughout the relevant period would have been securities fraud. But there is no evidence that anyone among senior management, the lawyers, the directors, and the auditors expressed concern that Qwest was committing fraud on investors by reaffirming this guidance. Nacchio had no reason to question their judgment about the materiality of any information inside the company.

Qwest's general counsel, Drake Tempest, was intimately apprised of Qwest's financial performance and the specific information at issue here. He received the monthly "dashboards" summarizing Qwest's performance and attended business unit reviews. Tr. 799, 834. As general counsel, he also managed the trading windows, and there was testimony that it was Tempest's duty to close the trading window if there was material non-public information barring insiders from trading. Tr. 688-89. The evidence at trial established that Tempest was closely involved in the 2001 budget planning process and knew the details of Qwest's plan to reach its 2001 budget goals. In late November or early December 2000, before Mohebbi sent Nacchio his memorandum about how to run Qwest in 2001, Mohebbi first discussed his ideas with Tempest. GX904; Tr. 1798. The memorandum predicted that Qwest's "recurring" business would need "to literally take off by April-May time frame" if Qwest was going to meet its internal budget goals. GX 904. Mohebbi later sent Tempest a copy of the memorandum and asked for Tempest's feedback. Tr. 1798. It is therefore beyond question that Tempest knew exactly what Nacchio knew: that the budget plan for 2001 was aggressive and that some were predicting difficulties meeting the internal targets unless the company scored strong results in the early part of the year. Yet there is no evidence that, after first quarter results were complete in April, Tempest advised Nacchio or anyone at Qwest that its disclosures were somehow inadequate. Moreover, the evidence also established that Nacchio's trading activity was publicly announced, and known to Tempest, and that at least one other insider told Tempest that he was selling Qwest stock. Tr. 302. In short, Tempest knew about the same internal debates the other insiders knew about, and, at the same time, knew that insiders were trading. Yet Tempest never closed the trading window, never advised the company to change its public disclosures, and, as far as the evidence showed, never told insiders not to trade.

Likewise, the audit committee, together with Qwest's outside auditors, considered the issue of IRU revenues on at least four occasions in 2000 and 2001. They determined that the revenues did not need to be separately identified in Qwest's financial statements. At the October 23, 2000 meeting, IRU revenues were discussed with Qwest's outside auditor, Mark Iwan of Arthur Andersen, and, according to the minutes, "Iwan … informed the Committee that [Arthur] Andersen was of the view that the Corporation's positions were supportable and not unduly aggressive." A-15. The committee met again on February 7, 2001, at which time Arthur Andersen took the position that Qwest's IRU disclosure position was "neither conservative nor aggressive." A-18 (attachment to minutes entitled "Required Audit Committee Communications"). Mark Schumacher, Qwest's controller, who attended the audit committee meeting, testified that this meant "[a]ssuming that [it's] no problem, neither conservative nor aggressive, they don't care if it's disclosed or not." Tr. 1401. The committee met twice more during the period of Nacchio's trades, on April 20 and May 2. In the course of the April 20 meeting, the committee discussed "first quarter accounting issues" which included a discussion of Qwest's 10-K, filed in March. The 10-K disclosed: "To a lesser extent, the company sells capacity under indefeasible rights of use contracts. Revenues from these contracts are included in commercial services and were not significant in either fiscal 2000 or 1999." A-19. The April 20 minutes report that "Iwan informed the Committee that Andersen had reviewed the Corporation's results and financial statements for the quarter and year ended March 31, 2001 *and had no disagreements or issues with the same*." A-19 (emphasis added). Szeliga and Schumacher each confirmed that the disclosure was reviewed and there were no disagreements. Tr. 1002. Schumacher testified that the 10-Q disclosure for the first quarter was finalized sometime after the April 20 meeting, but that Iwan and Szeliga both agreed to it. Tr. 1442, 1464. On May 2, Nacchio attended the audit committee meeting, by invitation, and "Accounting for IRU's" was noted as one of the discussion items attached to the minutes. A-20. It was not until "sometime in the summer," in connection with the second quarter 10-Q, that Schumacher recalls Iwan recommending disclosure of IRUs. Tr. 1410.

These judgments, implicit and explicit, from the company's lawyers and auditors, particularly in light of the technical nature of accounting and disclosure rules, necessarily informed Nacchio's own judgment of whether certain information was material. *See* Tr. 998-99. (Szeliga testimony that "we relied on [Iwan] to give us guidance" about accounting rules and disclosure requirements). The Government presented no evidence that Nacchio disagreed with those consensus judgments about the materiality of this information at the time. The Tenth Circuit recently recognized the importance of such evidence in *Lake*, where the defendants had argued that they did not knowingly or willfully violate their disclosure obligations because others in the company, "and, in particular, the corporation's general counsel," had reached similar conclusions about the materiality of certain information at the same time. 472 F.3d at 1261.

Moreover, all of the available evidence indicates that Nacchio's own personal belief was that the "risks" being identified by subordinates like Casey were an ordinary part of the budgeting process—similar to the fears expressed during the preceding seventeen quarters in which Qwest had always made its numbers, and certainly not material inside information that the public numbers were unattainable. It is undisputed that after the September guidance was issued *not a single person* at Qwest recommended to Nacchio that the public projections be lowered until August. Szeliga testified that "there was no conversation from me to [Nacchio] or back insisting that the numbers be brought down at that time." Tr. 850. In fact, in April, Nacchio received a memorandum from Mohebbi, the chief operating officer, extolling Mohebbi's role in the company's first quarter accomplishments. The memorandum pointed to the fact that Qwest had exceeded "street expectations" in first-quarter revenues, EBITDA, and earnings per share. Mohebbi summed up the quarter as "tough but very productive," noting that he "came close to a heart attack twice." GX 926. It was not until August 15, 2001—after first and second quarters in which the company had met analyst projections—that anyone advised Nacchio to lower the revenue projections for the year. Szeliga testified that she made a presentation to Nacchio during which she recommended that Qwest "take [the] numbers down." Tr. 867. Nacchio responded that "he wanted to look at the detail." *Id.* He then held reviews of the business units to assess "where they were, as a result of what [Szeliga] was showing them and their current estimates [in Szeliga's presentation]." Tr. 867-68. Ultimately, he decided that it was appropriate to take the numbers down. A reasonable jury simply could not infer from Nacchio's response to Szeliga's recommendation that this was something that he *knew* all along.[25]

The evidence also established that Nacchio had a genuinely optimistic view of Qwest's prospects. Weinstein testified that Nacchio shared his "view of his prospects for this company" and that Nacchio was "entirely and completely bullish for the entire period of time" and "certainly [through] August 13, 2001." Tr. 1628. Even when Qwest's stock price fell in 2001, Nacchio continued to maintain that the company, and the rest of the industry, would recover. Tr. 1643-44. His decision to stop his trading plan when the stock fell below $38, and reinstate it subject to a bar on sales below that level, further demonstrates that Nacchio thought any problems would be short-lived. Moreover, there is uncontradicted testimony suggesting that Nacchio's view of the IRU market differed from that of several of his employees. When Casey told Nacchio that the IRU market was tightening, Nacchio challenged him "as to whether he was reading the wholesale market correctly" and asked him to take a "serious look at his business." Tr. 842 (Szeliga); *see also* Tr. 767-68 (Nacchio asked Casey "a lot of questions").

Nacchio still had reason to be optimistic. The evidence showed that the second quarter of 2001 conformed to a familiar pattern for Nacchio and Qwest. At the end of every quarter in 2000, it was the same story: there was a risk the company would miss its quarterly numbers, and the company generally did not know it would make its numbers until the final two weeks. Tr. 780. It was not unusual that certain managers would identify problems. Tr. 1154. But ultimately the company made its targets—for seventeen straight quarters. Tr. 953-54. The information before Nacchio in April of 2001 simply does not allow the inference that he must

[25] Szeliga's testimony furthermore demonstrates that Nacchio relied principally on the "current estimates" to forecast where the company's revenues would be at the end of the year.

have concluded that the third and fourth quarters (now six and nine months away respectively) would turn out differently. "A history of successful operations in many circumstances may provide management with a reasonable basis for predictions of similar prospects in the future." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1279 (D.C. Cir. 1994).

In sum, all the evidence demonstrates that Nacchio believed in Qwest's prospects, believed that they would meet the year-end guidance, and trusted the expert determinations of other people at the company as to what information was material. No reasonable jury could infer beyond a reasonable doubt that Nacchio subjectively *knew* that he was in possession of material inside information that the guidance would not be met.

2. Nacchio Did Not Trade On The Basis Of Any Material Inside Information

The evidence on scienter was also insufficient because the Government failed to present evidence from which a reasonable jury could conclude beyond a reasonable doubt that he traded *on the basis of* material, non-public information. "It is the insider's *use*, not his possession, that gives rise to an informational advantage and the requisite intent to defraud." *United States v. Smith*, 155 F.3d 1051, 1068 (9th Cir. 1998) (emphasis added); *see also SEC v. Adler*, 137 F.3d 1325, 1338 (11th Cir. 1998) (rejecting "knowing possession" test in part because it would not "always and inevitably be limited to situations involving fraud").[26]

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[26] Since *Smith* and *Adler*, the SEC has promulgated Rule 10b5-1. The rule (while providing a limited safe harbor) attempts to define "on the basis of" to mean that the insider was "aware of the material nonpublic information" at the time of the trade. However, Nacchio argued, and the Court agreed, Tr. 2678-79, that Rule 10b5-1 does not affect *Smith*'s holding that only proof of the *use* of material inside information suffices to show an intent to defraud.

In addition, although *Smith* connects the requirement to intent, "on the basis of" might also be understood as a requirement of causation necessary for the *actus reus* of insider trading.

There is no direct evidence of any kind suggesting that Nacchio made the decision to sell shares during this period because of the inside information at issue here. This case instead turns on inferences to be drawn from undisputed circumstantial evidence. And the Tenth Circuit could certainly conclude that the only reasonable inference is that Nacchio's trades were motivated by his intention—publicly announced in October 2000—to exercise options and sell one million shares per quarter in order to distribute his sales over a long period of time in advance of the expiration of those options in June 2003.

In October 2000, Nacchio told investors exactly what he intended to do with his options. Tr. 540-42 (Slater). The options had an unusual six and a half year term, and Nacchio had sought to have the board of directors extend the term to ten years, which proved impossible for accounting reasons. *Id*. He therefore announced that he would exercise options at rate of one million shares each quarter between then and June 2003. *Id.* Nacchio began selling shares in accordance with his announced intention. At the close of the trading window, on February 15, Nacchio then entered a trading plan through which he would exercise 11,500 options each trading day through June of 2003. Tr. 1580. The only reasonable understanding of this plan is that it was intended to carry out the intention he announced in October. Nacchio canceled the plan on March 1, however, because—as announced in a Qwest press release—he was unwilling to sell stock at less than $38 per share. Tr. 502-03.

The Government argued that scienter could be inferred from the decision to cancel the trading plan, contending that Nacchio canceled the plan because "it didn't get rid of his shares fast enough." Tr. 3072. This inference is simply unreasonable, and entirely inconsistent with the

Under either theory, the absence of any evidence that Nacchio traded "on the basis of" material inside information would require reversal of his convictions.

Government's theory of what Nacchio believed about Qwest's prospects. After canceling the plan, Nacchio could not trade until the trading window reopened on April 26. That is more than seven weeks in which he could not sell a stock he supposedly believed was headed for disaster. Meanwhile, other stocks in the telecommunications industry had been falling. Tr. 2312, 2747-48. Moreover, Nacchio severely constrained his own ability to sell going forward by announcing that he would not sell below $38. The Government's theory assumed that Nacchio was clairvoyant—*i.e.*, that he canceled the plan because he knew the stock would tank, but not before rising back above $38 after April 26 to allow him to dump shares in quantity.[27] Its contention that Nacchio's $38 floor on sales was just "window dressing," or a diversion designed to distract attention away from the sales themselves, is similarly far-fetched and certainly not a conclusion that a reasonable jury could reach beyond a reasonable doubt.

IV. THIS COURT'S CIPA RULINGS PRESENT A SUBSTANTIAL QUESTION FOR APPEAL

The Court is aware of the classified evidence Nacchio sought to introduce bearing on his state of mind and the reasonableness of his beliefs that Qwest would meet its public projections. This evidence concerned his knowledge of the potential for Qwest to receive substantial government contract revenue in 2001. The Court acknowledged that "the prospect of undisclosed, classified contracts to be awarded during the relevant time period arguably goes to Defendant's good-faith belief that Qwest's financial prospects remained good." *See* First Memorandum Opinion and Order Pursuant to Section 6(a) of the Classified Information Procedures Act at 22 (Oct. 24, 2006) [Doc. No. 195]. However, the Court issued a series of

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[27] It cannot be that Nacchio somehow knows the news from the first quarter will be positive. The Government contends just the opposite—that by the end of February, Nacchio knew that first-quarter revenues were not on track. Tr. 2774.

rulings under CIPA that effectively precluded Nacchio from presenting this evidence to the jury. As set forth above, defendants are generally entitled to wide leeway to introduce evidence, and the improper exclusion of defense evidence can readily result in reversal of a conviction. The CIPA rulings present a substantial issue for appeal,[28] and the Court has noted its expectation that they would likely be raised on appeal. *E.g.*, Tr. of Status Conference Hr'g at 31-32 (Feb. 8, 2007) [Doc. No. 238] ("[T]he court's ruling and the Court's review of the information will be preserved for appeal, in the event an appeal is necessary. Obviously, the appellate court, if necessary, can determine whether the defense should have heard of this and whether this court was right or wrong in its determination.").

To the extent the Court's rulings were premised on Federal Rules of Evidence 401 and 403, the Tenth Circuit may well conclude this Court abused its discretion, particularly because the evidence was probative of Nacchio's state of mind. The standard for relevance under Rule 401 is extremely lenient, and the evidence the Court excluded satisfied it. For example, if credited, Nacchio's evidence would have tended to show that government officials made statements that led him to believe Qwest would be awarded very substantial government business. The reasonableness of his beliefs was a question for the jury, and went to the weight of

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[28] This Court made several written rulings, *see* Payne Ex Parte Order (Apr. 11, 2006) [Doc. No. 48]; CIPA Order (Oct. 24, 2006) [Doc. No. 195]; CIPA Order (Feb. 15, 2007) [Doc. No. 241]; CIPA Order (May 25, 2007) [Doc. No. 422]; CIPA Order (May 29, 2007) [Doc. No. 423], and oral rulings. The Court denied Defendant's initial request for access to the ex parte filings during the open portion of the February 8, 2007 Status Conference. Although the Court made a series of additional oral rulings during various of the closed hearings, they were never formally adopted in any written Order of the Court. Closed hearings were held on August 25 [Doc. No. 149], October 12 [Doc. No. 171] and December 8, 2006 [Doc. No. 198], and January 12 [Doc. No. 208], February 23 [Doc. No. 256], March 1 [Doc. No. 265] and March 9, 2007 [Doc. No. 269]. Nacchio objected to these rulings orally and in classified filings.

the evidence, not its admissibility. Moreover, because this evidence would have "tend[ed] to show lack of specific intent," the defendant was "entitled to wide latitude," and under controlling precedents had a right to present proof of "'a wider range than is allowed in support of other issues.'" *Brown*, 411 F.2d at 1137. *See supra* at 31-32. And "'Rule 403 is an extraordinary remedy and should be used sparingly.'" *Roberts*, 88 F.3d at 880 (citation omitted).

The Court's rulings also limited Nacchio's ability to cross-examine government witnesses who had been identified under Section 6(f) of CIPA, 18 U.S.C. app. 3, § 6(f), to show the reason Qwest did not receive these contracts, and to challenge the credibility of the witnesses identified by the government as available to rebut Nacchio's evidence. The Tenth Circuit could well conclude that Nacchio's rights under the Confrontation Clause of the Sixth Amendment were violated. Importantly, the standard of review of a Confrontation Clause claim is *de novo*, *Jones v. Gibson*, 206 F.3d 946, 957 (10th Cir. 2000), and convictions have been reversed on this basis. *See United States v. DeSoto*, 950 F.2d 626, 629-31 (10th Cir. 1991) (such a deprivation was a constitutional violation despite the trial court's discretion to reasonably limit cross-examination); *United States v. A&S Council Oil Co.*, 947 F.2d 1128, 1133-35 (4th Cir. 1991) (reversing criminal conviction based on district court's refusal to allow the defendant to fully explore the basis for the government's witness's testimony, which was used to bolster the credibility of the key prosecution witness); *United States v. Harvey*, 547 F.2d 720, 723 (2d Cir. 1976) ("'(A) defendant should be afforded the opportunity to present facts which, if believed, could lead to the conclusion that a witness who has testified against him either favored the prosecution or was hostile to the defendant. Evidence of all facts and circumstances which "tend to show that a witness may hade his testimony for the purpose of helping to establish one side of a cause only," should be received.'") (citation omitted). This Court's CIPA rulings raise a substantial issue for appeal.

CONCLUSION

Nacchio will raise substantial questions on appeal which, if resolved in his favor, will likely result in reversal of his conviction or a new trial. Accordingly, this Court should grant Defendant bail pending appeal pursuant to 18 U.S.C. § 3143(b).

Respectfully submitted this 23rd day of July, 2007.

s/ Herbert J. Stern
Herbert J. Stern
hstern@sgklaw.com
Jeffrey Speiser
jspeiser@sgklaw.com
Edward S. Nathan
enathan@sgklaw.com
Alain Leibman
aleibman@sgklaw.com
Mark W. Rufolo
mrufolo@sgklaw.com
Stern & Kilcullen
75 Livingston Avenue
Roseland, New Jersey 07068
(973) 535-1900
(973) 535-9664 (facsimile)

s/ Maureen E. Mahoney
Maureen E. Mahoney
maureen.mahoney@lw.com
Latham & Watkins LLP
555 11th Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200
(202) 637-2201 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July 2007, a true and correct copy of the foregoing **MOTION BY JOSEPH P. NACCHIO FOR BAIL PENDING APPEAL** was served on the following via email:

James O. Hearty
james.hearty@usdoj.gov
victoria.soltis@usdoj.gov
USACO.ECFCriminal@usdoj.gov

Cliff Stricklin
Cliff.stricklin@usdoj.gov

Leo J. Wise
leo.wise@usdoj.gov
dorothy.burwell@usdoj.gov

Colleen Ann Conry
colleen.conry@usdoj.gov

Paul E. Pelletier
paul.pelletier@usdoj.gov

Kevin Traskos
kevin.traskos@usdoj.gov

s/Edward S. Nathan
Edward S. Nathan