

REDACTED VERSION

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CSO: Macisso
DATE: 5/15/06

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.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

MAY 15 2006

GREGORY C. LANGHAM
CLERK

SECTION 5 CIPA SUBMISSION
ON BEHALF OF DEFENDANT

Defendant Joseph P. Nacchio, by and through undersigned counsel, pursuant to Section 5 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 5, and in accordance with the Court's Order, submits the following proffer of classified information which the defense expects to disclose in this proceeding.

INTRODUCTION

Mr. Nacchio intends to use certain classified information which was known to him prior to, and during, the period January 2 - May 29, 2001, the time when he is alleged to have committed insider trading. We intend to prove that Mr. Nacchio's knowledge was not shared with any of the Qwest employees alleged to have given him "warnings" concerning Qwest's 2001 public guidance. This knowledge related to discussions between Mr. Nacchio and representatives of various clandestine government agencies, such as

the Department of Defense ("DOD") and its Defense Information Systems

Agency ("DISA"), the National Security Council staff
and concerning hundreds of millions of dollars of
contracts these agencies were actively considering awarding to Qwest during 2001.

The classified information known to Mr. Nacchio during the time he traded allowed him to reasonably anticipate the award of classified government contracts. For years Mr. Nacchio had continually been in possession of such information and observed the manner and frequency with which his classified discussions about potential new projects ultimately bore fruit as actual classified contracts. As will be shown, as early as September 2000 -- when the 2001 guidance was first being issued -- Mr. Nacchio was aware of certain prospective classified projects which, in fact, came to be awarded as actual contracts to Qwest.

Critically, not only did Mr. Nacchio know that those criticizing the guidance did not share this classified knowledge, but he also knew that none of the prospective government contracts were incorporated in Qwest's 2001 public guidance. Taken together, Mr. Nacchio reasonably believed that those criticizing the guidance were mistaken, and that Qwest's public guidance remained accurate, if not actually low. In other words, Mr. Nacchio was able to conclude that the warnings being given to him did not, in actual fact, constitute material, nonpublic, information, because they were wrong.

Mr. Nacchio therefore lacked the requisite scienter to have committed insider trading. Mr. Nacchio's classified knowledge, as described below, is admissible at trial, not only as to his state of mind but as to whether or not the warnings of others were accurate at the time they were given.

PROCEDURAL HISTORY

During the Court's first conference in this matter, on December 20, 2005, counsel for Mr. Nacchio advised that CIPA would be at issue in these proceedings, that is, that the defense intended to rely on certain classified information known to Mr. Nacchio which was relevant to his defense. (See Transcript of Proceedings, 9:11-18 (December 20, 2005)). During the March 24, 2006 Hearing, the Court stated:

So -- and then the step after that would be for you to articulate somehow how this information would be necessary to a defense of the case.

* * *

... are you thinking that you will file some kind of notice of CIPA defense, perhaps, or some similar document?

(Transcript of Proceedings, 36:24-25, 37:16-18 (March 24, 2006)). The Court then set down May 15, 2006 as the filing date for the Defendant's CIPA submission. (*Id.*, 38:19-21)).

FACTUAL DISCUSSION

What Mr. Nacchio Knew

We intend to produce evidence that Mr. Nacchio engaged in classified communications with the government in several different contexts. First, clandestine agencies such as DOD/DISA, and all approached Qwest directly to take on top secret, national security-related, projects. Additionally, as CEO of a major telecommunications company, Mr. Nacchio was a member of the President's National Security Telecommunications Advisory Committee ("NSTAC").¹ Through the clandestine agencies which were Qwest customers, Mr. Nacchio came to know of future contracts that the agencies planned to place with Qwest.

¹ In 2001 Mr. Nacchio was appointed by the President as Vice-Chairman of NSTAC. He was later appointed Chairman, and was serving as Chairman when he resigned from Qwest in 2002.

Through Mr. Nacchio's discussions with national security staff and work on NSTAC, he was directly involved in the government's desire to rapidly shift classified communications away from satellite and internet transmissions, which were inherently vulnerable to the increasingly greater capabilities of hostile foreign powers, rogue states and terrorists to engage in what was known as "cyber-warfare." This shift would be accomplished by switching classified communications onto secure, untappable, fiber optic networks, and Qwest was just in the process of completing the construction one of the newest and most complete fiber optic networks.² Because Qwest's network was newly built, it had plenty of available bandwidth for sale and, because it was built using the purer glass which had become available after earlier networks were constructed by Qwest's competitors, it had superior transmission capabilities. These factors made dealing with Qwest particularly attractive to clandestine government agencies.

**Mr. Nacchio's Direct Communications
With Clandestine Governmental Agencies**

2. The Defense Information Systems Agency

In addition, we also intend to prove that Mr. Nacchio expected additional revenues from classified work that he believed would be awarded to Qwest by DISA, commanded by Lieutenant General Harry D. Raduege, Jr., who was also the Manager of the National Communications System ("NCS").

Mr. Payne first introduced Mr. Nacchio to General Raduege in the spring of 2000, because General Raduege was deeply involved in Pentagon procurement. As a result of the relationship between a relationship developed between Qwest and DOD. By the time of this meeting, Qwest was already the beneficiary of an approximately \$500,000,000 DOD contract. That contract entailed using Qwest fiber optic facilities to interlink various military installations throughout the country.

We intend to prove that Mr. Nacchio had a series of meetings with General Raduege from mid-2000 through the spring of 2001. During Mr. Nacchio's first meeting with General Raduege, they discussed making the Pentagon's communications less susceptible to "denial of service" attacks, by moving critical applications off of internet facilities and onto private "intranet" Pentagon facilities utilizing Qwest fiber optic IRUs. This led to subsequent growth in DOD's contract with Qwest. Still later discussions concerned the expansion of these facilities to overseas military installations.

We intend to prove that these conversations and the projections of future revenue in the months ahead were in Mr. Nacchio's contemplation as he evaluated the appropriateness of the guidance which Qwest was issuing between September 2000 and May 29, 2001. This information was not available to those who may have had a different view of the achievability of

the guidance and is highly relevant to the issue of whether or not Mr. Nacchio believed the guidance was appropriate.

3. The General Relationship Between Qwest And Governmental Agencies Doing Classified Work

From mid-1999 throughout 2000, Mr. Nacchio -- working with Mr. Payne -- was aware of still additional prospective classified business opportunities involving other clandestine agencies such as the

The relationship was such that Mr. Payne would flush out opportunities and when they matured to the point of possible closure he would bring in Mr. Nacchio.

It is not possible at this stage of the case, looking back six years without the benefit of having an extensive opportunity to examine corporate records and classified documents and, even more important, without the ability to interview Mr. Payne and others, to be able to make a precise proffer in this area. We can say that the general climate of the relationship between the company and these various agencies, along with a reasonable evaluation of the needs of those agencies and the likelihood of Qwest's participation in fulfilling those needs, were factors in Mr. Nacchio's evaluation of the proper guidance.⁵

The government may again attempt to argue that CIPA should not be an issue in these proceedings because the classified information known to Mr. Nacchio had already been incorporated into Qwest's 2001 public guidance.⁶ The government may cite, in its reply to this submission, interview memoranda with Messrs. Mohebbi, Graham, and Arnold, Qwest employees who purport to state that Qwest's public guidance incorporated potential classified government contracts. However, three of them did not even have top secret clearance and none of them were privy to any of the classified discussions Mr. Nacchio and Mr. Payne had with various clandestine government agencies.⁷ Indeed, all of these employees told the government that they received their information about classified contracts from Mr. Payne. And Mr. Payne told the government he did not include any prospective classified government work in his projections, which were limited only to contracts already issued or on the verge of being issued. Moreover, he confirmed to the government that Mr. Nacchio possessed classified information unknown to others at Qwest about prospective government contracts. Thus, there is no basis for any assertions by the government based on these witnesses that potential classified contracts were included in the public guidance.

⁶ In its "Memorandum Brief Regarding CIPA" (January 17, 2006) (Doc. 20-1), the government asserted that the September 7, 2000 public guidance already contained all of the government group's future revenue projections from classified contracts. Therefore, the government averred, Mr. Nacchio had no classified knowledge related to company revenue that was not already incorporated into the public guidance. (See *id.*, § II at 3-10). However, as we demonstrated in one of our recently filed motions, Mr. Payne had previously advised the government that prospective classified government contracts were *not* included that guidance. (See Mr. Nacchio's Omnibus Discovery Motion at 9-16 (May 1, 2006) (Doc. No. 65)).

⁷ While Mohebbi claims to have had such a clearance, he concedes that he was not personally involved in any classified discussions with clandestine government agencies.

CONCLUSION

The foregoing proffer is of classified information which the defense proposes to disclose in this proceeding.

Respectfully submitted this 15th day of May, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2006, a true and correct copy of the foregoing **SECTION 5 CIPA SUBMISSION ON BEHALF OF DEFENDANT** was filed and served by hand delivering same, in Washington, D.C., to the Court Security Officer appointed by the Court in this within matter.

s/Edward S. Nathan
Edward S. Nathan