

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF COLORADO

3 Criminal Action No. 05-cr-00545-EWN

4 UNITED STATES OF AMERICA,

5           Plaintiff,

6 vs.

7 JOSEPH P. NACCHIO,

8           Defendant.

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9                   REPORTER'S TRANSCRIPT  
10                   SENTENCING

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11                   Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,  
12 Judge, United States District Court for the District of  
13 Colorado, commencing at 9:00 a.m., on the 27th day of July,  
14 2007, in Courtroom A201, United States Courthouse, Denver,  
15 Colorado.

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23                   THERESE LINDBLOM, Official Reporter  
24                   901 19th Street, Denver, Colorado 80294  
25                   Proceedings Reported by Mechanical Stenography  
                  Transcription Produced via Computer

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## P R O C E E D I N G S

16  
17 *THE COURT:* The Court will call case 05-cr-545, United  
18 States of America v. Joseph P. Nacchio.

19 I'll begin by taking the appearances of counsel.

20 *MR. STRICKLIN:* Good morning, Your Honor. Cliff  
21 Stricklin on behalf of the United States, along with Colleen  
22 Conry, Leo Wise, James Hearty and Kevin Traskos. And seated  
23 also at counsel table are Special Agents Jo Jan Henderson and  
24 Susan Montoya.

25 *MR. STERN:* Good morning, Your Honor. Herb Stern,

1 Mr. Nacchio, along with Jeff Speiser, Mark Rufolo, John  
2 Richilano, Marci Gilligan, and Maureen Mahoney of the firm of  
3 Latham & Watkins.

4           *THE COURT:* This matter comes before the Court for  
5 sentencing this morning.

6           Before proceeding to that order of business, there are  
7 a number of pending motions which need to be addressed.

8           Someone, I think it was an appellate judge, once said,  
9 the function of an appellate court is to come on the field of  
10 battle after the war is over and shoot the wounded. So in  
11 ruling on these post-trial motions, to some extent, I feel like  
12 I'm shooting the wounded.

13           The first motion before the Court is Document No. 429,  
14 the motion for judgment of acquittal pursuant to Federal Rule  
15 of Criminal Procedure 29.

16           The Court has reviewed that very short motion. It  
17 appears to be designed to memorialize for the record positions  
18 that have been previously argued and ruled upon. And the Court  
19 will respond with even more brevity.

20           Based on the record that has been made and the Court's  
21 previous rulings, the motion is denied.

22           Document No. 430 is a motion to change venue. That,  
23 again, addresses a matter which was extensively considered and  
24 briefed during the trial. Of course, there has been  
25 supplemental briefing by the defendant, and the Government has

1 responded.

2           Much of what the Court has to say has already been  
3 said. At this point we now have a post-trial perspective. In  
4 other words, we can now look back at the battle and try to take  
5 another look at the motion to change venue.

6           In the Court's view, only one additional observation  
7 need to be made. And that concerns the jury selection process,  
8 the jury, the jury's deliberations, and the verdict.

9           The Court indicated last August that it thought many  
10 of the problems raised by the defendant's motion to change  
11 venue could be dealt with and addressed by the Court and the  
12 parties in the jury selection process. And when we chose the  
13 jurors, the Court tried to further that goal.

14           There was an extensive questionnaire that was sent out  
15 to jurors. At the urging of the defendant, and with the  
16 somewhat reluctant acquiescence of the Government, the Court  
17 eliminated large blocks of people who it thought would be  
18 likely to harbor some prejudice against the defendant. And it  
19 was further guided by the consideration that it thought it  
20 would be difficult to root out that prejudice, even in the voir  
21 dire process. So any people having an association with Qwest  
22 were by and large eliminated from further consideration.

23           We brought a jury in, a jury panel, and chose the  
24 jury, 16 jurors. Twelve deliberated. What I want to observe  
25 about the jury and its deliberations is that this was an

1 extraordinary jury. And its deliberations and the record in  
2 this case demonstrate that if there was prejudice, and if there  
3 was extensive publicity, there was no circus atmosphere in this  
4 courtroom, and that prejudice and publicity did not affect this  
5 jury's verdict. It did not affect the deliberative process.  
6 It did not affect these court proceedings.

7           The jury heard the evidence and deliberated for many  
8 days. During the deliberations they asked questions. The  
9 questions demonstrated to this Court's satisfaction that they  
10 understood what they were doing.

11           At the end of their deliberations they rendered a  
12 verdict. The verdict itself bears indicia that it is not the  
13 product of passion and it is not the product of prejudice.  
14 It's the product of a long, careful deliberative process.

15           The jury was not so angry with the defendant that it  
16 threw the book at him. It was not so angry with the defendant  
17 that it deliberated for a short time and returned a verdict of  
18 guilty on all counts. It deliberated for days and returned a  
19 mixed verdict.

20           In this court's view, the verdict takes a rational  
21 view of the evidence. That is, the jury could rationally and  
22 reasonably have found in this case that while Mr. Nacchio may  
23 not have committed crimes on an earlier date, there came a  
24 point in his discussions with his subordinates and with others  
25 at U S WEST that what was a prediction before had become

1 reality. What was possible before had become probable. And  
2 that is, that Qwest was facing some severe problems.

3 That, I believe, is the essence of what is reflected  
4 in the jury's verdict. And in the Court's view, it's rational.

5 I mention that because one of the things that we  
6 surely have to consider when we're considering pretrial  
7 publicity, and which the case law considers, is whether there  
8 was a circus atmosphere, whether the pretrial publicity somehow  
9 infected the court proceedings.

10 It did not. The motion for change of venue is denied.

11 The next motion that the Court needs to consider and  
12 deal with is the Government's motion for issuance of subpoenas  
13 directed at the doctor who is in charge of treating the  
14 defendant's son, Mr. David Nacchio. That motion is denied.

15 This Court sees absolutely no reason to further  
16 explore these private, sensitive facts concerning Mr. David  
17 Nacchio's unfortunate situation in these public proceedings.

18 If those materials have already been furnished, and I  
19 understand they may have, I trust that the parties will be able  
20 to negotiate their return.

21 The two other motions pending are the motion for  
22 downward departure made by the defendant and the Government's  
23 motion to modify conditions of release. It will be appropriate  
24 for the Court to address those motions at a later point in  
25 these proceedings.

1           There is one motion that for some reason is not  
2 showing up, perhaps because I just ruled on it this morning,  
3 and that is the Government's motion for an order of forfeiture.

4           The Court earlier this morning entered an order,  
5 Document No. 457. And for the reasons that are fully stated in  
6 that order, the Government's motion is granted. And the Court  
7 orders that the defendant will forfeit to the United States the  
8 sum of \$52,007,545.47 within 15 days of the date of this order.  
9 And that forfeiture order will be reflected in the criminal  
10 judgment which this Court will enter in a few days.

11           I believe we are now ready to proceed to sentencing.

12           Mr. Stern, it is the Court's assumption that you and  
13 the defendant have each received a copy of the presentence  
14 report excluding only the recommendation as to sentence.

15           *MR. STERN:* That is correct, Your Honor.

16           *THE COURT:* And have you and Mr. Nacchio had a full  
17 opportunity to prepare for this hearing and to go over the  
18 presentence report?

19           *MR. STERN:* We have, Your Honor.

20           *THE COURT:* All right. I'm aware of one objection,  
21 and that objection has to do with the calculation of gain,  
22 which is very important and drives this sentence. And I assume  
23 there are no other material objections. I know there are some  
24 corrections, but material objections.

25           *MR. STERN:* That is correct, Your Honor.

1           *THE COURT:* All right.

2           I'm not sure whether either side anticipates evidence  
3 this morning.

4           I think, Mr. Stricklin, you called my staff and  
5 indicated that the Government was not going to avail itself of  
6 the opportunity to present an hour and a half worth of victim  
7 testimony.

8           *MR. STRICKLIN:* That is correct, Your Honor.

9           *THE COURT:* All right. Are you aware of any victims  
10 who are present this morning and who do through their lawyers  
11 wish to present testimony?

12          *MR. STRICKLIN:* No, Your Honor, there are none.

13          *THE COURT:* All right. And Mr. Stern, I think that  
14 you may have David Nacchio's doctor here.

15          I don't require that testimony. The proposal is that  
16 it be taken in closed proceedings anyway, and I think that it's  
17 inappropriate to close these proceedings. I've got the  
18 doctor's report. And I think, as I said before, there is no  
19 need to dwell on this situation.

20          *MR. STERN:* May I have just a moment to confer with my  
21 colleagues and my client?

22          *THE COURT:* Yes.

23          *MR. STERN:* It's not easy to do that. Can we just --

24          *THE COURT:* Do you want to go to a corner?

25          *MR. STERN:* Yeah, and then I'll be better and I'll

1 come out.

2 *THE COURT:* Sure.

3 (Off-the-record discussion.)

4 *MR. STERN:* Should I go over there?

5 *THE COURT:* I can hear you, actually; so that's fine.

6 *MR. STERN:* You don't have my disabilities.

7 We are on the horns of a dilemma, to be quite frank  
8 about it. The Government's responding papers have indicated  
9 that it is their view that the record doesn't support our  
10 principal contention that as a practical matter -- as a matter  
11 of fact, it is entirely true that there is only one human being  
12 who provides a lifeline for this young man.

13 We are prepared to prove that. We furnished the  
14 records to the Government. We have brought the -- not an  
15 expert witness, but the treating physician who has been  
16 treating David Nacchio since June 11 of '01. We are prepared  
17 to make a detailed showing of all of the different  
18 confinements, the different incidents, what has happened, and  
19 who it has been who has literally been saving the kid's life.

20 This is not make believe. It's not an artifice. It's  
21 not a ploy. And we are prepared to demonstrate that, not with  
22 opinions from some hired person, as I said, but by the treating  
23 physician with all the records, with the hospital records.

24 Now, I understand that this is a heavy burden that we  
25 have. I understand that under the law we have to show in this

1 circuit that this is for real. There is one person who is  
2 desperately needed for this young man. I am in good faith with  
3 this court. I want to prove that to you.

4 If we have to drag this all out in the courtroom,  
5 that's one way to do it. It's not good for David. I'm  
6 prepared to do this in camera.

7 I sit -- or stand, more appropriately -- on this side  
8 of the bench. I cannot know what Your Honor needs for purposes  
9 of having demonstrated to you the factual basis for our request  
10 for departure on this ground.

11 *THE COURT:* Well, I have the doctor's report, and I  
12 read the doctor's report. And I'm not going to tell you what  
13 sentence I'm imposing or what sentence I'm thinking of  
14 imposing.

15 Let me approach it this way to see whether we can  
16 shorten this and whether this can give you some guidance,  
17 because I assume this cannot be a -- anything but a painful  
18 process for Mr. Nacchio to even want to put this in the record.

19 So I think it would be useful for you to address the  
20 following point: The logic of the argument that you are making  
21 is that Mr. Nacchio should not be imprisoned at all. Why  
22 should he not be imprisoned at all? Because as you put it,  
23 accepting what you just said as a fact, he is the lifeline to  
24 his son. He is the only person who can perform these  
25 functions, and there is no other way that these functions can

1 be performed.

2 I can say with some confidence that that logic cannot  
3 carry the day in this case. That is to say, Mr. Nacchio will  
4 not receive some sort of probationary sentence where he will be  
5 able to do these things in the way that he has done them in the  
6 past.

7 Assuming that a probationary sentence is out of the  
8 question, which it is, both by statute and because of the  
9 circumstances of this case, then I don't follow the logic of  
10 your argument.

11 If I were to impose a one-year sentence, if I were to  
12 impose a four-year sentence, a five-year sentence, a six-year  
13 sentence and -- a seven- or eight-year sentence, the fact is,  
14 Mr. Nacchio, assuming the verdict and the sentence are upheld,  
15 will be serving time in prison, in an institution. And he will  
16 not be able to do the things that he supposedly does for  
17 Mr. Nacchio.

18 To me, the argument falls of its own weight, because  
19 at that point even a one-year sentence is going to frustrate  
20 this end.

21 I don't know whether that gives you any guidance as to  
22 whether you wish to present evidence. I can tell you with some  
23 confidence, probation will not be granted.

24 *MR. STERN:* I hear you. I understand what you're  
25 saying, and I understand the logic that you have put forth.

1 But to quote Holmes, life of the law has not been logic, but  
2 experience.

3           The fact of the matter is that life is also a matter  
4 of degree. And the human mind is unfathomable. A lengthy  
5 sentence sets up one kind of barrier. A shorter sentence,  
6 another.

7           I'm not being cute with you. You're dealing with the  
8 hopes, aspirations, you're dealing with what amounts to the  
9 mental DNA of another person. I can't say to you, this  
10 sentence is enough, that sentence would be too much. I think  
11 that these things have been confided to you. I know something  
12 about that. But I know that you cannot, and you have indicated  
13 that you are not, entirely indifferent to this. And therefore,  
14 differences in degree make differences in kind.

15           And your logic, Your Honor, is certainly unassailable.  
16 But in terms of the practical application of it to human  
17 beings' lives, how much can make a difference.

18           I hope I'm being responsive to you.

19           *THE COURT:* Well, I think that you are being  
20 reasonably responsive. And I don't know how much further I can  
21 say in order to give you guidance as to what in addition you  
22 want to do.

23           I, of course, have Dr. Hammer's letter -- letters, I  
24 should say. And I have the other letters, of course, too. But  
25 Dr. Hammer's is the most persuasive. And I take it that's the

1 testimony that you are thinking you want to present, not other  
2 people.

3           To my way of thinking, Dr. Hammer is pretty detailed  
4 in his report.

5           *MR. STERN:* I hear you. And I hate to impose on you,  
6 may I have one more short conference?

7           *THE COURT:* Yes, of course. This is critical.

8           *MR. STERN:* Thank you, Your Honor.

9           *THE DEFENDANT:* Your Honor, can I address you?

10          *THE COURT:* Not at this point, sir.

11          (Off-the-record discussion.)

12          *MR. STERN:* If Your Honor please. All of this is  
13 really for you so that you can exercise your discretion. We  
14 can't have a public hearing. And Your Honor has indicated that  
15 you feel you are well enough informed. It would be foolish of  
16 me to fly in the face of that. And I'm not saying that for any  
17 artifice.

18           I make this offer: If you think you need it, we would  
19 be prepared to have you speak with Dr. Hammer, even, if  
20 necessary, without us, on question that is underneath the  
21 question you raise, as to -- you know, whether the degree of  
22 time matters.

23           If you don't feel you need it, then we are done.  
24 Because this is all aimed at assisting the Court in the  
25 exercise of what you know to be the most awesome power that you

1 have.

2           *THE COURT:* Well, does the -- I'm assuming the  
3 Government would have some problem with an ex parte  
4 conversation where I sat down with Dr. Hammer.

5           *MS. CONRY:* Yes, Your Honor.

6           *THE COURT:* All right. I think that's legitimate.  
7 Well, I'm going to assume there is no request for  
8 evidence.

9           And I'll say one further thing. To the extent that  
10 you and Mr. Nacchio need and want to present this in private,  
11 in camera, without the presence of the public, I don't think  
12 that can be justified in this case. I don't think that's the  
13 kind of issue for which the case law permits the Court to close  
14 a proceeding and not conduct it in public.

15           You know, I haven't reviewed the case law in detail,  
16 of course, but that's my general understanding.

17           So I would be requiring that this be public testimony.  
18 So if that helps your determination, then that's my ruling.

19           *MR. STERN:* Under those circumstances, we are going  
20 to -- May I just --

21           *THE COURT:* Yes, you may, of course.

22           (Off-the-record discussion.)

23           *MR. STERN:* Under those circumstances, we don't want a  
24 public hearing.

25           *THE COURT:* All right.

1           So there will be no testimony this morning.

2           At this point the Court will first hear from counsel,  
3 and then the Court will hear from Mr. Nacchio.

4           So Mr. Nacchio, if you would stand with your lawyer,  
5 or lawyers, if you want them there, at the lectern, I will hear  
6 from you momentarily, after I do hear from your attorneys.

7           MR. STERN: May I make one inquiry, Your Honor?

8           THE COURT: Yes.

9           MR. STERN: Do you -- I didn't know what your practice  
10 was. Are you going to rule on the guidelines first, or are you  
11 going to hear --

12           THE COURT: My practice is -- now, we can separate it.  
13 I've done it both ways. If you want to make legal argument  
14 concerning the calculation of gain and your departure request  
15 and the basis for those requests, I've sometimes separated that  
16 from your statement in mitigation. That's awkward, because I  
17 think they're mixed. I think in this case you're disputing  
18 some very dry guideline calculations, but nevertheless, some  
19 very important ones, and you are also asking for a departure.  
20 And the Court also has to consider the statutory purposes of  
21 sentencing as articulated in 18 United States Code Section  
22 3553(a). And all those get mixed up.

23           So my suggestion is, you proceed with both, then I'll  
24 hear from Mr. Nacchio.

25           MR. STERN: Well --

1           *THE COURT:* Your colleague may be wanting to support  
2 you here, amazingly enough.

3           *MR. STERN:* My --

4           *MR. STRICKLIN:* If I could.

5           *MR. STERN:* You want to help me?

6           *MR. STRICKLIN:* I hate to couch it in those terms.

7           But we have divided up the arguments amongst ourselves  
8 as to who has kind of the most knowledge about that area. That  
9 would be helpful to talk about gain versus downward departure.

10           *THE COURT:* I don't care about that. In this unusual  
11 circumstance because you've divided the argument, and if the  
12 defendant has done the same thing, if somebody is a specialist  
13 in gain calculations, I'm happy to hear from more than one  
14 lawyer on this occasion.

15           *MR. STERN:* Speiser --

16           *THE COURT:* I'm not happy to hear it, but I will allow  
17 it.

18           *MR. STERN:* Speiser is our gain man. If you would  
19 allow that --

20           *THE COURT:* Sure.

21           *MR. STERN:* -- then I'll come in.

22           *THE COURT:* All right. That's fine, then.

23           Why don't all of you just gather around the podium.

24           *MR. STERN:* Do you want Mr. Nacchio up there too?

25           *THE COURT:* Yes, I do.

1 People call it a lectern sometimes.

2 All right, Mr. Speiser. You're the gain man?

3 *MR. SPEISER:* Yes.

4 Your Honor, I think we would begin our argument with  
5 the sentencing guideline 2F1.2, which states, for the crime of  
6 insider trading, you increase the number of levels from the  
7 table in Section 2F1.1 corresponding to the gain resulting from  
8 the offense.

9 And in the commentary states, because the victims and  
10 their losses are difficult if not impossible to identify, the  
11 gain, i.e., the total increase in value realized through  
12 trading in securities by the defendant and persons acting in  
13 concert with him or to whom he provided inside information is  
14 employed instead of the victim's losses.

15 Now, we believe that the case law is very strong that  
16 in calculating the amount of the gain, that what should only be  
17 considered is that the losses are caused directly by the  
18 offense conduct.

19 The Government takes a totally different position.  
20 They take the entire amount. Now, if we were to follow --

21 *THE COURT:* Wait a minute, wait a minute. You all --  
22 this is part of my problem with the argument. You just used  
23 the word "loss." That's not the same as gain.

24 *MR. SPEISER:* That's correct. But in the cases where  
25 the -- where there have been securities fraud convictions and

1 the Court had to calculate the loss, it did so using the same  
2 principles that should be applicable here. The reason --

3 *THE COURT:* Well, are you talking about Judge Jones'  
4 decision for the Fifth Circuit in *Olis*?

5 *MR. SPEISER:* That's one of the cases.

6 *THE COURT:* Well, that's not an insider trading cases.

7 *MR. SPEISER:* No, it's not. But it is a securities  
8 fraud case.

9 *THE COURT:* Well, that makes a world of difference,  
10 because it's only the species of security fraud known as  
11 insider trading where the Court is directed to sentence  
12 according to the defendant's gain.

13 Judge Jones for the court in that *Olis* decision was  
14 calculating loss, not gain, because that's the way in most  
15 securities fraud cases the court determines the sentence.

16 *MR. SPEISER:* We would submit to the Court that the  
17 reason it's done by gain here, which is stated in the  
18 commentary, is because it is difficult to ascertain who the  
19 victims are.

20 *THE COURT:* Do you also acknowledge that the  
21 guidelines -- not this section, but I believe it's Section  
22 2B1.1, in commentary, says that in most cases, gain  
23 underrepresents the seriousness of the defendant's crime.

24 *MR. SPEISER:* That's correct. But almost all the  
25 cases that deal with securities fraud, and other crimes, the

1 guidelines are calculated by what gain the defendant received.  
2 And that's what we believe should be done here, to calculate  
3 the gain as a result of the insider trading. And the gain was  
4 not the full \$52 million. That would -- if you accept that,  
5 you would believe that the stock had no value whatsoever, that  
6 it had grown -- Mr. Nacchio was given the options in 1997 and  
7 didn't exercise them until 2001, that there was no value in  
8 those four years underlying the securities. And that is just  
9 not factually correct.

10 We've submitted an expert report, the Government  
11 hasn't contradicted the expert report, as to what the value was  
12 of the inside information.

13 *THE COURT:* What's unjust about telling him he has to  
14 give up that value too?

15 *MR. SPEISER:* I'm sorry to --

16 *THE COURT:* What is unjust about telling him to give  
17 up that value too, or calculating gain in such a way?

18 You're probably right, some value in those shares had  
19 been built up. But he sold, pocketed his value on that date,  
20 and walked away from it. Why shouldn't he have to give up that  
21 whole value, or at least have his sentence calculated based on  
22 that value?

23 *MR. SPEISER:* If I may give an example. If  
24 Mr. Nacchio had instead of exercising options and selling that  
25 took place in this case -- we had testimony that he learned of

1 a contract they were going to receive from Microsoft. And if  
2 he heard that and went out and bought shares and held onto them  
3 and sold them and -- the day after the information was  
4 released, and let's say the stock went up \$20, according to the  
5 Government's theory, the entire amount, what he paid for, plus  
6 the \$20 per share, would be the amount of the gain.

7 *THE COURT:* That's the *Mooney* case, right?

8 *MR. SPEISER:* Yes.

9 *THE COURT:* But this -- in the defense hypothetical,  
10 is he Moe, Curly or Larry in that hypothetical?

11 *MR. SPEISER:* Probably Curly.

12 But I'm applying to the facts in this case. If  
13 Mr. Nacchio had done the same thing and held onto the stock and  
14 then the stock plummeted, having nothing to do with anything he  
15 had done but because the market took a dive, then he would  
16 be -- the value would be far less. And the statute states that  
17 you shouldn't have that kind of disparity.

18 *THE COURT:* Well, the statute doesn't exactly say  
19 that. But at any rate, sticking with that -- you know, this  
20 isn't -- I'm ready to acknowledge that the Moe, Curly and Larry  
21 hypothetical is a little bit troublesome, because in the case  
22 where the insider purchases and thereafter holds because the  
23 insider anticipates something favorable coming out later on,  
24 there are problems that are not presented.

25 I mean, the Eighth Circuit solved those problems

1 simply and straightforwardly. But depending on the timing, as  
2 you point out, if it had been held until there was a loss,  
3 theoretically, you might calculate no gain. I doubt there is  
4 any court really confronted with that situation is going to say  
5 there is no gain. But I don't need to deal with it, do I?  
6 Because that's not this case.

7           *MR. SPEISER:* It is this case in the sense that it's  
8 insider trading on the same principle, that as CEO he used  
9 material inside information to buy or sell stock. I don't  
10 believe neither the statute nor the guideline or anything  
11 differentiates between buying and selling. It said these  
12 guidelines apply to either situation.

13           *THE COURT:* That's not what I'm suggesting. I'm just  
14 suggesting, you and the dissent in *Mooney* can come up with some  
15 theoretical problems that are presented when the shoe is on the  
16 other foot, when somebody's purchasing.

17           As a practical matter, in the real world, as opposed  
18 to the theoretical world that Judge Bright, I think, is talking  
19 about, insiders purchase because they expect the stock value to  
20 go up. And it does go up, because -- why? Because they're  
21 insiders, and they know what is going to happen when all of  
22 this information comes out.

23           So the scenario that you're posing, where the stock  
24 plummets, you know, is -- it could theoretically happen in --  
25 but in the real world, it's very unlikely.

1 All I'm suggesting to you is, I don't have to deal  
2 with that.

3 MR. SPEISER: Can I give another example I think which  
4 will show --

5 THE COURT: Hopefully this will be one that has to do  
6 with selling.

7 MR. SPEISER: Yes. If a CEO such as Mr. Nacchio  
8 received information that instead of making the quarter at  
9 \$5 billion, they were going to come up short, you know, and  
10 have maybe only 4,950,000,000. And he went out and he sold his  
11 stock immediately. Then when that information came out, the  
12 stock dropped a dollar. It wasn't very much money, they didn't  
13 make the numbers, but it wasn't serious.

14 If the same CEO learned that the United States  
15 Government was going to forbid the company from selling  
16 something because it was dangerous, and this would impact their  
17 earnings considerably, and that CEO went out and sold  
18 immediately, and the next day the stock plummeted from 40 to  
19 20, we're saying under the Government's theory, that same CEO  
20 would get the same jail sentence whether it was insignificant  
21 insider information or whether it was significant, instead of  
22 looking at what the value of the information was.

23 In one case, it was minor and insignificant. In  
24 another case, it was major. But both would get the same  
25 sentence.

1           *THE COURT:* No -- well, they would. And that's  
2 because gain measures the harm. And -- gain measures what he  
3 got out of it. What he got out of it was the same in both  
4 cases. You can't -- I --

5           *MR. SPEISER:* Well --

6           *THE COURT:* I know your argument is the same as the  
7 dissent in the --

8           *MR. SPEISER:* Mooney.

9           *THE COURT:* -- Mooney case, that you can parse this  
10 out. And if -- I just question that.

11           So I'll try to sit still and not interrupt you  
12 anymore.

13           *MR. SPEISER:* I'd rather address your questions than  
14 just speak theoretically.

15           *THE COURT:* All right.

16           *MR. SPEISER:* But --

17           *THE COURT:* Your whole case is theoretical. Why not  
18 continue to speak theoretically?

19           *MR. SPEISER:* Well, I think when you have so many  
20 cases in the criminal sense -- they may not be insider trading,  
21 but there are so many cases, both criminal and civil, civil  
22 insider trading cases, where the value is the issue, what did  
23 the defendant realize as a result of having inside information?  
24 And to not -- many of the civil cases, you know, go through  
25 proceedings and say, it's not easy to calculate it, but it can

1 be done. And they take expert testimony on it, and they  
2 calculate what the value is. And that is the amount the  
3 defendant is subject to.

4 And I think the same with the other securities  
5 fraud -- the same with the other securities fraud cases, and  
6 all criminal cases, the guidelines focus on what gain did the  
7 defendant receive as a result of his wrongdoing?

8 This would in a sense be the only situation where a  
9 defendant is punished not for the gain he received, but for the  
10 total sale, without taking into account what was legitimate,  
11 what he was entitled to, and what he wasn't entitled to.

12 And I think that's the essence of our argument, from  
13 both the cases and the logic, and the actual language of the  
14 guideline.

15 That essentially is our argument.

16 *THE COURT:* All right.

17 So who is next? I'm ready to hear anything you wish  
18 to say, by any lawyer.

19 Mr. Stern.

20 *MR. STERN:* The -- by any lawyer.

21 *THE COURT:* All right.

22 *MR. STERN:* Okay. I'm the rest of the lawyer.

23 *THE COURT:* All right.

24 *MR. STERN:* Well, it doesn't take a prophet to see  
25 where the Court is tending in terms of the numerical

1 guidelines.

2           *THE COURT:* Am I that easy to read?

3           *MR. STERN:* Yes, you're very --

4           *THE COURT:* Maybe --

5           *MR. STERN:* Well, that's possible, but that wasn't the  
6 take I got. I am comforted by that thought, because, Your  
7 Honor, seriously speaking there is no question about the fact  
8 that the proposition you set forth frees the Court from  
9 necessity of delicate, difficult quantifications.

10           It is very easy to say that the guideline number that  
11 drives here is the gross sale price.

12           By no -- I seem to be cutting out here. By no  
13 rational analysis -- I'll master this. You know, I'm not very  
14 good at this stuff.

15           *THE COURT:* Well, that microphone is weird, so -- it's  
16 probably the problem.

17           *MR. STERN:* No rational analysis would hold that on  
18 the facts of this case, the gain that was realized by this  
19 defendant was \$52 million. It may be that one can say that.  
20 It may be that the law requires it. But then the law would be  
21 departing from common sense and experience. His gain was not  
22 \$52 million.

23           If the Court and the law and those responsible for  
24 carving out the bright lines decide that it is too cumbersome,  
25 too difficult, too time consuming to actually burrow into what

1 the real gain, or if someone cares, the real loss is, I think  
2 that it would be far short of \$52 million, although that number  
3 drives a range of 70 months to 87 months.

4 I'm going to return to this in a few moments, if I  
5 may.

6 Your Honor was good enough to note, however, that the  
7 Moe, Curly and the other guy, that wasn't our hypothetical.  
8 That came from the United States Court of Appeals judge. And I  
9 think my colleague is absolutely correct.

10 *THE COURT:* Some of them have a sense of humor,  
11 evidently.

12 *MR. STERN:* Oh, very rarely, Your Honor.

13 I shared that view at one time about that.

14 But in any event, the fact of the matter is, as Jeff  
15 Speiser has indicated to you, that is precisely the kind of  
16 computation that is routinely made in civil cases where people  
17 who commit a civil wrong on the basis of either the buying or  
18 the selling of non-public material information are required to  
19 disgorge to other civil litigants, strikes me that if the courts  
20 can make that determination for the benefit of a civil  
21 litigant, we should seriously entertain making that kind of  
22 determination when deciding an important thing like for how  
23 long someone is going to be exposed to a sentence.

24 Having said that, I'd like to move on and assume,  
25 then, for the sake of the argument -- because Your Honor has

1 not said that you have finally decided -- that you will decide  
2 the legal issue against us, which means that the range is going  
3 to be 70 to 87 months, because I think there is no question  
4 left open other than, you know, amount of money in formulating  
5 the grid.

6           So then the question becomes, what can I say to you to  
7 help you to help Joe Nacchio in your application of your  
8 discretion to the landscape of between 70 and 87 months?

9           The Government has said that Your Honor should impose  
10 a sentence at the very height of the potential impossibilities.  
11 They request nothing less than 87 months. They request nothing  
12 less than a fine of \$19 million. They requested, and Your  
13 Honor has granted, nothing less than a forfeiture of 52 million  
14 some odd dollars.

15           We are left, therefore, with the Government demanding  
16 that a man who actually received in his pocket \$28 million  
17 should forfeit or be fined a total of \$71 million and should  
18 receive a sentence of confinement for 87 months.

19           What are the factors that has impelled the Government  
20 to ask you to exercise your discretion at the highest end of  
21 any possible punishment available to you?

22           I'm sure they're going to tell you that Joe Nacchio  
23 abused his trust under the verdict of the jury. Well, that  
24 cannot be denied, given the jury's verdict. But he has already  
25 paid that price by the application of 2 additional points in

1 assessing the guideline. Without those 2 points, the guideline  
2 range would have been 57 months at the low end and 71 months at  
3 the high end. So at the low end, it has been increased by 13  
4 months. And at the high end, it's been increased by 16 months,  
5 precisely because under the formulation for breach of trust,  
6 that's what happens to you.

7 I suggest to you as a matter of logic, and as a matter  
8 of experience, that to impose the highest possible punishment  
9 because of breach of trust would be to pile on in an  
10 inappropriate way and to ask and answer the same question  
11 twice.

12 Well, what else is there about the nature of the  
13 offense, the conduct, the man, his background? What else is  
14 there that impels the Government, or should possibly compel or  
15 persuade the Court to impose a sentence at the highest level  
16 available?

17 Well, did he have some secret information unavailable  
18 to anybody else in the company? Did he hide and conceal his  
19 actions? Was he bound and determined to profit by a carefully  
20 conceived plan of deception?

21 Well, we know, it's indisputable, that he did not want  
22 to sell the shares he sold. He went to the board of directors  
23 and asked them to extend the life. The Government's witness,  
24 Craig Slater, has said that. I believe Mr. Slater wrote to you  
25 privately. Mr. Slater was not called by me. He was called by

1 them. It is indisputable that he asked and begged the board to  
2 extend the life of the very options that he stands convicted of  
3 selling before you so he would not have to sell them. And it  
4 is indisputable that the board turned him down because they  
5 couldn't take the hit for the financials of the firm.

6 I'm not making it up, and it's not disputable or  
7 arguable. That is the fact.

8 So we know that he tried to avoid selling the very  
9 securities that he stands before you convicted upon for  
10 selling.

11 We know that he publicly announced the decision of the  
12 board, the necessity for him to sell, and announced publicly  
13 that he would sell 6 million of these options.

14 Now, is there anything about that conduct, I suggest  
15 to you, that should impel anybody to impose a sentence at the  
16 highest end of the range?

17 Well, did he vacate all the stock? Did he run because  
18 of some secret belief that the company was about to meet  
19 disaster? Did he sell all of his holdings? Did he sell the  
20 majority of his holdings? Did he sell a very large portion of  
21 his holdings?

22 No. It is indisputable that of the 6 million shares  
23 that he said he would sell, even as to those, he sold but a  
24 fraction of them, 1.33 million. Why? Because he stated he  
25 would refuse to sell under \$38 a share.

1           Now, I know to the untrained ear it may sound like I  
2 am at this moment making a summation in favor of an acquittal,  
3 but that day has passed. Nonetheless, I think I am entitled  
4 to, I think I am obligated to, and I believe the Court would  
5 want itself to consider in deciding where along the range of  
6 punishment it is appropriate to light the sentence, to look at  
7 the manner, the means, the degree.

8           Clearly, had he dumped every share he owned and that  
9 total amount was 52 million, that would be one thing. Clearly,  
10 even if one were to accept that he shouldn't have sold the  
11 52 million, the fact that it was but a fraction of what he  
12 owned, surely that is a factor to be considered in deciding in  
13 a range of between 70 months and 87 months, if that is the  
14 range that we are bound by.

15           Is it not appropriate to point out that there should  
16 be proportionality in not only sentencing, but sentencing to  
17 meet proportionality of conduct even within a range. For  
18 surely that's the reason why the Congress has given to the  
19 Court a range.

20           Well, then we have the question of, what is all the  
21 heat about in the case? What is -- to the extent there is  
22 anger in the community, what is it about? Is it about the fact  
23 that he sold \$52 million in shares without revealing the  
24 contrary views of some others in the company? Even though he  
25 went to the board, even though all of the disclosures that were

1 made were approved by the audit committee, the general counsel,  
2 the auditor -- pardon me, Your Honor -- the auditor, and the  
3 accountants?

4 I have read the recent submission of the Government,  
5 which seems to me to contradict its general position, that  
6 somehow he's responsible for putting out numbers that are not  
7 correct into the community. That is not the crime for which he  
8 is charged. And that explicitly was told to the jury  
9 repeatedly, first by Mr. Hearty in his opening, and then by  
10 Ms. Conry in her summation, that that's not what he did.

11 Ms. Conry said: I want to be very clear about this.  
12 If that's all he did, is not tell investors, none of us would  
13 be here, because, ladies and gentlemen, this is not a  
14 disclosure case. If the defendant had simply chosen not to  
15 tell investors, we would not be here. The decision he made  
16 which landed him in this courtroom today is not telling  
17 investors and then selling his stock. And it's a very simple  
18 theme I'd like to impress upon you. That is, if you don't  
19 tell, you can't sell.

20 Well, that's the crime he's charged with. That's the  
21 crime he was convicted of. That's the crime he is to be  
22 sentenced upon.

23 And there is a reason why the Government in this case  
24 has carefully tried in every way they could to distinguish  
25 between the duty of a corporation in terms of disclosure and

1 the duty of an individual not to sell. And that reason is  
2 because they know that every disclosure was vetted, approved  
3 and passed by the lawyers, the accountants, the directors, the  
4 audit committee, and they didn't want to take that on.

5           That creates its own problems legally for this case,  
6 which I don't intend to get into for the moment. But for  
7 purposes of sentencing, does it not strike you to be unfair,  
8 that now having crafted a case in which they did everything  
9 they could to prevent us from showing that the defendant's  
10 reliance upon the judgment of the professionals that things  
11 like IRUs did not have to be disclosed, that they should now  
12 come in and say, you must give him the very highest sentence  
13 that you can fashion because he didn't disclose that?

14           As you contemplate the range of punishment available  
15 to you, is it inappropriate for me here to stand before you on  
16 behalf of someone who is totally in your hands at this moment  
17 and to tell you that whatever you believe he did, he certainly  
18 did so with the knowledge, after consulting with the  
19 professionals who manned and womaned the highest levels of the  
20 company?

21           In sum, his failure, according to this case, was to  
22 sell a small portion of his holdings during a discrete  
23 five-week period without telling the public of the contrary  
24 views of some -- some of his colleagues about whether or not  
25 certain numbers would be made months out.

1           Now, Your Honor has said that the jury found that by  
2 April or May, or whenever it was, that point had been reached.  
3 I don't have the ability to know. Sometimes it's a compromise,  
4 we just don't know.

5           But this I do know: I know that on April the 9<sup>th</sup>,  
6 the internal budgets showed that they would make the numbers on  
7 December 31. And I know that on May the 2<sup>nd</sup>, the audit  
8 committee was presented and found that they would make the  
9 publicly stated financial targets.

10           We are beyond the point of arguing for an acquittal  
11 now. But we are arguing, what is the proper exercise of  
12 discretion along the line of possibilities which are conferred  
13 upon Your Honor?

14           Well, he sold 1.3 million, 1.33 million, the very  
15 options that were at risk. He refused to sell 4.4 million 5  
16 1/2 options, 2 1/2 million options at 28 and a half, over  
17 \$500,000 of his personal stock and a substantial portion of his  
18 children's stock.

19           And if there is one thing I know that you will  
20 believe, it is that this man loves his children. He didn't  
21 sell those either.

22           If that was insufficient to get us a judgment of  
23 acquittal, is it not appropriate in terms of the aggravation or  
24 mitigation for purposes of the exercise of discretion?

25           He rode the stock to the ground. And the losses after

1 that stock penetrated 38, he shared in significant measure --  
2 very significant measure with any other investor.

3 Now, that is an overview of some of the facts in the  
4 case which I believe are relevant to a sentencing judge in  
5 determining where along the lines, where -- I give up -- came  
6 back -- where along the lines of discretion, discretion should  
7 be exercised.

8 What about the man? Is he a bad man? Is he a man who  
9 has done a lot of bad things? He's a good man. You've had the  
10 letters, you've had the investigation. He's a kind man. He's  
11 helped a lot of people.

12 Whether or not you determine that that is sufficient  
13 for a downward departure, is it not relevant to where along the  
14 lines of the guidelines the sentence should fall? He's a man  
15 without blemish. He's a man who has been active in his church,  
16 helpful to his family, helpful to people outside of his family.  
17 You've been inundated with letters.

18 And, Judge, I didn't write those letters. I think you  
19 know that. They're too personal, too individual.

20 Well, under these circumstances, it seems to me that  
21 is it altogether appropriate for a United States district judge  
22 to stand between one person, this person, and even if it's an  
23 entire community, else what's Article III about?

24 Now, Your Honor has indicated, without deciding, to be  
25 sure, that it may be your view that the guidelines or the law

1 require the imposition of a finding of either gain or loss --  
2 and I get confused between the two -- of \$52 million, thus  
3 driving the range --

4           *THE COURT:* Mr. Stern, I don't mean to interrupt your  
5 argument, but I don't even think the Government is arguing for  
6 a loss figure of that amount to be used in calculating the  
7 guidelines. There is a distinction between the forfeiture,  
8 because forfeiture statutes have far different purposes. And  
9 the precedent for -- under forfeiture statutes are different.

10           *MR. STERN:* I --

11           *THE COURT:* My understanding of the Government's  
12 position is consistent with *Mooney*, where they did deduct, for  
13 example, the cost of exercising the options. So I don't know  
14 whether it's going to make any difference. We'll see. I think  
15 it makes a 1 point difference depending on how much I deduct.

16           *MR. STERN:* Okay. I think you're absolutely right.  
17 Thank you.

18           What I'm really going -- I'm really going to a  
19 different point.

20           *THE COURT:* Go ahead.

21           *MR. STERN:* But you are --

22           *THE COURT:* Don't worry about that. I can hear you.  
23 Just proceed. I know it's distracting, and I'm sorry that that  
24 microphone -- we'll figure it out. Sorry.

25           *MR. STERN:* I just don't want -- okay.

1           After I no longer had any personal experience,  
2 Congress passed these guidelines. I think that they were in  
3 large part aimed at limiting the discretion of judges. As a  
4 lawyer, I regret it. Because if you don't mind a brief  
5 philosophical reference, we cannot have simultaneously two  
6 things that we want, namely, that the law should be definite  
7 and certain and without exception, but that we should also have  
8 discretion to ameliorate, bend, create. It's not possible to  
9 have both.

10           And so the guidelines came. And in my opinion, tipped  
11 the balance way too far. And that the amount of discretion  
12 that they confided to United States district judges was  
13 insufficient to meet the exigencies before them from time to  
14 time.

15           And then along came the *Booker* case. And I believe it  
16 is the purpose of that case to free United States district  
17 judges, not to return to what it was where you could come out  
18 on the bench, and it was -- could be from nothing to 10 years,  
19 you could do what you wanted -- and it was unreviewable too, in  
20 those days. That was too far, in my judgment, in the other  
21 direction.

22           But now, you sitting there, even though you might be  
23 compelled in your view of the law, if you come to that  
24 conclusion, to use a \$52 million minus \$5.50 figure for  
25 purposes of establishing the range of the guidelines. That it

1 strikes me, is not the end.

2           It seems to me, without having to deal with Moe and  
3 Curly and the like of it, that there comes a moment when there  
4 is a realization that even though the law may compel that  
5 computation, it's not realistic under the circumstances. And  
6 that enables a United States district judge to depart -- I  
7 think the word is a little unfortunate -- but I would say to  
8 mold a sentence which is realistic to the facts before him or  
9 her.

10           That's what discretion is all about.

11           Now, it's inconceivable that anybody believes that he  
12 actually profited by 52 million or by 52 million minus  
13 8 million, I think is the number, nearly 8 million, which is  
14 the cost of it. That wasn't his profit. And even though the  
15 law may not recognize for purposes of the sentencing guidelines  
16 that a sentencing judge can call it differently, you do --

17           Pardon me, Your Honor, I'm going to take a little  
18 water, if I may.

19           *THE COURT:* Sure, yes.

20           *MR. STERN:* You do have the discretion, and you have  
21 the power to mold what goes on in this courtroom to the  
22 realities of the life outside of it.

23           I would find it difficult myself to look into the face  
24 of anyone and to say that the fruits of his activity, the wrong  
25 activity as found by this jury, is 52 million minus the \$5.50 a

1 share. It just isn't true.

2 And I think that this place has to be a place where  
3 it's true. That's what counts here.

4 Now, I would ask, therefore, that if you do decide on  
5 a range which you believe the law requires you to use because  
6 the formulation of the dissenters in I think it's *Mooney* are  
7 not correct, that nonetheless you use your discretion as a  
8 United States district judge to recognize the realities of the  
9 situation before you. Because other than that, I think it  
10 would be, and respectfully, the mechanical application of  
11 inequality. And it wouldn't be right.

12 Now, it brings me to the last portion of what I'd like  
13 to say to you, and I know that you can anticipate what that is.

14 Joe Nacchio has a unique family situation before you.  
15 I don't think there is anybody -- I would be shocked if the  
16 Government were to say that we're making this up, because we're  
17 not. He has been dealing for years with a devastating family  
18 situation which nobody would ever know about except for the  
19 exigencies with which he found himself.

20 The boy has been ill. Perhaps the full extent of his  
21 illness was not known early enough in my opinion, but I'm not a  
22 psychiatrist. You know he took this job with reservations, and  
23 you know that he took this job on the condition that he could  
24 spend at least three days a week home and would be on the job  
25 only four, which included travel to and from. And you know

1 that he would not have taken the job else. With all its  
2 emoluments and all its money and all its potential, he wouldn't  
3 do it.

4           You know that he suffered public obloquy for years  
5 because of it. You know because not to know is not to live  
6 here, that people felt that he was an absentee guy. You know,  
7 here is a big company, the biggest employer in the area, what  
8 do you mean, he doesn't live here? And he never said a word,  
9 ever.

10           You know that there came a time when the situation  
11 erupted, and you know he wanted to resign.

12           The man has many obligations. He has obligations to  
13 his family. He has obligations to the people who have  
14 entrusted a very large organization to him. I'm sure -- I have  
15 never asked him, but I'm sure he bitterly regrets to this day  
16 that in January and February of 2001, he didn't walk out. Had  
17 he done so, within a relatively short time, he could have sold  
18 every share he had, not just the relatively insignificant --  
19 and I say "relatively insignificant." It's a lot of money to  
20 me. I'm sure it's a lot of money to the Court. I'm sure it's  
21 a lot of money to the audience. But compared to his  
22 position -- the position of shares he had in the company,  
23 relatively insignificant. He could have sold the whole kit and  
24 caboodle, stated the reasons, walked away, and we wouldn't be  
25 here today. But he didn't.

1           Now, very reluctantly, very reluctantly, very  
2 tenuously, not putting a lot of emphasis on it, we used this to  
3 some degree, a fair amount you might say, just a little I would  
4 say, at the trial, because he didn't want to.

5           And we had all the records. We had all the records,  
6 and we were going to introduce those records. And the  
7 Government asked us not to introduce the records, but instead  
8 to stipulate. And they crafted a stipulation -- I don't have  
9 the exact words, as I stand before you, but said something to  
10 the effect that David Nacchio was hospitalized for about 30, 35  
11 days continuously because of the illness that you heard about.  
12 Didn't even mention suicide.

13           We willingly entered that stipulation. Why did the  
14 Government want it? They didn't want it to influence the jury.  
15 Why did we agree to it even though we knew it could influence  
16 the jury? Because he didn't want it. Why even this morning do  
17 I not go forward and say, I want an evidentiary hearing?  
18 Because it can't be in public. The kid will be hurt. And  
19 he'll take what you have to give him sooner than do that. And  
20 that's the truth.

21           Now, he's not just a chauffeur, bringing the kid from  
22 here to there. And I know that we're going to hear that, well,  
23 if it was so important for him to be around, how could he be  
24 here even four days a week, including travel time? But that is  
25 to misperceive the nature of the relationship and the illness.

1 I tell you now and represent to you the following:

2           It's the availability. It's being able to pick up on  
3 a moment's notice. No one is suggesting -- Dr. Hammer is not  
4 suggesting that he has to be side by side with him every single  
5 moment. But, rather, David must know that he is available. He  
6 lived his life that way before anyone accused him of any  
7 wrongdoing. He ran from this town on a moment's notice  
8 whenever the kid needed him. That's the only way he could  
9 justify to himself taking the job.

10           This is not fabricated. It's not made up.

11           For example, the boy's been institutionalized three or  
12 four times. He's had to do it. When the -- when he -- the  
13 only way he was able to get back to Pennsylvania to go to the  
14 University of Pennsylvania, Joe Nacchio went with him and lived  
15 with him for four months. And that was in 2004. There was no  
16 charge pending, no criminal investigation, which didn't begin  
17 until the beginning of '05.

18           Well, the law in the Circuit, as I understand it,  
19 recognizes that ordinarily family circumstances are not a  
20 ground for departure. And that's true. But as one court has  
21 pointed out, ordinarily doesn't mean never.

22           And the seminal case in this area, I probably won't  
23 say this right, is United States against McClatchey, I can -- I  
24 think you know the case. I don't have to spell it. And the  
25 test there is, to quote the court, there must be a critical and

1 unique emotional bond.

2           If there is any doubt in your mind about it -- we have  
3 the psychiatrist here. We have the records here. If there is  
4 any doubt in your mind, you have the ability to satisfy that  
5 doubt.

6           So what's to be done? I don't envy your task. I  
7 think I have some appreciation of its difficulty. Your logic,  
8 Your Honor, was impeccable. To the extent that by order of  
9 this court Joe Nacchio becomes unavailable to David, it will  
10 create a serious problem for him.

11           You've already indicated that you are not inclined to  
12 make Joe Nacchio continuously available when it comes time for  
13 him to serve his sentence.

14           Well, I have to confront that. I understand it.  
15 That's what you've said. But as I have said to you, the mere  
16 fact that we fail that test of logic does not mean that it  
17 won't make a difference as to how much time this Court  
18 determines that this man should serve. That would stretch  
19 logic to its breaking point.

20           I have no numbers to offer you, because anything that  
21 I say to you I think would be suspect. Moreover, I am not a  
22 prophet. I have no ability to foretell the future. But I know  
23 beyond a mere probability that there is a substantial risk  
24 here.

25           I hope that you will take all of this into account,

1 and I hope that you can find a way to ameliorate this  
2 difficulty.

3 May I have one moment to confer with my co-counsel?

4 *THE COURT:* Yes.

5 (Off-the-record discussion between counsel.)

6 *MR. STERN:* Thank you for your patience.

7 *THE COURT:* All right.

8 At this time we'll take a break before Mr. Nacchio  
9 makes a statement.

10 During the break we should see if we can get this  
11 microphone fixed, because it's unrelentingly distracting.

12 Court will be in recess for 10 or 15 minutes.

13 (Recess from 10:22 a.m. to 10:43 a.m.)

14 *THE COURT:* You may proceed. I'll hear now from  
15 Mr. Nacchio.

16 *MR. STERN:* Mr. Nacchio has asked me to advise the  
17 Court that he has nothing more to add to what I have said.

18 *THE COURT:* All right.

19 I'll hear from the Government.

20 *MS. CONRY:* Good morning, Your Honor.

21 I'm going to address the motion for downward  
22 departure. And Mr. Stricklin will address where we think --  
23 would like the sentence to fall within the guideline range.

24 And Mr. Hearty was prepared to address the Court on  
25 gain. If the Court has any questions, he's happy to address

1 you, but it didn't sound as though you needed to hear anything  
2 more on that from us.

3 *THE COURT:* I'll think about it. You may proceed.

4 *MS. CONRY:* Okay. Thanks, Your Honor.

5 As you know, Your Honor, the defendant bears the  
6 burden of showing in a motion for downward departure that the  
7 charitable acts and the family circumstances were  
8 extraordinary. If the Court finds they're ordinary, then  
9 they're not entitled to the downward departure that they've  
10 asked about.

11 Let me focus first on the charitable contributions.

12 Mr. Nacchio points to a couple of different charitable  
13 acts that he performed. First he talks about financial giving.

14 We've attached a chart to the back of our brief that  
15 shows that between 2000 and 2002 his charitable contributions  
16 were .08 percent to 1.95 percent of his total adjusted gross  
17 income. Those are by no means extraordinary. In fact, I would  
18 suggest they're paltry.

19 He's also points to his time of service on the NSTAC,  
20 the president's council. Again, wholly ordinary for CEOs in  
21 the telecom industry. As they point out in their brief, the  
22 commission is comprised of 20 CEOs of telecommunications  
23 companies. So it's practically expected, it's routine and  
24 ordinary for those who hold the position that Mr. Nacchio held  
25 at the time. So that's not extraordinary.

1           He points to his contribution to Delbarton. There was  
2 one trip to Kentucky over the many years that his sons attended  
3 the school. Again, not extraordinary, but ordinary. In fact,  
4 as we explained in our brief, it seems to us, it's nothing more  
5 than a publicity stunt. He brought a photographer. Qwest  
6 circulated photographs of him down in Kentucky handing out the  
7 food and circulated it to the newspapers in the 14 states where  
8 Qwest operated. Certainly not selfless giving on his part.  
9 Even the advocacy is that the trip was only made once by Mr.  
10 Nacchio.

11           We cited in our brief a case which reversed a downward  
12 departure on just these kinds of charitable acts, giving money  
13 to the poor, feeding the poor, volunteer time at schools. It's  
14 sort of what is expected about somebody -- from somebody who is  
15 in Mr. Nacchio's position as an executive in a large company.

16           *McClatchey* also describes that and cautions District  
17 Courts to scrutinize these claims of community service and  
18 charitable giving by people of Mr. Nacchio's stature, because  
19 it is just that, ordinary and expected.

20           So let me move on now to what we've heard a lot about  
21 today, and that is the situation with Mr. Nacchio's son and  
22 whether they have established and met their burden of  
23 establishing that this is an extraordinary circumstance that  
24 warrants a downward departure.

25           And, again, what I want to emphasize to the Court are

1 the positive things that are involved in David Nacchio's life  
2 right now. And that is, he has a wonderful mother who is  
3 trained in this area, who has her master's in treating these  
4 types of situations.

5 He has fabulous, top-notch care by Dr. Hammer.  
6 Dr. Hammer has access to all other sorts of physicians and  
7 psychiatrists, who he has taken advantage of, to his credit,  
8 and sought their help in treating David Nacchio, with some  
9 success.

10 He has a loving brother, who is getting to move on to  
11 law school but is going to be in the area, I presume. He has  
12 an uncle who lives in the area, who can fill in and provide  
13 that vital male role model that many sons look to.

14 And to be very clear, there is no claim, they concede  
15 in their briefs, there is any issue of financial support. He  
16 has all the financial support he's going to need to get the  
17 treatment that he needs.

18 And if you look at the case law, there is just not a  
19 single case where a downward departure is granted where the  
20 person is unfortunately ill is 26 years old, a college  
21 graduate, living on his own in the major metropolitan area with  
22 full access -- with a parent who has 100 percent of her time to  
23 devote to him. It's just -- this would be unprecedented action  
24 on the Court's part.

25 So I feel -- I want to emphasize, they've simply

1 failed to meet their burden on that end.

2           And I rely heavily on *McClatchey*, where the Court  
3 reversed a downward departure based -- that was granted by the  
4 District Court based on a mentally ill 22-year-old son. And I  
5 think the facts unfortunately are hauntingly familiar.

6           One fact that the Court looked at closely in  
7 *McClatchey* and relied on heavily, was the fact that the father  
8 was fully employed full-time prior to the conviction. And they  
9 found that in and of itself established that he wasn't such a  
10 critical part of the child's care if he was able to have  
11 full-time employment, and that's the case here.

12           They rely heavily on a case called *Sclamo*, which is a  
13 First Circuit case, and a couple of other cases that are  
14 factually similar to *Sclamo*. And I think they're  
15 distinguishable, because they primarily -- *Sclamo* involves a  
16 12-year-old who is in the formative years, who had previously  
17 been the victim of sexual abuse by the father. That's not  
18 alleged here.

19           Other cases involve similar abuse with similar facts.  
20 David Nacchio is 26 years old, and they do not allege any abuse  
21 in this case.

22           Let me move on to the ameliorating factors that  
23 Mr. Stern pointed to. And I don't want to address all of them,  
24 because I think all of the factors he pointed to, factual  
25 issues, were raised at trial and had to be rejected by the jury

1 for them to have convicted. But I do just want to set the  
2 record straight on a few things.

3 Mr. Stern said that Mr. Nacchio had to sell the stock  
4 because it was expiring. He had to exercise his options and  
5 sell the resulting stock. That's not at all true. The stock  
6 wasn't expiring for several years. Nothing stopped him from  
7 simply biding his time, see how the merger went for the first  
8 year, see how the combined company went, and then selling his  
9 stock. Nothing stopped him from doing that. That's just not  
10 true.

11 He also asked the Court to consider that Mr. Nacchio  
12 didn't dump all of his stock, didn't exercise all of his  
13 options. And that's nothing more than saying, if he had, we  
14 would be here with more crimes and a larger gain and a larger  
15 sentence. So we're here to sentence him on the crimes he did  
16 commit, not the ones he didn't.

17 He also points to an April 9 document from 2001 that  
18 shows that Mr. Nacchio would have had a good faith belief that  
19 the company was going to make its number for 2001. We know  
20 that's not true, because right around that time, in early to  
21 mid April of 2001, Greg Casey testified to the Court, he had  
22 informed Mr. Nacchio that the one source that was in the budget  
23 and in the projections corrections that would allow them to hit  
24 their numbers were IRUs, and he had drained that pond.

25 So Mr. Nacchio knew specifically that was not possible

1 and feasible. And again, I think the jury acted on that  
2 testimony.

3 He also points -- the last fact I'll try to correct is  
4 that Mr. Nacchio should be given some leniency because he rode  
5 his stock to the ground. Mr. Nacchio was sued by shareholders  
6 for securities fraud in a complaint that evolved over time but  
7 looks a lot like the charges that we put in our Indictment. On  
8 June -- I think it's July 26 or 27, 2001, which was the day the  
9 window opened for the second quarter. So the first time he was  
10 able to sell, he had been sued, and, of course, he wasn't going  
11 to be able to sell any more stock once he had been sued by the  
12 shareholders.

13 They also asked you to look to the fact that  
14 Mr. Nacchio may have been consumed with his son's illness in  
15 early 2001. And I ask the Court to look at the testimony at  
16 trial. And what we point out in our brief is, as soon as he  
17 found out his son had attempted to take his own life, which  
18 they raised in the opening, Mr. Nacchio didn't quit Qwest.  
19 Mr. Nacchio marched into the boardroom and renegotiated a  
20 raise, an increase in bonus, and 5 million additional stock  
21 options.

22 And quite candidly, the time for Mr. Nacchio to have  
23 thought about the importance of his son's illness, which was  
24 fresh in his mind right before he sold that stock was at the  
25 time of those sales. He knew at the time he sold those sales

1 that he was an important factor in his son's life. And it  
2 didn't matter enough to him then, and it shouldn't matter  
3 enough to this court now.

4 I also -- I just want to make a last point that the  
5 charitable and family circumstances combined don't call for a  
6 downward departure.

7 They rely heavily on a case called *Pena*, which was  
8 decided before the Sentencing Commission's 5K2 note that says  
9 that the combination of characteristics, while allowable, is  
10 extremely rare.

11 And I think when you look at the paltry charitable  
12 contributions we have in this case, combined with the  
13 tremendous, vibrant, robust support system that David Nacchio  
14 has outside of his father, this just isn't that rare decision.

15 *THE COURT:* Are you talking about the Tenth Circuit's  
16 decision in *Pena*?

17 *MS. CONRY:* I believe it was, yes, sir. It's in their  
18 brief. I don't have the Circuit cited here. I know they rely  
19 on it in their brief for the notion that a combination of  
20 factors can be -- I just want to highlight that the commission  
21 after that warned that that should be extremely rare.

22 Thanks, Your Honor.

23 *THE COURT:* Mr. Stricklin.

24 *MR. STRICKLIN:* Did you think better of the gain  
25 question, Your Honor?

1           *THE COURT:* Well, I'm still thinking.

2           *MR. STRICKLIN:* I like keeping Mr. Hearty on the spot.

3           *THE COURT:* Yeah, he's a little nervous, I can tell.

4       So we'll --

5           *MR. STRICKLIN:* Your Honor, I think that the most  
6       difficult job that a judge has is to pronounce sentence. The  
7       law requires that you consider a number of factors. And the  
8       real hard part -- I think, that's the lawyer part, and many  
9       judges are capable of that, good at that. I think the real  
10      hard part is, you have to do that while the eyes of many are on  
11      you. And I think that means, the eyes certainly of the  
12      defendant, the defendant's counsel, the defendant's family,  
13      they look to you, Your Honor.

14                 The eyes of victims, people that were harmed by the  
15      offense look to you. And certainly, eyes of the community. If  
16      you can look at how full this courtroom is this day, doesn't  
17      happen very often. The eyes of the community look to you when  
18      you pronounce sentence.

19                 And I think it's not an overestimation to say that  
20      today, for many people, you are the justice system. And that's  
21      what makes this task so difficult.

22                 I've heard a lot of times in white collar cases,  
23      people try to distinguish them from other types of crimes.  
24      Perhaps they can be distinguished in some way. But I think  
25      also that if you're going to look at how they're distinguished,

1 one way that they might fall into that category is the way that  
2 the business community follows these type of cases.

3           You have executives that will follow them, corporate  
4 executives, CEOs. You'll have investors. I'm sure we have  
5 publications here today that their main audience is the  
6 financial community. You'll have analysts that follow them,  
7 and you'll have lawyers who will follow these.

8           I'd venture to say by the time we leave here today,  
9 there will be e-mails coming out from some of the big law firms  
10 that specialize in representing corporate executives about the  
11 results. And the lawyers -- and these are the people that end  
12 up advising corporate executives on how to act.

13           All that to say is, I think one way that white collar  
14 cases are different is that they are better suited for a  
15 deterrent effect. Many cases that sentence are pronounced,  
16 just falls along the wayside, and people don't see it. But in  
17 a case like this, the message is sent directly to the community  
18 that needs to hear it the most.

19           What I've seen in working with white collar cases for  
20 a number of years and working with a number of people that have  
21 been involved in white collar crime is that there comes a time  
22 when they're taking actions, and they reach a point where they  
23 know their actions might not be right. And they pause ever so  
24 briefly.

25           Unfortunately, many of them choose just to go ahead

1 and take the action that they had already planned upon. And  
2 they don't back off, they don't change their course, they just  
3 move forward, and it gets them into lots of trouble.

4 Many times because of their business background, they  
5 make a quick, if not subtle and unknowing, cost/benefit  
6 analysis.

7 And because of the way we compensate our executives,  
8 the benefits in these type of cases are extremely, extremely  
9 high. And I would suggest to the Court that the law takes that  
10 into consideration when it also makes the costs very high.

11 We do ask for a sentence at the high end of the  
12 guideline range.

13 And I want to step back and just say, you know, we  
14 considered asking the Court for an upward departure. But we  
15 have been very measured in what we have asked for from this  
16 court.

17 This case probably could fit into a point that we  
18 could seek and under the law receive an upward departure. But  
19 we didn't ask for that. What we're asking for is a sentence in  
20 the high end of the guideline range. Let me explain that, if I  
21 could.

22 If you look at the types of cases of insider trading  
23 there are out in the world, you can start on this far end over  
24 here and see that the one type of case might be the tippee,  
25 someone who perhaps works in a printing shop. I've seen cases

1 like that. That works in a printing shop and gets news ahead  
2 of the public of something that is going to happen, and they  
3 take advantage of it for their own benefit.

4 I guess if we walk a little bit this way, we could see  
5 perhaps the tipper. We've even seen people, low level in the  
6 company, mailroom person or something, giving a tip to someone  
7 else.

8 You could move on down the scale to different areas  
9 and see people who have other inside information, a little  
10 higher up in the company, and act for their own benefit.

11 But finally on the far end of that scale, you would  
12 reach someone who not only hears about information, takes  
13 advantage of it, but takes the active role -- not a passive  
14 role, takes the active role in sending and setting the message  
15 for the firm, and sending and setting a message for the company  
16 that actually causes the stock to increase.

17 That's the case we have here. Mr. Nacchio is on this  
18 end of the scale. He was a CEO of an extremely large company.  
19 More than that, he set the message for that company. And  
20 people looked to him for that message. Joe Nacchio was Qwest.

21 In our trial we talked about the issues of  
22 credibility, something that certainly comes up at every trial  
23 when you have witnesses. And we saw how, you know, when the  
24 analysts lost credibility for Joe Nacchio, when they lost  
25 credibility in Qwest, we saw the devastating consequences that

1 had for the stock price and the resulting mayhem that it caused  
2 for Qwest and the people who were unfortunate enough to have  
3 their life savings in Qwest.

4           If there is anger, as Mr. Stern suggests there is, in  
5 the community, if there is anger here, it's because Mr. Nacchio  
6 self dealt and it's because of the -- because of his  
7 credibility, that people looked to him for the truth and didn't  
8 get it and were harmed because of it.

9           And as we talk about credibility in the case, we also  
10 talk about credibility in the justice system. And all of us,  
11 that's what we're here for, of course, today. But I think  
12 people look to this justice system to provide the credibility  
13 that Qwest did not provide.

14           We ask for a sentence on the high end of the guideline  
15 range, Your Honor, not for a pound of flesh, not for  
16 retribution, and not as Mr. Stern suggested, to pile it on. We  
17 ask for it because the law under 3553 requires a sentence that  
18 reflects the seriousness of the offense, that promotes the  
19 respect for the law, and most importantly, Your Honor, because  
20 it's a just and right sentence.

21           Thank you.

22           *THE COURT:* All right. Mr. Hearty, you're off the  
23 hook.

24           The Court must first resolve disputes concerning  
25 application of the guidelines.

1           This is a dry process and a legalistic process, but  
2 one which is critical here, because the guidelines provide that  
3 loss or gain in these types of cases increase the severity of  
4 the sentence.

5           Usually it is loss that is used as a measure of the  
6 harm that the defendant has caused to others. And use of that  
7 loss calculation reflects the statutory purposes of sentencing  
8 as articulated in 18 United States Code Section 3553(a), in  
9 that it reflects the seriousness of the offense.

10           This guideline and this crime are unique in that it is  
11 one of those instances where gain, rather than loss, is used to  
12 reflect the seriousness of the offense.

13           Before I talk about this guideline specifically,  
14 however, what I want to do is step back and address why we use  
15 loss and why gain is sometimes used as a substitute for loss.

16           This is not mathematics, and this is not a civil case.  
17 As the general guideline on loss, Section 2F1.1, states, the  
18 loss need not be determined with precision. The Court need  
19 only make a reasonable estimate of the loss, given the  
20 available information. This estimate, for example, may be  
21 based on the approximate number of victims and an estimate of  
22 the average loss to each victim, or on more general factors,  
23 such as nature and duration of the fraud and the revenues  
24 generated by similar operations. The offender's gain from  
25 committing the fraud is an alternative basis that ordinarily

1 will underestimate the loss.

2           When I say that this is not mathematics, what I mean  
3 is that this is not an instance such as courts face in civil  
4 cases where the Court is called upon to figure out what harm a  
5 plaintiff -- a particular plaintiff has suffered as a result of  
6 wrongdoing by the defendant. The Court is called upon, rather,  
7 to apply some guidelines in a case where it is possible to  
8 devise alternative theories that will complicate and elongate  
9 the criminal sentencing process unbelievably.

10           With that general background in mind, I turn now to  
11 the specific provision at issue, which counsel has already  
12 quoted.

13           The guideline directs that the Court use some  
14 statutory tables to increase the offense level corresponding to  
15 the gain resulting from the offense. The commentary to this  
16 Court's way of thinking, defines and explains the term "gain"  
17 in language that is clear and unmistakable.

18           Because the victims and their losses are difficult if  
19 not impossible to identify, the gain, that is, the total  
20 increase in value -- the total increase in value, realized --  
21 and the term "realized" has a common dictionary definition --  
22 through trading in securities by the defendant is employed  
23 instead of the victims' losses.

24           A loss is realized, according to the dictionary, if  
25 the converted into -- a gain is recognized or realized, if it

1 is converted into cash or into money.

2           As the Supreme Court explained in *Stinson*, the  
3 commentary accompanying the guidelines is more than legislative  
4 history. The commentary not only explains the guidelines, but  
5 provides concrete guidance as to how even unambiguous  
6 guidelines are to be applied in practice. The commentary, as  
7 the Court said in *Stinson*, is an authoritative guide to the  
8 meaning of the guideline.

9           The Court finds the commentary's explanation of the  
10 term "gain" to be unambiguous, inconsistent with the definition  
11 proposed by the defendant, something which would complicate and  
12 elongate the sentencing process beyond anything that is  
13 reasonable, and the explanation is straightforward in its  
14 application here. Although, as I observed, there may be  
15 instances where insider purchase sales, where the application  
16 is not so clear. I'm not going to deal with that. That is not  
17 the situation before this court.

18           According to the direction of the commentary, it is  
19 the, quote, total increase in value which is to be used, not  
20 some increase measured by trying to figure out what part of  
21 value somehow relates to the undisclosed inside information.

22           The Sentencing Commission could easily have used  
23 language that directs the Court to make some kind of  
24 determination as to what part of value is related to the inside  
25 information. The Sentencing Commission did not do that.

1           Further, it is the value which is, quote, realized in  
2 the transaction, not a hypothetical value calculated by some  
3 professor at a later time.

4           And I've already quoted the dictionary definition of  
5 what is meant by the term "realized." And there is no reason  
6 to think that the Sentencing Commission meant anything else.

7           And it is the total value realized through trading,  
8 through trading in the security, not the value somehow related  
9 solely to the inside information.

10           At least in this case, where the defendant sold stock  
11 using unfavorable inside information, the Court believes that  
12 the guideline commentary straightforwardly requires the Court,  
13 first, to calculate the defendant's net profit on each  
14 transaction by using his sales price less the cost of the stock  
15 to him. That is the approach that was used by the en banc  
16 majority -- by the district judge and affirmed by the en banc  
17 majority in the Eighth Circuit's decision in *United States v.*  
18 *Mooney*. And the Government, as I understand it, does not take  
19 issue with that approach.

20           The Court finds that this net profit is accurately set  
21 forth in Attachment C to the presentence report. And that gain  
22 is \$44,692,000 and change.

23           That is not the end of the matter, however. One of  
24 the defendant's arguments, although certainly not his main one,  
25 is that when he exercised his options, Qwest would deduct the

1 cost of the options, certain transactional costs, that is, and  
2 also withhold an amount for taxes. The amount deducted and  
3 withheld, according to the defendant, must be deducted in  
4 calculating gain because it represents money that the defendant  
5 never received.

6 The Government resists this particular conclusion,  
7 relying upon the District of Columbia Circuit's decision in  
8 *United States v. DeFries*. *DeFries*, however, was a RICO  
9 criminal forfeiture case. And, as the Court noted, Congress  
10 intended in allowing forfeiture in a criminal prosecution to  
11 provide an extreme remedy for an extreme situation, in which  
12 organized crime was corrupting otherwise lawful enterprises.

13 It is not apparent to this court why cases on criminal  
14 forfeiture should be persuasive on the question of how gain  
15 should be calculated for purposes of the guidelines. And the  
16 Government doesn't cite any other case.

17 Therefore, the Court returns, once again, to what it  
18 believes is the plain language of the commentary.

19 The commentary directs the Court to use the total  
20 value which is, quote, realized by the defendant. Under the  
21 dictionary definition of the term, the defendant did not  
22 realize what was not converted into money, cash or the  
23 equivalent.

24 When the amount withheld and not received or realized  
25 by the defendant is deducted, the true gain appears to be

1 somewhere in the neighborhood of \$28 million. And I use the --  
2 I round that figure, because there is a discrepancy between the  
3 presentence report and the materials that the defendant has  
4 submitted. And I think that that discrepancy has to do with  
5 the nature and amount of the transactional costs and fees which  
6 are deducted. And it doesn't make any difference. It's an  
7 immaterial discrepancy.

8           Based on the finding that the gain in this case is  
9 \$28 million, the increase in the offense level due to the  
10 defendant's gain is therefore 16, under the table which is set  
11 forth in 2F1.1.

12           Now, I digress here for just a moment to make the  
13 following observation: That makes 1 point's worth of  
14 difference in the offense level here. And this is an example,  
15 I think, of what counsel is talking about when he talks about  
16 the somewhat unrealistic and unfortunate way that the  
17 guidelines operate.

18           For this 1-point difference, we spilled a lot of ink.  
19 And frankly, it doesn't make any difference because the  
20 guideline levels overlap. And it is possible to impose an  
21 appropriate sentence, considering all of the Section 3553  
22 factors within that overlapping guideline range.

23           And it is the Court's view that the sentence which it  
24 has determined to impose is the one which properly reflects the  
25 statutory factors, and it doesn't really make any difference

1 about this 1-point distinction.

2           The Court will now address the defendant's main  
3 argument, the one that was elaborated on by counsel this  
4 morning.

5           His main argument is that the method of determining  
6 the gain set forth by the Court, which is consistent with the  
7 approach of the Eighth Circuit en banc majority in *Mooney*, is  
8 flawed.

9           According to the defendant, the gravamen of the  
10 offense of insider trader is the deceptive device of using  
11 undisclosed inside information, not trading in Qwest shares.

12           Defendant posits that the market value of Qwest shares  
13 on any given day is determined by myriad factors and the Court  
14 can determine defendant's true gain only by breaking those  
15 factors down and trying to isolate the part of the stock's  
16 value which can be attributed somehow by some logic to the  
17 undisclosed information.

18           Consistent with the dissenting opinion in *Mooney*, the  
19 defendant would have the Court perform this operation by trying  
20 to focus on the time when the inside information was disclosed,  
21 to the extent that that time can ever be determined, and to the  
22 extent that the inside information is disclosed on specific  
23 date, which in the real world doesn't happen.

24           The *Mooney* dissent and the defendant would then ask  
25 the Court to figure out how long it took the market to absorb

1 the information and then ascertain the stock's value on this  
2 date of absorption. That, the defendant argues, isolates the  
3 value of the information and properly values what the defendant  
4 truly gained by using the information.

5 The defendant relies, as I said, on *Mooney*, the  
6 dissent in *Mooney*. It also -- he also relies primarily on  
7 civil insider trading cases, on a criminal securities fraud  
8 case where the Court was asked to ascertain loss, not gain.

9 Most of the defendant's arguments have already been  
10 answered by the en banc majority in *Mooney*. I don't have  
11 anything to add. And, frankly, the appellate court in this  
12 jurisdiction will have to take a look at the issue.

13 While principles and rules developed in civil insider  
14 trading cases can sometimes be applied rationally in criminal  
15 insider trading cases, for example, where the issue is the  
16 proper interpretation of words in the statute having both civil  
17 and criminal consequences, that is not the nature of the issue  
18 here.

19 A civil plaintiff must ordinarily show a loss causally  
20 connected to the defendant's wrongdoing. Otherwise, the civil  
21 plaintiff may receive some sort of unwarranted windfall.

22 The market absorption approach advocated by the  
23 defendant and the dissent in *Mooney* is intended never to  
24 measure a defendant's gain. It's intended to measure a civil  
25 plaintiff's loss. Measurement of loss, as I've tried to

1 emphasize, is not an issue here, because the guidelines require  
2 the measurement of gain.

3           For similar purposes, the defendant's heavy reliance  
4 on the criminal case of *United States v. Ollis*, which I talked  
5 to counsel about in colloquy, is unavailing, because the Court  
6 there was addressing the loss used in a generic securities  
7 fraud case, not the gain required by application of the  
8 guidelines in an insider trading case.

9           In the Court's view, the defendant's proposed method  
10 of calculating gain suffers from another fundamental flaw. It  
11 misconceives the thrust of the statute and the nature of the  
12 harm at which the guideline and statute are directed.

13           As the Supreme Court has consistently said, a person  
14 who possesses material inside information is under a duty  
15 either to disclose the information or to abstain from the  
16 trading in stock. The Court said that in *Chiarella*. It  
17 repeated it in *United States v. O'Hagan*.

18           As the defendant pointed out during the trial,  
19 corporate insiders and the corporation itself commonly possess  
20 material inside information which they do not and/or cannot  
21 disclose because it is a corporate confidence or would put the  
22 corporation at a competitive disadvantage.

23           As a practical matter, then, the thrust of the  
24 statutory violation in this type of case, where the defendant  
25 is the chief executive officer of the corporation, is for

1 trading in inside securities on the basis of insider  
2 information, unless the insider can come within the safe harbor  
3 provided by Rule 10b5.1.

4 In other words, the prosecution in the Court's view  
5 had it essentially right during the closing. You have to  
6 either disclose, or you have to refrain from trading. Since  
7 there was no disclosure, the duty was to refrain from trading.  
8 And the violation was the trading.

9 As the Government observes, there would be no profit  
10 to the defendant and no loss to anyone else had the defendant  
11 complied with his duty not to trade in his shares.

12 The important point is that by trading in these  
13 shares, he unloaded them at a time when he was able to pocket  
14 all of the share growth and all of the share value accumulated  
15 on that date, and not just a hypothetical slice attributable to  
16 the inside information.

17 The guideline, therefore, in the Court's view is  
18 consistent with the thrust of the statute in measuring gain  
19 according to the total value realized by trading, not just the  
20 part of the price which may hypothetically be attributable to  
21 the undisclosed inside information.

22 The Court finds that no finding is necessary  
23 concerning the remaining issues raised by the defendant's  
24 objections. The controverted matters were not taken into  
25 account in imposing sentencing or would not affect the

1 sentence. They would also be unlikely to be considered by the  
2 United States Bureau of Prisons in classification and  
3 designation decisions.

4 With these exceptions, neither the Government nor the  
5 defendant has challenged any other aspect of the presentence  
6 report. And therefore, the fact -- remaining factual  
7 statements in the report are adopted without objection as this  
8 Court's findings of fact concerning the sentencing.

9 Based upon those materials, the Court determines the  
10 appropriate guideline calculations to be as follows:

11 The Base Offense Level is 8. There is a 16-point  
12 upward adjustment because of the amount of gain. There is an  
13 undisputed 2-point upward adjustment for abuse of position of  
14 trust, bringing the total offense -- Adjusted Offense Level to  
15 26. The Total Offense Level under the guidelines is also 26.

16 The defendant has an absolutely clean criminal record,  
17 no criminal history whatsoever. And therefore, his Criminal  
18 History Category is I, the least serious recognized by the  
19 guidelines.

20 The presumptive imprisonment range is 63 to 78 months.  
21 Supervised release range under the guidelines is 2 to 3 years,  
22 and the fine range is \$12,500 to \$19 million.

23 Counsel and the defendant should approach the lectern.

24 There are three components of the sentence in this  
25 case. The first the Court will address is a fine. The other

1 components are the term of imprisonment and the term of  
2 supervised release.

3 First, with respect to the fine.

4 The Court finds that the defendant is able to pay a  
5 fine within the guideline range. Therefore, the Court will  
6 impose a fine within that range.

7 In determining the amount of the fine, the Court has  
8 considered, as required by United States Code Section 3553(a)  
9 and 3572, and by Section 5E1.2(d) of the guidelines, the  
10 following matters:

11 The Court has considered the nature and circumstances  
12 of the offense and the history and characteristics of the  
13 defendant. The Court has also considered the need for the fine  
14 imposed to reflect the seriousness of the offense, to promote  
15 respect for the law, and to provide just punishment for the  
16 defense. And to afford adequate deterrence to criminal  
17 conduct.

18 Finally, as required by statute, the Court has  
19 considered the defendant's income, earning capacity, and  
20 financial resources. The Court has considered the burden that  
21 the fine will impose upon the defendant, any person who is  
22 financially dependent on the defendant, or any other person who  
23 would be responsible for the welfare of a person financially  
24 dependent on the defendant. And I have weighed that against  
25 the relative burden that alternative punishments would impose.

1           The Court has considered any pecuniary loss inflicted  
2 upon others as a result of the offense, the need to deprive the  
3 defendant of illegal gains obtained from the offense, and the  
4 expected cost to the Government of any imprisonment and  
5 supervised release.

6           With respect to these matters, the Court finds and  
7 concludes as follows:

8           The crimes of which the defendant has been found  
9 guilty are crimes of overarching greed. The testimony of  
10 Qwest's former officers permits the inference that trading on  
11 inside information was a familiar, accepted occurrence at  
12 Qwest. Since Mr. Nacchio was the chief executive officer of  
13 the company, the defendant's own actions cannot but have  
14 condoned a culture in which this could occur.

15           Indeed, as counsel observed, the defendant's entire  
16 presence in Colorado was occasioned primarily because of greed.  
17 He had a family in New Jersey. He had a wonderful job in New  
18 Jersey, a job that provided him high compensation. And his  
19 children were in New Jersey. He took this job reluctantly, but  
20 he took it because he couldn't turn it down. He couldn't turn  
21 it down because it was too much money.

22           It is the Court's premise that crimes of greed can be  
23 deterred in part by not only draining them of all monetary  
24 benefit, but by exacting additional monetary punishment to give  
25 the would-be perpetrators the message that the crime does not

1 pay. Not only does it not pay, it costs. It costs far and  
2 above and beyond mere payback.

3           It is this Court's view that the maximum fine  
4 permitted by statute and the guidelines is necessary primarily  
5 to afford adequate deterrence to this type of conduct, to  
6 discourage this type of flagrant greed that is demonstrated by  
7 these crimes, to provide just punishment for the offenses, and  
8 to reflect the seriousness with which the Court regards these  
9 offenses.

10           The defendant's financial resources, as disclosed in  
11 the presentence report and statements introduced as exhibits at  
12 trial, disclose to this Court's satisfaction that he is able to  
13 pay the fine which the Court has imposed. While the fine will  
14 undoubtedly impose some burden upon the defendant, that burden  
15 is appropriate. The Court finds that it will not unduly burden  
16 his family or any person financially dependent on him,  
17 particularly when it is compared to the alternative punishment  
18 of imprisonment.

19           Although the Court finds that its forfeiture order  
20 entered this morning will deprive the defendant of illegally  
21 obtained gains as a result of the commission of these offenses,  
22 it nevertheless believes the substantial fine to be appropriate  
23 and measured because of the consideration that the Court has  
24 previously recited.

25           An additional justification for such a fine is the --

1 under the statute, is that the defendant's conduct has imposed  
2 costs on the Government, including the costs of imprisonment  
3 and supervised release. Those, according to statute, should be  
4 reflected in the fine.

5 Based on the presentence report, the Court finds that  
6 the current cost of imprisonment is just over \$2,000 a month,  
7 \$2,036.92. And the cost of supervised release is \$294.60.

8 The levying of a fine above and beyond what the  
9 defendant has made on the transaction is one way that the Court  
10 has to make sure that it is not the Government which bears the  
11 cost of the consequences of the defendant's conduct.

12 I'm going to go a little out of order here and address  
13 the question of supervised release.

14 The Court finds that supervised release following  
15 imprisonment is appropriate in this case. The Court will  
16 impose the minimum term. The Court finds that the minimum term  
17 is sufficient and that the conditions the Court is going to  
18 impose and announce later in this proceeding involve no greater  
19 deprivation of liberty than is reasonably necessary to achieve  
20 the statutory purposes of a sentence of supervised release,  
21 including the need for the sentence imposed to afford adequate  
22 deterrence to criminal conduct, to protect the public from  
23 further crimes of the defendant, and to provide the defendant  
24 with needed rehabilitation, professional supervision,  
25 educational or vocational training, medical care, or other

1 correctional treatment in the most appropriate manner.

2           The Court must address the request for a departure  
3 from the guideline range.

4           The defendant has moved for imposition of a sentence  
5 below the guideline range, urging that there exists mitigating  
6 circumstance of a kind or to a degree not adequately taken into  
7 consideration by the commission -- the Sentencing Commission in  
8 formulating the guidelines.

9           In this case, the Government opposes the motion.

10           Specifically, in this case the defendant moves for a  
11 departure under Section 5H1.6 and under Section 5H1.11 of the  
12 guidelines.

13           In parallel language these sections provide, in the  
14 case of Section 5H1.6, that family ties and responsibilities  
15 and community ties are not ordinarily relevant in determining  
16 whether a sentence should be outside the guideline range.

17           Similarly, Section 5H1.11 says that charitable and  
18 similar prior good works are not ordinarily relevant in  
19 determining whether a sentence should be outside the applicable  
20 guideline range.

21           Thus, under well-established authority, a departure on  
22 these sections is appropriate only if the Court can conclude  
23 that family ties and responsibilities or charitable good works  
24 are extraordinary.

25           The Court will address the argument that the

1 sentence -- that the Court should depart because of charitable  
2 and similar prior good works.

3           It is true that in most cases which come before this  
4 court, the accused, or the person who has pleaded guilty or  
5 been found guilty, has not been a person who participates in  
6 charitable or good works. In most cases, either through their  
7 own fault or through no fault of their own, they're in no  
8 position to do so. Their economic circumstances do not permit  
9 them to do so.

10           In the class of cases more similar to Mr. Nacchio's,  
11 where the defendant has been prominent in the community and has  
12 accumulated some degree of wealth, that is, in the so-called  
13 economic or white collar crime cases, frankly, it is not  
14 uncommon for the Court to see charitable good works.

15           Charitable good works are expected of such people.  
16 That is a price that the community expects of them as a result  
17 of the wealth that they are taking out of the community.

18           The Government points out that as a percentage of  
19 Mr. Nacchio's income, the charitable giving is hardly  
20 extraordinary here compared to what other people give. The  
21 amount is ordinary.

22           It is true that Mr. Nacchio has engaged in a number of  
23 private acts of charity that are disclosed only in the  
24 presentence report. He has been generous to his family, and  
25 that includes not only his son, but his mother, his father, and

1 just about everybody else who is related to him. They all  
2 rely, as one of them wrote, on Uncle Joe to take care of them.

3           The Court is not unimpressed by those acts of private  
4 charity. They are commendable. They should be reflected in  
5 the sentence that the Court hands out in this case, and they  
6 will be reflected. They are not, in the Court's mind, so  
7 extraordinary as to merit a departure.

8           It is not uncommon in the Court's experience for  
9 people who have committed crimes, economic crimes, to take care  
10 of their families and to be good fathers and good uncles and  
11 good providers.

12           It may be ironic, but it is true that sometimes the  
13 people who commit these kinds of crime almost have two  
14 personalities. They are almost one person to the people that  
15 they know best and the people they care for most, and they wear  
16 another kind of personality to the public.

17           The Court therefore will not depart for this reason.  
18 Although, as I will try to explain in a moment, these acts of  
19 charity are certainly appropriate for the Court to consider in  
20 deciding where within the guideline range to impose the  
21 sentence.

22           The question of family ties and responsibilities is  
23 the central question here and the question that is the most  
24 difficult.

25           I must first of all observe that this Court sentences

1 defendants almost every Friday, and this is an argument that  
2 the Court hears frequently. It happens that the punishment  
3 which is exacted for somebody's crime inevitably affects those  
4 people who are closest to them. It affects their spouses, it  
5 affects their children, and it affects their friends who depend  
6 on them in some way.

7 I think that is why the guidelines try to carve that  
8 out and say that family circumstances are not ordinarily  
9 relevant. Because if they were, the tail would in a sense wag  
10 the dog. That is, in many cases, certainly not in every case,  
11 the Court would have to impose a sentence which somehow  
12 recognizes that it is sentencing the family members in some  
13 sense.

14 So the question is, what, if anything, is  
15 extraordinary about this case?

16 There is no question that the defendant's son is ill.  
17 And although it hasn't been discussed this morning, the papers  
18 establish that his mother is aged and will be emotionally  
19 affected by any incarceration of the defendant.

20 The more serious problem I think we recognize is David  
21 Nacchio.

22 The Court is not going to detail the medications that  
23 this young man is on, which include almost every medication  
24 known to those in the practice of psychiatry. The Court  
25 doesn't think it would serve any purpose to recite on the

1 public record the difficulties which this young man is having.

2           And the Court acknowledges that Mr. Joseph Nacchio,  
3 the defendant, has been an important figure in this young man's  
4 life. It is no exaggeration to say, he's been a wonderful  
5 father to this man -- this young man. But the Court will make  
6 some other observations.

7           You know, with all respect, when a choice has been  
8 made, as I alluded to before, by Mr. Nacchio himself, the  
9 choice hasn't always involved putting this young man at the  
10 very top of his list. He came to Colorado, took this job in  
11 Colorado. And as I've said, I see no reason why this man who  
12 grew up, the son of Italian immigrants, who grew up in New  
13 Jersey and New York, should ever have come out here to  
14 Colorado -- not that I think Colorado is a bad state, but his  
15 family was there. His ties were there. The son who needed him  
16 was there. The only reason I can see that he came here was, as  
17 I said before, greed. The love of money.

18           It is not unfair, therefore, to say that the Court's  
19 sentence in this case is not going to deprive David Nacchio of  
20 anything that Joseph Nacchio didn't deprive him of when he came  
21 to Colorado for four days a week and lived in Colorado.

22           I understand that he suffered obloquy because he came  
23 to Colorado. And I think this proceeding, if nothing else, has  
24 revealed that this wasn't a callous decision made by some  
25 arrogant easterner to stay away from this state. It was a

1 decision well grounded in his love for his family. And as  
2 counsel observed, looking back on it, I will bet anything that  
3 Mr. Nacchio wishes he had walked away from Qwest in January of  
4 2000 when he had the opportunity to do so. He didn't.

5 As the prosecution pointed out, not only didn't he  
6 walk, he negotiated a higher salary and more stock options.

7 The Court also thinks that there are ways that this  
8 situation can be dealt with that the parties really haven't  
9 suggested.

10 It's the defendant's family -- it's David Nacchio's  
11 family which is important to him. His father is central to  
12 that. But I think that it's a fair inference from what the  
13 psychiatrist is saying, that his mother, David Nacchio's  
14 mother, the defendant's wife, is able to provide some degree of  
15 care.

16 It is also the case, frankly, without seeming to sound  
17 callous about it, that Joseph Nacchio is not in isolation in a  
18 federal penal institution. He can be visited by all of his  
19 family members. He can be visited by his son David if his son  
20 David feels the need to be with him.

21 And finally, the Bureau of Prisons has great  
22 discretion in granting furloughs in extraordinary situations.  
23 And the Court will leave it to the Bureau of Prisons to deal  
24 with that if and when the extraordinary situation is presented.

25 On all the facts, the Court regards the defendant's

1 ties and family responsibilities as not rising to the level of  
2 extraordinary. They are important. The Court will consider  
3 them in deciding where within the guideline range to impose the  
4 sentence. The Court believes that they can be dealt with in a  
5 way that will not pose a threat to Mr. David Nacchio's  
6 well-being or his health.

7           And as the Court observed, and I still believe this is  
8 true, while it may be a matter of degree, the fact is that  
9 being in prison for a period of one year, two years, five years  
10 or seven years is the thing which will deprive David Nacchio of  
11 his father. And the logic of this argument is a probationary  
12 sentence. Because of the other factors, statutory factors that  
13 I will discuss in a moment -- and because of the statute,  
14 frankly, a sentence of probation is prohibited in this case.

15           The Court, therefore, denies the motion for a downward  
16 departure.

17           In determining each component of the sentence of  
18 imprisonment, the Court has considered the nature and  
19 circumstances of the offense and the history and  
20 characteristics of the defendant. Those in many ways are two  
21 sides of the same coin.

22           I've already talked about the overarching greed  
23 exhibited in this crime -- I should say, these crimes.

24           The other side of that is the history and  
25 characteristics of the defendant. In many ways, Mr. Nacchio is

1 the classic Horatio Alger story, somebody who rose from  
2 immigrant parents and who rose to enormous heights by sheer  
3 will and talent.

4           In many ways, Mr. Nacchio was what this nation expects  
5 of corporate executives, aggressive, tough, demanding, somebody  
6 who wouldn't accept less than best. Tragically, as frequently  
7 happens, or sometimes happens, because of, perhaps, a character  
8 flaw, because perhaps of his greed, he catapulted over the top  
9 in this case.

10           Nevertheless, the presentence report discloses him to  
11 be a person generous to all of his relatives, a good father to  
12 both of his children, and somebody with an absolutely  
13 unblemished record before his greed caused him to come to  
14 Colorado and embark upon the course which eventually led to his  
15 destruction.

16           The Court has considered the kinds of sentences  
17 available and the sentencing range established in the Federal  
18 Sentencing Guidelines. Of course, the guidelines serve the  
19 purpose of preventing unwanted sentencing disparities.

20           In addition, the Court has considered the statutory  
21 purposes to be served by a term of imprisonment. Some of them  
22 I've already recited in discussing the fine, because they are  
23 the same.

24           A sentence of incarceration, the necessity for such a  
25 sentence and the length of the term imposed is to be sufficient

1 but not greater than necessary to achieve the statutory  
2 purposes, including the need for the sentence imposed to  
3 reflect the seriousness of the offense, to provide just  
4 punishment for the offense, to afford adequate deterrence to  
5 criminal conduct, and to protect the public from further crimes  
6 of the defendant.

7           In this case some of these purposes are irrelevant. I  
8 don't think that a sentence of incarceration is necessary to  
9 protect the public from further crimes of the defendant.

10           I'm satisfied that once this episode is over, the  
11 justice system, I think, will not hear further from the  
12 defendant, at least not in a criminal case.

13           I've already discussed the other statutory purposes,  
14 and those purposes are equally important in deciding what the  
15 length of the imprisonment should be. And I'm particularly  
16 talking about the need to afford adequate deterrence to  
17 criminal conduct.

18           As I emphasized before, this, I believe, is the type  
19 of crime that can be deterred. And I've also talked about the  
20 need for the sentence imposed to reflect the seriousness of the  
21 offense and to provide some measure of just punishment.

22           What I haven't talked about so far is the need for the  
23 sentence imposed to promote respect for the law. That purpose  
24 is clearly set forth in the statute. And I believe this court  
25 is in a position to articulate what is meant by respect for the

1 law.

2           And so I will address you directly, Mr. Nacchio. I  
3 will address you as a citizen, and I will address your fellow  
4 citizens about what is meant by respect for the law.

5           To my way of thinking, one of the best illustrations I  
6 have ever heard of this is -- and of the role of the rule of  
7 law in our society, is a line from a movie called *A Man for All*  
8 *Seasons*.

9           As a practicing Catholic, you will appreciate, I  
10 trust, and as someone who according to some of the letters I  
11 read, has some interest in history, *A Man for All Seasons* is  
12 about a devout practicing Catholic named Sir Thomas Moore.

13           Sir Thomas Moore was a devout Catholic at a time when  
14 it was not very good for people to be devout Catholics, because  
15 the sovereign whom he served, the King of England, Henry VIII,  
16 was having his problems with the Catholic church. And Henry  
17 VIII was a monarch who made the law and enforced the law.

18           Sir Thomas Moore was also the lord chancellor of  
19 England, the king's minister, and a lawyer.

20           The scene that I'm talking about is a scene where he  
21 is -- where Sir Thomas Moore is being urged by his son-in-law  
22 Roper and by his wife and daughter to arrest a man -- a  
23 scoundrel, really, named Richard Rich. And Moore responds, as  
24 follows, referring to Rich.

25           And go he should if he were the devil himself until he

1 broke the law.

2 Roper says: So now you give the devil the benefit of  
3 the law?

4 And Moore replies: Yes. What would you do? Cut a  
5 great road through the law to get after the devil?

6 And Roper says: Yes, I'd cut down every law in  
7 England to do that.

8 And Moore replies as follows -- and this is the part  
9 that I want to talk to you about: Oh? And when the last law  
10 was down and the devil turned round on you, where would you  
11 hide, Roper, the laws all being flat? This country is planted  
12 thick with laws, from coast to coast, man's laws, not God's.  
13 And if you cut them down, do you really think you could stand  
14 upright in the winds that would blow them? Yes, I'd give the  
15 devil benefit of law for my own safety's sake.

16 This republic is planted thick with laws, from coast  
17 to coast. Not every one of us agrees with every one of those  
18 laws. There are people who disagree strongly, who think they  
19 can disobey the law whenever it suits their purpose. There are  
20 people who disregard the laws.

21 The law has protected you, and to the extent that this  
22 court has been able to do so, has protected you and permitted  
23 you to stand upright in the winds, because you've received to  
24 the best of this Court's ability, due process of law.

25 And you will continue to receive that. And no one

1 should begrudge you the opportunity to continue to pursue the  
2 rights that you believe you have.

3           The law in a republic such as this is in danger and  
4 cannot stand if a large portion or a significant portion of the  
5 citizens of that republic come to believe that it is not evenly  
6 enforced. And that is what is meant by equal justice under the  
7 law. It is not that you get the same sentence as everyone  
8 else, of course. It is that you are treated equally.

9           If it is perceived that there is one law for the rich  
10 and one law for everybody else, the law will ultimately fall  
11 into disrespect.

12           The law protects you from others, and it protects  
13 others from you. And it now becomes this Court's job to decide  
14 how important it is in this case for your sentence to promote  
15 respect for the law.

16           In a sense, yes, you are an example. In a sense, that  
17 is unfair to you. But the Court is a public institution in  
18 this republic, and it has a duty to promote respect for the law  
19 and to impose a sentence that is serious enough to do so.

20           So in addition to the other statutory purposes, I  
21 underscore the statutory purpose of promoting respect for the  
22 law and telling you and every other citizen that the law does  
23 not care that you are wealthy, or at least were wealthy. The  
24 law does not care about your station in life. The law can  
25 fashion a sentence which recognizes your charity and your good

1 works, but it will not let the charity and good works overwhelm  
2 the need to promote respect for the law.

3 For these reasons, Mr. Nacchio, it is the judgment and  
4 sentence of the Court that you receive a sentence within the  
5 statutory guideline range.

6 The Court specifically finds that such a sentence is  
7 the reasonable and appropriate sentence under Section 3553(a).

8 And accordingly, it is the judgment and sentence of  
9 the Court that you be committed to the custody of the United  
10 States Bureau of Prisons to be imprisoned for a period of 72  
11 months, 6 years, on each count of conviction to be served  
12 concurrently.

13 Is there a request, Mr. Stern, for designation of an  
14 institution for service of this sentence?

15 *MR. STERN:* Yes. May I get my paper?

16 *THE COURT:* You may.

17 *MR. STERN:* May Mr. Nacchio sit down?

18 *THE DEFENDANT:* I'd prefer to stand.

19 *MR. STERN:* Okay.

20 *THE COURT:* I think it's in the presentence report,  
21 but I didn't write it down, Mr. Stern.

22 *MR. STERN:* I did, but I -- it's Schuylkill.

23 *THE COURT:* Spell it for me, will you?

24 *MR. STERN:* Sure. It's S-C-H-U-Y-L-K-I-L-L.

25 *THE COURT:* And that is in Pennsylvania, right?

1           MR. STERN: I believe so, yes, Your Honor.

2           THE COURT: The Court will recommend that the Bureau  
3 of Prisons designate the Federal prison camp at Schuylkill for  
4 service of this sentence.

5           Upon release from your term of imprisonment,  
6 Mr. Nacchio, you are to serve a term of 3 years on supervised  
7 release, the minimum term on each count of conviction, to be  
8 served concurrently.

9           Within 72 hours of your release from custody you are  
10 to report in person to the probation office in the district to  
11 which you are released.

12           You are to observe all the standard conditions of  
13 supervised release which have been adopted by this Court.  
14 Those conditions will be specifically listed in a judgment that  
15 you will receive in a few days. And your probation officer  
16 will go over those conditions with you when your term of  
17 supervised release begins.

18           You are to observe the following special conditions of  
19 supervised release:

20           You are not to possess any firearm, destructive  
21 device, or any other dangerous weapon as defined by federal or  
22 state statute.

23           You are not to illegally possess or use controlled  
24 substances.

25           Because your presentence report indicates a low risk

1 of future substance abuse, or no risk, I should say, the Court  
2 suspends the statutory requirement concerning mandatory drug  
3 testing.

4           You are not to commit a federal, state or local crime.  
5 You are to cooperate in the collection of DNA as directed by  
6 the probation officer.

7           To the extent that you have not paid the fine before  
8 your term of supervised release commences, you are to pay the  
9 fine which I'm going to impose in compliance with the provision  
10 that I will impose the fine under.

11           You are to participate in a program for mental health  
12 treatment as directed by the probation officer until you are  
13 released from that program by the probation officer. You are  
14 to pay the costs of that treatment.

15           The Court will authorize the probation officer to  
16 release to the treatment agency all psychological reports  
17 and/or the presentence report for continuity of treatment.  
18 And, of course, you may continue in fulfillment of this  
19 requirement to consult with the doctor who has been treating  
20 you.

21           There is some suggestion that there is at least  
22 borderline alcohol abuse which has taken place recently, and  
23 that raises the issue of whether the Court ought to impose a  
24 condition you participate in a program for the testing and  
25 treatment of alcohol abuse. I thought about that. And

1 frankly, I think anybody who is under the stress you're under  
2 and is going through the things you're going through would  
3 start drinking. That's just a layman's view of the matter. It  
4 doesn't strike me that it's alcohol abuse. And upon my finding  
5 and belief that when you begin your term of supervised release  
6 and all of this stress has passed you, you'll handle it on your  
7 own the way that you need to handle it, the Court is not going  
8 to step in and impose any kind of condition concerning  
9 participation in an alcohol abuse program.

10           The Court is also required to specify that you are not  
11 to incur new credit charges or open additional lines of credit  
12 without the approval of the probation officer unless you are in  
13 compliance with all periodic payment obligations imposed  
14 pursuant to the Court's judgment and sentence.

15           You are to pay a fine of \$19 million. The fine is due  
16 and payable within 30 days of the date of sentencing. If it's  
17 not paid, then it will need to be paid as a condition of  
18 supervised release.

19           You are to pay a special assessment of \$1,900, \$100  
20 per count. And that is payable immediately. Payments made  
21 pursuant to the Court's judgment shall be applied in the  
22 following order: First to the special assessment, and then to  
23 the fine principal, and then to fine interest.

24           *MR. STERN:* Excuse me, Your Honor.

25           *THE COURT:* I'm not done.

1           MR. STERN: I understand.

2           THE COURT: Well, usually, you let the Court finish  
3 before you talk.

4           You know, I know that's not always been the custom  
5 during this proceeding.

6           Mr. Nacchio, the Court advises you of your right to  
7 appeal the jury's verdict of guilty and the sentence which the  
8 Court has imposed. And you undoubtedly know of that right.

9           If you wish to appeal, your trial attorney is obliged  
10 to assist you in filing that appeal. If you cannot pay the  
11 cost of an appeal, you may apply to the Court for leave to  
12 appeal as a poor person. If you so request, the Clerk of this  
13 Court will prepare and file forthwith a Notice of Appeal on  
14 your behalf.

15           So that brings us to -- unless you had something  
16 before, Mr. Stern, which you may now bring up, that brings us  
17 to the question of the defendant's motion for bond pending  
18 appeal.

19           MR. STERN: I did have one thing. We could take care  
20 of it later.

21           You had mentioned earlier 2 years supervised release,  
22 then later you said 3. There may be a little ambiguity. I  
23 frankly don't remember myself, but somebody handed me a note,  
24 and I didn't want to let the moment pass. And I certainly  
25 apologize.

1           *THE COURT:* Well, that's fine.

2           You're right. The term of supervised release is 2 to  
3 3 years -- 2 years. Your point is well taken.

4           *MR. STERN:* Thank you, Your Honor.

5           *THE COURT:* So we have the motion for bond pending  
6 appeal.

7           *MR. STERN:* Yes, Your Honor.

8           *THE COURT:* Mr. Nacchio, you can be seated at this  
9 point.

10          *THE DEFENDANT:* Can I stay with him?

11          *THE COURT:* You know, I'm going to figure out if  
12 Mr. Stern wants to argue. It's been briefed. The Government  
13 has responded. The Court is prepared to rule, but certainly  
14 would entertain argument from Mr. Stern or any counsel who  
15 wishes to argue.

16          *MR. STERN:* Well, we have provided you with a 61-page  
17 brief. There is, honestly speaking, little that I could add to  
18 that.

19          Since you have generously allowed me to make a few  
20 comments, I would confine myself, I think, to the brief that  
21 the Government filed. I didn't get it until last evening.  
22 Obviously, I'm a little disabled.

23          Anybody in my position is, of course, a little  
24 reluctant, because I think you probably have made up your mind,  
25 and I would hate to snatch a failure from a success. So being

1 from another place and another time, I might ask your  
2 indulgence in terms of hospitality. If you don't need to hear  
3 from me, I'll sit down. By that I mean, if I'm ahead, let me  
4 sit down.

5 *THE COURT:* You're not ahead.

6 *MR. STERN:* I'm not ahead?

7 Well, all right.

8 One of the very serious issues, of course, that's been  
9 raised by this case, which in my judgment is extremely unique,  
10 is what the obligations are in terms of the bespeaks doctrine.

11 It's our position, we've stated it as well as we know  
12 how to, that while the Government may take the position that  
13 the jury would have made the same finding anyway, it's our view  
14 that they were never instructed under the principles of the  
15 bespeaks doctrine, and that we were entitled under the *Grossman*  
16 case, to that instruction.

17 I notice that in their responsive brief, the  
18 Government does not argue *Grossman* is a civil case and this is  
19 a criminal case, and well they should not.

20 Securities fraud is securities fraud. And materiality  
21 can mean no difference -- no different thing for purposes of  
22 the same statute.

23 The only differences between a civil and a criminal  
24 case in that area, in my professional judgment, is the fact of  
25 the burden of proof and the necessity of proving criminal

1 intent.

2 Now, it is not necessary, as Your Honor knows, for  
3 Your Honor to find that you made a mistake or that we're right,  
4 only that it is a close question which could go the other way  
5 and that if it did go the other way, there is a substantial  
6 likelihood of a reversal or a new trial.

7 Although the last prong cannot be denied, if in fact  
8 we're right on this point, this is one of the most sensitive  
9 areas in the case. And it seems to me quite likely if we were  
10 entitled to that instruction, a reviewing court would find that  
11 it was a serious failure and would warrant a new trial, or a  
12 reversal.

13 The question then I think becomes, is it a close  
14 question?

15 There has never been a case like this in this circuit.  
16 We have not made it up afterwards. We submitted the  
17 instructions to you clearly. I think it is clearly a close  
18 question.

19 Now, in the area of the expert witness, we were denied  
20 the ability to call an expert. The Government says that you  
21 have made findings which are to be reviewed on the basis of an  
22 abuse of discretion. I think that is wrong. You heard no  
23 testimony on that issue. I say these things respectfully to  
24 you, obviously.

25 *THE COURT:* Wait a minute. The standard of review you

1 think is something other than abuse of discretion?

2           MR. STERN: I not only think so, I think -- I  
3 professionally say to you, it is my honest best judgment.

4           It is one thing to determine credibility. It is  
5 another thing to say that we were not entitled to call an  
6 expert because the Rule 16 notice was not sufficient.

7           THE COURT: Well, that was only one of multiple bases.

8           MR. STERN: That was -- I'm sorry, Your Honor. I  
9 didn't mean to interrupt. That is reviewed, I respectfully  
10 submit, de novo.

11           There was no hearing. There was no *Daubert* finding.  
12 These decisions as to whether or not the Court was required to  
13 hold such hearings were in my professional judgment almost  
14 certainly be reviewed on a de novo basis.

15           And the basis of the briefs submitted by the  
16 Government in opposition on this point principally rests on the  
17 fact that the United States Court of Appeals for the Tenth  
18 Circuit will review your findings in this area with deference.  
19 And with deference to you and to the Government, I say that is  
20 not correct.

21           These were nothing to do with evidence, nothing to do  
22 with listening to anybody, nothing to do with hearing what the  
23 testimony would be. This is a flat out prohibition against us  
24 calling an expert witness in a sophisticated securities case,  
25 where he would have testified on issues of materiality, on

1 issues about disclosure of IRUs, on issues about what actually  
2 happened in the marketplace when disclosures were made. It was  
3 essential to our case.

4 I do not say that it is 100 percent sure that you  
5 would be reversed in this. But I think it is fair to say that  
6 in a case of this magnitude, the sophisticated nature of this  
7 case, the fact you ruled that we were not allowed to have an  
8 expert testify on any one of those issues is certainly --  
9 presents a question which could well go the other way, and  
10 which, if it does, is quite likely to result in a reversal or a  
11 new trial.

12 The instruction that you gave which said to the jury  
13 that if Nacchio was in good faith, but committed -- said  
14 something that was dishonest, his good faith could not be a  
15 defense -- I have the exact words if you wish me to quote them.

16 *THE COURT:* No, you don't have to, because they're a  
17 standard Tenth Circuit instruction approved by the Circuit.

18 *MR. STERN:* Well, the Government used that instruction  
19 to stand before -- not this jury, but upstairs, where we used  
20 to be, to tell the jury that on the basis of Mr. David  
21 Weinstein's testimony, that the defendant committed an act of  
22 dishonesty. They therefore could find a lack of good faith  
23 to -- in defense of the charge of insider trading.

24 *THE COURT:* And the jury acquitted him on the only  
25 charges to which that could possibly have related.

1           *MR. STERN:* With all respect, that is not correct.  
2 You are talking about the backdated document. I am talking  
3 about the fact that the Government was allowed to ask a single  
4 question by Your Honor, and it came into this setting --

5           *THE COURT:* It's the same issue, Mr. Stern.

6           *MR. STERN:* No --

7           *THE COURT:* The backdating issue and the issue of  
8 whether he put different dates on documents than --

9           *MR. STERN:* What happens was --

10          *THE COURT:* -- than the date the document was  
11 created.

12          *MR. STERN:* What happened exactly was -- the  
13 Government called this witness, I didn't. He was the financial  
14 advisor of the defendant. And I asked the man on the stand as  
15 to whether or not the circumstances under which they spoke  
16 indicated reliability in terms of disclosure of the defendant's  
17 financial condition, expectations, the stock that he held and  
18 so forth. He said yes. And I asked him if he believed them.

19          Mr. Stricklin was -- then said that this opened the  
20 door, and Your Honor agreed, that Weinstein would be allowed to  
21 testify about some act of dishonesty which Weinstein said the  
22 defendant committed in terms of the -- some bill for  
23 professional services.

24          I believe that that offer was incorrect. We didn't  
25 list it among the main points that we raised.

1           Then the Government thereafter used the instruction  
2 that I have just addressed to argue to the jury that that one  
3 question and that one answer which Your Honor limited, I must  
4 say, fit perfectly under that instruction, and therefore we  
5 were done.

6           Now, the instruction which I think Your Honor intended  
7 to give undoubtedly was something to the effect -- I don't  
8 think it was communicated exactly as you wished -- that, you  
9 know, if you're in good faith but as you are committing  
10 whatever acts you are accused of, you know, you do unlawful  
11 things, your good faith won't save you from the unlawful things  
12 you do in terms of the charge which you are facing.

13           But that is not how the Government used it. And with  
14 all respect to you, Your Honor, that's not the way it was said.

15           *THE COURT:* So is one of the points you're going to be  
16 talking about the prosecutorial misconduct, or does this go to  
17 the jury instruction? What you're telling me, the jury  
18 instruction was fine, the Government just abused it.

19           *MR. STERN:* I am not telling you the jury instruction  
20 is fine. I thought I was very careful to say that whatever  
21 your intent may have been, it didn't come out correctly. But  
22 if I failed to make that clear, I certainly would like to.

23           And I'm not talking about prosecutorial misconduct.  
24 The literal words of what you said you would charge the jury  
25 did authorize the Government to make exactly the argument they

1 made. I do quarrel, respectfully, with having admitted that  
2 evidence at all. But that, as I say, is yet a different issue.

3 That evidence did not belong in this record. I opened  
4 no door to it, and the Government should not have made that  
5 argument to the jury.

6 In response, you know, what they have said in their  
7 brief -- which as I say, I only had late last evening to review  
8 -- they say the instruction was okay because it means, if you  
9 use an improper means in committing the crime, then, you see,  
10 your good faith won't save you. But Weinstein's testimony  
11 about some bill which he said was a fraud had nothing to do  
12 with that.

13 Now, Your Honor, it is a very unusual case. There  
14 isn't another case in the Tenth Circuit that I know of which  
15 deals with inside information in terms of projections. There  
16 isn't another case that I know of in this circuit which stands  
17 for the governmental proposition which they have offered to you  
18 that when you're dealing with the same projections of numbers,  
19 on the facts of this case, not where there is some information  
20 which the company has a right to keep quiet about -- like, you  
21 know, they use the example pretrial of a fire in a factory or a  
22 patent or a merger. But where you're talking about the  
23 projections of what the company expects their publicly stated  
24 financial targets to be 16 months, 9 months, 8 months or 6  
25 months out, these are extraordinary kinds of information.

1           And the law accords in this area different kinds of  
2 duties and obligations and protections to companies and  
3 executives and the like.

4           Now, we've thoroughly briefed it, and I don't want to  
5 invade your time unduly. I can look at this Court and honestly  
6 say that this is a substantial appeal raising unusual and  
7 unique issues in this circuit.

8           I can say that Your Honor was confronted with a case  
9 such as never has been in the district or circuit courts in  
10 this circuit. It is not, therefore, unusual that Your Honor  
11 may ultimately be found to have issued an instruction which in  
12 the fullness of time is found to be not what should have been  
13 done.

14           As Your Honor knows, you're not required to find that  
15 you have made a mistake or to disagree with anything that you  
16 have done, but only to say that it could go the other way. And  
17 that if it did, a new trial would be required.

18           Now --

19           *THE COURT:* Do you have anything to say about the  
20 provision concerning a reduced prison -- reduced sentence to a  
21 term of imprisonment less than total time already served plus  
22 the expected --

23           *MR. STERN:* I couldn't --

24           *THE COURT:* Sorry, I was mumbling.

25           Do you have anything to say about the provision

1 talking about a reduced sentence to a term of imprisonment less  
2 than the total of the time already served plus the expected  
3 duration of the appeal process?

4           *MR. STERN:* Well, I didn't brief that, I don't  
5 believe.

6           *THE COURT:* No. Nobody did.

7           *MR. STERN:* And I'd be happy to do that, if you'd  
8 like.

9           *THE COURT:* Well, I just thought I'd ask about it,  
10 just out of curiosity.

11           *MR. STERN:* Look, Judge, aside from all --

12           *THE COURT:* I'll ask Mr. Stricklin. It looks like he  
13 can't wait.

14           *MR. STERN:* Well, aside from all the other  
15 considerations, the very family issues that we've raised, I  
16 think we're entitled to as a matter of the application of the  
17 *Affleck* standard in this circuit. We've briefed it as well as  
18 we can.

19           If you want to hear from the Government, I'll sit  
20 down. And then obviously, you'll make your decision, and then  
21 I'll have to address what that means.

22           *THE COURT:* Mr. Stricklin.

23           *MR. STRICKLIN:* Your Honor, I'll address your question  
24 first, and that is, if there is any issue -- we didn't brief  
25 the issue as to whether there is any matter that if the Court

1 decided in the favor of the defendant, that would cause him to  
2 reduce his sentence to term of imprisonment that would be less  
3 than the time it takes to basically appeal the case.

4           And I think the only issue that could possibly fall  
5 into the realm -- without conceding it is a substantial  
6 question, and I do not believe it is -- that is the gain  
7 calculation that the Court just imposed.

8           But even if you use the gain calculation and you go to  
9 the chart under 2F1.2, and you go to, say, 1.5 -- all the way  
10 down to 1.5 million, that's still Level 12, four-level  
11 reduction, four-level reduction from a 26 is 22. Range of  
12 imprisonment is 41 to 51 months. And no appeal takes that  
13 long, Your Honor.

14           I just don't think -- not only is it a substantial  
15 question, I don't think that that comes close to applying in  
16 this case.

17           With regard to the Court's decision today on downward  
18 departure, you know, that's abuse of discretion standard.  
19 Gosh, out of all the downward departure cases I've ever looked  
20 at, I'm not even sure -- there is very few out there, I'll say,  
21 there is very few out there that say the Court in erred in not  
22 granting downward departure.

23           None of the questions presented certainly are what I  
24 would say substantial, and secondly, certainly not likely to  
25 result --

1           *THE COURT:* Tenth Circuit used to say that a guideline  
2 sentence was unreviewable, if the Court refused to depart --  
3 refused discretionary departure. Whether that survived the  
4 Supreme Court's recent decision, I wonder. May be a different  
5 question.

6           *MR. STRICKLIN:* I will say this, I'll direct -- you  
7 know, the defendants raised four issues. We briefed those,  
8 Your Honor. There is just no substantial question there.

9           I would just take a step back just briefly and look at  
10 the Bail Reform Act and look at the congressional intent behind  
11 it. I mean, it was changed to put the burden on the defendant  
12 once the -- once he had been found guilty and once the sentence  
13 had been imposed, there is a presumption that he should be  
14 remanded.

15           And the reason for that is spelled out very clearly in  
16 the congressional record, something we've spoken about at  
17 length here today. And that is a deterrent effect, which, of  
18 course, promotes respect for the law.

19           I'll be very candid and say, I can't think of anything  
20 else that would do more damage to a deterrent effect or  
21 promoting respect for the law than to give someone a sentence  
22 and then without having that substantial question, without  
23 having the -- without having a likelihood of reversal, new  
24 trial, to then say, you have -- you have a year and a half, two  
25 and a half years before you have to begin serving it.

1 I just cannot think of anything more damaging to that  
2 notion under the law.

3 I think our brief stated very clearly that the defense  
4 has failed to present a substantial question, and they have  
5 failed to show an issue where there is a likelihood of  
6 reversal, new trial or as the Court's question earlier.

7 And we'll leave it at that, Your Honor.

8 *THE COURT:* So you're asking for remand.

9 *MR. STRICKLIN:* Well, I'll be very candid, Your Honor.

10 It's not a concern to me that Mr. Nacchio leaves in  
11 handcuffs here today. That's not a concern to me. I am much,  
12 much more concerned that -- I am much more concerned that their  
13 motion for bond pending appeal be denied. That's what I'm  
14 asking for, motion for bond pending appeal be denied.

15 If the Court thinks in its wisdom self-reporting is  
16 appropriate -- we asked for a bail increase. To Mr. Nacchio's  
17 credit, he showed up. There has not been a concern of that.

18 So --

19 *THE COURT:* Mr. Stern.

20 *MR. STERN:* I just -- I'm glad that Mr. Stricklin  
21 clarified this, because the last line of their brief made it  
22 look like --

23 *THE COURT:* I know. That's why I asked.

24 *MR. STERN:* I know you did. And I wanted you to know  
25 several weeks ago we discussed this, and he was not asking for

1 it. That is merely a misreading -- not by you, by -- it didn't  
2 come out right. They're not asking for it, and I thank him for  
3 making that clear right now.

4 So that the Government even with all the arguments --  
5 I mean, I respect the law. I've spent a fair amount of my life  
6 doing that. But you've administered a very substantial  
7 sentence, very substantial fine. But it does no disrespect to  
8 law for a man to appeal.

9 Paul Scofield's words in *A Man for All Seasons*  
10 speaking about Robert Shaw playing Henry VIII contemplated an  
11 appeal too.

12 So crime in America, I promise you, will not flourish  
13 if this defendant is permitted to pursue his rights to appeal.  
14 Corporate America will not regard it as a license to commit  
15 crimes in board rooms if this court recognizes that under our  
16 system of justice, this is not the last word in the  
17 administration of criminal law.

18 So I've done what I can. I believe personally and  
19 represent to you that there are substantial questions in this  
20 unique kind of insider trading case. That's all I can do. But  
21 to deny bail pending appeal to send a message to the community  
22 is just wrong. That's not the purpose of bail pending appeal.

23 *THE COURT:* Well, once again, the Court starts with  
24 the law, the statute.

25 The law presumes that at this stage in the proceeding

1 a defendant is to be remanded. And the defendant bears the  
2 burden in order to avoid that to prove that he is not a flight  
3 risk and is not a danger to the community.

4 And those matters are not at issue here. The  
5 Government doesn't contend that he is a flight risk or a danger  
6 to the community.

7 The rub is that at this stage in the proceedings, the  
8 defendant must show that he has raised a substantial question  
9 of law or fact on appeal that is likely to result in reversal  
10 and order for new trial or a reduced sentence that doesn't go  
11 past the expected duration of the appeal process.

12 The Tenth Circuit has ruled in *Affleck*, a case that  
13 both parties cite, that a substantial question is a close  
14 question or one that could very well be decided the other way  
15 and one that if determined favorably to the defendant on appeal  
16 would be likely to result in reversal or an order for a new  
17 trial.

18 So, you know, there is no way to avoid the conclusion  
19 that as a practical matter the Court has to second-guess  
20 itself. The Court has to decide whether reasonable minds could  
21 differ on some of these things. And if reasonable minds could  
22 differ, whether there is harmless error; that is, whether an  
23 error is going to result in reversal or a new trial.

24 So addressing the things that the defendant brought up  
25 in the motion for bond on appeal, as opposed to other things

1 that might be raised on appeal, the Court notes that they first  
2 involve jury instructions.

3 The defendant argues with the jury instructions  
4 regarding materiality, non-public information, good faith.

5 As I understand what the Tenth Circuit will do, it  
6 considers the instructions as a whole, de novo, to determine  
7 whether they accurately inform the jury of the governing law,  
8 and then each particular instruction is reviewed for abuse of  
9 discretion.

10 With respect to materiality, the plaintiff goes over  
11 his previous arguments regarding the bespeaks caution doctrine  
12 and says that the materiality instruction should have  
13 instructed the jury that forward-looking statements are not  
14 material unless they were made without a reasonable basis or  
15 without good faith.

16 It's not necessary to instruct the jury in great  
17 detail concerning every rule of law that might be applicable.  
18 In this case, in the Court's view, the bespeaks caution  
19 doctrine is simply not applicable.

20 The defendant in the Court's view cannot use this  
21 doctrine to smoke screen the Government's evidence and warnings  
22 that Qwest's business was floundering. The bespeaks caution  
23 doctrine applies not in criminal insider trading cases, but in  
24 fraud on the market cases, in civil cases where liability turns  
25 upon a misstatement or omission in a public misrepresentation.

1           Here, the liability turns upon what the defendant knew  
2 when he traded, not on his statements to the public.

3           The defendant has not come forward with one case in  
4 which a court has applied this bespeaks caution doctrine to a  
5 criminal insider trading case.

6           Assuming that the bespeaks caution doctrine did apply,  
7 and thus Qwest's public financial targets for 2001 were  
8 immaterial for purposes of Rule 10b5, that does not mean that  
9 the targets were irrelevant to either the investing public or  
10 Qwest insiders.

11           There is no doubt in the Court's mind that Qwest  
12 employees were well aware that the company's stock price would  
13 drop if Qwest failed to meet its purportedly, quote, immaterial  
14 public targets. Thus notwithstanding the purported legal  
15 immateriality of the public targets, internal warnings that the  
16 company would fall short of its public targets, if reliable,  
17 are precisely, as this Court has previously found, the sort of  
18 information that a reasonable investor would consider important  
19 in deciding whether to buy or sell Qwest securities.

20           These warnings are the only -- these warnings are the  
21 only forward-looking statements that merit the jury -- merited  
22 the jury's careful consideration in this case.

23           As the Court stated in the *Smith* decision, earnings,  
24 projections of a company constitute a prime factor in  
25 estimating the worth of its stock.

1           The Court further found that the defendant is  
2 confusing the issue of materiality and the duty not to have to  
3 disclose material information and yet abstain. As I pointed  
4 out previously, projections of corporate earnings are many  
5 times the most material type of information one can imagine.  
6 And I believe the jury could have so found in this case.

7           The projections of corporate earnings in the  
8 September 7 guidance were in some sense fantastic. They were  
9 double digit projections, and the public was entitled to rely  
10 on these things. There was an internal debate. That's true.  
11 At some point the internal debate went beyond internal debate.

12           If the jury -- the Court previously said that if the  
13 jury bought the fact that there was nothing more than an  
14 internal debate, which it did not, then the information wasn't  
15 material, and the information did not need to be disclosed.  
16 The jury would have agreed with the defendant. It did not.

17           The jury was not, however, compelled to agree with the  
18 defendant's view of the matter.

19           So, you know, I'm sure that the argument will be put  
20 to the appellate court in the most persuasive form possible;  
21 but I just don't see it. I do not see any court applying this  
22 bespeaks caution doctrine in a criminal insider trading case.  
23 And I think that would be inconsistent with the Ninth Circuit's  
24 well reasoned decision in *Smith*.

25           Next, the defendant takes issue with the Court's

1 instruction concerning what is non-public. The defendant  
2 argues that the definition of "non-public" should have related  
3 to the defendant and Qwest had the same duty to disclose.

4 Well, we've been over that one. I think that misses  
5 the mark. The definition of "non-public" did not in any way  
6 speak of duties to disclose. It only defined non-public.

7 Second, whether the Qwest or the defendant had a duty  
8 to disclose is absolutely irrelevant to whether or not any  
9 particular information was actually non-public.

10 Third, and I suppose this would be a question on  
11 appeal, although I can't see why it makes any difference, it is  
12 simply not the case that defendant and Qwest always had the  
13 same duties to disclose. What the defendant had is the duty to  
14 disclose or to refrain from trading. And that's not  
15 necessarily the same duty that Qwest had.

16 So I don't see a problem, frankly. And I don't find a  
17 substantial question presented concerning the definition of --  
18 the instruction on what constitutes non-public information.

19 And then the defendant suggests that the good faith  
20 instruction was incorrect. He argues that it's internally  
21 inconsistent. I already said that it's not internally  
22 inconsistent, and I said why it's not internally inconsistent.

23 My recollection, unless I misstated something and I'm  
24 missing it now, is that the instruction I gave is a standard  
25 instruction. I think that it has been approved by the Tenth

1 Circuit.

2 Unless the Circuit -- if that's true, then unless the  
3 Circuit changes its mind, it's difficult to me to see how error  
4 is going to be predicated on that.

5 Next, the defendant complains, as he did at trial, of  
6 my exclusion of his expert. He raises Rule 16 and *Daubert*.

7 Those were not the only -- I think those were a  
8 sufficient basis, but those weren't the only bases or the main  
9 bases on which the Court rested its decision. The Court relied  
10 on Rule 702, 403 and 602.

11 Under Rule 702, the Court found that the expert's  
12 testimony would not be helpful to the jury, and this alone  
13 warranted exclusion. I said that because the proposed expert  
14 testimony was more akin to a closing argument. It recited  
15 facts that were not within the proposed expert's personal  
16 knowledge, some of the testimony was irrelevant, and much of it  
17 was regarding common knowledge and posed the danger of  
18 misleading jurors into believing they could not rely on their  
19 own common sense.

20 I am somewhat puzzled at the assertion that all of  
21 this will be reviewed de novo. Maybe it will. Maybe you will  
22 convince the appellate court that it should be reviewed de  
23 novo.

24 This Court understands that those kinds of issues will  
25 be reviewed for abuse of discretion. Rule 403 rulings are

1 reviewed for abuse of discretion.

2 Sure, the Court might find that I haven't been that  
3 discreet. It might find that I've -- that I have abused my  
4 discretion. I said before, I don't think it's a close  
5 question, and I continue to believe it's not a close question.

6 The same goes for Dr. Fischel's proposed rebuttal  
7 testimony. Again, under the applicable rule, I think it's  
8 going to be reviewed for abuse of discretion, and I don't think  
9 there is a close question.

10 The defendant suggests that he will raise questions  
11 about the insufficiency of the evidence. You know, I -- that  
12 can be raised, and who knows how it's going to come out. I've  
13 taken my best shot at it. I think the evidence was sufficient.  
14 I think the defendant wholly misconceives the thrust of the  
15 Government's case and misunderstands the Government's case.

16 The defendant wishes the Government had brought a  
17 different case. It didn't. The defendant was obliged to  
18 defend the case that the Government brought. He didn't.

19 It is true that when I read some appellate opinions, I  
20 don't recognize the case I tried. So maybe the appellate court  
21 will try -- will believe the defendant's case, not the  
22 Government's case. If that happens, I will stand corrected.

23 Finally, the defendant talks about the Court's rulings  
24 under the Classified Information Procedure Act. And I want to  
25 say a few things about that.

1           The defendant suggests that the Court somehow violated  
2 the confrontation clause in its rulings and it -- in an  
3 argument that I don't understand, it seems also to suggest that  
4 I somehow prevented the defendant from investigating and  
5 finding witnesses and bringing those witnesses to court. There  
6 was not one ruling where I denied the defendant the right to  
7 compulsory process, that I can recall.

8           Nor did I deny the defendant the right to speak to  
9 whomever he wanted. The Government may have limited him. The  
10 Government -- and the witnesses themselves may have refused to  
11 talk to them. But I don't think you can predicate error upon  
12 that.

13           And I don't remember any ruling that implicated the  
14 confrontation clause.

15           It is difficult to talk about these rulings in the  
16 abstract without getting into information that is classified.  
17 However, the Court will make these observations:

18           The Court's rulings were consistent with the District  
19 Court decision that the Court chose to follow, rulings on the  
20 question of whether the classified information that defendant  
21 thought was material to his defense and wanted to use at trial  
22 was admissible under the Rules of Evidence. The Government  
23 proposed a different standard, a more stringent standard. The  
24 Court rejected that standard and said the question would simply  
25 be, is it admissible under the rules of evidence without regard

1 to its classified nature.

2           The Court made rulings on that. By and large, I think  
3 the record will fairly reflect those rulings favored the  
4 defendant, in all areas except two. With respect to one of the  
5 agencies, the Court ruled that the evidence the defendant  
6 didn't want -- the evidence the defendant wanted to proffer, or  
7 wanted to get into, was irrelevant under Rule 401 and that it  
8 would mislead the jury and waste time and result in collateral  
9 sideshow under Rule 403.

10           In all other respects -- in most other respects, I  
11 should say, the rulings favored the defendant.

12           Now, it is true, in a number of instances the Court  
13 said that rather than direct, first-hand testimony under oath,  
14 the defendant would be required to present a summary or a  
15 sanitized version of facts which eliminated specific places or  
16 specific locations or matters that might compromise national  
17 security.

18           By and large, without prejudice to his position that  
19 such summaries were impossible, the parties worked those  
20 matters out. And the Court specifically said that it would be  
21 ready and willing to give an instruction which would protect  
22 the defendant if he testified and would protect any other  
23 witnesses that he called, in that it would tell the jury that  
24 the Court was not allowing the witness to relate specific  
25 locations or specific people because of the classified nature

1 of that information and that the jury should not -- draw no  
2 inferences about the defendant's credibility or the credibility  
3 of any witness he chose to call based on the fact that the  
4 defendant wasn't testifying to these details which might  
5 arguably affect the jury's view of the witness' credibility.

6           When trial came, that defense was gone. There was  
7 nothing about that defense at all.

8           Now, the Court allowed wide latitude. There was a  
9 great deal that the defendant was allowed to go into, either by  
10 way of direct testimony or in summary form. It is difficult  
11 for me to see how error can be predicated and a reversal can be  
12 obtained in a situation where the defendant chose not to use  
13 one item of the information that the Court gave to him, that  
14 the Court allowed him to get into.

15           It defies common sense. But then, sometimes, that  
16 occurs.

17           In addition, the Court's rulings, as I say, were  
18 evidentiary in nature. They were rulings under Rule 401 and  
19 403. Those rulings, I think, are still reviewed for abuse of  
20 discretion.

21           I explained very carefully why I was excluding under  
22 Rule 401 and 403. I with respect cannot agree that I abused my  
23 discretion. And therefore I can't see how error will be  
24 predicated on anything having to do with Classified Information  
25 Procedures Act.

1           For those reasons, the motion for release on appeal is  
2 denied.

3           And the question is, whether the defendant will be  
4 immediately remanded or whether he will be allowed to  
5 voluntarily surrender.

6           There was a time early in my judicial career when I  
7 either required immediate surrender or I ordered the marshal --  
8 the defendant to surrender voluntarily to the United States  
9 Marshal at the conclusion of the proceedings. I did that  
10 because of considerations such as those that counsel argued,  
11 that it seemed to me defendants and the public should begin to  
12 regard the sentencing process not as another step in the  
13 nebulous legal process, but as the day of reckoning.

14           They shouldn't be permitted -- and I'm not suggesting  
15 Mr. Nacchio did -- but they shouldn't be permitted to go put an  
16 hour's worth of change in the parking meter and expect to go  
17 retrieve their car at the end of the proceeding.

18           It came to my attention through one of the public  
19 defenders that the Bureau of Prisons and/or the Marshal Service  
20 drew some unfortunate adverse inferences from that practice.  
21 It was unique in this district, at least, and in many districts  
22 it is a custom, it is regular that defendants who pose no  
23 flight risk or danger to the community are allowed to surrender  
24 voluntarily. The marshals and the Bureau of Prisons liked  
25 that, and imposed adverse consequences on defendants for an

1 immediate remand because it costs them to transport the  
2 defendant from an institution -- from the holding institution  
3 here in Colorado to wherever he's going to surrender. In a  
4 word, it saves the Executive Branch, the Bureau of Prisons,  
5 and/or the Marshal Service money to have the defendant  
6 voluntarily surrender.

7           So I relented, and my practice conforms with practices  
8 of most other judges.

9           To require that Mr. Nacchio be an exception to that  
10 would undermine the rule of law that I talked about earlier.  
11 There is no reason to impose on him a condition or requirement  
12 that is not imposed in other cases.

13           Accordingly, the Court's order will be that he  
14 voluntarily surrender to the institution designated by the  
15 Bureau of Prisons within 15 days of the date of designation.

16           Is there anything further on behalf of the Government?

17           *MR. STRICKLIN:* Just one brief matter.

18           Walking over to court this morning, we did receive  
19 your order with regard to forfeiture. And --

20           *THE COURT:* You got it while you were coming to court?

21           *MR. STRICKLIN:* I did, Your Honor.

22           *THE COURT:* You have a device that --

23           *MR. STRICKLIN:* Yes, sir, I do.

24           *THE COURT:* That's absolutely amazing.

25           *MR. STRICKLIN:* And now my device is Mr. Traskos, who

1 points out to me, I think rightfully so, under the law that --  
2 the law contemplates an oral recitation that the sum of  
3 \$52,007,554.47 shall be forfeited to the United States within  
4 15 days of this order, and that it shall become final at the  
5 time of sentencing. That is, now.

6 *THE COURT:* I thought I did that.

7 *MR. STRICKLIN:* You did in written -- in writing  
8 form --

9 *THE COURT:* I did it at the beginning of this  
10 proceeding.

11 *MR. STRICKLIN:* Well, then if you just confirm that,  
12 then that's fine with us, Your Honor.

13 *THE COURT:* All right. Well, I think I did it  
14 already.

15 *MR. STRICKLIN:* Yes, sir.

16 *THE COURT:* But in case I didn't --

17 *MR. STERN:* May I say something before you do it?

18 *THE COURT:* Does it have to do with the forfeiture?

19 *MR. STERN:* Yeah.

20 *THE COURT:* Proceed.

21 *MR. STERN:* Okay. I think your order says 15 days.

22 *THE COURT:* Did I say -- I said 30 in my oral order,  
23 didn't I?

24 *MR. STRICKLIN:* It's 15.

25 *MR. STERN:* Well --

1           *THE COURT:* So what is your request, Mr. Stern?

2           *MR. STERN:* Well, he's asking for immediately, you --  
3 I'm trying to just call your attention to the fact that you  
4 have a written order that says 15 days.

5           *MR. STRICKLIN:* Just be clear, I'm asking that -- all  
6 I'm asking is for Nos. 2 and 3 to be read orally into the  
7 record. That is, shall become final immediately.

8           *THE COURT:* I thought I did that, but here goes.

9           *MR. STERN:* Can I just say one thing about this?

10          *THE COURT:* Sure.

11          *MR. STERN:* Thank you. We're obviously going to seek  
12 bail pending appeal. Will you stay your order so that we don't  
13 have to turn the money over until the Court of Appeals has  
14 addressed the stay?

15          *THE COURT:* Well, it's within 15 days of the date of  
16 this order he forfeits. Are you going to say he has to turn it  
17 over today?

18          *MR. STRICKLIN:* Within 15 days is fine, Your Honor.

19          *MR. STERN:* All right. Okay.

20                 Could you give me one second, Judge?

21                 Thank you.

22          *THE COURT:* The defendant shall forfeit to the United  
23 States the sum of \$52,007,545.47 within 15 days of the date of  
24 this order. The order will become final as to the defendant at  
25 the time of sentencing and will be included in the sentence and

1 included in the judgment.

2 *MR. STRICKLIN:* Thank you.

3 *THE COURT:* All right.

4 Anything further, Mr. Stricklin?

5 *MR. STRICKLIN:* No, Your Honor.

6 *THE COURT:* Anything further on behalf of the  
7 defendant?

8 *THE DEFENDANT:* Yes. I would just like to make one  
9 brief statement.

10 *THE COURT:* Why don't you consult with your client  
11 and -- because he is wanting to say something, I believe, and  
12 you and your -- you just need to decide whether --

13 *THE DEFENDANT:* I'm -- I'd like to address the Court.

14 *MR. STERN:* May we have a recess, please?

15 *THE COURT:* Mr. Nacchio, I gave you an opportunity  
16 to --

17 *THE DEFENDANT:* I'm asking permission to address the  
18 Court.

19 *MR. STERN:* No, I --

20 *THE COURT:* I'm required by rule to give you an  
21 opportunity to do that before sentence is imposed.

22 *THE DEFENDANT:* If you say no, it's fine.

23 *THE COURT:* I don't think that's appropriate at this  
24 time because your attorney is clearly signaling me that it's  
25 not in your best interests.

