

REDACTED

FILED WITH COURT SECURITY OFFICER
IN CAMERA AND UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

APR 09 2007

GREGORY C. LANGHAM
CLERK

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**RENEWED OBJECTION BY JOSEPH P. NACCHIO
TO EXCLUSION OF CLASSIFIED TESTIMONY
AS VIOLATIVE OF HIS CONSTITUTIONAL
RIGHT TO MOUNT A DEFENSE**

(FILED IN CAMERA AND UNDER SEAL WITH THE COURT SECURITY OFFICER)

Defendant Joseph P. Nacchio, by and through undersigned counsel, respectfully renews his objection to the Court's rulings excluding testimony surrounding his February 27, 2001 meeting at Ft. Meade with representatives from the National Security Agency ("NSA"), as violative of his constitutional right to mount a defense. Although Mr. Nacchio is allowed to tell the jury that he and James Payas went into that meeting expecting to talk about the "Groundbreaker" project and came out of the meeting with optimism about the prospect for 2001 revenues from NSA, the Court has prohibited Mr. Nacchio from eliciting testimony regarding what also occurred at that meeting.

The Court has also refused to allow Mr. Nacchio to demonstrate that the agency retaliated for this refusal by denying the Groundbreaker and

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perhaps other work to Qwest. In other words, if the government puts on rebuttal witnesses, we will not be allowed to impeach those witnesses by showing bias.

By being prevented from telling his full story to the jury or from fully and properly cross-examining any rebuttal witnesses, Mr. Nacchio has been deprived of the ability to explain why -- after he came out of the February meeting with a reasonable, good faith, expectation that Qwest would be receiving significant contracts from NSA in 2001 (prospective business which was unknown to the so-called "warners" and not included in the September 7, 2000 publicly stated guidance) -- Qwest was denied significant work. Instead, were Mr. Nacchio to tell just the part of his story which the Court has allowed, the government would be able to offer rebuttal evidence related to that limited portion of the story, purportedly that Qwest was never in line to receive substantial work. Without allowing Mr. Nacchio the opportunity to explain fully what happened or to cross-examine rebuttal witnesses about the agency's subsequent bias against Qwest [REDACTED] the Court's rulings would prevent Mr. Nacchio from being able to tell the full story and thereby counter any rebuttal evidence. This would allow the jury to draw false conclusions as to what really occurred and, potentially, discount the reasonableness of Mr. Nacchio's good faith belief that NSA would generate significant 2001 revenue. Consequently, as a direct result of the Court's restrictions, Mr. Nacchio is unable to fully mount a "CIPA" defense.

In May 2006, we made our first proffer related to the February 27, 2001 meeting with NSA. See Section 5 CIPA Submission On Behalf Of Defendant at 9 n.5 (May 15, 2006). The proffer was limited, in as much as it was offered without our being allowed to speak with Mr. Payne or anyone else, or to review any classified documents. During the October 12, 2006 closed hearing, the Court ruled that the proffer was conclusory and not sufficiently detailed, but

specifically noted that more detailed substantiation would render the proffer relevant and admissible. The Court stated:

It depends, it really depends. Suppose that the truth is that there was a \$200 million contract that NSA and Payne had been talking about, and Payne is reporting back to Nacchio and saying, we've got this \$200 million contract, it's going to be awarded to us in the next six months. And then Nacchio goes to this meeting in Washington, D.C., thinking he's going to firm up the contract, close the deal, and the NSA says, well, [REDACTED] I mean, I know they didn't say that. [REDACTED] as he represents. And he says, no, and the contract suddenly dries up, that's relevant.

Transcript of Closed Proceedings, 65:1-13 (October 12, 2006). The Court went on to note:

As to the earlier one, the proffer is that in late 2000 or early 2001, they visited NSA headquarters. Mr. Nacchio thought he was going to discuss this contract. And, again, we don't know -- as it stands now, we don't know about this contract. We don't know whether this is a glom in his eye or whether there are specific discussions before that. And lo and behold, he was -- as he says, he was shocked to hear [REDACTED] Well, if that happened and Mr. Payne swears that it happened in court, that's information that will come out unless the Government can convince me that under 6(e) it can be sanitized in some way. Is that clear enough?

(*Id.*, 66:7-19) Finally, the Court opined:

All right, I understand what is being said now. And the Court believes that it is still relevant. If there was such a contract to be awarded during the relevant time and as a matter of fact that contract was not awarded because of Mr. Nacchio's reactions, then the fact that it was not awarded or that he did not learn of the reasons until after May 29 is something that certainly comes out in front of the jury and can be evaluated by the jury, but it doesn't make it inadmissible.

(*Id.*, 68:9-17)

On October 31, 2006, within two weeks of being granted access to Mr. Payne, we made precisely the proffer suggested by the Court, providing detail about Qwest's participation in the Groundbreaker alliance and offering Mr. Payne's March 13, 2001 email to a group including Mr. Nacchio, in which he recounted how he and Mr. Nacchio met with NSA personnel on February 27, 2001 in order to discuss a Qwest "CyberCenter" solution to the Groundbreaker networking

issue. We then still further supplemented our proffer. See Reply To Response To Third Section 5 CIPA Submission On Behalf Of Defendant, etc. at 8-10 (November 30, 2006).

The Court then reversed itself, excluding the proffer as creating an unnecessary distraction. Transcript of Closed Proceedings, 48:14-16 (December 8, 2006)

It was not until two months after this, on February 13, 2007, that we received a Memorandum of Interview of a July 18, 2006 interview conducted with Mr. Payne by Messrs. Loone and Hearty, Special Agent Montoya and Postal Inspector Henderson. In other words, the interview was conducted three months before our October 31, 2006 filing and six months before the December 8, 2006 hearing.

In the interview, Mr. Payne confirmed that, at the February 27, 2001 meeting, "[t]here was some discussion about

Mr. Payne also stated:

Subsequent to the meeting, the customer came back and expressed disappointment at Qwest's decision. Payne realized at this time that "no" was not going to be enough for them. Payne said they never actually said no and it went on for years. In meetings after meetings, they would bring it up. At one point, he suggested they just tell them, "no." Nacchio said it was a legal issue and that they could not do something their general counsel told them not to do. ... Nacchio projected that he might do it if they could find a way to do it legally.

There was a feeling also, that the NSA acted as agents for other government agencies and if Qwest frustrated the NSA, they would also frustrate other agencies.

Id. At 8.

Despite knowing all of this, the government nevertheless filed papers on August 16, 2006 which flatly labeled as "untrue" [REDACTED]
[REDACTED] See Government's 2nd Response To Defendant's Section 5 CIPA Submission And Motion Pursuant To § 6(A) and (C)(1) For Substitution Of Facts at 18 (August 16, 2006).

Consequently, neither Mr. Nacchio nor the Court was aware of Mr. Payne's July 2006 statements on December 8, 2006, at which time the Court excluded any testimony related to [REDACTED]

It also appears that the government has made *ex parte* submissions to the Court regarding the February 27, 2001 meeting. See Government's *In Camera*, *Ex Parte* Motion for a Protective Order Pursuant to Section 4 of the Classified Information Procedures Act (February 5, 2007); Government's *Ex Parte In Camera* Motion For Protective Order Authorizing Substitutions Under Section 4 of the Classified Information Procedures Act (February 16, 2007). While the Court eventually ordered the government to turn over the summary memorandum of the government's interviews with agency counsel, over our objections, the Court has repeatedly refused to allow Mr. Nacchio access to the balance of the *ex parte* filings. The summary memorandum, however, confirmed that one purpose of bringing Messrs. Nacchio and Payne into the February 27, 2001 meeting was to [REDACTED] and stated that Qwest was subsequently denied any agency work as a direct result of Mr. Nacchio's refusal. After we brought this admission to the Court's attention, the statement was then disavowed.

In all, we have made no fewer than four oral or written applications for production of the *ex parte* materials and to be able to present this information to the jury. See Transcript of Open Proceedings at 22-36 (February 8, 2006); Motion For Disclosure Of Names Of Witnesses Who

Can Verify The Information Provided In The Summary Report Produced By The Government On 2/28/07 (March 1, 2007); Transcript of Closed Proceedings (March 9, 2007); Fifth Section 5 CIPA Submission On Behalf Of Defendant, And Request For Production Of Classified Documents Submitted *Ex Parte* Pursuant To CIPA § 4 (March 13, 2007). Each of those applications has been denied.

The end result is that Mr. Naochio cannot tell the full story about the February 27, 2001 meeting and give reasons why Qwest did not receive the work and, if he put on the limited testimony allowed by the Court, he would subject himself to rebuttal witnesses who could not then be fully and properly cross-examined as to bias.

Respectfully submitted this 9th day of April, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April 2007, a true and correct copy of the foregoing **RENEWAL OF OBJECTION BY JOSEPH P. NACCHIO TO EXCLUSION OF CLASSIFIED TESTIMONY AS VIOLATIVE OF HIS CONSTITUTIONAL RIGHT TO MOUNT A DEFENSE** was filed by hand delivering same to the Deputy Court Security Officer, at Denver, Colorado

s/Edward S. Nathan