

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**MOTION FOR A MISTRIAL ON THE BASIS OF THE EXCLUSION OF
EXHIBIT A-1031 OR PROPER EXAMINATION RELATING THERETO**

Defendant Joseph P. Nacchio, by and through undersigned counsel, moves for a mistrial on the basis of the exclusion of Defense Exhibit A-1031. Mr. Nacchio also prays for alternative relief set forth at the end of this motion.

Throughout the government's March 29, 2007 direct examination of David Weinstein, the government offered and the Court admitted a number of documents prepared by Mr. Weinstein as business records under Rule 803(6). (*See, e.g.*, Exs. 200, 201, 202, 211, 206, 215, 225-227, 213, 214.) These documents included government Exhibit 210, a December 13, 2000 memorandum referencing, *inter alia*, a telephone conversation Mr. Weinstein had with Mr. Nacchio on December 9, 2000. (Tr., Vol. 13, p. 1583).

Upon showing Mr. Weinstein Ex. 210 and reading the note referencing the telephone conversation - - "Joe is signing an irrevocable election to sell shares now, and that is why he can sell the shares during a non-window period." - - the government asked him to explain. Mr. Weinstein testified: "So I believe we had a conversation in that Joe - - when I raised the issue Joe told me, it's not a problem, I *made* an irrevocable election to sell the shares, even though it's not in the window period." (*Id.* at 1585 - 86) (Emphasis added). Then the government impeached the witness:

Q. In fact it says that he is - - he is signing an irrevocable election now; is that correct?

A. I believe so.

Q. And you were precise in your language.

A. I believe so.

Id. at 1586.

The government thus attempted to portray the language in the memo, reflecting the present tense, as fact, even though the witness's sworn testimony was that Mr. Nacchio was speaking in the past tense, and even though the witness appeared tentative on the point ("I believe so."). The government used the December 13 memo (Ex. 210) to emphasize that Mr. Weinstein's memorandum reflected that as of December 9, 2000, Mr. Nacchio told him he was signing the election form - rather than that it had already been signed. (*Id.* at 1621). The government even wrote this

information onto government's exhibit 413 for demonstrative purposes, (*Id.* at 1620), highlighting only one side of the inconsistency as fact.

The Weinstein testimony was thus ripe for further impeachment, rehabilitation, or clarification.

However, on cross examination, defense attempts to bring out critical evidence regarding this inconsistency were thwarted by the rulings of the Court. First, the defense offered Exhibit A-1031 (see attached) as a business record of Mr. Weinstein. Defense exhibit A-1031 is a *December 12, 2000* memorandum of Mr. Weinstein reflecting a December 7, 2000 telephone conversation with Yash Rana (an attorney employed at Qwest who was assisting in setting up Mr. Nacchio's Rule 10b5-1 plan).

The memo states in pertinent part:

I asked Yosh (sic) if there was a problem from an insider trading perspective and Yosh (sic) told me there was not. Joe previously made an irrevocable election to sell the shares during the last window period and according to their legal counsel, this qualifies for an exemption for the insider trading rules.

Upon laying a foundation under Fed. R. Evid. 803(6), the defense offered Ex. A-1031. Tr. Vol. 13 at 1664-66. The government objected as hearsay within hearsay, and the Court sustained the objection. *Id.* at 1666. Thereafter the defense attempted to lay a further foundation, and to refresh the witness's recollection, but the government's objections on both occasions were sustained. *Id.* at 1667.

We respectfully submit that the Court erred in not admitting Ex. A-1031 under Fed. R. Evid. 803(6), and in not allowing the defense to cross examine the witness

using the witness's own memo either to refresh his recollection, to rehabilitate his sworn testimony that Mr. Nacchio used the past tense, or to impeach the government's exhibit in its use of the present tense. It was also error to exalt procedural rules of evidence over the defendant's confrontation and due process rights under the Sixth Amendment.

803(6)

The Court erred in refusing to admit defense exhibit A-1031 under Rule 803(6). Specifically, defense counsel established that the document was a memorandum that was: (1) prepared in the usual and ordinary course of business, (2) a usual and ordinary course of the business to prepare such a memorandum, (3) and prepared contemporaneously with the events described. (*Id.* at 1665) Defense counsel also established that the information contained in the memorandum was obtained from an attorney assisting Mr. Nacchio in the terms of the growth share payment, and that it was in the normal course of Mr. Weinstein's duties to obtain such information. (*Id.* at 1666).

While it is true that business records admissible under Rule 803(6) may contain inadmissible hearsay within it, such is not the case here. The evidence elicited by the defense is that the witness was working with Mr. Rana, an attorney with Qwest, in regards to the growth share payment transaction. *See, e.g.*, Tr. Vol. 13 at 1666 (part of duties to deal with lawyers helping Mr. Nacchio); *Id.* at 1574 ("I always advise the executive to check with general counsel, corporate secretary or whomever to make sure

you're okay in trading company stock."), Indeed, it was in direct pursuit of this advice that Weinstein had the conversation with Rana, which conversation is reflected in Ex. A-1031. Mr. Rana's position at Qwest and his interest and purpose in communicating truthful information to Mr. Weinstein regarding Mr. Nacchio's sale of the company's stock provides assurances of accuracy sufficient to meet the exception of Rule 803(6). *See United States v., McIntyre*, 997 F.2d 687, 700 (10th Cir. 1993) ("If the business entity has adequate verification or other assurance of accuracy of the information provided by the outside person, the exception may still apply.") Thus there is a foundation that Mr. Rana, in the context of this transaction, was covered by the business record exception.

However, even if Rule 803(6) does not strictly apply, the memorandum should have been admitted under Rule 807 as a statement that has equivalent circumstantial guarantees of trustworthiness. Specifically, defense counsel established that the memorandum: (1) was offered as evidence of a material fact; (2) was more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;¹ and (3) the general purposes of these rules and the interests of justice will best be served by the admission of the statement into evidence.

Exhibit A-1031 contains sufficient circumstantial guarantees of trustworthiness. First, Weinstein's conversation with Rana was directly pursuant to Weinstein's advice to

¹ This was cross-examination of a government witness in the government's case-in-chief. The defendant cannot call witnesses at this juncture.

Mr. Nacchio to confer with corporate counsel respecting trading in company stock. Second, Mr. Rana as corporate counsel had an interest in imparting accurate information to Mr. Weinstein. Third, the memo contains information imparted by Rana to Weinstein *two days* before Weinstein's conversation with Mr. Nacchio, bearing directly on the subject matter the government seeks to exploit. Fourth, Rule 807 requires the admission of Defense Exhibit A-1031 because, without it, the government is able to pass off the later memo (Ex. 210) as the whole truth.

Finally, the Court's exclusion of the evidence violates fundamental fairness and the spirit of the Federal Rules of Evidence embodied in Rule 102:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Where reasonably reliable evidence is available, the jury should not be precluded from assessing the alleged backdating issue with only the government's version.

Failure to Allow Cross Examination to Impeach or Rehabilitate

A criminally accused has a constitutional right to vigorously confront and cross examine witnesses against him. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested); *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (Cutting off all questioning about an event that prosecution conceded had taken place and that a jury might reasonably have found furnished the witness with a motive to favor the

prosecution violated Confrontation Clause). This right was foreclosed by the Court's rulings, both in not allowing the admission of a memo, created by the witness *the day before* the government's exhibit, reflecting a critical conversation the witness had with an essential participant in the underlying business purpose of the memo, and in precluding further examination on the document. At a minimum, it was error for the Court not to allow the defense to seek to rehabilitate the witness's sworn testimony, which was consistent with the memo which the Court refused to allow.

Sixth Amendment Confrontation and Due Process Rights Must Take Precedence Over Procedural Rules of Evidence.

The government has made clear that its backdating theory is critical to its case. Therefore the defendant's ability to meet that theory with contradictory evidence is even more critical. Exhibit A-1031 is such evidence. Keeping the jury from hearing this evidence renders this trial fundamentally unfair to Mr. Nacchio, because the government is being allowed to present half the facts as the whole truth. Where fundamental constitutional guarantees are threatened by the imposition of procedural rules, those rules must give way. *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973). By enforcing the "hearsay within hearsay" rule to exclude defensive evidence, where the prosecution has offered several other exhibits of the identical ilk, and where the jury is left with a one-sided version of events, the Court, respectfully, has violated this sacred principle. The

Court's ruling is very close to the one the Supreme Court reverse in *Chambers*, and is similar to those condemned in *Holmes*, *Van Arsdall*, and *Davis* as well.

The Court's refusal to admit defense exhibit A-1031, or to allow further examination on it, was error and requires the declaration of a mistrial. In the alternative, we move to strike all testimony and evidence of David Weinstein relating to Exhibit 210.

Respectfully submitted this 1st day of April, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April 2007, a true and correct copy of the foregoing **MOTION FOR A MISTRIAL ON THE BASIS OF THE EXCLUSION OF EXHIBIT A-1031 OR PROPER EXAMINATION RELATING THERETO** was served on the following through the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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