

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

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

**UNITED STATES' RESPONSE TO MOTION TO STRIKE TESTIMONY OF
DAVID WEINSTEIN RELATED TO GOVERNMENT EXHIBITS 225, 226 AND 227,
AND TO STRIKE GOVERNMENT EXHIBITS 225, 226 AND 227
FROM EVIDENCE, OR, IN THE ALTERNATIVE, FOR A MISTRIAL**

The United States respectfully responds to Defendant's "Motion to Strike Testimony of David Weinstein Related to Government Exhibits 225, 226 and 227, and to Strike Government Exhibits 225, 226 and 227 from Evidence, Or, In the Alternative, For a Mistrial" (Docket No. 326).

INTRODUCTION

Defendant's motion relates to Mr. Weinstein's testimony in explaining the assets that Defendant Nacchio held during the late 2000 and early 2001 time period. As defense counsel acknowledges, government counsel offered these exhibits and this testimony "for the purpose of addressing three issues raised by Mr. Stern in opening and consistent throughout the trial, diversification, expiration, and taxation." Tr. 1595.

Defense counsel does not contest in the motion that those issues were relevant. Instead, defense counsel has two other complaints.

First, defense counsel complains that “the government spent nearly one-fourth of its examination of Mr. Weinstein discussing the admitted documents. The testimony focused not on the three issues proffered at the bench, but instead on the net worth of Mr. Nacchio, his wife Ann Esker, and a family limited partnership. As the Court is well aware, the net worth of Ms. Esker and the family limited partnership are not at issue in this case.” Docket No. 326 at 2.

Second, defense counsel complains that the examination “focused on an inflated calculation of net worth of Mr. Nacchio that included options that had not vested and therefore did not have any real value at the time. This tactic was clearly an attempt to inflate the wealth of Mr. Nacchio and his family in the eyes of the jury and create exactly the type of prejudice that the Court’s earlier order sought to avoid.” Id. at 2-3.

ARGUMENT

Defendant’s arguments lack merit.

I. This portion of the testimony was relevant and proper.

Defense counsel is incorrect in characterizing the testimony as not relevant to the issues of diversification, expiration, and taxation. This testimony properly focused on the various different kinds of assets held by Defendant Nacchio during this time period, the vested and unvested options he held, and how much cash he had. Tr. 1599-1615. Mr. Weinstein explained that these statements were what he used to keep track of Defendant’s diversification of his assets,

and that the statements were called “net worth statements.” Tr. 1593. It was proper to review the statements in detail to examine, for example, how diversified Defendant actually was.

The references to Defendant’s family were also proper. With respect to Ms. Esker, defense counsel had contended that these net worth statements double-counted Defendant’s net worth. Tr. 1599. Government counsel briefly addressed this point in the following manner when discussing a chart that showed various assets:

Under the assets — obviously with S and separate has something under — in this case, in the very first one, it has 600 something thousand dollars, and Mr. Joe Nacchio’s name, and because it’s separate it’s not listed in Anne’s name; is that right?

A. That’s right.

Q. With regard to joint window, 2,229,502, that number is mirrored exactly under Ms. Esker’s name. Is that number doubled or does it reflect a total amount?

A. No, the —

Q. The 2,229,502?

A. The total amount would be double that. The total amount is 4 million 4, one half is Mr. Nacchio, Ms. — one half is Ms. Esker.”

Tr. 1611. Government counsel then moved on. This is the only instance where Ms. Esker’s name appears in the examination by government counsel.

The examination was also proper with respect to the family limited partnership. Counsel for the United States asked only the following two questions about that partnership:

Q. And then just below that is 9,000 Qwest shares in FLP. What is FLP?

A. Mr. and Mrs. Nacchio set up a family limited partnership.

Q. What’s a family limited partnership?

A. Well, it’s an estate planning mechanism where the executive and the spouse typically are the general partners, and we have limited partners. It’s ultimately estate taxes.

Tr. 1605-06. Counsel for the United States then moved on.

Notably, defense counsel did not object to those questions. See *United States v. Pflum*, 150 Fed. Appx. 840, 845 (10th Cir. 2005) (unpublished) (“[u]nder Fed.R.Evid, 103 evidentiary objections generally must be made at the time the evidence is offered”); see *id.* (citing *Sorensen v. City of Aurora*, 984 F.2d 349, 355 (10th Cir. 1993), *United States v. Gibbs*, 739 F.2d 838, 849 (3d Cir. 1984) (*en banc*) (objection was untimely when made “not when the evidence was offered, but during a motion to strike made after the government had rested”) and *United States v. Kanovsky*, 618 F.2d 229, 231 (2d Cir. 1980) (ruling that an objection was not timely “since it was not made until after the witness was excused and the jury dismissed from the courtroom”)).

Finally, it is also worth noting that defense counsel has put his own wealth and his family’s wealth at issue in this trial. In opening statement, defense counsel told the jury that Mr. Nacchio believed in Qwest’s financial targets and “stood behind them with his personal wealth, with his children’s money.” Tr. 57. Defense counsel then referred to his children’s stock no less than seven more times in the opening statement. Tr. 79, 80, 98, 101, 104, 107. In light of these references to his wealth and his family assets, defense counsel cannot reasonably complain about the very limited issues raised in the examination by counsel for the United States.

II. The document was properly admitted and properly explained.

There is also no merit in defense counsel’s complaint that the net worth statements showed an “inflated calculation of net worth,” which was “clearly an attempt to inflate the wealth of Mr. Nacchio and his family ...” Docket No. 326 at 2-3.

Defense counsel surely did not expect government counsel to alter the actual documents so they would better suit the defense’s case. The documents say what they say. In any event,

defense counsel was able to clarify the meaning of the document to the jury through his examination, where he asked the following questions.

Now, in the net worth of Mr. Nacchio, which you have listed at the bottom of the page, you have listed options that are simply vested and that he hasn't sold, right?

A. Correct.

Q. And those really have no value unless he goes out and sell them, correct?

A. Correct.

* * *

Q. Now the next item is unvested options, right?

A. Yes.

Q. So you included in his net worth \$277,153,125 of options that he couldn't even sell, right?

A. Yes.

Q. He couldn't even alienate them, right?

A. Correct.

Tr. 1649. In view of this clarification, Defendant cannot show any unfair prejudice from the exhibit.

III. A mistrial is not warranted.

In addition, Defendant has not shown error of such magnitude and prejudice that a mistrial is necessary. "The standard for ruling on a motion for mistrial was set down long ago in *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824). The Supreme Court held that 'courts of justice ... [may] discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.'" *United States v. Taylor*, 605 F.2d 1177, 1178-79 (10th Cir. 1979). This standard requires examination not only of whether there was error, but also of whether the error had such prejudicial impact that it impaired the

defendant's right to a fair and impartial trial. See *United States v. Meridyth*, 364 F.3d 1181 (10th Cir. 2004) ("A district court has discretion to grant a mistrial only when a defendant's right to a fair and impartial trial has been impaired."); *United States v. Gabaldon*, 91 F.3d 91, 93-94 (10th Cir. 1996) (observing that motions for mistrial require "an examination of the impact of the prejudicial impact of an error or errors when viewed in the context of an entire case"). Here, defense counsel has not shown that the admission of any of the testimony and exhibits was error, let alone that it was such prejudicial error that Defendant's right to a fair and impartial trial has been impaired in the context of the entire trial.

CONCLUSION

The United States respectfully requests that the motion be denied.

Respectfully submitted this 3rd day of April, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2007, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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