

**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' MEMORANDUM ON
EVIDENTIARY ISSUE RELATING TO DAVID WEINSTEIN
AND DEFENDANT'S TRANSFERS OF ASSETS**

The United States respectfully submits this memorandum, which addresses an evidentiary issue that the government expects may arise in connection with the testimony of David Weinstein, whom the United States expects to call to the stand in the next few trial days. Mr. Weinstein was a Senior Account Manager for The Ayco Company LP, a financial counseling company. He served as a financial consultant to Defendant Nacchio for several years.

I. Background - Defendant's alleged good faith

Throughout this proceeding, Defendant has consistently indicated that his good faith will be a central issue in this case. In his opening statement, defense counsel suggested to the jury that Defendant's good faith could be seen in how he handled his children's assets up to and including 2002. Defense counsel first noted that in July 2000, Defendant "gives 90,000 shares of his stock to his children." *See* 3/20/07 Tr. 79:16-17. Defense counsel then stated he would show

Defendant sold “no personal shares in 2000, 2001, 2002.” *See* 3/20/07 Tr. 107:13.

Defense counsel then made clear to the jury that a central part of this showing of good faith would be based on his handling of his children’s assets up until June 2002. Defense counsel emphasized to the jury that Defendant “never sold” his children’s shares “during the entire time that he was the CEO of Qwest,” which he explained was until June 2002. *See* 3/20/07 Tr. 79:25-80:1, 106:18, 107:5-8.

Defense counsel showed the jury a chart regarding his shares and his children’s shares in Qwest stock in 2002, and told the jury that even when Defendant left Qwest in June 2002, he still had 564,000 shares, which still included “the 90,000 his children had.” *See* 3/20/07 Tr. 106:18-21, 107:5-8. He stressed that Defendant did not sell his children’s shares “even after 9/11, even after everything” and that “those children owned 90,000 shares and lost 3 1/2 or \$3.6 million on them” at the time he left Qwest. *See* 3/20/07 Tr. 80:2-5.

The clear message defense counsel conveyed to the jury from this discussion was that Defendant’s good faith can be seen in his handling his children’s assets through June 2002. The jury could readily infer that Defendant’s handling of these assets showed both his generosity in sharing Qwest shares with his family members and his willingness to take a loss.

II. Evidence regarding good faith

The United States intends to address this “good faith” argument by introducing, through Mr. Weinstein, evidence of how Defendant handled other family assets during the same time period. Specifically, in February 2002 Defendant directed the transfer of over \$90 million in assets (including Qwest securities) out of accounts held in his name or held jointly in his name

and his wife's name and into accounts held solely in the name of his wife.

This evidence is essential so that the jury can see Defendant's handling of family assets in the proper perspective. For example, these transfers make clear that during this time period when defense counsel emphasized that Defendant did not sell his children's shares, he was concerned with other transfers of family assets that were *enormous* next to the piddling (by comparison) amount of shares still maintained in his children's name. These transfers further allow the government to address the inference that the jury might otherwise draw — that moving shares into the names of family members is unequivocal evidence of Defendant's generosity.

The government also intends to offer evidence through Mr. Weinstein that these other transfers of family assets were motivated by Defendant's desire to hide his assets. In other words, his transfers were motivated by Defendant's desire to take dramatic action to avoid suffering a loss — which bears strong similarity to the desire that motivated his insider sales several months before when he was engaging in insider trading. As the Tenth Circuit has explained, “[s]ubsequent acts evidence is particularly relevant when a defendant's intent is at issue,” and a nexus to the crime can be demonstrated through the “defendant's indulging himself in the same state of mind” in both the extrinsic act and the charged offense. *United States v. Mares*, 441 F.3d 1152, 1157 (10th Cir. 2006).

Moreover, because these transfers of assets were so dramatic, huge, and sudden, they further raise a permissible inference that Defendant was not acting in the normal course but was instead acting out of knowledge that his assets were ill-gotten gains. This decision to hide his assets thus is properly admissible to show consciousness of wrongdoing. *United States v.*

Esparsen, 930 F.2d 1461, 1476 n.16 (10th Cir. 1991) (observing that two prior decisions had upheld the admission of evidence of consciousness of guilt and that such decision must have implicitly applied Rule 404(b) “[b]ecause matters such as motive, intent, plan or knowledge essentially involve ‘consciousness of guilt’”); *United States v. Harris*, 903 F.2d 770, 776 (10th Cir. 1990) (assessing whether evidence showed “circumstantial consciousness of guilt” and admitting the evidence). *See also United States v. Lim*, 57 Fed. Appx., 701, 703-04 (7th Cir. Jan. 23, 2003) (unpublished) (ruling that a defendant’s “efforts to spread his ill-gotten gains among several financial institutions is probative of an intent to defraud by demonstrating his desire to conceal the proceeds”).

III. Brevity of the issue

Finally, the United States notes that this evidence will not consume any significant amount of trial time. This evidence can be introduced briefly, in less than ten minutes and with just three exhibits.

CONCLUSION

In sum, in view of the issues Defendant has himself raised regarding his handling of family assets in 2002, the United States should be permitted to address Defendant’s alleged good faith by introducing other evidence showing how he handled other family assets during the same period.

Respectfully submitted this 27th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 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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