IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-MSK

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

Defendant.

MOTION FOR NEW TRIAL PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 33

Defendant, Joseph P. Nacchio, submits the following memorandum in support of his Motion for New Trial filed pursuant to Federal Rule of Criminal Procedure 33.[1] Mr. Nacchio respectfully requests that this Court hold oral argument on the motion.

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[1] This motion is not a Motion to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody under 28 U.S.C. §2255. It is a "bona fide" Rule 33 motion because it asserts the need "for a new trial on the basis of newly discovered evidence" and does not challenge the legality of Mr. Nacchio's conviction. *United States v. Evans*, 224 F.3d 670, 673-74 (7th Cir. 2000). Indeed, a motion under 28 U.S.C. §2255 is premature at this point. Out of an abundance of caution, however, if this Court were to conclude that this motion may be recharacterized as a motion filed pursuant to 28 U.S.C. §2255, Mr. Nacchio requests notice and an opportunity to withdraw the motion pursuant to *Castro v. United States*, 540 U.S. 375 (2003), and *United States v. Kelly*, 235 F.3d 1238 (10th Cir. 2000).

I. INTRODUCTION

Mr. Nacchio, the former Chief Executive Officer of Qwest Communications International ("Qwest"), was charged in the United States District Court for the District of Colorado with forty-two counts of insider trading for selling Qwest stock in 2001. The indictment alleged that Nacchio sold stock between January and May 2001 "while aware of and on the basis of material, nonpublic information." (Exhibit A (Doc. No. 1) at APP-67–68.[2]) The prosecution's only theory of materiality was that Nacchio knew that Qwest's "publicly stated financial targets" were "risky" and "aggressive." (*E.g.*, *id*. at APP-65–66.) The prosecution alleged that Nacchio knew "that the business units were underperforming with regard to their specific internal budgets, and that such underperformance would inhibit Qwest's ability to meet its 2001 financial guidance issued in September 7, 2000." (Bill of Particulars 8 (Apr. 10, 2006 Doc. No. 47); Exhibit. A at APP-65–66; Exhibit B (Tr.) at APP-1396.) The jury acquitted Nacchio of twenty-three counts, corresponding to his sales between January 2, 2001 and March 1, 2001, but convicted him of nineteen counts for trades in April and May 2001. This is the first case ever in which the government has predicated a criminal charge of insider trading on predictions about financial results for future quarters.

On appeal to the Tenth Circuit, Nacchio argued, *inter alia*, that the undisclosed information on which he was alleged to have traded was immaterial as a matter of law. Robin Szeliga, Qwest's former Chief Financial Officer and a government witness, testified at trial that she warned Nacchio in late December 2000 or early January 2001 of a "risk" that Qwest could

[2] "APP-" refers to the Appendix to Appellant's Opening Brief filed Oct. 9, 2007 (10th Circuit).

fall short of its year-end revenue projections. The government argued to the jury that the "risk" was that Qwest might only achieve revenues of $20.4 billion, a $900 million shortfall from the public projection of $21.3 billion—or a "risk" of a 4.2% shortfall, almost a year in the future. (Exhibit C (Tr.) at APP-4226–28.) Nacchio argued that the "risk" Szeliga warned him about was that Qwest might achieve revenues of $21 billion, only a $300 million shortfall from the public projection—or a "risk" of a 1.4% shortfall. The Tenth Circuit stated that the sufficiency of the evidence concerning materiality "revolves around interpreting testimony given by Qwest's vice-president of financial planning, Robin Szeliga." *United States v. Nacchio*, 519 F.3d 1140, 1163 (10th Cir. 2008). After analysis, described fully herein, the Tenth Circuit read a purported ambiguity in the light most favorable to the government and concluded that the 4.2% number was the "risk" it was required to consider on appeal. The court explained that it was a "close question" whether a 4.2% risk was immaterial as a matter of law such that Nacchio would be entitled to a judgment of acquittal, but ultimately held that the evidence was barely sufficient to uphold the conviction. *Id.* at 1164.

Newly discovered evidence establishes that the magnitude of "risk" that the prosecution pressed before the jury and Tenth Circuit was flat wrong. On February 4 and 5, 2009, Szeliga was deposed in connection with a civil suit brought by the Securities and Exchange Commission against Nacchio and other defendants. *See United States v. Nacchio*, No. 1:05-cv-00480-MSK-CBS (D. Colo.). Szeliga testified unequivocally that she had informed Nacchio about a risk of a shortfall of 1.4%, not a risk of 4.2% as the government contended before the jury and in the Tenth Circuit. In other words, newly discovered evidence establishes Nacchio's innocence as a matter of law.

Nacchio has presented this evidence by letter dated February 19, 2009, to the Acting Deputy Attorney General, Acting Assistant Attorney General Criminal Division, and Acting Solicitor General, and the Department of Justice has been in contact with the United States Attorney for Colorado. Nacchio has requested that the government join in this motion and has advised the government that it would be filed today, but has yet to receive a response.

Based on this evidence, Nacchio is entitled to a new trial at which the true facts may be presented. A new trial must be granted if it is in "the interests of justice." Fed. R. Crim. P. 33. It is not in the interests of justice to send an innocent man to prison. The motion should be granted.

II. PROCEDURAL HISTORY RELEVANT TO THIS MOTION

A. District Court Proceedings

Because the prohibition against insider trading applies only to those who trade on the basis of material undisclosed information, *Nacchio*, 519 F.3d at 1158, a key dispute at trial was whether the undisclosed information on which Nacchio was alleged to have traded was material. The prosecution's only theory of materiality was that Nacchio knew "that the business units were underperforming with regard to their specific internal budgets, and that such under-performance would inhibit Qwest's ability to meet its 2001 financial guidance issued in September 7, 2000." (Bill of Particulars 8 (Doc. No. 47); Exhibit A at APP-65–66: Exhibit B at APP-1396.) Nacchio and the government disputed the size of the "risk" discussed with him in December 2000/January 2001. Nacchio contended that the figure was $300 million, or 1.4% of total revenues; the government argued that Nacchio was warned of a larger risk of $900 million, or 4.2% of total revenues.

The critical testimony came from Szeliga, Qwest's CFO. At trial, she testified that she told Nacchio in December 2000/January 2001 that there was about a billion dollars of risk in Qwest's revenue targets for year-end 2001. However, Qwest had two sets of revenue targets: the public projections and the internal stretch targets, which were set higher than the public numbers to incentive managers to exceed expectations. At trial, Nacchio argued that he had been warned of a billion-dollar risk to Qwest's $22 billion final internal stretch target, while the government contended that he had been warned of a risk of a $1.2 billion dollar shortfall from a preliminary $21.6 billion dollar figure noted on a September 5, 2000 memo that Szeliga received from her subordinates, but never shared with Nacchio. Since the public projection was $21.3 billion, a $1 billion shortfall from the $22 billion target would miss the public projections by only $300 million, a 1.4% shortfall. A $1.2 billion shortfall from the $21.6 billion memo number would miss the public numbers by $900 million, a 4.2% shortfall.

On direct examination by the government, Szeliga testified that "we aggregated all the risk they were identifying, we were still at this time coming to a billion dollars of risk as it related to the target we had set." (Exhibit D (Tr.) at APP-2134.) Still on direct, she confirmed that she was "articulat[ing] that I thought we had a billion dollars of risk built into *the stretch targets*." (Exhibit E (Tr.) at APP-2211 (emphasis added).)

On cross-examination, Szeliga again testified that when she referred to the billion dollars of risk she meant one billion dollars less than the *internal* target of $22 billion:

> Q. Okay. Now when you were talking about a billion dollar risk that all of these folks were debating and discussing, that was a billion dollar risk in their view at the time to the internal budget which was $21,991,000,000. That's true, isn't it?

> A. In the--yes, in the original, we showed that as it rounded up to $22 billion.

(*Id*. at PP-2268.)

On re-direct, however, the government walked Szeliga through the September 5, 2000, memo prepared by Mr. Bickley, one of Szeliga's subordinates. This memo is the basis for the government's argument that the risk was 4.2%.

> Q. [I]f you can highlight the 1,192,000,000, what does Mr. Bickley describe that as?
>
> A. Grand total risk in street disclosures, 1,192,000,000.
>
> Q. I'm going to round that to 1.2 billion; is that fair?
>
> A. Yes.
>
> Q. And I'm going to call that risk. So when I take the street, according to this memo, minus the risks, what do I come to?
>
> A. 20 billion .4.
>
> Q. 20.4 billion, all right. Street minus the risk is 20.4 billion. And I want to compare that to the guidance that Mr. Nacchio gave to the street two days after this, okay.
>
> A. Okay.
>
> . . .
>
> Q. And how does this number, 20.4 billion, compare to the low end of the guidance that Mr. Nacchio disclosed to the street?
>
> A. About $900 million lower.

(Exhibit F (Tr.) at APP-2423–24.)

Szeliga testified, however, that Nacchio never saw this memo, and that she "discussed the billion dollar risk with Mr. Nacchio … *not this--not the specifics of this memo*." (*Id*. at APP-2421 (emphasis added).)

The defense then requested permission to re-cross Szeliga. The court refused to permit it. The court stated that "[t]here are two areas in which I would allow a limited recross," neither of which related to the "risk" Szeliga told Nacchio about. (*Id*. at APP-2446.) The defense asserted that it was "respectfully … entitled to do more." (*Id.* at APP-2447.) The court responded: "I gave you the two subject areas." *Id.*

In its closing argument, the government told the jury that "we've heard a lot about this in terms of the difference between the external targets and the internal targets at Qwest, and I want to put that issue to rest, because I think it's a little bit of a distraction and nothing more." (Exhibit C at APP-4226.) It then walked the jury through the September 5 memo, told the jury that the risk *on that memo* was what Szeliga told Nacchio about, and said that "if you factor in or you adjust for that unlikely revenue that's in the guidance, that brings it back to 20.4 billion [a $900 million or 4.2% shortfall]. That's well below what Mr. Nacchio is continuously touting to Wall Street." (*Id*. at APP-4227–28.)

Nacchio repeatedly moved to dismiss the indictment and for judgment of acquittal on the grounds that the supposedly nonpublic information of a potential 1.4% shortfall to the internal stretch targets was immaterial as a matter of law. The district court denied Nacchio's motions. The jury acquitted Nacchio of twenty-three counts covering his sales from January 2, 2001 through March 1, 2001, but convicted him of nineteen counts for trades in April and May 2001. Nacchio was sentenced to 72-months' imprisonment, fined $19 million, and ordered to forfeit $52 million.[3] The district court denied bail pending appeal under 18 U.S.C. §3143(b).

[3] Nacchio's appeal of the district court's sentencing and forfeiture determinations is still pending before the Tenth Circuit.

B. Proceedings in the Tenth Circuit

The Tenth Circuit reversed the denial of bail and granted release pursuant to §3143(b), which requires the defendant to present a "substantial question of law or fact" that if decided in his favor would require reversal. On appeal, Nacchio argued, *inter alia*, that the evidence against him was insufficient to convict because the allegedly inside information that he supposedly traded on was immaterial.

In its brief on appeal to the Tenth Circuit, the government represented that Szeliga had testified that the risk that she had warned Nacchio about was a $900 million shortfall from the public projection. (Exhibit G (Appellee's Br.) at 29.) The government argued that "Nacchio erroneously suggests this 'billion dollar risk' related only to the 'initial 22 billion budget target.'" (*Id*. at 30 n.14.) The government ignored Szeliga's testimony that she told Nacchio "that I thought we had a billion dollars of risk *built into the stretch targets*." (Exhibit E at APP-2211 (emphasis added).)

In its opinion, the Tenth Circuit recognized that materiality in this case "revolves around interpreting testimony given by Qwest's vice-president of financial planning, Robin Szeliga." *Nacchio*, 519 F.3d at 1163. "On direct examination, when she first discussed her December/January meeting with Nacchio, Ms. Szeliga testified that 'we aggregated all the risk they were identifying, we were still at this time coming to a billion dollars of risk as it related to the target that we had set.' App. 2134." *Id.* The court of appeals believed that "[t]his testimony was ambiguous because there were both public projections and internal targets." *Id.*

The court of appeals acknowledged that "[o]n cross-examination, Ms. Szeliga appeared to testify that she meant one billion dollars less than the internal target of $22 billion." *Id.* But it

ultimately concluded that "on re-direct examination, Ms. Szeliga corrected herself (without saying so), stating that the risk was closer to $1.2 billion and that it was against the public target at the time, not the private [internal] one." *Id*. The court pointed to Szeliga's re-direct testimony about the September 5 memo, and acknowledged that "Ms. Szeliga testified that Mr. Nacchio never saw the [September 5, 2000] memo" that this testimony related to, but nonetheless accepted the government's unsupported assertion that Szeliga was "talking to [Nacchio] about its contents." *Id.* at 1163–64. The court concluded that it was "required to interpret the evidence in the light most favorable to the government," and that "[g]iven Ms. Szeliga's clarification on re-direct, the jury was entitled to believe that the higher figure was accurate." *Id.* at 1164.

The court of appeals held that it was a "close question" whether "a risk that a company's revenue will fall $900 million short of its public guidance—a 4.2% shortfall—is necessarily immaterial to investors." *Id*. The court looked to the SEC's rule of thumb, which states that a numerical threshold, "such as 5%" for misstatements in the amount of revenues *already reported*, may serve as a preliminary assumption that an item is "'unlikely to be material.'" *Id.* at 1162 (quoting SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,151 (Aug. 19, 1999)). The court found the question close because the 4.2% number was less than the SEC threshold (which actually states that a higher threshold is appropriate for numbers based on "estimates", 64 Fed. Reg. at 45,152-153), but ultimately concluded that it could not "reject the possibility of materiality as a matter of law." *Id.* at 1164.

Although the court rejected Nacchio's sufficiency of the evidence argument, it reversed Nacchio's conviction on an alternative ground, holding that the district court had abused its discretion in excluding Nacchio's expert testimony.[4]

After the Tenth Circuit panel reversed Nacchio's conviction, the government sought and the Tenth Circuit granted rehearing *en banc* as to whether the exclusion of Nacchio's expert testimony was reversible error. In a 5-4 decision, the Tenth Circuit reinstated Nacchio's conviction holding that the district court did not abuse its discretion in excluding Nacchio's expert testimony. The Tenth Circuit's *en banc* decision did not address the subject of this motion.[5]

C. Post-Trial Events

On February 4 and 5, 2009, Szeliga testified during a deposition in connection with a case brought by the Securities and Exchange Commission against Nacchio and other defendants. Szeliga testified unequivocally that the risk she communicated to Nacchio in December

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[4] The majority held that the district court improperly interpreted Federal Rule of Criminal Procedure 16 to require a defendant to establish the reliability and admissibility of the expert testimony under *Daubert* and Rule 702 in the summary notice. 519 F.3d at 1153. It further held that "the district court made no genuine determination of any sort under *Daubert*," but "[e]ven reading the district court's ruling as a freestanding *Daubert* ruling rather than a finding that the Rule 16 disclosure was inadequate, such a ruling would have been an abuse of discretion on this record, which is devoid of any factual basis on which a *Daubert* ruling could be made." *Id*. Having denied Nacchio the opportunity to establish the admissibility of Fischel's testimony when called to the stand, the majority held, "[t]he district court could not make an informed *Daubert* determination without hearing such testimony or receiving submissions on this issue in some other form." *Id*. The majority also reversed the district court's alternative conclusions that the economic analysis was irrelevant and would not assist the jury. It held that the district court "misunderstands the nature of economic expertise" and that "expert economic testimony is routine when a materiality determination requires the jury to decide the effect of information on the market." *Id*. at 1155.

[5] Nacchio intends to file a petition for certiorari in the Supreme Court of the United States later this month.

2000/January 2001 was a billion dollar risk to the *internal* target—and thus a risk of a 1.4% revenue shortfall:

> Q. Do you remember telling the FBI that at some point during the budgeting process, Mr. Evans came to you and said that there might be $900 million worth of risk to the budgeted number?
>
> A. Yeah. Generally, I think he came to me with a big number like that. Again, I'd have to look at the documents again to try to refresh my memory.
>
> Q. Did you communicate to Nacchio in the December or January time period a risk number?
>
> A. Yes, I believe I did.
>
> Q. Okay. Now, I want to be clear about where that risk number came from because I think there's been some confusion about it.
>
> A. Okay.
>
> Q. The number that you went to Nacchio with was what?
>
> A. My general recollection is I was talking to Robert Woodruff and Joe Nacchio about a billion dollars of risk in the plan.
>
> Q. In the budgeted plan, correct?
>
> A. In the 2001 budget.
>
> Q. So--
>
> A. Against the target.
>
> . . .
>
> Q. … I want to know what you remember telling him?
>
> A. I remember talking about approximately a billion dollars of risk in the plan to Robert and Joe.
>
> . . .
>
> Q. A billion dollars in risk to the $22 billion plan that was in place, correct?
>
> A. I can't remember the number that was in place at the time, so--but that--from everything we've looked at, we were approximately

> at $22 billion of target action, but, again, there's just not that level of recollection.
>
> Q. Okay. And we'll look at February when it change[d]. But whatever the budget target was, the internal target, that's what the billion dollars of risk was to?
>
> A. Yes. I was trying to communicate that in our budget that we had put together that summed up to whatever it summed up to at that point in time that there was about a billion dollars of risk.

(Exhibit H (Depo. Tr.) at 239–40, 243–44.)

Szeliga's new testimony establishes that she communicated to Nacchio a risk of a 1.4% year-end revenue shortfall. She confirmed that the September 5, 2000 memo was "very early on" in the 2001 forecasting process, *id*. at 187, and that the billion dollars of risk she later communicated to Nacchio was based upon discussions that she had with the head of the budget process at Qwest, Mark Evans, *id*. at 186, 239, and was not based on the Bickley memo from September 5. This establishes that "the figure the government stressed in closing argument," *Nacchio*, 519 F.3d at 1163, was wrong; and it eviscerates the factual basis upon which the Tenth Circuit found that the evidence against Nacchio was (barely) sufficient for conviction.

III. UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 33(B)(1), NACCHIO IS ENTITLED TO A NEW TRIAL BECAUSE SZELIGA'S DEPOSITION TESTIMONY IS "NEWLY DISCOVERED EVIDENCE" WHICH DEMONSTRATES THAT NACCHIO IS INNOCENT AS A MATTER OF LAW

Under Federal Rule of Criminal Procedure 33, a defendant may move within three years after final judgment for a new trial based on newly discovered evidence. Fed. R. Crim. P. 33(b)(1) ("Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty."). In determining whether to grant a motion for new trial where the motion is based on newly discovered evidence, courts must determine

whether the interest of justice would be served by granting the motion: "The 'interest of justice' standard applies to *all* motions for new trials, including those predicated on newly discovered evidence." *United States v. Quintanilla*, 193 F.3d 1139, 1147 (10th Cir. 1999); *see also United States v. Sinclair*, 109 F.3d 1527, 1531 (10th Cir. 1997). "[T]he issue is whether in light of the new evidence, justice requires that a new trial be granted." *United States v. Carmichael*, 269 F. Supp. 2d 588, 595 (D.N.J. 2003). Officers of the court "must always be faithful to [the] overriding interest that 'justice shall be done,'" and "the 'twofold aim'" of the law, which is that "'guilt shall not escape nor innocence suffer.'" *United States v. Agurs*, 427 U.S. 97, 110–11 (1976) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). "[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system," *Schlup v. Delo*, 513 U.S. 298, 325 (1995), and the evidence recently discovered in this case conclusively shows that Joe Nacchio did not commit a crime.

In the Tenth Circuit, a defendant is entitled to a new trial based on newly discovered evidence if he demonstrates that "'(1) the evidence was discovered after trial; (2) the failure to learn of the evidence was not caused by his own lack of diligence; (3) the new evidence is not merely impeaching; (4) the new evidence is material to the principal issues involved; and (5) the new evidence is of such a nature that in a new trial it would probably produce an acquittal.'" *United States v. Redcorn*, 528 F.3d 727, 743–44 (10th Cir. 2008) (citation omitted). A trial court is afforded discretion in ruling on a Rule 33 motion, and is free to weigh the evidence and assess witness credibility. *Tibbs v. Florida*, 457 U.S. 31, 37–38 & n.11 (1982). Indeed, "[w]hen considering a motion for a new trial under [Rule 33], a trial judge considers the credibility of witnesses and weighs the evidence as a thirteenth juror. He does not view the evidence in the

light most favorable to the government as he would in ruling on a Rule 29 acquittal motion." *United States v. Lopez*, 576 F.2d 840, 845 n.1 (10th Cir. 1978).

A. Szeliga's Civil Deposition Testimony Is Newly Discovered Evidence

Subsequent sworn testimony constitutes newly discovered evidence for purposes of a Rule 33 motion. In *United States v. Sutton*, 767 F.2d 726 (10th Cir. 1985), the defendant moved for a new trial on the basis of, *inter alia*, a witness's deposition testimony from a later civil proceeding. *Id.* at 728. The defendant asserted that the deposition testimony substantiated his defenses asserted during the trial. The Tenth Circuit did not dispute that subsequent deposition testimony can qualify as newly discovered evidence under Rule 33, and only affirmed the denial of a new trial after finding that the evidence was "only cumulative" and was not likely to have led to an acquittal. *Id.* at 729.

In *United States v. Feldman*, 756 F.2d 556 (7th Cir. 1985), ten months after his conviction for mail and wire fraud, the defendant filed a Rule 33 motion with the district judge based on newly discovered evidence. Specifically, a trial witness gave testimony at a deposition in a related civil case, which the defendant claimed established conclusively that he did not have the requisite intent to commit the crime for which he was convicted. *Id*. at 558–59. In considering whether the witness's civil deposition testimony constituted newly discovered evidence, the Seventh Circuit held that it "must construe the requirement that the evidence be newly discovered liberally, requiring only that the evidence be something that in fact came to the attention of the defendant after trial, whether or not he *should* have known of it earlier." *Id.* at 1560. Although the witness had testified at trial, the court reasoned that only after the civil

deposition testimony "did the full extent of what [the witness] could testify to" become clear to the defense. *Id.*

Similarly, in *Carmichael*, the defendant moved for a new trial after learning of testimony given by a grand jury witness that seemingly exonerated him. 269 F. Supp. 2d at 596. In granting the defendant's motion for a new trial, the district court held that "inconsistencies in the testimony" at trial did not imply "that these inconsistencies were obvious ones that could have led the defense" to discover the actual facts that later surfaced post-trial. *Id.*

Szeliga's deposition testimony constitutes newly discovered evidence because it was not until after trial that Nacchio discovered the "full extent of what [Szeliga] could testify to." *Feldman*, 756 F.2d at 560. Indeed, Szeliga's deposition testimony has now provided precisely the evidence that the district court prevented Nacchio from eliciting on re-cross and it establishes his innocence as a matter of law. This is newly discovered evidence, which, at the least, warrants a new trial.

B. The Evidence Was Not Available During Trial

To meet the second prong of the Rule 33 test, the movant must have exercised due diligence. However, the Tenth Circuit has explained that the due diligence required to warrant a new trial is simply "reasonable diligence," such that defendants may not "keep an evidentiary trump card in the event of conviction." *United States v. LaVallee*, 439 F.3d 670, 701 (10th Cir. 2006) (quoting *Quintanilla*, 193 F.3d at 1147).

This is not a case in which Nacchio failed to exercise due diligence in locating a witness prior to trial, *Id*. at 701, or a case in which Nacchio strategically decided not to call a witness at trial or elicit certain testimony from a witness at trial, *United States v. Theodosopoulos*, 48 F.3d

1438, 1448–49 (7th Cir. 1995). Ms. Szeliga refused to meet with the defense before trial, and at the conclusion of cross-examination at trial her testimony was clear that her warning to Nacchio was of a 1.4% risk. The Tenth Circuit held that Szeliga "corrected herself (without saying so)" on re-direct examination and thereby muddled the record in a manner that opened the door for the jury (and hence a reviewing appellate court) to interpret her testimony as a 4.2% risk. 519 F.3d at 1163. Nacchio's counsel asked for an opportunity for re-cross, and was denied by the court. The newly discovered evidence in this case simply was not absent from the trial because of any lack of diligence on Nacchio's part. As one court has explained, "if evidence was not available during the trial through no fault of the defendants, then the second [diligence] element of the test is met." *Carmichael*, 269 F. Supp. 2d at 597.

C. Szeliga's Civil Deposition Testimony Is Not Cumulative Evidence

A motion for a new trial "must be based on more than mere impeachment or cumulative evidence." *United States v. White*, No. 98-1461, 1999 U.S. App. LEXIS 29521, at *5 (10th Cir. Nov. 9, 1999).[6] The Tenth Circuit addressed the cumulative evidence prong in *Sutton*, 767 F.2d at 726. It rejected the defendant's claim for a new trial only because the deposition testimony was "only cumulative" to the testimony the witness had already given at trial, "probably would

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[6] *See also United States v. Pupo*, 841 F.2d 1235, 1240-41 (4th Cir. 1988) (new trial not warranted by newly discovered corroborating evidence that witness had been beaten by police when defendant presented evidence to same effect during trial); *United States v. Champion*, 813 F.2d 1154, 1170-71 (11th Cir. 1987) (new trial not warranted based on impeaching evidence that witness had allegedly lost bail bondsman license, because witness was sufficiently impeached at trial); *United States v. Jackson*, 780 F.2d 1305, 1312-13 (7th Cir. 1986) (new trial not warranted on the basis of newly discovered impeachment evidence regarding credibility of an FBI agent's testimony against the defendants when the convictions were based primarily on the testimony of other witness); *Gov't of V.I. v. Lima*, 774 F.2d 1245, 1250 (3d Cir. 1985) (new trial not warranted by newly discovered evidence of affidavits bolstering defendant's alibi defense because the evidence was cumulative in nature).

not produce an acquittal, and, therefore, did not provide a basis for granting a new trial." *Id.* at 729.

This case, however, is starkly different from *Sutton*. Szeliga's deposition testimony is not "only cumulative" of testimony at trial; the operative premise of the Tenth Circuit's decision affirming this conviction was that Szeliga *did not* give testimony of this nature at the trial. It is not impeachment evidence but factual clarification of the issue that the Tenth Circuit regarded as the crucial determinant of guilt or innocence. And, unlike in *Sutton*, it is not only probable that Szeliga's recent testimony would produce an acquittal at a new trial—that testimony affirmatively establishes Nacchio's innocence as a matter of law under governing precedent.

D. Szeliga's Civil Deposition Testimony Is Material

To warrant a new trial, a defendant must also demonstrate that the newly discovered evidence is material. As the Tenth Circuit stated, "[t]he prohibition against insider trading applies only to those who trade on the basis of material undisclosed information." *Nacchio*, 519 F.3d at 1158. Because "courts look to the magnitude of a potential loss in determining whether knowledge of it is material," *id.*, at 1162, Szeliga's testimony regarding Nacchio's knowledge about the magnitude of the potential loss is highly relevant and material evidence. Indeed, Szeliga's testimony is not only material—it is dispositive.

Newly discovered evidence is immaterial if it does not impact the defendant's guilt or innocence.[7] By contrast, when newly discovered evidence bears upon an element of the charged

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[7] *See, e.g.*, *United States v. Blackthorne*, 378 F.3d 449, 452 (5th Cir. 2004); *United States v. Zagari*, 111 F.3d 307, 322 (2d Cir. 1997) (new trial not warranted by newly discovered evidence that strongly suggested prosecution's witness was "crazy" because witness's mental state was not material "in light of the substantial other cumulative evidence against the defendants"); *United States v. Bryant*, 117 F.3d 1464, 1469 (D.C. Cir. 1997) (newly discovered

offense, it is unquestionably material evidence. For example, in *United States v. Stoddard*, 875 F.2d 1233 (6th Cir. 1989), the defendant, president of the bank holding company that owned Michigan Bank-Midwest, had been charged with and convicted of misapplication of bank funds. Two months after the jury verdict, it was revealed that Michigan Bank-Midwest was not a member of the Federal Reserve System as alleged in the indictment and proven at trial. The Sixth Circuit reversed the district court's denial of a Rule 33 motion and held "[t]he new evidence clearly reflects that Midwest is not what it was alleged to be in the indictment …. The evidence was material and likely would have produced an acquittal on that issue if made known at trial." *Id.* at 1239.

Just as in *Stoddard*, the newly discovered evidence in this case is material to Nacchio's conviction because it establishes that the "risk" that Nacchio allegedly traded on was not "what it was alleged to be" by the government, and what the Tenth Circuit accepted when it sustained the conviction.

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evidence that defendant was a member of Marshal's Association, "a private booster organization with no law enforcement status whatsoever," was immaterial to the critical issue of whether defendant misrepresented himself as "special deputy marshal"); *United States v. Toro-Pelaez*, 107 F.3d 819, 828 (10th Cir. 1997) (newly discovered evidence of wire transfer record showing that defendant was provided with funds to establish himself in Kansas City was not material to the issue of "whether [defendant] knew that he was transporting 200 kilograms of cocaine"); *United States v. Krenning*, 93 F.3d 1257, 1268 (5th Cir. 1996) (new trial not warranted by newly discovered evidence that in different trial government took different position on timing of defendant's property lien, because instant fraud charge based not on lien, but on overstated value); *United States v. Mett*, 65 F.3d 1531, 1533-34 (9th Cir. 1995) (new trial not warranted because newly discovered evidence did not relate to the elements of the crime charged); *United States v. Burroughs*, 830 F.2d 1574, 1578-79 (11th Cir. 1987) (newly discovered evidence of immunity given to the wife of a prime witness was immaterial to the determination of a defendant's guilt).

E. Szeliga's Civil Deposition Testimony Demonstrates A Reasonable Probability Of Acquittal At A New Trial

Finally, a defendant is entitled to a new trial if the newly discovered evidence demonstrates "a reasonable probability of acquittal." *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1233 (10th Cir. 1998). In general, courts routinely refuse to grant new trials to defendants whose newly discovered evidence does not raise reasonable doubt about the defendant's guilt. *See, e.g., United States v. Snoddy*, 862 F.2d 1154, 1156-57 (5th Cir. 1989) (a new trial was not warranted when consideration of a government agent's false testimony did not raise reasonable doubt about the defendant's guilt). Conversely, courts have held that newly discovered evidence that is materially exculpatory raises a probability that the defendant will be acquitted at a new trial thereby establishing the defendant's right to a new trial. *See, e.g.*, *United States v. Lloyd*, 71 F.3d 408, 412 (D.C. Cir. 1995) (new trial was warranted by newly discovered tax returns of the defendant's clients where "materially exculpatory evidence" contained therein raised reasonable probability of different result on re-trial).

Here, the Tenth Circuit stated that materiality "revolves around" interpreting Szeliga's testimony and unquestionably considered dispositive the difference between a billion dollar shortfall to the internal targets and a billion dollar shortfall to the external targets. The court of appeals held that it was a "close question" whether a *risk* of a 4.2% shortfall nearly a year in the future was immaterial as a matter of law, by reference to the SEC's guideline that errors under 5% *in already reported past earnings* are generally immaterial. The court's analysis makes clear, however, that it would have regarded a risk of a shortfall essentially a third that size—1.4%—to be immaterial as a matter of law and require acquittal. The Tenth Circuit is not alone in recognizing that such small risks are immaterial as a matter of law. *See, e.g.*, *Shaw v. Digital*

Equip. Corp., 82 F.3d 1194, 1211 & n.21 (1st Cir. 1996) (evidence suggesting a future earnings decline is immaterial unless the end of the reporting period is imminent and the executive has "hard" inside information showing that the results will be an "extreme departure" from what the public expects); *Haw. Structural Iron Workers Pension Trust Fund v. Apple Computer, Inc. (In re Apple Computer, Inc.)*, 127 Fed. Appx. 296, 304 (9th Cir. 2005) ("[A] revenue estimate that was missed by approximately 10% was immaterial as a matter of law.")

The only theory of materiality charged in the indictment or presented at trial was that Nacchio was aware of some "risk" concerning Qwest's year-end 2001 financial projections, and Szeliga's testimony reveals that the magnitude of that "risk" as conveyed to Nacchio was too small to be material, as a matter of law.[8] Given the Tenth Circuit's recitation of the law on materiality, not only has Nacchio raised a reasonable probability that a new trial would produce an acquittal, but he has demonstrated that Szeliga's civil deposition testimony affirmatively absolves him of any wrongdoing under the law. Under such unique circumstances, the interest of justice warrants a new trial.

IV. CONCLUSION

Based on the foregoing, this Court should grant a new trial in the interest of justice pursuant to Federal Rule of Criminal Procedure 33.[9]

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[8] That was the only theory of materiality charged in the indictment or argued at trial, and the conviction cannot be affirmed on any other basis. *See Dunn v. United States*, 442 U.S. 100, 106 (1979); *United States v. Hill*, 835 F.2d 759, 764 n.7 (10th Cir. 1987); *Cola v. Reardon*, 787 F.2d 681, 688 (1st Cir. 1986).

[9] Because jurisdiction is currently vested in the Tenth Circuit, this Court must signal its intent to grant the motion and the court of appeals will then remand the case. *See United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).

Respectfully submitted this 5th day of March, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March 2009, I electronically filed the foregoing **MOTION FOR NEW TRIAL PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 33** with the Clerk of the Court using the Court's CM/ECF system, which will send notification of the filing to the following:

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