

**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 CHANGE OF VENUE PURSUANT TO
FEDERAL RULES OF CRIMINAL PROCEDURE 21(a) and (b)**

Defendant Joseph P. Nacchio, by and through undersigned counsel, respectfully requests that, pursuant to Fed. R. Crim. P. 21(a) and (b), the Court order a change of venue and transfer these proceedings to the District of New Jersey.

I. INTRODUCTION

It cannot be disputed that Mr. Nacchio has become among the most reviled figures in recent Denver history and, therefore, there are great obstacles to Mr. Nacchio receiving a fair and impartial trial by an unbiased jury of his peers here.¹ The very week Mr. Nacchio was indicted

¹ In our May 1, 2006 Motion For Order Directing Production Of Evidence By Government Agencies (the "Government Evidentiary Motion," Doc. 59), we demonstrated, in a graphic manner replete with audio and visual exhibits, how Mr. Nacchio was intercepted and literally chased by the press when he flew into Denver on the eve of his indictment, how former Qwest employees have publicly announced his guilt and demanded his conviction, and how this prejudice may even have infected an arm of this Court when, it appears, the U.S. Marshal and his

and arraigned, the press eagerly sought out and published highly prejudicial quotations from former Qwest employees and others, including a locally elected Member of Congress:

- Denver Post (December 21, 2005) -- The very day Mr. Nacchio was arraigned (*see Exhibit D* at 64-65):

- “I have been waiting years for this. He destroyed the company.”
- “There were a lot of smiles on people’s faces.”
- “It’s sad to say that for that kind of robbery he would get a maximum of ten years (per count).”
- “We were finally able to take down a corrupt individual.”

- Denver Post (December 21, 2005) -- Another article the day Mr. Nacchio was arraigned included a section called “What They Are Saying.” (*Id.* at 70) Among the quotes:

- “In my opinion, Joe Nacchio is the tip of a very big iceberg of corporate manipulation.... I only will be happy if he is convicted.... He knows a lot. Squeeze Joe, and he will squeal like the pig he is.”

- “I’m not surprised (about the indictment). Qwest throughout the period of Joe Nacchio’s leadership played very close to the edge, and as we learned from our hearings, went over that edge. ... [I]t was obvious that their business practices were over the edge. That allowed Mr. Nacchio to make \$200 million in profits.” Rep. Diana DeGette, D. Colo.

Chief Deputy detained Mr. Nacchio following his release on bail on December 20, 2005, and he was then paraded into this Court in handcuffs.

- Denver Post (December 22, 2005) -- The day after Mr. Nacchio was arraigned, a letter to the Editor stated, “It is long, long overdue: Joe Nacchio is doing the perp walk. Too bad you didn’t provide me a picture of that blessed sight. ... I had my life turned upside-down by this slick New Jersey confidence man.” (Exhibit G at 31)

When this pervasive prejudice is considered with other factors such as convenience and the interest of justice the Court should, respectfully, exercise its discretion and transfer venue. Mr. Nacchio and his family have a residence in New Jersey; most of the defense witnesses either reside in New Jersey or would find it more convenient to testify in New Jersey; many of the acts underlying the alleged offense took place away from Colorado, and many of those in New Jersey; and Mr. Nacchio’s principal attorneys are located in New Jersey. Significantly, should the Court ultimately determine that the prejudice in Denver is not, in and of itself, sufficient to mandate a transfer, that prejudice should nevertheless be considered a “special circumstance” under controlling law which, when taken into account when considering a transfer in the interest of justice, unquestionably tips the balance towards transferring venue.

**II. THE PERVASIVE PREJUDICE IN THIS DISTRICT
PREVENTS THE IMPANELING OF AN IMPARTIAL JURY**

The Constitution and Fed. R. Crim. P. 21 *mandate* a change of venue where outside influences, such as pretrial publicity, operate to prejudice a defendant and prevent him from obtaining a fair trial.² Even where outside influences might cast doubt on the perceived fairness

² In *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), the Court held that a defendant’s due process rights were violated when there was a “reasonable likelihood” that publicity and other outside influences prevented a fair trial in the venue in which the offense was allegedly committed.

of a trial, the court has the discretion to order such a transfer pursuant to Rule 21 and its supervisory powers.³

Among the populace in the greater Denver area, Mr. Nacchio is widely presumed to be guilty. The emotional, financial and psychological effects on the venire panel resulting from the price decline of Qwest stock, layoffs by the company, losses to the Qwest employee pension plan, together with the intensive negative media coverage repeatedly and continually showered on Mr. Nacchio and Qwest, a suit by the SEC and the numerous civil lawsuits pending in this District, not to mention this instant prosecution, combine to make it impossible to identify and therefore ultimately seat an impartial jury in Denver. In order to fully understand and demonstrate the poisoned local environment, Mr. Nacchio has retained an expert to analyze the attitude of the public in this vicinage towards Mr. Nacchio. Attached as Exhibit O is a Declaration by Professor Edward Bronson (the “Bronson Declaration”) setting forth his preliminary analysis and conclusions. Because of complex and voluminous factual issues that must be addressed in such a motion, coupled with scheduling considerations, Mr. Nacchio’s expert has not yet completed a survey of the Denver populace. Indeed, Professor Bronson cautions that: “Surveys that are conducted too early can become moot in light of intervening events or fading memories. (See Exhibit O, ¶ 19) Mr. Nacchio respectfully requests until September 15, 2006 to supplement his application for change of venue and submit the results of that survey. However, based on the present record -- including (i) Professor Bronson’s

³ Although a defendant’s Rule 21(a) motion could be construed as a waiver of his Sixth Amendment right to trial in “the State and district wherein the crime shall have been committed,” this motion is offered only in the event that Mr. Nacchio’s still-pending motion to dismiss the indictment for lack of venue in the District of Colorado is, ultimately, denied. (See Doc. 60)

preliminary analysis, (ii) the newspaper articles, and (iii) the evidence submitted as part of the Government Evidentiary Motion (Doc. 59) -- it is readily apparent that palpable prejudice pervades the entire community.

A. Criminal Rule 21(a)

The Federal Rules of Criminal Procedure specifically provide for a change of venue to protect from undue prejudice. Fed. R. Crim. P. 21, entitled “Transfer for Trial,” recites in relevant part (emphasis added):

(a) For Prejudice. Upon defendant’s motion, the court *must* transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

As will be shown, although the defense bears a large burden to demonstrate sufficient prejudice, the opprobrium against Mr. Nacchio is so extraordinary and unique that this is just such an occasion.

B. The Standards For Prejudice Justifying Change of Venue

Although a motion to change venue is a fact-specific inquiry, courts have recognized that a change of venue is appropriate under the following circumstances:

1. Extensive Publicity -- There has been extensive publicity, such as “voluminous newspaper articles ... paint[ing] a black and bleak picture” of the defendant. *See United States v. Abrahams*, 466 F. Supp. 552, 555, 558 (D. Mass. 1978); *see also United States v. Marcello*, 280 F. Supp. 510, 515-16 (E.D. La. 1968); *United States v. Parr*, 17 F.R.D. 512, 518 (S.D. Tex. 1955); *United States v. Florio*, 13 F.R.D. 296, 298 (S.D.N.Y. 1952); *United States v. Hoffa*, 205 F. Supp. 710, 722-23 (S.D. Fla.), *cert. denied*, 371 U.S. 892 (1962).

2. Close Attention To Procedural Moves -- “Close attention” has been paid to pre-trial “procedural moves” in defendant’s case and “every aspect of the [defendant’s] life [has] become[] grist for the reporter’s mill.” *See United States v. Williams*, 523 F.2d 1203, 1205-06 (5th Cir. 1975).

3. Effect On Local Vicinage -- The crime alleged has had a “profound and pervasive” effect on the local vicinage. *See e.g., United States v. McVeigh*, 918 F. Supp. 1467, 1470 (W.D. Okla. 1996); *Florio*, 13 F.R.D. at 298 (“matter of peculiarly local interest”); or there is “repetition of emotionally intense stories” of victims. *See e.g., McVeigh*, 918 F. Supp. at 1472.

4. Juror Stake In Outcome -- Potential jurors “feel a personal stake in the outcome,” whether emotional or financial. *See McVeigh*, 918 F. Supp. at 1473; *Washington Pub. Util. Group v. United States District Court*, 843 F.2d 319, 327 (9th Cir. 1987).

5. Plea Deals And Witnesses -- There have been highly publicized plea deals involving others alleged to have committed offenses similar or related to the one with which the defendant has been charged, and the local media covered those events with particular intensity and speculated how witnesses would be “star witness” in the defendant’s case. *See e.g., Coleman v. Kemp*, 778 F.2d 1487, 1532, 1538 (11th Cir. 1985).

6. Related Proceedings -- There are or have been highly publicized related proceedings. *See e.g., United States v. Mazzei*, 400 F. Supp. 17, 20 (W.D. Pa. 1975).

Further, the Supreme Court has held that in some cases, pretrial publicity may be so widespread that a court contemplating a change of venue can presume prejudice. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (citation omitted) (“[T]he test is ‘whether the nature and strength of the opinion formed are such as in law necessarily ... raise the presumption of partiality.’ ”);

Sheppard, 384 U.S. at 363 (right to due process violated where there was “a reasonable likelihood” that publicity and other outside influences prevented a fair trial in the venue where a crime has occurred). While the Court has acknowledged that “[i]t is not required [] that the jurors be totally ignorant of the facts and issues,” it cautioned that the availability of “widespread and diverse methods of communication ... cannot foreclose inquiry as to whether, in a given case,” a defendant is deprived of liberty without due process because of jurors’ preconceptions. *Id.*

Thus, while the normal practice in the Tenth Circuit is to initially ferret out the effects of pre-trial publicity on voir dire of the venire, “when the probability of prejudice is great because of deeply-rooted passions or recent massive publicity, the efficacy of voir dire in screening the prospective jurors is diminished.” *McVeigh*, 918 F. Supp. at 1470; *see also United States v. Holder*, 399 F. Supp. 220, 227 (D.S.D. 1975).

As the District Judge in *McVeigh* recognized, the prejudice that may deny a fair trial need not be limited to “bias or discriminatory attitude.” It can, in fact, be the product of something as understandable as pride:

The existence of such a prejudice is difficult to prove. Indeed it may go unrecognized in those who are affected by it. ... It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its most powerful effect if it generates strong emotional responses and fits into a pattern of normative values.

McVeigh, 918 F. Supp. at 1472.

In short, the need for a venue transfer in this case cannot be obviated through the voir dire process, because voir dire procedures are not effective where, as here, the negative view of Mr. Nacchio infects the entire community. (*See infra*, § IV and Exhibit O, Sec. IV.) Indeed, in light

of the deep, widespread feelings of betrayal, anger, and victimization throughout Denver, even jurors who have not formed a preconceived opinion of guilt will be under intense pressure from their peers and their community to convict. Finally, while there may be some potential jurors in the Denver jury pool who do not harbor latent bias against Mr. Nacchio, it will be exceedingly difficult to identify those who *do*, because bias and prejudice also operate at unconscious levels and are all but impossible to identify and weed out.

C. Each Factual Circumstance Compelling Transfer Exists Here

As has been shown, the media coverage during the week of Mr. Nacchio's indictment and arraignment reflected several categories of prejudice. Indeed, a review of the media coverage in this District going back to 2000 demonstrates that *all* of the elements justifying a change of venue discussed above exist here, together with a number of still other grounds for change of venue. Exhibit O is a preliminary report prepared by our expert, Professor Bronson, in which he explains the various types of prejudice portrayed in the media, discusses how that prejudice can be statistically analyzed, and offers an initial analysis of the extensive media reporting in this matter. Professor Bronson has concluded that the pervasive pretrial publicity has placed in dire doubt Mr. Nacchio's ability to receive a fair trial in the District of Colorado:

Conclusion on Extent of the Coverage. The extent of the coverage of this case, the defendant, and related events is one of the most extensive I have ever reviewed. By any objective criterion, it provides very strong support for a change of venue.

(Exhibit O, ¶ 57)

Exhibits K, L and M are chronological collections of selected media coverage from the Rocky Mountain News, Denver Post, and Denver Business Journal, respectively, going back as

early as May 2001.⁴ Additionally, although there is some amount of overlap, these collections have been sorted by seven specific types of prejudice, as follows:

1. Extensive Publicity -- Exhibit D is a chronological collection of articles from the three newspapers addressing this element. As has been shown, highly prejudicial publicity dominated the press during the week of Mr. Nacchio's indictment and arraignment. Some additional highlights addressing this element:

- Denver Business Journal (January 3, 2003) -- "Who was Denver's 'Person of the Year' in business? Was it Joe Nacchio, local poster boy for business excess, icon for gross miscalculation in business and revenue manipulation?" (Exhibit G at 33)

- Denver Post (October 4, 2002) -- An editorial headlined, "What Joe owes," began: "Joe Nacchio showed contempt for his former fellow Qwest workers and disrespect for a member of Congress during his Tuesday appearance before the U.S. House Investigations subcommittee." (Exhibit G at 25)

- Rocky Mountain News (June 20, 2002) -- An article headlined "The Anti-Nacchio Arrives" scathingly denigrated Mr. Nacchio in a point by point comparison with his successor as Qwest CEO, Richard Notebaert. (Exhibit D at 18)

- Denver Post (May 15, 2002) -- An "open forum" letter, headlined "Nacchio berated," stated: "It wasn't too long ago that Qwest's chief executive, Joseph Nacchio, haughtily remarked that he 'should be allowed to make more than a second baseman' because 'I create more economic value than they do.' Based on the recent price of Qwest stock,

⁴ For the purposes of his expert report, Professor Bronson was provided with articles dating back to January 2000.

substituting the word 'suffering' for 'value' might be more appropriate. However, Mr. Nacchio can't be totally faulted, since he certainly has provided more economic value (\$101 million, according to reports) for himself." (Exhibit G at 16)

- Denver Business Journal (March 1, 2002) -- In an "Editor's Notebook" piece headlined "Greedy, stupid and blind," the "year's special awards for outstanding achievement in the world of business" began with: "For outstanding performance in the category of Gross Revenue Estimating Enthusiasm amid Dropping Yield -- commonly known as the GREEDY award -- the hands-down winner is Joe Nacchio, boss of Qwest Communications International, our local phone company." (Exhibit F at 15)

2. Close Attention To Procedural Moves -- Perhaps the most graphic example of this close attention can be found in the manner in which the entire Denver press corps somehow knew to intercept Mr. Nacchio and his attorney and conduct an "ambush" interview at the Denver airport when they flew in on December 19, 2005, at the specific direction of the United States Attorney, in anticipation of Mr. Nacchio's indictment. (*See* Government Evidentiary Motion, Doc. 59, at 2-4.) Further demonstration can be found in Exhibit A to this motion, a May 5, 2005 column in the Denver Post, which was annexed by the government as Exhibit A to its opposition to Mr. Nacchio's Government Evidentiary Motion (Doc. 83-2). This column purported to "explain" that the press had not been tipped off by the government as suggested by Mr. Nacchio but, rather, had been tipped off by "somebody [who] saw him boarding a flight to Denver at the Newark airport and called the Denver media."

This explanation -- which has been adopted by the government -- is nothing short of preposterous. It presumes a chain of necessary events, each more implausible than the last.

An uninvolved “tipster” who had passed through Department of Homeland Security at Newark Liberty International Airport -- and presumably, had a plane of his own to catch -- saw Mr. Nacchio, recognized him, followed him until Mr. Nacchio boarded a plane to Denver, somehow knew the trip would be newsworthy even though no indictment had yet been handed down, then took it upon himself to find the right telephone numbers to contact not just the Denver Post, but the entire Denver press corps, all quickly enough that the press corps could then mobilize and adopt a unified plan to have a reporter and photographer purchase tickets that allowed them to pass through Department of Homeland Security screening in Denver and meet Mr. Nacchio’s plane at the gate, then chase Mr. Nacchio through the airport while making cell phone reports of progress to the rest of the assembled press, so that a classic ambush interview could then be conducted. Not only that, but this random New Jersey tipster acted quickly enough to allow one Denver television station to find and transport a woman claiming to be a former Qwest employee to a location near the airport, where she could be interviewed expressing the hope that Mr. Nacchio was prosecuted and convicted.

Whether, in fact, the government alerted the press to Mr. Nacchio’s arrival or a tipster set in motion the chain of events, the airport media ambush unmistakably demonstrates how every aspect of Mr. Nacchio’s life has become sensational grist for the media mill.

The Court may already be aware that the press has reported extensively on every hearing since Mr. Nacchio’s indictment, as well as on every governmental filing. Even before his indictment, the press was closely following the progress of the grand jury. For example, in a November 5, 2005 article in the Rocky Mountain News headlined, “Cross Hairs on Nacchio,” the story began: “Joe Nacchio, former Qwest chief executive officer and the focus of a federal

criminal investigation, is likely to be indicted on insider trading charges before year's end, sources have told the Rocky Mountain News." (See Exhibit K at 1120-22) Exhibit E is a chronological collection of articles from the three newspapers further addressing this element.

3. Effect On Local Vicinage -- In this regard, a whistleblower contacted Mr. Nacchio's counsel to allege that the United States Marshal and Deputy Marshal for the District of Colorado had restrained Mr. Nacchio after his arraignment so that he could be paraded before a packed courtroom of press in handcuffs, coatless, tieless and beltless. (See Government Evidentiary Motion, Doc. 59, at 5-7 and Exhibit A thereto (CD Rom containing a recording of the whistleblower's phone message to Mr. Nacchio's counsel).)

Yet a further instance of the profound and pervasive effect on the vicinage can be found in the press accounts of the CIPA-related proceedings in this matter. Exhibit B contains two related articles in the Rocky Mountain News. The first is a May 13, 2006 story reporting on the statement Mr. Nacchio issued in response to the USA Today expose of the National Security Agency's obtaining of telephone company customer records. The article asserted that, "[l]ong before the phone record story this week, Nacchio had been floating a possible 'national security' defense ... [which] goes something like this: Nacchio was optimistic about Qwest's financial condition because his secret work on a top presidential advisory panel led him to believe the Denver telco was in line to land some major federal contracts." The article then challenged this, stating that "*two sources* familiar with the situation said Nacchio was cleared to hear classified information by about March 2001" (emphasis added), and concluded that this fact "would still leave questions about Nacchio's defense for January and February 2001." (See Exhibit B at 2-4) Subsequently, after Mr. Nacchio made his Section 5 CIPA submission (See Doc. 73 for the

publicly available record of filing), the Court adjourned the July 14, 2006 hearing until August 25, 2006 because of logistical problems related to CIPA. The second article in Exhibit B is a July 8, 2006 story about the adjournment, in which the assertion is repeated that “Nacchio, however, didn’t obtain security clearances until March 2001, according to sources familiar with the situation.” (*Id.* at 5)

First, the assertion that Mr. Nacchio did not receive a classified security clearance until March 2001 is palpably false, as was made entirely clear in our Section 5 CIPA submission. (Doc. 73) More importantly, neither Mr. Nacchio nor his attorneys ever communicated such a falsehood to the Rocky Mountain News. Who, then, would be the two sources “familiar with situation” that disseminated false information to the press, so clearly designed to prejudice the public against Mr. Nacchio and ridicule his defense? Again, putting aside whoever these “two sources” might have been, the twice-reported leaks from inside sources unquestionably demonstrate the prejudice pervading the entire vicinage and the evident interest in minimizing any perceived defense.

Exhibit F is a chronological collection of articles from the three newspapers further addressing this element. Some additional highlights on the effect on the local vicinage are:

- Denver Post (December 27, 2005) -- Within a week of the press’ extensive coverage of Mr. Nacchio’s indictment and arraignment, the Post tracked down a Qwest retiree so that she could recount her experience asking Mr. Nacchio a question at Qwest’s 2002 annual shareholder meeting: “It’s amazing to me how he seemed to be expressing the same bravado he did when he was at the company.” “I guess you hope that someone will realize the damage they

have caused, but that did not seem apparent. His answers were rather flip.” “In my opinion, I believe I’m doing a good thing by speaking out against Joe Nacchio. I believe I’m still doing my part for the company.” (Exhibit D at 74)

- Denver Post (September 27, 2002) -- This type of media prejudice is not a recent phenomenon. Nearly four years ago, in an article on statewide losses of “\$2.65 billion in retirement assets last year because of the plunging stock market,” a Post business writer stated, “While executives such as former Qwest boss Joe Nacchio made hundreds of millions of dollars in exercised stock options, rank-and-file employees ... lost tens of thousands in their retirement plans.” “ ‘My way of life has changed,’ [the employee] said. ‘There’s no way I can recoup what I’ve already lost.’ ” Another Qwest employee was quoted as saying, “I think that the executives who have left Qwest should be forced to give back the piles of money that they’ve taken and disburse it to the workers who lost their retirement savings.” (Exhibit F at 33-34)

- Rocky Mountain News (August 26, 2002) -- An article headlined, “Starting Over” stated about a former Qwest employee: “Like other Qwest investors, employees and former workers who saw their fortunes fall with those of the company and the industry, she’s angry at the execs who led the company into trouble.” The article went on to note that “Qwest cut its work force from 65,000 to 55,000 in the past year.” The article then asserted: “While they’re getting on with the business at hand, [the former Qwest employees] are angry, mostly at former Chief Executive Joe Nacchio. They blame him for the collapse of a company that provides the livelihoods of so many hard-working employees. They also greatly resent the riches Nacchio reaped as Qwest faltered. In addition to millions in salary and bonuses, Nacchio reportedly pocketed \$230 million from the sale of company stock. He sold his shares during a

time when many employees were barred from doing so under the terms of their 401(k) plan. While Nacchio was getting richer, his arrogance came through in his dealings with Qwest workers, many say. In a now well-publicized incident shortly after the merger, Nacchio called U.S. West workers, ‘clowns.’ ” (*Id.* at 30-32)

4. Juror Stake In Outcome -- As many of the above articles and quotations have shown, potential jurors “feel a personal stake in the outcome,” whether emotional or financial. A graphic example of this, of course, is the interview broadcast on the eve of Mr. Nacchio’s arraignment by Denver television station KUSA with a woman claiming to be a former Qwest employee, who expressed a fervent wish that Mr. Nacchio be prosecuted and convicted. (Doc. 59, Exhibit A (CD Rom containing the televised interview).

Yet another example of this can be found in Exhibit C, a December 23, 2005 article in the Rocky Mountain News which quotes “Donna Jaegers, a telecommunications analyst for Denver-based Janco Partners Inc.” as “question[ing] whether Nacchio would get a fair trial in Denver because of the well-publicized tribulations of Qwest employees who lost money during Qwest’s downturn in the stock market.”

Exhibit G is a chronological collection of articles from the three newspapers further addressing this element. Some highlights from this compendium include:

- Denver Post (December 23, 2005) -- Just two days after Mr. Nacchio was arraigned, the lead item in an on-line blog by the Post’s business columnist was headlined, “A jury duty volunteer for Nacchio’s trial.” The item begins: “*I’d love to be on the jury of nacchio’s trial. I’d make sure the son of a (bleep) hung*” (emphasis added). Another reader posted a response that same day: “Most of the time the good citizens of Colorado would rather

avoid serving on a jury if they could legally get out of it. I know a lot of people, myself included, who would just love to be picked for natch joe's trial. They could probably measurably inflate the government's coffers by selling raffle tickets for places in the jury pool." Another poster, who said she was a journalist who "formerly covered Nacchio at Qwest," commented, "the court ought to sell tickets to this trial. It will be pure show biz. Nothing on TV or in the theaters will top it." (Exhibit G at 38-39)

- Rocky Mountain News (December 21, 2005) -- The day after Mr. Nacchio was arraigned, the News ran a story headlined, "Angry US West retirees wishing for a conviction." (See Exhibit K at 1154-55) The lead to the story was, "They're glad Joe Nacchio got indicted. Now, these retirees are crossing their fingers that the ex-CEO of Qwest will be found guilty and punished." Among the featured quotes:

- "I think he's guilty. And I'm scared to death he's going to get away with it."

- "If our legal system is any good at all, they'll get him."

- "I just hope that everything holds up in court and he is convicted."

- "If I were a betting man, I'd say he'll probably be found guilty.

Would I be sad? Not in the least."

5. Plea Deals And Witnesses -- The press has continually published accounts of proceedings involving other Qwest-related people. Just this past week, the newspapers have drawn Denver's focus to the July 28, 2006 sentencing of Robin Szeliga. Exhibit N contains a

series of articles from the day prior to and the days following, the sentencing.⁵ Some highlights from these recent articles are:

- A July 27, 2006 story in the Rocky Mountain News, is headlined “Szeliga may avoid jail” and states, “Government prosecutors on Wednesday recommended a lighter sentence for Szeliga based on her extensive cooperation with an investigation now firmly focused on former CEO Joe Nacchio. Szeliga could be a key witness in the case against Nacchio, who faces 42 counts of insider trading in connection with his sale of \$101 million of Qwest stock in the first five months of 2001.” The article went on to note that, “Government prosecutors made a motion Wednesday to lower Szeliga’s ‘offense’ level by six notches based on her ‘substantial assistance’ to their investigation. That reduction gets Szeliga into the area of being eligible for probation....” The article also stated, “In its filings, the government said Szeliga was in a ‘unique position’ and in some cases was one of only three participants in key communications. Former Chief Operating Officer Afshin Mohebbi also is expected to be a key witness.” (Exhibit N at 1-2)

- A July 28, 2006 article reporting on the sentencing in the Rocky Mountain News stated: “In previous cases, former Qwest executive Marc Weisberg received probation and a \$250,000 fine for wire fraud. Of four former midlevel executives accused of improperly booking revenue in an Arizona schools deal, two were acquitted, another was sentenced to probation and a fourth is expected to receive probation. The article also quoted the District

⁵ These events are so recent that they occurred after the compendiums of articles were created. They do not, therefore, appear in Exhibits K-M, the “complete sets” of collected articles from the Rocky Mountain News, Denver Post and Denver Business Journal.

Judge as stating: “I do not divorce this conduct from the overall illegality. There does seem to be a culture of -- I would use the word -- greed.” (Exhibit N at 3-4)

- The Denver Business Journal also ran a July 28, 2006 article on the Szeliga sentencing (Exhibit N at 5-6), which included the following quotes:

- “Szeliga, who pleaded guilty to one count of insider trading, is expected to be a key witness in the government’s insider-trading case against former CEO Joe Nacchio.”

- Along with Szeliga, other former Qwest executives have reached plea bargains in exchange for cooperating with the government’s case against Nacchio. Gregory Casey, former executive vice president of wholesale business, agreed to settle charges and cooperate with the SEC’s investigation. Former Qwest President Afshin Mohebbi was granted immunity and also is expected to testify in the case. Marc Weisberg, a former executive vice president at Qwest, was sentenced to 60 days of house arrest and fined \$250,000 for one count of wire fraud. Weisberg, who faced eight counts of wire fraud and three counts of money laundering, reached a plea bargain by agreeing to cooperate with federal prosecutors hoping to convict Nacchio. Denver-based Qwest already made a \$250 million settlement to cover the SEC’s charges of fraud.”

- The Rocky Mountain News ran a July 29, 2006 article on Szeliga’s sentencing which stated: “The sentencing sets the stage for the final step of the government’s prosecution against former Qwest executives: the case against former Chief Executive Joe Nacchio.” The article noted: “Nacchio faces 42 counts of insider trading in connection with selling \$101 million of stock in the first five months of 2001, while allegedly knowing the

Denver telco's financial condition was deteriorating. He has repeatedly denied wrongdoing. Szeliga is expected to be one of the prosecution's key witness should the case go to trial." (Exhibit N at 9-10)

- A July 31, 2006 article in the Denver Post features the sub-headline, "Szeliga likely to face defense's wrath in Nacchio case, and began: "former Qwest chief financial officer Robin Szeliga appears headed for the same scorching seat that ex-Enron CFO Andrew Fastow once occupied." The article went on to state, "Szeliga is expected to be the star witness in the government's insider-trading case against former Qwest CEO Joe Nacchio. Experts say she will also likely face significant heat on the witness stand." The article concluded by stating: "According to the U.S. Securities and Exchange Commission's civil charges against Nacchio and court documents, the following occurred during [April 2001]: On April 24, Nacchio and Szeliga issued Qwest's first-quarter earnings release ... (and) falsely claimed in the release that Qwest's growth stemmed from various recurring-revenue products. On April 29, Nacchio stated fraudulently (on Fox News Channel) that 'most of our growth comes from development of new products....'" (Exhibit N at 11-12)

Exhibit H is a chronological collection of earlier articles further addressing the element of "plea deals and witnesses." Some highlights from this compendium include:

- Denver Post (December 30, 2005) -- An article headlined, "A Fatburger With A Side Of Lies" began: "former Qwest executive Marc Weisberg's punishment - to be decided March 3 - may sound something like this: 'Marc, you're grounded.' Sixty day's home detention is what he'll serve under a plea agreement with federal prosecutors announced this week." (Exhibit H at 42-43)

- Denver Post (July 15, 2005) -- The article is headlined, “Deal in Qwest case -- Former CFO Szeliga enters guilty plea to insider trading -- A former federal prosecutor said Szeliga’s expected cooperation is ‘a step forward’ in the criminal cases against former CEO Joe Nacchio and his lieutenants.” (*Id.* at 14)

6. Related Proceedings -- The articles in the “pleas and witnesses” section might just as easily been placed in this section. Exhibit I is a chronological collection of still other articles from the three newspapers addressing this element. Some highlights from this compendium include:

- Rocky Mountain News (January 20, 2006) -- An article, headlined “Szeliga backs out of SEC deal,” began: “Former Qwest Chief Financial Officer Robin Szeliga - who already has pleaded guilty to a criminal charge of insider trading - has pulled out of a tentative civil fraud settlement with the Securities and Exchange Commission.” The article went on to assert, “Szeliga also is seen as a potential key witness in the government’s criminal case against Nacchio....” (Exhibit I at 116)

- Rocky Mountain News (September 8, 2005) -- A story, headlined “Former Qwest Exec, SEC Settle For \$2.1 Million,” began: “A Denver federal judge Wednesday approved a settlement by Qwest’s former top sales executive Gregory Casey of allegations that he backdated contracts and caused the Denver telco to buy communications capacity it didn’t need.” The article concluded by stating, “In what experts say could be an ominous development for Nacchio, former Qwest Chief Financial Officer Robin Szeliga recently pleading guilty to insider trading and agreed to cooperate with prosecutors.” (*Id.* at 100)

- Rocky Mountain News (April 30, 2004) -- A story, headlined, “Jury Foreman: Retry Qwest Case,” begins: “The jury foreman in the recent criminal trial of four former Qwest executives said the government should retry its case against Grant Graham and Thomas Hall.” The article added, “And while it’s unclear what former Chief Financial Officer Robin Szeliga and former Chief Executive Joe Nacchio knew about the particular deal, [the Jury Foreman] said he suspects the two were aware and ‘could have put a stop’ to the culture that led to specific activity.” (*Id.* at 81)

- In a June 20, 2006 story, the Denver Post’s business writer interviewed Robert Fusfeld, “who has overseen the Securities and Exchange Commission’s pending lawsuit against Joe Nacchio,” and was retiring from the SEC as manager of litigation for the States of Colorado, Wyoming, Utah, Texas, Oklahoma, Arkansas, Nebraska and both Dakotas. (*See Exhibit L* at 1243) The second sentence of the story quotes Mr. Fusfeld as saying, “[o]ne of the things I will really regret is not being able to cross-examine Joe Nacchio. That would have been the highlight of my career.” After six paragraphs devoted to Mr. Fusfeld’s work on the SEC’s case against Mr. Nacchio, the article quotes Mr. Fusfeld as stating that, “[t]he practice of law has gotten really nasty in the last several years. Defense lawyers will say and do anything ... There’s an awful lot of scorched-earth tactics.” Asked if there haven’t always been nasty attorneys, Mr. Fusfeld replied, “There are more of them (today) that weren’t breast-fed and are pathologically aggressive.” The article then averred, “[t]hey clog the courts with meaningless motions, make accusations that are patently untrue, take harrasing depositions - and they always seem to do this during the end of a month when they need to make their quota of billable hours. ‘I can’t believe some of the things their clients pay for,’ Fusfeld said.”

7. Comparisons to Other Corporate Frauds -- Just this past week, a July 28, 2006 article in the Rocky Mountain News on the Robin Szeliga sentencing drew parallels to other corporate frauds: “As with the WorldCom and Enron cases, cooperation from a former executive like Szeliga is expected to help prosecutors as they put Nacchio on trial.” (See Exhibit N at 3) And a July 31, 2006 article in the Denver Post (*id.* at 11-12) offered the following comparisons to other corporate fraud cases:

- “Former Qwest chief financial officer Robin Szeliga appears headed for the same scorching seat that ex-Enron CFO Andrew Fastow once occupied. Fastow was the star witness in the fraud conspiracy trial of former Enron chairman Ken Lay and former chief executive Jeff Skilling. On the stand, Fastow endured taunts and personal attacks from the defense.”

- “Former HealthSouth Corp. CFO William Owens pleaded guilty to fraud and conspiracy charges. He then provided key testimony against Richard Scrushy during the former chief executive’s fraud trial last year....”

- “Former WorldCom chief financial officer Scott Sullivan pleaded guilty to fraud and conspiracy charges. He was sentenced to five years in prison in August after providing key testimony that helped convict former chief executive Bernard Ebbers. Ebbers received 25 years in prison, a conviction upheld Friday by a federal appeals court.”

- “Fastow pleaded guilty to two counts of conspiracy and received a sentence of 10 years in prison. Fastow, an architect of Enron’s fraud, received that sentence before testifying to Lay’s and Skilling’s roles.”

○ “Fastow was grilled extensively by defense attorneys, who tried to undermine his credibility for having reached a plea deal with the government. The attacks were sometimes personal. In one exchange, Skilling attorney Daniel Petrocelli said, ‘Your greed was so great that you allowed your wife to go to prison.’ ”

Exhibit J is a chronological collection of articles from the three newspapers further addressing this element. Some highlights from this compendium include:

- Denver Post (December 22, 2005) -- In an article reporting on Mr. Nacchio’s arraignment, comparisons were made to Bernie Ebbers of WorldCom, Ken Lay of Enron, Dennis Kozlowski of Tyco, and Martha Stewart. (Exhibit J at 19-21)
- Denver Post (December 11, 2005) -- An article published just ten days before Mr. Nacchio was indicted, and headlined “Insider-trading cases,” began with: “Federal prosecutors have indicated they are focusing on insider-trading and securities-disclosure issues in their investigation into former Qwest CEO Joe Nacchio.” The article went on to detail five “examples of successful criminal insider trading prosecutions,” including Sam Waksal of ImClone Systems and David Delainey of Enron. (*Id.* at 14-15)
- Denver Post (February 27, 2003) -- An article headlined, “Pinning indictments on bigwigs difficult,” began: “Federal prosecutors have not indicted the chief executives at WorldCom, Enron, Kmart or Qwest despite months of investigations and billions of dollars in losses.” (*Id.* at 4-5)

* * *

Thus, there has been continuous negative and inflammatory coverage of Mr. Nacchio in the Denver press, going back *more than four years*. There is no doubt that this hostility in the

public media has been fanned by the use of “sources” and, unfortunately, “experts” from among the members of the Bar, who have not hesitated to comment unfavorably as to the merits of pending Court motions and the strategy of the defense -- often based on speculation and even though they have not been privy to material filed under seal. Some examples of the prejudicial “expert” pronouncements reported on by the press include:

- In a Denver Post article on Robin Szeliga’s sentencing for insider trading published on July 31, 2006, the very day this motion is being filed, a “former federal prosecutor” opined that “Szeliga will be center stage” at Mr. Nacchio’s criminal trial. That same “expert” added that, “[h]aving someone like Szeliga, who can give context to what Nacchio knew and when he knew it, is critical to prosecuting that case.” Later in the article, this “expert” predicted that Szeliga was “going to be attacked by Nacchio’s lawyers as having been bought and paid for by the government prosecutors. She’s going to be subjected to withering cross-examination by the Nacchio defense team.” (*See Exhibit N* at 11-12)

- Similarly, in a July 28, 2006 Rocky Mountain News article about the Szeliga sentencing, a “former federal prosecutor” was quoted as saying that “prosecutors wouldn’t bring criminal charges unless they could prove the executives had knowledge of the ‘accounting sleight of hand’ at the time of their sales.” (*See id.* at 5-6) In a second July 28, 2006 article in the Rocky Mountain News, a “securities lawyer” is quoted as saying of Szeliga: “The government needs her assistance. You can never have too many insiders testifying when you are trying to nail the CEO.” (*Id.* at 3-4).

- On December 6, 2005, two weeks before Mr. Nacchio was indicted, a Denver Post columnist predicted that: “Nacchio’s defense also will argue that he believed

Qwest's future was bright when he sold his stock. According to The Wall Street Journal, Nacchio's lawyers may argue that Nacchio believed Qwest was in line to receive lucrative contracts from the federal government - secret, national security contracts that only people near his level would know about." The columnist then quoted a "Denver fraud investigator" as stating: "It's the Alice in Wonderland defense. He's using inside information to justify using inside information?" (See Exhibit L at 1208-09)

- In a December 21, 2005 article in the Rocky Mountain News headlined "Cuffed and Charged," published the day after Mr. Nacchio's arraignment, a Denver "white-collar defense attorney" pronounced that the government's case against Mr. Nacchio was not complex: "It's a lot of quiet selling in the back alley when the public didn't know what he knew." In the same article, a law professor "said it's a given that Nacchio held insider information not available to the public when he sold the stock." (See Exhibit K at 1163-65)

- In another Rocky Mountain News article that same day headlined "Legal case not too complex," a Denver university business professor complained that Mr. Nacchio's indictment had taken so long, saying "he wondered if the government would ever get around to prosecuting Nacchio." (*Id.* at 1160-62)

- In a "Year In Quotes" piece on December 24, 2005, the Rocky Mountain News included a law professor's conclusion about Mr. Nacchio's indictment, that "These cases aren't all that complicated. The question is what did he know and when did he know it, and how did he know it? I can already see the government's graph tracking the company's stock price." (*Id.* at 1175-78)

- A March 21, 2005 article in the Denver Post, began: “If former Qwest chief executive Joe Nacchio goes to trial, legal experts say, his defense is likely to be one that failed WorldCom’s Bernard Ebbers: He relied on the advice of others.” The article quoted a law school professor as saying: “I think there’s far more evidence alleged here about Nacchio’s involvement than ever was alleged against Bernie Ebbers.” (See Exhibit L at 1129-31)
- In a May 3, 2006 Denver Post article reporting headlined, “Nacchio Wants Venue Change,” a “former federal prosecutor” is quoted predicting: “Chances are it won’t get any traction. It’s something that routinely happens in cases like this.” (*Id.* at 1372-73)
- On May 12, 2006, the Denver Post reported that Mr. Nacchio refused to accede to warrantless governmental surveillance. In that article, “[a] former federal prosecutor and a financial crimes investigator based in Denver” was quoted as stating: “I don’t think it speaks well of Joe Nacchio’s patriotism. That may make his stock go down. ... He could be seen as pro-terrorist.” (*Id.* at 1385-87)
- In a May 26, 2006 Rocky Mountain News story with the sub-headline, “Enron verdict not likely to sway trial of former Qwest CEO,” “a former federal prosecutor and now partner” at a Denver law firm was quoted as saying that the Nacchio case “ ‘is much more narrowly focused’ than Enron’s, which portends well for the prosecutors.” (See Exhibit K at 1251-52)

D. Professor Bronson's Declaration

Our expert, Professor Bronson, has set forth in great detail in his accompanying Declaration why a change of venue is, therefore, strongly recommended here:⁶

1) There has been unusually extensive pretrial publicity in this case. In the Denver Post and the Rocky Mountain News alone, there have been 1,408 articles since January 2000. This contrasts strikingly with the statistical mean of just 87 articles in the 115 cases in which Professor Bronson testified, and with even that low a mean average, almost half of the changes of venue motions were granted in those cases. In the Denver Post, the average length of the articles was 2.74 pages, and the average was 1.73 pages in the Rocky Mountain News. Between the two papers, there have been a total of 3,090 pages. 60% of the Denver Post articles were on the front page or the first page of an interior section. 276 photographs accompanied the articles in the Post, while 595 accompanied articles in the Rocky Mountain News. There were 40 Post editorials. These articles were spread out evenly over the years, *e.g.*, 211 in 2001, 215 in 2005 and, as of two weeks ago, 93 so far this year. The circulation of these papers is each more than a half million.

2) The coverage was highly inflammatory and replete with hostility, resentment, suspicion and repeated calls for Mr. Nacchio's indictment, *e.g.*, "Where is Nacchio?" and "elsewhere, prosecutors are nailing the honchos." (*See Exhibit O*, ¶ 86) The theme throughout the coverage was that there was no doubt as to Mr. Nacchio's guilt, and it didn't make a difference what the charges were so long as he was convicted of something. (*Id.*, ¶ 96) Other

⁶ In the 250 or so cases in which Professor Bronson has opined on this subject, he only recommended a change of venue in 106 situations. (*See Exhibit O*, ¶ 11)

examples of this coverage are set forth throughout this motion, as well as in Exhibit O, ¶¶ 66-111.

3) It has been demonstrated through many academic studies that jurors exposed to negative pretrial publicity were significantly more likely to judge a defendant guilty, compared to subjects exposed to less or no pretrial publicity. Pretrial publicity creates a framework about a defendant's guilt and once the belief is formed it is difficult to dislodge -- the presumption of innocence becomes a presumption of guilt. Jurors will therefore improperly reject evidence that conflicts with the "story model" they derived from reading about the case.

4) The salience of Mr. Nacchio and Qwest to the Denver community makes the pretrial publicity here particularly damaging. The salience not only involved municipal identity (in a similar manner as local citizens identified Enron with Houston), but also thousands of jobs, retirement security and investment portfolios. This combination of salient factors makes this case especially relevant to the potential jurors and, therefore, increases their interest in this proceeding. This creates more prejudice locally and only a change of venue can free the case from most of the prejudice described. (Exhibit O, ¶¶ 135-36)

5) Given the way this case has affected it, the size of the Denver community will not mitigate the prejudice. (*Id.*, ¶¶ 122-45)

6) Although Professor Bronson has not yet been able to complete a community survey of Denver, a survey he has completed in another case involving top corporate officials charged with white collar crime demonstrates a high level of bias against corporate leaders. For example, 60% agreed that if a high level executive is charged with fraud he is probably guilty, as compared to only 17% feeling the same way toward other defendants. Thus, in addition to the

high base line of prejudice and prejudgment against any CEO, we must add the specific bias against Mr. Nacchio as a result of *years* of adverse media reporting. Together, this makes Denver a wholly inappropriate place to conduct this trial. (*Id.*, ¶¶ 140-45)

III. A CHANGE OF VENUE SHOULD BE GRANTED FOR THE CONVENIENCE OF PARTIES AND WITNESSES, AND IN THE INTERESTS OF JUSTICE

Should the Court be disinclined to grant a Rule 21(a) change of venue due to the pervasive prejudice in the District of Colorado, the Court is, alternatively, respectfully asked to exercise its discretion and direct a Rule 21(b) transfer of these proceedings to the District of New Jersey for the convenience of parties and witnesses, and in the interests of justice. In this respect, the pervasive prejudice -- even if insufficient in and of itself to mandate a change of venue -- is, nevertheless one of the factors the Supreme Court instructed be taken into account when weighing the competing interests on a discretionary change of venue.

A. Criminal Rule 21(b)

Fed. R. Crim. P. 21, entitled “Transfer for Trial,” recites in relevant part:

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.

In this Circuit, it is well established that “[t]he decision whether to grant a motion for change of venue rests largely in the sound discretion of the trial judge” *United States v. Calabrese*, 645 F.2d 1379, 1384 (10th Cir.), *cert. denied*, 451 U.S. 1018 and 454 U.S. 831 (1981), *citing United States v. Jobe*, 487 F.2d 268, 269-70 (10th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974); *accord, United States v. Williams*, 897 F.2d 1034, 1037 (10th Cir. 1990), *cert. denied*, 500 U.S. 937 (1991) (quoting and citing earlier 10th Circuit authority).

The *Calabrese* court, 645 F.2d at 1384, looked to the standards set forth in the Supreme Court's seminal decision in *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 244 (1964), which provides guidance for the exercise of a court's discretion. In *Platt*, the Supreme Court approved specific factors for considering a Rule 21(b) transfer: (1) location of the defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of the defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district involved; and (10) any other special considerations. 376 U.S. at 243-44.

"While none of the above factors is, by itself, dispositive, 'it remains for the court to try and strike a balance and determine which factors are of greatest importance.'" *United States v. Martino*, 2000 WL 1843233, *5 (S.D.N.Y. 2000), quoting *United States v. Stephenson*, 895 F.2d 867, 875 (2d Cir. 1990). The *Martino* court held that:

Most relevant here is the location of the defendant. Courts in this district have accorded "greater weight to the defendant's interest in being tried in the district of his residence than to any other factor."

2000 WL 1843233, *6, quoting *United States v. Ohran*, 2000 WL 620217, *3 (S.D.N.Y. 2000) and citing *United States v. Russell*, 582 F. Supp. 660, 662 (S.D.N.Y. 1984). The *Russell* court observed, 582 F. Supp. at 662, that:

Unquestionably, it can be a hardship for defendants to stand trial far away from home. As a matter of policy, therefore, wherever possible, defendants should be tried where they reside.

In *United States v. Aronoff*, 463 F. Supp. 454, 456-67 (S.D.N.Y. 1978), the court took note of a long standing Supreme Court expression of public policy:

While the rule [21(b)] vests broad discretion in the trial court to determine whether the interests of justice dictate a transfer, the exercise of this discretion is guided by both constitutional history and case law. In *United States v. Johnson*, 323 U.S. 273, 276 ... (1944), Mr. Justice Frankfurter wrote:

Questions of venue in criminal cases ... are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed.

As he and many other judges have recognized, it can be a hardship for a defendant to face trial far away from home.... It has been stated, therefore, that as a matter of policy, a defendant should ordinarily be tried, whenever possible, where he resides. See, e.g., *Hyde v. Shine*, 199 U.S. 62, 78 ... (1905); *United States v. Cashin*, 281 F.2d 669, 675 (2d Cir. 1960).

Similarly, in *United States v. Benjamin*, 623 F. Supp. 1204, 1211 (D.D.C. 1985) (citation omitted), the court noted that it “has ‘liberally construed [Rule 21(b)] so as to minimize inconvenience to a defendant.’” Indeed, “[t]he primary concern of Rule 21(b) is to ‘minimize the inconvenience to the defense.’ ” *United States v. McDonald*, 740 F. Supp. 757, 762 (D. Alaska 1990), citing 2 C. Wright, *Federal Practice and Procedure*, Criminal 2d § 343 at 260 (1982); *United States v. Leining*, 1990 WL 11605, *2 - *3 (D. Kan. 1990) (setting forth the *Platt* factors and observing that “the first five factors have the most significance.”).

In contrast to the importance of the defendant’s location, the location of government attorneys is not a significant factor. The *Benjamin* court noted that “[t]he United States is ubiquitous. ... the Department of Justice ... should be, ‘at home,’ not only in Washington, D.C., but also ... any other place ... elsewhere in which a federal court sits. ... The government is represented by two attorneys from the Department of Justice whose duty and practice is to try cases in any federal court in the United States.” *Benjamin*, 623 F. Supp. at 1212. See also *United States v. Gruberg*, 493 F. Supp. 234, 243 (S.D.N.Y. 1979) (“the Government’s

convenience is, however, a factor given little weight when other considerations of convenience suggest transfer of a trial under Rule 21(b).”).

Importantly, a defendant does not bear an excessive burden on the balancing of the interests of justice:

Nothing in Rule 21(b) or in the cases interpreting it place on the defendant seeking a change of venue the burden of establishing “truly compelling circumstances” for such a change. It is enough if, all relevant things considered, the case would be better off transferred to another district.

Matter of Balsimo, 68 F.3d 185, 187 (7th Cir. 1995) (Posner, C.J., quoting *Platt*).

B. Mr. Nacchio’s Residence Strongly Merits A Change of Venue

As has been shown, the single most important *Platt* factor is the location of the defendant. Mr. Nacchio maintains a residence in New Jersey. Even when he was CEO of Qwest, Mr. Nacchio commuted to Denver from New Jersey on a weekly basis. Indeed, Mr. Nacchio’s refusal to move to Denver has long been the source of criticism by the local press, and is one basis for the pervasive prejudice which prevents Mr. Nacchio from ever receiving a fair trial in this District. A June 21, 2002 article in the Denver Business Journal, headlined “Notebaert’s plans include move; Qwest boss to call Denver home,” began: “With one simple move, Richard “Dick” Notebaert is distinguishing himself from his predecessor. The day after the news broke that Dick Notebaert would replace Qwest CEO Joe Nacchio, Notebaert’s wife Peggy went shopping in Denver for a place to live.” The article continued, “Nacchio had been criticized for never living in the city where his company has its headquarters. Instead, he spent more than five years splitting his time between his home in New Jersey and Denver -- flying in each week and staying at a downtown hotel.” (See Exhibit M at 149-51)

In addition to his personal inconvenience, Mr. Nacchio will have to relocate for many weeks, even months, to prepare for and try this case. Mr. Nacchio's wife and two sons plan to attend his trial. Taking them all away from their home for months on end will, at the very least, add to Mr. Nacchio's personal burden. As the *Benjamin* court so aptly explained when granting defendants' Rule 21(b) motion, 623 F. Supp. at 1212:

[T]his will be a protracted trial. The trial does not require the presence of any principal or corporate representatives of the government. However, nine defendants must be in court all day, every day, 3000 miles from their homes, families, businesses and offices.

Mr. Nacchio's 88 year old mother also resides in New Jersey. She has expressed a desire to support her son by attending the trial but her health will not allow her to do so if the trial is in Denver. Additionally, Mr. Nacchio shares caretaking responsibility for his mother, but he obviously will be unable to perform this duty during the months he would be required to be in Denver preparing for, and taking part in, the trial. His sons also require continuous medical supervision from their local physicians. Indeed, it was these familial duties to his elderly parents (his father since deceased) and to his children which prevented Mr. Nacchio from relocating to Denver as CEO of Qwest.

In the end, this important public policy, recognized by many circuits and districts across the country as well as by the Supreme Court itself, weighs heavily in favor of transferring Mr. Nacchio's trial to the District of New Jersey.

C. Mr. Nacchio's Witnesses Are In New Jersey Or, At A Minimum, More Accessible To New Jersey Than To Colorado

Many of Mr. Nacchio's fact witnesses are from New Jersey. Others, such as the brokers with whom he placed the "sell" orders which underlie the indictment, are in Boston, New York,

Florida or California. Mr. Nacchio's character witnesses are from New Jersey. The "CIPA" - related witnesses are largely located in the Washington, D.C. area.⁷ "Although numbers alone are not sufficient to warrant a change of venue, inconvenience to such a great proportion of witnesses weighs heavily in favor of transfer...." *McDonald*, 740 F. Supp. at 762.

Courts have repeatedly recognized that a defendant is prejudiced if his character witnesses are forced to testify in a venue where they are strangers:

The Court cannot underestimate the importance of these [character] witnesses to the Defendants and of the greater likelihood that the Defendants will in fact be able to produce such witnesses to testify if the trial of this action is held in [his home state], given Justice Murphy's observation that:

Very often the difference between liberty and imprisonment in cases where the direct evidence offered by the government and the defendant is evenly balanced depends upon the presence of character witnesses. The defendant is more likely to obtain their presence in the district of his residence The inconvenience, expense, and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use. Moreover, they are likely to lose much of their effectiveness before a distant jury that knows nothing of their reputations.

U[nited] S[tates] v. Johnson, 323 U.S. 272, 279 ... (1944) (Murphy, J., concurring). *See also, U[nited] S[tates] v. Posner*, 549 F. Supp. 475, 477-78 (S.D.N.Y. 1982); *U[nited] S[tates] v. Aronoff*, 463 F. Supp. 454, (S.D.N.Y. 1978).

⁷ As it already stands, even without further discovery from the government, Mr. Nacchio's Section 5 CIPA submission (*see* Doc. 73) has identified to the Court and to the government individuals representing various clandestine government agencies with whom Mr. Nacchio had critical conversations. Should the Court rule this evidence relevant, these individuals will also be among the witnesses called by the defense. None of these witnesses are resident in Colorado. Indeed, most work or reside in the Washington, D.C. area, far closer to New Jersey than to Denver.

United States v. Hurwitz, 573 F. Supp. 547, 552 (S.D. W.Va. 1983). Similarly, in *Russell*, the court stated:

Since this case involves allegations of fraud, the *mens rea* of the defendants and their general character will be of some consequence. Even if, as is likely, not all of the character witnesses ultimately testify, the ability of the Russells to call them will be much less, and the cost much more, if the case is tried in New York rather than Memphis. The availability and convenience of these witnesses, while not a controlling factor, is one that should be given considerable weight, *see, e.g., United States v. Haley*, 504 F. Supp. 1124, 1127-28 (E.D. Pa. 1981), and in this instance that factor favors transfer.

582 F. Supp. at 663; *see also Martino*, 2000 WL 1843233, * 6 (“As courts have recognized, the impact of character witnesses is generally greater in the district where such witnesses live and work.”) (multiple citations omitted).

Thus, the location of Mr. Nacchio’s witnesses in this case, where the issue of his *mens rea* is critical, also militates towards a transfer of venue to the District of New Jersey.

D. The Key Events At Issue Did Not Take Place In Colorado

Yet another *Platt* factor that favors change of venue is the locus of key events. Although the government claims that every event took place in Colorado, we have repeatedly demonstrated that this is not the case. Mr. Nacchio initiated many of the 42 trades at issue by telephone, often calling from New Jersey. The calls were placed to brokers located in Boston, Florida and California. The trades were then executed at the New York Stock Exchange. Few of these events occurred in Colorado. Additionally, as has been set forth in our Section 5 CIPA submission (*see* Doc. 73), virtually all of the year 2000 and 2001 discussions Mr. Nacchio had with representatives of clandestine government agencies took place in or around the District of Columbia, not the District of Colorado. These discussions, concerning classified government contracts which Mr. Nacchio reasonably believed would result in additional revenue to Qwest in

2001 which was *not* incorporated into Qwest's public "guidance," are key events going to Mr. Nacchio's lack of intent to defraud.

E. The Location Of Documents And Records Is Not A Factor

Many of the documents in this proceeding have been reduced to electronic form. In that respect, the location of documents is not a *Platt* factor. Additionally, all of Mr. Nacchio's trading records are maintained by his brokers, in locations such as Boston, Florida, California and New York. Here, too, there is nothing that favors trial in Denver.

F. Expense To The Parties And Location Of Counsel

Travel time and expense during a lengthy trial is an important factor courts consider when deciding whether transfer is merited. *McDonald*, 740 F. Supp. at 763 (noting that "travel time and expense would be considerably less for defendants if defendants, witnesses, and counsel did not have to travel....."). Mr. Nacchio, his family and his principal attorneys all reside in the New Jersey area. The cost of weekly transportation between New Jersey and Denver, added to the cost of lodging and the cost of storage and office space, will be a significant burden to the defense. Similarly, the cost of transporting and putting up the many fact and character witnesses will be substantially more if trial is held in Denver.

In contrast, only two government lawyers would have to travel from Denver to New Jersey. The other government lawyers are based in Washington, so even the cost to the government of trying the case in New Jersey might be less than to hold the trial in Denver. In any event, any additional expense to the government would be relatively insignificant because it is the custom of the various United States Attorneys to accommodate visiting prosecutors. *See*

McDonald, 740 F. Supp. at 763 (transferring venue and rejecting government's argument regarding financial burden).

This factor too, then, favors a change of venue.

G. Pervasive Prejudice In Denver

Finally, even if the pervasive prejudice we have shown to exist in the Denver area is not, in and of itself, reason to transfer venue under Fed. R. Crim. P. 21(a), the prejudice should still be considered a "special consideration" under Rule 21(b) and *Pratt*. It simply cannot be denied that severe animus exists towards Mr. Nacchio in the District of Colorado. Thus, if the "interests of justice" balancing is found to be close, this final factor ought to readily tip the scales in favor of transferring venue to the District of New Jersey.

IV. If The Court Deems A Rule 21(a) Transfer Premature, It Should Nevertheless Adopt Strict Voir Dire Procedures To Ensure That Any Prejudice Be Identified And Excluded From The Jury Pool

After the Court has had an opportunity to review the years of pejorative publicity in this case, it will be clear that the prejudice is so pervasive that an immediate change of venue should be ordered. If this motion is denied, Nacchio respectfully requests that the Court adopt the following procedure suggested by Professor Bronson (Exhibit O, Section IV), as a means to minimize prejudice among the jury pool:⁸

- A jury questionnaire should be prepared jointly by counsel, with any disagreements as to questions to be included (or excluded) resolved by the Court.

⁸ This procedure is similar to that used successfully in the first two trials in *United States v. Forbes*, No. 3:02cr264 (D. Conn.).

- The entire venire pool should be instructed to report to the Courthouse one week before jury selection begins, in order to complete the questionnaire. The completed questionnaires would then be made available to counsel so that they have ample time to review the questionnaires and confer as to those veniremen they agree should be excused for cause. As to any veniremen for whom there is disagreement as to whether they should be excused for cause based on the questionnaires, the parties would then present their arguments to the Court for a decision.

- When jury selection commences, the remaining veniremen should be brought before the Court in manageable groups, to be questioned individually by the Court and counsel, out of the presence of other members of the jury pool.

- When a sufficient number of potential jurors have been qualified in this fashion, that group should be assembled in Court for the exercise of challenges.

Professor Bronson's submission (Exhibit O, Sec. IV) provides a thoughtful and scholarly analysis of why these enhanced voir dire procedures are appropriate here. His research can be summarized as follows:

- 1) No Open Voir Dire -- Jurors are unconsciously influenced by others when they are questioned in groups. Jurors also are prone to give the "expected" answer under such circumstances. Conducting voir dire with each prospective juror individually, out of the presence of others, leads jurors to be more forthright and revealing of their opinions; the problem of tainting other jurors with prejudicial information is also avoided in the sequestered setting. Otherwise, prospective jurors can learn the "right" answers while listening to how others respond. This problem is particularly intractable in the face of pretrial publicity.

2) The Inability of a “Fair and Impartial” Voir Dire Question to Protect the Fair Trial Rights of the Defendant -- It is rare to see more than a handful of prospective jurors acknowledge that they cannot be fair and impartial, even in venue surveys, because there is so much pressure, even in an anonymous survey, for respondents to give the socially desirable and “good citizen” response.

3) Expanded Questionnaires To Be Filled Out At The Courthouse A Week In Advance -- This will actually make the voir dire more efficient and more effective, and also provide time for panelists to think more about their answers free from the pressure of voir dire in the courtroom. This procedure will also eliminate the possibility that prospective jurors will consult with family members or friends when completing the questionnaire.

4) Not Pre-Instructing The Panel Members (either on the questionnaires on in voir dire) -- It is far better to avoid telling panelists the purpose of the questionnaire or the voir dire is to get a fair jury, that the defendant is presumed innocent, etc., matters that might lead some panelists to downplay biased attitudes and information they hold. Instead, it would be preferable to instruct them that there are no right or wrong answers, only complete and incomplete answers.

5) Allow Partial Attorney-Conducted Voir Dire -- Only the attorneys are familiar enough with their case to propound useful and necessary follow-up questions, and even when a court allows follow-up questions to be submitted by the attorneys, the procedure lacks the necessary flow.

6) Use of Open-Ended Questions -- Another barrier to eliminating bias or prejudice is that voir dire is often conducted with so-called fixed-response or leading questions. A fixed-response question is one in which the answer is limited to a single response, such as yes or no,

agree or disagree. Only open-ended questions, which require jurors to formulate their thoughts in a sentence or two, will allow counsel some means of penetrating stereotyped and socially desirable responses, that is, to separate those jurors without unfair prejudice from those who are merely *unaware* of their unfair prejudices.

7) Additional Peremptory Challenges for The Defendant -- Since the voir dire in this case is likely to show more bias against Mr. Nacchio than against the government, given the prejudicial pretrial publicity and other survey results, it would be appropriate to award the Defendant a substantial number of additional peremptory challenges.

Enhanced voir dire procedures are nothing new, and have frequently been employed in circuits and districts throughout the country when there was excessive pretrial publicity. In *United States v. Giese*, 597 F.2d 1170 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979), the Circuit Court of Appeals observed:

Perhaps to the misfortune of everyone involved in the judicial process, no precise rule prescribes the type of voir dire examination which is necessary to protect against prejudicial pretrial publicity. The appropriate scope and detail of the voir dire depend on the level of pretrial publicity and the discretion of the district court. When "pretrial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might tend to defeat or impair the rights of an accused." ... The voir dire "must not simply call for the jurors' subjective assessment of their own impartiality, and it must not be so general that it does not adequately probe the possibility of prejudice." ... The district court should conduct a careful, individual examination of each prospective juror, preferably out of the presence of the other jurors. A general question directed to the entire group of prospective jurors is inadequate.

597 F.2d at 1183 (multiple citations omitted).

Thus, where -- as here -- pretrial publicity has been great, it is appropriate for the Court to conduct a much more thorough voir dire. There is ample precedent from multiple Circuits for a

pre-trial questionnaire. For example, in *United States v. Taveras*, 2006 WL 1875339, * 10 (E.D.N.Y. 2006), the District Judge noted that, “[i]n cooperation with the parties, the court has developed the jury questionnaire with an eye to possible prejudice.” Similarly, in *Casey v. Moore*, 386 F.3d 896, 902 (9th Cir. 2004), it was observed that:

The district court denied the motion for change of venue. However, the court reserved to Casey the right to renew his motion after jury selection began. Eighty six prospective jurors answered inquiries in a special jury questionnaire regarding their knowledge of the case, their knowledge of the parties, their familiarity with firearms, whether they had been exposed to pretrial publicity from newspaper articles or radio reports, whether they had discussed the case with anyone, whether they had formed an opinion about the case, and whether jury duty would cause undue hardship.

In *Oswald v. Bertrand*, 374 F.3d 475 (7th Cir. 2004), the Circuit Court noted that “jury questionnaires against the background of enormous publicity” had been employed and observed that, “[f]rom the case law we distill the principle that adequacy is a function of the probability of bias; the greater the probability, the more searching the inquiry needed to make reasonably sure that an unbiased jury is impaneled.” *Id.* at 480. Finally, in *United States v. Davis*, 154 F.3d 772, 784 (8th Cir. 1998), *cert. denied*, 525 U.S. 1161, 1163, 1169 (1999), the Eighth Circuit acknowledged that:

The district court in this case, however, took substantial steps to alleviate the possible impact of the press release on the jury. First, the defendants were allowed to draft a jury questionnaire focusing on possible bias stemming from the pretrial publicity.

V. CONCLUSION

For the foregoing reasons, Joseph P. Nacchio respectfully asks for entry, pursuant to Fed. R. Crim. P. 21(a) or (b), of an Order transferring these proceedings to the District of New Jersey.

Respectfully submitted this 31st day of July, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2006, a true and correct copy of the foregoing **MOTION FOR CHANGE OF VENUE PURSUANT TO FEDERAL RULES OF CRIMINAL PROCEDURE 21(a) AND (b)** was served on the following via the USDC CM/ECF system:

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