

UNITED STATES DISTRICT COURT

District of COLORADOUNITED STATES OF AMERICA
v.

JOSEPH P. NACCIO

JUDGMENT IN A CRIMINAL CASECase Number: 05-cr-00545-EWN-01USM Number: 33973-013Herbert J. Stern, Jeffrey Speiser, Mark Rufolo, Alain Leibman,
Edward Nathan, Joel Silverstein, John M. Richilano, and
Marci Gilligan, Retained

Defendant's Attorneys

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) 24 through 42 of the Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
15 U.S.C. §§ 78j and 78ff; 17 C.F.R. § 240.10b-5 and 10(b)5-1	Securities Fraud (Insider Trading)	05/29/2001	24-42
18 U.S.C. §§ 981(a)(1)(C), 1956(c)(7)(A), 1961(1)(D), and 28 U.S.C. § 2461(c)	Forfeiture Allegation	05/29/2001	

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) 1 through 23 of the Indictment

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 27, 2007
Date of Imposition of Judgment

s/ Edward W. Nottingham
Signature of Judge

Edward W. Nottingham, Chief U.S. District Judge
Name and Title of Judge

August 3, 2007
Date

DEFENDANT: JOSEPH P. NACCHIO
CASE NUMBER: 05-cr-00545-EWN-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: seventy-two (72) months on each count of conviction, to be served concurrently.

The court makes the following recommendations to the Bureau of Prisons:

Designate defendant to Federal Prison Camp, Schuylkill, Pennsylvania, for service of sentence.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .
as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 12 p.m. within 15 days of designation .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOSEPH P. NACCIO
CASE NUMBER: 05-cr-00545-EWN-01**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of: two (2) years on each count of conviction, to be served concurrently.

The defendant must report to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within fifteen (15) days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with thirteen of the fourteen standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) the defendant shall provide access to any requested financial information.

DEFENDANT: JOSEPH P. NACCHIO
CASE NUMBER: 05-cr-00545-EWN-01

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer. The defendant shall pay the cost of treatment as directed by the probation officer. The Court authorizes the probation officer to release to the treatment agency all psychological reports and/or the presentence report for continuity of treatment. The defendant may continue mental health treatment with his current psychiatrist.
2. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the periodic payment obligations imposed pursuant to the Court's judgment and sentence.

DEFENDANT: JOSEPH P. NACCHIO
CASE NUMBER: 05-cr-00545-EWN-01**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 1,900.00	\$ 19,000,000.00	\$ 0.00

The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ _____ 0.00	\$ _____ 0.00	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- the interest requirement is waived for the fine restitution.
- the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JOSEPH P. NACCIO
CASE NUMBER: 05-cr-00545-EWN-01**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:
The special assessment shall be paid in full immediately.

The fine is due and payable within thirty (30) days of the date of sentencing. If the fine has not already been paid, the defendant shall pay the fine in equal monthly installments during the period of supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States: \$52,007,545.47

Payments shall be applied in the following order: (1) assessment, (2) fine principal, (3) fine interest.

DEFENDANT: JOSEPH P. NACCHIO
CASE NUMBER: 05-cr-00545-EWN-01**STATEMENT OF REASONS**

See attached Amended Memorandum of Sentencing Hearing and Report of Statement of Reasons

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORTA The court adopts the presentence investigation report without change.B The court adopts the presentence investigation report with the following changes.(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.)
(Use page 4 if necessary.)

1 Chapter Two of the U.S.S.G. Manual determinations by court (including changes to base offense level, or specific offense characteristics):

2 Chapter Three of the U.S.S.G. Manual determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

3 Chapter Four of the U.S.S.G. Manual determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 Additional Comments or Findings (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions):

C The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)**A No count of conviction carries a mandatory minimum sentence.B Mandatory minimum sentence imposed.C One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on

findings of fact in this case

substantial assistance (18 U.S.C. § 3553(e))

the statutory safety valve (18 U.S.C. § 3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):

Total Offense Level: _____

Criminal History Category: _____

Imprisonment Range: _____ to _____ months

Supervised Release Range: _____ to _____ years

Fine Range: \$ _____ to \$ _____

 Fine waived or below the guideline range because of inability to pay.

DEFENDANT: JOSEPH P. NACCHIO
CASE NUMBER: 05-cr-00545-EWN-01**STATEMENT OF REASONS**

See attached Amended Memorandum of Sentencing Hearing and Report of Statement of Reasons

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)

A The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.

B The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons. (Use page 4 if necessary.)

C The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual. (Also complete Section V.)

D The court imposed a sentence outside the advisory sentencing guideline system. (Also complete Section VI.)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (If applicable.)A **The sentence imposed departs** (Check only one.):

below the advisory guideline range

above the advisory guideline range

B **Departure based on** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):

5K1.1 plea agreement based on the defendant's substantial assistance

5K3.1 plea agreement based on Early Disposition or "Fast-track" Program

binding plea agreement for departure accepted by the court

plea agreement for departure, which the court finds to be reasonable

plea agreement that states that the government will not oppose a defense departure motion.

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):

5K1.1 government motion based on the defendant's substantial assistance

5K3.1 government motion based on Early Disposition or "Fast-track" program

government motion for departure

defense motion for departure to which the government did not object

defense motion for departure to which the government objected

3 **Other**

Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

C **Reason(s) for Departure** (Check all that apply other than 5K1.1 or 5K3.1.)

<input type="checkbox"/> 4A1.3	Criminal History Inadequacy	<input type="checkbox"/> 5K2.1	Death	<input type="checkbox"/> 5K2.11	Lesser Harm
<input type="checkbox"/> 5H1.1	Age	<input type="checkbox"/> 5K2.2	Physical Injury	<input type="checkbox"/> 5K2.12	Coercion and Duress
<input type="checkbox"/> 5H1.2	Education and Vocational Skills	<input type="checkbox"/> 5K2.3	Extreme Psychological Injury	<input type="checkbox"/> 5K2.13	Diminished Capacity
<input type="checkbox"/> 5H1.3	Mental and Emotional Condition	<input type="checkbox"/> 5K2.4	Abduction or Unlawful Restraint	<input type="checkbox"/> 5K2.14	Public Welfare
<input type="checkbox"/> 5H1.4	Physical Condition	<input type="checkbox"/> 5K2.5	Property Damage or Loss	<input type="checkbox"/> 5K2.16	Voluntary Disclosure of Offense
<input type="checkbox"/> 5H1.5	Employment Record	<input type="checkbox"/> 5K2.6	Weapon or Dangerous Weapon	<input type="checkbox"/> 5K2.17	High-Capacity, Semiautomatic Weapon
<input type="checkbox"/> 5H1.6	Family Ties and Responsibilities	<input type="checkbox"/> 5K2.7	Disruption of Government Function	<input type="checkbox"/> 5K2.18	Violent Street Gang
<input type="checkbox"/> 5H1.11	Military Record, Charitable Service, Good Works	<input type="checkbox"/> 5K2.8	Extreme Conduct	<input type="checkbox"/> 5K2.20	Aberrant Behavior
<input type="checkbox"/> 5K2.0	Aggravating or Mitigating Circumstances	<input type="checkbox"/> 5K2.9	Criminal Purpose	<input type="checkbox"/> 5K2.21	Dismissed and Uncharged Conduct
		<input type="checkbox"/> 5K2.10	Victim's Conduct	<input type="checkbox"/> 5K2.22	Age or Health of Sex Offenders
				<input type="checkbox"/> 5K2.23	Discharged Terms of Imprisonment
					Other guideline basis (e.g., 2B1.1 commentary)

D **Explain the facts justifying the departure.** (Use page 4 if necessary.)

DEFENDANT: JOSEPH P. NACCHIO
CASE NUMBER: 05-cr-00545-EWN-01

STATEMENT OF REASONS

See attached Amended Memorandum of Sentencing Hearing and Report of Statement of Reasons

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM

(Check all that apply.)

A The sentence imposed is (Check only one.):

below the advisory guideline range
 above the advisory guideline range

B Sentence imposed pursuant to (Check all that apply.):

1 Plea Agreement (Check all that apply and check reason(s) below.):

binding plea agreement for a sentence outside the advisory guideline system accepted by the court
 plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable
 plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the advisory guideline system

2 Motion Not Addressed in a Plea Agreement (Check all that apply and check reason(s) below.):

government motion for a sentence outside of the advisory guideline system
 defense motion for a sentence outside of the advisory guideline system to which the government did not object
 defense motion for a sentence outside of the advisory guideline system to which the government objected

3 Other

Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system (Check reason(s) below.):

C Reason(s) for Sentence Outside the Advisory Guideline System (Check all that apply.)

the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
 to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
 to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
 to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
 to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the **most effective manner** (18 U.S.C. § 3553(a)(2)(D))
 to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))
 to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))

D Explain the facts justifying a sentence outside the advisory guideline system. (Use page 4 if necessary.)

DEFENDANT: JOSEPH P. NACCHIO
CASE NUMBER: 05-cr-00545-EWN-01

STATEMENT OF REASONS

See attached Amended Memorandum of Sentencing Hearing and Report of Statement of Reasons

VII COURT DETERMINATIONS OF RESTITUTION

A Restitution Not Applicable.

B Total Amount of Restitution: _____

C Restitution not ordered (Check only one.):

- 1 For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
- 2 For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
- 3 For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
- 4 Restitution is not ordered for other reasons. (Explain.)

D Partial restitution is ordered for these reasons (18 U.S.C. § 3553(c)):

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)

Sections I, II, III, IV, and VII of the Amended Statement of Reasons form must be completed in all felony cases.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Edward W. Nottingham

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**AMENDED MEMORANDUM OF SENTENCING HEARING AND
REPORT OF STATEMENT OF REASONS**

Counsel for the Government, defense counsel, and defendant were present for the sentencing hearing. Based on that hearing, the report concerning pre-sentence investigation of defendant (hereinafter, the "PSR"), all other materials submitted to the court during or in connection with the sentencing hearing, and all materials in the court's file, the court enters the following findings, conclusions, and orders:

1. Pursuant to rule 32(b)(6) and (c)(3) of the Federal Rules of Criminal Procedure, the court verified that the defense attorney and defendant (1) were timely provided a copy of the report of the PSR, excluding only the final recommendation as to sentence, together with all addenda, and (2) had read and discussed the report. No other information was withheld.

2. The court afforded all counsel the opportunity to speak, to introduce testimony or other information relating to the report, and to comment on the probation officer's determination and on other matters relating to the appropriate sentence. The court addressed defendant personally and determined whether defendant wished to make a statement or present any information in mitigation of the sentence. Pursuant to 18 U.S.C. § 3771 (2007), the court found that the number of crime victims made it impracticable to accord all of the crime victims the right to be reasonably heard and therefore fashioned a reasonable procedure that did not unduly complicate or prolong the proceedings.

RESOLUTION OF FACTUAL DISPUTES AND DISPUTES CONCERNING APPLICATION OF ADVISORY SENTENCING GUIDELINES

Calculation of Gain

3. The guideline applicable to insider trading cases provides that the base offense level must be ratcheted up level by level as the amount of gain on the transaction increases. Specifically, the court must use the table appearing at U.S.S.G. § 2F1.1 (Nov. 2000)¹ to increase the level “corresponding to the gain resulting from the offense.” U.S.S.G. § 2F1.2. The commentary elaborates, explaining the term “gain” in the following language:

Because the victims and their losses are difficult if not impossible to identify, the gain, *i.e.*, the total increase in value realized through trading in securities by the defendant, . . . is employed instead of the victims’ losses.

Id., comment (backg’d). As the Supreme Court explained in *Stinson v. United States*, 508 U.S. 36, 44(1993), the commentary accompanying the guidelines not only explains them, but it “provides concrete guidance as to how even unambiguous guidelines are to be applied in practice.” The commentary is “an authoritative guide to the meaning” of a guideline. *Id.* at 42. (Citation omitted). The court finds the commentary’s explanation of the term “gain” to be unambiguous, inconsistent with the definition proposed by defendant, and straightforward in its application here. According to the direction of the commentary, it is the “total increase in value” which is to be used, not some increase measured by trying to figure out what part of value somehow relates to the undisclosed inside information. It is the value which is “realized”² in the transaction not a hypothetical value calculated at a later time. And it is the total value realized “through *trading* in [the] security,” not the value somehow related solely to the inside information. At least in this case — where defendant sold stock using unfavorable inside information — the court believes that the guideline straightforwardly requires the court, first, to calculate defendant’s net profit on each transaction by using his sale price less the cost of the

¹The PSR proposes use of the guidelines promulgated and effective in November of 2000, since that was the version in effect in April and May of 2001, when defendant committed the offenses of which he has been found guilty. Neither party has objected. The court will apply this version, because application of later versions to the disadvantage of the defendant may be prohibited by the Ex Post Facto Clause of the United States Constitution.

² To “realize” is “[t]o convert (securities, paper money, etc.) into cash, or (property of any kind) into money.” OXFORD ENGLISH DICTIONARY, found at <http://dictionary.oed.com>.

stock to him. *Accord, United States v. Mooney*, 425 F.3d 1093, 1100 (8th Cir. 2005) (majority *en banc* opinion). The court finds that this net profit is accurately set forth in Attachment C to the PSR and that the gain is \$44,692,545.47.

4. That is not the end of the matter, however. One of defendant's arguments — thought not his main one — is that, when he exercised his options, Qwest would deduct the cost of the options and also withhold an amount for taxes. The amount withheld, says defendant, must be deducted in calculating gain, because it represents money defendant never received. The Government resists this conclusion, relying on *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997). *DeFries* however, was a RICO criminal forfeiture case, and as the court noted, "Congress intended, in allowing forfeiture in a criminal prosecution, to provide an extreme remedy for an extreme situation in which organized crime was corrupting otherwise lawful enterprises and activities with money from illegal drug distribution and other racketeering activities." 129 F.3d at 1314. It is not apparent to the court why cases on criminal forfeiture should be persuasive on the question of how gain should be calculated under the sentencing guidelines. Hence, the court returns to the plain language of the commentary. The commentary directs the court to use the total value "realized" by defendant. Under the dictionary definition of the term (*see note 2, supra*), defendant did not realize what was not converted into money, cash, or the equivalent. When the amount withheld and not received by defendant (\$16,078,147.81, according to ex. 1 attached to his response to the PSR) is deducted, defendant's true gain appears to be approximately \$28,000,000.³ The increase in the offense level due to defendant's gain is therefore 16. U.S.S.G. § 2F1.1(b)(Q).

5. Defendant's main argument is that the method of determining gain set forth above, which is consistent with the approach of the Eighth Circuit *en banc* majority in *Mooney*, is flawed. According to defendant, the gravamen of the offense is the deceptive device of using undisclosed inside information, not trading in Qwest shares. Defendant posits that the market value of Qwest shares on any given day is determined by myriad factors, and the court can determine defendant's true gain only by breaking down these factors and isolating the part of the stock's value which can properly be attributed to the undisclosed inside information. Consistent with the dissenting opinion in *Mooney*, defendant would have the court perform this operation by focusing on the time when the inside information was finally disclosed, figuring out how long it took the market to absorb the information, and ascertaining the stock's value on this date of absorption. That, defendant argues, isolates the value of the information and properly values what defendant gained by using the information. As authority for this approach, defendant relies

³The court is rounding because the math does not add up. The problem appears to be an immaterial discrepancy between the PRS's table and the defendant's. The PSR does not deduct the exercise fees and other fees which were withheld and not received by defendant.

primarily on civil insider trading cases, on criminal securities fraud cases where the court was asked to ascertain loss, not gain, and on the dissenting opinion in *Mooney*.

6. Many of defendant's arguments have already been answered by the *en banc* majority in *Mooney*. While principals and rules developed in civil insider trading cases can sometimes be applied in criminal cases (e.g., the proper interpretation of words in a statute having both civil and criminal consequences), that is not the nature of the issue here. A civil plaintiff must ordinarily show a *loss* causally connected to defendant's wrongdoing; otherwise the plaintiff may receive an unwarranted windfall. The market absorption approach advocated by defendant and the dissent in *Mooney*, is intended to measure a civil plaintiff's loss, which bears no necessary relation to the civil defendant's gain. Measurement of loss is not the issue here, because the guideline requires the measurement of gain. For similar reasons, defendant's heavy reliance on the criminal case of *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005) is unavailing, because the court there was addressing the *loss* used in a generic securities fraud case, not the gain required by the guidelines in an insider trading case.

7. Defendant's proposed method of calculating gain suffers from another fundamental flaw — it misconceives the thrust of the statute and the nature of the harm at which the guideline is directed. The Supreme Court has consistently been clear that a person who possesses material inside information is under a duty either to disclose that information or to abstain from trading in the stock. *Chiarella v. United States*, 445 U.S. 222 (1980); *United States v. O'Hagan*, 521 U.S. 642 (1997). As defendant pointed out during trial, corporate insiders (and the corporation itself) commonly possess material inside information which they do not and/or cannot disclose because it is a corporate confidence or would put the corporation at a competitive disadvantage. As a practical matter, then, the thrust of the statutory violation for such a person is *trading* in securities on the basis of inside information, unless the insider can come within the safe harbor provided by rule 10b5-1. As the Government observes, there would be no profit to defendant and no loss to anyone else had defendant complied with his duty not to trade in the shares. By trading he unloaded his shares and pocketed *all* share growth and share value accumulated on that date, not just a hypothetical slice attributable to the inside information. The guideline therefore is consistent with the thrust of the statute in measuring gain according to the total value realized by trading, not just the part of the price reflecting the undisclosed material information.

Miscellaneous

8. The court determines that no finding is necessary concerning the remaining issues raised by the objections. The controverted matters were not taken into account in imposing sentence or would not affect the sentence. *See Fed. R. Crim. P. 32(c)(1); United States v. Wach*, 907 F.2d 1038 (10th Cir. 1990). They also would be unlikely to be considered by the United States Bureau of Prisons in classification and designation decisions.

9. Neither the Government nor the defendant has challenged any other aspect of the PSR. Therefore, the remaining factual statements in the report are adopted without objection as the court's findings of fact concerning sentencing.

GUIDELINE CALCULATIONS AND FINDINGS

10. Based upon all materials before the court, the court determines the appropriate guideline calculations to be as follows:

- a. Base Offense Level 8
- b. Adjustment for Gain +16
- c. Adjustment for Abuse of Position of Trust +2
- d. **Adjusted Offense Level** 26
- e. **Total Offense Level** 26
- f. Criminal History Category I
- g. Imprisonment Range sixty-three to seventy-eight months
- h. Supervised Release Range two to three years
- i. Fine Range \$12,500 to \$19,000,000

FINE

11. The court finds that defendant is able to pay a fine within the guideline range. Therefore, the court will impose a fine within the range. In determining the amount of the fine, the court has considered , as required by 18 U.S.C. §§ 3553(a) and 3572 and by section 5E1.2(d) of the guidelines, the nature and circumstances of the offense and the history and characteristics of the defendant. The court has also considered the need for the fine imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and to afford adequate deterrence to criminal conduct. Finally, the court has considered defendant's income, earning capacity, and financial resources; the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose; any pecuniary loss inflicted upon others as a result of the offense; the need to deprive the defendant of illegally

obtained gains from the offense; and the expected costs to the government of any imprisonment, and supervised release.

12. With respect to the matters outlined in the previous paragraph, the court finds and concludes as follows. The crimes of which defendant has been found guilty are ones of overarching greed. The testimony of Qwest's former officers permits the inference that trading on inside information was a familiar, accepted occurrence at Qwest. Since he was the chief executive officer of the company, defendant's own actions cannot but have condoned a culture in which this could occur. It is the court's premise that such crimes of greed can be deterred, in part, by not only draining them of all monetary benefit but by exacting additional monetary punishment to give would be perpetrators the message that the crime does not pay; it costs, above and beyond mere payback. It is the court's view that the maximum fine permitted by statute and the guidelines is necessary to afford adequate deterrence to this type of flagrant greed, to provide just punishment for the offenses, and to reflect the seriousness with which the court regards these offenses.

13. The defendant's financial resources as disclosed in the PSR and statements introduced as exhibits at trial disclose to the court's satisfaction that he is able to pay the fine imposed. While the fine will burden defendant, it will not unduly burden his family or any other person financially dependent on him, particularly when it is compared to the alternative punishment of imprisonment. Although the court finds that its forfeiture order entered contemporaneously will deprive defendant of illegally obtained gains, it nevertheless believes the substantial fine to be appropriate because of the considerations previously recited. An additional justification for such a fine is that defendant's conduct has imposed costs on the Government, including the cost of imprisonment and supervised release. Those should be reflected in his monetary punishment. Based on the PSR, the court finds the current cost of imprisonment to be \$2,036.92 per month and the cost of supervised release to be \$294.60 per month.

STATEMENT OF REASONS FOR SENTENCE

14. The reasons for all components of the sentence, *see* 18 U.S.C.A. § 3553(c) (West 2006), were stated in open court and will not be repeated here. In determining each component of the particular sentence to be imposed, the court has considered the nature and circumstances of the offense and the history and characteristics of the defendant. The court has also considered the kinds of sentences available and the sentencing range established in the federal sentencing guidelines. Consideration of those guidelines also serves the purpose of avoiding unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. In addition:

a. The court finds (1) that a term of incarceration is appropriate and (2) that the length of incarceration imposed is sufficient, but not greater than necessary, to achieve the statutory purposes of such a sentence, including the need

for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant. The court recognizes “that imprisonment is not an appropriate means of promoting correction and rehabilitation.” 18 U.S.C.A. § 3582(West 2006). The court further finds that these purposes of incarceration will be adequately achieved by the combination of imprisonment and home detention/community confinement set forth in paragraph 17 below.

b. The court further finds (1) that a term of supervised release following imprisonment is appropriate and (2) that the length of the term and the conditions imposed are reasonably related to — and involve no greater deprivation of liberty than is reasonably necessary to achieve — the statutory purposes of this component of the sentence, including the need for the sentence imposed to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed rehabilitation, professional supervision, educational or vocational training, medical care, or other correctional treatment in the most effective manner.

15. Defendant has moved for imposition of a sentence below the guideline range recommended by the sentencing commission , urging that there exists a “mitigating circumstance of a kind, or to a degree, not adequately taken into consideration” by the commission in formulating the guidelines. *See U.S.S.G. § 5K2.0, p.s.* The Government opposes the motion. Specifically defendant moves for a departure under section 5H1.6 and 5H1.11. In parallel language, these sections provide that “[f]amily ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range” (section 5H1.6) and that “charitable . . . and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range (section 5H1.11). Thus, a departure based on these sections is appropriate only if the court can conclude that the family responsibilities or ties are “extraordinary.” For reasons recited in open court, the court does not find such “extraordinary” circumstances and thus declines to depart.

16. Because of the considerations recited above, especially the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, the court will impose a sentence within the recommended guideline range.

IMPOSITION OF SENTENCE

17. The sentence imposed is as follows:

a. Defendant is committed to the custody of the United States Bureau of Prisons, to be imprisoned for a period of seventy-two months on each count of conviction, to be served concurrently. The court recommends that the Bureau of Prisons designate FPC Schuylkill for service of sentence.

b. Upon release from his term of imprisonment, defendant will serve a term of two years on supervised release on each count of conviction, to be served concurrently. Within seventy-two hours of his release from the custody of the Bureau of Prisons, defendant will report in person to the probation office in the district to which he is released. Defendant will observe the "standard" conditions of supervised release heretofore adopted by this court, and the clerk shall specifically enumerate these conditions in the judgment prepared under rule 32(d) of the Federal Rules of Criminal Procedure. Defendant will also observe the following special conditions:

i. He will not possess any firearm, destructive device, or any other dangerous weapon, as defined by federal or state statute.

ii. He will not illegally possess or use controlled substances.

iii. Because defendant's PSR indicates a low risk of future substance abuse by defendant, the court suspends the requirement of 18 U.S.C.A. § 3583(d) (West 2006) concerning mandatory drug testing.

iv. He will not commit a federal, state, or local crime.

v. The defendant shall cooperate in the collection of DNA, as directed by the probation officer.

vi. If the fine has not already been paid, he will pay the fine imposed in paragraph 17.c in equal monthly installments during the period of supervised release.

vii. He will not incur new credit charges or open additional lines of credit without the approval of the probation officer, unless he is in compliance with all periodic payment obligations imposed pursuant to the court's judgment and sentence.

viii. Defendant will participate in a program for mental health treatment, as directed by the probation officer, until he is released from that program by the probation officer. He will pay all costs of such treatment. The court authorizes the probation officer to release to the treatment agency all psychological reports and/or the PSR, for continuity of treatment. He may continue mental health treatment with his current psychiatrist.

c. Defendant will pay a fine of \$19,000,000. The fine is due and payable within thirty days of the date of sentencing.

d. The defendant shall pay a special assessment of \$1,900. 18 U.S.C.A. § 3013 (West 2006). This amount shall be payable immediately.

e. Payments made pursuant to the court's judgment shall be applied in the following order: (i.) special assessment, (ii.) fine principal, (iii.) fine interest

MISCELLANEOUS

18. Defendant has been advised of his right to appeal the jury's verdict of guilty and the sentence imposed. If he wishes to appeal, his trial counsel shall assist him in perfecting the appeal. If he cannot pay the cost of an appeal, he may apply to the court for leave to appeal *in forma pauperis*. If defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of defendant.

19. This Memorandum of Sentencing Hearing and Report of Statement of Reasons is finalized and filed after oral imposition of sentence. It is intended to summarize and supplement the court's findings and conclusions delivered orally at the sentencing hearing. If any errors in the oral findings and conclusions were noted during the process of finalization, they have been corrected herein. Therefore, in the event of inconsistency between the oral findings and the contents of this memorandum, the contents of this memorandum are intended to control unless and until I expressly order otherwise.

20. Defendant was ordered to surrender himself voluntarily to the facility designated by the United States Bureau of Prisons within fifteen days of the date of designation.

21. The probation officer shall prepare the judgment required by rule 32(d) of the Federal Rules of Criminal Procedure, in accordance with this Memorandum of Sentencing Hearing and Report of Statement of Reasons. To comply with 18 U.S.C.A. § 3612(b)(1)(A) (West 2006), a separate section of the judgment styled "ADDENDUM TO JUDGMENT IN CRIMINAL CASE (CONFIDENTIAL INFORMATION CONCERNING DEFENDANT)" shall contain defendant's social security account number, mailing address, and residence address. The

probation officer shall maintain this Addendum, and it shall not be filed with the clerk. Unless otherwise ordered, the Probation Department shall disclose the Addendum only to counsel of record and to any attorney for the Government engaged, pursuant to 18 U.S.C.A. § 3612(b)(1)(A), in collection of a monetary obligation imposed by the judgment. The judgment entered and filed by the clerk shall refer to the Addendum and shall recite that it contains defendant's social security number, date of birth, residence address, and mailing address and is withheld from the file pursuant to court order. The court finds that defendant has a privacy interest in keeping this information confidential, that public disclosure of this information may potentially harm defendant, that the public interest in this information is minuscule, and that the potential harm to defendant outweighs the public interest in disclosure.

22. The court concludes that this statement of reasons for imposing sentence in a criminal case is presumptively a matter of public interest and scrutiny. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 1983, 1984 U.S.C.C.A.N. 3182, 3263 (1983) ("The statement of reasons . . . informs defendant and the public of the reasons for the sentence. It provides information to criminal justice researchers.") No party has made a sufficient showing of "good cause," Fed R. Crim. P. 32(i)(4)(c), why it should **not** be a matter of public record. Therefore, to facilitate systematic documentation of any decision concerning departure, in compliance with 18 U.S.C.A. § 3553(c)(2) (West 2006), the probation officer shall attach a copy of this Memorandum of Sentencing Hearing and Report of Statement of Reasons to the judgment filed by the clerk. The Probation Department shall attach a copy of this Memorandum of Sentencing Hearing and Report of Statement of Reasons to the PSR. The Probation Department shall also forward copies to the United States Sentencing Commission and the United States Bureau of Prisons.

Dated this 2nd day of August, 2007.

BY THE COURT:

s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
Chief United States District Judge