

NO. 07-1311

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH P. NACCHIO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE JUDGE NOTTINGHAM
DISTRICT COURT NO. 1:05-cr-00545-EWN

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

Herbert J. Stern
Jeffrey Speiser
STERN & KILCULLEN
75 Livingston Avenue
Roseland, New Jersey 07068
(973) 535-1900 (telephone)
(973) 535-9664 (facsimile)

Maureen E. Mahoney
Alexandra A.E. Shapiro
J. Scott Ballenger
Nathan H. Seltzer
LATHAM & WATKINS LLP
555 11th Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200 (telephone)
(202) 637-2201 (facsimile)
Maureen.Mahoney@lw.com

Dated: September 15, 2008

Counsel for Defendant-Appellant

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
I. NACCHIO FULLY COMPLIED WITH CUSTOMARY PROCEDURES FOR INTRODUCING EXPERT TESTIMONY AND HAD NO NOTICE THAT DIFFERENT PROCEDURES WOULD GOVERN	2
A. Nacchio Fully Complied With His Rule 16 Obligations	2
B. Nacchio Had No Obligation To Make Any Additional Proffer Prior To Calling Fischel To The Stand	4
C. The District Court Never Provided Nacchio Notice That It Was Modifying Ordinary Procedures.....	9
D. Nacchio Did Not Have A Fair Opportunity To Request A Hearing	12
II. THE GOVERNMENT IS UNABLE TO JUSTIFY THE DISTRICT COURT’S RULING ON OTHER GROUNDS	13
A. Fischel’s Testimony Satisfied Rules 16, 401, 702, 602, and 403	13
B. The Government Has No Justification For The District Court’s Decision To Preclude Fischel’s Rebuttal Testimony Or To Deny Nacchio’s Request For A <i>Daubert</i> Hearing	23
C. The Government Has Not Shown That The Error Was Harmless	25
III. A NEW TRIAL IS THE PROPER REMEDY	28
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985)	29, 30
<i>Bourjaily v. United States</i> , 483 U.S. 171 (1987)	5
<i>Beech Aircraft Corp. v. Rainey</i> , 488 U.S. 153 (1988)	7
<i>Brown v. Kuhlman</i> , 142 F.3d 529 (2d Cir. 1998)	29
<i>Cortes-Irizarry v. Corporacion Insular de Seguros</i> , 111 F.3d 184 (1st Cir. 1997)	6
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986)	7
<i>Daubert v. Merrell Dow Pharmaceuticals</i> , 509 U.S. 579 (1993)	2, 11, 20
<i>Dodge v. Cotter Corp.</i> , 328 F.3d 1212 (10th Cir. 2003)	7, 30
<i>General Electric Co. v. Joiner</i> , 522 U.S. 136 (1997)	7, 9
<i>Goebel v. Denver & Rio Grande Western Railroad Co.</i> , 215 F.3d 1083 (10th Cir. 2000)	6
<i>In re James Wilson Associates</i> , 965 F.2d 160, 173 (7th Cir. 1992)	24
<i>In re Paoli Railroad Yard PCB Litigation</i> , 916 F.2d 829 (3d Cir. 1990)	8
<i>Jackson v. Denno</i> , 378 U.S. 368 (1964)	29

	Page(s)
<i>Jonasson v. Lutheran Child & Family Services</i> , 115 F.3d 436 (7th Cir. 1997).....	6
<i>Koon v. United States</i> , 518 U.S. 81 (1996)	23
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (1999)	6, 8, 28
<i>LeBeau v. Libby-Owens-Ford Co.</i> , 799 F.2d 1152 (7th Cir. 1986).....	22
<i>Ley v. Visteon Corp.</i> , 2006 WL 2559795 (E.D. Mich. Aug. 31, 2006)	24
<i>Miller v. Pfizer, Inc.</i> , 356 F.3d 1326 (10th Cir. 2004).....	7
<i>Oddi v. Ford Motor Co.</i> , 234 F.3d 136 (3d Cir. 2000).....	9
<i>Padillas v. Stork-Gamco, Inc.</i> , 186 F.3d 412 (3d Cir. 1999).....	6, 8
<i>Phillips v. Hillcrest Medical Center</i> , 244 F.3d 790 (10th Cir. 2001).....	7
<i>Polys v. Trans-Colorado Airlines, Inc.</i> , 941 F.2d 1404 (10th Cir. 1991).....	7
<i>Robbins v. Koger Properties, Inc.</i> , 116 F.3d 1441 (11th Cir. 1997).....	15
<i>Robinson v. Missouri Pacific Railroad Co.</i> , 16 F.3d 1083 (10th Cir. 1994).....	13
<i>Shad v. Dean Witter Reynolds, Inc.</i> , 799 F.2d 525 (9th Cir. 1986).....	20
<i>Sprint/United Management Co. v. Mendelsohn</i> , 128 S. Ct. 1140 (2008)	28, 30

	Page(s)
<i>Taylor v. Illinois</i> , 484 U.S. 400 (1988)	22
<i>Thompson v. State Farm Fire & Casualty Co.</i> , 34 F.3d 932 (10th Cir. 1994)	23
<i>TK-7 Corp. v. Estate of Barbouti</i> , 993 F.2d 722 (10th Cir. 1993)	24
<i>TSC Industries, Inc. v. Northway, Inc.</i> , 426 U.S. 438 (1976)	24
<i>Unger v. Amedisys, Inc.</i> , 401 F.3d 316 (5th Cir. 2005)	15
<i>United States v. Alatorre</i> , 222 F.3d 1098 (9th Cir. 2000)	5
<i>United States v. Call</i> , 129 F.3d 1402 (10th Cir. 1997)	23
<i>United States v. Cohen</i> , 510 F.3d 1114 (9th Cir. 2007)	26
<i>United States v. Cronic</i> , 466 U.S. 648 (1984)	2
<i>United States v. Davis</i> , 40 F.3d 1069 (10th Cir. 1994)	5
<i>United States v. Diaz</i> , 300 F.3d 66 (1st Cir. 2002)	5
<i>United States v. Finley</i> , 301 F.3d 1000 (9th Cir. 2002)	3
<i>United States v. Forbes</i> , 2006 WL 2792883 (D. Conn. Sept. 28, 2006)	24
<i>United States v. Hall</i> , 93 F.3d 1337 (7th Cir. 1996)	26

	Page(s)
<i>United States v. Kingston</i> , 922 F.2d 1234 (6th Cir. 1990).....	11
<i>United States v. Nichols</i> , 169 F.3d 1255 (10th Cir. 1999).....	1, 5, 8
<i>United States v. Perez</i> , 989 F.2d 1574 (10th Cir. 1993).....	22, 29, 30
<i>United States v. Roberts</i> , 88 F.3d 872 (10th Cir. 1996).....	7, 22
<i>United States v. Safavian</i> , 528 F.3d 957 (D.C. Cir. 2008)	26
<i>United States v. Sandoval</i> , 390 F.3d 1294 (10th Cir. 2004).....	6
<i>United States v. Sarracino</i> , 340 F.3d 1148 (10th Cir. 2003).....	22
<i>United States v. Yarbrough</i> , 527 F.3d 1092 (10th Cir. 2008).....	26
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984)	29
<i>Washington v. Texas</i> , 388 U.S. 14 (1967)	2
<i>Weisgram v. Marley Co.</i> , 528 U.S. 440 (2000)	7

STATUTES

28 U.S.C. §2106	30
-----------------------	----

OTHER AUTHORITY

Federal Rule of Criminal Procedure 16(b)(1)(C)(i)	3
Federal Rule of Criminal Procedure 57(a)(2).....	12

	Page(s)
Federal Rule of Evidence 104, advisory committee's note.....	5
Federal Rule of Evidence 702	20

The government musters no authority even suggesting that Nacchio had any obligation to submit a written proffer by the time the court launched into its ruling. Its principal argument is that Nacchio, who had called his witness to the stand and was prepared to establish reliability in the ordinary manner, forfeited his defense by not getting the words “I want a hearing” out before the judge silenced him. The government cites nothing for this novel proposition. And its repeated assertion that Nacchio “could have” disclosed more information about Fischel’s testimony before calling him to the stand is irrelevant. The district court never ordered Nacchio to do more than he did and there is nothing prejudicial to the opponent in laying the foundation when the expert witness is called. *United States v. Nichols*, 169 F.3d 1255, 1263-64 (10th Cir. 1999).

Alternatively, the government claims that a preeminent expert on the operation of financial markets was not going to say a single thing that would have assisted the jury. But it does not cite even one case excluding this “venerable” form of expert evidence. And its closing argument demonstrates just how essential Fischel’s testimony was.

- The government told the jury that investors completely discounted IRUs and, when they were disclosed, “immediately stripped” “growth that was related to the IRUs” out of estimates. APP-4278.¹ Fischel would have explained to the jury that his study of competitors’ revenue multiples—a standard method in finance—demonstrated that investors did *not* discount IRU revenues or their contribution to growth.
- The government told the jury that “when [Qwest] disclosed in the 10k in

¹ “SB-” refers to Appellant’s Supplemental Brief; “SBUS-” refers to the Supplemental En Banc Brief for the United States; NACDL BR. refers to the en banc brief of National Association of Criminal Defense Lawyers; “US Supp. App.” refers to the Supplemental Appendix for the United States, filed before the panel; all other abbreviations are used as described in SB-1 n.1. Emphases are added unless noted.

August” “how the IRUs are playing a role, the stock price does drop.” APP-4478. That was totally misleading because expert testimony about how the market incorporates information, which Fischel would have provided when explaining the effect of Qwest’s disclosures on its stock price, would have shown that there was *no* significant decline in the price when the disclosures were made. He would also have explained why the decline in Qwest’s stock was attributable to a severe reduction in demand for telecom services across the sector, and that the risks of a deteriorating economy were already known to the market.

- The government told the jury that because Nacchio did not “take those numbers down like their competitors did” in late 2000 it was “conclusive evidence beyond a reasonable doubt that his conduct was intentional and willful.” APP-4502. Fischel’s own study showed that many of Qwest’s competitors did not accurately predict the severity of the economic downturn and also reduced guidance *after* Nacchio’s last trade.
- The government told the jury that an executive who “really believe[s] in the company” would “exercise the[] [options]” and “hold them.” APP-4464. Fischel would have explained that his study of executive trading practices demonstrated that executives customarily exercise and sell.

Fischel’s exclusion was fundamentally unfair and eliminated “the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing,” *United States v. Cronin*, 466 U.S. 648, 656 (1984), and “to present the defendant’s version of the facts ... to the jury so it may decide where the truth lies.” *Washington v. Texas*, 388 U.S. 14, 19 (1967). A new trial is essential.

I. NACCHIO FULLY COMPLIED WITH CUSTOMARY PROCEDURES FOR INTRODUCING EXPERT TESTIMONY AND HAD NO NOTICE THAT DIFFERENT PROCEDURES WOULD GOVERN

A. Nacchio Fully Complied With His Rule 16 Obligations

The government ignores the panel’s unanimous agreement that Nacchio’s notice satisfied Rule 16 and that it would be legal error to exclude an expert’s testimony because the Rule 16 notice did not establish reliability under Rule 702 and *Daubert v. Merrell*

Dow Pharmaceuticals, 509 U.S. 579 (1993). The government instead tries to suggest (at 1-2, 7-8, 9, 27, 30, 57, 59) that Nacchio should be faulted for failing to provide the prosecution with notice or a *Daubert* proffer during 15 months of pre-trial proceedings even though the trial court did not, and could not, make any such finding.

The notice was not late. Nacchio gave the government his Rule 16 notice on the date *suggested by the government and set by the court*, three days before jury selection commenced. SB-3.² A defendant is not required to provide *any* Rule 16 notice unless he requests expert disclosures from the government, “*and the government complies.*” Fed. R. Crim. P. 16(b)(1)(C)(i). The government provided its notice 25 days before trial. It was only then that the district court could set a due date for Nacchio’s notice. And the government was not strictly entitled to any Rule 16 notice at all because the court later found that it had *not* complied with its own Rule 16 obligations. U.S. Supp. App. 28.³

Although the government contends (at 33) that it could not prepare for cross-

² Although the court ordered Nacchio to “bring[] his submission into compliance with Rule 16,” Nacchio’s first (March 16) notice disclosed the “general nature” of Fischel’s testimony, *see United States v. Finley*, 301 F.3d 1000, 1017 (9th Cir. 2002), and explained that Fischel would “provide economic analysis of Mr. Nacchio’s trading patterns, and [would] testify about the economic importance of the allegedly material inside information.” Opn. 12; APP-460-62. In any event Nacchio provided the second notice as directed, by the time set by the court.

³ Nacchio moved to exclude the government’s computer expert because the notice was late and the testimony was irrelevant and based on speculation not specialized knowledge. U.S. Supp. App. 6, 14, 17. The court agreed it was late. *Id.* 27. Nacchio had requested the disclosures in January 2006 and moved to compel in June of that year. The court did not set a date for expert disclosures given the government’s representation that it would not call any. Then, just 25 days before trial, the government disclosed an expert report *that had been prepared in June 2005*. The court thus excluded the evidence (which had no relationship to the economic issues to be addressed by Fischel). *Id.* 34.

examination unless Fischel’s methodology was disclosed, the criminal rules do not confer such rights. Opn. 20-23. Unless the court orders special written submissions, the opponent’s opportunity to test the methodology will occur at a *Daubert* hearing, *voir dire* or cross-examination when the expert takes the stand. *Id.*; *see also* NACDL BR-9-11. The government was well-equipped to test Fischel’s methodology in any event. Thirteen months before trial, Nacchio moved to dismiss the indictment because the stock price reaction to publicly disclosed information demonstrated that the information was immaterial. The government responded that “[u]se of this methodology” might require a “*Daubert* hearing[] designed to determine whether *the expert* has correctly applied *known and accepted methods*.” APP-87. It described those methods and attached a 20-page article on methodology—which cites Fischel’s article on the proper methodology in securities fraud cases. APP-87. The government cannot credibly claim that it was unable to ask Fischel whether he applied these “accepted methods” to reach his opinions.

B. Nacchio Had No Obligation To Make Any Additional Proffer Prior To Calling Fischel To The Stand

The government fails to address the principal dispute between the majority and dissent—whether Rule 16 was in fact the basis for the lower court’s ruling. It plainly was. SB-10, 43-45. And that conclusion requires reversal unless the evidence could be excluded as unhelpful or a waste of time. *See infra*. But even if the trial court’s exclusion of Fischel for failure to disclose methodology was not based a misinterpretation of Rule 16, the government still offers nothing to counter the panel’s showing that any alternate rationale would have necessarily rested on a misinterpretation of the procedures

used for determinations under Federal Rules of Evidence 104 and 702.

1. The government argues that “any proponent of an expert must know that he will have to prove reliability to the district court’s satisfaction,” (at 23)⁴ and therefore Nacchio was on notice that he had “to present reliability evidence in support of Fischel’s testimony or had to request a hearing for that purpose” (at 22). Of course Nacchio knew that he had to establish reliability, but the issue is when and how. In the absence of a specific order from the trial court, a defendant may always lay the groundwork for establishing reliability *by calling the expert to the stand*. That is the usual and preferred procedure, endorsed by this and other courts. SB-27-35; NACDL BR-9-11.

First, Nacchio did not have to request a separate hearing to establish admissibility. This Court has explained that “the necessary foundation must be proved” and admissibility determined “before questions asking for opinions and conclusions will be permitted” and if there are any “matters inappropriate for hearing by the jury” questioning may be conducted “during a recess period.” *Nichols*, 169 F.3d at 1263 (citation omitted).⁵ And “ruling on the admission of the [expert] opinions” when “it is offered at trial” is a “flawless” procedure for establishing reliability. *Id.* at 1263-64.

⁴ The government invokes *Bourjaily v. United States* for this uncontroversial proposition, but omits that the Court expressly declined to “express an opinion on the proper order of proof that trial courts should follow in concluding that the preponderance standard has been satisfied in an ongoing trial.” 483 U.S. 171, 176 n.1 (1987).

⁵ See also *United States v. Davis*, 40 F.3d 1069, 1075 (10th Cir. 1994); *United States v. Diaz*, 300 F.3d 66, 74 (1st Cir. 2002); *United States v. Alatorre*, 222 F.3d 1098, 1104 (9th Cir. 2000); NACDL BR-9-10; Fed. R. Evid. 104, advisory committee’s note (“Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury”).

Second, the government’s decision to file a motion *in limine* did not trump this customary procedure and force Nacchio to establish reliability in a written response. Rule 702 does not include any such requirement, and courts have held that it is the *movant* seeking *in limine* relief who bears the burden of showing that the evidence cannot even be offered on the stand because it is “clearly ... inadmissible for any purpose.” *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 440 (7th Cir. 1997); SB-27-30. The government did not even try to prove that Fischel’s methodologies were unreliable as a matter of law. At most, it raised “cause for questioning” reliability, which would have required the trial court to take evidence (on the stand or at a hearing) and to make the requisite findings. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

As this Court explained in *United States v. Sandoval*, 390 F.3d 1294, 1301 (10th Cir. 2004), when there are material factual disputes about the admissibility of evidence, the district court “must” resolve the dispute by hearing evidence. And the issue of reliability is inherently factual.⁶ *See also Goebel v. Denver & Rio Grande Western R.R.*, 215 F.3d 1083, 1087 (10th Cir. 2000) (“The district court may ... satisfy its gatekeeper role when asked to rule on a motion *in limine*” but only “*so long as the court has sufficient evidence to perform ‘the task ...’*”). This Court has reversed the exclusion of evidence even where the proponent failed to establish admissibility in its notice or

⁶ *See also* APP-89 (government explaining that expert’s application of efficient market methodology “will be the focus of an intense factual dispute”); *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999) (when methodology is unclear, “the ruling on admissibility turns on factual issues”); *Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184, 188 (1st Cir. 1997) (“reliability” is a “factual inquiry” which courts cannot undertake “on a truncated record”).

opposition to a motion *in limine*. *United States v. Roberts*, 88 F.3d 872 (10th Cir. 1996); SB-28-29. The authorities are thus entirely consistent with Nacchio’s belief that he could establish Fischel’s reliability in the usual way, upon calling the witness.⁷

Third, the fault for any record gaps lies with the district court for its arbitrary refusal to permit Nacchio to even request a hearing when it made its surprise ruling. As *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003), explained, “[a] natural requirement of the gatekeeper obligation is the creation of ‘a sufficiently developed record.’”⁸ (Citation omitted.) Yet here the court found it needed more evidence but denied the defense a chance to speak.⁹ Parties may not be deprived of substantial rights when the court prevents them from “articulating the grounds on which evidence should be admitted.” *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 175 n.22 (1988) (court “cut [proponent] off and ruled on the defense objection before he had been allowed to complete even a single sentence”); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

Fourth, the government ignores the only cases squarely addressing whether a

⁷ Nor has there ever been any question that Nacchio clearly satisfied Federal Rule of Evidence 103, which only requires the proponent to state what the testimony is “expect[ed] to show” and “the grounds for which the party believes the evidence to be admissible,” such as “the purpose for which the evidence is offered.” *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1407 (10th Cir. 1991) (citation omitted); *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 802 (10th Cir. 2001).

⁸ See also *Miller v. Pfizer, Inc.*, 356 F.3d 1326 (10th Cir. 2004); SB-29-31. *Dodge* reversed the admission of expert testimony, but the Supreme Court has explained that courts “may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997). The Sixth Amendment concerns here also require special vigilance on appellate review.

⁹ The government’s repeated citations to *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), prove nothing. Obviously a proponent should introduce his “best expert evidence” on the “first try” but he has to be given the appropriate opportunity to do so.

proponent forfeits the right to a hearing by failing to request one. With good reason.

They held that a hearing was required even though not requested. *Padillas*, 186 F.3d at 417; *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 854 n.29a (3d Cir. 1990).¹⁰

Finally, the government's theory would allow it to control the timing and content of expert disclosures in criminal cases by requiring the defendant to respond to a motion *in limine* with a detailed proffer on reliability or face exclusion of his expert. That would circumvent the important differences between Rule 16 and the *civil* expert disclosure rules, and usurp the district court's judgment about what procedures are best-suited to satisfying its gatekeeping role in the particular case. *Kumho*, 526 U.S. at 152.¹¹

2. None of the cases the government relies on (at 25-26) supports its argument. As explained (SB-32 n.17), each is a civil case where the admissibility of the expert's testimony arose on a dispositive summary judgment motion after full development of the record. In each case, the movant made an *affirmative* showing that the expert testimony offered to meet an essential element of the claim failed to satisfy Rule 702. Thus, the

¹⁰ The government's citations (at 36 n.10, 11) to the book written by Professor Stephan A. Saltzburg and trial counsel support the defense. The government curiously quotes a section stating that the *movant*, and here that means *the government*, should request a hearing. The government's case law on motions to suppress (at 37) proves the same point. Although it asserts that "the defendant" must "raise factual allegations that are sufficiently definite" to obtain a hearing on a motion to suppress, *the defendant is the movant there*, and must prove that the evidence should be excluded before trial.

¹¹ Moreover, the government's policy arguments for placing the burden on the proponent (at 38), at least in criminal cases, will only produce less not more "judicial economy." "[T]he judge should be entitled to assume, as a default, that a hearing is not needed if not requested," (*id.*), but that is because ordinarily the proponent will meet any foundational burden at trial. *Nichols*, 169 F.3d at 1264 (this "'avoids the duplication that would result from a pretrial hearing'" (citation omitted)). There is no reason to require *every* defendant with an expert to request separate and unnecessary proceedings.

proponent of the expert was plainly on notice that the admissibility of the testimony had to be established *at that time* in order to defeat summary judgment.¹² Those courts still afforded more process than the district court gave Nacchio, SB-32 n.17, by holding oral argument and inquiring why the testimony was admissible. Here, the only question the trial court asked before excluding Fischel’s testimony was which prosecutor would cross-examine him. One is left to wonder whether the court found the answer unsatisfactory.¹³

The government relies on *Oddi v. Ford Motor Co.*, where a hearing was unnecessary because the record was complete and the expert had explained his methodology “in as much detail as possible.” 234 F.3d 136, 154-55 (3d Cir. 2000). But *Oddi* also explained that if “the ‘gatekeeper’ could not determine what methodology the expert used, and the reliability of the expert’s conclusion could therefore not be established ... a hearing *was necessary* to determine how the expert reached his opinion.” *Id.* at 155. Nacchio’s conviction would be reversed in the Third Circuit. SB-30-32.

C. The District Court Never Provided Nacchio Notice That It Was Modifying Ordinary Procedures

The court’s statements. The government does not address the statements the trial

¹² This is also true of *Joiner*. The government claims (at 26) that there was “no motion to exclude,” but one of defendant’s summary judgment arguments was that plaintiff’s expert testimony did not satisfy *Daubert*. *Joiner*, 522 U.S. at 139.

¹³ Approximately one hour before Fischel was called to the stand, the court asked the government: “I know I have the motion on expert testimony, but we’re already a half hour overdue with the jury, *and I know you want a ruling, Mr. Stricklin, but – who is going to examine Mr. [Fischel]?*” APP-3870. Upon hearing Mr. Traskos would do it, the court expressed concern. *Id.* (“**Really?** Mr. Wise has taken a shot at him before.”). In one hour the court went from being unable to address the motion without knowing who would be cross-examining Fischel, to summarily excluding his testimony and refusing to let the defense speak, and then yelling at and berating them. APP-3922-29.

court made indicating that Nacchio did *not* have to do anything more than is normally done in a criminal case to establish an expert's reliability. APP-352; 3603; 3870. And it now effectively concedes that the district court's *only* mention of *Daubert* or *Kumho* was its one remark at the March 22 status conference. It does not defend the dissent's eleven unsupported assertions that "[t]he district court had repeatedly questioned Professor Fischel's methodology." Dis. 2; *see also* SB-36 & n.24. The government suggests that the district court's comment informed Nacchio that it "anticipated" *Daubert* and *Kumho* "issues" (at 23). As the panel observed, the court's comment was a mere aside pointing out that *Kumho*, not *Daubert*, deals with non-scientific expert testimony. Opn. 13 & n.3.

Even if the court had actually said that *it* (not the government) "anticipate[d]" *Daubert* "issues," that was not notice or a directive to submit a *Daubert* proffer *before* calling the witness. (Nor is the defense's "forewarned" response an acknowledgement that it knew it had to address issues the government claimed "*might*" arise *before* calling Fischel.) The court's remark said nothing about the timing for resolving any issues, and gave no indication that the court wished to alter the usual procedure. SB-35-39.¹⁴

The government's motion. The government's motion did not "put the defense on notice of the need for a proffer or a hearing request." SBUS-24; *compare* SB-5-7, 38. The government sought exclusion on two primary grounds: (1) that Fischel's testimony would not assist the jury under Rule 702; and (2) "Defendant still has not complied with

¹⁴ Even if the district court's misunderstanding of the rules were interpreted as a directive to provide something "pretty close" to a civil report (SBUS-45 n.14), Nacchio's notice was closer to a civil report than the government's Rule 16 notices in other cases. Regardless, excluding an expert without argument because the notice did not meet some vague and undefined "pretty close" standard would be an abuse of discretion.

the expert disclosure rules.” APP-362. It *did not* seek to establish that Fischel’s methodology was unreliable. There is nothing “unnatural” about “reading ... the motion” as based on “arguments about Rule 16.” SBUS-24. The first three sentences are: “Defendant provided its revised expert disclosure regarding Professor Daniel Fischel on Thursday, March 29, 2007. Based on that disclosure, Professor Fischel should be excluded as an expert witness Defendant still has not complied with the expert disclosure rules.” APP-362.¹⁵

The fact that the government’s motion “invoked Rule 702 nearly 50 times” (at 14) did not trigger any duty for Nacchio to respond with a written proffer demonstrating reliability. The government repeatedly invoked Rule 702 to argue that Fischel’s testimony was *irrelevant and would not assist the jury*. SB-6. That is a question of “fit,” or relevance, not reliability. *Daubert*, 509 U.S. at 591-92. Nacchio responded to the “702” arguments the government *actually made*. APP-463-69.

Judge Nottingham’s “Practice Standards.” The district court never cited this “standard” as a basis for its decision, and did not actually enforce it in this or other

¹⁵ See also, e.g., APP-363 (“The [Rule 16] *disclosure* also does not show that Professor Fischel used a reliable methodology in reaching his opinions.”); APP-367 (“The *disclosure* thus violates *Federal Rule of Criminal Procedure 16(b)(1)(C)*.”); APP-418 (“Defendant has not complied with the *disclosure requirements*.”); *id.* (“Defendant has not adequately complied with *Rule 16’s requirements*.”); *id.* (“Those *Rule 16 factors* support exclusion of Professor Fischel’s testimony.”); APP-421 (because disclosure is inadequate, the court “*should grant additional disclosure* and then hold an evidentiary hearing”); APP-421 (“The United States believes that the Court should exclude Professor Fischel *based on the inadequacy of the disclosure*.”); SB-5-7 & n.5.

cases.¹⁶ Moreover, the government never relied on it below, before the panel, or even in its Petition. The standard did not apply here in any event. Nacchio had no need to request an “evidentiary hearing” to resolve the arguments the government actually raised in its motion, because they were meritless as a matter of law. And a separate evidentiary hearing *on reliability* was unnecessary because Nacchio intended to call Fischel and establish reliability through his testimony. Nacchio had no reason to think that he would forfeit his right to do that by not requesting extra unnecessary proceedings.¹⁷ And Nacchio had no reason to request a continuance. The defense was prepared to proceed.

D. Nacchio Did Not Have A Fair Opportunity To Request A Hearing

If the court was modifying ordinary procedures to put the burden on Nacchio, that was not apparent until its ruling. But even assuming *arguendo* that Nacchio had any obligation to make a request, the government cites no genuine “opportunity” to do so.

- The government faults Nacchio (at 16) for not requesting a hearing at the close of the government’s case and instead “proceed[ing] directly to its motion for acquittal.” But no competent lawyer would ask for a hearing before a ruling on whether the defense even needs to present a case.
- It would have made no sense for Nacchio to request a hearing at the close of the day on April 4 (SBUS-16) when the court stated: “You know, I just haven’t had a chance to look at it. It’s hitting pretty fast. I have formed

¹⁶ *E.g.*, Docket Nos. 60, 84, 98, 149 (holding evidentiary hearing on movant’s request despite opponent’s opposition); SB-34 n.21 & 37 n.25. *See United States v. Kingston*, 922 F.2d 1234, 1240 (6th Cir. 1990) (“We do not ordinarily enforce local rules of practice when the district court, as here, does not enforce them.”).

¹⁷ Moreover, the judge effectively dispensed with the rule when he told the parties, the evening that the defense worked on the response, that “I’m not criticizing anybody for not submitting things in writing.” APP-3603; *see also* Fed. R. Crim. P. 57(a)(2) (“A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement.”).

some preliminary views, but they haven't really jelled to the point where I want to [discuss it]." APP-3834.

- The government notes (at 16-17) that the morning of the 5th, the court said to the government, "I know you want a ruling," and "the defense said nothing." But it ignores the rest of the judge's statement that he still did *not* want to address it because the jury was waiting, and then asking which government lawyer *would be cross-examining Fischel*. APP-3870.
- And how could Nacchio have interrupted the judge when, after Fischel was called, he excused the jury and launched into his ruling (SBUS-17)?

II. THE GOVERNMENT IS UNABLE TO JUSTIFY THE DISTRICT COURT'S RULING ON OTHER GROUNDS

A. Fischel's Testimony Satisfied Rules 16, 401, 702, 602, and 403

The government claims that all of Fischel's testimony was excludable on other grounds, yet it speaks volumes that the government could not manage to cite a single case excluding evidence of this type. Instead, it attempts to obscure the significance of the testimony by disregarding key subjects (while purporting to set forth a comprehensive list); advances grounds for exclusion that the district court never mentioned or relied on; and ignores this Court's admonition that "[d]oubts about whether an expert's testimony will be useful 'should generally be resolved in favor of admissibility'" *Robinson v. Mo. Pac. R.R.*, 16 F.3d 1083, 1090 (10th Cir. 1994) (citation omitted).

1. As the panel explained, the Rule 16 notice listed Fischel's opinions on three broad topics: "[1] whether Mr. Nacchio's trading pattern was suspicious, [2] how Qwest stock prices related to the September 2000 guidance, and [3] the magnitude and importance of the information Qwest had about IRU revenue." Opn. 18; *see* APP-427, 430-32. The government's analysis does not address the admissibility or significance of

these three opinions. Instead, it attacks a list of eleven “opinions” (supported only by record citations to its own motion instead of Nacchio’s notice) that is patently incomplete and based on unduly narrowed versions of Fischel’s actual opinions or overly simplistic speculation about how Fischel would have explained the significance of facts included in the summary of reasons supporting his opinions.¹⁸

2. The government elected to rely on non-economic subjective testimony to prove a “close” question of materiality, APP-87, but that does not mean that economic analysis would not have assisted the jury under Rule 702. “Armchair economics is not the way to decide complex securities cases.” Opn. 27. When making different tactical decisions the government itself recognizes that economic testimony on materiality is vital. SB-46.

a. Fischel’s testimony concerning the materiality of Qwest’s guidance and the market’s understanding of the risks of an economic downturn was not merely helpful to the jury. It was critical. The government knew that Nacchio’s defense was built upon the market’s reaction to the supposedly inside information. *E.g.*, APP-87. Nacchio’s motion to dismiss the indictment stressed that the market did not react when the information was revealed in two disclosures—“one on August 7, 2001,” reaffirming the guidance and disclosing the extent of reliance on IRUs, “and the second on September 10, 2001,”

¹⁸ See SBUS-44-46, 53-54. For example, Paragraph 6 of the Rule 16 notice states that Fischel would explain “the effect, if any, of Qwest’s guidance on its stock price,” and on “analysts’ recommendations, forecasts and target prices.” APP-430-31. The government *admits* that the Rule 16 notice disclosed that Fischel would testify about the “the effect of Qwest’s public statements on its stock price” (SBUS-9), but inexplicably omits this opinion from its list and fails to defend its exclusion. Nor does the government even identify or address Fischel’s opinion described in Paragraph 5, that “the economic evidence is not consistent with the government’s allegation that Mr. Nacchio’s stock sales ... were made on the basis of material nonpublic information,” APP-427-28.

reducing the guidance. Motion to Dismiss Indictment at 19 [Docket # 30]. Fischel would have testified “about the guidance Qwest provided during 2000 and 2001 ... as well as the effect, if any, of Qwest’s guidance on Qwest’s stock price,” APP-430; about how the market incorporates information; about why, contrary to the government’s arguments (USBR-32), the importance of information should be evaluated by studying the stock price immediately after disclosure; and about why the lack of any significant decline showed that the supposedly inside information was not material. APP-431-32.¹⁹

The government has no response to this testimony, nor does it defend the district court’s conclusion that the significance of stock price reactions after a disclosure is a simple “fact” on which expert economic analysis would have been unhelpful. APP-3921. Even leaving aside Fischel’s ultimate conclusions, the jury was deprived of the analytic *tools* required for an intelligent evaluation of the government’s misleading assertion that “the stock price ... drop[ped]” when Qwest “disclosed how the IRUs are playing a role,” APP-4478.²⁰ For example, Fischel would have explained why price declines were only relevant if they occurred within two days of the disclosure. *See* APP-438 (Rule 16 notice identifying Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases*

¹⁹ The notice expressly mentioned the price reaction on September 10, APP-7, and fairly included the price reaction to the August 7 disclosure, a “subsequent reaffirmation of the guidance.” APP-430.

²⁰ *See Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447 & n.5 (11th Cir. 1997) (“Because market responses, such as stock downturns, are often the result of many different, complex, and often unknowable factors” “contributing forces must be isolated and removed ... with the help of an expert witness.”); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 325 (5th Cir. 2005) (“Many variables have the potential to and do affect a stock price—the daily market average; national, local and industry-specific economic news; competitors’ activities; and [so] on.... To this end, expert testimony may be helpful”).

Involving Actively Traded Securities, 38 Bus. Law. 1, 18 (1982)). There were no such statistically significant declines here but no one told the jury. The government's assertion (at 60 n.17) that Fischel was not prepared to testify about a statistical event analysis is wishful thinking. An "event study" is simply "the measurement of a stock price's movement in response to a specific event or announcement." APP-87 (citing article submitted to court by government). The government could not have been surprised that Fischel—a leading expert in his field—had performed this analysis, which is routine in securities cases. Nacchio's Rule 16 notice expressly stated that he would testify concerning "the effect ... of Qwest's guidance" on its "stock price," APP-430, and that he considered a variety of information typically used to conduct an event study. APP-433 (items A, C, E, J).

The government also has no response to Fischel's testimony that the market incorporated the economic risks into Qwest's stock price—his testimony that "analysts did not change their recommendations, target prices or forecasts after Qwest announced its guidance," and that the market "underst[ood] that economic conditions could cause Qwest's financial performance to be worse than expected." APP-431; *see, e.g.*, APP-550-52 (August 8, 2001 Piper Jaffray report that Qwest's ability to meet targets is solely "dependent on the economy" and "equity markets have already adjusted the valuation for any lower growth rate that may be realized in a slowing economy"). This would have been powerful coupled with Szeliga's testimony that Qwest missed the targets because of a "miscalculation about where the economy would be at year end," APP-244, and that the government's case was largely built on Nacchio's "inside" knowledge of Casey's

prediction that demand for IRUs “would *disappear* during the second half of 2001,” SBUS-50, because Casey believed the economy would continue to slow.²¹

Nor does the government address Fischel’s opinion, based on his study of analyst reports, that the opinions of the government’s analysts were “very different” from the collective views of the market; or that the “total mix” of information in the market further shows that investors would not have found Qwest’s IRU revenues material. APP-481, 432; Supp. App. 49-50. And the government told the jury that Nacchio did not just get “stuck in some bad economic circumstances” because he did not “take those numbers down, like [Qwest’s] competitors did.” APP-4502. It even told the jury that this was “conclusive evidence beyond any reasonable doubt” that Nacchio knew he had material inside information. *Id.* Yet now it does not even acknowledge that Fischel would have testified, based on his study of telecom companies’ disclosure practices in response to changing economic conditions, that many telecom companies, like Qwest, did not reduce

²¹ Of course, even if the entire amount (\$350M) of “risk” in the budget that Casey attributed to this prediction about the economy had been realized, it would have resulted in a 0.4% miss for year-end revenues—immaterial as a matter of law under any standard. SB-19-20. And when Qwest revised its business plan in April to reflect that recurring revenues were not growing at the expected rate—which Nacchio promptly disclosed to the market (APP-4828, explaining that the target was 8%-9% and they achieved 6.3%)—and increased their plan to sell IRUs, *all* of the increase was in the Global Business Unit (led by Graham), *not* Casey’s unit. But Graham, *a cooperating witness*, testified that the only “risks” he saw in his increased numbers were that “we were seeing the economy slow a little bit,” but there was still additional “competitive activity” (APP-2645-46) and that “the representation of the [April 9] forecast” which included his unit’s IRU forecast, “provid[ed] *our best belief of what things were going to happen*” (APP-2702). Was Nacchio required to tell the market about Graham’s predictions about the economy as well as Casey’s? The jury needed Fischel’s testimony so that it could understand what information about guidance and economic forecasts would be important to investors.

guidance until *after* Nacchio's last trade. APP-431.²² Nor does it explain why Fischel's testimony about "the effect of the economic downturn ... in the telecommunications industry on Qwest's stock price," APP-465, would not have assisted the jury.²³

b. The government acknowledges that Fischel would have testified that the revenue mix would have been immaterial to reasonable investors. APP-431-32. Its only argument for exclusion is that Fischel had no specialized "knowledge about the telecommunications industry, let alone about IRUs," (at 51, 49) and that "the government never argued, and its witnesses never testified, that IRU revenue was worthless" (at 50). But industry-specific knowledge is not a prerequisite to use of standard economic analysis, and Fischel's expertise, including as a professor of finance at leading business schools (APP-3982), surely qualified him to calculate the value of a business and its revenue streams (and the government cites no contrary authority).

Critically, moreover, Nacchio was entitled to introduce expert testimony showing how the market valued IRU revenues, *regardless of what the government introduced*. Fischel would have testified that "the magnitude of Qwest's IRU revenue would not have been material" based on his comparison of "the market valuations of telecommunications companies that engaged in IRU transactions ... to the market valuations of

²² Despite telling the jury that Nacchio's failure to reduce guidance like other telecom companies was "conclusive" evidence of guilt, it argued to the court that Fischel's testimony on this subject had no "conceivable relevance" and would "confus[e] and mislead[] the jury." APP-411.

²³ Indeed, as the panel noted Qwest stock fell 60% from its January high, and the NASDAQ fell only 46% (Opn. 10), but the *telecom index* fell 63.5% over the same period. (Jan. 11 closing price of 526.42; September 21 closing price of 192.87).

telecommunications companies that did not.” APP-431-432. Fischel would have shown that the market placed *greater* value on companies with IRUs than those with only “recurring” revenues—which would have been the *only* economic evidence of how the market *actually* valued IRUs at the critical point in time. The study was based on those companies that *had disclosed* the magnitude of their IRU sales during the relevant time and demonstrated how the market responded. *Id.*; APP-465. The court’s exclusion on the grounds that the study did not include Qwest is nonsensical: including Qwest would have shown nothing about how the market valued IRU revenues at the time of the trades because Qwest had not disclosed the precise magnitude. Fischel’s testimony would have directly refuted the government’s argument that investors needed to know about IRUs because they “value recurring revenue more than nonrecurring revenue,” APP-1410, and the analysts’ testimony that IRU revenues were worthless, *infra* 23-24.

3. Fischel’s opinion testimony on Nacchio’s trading patterns was also admissible under Rule 702. The government argues, based on its misdescription of Fischel’s “opinions,”²⁴ that the testimony could be excluded because the jury knew the dates and

²⁴ Compare SBUS 44-48 with APP-428-30 (portions of items A, B, C, E, I, K). The government ignores Fischel’s testimony that the pattern of sales “contradict the Government’s claim that Mr. Nacchio’s ‘stock sales accelerated in January 2001’” APP-428 (item A); about the economic rationales for entering into and cancelling Rule 10b5-1 trading plans, APP-429-30 (items F-H); his analysis of Nacchio’s overall holdings to help the jury understand the significance of Nacchio’s decision to sell only the options set to expire, APP-429 (item D); his explanation of how “bunching” sales on option expiration dates impacts the market and the price of the stock, which would undermine the government’s assertion that Nacchio did not need to exercise and sell, APP-429 (item C); and his analysis of Nacchio’s exercises of options and trades in prior years to help test the same theory, APP-428 (item A). The government (at 47) also calls Fischel’s opinion that Nacchio’s leadership behind the Bell South buyback (APP-430 item E) was

amounts of Nacchio's trades (at 44) and "could figure out on its own" what Nacchio's economic incentives were (at 46), and because Nacchio's financial advisor testified about diversification (at 47). It cites no supporting case and the cases (and its own arguments SB-35-36 n.23, 46, 48) are to the contrary (SB-48). It even admits (at 57 n.16) that this "is much more complicated ... than the average case." And it invited the jury to infer nefariousness from trading that, as the panel noted, would be "curious behavior for somebody with inside knowledge that the stock was likely to plummet." Opn. 57.

"Need" is not a prerequisite for expert testimony, which is admissible if it will "assist the trier of fact to *understand the evidence* or to determine a fact in issue," Fed. R. Evid. 702—*i.e.*, is "relevant to the task at hand," *Daubert*, 509 U.S. at 597. Fischel would, for example, have helped the jury understand why the prosecution's comparison of Nacchio's April-May 2001 trades to those between 1998- 2000, Opn. 9, was uninformative. The more appropriate comparison was to October-November 2000, when he exercised an average of 103,571 options per trading day, APP-4764, which was not a statistically significant difference from the 105,000 average for April-May that the government cited (USBR-13) as a "dramatic" increase. APP-428. Expert economic testimony would have been very helpful because of the risk that the jury would be "left with meaningless numbers from which they cannot judge the appropriateness of the transaction." *Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525, 530 (9th Cir. 1986).

economically odd behavior for someone with negative inside information "a red herring," but it told the jury that "the Bell South buyback" is another example of Nacchio saying "screw [investors], tell them to buy," APP-4479-80, a claim Nacchio was deprived of evidence to rebut.

Fischel also would have: (1) helped the jury understand the deficiencies in the government’s “powerful” “exercise and hold” theory (as discussed SB-48-49)²⁵; (2) countered the argument that Nacchio “dumped 860,000 shares in the first four days after the window opened on April 26,” (USBR-23) (emphasis in original), by explaining that the government’s suggested inference did not make sense economically, because Nacchio had no incentive to sell many shares early in the trading window (as opposed to spreading them out more evenly) unless adverse information were about to be disclosed (it was not); (3) explained the purpose of Rule 10b5-1 plans and shown that (contrary to the government’s argument, APP-4273, 4508-09), refusing to sell because the price was too low was economically irrational behavior for someone with inside knowledge of an impending decline and made sense only if, as other witnesses testified, Nacchio believed the stock would quickly recover, Opn. 57; and (4) helped the jury understand whether the actual facts were consistent with the diversification plan that the government’s witness “explained ... to the jury” (SBUS-47). *See* Opn. 27 (expert testimony admissible ““even if all it does is put [facts already in the record] in context””) (citation omitted).

4. The government’s claim (at 46, 47, 50) that three “opinions” were not disclosed in the March 16 notice (a minor subset of the testimony) is wrong and irrelevant. That notice explained, *inter alia*, that Fischel would testify “about Mr. Nacchio’s holdings and transactions of ... Qwest options, and Qwest stock,” APP-460; about disclosures

²⁵ A government witness testified that Nacchio should have exercised and held “[b]ecause when a CEO sells stock in the company, the concern in the investment community is that the CEO knows something bad about the company that investors don’t know.” APP-1681-82. Fischel’s study of the trading practices of other CEOs (and Nacchio’s past practices) would have refuted the government’s theory.

regarding “guidance Qwest provided during 2000 and 2001,” and “about the disclosures made by Qwest ... concerning recurring and nonrecurring sources of revenue,” APP-461. Testimony about Nacchio’s trading incentives, principles of portfolio risk, and the materiality of information in IRU disclosures was within the opinions disclosed.

Moreover, even if these were “new” opinions, the district court did not exclude this testimony on that ground or make any necessary finding of bad faith²⁶ that would justify the exclusion of opinions belatedly disclosed. *See United States v. Perez*, 989 F.2d 1574, 1582 (10th Cir. 1993) (en banc) (factfindings should not be made on appeal even if “they *could* be supported by the record”) (emphasis in original).²⁷ Nor could it have done so. Potential defense experts in criminal cases will rarely know the full extent of their opinions until after the government’s witnesses testify. Nacchio could have updated his notice pursuant to Rule 16(c) after seeing seven days of the government’s case with responsive evidence irrespective of the court’s order to supplement the notice.

5. Rule 403, “an extraordinary remedy [that] should be used sparingly,” *United States v. Roberts*, 88 F.3d at 880 (citation omitted), did not provide grounds to exclude Fischel’s testimony. The government argues (at 40) that “the panel did not purport to apply an abuse-of-discretion standard [under Rule 403] at all,” but ignores that “[t]he abuse-of-discretion standard includes review to determine that the discretion was not

²⁶ *E.g.*, *United States v. Sarracino*, 340 F.3d 1148, 1170 (10th Cir. 2003); *see also Taylor v. Illinois*, 484 U.S. 400 (1988); NACDL BR-2-3, 5-7.

²⁷ *See also, e.g., LeBeau v. Libby-Owens-Ford Co.*, 799 F.2d 1152, 1161 n.12 (7th Cir. 1986) (“[I]t would be improper to ... affirm[] the exercise of ... discretion on grounds that do not appear in the district court’s opinion.”).

guided by erroneous legal conclusions.” *Koon v. United States*, 518 U.S. 81, 100 (1996). Here the panel correctly determined that “erroneous legal conclusions” did infect the analysis. The district court did not genuinely balance 403 considerations or make any finding that the probative value was “substantially outweighed” by other considerations. It instead invoked 403 because it wrongly concluded that the probative value of Fischel’s testimony was zero and thus it was “needless” and a “waste of time,” APP-3919—while then remarking, “we’re way ahead of time,” APP-3942, and excusing the jury for lengthy periods, SB-12-13.²⁸ The government also offers no explanation why any Rule 403 concern “*substantially outweighs*” the probative value or Nacchio’s right to present it.²⁹

B. The Government Has No Justification For The District Court’s Decision To Preclude Fischel’s Rebuttal Testimony Or To Deny Nacchio’s Request For A *Daubert* Hearing

The government’s claim (at 50) that it “never argued, and its witnesses never testified, that IRU revenue was worthless” is both irrelevant and wrong. It is irrelevant because Nacchio was entitled to explain, through Fischel, that the IRU revenue mix was not material to investors regardless of the precise contours of the government’s argument. It is untrue because the analysts testified that they eliminated IRUs *entirely* from Qwest’s

²⁸ A court can only exclude evidence under Rule 403 if the danger of the “needless presentation of *cumulative evidence*” substantially outweighs its probative value. That the jury might be able to reach conclusions from facts in evidence does not transform the expert’s opinions about that evidence into “cumulative evidence.”

²⁹ The only purpose of the testimony in *United States v. Call*, 129 F.3d 1402, 1406 (10th Cir. 1997), was to bolster the defendant’s credibility, which “is generally not an appropriate subject for expert testimony.” Fischel would not opine on Nacchio’s credibility. And *Thompson v. State Farm Fire & Casualty Co.*, 34 F.3d 932, 941 (10th Cir. 1994), involved testimony that “would not even marginally ‘assist the trier of fact.’”

growth rate and analysis of its ability to meet its projections. SB-14-15; APP-4278 (closing argument that Johnstone “immediately stripped [IRUs] out of his model ... that growth that was related to the IRUs, he just took it out.”); APP-4501 (Qwest “ma[de] their numbers” “through bogus swaps—that’s how Mr. Khemka described the swaps.”).

Nacchio was entitled to rebut this testimony with evidence that the market did not believe IRU revenue should be “stripped out” of Qwest’s growth rate. *Supra* 18-19, 23-24. And Fischel’s testimony about analyst reports was not “rank hearsay.” SBUS-49. It would have shown the total mix of information available to the market and would not have been introduced for the truth of the matters asserted.³⁰ Even if they were hearsay, Rule 703 permits experts form opinions based on inadmissible information in any event.

The government echoes the district court’s assertion that Nacchio did not *need* Fischel to rebut the analysts’ testimony because the court would “permit the defense to call [other] analysts.” SBUS-49. But an individual analyst’s testimony would not reflect the “‘total mix’ of information made available.” *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), and the court cannot dictate how Nacchio presents his defense (SB-53). The suggestion that Nacchio could have called analysts to testify merely highlights how unfair the ruling was. The court initially ruled that the analysts could not testify about materiality because their personal opinions were irrelevant and they were not disclosed as

³⁰ *E.g.*, *United States v. Forbes*, 2006 WL 2792883, at *3 (D. Conn. Sept. 28, 2006); *Ley v. Visteon Corp.*, 2006 WL 2559795, at *7 (E.D. Mich. Aug. 31, 2006). *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732-33 (10th Cir. 1993), and *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992) (cited in SBUS-43), are inapposite. Fischel was not going to “adopt” dozens of analysts’ varying opinions as his opinion. Rule 602 was also no bar to Fischel’s opinion testimony. SB-51.

experts,³¹ but then nonetheless *let the analysts testify on materiality anyway*. When the defense objected, showing the court its written opinion, the court overruled the objection and pretended it never found the analysts’ testimony irrelevant.³² In contrast, the court precluded Fischel (who *was* disclosed as an expert) from testifying and told the defense (at the end of trial) that it should have gotten an analyst instead.³³

C. The Government Has Not Shown That The Error Was Harmless

The jury acquitted on more than half the counts and the panel unanimously recognized that Nacchio was nearly entitled to acquittal as a matter of law. Opn. 46-47; *see also* SB-57 n.35. The Petition did not even suggest that the panel’s conclusion that the error “was not harmless” (Opn. 30) was worthy of *en banc* review, nor did this Court direct briefing on that issue. And for good reason—the government offers no basis to disturb the panel opinion on this factbound question that did not even garner a dissent.

The panel explained that the constitutional right to present a defense was implicated by the exclusion of Fischel, but “even if the exclusion does not rise to the level of” constitutional error, it “was not inconsequential under any standard” and that

³¹ App-358, 353 (“the information a financial analyst personally finds important is *irrelevant* to whether that information would be important to a reasonable investor,” because materiality testimony must come from an expert and the government did not disclose its intent to use an expert).

³² APP-3593 (“[T]he reason I excluded this, frankly, had nothing—it didn’t have to do with ... the relevancy of the evidence. It would be because he would be testifying as an expert, and the Government didn’t adequately disclose his expert status.”).

³³ Nacchio did not “invite” the court’s error (SBUS-50) by arguing that analysts’ personal opinions on materiality are not helpful because analysts are not reasonable investors. That is not inconsistent with arguing the relevancy of an expert’s review of all analyst reports to opine on the total mix of information in the market. And Nacchio did not invite the court to admit the government’s version but exclude the defense’s.

“[t]he record does not otherwise contain ‘overwhelming evidence of guilt.’” Opn. 29-30 (citation omitted). The government argues that the panel did not “identify which opinions the jurors might have credited” and “which ones might have persuaded them to acquit” (SBUS-52), but it is only able to do that based on its peculiar and self-serving description of what the opinions were. The panel identified Fischel’s opinions regarding Nacchio’s trading patterns, the impact on the stock price, and the significance of Qwest’s IRU revenues and concluded that on “each of these issues” Fischel’s testimony “if credited by the jury” could have led to acquittal. Opn. 30. The government’s analysis is an empty exercise because it ignores most of the testimony.

The panel’s analysis was consistent with this Court’s (and other circuits’) analyses in other similar cases. For example, in *United States v. Yarbrough*, this Court held that the erroneous exclusion of evidence was not harmless because (without elaboration) the excluded evidence was “important” and “relevant to a sharply controverted question going to the heart of [the] defense.” 527 F.3d 1092, 1103 (10th Cir. 2008).³⁴

In any event, the government cannot meet its burden even using its distorted analysis. *First*, with respect to the minor piece of materiality testimony the government does mention, it contends (at 53-54) that the jury heard of a general decline in telecom stocks during 2001. But the testimony it points to is just Fischel’s response to questions about the price of Qwest stock at various times, *e.g.*: “[B]y the end of the year, because of

³⁴ See also, *e.g.*, *United States v. Safavian*, 528 F.3d 957, 967 (D.C. Cir. 2008) (exclusion of defendant’s expert testimony relating to intent not harmless because “the expert’s testimony would have supplied crucial context and support” for defense); *United States v. Cohen*, 510 F.3d 1114, 1126-27 (9th Cir. 2007); *United States v. Hall*, 93 F.3d 1337, 1344-45 (7th Cir. 1996).

the meltdown in the telecommunications industry for Qwest and other firms, the price was somewhere between 10 and 15, as I recall.” APP-4063; *see also* APP-4025, 4037. These isolated statements (all on cross-examination), did not explain that economic analysis established that the decline in Qwest stock was *not* attributable to its disclosures, or that the market did not react (contrary to the government’s argument, APP-4478) to the information the government told the jury was material. This economic analysis would have been particularly powerful because the government’s only proof of materiality was testimony from its analysts, and from Qwest’s head of investor relations, who said that analysts wanted to know more about Qwest’s IRUs. Also, without Fischel, Nacchio had no way to counter the argument (USBR-32-33) that materiality could *not* be determined by looking to stock price immediately after the disclosures.

Second, as noted *supra* 18-19, 23-24, the court excluded Fischel’s revenue multiples study on how the market actually valued IRU revenues at the critical time. This alone would have destroyed the government’s basic premise that investors “value recurring revenue more than nonrecurring revenue.” APP-1410. The court’s erroneous rebuttal rulings ensured that the only evidence the jury had on how anyone valued IRU revenue or factored it into its growth rate was the government’s evidence. *Supra* 23-24.

Third, the facts highlighted by the government (SBUS-53) do not show that the exclusion of Fischel’s economic analysis of these (and numerous other factors) was harmless.³⁵ Without Fischel the jury had no economic context or basis to evaluate the

³⁵ Although Fischel was able to testify, as a factual matter, about the dates and amounts of Nacchio’s trades, he was prevented from offering any economic analysis or

government's claim that Nacchio's trading decisions were criminally deceptive.

There is no valid basis to disturb the panel's harmless error holding.

III. A NEW TRIAL IS THE PROPER REMEDY

First, the government did not ask the panel for a limited remand or list the issue as a question in its Petition. It has now shifted from its footnote claiming that *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), cast doubt on *Dodge* to saying the panel was not bound by *Dodge*. It would be particularly unfair to excuse this waiver, overturn settled precedent, and create a circuit conflict, SB-58-60, where the government argues that Nacchio forfeited the right to present a defense by failing to request a hearing.

Second, the government's premise—that Nacchio did not demonstrate the admissibility of any of Fischel's opinions on this record—is flawed. The panel opinion shows (at 27, 29) that much of Fischel's testimony was clearly admissible (as the government argues in other cases, SB-46, 51 n.31). At least Fischel's analysis of trading patterns, diversification, and common practices of CEOs, his explanation of how information, including economic risks, is translated into stock prices, and his evaluation of analysts' reports to show the collective views of the market, were wrongly excluded on this record.³⁶ A new trial where the jury may consider this evidence is required.

informed opinions. Reply-24 n.11; APP-3988.

³⁶ *Kumho*, 526 U.S. at 152 (court can “avoid unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted”); *id.* at 156 (“an expert might draw a conclusion from a set of observations based on extensive and specialized experience.”). Nacchio’s “summary” was plainly sufficient under Rule 16 but did not include every detail of the event study and the selection criteria for the revenue multiples study (though the analysis was “the same method used by the analysts who testified for the government,” Supp. App. 49)). Thus,

Third, even if the record did not demonstrate the admissibility of *any* opinions, a new trial would still be the proper remedy. Neither *Waller v. Georgia*, 467 U.S. 39 (1984), nor *Jackson v. Denno*, 378 U.S. 368 (1964), which address only what remedy is constitutionally required (and not necessarily what may be appropriate), suggests otherwise. In *Jackson*, the trial court correctly applied then-governing law, but on collateral review the Court struck down the state procedure, requiring new findings. The Court recognized that a new trial would be an appropriate remedy, but left it for the state court to decide. In *Waller*, the Court extended prior decisions on public proceedings to apply, for the first time, to suppression hearings, thus requiring new findings that the trial court had not made. And the error in *Waller* did not affect the fairness of the trial or “risk[] an unreliable outcome and the consequent conviction of an innocent person.” *Brown v. Kuhlman*, 142 F.3d 529, 539 (2d Cir. 1998) (citation omitted). *Compare Ake v. Oklahoma*, 470 U.S. 68, 78 (1985) (remand for new trial where defendant was denied expert witness because the “interest in the accuracy of a criminal proceeding that places an individual’s life or liberty at risk is almost uniquely compelling”).

Fourth, *Dodge* is not inconsistent with *Perez*, 989 F.2d 1574. Because the court there admitted evidence without making required findings, this Court would not engage “in the questionable process of first presuming that the trial judge made implicit findings and then searching the record on appeal for evidence that the trial court might have relied upon to support the findings.” *Id.* at 1582. *Perez* and its progeny are thus simply an

the panel simply found that some factual issues regarding reliability could not be resolved without further development of the record. Opn. 22.

application of the logic in *Sprint*: with no findings and a record “equally susceptible” to an interpretation that the court correctly applied the governing law (and made implicit findings), courts of appeals should not “presume that the lower court reached an incorrect result,” 128 S. Ct. at 1146, and it is “permissible” (but not necessarily required, *see* 28 U.S.C. §2106) to remand for clarification. SB-60. But here it is clear that the district court *did not* correctly apply the governing law. And a *Perez* remand (like those in *Waller* and *Jackson*) does not require the taking of additional evidence.

Perez’s remand procedure was also adopted to eliminate the incentive an automatic reversal rule created for the defense to remain silent after objectionable evidence was admitted. 928 F.2d at 1581-82. The defense here had every incentive to do what was necessary for *its* testimony to be admitted, and tried to speak but was silenced.

Fifth, Dodge and other circuits conclude that a new trial is the appropriate remedy here because: a remand will require the district court to reconsider its own reasoning and the risk of post-hoc rationalization is greatest; the new trial rule promotes adherence to the gatekeeper obligation; and a new trial is the fairest course because the error affects the accuracy of the trial. SB-58-60. The only factor the government points to is its “costs” (at 57) a consideration rejected in *Dodge*, 328 F.3d at 1229, which did not even involve the “uniquely compelling,” *Ake*, 470 U.S. at 78, interest at issue here.

Finally, for the reasons the panel found (Opn. 58-60), this case cannot go back to the same judge for an evidentiary hearing or new trial. SB-2-3, 40-41 & nn.27-28.

CONCLUSION

This Court should decline to vacate the panel opinion.

Respectfully submitted,

/s/ Nathan H. Seltzer

Herbert J. Stern
Jeffrey Speiser
STERN & KILCULLEN
75 Livingston Avenue
Roseland, NJ 07068
(973) 535-1900 (telephone)
(973) 535-9664 (facsimile)

Maureen E. Mahoney
Alexandra A.E. Shapiro
J. Scott Ballenger
Nathan H. Seltzer
LATHAM & WATKINS LLP
555 11th Street, N.W., Suite 1000
Washington, DC 20004
(202) 637-2200 (telephone)
Maureen.Mahoney@lw.com

Dated: September 15, 2008

Counsel for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 32

I hereby certify in accordance with Fed. R. App. P. 32(a)(7)(C) that this brief does not exceed 30 pages pursuant to this Court's order of July 30, 2008, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I hereby certify that this brief complies with the typeface requirements of 10th Circuit Rule 32(a) because this brief was prepared using Microsoft Word 2003 in 13-point Times New Roman font.

/s/ Nathan H. Seltzer
Nathan H. Seltzer
Latham & Watkins LLP
555 11th Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200 (telephone)
(202) 637-2201
Nathan.Seltzer@lw.com

CERTIFICATION OF DIGITAL SUBMISSIONS

I, Nathan H. Seltzer, hereby certify that:

(1) there were no privacy redactions to be made in the documents submitted on September 15, 2008, and every document submitted in Digital Form or scanned PDF format is an exact copy of the written document that was sent to the Clerk; and

(2) the digital submissions have been scanned for viruses using McAfee VirusScan Enterprise version 8.0 + McAfee Anti-Spyware Module 8.0.0.1039, Virus Definitions 5276, last updated on August 29, 2008, and, according to the program, are free from viruses.

/s/ Nathan H. Seltzer

Nathan H. Seltzer
Latham & Watkins LLP
555 11th Street, N.W.
Suite 1000
Washington, DC 20004
(202) 637-2200 (telephone)
(202) 637-2201
Nathan.Seltzer@lw.com

AMENDED CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2008, I caused the foregoing **APPELLANT'S SUPPLEMENTAL REPLY BRIEF** to be submitted via electronic mail to:

U.S. Court of Appeals for the 10th Circuit:
esubmission@ca10.uscourts.gov

Stephan Oestreicher
Stephan.Oestreicher@usdoj.gov

Kevin Traskos
kevin.traskos@usdoj.gov

Leo J. Wise
leo.wise@usdoj.gov

Troy Eid
Troy.Eid@usdoj.gov

Edwin S. Kneedler
Edwin.S.Kneedler@usdoj.gov

I further certify that on the 15th day of September, 2008, I caused two (2) paper copies of the foregoing **APPELLANT'S SUPPLEMENTAL REPLY BRIEF** to be sent via U.S. mail postage prepaid to:

Stephan E. Oestreicher, Jr.
Criminal Division, Appellate Section
U.S. Department of Justice
P.O. Box 899
Ben Franklin Station
Washington, DC 20044-0089

Kevin Traskos
Troy A. Eid
U.S. Attorney's Office-Denver Colorado
District of Colorado
1225 17th Street
Suite 700
Denver, CO 80202
(303) 454-0100

Leo J. Wise
U.S. Department of Justice
Criminal Division-Fraud Section
1400 New York Ave., N.W.
3rd Fl.
Washington, DC 20530
(202) 514-9842

Edwin S. Kneedler
U.S. Department of Justice
950 Pennsylvania Ave, N.W.
Room 5137
Washington, DC 20530
(202) 514-3261

/s/ Nathan H. Seltzer
Nathan H. Seltzer
Latham & Watkins LLP
555 11th Street, N.W., Suite 1000
Washington, DC 20004
(202) 637-2200 (telephone)
(202) 637-2201 (facsimile)
Nathan.Seltzer@lw.com