

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 BRIEF

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Most insider trading cases involve accusations of trading ahead of merger news or earnings releases, or other “hard” nonpublic information that anyone would recognize as material. This case is completely different; indeed, unprecedented. The government’s sole theory of materiality was that Nacchio somehow knew, eight months in advance, that Qwest would not meet its year-end 2001 revenue projections. In the first and second quarters of 2001, growth in “recurring” subscriber revenues was falling short of internal estimates, but long-term leases of capacity on Qwest’s fiber optic network, known as indefeasible rights of use (“IRUs”), were increasing. At the time of Nacchio’s sales in April and May 2001 all the internal forecasts showed Qwest exceeding the year-end numbers, but the government alleged that Nacchio nonetheless knew he had undisclosed “material” information of increased “risk” because a Qwest manager expressed his view that the softening economy and overcapacity in the fiber market would cause IRU sales to decline later in the year. Opn. 2-5.¹ The government told the jury that Nacchio dramatically increased his sales of stock in April and May over prior periods because he knew this information was “material” and had not been disclosed. Opn. 9.

The heart of Nacchio’s defense, indeed the only substantive defense witness on the key issues, was Professor Daniel Fischel, one of the nation’s leading experts on these subjects who is frequently retained by the government, including DOJ, and has testified more than 200 times and never before been excluded. Fischel would have explained,

¹ “Opn.” refers to the panel slip opinion; “Dis.” refers to the slip dissenting opinion; “BR-” and “Reply-” refer to Nacchio’s opening and reply briefs; “USBR-” refers to the government’s response brief; “Pet.” refers to the petition for rehearing en banc; “APP-” refers to the Appendix; “Supp. App.” refers to the Supplemental En Banc Appendix; and “ADD-” refers to the Addendum attached hereto.

inter alia, that the sales for which Nacchio was convicted were consistent with his previously announced plan and did not accelerate in 2001 as the government alleged, that the government's basic premise that investors discounted the value of revenues attributable to IRUs was demonstrably incorrect, that the market did not react negatively to the eventual disclosure of the information that the prosecution thought was material, and that other market forces explained the decline in Qwest's stock price, particularly the massive economic decline in the entire telecommunications sector. Rule 702 itself describes the presentation of this exact testimony as a "venerable practice."

The panel unanimously concluded that it was "a close question" whether Nacchio was entitled to acquittal *as a matter of law* because no reasonable investor could find the "inside" information material. Opn. 46-47. But the district court had summarily excluded Fischel, who would have shown the jury that the economic evidence unequivocally contradicts any suggestion that the information was "*so obviously material* that [Nacchio] must have been aware both of its materiality and that its non-disclosure would likely mislead investors." *City of Phila. v. Fleming Cos.*, 264 F.3d 1245, 1261 (10th Cir. 2001).² It did so without once providing notice of any concerns about Fischel's methodology; in the absence of any rule or case that gave Nacchio the burden to do anything differently than he did; and on the grounds that it needed more information, while yelling at Nacchio's attorneys for attempting to provide it.

Every defendant has a right to present a defense, and the concerns about fairness are heightened all the more when these rulings were issued by a judge who said he could

² Emphases added unless otherwise noted.

“see no reason why this man who grew up, the son of Italian immigrants ... in New Jersey and New York, should ever have come out here to Colorado.” APP-1324. Justice demands that this conviction be reversed and remanded for a new trial before a different judge.

FACTS RELEVANT TO SUPPLEMENTAL QUESTIONS

THE INITIAL RULING EXCLUDING FISCHER

1. At a March 1, 2007 status conference, the government suggested, and the court set, March 16th as the date for Nacchio’s Rule 16 notice. Supp. App. 18-19. Nacchio complied with this deadline, but the government objected to his Rule 16 notice and filed a motion with the court for a “Proper Expert Disclosure.” APP-349. On March 22, the district court issued a written decision, stating that “[t]he matter may be settled through analysis under Rule 16,” APP-351, and ordered Nacchio to “bring[] his submission into compliance with Rule 16.” APP-352.

At a pre-trial conference that day, the government lawyer then stated, discussing the March 16 disclosure that the district court had found inadequate, “it’s my concern *at least based on the way the [March 16] disclosure is raised right now*, there *could be Daubert* issues that arise with respect to certain parts of the testimony.” APP-2041-42. The district court corrected the prosecutor, remarking: “Probably not *Daubert*, but maybe *Kumho Tire* issues,” and the government responded, “Yes, I misspoke.” APP-2042.³ Defense counsel commented: “In Latin, forewarned is forearmed.” *Id.* The court

³ As the panel noted, the court was simply pointing out that *Daubert* addressed “scientific” evidence, whereas *Kumho* addressed technical or other specialized knowledge. Opn. 13 n.3. Nacchio will continue to use “*Daubert*” here.

responded: “That’s not Latin,” and recessed for the week. *Id.* This was the court’s only mention of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), or *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), before it excluded Fischel.

2. As directed, Nacchio provided the government with his revised Rule 16 notice on March 29. APP-425-59. No panel member questioned the adequacy of this disclosure for Rule 16 purposes which, as the dissent observed, “certainly did not require [Nacchio] to demonstrate admissibility.” Dis. 9.

Indeed, unlike the “detailed and complete” expert *reports* required in civil cases,⁴ a Rule 16 “summary” of the expert’s opinions need only state “the bases and reasons for those opinions, and the witness’s qualifications,” and is not filed with the court, but only given “to the government.” Fed. R. Crim. P. 16(b)(1)(C). The purpose of Rule 16 is “to give opposing counsel notice that expert testimony will be presented, permitting ‘more complete trial preparation,’ by the opposing side, such as lining up an opposing expert, preparing for cross-examination, or challenging admissibility on *Daubert* or other grounds.” Opn. 17 (citing Fed. R. Crim. P. 16, 1993 advisory committee’s note). This notice requirement will naturally provide the government (and court if shown the notice) with substantially less information than the expert report, deposition transcript, Rule 56 affidavits, and summary judgment briefs that comprise the record in civil cases.

The notice stated that Fischel is President of a consulting firm that applies

⁴ Fed. R. Civ. P. 26, 1993 advisory committee’s note; *see* Fed. R. Civ. P. 26(a)(2) (expert *report* must include “a *complete statement* of all opinions the witness will express and the basis and reasons for them,” and all “data or other information considered by the witness,” and “any exhibits that will be used to summarize or support” the opinions).

economics to legal and regulatory issues, Professor of Law and Business at Northwestern, and former dean of the University of Chicago Law School. He has published approximately fifty articles in leading legal and economics journals. Courts of all levels, including the Supreme Court, have repeatedly cited his articles. He has advised the DOJ, SEC, NASD, and NYSE, and has testified as an expert, including for the government, more than 200 times on a wide range of financial issues. APP-425-27, 435-59. Until this case, Fischel had never been excluded as an expert.

The notice, as required, provided a summary of Fischel's opinions, and the reasons and bases for those opinions, which would have addressed the key issues of materiality and scienter. In particular, the notice summarized Fischel's study of Nacchio's trading patterns; the materiality of the supposedly inside information and non-fraud factors that accounted for the decline in Qwest's stock price; and how the market valued IRU revenues. APP-425-34.

3. On April 3, the government filed a motion styled "United States' Motion To Exclude Testimony By Daniel Fischel," APP-362, which made essentially two categories of arguments: (1) that Fischel's testimony was inadmissible under Rule 702 because it was (a) "irrelevant," APP-364; (b) "well within the jury's understanding and would not assist the jury," APP-363; and (c) a recitation of "facts" not proper for expert testimony, APP-363; and (2) that "Defendant *still has not complied with the expert disclosure rules,*" APP-362, and "[t]he disclosure also does not show that Professor Fischel used a reliable methodology in reaching his opinions," APP-363. After fifteen pages of boilerplate discussing district courts' gatekeeping responsibility, APP-367-81, the motion addressed

each individual opinion and made, with minor variations, the two arguments listed above.

With respect to Rule 702, the motion repeatedly argued that “it is not disclosed how Professor Fischel has any special knowledge,” APP-389, 383, 387, 393, 395, 397-98, 400, 403, 405, 408, 414, and that his testimony was a recitation of facts that would not assist the jury, APP-383, 386, 388, 392, 393, 401, 405, 406, 414. On these grounds, the government argued that Fischel’s testimony was “clear[ly] inadmissib[le].” APP-421.

The motion also argued that the information supplied in the Rule 16 notice did not prove that Fischel had followed a reliable methodology. The government *did not* argue that Fischel’s disclosed methodology was unreliable or that the district court already had sufficient information to carry out its gatekeeping responsibility. To the contrary, the government’s arguments were premised upon its contention that “the [Rule 16] disclosure does not set forth any reliable principles or methods,” APP-388, and that “because there is no suggestion of any methodology used by Professor Fischel, it is also impossible to determine whether—even assuming a reliable methodology was used—the methodology was reliably applied to the facts,” APP-408.⁵ The government repeatedly told the district

⁵ See also APP-385 (“[T]here is *no suggestion* that Professor Fischel used any reliable economic principles or methods in developing this opinion”); APP-390 (“[I]t *does not appear* that Professor Fischel applied any reliable economic principles or methods in reaching this conclusion.”); APP-396 (“[I]t *does not appear* that Professor Fischel applied any reliable principles or methods in reaching this inference.”); APP-398 (“[T]he *disclosure does not set forth* any ‘reliable principles and methods’ that Professor Fischel might possibly have used in reaching his conclusions about Defendant’s incentives in this particular transaction.”); APP-400 (“[T]here is *no explanation* of what methodology Professor Fischel used.”); APP-403 (“[T]here is of course *no indication* that Professor Fischel reached the opinion by applying reliable principles and methods to an adequate and correct set of facts.”); APP-405 (“[N]o *indication* that this opinion – to the extent it is an opinion – is the result of reliable principles and methods.”); APP-415

court, incorrectly, that Rule 16 requires expert disclosures comparable to the expert reports compelled by Rule 26 in civil cases. APP-368 (Rule 16 “disclosure requirement is similar to the disclosure requirements in civil actions”); APP-419 (Nacchio’s disclosure is “far less informative than the typical expert report in a run-of-the-mill medical malpractice case”); *see also* APP-418-21.

The government did not even ask the court to rule on reliability if the Rule 16 notice were in fact adequate. It argued that once Nacchio submitted “a proper disclosure that meets the requirements of Rule 16,” there would need to be briefing, and “the Court would likely need to hold an evidentiary hearing.” APP-420. Indeed, the government argued that unless the court excluded Fischel “based on the inadequacy of the disclosure” or “the clear inadmissibility of the testimony”—which referred to the government’s Rule 702 arguments on relevance and assistance to the jury—then additional disclosure and “*a hearing ... out of the presence of the jury*” *would be necessary in order for the court to be able to make a reliability finding*. APP-421.

The same day the government filed its motion, after the jury was excused for the day, the court told the defense that it understood that in the midst of this fast-paced trial written submissions were not always possible, and that the court would not penalize anyone for failing to make arguments in writing. The context was a discussion with

(“[T]he *disclosure does not set forth* any reliable principles or methods that were used in reaching this opinion.”); APP-415 (“[T]he *disclosure does not suggest* that if there was a reliable methodology, Professor Fischel has reliably applied that methodology to the facts.”); APP-415 (“One might speculate that the methodology might be mathematical and have something to do with profit margins and revenue multiples, but even assuming that is correct, there is *no suggestion* of how these variables actually fit together, let alone whether such a methodology is reliable.”).

Nacchio's counsel regarding the presentation of Nacchio's Rule 29 motion, and how proceedings would be handled going forward. The court stated: "[W]ith that guidance, I'll just say, if you can submit things in writing, that's always helpful, and to some extent you have." APP-3603. Counsel responded: "Yes, Your Honor. And I appreciate that. I think you can also appreciate that with the very vigorous and rigorous schedule we've been running and with our necessity of going back and preparing for each day, it's been not easy to do that." *Id.* The court replied: "I understand that. *I'm not criticizing anybody for not submitting things in writing.*" *Id.*

4. The next day, April 4, during a full day of trial in which Nacchio's attorneys orally moved for acquittal under Rule 29, Nacchio's attorneys also prepared and filed a brief response to the government's two categories of arguments. APP-463-69. Nacchio responded to the government's arguments that under Rule 702 Fischel's testimony was irrelevant or would not assist the jury, by explaining that Fischel's opinions were proper for expert testimony because they were based on "specialized knowledge" and would "assist the trier of fact to understand the evidence and to determine a fact at issue." APP-466. He explained that, "Professor Fischel has completed extensive review of SEC filings, press releases and other financial data and applied his academic study and professional experience in economics and the public markets to formulate opinions." *Id.*

Nacchio responded to the government's arguments that his Rule 16 notice was inadequate, and that the Rule 16 notice failed to "show that Professor Fischel used a reliable methodology in reaching his opinions," APP-363, by demonstrating that he had disclosed all—and indeed, more—than was required by Rule 16. APP-463-66.

5. Just before court recessed for the day on April 4, the government asked: “What about Fischel?” APP-3834. The district court gave no indication that it contemplated excluding him, or needed additional information about his methodology in order to rule on admissibility. Instead, the court responded: “You know, I just haven’t had a chance to look at it. It’s hitting pretty fast. I have formed some preliminary views, but they really haven’t jelled to the point where I want to—” *Id.* The government and defense informed the court that Fischel would be on the stand in the morning. *Id.*

The next morning, April 5, just before 9:30, the district court asked the government which one of its attorneys would be cross-examining Fischel, APP-3870, implying that Fischel would in fact be testifying. The government responded: “We’ve got Mr. Traskos for that, Your Honor.” *Id.* The court replied: “Really? Mr. Wise has taken a shot at him before,” *id.*, apparently referring to the fact that one of the other prosecutors, Leo Wise, had previously cross-examined Fischel in a different case. The defense then called its first two witnesses.

6. It was only about one hour later that the defense called Fischel to the stand. APP-3913. The court then interjected and excused the jury. *Id.* Before either party could say anything, the court excluded Fischel’s testimony. In its ruling, the court echoed the government’s arguments criticizing Nacchio’s Rule 16 notice and held that the notice did not establish the reliability of Fischel’s proposed testimony under Rule 702 and *Daubert*. *See, e.g.*, APP-3914 (“the deficiencies under *Daubert* and *Kumho Tire* in these disclosures are so egregious”), 3921 (after reading from the Rule 16 notice, excluding testimony “primarily [for] the gross defect in failing to reveal the

methodology”). As the court later explained, it excluded Fischel because “[a]ny suggestion that *the Government* was in possession of Fischel’s ... methodology is simply disingenuous” because “[t]he March 29, 2007[] disclosure [which was Nacchio’s Rule 16 notice] contained no methodology or reliable application of methodology to the case. It was precisely that lack of—lack of reliability ... that led the Court on April 5, 2007, to exclude much of Fischel’s proposed testimony.” APP-4075; *id.* (citing the “*non-disclosure of the methodology ... [in] the original expert report*” as reason for exclusion).

The court also adopted the government’s arguments that the testimony would not assist the jury under Rule 702 or was not proper expert testimony under Rule 602. APP-3920. In particular, the court found that Fischel’s testimony regarding the information that was already known and absorbed by the market, how the market responded to Qwest’s forecasts, and how the drop in stock price was attributable to a massive downturn in the telecommunications industry and could not be tied to the IRU disclosures, was “a recitation of facts” that Fischel could not testify about. APP-3920-21. The court also invoked Rule 403. APP-3919.

The court then stated: “Who is your next witness?” APP-3921. Able to speak for the first time, Nacchio’s counsel attempted to make further argument and request a hearing, asking: “Your Honor, may I be heard?” The court refused: “No. ... Any argument that you wish to make could have been [submitted in writing].” *Id.* The defense responded that, “[w]e were under tremendous time pressure,” *id.*, the same time pressure that, the court told the parties the day before, had prevented the court from having the time to even “look at” the issue. The court replied: “So what? You could

have put it in [writing],” APP-3921-22, even though it had specifically told the defense on the day the government filed its motion that due to the “rigorous schedule,” “*I’m not criticizing anybody for not submitting things in writing,*” APP-3603.

7. The court made no finding that Fischel’s methodology was unreliable. Echoing the government’s argument that “it is ... impossible to determine” Fischel’s methodology from the Rule 16 notice, APP-408, the court found only that it did not have sufficient evidence to make a reliability determination. APP-3921 (excluding testimony for “failing to *reveal* the methodology”); APP-3930 (“It’s sort of like trying to nail jello to the wall. You just don’t know what it is.”).

The court also made no specific findings regarding crucial topics of Fischel’s testimony. The previous day the court stated that the “most important thing the jury could take away from the government’s evidence” is that it was “necessary [for Qwest] to rely on these IRUs” to meet its year-end projections. APP-3806. One of the government’s chief contentions was that investors would discount the value of revenue derived from IRUs because it was not “recurring,” and that the percentage of Qwest’s overall revenue attributable to IRU sales was undisclosed and material to evaluating Qwest’s projections. But in its ruling, the court did not mention Fischel’s proposed testimony “that the economic evidence does not establish that the information concerning the magnitude of Qwest’s IRU revenue would have been material to reasonable investors,” APP-431-32, and therefore made no findings and provided no rationale for excluding it.

Nor did the court mention Fischel’s testimony about “the market valuations of

telecommunications companies that engaged in IRU transactions as compared to the market valuations of telecommunications companies that did not,” APP-432, which would have shown that investors did not discount IRU revenues, *id.* at 432-33, 480-81, or make any findings or provide any rationale for excluding it.

8. Even though the court excluded Fischel on the grounds that it needed more information to assess the reliability of his testimony, the court refused to let Fischel take the stand for *voir dire* that could have provided the additional information, and refused to hold argument or even let Nacchio’s lawyers speak, despite the defense’s readiness to proceed. The court’s refusal to do any of these things is particularly inexplicable in light of its comments—moments after having made the ruling—that the trial was on track to finish “way ahead of time,” and “is going to be completed easily within probably half the time that ... was allotted to it.” APP-3942. The court then excused the jury for the afternoon that Thursday, all day Friday, and until Monday morning. APP-3949.

9. Over the weekend, Nacchio filed a motion that “ask[ed] the Court to reconsider its exclusion of the testimony,” and to hold an evidentiary hearing. APP-481. Nacchio cited this Court’s case law establishing that an evidentiary hearing is appropriate where a court believes the expert’s testimony “was insufficiently detailed.” *Id.* Nacchio also requested leave to introduce Fischel to rebut the testimony of the government’s analysts (discussed below) following any evidentiary hearing. *Id.* The defense had also sent the government additional notice and 438 pages of supporting documentation the day prior to filing the motion. APP-506. The government moved to preclude Fischel’s testimony “for reasons very similar to those already discussed by the Court.” APP-489.

Although the defense case was not over, Fischel had not yet even begun to testify as a summary fact witness, and the court was still weeks ahead of schedule, it refused Nacchio's request for a *Daubert* hearing on the grounds that "[t]here is no more disclosure or substantially no more disclosure than we originally had," APP-4075⁶—even though the purpose of such a hearing would have been to fill any gaps in the information before the court regarding the expert's methodology. Despite refusing to hold a hearing, the court again excused the jury early (at 3 pm) for the second time in as many days stating: "Members of the jury, we are—as I told you Thursday, we're moving much faster than ever anticipated I think we've outrun our supply lines, kind of like the third Army. It's gone so fast that we're having trouble getting the next—the logistics of the next moves coordinated, so we're going to slow down just for a bit. I will excuse you for the rest of the afternoon." APP-4120. It excused the jury until 1 pm the next day. *Id.*

The Exclusion of Fischel's Rebuttal Testimony

Although neither the panel majority nor the dissent addressed the issue, Nacchio argued on appeal that the district court's refusal to allow Fischel to rebut expert testimony by two government witnesses—the subject of Nacchio's motion to reconsider—was an additional error. BR-46-48; Reply-28.

1. On March 26, the district court issued an order precluding two government witnesses, analysts Drake Johnstone, and Prashant Khemka, from providing opinion testimony on materiality. APP-353. It reasoned that this type of testimony required the

⁶ *See also* APP-4075 ("[T]he Court continues to have the same difficulty with this methodology and non-disclosure of the methodology as it had with respect to the original expert report.").

witnesses to be qualified as experts, but that the government had failed to provide any Rule 16 notice. *Id.* The district court thus ruled that the analysts would be precluded from telling the jury what information was “important” or “material.” APP-358-59.

2. In spite of the court’s ruling, the government proceeded to elicit expert opinion testimony from both analysts. For example, Johnstone began his testimony by telling the jury, over objection, that “on three separate occasions, the Wall Street Journal recognized me as one of the best on-the-street analysts for the year in question, 2001. I was ranked as the best fixed mind [sic] telecom analyst in the U.S.” APP-3563. He explained that his testimony was based on “read[ing] up on the company to learn about the company and their competitors and the industry situation,” “the company’s quarterly results, press results, telling how they did and their expectations,” “10Q filings filed with the SEC on quarterly basis, 10K filings,” his “good sense of [the] industry,” and “also looking at the results and looking at conference calls of the industry,” APP-3561 (a list quite similar to the information that Nacchio’s Rule 16 notice stated Fischel relied upon).

The “best ... telecom analyst in the U[nited] S[tates]” then testified on direct examination that Qwest’s IRU revenues were not meaningful to investors and should be discounted *completely*. APP-3589. He testified that, “in the first quarter of 2001, Qwest published in their press release that they grew revenue 12 percent. But investors ... did not know that that figure included over \$400 million of one-time [IRU] revenue, which if you look at recurring revenue, the company actually grew its revenue 7½ percent over year, not 12 percent.” *Id.* According to Johnstone, therefore, when assessing Qwest’s growth rate, it was necessary to know what percentage of revenue came from IRU sales,

because “investors” would completely strip that amount from models evaluating Qwest’s growth and ability to meet its projections.

Johnstone further testified that he disseminated that information in a report “to investors.” APP-3590. The defense’s objection was again overruled. *Id.* Johnstone continued: “So when I saw the 10Q filing, I described *to investors how my view of the company had changed now that I had full disclosure*, now that I realized that the revenue that was reported first and second quarter press releases was not, in fact, all recurring revenue, that there is a big chunk of revenue that was one-time in nature. So at the time, *that warranted a change in rating and point of view on the company.*” *Id.*

3. Analyst Khemka likewise began his testimony by telling the jury that he was “an expert on the [telecommunications] sector.” APP-3652. He too testified about his review of SEC filings and other reports. APP-3656-57. Khemka’s testimony directly conveyed to the jury his belief that it was essential to know the magnitude of Qwest’s IRU revenues in order to properly value the company. Khemka testified that in 2001 he was busy “trying different ways” to “figure out the one-time—what was the magnitude of the one-time sales and their contribution to growth.” APP-3679. He testified that Qwest’s IRU revenues should not be considered in determining its growth rate because they “were *not meaningful* when we look at [it] as an investor,” and were not “genuine,” APP-3671, and that therefore Qwest’s “revenue quality” was “poor” because it included “one-time or non-recurring items.” APP-3676. As with Johnstone, the government elicited all of this testimony on direct examination.

4. In his written motion to reconsider, submitted after the court unexpectedly

excluded Fischel and then refused to allow counsel to speak, Nacchio also asked the court to at least permit Fischel to testify in rebuttal of Johnstone and Khemka. The motion emphasized two aspects of Fischel's proposed testimony that would have directly rebutted the two analysts' assertions that investors needed to know the percentage of revenues attributable to IRUs, and that when that percentage was disclosed, "investors" completely stripped the IRU revenue from their models. APP-475. First, Fischel analyzed revenue multiples to show that the market did *not* perceive IRU revenues as less valuable than so-called recurring revenues. APP-480-81. Second, Fischel would have testified that the two analysts' testimony was not consistent with the collective views of analysts and what the market understood about the importance of Qwest's IRU revenues to its growth rate. APP-481. Nacchio expressly requested a *Daubert* hearing on the admissibility of this rebuttal testimony. *Id.*

The government sought to preclude rebuttal, "for reasons very similar to those already discussed by the Court." APP-489. Nacchio replied that "[t]he theory the government set forth through its analyst witnesses was that if Qwest had provided more disclosure regarding IRUs Qwest's stock would have been adversely impacted. The testimony of Professor Fischel would directly address that testimony in that he would testify about how the marketplace reacted to such disclosures by other companies during the relevant time." Supp. App. 49-50. Further, Nacchio explained that "Professor Fischel used the standard method for analyzing particular revenue streams of other companies who sold IRUs at the same time at issue in this case and did or did not reveal those sales. This is the *same method used by the analysts* who testified for the

government about how the valuation was applied to Qwest.” Supp. App. 49.

5. The court refused to permit rebuttal or a hearing. It characterized Khemka’s materiality testimony as “isolated.” APP-4073. Although the court had repeatedly told the jury that the trial was running well ahead of schedule, it refused to let the defense present the rebuttal expert of its choice because of the court’s own opinion that “they don’t need an expert to rebut Khemka’s or Johnstone’s testimony.” APP-4075; APP-4070 (“maybe it requires rebuttal, but it doesn’t require an expert such as Professor Fischel.”). The court also stated that it “continues to have the same difficulty with this methodology and non-disclosure of the methodology as it had with respect to the original expert report.” APP-4075. The court further stated that “even if it were reliable, the Court remains of the conclusion that the testimony is of no relevancy,” because “it is markedly difficult for this Court to ascertain how the testimony would be relevant ... and ... anything other than a confusing waste of time,” APP-4075-76.

Why Fischel’s Testimony Was Essential To The Defense

As explained below, the need for Fischel’s testimony is one factor relevant to whether the district court abused its discretion. It is accordingly important to summarize why Fischel’s opinions concerning the economic evidence could have led the jury to believe the defendant’s explanation of the relevant events and to reject the government’s charge that Nacchio knowingly violated the law.⁷

1. There was substantial evidence that could have led the jury to reject the

⁷ The government had to prove that Nacchio possessed material nonpublic information, that he traded on the basis of it, and that he *knew* the information was material. *Fleming*, 264 F.3d at 1261.

government's theory, described *supra* 1, if Fischel had been permitted to explain why the economic evidence strongly supported the defense.

First, Nacchio offered a completely innocent justification for making these sales. In October 2000, *six months before he obtained any of this supposedly material information*, Nacchio told the market he had begun a plan to exercise and sell “about a million” of his \$5.50 stock options per quarter that were set to expire in thirty months. DX1560⁸ (market told to expect “big selling” by Nacchio). The testimony was undisputed that Nacchio tried to avoid the need for these sales by asking the Board to extend the options' expiration date but that the Board was unable to do so. DX1560; APP-1879, 1928-29. Nacchio's sales were wholly consistent with his announcement and testimony that he was “bullish” about the stock's value. APP-3014-15, 3017-18, 3030-31, 3041-44. Through the date of the sales at issue, Nacchio had actually sold about 100,000 *fewer* shares than he told the market to expect by that point in time because he suspended sales when he viewed the price as too low. APP-1929, 4764-65. Even with the challenged sales, Nacchio ended the year with more than 9 million vested options, which was more than he had at the beginning of the year, and more than 500,000 shares of Qwest stock, which he refused to sell despite the declining stock price. APP-4765-66.

Second, the government's theory of materiality was that Nacchio had material inside information that Qwest would miss its year-end projections, but it is undisputed that Qwest's management did not tell Nacchio that the projections had to be reduced until August 15th, nearly three months after the sales at issue. APP-2255-56. During the

⁸ “DX” refers to Defendant's Exhibits.

period of Nacchio's trades there was no internal Qwest estimate forecasting 2001 revenues below public expectations, and no one at Qwest advised Nacchio not to reaffirm guidance or recommended to him that the public projections be lowered. *Id.* Qwest met its public expectations for the first and second quarters. APP-2309-10. Shortly before the trades, Qwest management conducted an extensive business review and adjusted its internal budget to reflect the fact that increases in subscriber revenues (referred to as "recurring revenues") were "not occurring at the rate expected," APP-5000. Qwest had, however, experienced an increase in IRU sales—particularly in the global-business unit whose sales were 61% greater than forecast in the first quarter. APP-5008, 5061. After this process was completed, Qwest management told Nacchio that even "*with all of the debates* [regarding the projections and IRU revenues] ... the internal current view of Qwest was that they would reach \$21.5 billion by December 31st, 2001"—substantially *exceeding* the public guidance. APP-2323, 3276-77.

Third, the government argued that the IRU market was drying up, but there was substantial evidence that the amount of IRU revenues supposedly in jeopardy was very small and merely related to the inherently unpredictable path of the economy. The head of the wholesale business unit, Greg Casey, only identified \$350 million of "risk" in his April estimate due to his prediction that the "[m]arket for IRUs [was] tightening." APP-5037. Casey had underestimated before (BR-23), and even if those revenues were discounted completely, the resulting shortfall in the projections would have been only 0.4%. Casey had already identified \$900 million in IRU contract opportunities by April when he only needed \$529 million in IRU revenues *for the balance of the year* to meet

his forecast, APP-5039, and just weeks later, he identified an additional \$200 million in opportunities, APP-2572-73; *see also* 2700-03. Nacchio had no reason to believe that predictions ““of a fickle and changeable character,”” *Garcia v. Cordova*, 930 F.2d 826, 830 (10th Cir. 1991) (citation omitted), like Casey’s concerns about the economy, were material.⁹

Fourth, there was substantial evidence that Nacchio had disclosed sufficient information about the “risks” inherent in Qwest’s projections as of the date of these sales. Investors certainly knew that Qwest sold IRUs, APP-2390-91; BR-26, as Qwest’s 2000 Annual Report & March 10Q stated that “the Company sells capacity under indefeasible rights of use contracts,” and they also knew by October 2000, that “there was an overcapacity” of “fiber optic cable,” which was putting “downward pressure on the Qwest stock price.” APP-1589; APP-1513. When Nacchio (and the CFO) reaffirmed Qwest’s projection of “revenues between \$21.3 and \$21.7 billion” on April 24, APP-4805, Nacchio also told the market that he was “not pleased with the performance of [the consumer and small business] unit” APP-4807—*i.e.*, recurring revenues—and that Qwest had to reduce their reliance on that sector for year end revenue projections.¹⁰ Nacchio

⁹ SEC rules state that a numerical threshold, “such as 5%” for misstatements in the amount of revenues *already reported*, may serve as a preliminary assumption that an item is “unlikely to be material.” SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,151 (Aug. 19, 1999); Opn. 43; Reply-8. Even higher thresholds are appropriate for numbers based on “estimates.” *Id.* at 41,152, 41,153.

¹⁰ He informed the market that Qwest had previously projected growth of 8-9% in this sector; that growth was only 6.3% for first quarter; and that “we are [now] going to be talking somewhere between 6 and 8 percent” for the year. APP-4828, 4808. As

also acknowledged that there was “softness” in the economy, but believed that Qwest could “hold the numbers” if “the economy strengthen[s] in the second half.” APP-4808.

Finally, this is a specific intent crime and there was substantial evidence that Nacchio would not have *known* that any additional undisclosed information was “material” under the securities laws. By the time of Nacchio’s trades, the CFO, the Audit Committee, and the outside auditors concluded the precise percentage of IRUs for the first quarter was not material and did not need to be disclosed, as they had similarly concluded three other times in 2000 and 2001. BR-29-30; *see also* APP-2388-89.¹¹ It was not until well after all the trades at issue that Qwest’s outside auditors recommended additional disclosures of IRU percentages. APP-2797. And Qwest’s General Counsel, who was aware of all of the information at issue here necessarily determined it was not material. He was required to close the trading window if this was nonpublic material information, but he did not do so, and he approved Nacchio’s 10b5-1 plan, “represent[ing] and warrant[ing],” before seven of the trades, that Nacchio did not have material nonpublic information. BR-29; Reply-10-11; APP-2201, 2222, 4990-91.¹²

Johnstone admitted, Nacchio was disclosing that “they were not being successful in the first quarter.” APP-3636.

¹¹ SEC rules (Item 101 of Regulation S-K) support their assessment: Issuers must disclose “the amount or percentage of total revenue contributed by any class of similar products or services which accounted for 10 percent or more of consolidated revenue.” 17 C.F.R. §229.101(c)(i). Qwest disclosed that it sold IRUs in 2000, when the Q4 percentage was 5%; Nacchio had no reason to believe an increase to 8% had to be disclosed when SEC rules indicated the contrary and Qwest’s CFO, Audit Committee, and outside auditors determined that it did not need to be disclosed.

¹² There was also evidence of a legitimate reason for delaying disclosure of the precise percentages of IRUs until the auditors determined it was “material.” Casey

2. Fischel's expert testimony would have shown the jury that the economic evidence is consistent with the defense, not the government's allegations. *First*, the economic evidence would have shown that Nacchio's trades did not accelerate in April-May 2001, were not unusual or suspicious, and were inconsistent with any economic incentives the supposedly inside information would have given him. *Second*, Fischel would have shown that the economic evidence supported Nacchio's view that the information regarding the magnitude of Qwest's IRU revenues would not have been material to investors on the dates of his sales—contrary to the analysts' testimony.¹³ When the percentages of IRUs were disclosed, there was no discernible negative effect on Qwest's stock price; when the projections were reduced, the stock rose 9.3%. BR-27-28. Fischel would have explained that this showed the market appreciated the risks in Qwest's projections and did not consider the IRU revenue mix material. He also would have shown, through his economic study that the market did not discount IRU revenue streams or the growth rate of companies selling IRUs.

Finally, Fischel would have supported Nacchio's evidence that the information did strongly opposed any unnecessary disclosure of the percentage for competitive reasons. APP-2549-51.

¹³ The significance of Fischel's potential to rebut the analysts' opinions cannot be understated. The government stressed Johnstone's testimony in its closing argument as evidence that the market considered Qwest's IRU revenues as worthless when valuing the company and its growth rate: "I think you heard this from Mr. Johnstone, the company finally does describe the volume of IRUs that they were doing in the first quarter and the second quarter. And, you know, I think Mr. Johnstone's testimony was, *he immediately stripped it out of his model*. I think his testimony was—when I say, *stripped it out of his model, that growth that was related to the IRUs, he just took it out*. I think his testimony was, *he used to think that Qwest was growing at 12 percent, and now he knows they're really only growing at 7 ½ percent* because he knows these IRUs are also going away, very difficult market, one-timers." APP-4278.

not lead him to believe, at the time of the trades, that the projections were materially misleading, by showing that the decline in stock price throughout 2001 was the result of the massive economic downturn in the telecommunications industry, and was not attributable to a market reaction to misleading projections.

SUMMARY OF ARGUMENT

The exclusion of Nacchio's principal witness, who would have directly countered the government's proof on the two key disputed elements in what the panel unanimously described as a "close" case, Opn. 46-47, must be assessed with particular care. "The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citation omitted), and "due process guarantees are implicated whenever the exclusion of evidence acts to obstruct this right." *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1121 (10th Cir. 2006) (citing *Taylor v. Illinois*, 484 U.S. 400, 408 (1988)). Like the "latitude" afforded legislators to craft rules "excluding evidence from criminal trials," the discretion vested in trial judges to exclude a defendant's evidence "has limits," and must be applied in a manner that avoids unduly "infring[ing] upon a weighty interest of the accused." 547 U.S. at 324. The district court here abused its discretion, both by depriving Nacchio of the opportunity to establish Fischel's reliability under Rule 702, and by precluding him from offering this critical evidence.

First, the court failed to afford Nacchio the process he was due. Exclusion of expert testimony is the "exception rather than the rule," Fed. R. Evid. 702, 2000 advisory committee's note. The evidence Nacchio offered is presumed admissible and need only

be supported by “good grounds.” *Daubert*, 509 U.S. at 590. Numerous courts in this Circuit and elsewhere have held that the party making a motion *in limine* bears the burden of demonstrating that the challenged evidence is inadmissible as a matter of law, or that a hearing is required to develop the record and resolve disputed facts. Indeed, this Court has reversed *in limine* rulings excluding evidence because the court had insufficient information to carry out its obligation under Federal Rule of Evidence 104(a) to rule on admissibility, *even where the proponent failed to provide sufficient information at a hearing*. *United States v. Roberts*, 88 F.3d 872, 881 (10th Cir. 1996).

The only directive Nacchio received from the court was to comply with Rule 16, which he did. The government’s motion then attacked the adequacy of Nacchio’s Rule 16 notice on an erroneous basis, principally arguing that there was a dearth of information regarding the expert’s methodology, and requested a hearing. Nacchio, quite properly, responded to the arguments the government made. And the common practice in criminal cases, where the expert disclosure is minimal and there are no depositions or summary judgment, is to decide *Daubert* issues after either a hearing or *voir dire* at trial. Opn. 22-23. Nacchio had no reason to believe that the court would decline to follow this usual practice, or that he was under any special obligation to produce a detailed written proffer establishing admissibility, given that there is no rule that requires a defendant to request a hearing or establish the admissibility of his expert’s testimony prior to calling the witness to the stand.

Although courts sometimes do order that the parties follow special procedures to evaluate expert testimony, that did not happen here. The court even gave every

indication *not* to do anything further: it assured Nacchio that he would not be “criticized” for making arguments orally, the night before calling Fischel the court had not even looked at the issue yet and did not want to discuss it, and that morning, asked who would be handling cross-examination. Defendants are not required to be mind-readers. And under any standard, the court’s refusal to allow Nacchio to speak should dispose of any suggestion Nacchio should have done more: “When the court does not allow a lawyer to present arguments, we will not penalize him for failing to present them.” Opn. 25.

Second, the court below erred as a matter of law when it excluded Fischel on the grounds that Nacchio’s Rule 16 notice failed to satisfy the requirements of Rule 702. It also abused its discretion by abdicating its “gatekeeper” function; by failing to ensure the creation of “a sufficiently developed record,” from which it was supposed to “‘carefully and meticulously’ review the proffered ... evidence.” *United States v. Call*, 129 F.3d 1402, 1405 (10th Cir. 1997) (citation omitted); and by concluding that economic testimony routinely admitted (often for the government) in securities fraud cases, would not “assist the jury” because the issues before it were no more complicated than those in “a simple negligence case.” The court deemed “irrelevant” testimony that would have directly countered the government’s arguments, and allowed two analysts, whose testimony was emphasized in closing argument, to opine on a number of critical subjects, but prevented Fischel from rebutting it. The district court’s miserly approach to what evidence Nacchio could present in his own defense was a clear abuse of discretion. It reflected, at best, a complete lack of appreciation of the “essential [need] in this [expert]-related area that the courts administer the Federal Rules of Evidence in order to achieve

the ‘ends’ that the Rules themselves set forth, *not only so that proceedings may be ‘justly determined,’ but also so ‘that the truth may be ascertained.’*” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 149 (1997) (Breyer, J., concurring) (quoting Fed. R. Evid. 102).

As the Supreme Court expressly held in *Kumho*, 526 U.S. at 153, “*the jury must decide among the conflicting views of different experts, even [where] the evidence is ‘shaky.’*” *See also Daubert*, 509 U.S. at 596 (“[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence”). Here, the jury never had the chance. Especially “[w]hen a defendant’s liberty is at stake,” the district court’s complete failure “to apply the correct law, follow the appropriate decision-making steps and articulate the bases upon which its decision rests,” and “appl[y] the analytical principles set forth in *Daubert*,” requires that the conviction be reversed. *United States v. Smithers*, 212 F.3d 306, 315 (6th Cir. 2000). A new trial is the only appropriate remedy under the settled law of this Circuit, and indeed, all others to have addressed the subject. *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1146 (2008), which the government could have but failed to raise before the panel, did nothing to change that law, and is irrelevant because the district court’s ruling is not “equally susceptible of a correct reading.”

The panel’s ruling on the exclusion of Fischel should not be disturbed.

ARGUMENT

I. NACCHIO DID NOT HAVE NOTICE OF ANY OBLIGATION TO PROFFER WRITTEN TESTIMONY OR REQUEST A HEARING

A. Nacchio’s Assumption That Reliability Could Be Established By Calling Fischel Was Based On Settled Law And Common Practice

1. The Government, As Movant, Bore The Burden Of Establishing That It Was Entitled To *In Limine* Relief Or, Alternatively, A Hearing On Admissibility

First, the proponent of evidence bears the *ultimate* burden of demonstrating admissibility, but there is no legal requirement that the proponent meet that burden at any specific point in time before presenting the witness. Numerous courts have held that to demonstrate entitlement to *in limine* relief the *movant* must show that evidence is “*clearly* ... inadmissible for *any* purpose,” *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 440 (7th Cir. 1997); *e.g.*, *Koch v. Koch Indus., Inc.*, 2 F. Supp. 2d 1385, 1388 (D. Kan. 1998) (“The *movant* has the burden of demonstrating that the evidence is inadmissible on *any* relevant ground.”),¹⁴ or must, as the government did here, request an evidentiary hearing if there is insufficient information for the court to rule on admissibility at the time the *in limine* ruling is sought. *Cf. Luce v. United States*, 469 U.S. 38 (1984) (denial of motion *in limine* not preserved for review where *movant* failed to take sufficient steps to ensure creation of adequate record to determine admissibility).

If the proponent argues in response (as Nacchio did here) that the motion fails to

¹⁴ *See also Morrison v. Stephenson*, 2008 WL 343176, at *1 (S.D. Ohio Feb. 5, 2008) (“A court should not make a ruling *in limine* unless the moving party meets its burden of showing that the evidence in question is clearly inadmissible.”); *Plair v. E.J. Brach & Sons, Inc.*, 864 F. Supp. 67, 69 (N.D. Ill. 1994) (same); *Brookins v. Vogel*, 2008 U.S. Dist. LEXIS 52148, at *16-17 (E.D. Cal. July 8, 2008) (same); *Bynum v. Cavalry Portfolio Servs., LLC*, 2006 WL 897712, at *2 (N.D. Okla. Mar. 31, 2006) (same); *In re Hardesty*, 242 B.R. 712, 714 (D. Kan. 1999) (same); *Indiana Insurance Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004) (same); *Allen v. City of N.Y.*, 466 F. Supp. 2d 545, 547 (S.D.N.Y. 2006) (same).

show why the testimony should be excluded *in limine*, he is not precluded from subsequently providing further details supporting admissibility through live testimony by the witness. Indeed, that is precisely the procedure contemplated in *Kumho*: When the movant meets the burden of showing “cause for questioning,” the judge must create “appropriate proceedings” to “investigate reliability,” which can include “special briefing” or “other proceedings,” 526 U.S. at 152, where the judge is to “ask questions,” *id.* at 151. This Court too has emphasized that it is “most desirable from all standpoints” to permit the proponent of evidence to “examine the witness before the court,” *United States v. Adams*, 271 F.3d 1236, 1241 (10th Cir. 2001), and, as the government acknowledges (Pet. 9), “when the reliability” of expert testimony is disputed, “the district court ‘*must hold an evidentiary hearing unless the proffer on its face is insufficient to raise a material issue of fact.*’” *United States v. Sandoval*, 390 F.3d 1294, 1301 (10th Cir. 2004) (citation omitted).¹⁵ As the drafters of Rule 104(a) have emphasized, “[i]f the question is factual in nature, the judge will *of necessity receive evidence pro and con on the issue.*” Fed. R. Evid. 104(a), 1972 advisory committee’s note; *see also Head v. Lithonia Corp.*, 881 F.2d 941, 944 (10th Cir. 1989) (stressing that process of assessing admissibility of expert testimony under Rule 104(a) “*presupposes the court’s guidance*”). It was the district court, and not Nacchio, which failed to comply with its obligations.

This Court’s holding in *United States v. Roberts*, 88 F.3d 872 (10th Cir. 1996),

¹⁵ *See also Hays v. Clark County Nev.*, 2008 WL 2372295, at *7 (D. Nev. June 6, 2008) (“[A] motion *in limine* should not be used to resolve factual disputes” and should be granted only where evidence is “inadmissible on *all* potential grounds.”) (citation omitted).

further illustrates the point. There, the government sought to introduce evidence of a common scheme under Federal Rule of Evidence 404(b), which, like Rule 702, “is a rule of inclusion,” and served a “404(b) notice,” of its intent. *Id.* at 879-80. The defendant filed a motion *in limine* to exclude the evidence, which the government opposed. *Id.* at 880-81. This Court reversed the district court’s exclusion of the evidence, *even though the government’s notice and opposition to the motion in limine did not contain sufficient information to establish admissibility. Id.*

This Court held that the government’s proffer indicated a “plausibility” that the evidence was admissible, but that because “the government offer[ed] limited evidence concerning the ... probable testimony at trial,” it was not possible for the court “to definitively determine whether [the evidence] sustains the government’s hypothesis,” without investigating further. *Id.* at 881. This Court concluded that the district court abused its discretion by not inquiring further even though it was “the government [that] failed to provide the district court ... with a sufficiently detailed record to effect an appropriate resolution of the issue.” *Id.* Under *Roberts*, the improper exclusion of Fischel requires reversal regardless of whether Nacchio provided sufficient information to establish admissibility before the court’s *in limine* ruling.

Second, the principle articulated in *Roberts* is entirely consistent with this Court’s *Daubert* precedents, which stress that “[a] natural requirement of the gatekeeper obligation is the creation of ‘a sufficiently developed record,’” *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003) (citation omitted), because the court’s obligation to assess reliability “can be satisfied only if ‘the court has sufficient evidence to perform the

task,” *id.* at 1228 (citation omitted); *see also United States v. Ellis*, 193 Fed. Appx. 773, 778 (10th Cir. 2006) (unpublished) (to satisfy the gatekeeping obligation “a court should *inquire* into the qualifications and background of the expert and *ask* if ‘the reasoning or methodology underlying the testimony is scientifically valid’”) (citation omitted).

Kumho, *Dodge*, and *Ellis* show that the dissent was wrong when it said “we have never required a district court to inquire about *Daubert* issues,” Dis. 8, and “insofar as there were any gaps in the record before the district court when it made its *Daubert* ruling, Mr. Nacchio must be held responsible for them,” *id.* 11 n.7. Indeed, we are aware of no court which has held that a district court may refuse to order “appropriate proceedings” when the information before the court does not establish *unreliability*, but only that more information is needed to assess methodology. *Kumho*, 526 U.S. at 158-59 (Scalia, J., concurring); *United States v. Velarde*, 214 F.3d 1204, 1209 (10th Cir. 2000).

Third, holding Nacchio “responsible” for any evidentiary “gaps” that existed when the district court excluded Fischel would also squarely conflict with the Third Circuit’s “approach” to assessing the reliability of expert testimony, which the government endorses as “the better one,” Pet. 11. The Third Circuit has repeatedly held that where expert testimony is not inadmissible as a matter of law the “failure to hold a hearing”—regardless of whether the proponent requested one—constitutes “an abuse of discretion *where the evidentiary record is insufficient to allow a district court to determine what methodology was employed by the expert in arriving at his conclusions.*” *Murray v.*

Marina Dist. Dev. Co., 2008 WL 2265300, at *2 (3d Cir. June 4, 2008) (unpublished).¹⁶ For example, in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 854 (3d Cir. 1990), the court held that the district court had not “provided the [proponent] with sufficient process for defending their evidentiary submissions,” where it “failed to conduct an *in limine* hearing” and “denied oral argument on the evidentiary issues.” Even though the proponent was alerted to the movant’s *Daubert* concerns, the Third Circuit reversed because, like *Nacchio*, the proponent had “no foreknowledge of the direction that the district court’s opinion might take,” and “should have been given an opportunity to be heard on the critical issues before being effectively dispatched from court.” *Id.* at 855. It was also irrelevant that “[t]he plaintiffs did not request an *in limine* hearing and *in fact opposed* [the movant’s request for one] *on the grounds that it was premature*” because discovery was incomplete. *Id.* at 854 n.29a; *see also Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 416-18 (3d Cir. 1999) (reversible error to exclude expert without hearing, where report did not disclose methodology, because that did not “establish that [the expert] may not have ‘good grounds’ for his opinions, but rather, that they are insufficiently explained and the reasons and foundations for them inadequately and perhaps confusingly explicated,” and in such cases, district courts *must* hold a

¹⁶ *See also Elcock v. Kmart Corp.*, 233 F.3d 734, 745 (3d Cir. 2000) (holding that where district court cannot determine what methodology was used and methodology raises “significant reliability questions,” *Daubert* hearing is “a necessary predicate for a proper determination as to the reliability of [the expert’s] methods”); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 153-55 (3d Cir. 2000) (where record is not clear or inadequately developed, hearings are “necessary to determine how the expert reached his opinion”; finding hearing unnecessary only because record “was far from scant” and expert, through report, amended report, affidavit, two depositions, and summary judgment briefing, “did explain how he arrived at his opinion, ... in as much detail as possible”).

“‘hearing to assess the admissibility of the [testimony],’ giving [the proponent] an opportunity to respond to *the court’s* concerns”) (citations omitted).

Fourth, none of the cases on which the dissent and the government rely provide *any* authority establishing that Nacchio had notice that he had to establish the reliability of Fischel’s testimony *prior* to his taking the stand. Each is a *civil* case at the summary judgment stage with a full evidentiary record where the parties were fully on notice that *at that time in order to defeat summary judgment* they had to establish that the evidence on which they relied (typically just the expert testimony) was admissible and therefore created a material factual dispute. *See* Fed. R. Civ. P. 56. And the proponent of the evidence in each case still received far *more* process than Nacchio.¹⁷

Finally, any rule requiring a criminal defendant to provide a written *Daubert* proffer or request a hearing, in advance of calling his expert witness, would be fundamentally inconsistent with the policies underlying Rule 16, Rule 702, and the Sixth Amendment. Rule 16 is not intended to supply information for *the court* so it can exercise its gatekeeping function under *Daubert*. It is a discovery tool designed to “minimize surprise” at trial for parties; its purposes include “provid[ing] the opponent

¹⁷ *See Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 n.4 (10th Cir. 2001) (court ordered supplemental briefing and held hearing); *Solorio v. United States*, 85 Fed. Appx. 705, 708 (10th Cir. 2004) (briefing followed by argument at which “district court zeroed in on the *Daubert* issue,” and asked “tell me why your guy’s testimony should come in under Rule 702”); *Champagne Metals v. Ken-Mac Metals, Inc.*, No. 02-528 (W.D. Okla.) (Docket No. 307, at 7) ((separate *Daubert* and summary judgment briefing and court found that “[a]lthough Plaintiff does not request a hearing, the Court is obligated to develop the record to such an extent that it ‘has sufficient evidence to perform [the gatekeeper obligation]’”), *aff’d* by 458 F.3d 1073, 1076 (10th Cir. 2006); *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244 (6th Cir. 2001) (same).

with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." Fed. R. Crim. P. 16, 1993 advisory committee's note. This suggests that the drafters anticipated that the reliability of an expert would be tested through cross-examination, whether at a hearing or on *voir dire*, and *not* in a written proffer. Any rule requiring a written proffer would allow the government to use motions *in limine* as a discovery tool to circumvent Rule 16 and import Civil Rule 26's more rigorous disclosure requirements into every criminal case.¹⁸

2. Nacchio's Actions Were Consistent With Common Practice In Criminal Cases

Common practice in criminal cases also belies any suggestion that Nacchio was on constructive notice of some obligation to produce evidence of admissibility or request a hearing before the court excluded Fischel. Unlike civil cases, a defendant's *only* expert disclosure obligation is to give to the government the brief Rule 16 notice. Absent a contrary court order, the presumptive time for establishing the reliability of the expert's testimony is ordinarily on the witness stand.¹⁹

¹⁸ Notably, the drafters of Rule 702 expressly chose *not* "to set forth procedural requirements for exercising the trial court's gatekeeping function," to encourage courts to "continue" to employ "ingenuity and flexibility" in carrying out their gatekeeping role. Fed. R. Evid. 702, 2000 advisory committee's note; *see also Kumho*, 526 U.S. at 152-53.

¹⁹ Of course, district courts have ample discretion to direct the parties to employ other procedures. *See United States v. Impastato*, 535 F. Supp. 2d 732, 743 (E.D. La. 2008) (courts have the "authority and discretion to create appropriate procedures for determining the admissibility of expert testimony in criminal cases ... but ... these procedures must be crafted in a way that respects the fact that the Defendant has no obligation to present a defense until the Government has established its case"; ordering *in camera* submissions from defense of the "subject matter of any potential expert witness"; indicating that if admissibility of any defense experts "should be determined prior to

Daubert hearings (often *sua sponte*),²⁰ are “[t]he most common method for fulfilling [the gatekeeper function].” *Goebel v. Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1087 (10th Cir. 2000). Even the court below, without a request from the proponent, has ordered them in other cases.²¹ Because a separate hearing can be unnecessary and inefficient, in criminal cases (and even at civil trials) courts sometimes conduct *voir dire* or permit the adversary to question the expert before ruling on admissibility. *United States v. Sepulveda*, 15 F.3d 1161, 1184 n.15 (1st Cir. 1993). Indeed, “[a] trial setting normally will provide the best operating environment for the triage which *Daubert* demands. *Voir dire* is an extremely helpful device in evaluating

trial,” court would “order such hearings as appropriate”); *see also United States v. Poulsen*, No. 06-00129 (S.D. Ohio) (Docket No. 366 at ADD-29) (ordering defendants to submit expert reports *in camera* to prevent the government from getting “an unjustified preview of Defendants’ litigation strategy”); *United States v. Libby*, No. 05-cr-00394 (D.D.C.) (Docket Nos. 122, 129, 169) (ordering defendant to submit motion to admit expert testimony under Rule 702 along with his Rule 16 notice and then holding hearing); *United States v. Causey [Skilling]*, No. 04-0025 (S.D. Tex.) (Docket No. 835 at ADD-8) (ordering defendant to file written proffer 10 days prior to calling expert); *United States v. Siegelman*, No. 05-cr-00119 (M.D. Ala.) (Docket No. 246) (authorizing expert depositions). The district court here did not do so, however.

²⁰ *E.g. United States v. Wittig [Lake]*, No. 03-cr-40142 (D. Kan.) (Docket Nos. 453 at 27, 425, 431, 902, 904-08, 930, 951; Docket No. 936 at 17) (scheduling hearing to resolve government’s motion *in limine* to exclude the defense expert, even though defendant argued that the evidence was clearly admissible and “[a] *Daubert* hearing is unnecessary”), *rev’d on other grounds sub nom. United States v. Lake*, 472 F.3d 1247 (10th Cir. 2007); *see also, e.g., United States v. Rodriguez-Felix*, No. 04-CR-665 (D.N.M. filed Mar. 25, 2004) (Docket Nos. 75, 76), *aff’d* 450 F.3d 1117 (10th Cir. 2006).

²¹ *E.g., Schioppi v. Costco Wholesale Corp.*, No. 06-2274 (D. Colo.) (Docket Nos. 60, 64, 67, 70) (after full briefing and civil expert discovery, scheduling *Daubert* hearing even though no party requested one); *High Country Container, Inc. v. Union Pac. R.R.*, No. 05-2059 (D. Colo.) (Docket Nos. 50, 51, 59, 68, 70) (same); *Trustees of Colo. Laborers Health & Welfare Trust Fund v. Am. Benefit Plan Adm’rs, Inc.*, No. 04-2630 (D. Colo.) (Docket Nos. 40, 47, 51) (scheduling *Daubert* hearing even though movant requested one but proponent’s response, like Nacchio’s, did not).

proffered expert testimony.” *Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184, 188 (1st Cir. 1997); *Padillas*, 186 F.3d at 418.²² Nacchio had every right to assume the court would follow this procedure here if it needed additional information.

B. The Court Never Ordered Nacchio To Proffer Written Testimony, And There Was No Reason For Him To Repeat The Government’s Request For A *Daubert* Hearing

Before it excluded Fischel, the district court never once mentioned methodology or suggested that Nacchio was required, before calling Fischel to the stand, to preemptively establish the reliability of Fischel’s methodology. The *only* time the district court *ever* referred to *Daubert* before excluding Fischel was at the March 22, 2007 hearing. That was a mere aside, pointing out that *Daubert* addressed scientific testimony, during a colloquy regarding the deadline for Nacchio to serve his second Rule 16 notice. APP-2042. As the dissent pointed out, Rule 16 “certainly did not require [Nacchio] to demonstrate admissibility.” Dis. 9. Nacchio thus reasonably interpreted the court’s order at face value, as directing him only to “bring his submission into compliance with Rule 16.” APP-352. He did so in a notice, BR-44-45, which was far more detailed than the Rule 16 notices provided by Nacchio’s prosecutors in other insider trading cases.²³

²² Indeed, the advisory committee notes to the 2000 amendments to Fed. R. Evid. 702 cite *Cortes-Irizarry*, and *In re Paoli Railroad Yard PCB Litigation*, as examples of how courts should “consider[] challenges to expert testimony under *Daubert*.” See also, e.g., *United States v. Nichols*, 169 F.3d 1255, 1263 (10th Cir. 1999); *United States v. Davis*, 40 F.3d 1069, 1075 (10th Cir. 1994); *City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 586 (10th Cir. 1998) (Kelly, J., sitting as district judge).

²³ In *United States v. Causey [Skilling]*, for example, Mr. Wise provided this Rule 16 notice: “H. Nejat (Nejat) Seyhun is The Jerome B. & Eilene M. York Professor of Business Administration; Professor of Finance at the Ross School of Business at the

Less than thirty-six hours before excluding Fischel, the court said that given the vigorous trial schedule, it would “not criticiz[e] anybody for not submitting things in writing.” APP-3603. The night before excluding Fischel, the court said, “You know, I just haven’t had a chance to look at [the government’s motion].” APP-3834. And the morning it excluded Fischel, the court asked the government which attorney would be cross-examining Fischel’s. APP-3870. These events did not give Nacchio any reason to suspect that he was at risk of forfeiting the right to put his witness on the stand to establish methodology when, absent some order from the court, *that is the way it is normally done in criminal cases*. See also Fed. R. Crim. P. 47(b) (motions not regulated by a more specific rule need *not* be in writing “when made during a trial or hearing”).

The record thus belies the dissent’s many assertions that “[t]he district court had *repeatedly questioned* Professor Fischel’s methodology,” Dis. 2, and “the district court *clearly indicated on numerous occasions* that it was concerned about Professor Fischel’s methodology,” *id.* 8.²⁴ *Not one of these statements in the dissent is or could be followed by any citation to the record.*

University of Michigan. Professor Seyhun’s research focuses on insider trading and option pricing among other topics. If called to testify Professor Seyhun will offer expert opinions in response to testimony by Gregg A. Jarrell, whom Defendant Skilling has disclosed he intends to call, on the topic of Skilling’s sales of Enron stock.” No. 04-0025 (S.D. Tex.) (Docket No. 919 at ADD-11) (quoting May 1, 2006 email from Leo Wise).

²⁴ See also Dis. 1-2 (“[B]y the time the district court ruled to exclude Professor Fischel’s testimony, it was *clear that the court was asking about Daubert.*”); *id.* 2 (“[W]hen *the district court was asking about methodology*, Mr. Nacchio was required to rise to meet his burden of demonstrating that the expert testimony was admissible.”); *id.* 1 (“*Daubert* was at the heart of the district court’s decision, and Mr. Nacchio was on *clear notice* of this fact.”); *id.* 2 n.2 (“[A] *district court’s repeated probing* as to the sufficiency of an expert’s methodology, as here, would put an expert witness’s proponent on notice

The dissent acknowledges that “the court did not specifically order a *Daubert* proffer,” but concludes that the court “effectively invited” Nacchio to submit one “through its repeated questions on methodology.” *Id.* But the record evinces *no* questions on methodology by the district court, let alone “repeated” ones, and “parties cannot be held to guess the procedural rules in advance.” Opn. 25. The court could have expressly demanded a *Daubert* proffer, but did not, even though it has previously done so in similar situations involving the government’s experts.²⁵ Here its only order directed Nacchio to comply with Rule 16. He did. Because the order “did not require [Nacchio] to do anything differently,” and there was no “violation of any clearly-established rule or duty,” “the drastic sanction of precluding [Fischel] altogether is unwarranted.” *United States v. Harvey*, 117 F.3d 1044, 1048 (7th Cir. 1997) (reversing conviction).

The government’s motion to exclude Fischel could not and did not substitute for express direction from the court and failed to put Nacchio on notice that he was required

that *Daubert* was at issue.”); *id.* 8 (referring to the district court’s “repeated questions on methodology”); *id.* (“Mr. Nacchio failed to accept [the district court’s] invitation to alleviate its *Daubert* concerns”); *id.* 8 n.6 (“[I]t became apparent that the district court was not convinced that Professor Fischel’s testimony was admissible.”); *id.* 11 n.7 (“[I]t was incumbent upon Mr. Nacchio to make the appropriate submissions ... particularly given that the district court had been drawing his attention to its concern over methodology.”); *id.* 13-14 (district court gave “ample notice that the methodology underlying Professor Fischel’s opinion ... was at issue”).

²⁵ For example, in *United States v. Rollen*, No. 04-cr-514 (D. Colo.) (June 2, 2005 Status Conf. Tr. at ADD-47), the court was “having difficulty getting a handle on the extent of the nature of this testimony.” It therefore scheduled a *Daubert* hearing (despite the government’s argument that “there is no need,” *id.*) to determine “if there is a factual base for [the testimony],” ADD-50, and directed the prosecution to file an “outline of testimony” or “supplemental proffer of testimony” for the hearing, ADD-57, and remarked that “until I can at least begin to get a grip ... I guess I just need to listen,” ADD-51.

to submit detailed evidence of Fischel’s methodology. That motion was written entirely from the (incorrect) view that Nacchio had not complied with his disclosure obligations. APP-362 (“Defendant still has not complied with the expert disclosure rules.”); APP-368 (Rule 16 “disclosure requirement is similar to the disclosure requirements in civil actions”); APP-419 (Rule 16 disclosure is “far less informative than the typical expert report in a run-of-the-mill medical malpractice case”). That position was plainly wrong, Opn. 20, and indeed contrary to the government’s (and this prosecutor’s) arguments in other cases that Rule 16 is merely a “minimal notice requirement.”²⁶

The remainder of the government’s motion argued that the “the [Rule 16] disclosure does not set forth any reliable principles or methods,” APP-388, and that the reliability of Fischel’s methodology could not be determined from the notice, *e.g.*, APP-408; *supra* 6 n.5. This is hardly surprising, because that is not the purpose or a requirement of the notice, as the majority and dissent agreed. Opn. 16; Dis. 9. This was not a genuine “*Daubert*” motion by any understanding; the government was simply demanding up-front disclosures that it was not entitled to under the Criminal Rules. No competent lawyer would respond to such a motion—which argued that the disclosure did not disclose what is not required to be disclosed—*by disclosing it*. A defendant cannot be faulted for not making the wrongfully demanded disclosures, in the face of silence from

²⁶ For example, in *United States v. Poulsen*, No. 06-00129 (S.D. Ohio) (Docket No. 377 at ADD-33), as government counsel, Mr. Wise argued that Rule 16 “does not require the preparation of formal written reports,” is a “minimal notice requirement[,]” ADD-32, designed to “minimize surprise,” *id.*, and that where testimony is routine “the requirements of the Rule have been satisfied even where a summary was not provided to the defense.” ADD-33.

the district court.

Finally, the government's motion asked the court to order further disclosure, which courts sometimes do, *supra* 33-34, but the court here was silent. The government argued that a hearing was necessary for the court to make a reliability finding (because the Rule 16 notice did not establish a reliable methodology), APP-421, and Nacchio did not oppose the government's request for a hearing out of the presence of the jury. Given that his Rule 16 notice *was* adequate, and the government's motion did not even suggest that the court could perform its *Daubert* gatekeeping obligations *without holding a hearing*, he was entitled to presume that he could establish admissibility on the stand, and that if the court felt it needed additional information before then, it would hold a hearing that would afford Nacchio the opportunity to respond to any concerns the court might have. "Given the 'liberal thrust' of the federal rules, it is particularly important that the side trying to defend the admissibility of evidence be given an adequate chance to do so."

In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 739 (3d Cir. 1994) (quoting *Daubert*).

II. NACCHIO DID NOT HAVE AN ADEQUATE OPPORTUNITY TO PRESENT EVIDENCE OF METHODOLOGY OR REQUEST AN EVIDENTIARY HEARING BEFORE THE RULING, BUT DID REQUEST A DAUBERT HEARING BEFORE FISCHEL TESTIFIED AS A SUMMARY FACT WITNESS

First, Nacchio had virtually no time to respond to the government's motion to exclude, and certainly not adequate time to prepare, in effect, a complete written report detailing all of Fischel's methodology and supporting analysis, before the trial court excluded his testimony. He did file a written response to the arguments the government made in the motion, and in less than 24 hours, because he was calling Fischel the next

day. Rule 47(c) did not even require a written response, and its default deadline where there is no “court order set[ting] a different period” confirms this was not adequate time to prepare a full one. Fed. R. Crim. P. 47(c) (five days). Because the response was not even required or technically due on April 5, at the very least, he should have been allowed to supplement his response orally.²⁷ However, when he called Fischel to the stand and would have established the necessary foundation, the court denied him this opportunity by refusing to allow Nacchio’s attorney even to speak.

The dissent faults Nacchio for not making a request for “a continuance or even a *Daubert* hearing before he called Professor Fischel to the stand,” because “these requests would have been rather simple and certainly would not have required much time at all.” Dis. 7 n.5. But the government’s motion attacked the adequacy of Nacchio’s *Rule 16* notice and there was no need for a hearing *on that*. And there has never been any rule that a party must request a hearing to get permission to introduce evidence before he introduces it. Regardless, why should Nacchio’s right to present critical testimony turn on whether he requested a hearing in his response to the government’s motion on April 4, as the dissent says he should have, or first thing in the morning on April 5, as he tried to do after calling Fischel to the stand? Six years in prison should not turn on so trivial a matter. *Harvey*, 117 F.3d at 1048 (“The stakes in criminal prosecutions are always high,

²⁷ The response was not only prepared in less than a day, but also on the first day and second night of Passover. Nacchio’s counsel had requested a brief adjournment during Passover so that his lawyers could observe the holiday with their families in New Jersey, but the judge, after consulting with “[m]y Jewish friends,” Supp. App. 68, adjourned only one-hour early on the first night, so “[y]ou can go to eat gefiltefish [sic],” APP-2814.

and defendants' Sixth Amendment rights must be protected to ensure that the truth is ultimately found."); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (trial rules may not be applied "mechanistically to defeat the ends of justice"). The government had already received all the disclosure it was entitled to. On the 4th, the government was still presenting its case, which was immediately followed by argument on the Rule 29 motion. By the end of the day, the court had yet to even "look at" the government's motion and Nacchio's response; it is highly unlikely the court would have stopped all other proceedings to hold a hearing on an issue about which it was still uninformed. APP-3834. Any hearing necessarily would have occurred *on the 5th*, and there was no point to requesting a continuance. Nacchio had called his witness to the stand and was ready to proceed.²⁸

Second, before court resumed, Nacchio moved in writing for reconsideration and requested an evidentiary hearing. APP-481. The motion was filed *before* Fischel even took the stand, for the limited summary fact testimony that the court permitted. There was thus ample opportunity to hold the hearing without disrupting the schedule even after Nacchio finally got the opportunity to request one. *See Short v. Sirmons*, 472 F.3d 1177,

²⁸ Moreover, although a continuance was not necessary and would have been pointless, it is unlikely that the district court would have granted one. After the court excluded Fischel, the defense asked for a "a few minutes, in light of Your Honor's ruling," APP-3922, but the court yelled at, berated and mocked the defense, APP-3922-29, suggesting that "why don't we just tell the jury to take a week off," APP-3928, before begrudgingly acceding to a 15-minute recess after it was pointed out that the court granted the government that courtesy earlier that morning, APP-3929. Moments after the break, the court noted: "[W]e're way ahead of time. This trial is going to be completed easily within probably half the time ... allotted to it." APP-3942. This was consistent with the court's treatment of the defense throughout the proceedings. APP-1317, 1324, 1326, 1327, 1329-30, 2393, 2813-14, 3923-24, 3927-29, 3973; BR-57; *supra* n.26.

1188 (10th Cir. 2006) (“The state had already presented its case-in-chief ... so a recess would not have created an unnatural break in its presentation of evidence.”). But the court again refused to hold a hearing even though the trial was running so far ahead of schedule that the court then gave the jury its *second recess in as many days*, excusing it for the afternoon on April 9, and until 1 pm on April 10. Particularly in light of the well-settled principle that district courts may “alter a previous *in limine* ruling” as the case progresses, *e.g.*, *Luce*, 469 U.S. at 41-42, the blame for the court’s failure to carry out its gatekeeper obligation cannot lie with Nacchio.

III. NACCHIO HAD NO BURDEN TO REQUEST A HEARING

As explained in Point I.A Nacchio had no burden to request a hearing and any contrary holding would contravene this Court’s holding in *Roberts*, and Third Circuit decisions expressly holding that the request for a hearing (or lack of a request) is irrelevant because district courts that do not hold hearings err when they rule on a record that is inadequate for a proper reliability determination. Moreover, even if it was Nacchio’s burden to request a hearing, he tried to do so but was not permitted to speak, and then actually *did* request a hearing in writing. There is no basis for concluding that this request was somehow insufficient to satisfy any burden.

IV. THE COURT ABUSED ITS DISCRETION BY EXCLUDING FISCHEL’S TESTIMONY

The district court’s refusal to hold a hearing or afford Nacchio any opportunity to establish the reliability of Fischel’s testimony is the epitome of an abuse of discretion. Moreover, as explained below, none of the rationales offered by the district court support

its ruling, as the panel majority properly held, and any doubts had to be resolved in favor of the defense given the importance of the testimony. *E.g.*, *Dodge*, 328 F.3d at 1226, 1228-29.

A. The District Court’s Decision Rested On A Misinterpretation Of Rule 16

The panel unanimously and correctly agreed that is legal error for a district court to use a Rule 16 notice as the basis for excluding a witness under *Daubert*. Opn. 16-22; Dis. 9, 13. The panel members disagreed only as to whether Rule 16 was in fact the basis for the district court’s ruling. *Compare* Opn. 21-22 *with* Dis. 5-6 & n.4. The record demonstrates that the majority’s view is unambiguously correct, and that in any event excluding Fischel based on the perceived *lack of information* about his methodology was legal error. *McCoy v. Whirlpool Corp.*, 2008 WL 2808927, at *2 (10th Cir. July 22, 2008) (unpublished) (“whether the district court performed [its] ‘gatekeeper’ function and applied the proper legal standards” is reviewed *de novo*).

First, the district court’s ruling must be assessed in the context in which the government’s motion was presented. The government argued that the methodology was *undisclosed*, that Nacchio had failed to meet his supposed Rule 16 burden of establishing admissibility, and it even argued that in the event the court found the disclosure adequate, a hearing was necessary to assess reliability. *Supra* 5-6. It made Rule 702 arguments regarding relevance and assistance to the jury, but those were not framed in terms of reliability under *Daubert*. *Supra* 5-6.

Second, the district court’s statements show it was adopting these arguments. The

court focused on the inadequacies it perceived in the notice, as the majority explained. Opn. 15 (quoting APP-3917 (“methodology ... is absolutely *undisclosed* in this expert *disclosure*”); APP-3914). The dissent criticized the majority for relying on just these two passages, which it found “ambiguous,” Dis. 6 n.4, but there is much more, and it clears up any conceivable ambiguity: In denying Nacchio’s motion for reconsideration, the court expressly confirmed that it had excluded Fischel’s testimony because Nacchio’s “original expert *report*,” the “*March 29, 2007*[] *disclosure*,” “*contained no methodology or reliable application of methodology to the case*,” and thus “*the Government*” was not “*in possession of Fischel’s ... methodology*.” APP-4075; *see also* APP-3921 (reading from Rule 16 notice and excluding Fischel “primarily [for] the gross defect in *failing to reveal the methodology*”). The record is not ambiguous; contrary to the dissent (Dis. 5-6 & n.4), the majority did not improperly “assume” that the district court based its ruling on Rule 16 (as the court expressly said it did). *Sprint*, 128 S. Ct. at 1146, does not apply.

Finally, the court certainly mentioned and may have *believed* it was applying *Daubert*, but what it clearly found deficient was the absence of information in the notice demonstrating reliability. Nowhere did the district court actually “*assess the reasoning and methodology underlying the expert’s opinion*,” to “*determine whether it is both scientifically valid and applicable to a particular set of facts*,” as *Daubert* requires. *Dodge*, 328 F.3d at 1221. Nor could it have done so, having concluded that the methodology was undisclosed. APP-3930 (“[Fischel’s methodology] is sort of like trying to nail jello to the wall. *You just don’t know what it is*.”). The court never concluded that Fischel lacked good grounds for his opinions or that his opinions were so far “outside the

range where experts might reasonably differ” as to be *unreliable*. *Kumho*, 526 U.S. at 153. Instead, the court summarily precluded Fischel from testifying, without any hearing, *voir dire*, or argument from counsel, because it thought there was no factual basis from which to assess reliability. As the panel explained, the Rule 16 notice “is not designed to allow the district court to move immediately to a *Daubert* determination without briefs, a hearing, or other appropriate means of testing the proposed expert’s methodology,” Opn. 17, but that is precisely what the judge did here. This was an abdication of its “gatekeeping” function and thus, legal error. *E.g.*, *Velarde*, 214 F.3d at 1211, 1209 (reversing where court “made *no* reliability determination” because the court must, on the record, make *some* kind of reliability determination); *see also Dodge*, 328 F.3d at 1228-29; *Ellis*, 193 Fed. Appx. at 777-78. The same analysis applies to references to “Rule 702” also emphasized by the dissent, Dis. 3-4 & n.3.²⁹

B. The District Court Misunderstood The Central Importance Of Economic Evidence To The Charges At Issue

Rule 702 was drafted mindful of “the venerable practice of using expert testimony to educate the factfinder on general principles,” including “how financial markets respond to corporate reports.” Fed. R. Evid. 702, 2000 advisory committee’s note. Neither the dissent nor the government has questioned that expert testimony on the subjects Fischel was to address is routinely admitted. BR-40 n.13.

The government, moreover, frequently offers such economic testimony in criminal

²⁹ Indeed, to the extent the court actually analyzed the testimony under Rule 702, it was not a *Daubert* analysis of reliability, but rather the incorrect application of the Rule’s requirement that the testimony “assist the jury,” discussed below.

securities fraud cases,³⁰ and has vigorously advocated the admissibility of testimony by *its experts* on the same topics that Fischel would have opined on, using arguments *directly at odds* with those it made here. For example, in *United States v. Heron*, No. 06-674 (E.D. Pa.) (Docket No. 97 at ADD-23-25), the government sought to introduce expert testimony about, *inter alia*, “the reporting requirements of public companies”; “the materiality of earnings announcements”; “the materiality of unannounced corporate deals”; “the role of stock analysts”; “the reasonableness of using the closing price of the day after news is released as a measure of its impact on the market to evaluate its materiality”; and “the significance of analyst reports to stock prices” and “how they serve as a gateway to the public for information about a specific company,” and “the significance of the defendant’s trading.” As the government explained, testimony on these subjects is needed because it “goes beyond the common knowledge of the average juror,” ADD-17; has “obvious utility and relevance,” ADD-18; and is “clearly relevant” and “ [will] assist the trier of fact,” ADD-23, by providing “context” and “enabl[ing] the jury to understand the government’s evidence,” ADD-19, 24.

The district court displayed a basic misunderstanding of the utility of economic expertise and materiality when it excluded Fischel. It dismissed the testimony on materiality as unhelpful, with a statement directly contrary to the conclusion of every court or treatise to consider the issue (and the government in other cases), saying: “[A]ll of this kind of testimony is superfluous. The Court would analogize this to a ... a simple

³⁰ *E.g.*, *Skilling*, No. 04-0025 (S.D. Tex.) (Docket No. 919 at ADD-11); Reply-24 & n.12.

negligence case, where the jury is asked to determine whether the—a person who is allegedly negligent took an action a reasonable man would take or failed to take an action a reasonable man would not take in order to avoid harm to himself or others. ... And that is something that the jury can decide on its own without the necessity of having [witnesses] come in and give the jury their opinion on what is material.” APP-3841-42. This flawed reasoning echoed throughout the court’s analysis.

1. Fischel’s Testimony Regarding Trading Patterns

The district court excluded this testimony on the grounds that it was “within the common knowledge of the jury” and “[t]he jury simply d[id]n’t need this so-called expert witness to testify that diversification is an issue in this case.” APP-3919. As the panel majority properly held, “[t]his misunderstands the nature of economic expertise. An economic expert is permitted not only to tell the jury that an economic concept ‘is an issue’ but to analyze the concept and offer informed opinions. In other words, expert testimony may ‘assist the trier of fact to understand the facts already in the record, even if all it does is put those facts in context.’” Opn. 27 (quoting 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 702.03[1] (2d ed. 2006)); *Heron*, No. 06-674 (Docket No. 97 at ADD-19). Likewise “[d]oubts about whether an expert’s testimony will be useful ‘should generally be resolved in favor of admissibility The jury is intelligent enough ... to ignore what is unhelpful in its deliberations.’” *Robinson v. Mo. Pac. R.R.*, 16 F.3d 1083, 1090 (10th Cir. 1994).

The dissent concluded that the district court could exclude this testimony on relevance grounds. Dis. 10. That cannot be correct. Stock trades are not suspicious

unless “‘dramatically out of line with prior trading practices,’” *Nursing Home Pension Fund v. Oracle Corp.*, 380 F.3d 1226, 1232 (9th Cir. 2004) (citation omitted), and a “‘credible and wholly innocent explanation for the stock sales’” “‘conclusively rebut[s]” any inference of scienter, *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1427-28 (9th Cir. 1994) (citation omitted). Whether Nacchio’s trades accelerated in 2001 on the basis of material nonpublic information was determinative, not irrelevant. Neither the district court, government, or dissent have cited any case from any court excluding expert testimony on trading patterns, because courts routinely “‘admit[] expert testimony to assist the trier of fact in understanding trading patterns.” *SEC v. U.S. Envtl., Inc.*, 2002 WL 31323832, at *2 (S.D.N.Y. Oct. 16, 2002); *Heron*, No. 06-674 (E.D. Pa.) (Docket No. 97 at ADD-23) (“without [government’s] expert testimony,” “the jury will have no basis to understand the significance of the defendant’s trading”).

The only specific evidence on trading patterns that the dissent cites as irrelevant was Fischel’s testimony regarding the trading of CEOs at other companies. Dis. 10. But this testimony was relevant too. The government sought to refute Nacchio’s explanation that he sold the stock because his options would expire in June 2003 by telling the jury that Nacchio could have exercised the options and held the stock instead of selling it. USBR-23. Fischel’s testimony about the practices of other executives would have demonstrated that executives virtually never exercise options and retain the stock, and Nacchio’s actions were thus not unusual. Reply-4-5. As the panel recognized in response to Nacchio’s argument that the government’s “exercise and hold” theory did not demonstrate scienter: That “CEOs sell stock as soon as they exercise an option” was a

“powerful argument[] for the jury, but ... do[es] not establish his innocence as a matter of law,” Opn. 57. But the district court prevented Nacchio from presenting this “powerful” theory to the jury through Fischel, erroneously finding it “so wide afield.” APP-3919.

2. Fischel’s Materiality Testimony

Fischel’s testimony about materiality also would have assisted the jury. *First*, Fischel would have testified about Qwest’s relevant disclosures and their impact on Qwest’s stock price, and would have opined that the decline in the stock price was attributable to a general economic decline in the telecommunications industry, and not anything specific to Qwest. APP-431-32. Moreover, he would have testified that investors did not discount companies with a revenue mix that included IRU revenues. APP-432-33, 480-81. “[U]sing stock prices and information issued by various companies is a common and reasonable way for an economist to analyze the impact of that information on the stock prices.” Opn. 29. And there is nothing in the record suggesting that Fischel did not “employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1243 (10th Cir. 2000) (quoting *Kumho*, 526 U.S. at 152); *see also* APP-793-803.

The court prohibited Fischel from testifying about these two critical topics without *any* findings whatsoever. *Supra* 11-12. That is reversible error because “a district court ‘must adequately demonstrate by *specific findings on the record* that it has performed its duty as gatekeeper.’” *Dodge*, 328 F.3d at 1223 (citation omitted); *Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1031 (10th Cir. 2007) (reversing because “[i]n the

absence of findings by the district court to support its ruling to exclude ... we cannot determine whether it applied the relevant law and properly performed its gatekeeping function”); *Velarde*, 214 F.3d at 1211; *Ellis*, 193 Fed. Appx. at 778-79.

Second, Fischel would have testified about what the market already knew and how analysts reacted to Qwest’s guidance in 2000 and 2001, their recommendations, forecasts, and target prices. APP-430. He would have testified that analysts did not adopt Qwest’s forecasts and had their own assessments of the economy, and analyst reports reflected a market “understanding that economic conditions could cause Qwest’s financial performance to be worse than expected.” APP-431. The district court appears to have excluded this testimony on the grounds that Nacchio’s representation that “Professor Fischel has completed extensive review of SEC filings, press releases and other financial data and applied his academic study and professional experience in economics and the public market to formulate opinions,” was “woefully inadequate.” APP-3916.

But it is not at all clear what the district court found inadequate. The committee notes to Rule 702 explain that an expert can be qualified on the basis of experience, knowledge, skill, training, or education alone. As the Supreme Court explained in *Kumho*, “no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience,” 526 U.S. at 156, and routine testimony may be admitted without “unnecessary ‘reliability’ proceedings” “where the reliability of an expert’s methods is properly taken for granted,” *id.* at 152. Fischel is the nation’s preeminent expert on these topics, and the economic analysis was routine. *Supra* 4-5; APP-425-27, 435-59, 3914. Even the government has argued, in *other* insider-trading

cases, that the reliability of *its own economic experts* could be established based entirely on their credentials.³¹ The dissent faults Nacchio for not explaining how Fischel’s “experience leads to the conclusions reached,” or “why that experience is a sufficient basis for the opinion.” Dis. 12-13. But it is unclear why anything that needed to be said could not be accomplished in a matter of minutes when Fischel was called.³²

C. No Rule Afforded Discretion To Exclude This Testimony

The district court also purported to exclude testimony under Rule 602, but Rule 602 does not apply. *Daubert*, 509 U.S. at 592; Opn. 28-29; BR-48 n.18; Reply-29. It also mentioned Rule 403, but as the panel explained, the court’s analysis was brief and was dependent upon other erroneous conclusions. Opn. 28; *see also Roberts*, 88 F.3d at 880 (“Rule 403 is an extraordinary remedy and should be used sparingly.”); *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1239 (3d Cir. 1993) (“[I]f expert testimony survives ... Rule[] 702 ... then Rule 403 becomes an unlikely

³¹ *Heron*, No. 06-674 (E.D. Pa.) (Docket No. 97 at ADD-17-18) (where government’s expert would testify on similar subjects to Fischel, government explained that “[t]he use of such expert testimony in securities cases is well-established,” in light of its “obvious utility and relevance” and “it is black-letter law that [such] non-scientific testimony can be found reliable on the basis of the expert’s ‘personal knowledge or experience’” and any argument to the contrary was “sophistic legal analysis,” “meritless,” and “frivolous,” because “[t]he reliability of [expert’s] opinions are thus based upon his unquestionably impressive credentials”).

³² The court also asked none of the relevant questions that Rule 702 instructs are appropriate considerations in these circumstances, such as, whether the expert undertakes the same research outside of litigation; whether alternative explanations were considered; “[w]hether the expert ‘is being as careful as he would be in his regular professional work outside his paid litigation consulting,’” and “[w]hether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.” Fed. R. Evid. 702, 2000 advisory committee’s note (citation omitted).

basis for exclusion”); *United States v. Cruz-Kuilan*, 75 F.3d 59, 61 (1st Cir. 1996) (because expert testimony was so “tightly linked” to the key issues, “it would be surpassingly difficult to justify a finding of unfair prejudice from its introduction”).

D. The District Court Also Abused Its Discretion By Refusing To Hold A *Daubert* Hearing When Fischel’s Testimony Was Offered As Rebuttal

The district court initially ruled that the government’s analysts could not testify regarding the importance of Qwest’s IRU revenues to the market. APP-353. However, Johnstone—the “best ... telecom analyst in the U.S.” APP-3563—testified on direct that Qwest’s disclosures regarding its IRU revenue “changed” his “view of the company” and “warranted a change in rating and point of view on the company,” APP-3590, and that Qwest’s IRU revenues were not meaningful to investors and should be eliminated *completely* from any assessment of Qwest’s growth rate or value. APP-3589. Khemka—also “an expert on the sector” APP-3652—testified on direct that Qwest’s IRU revenues “were not meaningful ... [to] an investor,” and were not “genuine,” APP-3671, 3676. As noted, the court conceded that the analysts’ testimony probably required rebuttal, but found that expert testimony was unnecessary for such rebuttal; that the methodology was insufficiently disclosed; and questioned its relevance. *Supra* 17.

The preclusion of this rebuttal testimony is an additional basis for reversal. *First*, “[i]t is an abuse of discretion ‘to exclude the otherwise admissible opinion of a party’s expert on a critical issue, while allowing the opinion of his adversary’s expert on the same issue.’” *United States v. Lankford*, 955 F.2d 1545, 1552 (11th Cir. 1992) (citation omitted); *see also United States v. Lueben*, 812 F.2d 179, 184 (5th Cir.) (“[T]he district

court abused its discretion ... because it allowed the government to offer evidence on the issue of materiality, but not the defense.”), *vacated in part on other grounds*, 816 F.2d 1032 (5th Cir. 1987); *United States v. Van Dyke*, 14 F.3d 415, 422 (8th Cir. 1994) (reversible error to preclude defendant’s expert from testifying on same subject as government expert); *SEC v. Peters*, 978 F.2d 1162, 1171-72 (10th Cir. 1992); *Breidor v. Sears, Roebuck & Co.*, 722 F.2d 1134, 1138-39 (3d Cir. 1983); *United States v. Gaskell*, 985 F.2d 1056, 1063 (11th Cir. 1993).

Second, the district court’s notion that it could dictate what type of witness Nacchio could call for necessary rebuttal was incorrect as a matter of law. The D.C. Circuit reversed the defendant’s conviction in *United States v. Safavian*, 528 F.3d 957, 967 (D.C. Cir. 2008), because the district court did not allow the defendant to introduce certain expert testimony that “would have been especially important in light of the fact that two government witnesses, *though not appearing as experts*, testified regarding [the same subjects].” *See also United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (reversing conviction where court excluded expert testimony on subject on which three government lay witnesses opined). And only an expert economist can testify about the “total mix” of information in the marketplace. Nacchio was not required—nor would it have been feasible—to call scores and scores of individual analysts (many of whom vigorously disagreed with Johnstone and Khemka) to paint the same picture for the jury.

Third, there was no legitimate reason to deny rebuttal or a hearing. Nacchio had sought leave for rebuttal and requested a *Daubert* hearing prior to Fischel taking the stand as a summary fact witness, and Fischel was still *on the stand* when the defense concluded

its summary fact presentation and requested that the court rule so that it could elicit crucial expert rebuttal or excuse Fischel. APP-4064. The court refused to permit rebuttal because of the court's "difficulty with the methodology" APP-4075, and "difficult[y] ... ascertaining how the testimony would be relevant," APP-4076, *but refused to get clarification or permit argument even though Fischel was still sitting in the witness chair, id.*, and "we're moving much faster than ever anticipated." APP-4120 (excusing the jury until 1 pm the next day).

Finally, the court's finding that Fischel's study of revenue multiples was not relevant was a plain abuse of discretion. The study showed that the market did not discount IRU revenues, and Fischel "used the standard method for analyzing particular revenue streams," which "*is the same method used by the analysts who testified for the government,*" Supp. App. 49. That Qwest was not included in Fischel's study, as the district court stated as a basis for excluding the evidence, APP-4076, *was the point*: Fischel's study showed that (contrary to the analysts' testimony) the market did not discount the revenue multiples of companies *when they disclosed IRU revenues*, which demonstrated that Qwest's stock would not have adversely reacted to any IRU disclosure.

E. Fischel's Testimony Was Critical To The Defense

The district court's numerous evidentiary errors affected Nacchio's substantial rights and for that reason warrant a new trial. *Taylor*, 484 U.S. at 408; *Velarde*, 214 F.3d at 1211; Opn. 29-30. Given that Fischel's testimony *was* Nacchio's defense and was vital to explaining to the jury the evidence regarding both materiality and intent, to rebut the testimony of two government witnesses, these errors deprived Nacchio of "the right to

present the defendant's version of the facts ... to the jury so it may decide where the truth lies. ... This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967); Opn. 29.

The government's own defense of the sufficiency of the evidence demonstrates just how "essential to the defense" Fischel's testimony was. *United States v. Finley*, 301 F.3d 1000, 1018 (9th Cir. 2002). The government argued that Qwest's IRU disclosures negatively affected its stock price (USBR-31), that "[a] reasonable jury may consider a range of facts, including: the information's effect on the market value when disclosed," (USBR-26), and that the information was material and "Nacchio knew these facts were important to investors" (USBR-17). Fischel would have testified, however, that Qwest's IRU disclosures did *not* negatively affect Qwest's stock price, and that the economic evidence establishes that the information was not material. Opn. 27, 29-30; APP-431-32. He was to opine that the decline in Qwest's stock price was attributable to the "massive economic downturn in the telecommunications industry," not Qwest's disclosures. *Id.*

The government also argued that materiality cannot be determined by looking to stock price immediately following disclosure, and that the lack of movement in Qwest's stock immediately following its disclosures was the result of Nacchio "trickling out" information. USBR-32-33. Fischel would have refuted these claims, Opn. 29-30, with testimony just like what the government has offered in another insider trading case,³³ and would have demonstrated that Qwest's stock did not move because the market already

³³ *Heron*, No. 06-674 (Docket No. 97 at ADD-25) (government's expert to testify "that using the closing price of the day after the newly release[d] information is public is a reasonable data point for determining the material impact of that information").

knew and appreciated the risks inherent in Qwest's projections. *See also* Opn. 47-48 (evidence that the stock price did not react to disclosures is "powerful evidence").

The government presented testimony, and stressed in closing, that "investors" considered IRU revenues to be *worthless* and that the market discounted them entirely when their magnitude was disclosed. USBR-15. Fischel would have countered with an economic study demonstrating that the market did not discount IRU revenues or regard the revenue mix as material. APP-431-32, 480-81.

All of this testimony was critical to the jury's assessment not only of materiality, but also whether Nacchio *knew* he possessed material information that had not been disclosed. "[T]he more unreasonable the [defendant's] asserted beliefs ... are, the more likely the jury ... will find that the Government has carried its burden of proving knowledge." *Cheek v. United States*, 498 U.S. 192, 203-04 (1991). Thus, "evidence of a belief's reasonableness" is "highly probative" and "tends to negate a finding of willfulness and to support a finding that the defendant's belief was held in good faith." *Lankford*, 955 F.2d at 1550-51. Fischel's testimony about how the market—*i.e.*, reasonable investors—valued IRU revenues and reacted to Qwest's disclosures would have showed how Nacchio's beliefs were reasonable and held in good faith. So would his testimony on trading patterns, which would have refuted the government's argument that Nacchio's sales accelerated in 2001 (by comparison to his trading prior to October 2000), and would have demonstrated that they reflected an economically consistent

pattern and diversification strategy, Opn. 27, 56-58; APP-428-30.³⁴

Fischel's testimony might have changed the jury's mind. Opn. 30. Indeed, in several other circuits, the "close" evidence of materiality here would have been insufficient as a matter of law, and the jury surely should have been permitted to hear from Fischel on why the type of information at issue would not have been important to investors.³⁵ The district court's failure to appreciate the "decisive value" of the evidence, *Finley*, 301 F.3d at 1018, was an abuse of discretion. *See also Smithers*, 212 F.3d at 315-18 (reversing conviction and remanding for new trial because court excluded expert without *Daubert* hearing).

³⁴ "[F]orbid[ding] the jury to consider [such] evidence ... would raise a serious question under the Sixth Amendment's jury trial provision." *Cheek*, 498 U.S. at 203. Defendants are "entitled to wide[r] latitude" "than is allowed in support of other issues" to introduce evidence "which tends to show lack of specific intent." *United States v. Brown*, 411 F.2d 1134, 1137 (10th Cir. 1969) (citation omitted).

³⁵ In these other circuits, it is not necessary to disclose data, assumptions, estimates, interim operating results, or other information that might cast doubt on a public projection unless that information is "so certain that [it] reveal[s] the published figures as materially misleading," *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 516 (7th Cir. 1989), or suggests an "extreme departure" from public expectations, *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1210 (1st Cir. 1996). These circuits have applied such reasonable basis principles where the corporation *was trading* in its own securities, *e.g.*, *Wielgos*, 892 F.2d at 515-16, and *Shaw* expressly held that a company's "stringent" disclosure obligations in an initial public offering *are the same as* "an individual insider transacting in the company's securities"; that this "poses a classic materiality issue"; and that a company is only under a duty to disclose internal estimates or mid-quarter results, or abstain from trading, if it possesses information "indicating some substantial likelihood that the quarter would turn out to be an *extreme departure* from publicly known trends and uncertainties." 82 F.3d at 1208, 1202-04, 1209-11; *see also Glassman v. Computervision Corp.*, 90 F.3d 617, 632 & n.24 (1st Cir. 1996) (information five weeks prior to quarter-end that company's sales were *only* 24% of its internal forecast did not meet *Shaw*'s "extreme departure" standard as a matter of law, even though the stock dropped 30% in one day following the announced shortfall at the end of the quarter).

V. A NEW TRIAL IS THE APPROPRIATE REMEDY

A. The Government's Argument Is Waived

In a footnote to its petition for rehearing, the government for the first time argued that a new trial was “too drastic” a remedy. Pet. 12 n.3. The government could have argued before the panel that *Sprint*, which was decided *before* the panel opinion, superseded this Court's decision in *Dodge*, but it did not. Moreover, *Sprint* says nothing new. The sentence invoked by the government is simply applying a case decided over 25 years ago, *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 & n.22 (1982), which in turn refers to its subject matter as “usual” and “elementary” and quotes even earlier cases. The Ninth Circuit case the government cited is more than a decade old. Pet. 12 n.3. There has been no intervening change in law. The belated argument is waived.

B. Dodge Is Sound, And Nothing In Sprint Casts Doubt On Its Holding

First, in *Dodge*, after finding that the district court failed to properly undertake its gatekeeper function before admitting expert testimony, this Court “decline[d] to entertain the possibility of a remand to the district court to make specific findings relative to these experts, for we think no district court would be well positioned to make valid findings given the overwhelming temptation to engage in post hoc rationalization of admitting the experts.” 328 F.3d at 1229; *see also Goebel*, 215 F.3d at 1088-89 (same); *Velarde*, 214 F.3d at 1208, 1213 (same). Likewise, in *Mukhtar v. California State University*, the Ninth Circuit, citing *Dodge*, held that “[a] post-verdict analysis does not protect the purity of the trial, but instead creates an undue risk of post-hoc rationalization.” 319 F.3d

1073, 1074 (9th Cir. 2003), *amending* 299 F.3d 1053, 1066 (9th Cir. 2002).³⁶

Dodge's reasoning applies equally to a court that wrongly excludes an expert witness, as other circuits have held. In *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, the First Circuit held that “when a trial court erroneously excludes evidence, and the exclusion meets the standard criteria of harmfulness, the harm is not cured by a mere possibility that other appropriate grounds for exclusion of the same evidence may later be found to exist.” 161 F.3d 77, 88 (1st Cir. 1998). Therefore, “vacation of the judgment, rather than a remand for further findings, is the fairest course.” *Id.* And in *United States v. Hall*, the Seventh Circuit reversed the conviction and remanded for a new trial because “the court’s failure to conduct a full *Daubert* inquiry” “may have led to the exclusion of critical [expert] testimony.” 93 F.3d 1337, 1345-46 (7th Cir. 1996); *see also Smithers*, 212 F.3d at 318 (reversing conviction following exclusion of expert without *Daubert* inquiry). The concerns this Court highlighted in *Dodge* are particularly prescient in high-profile criminal cases where a jury has found the defendant guilty, and the public’s interest in the finality of criminal proceedings could infect the calculus.

Second, nothing in *Sprint* undermines *Dodge*. *Sprint* addressed the review of a district court decision that did not explain the basis for the evidentiary ruling and was

³⁶ The government’s reliance on *United States v. Cordoba*, 104 F.3d 225 (9th Cir. 1996), which predated *Mukhtar*, is misplaced. To the extent *Cordoba* retains any validity, it is *sui generis*. In *Cordoba*, the district court applied a *per se* bar to polygraph evidence, which was required by Ninth Circuit law. *Id.* at 227. On appeal, the Ninth Circuit concluded that its *per se* rule was “effectively overruled” by *Daubert*. *Id.* Because the court had yet to make any findings in the first instance—and, unlike this case, had not made any error—the Ninth Circuit remanded to permit the district court to exercise its discretion. *Id.* at 229.

“equally susceptible” to two interpretations—one of which was legal error and the other of which would have been reviewed for an abuse of discretion. The court of appeals concluded that the court erred as a matter of law and conducted Rule 403 balancing in the first instance. 128 S. Ct. at 1144. Against this background, the Supreme Court held that courts of appeals “should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading.” *Id.* at 1146. Rather, the Supreme Court held, a “permissible” and, under the facts of that case better, approach would be a “remand directing the district court to clarify its order.” *Id.*

That is perfectly sensible. The concerns in *Dodge* “are certainly attenuated, and perhaps even absent, when a judge is himself merely asked to clarify an earlier ruling.” *United States v. Stanfield*, 360 F.3d 1346, 1362 (D.C. Cir. 2004). But neither this case nor *Dodge* involves a district court ruling “equally susceptible of a correct reading.” 128 S. Ct. at 1146. Regardless of how the district court erred here, there is nothing to clarify.

The government also argues that “[t]he record does not show that *any* of Fischel’s opinions were in fact admissible under Rule 702,” and “where it is not clear from the record whether exclusion was actually erroneous,” a remand for a hearing is appropriate. Pet 12 n.3. That is inconsistent with *Dodge*, and courts of appeals do not remand for reconsideration where they “and the district court have focused on the same ... material and reached divergent conclusions on its legal significance.” *United States v. Aviles-Colon*, 2008 WL 2930115, at *14 n.14 (1st Cir. July 31, 2008).

CONCLUSION

This Court should decline to vacate the panel opinion.

Respectfully submitted,

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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 60 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.

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CERTIFICATION OF DIGITAL SUBMISSIONS

I, Nathan H. Seltzer, hereby certify that:

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I hereby certify that on this 29th day of August 2008, I caused the foregoing **APPELLANT'S SUPPLEMENTAL BRIEF**, to be submitted via electronic mail to:

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