

## **ADDENDUM**

U.S. District Court  
District of Colorado  
Calendar Events Set for the Week of April 2, 2007  
(current as of 8:00 a.m. on March 30, 2007)

Judge Edward W. Nottingham, Presiding  
Courtroom A1001

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**Monday, April 2, 2007**

8:45 a.m. - 5:00 p.m. Day Nine — Thirty-Day Trial to Jury

05-cr-00545-EWN-1

USA

v.

Joseph P. Nacchio

Cliff Stricklin, Colleen Conry, James  
Hearty, Kevin Traskos, Leo Wise and  
Paul Pelletier

Herbert Stern, Alain Leibman,  
Edward Nathan, Jeffrey Speiser, Joel  
Silverstein, John Richilano, Marci  
Gilligan and Mark Rufolo

**Tuesday, April 3, 2007**

8:45 a.m. - 5:00 p.m. Day Ten — Thirty-Day Trial to Jury

05-cr-00545-EWN-1

USA

v.

Joseph P. Nacchio

Cliff Stricklin, Colleen Conry, James  
Hearty, Kevin Traskos, Leo Wise and  
Paul Pelletier

Herbert Stern, Alain Leibman,  
Edward Nathan, Jeffrey Speiser, Joel  
Silverstein, John Richilano, Marci  
Gilligan and Mark Rufolo

**Wednesday, April 4, 2007**

**8:45 a.m. - 5:00 p.m.**  
05-cr-00545-EWN-1  
USA

v.  
*Joseph P. Nacchio*

**Day Eleven — Thirty-Day Trial to Jury**

Cliff Stricklin, Colleen Conry, James Hearty, Kevin Traskos, Leo Wise and Paul Pelletier

Herbert Stern, Alain Leibman, Edward Nathan, Jeffrey Speiser, Joel Silverstein, John Richilano, Marci Gilligan and Mark Rufolo

**Thursday, April 5, 2007**

**8:45 a.m. - 5:00 p.m.**  
05-cr-00545-EWN-1  
USA

v.  
*Joseph P. Nacchio*

**Day Twelve — Thirty-Day Trial to Jury**

Cliff Stricklin, Colleen Conry, James Hearty, Kevin Traskos, Leo Wise and Paul Pelletier

Herbert Stern, Alain Leibman, Edward Nathan, Jeffrey Speiser, Joel Silverstein, John Richilano, Marci Gilligan and Mark Rufolo

**Friday, April 6, 2007**

**9:00 a.m. - 11:00 a.m.**  
06-cr-00244-EWN  
USA

v.  
1. *Nicole Puller*  
2. *Talita James*  
4. *Taiwan Lee*  
6. *Ronald Fontenot*  
7. *Torrence James*

**Sentencing Hearing**

James Russell, Kenneth Harmon and Tim Neff  
Neil MacFarlane  
Harvey Steinberg  
Thomas Hammond  
Scott Poland  
Gary Fielder

and

**05-cr-00182-EWN-1**  
USA  
v.  
*Talita James*

**Supervised Release Violation Hearing**  
Tim Neff

<b>11:00 a.m. - 11:15 a.m.</b>	<b>Status Conference</b>	
05-cv-01528-EWN		
USA		James Russell
v.		
2005 GMC Yukon Denali XL, VIN 1GKFK66U65J168877		
\$3,200.00 in United States Currency		
Nicole Puller		
Rapid Contracting Services, LLC		
<b>2:45 p.m. - 3:00 p.m.</b>	<b>Hearing Regarding Social Security Appeal</b>	
06-cv-00716-EWN		
Marilyn Brandau		Chrisilda Noel
v.		
Jo Anne B. Barnhart		Kurt Bohn and Teresa Abbott
<b>3:00 p.m. - 3:15 p.m.</b>	<b>Hearing Regarding Motion to Dismiss</b>	
06-cv-00638-EWN-CBS		
GrayMore, LLC		John Paddock, Jr
v.		
Chester Gray		Charles Mitchell
<b>3:15 p.m. - 3:45 p.m.</b>	<b>Sentencing Hearing</b>	
06-cr-00439-EWN-1	<b>INTERPRETER</b>	
USA		Habib Nasrullah
v.		
Javier Ruiz-Carranza		Susan Fisch
<b>3:45 p.m. - 4:15 p.m.</b>	<b>Sentencing Hearing</b>	
05-cr-00028-EWN-1		
USA		Kenneth Harmon
v.		
Sebastian J. Schowe		Matthew Golla

APPEAL, CLOSED, INTAPPL, TYPE-E

**U.S. District Court  
 District of Columbia (Washington, DC)  
 CIVIL DOCKET FOR CASE #: 1:99-cv-02496-GK**

USA v. PHILIP MORRIS USA, et al  
 Assigned to: Judge Gladys Kessler  
 Demand: \$0  
 Case in other court: USCA, 06-05267  
                           USCA, 06-05268  
                           USCA, 06-05269  
                           USCA, 06-05270  
                           USCA, 06-05271  
                           USCA, 06-05272  
                           USCA, 06-05332  
                           USCA, 06-05367  
                           USCA, 07-05102  
                           USCA, 07-05103

Date Filed: 09/22/1999  
 Date Terminated: 08/22/2006  
 Jury Demand: Both  
 Nature of Suit: 890 Other Statutory  
 Actions  
 Jurisdiction: U.S. Government Plaintiff

Cause: 42:1395 HHS: Adverse Reimbursement Review

Date Filed	#	Docket Text
06/07/2005	5486	NOTICE OF TRANSCRIPT of status call held on 5/26/05 and 6/3/05 before Judge Kessler. Court Reporter: Scott L. Wallace. The public may view the documents in the Clerk's Office between the hours of 9:00 a.m and 4:00 p.m, Monday through Friday. (rje, ) (Entered: 06/08/2005)

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09/07/2008 09:59:40			
PACER Login:	[REDACTED]	Client Code:	
Description:	Docket Report	Search Criteria:	1:99-cv-02496-GK Starting with document: 5486 Ending with document: 5486
Billable Pages:	1	Cost:	0.08

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.
	.
Plaintiff,	. Docket No. CA99-02496
	.
v.	.
	.
PHILIP MORRIS USA, et al.,	. Washington, D.C.
	. May 26, 2005
	.
Defendants.	.
. . . . .	.

TRANSCRIPT OF STATUS CALL PROCEEDINGS  
BEFORE THE HONORABLE GLADYS KESSLER,  
UNITED STATES DISTRICT JUDGE

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1 to show this, there's no evidence in this testimony that  
2 Mr. Fischel has relied on reliable principles and methods to  
3 arrive at what amounts to his criticisms of Dr. Bazerman's  
4 testimony in this case. The evidence that Mr. Fischel has not  
5 applied reliable principles and methods really came out in his  
6 deposition. When pressed for support for his conclusions,  
7 Mr. Fischel retreated to things like, well, it's just obvious or  
8 I think it's logical and therefore it didn't need to be supported  
9 empirically or with other research.

10 Because he hasn't applied reliable principles and methods,  
11 his testimony and his criticisms really amount to personal  
12 beliefs about the weight of the evidence. And as the Court in  
13 McGowan said in a citation we cited in our papers, testimony of a  
14 witness, of an expert witness, that goes to personal beliefs  
15 about the weight of evidence invades the province of the  
16 fact-finder, and therefore should be excluded.

17 The second problem --

18 THE COURT: Of course, in this case the fact-finder is the  
19 Court and I can pretty well screen out testimony that I don't  
20 find either helpful or persuasive, but go ahead, Mr. Wise.

21 MR. WISE: And that really raises, I think, an ancillary  
22 issue, which is whether or not this testimony at this late stage  
23 assists the trier in any way, and that really goes to my second  
24 point, which is, regardless of what Mr. Fischel is qualified to  
25 give testimony on in other cases, what he's been proffered for in

1 this case is a miss match.

2 In his written direct testimony he was first identified as  
3 an expert in economic principles. When our objections were  
4 filed, he was then repackaged as an expert in corporate  
5 governance, and then further an argument was made that  
6 Mr. Fischel was going to be able to give expert testimony about  
7 the extrapolation of laboratory experiments to what he referred  
8 to as "real world circumstances".

9 I would just briefly, first, on the point that Mr. Fischel  
10 is now an expert in corporate governance, if I may, if Your Honor  
11 were to go to the Website for Lexicon, Mr. Fischel's consulting  
12 company, you'll see his areas of expertise are identified as  
13 board advisory, damages, securities, and valuation. And so in  
14 deposition when we saw "board advisory" we inquired if that  
15 included corporate governance, and in response -- and notice -- I  
16 should say prior to that, corporate governance is not identified  
17 as one of his expert areas.

18 And so in response to questioning in deposition we asked  
19 Mr. Fischel "do you advise boards, boards of directors for  
20 companies?" And he responded "not usually".

21 We responded by asking, well, "how often do you that, what  
22 is usually" and Mr. Fischel really got to the heart of what he  
23 does and that is other than in the context of providing advice  
24 typically through counsel relating to litigation of regulatory  
25 disputes for all practical purposes never.

1           We followed up with, "have you ever consulted directly to  
2 senior management of a corporation" and he identified, "no, I  
3 don't believe so, again, other than by being retained perhaps by  
4 a general counsel who might be a high corporate officer in  
5 connection of litigation of one type or another".

6           You know, Mr. Fischel references the fact that he  
7 testified for the Department of Justice when he's asked about  
8 whether he's given testimony on cases involving corporate  
9 scandals and he mentioned the Winstar cases, but if you look at  
10 the same page from Lexicon where they identify his experience,  
11 they describe it as "being the principle damages witness for the  
12 United States Department of Justice in a series of breach of  
13 contract cases commonly called the Winstar cases". And after  
14 reviewing what we could of the 192 instances in which he's given  
15 sworn testimony, that's the best we can arrive at, that  
16 Mr. Fischel is really a valuation expert in cases involving  
17 regulatory issues.

18           THE COURT: I'm going to ask you to refresh my  
19 recollection. What were those cases about? I know I've read  
20 them in the past.

21           MR. WISE: The Winstar case, and I'm going to disclose my  
22 own sort of lack of expertise on this, the Winstar cases involved  
23 the savings and loan industry and a finding by the Supreme Court  
24 that there had been what amounted to regulatory taking and that  
25 companies, therefore, could bring damage claims. And that's

1 really what the litigation concerned, it concerned calculation of  
2 damages and that's what Mr. Fischel does. That's what he did in  
3 Enron, which he cited in his written direct testimony. He was  
4 the principle defense witness to rebut the government's valuation  
5 expert. The government's valuation expert said certain dealings  
6 cost shareholders \$143 million and Mr. Fischel said no, it cost  
7 them \$120,000 and that was the substance and sum of his testimony  
8 in Enron.

9 In sum, Your Honor, Mr. Fischel is a lawyer, he teaches on  
10 a law faculty and consults with law firms in litigation. He's  
11 really been offered to give opinion outside of his expertise in  
12 this case, and as the Textron and Diet Drugs case in our brief  
13 make clear, simply because opinion is given by an expert, doesn't  
14 make it expert opinion. In other words, the expertise of the  
15 proffered witness has to match the purpose for which he's  
16 proffered, and Courts have, in numerous instances -- we included  
17 a non-exhaustive list -- ruled that while an expert may be  
18 qualified to testify about matters in other cases, it's really  
19 the fit in the case in which they're offered that's controlling.  
20 Thank you, Your Honor.

21 THE COURT: And of course by "fit" you're using that term  
22 that we all know from Daubert; is that right?

23 MR. WISE: Yes, Your Honor.

24 THE COURT: All right, Mr. Bernick.

25 MR. BERNICK: Yes, Your Honor. I appreciate the

1 opportunity to address the Court further on this and I'll try to  
2 keep my remarks fairly brief, but I think that the big problem  
3 that we're wrestling with here, and I'll take responsibility for  
4 it in part because I think in part it is a communication problem,  
5 is exactly what role Mr. Fischel really is playing in this case  
6 and why is it that he is responding to Dr. Bazerman.

7 THE COURT: And how you misidentified his area of  
8 expertise.

9 MR. BERNICK: I probably will get into that, yes, Your  
10 Honor. I'm not sure exactly what Your Honor means by that.

11 THE COURT: This is what I mean. I read his direct -- no,  
12 I read the government's objections, I didn't have your response  
13 yet, and then I read the direct. There was not a word in the  
14 direct about his being offered as an expert in corporate  
15 governance. Even though a significant portion of his testimony,  
16 in my view, squarely dealt with issues of corporate governance.  
17 Then I read your response, which reads as if you had offered him  
18 as an expert in the field of corporate governance. That's my  
19 point.

20 MR. BERNICK: Let me get to it this way, because I think  
21 that the problem is the word "governance". There's the sense,  
22 and I don't want to get into a, you know, well, what does it  
23 really mean and this kind of stuff. So as I say I take  
24 responsibility because in trying to figure out how best to  
25 describe it I used the term "corporate governance", that's why I

1 say I take responsibility.

2 THE COURT: Well, I happen to think that's an accurate  
3 term in terms of what he actually talks -- in terms of some of  
4 what he actually talked about.

5 MR. BERNICK: Right, and this is the difficulty. We're  
6 really dealing with the issue in this case in this phase of the  
7 relationship between corporate conduct and, obviously, what the  
8 Court is going to be focusing on is preventing and restraining  
9 RICO violations, and the legal rules. And the legal rules that  
10 we're going to be dealing with is how do we assure that, in fact,  
11 these companies going forward in their conduct are conducting  
12 themselves in accordance with whatever it is that Your Honor  
13 determines. And essentially we can put it in a simple term, this  
14 is an issue of compliance. Dr. Bazerman specifically addresses  
15 this issue of compliance. He says you can't count on these guys  
16 to follow these rules. So we're talking about a compliance  
17 problem.

18 Now, what Dr. Bazerman does is he goes back and he deals  
19 with these experiments. I mean, Your Honor's familiar with these  
20 experiments, it's the railroad switch and the guy who is going to  
21 get pushed off the bridge and stuff like that.

22 So he's got these experiments and Mr. Fischel is not  
23 called for the purpose for asking or opining as to whether these  
24 experiments are any good or not. He's not qualified to talk  
25 about whether Dr. Bazerman's experiments were well done or poorly

1 done, that's not the essence of his testimony.

2           These experiments all go to demonstrate what Dr. Bazerman  
3 considers to be bias, and on the basis of his perception or his  
4 conclusion that there is, in fact, bias of various kinds and we  
5 heard about it, he then says that when it comes to compliance  
6 going forward these experts tell me that there are going to be  
7 compliance problems and he recognizes, and Your Honor recognized  
8 that that is an extrapolation.

9           There is no data that Dr. Bazerman has that really is  
10 derived from company conduct itself, much less company conduct in  
11 compliance or not compliance with legal rules. He's gathered  
12 data regarding the behavior of certain individuals under highly  
13 constrained experimental situations, which he finds to be  
14 important from a psychological point of view. But the issue at  
15 the end of the day is "fit", do these experiments fit with the  
16 issue that is before the Court in connection with the remedies  
17 phase?

18           Now, we move to strike Dr. Bazerman's testimony. We said  
19 I'm sorry, but that extrapolation is not enough. We have a  
20 problem with whether his testimony really goes to a central issue  
21 in the case. Your Honor denied the request, said the experiments  
22 are there, the experiments, presumably, are based upon a reliable  
23 methodology, nobody really questioned the methodology of the  
24 experiments, and he extrapolated, and I believe that was the term  
25 that Your Honor used, he extrapolates from there to talk about

1 what might happen here.

2           This -- the validity of this extrapolation, not the  
3 validity of experiments, the validity of the extrapolation now  
4 becomes an issue in this case that we have to respond to through  
5 trial evidence.

6           The essence of what Mr. Fischel does is to address the  
7 question: Is the model that Dr. Bazerman has brought here,  
8 assuming that all of the data is totally valid, does this model  
9 match in terms of the circumstances and the facts that it  
10 addresses, the kind of behavioral conduct that's implicated by  
11 the compliance issue that's before the Court. That is the  
12 central thrust of what Mr. Fischel is going to talk about, which  
13 is the "fit". It's not a trial issue. It could have been a  
14 Daubert issue, we could have called Mr. Fischel as a Daubert  
15 issue, but it's now a trial issue because our motion to strike  
16 was denied.

17           Now, there is a lot of talk about, well, gee, you know,  
18 why is it that Mr. Fischel hasn't come in with his own data, and  
19 actually, if you take a look at the deposition when he was asked  
20 this question -- and if necessary we can supply this to the  
21 Court -- it's at pages 181 and 182 of his deposition. The  
22 question is put to him, "now, before you reached your conclusions  
23 about injunctive relief being more direct and efficient, did  
24 you do any empirical research on the effectiveness of  
25 injunctions?"

1           And it's kind of the same question, where's your empirical  
2 data. And Mr. Fischel, whose been a witness many times --

3           THE COURT: 192, right?

4           MR. BERNICK: Yeah, but we're going to talk about the  
5 reason he's been called so many times is that he has been  
6 approved repeatedly as an expert in economics, he's been -- his  
7 testimony has been lauded by two different Circuits in this  
8 country. He is the number one witness in a huge number of cases  
9 for the United States as their economics expert. In fact, the  
10 United States government, the Department of Justice, is Lexicon's  
11 principle client, and Mr. Fischel is the lead economist for the  
12 Department of Justice in all of those different matters. So, it  
13 is odd that they now take issue with his qualifications, and the  
14 real question is, what's his role here? It's not a question of  
15 whether he's qualified as an economist. He's published, he's  
16 been cited by like a hundred different opinions, he's eminently  
17 qualified, he's a very bright guy. The question is, how does he  
18 fit. And that's what I'm getting to, is how he fits.

19           He answers the question, well, did you give any research,  
20 and he says, again, "I stated what my conclusion was in  
21 relationship to it. I would say it's more accurate to say that I  
22 looked to see if Dr. Bazerman, who is the one who is offering the  
23 affirmative opinion that defendants assumed misconduct will  
24 continue, regardless of what the Court does, what remedy the  
25 Court orders" as I said strikes me as an extraordinary opinion.

1           In other words, what he's saying is he's not coming in to  
2 offer his own opinion on the impact of the remedies that the  
3 government is talking about, he hasn't gone off and done his own,  
4 you know, controlled empirical research. What he's saying is  
5 that the burden is on the government through its witness to offer  
6 up that data, to offer up that research.

7           This case in this respect, Your Honor, is very much like  
8 the Microsoft case. When Microsoft was remanded back for a  
9 remedies trial because the Court said there's got to be evidence  
10 to support the efficacy of the remedies just like there's  
11 evidence to support the liability, the matter before the Court  
12 was a compliance matter. That is, what should be ordered of  
13 Microsoft, what conduct should be ordered and what would be the  
14 effect of that order on conduct and on competition. And  
15 competing experts were called, and economists, to present  
16 causation testimony about what the effect of the order would be.

17           So you had competing economists saying here's the  
18 empirical data back and forth, and at the end of the day the  
19 Court in that case determined that the government's experts  
20 didn't have the empirical data. What's Mr. Fischel saying?  
21 Mr. Fischel is saying that Dr. Bazerman's experiments do not  
22 constitute empirical data regarding the effect of Court orders on  
23 this industry. Why? Because those experiments don't fit. Why?  
24 Because they're highly simplistic experiments, the  
25 decision-making that's undergone by corporations, with which he's

1 intimately familiar, is much more complicated and much more  
2 sophisticated. Sure, people have biases individually, but  
3 whether the switch gets thrown on the railroad track, which is  
4 the question that drives some of the experiments, doesn't really  
5 represent a real world decision that a company makes. They don't  
6 simply throw switches in hypothetical railroad tracks, they  
7 operate in very, very complex circumstances subject to a variety  
8 of checks and balances. So Mr. Fischel comes in and says, I have  
9 not done my own empirical analysis, although he's got some data  
10 that he does provide in his research. He says, Dr. Bazerman has  
11 failed to produce empirical data, therefore, he must extrapolate,  
12 and his extrapolation is no good because his experimental set up  
13 is worlds apart.

14 Remember, Dr. Dolan came in and talked about the Harvard  
15 case studies and he had the Harvard case studies of Marlboro  
16 Friday. The case study runs 40 pages, it's detailed and that's  
17 just a single decision taken by one company at one point in time.

18 Mr. Fischel is saying, the experiments -- the hypothetical  
19 experiment of throwing the switch and everybody raises their hand  
20 about whether they would do it or not has almost no relationship  
21 to the kinds of subjects that are taken up as part of Harvard  
22 case studies. That's the essence of what he has to say.

23 Now, what's his background in this area? His background  
24 in this area is he is one of the foremost scholars in the whole  
25 field of the relationship of legal rules in corporate conduct.

1 He's written books with now Judge Easterbrook dealing with the  
2 economic structure of the corporate law.

3 Economic structure of the corporate law is a recitation,  
4 including a whole chapter dealing with legal rules and the  
5 economic approach, what about remedies for breach of fiduciary  
6 obligations. What kind of remedy, what kind of legal rule will  
7 have the appropriate effect on corporate conduct? The book goes  
8 from A to Z in terms of board level obligations, obligations  
9 during extraordinary transactions, damage calculations. How do  
10 you do damage calculations so that it provides the appropriate  
11 incentives? This is his whole world, is making intelligible  
12 through economics decisions like compliance decisions.

13 Now, I chose the word "corporate governance" on the idea  
14 that, well, gee, in this case we're talking about high level  
15 management decisions, corporate governance in a broad broad  
16 sense. But what I'm really getting at is the -- the reason it's  
17 relevant is that here we're talking about a particular kind of  
18 governance, which is compliance with legal rules, and Mr. Fischel  
19 is totally qualified in this area. Dr. Bazerman has zero  
20 qualifications in that area, he's never published a single word  
21 in that area, and his experiments have no relationship to that  
22 area.

23 So we are bringing in -- that's why our brief says -- the  
24 argument is backwards. Dr. Bazerman is not the benchmark, is not  
25 the benchmark for whether Mr. Fischel is qualified, it's the

1 other way around. Mr. Fischel is totally qualified in the area  
2 that's germane to the Court's issues and what he's saying is  
3 looking at it from his perspective the application of these  
4 experiments is telling how companies operate, is just a  
5 non-start.

6 So, we believe it's critical to make our record before the  
7 Court, that establishes the disconnect between Dr. Bazerman's  
8 experiments and the real world facts that Mr. Fischel analyzes  
9 all of the time and he is the person that's best suited to do it.

10 The cases that we've pointed out, and I am sorry for not  
11 having furnished the citations to the Court previously, but are  
12 the -- a whole series of cases where the United States has  
13 actually proffered Mr. Fischel as an expert in economics, and  
14 indeed supported his proffer in that regard against Daubert  
15 challenges. Those cases, the California Federal Bank versus the  
16 United States, includes analyses that are not simply damage  
17 calculations, but the economic explanation of why a company acted  
18 as it did. Economics explaining corporate conduct.

19 You have the Yankee Atomic Electric Company versus the  
20 United States. This is another case where he has proffered for  
21 his expertise in economics and damages, not simply damages, again  
22 by the government and the Court goes on at length about the scope  
23 and quality of his testimony against an effort to keep him from  
24 testifying.

25 The U.S. Court for the Court of Federal Claims, Glendale

1 Federal Bank versus the United States, that's a case which we  
2 included just because of the praise that was given to that  
3 Professor Fischel in the context of that case.

4 7th Circuit's decision in Leigh versus Engle.

5 THE COURT: I hope Judge Easterbrook didn't sit on that  
6 decision, did he?

7 MR. BERNICK: The 7th Circuit decision was 1988 and this  
8 was -- would have been before Easterbrook was on the bench. I  
9 don't think that Easterbrook went on the bench until like the  
10 early '90s. At the time that Easterbrook worked with Fischel he  
11 was -- they were fellow professors at a law school. Professor  
12 Easterbrook was even smarter than Mr. Fischel, believe it or not.  
13 But the 7th Circuit praises his --

14 THE COURT: But not as smart as Judge Posner, who went to  
15 a different law school.

16 MR. BERNICK: Well, I worked for Judge Posner while he was  
17 at the University of Chicago and he may well have been the  
18 smartest one, but the best thing of all was that he never talked  
19 about how smart he was, which is probably the best indication of  
20 all.

21 And then finally, the case -- New Jersey District Court  
22 case, Crowelly versus Chait, which actually recites Fischel's  
23 expertise as economics, he holds a faculty position, law school  
24 business school, once Dean of the law school, he's the author of  
25 more than 50 books and articles, most of which address the

1 application of economic principles and analysis to legal issues  
2 or cases. His books and articles have been cited over a hundred  
3 times by various Courts including both the Supreme Court and the  
4 3rd Circuit. He's testified in over a hundred cases in the last  
5 20 years. Expert in economics. And this is a case where he  
6 talks about the economic analysis of certain decisions that were  
7 made in the case that implicated PWC.

8 He's a -- this is his whole career, and again, it's  
9 probably my problem because I said "corporate governance". It's  
10 really not the right word, it's too narrow, it's how corporate  
11 conduct interfaces with legal rules, it's the economic analysis  
12 of corporate law. And that is taking him into contact with all  
13 kinds of situations of complex decision-making.

14 He's perfectly situated to respond to Dr. Bazerman, who  
15 from our point of view is the one who should not have -- whose  
16 testimony is not germane here. So he's not here to second-guess  
17 Dr. Bazerman for the quality of his work, he's here to say  
18 Dr. Bazerman has not provided the appropriate empirical support,  
19 Your Honor.

20 THE COURT: Briefly, Mr. Wise.

21 MR. WISE: Respectfully, Your Honor, I think we've now  
22 heard a third version of what it is Mr. Fischel was perhaps  
23 intended to do, but has not done in this case.

24 Now, it's my understanding that Mr. Fischel is here to  
25 offer opinion on the economic impact of legal rules on corporate

1 decision-making, and if that's, in fact, what he was intended to  
2 do, it's illuminating at this stage, but it's not reflected in  
3 his testimony and it was not reflected in his expert report and  
4 we were not given the opportunity to depose him on that. And in  
5 fact, if that is the case, then that may raise the need for some  
6 sort of rebuttal witness. Mr. Bernick really pointed to the  
7 problem with Fischel's testimony and that is, he hasn't done his  
8 own analysis.

9 His conclusions are not the product of the application of  
10 specific theories or econometric work. I mean, that's the tools  
11 economists use. There's no regression analysis in this paper to  
12 offset or rebut Dr. Bazerman's controlled laboratory experiments.  
13 And while we're on the subject, Mr. Fischel is not qualified to  
14 talk about the extrapolation of laboratory experiments to  
15 corporate conduct because the one -- one of the differences  
16 between Mr. Fischel and Dr. Bazerman, is Dr. Bazerman actually  
17 works with corporations, and is hired by corporations to help  
18 them with decision-making. Mr. Fischel is not, as his own  
19 testimony in deposition reveals. He is an expert witness on  
20 largely regulatory issues of valuation. The idea that he could  
21 criticize experiments he doesn't understand based on experiences  
22 he doesn't have, I think strains even what his long record of  
23 testifying can do.

24 And that's revealed by the admission -- you know, in the  
25 Microsoft case, as Mr. Bernick said, there were competing

1 economists that had competing data sets. That was the same thing  
2 that was true in Enron, Mr. Fischel had done an analysis that was  
3 offered against the government's analysis. There's nothing like  
4 that here. There's simply nothing offered to rebut Dr. Bazerman  
5 other than what amounts to literary criticisms, statements like,  
6 well, "it's equally plausible that" and that's not backed up by  
7 data, that's not backed up by evidence. That may be what  
8 Mr. Fischel thinks based on his understanding of what  
9 Dr. Bazerman has written, but that's not expert testimony.

10 I think, Your Honor, there's just a couple of -- I think  
11 there's just a couple of additional facts that are important to  
12 understand. Mr. Fischel has not studied the defendants' conduct  
13 in this case, so when he makes statements about boards and  
14 managers, it's divorced from the facts in this matter. He admits  
15 in deposition testimony he hasn't studied the behavior of the  
16 boards of any of the defendants, he hasn't studied --

17 THE COURT: I don't think Dr. Bazerman had.

18 MR. WISE: Dr. Bazerman cited extensively to testimony by  
19 top managers that he had reviewed in this case and to internal  
20 documents, and that is how, in part, in his real world  
21 experience, he interfaces with decision makers. He's brought in  
22 to advise on decision-making and works with executives. And in  
23 this setting, working off of their testimony actually was a very  
24 close fit to what he does in the real world. There's nothing  
25 like that in this case. I mean, the table that Mr. Fischel

1 prepared attached to his expert report was a series of newspaper  
2 articles that didn't even include any tobacco companies. There  
3 are lots of --

4 THE COURT: Is that the demonstrative that he mentions but  
5 I haven't seen?

6 MR. WISE: Yes, yes, Your Honor, there's lots of  
7 methodological problems with that. Whatever the various Circuits  
8 have said about Mr. Fischel, we in no way challenge that, I  
9 think, as Mr. Bernick points out, the Department of Justice knows  
10 full well what his expertise is in, but the point is, Your Honor,  
11 it's not in now the third version of what we're told he was  
12 supposed to do, and that is, I think, economic impact of legal  
13 rules on corporate conduct. That's just not what we're seeing.

14 THE COURT: Well, I think the extent and length of the  
15 discussion illustrates the complexity of the problem, and so let  
16 me state where I come out and why.

17 Dr. Bazerman was a psychologist who specialized in  
18 organizational behavior. That was the expertise for which he was  
19 offered, or the expert area for which he was offered to testify  
20 in.

21 His testimony was premised, at least in significant part,  
22 on the experimental work he had done. And then, as Mr. Bernick  
23 certainly recognized in his argument, Dr. Bazerman's testimony  
24 extrapolated the results of those experiments and applied those  
25 results to a corporate setting and a corporate scenario.

1 Professor Fischel, I think, that's really the proper way to refer  
2 to him, is being brought in by the defendants in order to combat  
3 or counter Dr. Bazerman's testimony. Professor Fischel has no  
4 background in psychology, other than maybe a college course,  
5 that's not even in the record, but I'll certainly be prepared to  
6 assume that, but he certainly has no specialty in psychology, and  
7 none, at least on the record, in the area of psychology that  
8 focuses in particular, as Dr. Bazerman's testimony did, on  
9 organizational behavior in a corporate context.

10 I think those premises are very important, because they're  
11 the premises of my opinion. Consequently, in my view, Professor  
12 Fischel, as qualified and noted as he is, and I'll get to that in  
13 some areas of his testimony, is simply not qualified to testify  
14 on the -- on his agreement or disagreement with the results of  
15 Dr. Bazerman's experiments and the conclusions he draws from  
16 those experiments and the conclusions he presents in his  
17 testimony. That doesn't mean he's not qualified on a number of  
18 other issues, but I'll get to that.

19 What is more, the failure of Professor Fischel's testimony  
20 to directly counter Dr. Bazerman's testimony is reflected in the  
21 fact that defendants have had such difficulty explaining what  
22 Professor Fischel's area of expertise is. He may be a  
23 Renaissance person, he may have many areas of expertise, indeed  
24 he seems to, but whatever those areas are, they do not directly  
25 counter those of Dr. Bazerman. And as the government has argued,

1 and I think they are right on this particular point, the  
2 testimony, the expert opinions have to be offered in the area for  
3 which the person testifying is being submitted as an expert. And  
4 as we have seen, that's been a problem here. The direct  
5 testimony itself, I would remind everybody, says at page 4, this  
6 is Dr. -- I'm sorry, Professor Fischel, "I've been asked by  
7 counsel for defendants to evaluate from an economic perspective  
8 the opinions and testimony of Dr. Bazerman concerning potential  
9 remedies in this case. In particular, I've been asked to analyze  
10 Dr. Bazerman's opinions and testimony regarding how potential  
11 incentives and biases will affect defendants' future conduct, and  
12 to focus on one of the more extreme remedies discussed by  
13 Dr. Bazerman, dash the removal of senior management." I must  
14 say, when I read that, I had a gigantic question mark, i.e., what  
15 is he actually being offered for? It wasn't clear to me from  
16 that rather long-winded explanation. He is, in fact, a lawyer  
17 and a law professor. Interestingly, while he may have acquired  
18 great expertise in the field of economics over the years as a  
19 practical matter, I did not see any degrees in the field of  
20 economics. I'm not saying that's the sine of qua non of being an  
21 economist, but it usually shows it.

22 But the bottom line is, I want to get back to the first  
23 and most important issue, and that is that based on all that, I  
24 know Professor Fischel does not have the expertise in the area of  
25 psychology and in particular the organizational behavior of

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1 corporate entities to counter, combat, disagree with, critique,  
2 whatever word you want to use, Dr. Bazerman's testimony. That  
3 covers, however, only, in my view, issue number one.

4 If you all turn to page 6, I'm sure you all have probably  
5 memorized his testimony at this point, issue number one focuses  
6 on Dr. Bazerman's reliance on behavioral decision research to  
7 justify the removal of senior management. I've already indicated  
8 that Professor Fischel is not, as I've said, qualified to address  
9 that issue.

10 I do believe that it is appropriate to offer Professor  
11 Fischel as an expert in the field of corporate governance,  
12 whether one applies the word narrowly or broadly. Mr. Bernick  
13 has asked that it be applied broadly, he's asked that he be  
14 offered as an expert in the economic impact of legal rules on  
15 corporate decision-making. Again, he's phrased it differently at  
16 different times, but essentially I would agree with the  
17 defendants that Professor Fischel fits the category of being an  
18 expert in the area of corporate governance. There can't really  
19 be much question about that. He has taught these courses, as  
20 stated at great length in the direct and in the responses to the  
21 objections, for many many years.

22 He, of course, was Dean of the University of Chicago Law  
23 School. Perhaps more relevantly, he was director for a number of  
24 years at the law and economics program at the University of  
25 Chicago Law School, and I think it's pretty fair to say I can

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1 take judicial notice of the eminence of that program. He's  
2 written many, many, many books and articles. I think more than  
3 50 articles and several books, and while certainly one cannot say  
4 that one obtains expertise from testifying as an expert, I think  
5 that would be sort of tautological, the Courts have recognized  
6 his expertise in the area of -- actually in several areas, but  
7 all relating to corporate activities and economics.

8 All of that discussion brings me to the conclusion that he  
9 can testify, as he has, as to other areas that are tangentially  
10 related, perhaps not even tangentially, related to Dr. Bazerman's  
11 testimony, but areas that do not require Professor Fischel to  
12 have the expertise that Dr. Bazerman has in the area of  
13 organizational behavior of corporations, and of course, as I've  
14 said earlier, in the much larger scientific area of psychology.

15 I have gone through his testimony very carefully. I will  
16 go through it with everybody now.

17 I will tell you what portions are excluded. I have  
18 allowed him to present testimony in which he factually states --  
19 first of all, he may give all his credentials naturally, he may  
20 give testimony where he factually states Dr. Bazerman said X, and  
21 in particular, I'm thinking of a particular area which I'll get  
22 to in the testimony, he says Dr. Bazerman in such-and-such an  
23 article said the reverse of X or non-X.

24 That doesn't require Professor Fischel to have substantive  
25 expertise in the area of -- in Dr. Bazerman's area. It simply

1 allows him to point out that the government's expert has  
2 expressed differing views in the area of his expertise.

3 I am certainly allowing him to testify as the joint  
4 defendants' expert on corporate governance as to his views on the  
5 effectiveness of certain remedies in terms of how corporations  
6 actually operate.

7 Let me go through this, and I hope it will be clear to  
8 everyone what the lines are that I have tried very hard to draw.

9 Page 6 -- this is exclusions, now, everybody.

10 Page 6, lines 16 through 17, and I am only covering sub --  
11 well subparagraph 1 which describes his opinion, number one.

12 Page 7, lines 1 through 7 is a summary of his first  
13 opinion.

14 Page 8, lines 18 through 22, he clearly does not have the  
15 expertise to answer that question, and that is the expertise in  
16 Dr. Bazerman's area.

17 Page 9, 1 through 13, a discussion, as you can see, of  
18 whether Dr. Bazerman was correct in relying on certain  
19 research -- on his research to make predictions about real world  
20 situations. Again, that would require an expertise that  
21 Professor Fischel does not have.

22 Page 10, line 15, where the question refers to whether  
23 Professor Fischel's opinion would be -- whether the opinion that  
24 Professor Fischel just gave that I struck would be changed by  
25 certain things. Again, all of that testimony involves expertise

1 that Professor Fischel does not have. That would be page 10,  
2 line 15 through page 13 line 7. All of that testimony concerns  
3 the substance of Dr. Bazerman's testimony.

4 Page 21, line 7 through line 23 and 22 line 1 through 9.  
5 Again, this is direct criticism of Dr. Bazerman's expert  
6 testimony insofar as it relates very narrowly and very  
7 specifically, I should say, to Dr. Bazerman's testimony about  
8 bias within corporations and the organizational and institutional  
9 behavior of corporations.

10 MR. BERNICK: I'm sorry, Your Honor, I don't mean to  
11 interrupt. You had page 20, line 7 through --

12 THE COURT: No, no, that's not right.

13 MR. BERNICK: Then I --

14 THE COURT: Page 21.

15 MR. BERNICK: 21.

16 THE COURT: Line 7.

17 MR. BERNICK: Got it.

18 THE COURT: Through 23; 22, 1 through 9.

19 MR. BERNICK: Okay.

20 THE COURT: Page 22, line 10 through 20, which is  
21 essentially a repetition of an earlier criticism which had been  
22 struck.

23 And the remainder -- of course, I have allowed other  
24 testimony to remain in, but the remainder of the testimony  
25 through page 24 may remain in because it clearly relates to

1 Professor Fischel's own area of expertise, which is corporate  
2 governance. The other portions of his testimony, which I have  
3 allowed to remain in throughout the 24 pages, also relate to  
4 Professor Fischel's specific area of expertise, namely corporate  
5 governance, or even if you want to read it as broadly as the  
6 economic impact of legal rules on corporate decision-making.

7 MR. BERNICK: Your Honor --

8 THE COURT: I know you all will have to go back and look  
9 at these.

10 MR. BERNICK: I think I understand that. In order to make  
11 this process smooth and as unremarkable as possible, I -- and I  
12 don't know whether Your Honor received copies of these proposed  
13 demonstratives.

14 THE COURT: No, I didn't get any of the demonstratives.

15 MR. BERNICK: Okay. I had intended to bring out this  
16 demonstrative, and there are a couple of others that are like it,  
17 that compared the examples offered by Dr. Bazerman factually with  
18 the kinds of factors that are involved in business  
19 decision-making. If I don't elicit an opinion that is critical  
20 of Dr. Bazerman, that simply says -- I want you to assume that  
21 Dr. Bazerman talks about these kinds of factual scenarios, what,  
22 if any, differences are there between those factual scenarios and  
23 the factual scenarios that you deal with? Will that be  
24 problematic from the Court's point of view? In other words, I  
25 want to bring out his knowledge base and the circumstances, as he

1 understands them factually pertaining to the business world, and  
2 this chart help to do it. But I don't want to run afoul of Your  
3 Honor's determinations so I thought I would raise it now.

4 MR. WISE: Your Honor if I may, the experiment -- to refer  
5 to it as a factual scenario, I think stretches. These are  
6 criticisms of Dr. Bazerman's use of experiments from his field,  
7 and I think this goes to precisely what was struck, and I think  
8 this demonstrative couldn't be used in any way that didn't bleed  
9 into testimony that has been struck, because Mr. Fischel simply  
10 is not qualified to criticize these experiments.

11 THE COURT: He's not -- as I understand the testimony, and  
12 of course, I'll be listening carefully and I'll limit it if it  
13 doesn't fit within my analysis and rationale, but as I  
14 understand, Mr. Bernick, there's not going to be a criticism --

15 MR. BERNICK: Right.

16 THE COURT: There's going to be a factual distinction, if  
17 you will, which he's entitled to give. He is an expert  
18 testifying on his own. He doesn't need to be necessarily  
19 presenting empirical data.

20 MR. WISE: But I do think this is exactly what's on pages  
21 12, 10, 11, and -- 12 and 13, which is all of the testimony about  
22 the experiments.

23 MR. BERNICK: I'm not -- I don't even have to elicit it as  
24 being the experiment. I want him to compare and contrast the  
25 facts of business decisions from these kinds of facts. I can

1 even ask him --

2 MR. WISE: Experiments.

3 MR. BERNICK: I'm sorry.

4 MR. WISE: I apologize.

5 MR. BERNICK: Excuse me, I'm not going to elicit, they're  
6 experiments, I can give him a hypothetical as an expert and say I  
7 want you to assume a situation were you involving the railroad  
8 and the guy with the switch et cetera, et cetera, factually are  
9 those the kinds of situations that you deal with in your analysis  
10 of business decisions. I don't even have to mention Bazerman's  
11 name. The point is that I'm illustrating how the business world  
12 operates and that's a very, very important factor -- very  
13 important fact to elicit his, I think, more, we would say his  
14 more sophisticated appreciation of how the business world  
15 operates totally separate and apart from whether he even read  
16 Dr. Bazerman's testimony.

17 MR. WISE: I mean, if they want to ask questions about  
18 running a railroad I think that's one thing, but this experiment,  
19 it is an experiment, it's not a factual situation, it's a  
20 controlled laboratory experiment. It doesn't exist in the world  
21 outside the laboratory, and that was the criticism on page 10  
22 through 13, which Mr. Fischel -- Professor Fischel is not  
23 qualified to give. If he wants to ask questions about running  
24 railroad businesses or -- I'm straining to understand how you  
25 could argue that a laboratory experiment can be analyzed the way

1 Mr. --

2 THE COURT: He can testify how the real world operates.

3 MR. BERNICK: Right.

4 THE COURT: I think you're going to -- you'll have to  
5 figure out as we go on.

6 MR. BERNICK: I'll be very careful not to elicit  
7 criticisms of experiments or anything of the kind.

8 THE COURT: He's clearly qualified to testify as to how  
9 the real world operates, obviously we're talking about the real  
10 world now and corporate governance.

11 Well, I hope everybody --

12 MR. BERNICK: I appreciate that, Your Honor, and to the  
13 extent --

14 THE COURT: Understands.

15 MR. BERNICK: I take responsibility --

16 THE COURT: Mr. Brody looks as if he doesn't, but I  
17 certainly did put a lot of thought into trying to figure out what  
18 in the world you all were trying to do.

19 MR. SCHWARTZ: Your Honor, I was looking puzzled because I  
20 understand your ruling clearly, but I think Mr. Bernick faces  
21 quite a challenge in trying to fit the questions within the  
22 ruling without drawing an objection that's consistent with what  
23 was stricken. That was the puzzlement.

24 MR. BERNICK: I am confident that there will be  
25 objections, but I'm being sensitive to the fact that there are

1 objections, I'm going to do my level best to do exactly what the  
2 Court did, which is to draw lines on the same basis.

3 THE COURT: All right. Let me ask one other thing, and I  
4 realize people may have to adjust this tomorrow based on rulings  
5 today. How long do you think you'll be with your opening direct  
6 of him?

7 MR. BERNICK: Maybe 20 minutes.

8 THE COURT: And Mr. Wise, do you have any sense?

9 MR. WISE: At this point, Your Honor, I have to really  
10 revise what I've done, I could give an estimate in the morning  
11 before we start.

12 THE COURT: What was your original estimate?

13 MR. WISE: It was quite long, Your Honor, it was really  
14 the larger part of the day.

15 THE COURT: Does everybody think we can finish him  
16 tomorrow?

17 MR. WISE: I'll do my very best, Your Honor, to get  
18 through the material tomorrow. And I have to be honest, our  
19 experience in deposition was that it will take a little while,  
20 and I won't say anything more than that, but the deposition set  
21 a -- had a certain tempo and if that's anything like what to  
22 expect in Court, it will take a while.

23 MR. BERNICK: I think that's really very unfair. I read  
24 the entire transcript and that is -- that's an unfair swipe at  
25 the witness. The man has testified God knows how many times, if

1 he didn't know how to answer questions he won't have much of a  
2 testimonial practice.

3 MR. WISE: I wasn't suggesting --

4 THE COURT: Everybody, I'm just trying to estimate, which  
5 is the only reason I'm hesitating in letting you all go on, as to  
6 whether we can safely start at 10 tomorrow and if we can't tell  
7 me and we'll start at the usual 9:30.

8 MR. WISE: Would Mr. Fischel be available Tuesday in case  
9 we do go over?

10 MR. BERNICK: I am extremely confident that he won't be,  
11 that's why we set up tomorrow and we did so on the basis of the  
12 estimate which I think was -- what was it three hours, maybe.

13 THE COURT: Then we wouldn't have any trouble.

14 MR. WISE: Five.

15 MR. BERNICK: Even if it were five hours.

16 THE COURT: 9:30 everybody.

17 MR. WISE: Thank you, Your Honor.

18 (Proceedings adjourned at 2:54 p.m.).

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C E R T I F I C A T E

I, Scott L. Wallace, RDR-CRR, certify  
that the foregoing is a correct transcript from the  
record of proceedings in the above-entitled matter.

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Scott L. Wallace, RDR, CRR  
Official Court Reporter

APPEAL, COMPLEX, PRIOR

**U.S. District Court  
SOUTHERN DISTRICT OF TEXAS (Houston)  
CRIMINAL DOCKET FOR CASE #: 4:03-cr-00093 All Defendants**

Case title: USA v. Howard, et al

Date Filed: 03/26/2003

Magistrate judge case number: 4:03-mj-00192

Date Filed	#	Docket Text
04/14/2005	594	ORDER granting in part denying in part Motion in Limini as to Daniel R. Fischel; Motion in Limini deied as to Brian N Bershad; Motion in liminie is Denied as John Tittle, Jr; Motion in limine is denied as to Steven Kursh; the motion in limine is denied withut prejudice to re-urging as to Larry R. Lelbrook; the motion in limine is denied in part and granted in part as to John Tittle, Jr; the motion in limine is denied as to Graham Glass; motion in limini is denied in part without prejudice to reurging; motion in limine is Granted with respect to this proposed testimony as to Michael Krautz, Joseph Hirko, Scott Yeager, Rex Shelby ( Signed by Judge Vanessa D Gilmore ). Parties notified. (ncavazos, ) (Entered: 04/15/2005)

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09/11/2008 20:07:31			
<b>PACER Login:</b>	[REDACTED]	<b>Client Code:</b>	
<b>Description:</b>	Docket Report	<b>Search Criteria:</b>	4:03-cr-00093 Starting with document: 594 Ending with document: 594
<b>Billable Pages:</b>	1	<b>Cost:</b>	0.08

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

United States Courts  
Southern District of Texas  
ENTERED

APR 15 2005

Michael N. Milby, Clerk of Court

UNITED STATES OF AMERICA

v.

KEVIN HOWARD, *et. al.*

§  
§  
§  
§  
§

CRIMINAL ACTION NO. H-03-0093

**ORDER**

The United States has filed objections to the proposed expert witnesses of the Defendants  
(Instrument No. 525) as follows:

Defendant

Joseph Hirko

Scott Yeager

Rex Shelby

Michael Krautz

Witness

Daniel R. Fishcel

Dr. Brian N. Bershad

John Tittle, Jr.

Steven R. Kursh

Dr. Larry R. Leibrock

John Tittle, Jr.

Graham Glass

Michael M. Mulligan

The Court enters the following ruling with respect to each potential witness:

**Daniel R. Fischel**

1) With respect to the opinions the witness intends to offer regarding the January 20, 2000 analyst conference, the Motion in Limine is **GRANTED** in part and **DENIED** in part as follows: The witness will generally be able to offer the opinions outlined in his report, however, because causation is not a factor in this criminal trial, the witness will not be permitted to offer testimony regarding how and whether the statements, if any, might have affected a reasonable investor or

whether such an investor would have been influenced by the statements. To the extent that the Government attempts to offer evidence at trial of a causal link between the statements of the Defendants and any impact on the market, nothing in this order will prevent the Defendants from presenting rebuttal testimony through this witness on this issue.

The motion in limine is **DENIED** in all other respects

**Dr. Brian N. Bershad**

The motion in limine is **DENIED**.

**John Tittle, Jr.** (regarding Defendant Scott Yeager)

The motion in limine is **DENIED**.

**Dr. Steven R. Kursh**

The motion in limine is **DENIED** without prejudice to reurging. The testimony will be allowed, however, the Court is concerned that some of the proposed testimony may invade the province of the jury. Specifically, testimony related to what factors may have influenced the judgments regarding EBS.

**Dr. Larry R. Leibbrook**

The motion in limine is **DENIED without prejudice to re-urging**

**John Tittle, Jr.** (regarding Defendant Rex Shelby)

The motion in limine is **DENIED** in part and **GRANTED** in part. The witness will generally be allowed to offer testimony regarding Mr. Shelby's personal financial dealings and investment strategies, however, he will not be allowed to opine about whether his financial dealings appear to be consistent or inconsistent with someone using insider information to maximize his personal gain.

**Graham Glass**


The motion in limine is **DENIED**.

**Michael M. Mulligan**

The motion in limine is **DENIED** in part without prejudice to reurging. The witness will be allowed to testify, however, the Court is concerned that some of the proposed testimony may invade the province of the jury. Specifically, the witness will not be allowed to offer testimony that the accounting errors, if any, would not have caused a reasonable investor to change his view of the value of EBS or Enron stock and the motion in limine is **GRANTED** with respect to this proposed testimony.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 14<sup>th</sup> day of April, 2005 at Houston, Texas.

  
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**VANESSA D. GILMORE**  
**UNITED STATES DISTRICT JUDGE**

APPEAL, CLOSED

**United States District Court  
Eastern District of Pennsylvania (Philadelphia)  
CRIMINAL DOCKET FOR CASE #: 2:06-cr-00674-SD All Defendants**

Case title: USA v. HERON  
Magistrate judge case number: 2:06-mj-01106

Date Filed: 11/30/2006  
Date Terminated: 01/25/2008

Date Filed	#	Docket Text
10/10/2007	101	ORDER GRANTING IN PART 93 MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF DR. PETER HUANG. DR. HUANG MAY NOT TESTIFY AS TO THE MEANING OR OPERATION OF SECURITIES LAWS AND REGULATIONS. DR. HUANG WILL LIMIT HIS TESTIMONY TO EITHER RENDERING AN OPINION BASED ON THE FACTS OF THE CASE ITSELF OR GIVING THE JURORS KNOWLEDGE SUFFICIENT TO ANALYZE THOSE FACTS FOR THEMSELVES. Signed by Judge STEWART DALZELL on 10/10/07.10/10/07 ENTERED AND COPIES E-MAILED AND FAXED BY CHAMBERS. (jh, ) (Entered: 10/10/2007)

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA                   :           CRIMINAL ACTION  
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  :           :  
  :           :  
KEVIN HERON                                   :           NO. 06-674-1

ORDER

AND NOW, this 10th day of October, 2007, upon consideration of Heron's motion to exclude the testimony of Dr. Peter Huang (docket entry # 93), the Government's response (docket entry # 97), and Heron's reply (docket entry # 98) and the Court finding that:

(a) The Government seeks to present the testimony of Dr. Peter Huang as an expert on securities markets and securities trading;

(b) Dr. Huang is on the faculty of the James Beasley Law School at Temple University where he teaches, among other things, securities regulation;

(c) The Government's notice to Heron that it intended to call Dr. Huang included a list of those topics about which it expected him to testify;

(d) Heron filed this motion to exclude some of that testimony on the grounds that it does not comport with the requirements of Daubert v. Merrell Dow Pharm, Inc., 509 U.S. 579 (1993);

(e) Expert testimony, in order to be admissible, must meet the requirements of "qualification, reliability and fit," Schneider v. Fried, 320 F.3d 396, 404 (3d Cir. 2003);

(f) There is no challenge here to Dr. Huang's qualifications, which clearly meet the requirements of Fed. R. Evid. 702 and Daubert;

(g) Our Court of Appeals has enumerated a non-exclusive list of factors to consider when determining whether proffered expert testimony is reliable: "(1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put," In re Paoli R.R. Yard PCB Litig., 35, F.3d 717, 742 n.8 (3d Cir. 1994);

(h) Our Court of Appeals has defined "fit" as the "proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case," id. at 743 (quoting United States v. Downing, 753 F.2d 1224, 1237 (3d Cir. 1985));

(i) Heron objects to some of Dr. Huang's proffered testimony on the grounds of both reliability and fit;

(j) Much of Dr. Huang's proffered testimony is addressed not to the specific facts of this case but the hypothetical behavior of investors in general;

(k) For example, the Government seeks to have Dr. Huang testify that "Generally speaking, calls are purchased for bullish strategies, while puts are purchased for bearish strategies," Def. Mot. ex. A, ¶ 2;

(l) Testimony of this sort is not helpful to a trier of fact that is charged with determining what Kevin Heron actually did;

(m) As we read the Court of Appeals' guidance, in order to be useful to the jury, an expert must either render a scientifically reliable opinion based on the facts of the case itself or must give the jurors enough knowledge to analyze those facts for themselves;<sup>1</sup>

(n) Dr. Huang's proposed testimony about why investors typically buy options does neither;<sup>2</sup>

(o) Rather, this testimony is "opinion evidence that is connected to existing data only by the ipse dixit of the expert," a class of evidence that we are instructed to exclude, Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997);

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<sup>1</sup> By way of example, Dr. Huang could (assuming, of course, that his opinion was supported by reliable methodology) testify that Heron's trades would be consistent with an expectation that the price of the stock would fall. Alternatively, he could explain to the jury the operation of puts and calls and the relationship of the value of those options to the underlying stock price.

<sup>2</sup> We also take issue with the factual accuracy of Dr. Huang's proposed testimony. There are many reasons why investors might buy or sell options, some of them extremely complex. Dr. Huang's attempt to generalize and simplify runs a significant risk of misleading the jury.

(p) Similarly, Dr. Huang's testimony that "Earnings and unannounced corporate deals are classic examples of the types of nonpublic information which is material to investors" is simply not helpful to the jury in this case;

(q) Because such testimony provides the jury with no basis for applying Dr. Huang's generalization to the facts of this case, it lacks the reliability and fit that our jurisprudence requires;

(r) Neither is it acceptable for Dr. Huang to testify about the proper interpretation of securities law;

(s) Instructing the jury on the law is the province of the Court, not of an expert witness, see, e.g., Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898, 900 (7th Cir. 1994) ("The meaning of federal regulations is not a question of fact, to be resolved by the jury after a battle of experts. It is a question of law, to be resolved by the court.") (Easterbrook, J.);

(t) While the Government is correct that this is a case in which expert testimony may assist the jury in rendering its judgment, such testimony must demonstrate a proper fit to the facts of this case;

(u) Because we find that some of Dr. Huang's proposed testimony would assist the jury, we will grant Heron's motion only in part;

It is hereby ORDERED that:

1. Heron's motion in limine is GRANTED IN PART;

2. Dr. Huang may not TESTIFY as to the meaning or operation of securities laws and regulations; and

3. Dr. Huang will LIMIT his testimony to either rendering an opinion based on the facts of the case itself or giving the jurors knowledge sufficient to analyze those facts for themselves.

BY THE COURT:

/s/ Stewart Dalzell, J.