**NO. 07-1311**
**(En Banc Oral Argument Scheduled for September 25, 2008)**

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

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**UNITED STATES OF AMERICA,**
**APPELLEE**

**V.**

**JOSEPH P. NACCHIO,**
**APPELLANT**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**(Nottingham, C.J.)**

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# SUPPLEMENTAL EN BANC BRIEF FOR THE UNITED STATES
**(Includes Attachments in Scanned PDF Format)**

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In December 2005, Joseph Nacchio was charged with 42 counts of insider trading — that is, selling about $100 million of his Qwest stock on the basis of material inside information. App. 64-68.[1] During the 15 months between indictment

[1] Hereinafter, "Nacchio Br." refers to Nacchio's opening panel brief; "Gov't Br." refers to the government's panel brief; "App." refers to Nacchio's 16-volume panel appendix; "Supp. App." refers to the government's supplemental panel appendix; "Pet." refers to the government's petition for rehearing en banc; "Add." refers to the petition's addendum, which attaches the panel's opinion; and "En Banc App." refers to the supplemental en banc appendix submitted herewith. The government's unopposed motion for leave to file the supplemental en banc appendix remains pending as of the filing of this brief.

and trial, the parties wrangled over all manner of evidentiary issues, but the defense did not disclose any experts. On March 16, 2007, the last business day before trial, the defense disclosed that it intended to call law professor Daniel Fischel as an expert.

The district court found the expert disclosure altogether inadequate. Nevertheless, it gave the defense until well into the government's case in chief to prepare an adequate one. When the defense provided its revised disclosure, the government moved to exclude Fischel's opinion testimony, presenting an opinion-by-opinion explanation of why it was inadmissible on multiple grounds. The defense filed an opposition that did not respond to the government's point-by-point analysis, did not identify any dispute that would warrant a hearing, and did not even request such a hearing. The court excluded Fischel's opinions.

The court found that the defense had not met its burden of showing that the opinions were reliable under Rule 702 of the Federal Rules of Evidence as construed by *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999). The court was well within its discretion: the defense bore the burden of either establishing Fischel's reliability outright or requesting (and establishing the need for) a hearing; it had sufficient notice of the burden; and it had ample opportunity to meet it but failed to do so. *See infra* Argument Point I (pertaining to Questions 1, 2, and 3 of this Court's order

granting rehearing en banc).

Even if the court could not properly exclude some aspect of Fischel's opinions for lack of reliability, it still did not abuse its discretion. The court excluded the opinions on several other grounds — including the "helpfulness" component of Rule 702; Rules 403, 602, and 703 of the Federal Rules of Evidence; and Rule 16 of the Federal Rules of Criminal Procedure. Those rules justified exclusion, and rendered an evidentiary hearing unnecessary, wholly apart from reliability concerns. *See infra* Argument Point II (pertaining to the first half of Question 4 of this Court's order granting rehearing en banc).

Finally, even if the Court nevertheless concludes that the district court abused its discretion either in not conducting a hearing or in finding the evidence inadmissible, reversal and remand for a new trial would be unwarranted. The panel should have affirmed Nacchio's convictions irrespective of any error because Nacchio would have been convicted even if Fischel's opinions had been admitted. But even if this Court were unable to conclude on the record to date that the alleged error did not affect the verdict, the appropriate course would be a limited remand. The panel did not conclude that Fischel's opinions *were* reliable under Rule 702, such that they would be admissible at any new trial. Instead, it held that the defense had been given no *opportunity* to establish reliability, such that the district court, on an

incomplete record, "abuse[d] its discretion [in] mak[ing] a *Daubert* finding of unreliability." Add. 26; *see* Add. 21-26. The most tailored remedy for that alleged error would be to remand the case for particularized evidentiary proceedings, permitting the district court to decide admissibility in the first instance. *See infra* Argument Point III (pertaining to the second half of Question 4 of this Court's order granting rehearing en banc).

## ISSUES PRESENTED

**I.** Whether the district court abused its discretion in excluding Fischel's opinions under Rule 702, *Daubert*, and *Kumho*. Resolution of this issue turns on the first three questions presented by this Court's order granting rehearing en banc:

A. Was the defense sufficiently on notice that it was required either to present evidence in support of Fischel's methodology or to request an evidentiary hearing before presenting his testimony?

B. Did the defense have an adequate opportunity either to proffer reliability evidence or to request an evidentiary hearing before presenting Fischel's testimony?

C. Did the defense bear the burden of requesting an evidentiary hearing?

**II.** Whether the district court otherwise abused its discretion in excluding Fischel's opinions. This issue encompasses the first half of the fourth question presented by this Court's order granting rehearing en banc.

**III.** Whether a new trial is the appropriate remedy for any error in excluding Fischel's opinions. This issue encompasses the second half of the fourth question presented by this Court's order granting rehearing en banc.

## STATEMENT

### I. The Underlying Facts

The government's panel brief details the indictment's charges and the evidence presented at trial. Gov't Br. 2-16. Only a contextual summary is provided here.

Nacchio was the Chief Executive Officer of Qwest Communications International, a large telecommunications company headquartered in Denver. Add. 2; Gov't Br. 3. In September 2000, Nacchio announced unrealistic revenue, earnings, and growth targets for Qwest in 2001. Add. 2; Gov't Br. 4-5. During the final months of 2000 and the first half of 2001, he received progressively more detailed and dire information from his top executives indicating that the company would fall short of its 2001 public targets. Add. 3-5, 10; Gov't Br. 5-9. Relatedly, he learned that the revenue, earnings, and growth figures that the company *had* been able to book in the early part of 2001 disproportionately owed to "one time" transactions involving "indefeasible rights of use" (IRUs) that were drying up, such that they could not sustain the company's growth for the rest of 2001 and beyond. *Ibid*. Nacchio was "visibly disappointed" with the news. Gov't Br. 9.

Nacchio did not inform the investing public about the warnings he had received. Add. 6, 10; Gov't Br. 10-11, 13-16. Rather, while he was telling his top executives how displeased he was with the company's performance—and threatening some of them with termination (Gov't Br. 5)—he was making public statements and issuing press releases to the effect that "we are very pleased with the [results] reconfirming our estimates for 2001" and "[w]e see nothing to dissuade us from the plan we announced." Gov't Br. 11; *see id*. at 10-11, 13-16; Add. 6, 10. The evidence at trial would later reveal the reason for the dissonance: Nacchio knew that Qwest's stock would get "whack[ed]" if he told investors the truth. Gov't Br. 29; *see id*. at 10, 14, 34-36; Add. 51-53. For example, when the head of Qwest's investor-relations team told Nacchio that investors needed to know about the extent of the company's reliance on IRUs, Nacchio rhetorically asked about such a disclosure: "[C]an you guarantee me the stock price won't go down?" Gov't Br. 10. When the executive responded that the price would indeed fall, Nacchio said of the investors: "[S]crew them, go tell them to buy." *Ibid*.; *see* Add. 52.

While telling investors he was "very pleased" with Qwest's performance (Gov't Br. 11), Nacchio sold millions of shares of his Qwest stock (Add. 7-9; Gov't Br. 12-13, 22-25). Only later did Qwest disclose some (but not the full extent) of its problems and lower its 2001 targets. Add. 10. By the time Qwest missed its (already-

lowered) third-quarter numbers, the company's stock was trading for less than a third of the price at which Nacchio had sold it. Gov't Br. 31-32.

## II. The Indictment

In December 2005, a grand jury in the United States District Court for the District of Colorado returned an indictment charging Nacchio with 42 counts of insider trading, in violation of 15 U.S.C. §§ 78j(b) and 78ff and Securities and Exchange Commission (SEC) Rules 10b-5 (17 C.F.R. § 240.10b-5) and 10b5-1 (17 C.F.R. § 240.10b5-1). Gov't Br. 2-3. The 42 counts comprised Nacchio's stock sales in 2001 from January 2 to March 1 and from April 26 to May 29. App. 67-68; *see* Add. 10. The indictment alleged that Nacchio, with the intent to defraud, had sold his stock based on the IRU information and the other undisclosed bad news that he had received. Add. 10-11. The indictment further alleged that the undisclosed information was material. *Ibid*.

## III. The Pretrial Proceedings

Nacchio pleaded not guilty in late December 2005. App. 7. For the next 15 months, while the district court held exhaustive hearings on discovery and *in limine* evidentiary matters (App. 7-38), the defense disclosed no expert witnesses. In January 2006, however, the defense did request a summary of any expert testimony the government intended to elicit "under Rule 702, 703, or 705 of the Federal Rules

of Evidence." En Banc App. 3. In making the request, the defense acknowledged its "burden of reciprocal discovery as set forth in Rule 16(b)(1)(C)." *Ibid*.

Twenty-five days before trial, on February 22, 2007, the government disclosed its intention to call two computer experts. Supp. App. 3. The defense moved to exclude the experts, arguing (*inter alia*) that: the "11th hour" disclosure violated Rule 16 (Supp. App. 16-20); 25 days was not "sufficient * * * to meaningfully prepare a challenge to the proposed expert testimony," because the defense would have to retain its own expert to review the opinions and perhaps testify as a "competing expert" (Supp. App. 15); the government had not in any event established the experts' reliability under *Daubert* (Supp. App. 14); and a continuance would undermine the integrity of the trial schedule (Supp. App. 20).

Without holding a hearing (*see* App. 40), the district court excluded the government's experts, agreeing that the government's disclosure was untimely under Rule 16 (Supp. App. 30). The court emphasized the need to "prevent surprise" of the defense and to provide the court with adequate time to "entertain motions * * * and conduct any necessary hearing." Supp. App. 30. "Considering the complexity of the case," the court believed that 25 days did not suffice to serve these purposes. *Ibid*.; *see* Supp. App. 30-34.

## IV. The Procedural History of Fischel's Exclusion

A. On March 16, 2007, the last business day before trial, the defense disclosed its intention to call Fischel.[2] App. 460-462. The disclosure listed a summary of broad topics about which Fischel "may testify" (App. 460-461), including how Nacchio had obtained his Qwest options (App. 460), the effect of Qwest's public statements on its stock price (App. 461), and the downturn in the telecommunications industry in 2001 (*ibid*.). To the extent that the disclosure mentioned any opinions, it failed to state the "bases and reasons" for them, as required by Rule 16(b)(1)(C). App. 460-462.

Rather than moving immediately for Fischel's exclusion under Rule 16, as the defense had done with the government's experts, the government moved for a proper disclosure. Supp. App. 35-42; *see* Add. 12. The motion argued that the defense's summary of "topics" consisted mainly of "matters of historical record" (Supp. App. 38-39) and that it failed to disclose the "bases and reasons" for any opinions — including the underlying "'written and oral reports, tests, * * * investigations,'" articles, studies, or other such materials. Supp. App. 36 (quoting Fed. R. Crim. P. 16, 1993 Adv. Comm. Notes). The government emphasized that the disclosure's

[2] The government had complained, at a pretrial conference a few weeks earlier, that it had not yet received any expert disclosure from the defense, and the defense agreed to provide its disclosure by March 16. En Banc App. 18-19.

vagueness and failure to identify the underlying materials precluded the government from determining what (if any) methods Fischel had relied upon, and from "test[ing]" those methods for reliability under Rule 702. Supp. App. 39; *see* Add. 63. The government also objected that the nature of the disclosure made it impossible to determine whether the proposed testimony would be relevant and helpful to the jury under Rules 401 and 702, or whether it would be inadmissible under those rules or Rule 403. Supp. App. 40-41. The government accordingly asked that the defense be ordered to provide a disclosure correcting the deficiency. Supp. App. 42.

At the end of the trial's first week, on March 22, 2007, the district court granted the government's motion (App. 349-352), agreeing that the defense's disclosure had failed to provide the "bases or reasons" for any opinions (App. 352). The court ordered the defense to correct the deficiency—*i.e.*, to provide an expert disclosure "compliant with the federal rules described herein" and "to clarify the character and content of Professor Fischel's testimony"—by March 26. App. 352; *see* Add. 12-13.

B. Upon receiving the order, the defense asked in open court for "a few more days" beyond March 26. App. 2037. The district court observed that the first disclosure had been "loosey-goosey," "completely unacceptable," and "patently inadequate." App. 2038. The court further noted that, although the defense had not disclosed Fischel until the day before trial, it had been given an extra "ten days" even

beyond that to remedy the disclosure's deficiencies. *Ibid*. Obviously frustrated with the delay ("I am flabbergasted, frankly"), the court nevertheless granted an extension to March 29. App. 2041. But the court cautioned: "[T]hat assumes an adequate disclosure." *Ibid*. The court stated that it expected a disclosure "pretty close to what is required in the civil area," especially because, unlike in civil cases, the government would not "have a chance to depose the expert[]." *Ibid*.; *see* Add. 13.

Immediately after the foregoing colloquy, the government added that, based on its review of the first disclosure, "there could be *Daubert* issues that arise with respect to certain parts of the testimony." App. 2041-2042. The district court agreed, saying that there might be "*Kumho* * * * issues." App. 2042. The defense responded: "[F]orewarned is forearmed." *Ibid*.; *see* Add. 13, 63.

On March 29, well into the government's case in chief, the defense provided its revised disclosure. App. 425-434. It stated that Fischel proposed to opine on nearly a dozen topics (which are enumerated at p. 13, *infra*, in connection with the government's motion to exclude). Many of the opinions were brand new, falling outside even the broad topics listed in the first disclosure.

C. On April 3, 2007, the government filed a detailed motion to exclude Fischel's opinion testimony (App. 362-424) on grounds that: the defense "still ha[d] not complied with the expert disclosure" requirements of Rule 16 and had identified

brand new opinions (App. 362-363, 418-420);[3] the disclosures the defense *had* provided did not remotely suggest that "Fischel actually selected any reliable principles and applied them reliably to the facts, as he must [under] Fed. R. Evid. 702" (App. 363); Fischel would be "present[ing] and emphasiz[ing]" inadmissible hearsay and other facts beyond his personal knowledge under Rules 602 and 703 (*ibid*.); and under Rule 403, considerations of prejudice, confusion, delay, and waste of time substantially outweighed the opinions' probative value (App. 364). *See* Add. 14, 63. The motion provided legal background about each of these rules. App. 367-381. The background section on Rule 702: devoted more than four pages just to reliability principles (App. 374-378); noted that the defense, as the proponent, had the burden of showing admissibility under the rule (App. 370); and discussed at length *Daubert*, *Kumho*, and this Court's precedent applying those cases (App. 370-378).

In light of the background principles it had discussed, the motion then addressed seriatim each of the proposed opinions listed in the defense's second disclosure. Those opinions, and the pages at which the government addressed them, were as follows:

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[3] As to Rule 16, the government argued that a continuance was inappropriate for the same reasons of scheduling integrity that the defense and the district court had cited with regard to the government's proposed experts. App. 419-420.

(1) The pattern and timing of Nacchio's stock sales in 2001 were consistent with the pattern and timing of his sales in prior years. App. 384-386.

(2) Nacchio's January 2001 sales of "growth shares," charged in Counts One and Two of the indictment (App. 67), were consistent with his purported preference of receiving cash for growth shares. App. 386-388.

(3) Nacchio had no incentive to sell growth shares based on inside information. App. 388-392.

(4) Nacchio's stock sales in 2001 were consistent with an earlier-stated desire to sell. App. 392-393.

(5) If Nacchio in 2001 had actually sold his stock based on material inside information, he would have sold more shares than he did. App. 393-397.

(6) Qwest's repurchase of 22 million shares of its own stock from BellSouth in January 2001 shows Nacchio possessed no "material adverse inside information at th[e] time." App. 397-399.

(7) Nacchio's stock sales in 2001 were consistent with an effort to diversify his portfolio. App. 400-401.

(8) Other executives at Qwest, and at other large companies, sold stock in 2001. App. 401-404.

(9) Qwest's performance in the first half of 2001 was consistent with its earlier-stated targets. App. 404-405.

(10) Qwest's failure to meet its targets in the second half of 2001 owed to a downturn in the telecommunications industry. App. 405-412.

(11) The extent of Qwest's reliance on IRUs would not have been material to reasonable investors. App. 412-418.

As to each opinion, the motion offered an analysis about why it must be excluded under Rule 16, Rule 403, Rule 602, Rule 702, and/or Rule 703. App. 383-418.

In the motion's concluding paragraphs, the government again stressed that the defense, as the proponent, had the burden of showing admissibility under Rule 702. App. 420. It further argued that the defense had not shouldered the burden, warranting exclusion under Rule 702. App. 420-421. Finally, the government noted that if the district court were nonetheless "inclined to allow any portion of [Fischel's] opinion testimony," the government would "respectfully request[] a hearing prior to the admission of such testimony in order to challenge its admissibility out of the presence of the jury." App. 421. The government further requested an opportunity to review the documents underlying the opinions in advance of any such hearing. App. 422. In support of the alternative request for a hearing prior to admission of any testimony, the government cited *Dodge* v. *Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003), and *Goebel* v. *Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083 (10th Cir. 2000), cases that deal all but exclusively with the gatekeeping requirements of Rule 702 and *Daubert*. By the end, the motion had invoked Rule 702 nearly 50 times.

On April 4, near the end of the government's case in chief, the defense filed a seven-page opposition. App. 463-469. The opposition's two principal sections claimed that the defense's "expert disclosure complie[d] with Rule 16" (App. 463)

and that the "professor's opinions are proper under Rule 702" (App. 466; *see* Add. 63-64 & n.3). In asserting that Fischel's opinions were admissible under Rule 702, the defense referred (App. 467) to its "expert report" (*i.e.*, its revised disclosure) but did not describe Fischel's methodology or attempt to establish that his opinions were reliable. *See* Add. 14. The defense's opposition argued that the government's motion was "without merit" (App. 463) and should "be denied" (App. 468), but it provided no elaboration as to any particular opinion and did not engage the government's seriatim analysis. Nor did it request a hearing for that or any other purpose (*see* Add. 64, 67 & n.5, 68 n.6, 74), even though the district judge's standard rules provide that "[a]ny party opposing [a] motion must * * * state whether that party believes an evidentiary hearing is necessary." HON. EDWARD W. NOTTINGHAM, PRACTICE STANDARDS — CRIMINAL ¶ 17 (2004).[4] Nor did the defense request a continuance or some other opportunity to respond further to the government's motion (*see* Add. 67 n.5), though it could have done so in the opposition or by separate motion.

During the lunch recess on April 4, after the defense had filed its opposition, the district court stated that it was "mindful of the fact that I probably need to issue

[4] The judge's rules are included in the attached addendum. *See* Fed. R. App. P. 28(f). The defense was aware of the rules; it previously referred to them during a pretrial status conference. En Banc App. 63 (defense directed the judge's attention to "your rules").

some rulings" on pending motions. App. 3719. The government reminded the court of the pending motion to exclude Fischel. App. 3721. The court noted that the defense had "filed a response." *Ibid*. But the defense did not at that point attempt to augment its opposition or ask for a hearing; instead, the lawyers proceeded to other issues without discussing Fischel. App. 3721-3723.

At the close of the government's case on April 4, the district court dismissed the jury early and asked whether the defense had any motions. App. 3774-3775. Without mentioning the pending Fischel issue—let alone asking for a hearing or some other opportunity to present reliability evidence—the defense proceeded directly to its motion for acquittal. App. 3775-3804. It then moved on to other motions (App. 3808-3834), but not the Fischel matter. When the court indicated that it was about to adjourn for the day, the government asked: "What about Mr. Fischel?" App. 3834. The court stated that it had "formed some preliminary views" but was not yet ready to rule on the motion to exclude. *Ibid*. Besides noting that Fischel would be its third witness, the defense said nothing. App. 3834-3835.

D. The defense case began the next day, April 5. Before the jury entered the courtroom, the parties again discussed pending motions and the district court ruled on five of them. App. 3838-3870. When the court briefly mentioned the Fischel matter, saying "I know you want a ruling" (App. 3870), the defense said

nothing (App. 3873). When the jury was seated, the defense called two lay witnesses. App. 3873-3913. Without first asking the court to excuse the jury for any type of proceedings on admissibility, the defense indicated that its next witness was Fischel. App. 3913. The court excused the jury, explaining that it "need[ed] to make some legal rulings." *Ibid*. The defense again sat silent; it did not ask for argument time, a hearing, or a continuance before the court ruled. *Ibid*.

Addressing Fischel's opinions both generally and one by one (App. 3917-3921; *see* App. 427-433), the district court excluded them on several independent grounds:

*First*, and "[m]ost convincingly," the court ruled that the defense had "made no attempt to comply with Rule 702 or *Daubert* and establish that Fischel's testimony [would be] the product of reliable principles and methods." App. 3915; *see* Add. 66 n.4. The court could find only one allegation of reliability in the defense's opposition: "'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.'" App. 3916 (quoting App. 466). The court found that lone assertion "woefully inadequate to satisfy Rule 702." *Ibid*. The court reasoned that, to the extent Fischel was relying only on his experience, neither he nor the defense had provided the requisite explanation of how his experience led him to his conclusions, why his experience was

a sufficient basis for his opinions, or how his experience was reliably applied to the facts. *Ibid*. (citing Fed. R. Evid. 702, 2000 Adv. Comm. Notes); *see* Add. 72.

*Second*, the court found that much of the proposed testimony covered areas "within the common knowledge of the jury" (App. 3918) and thus "would not be helpful" to the jurors' deliberations (*ibid*.), as required by the "helpfulness" component of Rule 702. App. 3917, 3919; *see* Add. 70. The court concluded that the testimony was also excludable under Rule 403, because it "would be a needless presentation of evidence," "would lead to delay and waste of time," "would mislead the jury," and would "invit[e] the jurors to abandon their own common sense and common experience and succumb to [Fischel's] credentials." App. 3919-3920.

*Third*, the court concluded that, under Rules 602 and 703, the "bulk" of the proposed testimony was an improper "recitation of facts." App. 3920. The court commented that the defense could "establish those facts by competent evidence if it wishe[d] to do so." App. 3921. But the defense would not be allowed to "spin" the facts "by offering the testimony of an expert who purports to offer an opinion or a conclusion that the jury can draw from other evidence in the case." App. 3918.

*Fourth*, the court concluded that the defense's second expert disclosure was still so "gross[ly] defect[ive]" that exclusion was also warranted under Rule 16. App. 3921; *see* Add. 16, 22.

After the court ruled, the defense asked to be heard. App. 3921. The court denied the request, noting that "[a]ny argument that you wish to make could have been put in the response" to the motion to exclude. *Ibid*. When the defense complained that "[w]e were under tremendous time pressure," the court again replied that "[y]ou could have put it in the response." App. 3921-3922; *see* Add. 15-16.

The district court excluded all of Fischel's opinion testimony, but it permitted him to testify as a summary witness under Rule 1006 of the Federal Rules of Evidence, in order to present charts of Nacchio's trading patterns (though only after the bases of the charts had been disclosed). App. 3922, 3942; *see* Add. 16. Fischel later did present that testimony, at length. App. 3981-4064.

E. On Saturday, April 7—the weekend *after* Fischel's opinions were excluded—the defense sent the government hundreds of pages of previously-undisclosed exhibits that Fischel would testify about during the following week, if permitted to do so. Supp. App. 55-56, 76-149. The defense moved for leave to offer the testimony and, for the first time, requested a *Daubert* hearing. App. 480-481 & n.4; *see* Add. 67. The defense acknowledged that the district court was "not specifically mandated to use the normal *Daubert* hearing to fulfill its gatekeeper function," but argued that "[a]n evidentiary hearing is particularly appropriate where, as here, the court believes the expert['s] report was insufficiently detailed." App. 481

n.4 (quotation omitted). The government again filed a motion to exclude. Supp. App. 54-75. The court again granted it, citing (*inter alia*) "egregious" untimeliness, "non-disclosure of * * * methodology," and irrelevance. App. 4073-4076.

## V. Nacchio's Conviction and Appeal

The jury acquitted Nacchio of the indictment's first 23 counts (covering his trades from January 2 to March 1, 2001) and convicted him on the remaining 19 counts (covering his trades from April 26 to May 29, 2001). Add. 11; *see* App. 67-68. The district court sentenced him to 72 months of imprisonment, assessed a $19 million fine, and ordered forfeiture of about $52 million. Add. 11.

Nacchio argued on appeal that: the evidence was insufficient to show that he had traded on the basis of material inside information with the intent to defraud (Nacchio Br. 10-31); the district court's materiality, inside-information, and good-faith instructions were erroneous (Nacchio Br. 31-39); the court abused its discretion in excluding Fischel's opinion testimony (Nacchio Br. 39-50); the court abused its discretion in denying discovery, and admission into evidence, of certain classified information (Nacchio Br. 50); for sentencing purposes, the court miscalculated the amount of money that Nacchio had gained from his illicit stock sales (Nacchio Br. 50-54); and, for forfeiture purposes, the court miscalculated the amount of proceeds that Nacchio had obtained from the sales (Nacchio Br. 54-57).

A divided panel of this Court (Kelly and McConnell, JJ., with Holmes, J., dissenting) reversed Nacchio's convictions and remanded for a new trial before a different district judge. Add. 60. The panel unanimously concluded that: the evidence was sufficient to support the verdict (Add. 42-48, 51-53, 56-58; *see* Add. 61); the jury instructions were correct and perhaps even more favorable to Nacchio than was legally justified (Add. 35-42, 48-51, 53-56; *see* Add. 61); and the district court properly denied discovery, and excluded evidence, about certain classified information (Add. 30-31; *see* Add. 61). But the majority concluded that the court abused its discretion in excluding Fischel's opinion testimony, whereas Judge Holmes found no error in that regard.[5] *Compare* Add. 12-30 *with* Add. 61-74.

The government petitioned for rehearing en banc. Pet. 1-15. This Court granted the petition and directed the parties to address the issues presented herein.

## ARGUMENT

### I. The District Court Properly Excluded Fischel's Opinion Testimony Under Rule 702, *Daubert*, and *Kumho*

As Judge Holmes observed in his panel dissent, Fischel's exclusion under Rule 702 was hardly the "tale of an invidious district court ruling." Add. 62. Rather, it was the inevitable result of the defense's own failings and tactical decisions. To

[5] Neither the majority nor Judge Holmes addressed Nacchio's sentencing and forfeiture claims. Add. 59; *see* Add. 61 n.1.

answer this Court's first three questions presented on en banc review: the defense was on notice that it either had to present reliability evidence in support of Fischel's testimony or had to request a hearing for that purpose (*see infra* Part A, pertaining to Question 1); the defense had a sufficient opportunity to do either or both of those things (*see infra* Part B, pertaining to Question 2); and, if the defense had wanted such a hearing, it bore the burden of asking for one (*see infra* Part C, pertaining to Question 3).

### A. The defense had notice of its need either to present reliability evidence or to request a hearing.

Under Rule 702, *Daubert*, and *Kumho*, expert testimony may not be admitted unless "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702; *see Daubert*, 509 U.S. at 597 (holding that Rule 702 requires trial judges to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand"); *Kumho Tire Co.*, 526 U.S. at 147-149 (applying *Daubert* to non-scientific testimony). It is beyond dispute that the proponent of an expert "has the burden of establishing that [these three] admissibility requirements are met by a preponderance of the evidence." Fed. R. Evid. 702, 2000 Adv. Comm. Notes (citing *Bourjaily* v.

*United States*, 483 U.S. 171 (1987)). Thus, any proponent of an expert must know that he will have to prove reliability to the district court's satisfaction. *See Weisgram* v. *Marley*, 528 U.S. 440, 455 (2000) ("Since *Daubert*, * * * parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet."). The panel did not hold otherwise. *See* Add. 24, 68, 71 n.7 (the panel majority and Judge Holmes agreed that the defense had the burden of establishing Fischel's reliability). Instead, in the panel's view, Fischel's exclusion was improper because, at the time of the district court's ruling, the defense simply had no idea that reliability was yet at issue. Add. 22-25. The record, fairly read, is to the contrary.

1. As early as the government's motion for a more complete disclosure, the defense was placed on notice that Fischel's reliability would be at issue. The motion argued that the defense's initial disclosure was too vague to ensure meaningful "test[ing]" of Fischel's methods under "Rule 702." Supp. App. 39; *see* Add. 63. After the district court granted the motion, it made clear that it expected a thorough disclosure, because the government would be unable to depose Fischel. App. 2041. Additionally, the government and the court commented that they anticipated "*Daubert*" and "*Kumho*" "issues" with respect to Fischel's testimony.[6] App. 2041-

[6] *Daubert* was not foreign to the defense, which had earlier cited the case in arguing that the government had not established its own experts' reliability. Supp. App. 14.

2042. The defense acknowledged the "forewarn[ing]" (App. 2042), and it certainly could be expected thereafter to read all the pleadings through the lens of Rule 702, *Daubert*, and *Kumho*.

2. The government's motion to exclude plainly joined issue on reliability and put the defense on notice of the need for a proffer or a hearing request. The motion cited Rule 702 on nearly every page (*see generally* App. 362-424) and discussed reliability at length (App. 374-378). It pointed out, twice, that the defense had the burden of establishing admissibility under Rule 702. App. 370, 420-421. It explained in detail the requirements of *Daubert* and *Kumho*. App. 370-378. It attacked each of Fischel's opinions, one at a time, on reliability grounds. App. 385, 388, 390, 393, 396, 398, 400, 403, 405, 407-411, 415-417. Nacchio's defense team of eight seasoned trial attorneys (App. 1-2), having already been "forewarned" about *Daubert* and *Kumho*, could hardly have missed the reliability thrust of the motion.

In the panel's view, the defense may have thought the motion's manifold references to Rule 702 and *Daubert* were "arguments about Rule 16." Add. 24. With respect, that is an unnatural reading of the motion, especially where both the government and the court had already alerted the defense to "*Daubert*" and "*Kumho*" "issues." The motion invoked Rules 16, 403, 602, 702, and 703 as alternative (and independently adequate) bases for exclusion — in separate sections and paragraphs.

*See, e.g.*, App. 362-364 (summary of the alternative bases for exclusion); *see also* App. 3914 (district court noted that the motion sought exclusion "under Rule[s] 602, 403, 702, and 703"). And, again, when the motion attacked Fischel's opinions seriatim, it argued a lack of reliability as to each one. App. 383-418. Finally, as the majority itself recognized, the motion argued in conclusion that "'[e]ven if the Court determines that the disclosure was adequate, the Court should rule that Defendant has not established [Fischel's] admissibility' under, among other things, *Daubert*." Add. 14 (quoting App. 420) (second alteration added).

The defense showed that it understood the difference between Rule 16 and Rule 702. In its opposition, it responded to the two alternative points in two separate argument sections titled, respectively: "Defendant's Expert Disclosure Complies with Rule 16" (App. 463) and "Professor's Opinions Are Proper Under Rule 702" (App. 466). *See* Add. 64 n.3 (Judge Holmes: "[T]he substance of [the opposition] underscores Mr. Nacchio's awareness that *Daubert* was in play.").

3. Courts have rejected claims of unfair surprise where the proponent of expert testimony had far less notice that Rule 702 was at issue. As Judge Holmes pointed out (Add. 62), this Court in *Ralston* v. *Smith & Nephew Richards, Inc.*, 275 F.3d 965 (10th Cir. 2001), rejected a plaintiff's claim of surprise where the district court excluded her expert based on the opponent's written challenge to the witness's

qualifications. *Id*. at 970 n.4. The Court rejected another such claim in *Solorio* v. *United States*, 85 Fed. Appx. 705 (10th Cir. 2004) (unpublished). There, the district court excluded the plaintiffs' expert "in the absence of [either] a separate motion to exclude evidence [or] an explicitly-noticed *Daubert* hearing." *Id*. at 709. The Court affirmed the exclusion, pointing out that (a) the government's reply brief in support of summary judgment "mounted an explicit *Daubert* attack" (*id*. at 708); and (b) the district court flagged *Daubert* and Rule 702 in open court prior to exclusion (*ibid*.). *Cf*. *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 144 (1997) (though no motion to exclude was filed, the court had discretion to exclude expert testimony where the opponent's summary-judgment motion challenged the testimony as unreliable and the proponent "failed to reply to this criticism").

The Third Circuit has reached the same conclusion on similar facts. In *Oddi* v. *Ford Motor Co.*, 234 F.3d 136 (3d Cir. 2000), the opponent of an expert challenged the expert's reliability under *Daubert* in a summary-judgment motion. *Id*. at 141-142. The district court excluded the expert. *Id*. at 142. The court of appeals rejected the proponent's claim that he had been "blind-sided" by the exclusion under *Daubert*, reasoning that he "was surely alerted to this problem when [the opponent] raised a *Daubert* challenge in its summary judgment motion." *Id*. at 151.

### B. The district court afforded the defense sufficient opportunity either to present its *Daubert* case or to request an evidentiary hearing for that purpose.

The defense had well over a year before trial, and the entirety of the prosecution's case in chief *during* the trial, to prepare and present reliability evidence in support of Fischel's opinions. And even if the defense had had insufficient notice of Rule 702 or *Daubert* until the government filed its motion to exclude, it thereafter had a written submission and several open-court chances to make a proffer or to ask for a hearing. Because the defense had (as Judge Holmes put it) a "multitude of opportunities to provide more information" (Add. 68), the district court was not required to provide, *sua sponte*, still another bite at the apple. *See Oddi*, 234 F.3d at 154 (a district judge need not afford a proponent "an open-ended and never-ending opportunity to meet a *Daubert* challenge until [he] gets it right" (quotation omitted)).

1. The defense's opposition argued that Fischel's opinions satisfied Rule 702 (App. 466-467) and that, accordingly, the motion to exclude was "without merit" (App. 463) and should "be denied" (App. 468). Any reasonable court nearing the end of a long trial would interpret that as an invitation to rule on admissibility without further proceedings, especially considering:

- the defense's acknowledgment that it had been "forewarned" about *Daubert* and *Kumho* (App. 2042);

- that even though the motion to exclude had, as an alternative remedy, requested a *Daubert* hearing at which to test reliability in the event the court were "inclined to allow any portion" of Fischel's testimony (App. 421), the defense's written opposition requested denial of the motion outright without mentioning that request and without making a hearing request of its own (App. 463-469);

- that even though the motion to exclude raised the issue of whether a continuance should be granted (and argued that none should be, App. 420), the defense's written opposition did not mention the issue or otherwise request a continuance (App. 463-469);

- the defense's silence when the government and the district court, after full briefing, repeatedly raised the Fischel issue during motion colloquies (App. 3834-3835, 3870-3873); and

- that the defense still did not ask for a hearing when the court explained that it was excusing the jury to make legal rulings (App. 3913).

The defense's post-exclusion conduct buttresses this conclusion. In a pleading filed the weekend after exclusion, the defense argued that its second disclosure had sufficiently explained Fischel's methodology. En Banc App. 50. The defense made the same claim during oral argument before the panel. *See* Add. 16 n.4 ("At oral argument, the defendant appeared to argue that the Rule 16 disclosure did substantially discuss Professor Fischel's methodology."). In other words, the defense did not contend that it needed more time to establish reliability; instead, it claimed that it *had* established reliability.

2. The panel majority was troubled by the district judge's refusal to hear oral argument on the motion to exclude. Add. 15-16, 25-26. But as the judge suggested (App. 3921-3922), the defense could have made its arguments in its written opposition. Likewise, it could have attached a proffer to, or requested a hearing in, the opposition. Indeed, the judge's standard rules *required* the defense to ask for any hearing in its opposition. NOTTINGHAM, PRACTICE STANDARDS — CRIMINAL ¶ 17.

At the very least, the defense could have requested oral argument in the opposition or immediately before calling Fischel to the stand. The judge's ground rules for this particular trial demanded as much, as the defense well knew. Early in the trial, the judge warned the parties to inform him ahead of time if there were any matters to be taken up outside the jury's presence. App. 1530 ("When I tell the jury to be here at a certain time, that means I expect we will be ready to go in front of the jury at that time. If there is an issue that you need to have me consider, try to warn me enough in advance that the issue is coming up * * * so we don't have the jury sitting in the jury room twiddling their thumbs[.]"). It was not the court's responsibility to mandate oral argument absent a request.[7]

[7] The defense could reasonably foresee, before calling Fischel, that the district court would not permit argument after the fact. Earlier in the trial, defense counsel observed of the judge, "I know you don't like reargument" or "a lot of back-and-forth once you've made a ruling." App. 2275, 3409. And the very morning the judge excluded Fischel's opinions, he had already ruled on several defense motions on the

Resolving the motion based on the parties' submissions and without oral argument was within the district court's sound discretion. In *Kumho*, the Supreme Court made clear that a judge has "considerable leeway in deciding * * * whether or when special briefing or other proceedings are needed to investigate reliability." *Kumho Tire Co.*, 526 U.S. at 152. Because that teaching applies to evidentiary hearings (*see infra* p. 35), it applies *a fortiori* to oral argument — especially where argument time is not requested in advance.

3. In response to the district court's refusal to hear argument, the defense said that it had been "under tremendous time pressure" in filing the opposition. App. 3921; *see* Add. 16. The panel majority endorsed that excuse, stating that "[t]he defense had only one day to respond to the government's 63-page motion." Add. 24. That observation is factually inaccurate and legally irrelevant.

a. The defense had 15 months of pretrial preparation and then the entirety of the government's case in chief to prepare to show reliability. It disclosed Fischel the day before trial and was then given nearly two weeks to (attempt to) clarify the details of his opinions. The government filed its motion to exclude in the midst of

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papers, without oral argument. App. 3838, 3845, 3847, 3850, 3859. In any case, the judge effectively *did* allow reargument about Fischel. The defense filed a motion to reconsider over the following weekend (App. 481 n.4), and the judge considered and denied it on the merits (App. 4073-4076).

trial only because the defense had withheld Fischel's opinions for that long (and even still had not disclosed all the details). The defense could hardly complain about time pressures of its own making. *See Middle Rio Grande Conservancy Dist.* v. *Norton*, 294 F.3d 1220, 1231 (10th Cir. 2002) (district court did not abuse its discretion in declining to extend the deadline for a party's evidentiary proffer where the party's "difficulties in meeting the deadline stemmed from its delays in the past and were difficulties of its own making" (internal quotation marks omitted)).

b. In any event, the court had set no deadline for the opposition. Practically speaking, the only deadline was set by the defense itself, in calling Fischel. When the court made its ruling, it had before it contentions that it should exclude the evidence (as the government had argued, App. 422) or that it should admit the testimony absent any evidence of reliability (as the defense had effectively requested, App. 468).

The court was not required to grant a continuance to allow an additional submission from the defense, given that the defense had not *sought* a continuance.[8] *See, e.g.*, *United States* v. *Barbuto*, 60 Fed. Appx. 754, 758 (10th Cir. 2003) (unpublished) (district court did not abuse its discretion in "fail[ing] to *sua sponte* grant a continuance on the day trial was set to begin"). The Supreme Court and this

[8] As Judge Holmes pointed out (Add. 67 n.5), it "would not have required much time at all" to seek a continuance, particularly with eight lawyers on duty (App. 1-2).

Court have long paid district judges strong deference on matters of scheduling and continuances. *See, e.g.*, *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983) (trial judges have "a great deal of latitude in scheduling trials," and the "burden" of "assembling the witnesses, lawyers, and jurors at the same place at the same time" "counsels against continuances except for compelling reasons"); *United States* v. *Evans & Assocs. Constr. Co.*, 839 F.2d 656, 659 (10th Cir. 1988). The same deference is due even where the denial of a continuance spells exclusion of a criminal defendant's witness. *See United States* v. *Russell*, 109 F.3d 1503, 1511 (10th Cir. 1997).

Even if the defense had asked for a continuance, exclusion would have been within the court's discretion. By the defense's own calculation, a continuance as to the government's experts 25 days *before* trial would have so undermined the schedule that exclusion was warranted. Supp. App. 20. A continuance several weeks *into* the trial would necessarily have been more disruptive. *See United States* v. *Devin*, 918 F.2d 280, 291 (1st Cir. 1990) ("orderly management of crowded dockets" requires that "mid-trial continuances * * * be granted sparingly, for good cause shown, not conferred upon litigants merely for the asking").

Fischel needed half a day just to testify about the pattern of Nacchio's stock sales. App. 3981-4064. Testing all 11 of his opinions through pleadings and a hearing would have taken much longer, especially because the government could not

be expected to quickly cross-examine an as-yet-undisclosed methodology without as-yet-undisclosed underlying materials. *See* App. 420 (motion to exclude argued that a continuance would be inappropriate for this reason); *see also* Marc T. Treadwell, *Evidence: Eleventh Circuit Survey*, 56 MERCER L. REV. 1273, 1279 (2005) ("District courts spend days, sometimes weeks, on *Daubert* hearings[.]"). The delay would have inherently prejudiced the government, whose case in chief would have faded from the jury's memory day by day. And it is far from clear that a continuance to allow further disclosures would have been worthwhile, given that the defense had not put its previous weeks to much use. Add. 12-13, 16 n.4, 20 (the defense's second disclosure did not discuss Fischel's methodology, even after the district court granted an extension and prodded the defense for a disclosure "pretty close to what is required in the civil area"); *see United States* v. *Rivera*, 900 F.2d 1462, 1475 (10th Cir. 1990) (en banc) (in considering a continuance, a court should weigh, *inter alia*, the "diligence of the party requesting [it]" and the "likelihood that the continuance, if granted, would accomplish [its stated] purpose" (quotation omitted)).

4. As explained in the en banc petition (Pet. 11-13), a holding from this Court requiring district judges to provide mid-trial *Daubert* hearings after full briefing on reliability and absent a request would have untoward practical consequences. It would promote gambling and gamesmanship, giving the proponent

incentive to withhold its reliability showing well past the proverbial eve of trial, even after briefing, until the very moment the witness is called to the stand — or even afterward.[9] Endorsing such non-disclosure would require frequent and substantial mid-trial continuances, causing "'unjustifiable expense and delay.'" *Kumho*, 526 U.S. at 152 (quoting Fed. R. Evid. 102). Worse yet, it would encourage uninformative responses to *Daubert* motions, depriving judges of focused, adversarial reliability pleadings and thwarting their gatekeeping efforts under Rule 702. *Cf. Burns* v. *United States*, 501 U.S. 129, 137 (1991) (timely notice of a sentencing departure "promot[es] focused, adversarial resolution of the legal and factual issues relevant to fixing [a] sentence[]"); *Williams* v. *Florida*, 399 U.S. 78, 82 (1970) ("The adversary system * * * is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.").

[9] During the weekend after Fischel's exclusion, the defense disclosed some 443 pages of materials underlying his opinions. *See* App. 486; *see also, e.g.*, App. 506-578. If Fischel used these materials in formulating his initially-disclosed opinions, the defense was required to disclose the underlying materials at that time, not in its post-exclusion filings. Under that scenario, the materials would further confirm that the defense had an adequate opportunity to assemble and present its *Daubert* case but simply chose not to do so. If, on the other hand, the materials were generated after exclusion, Fischel necessarily did not rely on them when formulating his initially-disclosed opinions, which means the materials could not have established the reliability of those opinions.

### C. The defense had the burden of requesting an evidentiary hearing.

The panel majority observed that "[t]he prosecution had every right to demand a *Daubert* hearing to test [Fischel's] methodology." Add. 21. As Judge Holmes recognized (Add. 68 n.6), that is true but beside the point: on a motion to exclude Nacchio's expert, it was the defense's obligation, not the government's, to prove reliability and thus to request the proceedings necessary for the task.

1. District judges are not required to hold *Daubert* hearings. As noted (*supra* p. 30), the Supreme Court made clear in *Kumho* that a judge has "considerable leeway in deciding * * * whether or when special briefing or other proceedings are needed to investigate reliability." *Kumho Tire Co.*, 526 U.S. at 152. This means "that whether to hold a hearing is a question that falls within the trial court's discretion." *Nelson* v. *Tenn. Gas Pipeline Co.*, 243 F.3d 244, 249 (6th Cir. 2001) (citing *Kumho Tire Co.*, 526 U.S. at 152); *see United States* v. *Call*, 129 F.3d 1402, 1405 (10th Cir. 1997) ("*Daubert* does not mandate" "an evidentiary hearing" prior to an expert's exclusion); *see also Cook* v. *Sheriff of Monroe County*, 402 F.3d 1092, 1113 (11th Cir. 2005) (a court has "no obligation" to hold a *Daubert* hearing to provide the proponent "an additional opportunity to meet [its] burden" where its written proffer contains only "conclusory statements devoid of * * * analytical support").

In view of these settled principles, with which counsel was well familiar,[10] the defense could not expect that the district court would hold a hearing as a matter of course and absent a specific request. Indeed, as mentioned (*supra* pp. 15, 29), the district judge's standard rules require "[a]ny party opposing [a] motion [to] state whether that party believes an evidentiary hearing is necessary."[11] NOTTINGHAM, PRACTICE STANDARDS — CRIMINAL ¶ 17. The defense's opposition did not comply with that requirement. To the contrary, the opposition said that the government's motion to exclude should "be denied." App. 468. Accordingly, the court could infer that the defense sought denial not only of exclusion (App. 422) but also of the alternative remedy proposed in the motion — further disclosure and then a *Daubert* hearing in the event the court were "inclined to allow any portion of the proposed expert opinion" (App. 421).

2. Though the district court's Rule 403 and Rule 702 "helpfulness" findings are addressed primarily below (*see infra* Argument Point II), it bears noting here that

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[10] Nacchio's trial counsel has written that *Kumho* "makes it clear that whether to hold a hearing * * * is left to the discretion of the trial judge." HERBERT J. STERN ET AL., TRYING CASES TO WIN: EVIDENCE, WEAPONS FOR WINNING, Vol. 3 at 223 (2004); *see id*. at 213 (observing that, after *Kumho*, "appellate courts * * * will defer to the trial judge's decision on how to determine reliability (*e.g.*, to hold a hearing)").

[11] *Cf*. STERN ET AL., *supra*, Vol. 1 at 567 (counseling advocates that "[i]t is important to indicate in any motion whether you believe that an evidentiary hearing is necessary and to explain why it is if you request one").

the court had discretion to exclude Fischel's opinions on those alternative bases without holding a hearing. In *Call*, this Court affirmed exclusion of expert testimony on Rule 403 grounds over the defendant's argument that the district court erred in failing to hold a hearing. 129 F.3d at 1405-1406; *accord Guerra* v. *North East Indep. Sch. Dist.*, 496 F.3d 415, 419 (5th Cir. 2007) (per curiam) (finding "no cases" to support the proponent's contention that a hearing is a prerequisite to exclusion under Rule 403); *United States* v. *Waters*, 194 F.3d 926, 930 (8th Cir. 1999) (finding no error in the district court's failure to hold a *Daubert* hearing where the court "independently excluded the evidence under Fed. R. Evid. 403").

The dissent in *Call* would have held that "fail[ing] to hold an evidentiary hearing in the face of proffered evidence materially addressing issues relevant to Rule 403" is an abuse of discretion. 129 F.3d at 1406 (Ebel, J., dissenting). But even the dissent's proposed rule would have required a "material[]" "proffer[]" to trigger a hearing. *Ibid.*; *cf. United States* v. *Barajas-Chavez*, 358 F.3d 1263, 1266 (10th Cir. 2004) (a district court need not hold a hearing on a motion to suppress unless the defendant "raise[s] factual allegations that are sufficiently definite, specific, detailed, and nonconjectural"); *United States* v. *Sandoval*, 390 F.3d 1294, 1301 (10th Cir. 2004) (same, as to a motion to withdraw a guilty plea). Here, the district judge would have been well within his discretion to find the defense's anemic disclosures and

opposition insufficient to trigger a hearing. Even if the defense had actually requested such a hearing—which, in violation of the judge's rules, it did not—its opposition did not remotely engage the government's point-by-point attack on Fischel's opinions. Thus, there was nothing to hold a hearing *about*.

3. Looking beyond the facts of this case, commonsense principles of adversarial process and judicial economy underscore the wisdom of placing on the expert's proponent the burden of requesting a hearing. To repeat, the proponent has the burden of showing reliability and the other requirements of admissibility. Fed. R. Evid. 702, 2000 Adv. Comm. Notes; *see Ralston*, 275 F.3d at 970 n.4; *see also Bourjaily*, 483 U.S. at 175-176. Obviously, then, the proponent is in the best position to know what proceedings he will need in order to satisfy the requirements. *See Greenlaw* v. *United States*, 128 S. Ct. 2559, 2564 (2008) ("[O]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." (quotation omitted)). Where the proponent does not ask for a hearing, neither the opponent nor the district judge should be forced to guess about whether one is necessary. Rather, in the interests of "avoid[ing] unnecessary reliability proceedings" (*Kumho Tire Co.*, 526 U.S. at 152 (quotation omitted)) and conserving judicial resources (*see* Fed. R. Evid. 102), the judge should be entitled to assume, as a default, that a hearing is not

needed if not requested. *Cf. Weisgram*, 528 U.S. at 455 ("It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail.").

## II. The District Court Properly Excluded Fischel's Opinion Testimony Under Rules 16, 403, 602, 703, and the "Helpfulness" Component of Rule 702

For the foregoing reasons, the district court did not abuse its discretion in excluding Fischel's opinions on reliability grounds under Rule 702, *Daubert*, and *Kumho*. But even assuming *arguendo* that the court erred with respect to reliability, it properly exercised its substantial discretion (*see infra* Part A) to exclude the testimony on several other grounds, including Rules 16, 403, 602, and 703, and the "helpfulness" component of Rule 702 (*see infra* Part B).

### A. The district court had broad discretion.

In a recent case from this circuit, the Supreme Court stressed that "a district court virtually always is in the better position [than the appellate court] to assess the admissibility of the evidence in the context of the particular case before it." *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 128 S. Ct. 1140, 1146 (2008). Accordingly, and "[i]n deference to a district court's * * * greater experience in evidentiary matters, courts of appeals [must] afford broad discretion to a district court's evidentiary rulings." *Id.* at 1144-1145. Such deference not only gives district judges

"the necessary flexibility to resolve questions involving multifarious, fleeting, special, narrow facts" (*Koon* v. *United States*, 518 U.S. 81, 99 (1996) (quotation omitted)); it also bolsters their "ability to control the litigants before them" (*Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 404 (1990)). These concerns apply with full force to exclusion of expert testimony. *See Joiner*, 522 U.S. at 143 (reversing court of appeals' reversal of an expert's exclusion, because court of appeals "failed to give the trial court the deference that is the hallmark of abuse-of-discretion review"). And they apply whether the ground for exclusion is Rule 16, Rule 403, Rule 602, Rule 702, or Rule 703.[12]

The panel concluded (Add. 16-29) that the district judge abused his discretion as to every ground invoked for exclusion. In doing so, it paid too little deference to the judge's fact-intensive, on-the-scene findings under Rules 16, 403, 602, 702, and 703. Indeed, as to Rule 403, the panel did not purport to apply an abuse-of-discretion standard at all. Add. 26-28. Nor did the panel examine Fischel's opinions point by point—through the lens of notice, relevance, prejudice, juror confusion, delay, waste of time, or Fischel's lack of personal knowledge or use of hearsay—to determine

[12] *See United States* v. *Nichols*, 169 F.3d 1255, 1266-1269 (10th Cir. 1999) (Rule 16); *Sprint*, 128 S. Ct. at 1145 (Rule 403); *United States* v. *Hernandez*, 693 F.2d 996, 1000 (10th Cir. 1982) (Rule 602); *United States* v. *Gabaldon*, 389 F.3d 1090, 1098-1099 (10th Cir. 2004) (Rule 702); *United States* v. *87.98 Acres of Land*, 530 F.3d 899, 904-905 (9th Cir. 2008) (Rule 703).

which opinions the judge had abused his discretion in excluding. After addressing some general principles about the relevant rules (*see infra* Part B.1), the government undertakes that opinion-by-opinion examination below (*see infra* Part B.2).

### B. The district court properly exercised its discretion.

#### 1. The rules

a. A district judge may exclude expert testimony under Rule 16 if the proponent fails to disclose the "bases and reasons" for it in a thorough and timely manner. Fed. R. Crim. P. 16(d)(2) ("If a party fails to comply with this rule, the court may * * * prohibit that party from introducing the undisclosed evidence [or] enter any other order that is just under the circumstances."). *See, e.g.*, *United States* v. *Adams*, 271 F.3d 1236, 1243-1244 (10th Cir. 2001) (affirming exclusion of defense expert under Rule 16); *Nichols*, 169 F.3d at 1266-1269 (same).

b. Rule 702 requires not only that an expert's opinion be reliable but that it "assist the trier of fact." Fed. R. Evid. 702. As Judge Holmes recognized, this Court will affirm exclusion of expert testimony under Rule 702 if it is irrelevant; if it is "argument based on factual matters before the court," Add. 70; *see Champagne Metals* v. *Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1080 n.4 (10th Cir. 2006); or if it does "'not deal with matters outside the everyday knowledge of a typical juror,'" Add. 70 (quoting *United States* v. *Fredette*, 315 F.3d 1235, 1240 (10th Cir. 2003)).

c. Similarly, Rule 403 authorizes district judges to exclude unhelpful, misleading, confusing, or superfluous opinions, even if the opinions meet the test of relevance. Specifically, the rule provides that "relevant * * * evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. The judge's leeway to exclude evidence under Rule 403 is especially broad in the expert context. As the Supreme Court observed in *Daubert*: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 * * * exercises more control over experts than over lay witnesses." 509 U.S. at 595 (quotation omitted). Given this extra measure of latitude over expert testimony—and the judge's institutional advantage in performing "an on-the-spot balancing of probative value and prejudice" (*Sprint*, 128 S. Ct. at 1145 (quotation omitted))—this Court regularly affirms exclusion under Rule 403 for all manner of case-specific reasons. *See, e.g.*, *Call*, 129 F.3d at 1406 (expert testimony pertained to witness credibility and would have "usurp[ed] a critical function of the jury"); *Thompson* v. *State Farm Fire & Cas. Co.*, 34 F.3d 932, 941 (10th Cir. 1994) (expert testimony would have been a "needless presentation").

d. Finally, Rules 602 and 703 authorize a district judge to ensure that an expert does not gratuitously introduce facts of which he has no personal knowledge (Rule 602) or which are otherwise inadmissible (Rule 703). The panel observed (Add. 28-29) that these rules do not prohibit an expert from stating an *opinion* based on inadmissible facts. But the rules *do* prohibit an expert from channeling inadmissible hearsay, hoping that the jury will consider it as substantive evidence and accept whatever argumentative spin he puts on it. Fed. R. Evid. 703 ("Facts or data that are otherwise inadmissible shall not be disclosed to the jury * * * unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."). *See, e.g.*, *TK-7 Corp.* v. *Estate of Barbouti*, 993 F.2d 722, 732-733 (10th Cir. 1993) (expert may not channel into evidence another's financial projections by "adopt[ing]" them, thereby "circumventing the rule against hearsay"); *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992) (district judge has discretion to exclude an opinion based on inadmissible facts where the proponent will use the facts for substantive purposes).

**2. The rules applied to Fischel's opinions**

Applying the foregoing principles to Fischel's testimony on an opinion-by-opinion basis reflects a sensible exercise of discretion. For ease of reference, the government reproduces each of Fischel's opinions (listed at p. 13, *supra*) and then

provides a brief analysis before proceeding to the next one. A more detailed analysis, citing additional grounds for exclusion, can be found in the government's motion to exclude, at the pages appearing *infra* next to each opinion. App. 383-418.

(1) The pattern and timing of Nacchio's stock sales in 2001 were consistent with the pattern and timing of his sales in prior years. App. 384-386.

The district court actually permitted Fischel to testify, using summaries and charts, about the pattern and timing of Nacchio's trades. App. 3981-4064. The dates of the trades were a matter of fact, not opinion. And whether Nacchio sold a lot more or only a little more in 2001 than in prior years was not a matter on which expert testimony was needed. Fed. R. Evid. 403, 702. As Fischel himself noted, "anybody can perform any of these calculations." App. 4028.

(2) Nacchio's January 2001 sales of "growth shares"[13] were consistent with his purported preference of receiving cash for growth shares. App. 386-388.

This opinion was not within the scope of the defense's initial Rule 16 disclosure. App. 460-462. The district court's order to "clarify" and provide the

[13] Nacchio was entitled to some $25 million in "growth shares." App. 1909. As a Qwest board member explained at trial (App. 1909-1914), growth shares differed from other shares in that they effectively had a fixed value: Nacchio would receive $25 million in stock for his growth shares on a specified date no matter what the price of Qwest's stock was at that time. In other words, if Qwest's stock was $25 per share, Nacchio would receive one million shares. If Qwest's stock was $1 per share, Nacchio would receive 25 million shares.

"bases and reasons" for Fischel's initially-stated opinions (App. 352)[14] did not give the defense license to come up with new ones in the second disclosure. Exclusion was therefore warranted on notice grounds. Fed. R. Crim. P. 16.

In any event, the truism that selling shares for cash is consistent with a desire for cash was hardly beyond the jurors' knowledge. Fed. R. Evid. 403, 702.

(3) Nacchio had no incentive to sell growth shares based on inside information. App. 388-392.

Fischel would have said that the dollar value of Nacchio's growth shares did not depend on Qwest's stock price. The government said the same thing in its opening statement (App. 1429), and two government witnesses testified to the same effect (App. 1909-1914, 3027-3029). The jury did not need to hear from an expert an undisputed fact it had heard several times before. Fed. R. Evid. 403, 702; *see* App. 3917 (district court noted that all the "factual material" about growth shares was

[14] The panel majority (Add. 19-20) faulted the district court for expecting a disclosure "pretty close to what is required in the civil area." App. 2041. Yet for purposes of the order requiring the defense to clarify the "bases and reasons" for Fischel's testimony (App. 352), the expectation was reasonable: Fed. R. Crim. P. 16(b)(1)(C) and Fed. R. Civ. P. 26(a)(2)(B) do vary in some respects, but they both require a statement of the witness's opinions and the "bas[e]s and reasons" for them. In any case, the court made clear what it expected from the defense in response to the government's initial motion for a more complete disclosure, which raised objections (Supp. App. 38-42) under not only Rule 16 but also evidentiary rules (including Rules 403 and 702) that would govern admissibility of any opinions the defense identified in a clarified filing. Thus, the defense could not claim unfair surprise. App. 38-42.

already before the jury).

(4) Nacchio's stock sales in 2001 were consistent with an earlier-stated desire to sell. App. 392-393.

The defense's initial disclosure did not suggest Fischel would address what statements Nacchio made or when he made them. App. 460-462. That was a new topic that could be excluded for lack of timely notice. Fed. R. Crim. P. 16.

In addition, whether Nacchio had said he wanted to sell his stock was a matter of fact that the jury could figure out on its own. Fed. R. Evid. 403, 702. Likewise, jurors do not need expert guidance to know that selling stock is consistent with a desire to sell stock. *Ibid*. Nor did Fischel have any special expertise on the subject. The defense simply wanted him to highlight Nacchio's statement, not to provide some profound economic insight about it.

(5) If Nacchio in 2001 had actually sold his stock based on material inside information, he would have sold more shares than he did. App. 393-397.

This opinion was based on the fact that Nacchio did not exercise all his options or sell all his holdings. The jury was competent to decide whether he stopped at $100 million in sales because he feared getting caught (*see* Gov't Br. 25), because the stock price had plummeted (*see ibid*.), or because he was not trading on inside information. Fed. R. Evid. 403, 702. Fischel had no unique wisdom to offer about Nacchio's state

of mind. Indeed, his testimony on the matter likely would have confused the jury about its role in deciding *mens rea*. Fed R. Evid. 403; *cf.* Fed. R. Evid. 704(b).

(6) Qwest's repurchase of 22 million shares of its own stock from BellSouth in January 2001 shows Nacchio possessed no material adverse inside information at the time. App. 397-399.

The defense did not disclose how Fischel reached this conclusion. Fed. R. Crim. P. 16.

Anyhow, Fischel did not distinguish between *Qwest's* incentive to repurchase shares from another company and *Nacchio's* incentive to trade on inside information, which presented a substantial danger of juror confusion. Fed. R. Evid. 403; *see* App. 3667-3668 (court concluded that the repurchase was a "red herring").

(7) Nacchio's stock sales in 2001 were consistent with an effort to diversify his portfolio. App. 400-401.

The defense's initial disclosure said nothing about diversification. App. 460-462. That was, again, a topic raised for the first time in the second disclosure. Fed. R. Crim. P. 16.

Moreover, this opinion was cumulative, because Nacchio's own financial advisor had already explained diversification to the jury. App. 2949-2950, 3017, 3021, 3040, 3049. And, anyway, the concept was not beyond the jury's commonsense understanding. Fed. R. Evid. 403, 702.

(8) Other executives at Qwest, and at other large companies, sold stock in 2001. App. 401-404.

This was not an opinion at all, and it was utterly irrelevant, as the district court recognized. Fed. R. Evid. 403, 702; *see* App. 3919 (district court found it "preposterous" that Fischel would "point out, evidently, that Michael Eisner was selling his Disney stock and Mr. Dell was selling his stock in Dell at the same time").

(9) Qwest's performance in the first half of 2001 was consistent with its earlier-stated targets. App. 404-405.

Whether Qwest met its targets in the first half of 2001 was not a complex question requiring an expert. Fed. R. Evid. 403, 702. It was undisputed that Qwest made its numbers in those quarters. App. 1437 (government's opening statement). Plainly, that was just another fact the defense wanted a neutral-seeming and smart-sounding expert to highlight. Fed. R. Evid. 403; *see Call*, 129 F.3d at 1406 (affirming Rule 403 exclusion partly because of the "danger" that the jury would "overvalue" the expert's testimony because of its apparent "scientific nature").

(10) Qwest's failure to meet its targets in the second half of 2001 owed to a downturn in the telecommunications industry. App. 405-412.

The defense's second disclosure reflected that this opinion, too, was just a collection of facts for Fischel to highlight: *e.g.*, Qwest's stock performance when it raised its targets in September 2000; the reaction of the market when the company

reduced its targets in September 2001; and so on. App. 431. The opinion was excludable on a number of grounds:

*First*, the disclosure did not indicate the reasons why Fischel reached the conclusion that he did based on the cited facts. Fed. R. Crim. P. 16.

*Second*, and relatedly, it was unclear whether Fischel had applied any reliable methodology in reaching his conclusion. Nor was there any suggestion that Fischel had specialized knowledge of the telecommunications industry or was otherwise qualified to opine on the subject. Fed. R. Evid. 702.

*Third*, according to the disclosure, Fischel relied in part on "analysts' reports reflect[ing] an understanding that economic conditions could cause Qwest's financial performance to be worse than expected." App. 431. The analysts' reports were rank hearsay. The district court could readily prevent the defense from using Fischel to channel the analysts' "understanding," which would be immune from cross-examination. Fed. R. Evid. 602, 703; *see TK-7 Corp.*, 993 F.2d at 732-733; *In re James Wilson Assocs.*, 965 F.2d at 173.

*Fourth*, because Fischel was basing his opinion on secondhand information, the court could also exclude it under Rule 403. The court suggested that it would permit the defense to call analysts to elicit their firsthand "understanding," if it chose to do so. App. 3920-3921; *see Old Chief* v. *United States*, 519 U.S. 172, 184-185

(1997) (under Rule 403, a district judge's "discretionary judgment may be informed" by "evidentiary alternatives"). That the defense did not take up the court's offer speaks volumes about probative value.

*Fifth*, the defense had already convinced the court that these analysts' views as to materiality were irrelevant. En Banc App. 27-33. Thus, any error in excluding Fischel's summary thereof was invited and cannot serve as a basis for appellate relief. *See John Zink Co.* v. *Zink*, 241 F.3d 1256, 1259 (10th Cir. 2001).

> (11) The extent of Qwest's reliance on IRUs would not have been material to reasonable investors. App. 412-418; *see* Supp. App. 58-64.

The defense's initial disclosure did not even remotely touch on this opinion. Exclusion was therefore proper under Rule 16.

Also, the defense's weekend clarification of the opinion is telling in terms of relevance. After the district court excluded Fischel's opinions, the defense sent the government an email stating that, if the court reconsidered its ruling, Fischel would testify "that IRU revenue was not worthless." App. 506. But the government never argued, and its witnesses never testified, that IRU revenue was worthless. Instead, the government argued that Nacchio had traded on information that the IRUs would *disappear* during the second half of 2001, such that Qwest would not be able to meet its targets. *See, e.g.*, Gov't Br. 9, 27-28; Add. 5. Fischel's opinion, at least as

clarified, was therefore beside the point. Fed. R. Evid. 403, 702.

And, once again, nothing in the defense's disclosures suggested that Fischel had the requisite knowledge about the telecommunications industry, let alone about IRUs, to qualify him to opine on the matter. Fed. R. Evid. 702.

## III. Even if the District Court Abused its Discretion, a New Trial Would Be Unwarranted

Even assuming *arguendo* that the district court exceeded its discretion as to one or more of the foregoing opinions, a close examination of the record raises no grave concern that exclusion had a substantial effect on the verdict. *See infra* Part A.

But even if the Court (1) ultimately agrees with the panel that the district court gave the defense "no * * * opportunity to present evidence" of admissibility (Add. 26); (2) concludes that Rules 16, 403, 602, 703, and the "helpfulness" component of Rule 702 do not on the present record provide sufficient alternative bases for exclusion of some aspect of the testimony; and (3) cannot satisfactorily conclude on the present record that Nacchio would have been convicted even if Fischel's testimony had been admitted, the panel's order of a new trial (Add. 60) would still be too drastic. Under those circumstances, the appropriate relief would be a limited remand for particularized evidentiary proceedings, giving the defense a chance to make its proffer and allowing the district court to decide admissibility in the first

instance. Such relief would fully remedy the alleged harm without unduly infringing other interests, including conservation of judicial resources and ensuring justice with dispatch. *See infra* Part B.

**A. Admission of Fischel's opinions would not have affected the verdict.**

In conducting harmless-error review, this Court first evaluates for error each individual ruling of the district court and only then decides whether any errors, standing alone or cumulatively, warrant reversal. *See Rivera*, 900 F.2d at 1470-1471. Applying that procedure to Fischel's opinions, the panel should have decided (a) which opinions the district judge abused his discretion in excluding, and (b) which erroneously-excluded opinions, if any, were *prejudicially* excluded. In undertaking the latter inquiry, the panel should have determined whether there was a "*grave*" concern that the exclusion of any admissible opinions "had a *substantial* effect on the [trial's] outcome." *United States* v. *Charley*, 189 F.3d 1251, 1270 n.29 (10th Cir. 1999) (en banc) (emphases in original). The panel did not do any of that. It broadly concluded that "Fischel's testimony, * * * if credited by the jury, might have changed the jury's mind" (Add. 30), but it did not identify which opinions the jurors might have credited, let alone which ones might have persuaded them to acquit.

For the following reasons, none of Fischel's opinions, alone or in combination, would have had a substantial effect on the trial's outcome if they had been admitted:

- Opinion (1). Using charts, Fischel was permitted to testify about the timing and pattern of Nacchio's sales. App. 3981-4064.

- Opinions (2) and (3). Nacchio was acquitted of Counts One and Two, the only counts charging the sales of growth shares. App. 67, 1367. *See United States* v. *Angelos*, 433 F.3d 738, 748 (10th Cir. 2006) (error in admitting suppressible evidence was harmless where the evidence related to acquitted counts).

- Opinion (4). Other witnesses testified about Nacchio's earlier-stated desire to sell (App. 1929, 2958), and the jury saw a video of the statement (DX 1560).

- Opinion (5). Using charts, Fischel was permitted to testify that Nacchio sold "far less [stock] than what he could have sold." App. 3996.

- Opinion (6). Qwest repurchased its stock from BellSouth in January 2001. App. 429. Nacchio was acquitted of the January 2001 sales charged in the indictment. App. 67, 1367. Fischel's testimony that Nacchio possessed no "material adverse inside information" in January 2001 would have been too remote in time to affect the remaining counts, which charged sales in late April and May of 2001. App. 68.

- Opinion (7). Nacchio's own financial advisor testified at length about Nacchio's "diversification strategy." App. 2949-2950, 3017, 3021, 3040, 3049.

- Opinion (8). Other executives' stock sales were at best tangentially related to Nacchio's. In any event, the defense could have called a fact witness to testify about the sales.

- Opinion (9). No one disputed that Qwest's first-half performance in 2001 was consistent with its earlier-stated public targets. App. 1437.

- Opinion (10). During his summary testimony, Fischel repeatedly offered his unsolicited view that Qwest's stock price dropped in 2001 "as other telecommunications companies[']did" (App. 4025; *see* App.

4037) and that this was "because of the meltdown in the * * * industry for Qwest and other firms" (4063-4064). Also, the district court offered the defense a chance to further explore the downturn in the industry using "competent evidence." App. 3920-3921. The defense chose not to do so. Holding it to that tactical decision is not cognizable prejudice.

- Opinion (11). Again, Fischel would have testified "that IRU revenue was not worthless." App. 506. But, again, the government never argued, and its witnesses never testified, that IRU revenue was worthless. Also, Fischel would have testified about (a) companies that did not sell IRUs, and (b) companies that sold IRUs and disclosed their magnitude. Supp. App. 77-81. But because Qwest fell into neither category, the testimony could not have aided Nacchio.

### B. Even assuming there was an abuse of discretion and the Court cannot conclude on the present record that the error was harmless, a limited remand, not a new trial, would be the appropriate remedy.

The panel did not conclude that the defense had established admissibility but rather that it should have been given an additional opportunity to do so. Add. 21-26. Assuming that is true, and assuming that the Court is unpersuaded by the many other arguments for affirmance, the appropriately-tailored remedy is a limited remand.

1. The Supreme Court has long counseled "that remedies should be tailored to the injury suffered" and "should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). The Court has repeatedly applied that teaching in the context of the criminal trial, ordering a limited evidentiary remand in cases where a new trial would give the defendant a "windfall" at the expense of judges, jurors, witnesses, the government, and the public at large.

*Waller* v. *Georgia*, 467 U.S. 39 (1984), and *Jackson* v. *Denno*, 378 U.S. 368 (1964), are two particularly salient examples.

In *Waller*, the defendants were convicted of various offenses under Georgia law following a closed suppression hearing at which the trial judge denied the defendants' motion to suppress certain evidence. 467 U.S. at 41-43. The Supreme Court held that the closure of the suppression hearing violated the Sixth Amendment (*id*. at 44-49) but declined to order a new trial (*id*. at 49-50). Instead, the Court remanded for a new suppression hearing (*id*. at 50):

> [T]he remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest. * * * A new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties.

Similarly, in *Jackson*, the Court found that a New York state court erred in submitting to the jury, at the defendant's murder trial, the issue of whether his confession was voluntary. 378 U.S. at 374-391. In reversing, the Court declined to order a new trial. *Id*. at 393-396. It remanded the case for a lower-court determination about whether to grant a new trial or, instead, an evidentiary hearing on voluntariness. *Ibid.* In doing so, the Court reasoned that the defendant was not "automatically entitled to a complete new trial" (*id*. at 394-395):

> [I]f at the conclusion of such an evidentiary hearing * * * it is determined that [the] confession was voluntarily given, * * * we see no constitutional necessity at that point for proceeding with a new trial[.] * * * [T]he State is free to [order] a new trial if it so chooses, but for us to impose this requirement before the outcome of the new hearing * * * would not comport with the interests of sound judicial administration.

Finally, though not in a criminal case, the Supreme Court earlier this year endorsed a similar approach in *Sprint*. 128 S. Ct. at 1146-1147. There, the district court excluded evidence under Rule 403, but the record on appeal did not disclose whether the decision was based on a proper or erroneous ground. *Id*. at 1144, 1146. This Court reversed and remanded for a new trial (*see id*. at 1144), but the Supreme Court vacated that decision and remanded to the district court for evidentiary proceedings to be conducted "under the appropriate standard" (*id*. at 1143).

2. In this case, if the Court determines that anything other than affirmance is warranted, it should order a limited remand rather than a retrial, in keeping with the practical concerns underlying *Waller*, *Jackson*, and *Sprint*.[15] A retrial here would be just as much of a "windfall" to Nacchio as a new trial in *Waller* would have been to the defendants there. 467 U.S. at 50. Just as the record in *Waller* did not establish that the defendants were entitled to suppression, the record here (to put it mildly) does

[15] In view of *Sprint*, and the broadly-applicable considerations animating *Waller* and *Jackson*, a limited remand would be an equally appropriate remedy if this Court were to conclude either that the district court held insufficient *Daubert* proceedings *or* that its Rule 403 findings were insufficiently specific.

not establish that Nacchio is entitled to present Fischel's opinions to the jury.

By the same token, a new trial would be costly. During the 15 months from indictment to trial, the parties litigated a number of resource-intensive evidentiary matters, including sensitive issues pertaining to classified information. That litigation consumed much of the district court's calendar. On any retrial, the defense would be permitted to revisit its voluntary decision not to introduce into evidence certain classified information. (It would not, of course, be permitted to introduce the information the panel held was properly excluded. Add. 30-31.) Going that route would require additional pretrial proceedings under the Classified Information Procedures Act. And that is to say nothing about the retrial itself, which would likely occupy jurors and witnesses for just as long as the initial trial did.[16]

These are the very "public interest" (*Waller*, 467 U.S. at 50) and "judicial administration" (*Jackson*, 378 U.S. at 395) concerns the Supreme Court has credited when endorsing limited remands and other resource-preserving doctrines. *See United States* v. *Mechanik*, 475 U.S. 66, 72 (1986) (noting that harmless-error review saves

[16] The panel's decision to "assign any new trial to a new district judge" (Add. 59) would exacerbate the costs inherent in a retrial, contrary to the panel's assurance (Add. 60). The new judge would not have any experience with this case, which, though not byzantine, is much more complicated and fact-intensive than the average case. Getting the new judge up to speed would take time. Even assuming the new judge would handle any limited remand, the judge's review of and rulings on the admissibility issue would be far less time-consuming than a full-blown retrial.

from reversal costs such as: forcing courts, jurors, and witnesses to expend time on a repeat trial; asking victims "to relive their disturbing experiences"; risking "erosion of memory * * * and dispersion of witnesses"; compromising "society's interest in the prompt administration of justice"; and impeding "deterrence and rehabilitation").

3. To be sure, in *Dodge* v. *Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003), this Court "decline[d] to entertain the possibility of a remand to the district court to make specific findings" about experts whose opinions the judge had admitted without verifying reliability. *Id*. at 1229. The Court believed no judge "would be well positioned to make valid findings" on remand "given the overwhelming temptation to engage in post hoc rationalization." *Ibid*. But the same temptation presumably existed in *Waller*, *Jackson*, and *Sprint*, and that did not foreclose remands there.

*Dodge*, moreover, is in substantial tension with other opinions of this Court. In *United States* v. *Perez*, 989 F.2d 1574 (10th Cir. 1993) (en banc), for example, the Court held that a remand for an evidentiary hearing, rather than a new trial, is the appropriate course where (a) the district court fails to make the requisite findings before admitting an alleged coconspirator statement under Rule 801(d)(2)(E); and (b) the court of appeals "cannot view the admission as harmless." 989 F.2d at 1582. Under the *Perez* approach, a defendant is entitled to a new trial only if the district court on remand finds the statement inadmissible. *Ibid*.; *see United States* v. *Rascon*,

8 F.3d 1537, 1540 (10th Cir. 1993) (invoking *Perez* to remand for a hearing on admissibility of alleged coconspirator statements). In *Perez* and *Rascon*, too, there was a risk of "post hoc rationalization," but the Court apparently did not believe that risk significantly undermined a limited-remand approach.

For these reasons, and because the Supreme Court's supervening decision in *Sprint* casts *Dodge* into further doubt, the Court should not follow *Dodge* here.

4. To be clear, the government does not in any way believe that Nacchio is entitled to relief of any sort. Rather, in the government's view, a close examination of the record will confirm that, for all the reasons stated above, a limited remand would itself be a windfall. In any event, if the Court does order a remand, it should make clear that the district judge need only review for admissibility the opinions that the defense mentioned in its Rule 16 disclosures. In reviewing evidentiary decisions, an appellate court must "evaluate the trial court's decision from its perspective when it had to rule." *Old Chief*, 519 U.S. at 182 n.6. No different approach should apply where a district court, on remand, is reviewing its own determination. To hold otherwise here would confer a tactical advantage on the defense for having disclosed Fischel the day before trial and having withheld throughout the trial the full scope of,

and bases for, his opinions.[17]

## CONCLUSION

The Court should vacate the panel's judgment and affirm Nacchio's convictions. Because the panel had no occasion to address Nacchio's sentencing and forfeiture claims (*see supra* note 5), the Court should remand those issues to the panel for decision based on the parties' panel briefs. *See United States* v. *Prentiss*, 256 F.3d 971, 973 (10th Cir. 2001) (en banc) (per curiam) (remanding to panel an issue not previously considered on its merits).

In the alternative, if the Court finds an abuse of discretion that is not harmless, it should vacate the panel's judgment, retain jurisdiction, and order a limited remand so that the district court may decide the admissibility of Fischel's opinion testimony. If the district court finds the testimony inadmissible, this Court should affirm Nacchio's convictions and remand the sentencing and forfeiture issues to the panel. If the district court finds the testimony admissible (and its exclusion prejudicial), this Court should reverse Nacchio's convictions and remand for a new trial.

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[17] For example, it would be unseemly to permit the defense to present the stock-price "event study" that Nacchio, on appeal, has argued would have been a "[c]ritical" part of Fischel's testimony. Nacchio Br. 40-42, 48-49. The defense first presented Fischel's event study after Nacchio was convicted, in a report prepared for sentencing. App. 793-803. The Court will search the Rule 16 disclosures in vain for it. App. 425-434, 460-462.

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## CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that the foregoing Supplemental Brief for the United States was this day delivered by overnight mail and electronic mail to the Clerk of the Court and to counsel for appellant Joseph P. Nacchio at the following addresses:

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## CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), the undersigned counsel of record certifies that: the foregoing Supplemental Brief for the United States was prepared in a 14-point, proportionally spaced, serif font (Times New Roman), using WordPerfect 12; the Supplemental Brief does not exceed 60 pages; and, accordingly, the Supplemental Brief complies with the requirements of Fed. R. App. P. 32(a)(7) and this Court's order of July 30, 2008, granting the Petition for Rehearing En Banc and ordering initial supplemental briefing not to exceed 60 pages per party.

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## CERTIFICATE OF DIGITAL SUBMISSION

The undersigned counsel certifies that:

(1) there were no privacy redactions to be made in the foregoing Supplemental Brief for the United States, and the Digital Form version e-mailed to the Court on this day is an exact copy of the written document that was sent to the Clerk; and

(2) the Digital Form version of the Supplemental Brief for the United States e-mailed to the Court on this day has been scanned for viruses with McAfee Virus Scan, version 3.6.0.569, which is continuously updated, and according to that program is free of viruses.

**DATED: AUGUST 29, 2008**

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