

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**RESPONSE TO UNITED STATES' MOTION TO EXCLUDE CERTAIN TESTIMONY
AND EVIDENCE TO BE OFFERED BY DANIEL FISCHEL**

Defendant Joseph P. Nacchio, by and through undersigned counsel, responds to the United States' Motion to Exclude Certain Testimony and Evidence to be Offered by Daniel Fischel as follows:

The government's latest motion to exclude the testimony of Professor Fischel attempts to misconstrue Professor Fischel's proposed testimony. This Court has already determined that Professor Fischel may testify as a 1006 summary expert and such testimony will be presented through the exhibits provided to the Court and the government in court on April 5. However, in light of the government's presentation of expert testimony through its analyst experts – Mr. Johnstone and Mr. Khemka – the defense also intends to call Professor Fischel as a rebuttal expert on the discrete issue

of the significance of Qwest's non-recurring revenues to the value of Qwest and its shares and the "total mix" of publicly available information, such as analysts' reports that are contrary to the views of the government's analysts.

As was discussed in the Motion to Permit Expert Rebuttal, or, Alternatively to Strike, Opinion Testimony by Witnesses Johnstone and Khemka Adduced by the Government in Contravention of the Court's Prior Order and Memorandum of Decision Limiting Their Testimony [Doc. 348], the issue of the significance of Qwest's nonrecurring revenues was addressed at length by the government through the testimony of Mr. Johnstone and Mr. Khemka. *See* Doc. 348, pp. 3-7. However, materiality is not about one analyst's opinion, it is about the total mix of information available. As the government has now presented its one-sided evidence on this issue, the defense should be permitted to call Professor Fischel as an expert to opine on what other analysts viewed as material or important in evaluating companies at the same time – that is what analysts considered important in the valuation of revenue multiples.

In reaching his opinions on the valuation of revenue multiples, Professor Fischel used the standard method for analyzing particular revenue streams of other companies who sold IRUs at the same time at issue in this case and did or did not reveal those sales. This is the same method used by the analysts who testified for the government about how the valuation was applied to Qwest.

The theory the government set forth through its analyst witnesses was that if Qwest had provided more disclosure regarding IRUs Qwest's stock would have been

adversely impacted. The testimony of Professor Fischel would directly address that testimony in that he would testify about how the marketplace reacted to such disclosures by other companies during the relevant time. Further, in relying on the statements of other analysts during that time, Professor Fischel would be relying on information that is appropriately relied upon under Rule 703. As a result, the government's argument that Professor Fischel's proposed testimony should be excluded because it does not address Qwest is without merit.

The government has had Professor Fischel's opinion and methodology on this opinion since March 29, 2007 (*see* Defendant's Expert Disclosure ¶ 7). Thus, it is hard pressed to claim surprise. Further, the only exhibits that will be offered on this opinion are those that government counsel were provided last week, not the documentation sent over the weekend.

Ultimately, as the government has been permitted to present expert testimony on this issue in its case-in-chief, the defendant should be permitted to rebut it. To the extent the government is challenging Professor Fischel's qualifications as an expert on this issue – which would be surprising since a member of the prosecution has used him as an expert in the past – the Court should hold a *Daubert* hearing before a determination as to expertise is made.

Respectfully submitted this 8th day of April, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April 2007, a true and correct copy of the foregoing **RESPONSE TO UNITED STATES' MOTION TO EXCLUDE CERTAIN TESTIMONY AND EVIDENCE TO BE OFFERED BY DANIEL FISCHEL**

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