IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

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

The United States moves to exclude certain testimony and evidence that government counsel learned on Saturday, April 7, 2007, will be offered through Professor Daniel Fischel.

BACKGROUND

On Thursday, April 5, 2007, the Court ruled that Professor Daniel Fischel's proposed expert testimony would be excluded pursuant to Federal Rules of Procedure 401, 403, 601, 702, and 703. Tr. 2426-34. In its ruling, the Court observed that Defendant could proceed by using Professor Fischel as a summary witness:

> The Government has presented a summary testimony tending to show, if believed, that the sales and the rate of sales and the rate of money made increased in the first six months of 2001. The defendant has already cross-examined on that issue and brought out

> facts from which the jury could believe that the prosecution's summary is essentially a spin. If the defense wants to do a different summary and spin it differently, the defense may do so.

Tr. 2431.

Defense counsel promptly indicated that they wished to proceed by call Professor Fischel to testify as a summary witness. They presented the Court with a binder containing 31 exhibits, and stated to the Court, after some discussion, that exhibits "3 through 10 would be the exhibits we wish to put in through the witness." Tr. 2435, 2439. After further discussion, the Court then ordered the defense to produce the underlying materials. Tr. 2443.

After Court adjourned, on Thursday afternoon, government counsel and defense counsel met in person and discussed backup documents for exhibits 3 through 10. Government counsel notes that it expects to have no objection to admission for almost all of those exhibits, most of which present summaries of Mr. Nacchio's option exercises and also calculate some simple averages and percentages.

During that discussion on Thursday afternoon, defense counsel did not suggest that any other exhibits would be at issue. However, on Saturday, April 7, 2007, at noon, government counsel received the following e-mail from defense counsel:

> I am sending you 5 emails. The first 5 pages are exhibits we will move into evidence. The rest is the backup for those 5 pages. Professor Fischel will testify in response to your analysts that IRU revenue was not worthless and the effect IRU revenue had on telecom companies. His methododly [sic] and conclusions are set forth in detail in the first 5 pages as well in the backup materials.

> We will also introduce the chart and the analyst report behind the MISC tab as well as the analyst reports previously submitted to you in connection with Professor Fischels [sic] testimony. If you have any questions please call.

See Ex. 1.

Attached to the e-mail (and the four that followed) were documents totaling 443 pages. The first five pages showed calculations of "Revenue Multiples for Companies in the Telecommunications Industry." *See* Ex. 2. The first page divided these multiples into "Companies that Engaged in and Disclosed Magnitude of IRU Sales," and "Companies that Did not Engage in IRU Sales." (Notably, Qwest falls into neither category and is not even mentioned on the charts.) The charts appear to calculate "revenue multiples" for various companies at different times, starting with an "enterprise value," then making adjustments based on price and "book value of debt." Each of those calculations, in turn, appear to have involved background calculations for other companies, including apparent adjustments for other factors. *See* Ex. 2.[1]

The following 438 pages showed the following: (1) hundreds of pages of excerpts from SEC reports[2]; (2) a listing of "CRSP" data, otherwise undefined, *see* Ex. 3; (3) a few

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[1] Government counsel notes that while he has not checked all of the numbers, the very first page of this chart appears to be the same as the twenty-eighth document received from defense counsel on the evening of Wednesday, April 4, 2007. The remaining pages were not received on that date.

[2] Due to the large size of the pdf document, those excerpts are not attached hereto.

pages showing what appears to be a printout of a computer program run on Friday, April 6, 2007, *see* Ex. 4; and 4) several pages with "Bloomberg" written at the top and several columns of data. *See* Ex. 5.

Defense counsel's e-mail, as noted, also indicated defense counsel's intention to introduce into evidence "the chart and the analyst report behind the MISC tab." At the end of the 438 pages, behind a "MISC" tab, defense counsel included the following documents: (1) a chart entitled "Disclosure practices of Telecommunications Companies that Sold IRUs," which divided the "disclosure practices" of several different selected companies into three undefined categories: "none," "qualitative," and "qualitative," *see* Ex. 6[3]; (2) an excerpt from an analyst report relating to a company called 360networks, *see* Ex. 7; (3) an excerpt from the trial transcript in this case (which government counsel assumes was included inadvertently), and (4) additional untitled charts, which indicate, at the bottom right-hand corner, that they were run on Friday, April 6, 2007. *See* Ex. 8.

The e-mail further stated defense counsel's intention to offer into evidence "analyst reports previously submitted to you in connection with Professor Fischels [sic] testimony." Ex. 1. Government counsel understands these to be three analyst reports that were part of the set of exhibits provided to government counsel on the evening of Wednesday, April 4, 2007. They include (1) an August 8, 2001 analyst report from US

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[3] Government counsel notes that this chart appears to be the same as the twenty-seventh document received from defense counsel on the evening of Wednesday, April 4, 2007.

Bancorp/Piper Jaffrey, *see* Ex. 9; (2) a September 25, 2001 Legg Mason Analyst report, *see* Ex. 10, and (3) September 10, 2001 Salomon Smith Barney Analyst report. *See* Ex. 11.

Shortly after receiving that first set of five e-mails, government counsel received another e-mail from defense counsel stating that "Professor Fischel will also rebut the analysis contained in government exhibits 400, 401, 403-406, 411, 412, 435, 436." *See* Ex. 12. Those exhibits are the Rule 1006 exhibits that were introduced into evidence through the testimony of Dana Chamberlin on Wednesday afternoon, April 4, 2007.

In sum, it appears that defense counsel wishes to have Professor Fischel (1) present charts about revenue multiples and opine that these charts show that "IRU revenue was not worthless" and on "the effect IRU revenue had" on other selected telecommunication companies, (2) "rebut the analysis" of Dana Chamberlin, the government's Rule 1006 witness, and (3) introduce various hearsay analyst reports into evidence.

I. The Court should not permit this proposed expert testimony about significance of IRUs and charts analyzing other companies revenue multiples.

As noted above, defense counsel intends to have Professor Fischel testify that IRU revenue was not worthless and on the effect IRU revenue had on telecom companies, relying on various charts regarding revenue multiples, which in turn rely on other information, including another chart entitled "Disclosure practices of Telecommunications Companies that Sold IRUs," which divides the disclosure practices of several different companies into three undefined categories: "none," "qualitative," and

"qualitative."

This testimony and the accompanying charts should be excluded. This is expert testimony that is not admissible for the reasons set forth in the Court's oral ruling on April 5, 2007.

A. This evidence is inadmissible under Rule 702.

Defense counsel's latest disclosure still does not comply with Rule 702, for reasons very similar to those already discussed by the Court.

First, defense counsel still has not provided any further disclosure showing that Professor Fischel is qualified as an expert to testify on this subject by virtue of having relevant knowledge or experience in the relevant field. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999) (explaining that the issue was not whether qualified tire experts exist, but "whether this particular expert had sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case"). There has been no disclosure suggesting that Professor Fischel knows anything about this industry, about these other companies, about IRUs, or about what conclusions experts may properly draw from "revenue multiples."

Second, there is still no reliable methodology that supports the opinions Professor Fischel proposes to draw. Defense counsel has disclosed numerous pages of calculations, but it is quite a leap to conclude that IRUs were "worthless" or to learn the "effect IRU revenue had on telecom companies." Defense counsel has not described how that grand

leap can be made. For example, defense counsel has not identified any reliable principle or method that supports the view that there is a direct connection between the revenue multiples and the IRUs. Nor has defense counsel provided any explanation that would suggest that anyone in the relevant field — a field that defense counsel has yet to define — would draw any useful conclusions from comparing the revenue multiples of selected telecommunications companies. As the Court is aware, "'any step that renders the analysis unreliable ... renders the expert's testimony inadmissible.'" 2000 Adv. Comm. Notes to Fed. R. Evid. 2000 (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994)); *see also General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (observing that testimony may be excluded if there "simply too great an analytical gap between the data and the opinion proffered").

Third, even if such a reliable principle or method exists, defense counsel has not shown that such a method has been reliably applied to the facts of this case. As noted, there is no analysis in the revenue multiple charts that even mentions Qwest or says anything that explains why these comparisons mean anything. Defense counsel has not provided any document explaining how these companies were selected, what relationship they have to Qwest, how they compare to Qwest, and so on.

B. This evidence is not relevant.

The opinions Professor Fischel proposes to offer — that IRUs are "not worthless" and what effect IRUs had on the revenue multiples of other selected telecommunications

companies — are also not relevant. First, the fact that IRUs are "not worthless" is not disputed. None of the witnesses called by the government stated as much. Rather, as the Court is aware, IRUs made up a significant portion of Qwest's growth in early 2001. Second, as for the effect of IRUs on other telecommunications companies' revenue multiples, this fact is not relevant. To the extent defense counsel believes it is relevant to materiality, defense counsel is mistaken. Materiality is based on the views of a reasonable investor, not on an law professor's computer analyses of the effects of IRUs on selected companies.

Indeed, the revenue multiple chart tells the jury nothing about Qwest (let alone Mr. Nacchio). It does not identify Qwest. It presents an analysis of selected firms that fall into two categories: firms that disclosed the magnitude of their IRUs, and firms that did not have IRUs. Qwest is not in either category, and is not listed on the chart in any way.

C. The testimony will not assist the jury, and poses a substantial danger of misleading or confusing them and wasting their time.

This testimony from Professor Fischel will not assist the jury. *See* Fed. R. Evid. 702. On the contrary, it poses a significant danger of misleading and confusing them. *See* Fed. R. Evid. 403. If Professor Fischel is permitted to testify regarding these revenue multiples, the jury is likely to assume that he has some special economic insight into the materiality of these IRUs, and may defer to his testimony. Assuming that Professor Fischel's testimony would reflect some mathematical analysis, it would confuse and mislead the jury, as it might lead them to believe that his technical-sounding

pronouncements and official-sounding views should guide their decision as to materiality.

Presentation of this testimony also will divert the jury's attention from the relevant issues in the case, and instead will focus attention on those other twelve companies. Government counsel will be required to show that many of the companies Professor Fischel selected for the chart are very different from Qwest, in numerous respects. To take just one example from the twelve companies discussed on the chart, the chart includes data for 360networks, a small company that (1) was Canadian, (2) had one-twentieth the revenues of Qwest, (3) did not show any revenue for several quarters, (4) made virtually all of its money by selling capacity, unlike Qwest, and (5) had three main competitors, none of which was Qwest (at least according to the analyst report that defense counsel has provided as part of the 443 pages, *see* Ex. 7 at 4).

Government counsel would need to probe, for each of the twelve companies, the nature of the IRU revenue of each company, the magnitude of IRUs as a percentage of revenue, whether the revenue that serves as the basis for these calculations was their original revenue or their restated revenue, *see* Ex. 2 at 4 (showing that Global Crossing restated its revenues), and so on. Given all the differences between Qwest and many of these companies, there is ample basis for a very extended cross-examination on these issues. Given how irrelevant this revenue information appears to be in the first place, this tour of other companies would waste the jury's time.

D. The testimony should be excluded under Rule 16.

The United States also submits that even if this disclosure did satisfy Rules 401, 403, and 702, it still runs afoul of Defendant's Rule 16 obligations, and the Court could reject the disclosure on timing grounds alone.

First, as the United States has previously noted, Defendant has had ample time to obtain an adequate expert report. As Defendant has himself emphasized, the issue of experts arose at the outset of this case, back in December 2005. Defendant's expert disclosure was not due until March 16, 2007 — one business day before trial — and was entirely inadequate. The proposed testimony is on a topic that was not within the scope of any of the many topics set forth in *that* disclosure, which did *not* suggest in any way that Professor Fischel would address the profitability of IRUs. The Court then provided Defendant with an additional *thirteen* days — well into the trial — to provide a clearer disclosure, but the analysis still was not provided. It again was not provided (or mentioned) when government counsel met with defense counsel on Thursday, April 5, 2007. Indeed, based on the supporting documents, it appears that parts of this analysis may not have been performed until Friday, April 5, 2007.

Second, there would be substantial prejudice in allowing Professor Fischel to testify. This exceedingly late disclosure prevents counsel from adequately preparing for cross-examination. Even this disclosure is uninformative, as it includes no explanation whatsoever but instead sets forth models of the data and several hundreds of pages of

backup documents and charts, all presented to government counsel less than 48 hours before testimony. The United States would need days simply to download the relevant information on these companies in order to check Professor Fischel's work.

Third, a continuance is unwarranted. There is no good reason for the jury to have to wait several days while Professor Fischel better explains his opinions and then the government seeks to prepare to respond to them. An extended continuance is unjustified in light of the scheduling considerations in this trial, which the Court has previously noted. *See* Docket No. 295 at 10-12.

E.. This testimony also should not be permitted as summary testimony under Rule 1006.

The proposed testimony and charts also do not qualify as a summary of the contents of voluminous writings under Rule 1006. That rule provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court.

Fed. R. Evid. 1006. The proposed testimony and supporting charts about the revenue practices of selected telecommunications companies are not admissible as summary testimony under this rule, for at least six reasons.

First, Rule 1006 permits simple calculations (such as Professor Fischel's summaries of Defendant Nacchio's option exercises), not interpretations of data or

complex calculations that normally would be run by an expert. *See State Office Systems, Inc. v. Olivetti Corp. of Am.*, 762 F.2d 843, 845-46 (10th Cir. 1985) (holding that a witness's calculations of future lost profits were "not legitimately admissible as summaries under Rule 1006" as they were "interpretations" of the data and "not a simple compilation of voluminous records," and concluding that the calculations were properly deemed "opinion testimony"); *contrast Bryant v. Farmers Ins. Exchange*, 432 F.3d 1114, 1124 (10th Cir. 2005) (observing that it was proper to use a summary witness under Rule 1006 to present "a simple average of 103 numbers" because taking an average "is not so complex a task that litigants need to hire experts in order to deem the evidence trustworthy").

Second, for evidence to be admitted pursuant to Rule 1006, the underlying documents must be admissible. "While '[t]he materials upon which the summary is based need not themselves be admitted into evidence[,] ... [a]dmission of summaries, however, is conditioned on the requirement that the evidence upon which they are based, if not admitted, must be admissible.'" *United States v. Schuler*, 458 F.3d 1148, 1154 (10th Cir. 2006) (quoting *United States v. Samaniego*, 187 F.3d 1222, 1223 (10th Cir. 1999)). Here, defense counsel cannot establish the admissibility all of the underlying documents upon which Professor Fischel's opinions and charts appear to be based. Indeed, those documents — which include computer program runs, analyst reports, other charts, other data on companies that are not similar to Qwest, and so on – appear to be excludable, at a

minimum, under Rules 401, 403, and 802.

Third, even if these underlying documents were admissible, they were not provided to government counsel at a "reasonable time," as required by Rule 1006. As noted, government counsel did not receive these documents until midday Saturday (April 8, 2007). Government counsel was not expecting these documents, because defense counsel had represented to the Court on April 5 that defense counsel intended to use only exhibits 3 through 10, and those were the only ones discussed on the afternoon of April 5. These documents received were voluminous, amounting to 443 pages, and are impossible to digest and analyze in the short time before Professor Fischel takes the stand. Under these circumstances, this disclosure was not at a "reasonable time" within the meaning of Rule 1006. *Cf. Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 753 (7th Cir. 2005) (observing that pursuant to Rule 1006, a district court may "prevent a party from springing thousands of documents on the opposing party so late in the day that the party can't check their accuracy against the summarized documents before trial").

Fourth, these charts are not relevant. As noted above, they appear to be offered to establish positions (that IRUs are not worthless) that are not disputed in this case. Moreover, if these charts are presented to the jury absent an expert explanation of what they mean, these charts are entirely meaningless.

Fifth, if these charts are presented to the jury without expert explanation, they are

likely to confuse and mislead the jury, as the jury will expect that the charts *must* mean something or other. Defense counsel should not be permitted to present these charts without any expert explanation, and hope that the jury will speculate about their meaning in a manner that is favorable to Defendant.

Sixth, as noted, introduction of these charts will waste the jury's time. As noted above, cross-examination will focus on the ways that many of these twelve companies selected by Professor Fischel — who has provided no explanation of the selection — were hardly comparable to Qwest.

II. Professor Fischel should not be permitted to offer his comments on the testimony of Ms. Chamberlin.

Professor Fischel should proceed in the same manner as the government's summary witness, Dana Chamberlin. Ms. Chamberlin presented summary charts showing her summary of sales data relating to Defendant Nacchio, and testified as to what each chart depicted and what data it was based on. Tr. 2241-67. She was then cross-examined at length about the charts. Tr. 2267-2283.

Because Professor Fischel is also testifying as a summary witness pursuant to Rule 1006, he must proceed in the same manner, notwithstanding any credentials or expert thoughts he may have. He may present his summaries, and testify about what they depict and what data each summary was based on. As noted, as to the exhibits discussed in Court on Thursday, April 5, 2007, the government expects to have no objection to the admission of almost all of them.

Government counsel is concerned, however, by the statement of defense counsel that Professor Fischel will "rebut the analysis" of Ms. Chamberlin's exhibits. Defense counsel did not explain what was meant by this, but notes that there has been no suggestion that Professor Fischel ran the data and came up with different results. (If he had, the proper way for him to proceed pursuant to Rule 1006 would be to present the data as determined by him, and explain how he calculated the data.) Accordingly, government counsel is concerned that Professor Fischel still intends to testify as an expert witness, and offer his own views as to why Ms. Chamberlin's charts do not show a proper analysis — *e.g.*, why it is better to view the evidence through his parameters rather than hers.

Professor Fischel is not permitted to offer such views. First, Professor Fischel's own views on another witness's exhibits do not fall within the proper scope of testimony pursuant to Rule 1006. That rule allows witnesses who otherwise would not be competent pursuant to Rule 602 — due to their lack of personal knowledge — to present testimony about their summaries of the facts. It does not permit them to *comment* on those facts, let alone comment on how the facts should have been presented by another witness. Professor Fischel thus cannot properly offer his views as to why the charts presented by Ms. Chamberlin were not convincingly presented. Indeed, he cannot even properly offer his views as to why the evidence shown in *his* charts is persuasive. Such testimony extends beyond the narrow scope of permissible testimony under Rule 1006.

See United States v. Caballero, 277 F.3d 1235, 1247 (10th Cir. 2002) (in rejecting a challenge to the testimony of summary witnesses under Rule 1006, observing that the testimony "expressed neither a lay nor an expert opinion"); *State Office Systems, Inc. v. Olivetti Corp. of Am.*, 762 F.2d 843, 845-46 (10th Cir. 1985) (holding that a witness's calculations of future lost profits were interpretations of the data and were properly deemed "opinion testimony"); *United States v. Eldridge*, 107 Fed. Appx. 36, 40 (9th Cir. 2004) (unpublished) (affirming the district court's decision to admit summary testimony where the summary witness "simply explained the summary chart he prepared" and "expressed no opinion on the summary evidence"); *United States v. Evans*, 910 F.2d 790, 803-04 (11th Cir. 1990) (affirming the district court's decision to exclude charts where the summary "reflected the expert's opinion" and "would necessarily entail judgments about the content" of the information at issue); *Goldberg v. United States*, 789 F.2d 1341, 1343 (9th Cir. 1986) (affirming the district court's decision to admit summaries of voluminous tax records where "no expert opinions or conclusions were offered").

Second, as a fact witness, Professor Fischel cannot testify as to his personal views about the evidence of other witnesses. While the Federal Rules of Evidence permit *experts* to comment on facts made known to them at the trial, *see* Fed. R. Evid. 703 (providing that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing"), there is no similar rule for fact witnesses, who must have personal

knowledge.

Third, government counsel has some concern about what Professor Fischel may have done to prepare to "rebut the analysis" presented by Ms. Chamberlin. On Thursday, April 5, 2007, the Court made clear that Professor Fischel could testify only as a summary witness, not as expert witness, and defense counsel made clear that it was their intention to put him on the stand in this capacity. Tr. 2431, 2435, 2439. At that time, therefore, Professor Fischel became a fact witness subject to the sequestration order. That order provides, in relevant part, that "No witness shall read the trial testimony of another witness, except for (1) the defendant, to the extent authorized by the Sixth Amendment, and (2) any expert witness, in order to permit the expert witness to properly consider the trial testimony of any other witness in formulating the expert's opinion testimony." *See* Docket No. 271 at 1. Given that defense counsel has indicated that Professor Fischel intends to rebut the testimony of Ms. Chamberlin, government counsel has some concern that Professor Fischel may have reviewed the testimony of Ms. Chamberlin.[4]

Fourth, permitting Professor Fischel to opine on the factual summaries presented by Ms. Chamberlin presents a serious danger of confusing or misleading the jury. *See* Fed. R. Evid. 403. Undoubtedly, defense counsel will elicit Professor Fischel's academic background. If defense counsel then has Professor Fischel offer his views on the proper

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[4] Government counsel notes that Ms. Chamberlin obeyed the sequestration order. Government counsel made a point of excluding Ms. Chamberlin, prior to her testimony, from all discussions relating to the testimony of other witnesses.

manner for the jury to view the evidence, the jury will be inclined to view him an expert of some sort and defer to his views about how the evidence should be viewed. This may divert the jury from their true focus, which should be on the *facts* as summarized by each summary witness, rather than on Professor Fischel's views on how the facts should best be presented.

Fifth, this presentation would not be helpful to the jury. *See* Fed. R. Evid. 403. The jury is quite competent to hear about the facts summarized in different ways, and to evaluate the different factual presentations. To the extent that defense counsel wished to call attention to the way the facts were presented by Ms, Chamberlin, defense counsel had an extensive opportunity through cross-examination to do just that, and indeed did so. Professor Fischel now appears to wish to pile on and tell the jury why his evidence is better than Ms. Chamberlin's. This is not something he is permitted to do as a fact witness who can testify only pursuant to the strictures of Rule 1006. It is up to defense counsel in closing arguments — not Professor Fischel through his summary testimony under Rule 1006 — to attempt to persuade the jury to accept the angle on the facts as presented by Professor Fischel.

III. The analyst reports are inadmissible.

Defense counsel's Saturday e-mail also stated that defense counsel would introduce the "analyst report behind the MISC tab as well as the analyst reports previously submitted to you in connection with Professor Fischels testimony." Ex. 1.

These analyst reports appear to include the following: (1) an excerpt from an analyst report relating to a company called 360networks, *see* Ex. 7; (2) an August 8, 2001 analyst report from US Bancorp/Piper Jaffrey, *see* Ex. 9; (3) a September 25, 2001 Legg Mason Analyst report, *see* Ex. 10, and (4) September 10, 2001 Salomon Smith Barney Analyst report. *See* Ex. 11.

These analyst reports are inadmissible on several grounds. First, they are hearsay. *See* Fed. R. Evid. 802. Second, Professor Fischel is not competent to testify as to them. *See* Fed. R. Evid. 602. Third, they are each only a few pages long and thus cannot reasonably be characterized as "voluminous" documents that he can summarize. *See* Fed. R. Evid. 1006.

In the Court's ruling on April 5, 2007, the Court observed that defense had proposed to call Professor Fischel as a witness to testify that analysts "did not change their recommendations, targets or forecasts after the 2000 guidance was issued. If that's the fact, the defendant can call witnesses and establish that fact. It doesn't need this testimony." Tr. 2433. Thus, if defense counsel wishes to introduce the views of analysts, it can present them for live testimony (as the United States has done), so they can be subjected to cross-examination. It should not, however, be permitted to introduce a few selected hearsay statements of such analysts and evade cross-examination in this manner.

CONCLUSION

For the numerous reasons set forth herein, the United States respectfully requests

that the Court limit the testimony of Professor Fischel as set forth above, by precluding him from (1) presenting his charts about revenue multiples and his opinions that these charts show that "IRU revenue was not worthless" and on "the effect IRU revenue had" on other selected telecommunication companies, (2) "rebutting" or otherwise giving his own views on the analysis presented by Dana Chamberlin, and (3) introducing various hearsay analyst reports into evidence.

Respectfully submitted this 8th day of April, 2007.

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CERTIFICATE OF SERVICE

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