NO. 07-1311

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH P. NACCHIO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE JUDGE NOTTINGHAM
DISTRICT COURT NO. 1:05-cr-00545-EWN

APPELLANT'S OPPOSITION TO THE PETITION FOR REHEARING EN BANC

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INTRODUCTION

This Court recently reversed Joseph P. Nacchio's insider-trading conviction and remanded the case for a new trial before a different judge. The Court held that the district court improperly excluded Daniel Fischel, a nationally-renowned expert who is frequently retained by the government and has never before been precluded from testifying. Professor Fischel would have provided expert testimony of a kind routinely admitted in securities fraud cases, and would have refuted the government's evidence on the key issues in the case, materiality and intent. The Court held that the district court committed reversible error when it excluded the evidence based on its erroneous conclusion that a defendant's notice under Federal Rule of Criminal Procedure 16 must demonstrate the admissibility of expert testimony under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 702. Add.[1] 16–22.

The government *does not even challenge that holding*, presumably because it is dictated by the text of the rule, reflects the uniform interpretation adopted by other circuits, and ultimately rests upon the Court's fully supported (and fact bound) characterization of the basis for the district court's ruling. Confronted with a holding that provides no plausible ground for rehearing en banc, the petition instead takes aim at (and mischaracterizes) the Court's alternative reasoning—that, even if the district judge had

[1] "Add." refers to the Slip Opinion attached as an Addendum to the Petition for Rehearing En Banc ("Pet."). "BR" refers to Appellant's Opening Brief; "APP" refers to the Appendix to Appellant's Opening Brief; "USBR" refers to the Brief for the United States; and "Reply" refers to Appellant's Reply Brief.

independently excluded the evidence under *Daubert* without regard to his misinterpretation of Rule 16, that too would have been an abuse of discretion. Add. 22.

En banc review of alternative reasoning that is essentially *dicta* is not remotely warranted under the controlling standards. Fed. R. App. P. 35(a). Regardless, the Court's *Daubert* analysis is plainly correct and applies this Court's well-settled law to the specific facts of this case. The government does not, and could not, contend that en banc review is necessary to maintain uniformity of this Court's decisions. The decision does not create any conflict between the circuits or raise an issue of broad significance that might merit the en banc court's attention. Rehearing en banc should be denied.

REASONS FOR DENYING THE PETITION

1. The petition presents an inaccurate description of the record.

First, the government's assertion that "[i]n early 2001" Nacchio "learned from his top executives that … the company would fall short of its public financial targets," Pet. 3, is simply false. As the Court explained, all Nacchio was told was that there was a degree of "risk" in Qwest's targets at least eight months in the future, and it was a "close question" whether that "risk" was immaterial as a matter of law. Add. 3–5, 10, 45–47. It is also undisputed that *no one* at Qwest advised Nacchio that Qwest's public projections had to be reduced until months after his last sale, BR-28–30; Reply 7, and that in April 2001, shortly before Nacchio's first trade, Qwest's managers reaffirmed to Nacchio that even "with all of the [internal] debates … the internal current view of Qwest was that they would reach $21.5 billion by December 31st, 2001"—substantially exceeding the public guidance. Add. 5; APP-2323, 3276–77.

Second, the government asserts that when "Qwest finally disclosed some (but not all) of the information to which Nacchio had been privy, the stock traded at less than half the price at which Nacchio had sold." Pet. 3–4. This statement tries to suggest that disclosure of the information at issue caused a 50% drop in stock price, which illustrates all the more why Fischel's testimony was so essential. It is undisputed that the entire telecommunications sector declined precipitously that summer, unrelated to any information Nacchio supposedly withheld. APP-3634–35.[2] And Fischel would have testified that "Qwest's stock price was not significantly affected when the allegedly material information was released." Add. 14. Moreover, when Qwest reduced the projections, its stock *went up*. APP-4763.

Third, the government's suggestion that it was somehow disadvantaged by Nacchio's disclosure of Fischel's testimony "just three days before trial," Pet. 4, is baseless. The information was disclosed on the date *the government had proposed*, and the district court had established, for these disclosures. Trial Preparation Conference Tr. 10–11, Mar. 1, 2007.

Fourth, the petition repeatedly but incorrectly suggests that Nacchio had a full and fair opportunity to defend Fischel's methodology under *Daubert*. Pet. 1, 4–5. As the Court explained, "the defense was never permitted to speak to the issue in court. When Professor Fischel was called, the district judge immediately announced that he was excluding the testimony. A defense lawyer asked to speak. The judge silenced him

[2] *E.g.*, *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 263 (5th Cir. 2007) ("Allegiance's stock, like that of the rest of the telecom industry, was plunging … during 2001.").

immediately, saying that once the court had ruled, the trial was '[n]ot … an interactive process where you get to argue later on.' App. 3921. *When the court does not allow a lawyer to present arguments, we will not penalize him for failing to present them*." Add. 25 (emphasis added) (alterations in original).

Finally, the government entirely ignores the district court's refusal to permit Fischel to rebut the testimony of two of the government's analysts who provided opinion testimony on materiality. *See* BR-46–48; Reply 28. Nacchio did request a *Daubert* hearing with respect to this rebuttal testimony, APP-481, thus alleviating many of the dissent's concerns, Add. 67 & n.5, 68 & n.6, 71 & n.7. This supplies an additional basis supporting the judgment, albeit one the Court did not need to reach.

2. The government's principal argument for rehearing rests on the premise that the district court independently excluded Fischel for failure to establish the reliability of his methodology under *Daubert* and Rule 702. This is reason enough to deny the petition, because the Court plainly held that the district judge's decision to exclude Fischel's testimony was in fact dependent upon his misinterpretation of Rule 16, *and the government does not even challenge that determination*.

The Court explicitly held that "[t]he district court's belief that Rule 16 also requires extensive discussion of a witness's *methodology* was incorrect, and its exclusion of the evidence an abuse of discretion," Add. 16, and that "a Rule 16 disclosure need not provide a full explanation of the witness's methodology, so it was wrong to demand that such a disclosure satisfy *Daubert*," *id.* at 22; *see also id.* at 18 ("It is therefore a mistake to regard the Rule 16 disclosure as a substitute for a *Daubert* hearing."). Indeed, the

Court stated that "[w]e have found no case—and the government has cited none—where a defendant's proffered expert was excluded under *Daubert* solely on the basis of a Rule 16 deficiency, without any further opportunity for briefing or hearing." *Id*. at 19. The government fails to address, let alone challenge, the Court's holding under Rule 16.

The petition's effort to depict the Court's opinion as a pure *Daubert* ruling is accordingly off base. Instead, the Court held that "the district court made no genuine determination of any sort under *Daubert*," *id.* at 21, and that the district court discussed *Daubert* "only in explaining what was missing from the Rule 16 disclosures," *id.* at 22. It was only in a secondary analysis, not necessary to the judgment, that the Court addressed what the government challenges: "*Even reading the district court's ruling as a freestanding* Daubert *ruling rather than a finding that the Rule 16 disclosure was inadequate*, such a ruling would have been an abuse of discretion on this record, which is devoid of any factual basis from which a *Daubert* ruling could be made." *Id.* (emphasis added) (footnote omitted).

The petition thus seeks en banc review of alternative reasoning that would not change the result. For that reason alone, it should be denied.

3. Even if the Court's judgment had actually been based upon *Daubert* or Rule 702, en banc rehearing would not be warranted.

First, the Court's decision announces no new law; it merely applies settled law to the facts of this case. The decision was expressly dependent upon an interpretation of the transcript, the relevant orders, and motions below, Add. 21–26, and the Court's conclusion that "the district court made no genuine determination of any sort under

Daubert," *id.* at 21. It was "*on this record*" that the Court properly found that the district court lacked sufficient information to make a reliability determination under *Daubert*. *Id.* at 22 (emphasis added).

Second, the Court's decision is correct, and the government does not even claim that it directly conflicts with other Tenth Circuit precedent. Nor could it. This Court's prior decisions have emphasized that although "a district court exercises significant discretion in deciding how to perform its gatekeeper role" under *Daubert*, "ultimately, the obligation can be satisfied only if 'the court has sufficient evidence to perform the task.'" *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1228 (10th Cir. 2003) (citation omitted).[3] The Court broke no new ground in applying this incontrovertible principle to the facts before it. *Compare* Add. 22 ("Even reading the district court's ruling as a freestanding *Daubert* ruling …, such a ruling would have been an abuse of discretion on this record, which is devoid of any factual basis on which a *Daubert* ruling could be made."), *id.* at 23 ("The district court could not make an informed *Daubert* determination without hearing such testimony or receiving submissions on the issue in some other form."), and *id.* at 24 (finding it "abuse of discretion" to preclude expert "because his methodology is unreliable without allowing the proponent to present *any* evidence of what the methodology would be") *with Dodge*, 328 F.3d at 1229 ("In a case like this one, where

[3] *See also Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1243 (10th Cir. 2000) (district court must "undertake whatever inquiry is necessary" to evaluate the reliability of the testimony); *United States v. Sandoval*, 390 F.3d 1294, 1301 (10th Cir. 2004) ("[W]hen the reliability" of expert testimony is disputed, "the district court 'must hold an evidentiary hearing unless the proffer on its face is insufficient to raise a material issue of fact.'") (citation omitted).

the expert testimony is crucial to the ultimate outcome, [and] is vigorously challenged …, we think it unreasonable to limit so severely both the underlying documentation and the use of live witness testimony upon which the court might base a decision.").

The government also ignores that this is a criminal case, and the "'right to present a defense … is a fundamental element of due process.'" Add. 29 (citation omitted) (alteration in original). The government relies entirely on civil cases governed by different rules and considerations. As the Court explained, "[u]nlike under the civil rules, an expert in a criminal case is *not* required to present and disclose an expert report in advance of testimony." Add. 19; *id.* at 19–20 (comparing Rule 16 with Fed. R. Civ. P. 26(a)). Even those inapt comparisons are unavailing, as discussed below.

4. Contrary to the government's argument, the Court's decision does not conflict in any way with the Third Circuit's decision in *Oddi v. Ford Motor Co.*, 234 F.3d 136 (3d Cir. 2000), affirming the exclusion of an expert; and "[t]he facts of *Oddi*" are not "materially indistinguishable from the facts of this case." Pet. 11. *Oddi* is entirely consistent with, and strongly supports, the Court's opinion. Indeed, the Third Circuit again "reiterated the importance of an *in limine* hearing in ruling upon *Daubert* challenges *even in the absence of a request for such a hearing*," 234 F.3d at 152 (emphasis added), and held that where an expert's methodology is unclear or questions about reliability have been raised, "a hearing [i]s necessary to determine how the expert reached his opinions." *Id.* at 154–55.

First, unlike in this case, the district court in *Oddi* excluded the expert based upon an extensive record, developed over a 15-month-period, which fully exposed the expert's

methodology, and afforded the proponent of the testimony ample opportunity to address the *Daubert* challenge. The expert first submitted a detailed report pursuant to Federal Rule of Civil Procedure 26, and, after reviewing the deposition of the defendant's expert, an amended report further detailing his analysis. *Id.* at 146–47. The expert was then deposed—*twice*. *Id*. at 146, 148–50. Finally, in response to a motion for summary judgment attacking his methodology, the expert submitted an affidavit, further detailing his methodology. *Id.* at 147–48. It was upon this full record that the district court excluded the expert, after concluding that an evidentiary hearing was unnecessary because the record gave the court sufficient information to assess the reliability of the expert's testimony. *Id.* at 153, 155 ("the evidentiary record pertaining to Oddi's expert was far from scant"; expert had opportunity to "explain how he arrived at his opinion, and he did it in as much detail as possible").

Here, by contrast, the district court failed to provide Nacchio with an adequate opportunity to present Fischel's methodology. He had only 24 hours to respond to the government's motion to exclude Fischel—which, as the Court correctly stated, was primarily addressed toward purported inadequacies in the Rule 16 disclosure. Add. 24–25. Moreover, the district court refused even to allow defense counsel to speak to the issue. *Id*. at 25. Whereas the *Oddi* district court dispensed with a hearing because the expert himself had described his methodology in detail in two reports, two depositions, and a supplemental affidavit, the court below excluded Fischel while simultaneously expressing a need for more information and refusing to hear it. *E.g.*, *id.* at 15–16, 25–26.

Second, the Third Circuit's extensive analysis in *Oddi*, and particularly its distinction of *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 (3d Cir. 1999), a case similar to this one, is fully consistent with the Court's decision here. In *Padillas*, the Third Circuit reversed the district court's exclusion of an expert without a hearing. As *Oddi* explained, the expert's report in *Padillas* was "quite conclusory and did not adequately explain … the methodology employed in reaching his conclusions." 234 F.3d at 152. The *Padillas* district court, however, just like the court below, "'d[id] not establish that [the expert] may not have "good grounds" for his opinions, but rather, that they are insufficiently explained and the reasons and foundations for them inadequately and perhaps confusingly explicated.'" *Id.* (quoting *Padillas*, 186 F.3d at 418). "It was in that context," the *Oddi* court explained, that the *Padillas* district court "'should have had an *in limine* hearing to assess the admissibility of the report giving the plaintiff an opportunity to respond to the court's concerns.'" *Id.* (quoting *Padillas*, 186 F.3d at 418). Because "the record in *Padillas* was scant, and the district court therefore had no way of determining how [the expert] had arrived at his conclusions … we held that the court had an independent obligation to reach a decision upon a record that had been adequately developed to allow for a meaningful evidentiary determination." *Id.* at 153. Unlike *Padillas*, however, "the evidentiary record pertaining to Oddi's expert was far from scant." *Id*. Thus, in *Oddi*, unlike *Padillas* and this case, it was within the court's discretion to dispense with additional procedures.

Oddi and *Padillas* thus establish that if an expert may have "good grounds" for his opinions, but the district court does not have sufficient information to make a reliability

determination, it must conduct a hearing or undertake some other inquiry in order to make a reasoned decision on an adequately developed record. Third Circuit law is thus fully consistent with this Court's decision here and its prior decisions. *See supra* Point 3.

5. The Court's opinion does not impose costly and unnecessary burdens on district courts to always hold hearings before excluding testimony, even "where the judge can tell from the written submissions that the testimony is unreliable," as the government argues. Pet. 12–13. The district court never held that it could tell from the Rule 16 notice that the testimony was unreliable; it found only that there was not a sufficient disclosure of Fischel's methodology in the Rule 16 notice to make any reliability finding. Add. 17–18. Indeed, it is facially implausible to presume that a preeminent expert who has testified more than 200 times and never been excluded would have no reliable methodology to support *any* of the opinions he sought to offer in this case. Nor does the Court's decision require hearings in every case. The Court expressly stated: "We do not doubt that, in response to a Rule 16 disclosure statement, the district court could order a party to make a written proffer in support of admissibility under Rule 702." *Id.* at 19; *see also id.* at 21, 22–23. All the Court held was that "on this record," *Id.* at 22, "[t]he district court could not make an informed *Daubert* determination without hearing such testimony *or* receiving submissions on the issue in some other form," *id.* 23 (emphasis added). *See also id.* at 23–24 ("[A]t a minimum it is an abuse of discretion to exclude an expert witness because his methodology is unreliable without allowing the proponent to present *any* evidence of what the methodology would be."). That is no different from *Dodge*, 328 F.3d at 1229, or other cases applying that general principle to particular facts.

Moreover, *Daubert* hearings are not unusual, especially in criminal cases, where expert discovery is minimal;[4] nor do they impose an excessive burden on district courts. As the Third Circuit pointed out in *Oddi*, "the most efficient procedure that the district court can use in making the reliability determination is an *in limine* hearing. *Such a hearing need not unduly burden the trial courts*; in many cases, it will be only a brief foundational hearing either before trial or at trial but out of the hearing of the jury." 234 F.3d at 154 (emphasis added); *see also* Add. 26. And here, Fischel was sitting in the courtroom, and no more than an hour after excluding Fischel's testimony, the court told the jury that the trial was on track to finish "way ahead of time." Add. 26 (quoting APP-3942).

6. En banc review of the Court's decision under Rule 403, which applied settled law to the particular facts here, is not warranted. The Court did not, contrary to the government's argument, hold "without any apparent qualification, that an economic expert must be permitted to provide 'context' about 'economic concept[s]' even if the jurors already understand the concepts," Pet. 2 (alteration in original), or adopt a "per se rule of admissibility," Pet. 14, that restricts a district court's discretion to exclude "unsupported expert opinions and unnecessary expert commentary." *id.* at 2; *see also id.* at 6–7, 14.

First, the *only* testimony the district court excluded because it believed it to be "'within the common knowledge of the jury,'" Add. 27 (quoting APP-3918–19), was

[4] In criminal trials the first time the government has an opportunity to understand and probe an expert's methodology is often at a *Daubert* hearing. Add. 21.

testimony about Nacchio's trading patterns. The government completely ignores the other critical testimony Fischel would have provided on the materiality of the information, including the market's valuation of IRU revenues, and comparison of the revenue multiples of telecommunications companies to assess investors' responses to different revenue mixes, BR-41–43; Reply 23–24; Add. 14, 18, 27, 29–30. The government apparently concedes these are not subjects that ordinary jurors already understand, and cannot dispute that Fischel's testimony on these subjects would have assisted the jury.[5] As the Court pointed out, "expert economic testimony is routine when a materiality determination requires the jury to decide the effect of information on the market." Add. 27. The government itself often employs it in criminal securities cases. Reply 24.

Second, the Court explicitly *rejected* the district court's conclusion that Fischel's proposed testimony about trading patterns was "within the common knowledge of the jury," Add. 27 (quoting APP-3918–19), and explained that the district court "misunderst[ood] the nature of economic expertise," *id.* Decisions of other courts are in accord, BR-49, and the government cites no case to the contrary. Moreover, the Court's

[5] In defending sufficiency, the government argued that Qwest's IRU disclosures negatively affected its stock price, *see* USBR-31, and that "[a] reasonable jury may consider a range of facts, including: the information's effect on the market value when disclosed," USBR-26. As the Court properly recognized, Fischel would have refuted the government's claims with testimony that "the economic evidence does not establish that the information concerning the magnitude of Qwest's IRU revenue would have been material to reasonable investors on the dates of the Questioned Sales." APP-431–32; Add. 14, 29–30. As the Court recognized, the exclusion of the testimony was "not inconsequential under any standard," because it would have addressed materiality and intent, and "might have changed the jury's mind." Add. 29–30.

conclusion that experts may analyze economic concepts and offer informed opinions on how they apply to particular facts is hardly novel. Add. 27 (citing 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 702.03[1] (2d ed. 2006) ("[E]xpert testimony is admissible if it will simply assist the trier of fact to understand the facts already in the record, even if all it does is put those facts in context.")). The drafters of Rule 702 have emphasized "the venerable practice of using expert testimony *to educate the factfinder on general principles*," including "*how financial markets respond to corporate reports*." Fed. R. Evid. 702, advisory committee's notes to 2000 amends. (emphasis added); *see also* BR-48–50.

Third, the Court did not adopt any *per se* rule that hampers a district court's ability to exclude "unsupported" and "unnecessary" expert testimony. All expert testimony must still satisfy Rule 702 and *Daubert*, and a district court is obligated to test the reliability of the expert's methodology. Testimony that meets those standards is, by definition, not "unsupported" or "unnecessary." The Court properly found that Fischel's testimony "was not inconsequential under any standard." Add. 29. In light of that conclusion, a defendant's constitutional right to present a defense (in this case a defense that "relied heavily" on Fischel's proposed testimony, *id.* at 12), and the district court's statement shortly after excluding Fischel that the trial was on track to finish "way ahead of time," *id.* at 26, the government has no genuine argument that considerations of

"delay, and waste of time," Pet. 2, "*substantially outweighed*" the testimony's probative value, Fed. R. Evid. 403 (emphasis added), and Nacchio's right to present it.[6]

7. The government belatedly asserts, in a footnote, that remanding for the district court to reconsider the admissibility of Fischel's testimony, not a new trial, is the appropriate remedy. Pet. 12 n.3. The government waived that argument and cannot raise it for the first time in a petition for rehearing. *See United States v. Charley*, 189 F.3d 1251, 1264 n.16 (10th Cir. 1999). The argument is not in the government's questions presented for en banc review or in the statement required by Rule 35; the footnote does not even contend that this issue satisfies the standards for en banc review. Nor could it.[7]

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[6] *See also United States v. Roberts*, 88 F.3d 872, 880–81 (10th Cir. 1996) (explaining that "'Rule 403 is an extraordinary remedy and should be used sparingly,'" and reversing the pre-trial exclusion of evidence and remanding for further proceedings, even though the proponent (the government) "offer[ed] limited evidence concerning the … probable testimony at trial," because the record was not sufficiently developed for the court to determine that the evidence did not "sustain[] the government's hypothesis") (citation omitted); *id.* at 881 ("[W]e believe a detailed investigation of the evidence is appropriate because the government failed to provide the district court or this court with a sufficiently detailed record to effect an appropriate resolution of the issue.").

[7] No court of appeals has ever ordered this type of limited remand in an analogous context; this Court's decision in *Dodge* soundly and decisively rejects such a procedure, 328 F.3d at 1229; and nothing in *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), undermines *Dodge*. *Dodge*, relying on a Ninth Circuit case, expressly rejected this procedure, and the government's sole citation is to an earlier, entirely inapposite Ninth Circuit case, *United States v. Cordoba*, 104 F.3d 225, 229–30 (9th Cir. 1997), involving a remand to consider the admissibility of evidence in the absence of the Ninth Circuit's *per se* exclusionary rule recently rejected by the Supreme Court. Nor does *Sprint* cast any doubt on *Dodge*. *Sprint* addressed a district court ruling that was "equally susceptible" to two interpretations—one correct and one incorrect—and the Court held that the better approach would have been to remand for clarification. 128 S. Ct. at 1146. That is not this case as the Court held that the district court erred under any interpretation of the record. A new trial is the only proper remedy.

CONCLUSION

The petition should be denied. However, in all fairness, if this Court grants the government's petition it should review the entire case and not artificially limit its review to particular issues selected by the government. Mr. Nacchio's arguments about the jury instructions, the sufficiency of the evidence, and the limitations on discovery and admissibility of certain classified information were rejected by the panel, but each is a substantial and "close" question,[8] and each was entwined with the Court's conclusion that the exclusion of Fischel was not harmless because "[t]he record does not otherwise contain 'overwhelming evidence of guilt.'" Add. 30 (citation omitted). In the interests of justice, if the government's petition for rehearing en banc is granted, Mr. Nacchio should have the opportunity to present this case in its entirety to the en banc Court.

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[8] For example, the panel considered it a "close question," whether the "risk" of a shortfall in results more than eight months in the future was immaterial as a matter of law. Add. 46. Other circuits have held, in cases involving corporations trading in their own securities, that interim operating results, data, assumptions, estimates, or other information that might cast doubt on a public projection are immaterial as a matter of law unless they suggest an "extreme departure" from public expectations, *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1202-04, 1209-1210 (1st Cir. 1996) (holding that a company's disclosure obligations in an initial public offering are the same as "an individual insider transacting in the company's securities," and that this "poses a classic materiality issue"), or are "so certain that [it] reveal[s] the published figures as materially misleading," *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 514-16 (7th Cir. 1989); *see also Glassman v. Computervision Corp.*, 90 F.3d 617, 632 & n.24 (1st Cir. 1996) (interim information that with approximately five weeks remaining in the quarter the company's sales were only 24% of its internal forecast did not meet *Shaw*'s standard as a matter of law because the information was "remote in time and causation" and "did not indicate a 'substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties,'" even though stock dropped 30% in one day following announced shortfall at the end of the quarter).

Respectfully submitted,

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CERTIFICATION OF DIGITAL SUBMISSIONS

I, Maureen E. Mahoney, hereby certify that:

(1) there were no privacy redactions to be made in the foregoing Appellant's Opposition to the Petition for Rehearing En Banc, and the document submitted in Digital Form is an exact copy of the written document that was sent to the Clerk; and

(2) the digital submissions have been scanned for viruses using McAfee VirusScan Enterprise version 8.0 + McAfee Anti-Spyware Module 8.0.0., Virus Definitions 5292 created on May 9, 2008, with Patch Versions 15, and according to the program, are free from viruses.

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