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

_____

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

_____

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

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There was nothing "unprecedented" (Br. 1)[1] about this prosecution or about the exclusion of Daniel Fischel's proposed "expert" opinions. Only on appeal and in hindsight has Fischel's testimony become "[t]he heart of Nacchio's defense." *Ibid*. The district court properly excluded that testimony.

Nacchio sold his Qwest stock in April and May 2001 after "learn[ing] that * * * things *had* gone wrong." Add. 42 (emphasis in original). He knew that Qwest had met its targets in early 2001 only because of IRUs, but that the IRU market was drying up. Add. 5. He knew that Qwest had *already* failed to make a planned "shift" away from IRUs to recurring revenue, leaving a $900 million shortfall in Qwest's public revenue target. Add. 3-5, 46. In contrast, he himself had said in January that a *$50 million* shortfall would cause the company's stock to drop by 15 or 20 percent. Add. 47.

Most of the "critical" (Br. 54) testimony Nacchio now says Fischel would have offered to refute the foregoing evidence was not mentioned in his initial expert disclosure. Some of the testimony was not mentioned *at all* prior to exclusion. The testimony the defense did disclose was unsupported by any methodology or underlying materials. Nacchio cannot colorably claim he did not know of his burden under Rule 702 to establish Fischel's reliability. The court's ruling on Nacchio's first expert disclosure, its subsequent

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[1] "Nacchio Br." refers to Nacchio's opening panel brief; "Nacchio Reply Br." refers to his panel reply; "App." refers to his panel appendix; "Gov't Br." refers to the government's panel brief; "Supp. App." refers to its panel appendix; "Pet." refers to the en banc petition; "Add." refers to the petition's addendum; "Gov't En Banc Br." refers to the government's opening en banc brief, and "En Banc App." refers to the appendix submitted therewith; "Br." refers to Nacchio's opening en banc brief; and "NACDL Br." refers to the en banc brief of *amicus curiae* The National Association of Criminal Defense Lawyers.

admonitions, the government's motion to exclude, and the law all gave Nacchio notice of his need to meet that burden. In his opposition, Nacchio himself cited his expert disclosure (which he called an "expert report") and invited a ruling on reliability. Neither in the opposition nor at any other point before exclusion did Nacchio ask for a hearing, as the court's rules required him to do if he wanted one. Given his failure to ask for one, or to suggest what he would *show* at one, the court was not required to hold one *sua sponte*.

Given the defense's conduct, the court was not required to assume Fischel was "the only substantive defense witness on the key issues." Br. 1. Nor did exclusion deprive Nacchio of a fair trial. The defense listed some 20 witnesses before trial. It called almost none of them. It was permitted to present evidence relating to classified matters. It chose not to. Instead, the defense told the jury that stock-price changes were not a science, and it rested on its lengthy cross-examinations of the government's witnesses. Those strategic choices did not require the district court to admit Fischel absent any showing of admissibility.

ARGUMENT

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

Nacchio's claims about Rule 702 (Br. 26-42) rest on the premises that (A) he lacked notice that the district court might rule on the submissions; and (B) the court was required to hold a hearing even though Nacchio did not ask for one. Each contention lacks merit.

A. Nacchio had notice that the court could rule on the written submissions.

In *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999), the Supreme Court emphasized a district judge's "considerable leeway in deciding * * * whether or when special

briefing or other proceedings are needed to investigate reliability." *Id*. at 152. Nacchio pays lip-service to that procedural discretion (Br. 33-34 n.19), but claims the judge here abused it by employing the most obvious procedure of all: deciding reliability based on a motion to exclude addressing reliability opinion by opinion, and a written opposition seeking denial of that motion but without even responding to the government's point-by-point submission or requesting further proceedings. He says he had no notice the judge would proceed in that fashion, and that he was entitled to assume he would be given a further opportunity to address reliability with Fischel on the stand. The facts and the law are to the contrary.

1. After Nacchio presented his first inadequate expert disclosure, the government's motion for a more complete disclosure argued (*inter alia*) that the initial offering precluded "test[ing]" of Fischel's methods under "Rule 702." Supp. App. 39. The district court granted the motion and ordered Nacchio to "produce an expert disclosure compliant with the federal rules described" in the ruling — which, though focused primarily on Rule 16, also included Rule 702. App. 351-352. Thereafter, in open court, the judge stressed the importance of a complete disclosure, pointing out that the government would not be able to test Fischel's opinions through a deposition. App. 2041. The government and the court also "forewarned" the defense that Fischel's opinions faced "*Daubert*" and "*Kumho*" hurdles. App. 2041-2042. The government then filed its motion to exclude, which was itself sufficient to warn Nacchio that the court might grant it. *See Ralston* v. *Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 n.4 (10th Cir. 2001).

Nacchio mischaracterizes the motion in arguing (Br. 5-7, 37-39, 43) that it gave him no notice of the need to present reliability evidence. He says (Br. 43) the motion's "Rule 702 arguments * * * were not framed in terms of reliability under *Daubert*." That is simply incorrect. The motion attacked all 11 of Fischel's opinions for (*inter alia*) lack of reliability, repeatedly invoking Rule 702(2) and (3), which require exclusion unless the proponent establishes reliability. App. 385, 388, 390, 393, 396, 398, 400, 403, 405, 407-411, 415-417. And contrary to Nacchio's contention (Br. 7, 24, 27, 39), the motion sought exclusion *without* further proceedings (App. 418, 420-422), *unless* the court were for some reason "inclined to allow any portion of" Fischel's testimony (App. 421).

Nacchio notes (Br. 6-7 n.5, 38, 43) that the motion claimed the revised disclosure contained no evidence of reliability. But that was not just a challenge to the disclosure itself; the motion argued that the defense had failed to shoulder its burden, as the proponent of expert testimony, of establishing reliability. App. 370, 420-421. The motion focused on the disclosures only because they were the only information the defense had provided. Nacchio is wrong to criticize the government's motion for "not argu[ing] that Fischel's *disclosed methodology* was unreliable." Br. 6 (emphasis altered). There was no "disclosed methodology" to critique. *See* Add. 16 n.4. That does not mean Nacchio's team of eight well-versed defense attorneys could proceed as though reliability was not yet at issue.

Nor did they do so. Instead, without requesting a hearing or suggesting that their *Daubert* case was still to come on *voir dire*, they argued in their opposition that Fischel's "Opinions Are Proper Under Rule 702" (App. 466), that Fischel's "expert report" established

as much (App. 467),[2] and that the government's motion should "be denied" (App. 468). Those were the words of attorneys not merely inviting, but affirmatively "request[ing]" (*ibid.*), an admissibility ruling based on the papers submitted to the court.[3]

Nacchio also faults the district judge for expecting defense counsel to be "mind-readers." Br. 25. But the fault lies with the defense. After the defense filed its written opposition without requesting a hearing, the judge repeatedly indicated he intended to rule before Fischel took the stand. The defense's silence could only be understood as acceptance of that course. Before the noon recess on April 4, the judge said he was "mindful of the fact that I probably need to issue some rulings." App. 3719. Defense counsel stated that "[w]e anticipate our entire case to be a day and a half" (not including the decision whether Nacchio himself would testify) and proposed for the defense to commence immediately. App. 3720. Another defense counsel interjected by observing that "[s]ome of that is dependent on your rulings, obviously," but he did not suggest any need for further proceedings before any such rulings. *Ibid.* The government then noted that one of the defense witnesses was Fischel and pointed out that there was "a motion pending" on him. App. 3721. The judge said, "I didn't know I'd have to go quite so fast on that one," but noted that the defense had "filed a

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[2] The reference to the second expert disclosure as an "expert report" was no accident. The following weekend, Nacchio again referred to the disclosure, twice, as an "expert report" (App. 481 n.4), and represented that it contained Fischel's methodology (En Banc App. 50).

[3] Nacchio relies on the court's statement (App. 3603) that it was "not criticizing anybody for not submitting things in writing." Br. 8, 25, 36. The court made that statement in connection with Rule 29 arguments (App. 3602), which, as the court observed, are "[n]ormally * * * done orally." App. 3603. And it made that statement *before* the defense chose to file a written opposition to the government's motion to exclude. Having filed in writing, Nacchio cannot now fault the court for ruling on that basis.

response." *Ibid*. It was thus evident the court believed that the matter had been served up for a decision and that a prompt ruling would be required. The defense said nothing to the contrary.

Later on April 4, when the government asked about Fischel, the judge said he had "formed some preliminary views" but they had not "jelled." App. 3834. When the defense noted that Fischel would be its third witness the following day (App. 3834-3835), the judge stated that he would "just have to do the best I can by tomorrow" (App. 3835). Again, the defense did not suggest that any proceedings would be necessary before a ruling.

Early the next morning, the court ruled on five defense motions and said to the prosecution about the Fischel matter: "*I know you want a ruling*." App. 3870 (emphasis added). The defense did not say it did *not* want a ruling, that it was planning to respond further to the government's motion, or that it would present reliability evidence on *voir dire*.[4] App. 3870-3873. Thereafter, when the defense called Fischel, the judge said "I need to make some legal rulings at this time." App. 3913. If Nacchio's lawyers thought they would be

[4] During this colloquy, the court asked who would cross-examine Fischel. App. 3870. Nacchio suggests this comment lulled him into believing that Fischel would be allowed to testify. Br. 9, 25, 36. But given the judge's prior indications that he would make a ruling, the comment did not mean he would necessarily hold a hearing. Nacchio may have hoped the comment meant that the court would deny the government's motion outright, as the defense had requested. And even if it appeared that the judge might allow Fischel to testify in some way, that was not misleading: Fischel *did* testify as a summary witness, and he *was* cross-examined. App. 3981-4064. In any case, the defense certainly could not take reliability for granted as to *every* opinion. *See Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 897 (1990) ("As to the suggestion of unfair surprise: A litigant is never justified in assuming that the court has made up its mind until the court expresses itself to that effect, and a litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk.").

presenting reliability evidence rather than receiving a ruling, they did not show it. Instead, as the jurors filed out of the courtroom, the defense sat silent. App. 3913-3914.

2. The notion that the defense expected to proffer its reliability case with Fischel on the stand not only lacks any basis in the foregoing procedural history, but it defies general practice and common sense. It has long been the practice for defense counsel, on any motion, to inform the district court whether it will be necessary to present evidence or conduct a hearing. ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, Vol. 2, § 222 at 4 (1988) (when a motion turns on "facts that are not already in the record, counsel should decide whether to request an evidentiary hearing" or "file supporting factual affidavits"). The defense did not do that. It knew the government would not have been able to quickly and effectively test, through ad hoc *voir dire*, the undisclosed methodologies underlying Fischel's 11 opinions.[5] Indeed, the district court's concern about "tell[ing] the jury to take a week off" (App. 3928)—a serious problem no matter how far ahead of schedule the trial may have been (Add. 26; *see* Gov't En Banc Br. 33)—was a conservative estimate. The revised disclosure, provided only a few days earlier, identified new topics but did not support them with a methodology or underlying materials.

[5] NACDL cites run-of-the-mill drug and gun cases in which experts testifying about a single, simple opinion were tested on *voir dire* in the jury's presence. NACDL Br. 9-10. The cases only serve to contrast how Fischel's many vague and compound opinions, and undisclosed methodologies, could not have been tested in that fashion. *See, e.g.*, *United States* v. *Conn*, 297 F.3d 548, 551-552 (7th Cir. 2002) (expert opined about whether defendant's firearms were "collector's items"); *United States* v. *Alatorre*, 222 F.3d 1098, 1099-1100 & n.2 (9th Cir. 2000) (expert opined about street value of drugs). Nacchio's arguments that he was "ready to proceed" (Br. 41) and that a "continuance was not necessary" (Br. 41 n.28) simply confirm that he chose not to disclose the methodologies in the hope of forcing the government to cross-examine them on the fly.

Genuine testing would have required assembly and disclosure of the materials, careful review by the government, possible retainer of a competing expert, and an extensive, point-by-point examination of Fischel. The defense knew this from the government's motion to exclude. App. 420 (motion opposed continuance for these reasons); *cf.* Supp. App. 19-20 (defense successfully claimed *25 days* was not enough to prepare challenge to government experts).

The court should not endorse the regime Nacchio envisions (Br. 33) — one in which the proponent of an expert, faced with a motion to exclude, can file a shoddy opposition that fails to meet the objections while presuming to preserve, *sub silentio*, a further chance to present reliability evidence on the stand during trial. Such a rule would promote neither truth-seeking (Br. 26, 55) nor efficiency. It would instead reward bare-bones, last-minute disclosures; result in uninformative motions and oppositions; deprive courts of the ability to rule on such motions without full-blown hearings; and encourage proponents to gamble on their experts in hopes that their opinions might slip through in the heat of trial without effective testing.[6]

B. The court was not required to hold a hearing *sua sponte* or to offer Nacchio yet another opportunity to present reliability evidence.

Nacchio claims he was entitled to assume the district court would hold a hearing even though he did not ask for one. Br. 30-32, 39, 42. The contention is groundless.

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[6] Given leeway under *Kumho* (526 U.S. at 152), a judge may properly decide—at least where the proponent provides disclosure and the opponent files no motion to exclude—that *voir dire* is a suitable means of testing reliability. *See* NACDL Br. 9-10 (citing cases confirming judges' discretion to conduct limited *voir dire* in lieu of a hearing). But none of Nacchio's or NACDL's cases requires mid-trial *voir dire* by default, *see* NANCY HOLLANDER ET AL., EVERYTRIAL CRIMINAL DEFENSE RESOURCE BOOK § 60:5 (2008) ("Expert issues will usually be resolved pretrial."), let alone where the proponent seeks an earlier ruling.

1. The Supreme Court's decisions in *Kumho* and *General Electric Co.* v. *Joiner*, 522 U.S. 136 (1997), gave Nacchio notice that he had no general right to a hearing. In *Kumho*, the district judge granted the defendants' motion to exclude the plaintiffs' expert on the written submissions, finding that "no evidentiary hearings * * * are necessary at this time." *Carmichael* v. *Samyang Tires, Inc.*, 923 F. Supp. 1514, 1517, 1524 (S.D. Ala. 1996). "In light of the record as developed by the parties," the Supreme Court held that the judge had acted within his "lawful discretion." *Kumho*, 526 U.S. at 158. Similarly, in *Joiner*, the defendants moved for summary judgment, attacking the reliability of the plaintiffs' experts. *Joiner* v. *Gen. Elec. Co.*, 864 F. Supp. 1310, 1311, 1319-1327 (N.D. Ga. 1994). The plaintiffs opposed the motion in writing and requested oral argument. *Id*. at 1311. The district judge granted the motion based on the written submissions and denied the plaintiffs' request for argument. *Id*. at 1327. The Supreme Court—noting that the motion had challenged the testimony's reliability and that the proponent had "failed to reply to this criticism" (522 U.S. at 143-144)—held that the judge did not abuse her discretion in ruling on the papers that the plaintiffs had not made a sufficient reliability showing (*id*. at 146-147).

Consistent with *Kumho* and *Joiner*, this Court stated plainly in *United States* v. *Call*, 129 F.3d 1402 (10th Cir. 1997), that "*Daubert* does not mandate" "an evidentiary hearing" prior to an expert's exclusion, even though the defendant there requested one. *Id*. at 1405. Likewise, the district judge's rules made clear that if Nacchio wanted a hearing, he had to request one in his opposition.[7] HON. EDWARD W. NOTTINGHAM, PRACTICE STANDARDS —

[7] Even "poor[]" defendants and "unsophisticated" counsel (NACDL Br. 12) would be obligated to follow the judge's rules. Surely, then, Nacchio's seasoned defense team could

CRIMINAL ¶ 17 (2004); *see* AMSTERDAM, *supra*, Vol. 2, § 222 at 4 (emphasizing that "[l]ocal practice may * * * compel" defense counsel to "request an evidentiary hearing"). Nacchio says he "did not oppose the government's request for a hearing" (Br. 39) and had "no reason * * * to repeat" it (Br. 35). He is doubly mistaken. The judge's rules provide that "[a]ny party opposing [a] motion must *likewise* state whether that party believes an evidentiary hearing is necessary" (NOTTINGHAM, *supra*, ¶ 17 (emphasis added)), which means an opposition must address the issue even if the motion already has. And here, the government's motion sought outright exclusion *without a hearing*, arguing that one would be "*unjustified* in light of the scheduling considerations." App. 420 (emphasis added). Only after making this point did the government request a hearing (and prior additional disclosure) *in the alternative*, in the event the judge were "inclined to allow any portion of" Fischel's testimony. App. 421. In response, Nacchio's opposition argued that the motion was "without merit" (App. 463) and "request[ed] that [it] be denied" (App. 468). The judge could hardly read that as a representation that a hearing was necessary.[8] And the defense knew—from its own past successes at the trial (App. 357-361, 2825)—that the judge would

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not assume that an evidentiary hearing would be held absent a request. *See* Hon. Barbara Jacobs Rothstein, *Manual for Complex Litigation: Expert Scientific Evidence*, SL084 ALI-ABA 189, 232 (Feb. 2006) (the "consensus" among district judges is that "neither the party proffering the testimony nor the party opposing it is entitled to a [*Daubert*] hearing").

[8] Even hindsight—which is not allowed here, *see Old Chief* v. *United States*, 519 U.S. 172, 182 n.6 (1997) (appellate court must consider judge's perspective at the time of ruling)—would show that the judge's interpretation was correct. When Nacchio sought reconsideration and requested a hearing for the first time (App. 481 n.4), he did not represent, as he claims now, that he had always assumed a hearing would be held (Br. 33, 35) or that he was about to ask for one when the court ruled (Br. 40). To the contrary, he acknowledged that a hearing was "not specifically mandated." App. 481 n.4 (quotation omitted).

grant requests to exclude evidence based on the papers, without a hearing.

2. Moreover, even if Nacchio had requested a hearing, he still would have had to make a sufficient showing to be entitled to one. He had disclosed no methodology, "written and oral reports, tests, * * * investigations," articles, studies, or other such materials. Fed. R. Crim. P. 16, 1993 Adv. Comm. Notes. Nor had he countered the government's opinion-by-opinion attack on Fischel under Rule 702. *Compare* App. 383-418 *with* App. 466-467. He thus failed even the minimal test he now proposes, because his proffers were "insufficient to raise a material issue of fact." Br. 28 (quotation and emphasis omitted).[9]

3. Nacchio claims (Br. 39) he lacked "an adequate opportunity to present evidence of methodology or request an evidentiary hearing." But it would have required one minute to request a hearing, a continuance, or both, in the opposition or in court.[10] And the court could assume that, by the time the opposition was filed—a day before Fischel was to present his opinions—the defense had assembled whatever reliability evidence it intended to present. After all, Fischel had been retained weeks (or perhaps months) earlier (App. 460-462); he had a staff of his own (App. 433), even apart from the eight-lawyer defense team (App. 1-2);

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[9] This Court has never held that a judge must conduct a *Daubert* hearing "'unless the proffer on its face is insufficient to raise a material issue of fact.'" Br. 28 (quoting *United States* v. *Sandoval*, 390 F.3d 1294, 1301 (10th Cir. 2004)). *Sandoval*'s statement to that effect was not only dicta but an apparently-inadvertent quotation of the *dissent* in *Call*. 129 F.3d at 1407 (Ebel, J., dissenting). Anyway, such a rule would be hard to reconcile with *Kumho*, which expressly vests broad procedural discretion in district judges. 526 U.S. at 152.

[10] Nacchio suggests that, because of Passover, the defense did not have enough time to draft its opposition. Br. 40 n.27. The defense could have asked for a continuance or an opportunity "to supplement [the] response orally" (Br. 40), citing Passover as a basis for such relief, but it did not do so.

he was familiar with the procedures of testifying as an expert, having done so before (App. 441-458); and he could anticipate his opinions being challenged because he had previously faced such challenges (some of which were successful, *see infra* note 16, *contra* Br. 1, 5).

4. Nacchio complains (Br. 29-30) that, because he had not provided the district court with "sufficient evidence" to "assess reliability," the court had to give him further reliability proceedings *sua sponte* on pain of reversal under *Dodge* v. *Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003).[11] But he effectively told the court the record was ripe for a ruling. App. 464 (representing that revised disclosure provided "the analysis [Fischel] conducted," "outline[d] [his] specific testimony," and "includ[ed] factual support"); App. 467 (calling disclosure an "expert report" and claiming it provided "full disclosure of intended testimony"); App. 481 n.4 (again calling the disclosure Fischel's "expert report").

In any event, if the court lacked reliability evidence, it was only because Nacchio failed to provide it in a written opposition that, in its own text (App. 466-467), purported to establish admissibility under Rule 702. Nacchio, as the proponent of expert evidence

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[11] Nacchio knew reliability was at issue (*see* Gov't En Banc Br. 9-17, 22-26; *supra* pp. 2-8), and cannot credibly argue that he "had no foreknowledge of the direction that the district court[] might take." Br. 31 (quotation omitted); *see Oddi* v. *Ford Motor Co.*, 234 F.3d 136, 151-153 (3d Cir. 2000) (affirming exclusion and distinguishing prior Third Circuit cases on this basis). He suggests (Br. 12) the court nonetheless should have given him further proceedings because the court was free "all day Friday," April 6. But the judge on that day had a full slate of other matters, including the sentencings of seven defendants. Nottingham Calendar for Week of April 2, 2007, at 2-3 (included in attached addendum). That was consistent with the judge's standard practice, as the defense knew. NOTTINGHAM, *supra*, ¶ 11(d) ("Hearings and conferences in matters other than the one being tried will be scheduled * * * on Fridays[.]"); *see* En Banc App. 70 (at pretrial conference, judge told counsel he would not work on this case on Fridays). Nacchio cannot fairly contend that the judge abused his discretion in failing to give the defense—at the expense of more than a dozen other parties—this further (unrequested) opportunity to get reliability right.

attempting to establish admissibility through a written proffer, assumed the risks of that default. In *United States* v. *Rodriguez-Felix*, 450 F.3d 1117 (10th Cir. 2006), the defense's initial expert disclosure did not reveal the expert's methodology; the district judge ordered a proffer of the testimony; that proffer did not enable the judge "'to assess the reasoning and methodology underlying the expert's opinion'" (*id*. at 1125); and so the judge excluded the expert (*id*. at 1122). *See* Appellee's Brief, *United States* v. *Rodriguez-Felix* (No. 05-2142), 2005 WL 3516704, at *4-*5. This Court affirmed, "agree[ing]" with the district court that there was "'nothing in this record that allows [for a reliability] determination.'" 450 F.3d at 1125. In other words, the Court held the defense responsible for the evidentiary "gap[]," as Judge Holmes would have done here (Add. 71 n.7).

Nacchio resists this analysis, arguing (Br. 27, 30) that the government had to show *un*reliability under Rule 702 until the moment Fischel took the stand.[12] The claim is unfounded. For one thing, it is contrary to *Kumho* and *Joiner*, which addressed motions filed before trial and affirmed exclusion where the *proponents* had failed to establish reliability. *Kumho*, 526 U.S. at 145, 158; *Joiner*, 522 U.S. at 143-144, 146-147. Additionally, the reliability of an expert can be shown at any time: the court need not even wait until trial to determine if an opinion "is based on sufficient facts or data" or "is the product of reliable principles and methods" that have been "applied * * * reliably." Fed. R. Evid. 702(1)-(3). This Court in *Rodriguez-Felix* thus affirmed exclusion where the judge ruled before trial (*i.e.*,

[12] Rule 702 is not a "rule of inclusion" like Rule 404(b). Br. 28-29 (citing *United States* v. *Roberts*, 88 F.3d 872 (10th Cir. 1996)). Rule 702 establishes several requirements a proponent must satisfy before his expert may be admitted. Rule 404(b) works the other way, providing that certain evidence is inadmissible only if offered for an improper purpose.

on an *in limine* basis) that the *defense* had failed to prove reliability. 450 F.3d at 1122, 1125. Finally, the judge here ruled on the motion to exclude after hearing nearly all the evidence. He thus had sufficient factual context to address other Rule 702 hurdles (such as helpfulness to the jury) and was not required to defer ruling even longer than he already had.

Nacchio says the district court also ran afoul of *Dodge* by failing to make any reliability determination at all. Br. 11, 30. He is wrong, and any doubt on the matter must be resolved in the district court's favor. *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 128 S. Ct. 1140, 1146 (2008); *see* Add. 65. Even Nacchio, until now, interpreted the court's ruling as a reliability determination. App. 481 n.4 (in footnote asking court to reconsider Fischel's opinion about IRUs, Nacchio said it had been excluded "based on *Kumho* reliability considerations"); *see* Nacchio Br. 44 (stating the court found that Nacchio "did not conclusively establish * * * reliability" "under Rule 702 and *Daubert*"). He was right. The court held that, under "Rule 702 [and] *Daubert*," the defense had not "*establish[ed]* that Fischel's testimony is the product of reliable principles and methods." App. 3915 (emphasis added). In other words, the defense's failures were not just failures of disclosure under Rule 16 — they were failures of *proof* under Rule 702.[13] Thus, the court did make a reliability determination: like the district court in *Rodriguez-Felix*, it found that the defense had failed

[13] To be clear, the government does not contend that the defense was required "to preemptively establish the reliability of Fischel's methodology" (Br. 35) in its initial expert disclosure. *See* Add. 69 (Judge Holmes: "Rule 16 * * * did not require [Nacchio] to demonstrate admissibility[.]"). But the defense *did* have to respond to the government's motion to exclude, which squarely raised the reliability issue (*see supra* p. 4) and followed the court's own expression of concern about "*Kumho* * * * issues" (App. 2042). In any event, once the defense filed a written opposition seeking a ruling on the record as it stood (App. 468), it could not fault the court for issuing one on that record.

to prove reliability, despite notice and sufficient opportunity to do so.[14]

II. The District Court Properly Excluded Fischel's Opinions Under Rules 16, 403, 602, 703, and the "Helpfulness" Component of Rule 702, and Any Error Would Have Been Harmless In Any Event

The 11 opinions Nacchio mentioned in his revised disclosure (App. 427-433) are enumerated in the government's opening en banc brief. Gov't En Banc Br. 13. At trial, he represented that the disclosure contained a complete list of Fischel's opinions. App. 464 (it "outline[d] the specific testimony" and "includ[ed] factual support"); App. 467 (it "ensure[d] full disclosure of intended testimony"). In this Court, however, Nacchio does not address Fischel's actual, discrete opinions. Instead, he discusses three "topics"—"Testimony Regarding Trading Patterns" (Br. 47-49), "Materiality Testimony" (Br. 49-51), and "Rebuttal" about IRUs (Br. 52-54)—and includes opinions that were either belatedly disclosed or have been raised for the first time on appeal.

A. "Trading patterns"

1. Contrary to Nacchio's characterization (Br. 48), Fischel did not propose to opine about "[w]hether Nacchio's trades accelerated in 2001 on the basis of material

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[14] Although the court made additional specific findings about its other grounds for exclusion (App. 3917-3921), it did not need to provide any more reliability findings than it did (App. 3915-3917). Nacchio has never contested the court's description of the Rule 702 standards. Where, as here, the proponent has not even disclosed his expert's methodology or established reliability under those standards, there is little for a judge to say except to point out the failure. And even in settings where a lengthier explanation might be expected—in the multi-faceted sentencing context, for example—appellate courts do not ordinarily second-guess the judge's determination about how extensive an explanation must be. *See, e.g.*, *Rita* v. *United States*, 127 S. Ct. 2456, 2469 (2007) (though judge "might have said more" in denying motion for departure from advisory Guidelines range, his statement that a sentence at the bottom of the range would be "appropriate" satisfied 18 U.S.C. § 3553(c)).

nonpublic information." Nor did the government claim that would be "irrelevant" (*ibid.*).

According to the revised expert disclosure, Fischel would have opined that the pattern of Nacchio's sales in 2001 was "consistent with" the pattern of his earlier sales. App. 428; *see* Gov't En Banc Br. 44 (Opinion (1)). The government did not contend that such "consisten[cy]" would be irrelevant. Rather, it argued (App. 384-386), and the district court agreed (App. 3918), that the pattern of Nacchio's sales was a factual issue the jury could decide for itself, based on any summary trading-pattern evidence the defense wished to present (without Fischel's additional expert commentary). Fed. R. Evid. 403, 702.

Nacchio fails to mention that the district court *permitted* Fischel to present numerous charts comparing and contrasting Nacchio's trading patterns over time. App. 3981-4064. Fischel also told the jury how options work (App. 3989-3990), when it was "economically rational" for Nacchio to exercise them (App. 3990), and that Nacchio sold less than he could have (App. 3996). Nacchio does not say (Br. 47-49) what further commentary Fischel would have added to the charts. The defense *could* have had Fischel compare the expiration date of Nacchio's options to the rate at which he exercised them—as the government's summary witness had done (App. 3738-3745), and in an effort to show that Nacchio was selling to avoid expiration two years later (Br. 48)—but the defense chose not to do so.

2. Nacchio asserts, for the first time, that Fischel would have opined that "executives virtually never exercise options and retain the stock." Br. 48. Neither the revised expert disclosure nor the opposition to the motion to exclude said anything of the sort. Nor did Nacchio mention the opinion in his opening panel brief. The notion that it is

"rare for executives to exercise options and hold the stock" first appeared in Nacchio's panel reply (Nacchio Reply Br. 4), and even that brief did not claim Fischel would have *testified* to that effect. The district court could not have abused its discretion in failing to admit an opinion never presented. Nor would the opinion, even if timely presented and admitted, have changed the verdict. The government did not contend that executives normally exercise options and hold stock. It argued that Nacchio was not required to sell (App. 3774, 4018) and that he *could* have avoided expiration by exercising the options and holding the stock (App. 4456) — as he had done in the past (App. 4018, 4022) and as a fellow executive, based on investor comments, had advised him to do in 2001 (App. 1681-1682).

The revised expert disclosure did say Fischel would testify that executives at Qwest and other companies "frequently exercised options and sold substantial amounts of stock." App. 430. But the defense failed to address how that was relevant. Fed. R. Evid. 403, 702; *see* App. 401-404 (motion to exclude); App. 463-468 (opposition); Gov't En Banc Br. 48 (Opinion (8)). In any case, the fact that other Qwest executives exercised options and sold stock was already in evidence. *E.g.*, App. 1621-1622, 2245-2246, 2471-2472, 2904-2905.

B. "Materiality"

1. Nacchio claims Fischel "would have testified about Qwest's relevant disclosures and their impact on Qwest's stock price." Br. 49. Similarly, Nacchio told the panel that Fischel "would have identified * * * the relevant disclosures * * * and, using an 'event study,' would have explained the effect of each disclosure on Qwest's stock price." Nacchio Br. 41 (citing App. 796-798). Again, the revised expert disclosure mentioned no

such opinion. It did not identify any "disclosures" by Qwest of inside information, let alone suggest Fischel conducted any statistical analysis to determine their collective effect on the stock price. App. 430-431. Nor did it indicate that Fischel would have explained "'how financial markets respond to corporate reports.'" Br. 45 (quoting Fed. R. Evid. 702, 2000 Adv. Comm. Notes). Nor did Fischel's binder of charts (*see* App. 3925) contain any hint of an "event study." Nor did the defense provide any such study as an offer of proof to the court in its several weekend filings after exclusion.

The revised disclosure actually stated (App. 431) that Fischel would have testified that "Qwest's stock price did not decline significantly when it reduced its [targets] on September 10, 2001." Only *after* Nacchio was convicted did the defense, in preparation for sentencing, unveil an "event study." App. 793-803 (dated July 2, 2007). In short, the court was not even presented with the statistical evidence Nacchio now claims was improperly excluded.

The bare point that "Qwest's stock price did not decline significantly when it reduced its [targets]" (App. 431) was a fact, not an opinion. Fed. R. Evid. 403, 702. The district court correctly concluded as much. App. 3921. And that fact was not materially exculpatory. Even the event study that Fischel prepared for sentencing focused on *several* disclosures of inside information (App. 796-797), indicating that, in Fischel's own view, a singular focus on Qwest's reduction in targets on a single date was unreliable. Even then, Fischel failed to account for every relevant disclosure. App. 1140-1145 (government criticized Fischel's model on this ground); *see* Add. 47-48 (panel observed that the market was "already skeptical of Qwest's revenue" even before Qwest disclosed some inside information, and that

Nacchio "trickled out" the information "to avoid a major market shock").

The stock price was hardly "[t]he heart of Nacchio's defense." Br. 1. The defense noted in its opening statement that Qwest's stock price did not immediately go down when Qwest lowered its targets. App. 1493. But the defense then told the jury: "The point of that is nothing, [and] it's not exactly a science." *Ibid*. Exclusion of this opinion, even assuming it was going to be expressed at all and was excluded in error, was harmless.

2. Nacchio says Fischel "would have opined that the decline in the stock price was attributable to a general economic decline in the telecommunications industry." Br. 49. Once again, this description does not match the revised expert disclosure. The disclosure said, at most, that Fischel would opine that Qwest failed to meet its "guidance" (*i.e.*, revenue targets) because of "adverse changes in economic conditions." App. 431. Because Nacchio never explained how Fischel had reached that conclusion, exclusion was proper under Rule 702 for failure to prove reliability. *See* App. 407-411 (motion to exclude); Gov't En Banc Br. 48-49 (Opinion (10)); *Joiner*, 522 U.S. at 146 ("ipse dixit" insufficient); *see Champagne Metals* v. *Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1079-1080 (10th Cir. 2006) (same). The court excluded the testimony for this very reason (among others), contrary to Nacchio's contention (Br. 49) that the court made no findings on the matter. App. 3916-3917 (court held that Fischel's opinion was "connected to existing data only by [his] ipse dixit").

In any event, the defense did not establish that Fischel was qualified to render such an opinion. Nacchio touts Fischel's credentials (Br. 4-5) and proclaims that he has "never before been excluded" (Br. 1, 5). But when the government challenged Fischel's expertise

on the specific matter of "adverse changes in economic conditions" for Qwest (App. 406, 408-409), the defense did not claim that he had knowledge of the telecom industry, let alone the revenue issues at Qwest specifically (App. 467-468).[15] *See Kumho*, 526 U.S. at 156 (expert must have "sufficient *specialized* knowledge to assist the jurors in deciding the particular issues in the case" (emphasis added) (quotation omitted)). And Fischel's opinions *have* been excluded, including on grounds that they were beyond his expertise.[16]

Fischel's lack of specific expertise also made exclusion proper under Rule 403, given the danger that the jury would overvalue his testimony. *Call*, 129 F.3d at 1406 (affirming Rule 403 exclusion on this basis); *see Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) (under Rule 403, judges can exercise more control over experts than over lay

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[15] Nacchio contends that "nothing in the record suggest[s] that Fischel did *not* employ [the] intellectual rigor that characterizes the practice of an expert in the relevant field." Br. 49 (quotation omitted) (emphasis added). But nothing suggests that he *did*, either, and the burden on that point belonged to Nacchio. Fed. R. Evid. 702, 2000 Adv. Comm. Notes.

[16] *See, e.g.*, *United States* v. *Philip Morris USA*, No. 99-cv-02496-GK (D.D.C.), Docket 5486, 5/26/05 Status Call Tr. 23 (included in attached addendum) (court excluded Fischel's opinions about behavioral psychology because he had no background in area and defendants had "difficulty explaining what [his] area of expertise is"); *United States* v. *Howard*, No. 03-cr-00093 (S.D. Tex.), Docket 594, 4/15/05 Order 1-2 (included in attached addendum) (excluding some of Fischel's opinions as irrelevant); *Abrams* v. *Van Kampen Funds, Inc.*, 2005 WL 88973, at *10 (N.D. Ill. 2005) (unpublished) (excluding one of Fischel's opinions because it was "not supported by adequate methodology nor shown to be relevant"); Respondent's Brief, *Bluebird Partners* v. *First Fid. Bank*, 2004 WL 5371376, at *40 (brief observed that trial court did not permit Fischel to testify as damages expert); *cf. In re Taxable Mun. Bonds Litig.*, 1994 WL 532079, at *3-*4 (E.D. La. 1994) (unpublished) (refusing to rely on Fischel's discussion of press and analyst reports because "'[i]t does not require any special competence to read [such] reports'" (quoting *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989))); *SEC* v. *First City Fin. Corp.*, 688 F. Supp. 705, 727-728 & n.22 (D.D.C. 1988) (rejecting Fischel's profit analysis as "speculative"), *aff'd*, 890 F.2d 1215, 1232 (D.C. Cir. 1989) (agreeing that analysis was "impossibly speculative").

witnesses);[17] *United States* v. *Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) (en banc) (judges must carefully consider expert evidence under Rule 403 because jurors may "assign[] [it] talismanic significance"). Contrary to Nacchio's claim that the court made no findings on the matter (Br. 49), the court clearly invoked valid countervailing concerns under Rule 403 (not just unhelpfulness) as independent bases for exclusion. App. 3919-3920.

3. Turning to the IRU testimony proposed in his revised expert disclosure (App. 431-433), Nacchio does not dispute that his *initial* disclosure (App. 460-462) did not mention it. Br. 49; *see* App. 413 & n.4 (motion to exclude). The district court's order to "clarify" the opinions in the initial disclosure (App. 352) was not an invitation to submit new ones.

Additionally, though Nacchio asserted that "Fischel is clearly an expert [on] * * * the materiality of IRU sales" (App. 468), he never explained how Fischel's background in "corporate finance," "corporations," "economic analysis of law," and the like (App. 436) qualified him to opine about IRUs — a specialized subset of the telecom industry. Fed. R. Evid. 702; *see* App. 414 (motion to exclude). As Judge Holmes pointed out, the court was not required to "'simply tak[e] the expert's word for it.'" Add. 72 (quoting Fed. R. Evid. 702, 2000 Adv. Comm. Notes); *see Frazier*, 387 F.3d at 1261.

Nor did the defense address any of the government's other challenges to the IRU testimony proposed in the revised disclosure. App. 412-418.

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[17] Nacchio relies on *Petruzzi's IGA Supermarkets, Inc.* v. *Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993), for a narrow interpretation of Rule 403. Br. 51-52. *Petruzzi's IGA* was briefed and argued before, and decided just two weeks after, the opinion in *Daubert* was issued. Its analysis of Rule 403 (998 F.2d at 1239-1241) fails to account for *Daubert*'s conclusion (509 U.S. at 595) that the rule gives judges broad discretion over experts. To that extent, the case should hold no sway here.

4. Nacchio next claims (Br. 50) Fischel was to testify about "how analysts reacted to Qwest's guidance in 2000 and 2001."

a. The revised expert disclosure was far narrower. It stated that Fischel had considered reaction to "Qwest's September 7, 2000 guidance." App. 431. And it said that Fischel would have opined, "[m]ore specifically," that telecom analysts' reports in reaction to that guidance "reflected an understanding that economic conditions could cause Qwest's financial performance to be worse than expected."[18] *Ibid.*; *see* Gov't En Banc Br. 49 (Opinion (10)). Nacchio suggests (Br. 50) Fischel "is the nation's preeminent expert" on the analysts' "understanding" of this mundane point (that the economy could affect Qwest). But Fischel disclosed no particular qualification to comment on telecom analysts,[19] much less

[18] The disclosure also stated (App. 431) that Fischel would testify about whether, in response to the September 2000 guidance, analysts changed their recommendations, and whether they adopted Qwest's targets as their own. The government pointed out (App. 407) that these were just facts and had "nothing to do" with the proposed opinion they purported to support, which related to Qwest's performance in late 2001. The defense offered no explanation in its opposition, except to claim (App. 467) that "these facts were included to ensure full disclosure of intended testimony." The court specifically, and correctly, found (App. 3920) that these comprised a "recitation of facts" not connected to an opinion. But the court did *not* exclude them: it expressly allowed the defense to offer "competent evidence" of them (App. 3921), presumably through reports or analysts (*cf.* App. 4069), or to call Fischel "for summarization charts" (App. 3922) in accordance with Rule 1006. Given that these were mere facts, summary charts were a perfectly legitimate evidentiary alternative. But the defense chose not to pursue that alternative or to offer other competent evidence.

[19] Nacchio's citation (Br. 35-36 n.23, 38 n.26, 51 & n.31) to government disclosures in other cases is unavailing. He points to proposed economic testimony from a government expert in *United States* v. *Heron*, No. 06-cr-00674-SD (E.D. Pa.), in arguing that Fischel's testimony about the analysts was "routine" (Br. 50) and admissible based on Fischel's "credentials" (Br. 51 & n.31). But the judge in *Heron* excluded much of the securities expert's testimony, on grounds that it was "connected to existing data only by the [expert's] ipse dixit" and was unreliable and unhelpful. *Heron*, Docket 101, 10/10/07 Order 3-4 (included in attached addendum). The expert ultimately did not testify at all. In *United*

what they understood in 2001. Though the motion to exclude repeatedly challenged Fischel's qualifications (App. 387, 389, 395, 400, 405, 414)—including on this analyst issue (App. 408-409)—the opposition (save for its unsupported assurance about IRUs, App. 468) did not indicate Fischel had any specialized telecom expertise.

Even if Fischel had experience relating to the analysts' understanding, an expert relying on experience "must explain how that experience leads to the conclusion reached, why [it] is a sufficient basis for the opinion, and how [it] is reliably applied to the facts." Fed. R. Evid. 702, 2000 Adv. Comm. Notes; *see* Add. 72. At no point did the defense proffer such an explanation. Fischel did not indicate which reports he had reviewed, how many, or how he had discerned the analysts' understanding. Exclusion was proper under Rule 702.

b. Rules 403, 602, and 703 provided additional grounds for exclusion of this testimony about the analysts' understanding. An expert may not present hearsay unless (1) "he has personal knowledge of the making of the statement" (Fed. R. Evid. 602, 1972 Adv. Comm. Notes), or (2) the facts are the basis for an opinion, they are "of a type reasonably relied upon by experts in the particular field," and "their probative value * * * substantially outweighs their prejudicial effect" (Fed. R. Evid. 703).

Fischel's testimony about telecom analysts failed those tests: he would not have offered his own opinion but would have served as an improper conduit for the opinions of unnamed others (Fed. R. Evid. 703), confusing the jury in the process (Fed. R. Evid. 403).

States v. *Causey [Skilling]*, No. 04-cr-00025 (S.D. Tex.), the proposed expert Nacchio mentions similarly did not testify. And in *United States* v. *Poulsen*, No. 06-cr-00129-ALM (S.D. Ohio), the government's position was that the witnesses were *not* experts and that it had no intention of eliciting opinion testimony from them. Addendum to Br. at 30.

See Champagne Metals, 458 F.3d at 1080 n.4 (expert could not "confirm[]" facts); *United States* v. *Gabaldon*, 389 F.3d 1090, 1099 (10th Cir. 2004) (expert could not "restate[] * * * autopsy reports"); *TK-7 Corp.* v. *Estate of Barbouti*, 993 F.2d 722, 732-733 (10th Cir. 1993) (expert could not present another's projections); *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992) (expert could not serve as another's "spokesman").

The district court was well within its discretion to conclude that, while the defense could establish the analysts' views "by competent evidence" (App. 3921; *see also supra* note 18), Fischel's presentation of them would have "misle[d]" the jurors (App. 3919) and "invit[ed]" them to "succumb" to his credentials (App. 3920). Nacchio is wrong to suggest (Br. 51) that these findings were insufficient. *See United States* v. *McVeigh*, 153 F.3d 1166, 1189 (10th Cir. 1998) (judge may exclude evidence under Rule 403 without even making "explicit, on-the-record findings").

c. Finally, even if the analyst testimony were otherwise admissible, Nacchio's tactics would foreclose appellate relief. The defense had already urged the district court, successfully, to *preclude* the government from eliciting any such testimony.

The government had proposed to call analysts Drake Johnstone and Prashant Khemka to testify about "the significance of insider information that was not public[]" when Nacchio was selling Qwest stock. En Banc App. 25. The defense moved to exclude the testimony (En Banc App. 25-33), claiming (*inter alia*) that the views of analysts and other professionals were irrelevant (Fed. R. Evid. 401) and unfairly prejudicial (Fed. R. Evid. 403) under the reasonable-investor test of *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). The court agreed

and, without holding a hearing (App. 40-41), granted the defense's motion to exclude (App. 353-361). It permitted Johnstone and Khemka to testify, but only as *fact* witnesses about what information they received from Qwest and then publicly disseminated. App. 354-357; *see* App. 3559-3594, 3650-3684. The analysts did not testify as experts, and the court carefully monitored their testimony (App. 3571, 3583-3585, 3592, 3670), even striking Johnstone's testimony mentioning what rating he gave Qwest (App. 3590-3591).[20]

Having persuaded the court to exclude the analysts' materiality views, Nacchio then sought to take advantage, proposing that Fischel present secondhand analyst opinions on the very same subject. Any error was either invited, given Nacchio's ambush attempt (*John Zink Co.* v. *Zink*, 241 F.3d 1256, 1259 (10th Cir. 2001)),[21] or harmless, given his choice not to take up the court's offer to present "competent evidence" of the analysts' views (App. 3921).

C. "Rebuttal"

Nacchio contends that Fischel would have "rebutt[ed]" Johnstone's and Khemka's "expert" testimony about "the importance of Qwest's IRU revenues to the market" (Br. 52) and that the district court erred in excluding the "rebuttal" without holding a hearing (Br. 52-54). He is again mistaken about both the facts and the law.

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[20] Nacchio complains (Br. 14-15, 52) that Johnstone and Khemka talked up their background (App. 3563, 3652) though testifying as lay witnesses. But there was nothing unusual or improper about that (*see* KENNETH MOGILL, EXAMINATION OF WITNESSES § 5.37 (2008)), and Fischel did the same thing when testifying in summary (App. 3981-3983).

[21] Nacchio now argues, contrary to his successful motion to exclude Johnstone and Khemka (En Banc App. 25-33), that the court erred in believing that telecom analysts' materiality views were "superfluous" under the reasonable-investor standard. Br. 46-47. The invited-error doctrine forecloses consideration of the argument (*Zink*, 241 F.3d at 1259), as does judicial estoppel (*Zedner* v. *United States*, 547 U.S. 489, 504 (2006)).

1. Johnstone did not opine that IRUs (non-recurring revenue) "should be eliminated" from Qwest's numbers. Br. 52. He stated only what Qwest had and had not disclosed about *recurring* revenue. App. 3589 (investors were not told Qwest's growth rate for "recurring revenue"). As noted (*supra* p. 25), Johnstone volunteered the rating he later gave Qwest, but the court immediately struck the testimony, telling the jury it was "improper opinion." App. 3590-3591. Similarly, Khemka's alleged opinion testimony (Br. 52) was just an explanation of a letter he had sent Nacchio, in which he complained that Qwest had not sufficiently disclosed its "revenue breakdown." App. 3670-3671; *see* Supp. App. 224.

All of this was fact testimony about what information Qwest had or had not disclosed; it was not opinion testimony about whether the information was material. The district court properly concluded as much after a painstaking line-by-line review of the transcript.[22] App. 3969-3974, 4065-4073. That on-the-scene determination is entitled to substantial deference. *See United States* v. *Ward*, 182 Fed. Appx. 779, 791 (10th Cir. 2006) (unpublished).

2. Even if Johnstone and Khemka had stated expert views, Fischel's testimony would not have addressed them. At most, Johnstone's admitted testimony was that IRU revenue and recurring revenue were different. App. 3589-3590. But Fischel did not disclose any basis to opine otherwise. App. 480-481; Supp. App. 76-149. And, at most, Khemka distinguished between "genuine" IRUs and "swap[ped]" IRUs — the latter of which, in contrast with "genuine" IRUs, Khemka labeled as "not meaningful." App. 3671-3672; *see*

[22] As the court noted (App. 3637, 4069), the government abided by the order precluding opinions about materiality, but the defense on cross-examination elicited a host of such opinions. *E.g.*, App. 3627-3628, 3632-3633.

App. 4071-4072. But Fischel did not propose to testify that "genuine" IRUs and "swaps" were no different. App. 480-481. Rather, in support of an opinion that IRUs in general were "not worthless" to investors (App. 506; *see* App. 480-481), Fischel proposed to present charts comparing the "revenue multiples" of companies that did *not* sell IRUs, and companies that sold IRUs and disclosed their magnitude. Supp. App. 77-81. Johnstone and Khemka, however, never said IRUs were "worthless" or testified about "revenue multiples." In short, Fischel's IRU opinion was not rebuttal at all, and its exclusion was proper.

a. Nacchio does not contend that he established the opinion's reliability, as required by Rule 702. Instead, he argues (Br. 17, 53-54) that the court abused its discretion in failing to hold a hearing "on this particular point" (App. 481 n.4), a possibility Nacchio raised in a footnote in his weekend motion for leave to present rebuttal (*ibid*.). But the motion acknowledged that the court was "not specifically mandated" to hold a hearing (App. 481 n.4 (quotation omitted)) and did not in any event indicate what the defense would show at one.[23] In fact, the defense told the court that, as to Fischel's IRU testimony, the record *already* contained his methodology. En Banc App. 50. When the motion came up during the next court day, the defense—without mentioning a hearing or making any argument—told the court: "I think you need to make a ruling." App. 4064. And so the court

[23] The defense suggested a hearing to the extent the court had concerns about Fischel's "qualifications" to testify in this area. En Banc App. 50. But the defense did not make any proffer of how it would show Fischel had relevant qualifications to discuss IRUs, and nothing in his *curriculum vitae* (App. 435-459) reflects that he had any. And, notably, the defense did not seek a hearing to show Fischel's methodology; on the contrary, and as mentioned in the text, *supra*, it claimed (En Banc App. 50) that the court *already had* the methodology.

did, immediately thereafter. App. 4064-4076. That was not error, let alone reversible. *Zink*, 241 F.3d at 1259.

b. The court properly excluded Fischel's "rebuttal" opinion on several other independent and adequate grounds: it was irrelevant (Fed. R. Evid. 702), prejudicial (Fed. R. Evid. 403), and an improper attempt to turn Fischel into a conduit for the expert opinion of someone else (Fed. R. Evid. 602 and 703). App. 4074-4076; *see* Supp. App. 58-64 (motion to exclude); Gov't En Banc Br. 50-51. Because Qwest *did* sell IRUs and *did not* disclose them, Fischel's charts about companies that did not fit that description (Supp. App. 77-81) were beside the point and confusing. As for the conduit problem, the court's choice of an evidentiary alternative—allowing the defense to elicit IRU views from any analysts it wished to call (something the court had not allowed the *government* to do)—was well within its discretion.[24] *TK-7 Corp.*, 993 F.2d at 732-733; *In re James Wilson Assocs.*, 965 F.2d at 173; *see Old Chief* v. *United States*, 519 U.S. 172, 184-185 (1997) (judge's decision may be informed by "evidentiary alternatives"); *see also supra* note 18.

c. Finally, any error was harmless. Even if Fischel had testified that the market generally "valued IRU revenues" (Br. 56), he could not have undercut specific evidence that (1) Nacchio himself believed IRUs were an "accounting trick[]" and recurring revenue was "more valuable" "in terms of what the marketplace valued in Qwest" (App. 2464-2466); and

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[24] Nacchio suggests (Br. 53) Fischel would have presented "the total mix" of *all* analyst reports. That is incorrect. He asked to have Fischel "present[] the contemporaneous views of other analysts" (App. 481), and represented that Fischel's underlying materials "were all provided to the government" (*ibid.*), but he had provided only *three* analyst reports. Supp. App. 57-58, 120-148. Presenting three reports would hardly show the "total mix."

(2) in any event, Qwest would not be able to sell IRUs in the second half of 2001 (App. 2494-2496), meaning it would miss its targets no matter how much the market valued IRUs.[25]

III. Even Assuming There was an Abuse of Discretion that was Not Harmless, a Limited Remand, Not a New Trial, Would Be the Appropriate Remedy

Nacchio argues that the government has "waived" a limited remand (Br. 58) and that concerns about "post hoc rationalization" preclude any such remand (Br. 58-60).

1. The government has not waived a limited remand. As the appellee, it was not required to specify any particular form of relief. *Compare* Fed. R. App. P. 28(a)(10) (requiring appellant to "stat[e] the precise relief sought") *with* Fed. R. App. P. 28(b) (requiring appellee to "conform to the requirements of Rule 28(a)(1)-(9) and (11)," but not Rule 28(a)(10)). The government sought affirmance (Gov't Br. 70) and was not bound to request alternative relief to which Nacchio, in the government's view, was not entitled. *See* Gov't En Banc Br. 59-60 (limited remand would itself be a windfall). And this Court has discretion to order a remand if it is "just under the circumstances." 28 U.S.C. § 2106.

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[25] Nacchio's defenses (Br. 17-21) are overstated. Briefly: his much-earlier comment that he would "dribble" out his shares (DX 1560; *see* Br. 18) hardly foreshadowed his selling in the first trading days in April 2001; other executives did not tell him to take Qwest's numbers down (Br. 18-19) because only Nacchio could (App. 2134, 2238, 2240, 2254, 2493, 3144-3145, 3429); Qwest's unchanged internal estimate was no source of comfort (Br. 19) because Qwest's practice was to "plug[] in numbers" so the year-end budget would not change (App. 2508, 2653); the fact that IRU revenues were small (Br. 19-20) only confirmed that IRUs could not cover the revenue gap (App. 2210-2211, 2495); Nacchio's statements about the consumer and small business unit were hardly disclosure (Br. 20) because he gave no numbers and said nothing about the global business unit's shortfall in recurring revenue growth (App. 2597-2600, 2635-2638); the auditors (Br. 21) were not called as witnesses and there was no evidence that they knew Qwest's plan depended on recurring revenue growth or that Nacchio knew what they said (App. 2401); and the general counsel (Br. 21) agreed with Nacchio to delay releasing bad news to investors. App. 1677; *see* Add. 52-53.

"[J]ust[ice] under the circumstances" counsels the most tailored remedy available for the district court's alleged errors. *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Here, Nacchio never established the reliability of any opinion. Thus, if the Court finds, as to any opinion, an abuse of discretion that raises grave doubt about the verdict, the most tailored remedy would be to vacate the panel's judgment, retain jurisdiction, and order a limited remand so the district court may determine, in the first instance, that opinion's admissibility.

2. Concerns about "post hoc rationalization" would not preclude a remand if the Court were to find an error that is not harmless. The cases Nacchio cites raising this concern (Br. 58-59) do not account for *Waller* v. *Georgia*, 467 U.S. 39 (1984), *Jackson* v. *Denno*, 378 U.S. 368 (1964), *United States* v. *Perez*, 989 F.2d 1574 (10th Cir. 1993) (en banc), or the recently-decided *Sprint* case (128 S. Ct. 1140), all of which endorsed limited remands despite the risk of hindsight justification for a prior ruling. Nor should the Court lightly assume a district judge would not rule properly and honestly after full and fair remand proceedings. *First Interstate Bank of Ariz.* v. *Murphy, Weir & Butler*, 210 F.3d 983, 988 (9th Cir. 2000) (judges "are presumed * * * to discharge their ethical duties faithfully"); *see Liteky* v. *United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring in the judgment).

CONCLUSION

The Court should vacate the panel's judgment, affirm Nacchio's convictions, and remand Nacchio's sentencing and forfeiture claims to the panel.

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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 Reply 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 Reply Supplemental Brief for the United States was prepared in a 13-point, proportionally spaced, serif font (Times New Roman), using WordPerfect 12; the Reply Supplemental Brief does not exceed 30 pages; and, accordingly, the Reply Supplemental Brief complies with the requirements of Fed. R. App. P. 32(a)(7), 10th Cir. R. 32(a), and this Court's order of July 30, 2008, granting the Petition for Rehearing En Banc and ordering reply supplemental briefing not to exceed 30 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 Reply 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 Reply 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.

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